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With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURNAL

LAW FOR IN VITRO FERTILIZATION IN INDIA: A COMPARATIVE STUDY

BY GUNEET KAUR BHATIA

ABSTRACT

As reproduction is considered as the essence of continuing human generations and infertility a bane, the following review attempts to make an anthropological research on the laws related to artificial reproduction, precisely, In Vitro fertilization.

Artificial insemination is widely discussed topic all across the world and IVF to be specific, helps a couple to overcome their problem of genetic heritable or unnatural disorder of infertility.

The increasing growth of IVF into the mainstream medical operations has generated a lot of scientific, religious, ethical and legal issues. These issues of interest have effected n number of collaborators in all the countries in which IVF is practiced and promoted, to react with both regulations and guidelines, in order to prevent the interests of a couple who cannot be pregnant. Over many years IVF has turned out to be a great cause in bestowing parenthood and in bringing millions of happy families.

In vitro fertilization here is preferred over surrogacy and adoption in the light of the madness and desperation of a couple in advancing their family through their own blood. It is the most common form of Assisted Reproductive Technology, which in general has emerged as a wave of shift in the way general population perceives infertility, morals and ethics. It has also augmented the imbalance of child's rights and parent's privacy by unilaterally enhancing procreational autonomy of parents.

This very analytical and comparative research is divided into four parts, mainly: introduction, laws in India, laws in other countries such as- The United Kingdom, Germany and Canada, methodology and comparative analysis and conclusion and suggestions. The main purpose of this research is to highlight IVF in India and the importance and need to bring specific Bills for IVF.

CHAPTER-1

INTRODUCTION

“The children we bring into the world are small replicas of ourselves and our husbands; the pride and joy of grandfathers and grandmothers we dream of being mothers, and for most of us that dreams are realised naturally. For this is the Miracle of life.”

– **Azelene Williams**

Everybody knows how having a baby genetically as well as emotionally yours is important.

The constant feeling and need of a couple to advance their legacy with a baby who is biologically related to them is not uncanny. But facing the problem of infertility is certainly a bane for them.

1.1 Is Infertility a bane?

Infertility is seen as sprouting disgrace to a family. In earlier times the only option a couple had, was to adopt, which hindered their want of bringing their own blood into the family.

But with increasing technology and changing trends it is possible for them to give birth to a healthy baby with a lot less risk rate than any other assisted reproductive treatment. Assisted reproductive technology (ART) is used to treat the problem of infertility. It incorporates fertility treatments in which both a woman’s eggs and a man’s sperms are handled. This procedure works by removing eggs from a woman’s body and then mixing it with the sperms in a lab to make embryos, which are then placed back in the woman’s body. This is the procedure of IVF which is the most effective and common type of ART.

ART also involves procedures in which donor eggs or sperms or previously frozen embryos are used. It may also comprise a gestational or surrogate carrier.

Under almost all international and national laws a child born through ART is presumed to be the legitimate child of the couple. Also, oocyte/sperm donors have no parental duties or right in connection with the child and their anonymity should always be protected.

Now IVF here works like a ray of sunshine for couples who have been dealing with infertility and are facing problems in desperately bringing their own blood in the world to build a family.

1.2 What is In Vitro Fertilization?

In Vitro Fertilization is an infertility treatment basically used to cure infertility.

It is a treatment where the eggs from a woman and sperms from a man are fertilized in a petri dish instead of a woman's body.

This way, several eggs are harvested and fertilized in the lab, that is why the name- test tube baby, is put up. Once the eggs are fertilized the embryos are chosen and transferred to the same woman's uterus. Usually, one or two embryos are transferred from this process and the entire cycle takes about two weeks of completion.

1.3 History of IVF

The technique of in vitro fertilization was first developed and tested in The United Kingdom by Dr. Patrik Steptoe and Dr. Robert Edwards.

The first test-tube baby, Louise Brown, was born as a result of this technology on 25th July, 1978, amid grave controversy over morality and safety of the procedure.

The second successful In vitro fertilization treatment in the world and second in India was performed by Dr. Subhash Mukhopadhyaya on 23rd October 1978 in Calcutta.

These events caused criticism, public debate, and professional ostracism. But besides all the criticism, IVF has survived quite successfully, treating those with infertility issues.



1.4 Why IVF and not surrogacy?

As earlier mentioned that, want of having their own small ones in the family is very common in couples, so, they generally opt IVF over surrogacy, as in the process of surrogacy the baby is biologically related to the surrogate mother which is not in the case of IVF. Also, the desire of a woman to carry her own child is not fulfilled through surrogacy.

Apart from the ethical and moral issues, there are several medical and legal issues due to which people prefer IVF.

The medical issues and risks are comparatively less in IVF than in surrogacy. The risks involved in surrogacy includes that, the genes of a surrogate mother can affect the unborn child, also ectopic pregnancy, and birth defects can take place.

And when it comes to the legal issues, the legalities are quite less when it comes to IVF. Surrogacy involves the fulfillment of complex legalities such as determining the eligibility and finding a suitable surrogate requires proper legally counselling. And on the other hand, IVF does not require any of that.

ART has any how helped couples across the world but still there is need for specific laws in some countries. In countries like UK and Germany ART is recognized by having separate legislation for different times of assisted technologies. But there are some countries such as India who do not provide statutory regulations, specifically for IVF, up till now.

CHAPTER-2

IVF LAWS IN INDIA

Only an infertile couple can describe the mental agony and trauma of not being able to have a baby of their own as they are driven by emotional needs and social pressure to build a family.

But ART makes it easier for every infertile couple to have a baby of their own, instead of being just left with an option of adopting.

The world's second, and India's first IVF baby Kanupriya Agarwalias Durga, was born in 1978.

However, after the birth of baby Durga, the field of assisted reproduction has developed rapidly through years in India, with newer modifications and techniques.

Yet, there is no specific legislation for IVF.

ART has been recognized as infertility treatment under the Government of India Ministry of Tourism Policy, since 2002. The Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) by order of the Ministry of Health and Family Welfare, Government of India, in 2005 came up with National Guidelines for accreditation, supervision, and regulation of ART clinics in India, which are non-statutory provisions, for the first time. The ICMR then developed a draft for ART (Regulation) Bill in 2008 and then sent it to the Ministry of Health & Family Welfare, which has now been revised by the Ministry of Law & Justice as ART (Regulation) Bill, 2013. Also, in the year 2009, 18th Law Commission submitted its 228th report on 'Need for legislation to regulate ART clinics as well as rights and obligations of parties to a surrogacy'. After this, in the year 2012 the government limited surrogacy to foreigners.

Thereafter, on 27th October 2015 ICMR sent a notification to all the ART clinics requesting them not entertain any foreign nationals for the arrangements of surrogacy in India. This step was taken by the government taking into the public interest litigation filed by Advocate Jayashree Wad after the **Jan Balaz case**.¹

Moreover Cabinet Ministers on 25th August 2016 approved a fresh surrogacy bill and gave a green signal to the bill to introduce it in Parliament. This bill aimed to prohibit commercial surrogacy even for Indians, and the then Minister of External Affairs Sushma Swarja said that commercial surrogacy won't be allowed, also surrogacy cannot be opted by gay, single and live-in couples and foreign nationals cannot opt for this, too. But later this was changed and foreigners and single people were allowed to have a child through ART but non-commercially.

The Indian Government, came out with a draft bill on ART (Bill) and rules 2008, 2010, 2013 and 2016, but the struggle for enacting proper law did not happen, the regulations were not as strict in IVF clinics due to lack of proper regulations formed for this technique of assisted reproduction.

In the case **Dr. M. Khochar Vs Ispita Seal, AIR2011**², due to lack of proper care taken while performing the procedure of IVF and negligence of the doctor in charge, the complainant permanently lost her chance of future pregnancy.

In 2019 Government introduced Surrogacy (Regulation) Bill, 2019 in Lok Sabha, which said that only close relatives will be allowed to act as surrogates to the infertile couple. This is acting like a paving way for new laws for in vitro fertilization in India. In 2019 bill the government also tried to introduce an age cap for the treatment under ART, which was 50 years.

The Union Cabinet in 2020, approved the Assisted Reproduction Technology (Regulation) Bill, 2020 which made specific provisions for safe and ethical practice of ART services in India. Also, this bill ensures confidentiality of the couples. The 2020 bill made Pre-Genetic Implantation Testing mandatory to avoid any genetic diseases.

¹ Jan Balaz Vs Anand Municipality and 6 ors., AIR2010Guj21

² Dr. M. Khochar Vs Ispita Seal, DSCDRC2011

The regulations of the clinics will be made more stringent and those performing sex selection, sale of embryos or gametes will be fined Rs.10lakh at first instance and imprisonment up to 12 years in second instance.

But due to dearth of laws for IVF medical negligence is still carried out by the clinics and hospitals all across the nation, such negligence was found in the case **Delhi IVF and fertility clinic and Another Vs. Lina Goyal (Dr)**³, respondent availed services of the appellants for the treatment of IVF. The doctor in charge (Dr. Patil) left for Bombay due to some personal reasons after performing the treatment. The respondent was assured by Dr. Patil and appellant No.2 that she won't face any complications during next 14 days. But unfortunately the respondent developed some complications during that time, and she contacted Dr. Patil, who suggested some medicines over call. The condition of the respondent deteriorated with time and the respondent had to visit appellant no.2, who then called Dr. Patil. He said there are some minor complications which will get cured in two days or so. When the respondent was left with no other option, she had to rush to Spring Meadows Hospital, where she was taken care of.

The court held that this is the case of medical negligence on the part of Dr. Patil and appellant no.2. Also, it was a case of administrative deficiency as well, as no post care treatment was done. And due to lack of proper regulations and maintenance of the clinic, the health of the respondent deteriorated even more.

This shows the need of proper regulations, and a separate bill for IVF.

Question before the Government?

It is all true that in all circumstances there will always be good as well as bad, and it is sole responsibility of the government to make specific provisions and laws to avoid all quarrels and catastrophe.

ART mainly includes surrogacy and IVF, but in India specific laws are only made for surrogacy, which is, the Surrogacy Bill.

The questions which arise here are, why not make specific laws for IVF? Why not pass a specific bill for IVF? Why not form specific regulations for IVF, too?

³ Delhi IVF and fertility clinic and Another Vs. Lina Goyal(Dr), DSCDRC2007

CHAPTER-3

IVF LAWS IN OTHER COUNTRIES

Laws have been cracking down on IVF treatments all across the world because as much as they help infertile couples, some people just take advantage of these couples' misfortunes.

3.1 The United Kingdom

The technique of in vitro fertilization was first developed in England, and being the first country in the world, the legislation of the United Kingdom legalizes IVF treatment.

After the birth of Louise Brown (first child born through IVF), new proposals were brought up by the government to regulate this new technology, and then in the year 1990, The Human Fertilization and Embryology Act was passed.

This Act provided for the establishment Human Fertilization and Embryology Authority (HFEA), a statutory body, which is responsible for the regulation and inspection of all the clinics in the UK providing IVF, artificial insemination and the storage of human eggs, sperm or embryos, and with certain alterations in the coming years.

In 2005, government implemented certain changes enabling donor-conceived children to access the identity of their sperm, egg or embryo donor after reaching the age of 18 for identifying information and allowed to request non- identifying information at the age of 16.

Further in 2008, the government added certain new elements to The Human Fertilization and Embryology Act, which are mentioned as follows:

- The HFEA will now ensure that the creation and usage of all human embryos outside the body are subject to regulation.
- Due to social reasons a ban on selection of sex of offspring is imposed.
- The clinics will take account of the welfare of the child when providing fertility treatment.
- Both the partners in a same-sex relationship will be recognized as legal parents of children conceived through the use of donated sperm, eggs or embryos.
- Now unmarried couples and people in same sex relationships can apply for an order allowing them to be treated as the parents of children who are born through surrogacy.

- The research could be made easier by changing restrictions on the use of data collected by the HFEA.
- Provisions are made to clarify the scope of legitimate embryo research activities, which includes regulation of "human admixed embryos".

Also, the UK government has capped the age limit for people going through IVF treatment as 42 years and for the clinics to keep frozen embryos as 10 years.

These laws are still followed till the present date and the consent between a man and woman is still considered as the most important thing in the reproductive process.

This is proved through the landmark judgment, **Evans v The United Kingdom**⁴, which was a key case at the European Court of Human Rights.

In this case, Natallie Evans was diagnosed with ovarian cancer, and was suggested to undergo the treatment of IVF if she wanted to conceive. After the fertilization of Evans' eggs and Johnston's (husband of Evans) sperms, the embryos were fertilized as Evans had to undergo an operation to remove her ovaries and was told to wait for two years before the implantation of embryos. Woefully, during that time, the couple split up. Consequently the clinic informed Evans that the consent of both the parties is required to continue the IVF treatment, as Johnston had already not give his consent for the same.

Evans filed a suit in the High Court of Justice that, as the treatment was already going , the men should not have the right to stop it. The court firmly said that it cannot overrule the law as it stood. Further, the case was brought before the House of Lords, where it was dismissed again saying that the consent of both the parties is primary.

Thus, it can be said that IVF laws in the United Kingdom are quite inflexible.

3.2 Canada

Though being encircled by the taboo of artificial reproductive techniques being ethically and morally wrong, Canada certainly managed to developed policies and safeguards for IVF treatments. The result came up to be Assisted Human Reproduction Act (AHR Act) which was passed in March 2004 with some main principles which are still followed.

⁴ Evans v. United Kingdom, App. No. 6339/05 Eur. Ct. H.R. (Apr. 10, 2007).

The said principles are:

- Children's health and well being must be the priority while using AHR technologies.
- Health of the woman must be protected as they go through these treatments, and not men.
- Appropriate measures should be used to protect the health, dignity, safety and rights of people affected by the use of AHR technologies.
- Nothing compares to **consent**. Thus, free consent must be given before the use of these technologies, always.
- Protection and preservation of human individuality and diversity must be upheld.

The most significant principle mentioned is consent. Therefore, under AHR Act a person is prohibited from using human reproductive material to create an in vitro embryo until a written consent is given by the donor.

But the issue of frozen embryos and them having property traits, has suffered a rigorous course of arguments in Canada. In the landmark Canadian decision of **J.C.M v A.N.A**, a lesbian couple purchased sperms from a US sperm bank. Both of them used the sperm straws and conceived two children. The couple later split up, and divided all the assets of their relationship, but were not able to decide about the remaining sperm straws. The applicant, J.C.M, met a new partner later and wanted to use the remaining sperms to conceive a child. A.N.A refused to allow the usage of the remaining sperm straws and asked that donated sperm straws to be destroyed. J.C.M brought an application before the court seeking a declaration that the sperms were her sole property.

The Honorable Madame Justice Russell ordered that the 13 remaining sperm straws be divided between the parties as a property.

3.3 Germany

The first "test tube baby" in Germany was born just four years after the birth of Louise Brown (first IVF baby in the world) , that is, in 1982.

Births through IVF have been increasing rapidly in Germany after the systematic registration of ART. However, the laws related to ART are quite stern and restrictive in Germany as compared to other countries and are regulated through The Embryo Protection Act, 1991.

The main purpose of German laws is to bar the number of transferred embryos to a maximum of three, while still attaining good pregnancy rates. The law has made it a crime to transfer more than three embryos to the uterus to fertilize and will punish those with three years of imprisonment who do not abide this law, as the wastage of embryos are highly not acceptable.

Also, treatment of lesbians and single women is not prohibited in Germany but some clinics provide services to those who have a man in the recipient family who will accept legal paternity, as a donor is not sufficiently protected from paternity if the case is not so. Due to this limitation, an increasing number of couples and individuals are travelling abroad for ART.

Besides this, oocyte donation and surrogacy are prohibited in Germany under the Embryo Protection Act.

CHAPTER-4

COMPARITIVE ANALYSIS

In vitro fertilization is one of the forms of ART which is now available and promoted in most of the countries due to its success rate. Yet, countries differ in the potency of regulations and laws. As a result, there are some notable differences in some laws related to IVF.

While examining the judicial systems of the mentioned countries we came across the most repeated and controversial topic of the future of frozen embryos and their importance. Countries like UK and Canada refer to the frozen embryos having property traits, whereas, in Germany embryos and fetuses are entitled to the same right to life and dignity that all the people have. Thus, these countries do not allow the usage of frozen embryos, sperms or oocyte without free consent of both the partners. Consent, here, has a significant and unmatched importance. On the other hand, India has no say and real thought when it comes to this controversial issue due lack of laws.

Then the issue arises of medical negligence in IVF clinics which is rare in UK, Canada and Germany but is on its peak in India.

Also, children born through IVF treatments are considered to be legitimate, and single and same sex couples are permitted to undergo IVF treatment in all the above mentioned countries except Germany with some complications related to the donor not being sufficiently protected from paternity. And when it comes to divulgence of the donor's identity, UK is way more strict and inflexible than Canada and Germany. But what should be noted here is that, no country puts the interest of donors at stake.

The final difference between the legislation of these countries is the age limit to undergo this infertility treatment. In India the limit is 50 years, in UK it is 42 years, Canada limits it to 43 years and Germany between 42-45 years of age.

CHAPTER-5

CONCLUSION AND SUGGESTIONS

“Science is a beautiful gift to humanity; we should not distort it”

- A.P.J Kalam

The right to ART services to establish one's own family is recognized as one of the most important human right internationally. But even then there are no uniform and civil regulations in all the countries, especially in India.

This manuscript has presented how synchronized other countries are when it comes to their laws relating to IVF and India being the imprudent one has no laws at all. The main purpose of this research was to exhibit that how there is a noteworthy need to bifurcate IVF laws in ART Bill, in India.

A diverse country like it should have a disparate Bill for IVF as there is one for surrogacy under the above mentioned bill, as people from all across the world visit India for infertility treatments

The IVF Bill should at least contain all the relevant regulations to control clinics where IVF treatments are performed, as medical negligence cannot be disregarded. It should also include other points keeping in mind the laws that other countries follow.

Furthermore, as developments in law have far often resulted from quarrels that legislation did not anticipate, legislatures have been in fact less prominent in the advancement of law in this area. Accordingly, courts, while passing judgments of this sort, should keep in mind their broader cultural context.

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