

Legal and Ethical Dimensions of Artificial Reproduction and Related Rights

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Abstract

Recent years have illustrated how the reproductive realm is continuously drawing the attention of medical and legal experts worldwide. The availability of technological services to facilitate reproduction has led to serious concerns over the right to reproduce, which no longer is determined as a private/personal matter. The growing technological options do implicate fundamental questions about human dignity and social welfare. There has been an increased demand for determining (a) the rights of prisoners, unmarried and homosexuals to such services, (b) concerns over child's information and health needs, (c) claims for wrongful birth and wrongful life, (d) the role of donors and physicians, (e) posthumous reproduction etc. In addition, the role of national and international law has been emphasised for an efficient system of functioning and delivery. This paper is an attempt to explore the pressing claims to reproductive choices, coupled with a marked increase in demand for legislative intervention in India.

I. Introduction

Recent years have illustrated how the reproductive realm is continuously drawing the attention of medical and legal experts worldwide. The availability of various technological services to facilitate reproduction has led to serious concerns on the right to reproduce or give birth, which no longer is determined as a private/personal matter. With reproductive technologies gaining vogue, it becomes

relevant to deliberate upon the responsibilities of the legal fraternity towards the ever increasing claims to reproduce with such technology.

In brief, the process of technological or artificial reproduction (AR) commonly with the use of 'Assisted Reproductive Technologies' (ART's) employs various techniques such as In-vitro Fertilisation and Embryo Transfer (IVF- ET), based upon the assumption that it is a legitimate extension of the natural methods of reproduction. But is this assumption correct or is it just a convenient means to avoid jurisprudential and policy concerns, is no less than an enigma. At the root of any law/decision/policy affecting artificial reproduction is a well thought of constructed agenda argued on the grounds of either instinct/nature on the one hand or social welfare/public policy on the other. Most often, the notion of reproductive autonomy and sexual privacy are most commonly advanced by critiques of the *welfare principle*. The principle stands for a system of regulation involving various prohibitions as the only means to obviate problems commonly associated with the process of AR. As we advance with the discussion, it's evident as to how artificial reproduction inherently has implications for the common good. It is an institutionalised manufacturing process that undermines human life affecting matters of human reproduction, parenthood and identity.¹ The process fundamentally alters the way species reproduce, materialising human life bringing it well within the public

realm, subject to State control. The State has no alternative but to be concerned with the manner in which its members are created. If promoting the interests (in reproduction) for instance of one generation means undermining the interests of later generation the State is obliged to intervene in favour of the generation at risk.²

The counter argument to the welfare principle is put forth by the *rights based* analysts, which consider it an unjust infringement of individual liberty for the state to interfere with individual or group freedom artificially to produce a child. To them, intrusion into the private choices of individual's seeking to have a family cannot be justified. Stemming from the works of J.S. Mill and debates between Hart and Devlin³, arguments are advanced that reproductive activity has matters of sexual morality at its core. As a natural consequence, such self regarding behaviour should be prima facie immune from restrictions deriving from consideration of common good.⁴ The problem is that supervision of the process of reproduction as a commercial process results in ceding of control of one's fertility to an expert, which does not happen to fertile people by requiring proof of parental adequacy prior to conception. The two arguments indicate that there is a possibility of exploring and identifying the means to preserve individual reproductive autonomy since it is valuable in fostering human needs. The law with each day is a witness to new issues emanating from claims of those involved in the process of technological reproduction. As to whether the law will always take a human rights approach when

addressing the desire of individuals is still speculative or uncertain. In this regard, due consideration must be placed on the cultural values, ethical judgments, and the role of the international community in promoting a concern for the rights, as well as making the realm of reproduction safe and ethically viable for the generations to come.

II. Artificial Reproduction: Practice and Opinions

Reproductive technologies were originally introduced to treat infertility. Today they satisfy a variety of other concerns. For instance, it is being offered to fertile heterosexual's couples as a means of avoiding the risk of transmitting hereditary diseases to their offspring. With increasing claims to utilise AR services, the process inevitably raises moral and human right concerns.⁵.

Medical Practice

The process of Artificial Insemination for the purpose of procreation can be practiced in three ways. Firstly, the artificial insemination homologous or husband (hereinafter AIH), wherein the semen is injected into the female body is that of her husband. AIH is less controversial since the semen that gives birth to a child in it belongs to the woman's legally wedded husband.⁶ In the second type, the sperm of a third party donor is introduced into a woman on her expected ovulation date to help her conceive. This is known as artificial insemination donor (hereinafter AID).

Although AIH and AID both offer an infertile couple increased odds of conceiving a child, they produce different results and different legal issues. The husband

and wife who conceive using AIH are both the genetic parents of the child, whereas under AID only the mother is genetically related to the child.⁷ The third kind is not very popular, wherein the seed of the husband and that of a third party is co-mingled, known as confused or combination artificial insemination.⁸ In IVF, mature ova are surgically removed from a woman and placed in a laboratory medium together with a male sperm. After fertilization and several cell divisions, the early embryo is implanted in the uterus of either the ovum donor or another woman. The process is likely to raise several issues on legal parentage of IVF born children, status (whether person or property) of pre-embryos created through IVF and frozen for future use. The option of surrogacy also makes use of technological advancements conducted on the basis of written document specifying rights and obligations.

The first IVF baby was born in England in 1978. In 1986, India's first scientifically documented IVF baby was born with research efforts of the Indian Council of Medical Research (hereinafter ICMR). Research and promotion of ART's was undertaken in India as government initiative ,but it soon fed into private health sector and has since then flourished as a private enterprise. The only regulatory framework set up is through the guidelines issued by the ICMR. The public sector eventually discontinued the programme, but the ART industry has expanded and clinics offering ART procedures have mushroomed since then.⁹ According to Sama¹⁰, the existence of social pressure to

have children justified the rapid propagation of ART. The information gathered from the providers suggested that woman bear the disproportionate burden and social stigma of infertility and childlessness, they would certainly be willing to subject themselves to all forms of medical interventions in order to bear a child.¹¹

Rights of Prisoners, Unmarried and Homosexuals

Experts suggest that an ethical analysis of issues on reproductive autonomy does not lead to determined conclusions; rather, it exposes considerations that require or warrant attention, balance and prioritization.¹² One of the several legal and moral issues is whether people with impaired infertility who resort to ART should be as free as those with usual fertility or those that can be exempted for policy considerations. A human rights perspective ideally does not permit any discrimination.

Countries worldwide have also witnessed a claim to procreation by unmarried individuals, of single, lesbian women and prisoners¹³ to utilise AR to fulfil their desires has attracted attention and academic debate utilising artificial reproduction. Policy considerations indicate, that in order to demonstrate an interest sufficiently compelling to override unmarried person's procreation rights, or to justify disparate treatment based on marital status, a state should have to allege differences between married and unmarried persons- actual differences, not distinctions based on stereotypical assumptions- and show that allowing unmarried persons to parent would have identifiable and significant negative results¹⁴. In the

interest of public morals a state might contend that expanding procreative alternatives for unmarried persons might threaten the traditional family unit and discourage individuals who want to have children from getting married. However, law permits single persons to adopt and raise children. And a variety of human interests and needs might motivate an unmarried person to seek procreation with the aid of technology.¹⁵.

There are also strong proposals for equal reproductive freedom of gay and lesbian couples to access ART. Various decisions of the Human Rights Committee set up under the International Covenant on Civil and Political Rights (1966) are indicative of an increase in claims for recognition of gay men and lesbian women procreative and parental rights¹⁶. Much of the case law revolves around the right to found a family¹⁷, to protection given to family and family life, and the rights to non-discrimination and equality. The Committee's jurisprudence on Article 23 is restricted to marriage based families¹⁸.

In this regard, the European Commission of Human Rights in *E.B. v. France*¹⁹ recognized the full equality of gay and lesbian couples in Europe. The court specifically held that the States are not to discriminate on grounds of sexual orientation in adoption proceedings. The decision has strengthened the process towards the acceptance of same sex families.

Adoption and ART

The significance of ART is often established while referring to the old age practice of adoption. As often indicated, it was the very value of having children that culminated in the social acceptance of adoption.²⁰ However, in terms of the law adoption is governed on grounds of welfare and state regulation and the practice of ART is indicative of an approach favouring autonomy in medical decisions regarding access to technology. Those offering to seek no difference in adoption or ART signify that 'ART's help bring us an understanding of parenting that comes very close to the one adoption...in which one's own child refers to a relationship created by care and function, not biology or genetics'²¹

III. Legal Issues and State Policy

Several countries have made efforts to develop a consistent legal framework to govern technological conception.²² Statutory standards or guidelines have been premised on the view that the whole area will remain one of public interest and also of controversy²³. For such reasons it becomes important to examine the interplay between three main entities directly influencing best interest outcomes for AR offspring. These entities are the professionals, the parents and the State. The commonly raised issues before the courts or those addressed by the law are carefully summarised below.

Child's Information and Health Needs

The international community has over the years unanimously expressed concern over rights and security of

children worldwide²⁴. Questions are often raised as to whether it is wrong to use reproductive technologies to create children, if they bore a significant chance of producing substantial harm by way of serious disease and impairments. The harm indicated can be physical as well as psychological. Very few countries, for instance Australia maintain a record of statistics indicative of how children born of IVF are two or three times more likely to suffer serious diseases²⁵. On the other hand, American studies have shown no such likelihood of greater damage in cases involving the process of AR²⁶.

Psychological interests are inclusive of the need of each individual to develop a sense of identity in combination with other prerequisites for personal security and stability²⁷. The quest for identity is the process by which offspring become aware of who they are or where they belong. The issue that necessarily gets attached is, whether revealing of donors identity to the child will be contradictory to the secrecy attributed to the donation of gametes and be detrimental to donor's interests? ²⁸. As carefully spelled out, the harvesting of gametes also implicates genetic information because gametes are, by definition, cells which hold half of the genetic information needed for human procreation. Genetic information entails an information privacy interest because to request a family history or... the results of genetic tests is to ask about personal information, that an individual may feel it important to secure from access to others...Thus, information privacy reflects in individual's ability to

control the manner in which others access and use the information that is intertwined with his personhood²⁹.

In AID since the identity of the donor is kept secret, the biological father is out of the picture. It is argued that technologically conceived children have informational needs. Given the likelihood that that child could inherit some of their parent's psychological problems, AID children have an interest in knowing the psychological profile of their biological fathers. The ignorance and inability to discover their biological roots may greatly disturb the AID children and cause, as the psychologists call it, the 'genealogical bewilderment'³⁰. The right to know may be necessary in certain cases like, when the child wants to marry and also in cases where there is a necessity to detect genetic diseases. So whether the right to know can be given to an AID child and if given, under what circumstances, has to be determined by the legal system³¹. However, only a system allowing linkage between donors and recipients can serve the interests of artificially conceived children in case of emergency or otherwise.³²

Apart from the concerns of the child, the medical community also has reasons to set up a mechanism for maintenance of records and information of donors.³³ However, the practice traditionally has always been to maintain donor anonymity. This is done because if it were otherwise, physicians and sperm banks will not be get sufficient donors. In this matter, there is visible change likely to gain momentum on the issue of donor anonymity. The United Nations Convention on the Rights of the Child

(1989) also includes the right to identity within its provisions³⁴. It is advocated, that legislative enactments should travel beyond the traditional issues of parentage and legitimacy. The doctors should be required to keep detailed records of the donors and the recipient couples. The information must necessarily include details of social and medical history. For instance, detailed medical and psychological history, race, nationality, education, general physical appearance, family history, religion etc. This is what is called non-identifying information, which the children should have accessibility to. This system allows access to donor's genetic background, while still maintaining the anonymity³⁵.

In India, under the law governing marriage since persons are not permitted to marry within certain degrees of prohibited relationship³⁶, the need for getting information about the donor for medical and matrimonial reasons arises. A legislation empowering a statutory body with the maintenance of records of the donors of sperms and the children conceived as a result of it is necessary. In this regard the ICMR has furnished a Draft Bill, 2010 (mentioned in the latter part of this paper) before the Government of India for addressing the information needs of the parties including the children born. Although realizing such needs as rights would be a process with difficulty involving interests of donors, medical professionals, parents and the state.

AID and Adultery

Another frequently raised issue is whether the use of AID in the absence of husband's consent amounts to adultery. The earliest relevant decision was of the Canadian Court in *Oxford v. Oxford*³⁷ wherein the court held that it did amount to adultery in the absence of consent of the husband.³⁸ What followed were a series of cases on the issue before various courts.³⁹ In *MacLennan v. MacLennan*,⁴⁰ the Court of Session in Scotland held that AID did not lead to adultery. What emerged from the various decisions was: (a) for adultery to be committed there must be two parties physically present and engaging in the sexual act at the same time. In order to constitute the sexual act, there must be some union involving some degree of penetration by the male organ. The placing of male seed in the female ovum need not necessarily result from the sexual act, if it does not, there is no sexual intercourse.⁴¹.

In India, by virtue of Section 497 Indian Penal Code, AID does not amount to adultery. The section requires sexual intercourse as a necessary ingredient for the offence of adultery. But AID, without consent of husband can be a ground for divorce or judicial separation (ICMR Guidelines as applicable in India).

Claims for Wrongful Birth and Wrongful Life

Several experiences have indicated that there is likelihood of the process of AR going wrong by mixing up sperms of the donor with that of someone else, transplant of gametes in the wrong patient, disposal of embryo by mistake etc. The issues of wrongful birth (wherein action is brought by the

parents of the child for damage to themselves resulting from birth) and wrongful life (wherein action is brought by a child for damage to himself arising from the fact of birth) have been brought before the English and American courts time and again. As simply stated, 'the problem of so called wrongful life...is germane to the rather broader concern that assisted reproduction has had a deleterious impact on children as a class. Whether this has led to children being 'made to order', whether they have been converted into commodities is an important question, and no one concerned with the advancement of the status of the child or with children's rights can ignore this issue'⁴² The first English case to witness the problems of a wrongful life claim was *Mc Kay v. Essex County Council*⁴³ in 1982. The courts found no reason as yet to allow such claims for various policy concerns. Similarly, the American courts witnessed a series of joint actions by the child and the parents.⁴⁴ The dilemma of the courts towards such claims is an expression of how the problem of wrongful conception and wrongful birth requires an evaluation not only of the law, but also of existing morals in society and the field of medicine. That perhaps is an explanation to the divergent judicial responses⁴⁵. As a clear step forward, the English Parliament has provided the child with remedies under the Congenital Disabilities (Civil Liability) Act 1976⁴⁶. In India, wrongful life claims have not yet been recognised. Though it maybe possible for the parents who availed the services of the physician to claim remedy against the doctor under the Consumer Protection Act for deficiency of services

after the Supreme Court ruling in *Indian Medical Association v. V.P Shantha*⁴⁷.

The most commonly advanced argument for not disallowing claims of wrongful life relies on the idea of existential debt. It considers that human life is a good or a thing of value and that a child does have a kind of debt to the authors of his existence. In contrast, the wrongfulness of certain means of reproduction is correct, the creation of such a cause of action cannot be ruled out in principle. By admitting the claim, the law only permits the claimant to ask for compensation for the harm done.

IV. The Commodification Issue:

Role of Donors and Physicians

As perceived by many, life or birth can not be commodified. And when something is made not commodified or is non-saleable we place that thing beyond supply and demand pricing, brokerage, advertising and marketing etc.⁴⁸. However the case of AR has potentially placed the realm of reproduction into the market spaces⁴⁹. As expressed, 'commodification is inherent and implied in the very artificiality of AR...In effect commodification takes out of the private sphere, and puts into the public sphere, a large part of the process of reproduction itself. By turning the most intimate aspects of human activity into essentially public, commercial processes supervised from beginning to end by third parties, one thereby cedes dominion of one's character as parent. In AR, the act of becoming a parent is founded upon the assumption that is the freezing, mass storage experimentation upon, quality control and

destruction of particular parent's offspring is a legitimate technological extension of natural methods of reproduction'.⁵⁰

To reduce the chances of commodification, it is often necessary for the law and for the society to take cognizance of how to frame standards towards legal duties vis-à-vis physician/patient relationship. The final decision to utilise AR is always with the physician who decides whether they should avail such treatment⁵¹. More often value judgments are made and the physician is not compelled to divulge his decisions in each case. It overtly requires a social judgment to be made in what would otherwise be assumed to be a medical decision⁵². The decision is upon the justification advanced for undergoing the treatment and on whether the person is qualified to undergo such treatment.

In addition to the physicians, the donors also have duties and rights as an important party to the entire process⁵³. The issue often raised is whether fee payments should be provided on donation of gametes since it is likely to commercialise the entire process. However, practice has been in favour of payment of fees since on the absence of it is likely to lead to non-availability of persons for donating their gametes.⁵⁴

Are Embryo's Persons

The most ethically charged claim made in terms of AR has been in reference to the embryos that form part of the process. Very often the courts are required to decide upon

the claim to ownership or exclusive use of sperms by a particular spouse. For instance, in the controversial case of *Evans v. Amicus Healthcare Ltd*⁵⁵, the England and Wales High Court was to decide upon the competing claims over stored embryos created from the gametes of a couple, Ms Evans and Mr Johnson⁵⁶. The Human Fertilisation and Embryology Act 1990 in England provides for destruction of embryos if one party withdrew his/consent to use them. Ms Evans challenged this provision as that being contrary to the right to private and family life, the right to marry and found a family under the European Convention of Human Rights. Also, that the embryos were also entitled to the right to life. Although her claim failed, the decision raised numerous voices on the grounds of justice and equity. As facts indicated, the embryo constituted Ms. Evans only chance to have a child to whom she was biologically related, and this desire would be permanently frustrated by Mr Johnson's choice to withdraw his consent. Balancing such claims in the absence of clear provisions is difficult and likely to lead to subjective conclusions⁵⁷. The legal community is to consider as to whether decisions to avoid reproduction are more worthy of respect (as in the case of Mr Johnson) than decisions to reproduce (in case of Ms Evans). The underlying question is: are embryos persons? If yes, then 'the analogy is to children, and the legal framework is one of custody and protection of embryo rights'. On the other hand, if embryos are property, then the analogy is to gametes, and the legal framework is one of control, contract and protection of the progenitor's

rights⁵⁸. In this regard, the natural rights theory advocated by John Locke is widely consulted. The theory suggest, that property rights are not the product of the government, but arise naturally out of the individual's action, and men accepted the state authority for protection of property rights, which entail ownership over the self and over the product of one's labour. Incidentally, embryos are part of one's own body and are property⁵⁹. Another theory worthy a mention is the 'personality theory' taken from the works of Hegel⁶⁰. It says, private property is essential for the development of freedom and ...serves as a medium through which the individual becomes a person. But the designation of something a personal depends on out cultural and social commitments of a legal regime on property and personhood.

Posthumous Reproduction

Posthumous births have also time and again been legally and ethically determined. If recognised it allows a couple to realise the need to have children on occasion of death of his or her partner. The controversial issue of posthumous insemination was considered in France in the case of *Mme Parpalix*⁶¹(1984) wherein a widow requested insemination with her deceased husband's sperm, which he had submitted with a federal institution during his lifetime for future use, but left no instructions as to what should have been done with sperm on his death. The court ordered for surrender of the sperm and the widow was inseminated with it. The procedure however proved unsuccessful. On this

matter, it has been advocated that posthumous insemination should not be permitted because the right to dispose off the sperm ends with the death of the sperm donor. Since the right cannot be transferred to the sperm bank or physician, the sperm should not be used after the death of the donor's death.

As evident from the above discussion, the realm of artificial reproduction is facing a pool of concerns and claims. With several countries responsive and vigilant, a few are still failing to look into the repercussions of inaction or disregard to the ethically charged issues involved.

V. Regulatory Framework in India

In India, the Indian Council for Medical Research is the apex authority regulating the practice of artificial reproduction.⁶² The National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India were carefully drafted by the ICMR under the Ministry of Health and Welfare, Government of India in 2005⁶³. In the absence of a suitable legislation, the conditions in India are far from satisfactory.

There are endless stories of unethical practices occurring in infertility clinics, the stealing of eggs and embryos, illegal selling of fertility drugs, loss of medical records, procedures undertaken by visiting foreign experts that are banned in home country, sale of embryos on the internet

etc⁶⁴. A writ petition filed in the Kerala High Court⁶⁵ was one of the many endeavours to seek for the imposition of restrictions on the use of donor ova, donor sperm and donor embryo in the ART for infertility treatment in the clinics. According to the petitioners, the infertility clinics and hospitals were adopting unethical and illegal practices while treating infertility in their hospitals. In fact, they were functioning without adhering to any statutory rules⁶⁶. They were using the donor sperms and ova without the consent of the spouses. Since, no law incorporating the guidelines had been enacted so far, these clinics had no authority to collect, keep, store and deal with donor ova or donor sperms. The court therein, issued notice to the Union Government, Health Secretary, Indian Medical Council, and Indian Council of Medical Research, that there was an obligation on part of the government check such illegal practices of these clinics.

In August 2009, the matter of ART's was taken cognizance by the Law Commission of India in its 228th Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well Rights and Obligations of Parties to a Surrogacy".⁶⁷ The Report is primarily discusses the process of surrogacy and related aspects in India.

The ICMR also submitted a Draft Bill before the Ministry of Health and Family Welfare, Government of India as the Assisted Reproductive Technology (Regulation) Bill, 2010.⁶⁸ Under the ICMR guidelines that are applicable within India, three categories of requirements are laid down for the clinics: Minimum Physical Requirement of ART clinics,

Essential Qualifications of ART Team and ART Procedures. The standard criteria necessary for screening of patients and selecting a suitable procedure with information to be given for possible complications, are a salient feature of these guidelines⁶⁹. There is a serious concern advanced by the ICMR that since there is no legislation, there should be a ban on the sale or transfer of human embryos or gametes in any form or in any way, to foreign practitioners as a means of commercial exploitation.

The guidelines incorporate the following features: (a) The rights of the child born through ART techniques. Firstly, the child shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, he shall have a legal right to parental support, inheritance etc. Secondly, children born through use of donor gametes, and their adoptive parents shall have a right to available medical or genetic information about the genetic parents that maybe relevant to the child's health. Thirdly, children born through the use of donor gametes shall not have any right whatsoever to know the identity (name, address, identity etc) of the genetic parents. A child thus born will be provided the rest of the information about the donor, as in when desired, when he becomes an adult. No couple will make a deliberate attempt to hide the information when asked by him. (b) Single women are allowed to AIH, and the child born would be legitimate. However, the guidelines recommend that normally it should be performed on married women, as a two parent family would be better in

the interests of the child. (c) There is a provision for treatment of the economically weaker sections of the society. (d) The guidelines recommend initiatives in the public sector in order to make modern techniques within the reach of all sections of the society. The concerned ministers must encourage and support local pharmaceutical industries to start manufacture of the necessary drugs.

In 1991, the Indian Society for Promoting Assisted Reproduction was formulated with its headquarters at Bombay. The Society has been set up with a detailed objective of assisting couples in using ART's, providing the necessary information, to bring together medical personnel or experts in the concerned field for a meaningful discussion on the techniques, to create awareness on ART's etc.⁷⁰

In 2005, the First National Bioethics Conference (NBC 2005)⁷¹ was held. The broad theme of the conference was 'Ethical challenges in health care: Global context, Indian reality', covering areas of clinical medicine, bioethics, medical and social science research, community and public health, women's rights, theology, biotechnology, law, governance, and public policy. Based on its research, the IJME identified a few areas factors affecting clinical practice and outcomes. For instance, market forces, the cost of the technologies widening the gap in access to health care technology between socio-economically privileged and disadvantaged individuals and communities etc. Indeed, much has been done, but the troubles are far from being

resolved. Apart from several research initiatives and a frame of guidelines, there is a greater deal to come to terms with the social, legal and human rights implications of the techniques.

VI. International Law

The concern for human wellbeing has led the international community to conduct research and deliberate wisely on the common problems faced vis-à-vis the ART's. In 2005 the United Nations Educational, Social and Cultural Organization (UNESCO) adopted the Universal Declaration on Bio-Ethics and Human Rights⁷², with an aim to provide a universal framework of principles and procedures to guide states in formulation of laws, to safeguard the interests of the present and the future generations. The most significant provisions with respect to autonomy and welfare of individuals are: (a) Articles 3 (respect for human rights and the welfare of the individual should have priority interest of science and society, (b) Article 5 (autonomy of persons to take decisions should be respected), (c) Article 6 (medical intervention should be done only with free and willing consent of the person concerned), and (d) Article 9 (respect for privacy and confidential information).

In Europe, an effort for the creation of ethical and methodological regulations in the medical arena was evident by the Convention of Human Rights and Bio Medicine (1997). Research conducted has shown that in response to globalization and related impact, the modern state became

more reflexive to the society, its beliefs, values, religious affiliation etc, that lie at the core of development of bioethics and related norms. The Convention requires that where the law allows research on embryos, it shall ensure adequate protection of the embryo. Where such embryo research is allowed nationally, the embryo research must be limited to embryos that are not more than 14 days old.⁷³.

In addition, there is also extensive research conducted world over on the subject of AR and its impact on the social patterns of a society. In Denmark new treatment or diagnostic methods in connection with AR may not be started until the Minister of Health approves these activities based on ethical and professional health services. The Danish Council of Ethics in 1995⁷⁴ outlined the basic ethical considerations on procreation, with focus on the community's interests in protecting cultural values relating to procreation. As per its findings, a minority in the society favour strict regulation to protect human beings from being detached from human reproduction and thus they favour a ban on the techniques to AR. A majority find assisted reproduction permissible. It concludes, that a community centered approach may be difficult to adopt, since procreation is closely connected to intimate issues and individual autonomy.

The international community, independently and collectively has certainly facilitated a process to determine the controversial and significant issues on ART's in a pragmatic and cultural specific manner.

VII. Conclusion

Mankind has benefited as well as suffered from medical innovations. The growing technological options not only provide treatment, but also implicate fundamental questions about human dignity and social welfare. Human dignity lies at the heart of the various international resolutions, inviting great deliberations on what it means or conveys in a socially and ethically complex situation. For that reason itself, the law must be clear and strong to balance conflicts and dilemmas.

In the developing countries, infertility "causes harsh, poignant and unique difficulties: economic hardship, social stigma and blame, social isolation and alienation, guilt, fear, loss of social status, helplessness and, in some cases violence".⁷⁵ For such reasons ART's must be a priority agenda for the State. In India, to deal effectively with the medical practice of artificial reproduction, an independent and comprehensive legislation is needed. It should ideally be a law that must reflect upon what the use of technology does to the stability of family life, the population, as well as prevailing social norms vis-à-vis reproduction. The problems as discussed above make out a strong case to carefully govern technological reproduction having individual and social significance. Although AR has gained universal acceptance, attempts at deliberating its social or ethical viability continue to lead to disagreements. To deal with them, a mere regulatory framework would not be a feasible option. In the case of India, a mere regulatory framework is inadequate to protect the interests involved in the process. As expressed, argued, deliberated by many

and on several occasions, the realm of reproduction related deeply to the values of life and dignity sanctified within the Constitution of India, must be set out as a priority agenda by the State.

¹ As a resultant of the process, the offspring born stands out as a class aside from the rest of the society, possibly being deprived of the fundamental information about parentage, ancestry, medical inheritance etc. depending upon the prevailing laws on artificial reproduction. In that case, it is argued that AR replacing natural processes makes deception, secrecy and manipulation almost inevitable.

² Jacqueline A. Laing and David S. Odeberg, "Artificial Reproduction, the Welfare Principle, and the Common Good", 13 *Med L. Rev* 328 (2005).

³ J.S Mill said- the society has no right to enforce its moral perceptions where their violation would not cause objectively perceptible harm to others. On the other hand, the Hart Devlin debate also revolves around the harm principle as proposed by Mill, as to whether there are or not any private areas of morality into which the law should not intrude. See Hillary McCoubrey and Nigel d. White, *Textbook on Jurisprudence*, 53 Oxford University Press (1999).

⁴ *Supra* note 2 at 329.

⁵ Warren Freedman, *Legal Issues in Biotechnology and Human Reproduction: Artificial Conception and Modern Genetics*, Quorum Books 114 (1991).

⁶ Kusum, "Artificial Insemination and the Law", 19:3 *Journal of the Indian Law Institute* 283 (1977).

⁷ Marsha Garrison, "Law Making for Baby Making: An Interpretive Approach to the Determination of Legal parentage" 113:835 *Harvard Law Review* 837 (2000).

⁸ Ateeque Khan, "Artificial Insemination and Surrogate Parenthood: An Indian Socio-Legal Perspective", 31:3 *Journal of the Indian Law Institute* 394 (1989).

⁹ Sama Team, "Assisted Reproductive Technologies in India: Implications for Women", 42 (23) *Economic and Political Weekly* 2184 (2007).

¹⁰ Sama- Research Group for Women and Health is a Delhi based women's group working on health from a larger perspective that links women's well being with issues not only of health, but also livelihood, violence. *Ibid*.

¹¹ *Supra* note 8 at 394.

¹² Interestingly, most religions have opinionated views about the creation of new family with the use ART's. In the 1980's the Catholic Church in the United States condemned AID, as morally illicit and went so far as to making both AID and AI criminal acts, for it (specifically in case of test tube fertilization) reduces human beings to objects and degrades their being, value and dignity. The church advocated that childbearing should be limited to the conjugal act between husband and wife. In 1992, an instruction was issued wherein the Church accepted AIH as perhaps less worthy of condemnation than AID. But its stand on AID is somewhat the same. Theorists claim that religious connotations may affect or have affected decisions of the medical fraternity or many couples. See Norman

M. Ford, *"The Prenatal Person- Ethics from Conception to Birth"*, Blackwell Publishing (2002). Also available at <http://books.google.com/books?id=A22ndDR0D6sC>.

¹³ In case of *Dickson v. United Kingdom*, (2006) the European Court of Human Rights established that where there is a desire for a child, there should be an equal opportunity to realise procreation. The facts in brief were: Kirk was serving life sentence in prison where he met Lorraine who was also in prison, by a pen pal service network. After Lorraine was released, they both got married and wanted to have a child together. They could not conceive naturally, since Kirk was not permitted to visit home and exercise his conjugal rights. Hence, they applied for AI services. The Secretary of State refused their request on the basis of policy, wherein AI could be permitted for prisoners only in exceptional cases, there was no material to ensure the welfare of the child in the future and would be confronted with prolonged absence of the father. Finally, after a long legal process, the Grand Chamber rejected all such considerations on three main grounds: there were no security issues or administrative or financial burden on the State to permit access to AI, there was also a need to look into the rehabilitative purpose of penal law and finally that Article 8 of the European Convention on Human Rights came to the rescue of the applicants. See Marleen Eijkholt, "The Right to Procreate is not Aborted Dickson v. United Kingdom" 16 *Medical Law Review* 284 (2008).

¹⁴ Annas, "Reproductive Technology and the Procreation Rights of the Unmarried", 98 *Harvard Law Review* 669 (1985).

¹⁵ In this regard, the American courts have implicitly recognised the right to procreate by individuals, and such interests can be reconciled with unmarried person's procreation rights by means of legislation that grants access to reproductive technology regardless of marital status and that also mandates careful monitoring to prevent abuses *Ibid*.

¹⁶ Aleardo Zanghellini, "To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?" 4 *Melbourne Journal of International Law* (2008). Available at <http://www.austlii.edu.au/au/journals/MelbJIL/2008/4.html> (Last Visited 4.11.08).

¹⁷ ICCPR Article 23(2): "The Right of men and women of marriageable age to marry and to found a family shall be recognised.

¹⁸ In *Joslin v. New Zealand*, (UN Human Rights Committee, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (30 July 2002)), the Committee noted: "Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other".

¹⁹ (European Court of Human Rights January 22, 2008). Available at <http://cmiskp.echr.coe.int/tkpl>

97/view.asp?item=l&portal=hbkm&action=html&highlight=43546/02&sessionid=41595631&skin=hudoc-en. Also see Elizabeth Burleson, "International Human Rights Law, Co-Parent Adoption, and the Recognition of Gay and Lesbian Families", 55 *Loyola Law Review* 797 (2009).

²⁰ A few similarities and differences between adoption and ART's can be summarised: 1) Both create families: one provides children with parents, whilst other provides adults with children. Adoption today may not be an infertility service, but in the past it has been. Artificial reproduction is an infertility service. 2) Both involve professional intervention...in artificial reproduction skills involved maybe more specialised. The medical profession has a greater role to play, in deciding on the suitability of procedures etc, than the social work profession in cases of adoption. 3) In the case of adoption, the child already exists. In the latter, the child is created to satisfy the needs of the infertile and 4) in adoption usually neither adoptive parent is biologically related to the child. Whereas in AR, one of the social parent is also the genetic parent. See Micheal D. Freeman, *The Moral Status of Children: Essays on the Rights of the Child*, 192 Martinus Nijhoff Publishers (1997).

²¹ Susan Frelich Appleton, "Adoption in the Age of Reproductive Technology", University of Chicagl Legal Forum 393 (2004). Available at <http://ssrn.com/abstract=490642>

²² While the relevance and need for ART may be readily established, some challenge their use in developing nations. The criticism is levelled on two grounds. First, given the overpopulation problem in many developing countries, it is argued that overfertility, rather than infertility, should be the focus of the family planning programmes. Second, treating infertility through expensive ART cannot be justified in low resource settings where other pressing needs must be given priority. However, denial of infertility treatment and access to ART is an ill considered population control policy. The most effective and significant step would be to educate women in developing countries and interpretation to the UDHR would establish a right to access infertility treatment through ART. In India, the increasing demand for ART has resulted in mushrooming of infertility clinics. In the absence of any legislation, there is no registry of such clinics, with ever increase of malpractices. The only relief comes in form of guidelines formulated by the Indian Council of Medical Research, discussed in the latter part of the paper. See Chew S C *et al*, "Assisted Reproductive Techniques- Promises and Problems", 40 *Singapore Medical Journal* 303 (1999).

²³ In United Kingdom, in the early 1980's AR was a field in which decision making had taken place almost entirely in the private field. It was a discourse between the individuals. However, with the advent of high-tech procedures the state was invited to apply brakes and impose rules. In the period 1979- 1988 was the phase of guideline writing followed by specific legislations on the subject. See Ken R. Daniels and Darrel Hall, "The Best Interests of the Child in Assisted Human Reproduction: The Interplay between the State, Professionals, and Parents", in *Children, Medicine and the Law*, by Michael Freeman, 33 Ashgate Dartmouth (2005).

²⁴ The United Nations Convention on the Rights of the Child (1989) states: "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

²⁵ Cynthia B. Cohen, "Give Me Children or I Shall Die" in *Children, Medicine and the Law*, by Michael Freeman, 19 Ashgate Dartmouth (2005).

²⁶ In the absence of any strong evidence of damage, authors such as John Robertson advocate the Interest in Existing Argument: "a higher incidence of birth defects in such offspring would not justify banning the technique in order to protect the offspring, because without these techniques these children would not have been born at all, a very unlikely supposition, the defective children of such a union have not been harmed if they would not have been born healthy". *Ibid*.

²⁷ Ken R. Daniels and Darrel Hall, "The Best Interests of the Child in Assisted Human Reproduction: The Interplay between the State, Professionals, and Parents", in *Children, Medicine and the Law*, by Michael Freeman, Ashgate Dartmouth 36 (2005).

²⁸ The donor also has an interest in keeping his identity a secret for avoidance of psychological disturbance in the future, affect on his family life and relations etc.

²⁹ Sunni Yuen, "An Information Privacy Approach to Regulating the Middlemen in the Lucrative Gamete Market", 29 U.Pa. J.Int'L. 527 (2007).

³⁰ Hollace S.W. Swanson, "Donor Anonymity in Artificial Insemination: Is It Still Necessary?" 27 *Columbia Journal of Law and Social Problems* 178 (1993).

³¹ K.R. Mythili, "Artificial Insemination- Legal Issues", 39 *Journal of the Indian Law Institute* 349 (1997).

³² In UK the Human Fertilisation and Embryology Act 1990 provides for access to knowledge as regards origin by a child conceived by artificial insemination from the authority. He is allowed to get information as to whether the person whom he is going to marry is related.

³³ First, if a problem with the sperm is discovered after its use, the physician must know identity of the donor to identify other samples donated by him and to stop dissemination of his sperm. Secondly, in cases of AID, a child might have a birth defect or genetic disease. The physician would want to disqualify the donor from the program. Thirdly, for additional research on the affects of technological techniques, accurate recording is a prerequisite. *Supra* note 30 at 182.

³⁴ It is the first human rights instrument recognising the right to identity. The concern is worth a mention: 'Identity as what we know and what we feel is an organizing framework for holding together our past and our present and it provides some anticipated shape to our future life. Is it morally correct to deny this well being to children?' See *Supra* note 20 at 204.

³⁵ Pino D'Orazio, "Half of the Family Tree: A Call for Access to a Full Genetic History for Children Born by Artificial Insemination" 2 *Journal of Health & Biomedical Law* 249 (2006).

³⁶ Section 2(g) of Hindu Marriage Act, 1955.

³⁷ 58 O.L.R 251 (1921). For brief analysis of the case See Bartholomew, "Legal Implications of Artificial Insemination" 21 *Modern Law Review* 239 (1958).

³⁸ The opinion of the court is worth a mention in order to appreciate or not, the case decisions that followed subsequently. It goes, "In my judgement, the essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or

enjoyment of any person other than the husband or the wife comes within the definition of adultery”.

³⁹ In *Strand v. Strand* (78 N.Y.S. 2d 390), the wife obtained custody of children after separation with only visitation rights with father. She later for various reasons opened the suit to defeat the rights of the father that the child was conceived through AID and was illegitimate.

⁴⁰ 1958 S.L.T.12

⁴¹ *Supra* note 6.

⁴² *Supra* note 29 at 186.

⁴³ (1982) 2 All E.R. 771.

⁴⁴ In *Gleitman v. Cosgrove* (1967)22 A.L.R 3d 1411, the court admitted that the parents claim stood in a somewhat different from the infant. Nevertheless, policy factors articulated in the wrongful life cases cannot be ignored because of the inter-relation in both areas of the same.

⁴⁵ C. R Symmons, “Policy Factors in Actions for Wrongful Birth”, 50 *Modern Law Review* 269 (1987).

⁴⁶ Section 1A states that “a child may sue under this Act if the child is born disabled and the disability results from an act or omission in the course of selection, or the keeping or use outside the body, of the embryo, or the gametes used to bring about creation of the embryo, for a wrongful act against the person who was responsible for it”.

⁴⁷ (1995) 6 SCALE 273.

⁴⁸ Margaret Jane Radin, “Market Inalienability”, 100 *Harvard Law Review* 1849 (1987).

⁴⁹ There has always been a debate over commodification or possible sale of sperm, eggs and embryos, just like that of human organs, babies, sexual services etc. *Ibid.*

⁵⁰ *Supra* note 2.

⁵¹ Under s. 13(5) of the Human Fertilisation and Embryology Act 1990, the clinics licensed to offer assisted reproduction treatment must, before offering treatment services to a woman, take account- of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

⁵² Gillian Douglas, “Assisted Reproduction and the Welfare of the Child”, 55 *Current Legal problems* (1993-2).

⁵³ A few of the duties are: to assist the physician in assessing whether he is a suitable donor or not, by divulging information on his health conditions, to sign a consent form to maintain secrecy of his identity to the recipients, to obtain the consent of the spouse, if any is also a must prior to such donation etc. His rights include: the assurance that no responsibilities or liabilities will be bestowed upon him as a result of donation of gamete.

⁵⁴ *Supra* note 31 at 353.

⁵⁵ (2003) 4 All E.R 903. For a brief analysis of the case see Nicolette Priaulx, “Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters”, 16 *Medical Law Review* 169 (2008).

⁵⁶ As per the facts, Mr Johnson withdrew his consent and wrote to the clinic for destruction of the embryos. Ms Evans, who had agreed to the harvesting of her eggs and the creation of embryos with Mr Johnson sperm, had done so in order to have a child in the future.

⁵⁷ The case of Ms. Evans has led to considerable demand for reform to the interpretation of the 1990 Act in terms of the requirement of consent, right to life of the embryo etc.

⁵⁸ Jessica Berg, "Owning Persons: The Application of Property Theory to Embryos and Fetuses", 40 *Wake Forest Law Review* 159 (2005).

⁵⁹ *Ibid.*

⁶⁰ Gary H. Herbert, "A *Philosophical History of Rights*", Transaction Publishers 197 (2003).

⁶¹ 1984 JCP II 20321. For brief analysis of the case see Dieter Geisen, *International Medicine Malpractice Law: A Comparative Law Study of Civil Liability Arising from Medical Care*, Martinus Nijhoff Publishers 638 (1988).

⁶² In *B.K. Parthasarathi v. Government of Andhra Pradesh* AIR 2000 A.P. 156, the High Court of Andhra Pradesh upheld the right to reproductive autonomy as a significant aspect of an individual's right to privacy.

⁶³ Available at <http://icmr.nic.in/>.

⁶⁴ Nirupa Sen, "ICMR Spurs Public Debate on Infertility Clinics", 80 *Current Science* (2002). Available at <http://www.iisc.ernet.in/currsci/nov252002/1185.pdf> (Last visited 12.11.08).

⁶⁵ Published in the Online Edition of The Hindu, "Notice Issued on Petition to Regulate Infertility Clinics" Available at <http://www.hindu.com/2004/06/23/stories/2004062308910400.htm> (Last Visited 3.11.08).

⁶⁴ Another case came up in 2003, wherein a woman contracted HIV from artificial insemination. Investigations suggested, that a sperm bank is required to test the blood of a donor and cryogenically preserve the sperm for six months, after which it had to be tested again, and only then could it be used for artificial insemination. And in this case perhaps the procedure was not followed. See Sujoy Dhar, "India: HIV Case shows Need to fix Rules on Assisted Reproduction", Inter Press Service, June 5 (2003). Also available at <http://www.aegis.com/news/ips/2003/IP030606.html>

⁶⁷ The text of the report is available on

<http://www.lawcommissionofindia.nic.in> (Last visited 17.5.2012).

⁶⁸ The Draft Bill in its Preamble highlights that in the last "nearly 20 years have seen an exponential growth of infertility clinics that use techniques requiring handling of spermatozoa or the oocyte outside the body, or the use of a surrogate mother. As of today, anyone can open infertility or assisted reproductive technology (ART) clinic; no permission is required to do so. There has been, consequently a mushrooming of such clinics around the country. In view of the above, in public interest, it has become important to regulate the functioning of such clinics to ensure that the services provided are ethical and that the medical, social and legal rights of all those concerned are protected". The key features of the Bill are: (a) Chapter Two which provides for the establishment of the National Advisory Board as the central body for the formulation of rules for the regulation and control of procedures and formalities regarding physical infrastructure of clinics, ART procedures, selection of patients, research on embryos, establishment of a national database in respect of infertility etc. (b) Chapter III which provides a mandate on all reproductive technology clinics to register with the Registration Authority created under this

Act. Any act done in contravention of this section would be an offence. (c) Chapter IV provides for the general duties of the ART clinics regarding patient testing, obtaining of relevant information, disclosure of donor information, confidentiality requirements etc. (d) Chapter VII deals with rights and duties of the patients. It permits the use of ART by single persons, as well as married and unmarried persons. The donors are to relinquish all parental claims over the child. In cases of surrogacy, it is to be given effect to by an agreement which shall be enforceable. The child born through the ART procedures shall be presumed to be the legitimate child of the couple, with both spouses having an equal right.

69 The other provisions deal with, basic requirements of a infertility clinic, the essential qualifications of the ART team and the various approved ART procedures, there is a procedure for patient selection, in order to categorize them in specific groups and then refer them to different levels of infertility care units for step wise investigation and treatment. A few of the provisions deal with: registration of clinics, confidentiality of information, counseling and consent requirements. In regard to the storage and usage of embryos, the requirements are like those under the Human Fertilization and Embryology Act, UK (1990). Firstly, consent shall be taken from the couple for the use of their stored embryos by other couples or for research. Research is permitted only in the first 14 days. And the establishment of a National Database for Human Infertility, since there is no documented available in our country that would cover data on all aspects of infertility, and there is an urgent need for the same.

⁷⁰ Available at <http://www.isarindia.net/>

⁷¹ Available at <http://www.cehat.org/nbc-ijme.html>.

⁷² Available at unesdoc.unesco.org/images/0014/001461/146180E.pdf (last visited 15.11.08).

⁷³ Sule Toktas, "Internalization of Bioethics: The Search for Common Norms of Bio-Ethics in the EU and the Council of Europe", Available at <http://kosbed.kou.edu.tr/sayil2/toktas.pdf>. (Last Visited 20.11.08)

⁷⁴ Andrew Bainham, *The International Survey of Family Law: 1996*, Martin Nijhoff Publishers (1998).

⁷⁵ Effy Vayena, Patrick Rowe, David Griffin (Eds.), "Current Practices and Controversies in Artificial Reproduction", Report on a Meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction" at 19, held at WHO Headquarters in Geneva, Switzerland 17-21 September 2001. The World Health Organization (2002). Available at http://www.imamu.edu.sa/Scientific_selections/files/DocLib/report.pdf (Last visited 15.5.2012).