

Right to Access to Human Reproductive Technologies under Indian Legal Framework: A Bird's View

Dr. Aneesh V. Pillai

Assistant Professor,
School of Legal Studies,
Cochin University of Science and Technology, Kerala.

Introduction

The need and importance of a child is recognized by almost all religions all over the world. Begetting a child is one of the most joyful moments in the life of a person. In fact, begetting a child is considered as a sacred duty of an individual towards his family and the society and this duty is fulfilled through the institution of marriage. The act of procreation is normally a natural process of sexual union between couples and requires no external interference of a third party. However, many couples are unable to beget a child due to infertility caused by various factors. Such infertility and the inability to beget a child have a severe impact on the couples and particularly woman. It affects their personal, family and social relations. Since the ancient times mankind has tried to find a solution to the problem of infertility and help such couples to beget a child.

With the advancement of medical science and technology various methods and techniques have developed to help these couples to beget a child such as Artificial Insemination, In Vitro Fertilization, Surrogacy and Reproductive Cloning. These methods and technologies are collectively termed as 'Assisted Human Reproductive Technologies¹' and are considered as blessing for infertile couples as it helps them to fulfil their most cherished desire to have a child. However, the right to use these ART's for begetting a child is a highly debatable issue and there are diverse opinions in this regard. This paper seeks to identify the legal basis of right to access to ART and its scope in India.

Right to reproduction

Right to reproduction is a core human right and it is essential for realisation of many other human rights. According to the World Health Organization reproductive rights as a right including recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have information to do

¹ Hereinafter referred to as ART.

so, and right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decision concerning reproduction free of discrimination, coercion and violence². The United Nations International Conference on Population and Development (ICPD), 1994 explains that “Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence”³.

An analysis of various literatures shows that, right to reproduction includes the right to legal or safe abortion, the right to control one’s reproductive functions, the right to quality reproductive healthcare, and the right to education and access in order to make reproductive choices free from coercion, discrimination, and violence. These rights may also be understood to include education about contraception and sexually transmitted infections, and freedom from coerced sterilization and contraception, protection from gender-based practices such as female genital cutting (FGC) and male genital mutilation (MGM). Violation of these rights would cause severe injustice to women and an aberration to the fulfilment of gender justice.

However, it is to be noted that, there is no single human rights instrument which deals with all the various aspects of right to reproduction. But various international human rights instruments deals with different aspects of right to reproduction directly or indirectly such as Universal Declaration of Human Rights, 1948⁴; International Covenant on Civil and Political Rights, 1966⁵; International Covenant on Economic, Social and Cultural Rights, 1966⁶; Convention on the Elimination of All Forms of Discrimination against Women, 1979⁷; and International Conference on Population and Development, 1994; Fourth World Conference of Women held in Beijing, 1995.

²See (30.06.2019, 7.30 pm) <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Reproductive-Rights-In-Indian-Courts.pdf>

³ See, “Right to Health, Reproductive Health and Family Planning”, (30.06.2019, 7.30 pm) <http://www.unfpa.org/rights/language/right2.html/>

⁴ Articles 12, 16, 25 & 26

⁵ Article 23

⁶ Articles 12 & 13

⁷ Article 12

The Article 23 (1) (b) of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2006 is the first comprehensive international human rights instrument that specifically recognized the right to reproductive and sexual health as a human right at international level. At the regional level, Article 14 of Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, 2003 expressly articulates women's reproductive rights as human rights.

In India there is no specific law which confers the right to reproduction. The Constitution of India is described as the conscience of the Nation and the cornerstone of the legal and judicial system. This Constitution doesn't provide any explicit provision for reproductive rights. However, the Judiciary in India has recognized the reproductive right of individuals as a basic right in several cases. In *B. K. Parthasarathi v. Government of Andhra Pradesh*⁸, the Andhra Pradesh High Court upheld, the right of reproductive autonomy of an individual is an aspect of his right to privacy. Further in *Suchita Srivastava & Another v. Chandigarh Administration*⁹ has declared that, a woman's right to make reproductive choices is also a dimension of personal liberty as understood under Article 21 to the Constitution of India. Thus, it can be seen that, both at National and International levels, right to reproduction has been recognised as a basic human right. Nevertheless, many individuals are unable to enjoy this right. The major barrier to realizing this right is the problem of infertility among couples.

Human Reproductive Technologies

Every individual is born in a family consisting of a mother, father and frequently one or two siblings. The majority of people expect one day to establish a family of their own. However there are significant numbers of people who are unable to conceive their own offspring unaided¹⁰. This is because of the problem of infertility. Infertility is the inability to conceive after a year of unprotected intercourse in women under thirty-five, or after six months in women over thirty-five, or the inability to carry a pregnancy to term¹¹. The absence of a child in a family is considered as a stigma to the family and particularly in India it is looked as a curse. Hence the childless couples look for various measures to overcome this problem. Since ancient times the practice followed was that childless people would perform various prayers,

⁸ 1999 (5) A.L.T. 715

⁹ (2009) 9 S.C.C. 1

¹⁰ Adiva Sifris, "Dismantling Discriminatory Barriers: Access to Assisted Reproductive Services for Single Women and Lesbian Couples", 30 *Monash University Law Review* 2 (2004) 239.

¹¹ Maureen McBrien, "Human Cloning: Beyond the Realm of the Constitutional Right to Procreative Liberty", 21 *Buff. Pub. Int. L.J.* 107 (2002-2003)

rituals, offerings and fasting to please the Gods to get a child. Adoption was also considered to fulfil the dream of a child. The developments in science and technology have come to the rescue of such childless couples and helped them to have a child through various techniques collectively and popularly known as Artificial Reproductive Technologies (ART's)¹². Assisted Reproductive Technology 'refers to the body of medical and scientific knowledge and research which when applied enables the creation of a child who could not have been conceived or born without the intervention and application of that technology'¹³ ART is an umbrella term which includes several methods of fertilization, all of which share a common feature: the manipulation of both an egg and sperm in order to attempt fertilization.' The most commonly known ART methods include Artificial Insemination, In vitro fertilization and Surrogacy.

Artificial Insemination:

It involves manipulation of fertilization by injecting of a sperm artificially through a needle into the uterus of the wife directly without sexual intercourse. When a man cannot produce sperms or his sperm count is low, the wife is artificially inseminated with the sperm of an anonymous donor or the husband. In cases where the husband's sperm count is low or because of a disease cannot ejaculate, the artificial insemination is done with the sperm of the husband called [AIH]. But where the husband is not able to produce sperms the sperm can be taken from an anonymous donor called [AID]. To help such couples there are sperm banks established in certain advanced technological cities. Artificial insemination can also be availed by lesbian couples and AI is done by inseminating one of the partners by a donor sperm. Artificial Insemination is normally the first infertility treatment a couple will try as it is simple to accomplish, involves no pain and is less expensive as compared to other reproductive techniques¹⁴.

In Vitro Fertilisation:

IVF is a method of assisted reproduction in which a man's sperm and a woman's eggs are combined outside of the body in a laboratory dish. One or more fertilized eggs (embryos) may be transferred into the woman's uterus, where they may implant in the uterine lining and

¹² See for more, Aneesh V. Pillai, Assisted Human Reproductive Technologies (Scholar's Press, Germany, 2014).

¹³ Adiva Sifris, "Dismantling Discriminatory Barriers: Access To Assisted Reproductive Services For Single Women And Lesbian Couples", 30 Monash University Law Review 2 (2004) 239.

¹⁴ See for more, Aneesh V. Pillai, Assisted Human Reproductive Technologies, (Scholar's Press, Germany, 2014)

develop. Excess embryos may be cryopreserved (frozen) for future use. Initially, IVF was used to treat women with blocked, damaged, or absent fallopian tubes. Today, IVF is used to treat many causes of infertility, such as endometriosis and male factor, or when a couple's infertility is unexplained. The basic steps in an IVF treatment cycle are ovarian stimulation, egg retrieval, fertilization, embryo culture, and embryo transfer¹⁵.

Surrogacy:

Surrogate motherhood involves a woman bearing the child of another woman. In situations where the woman cannot produce eggs, they enter into a contract with another woman who agrees to be artificially inseminated with the sperm of the husband of the woman desiring to have the child and she bears the child for them. Also where the woman can produce eggs but she is unable to carry a child to a term, the embryo is externally formed by in-vitro fertilization of husband's sperm and wife's ova, the embryo is implanted in surrogate mother's womb and she bears the child for them. This can be done in two ways-either the husband's semen is squirted in the vagina of the surrogate or the fertilization is done externally in the lab by IVF and the embryo is implanted in the uterus of the surrogate mother. The surrogate mother is paid by the married couple for renting her womb. In this case the child would inherit the genetic code of the contracting couple and the sanctity of marriage is maintained. Still the surrogate motherhood is the most controversial of the new reproductive techniques¹⁶.

The ART offer new ways for infertile and other individuals/couples to become parents. They facilitate the pursuit of biological parenthood and in many cases where couples/individuals have opted for ART it have brought enormous joy into their lives by helping them to beget a child which they never thought that they would have. It might be thought that such a miraculous procedure which creates new life and produces such happiness would be accepted by all without any objections. But it is not so. The ART's are criticized and objected on various grounds. Each of the method of ART poses a diverse range of legal, ethical and social issues which pose a challenge to the legal systems¹⁷.

Access to Reproductive Technologies

¹⁵ Ibid.

¹⁶ See for more, Dr. Aneesh V. Pillai, Surrogate Motherhood and the Law, (Regal Publications, New Delhi 2015)

¹⁷ See for more detailed discussion, Aneesh V. Pillai, Assisted Human Reproductive Technologies, (Scholar's Press, Germany, 2014)

The human procreation is a natural biological process and generally takes place without any technological intervention. It only requires minimum medical assistance. But in case of infertile and socially infertile couples¹⁸, the process of procreation to beget a child would not occur without the intervention of science and technology. So also considering the various criticisms against ART, it is necessary to identify, whether there is a right to access artificial reproductive technologies. Primarily, it is argued that, for those medical and social infertile couples/individuals, it is reasonable that the advancements in medical science are to be utilized for their benefit and therefore they must be allowed to use ART.

John A. Roberts, argues that, *'if coital reproduction is protected, then we might reasonably expect the courts to protect the right of infertile persons to use non-coital means of reproduction such as artificial insemination (AI), in-vitro fertilization (IVF), and related techniques so as to combine their gametes for the purpose of begetting a child. Infertile couples who use these techniques are trying to achieve the same goal of having and rearing offspring that fertile couples achieve through coitus. Therefore there is no valid reason not to grant them the same presumptive freedom to achieve that goal which fertile persons have. The use of such techniques may however be subject to certain limitations if use of those techniques affects the best interests of other individuals, child and society'*¹⁹.

The right to access ART of an individual/couple can be justified mainly on the grounds of reproductive autonomy of an individual. Reproductive autonomy includes within its ambit all ideas relating to reproduction such as whether or not to have children, when to have children, where, how, and with whom to have children. These decisions are profoundly important and intimate for individuals. In fact for most people reproductive decisions are central to how they wish to live their lives. The state should therefore, as far as possible, assist couples who need treatment or help to have children²⁰.

It is to be noted here that, though ART has developed as a significant branch of medical science, at international level, none of the human rights instruments specifically recognised a right to access ART. In India, there is no specific legislation dealing with ART, however, there is a National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in

¹⁸ Singles, gay couples, lesbian couples. See for more Dr. Aneesh V. Pillai, Surrogate Motherhood and the Law, (Regal Publications, New Delhi 2015)

¹⁹ John A. Robertson, Gay and Lesbian Access to Assisted Reproductive Technology, 323 Case Western Reserve Law Review, Vol. 55:2 (2004), p.328.

²⁰ See for more, Dr. Aneesh V. Pillai, Surrogate Motherhood and the Law, (Regal Publications, New Delhi, 2015)

India, adopted by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences, India in 2005, which recognises right to access to ART. But it is to be noted that, this is a non-binding instrument. Further in several cases relating to surrogacy such as *Baby Manji Yamada v. Union of India*²¹ and *Jan Balaz v. Anand Municipality and Ors*²², the Indian judiciary has approved that there is a fundamental right to access ART (Surrogacy).

In this expanding era of human rights jurisprudence, one can trace the foundation of right to access to ART from the following human rights such as: Right to Personal Liberty, Right to Procreation, Right to Found a Family and Decide on the Number and Spacing of Children, Right to Privacy and Right to Enjoy Benefits of Scientific and Technological Progress²³. It must be emphasized here that access to ART, like any other rights are not absolute and therefore reasonable restrictions can be imposed for the welfare of the child and in the interests of the society. This right can be restricted and regulated to secure the due recognition of the rights and freedoms of others, to meet the just requirements of morality, public order and general welfare in a democratic society

Conclusion

Nature has bestowed the beautiful capacity to procreate a life within women and every woman cherishes the experience of motherhood. Every couple has the innate desire to have a child and this is recognized by the right to procreation. Unfortunately, some couples due to certain medical conditions cannot beget a child. The desire for parenthood leads them to search for alternative solutions, and the developments in science and technology have provided an option in the form of assisted human reproductive technologies. Assisted human reproductive technologies have emerged to medically assist those who are unable to conceive naturally. Infertility may be 'cured' and assisted reproductive technologies are emerging as the major techniques for curing the problem of infertility. Advances in assisted reproductive techniques have revolutionized the field of human reproduction and provide a ray of hope to those couples who are unable to beget a child naturally. In the past two decades, it is not only the infertile married couples but also single individuals, gay couples and lesbian couples who are also seeking the help of ART for begetting a child. The increasing use of ART by these

²¹ A.I.R. 2009 S.C. 84

²² A.I.R. 2010 Guj. 21

²³ See for more, Dr. Aneesh V. Pillai, Surrogate Motherhood and the Law, (Regal Publications, New Delhi 2015)

single individuals, gay couples and lesbian couples raises various complicated legal and human rights issues. Some of the important issues are: whether a widow should be allowed to use ART; whether an unmarried girl should be allowed to access ART; whether a disabled person should be allowed to access ART; If a person is allowed to access ART, how many times he can use ART; What can be the maximum age of a person who wish to access ART; is it necessary that, he must not have a child of his own for accessing ART; What legal status the Child must have after birth, etc. Thus the need of the hour is to develop an appropriate legal framework to regulate the access to ART by various categories of individuals and the related issues.