

## BURNISHED LAW JOURNAL

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### STRUGGLE OF IVF IN INDIA: LEGALITIES AND COMPARATIVE ANALYSIS

#### Abstract

Human Rights are the rights which are available to each and every individual without any scope of discrimination. One of the most important Human Right is Right to Life which is supreme and inalienable. Reproduction through Assisted Reproductive Technology is an upcoming method of reproduction, especially in urban areas. One such method is In Vitro Fertilization (IVF). This study analyses and focuses on the need of improvement in the laws of In Vitro Fertilization in India. This research seeks to answer that there should be proper laws for IVF as it will give a positive impact on everyone's thinking in the country in the present scenario due to non-enactment of proper laws of IVF as required to encourage the people. According to ART Regulation Bill passed by Parliament, every couple has the right to avail IVF. But in India, IVF is considered sinful or immoral according to many schools of thoughts, and thus, is perceived negatively in the society. It should be the right of the couple who wants to use this method to give birth to their child. Medical organizations across the world have fought for the right to access safe and legal IVF methods for decades, and increasingly international human rights law supports their claims. In fact, international human rights legal instruments and authoritative interpretations of those instruments conclude that every fertile or infertile couple have the right to decide independently in all matters related to reproduction, including the issue of using IVF as one of the reproduction methods. In this particular research need for proper laws and present laws with comparison with laws of other countries is taken into consideration. It is divided into five parts, that is, the introduction of IVF, IVF laws in India and ART bill, comparative study, conclusion and suggestion.

#### Introduction

Nowadays Artificial Reproductive Technology is most commonly used when couple don't wish to use the natural method to give birth or they are infertile, In vitro fertilisation (IVF) is a procedure of treatment where an egg is joined with sperm outside the body, in vitro. The procedure of In Vitro Fertilization was first started in England, United Kingdom. Louise Brown was the child's name in 1978. It is surprising that the second child born through In Vitro Fertilization was from India. After 67 days of In Vitro Fertilization procedure in UK, A girl named Durga was born in India through this method. Still India's laws are very weak and unstable when they are compared with UK. Dr. Subhash from Kolkata conducted this procedure back then. IVF is very famous in medical negligence. There have been many cases of mixing of egg and many such mistakes leading to many problems for the patients. Strict laws made in other countries like United Kingdom, United States of America, South Africa made good laws which lead to a massive reduction in medical negligence cases in the procedure of In Vitro Fertilization. There have been complications too in In Vitro Fertilization procedure as there are chances of multiple births. Major problems like pregnancy loss, weakness in female's body is observed. Sometimes it is very worst which leads to female's death. Biologically, women after menopause fail to conceive but, through In Vitro Fertilization women over the age of 50 (age of menopause) are also giving birth. But as there is a major

problem of over population in many countries, there are laws passed stating a particular age limit for any artificial reproductive technologies method. In India the maximum age limit is from 50-52 depending on the health of the women. Doctors worldwide have certified IVF as a safe method of reproduction. IVF has become very common in many developed and developing countries and now it is time for India to make its positive image in the country by making its proper laws by passing bill of IVF. The Government of China banned the process of In vitro fertilization for non-married couple or couples having some kind of virus or disease as it will be harmful for the child. The countries of Muslims specially Sunni muslims allow IVF procedure but do not allow surrogacy. Costa Rica is only one country in the world which has a complete ban on In vitro fertilization.

### **IVF Laws In India And ART Bill**

In India, people mostly impose restrictions on anything which is not natural or it is against the customs. In Vitro Fertilization is considered to be bad in various states in India. Because of this thinking there are no proper laws in India. In India, Laws are not made for In Vitro Fertilization, Still there are many private clinics which provide In Vitro Fertilization Treatments across the country. Rules of representing IVF focuses and egg banks are still examined in India. The Assisted Reproductive Technology (ART) Bill was drafted in 2010 to focus on illegal In Vitro Fertilization and Surrogacy treatments in India. Also the bill was passed to promote Artificial reproductive technologies methods in India and reduce its misuse as it was made a business which was legally, morally and ethically not allowed in India or in any country where In vitro Fertilization was practiced. In 2015, Indian Council of Medical Research notified that no foreigners are allowed to avail this treatment in India. A major decision was taken in 2016 through a notification that no Gay couple, single person or live in couples can avail the ART procedure in the country though new bills passed in 2020 changed the rules and made this procedure flexible. In the bills passed in the past, it was said that there should be proper records for the In Vitro Fertilization Treatments or any other Assisted Reproductive Technologies method as it reduces crime and wrongful gains from such treatments. India being 2<sup>nd</sup> largest country with a stable economy fails to have proper laws for such major treatments which leads to crime and illegal practices. India was the second country where IVF was practiced. A girl named Durga was born in Kolkata through this method. People in India mostly in rural areas tease infertile women as 'banjh' which means infertile. In some cases, couple takes divorce as they feel there is no option as their motive to get married was to have their heirs. Proper laws made for IVF will impact the people's way of thinking and infertility will not be teased. This is possible if bills for IVF laws pass from the parliament and everyone should get informed about the procedure and legality of this method of reproduction.<sup>1</sup>

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<sup>1</sup> <https://health.economictimes.indiatimes.com/health-files/ivf-in-india-swinging-in-legal-and-ethical-aspects/1725>

### ART Bill 2020

The Artificial Reproductive Technology Bill was passed on 19<sup>th</sup> February 2020. This bill focuses on treating fertility across the country. This bill focussed on the rights of the children and the parents. Both male and female should have the right to stop the procedure if they have a valid reason for example if they get separated when the procedure was in process. There are very strict punishments decided in ART bill 2020 regarding sex choice or selling embryos. Jail for 12 years or Rs. 10 lakhs is to be paid as the punishment. Due to no proper laws for IVF, India faces many cases of medical negligence which creates problem for the patient physically and financially. There is no proper hygiene in the medical clinics where IVF is practiced. <sup>2</sup>Proper laws can reduce negligence and make the clinics hygienic which is important as embryo needs to get stored in clean surroundings. A case law which prove the need for proper laws are as follows-

### *Delhi IVF and Fertility clinic and Others Vs Lina Goel, DSCDRC 2007*

This case was about medical negligence and administrative deficiency in their procedures of In Vitro Fertilization where Dr. Sanjay Patil after completing the procedure went to Mumbai. After few days the patient who is respondent had some complications. There was no specialised doctor present in the clinic. The clinic was not hygienic which is a major drawback and a risk factor for patients under the treatment of IVF. Later the patient had to go to a different hospital for treatment. The court held that this is a case of medical negligence and administrative deficiency. This case relates to the research as negligence happens when there are no proper laws. Such negligence does not happen at the time of surrogacy. With proper laws for IVF such problems will gradually reduce. <sup>3</sup>

### **Comparative Analysis With Other Countries**

#### United Kingdom

The paper compares the laws of India with UK. UK is the first country to perform the procedure of IVF and India is the second. Still the laws of UK are much better and stronger than India's. In UK, live in couples, people from different countries, gay couples or single parent is allowed to use IVF for reproduction whereas earlier in India they were restricted but the latest ART bill 2020 have improved the laws and made this procedure very flexible in India but still awareness and strong laws are still awaited in India. As compared with India, United Kingdom had the

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<sup>2</sup> <https://www.drishtiiias.com/daily-updates/daily-news-analysis/assisted-reproductive-technology-regulation-bill-2020>

<sup>3</sup> Delhi IVF and Fertility clinic and Others Vs Lina Goel, DSCDRC 2007

<https://www.legalcrystal.com/case/1112190/delhi-ivf-fertility-clinic-vs-lina-goyal>

first case of IVF in England and India was the second. Both the countries play important roles in the history of IVF. Laws passed in UK state that women over the age of 40 cannot avail In Vitro Fertilization for reproduction and if we compare it with India, India has the age limit of 50 according to the latest bill passed in 2020. The Human Fertilization and Embryo Authorisation ACT 1990 was passed to ensure safe and legal treatment of IVF. The act ensured to keep records of the couple and the surrogate for any future requirements. The act ensured proper privacy to the surrogate and the couple in the case of surrogacy. It is on the will of the child whether he/she wishes to know about their surrogate mother. A limited information is provided. No business or money making is allowed. Only the licenced clinics are allowed to practice the treatment of IVF. The Human Fertilization and Embryo Authorisation ACT 1990 also focusses on the welfare of the child. Government verifies the couple before the treatment and checks on few aspects. The verification firstly checks their lifestyle and their house. Their financial condition is checked to make sure whether they can afford the expenses borne for the necessities of a child. Also their criminal records are checked and they are asked to promise that they will keep the child with them and treat him well and fulfil his needs till the child turns eighteen years old. The age of the couple is checked and their level of maturity is tested which is required to become a parent. The HFEA act also keeps a check on the child till the child turns eighteen years old.

Case Law which proves the importance of rights of both male and female and laws for the same are as follows<sup>4</sup>

*Evans Vs United Kingdom, 10th April 2007, European Court of Human Rights*

In this case, the woman had some complications to conceive and she was suggested to use IVF method for reproduction. But it was only possible 2 years after their donation of sperms and ovaries. As suggested by the doctors, they gave their samples. Within the span of two years, the couple divorced. As they had given their samples and time span of 2 years got completed, the wife decided to continue with the procedure but the husband refused as their relationship was over and he didn't want any new start to their relation and refused to give consent to continue the procedure of IVF.

The wife filed a case against her ex-husband in the court of Human rights in 2007.

The court held that the husband has the right to say no if he wishes to. Both the male and female have equal say in the decisions taken in the procedure of IVF. There should be always equal rights in the hands of the couple. In this case husband availed his right which was challenged by his ex-wife.

This case law relates to the paper as how important it is to have clear and proper laws to give justice. Having proper laws of IVF clears that both male and female have equal say in the whole procedure.<sup>5</sup>

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<sup>4</sup> <https://www.nhs.uk/conditions/ivf/availability/>

<sup>5</sup> Evans Vs United Kingdom, 10th April 2007, European Court of Human Rights

### United States of America

USA has relaxed laws of IVF and it has a flexible procedure. Women over the age of 50 can also use IVF for giving birth and single, gay couple etc are also allowed to avail this procedure unlike other countries like France and India. Laws are different in every state in United States of America. Laws of IVF in USA are totally different from other countries. In 2009 a bill was suggested stating adoption of eggs which later not passed by the government. There are no proper laws for IVF in USA just like in India. Instead of passing bills for IVF, American Society of Reproductive Medicine (ASRM) was introduced which had its own ruling and it was certified by the government. It was formed in 1944. IVF is considered to be most costly in USA which is approximately 14000 Dollars for one cycle. United States of America has a totally different IVF method. One of them is a cheaper IVF method called 'Mini IVF' in which small and cheap doses are given to the patient. The other one is the normal procedure of IVF which is suggested by the doctors. The first IVF treatment was done in 1981. Women at the age of 54 became mother in USA which shows how the regulations and the mindset of the country supports IVF treatment. USA have choice to choose the sex of their child unlike India. Choosing sex in India is covered under crime and imprisonment of 12 years or Rs. 10 lakhs is to be paid if such thing happens in India. Independence is given to clinics in all states but they all have different guidelines to follow which are decided by American Society of Reproductive Medicine (ASRM)

### Astrue v. Capato, 566 U.S. 541 (2012)

In 1999, Karen Capato's husband, Robert Capato, had detected with cancer which lead to a tensed situation for the couple. He later had to start with chemotherapy. As chemotherapy can make a person ineffective for sexual reproduction, he started donating his sperm to a sperm bank for sibling of his child. Later when he recovered from the deadly disease of cancer, he was infertile and was unable to reproduce. He and his wife decided to go for In vitro fertilization but when the procedure started, his health got worse and he passed away. After eighteen months of his death, his wife was blessed with twins who were conceived after he passed away.

She later applied for Social Security Survivors Benefits on the income of her husband but its got rejected by Social Security Administration. She later filed a case in the court claiming her benefits over her husbands income.

The court held that the place of death of Mr. Capato was Florida. Florida's law stated that no child can inherit if they are conceived once the parent is no more. The case was decided against the favour of Mrs. Capato. She later appealed against the judgement passed by SSAD and the case went to US Court of Appeals in Philadelphia, Pennsylvania.

The final judgement passed in Supreme Court was that there will be no social security benefits for children conceived after the parent's death.<sup>6</sup>

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<https://opil.ouplaw.com/view/10.1093/law:ihrl/2581echr07.case.1/law-ihrl-2581echr07>

<sup>6</sup> Astrue v. Capato, 566 U.S. 541 (2012)

<https://www.law.cornell.edu/supct/cert/11-159>

This case relates to the research and can be compared with India as, due to lack of proper laws, no rigid decision is made and there is always been confusion relating to matters of IVF.

### NETHERLANDS

According to the laws of Netherlands, IVF or any assisted reproductive method is not allowed in the country if it is done for business purposes. But in situations where it is necessary and the couple does not have any other choice and there is no intend of doing any kind of business or shelling out money out this procedure, IVF or any ART method is allowed in Netherlands. The age limit in Netherlands is 43-45 (maximum). An Embryos Act was passed in 2002. This act prohibits any kind of business by selling embryos. It's a criminal offense. This act prohibits charging extra costs for any Artificial Reproductive Method, it is an offense to choose sex of the child, like it is in India. Few countries like United States of America allow this method. As compared with India, there are very less chances of illegal IVF methods. Strong and rigid laws make such situation possible in a country. Implementation of proper laws in India can reduce illegal IVF and medical negligence.<sup>7</sup>

### Conclusion and Suggestions

The matter of poor laws and need for individual and strong laws for In Vitro Fertilization brings into picture the critical understanding of the importance of strong laws and how it changes the procedure to perform a particular activity.

The answer of the crucial question, "Why there are no individual laws for IVF and why do the country need individual laws" can be answered through this research. The need of the hour is to provide safety to the patients from medical negligence and unhygienic environment.

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In India, proper laws can help the judiciary to take proper decisions against medical negligence and problems relating to couple disputes in between the treatment of IVF. This is only possible if the people of India get awareness of this procedure and stop thinking about this negatively. Proper bill should be passed by the parliament and well organised clinics should be assigned by the government across the country for avoiding illegal treatment and insuring hygiene. A medical committee should be set up for the exceptional cases, to prevent cases that occur due to the grinding legal system.

India's legal system needs to throw light on In vitro fertilization treatment as it is right to life of the child which violated because of illegal practices and doing businesses. The comparison with other countries show the stability, decrease in medical negligence, decrease in illegal practices due to implementation of strict laws in their countries. India needs strict laws and individual laws to avoid problems which are faced.

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<sup>7</sup> <https://www.anastasiaherman.com/fertility-laws-by-country-netherlands>

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