

Frozen Embryos and its Prospective Owners: A Study of Fundamental and Legal Rights

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“There's already a marriage clock, a career clock, a biological clock. Sometimes being a woman feels like standing in the lobby of a hotel, looking at the dials depicting every time zone in the world behind the front desk—except they all apply to you, and all at once.”

-Sloane Crosley

Abstract

It is undeniable that embryo freezing has served as a boon to womankind and also to infertile men, as they can now become biological parents through assisted reproduction. For a long time, the industry of assisted reproduction was running unbridled; however, the recent Assisted Reproduction Act and the amendments in Surrogacy Act has sought to manage the same. The efficacy shall be determined in the years to come. With assisted reproduction becoming a million-dollar industry a lot of moral and ethical dilemmas have arisen especially when it comes to the embryos that have been frozen. Whether they can be considered as unborn child and the various rights that can be assigned to them, including the right to be born alive, or whether they should be treated as property. Indian law has yet to provide an insight on what an unborn child and due to this a grey area and a need to address it. The researcher aims to ascertain the various issues in regard to the embryos which have been frozen such as personhood along-with the rights of their owners in the purview of various laws and judicial decisions.

Keywords: ART, oocyte, surrogacy, unborn child and embryos.

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I. Introduction

In today's day many women are faced with a dilemma of what they should focus their attention on whether on starting a family or having a sound education and career. The dilemma being faced is not of the women alone but also something they go through with their respective partners/husbands. It has slowly dawned on society that child rearing is not a gender-oriented role assigned only to the female, but men should also have an active participation in the same, and hence not only the eggs but also the embryos are being frozen to be used when the time is right and the couple is ready for the upbringing of a new life. In Indian society having a biological child is the utmost task assigned to a woman. Adoption is shunned, and with the declining fertility rate the 21st century women have yet another herculean task before her. Assisted Reproduction has provided a suitable recourse with the aid of advanced science and technology to freeze fertility.

II. Embryos-etymology

Human embryologists should be the ones to address the scientific question of when the physical material dimension of a human being begins, not philosophers, bioethicists, theologians, politicians, x-ray technicians, movie stars, or obstetricians and gynaecologists.³ Etymologically, the term embryo comes from the Greek noun *embryon*, which means "in growth."⁴ The embryo is an organism in its infancy, from conception to the end of the eighth week, according to Stedman's Medical Dictionary.⁵ As per Section 2 of the Assisted Reproductive Technology (Regulation) Act, 2021, an embryo is defined as **"developing or developed organism after fertilisation till the end of fifty-six days from the day of fertilisation."**⁶ An individual can also choose to transfer embryos to or receive the same from another person. This is known as embryo donation. Section 2(h)

³ Dianne N. Irving, *When Do Human Beings Begin? "Scientific" Myths and Scientific Facts*, INTERNATIONAL JOURNAL OF SOCIOLOGY AND SOCIAL POLICY (1999), <https://www.princeton.edu/~prolife/articles/wdhbb.html> (Last visited on 23.07.2022)

⁴ Sufiya Ahmed, *Embryo Freezing and Donation: Ethical-Legal Issues*, ILI LAW REVIEW SUMMER ISSUE 115(2018) <https://ili.ac.in/pdf/dsa.pdf> (Last visited on 23.07.2022).

⁵ Quoted in *Ibid* at pg. 115

⁶ The Assisted Reproductive Technology (Regulation) Act, 2021 (Act 42 OF 2021) <https://egazette.nic.in/WriteReadData/2021/232025.pdf> (Last visited on 20.07.2022)

of the Act states that a gamete donor is a person who gives a sperm or an oocyte to an infertile couple or woman in order to assist them in reproduction.⁷ Here gametes mean oocytes and sperm.”⁸ Infertility, on the other hand, refers to a couple's inability to produce a child after a year of unprotected coitus or when a medical problem prevents the couple from conceiving a child.⁹ These embryos are subsequently transferred in the womb of a mother which is the process in which embryos are placed in the uterus or fallopian tube. Section 2(1)(b) and 21(1) (c) of the Act defines "Assisted Reproductive Technology Bank" and "Assisted Reproductive Technology Clinic," respectively. An infertile married pair is referred to as a "commissioning couple" under Section 2(1)(e).

A. Frozen Embryos: The Need

The major reason for freezing embryos is to preserve them so that they can be used eventually in the future. There is now a need for freezing of the embryos due to various reasons such as the following:

- The present generation now perceives the concept of a child differently than the previous generation. The focus is now on child upbringing rather than child rearing.
- Adulteration in the food has become a commonplace activity, with the adverse impact clearly being reflected in the women's bodies. Justice Shah, while refusing the bail plea in food adulteration case quoted- ***“Only in India we are liberal with health concerns”***¹⁰
- Some people are undergoing medical treatment for life-threatening diseases such as cancer or other surgeries, which not only takes a long time to heal but also reduces fertility. Hence, embryo freezing becomes a necessity as a future assurance. Other diseases such as diabetes, obesity have also played a role in reducing fertility. Other reasons include: obstruction or harm to the fallopian tube and ovarian dysfunction. Endometriosis is a disorder in which the tissue lining the uterus, endometrial, develops outside of the organ.

⁷ *Ibid.*

⁸ *Ibid* at Sec. 2(g)

⁹ *Ibid* at Sec. 2 (j)

¹⁰“Only in India we are liberal with health concerns’, says SC on bail plea in food adulteration case”, The Hindu, June 09, 2021.

Uterine fibroids are a condition in which women of reproductive age develop non-cancerous tumours in their uteri; sperm that cannot survive in cervical mucous, poor-quality eggs, impaired sperm production, and, among other things, genetic illnesses.¹¹

III. Historical background and evolution of embryo technology

In-Vitro Fertilisation (IVF) saw a surge in popularity in the 1980s and 1990's for the treatment of infertility resulting from increased age.¹²

A. Historical Background at the International Level

In the year 1983, it was in Trounson, Australia, that the use of a donated embryo in assisted conception was first reported.¹³ The woman in this case had many medical issues, including a twisted right fallopian tube, a locked left fallopian tube, and a three-centimeter benign tumour growing on the uterine wall.¹⁴ This, however, was an unsuccessful attempt resulting in miscarriage. In the year 1984 on 28th March, Zoe Leyland was born in Melbourne, Australia.

In United Kingdom Robert Edwards and Patrick Steptoe pioneered the field of assisted reproductive technology (ART) and were responsible for the world's first test-tube baby, Louise Brown, born in Oldham, England, on July 25, 1978. The road was tough in England and funds were refused one of the grounds being ***"belief that infertility should not be treated because the world was overpopulated."***¹⁵ Robert Edwards received the Nobel Prize for Physiology or Medicine for his contributions in the field of IVF in the year 2010. In United

¹¹Kshitiz Murdia, "Facing infertility? Here is all you need to know about IVF treatments in India" *The Times of India* July 25, 2022.

¹² Lucy van de Wiel, *Freezing Fertility-Oocyte Cryopreservation and the Gender Politics of Aging* 5 (New York University Press, New York, 2020)

¹³ Fiona MacCallum and Heather Widdows, "Ethical issues in embryo donation" <https://www.researchgate.net/publication/289382390> (Last visited on 24.07.2022).

¹⁴ Alan Trounson, John Leeton, *et. al.*, "Pregnancy Established in an Infertile Patient After Transfer of a Donated Embryo Fertilized In Vitro" (1983) <https://embryo.asu.edu/pages/pregnancy-established-infertile-patient-after-transfer-donated-embryo-fertilized-vitro-1983> (Last visited on 24.07.2022).

¹⁵Martin H Johnson, "Robert Edwards: the Path to IVF Reproductive" *Biomedicine*, 23(2), 245–262 (2011) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3171154/> (Last Visited on 24.07.2022)

Kingdom since 1 July 2022, according to law an individual can store embryos for use for a period of 55 years.

B. Historical Background at National Level

In the Hindu epic the *Mahabharata*, it is plausible, that *Gandhari's* "pregnancy" was a case of pseudocyesis.¹⁶ *Rishi Vyasa* used the in vitro fertilization technology and used that lump of flesh for the birth of the *Kurus*. After examining the lump of flesh, he found 101 cells and separated each and put them in a nutrient medium in earthen pots.¹⁷ Subsequently, hundred and one *kurus* were born into this world. Dr. Subhash Mukherjee pioneered assisted reproduction, and through this, Kanupriya Aggarwal also known as "Durga," was born in 1978 as India's first and the world's second test tube baby. Dr. Mukherjee was, however, subjected to ridicule and resentment at the hands of the government of the State of West Bengal, which formed an expert committee along with the medical association, terming his research papers as "absolutely bogus".¹⁸ Dr. Mukherjee committed suicide in the year 1981. According to Ernst & Young's Call to Action study, the fertility space in the country has expanded by 20% in the previous five years.¹⁹ The Indian fertility industry was valued at \$746 million in 2021 and is predicted to reach \$1,453 million by 2027, with a capacity of performing 5-6 lakh IVF treatments.²⁰ According to a recent poll by an IVF clinic in Mumbai, 84% of women and 81% of men are unaware of fertility preservation techniques like

¹⁶ Bharti Kalra, Manash P. Baruah, Sanjay Kalra 405, *The Mahabharata and reproductive endocrinology* 405 INDIAN JOURNAL OF ENDOCRINOLOGY AND METABOLISM (Vol. 20 Issue 3, 2016).

¹⁷ Manoshi Sinha "Surrogacy and artificial insemination in ancient India: An analysis", <https://www.myindiamyglory.com/2020/02/29/surrogacy-and-artificial-insemination-in-ancient-india-an-analysis/> (Last visited on 24.07.2022)

¹⁸ Sanchari Pal, "The Pioneer of IVF In India who was rewarded with suicide: Subhash Mukhopadhyay" <https://edtimes.in/the-pioneer-of-ivf-in-india-who-was-rewarded-with-suicide-subhash-mukhopadhyay/> (Last visited on 24.08.2022)

¹⁹ Pankaj Talwar, "How IVF stands tall in India with increasing success rates", *The Times of India*, July 26, 2022

²⁰ *Ibid*

freezing eggs and embryos.²¹ It showed that 26% of women and 27% of men believe that consulting a fertility specialist should be the very last resort.²²

IV. Technological Advancements in Freezing Fertility

“I’m proud to have done my work with limited resources and training,” Dr Hinduja says. “Today, couples are more aware and knowledgeable. They decide at what stage in their life they’d like a child. The success rate in IVF has increased too, from about 13% of couples to about 55%, in my experience.” - Dr. Hinduja²³

Fertility doctors can individually freeze and thaw embryos using cutting-edge technology known as vitrification. It is a cryopreservation technique that removes the chance of embryo harm.²⁴ There are three key technical steps in the process of in vitro fertilisation-(i) inducing ovulation to produce a large number of oocytes; (ii) fertilising the oocytes and developing early embryos in the laboratory; (iii) transferring the embryos into the uterus.²⁵

Bourn Hall Clinic, established in the year 1980 by Mr. Patrick Steptoe and Professor Edwards is the world’s first In Vitro Fertilisation clinic. The embryos are kept in a liquid nitrogen tank that is frozen at 384 degrees below zero Fahrenheit and doubles as a storage space for them for up to six months.²⁶ The procedure begins with hormonal stimulation of a woman's ovaries, which results in the production of a significant number of eggs. These eggs are then extracted with a laparoscope or an ultrasound-guided needle aspiration and placed in a glass petri dish where they are

²¹Anagha Sawant, “Unaware of IVF, infertility is still a taboo for most Mumbaikars” *DNA*, Feb 06, 2019.

²² *Ibid.*

²³ Kruti Behrawala “Destiny’s Child: India’s first test-tube baby is 32, a mom and a ray of hope, *Hindustan Times*, July 22, 2018

²⁴<https://artreproductivecenter.com/services/embryo-freezing-and-storage/#:~:text=Today's%20most%20advanced%20technology%20has,the%20risk%20of%20embryo%20damage>. (Last visited on 14.08.2022)

²⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2590090/?page=1> (Last visited on 24.08.2022)

²⁶ Harry Nelson, “Birth of First Frozen Embryo Baby in U.S. Due in June: Two Successful Pregnancies Reported Involving Transfer of Fertilized Eggs from a Laboratory Dish to Mother” *Los Angeles Times*, March 28, 1986.

exposed to sperm. After an egg is fertilized by a sperm cell, pre-zygotes, also known as pre-embryos, are transported into a woman's uterus via a cervical catheter. The frozen embryos are defrosted and then implanted vaginally into the mother's uterus. The process of storing the embryo for later implant, colloquially known as "test-tube babies," is a relatively new discovery in in-vitro fertilization. Pre-zygotes continue to divide until they reach the four- to eight-cell stage. A successful procedure will result in an embryo attaching to the uterine wall, differentiating, and growing into a foetus. As per Section 2(m) of the Surrogacy Act, from the beginning of the fifty-seventh day since fertilisation to the subsequent birth, a human organism is considered to be a "foetus".²⁷

V. Adoption of Frozen Embryos

"One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe are all likely to influence and to colour one's thinking and conclusions about abortion."
*Roe vs Wade*²⁸

Most couples store multiple embryos as a back-up in case the first implant is not successful. The procedure of starting from scratch is not only painful but also lengthy, and therefore more than one embryo is frozen. The frozen embryos, which are not implanted in the womb of women are exposed to a preposterous predicament. According to Embryo Adoption Awareness Centre there are over ten lakh surplus frozen embryos in America.²⁹ Adoption has been a long-standing tradition in India. The Hindu Marriage and Adoption Act, 1956, governs the procedure of adoption in India. It states the requirements of a valid adoption. The law requires a male and a female to be 21 years older than the child if the child to be adopted is a girl and a boy, respectively.³⁰ However, the act is applicable to a child after he has taken birth, and prenatal adoption is not covered by it. Embryo

²⁷The Surrogacy (Regulation) Act, 2021 (Act No. 47 Of 2021) <https://egazette.nic.in/WriteReadData/2021/232118.pdf> (Last visited on 18.09.2022)

²⁸ 410 U.S. 113 (1973).

²⁹ Nicole Harris, What is Embryo Adoption, <https://www.parents.com/parenting/adoption/what-is-embryo-adoption/> (Last visited on 29.08.2022).

³⁰ The Hindu Marriage and Adoption Act, 1956 (Act No. 78 of 1956) at Section 12

donation and adoption are different from the traditional adoption practices. Embryo donation is a very complex procedure that involves medical, legal, and emotional relationship aspects.³¹ It is the process in which a woman carries a genetically unrelated child in her womb, which begins when a couple chooses to donate healthy embryos to someone else. The process relating to the adoption of frozen embryo and the adoption of a child is very much the same; the major difference is that of the pregnancy experience. Would it be considered an offence against the sanctity of marriage when a woman chooses to implant someone else's embryo in her womb? There is difference between fornication and adultery. The act of adultery is wrong, but the consequence of it, i.e., pregnancy, cannot be deemed to be so.³² In India, as per the ART guideline no. 3.16.2, it shall not amount to adultery if a married woman goes through assisted reproduction with the consent of her husband. However, if artificial insemination with donor semen (AID) is done without her husband's consent, then it shall be a ground for divorce and judicial separation. The current act of 2021 is silent in this aspect. According to ART guideline no. 3.16.4, a child born to a single woman who uses artificial insemination with donor semen (AID) would be considered legitimate. According to Section 31(1) of the ART Act 2021, any child born through ART must be assumed to be the biological child of the commissioning couple and is entitled to all of the rights and privileges granted to a natural child. Embryo donation can be done anonymously where the donor and the recipient families are not known to each other.³³ The donation arrangements are murky legally, as well as emotionally. Some enter into private contracts for the adoption of the embryos and to ensure ownership and also follow up with a legal adoption after a child is born to further secure their rights. The child born through the embryo donation is still biologically related to the donor family, even though some other couple has gone through the gestation period and given birth. It is also subject to debate whether the children born through donor sperm should have the right to know about their donor parents. The children born out of this procedure can

³¹<https://www.embryodonation.org/wp-content/uploads/2015/01/webManual.pdf> (Last visited on 30.08.2022)

³²Thomas V. Berg and Edward J. Furton, *Human Embryo Adoption-Biotechnology, Marriage, and the Right to Life* 212 (The National catholic Bioethics Center, Philadelphia and The Westchester Institute for Ethics & the Human Person, Thornwood, New York, 2006).

³³<https://www.raipurivf.com/embryo-adoption/> (Last visited on 30.08.2022).

have siblings too, which are spread across the globe, as the donor parents could have donated to more than one couple.

The question also arises: can the donor be held liable for a genetic defect that the child has? In the case of *Paretta v. Med. Offices for Human Reproduction*,³⁴ the plaintiffs—Josephine and Gerard Paretta—underwent fertility treatment by using an ovum donor. They were provided information related to the potential donor by the doctor. It was the practice to screen the donor for cystic fibrosis and inform the adopters of the same. The donor in this case was a carrier, and the same was never communicated to the plaintiff, and the female child born was diagnosed with cystic fibrosis and had to undergo medications and stay under doctor supervision for the rest of her life. The court stated that “the emotional distress and psychic pain suffered by parents who give birth to a sick child after in vitro fertilization is not any different from that sustained by other parents.” And therefore, the parents cannot be compensated for emotional distress. However, as the Paretas were not informed of the disease and had to care for a sickened child, they were allowed recovery by the court. According to section 21(b) of the ART Act, 2021, it shall be ensured by the banks that the donor has undergone a medical examination to ascertain diseases.

VI. Personhood and Right to Life of a Frozen Embryo

It is, however, sometimes argued that until brainwaves are spotted, personhood cannot be affirmed.³⁵ So, would it be valid to include only a conscious person in the sphere of personhood? According to Aristotle’s “act and potency” theory, act does not exist without potency, and potency is associated with an act.³⁶ It can be said that the embryos have the potency to develop into a human being in the future. According to Section 2(ba) of the Pre-Conception & Pre-Natal Diagnostic

³⁴760 N.Y.S.2d 639 (N.Y. Misc. 2003) available at <https://casetext.com/case/paretta-v-med-offices-for-human-reproduction> (Last visited on 30.08.2022).

³⁵ Francis J. Beckwith, “Abortion, Bioethics, and Personhood: A Philosophical Reflection”, http://d3pi8hptl0qhh4.cloudfront.net/documents/sbjt/sbjt_2000spring3.pdf (Last visited on 27.08.2022)

³⁶ Anthony Okechukwu Nnadi, *The Adoption of Frozen Embryos Ethical Dilemmas* 37 (Xilbris US, 2020)

Techniques Act, 1994³⁷:-“*conceptus means any product of conception at any stage of development from fertilization until birth, including extraembryonic membranes as well as the embryo or foetus;*” Therefore, at any stage of fertilization of the egg with the sperm, it can be said that a woman has conceived a child. What should be an intelligible differentia when it comes to the status of an embryo and a full-fledged human being? In order to understand, let’s take an example of twins born on the same day Larry and Ervin.³⁸ Larry is born conscious but subsequently slips into coma and he shall awaken from it after eight years.³⁹ Ervin, however, is born in a comatose state but he too shall awaken on the same day as Larry.⁴⁰ Would it be justified in this case to kill off Ervin just because he never attained self-consciousness? ⁴¹The only difference here is functional i.e., of consciousness and it is not morally relevant, and this is the difference between an unborn and a developed child.⁴² Therefore, it can be argued that the unborn are not “*potential persons but human persons with great potential.*”⁴³

A. Rights of Frozen Embryo and its Prospective Owner

For grasping the concept of the rights of frozen embryos, according to the researcher, it is important to answer the basic question-whether the embryos can be considered to be an unborn child. Simply stated, “unborn” means one not yet born. According to section 3(d) of the word “unborn kid” in the United States Code refers to a child still inside the womb, while the terms “child in utero” and “child who is in utero” refer to a member of the homo sapiens species, irrespective of the stage of development. ⁴⁴According to Kansas Statutes-2012

³⁷The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (Act No. 57 Of 1994) And The Pre-Natal Diagnostic Techniques (Regulation And Prevention Of Misuse) Amendment Act, 2002 (No.14 Of 2003) <https://www.indiacode.nic.in/bitstream/123456789/8399/1/pre-conception-pre-natal-diagnostic-techniques-act-1994.pdf> (last visited on 18.09.2022)

³⁸ *Supra* Note 34 pg. 19

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ *Ibid*

⁴² *Ibid* pg. 20

⁴³ Quoted at *Ibid* pg. 20

⁴⁴<https://www.govinfo.gov/content/pkg/STATUTE-118/pdf/STATUTE-118-Pg568.pdf#page=2> (Last visited on 10.09.2022).

Kansas Statutes Chapter 21 on Crimes and Punishments an-"unborn child" signifies a living individual homo-sapiens organism that is in utero and is at any stage of pregnancy, from fertilisation to birth.⁴⁵ According to Article 4 of the American Convention on Human Rights, every person has the right to have his or her life respected. No one's right to life shall be unilaterally taken away; rather, this right shall be protected by legislation and generally begins from conception.⁴⁶ According to the Indian Penal Code (IPC), there are three stages of an unborn kid in terms of law: the unborn child in its simplest form, the woman is quickly pregnant, and, finally, the unborn child is capable of being born alive.

The researcher shall now shed light on the various laws in existence as undermentioned—

1. According to "Section 6 of the Limitation Act, 1963," a minor can file a lawsuit or an application for the execution of a decree once the disability has ceased, i.e., he attains the age of majority. The prescribed period shall be calculated once he attains the age of majority.⁴⁷ A child that is in the womb is also considered to be a 'minor.'⁴⁸
2. The rights of a child in the womb are acknowledged under "Section 20 of the Hindu Succession Act, 1956."⁴⁹ In order to inherit: -⁵⁰ The child must have been conceived at the time of the intestate's death and then be born alive.
3. As per "Section 2(e) Indian Majority Act of 1875," "minor" is any person who has not attained his majority as well as any other person who has not attained

⁴⁵ Section 21-5419
<https://law.justia.com/codes/kansas/2012/chapter21/article54/section21-5419/> (Last Visited on visited on 10.09.2022).

⁴⁶[https://www.globalhealthrights.org/instrument/american-convention-on-human-rights-achr/#:~:text=1.,arbitrarily %20deprived%20of%20his%20life](https://www.globalhealthrights.org/instrument/american-convention-on-human-rights-achr/#:~:text=1.,arbitrarily%20deprived%20of%20his%20life). (Last Visited on 10.09.2022)

⁴⁷ The Limitation Act, 1963 (Act No. 36 of 1963).

⁴⁸ *Ibid.*

⁴⁹ The Hindu Succession Act, 1956 (Act 30 of 1956).

⁵⁰ U.P.D. KESARI, MODERN HINDU LAW, 343 (Central Law Publication, Allahabad, 9th Edn. 2013).

the age of eighteen years; and “minority” refers to the status of any such person.”⁵¹

“Section 112 of the Act” recognizes the rights of a person coming into existence after the death of a testator.⁵² “Section 114” Before the unborn child is given ownership of the corporeal or incorporeal property, a prior interest may be created. However, according to the Act, no property would be considered to belong to the unborn child until he is actually born alive.⁵³

4. “Sections 312 to 316 of the Indian Penal Code” deal with the offence of committing miscarriages, acts committed to abort a child, and acts that result in the culpable homicide of a quick unborn child. The same are punishable under the eyes of the law.
5. According to the Transfer of Property Act, 1882, Section 13-A, property may be transferred for the benefit of an unborn person.⁵⁴ It cannot be, however, transferred directly to the unborn child. Furthermore, the interest to be transferred must be absolute.
6. The “Medical Termination of Pregnancy (MTP) Act,” which came into effect from April 1, 1972, had in mind the concept of reducing the illegal abortions, which were not only a threat to the unborn child but most of the time resulted in the death of the women. The same was amended in the year 2021. Now, according to Section 3,⁵⁵ women can terminate pregnancy up to 24 weeks of gestation.
7. According to “Section 3A of the Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994,”⁵⁶ it is prohibited to select the sex of the embryo. The Act as per section 6, prohibits sex determination as well.

⁵¹ The India Succession Act, 1925(Act No.39 of 1925) <https://www.indiacode.nic.in/bitstream/123456789/2385/1/a1925-39.pdf> (Last visited on 06.09.2022)

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ The Transfer of Property Act, 1882(Act No. 4 of 1882)

⁵⁵ The Medical Termination of Pregnancy (Amendment) Act, 2021 No. 8 Of 2021 <https://egazette.nic.in/WriteReadData/2021/226130.pdf> (Last visited on 05.09.2022).

⁵⁶ *Supra* Note 36.

VII. Legal Framework

A. The Assisted Reproductive Technology (Regulation) Act, 2021

On September 14, 2020, the Assisted Reproductive Technology bill was introduced in the Parliament, which was then referred by the Lok Sabha to the Standing Committee. The Assisted Reproductive Technology Act, 2021, has focused on many things—

- i. It has been made so that any woman can opt for assisted reproduction provided she is 21 years of age.⁵⁷ As the term ‘any women’ is used, it can be said that even single women are covered under it. Furthermore, throughout her lifetime, the oocyte donor can donate only.⁵⁸
- ii. The Act has made provisions for the setting up of a National Assisted Reproductive Technology and Surrogacy Board subjected to the provisions of the Surrogacy Act.⁵⁹
- iii. The Act provides that a maximum of three embryos can be planted in the womb of a woman.⁶⁰ This ensures the safety of the woman.
- iv. The law also provides that Pre-implantation Genetic testing can be done only for the purpose of ensuring that the embryo is healthy. The Act also prohibits the selection of sex or determining beforehand the sex of the child to be born through ART.⁶¹ Furthermore, the donor has to relinquish all claims on the child.
- v. The act limits the oocyte donor to not donate more than seven oocytes to a single receiver. The minimum and maximum ages for receiving the oocyte from a female, they are twenty-three and thirty-five, and for sperm from males is twenty-one and fifty-five.⁶²

⁵⁷*Supra* Note 4 Sec. 2(u).

⁵⁸ *Ibid.*

⁵⁹ *Ibid* Sec. 4.

⁶⁰ *Ibid* Sec. 24(b).

⁶¹ *Ibid* Sec. 26.

⁶² *Ibid.* Sec. 27.

VIII. Judicial Response vis-à-vis Frozen Embryos

A. Judicial Response at International Level

In the landmark case of *Roe vs. Wade*,⁶³ Ms. Jane Roe, who was pregnant, filed a lawsuit to challenge the validity of the Texas laws on abortion according to which a woman could abort only under the guidance of a medical expert when the purpose was to ensure the safety of a woman. The Texas court was tasked with the responsibility to adjudicate this grave matter. Despite the fact that this decision invalidated a Texas law that made getting an abortion illegal (except in situations where the mother's health was exposed to dire health risks due to the pregnancy), it also recognised that, after a certain point in the gestation period, there was a compelling state interest in safeguarding the woman and the unborn child.

In the case of *York v. Jones*,⁶⁴ a married pair going through IVF at the Jones Institute for Reproductive Medicine in Virginia had a dispute over the transfer of their frozen embryos to a reproductive centre in San Diego for subsequent implantation as they were relocating to California.⁶⁵ The York court determined that the agreement for cryopreservation between the Yorks and the Institute constituted a relationship of bailment and required the Institute to restore the subject of the bailment to the Yorks after the purpose for the arrangement's intended use was served.⁶⁶ When the objective of the bailment has been fulfilled, the bailee is under an absolute responsibility to restore the bailment's subject matter to the bailor due to the nature of the bailment relationship.⁶⁷ Therefore, the frozen embryos were transferred back to Yorks.

In the case of *Davis vs Davis*⁶⁸ the contention was the use of the frozen embryos. In this the parties, Junior and Mary Sue, had kept certain embryos in a frozen state. However, they got divorced subsequently. The Supreme Court of Tennessee ruled that the progenitors had equal rights to privacy under the state

⁶³ *Supra* Note 27.

⁶⁴ 717 F. Supp. 421 (E.D. Va. 1989).

⁶⁵ <https://law.justia.com/cases/federal/district-courts/FSupp/717/421/1584239/> (Last visited on 14.05.2022).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ 842 S.W.2d 588 (Tenn. 1992).

and federal constitutions, including the freedom from government intervention with reproductive choices.⁶⁹ Are they to be considered as “persons,” “property,” or “nascent human life”? The Court, answering this question, held that the pre-embryos were not persons; however, neither were they considered to be property, and concluded that the pre-embryos could not be categorized as persons or property, **“but occupy an interim category that entitles them to special respect because of their potential for human life.”** According to the Court, the autonomy of procreation includes both “the right to procreate and the right to avoid procreation.”

In the landmark case of *Evans vs United Kingdom*⁷⁰ it was determined if British law's requirement of both genetic parents' approval for the implantation of IVF-created embryos was in accordance with Articles 2 (Right to life), 8(right to respect for private and family life), and 14 (prohibition of discrimination) of the European Convention on Human Rights. This lawsuit dealt with the question of whether a British lady who due to cancer had lost her ovaries might use frozen embryos she had made with her previous romantic partner Mr. Johnson, even though he objected to same. Additionally, the decision established broadly whether states that are signatories to the European Convention on Human Rights may need the consent of the person who donates his sperm for IVF treatment keeping in mind that the citizens' rights to a private life are not infringed and freedom from discrimination on the basis of disability.⁷¹ The Grand Chamber held that there was not right to life assigned to the embryos within the Article 2.⁷²

B. Judicial Response vis-a-vis Frozen Embryos in India

In the case of *Accidents Claims Tribunal v. Abhulasees.P.P*⁷³ the pregnancy of the woman was aborted due to collision with a jeep. The court held that an

⁶⁹<https://law.justia.com/cases/tennessee/supreme-court/1992/842-s-w-2d-588-2.html> (Last visited on 14.09.2022).

⁷⁰ 43 E.H.R.R. 21 <https://www.womenslinkworldwide.org/files/1160/resumen-del-caso-solo-en-ingles.pdf> (Last visited on 21.09.2022).

⁷¹ *Ibid.*

⁷²[https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22003-1971098-2073178%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-1971098-2073178%22]}) (Last visited on 21.09.2022).

⁷³<https://indiankanoon.org/doc/21420757/> (Last visited on 21.09.2022).

embryo was different from foetus.⁷⁴ As the embryo was only fifty days old, the Kerala High Court didn't grant it the status of a child.

In the case of *Smt. Sadhna Agrawal v. State of Chhattisgarh*,⁷⁵ the petitioner was unable to conceive; she chose to implant an embryo in the womb of a surrogate mother.⁷⁶ The petitioner, a working woman, requested maternity leave, but it was denied to her on the grounds that there was no provision in the law for maternity leave to be granted to a woman who had given birth through surrogacy.⁷⁷ The Chhattisgarh High Court ruled that the state government cannot differentiate between a mother who gave birth naturally, a mother who did so biologically, and a mother who did so through a surrogacy method.

The case of *Mrs. X and Ors. v. Union of India*⁷⁸ led to the amendment of the Medical Termination of Pregnancy Act. Mrs. X was a rape survivor with twenty-four weeks of pregnancy. The petition contended that the MTP Act's 20-week restriction violates women's rights. The Court held that according to the Indian Constitution, a woman's right to health is protected alongside her right to life, and when she is forced to carry a pregnancy to term, which might have catastrophic repercussions, she is violating both of these rights. The mother had the right to preserve her life and therefore Mrs. X was allowed to terminate her pregnancy.

The Supreme Court stated in the case of *F.M. Devaru Ganapati Bhat vs. Prabhakar Ganapathi Bhat*⁷⁹ that it was not prohibited to transfer an interest in favour of an unborn person. Under Section 20 of the Transfer of Property Act an interest can be created for the benefit of an unborn person, who then acquires it

⁷⁴ *Ibid.*

⁷⁵ W.P.(S)No.4927/2016 <https://indiankanoon.org/doc/129367316/> (Last visited on 14.09.2022).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Writ Petition (Civil) No. 81 of 2017 <https://indiankanoon.org/doc/73782861/> (Last visited on 14.09.2022)

⁷⁹ AIR 2004 SC 2665 (2668) Available at <https://indiankanoon.org/doc/96002/> (Last visited on 14.09.2022)

when he is born. In *Indulekha Sreejith v. Union of India and Ors*⁸⁰, Justice P.B. Suresh Kumar dismissed the petitions seeking termination of 31 weeks of pregnancy. The respondent argued that the medical report had suggested abortion. The Kerala High Court submitted: -*“the right to life of an unborn shall also be considered as one falling within the scope of Article 21 of the Constitution.”*

Recently, the subject matter of embryos was brought up in the case of *Rakhi Bose and Anr. v. Union of India and Ors*, 2022⁸¹ the petitioners had frozen four embryos at the respondent's hospital in Dubai. The petitioners, however, switched the hospitals and requested the frozen embryo preserved at the earlier hospital.⁸² However, during that time period, the Assisted Reproduction Technology Act 2021 came into force, due to which the transfer process of the frozen embryos was halted.⁸³ The Kerala High Court held -*“Apart from the aspirations of the first petitioner to conceive and the second petitioner to beget a child, the right of the life inside the embryo, which is kept frozen for the past 8 years, to develop into a foetus and be born cannot be stultified by relying on a provision which has no application. The primary objective of the Act is the regulation and supervision of the assisted reproductive technology clinics and banks by preventing misuse and ensuring safe and ethical practice of assisted reproductive technology services. The Act is not intended to create difficulties for persons opting for assisted reproductive procedures.”*⁸⁴

IX. Conclusion

As the researcher reaches at the end of this research work, the researcher finds it appropriate to sum up the arguments related to the frozen embryos in the words of Sri. M-

“I’ve had memories of being enclosed in some dark room as a small little embryo, powerless, not able to move, but memories flooding inside of the past.

⁸⁰2021, https://www.livelaw.in/pdf_upload/indulekha-sreejith-v-uoiiwatermark-399888.pdf (Last visited on 14.09.2022).

⁸¹ https://www.livelaw.in/pdf_upload/frozen-embryo-423016.pdf (Last visited on 14.09.2022).

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

And then one day all of a sudden, all that memory disappeared and I was out.”

„85

The researcher has reached the conclusion through this research work that whether it is morally, philosophically, medically, or even legally, it cannot be denied that the embryo is considered to be the beginning of human life. The researcher, therefore, posed the very relevant question: What should be done with the embryos that have been in a frozen state for years on end and have no realistic probability of ever seeing the light of day—as in cannot be transferred in a woman’s womb should be thawed and allowed to die? Even though it would be ethically and legally wrong to so discard a life which is full of potential, but if one were to think logically and legally what better resort is there? It is almost impossible to transfer these embryos in the womb of women, even the women who in the first place created them, not only because it would be life-threatening to women and reduce her status to that of a breeding machine, but also what about the lifestyle of such children? In today’s inflation it hard for parents to sustain two children, let alone the many children that they would be forced to conceive and look after if any law that places responsibility is created. Also, such a step would be burdening the already overpopulated planet earth. The researcher has also observed that despite the laws accommodating single women into the spectrum of embryo freezing, it is still a long road, as she not only has to arrange for sperm but also the prying eyes and the harassment at the hands of fertility clinics, which only entertain married couples when it comes to fertility treatment. Therefore, the researcher has reached the conclusion that ART still has a long way to go.

The researcher would suggest the following changes, which should be made in the Indian scenario:

1. The Indian legislation has nowhere defined what an unborn child means. There is no clarity on the gestation period where an unborn can be associated with the status of a child. It is impertinent to give clarity on the meaning of the unborn child.

⁸⁵ “Master Yogi Sri M On Scary Encounter with A REAL Yeti, The Kundalini & The Nagas [TheRanveerShow236” <https://www.youtube.com/watch?v=DASU0GU9to0> (Last visited on 19.09.2022).

2. The researcher in respect to the Surrogacy Act, 2021, has certain suggestions:

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- i. The surrogacy act does not go hand in hand with the Assisted Reproductive Technology Act, 2021. It has kept out of its purview the access to single women, the live-in couples, and the LGBTQ community, which violates the Right to Equality.
- ii. The act has made commercial surrogacy a penal provision under section 40. It allows a woman to be a surrogate only once in her lifetime. Further, only a married woman with a child can undertake surrogacy. The act has therefore hit the livelihood of the women who were depended on it and also to the hopes of individuals who intended to become a parent.
- iii. The Act talks about obtaining an eligibility certificate by the intending couple under section 4. The section states that the intending couple should be married and that they are between the ages of 23 to 50 years for women and between 26 to 55 years for men on the day of certification, which makes no sense as the legal marriage age in India is 21 years. It is outside comprehension as to why such bizarre age criteria have been specified. This needs to be looked into and amended.

3. The researcher has certain suggestions for Assisted Reproductive Technology Act, 2021: -

- i. Accessing the assisted reproduction technology is a costly affair. Not everyone's pocket can afford the same. The Act has failed to regulate the prices that can be charged by the assisted reproduction technology clinics, making it still out of reach of the poor families.
- ii. Live-in relationship is the norm at present. The Act has not addressed the future of a frozen embryo should a live-in couple separate. Also, section 22(4) provides that the consent may be retracted by any of the commissioning couple at any moment prior to the transfer of human embryos or the gametes to the uterus of the woman. This is highly ambiguous, as it is not clear whether the same can be withdrawn even if one partner backs out. Also, it does not address the redressal issue and the legal remedy of the other partner in case one opts out at the moment of

the embryo transfer. The Act, is also silent on who should be considered to be the owner of the frozen embryos.

- iii. Section 22(1)(b) of the Act talks about providing insurance coverage to the donors of oocyte for a period of twelve months. However, it does not provide proper compensation to the donor for the donation made by them. The parameters of the insurance cover are ambiguous, and no clarity has been provided on the same.
- iv. Section 25 of the Act talks about how the scope of the potential of the frozen embryo has been constrained by pre-implantation genetic testing, which determines whether any pre-existing, heritable, or genetic diseases exist. As a result, the embryo cannot be used for research without the consent of the commissioning couple or woman or only in situations where the embryo has some pre-existing, heritable, fatal, or genetic diseases.
- v. According to Section 27(6) of the Act, it is required by the donor to submit their Aadhar card. The researcher would further accentuate that the right to privacy of the donors would clash with the right to know of the child of his genetic parents.
- vi. At present the law has not restricted to a maximum of number of embryos that can be frozen by a couple. According to section 28(2), the embryo can be stored for a period of maximum ten years only, due to which couples who are pursuing their careers or who are not looking forward to start a family immediately are at a loss.
- vii. Though the Act, according to Section 30(1), bans the embryo transfer to outside India, it has failed to regulate or shed light on the foreign nationals coming to India and accessing the Assisted Reproduction Technology or adopting any frozen embryo.
- viii. The Act is silent on the LGBTQ community. Also, according to Section 33(e) makes it an offence to transfer the embryo into a male person. The law has shed no light on the people who have transitioned from male to female body or vice versa. Thomas Tracie Beatie was the first trans man to undergo childbirth through ART. In India recently, the first reported childbirth by a trans-man was Zahhad Paval. In purview of all this, the

Act has failed to give due space to the LGBT community, and the same needs to be amended in order to be more inclusive and for better clarity.

- ix. The Act has levied unreasonably high fines for the offences committed to the tune of ten lakh rupees under section 33(1) without any reasonable basis and needs to be amended.