

Artificial Insemination and Right to Privacy of Donor in India

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Abstract

Artificial insemination has been popularized in India, but the legal issue relating to anonymity of donor is still to resolve. Though right to privacy has been considered as an integral part of fundamental rights, but still issue relating to right of anonymity of donor in case of artificial insemination is yet to be decided. In the present paper, the issue has been dealt with, considering various judgments of Hon'ble Apex Court.

Keywords: Artificial insemination, anonymity of donor, right to privacy, right to know

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INTRODUCTION

The technique involves artificial insemination of other woman with the sperm of the husband of a woman who could not give birth to a child. After surrogate birth, the baby is handed over to its biological father and his wife. It is now also possible to remove a mature healthy ovum from the wife and fertilize it with the husband's sperm *in-vitro* in the specialized laboratory and re-implant this fertilized ovum (Embryo) in the hired womb of another woman. The child born out of this arrangement may search for his surrogate mother or donor father or mother; so, an important aspect of artificial insemination is the identity of donor or surrogates.

Whether Surrogates or Donors have the Right of Privacy?

Article 12 of the Universal Declaration of Human Rights (1948) refers to privacy and it states:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Article 17 of the International Covenant on Civil and Political Rights (to which India is a party) refers to privacy and states that:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."

The European Convention on Human Rights, which came into effect on September 3, 1953, also states in Art. 8:

1. "Everyone has the right to respect for his private and family life, his home and his correspondence."
2. "There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others."

Anonymity of donor is also an important aspect to be considered with; whether it should be secret, or a child has right to know his origin is a question of debate.

Sweden is the first country which provides right to a child to trace his origin. Austria also allows a child on maturity to access to information about the origin, but Switzerland, France, Canada, Norway and Denmark do not allow offspring any information. In US, there is no legislation, at either Federal or State level; that either provides or enforces anonymous

Gamete donation. The matter is regulated by non-legal binding professional guidelines which recommend the anonymity or identity.

In UK, '**The Human Fertilization and Embryology Act 1990**' provides limited access to knowledge of origin to get information to an AID child limited to as to whether the person/woman whom he/ she is going to marry is related.

Initially, right to privacy was considered in reference to the intrusion into the home by police through domiciliary visits at any time. Police were empowered to conduct such visit at any time, night or day, to keep a tag on persons for finding out suspicious criminal activity, if any, on their part. Such domiciliary visits were provided through a UP regulation. The validity of these regulations came under challenge. In the first one, *Kharak Singh v. State of UP*¹, the majority referred to *Munn v. Illinois*¹ and held that though Indian Constitution nowhere refer to the right to privacy expressly, but it is included in right to life and personal liberty Art. 21 [1, 2]. However, the majority did not discuss the application of right to privacy in the matter of 'domiciliary visits'. While in his concurring judgment, Subba Rao J was disagreed with the majority view that the right to privacy is the part of Article 21, but he considered it the part of the right to freedom of speech and expression in Art. 19(1)(a), and of the right to movement in Art. 19(1)(d). His lordship held that the regulations permitting surveillance is in contravention to the fundamental right of privacy.

In another landmark judgment, *Govind v. State of MP*¹, Mathew J. modified the laws as to privacy after the judgements in *Kharak Singh* [3]. The learned judge referred *Griswold v. Connecticut*¹ in which Douglas, J. mentioned the theory of penumbras and peripheral rights and had said that the right to privacy become implied inside the right to freedom of speech and expression and could be accrued from the entirety of fundamental rights within the constitutional scheme, for, without it, those rights could not be enjoyed meaningfully [4]. Mathew J. also cited *Jane Roe v. Henry Wade*¹, where it was mentioned that though the right to privacy found no place in US Constitution, its roots can be searched in

the First, Fourth and 5th Amendments, within the penumbras of the invoice of rights, within the ninth amendment, and within the concept of liberty assured by the first phase of the "Fourteenth amendment" [5]. Mathew, J. stated that, the 'right to privacy is not absolute' and that the makers of our charter wanted to ensure conditions favorable to the pursuit of happiness as explained in *Olmstead v. United States*¹; the privacy may be denied only while an essential countervailing interest is proven to be superior', or where existence of a compelling state interest has been proved (Mathew, J. left open the issue) [6]. According to Mathew, right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child bearing and so on. He further explained that, if there must be 'a reasonable basis for intrusion' in case of every state intrusion to the privacy of an individual.

The reasons given by Mathew, J. in *Govind* show that the right to privacy has been implied in Art. 19(1)(a) and (d) and Art. 21; that, the right is not absolute and that any State intrusion can be a reasonable restriction only if it has reasonable basis or reasonable materials to support it.

Hon'ble Apex Court in *R. Rajagopal v. State of Tamil Nadu*¹ held that right to privacy is implicit in the right to life and personal liberty enshrined in Article 21 of the Constitution of India and found "It is the right to be let alone" [7]. The lordship recognized the right of every citizen to safeguard the privacy of his own. Court further clarified that such privacy cannot be claimed in public records, including court records. Thereafter, right to privacy has been recognized in many cases as a fundamental right as the part of right to life in some other cases, namely, *PUCL v. Union of India*, (1997) 1 SCC 301; *Mr. X v. Hospital 'Z'*, (1998) 8 SCC 296; *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399; *Sharda v. Dharmpal*, (2003) 4 SCC 4931 etc.

Recently, on 24 August 2017, in *Justice K.S. Puttaswamy (Retd) v. Union of India*¹ a Nine Judge bench of Hon'ble apex court unanimously declared that "*The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article*

21 and as a part of the freedoms guaranteed by Part III of the Constitution” [8].

In Mr. X v. Hospital 'Z' Hon'ble Apex Court held that:

“25. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

26. Right of Privacy may, apart from contract, also arises out of a specific relationship which may be commercial, matrimonial, or even political. As already discussed above, Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore. Doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the Right of Privacy which may sometimes lead to the clash of person's “right to be let alone” with another person's right to be informed.

27. Disclosure of even true private facts has the tendency to disturb a person's tranquility. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the Right of Privacy is an essential component of right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

28. Having regard to the fact that the appellant was found to be HIV (+), its disclosure would not be violative of either the rule of confidentiality or the appellant's Right of Privacy as Ms. Akali with whom the appellant was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if marriage had taken place and consummated¹” [9].

From the above discussion it is quite clear that right to privacy though protected by the Constitution of India, but it is not absolute right and is subject to such action as may be lawfully taken for the prevention of crime or

disorder or protection of health or morals or protection of rights and freedoms of others.

Right of Privacy vis-a-vis Right to Know

Now another question arises i.e. right of privacy vis-a-vis right to know, but it is also clarified by Hon'ble Apex Court that right of Privacy will prevail over right to know though its disclosure would not be violative of either the rule of confidentiality or the appellant's Right of Privacy in exceptional cases as discussed above.

Even though in India, system of prohibited degree is provided in section 3(g) of Hindu marriage Act 1955 and as per section 5(iv) of the Act, the precondition of a valid Hindu Marriage is:

“.....
.....

iv. *The Parties are not within the degrees of prohibited relationship unless the customs or uses governing each of them permits of a marriage between the two,*

v *The Parties are not Sapindas of each other unless the customs or uses governing each of them permits of a marriage between the two,”*

CONCLUSION

Unfortunately, there is no law to regulate such identity or genetic information about any critical circumstances, a law like Sweden or at least like UK. It is high time to make a regulatory framework to regularize and balance the right for the protection of identity of donor and at the same time to ensure the right to know the personal identity of children.

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Cite this Article

Sandeep Kulshrestha. Artificial Insemination and Right to Privacy of Donor in India. *Indian Journal of Health and Medical Law*. May 2018; 1(1): 1–4p.