

## **FERTILITY FRAUD: EXPLORING THE LEGAL GAPS IN INDIA VIS A VIS THE UNITED STATES**

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### **Abstract**

Infertility is an issue that many couples worldwide are facing. There are numerous individuals who seek treatment for this condition. However, those who treat infertility often handle all sperm samples equally, without differentiating between the sperm of the intended parents and that of others. This raises concerns about fertility fraud, where people intentionally exchange sperm samples. Many countries have recognized this as a sexual offense, but in India, there is currently no specific law addressing this issue. This question was initially raised when a case of this fraud occurred in the United States. This paper addresses all the related issues and provides a comparative analysis of the laws in India and the United States.

### **Keywords**

Infertility, Fraud, India, US, Sexual offence, Laws

### **Resumo**

A infertilidade é um problema que muitos casais em todo o mundo estão a enfrentar. Há muitos indivíduos que procuram tratamento para esta condição. No entanto, os profissionais que tratam a infertilidade tratam frequentemente todas as amostras de esperma da mesma forma, sem diferenciar entre o dos pais pretendidos e o de outros. Este facto suscita preocupações quanto à fraude na fertilidade, em que as pessoas trocam intencionalmente amostras de esperma. Muitos países reconheceram esta prática como uma ofensa sexual, mas na Índia não existe atualmente nenhuma lei específica que trate desta questão,



inicialmente levantada quando ocorreu um caso de fraude nos Estados Unidos. O presente documento aborda todas as questões relacionadas e apresenta uma análise comparativa das leis da Índia e dos Estados Unidos.

### **Palavras-chave**

Infertilidade, Fraude, Índia, EUA, Crime sexual, Legislação.

### **How to cite this article**

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### **Introduction**

Infertility is a health issues prevalent worldwide, one in four couple face infertility in developing nation<sup>1</sup>. As per World Health Organization's recent estimation, around 48.5 million individuals and 186 million couples around the world<sup>2</sup> are suffering from infertility. While developed nations have access to infertility diagnosis and treatment, many countries do not have easy access to fertility treatments, for examples countries in Africa such as Angola, Chad, Congo, Mali, and Somalia<sup>3</sup>. In fact, doctors have even claimed that "Assisted reproductive technology cannot be done in Africa as it is done in Europe<sup>4</sup>". In fact, even if the countries do have fertility treatment only a few countries have public funds for fertility treatment such as Sweden, Netherlands, and United Kingdom (with conditions for the eligibility to the fund) but other countries such as Taiwan and India fertility treatment is provided by the private sector and public fund is not provided<sup>5</sup>. In India cost of fertility treatment can range from hundred fifty to five thousand US Dollars

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- <sup>1</sup> SingleCare, "See the Most Recent Fertility Stats" (*The Checkup* February 4, 2023) <https://www.singlecare.com/blog/news/infertility-statistics/#:~:text=Epidemiology%20of%20infertility,-Infertility%20is%20becoming&text=One%20in%204%20couples%20in,million%20couples%20experience%20infertility%20worldwide>, accessed October 5, 2023
  - <sup>2</sup> SingleCare Team, "See the Most Recent Fertility Stats" (Marissa Walsh ed *The Checkup* February 4, 2023) <https://www.singlecare.com/blog/news/infertility-statistics>, accessed December 15, 2022
  - <sup>3</sup> Ombelet W and Onofre J, "IVF in Africa: What Is It All about?" (*Facts, views & vision in ObGyn* March 2019) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6822948/>, accessed 25 December 2022.
  - <sup>4</sup> Hörbst V, "'You Cannot Do IVF in Africa as in Europe': the Making of IVF in Mali and Uganda" (*ScienceDirect* June 1, 2016) <https://www.sciencedirect.com/science/article/pii/S240566181630020X>, accessed December 20, 2
  - <sup>5</sup> Ndegwa S and Kelly SE, "Status of Public Funding for In Vitro Fertilization in Canada and Internationally" (*CADTH* 2010) [https://www.cadth.ca/sites/default/files/pdf/Public\\_Funding\\_IVF\\_es-14\\_e.pdf](https://www.cadth.ca/sites/default/files/pdf/Public_Funding_IVF_es-14_e.pdf), accessed December 26, 2022



(with sperm donation it is hundred fifty US Dollars, fertility treatment with their own eggs is two thousand US Dollars and fertility treatment with egg donation is five thousand US Dollars)<sup>6</sup>. Whereas, in Singapore it ranges from six hundred to twenty thousand US Dollars (with sperm donation it is six hundred US Dollars, fertility treatment with their own eggs is twelve thousand US Dollars and fertility treatment with egg donation is between fifteen to twenty thousand US Dollars)<sup>7</sup>. Therefore, as observed, while private sectors do provide fertility treatments, it is not accessible to everyone due to the expensive nature of it without the exception of a nation being developed or not. In fact, one of the reasons India is popular for medical tourism is because of the affordable cost of fertility treatment as compared to the rest of the countries around with a procedure than fifteen thousand US Dollars in United States but the same procedure is done in India between three to four thousand US Dollars<sup>8</sup>. Which is most probably the reason for the rise in illegal fertility clinics like mushrooms<sup>9</sup>. Artificial reproductive technologies are used in fertility treatment such as In vitro fertilization, in this procedure, intensive hormone therapy is done on the patient to boost egg production. The sperm from the husband, partner, or donor is then implanted into these eggs. Couples who opt for any kind of Artificial Reproductive Technology (ART) are desperate for a child of their own, as they make this choice only failing various fertility treatments resulting from severe form of infertility (Society for Assisted Reproductive Technology)<sup>10</sup>. They often decide to go on this long and painful journey due to the tedious and long procedures of adoption or often due to the societal pressure placed on a couple to have a child of their bloodline. However, as there is a lack of laws overlooking the practice of ART, it has led to those receiving these treatments vulnerable to fertility frauds due to the lack of proper laws regarding fertility treatments and frauds<sup>11</sup>.

Fertility fraud happens when the health care provider misrepresents one or more of the following, i.e., the source of reproductive material, the way the reproductive material will be used and the risks, benefits and cost associated with each procedure. Fraudulent insemination is arguably one of the most egregious types of fertility fraud in recent, it is when a doctor artificially inseminates a patient with his own sperm without the patient's knowledge or consent, it is called fraudulent insemination<sup>12</sup>. The patient is typically made to believe the sperm was either her husband's or that of a thoroughly vetted anonymous

<sup>6</sup> Suaza C, "IVF Price Comparison in Different Countries" (*MedicalTourism.Review* June 10, 2021) <https://medicaltourism.review/articles/ivf-price-comparison-different-countries/>, accessed December 22, 2022

<sup>7</sup> *Idem*.

<sup>8</sup> Daddy's Digest, "The Rise of Fertility Tourism in India" (*Daddy's Digest* February 18, 2022) <https://daddysdigest.com/the-rise-of-fertility-tourism-in-india/>, accessed December 22, 2022

<sup>9</sup> Kapil S, "Illegal Fertility Clinics Mushroom across Capital" (*The Asian Age* March 26, 2017) <https://www.asianage.com/metros/delhi/260317/illegal-fertility-clinics-mushroom-across-capital.html>, accessed December 22, 2022

<sup>10</sup> Society for Assisted Reproductive Technology, "Assisted Reproductive Technologies" (SART) <https://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/assisted-reproductive-technologies/>, accessed November 1, 2022

<sup>11</sup> Saraswat A and Mondal O, "The Assisted Reproductive Technology (Regulation) Act, 2021: A Step Forward, Two Steps Back?" (*THE CONTEMPORARY LAW FORUM* April 21, 2022). <https://tclf.in/2022/04/21/the-assisted-reproductive-technology-regulation-act-2021-a-step-forward-two-steps-back-2/>, accessed November 5, 2022

<sup>12</sup> Madeira, Jody Lynee (2020). 'Understanding Illicit Insemination and Fertility Fraud, from Patient Experience to Legal Reform', 39 Colum J Gender & L 110



donor such as the case of Dr. Bertold Wiesner who has allegedly father more than six hundred children in the United Kingdom<sup>13</sup>.

Patients undergoing IVF are also under risk of various forms of frauds such as,

1. The embryos that were left unused can be used in another patient without the consent of the couple, or the couple could be on the other end and receive another woman's eggs or couple's embryo can be implanted during the procedure without the knowledge or consent of either couple<sup>14</sup>.
2. Another form of fertility fraud is the fraudulent use of sperm. Patients with fertility issues are frequently permitted to review information on anonymous sperm samples, including the donor's genetic profile and personal traits. However, since the donor is anonymous there is no guarantee whether the sperm used was not the one, they had consented to<sup>15</sup>.
3. Overall fraud happens when one or more of the following are done:
  - (i) the donor was not screened at all.
  - (ii) the profile information was false.
  - (iii) the woman was conceived using a different sample of sperm; or the sample was utilised more frequently than was revealed to the patient or donor<sup>16</sup>.

This is what had happened in the case of Dr. Reynold Boyd. He had given false information about the donor in his case with Catherine and Paul Watt, whose sperm he had fraudulently used by taking his sperm without his knowledge to impregnate Catherine's mother and had cheated to Catherine's parents as well who were told that the sperm donor was a medical student<sup>17</sup>. The reason fertility fraud must stop is because it is a crime on many levels, it is violative of an individual's reproductive rights and a form sexual assault against men and women desperate for children. It is also a biomedical crime; it unknowingly exposes the offspring to genetic disorders and predispositions. It puts the gene pool at risk of having close relatives get married and have children without being aware of their kinship (Stein Law Firm)<sup>18</sup>. Unfortunately, in India these practices are not held as crime, so even as there are victims of such cases in India as we will observe later this paper, they are unable to report it as there are laws explaining such acts as crimes. This paper will present a comparative study of the laws regarding fertility fraud in the United States of America and India because there are lot of cases in US and

<sup>13</sup> Pinto-Correia C, 'Fertility Rites' (De Gruyter, 25 September 2017), <https://doi.org/10.7312/qilb17094-007> accessed 28 February 2024

<sup>14</sup> Stein Law Firm, "Fertility Fraud: What You Should Know" (Stein Law Firm January 31, 2023) <https://www.steinlawoffices.com/fertility-fraud-what-you-should-know/>, accessed November 1, 2022

<sup>15</sup> Gong D and others, 'An Overview on Ethical Issues about Sperm Donation' (U.S. National Library of Medicine, November 2009). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3735320/>, accessed 28 February 2024

<sup>16</sup> Cho K, Ruitter J and Dahan MH, 'Protecting Fertility Clinics against Sperm-Related Fraud: A Call to Action' (U.S. National Library of Medicine, June 2018). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6029996/>, accessed 28 February 2024

<sup>17</sup> Kleeman J, "The Great Sperm Heist: 'They Were Playing with People's Lives'" (The Guardian September 25, 2021). <https://www.theguardian.com/lifeandstyle/2021/sep/25/the-great-sperm-heist-they-were-playing-with-peoples-lives>, accessed December 26, 2022

<sup>18</sup> Stein Law Firm, "Fertility Fraud: What You Should Know" (Stein Law Firm January 31, 2023) <https://www.steinlawoffices.com/fertility-fraud-what-you-should-know/>, accessed November 1, 2022



there are some laws made in some cities of US. This paper will further suggest how those laws can be implemented in India, after some changes as per the requirements demanded by the Indian society.

The laws against fertility fraud in the US legal system are a new addition having been enacted only in nine states and not on a federal level<sup>19</sup>. There are over twenty cases of fertility fraud in the US, two of the most notorious cases would be the case of Dr. Donald Cline of Indiana and Dr. Kim McMorries of Texas<sup>20</sup>. These two cases are of utmost importance as they not only caused public uproar but also led to change in law. In the case of Dr. Donald Lee Cline, it was Jacoba Ballard, one of Cline's children, who was among the first to piece all the information together. (ref) Ballard was thirty-three when she had started the search for her half-siblings being aware from a young age that she was conceived through donor insemination. She had used a DNA tracing kit 23andMe in hopes of finding some half-siblings<sup>21</sup>. She had been expecting one or two half-siblings but was surprised to find that she had eight half-siblings listed on the website. This contradicted what Cline had told his patients. He'd stated that the donors he used were medical students. He'd stated that he only used each donor for three successful pregnancies. However, 23andMe revealed that he'd used the same donor at least eight times, with the resulting children born between 1979 and 1986. They found dozens of more distant genetic matches, but no one in the 23andMe database shared enough DNA with them to be their father. They could build a massive family tree by combing through public records and social-media profiles, and sometimes simply asking genetic matches about their families. It was after a lot of searching As Ballard and her half siblings researched their family tree, one name kept popping up: Cline. It was only after much investigation, filing a complaint with Indiana's attorney general that Cline had used his own sperm in patients and asking for an investigation and asking a TV channel to air the news about the unusually high number of kids from one sperm donor. However, Cline was only charged with obstruction of justice. Even then Cline was ultimately only fined \$500 and given a year of probation. He lost his medical license, but he had been retired since 2009. In fact, he probably would not have even been charged had he not replied to the Attorney General's letter claiming that the complaint against him was a try at defaming him and very well lying on legal ground, as he was biologically the father of Ballard and her other half-siblings. In fact, he had even lied further to Ballard on a call with her that he had cheated by using his own sperm only nine to ten times, when clearly the current count of offspring resulting from his sperm is over ninety-four<sup>22</sup>. The reason this man was not charged and was let go of free was because there were no laws regarding this form of fraud at the time.

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<sup>19</sup> *Idem*.

<sup>20</sup> Mroz J, "Their Mothers Chose Donor Sperm. the Doctors Used Their Own." (*The New York Times* August 21, 2019). <https://www.nytimes.com/2019/08/21/health/sperm-donors-fraud-doctors.html>, accessed January 2, 2023

<sup>21</sup> Zhang S, "The Fertility Doctor's Secret" (*The Atlantic* March 19, 2019). <https://www.theatlantic.com/magazine/archive/2019/04/fertility-doctor-donald-cline-secret-children/583249/>, accessed December 15, 2022

<sup>22</sup> *Idem*.



The case of Dr. Donald Cline caused a massive public uproar and essentially led to the introduction of fertility fraud laws in Indiana<sup>23</sup>. As of May 2019, Indiana offers both criminal and civil remedies for fertility fraud. That is if human reproductive material is used without the express consent of the donor created a felony offence level 6 and a civil cause of action that the patient, their spouse, or child may bring. Attorney's fees, the cost of fertility treatment, punitive and compensatory damages, or ten thousand US dollars are all possible damages that the victim can claim<sup>24</sup>. The statute of limitations is ten years after the child's 18th birthday (or twenty years after the procedure was performed), or five years after the discovery of fertility fraud via DNA testing, confession by the health care provider, or sufficient evidence<sup>25</sup>. However, even the state of Indiana fails to recognize the sexual nature of the offence taking place. Cline had to masturbate each time to obtain the semen for the IVF process and then his semen would be used by him on his patients without their consent for using his own semen<sup>26</sup>.

### **Countries that have accepted this as a sexual offence**

Texas, different from Indiana, recognized the sexual nature of the crime and hence also recognizes this as a sexual offence. Laws in Texas were brought after the case of Dr. Kim McMorries<sup>27</sup>. Wiley was conceived in the year 1986 with the semen of "Donor 106" in McMorries' clinic. It was in mid-2018 that she tried to communicate with McMorries after being linked to McMorries through multiple consumer DNA matches. McMorries then replied to her in a series of mails that he was indeed her biological father. This emotionally disturbed Wiley who had bonded with "Donor 106" whom she presumed was her biological father. Wiley presented this case in front of Texas legislators. Texas legislators after hearing Wiley's and multiple other victims decided and made it a felony sexual assault for any Texas doctor to secretly impregnate patients with his own sperm. However, the law, which went into effect in September 2019, is not retroactive, and the physician whose actions inspired the reform was not prosecuted<sup>28</sup>.

However, Indiana and Texas are not the only states in the States have laws against fertility fraud though. The following eight states are the states excluding Indiana and Texas that have laws against fertility fraud in the United States:

### **Arkansas**

In 2019, Matthew Smith learned that he was the victim of a fertility scam. His family brought a civil lawsuit against the doctor, and Arkansas passed legislation establishing

<sup>23</sup> Zhang S, "A Decades-Old Doctor's Secret Leads to New Fertility-Fraud Law" (*The Atlantic* May 9, 2019) <https://www.theatlantic.com/science/archive/2019/05/cline-fertility-fraud-law/588877/>, accessed September 5, 2022

<sup>24</sup> Indiana Code 1976, Title 34, Article 24, Chapter 5

<sup>25</sup> *Idem*.

<sup>26</sup> Zhang S, "A Decades-Old Doctor's Secret Leads to New Fertility-Fraud Law" (*The Atlantic* May 9, 2019). <https://www.theatlantic.com/science/archive/2019/05/cline-fertility-fraud-law/588877/>, accessed September 5, 2022

<sup>27</sup> Olsen L, "Conception Deception" (*The Texas Observer* September 15, 2020) <<https://www.texasobserver.org/fertility-fraud-east-texas-kim-mcmorries/>> accessed December 1, 2022

<sup>28</sup> *Idem*.



both civil and criminal causes of action for fertility fraud<sup>29</sup>. As of April 2021, a patient or spouse may file two felonies and a civil action against a health care provider who uses his own sperm without the patient's written consent, and who reasonably should have known the donor did not consent to its use or in the manner it is being used. The statute of limitations runs for five years from the date of discovery, or the defendant admits to the facts giving rise to the action. Attorney's fees, treatment costs, and economic, compensatory, and punitive damages may be awarded. This protects those who submit their sperms/ovum for the purposes other than donating it for some other person's use<sup>30</sup>. However, it once again fails to recognize the victims as victims of sexual offence. It also fails to recognize the victims whose reproductive materials have been used without their consent.

## Arizona

In 2020, Kristen Finlayson learned that she was the victim of in vitro fertilisation fraud. She testified in support of a law in Arizona that was passed in 2021 against fertility fraud after her family filed a civil lawsuit against the doctor. This bill gave victims a civil cause of action<sup>31</sup>.

As of March 2021, the patient, the patient's spouse, and the child can file a civil action against a health care provider who used their own reproductive material without the patient's written consent. There is a possible award of compensatory and punitive damages, as well as liquidated damages of \$10,000. Each child has his or her own cause of action. A civil action may be filed within five years of the discovery of sufficient evidence for a case or the defendant's confession<sup>32</sup>. However, Arizona not only fails to recognize it as asexual offence but fails to recognize it as an offence all together.

## California

California in 1996 itself made it a crime to use reproductive material other than that specified on the donor's consent form (except for sperm donors) and to implant reproductive material without the recipient's written consent. Violations are punishable by up to five years in prison and a \$50,000 fine<sup>33</sup>. California while was earliest in the race to recognize the importance of laws against fertility fraud and is still much ahead of other states by not only recognizing it as criminal offence not only punishable with prison but also with a hefty sum as a form of compensation.

<sup>29</sup> Evewiley, "Stories Behind the Legislation..." (Evewiley2022). <https://evewiley.com/fertility-fraud-cases>, accessed May 5, 2023

<sup>30</sup> Arkansas Code 1987, Title 16, Subtitle 7, Chapter 118, s 16-118-117

<sup>31</sup> Evewiley, "Stories Behind the Legislation..." (Evewiley2022). <https://evewiley.com/fertility-fraud-cases>, accessed May 5, 2023

<sup>32</sup> Arkansas Code 1987, Title 16, Subtitle 7, Chapter 118, s 16-118-117

<sup>33</sup> California Penal Code 1872, Part 1, Title 9, Chapter 12, s 376g





## Colorado

In October 2019, Maia Emmons-Boring and seven other families sued Dr. Jones and Women's Health Care of Western Colorado, the clinic where he worked. He was charged with medical malpractice, fraud, and contract violation. It was this case that led to new legislation to be made in regard to fertility frauds. As per July 2020, a felony offence (Class 6) and civil liability was created in Colorado, which can be brought by the patient, spouse/partner, or child, with liability for each child. Attorney's fees may be awarded. Damages are \$50,000 or reasonable compensation for injuries. Other legal remedies may be pursued. A Class 6 felony offence carries a sentence of 18 months in prison and a fine of \$1,000 to \$100,000. The statute of limitations begins when the offence is discovered. Fertility fraud is now listed as an example of unprofessional behaviour<sup>34</sup>.

## Florida

An offspring of a doctor daddy case in Florida contacted Eve Wiley in 2019. They chose to settle in mediation after she assisted them in getting in touch with an attorney. She represented them in Florida behind closed doors, working with Senator Lauren Book and Representative Jenne<sup>35</sup>. As result in June 2020, a third-degree felony offence was created for using material without the patient's specific consent, punishable by up to 5 years in prison and a \$5,000 fine. If a doctor uses their own material, it is a second-degree felony punishable by up to 15 years in prison and a \$10,000 fine. The patient's consent to an anonymous donor is not a defence. It is necessary to register with the police. The statute of limitations begins when the offence is discovered. Fertility fraud is also listed under enumerated unprofessional conduct<sup>36</sup>.

## Iowa

As per July 2020 it is a sexual offense if a health professional uses human reproductive material that the patient did not expressly consent to. It is a crime to give a patient false information about assisted reproduction, including the material used and the donor's identity and medical history, and for a health professional or facility to give a patient material in a way that neither the donor nor the patient consented to (a request for anonymous donor is not a defense). Either crime gives rise to a private cause of action for the patient, spouse, children, and donor. If a doctor used his own sperm, in addition to compensatory or punitive damages, he must pay back child support and pay for the offspring's postsecondary education - no legal parent-child relationship is created. A violation can result in the revocation of a health professional's or a health facility's licence<sup>37</sup>.

<sup>34</sup> O HOUSE BILL 20-1014 2020

<sup>35</sup> Ewewiley, "Stories Behind the Legislation..." (Ewewiley2022). <https://ewewiley.com/fertility-fraud-cases> accessed May 5, 2023

<sup>36</sup> Florida Senate, "Bill Analysis and Fiscal Impact Statement - Florida Senate" (flsenateFebruary 28, 2020). <https://www.flsenate.gov/Session/Bill/2020/698/Analyses/2020s00698.rc.PDF>, accessed December 1, 2022

<sup>37</sup> Iowa Legislative Services Agency, (Iowa legislature - billbookJune 14, 2022). <https://www.legis.iowa.gov/legislation/BillBook?qa=89&ba=SF529> accessed November 1, 2022



## Kuntucky

Susan Crowder discovered decades later that the daughter she had conceived through IVF, was not through an anonymous donor but her own doctor<sup>38</sup>. She worked with other victims and Dr. Jody Medeira to pursuit House Bill 402 which was sponsored by Representative Deanna Frazier Gordon<sup>39</sup>. As a result, as per April 2022, use of human reproductive material other than that to which the patient has consented, or use of the health care provider's own material without the patient's prior knowledge and consent. With a five-year statute of limitations after DNA discovery and a class D felony for such actions, it creates a cause of action for the patient, spouse, offspring, and donor whose materials were used in a manner other than what was consented to for compensatory and punitive damages. Kentucky provides a cause of action for even to those whose materials were used for purposes other than they had consented for<sup>40</sup>.

## Utah

Since March 2021 a third-degree felony is committed by a health care provider who uses their own gametes without the patient's written consent. Utah is the only state which while does recognize fertility fraud as a felony, but is vague about it, to the point it can be deemed of no benefit for the victims. It can be seen that this was brought in action without much consideration put into it<sup>41</sup>.

## India

India as mentioned before does not currently have any specific laws against fertility fraud. As mentioned before in this paper both Indian legal system and American have legal systems closely derived from English laws. Therefore, with a few changes the laws currently in action the States can be applied in India as well. Current regulations as per the Assisted Reproductive Technologies (ART) Act<sup>42</sup> (hereinafter to be referred as the Act) which was enacted in December 2021 and came to force in January 2022, every ART clinic and bank must be registered with the National Registry of Banks and Clinics of India, which shall maintain a central database of such institutions' information. Such clinics and banks are registered for five years and can be renewed for another five. If the institution violates the Act, it may be canceled or suspended. Clinics are not permitted to provide a child of a specific gender and must screen for genetic diseases before implanting an embryo in a woman's body.

This Act defines offences as abandoning or exploiting children born through ART; selling, purchasing, or trading embryos; exploiting the couple or donor in any way; and

<sup>38</sup> McAlister S, "Doctor Used Own Semen to Impregnated Patient without Her Knowledge. Now, She's on a Mission to Make Fertility Fraud Illegal in Kentucky" (*whas11.com* February 27, 2022). <https://www.whas11.com/article/news/investigations/fertility-fraud-criminalized-kentucky-bill-susan-crowder-dr-jody-medeira/417-44eb51d0-f38f-4bb3-bdf9-60b145bcd731>, accessed May 5, 2023

<sup>39</sup> Ewewiley, "Stories Behind the Legislation..." (*Ewewiley* 2022). <https://ewewiley.com/fertility-fraud-cases> accessed May 5, 2023

<sup>40</sup> Kentucky Revised Statutes 1942, Title 26, Chapter 311, s 311.373

<sup>41</sup> UT House Bill 192 2021

<sup>42</sup> The Assisted Reproductive Technologies (Regulation) Act 2021



transferring an embryo into a male or an animal<sup>43</sup>. For the first time, such offences may result in a fine of Rs 5 to 10 lakhs subsequent offences are punishable by 8 to 12 years in prison and a fine of Rs 10 to 20 lakh Rupees<sup>44</sup>. And only on the basis of a complaint from the National or State Board will a court take cognizance of an offence<sup>45</sup> and no offence punishable by this Act can be tried in a court lower than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class making the process even more complicated<sup>46</sup>. All the offences under this Act are cognizable but they are also bailable notwithstanding anything mentioned in the CrPC 1973<sup>47</sup> i.e., Code of Criminal Procedure 1973<sup>48</sup>.

## Reforms

The Act however fails to recognize the seriousness of the offence and has written of the offences in a vague manner which leaves huge scope and loophole for further offences to be committed. "Exploitation" for example can be overlooked as simple monetary exploitation and overlooks the sexual exploitation and trauma that a donor or couple would have to go through. The Act also fails to provide relief to those who have suffered from the fraud but have discovered of the fraud after the birth of the child. It has not provided any time duration and who are the parties that can lodge the complaint. As in such cases not only are the couples and/or donors the victims but also the children at times and hence should have fair chance to lodge complaint as a victim as well which the Act fails to recognize as well. Also, the punishment doesn't seem to mention the suspension or the expulsion of the license of the medical practitioner, failing to realise that fertility fraud is as well a medical offence. Overall, there needs to be much work that needs to be done regarding fertility fraud to provide justice and relief to the victims of fertility fraud. Following are the reforms based on the active American laws against fertility fraud that are adjusted as per the Indian legal system:

An option should be created for all the victims of the fertility fraud that is the couple, the donor and the offspring. A limit of filing a FIR within a year of discovering the fraud (Arkansas). Giving a patient false information about assisted reproduction, including the material used as well as the donor's identity and medical history, should be considered as a crime, as should giving a patient human reproductive material in a way that neither the donor nor the patient consented to and request for an anonymous donor should not constitute as defence (Iowa). The insertion of the sperm of the doctor or the medical practitioner or of any donor for whom the patient has not given explicit consent should be constituted as while not rape but still as a form of sexual offence similar to how section 376C<sup>49</sup> of the Indian Penal Code treats sexual intercourse with a person in authority. There should also be civil action and compensation available to all the victims that is the couple, the donor, and the offspring (Arizona). And this compensation should be available to each one of the offspring separately (Arizona). And the accused should also pay for

<sup>43</sup> The Assisted Reproductive Technologies (Regulation) Act 2021, s 33 (1)

<sup>44</sup> The Assisted Reproductive Technologies (Regulation) Act 2021, s 33 (2)

<sup>45</sup> The Assisted Reproductive Technologies (Regulation) Act 2021, s 35 (1)

<sup>46</sup> The Assisted Reproductive Technologies (Regulation) Act 2021, s 35 (2)

<sup>47</sup> The Assisted Reproductive Technologies (Regulation) Act 2021, s 36

<sup>48</sup> Code of Criminal Procedure 1973

<sup>49</sup> The Indian Penal Code 1860, s 376C



the sum of attorney's fee or any other legal remedy that the victim had to face regarding this case (Colorado). As a punishment the medical practitioner or the doctor should face expulsion of his medical license along with 8 to 12 years of prison time and fine of 10 to 20 lakh Rupees. And most importantly the reformed laws should be retrospective in nature so that only future victims but also the victims already harmed are able to get the justice they deserve.

## Remedies available

However, as we do not have any stringent and specific law in action against fertility fraud in India, a remedy other than the one provided by the Act would be section 42<sup>50</sup> of the Indian Penal Code on cheating which is defined in section 415<sup>51</sup> of the Indian Penal Code which states that Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat" (explanation.—A deception within the meaning of this section is a dishonest concealment of facts). In the case of fertility fraud, the sperm and ovum of the donor can be regarded as their property and the misuse of their human reproductive material, or the deceptive use of the material can be considered as cheating the donors. Whereas the patients can approach this situation under section 416<sup>52</sup> of the Indian Penal Code on cheating by personation which states that a person is said to "cheat by personation" if he cheats by pretending to be someone else, or knowingly substituting one person for another, or representing that he or such other person is someone other than what he or such other person is (explanation.—Whether the individual personated is a real or fictitious person, the offence is committed). In the case that an individual uses the reproductive of a donor on the patient that they had not consented to while deceiving them into believing that it was the donor, they had consented to the patient can use this section. Another situation where a patient can use section 416 would be where an individual has deceived the patient into believing that they are a licensed medical practitioner licensed to carry out such practice. Both are situation which have already occurred but have left the victims without justice due to the lack of laws and regulation in place. There has also been a case<sup>53</sup> where a minor girl was violated by her stepfather, with the knowledge mother, who along with her stepfather would force her under medical procedures to donate her ovum (done more than 3 times) without her consent. Even when her stepfather was convicted, he was only convicted for assaulting her, but not for violating her by forcing to follow through the medical procedure. While it may seem satisfactory that he was punished for sexual assault, but he was not punished for the other form in which he had sexually violated her. The victim (i.e., minor girl) received justice only partially. She felt violated not only when being

<sup>50</sup> The Indian Penal Code 1860, s 420

<sup>51</sup> The Indian Penal Code 1860, s 415

<sup>52</sup> The Indian Penal Code 1860, s 416

<sup>53</sup> Nath A, "Woman Forces Teen Daughter to Donate Eggs to Fertility Clinic, Arrested" (*India Today* June 4, 2022). <https://www.indiatoday.in/crime/story/woman-tamil-nadu-erode-daughter-donate-eggs-fertility-clinic-arrested-embryo-1958118-2022-06-03> accessed May 6, 2023



assaulted by her stepfather, but also every time she was under the medical procedure to which she had consented. Therefore, unless until much more stringent laws are brought about in force victims will only be able to justice partially.

## Conclusion

United States of America is not the only the country that has enacted laws against fertility fraud. Other countries such as New Zealand<sup>54</sup> with its Human Assisted Reproductive Technology Act 2004<sup>55</sup>, Canada<sup>56</sup> with its Assisted Human Reproduction Act 2004<sup>57</sup> and United Kingdom<sup>58</sup> with its Human Fertilisation and Embryology Act 1990<sup>59</sup>. United Kingdom was one of the earliest countries to introduce laws regarding assisted reproductive technologies by enacting the Human Fertilisation and Embryology Act<sup>60</sup> in 1990 itself. In fact, the first IVF-baby in India and second in the world was born in 1978<sup>61</sup>. Assisted Reproductive Technologies (ART) Act 2021<sup>62</sup> was made active in 2022, that is more than four decades after this technology was introduced in India. Indian legislature was not only late in introducing any form of regulation in India but also complacent about the issue. This issue is rampant and concerning, it may not seem large scale because there are not many records, but the reasons such records are not there is because people do not have the provisions under which they can report the wrong that has been committed against them. It took the state forty-four years to clarify simply that the donor of the child conceived through IVF did not have any legal rights towards the said child<sup>63</sup>. In an era where the society is moving at a pace faster than ever, the law should not keep up but rather be one step ahead of society. This paper has argued that the laws currently present in India against fertility fraud are not sufficient and needs to be modified. The Act in power right now leave aside providing protection against fertility fraud, it does not even acknowledge or define fertility fraud. A case like Dr. Kim McMorries or Dr. Donald Cline's should not happen in India for it to take an action. It is important to empathize with the couples who come to receive these treatments with hope for a child after losing trying all other possible methods. The process in which a child is conceived with the artificial reproductive technologies is painful beyond the understanding of anyone who has not themselves experienced the pain that comes along with hope. Couples go through

<sup>54</sup> Advisory Committee on Assisted Reproductive Technology (*Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy*2020). <https://acart.health.govt.nz/assets/Uploads/ACART/Publications/donation-and-surrogacy-guidelines-18august2020.pdf>, accessed May 5, 2023

<sup>55</sup> Human Assisted Reproductive Technology Act 2004

<sup>56</sup> Health Canada, "Consent to Use Human Reproductive Material and In Vitro Embryos" (*Canada.ca*February 5, 2020). <https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction/consent-human-reproductive-material-vitro-embryos.html> accessed May 6, 2023

<sup>57</sup> Assisted Human Reproduction Act 2004

<sup>58</sup> The Fertility & Gynaecology Academy, "Legal Information" (*The Fertility & Gynaecology Academy* April 11, 2022). <https://www.fertility-academy.co.uk/legal-information/>, accessed May 6, 2023

<sup>59</sup> Human Fertilisation and Embryology Act 1990

<sup>60</sup> *Idem*.

<sup>61</sup> IVF Specialist, "Louise Brown: The First Test Tube Baby in the World" (*IndiraIVF*April 2022). <https://www.indiraivf.com/blog/louise-brown-the-first-test-tube-baby-in-the-world#:~:text=Test%20Tube%20baby,The%20name%20of%20the%20first%20Indian%20test%20tube%20baby%20is,baby%20through%20the%20IVF%20procedure>, accessed May 6, 2023

<sup>62</sup> Assisted Reproductive Technologies (ART) Act 2021

<sup>63</sup> *Idem*.



this process even though it is considered taboo within the Indian society and taunted by the society. It is important to protect such people and provide them justice if the protection was breached by someone who had legal responsibility towards them. This paper has suggested reforms that can be brought as actions against fertility fraud based on the laws currently in action in the United States of America against fertility fraud. The reforms in this paper are suggested keeping in mind the unique diverse society and legal system of India.

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