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## **Reproductive technologies and reproductive rights**

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### **Abstract:**

We observe a modern approach that allows for the possibility of a planned separation between sexual relations and procreation. The widespread use of contraceptives created the possibility of sex without reproduction, just as reproductive technologies created the possibility of reproduction without sex. Consequentially, the individual's ability to control and plan childbirth has expanded, but parallel possibilities have been created for societal intervention in that process. The question whether society may limit one's right to be a parent through the use of reproductive technologies has become a crucial legal issue.

Artificial techniques of procreation present a special problem. On the one hand, we are concerned with planning the birth of a child and not with establishing what is best for a child already born. On the other hand, it is not a matter that begins and ends in the bedroom. Moreover: persons requiring artificial techniques expect not merely non-intervention but positive aid. It is submitted that a distinction should be drawn between limiting a person's freedom to realize his right to parenthood as he sees fit, and the denying societal aid. The limits of positive societal aid are established through the changes in the legal definition of parenthood that society is willing to accept in order to meet individual desires. Thus, while we may question the existence of a justification for denying single woman's freedom to procreate, or the freedom of a couple to seek the aid of a surrogate mother – that does not mean that society must provide the legal framework that might have the effect of denying parenthood to other partners to the procreative process.

### **Keywords:**

Reproduction, surrogate mother, parenthood, artificial insemination, homosexual partners international surrogacy

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The Bible wrote: "For my father and my mother have forsaken me, but the Lord will take me up" (Psalms 27:10). The eleventh-century commentator Rashi explains that this abandoned child, forsaken by his father and mother, is actually a fetus. "During sexual intercourse, they have thought of their own enjoyment, and having finished their enjoyment, he turns away and she turns away", and the Lord "protects the semen and creates the fetus". This depiction of the bedroom is an attempt to portray human existential solitude from the very moment of conception. He is abandoned by his own parents, who were partners to his conception. God assumes responsibility for the continued development of the embryo from conception onward. The underlying assumption is that childbirth is an incidental byproduct of sexual relations, which are primarily intended for mutual pleasure.

Opposed to this assumption stands the widely-held view that it is procreation that is the primary purpose of marriage, and marriage is deprived of purpose and vitality if it does not facilitate parenthood. Particularly for women, infertility is often seen as an existential failure. The realization of motherhood is, perhaps, a woman's primary expectation of a man. "Give me children, or I shall die", cries Rachel at Jacob on the biblical story (Genesis 30:1). A similar idea is expressed by the German philosopher Friedrich Nietzsche: "man is for woman nothing but a means – the end is always the child".

These two conflicting views of the nature of marriage – for procreation or for enjoyment – nevertheless share a common denominator, namely the necessary connection between sex and procreation. Today, however, we observe a more modern approach that allows for a possible planned separation between sexual relations and procreation. The widespread use of simple, accessible contraceptives created the possibility of sex without procreation, just as artificial techniques created the possibility of reproduction without sex. Consequentially, the individual's ability to control and plan childbirth has expanded, but on the other hand new possibilities have been created for societal intervention in that process. In modern times destiny is no longer a matter of chance, but it is a matter of choice, but in the framework of choice individual is not the single player – society has its own choices as well.

As a starting point, we may take the question whether a person has a legally protected right to decide to be or not to be a parent. As far as natural procreation is concerned, the answer would seem to be on the affirmative. The right of parenting is supported by a number of considerations. The primary significance of the parenting right is negative, deriving as it does from a person's right to physical integrity and freedom. However, it arises no less from the right to privacy that is from a person's justified demand to block any external intervention in his intimate decisions. It is, indeed, a fundamental principle that society may not intervene in intimate questions of childbirth, in the absence of overriding interests. It applies to natural birth where societal intervention constitutes an infringement of a person's rights over his body, as his right to privacy. As opposed to this, those rights are not applicable to adoption of children, since in this regard the individual's wishes go beyond the desire to protect his body and intimacy; he asks that he be given a child that others brought into world.

The question that then arises is: can the parenting right be expanded to include a positive aspect that demands the assistance of society for the realization of a person's desire for happiness and well-being? Recognizing such a right is far more problematic, in terms of

## Reproductive technologies and reproductive rights

the legitimate claims of the individual, if only due to the difficulty in meeting the demands of all that are in need. Indeed, the shortage of children for adoption is the result of social and legal considerations, such as the prohibition on selling children, and the legal limitations upon private adoptions. However, we must bear in mind that demand to adopt a child is not, in essence, a private matter. It cannot be realized except through another person – the child – whose interests are deserving of preference in deciding of his fate. The best interests of the child already born should be our first and predominant concern.

In this context, artificial techniques of procreation would seem to occupy the middle ground. On the one hand, we are concerned with planning the birth of a child and not with establishing what is best for a child already born. It is extremely difficult to argue that the welfare of a future child is not to be born at all, as distinct from the demand that it be born healthy. Also, we do not, in most cases, face a severe problem of shortage. On the other hand, it is not a matter that begins and ends in the bedroom. Rather, it requires the involvement of others. Persons requiring artificial techniques expect not merely non-intervention but positive aid. This problem can be demonstrated by considering the issue of a single woman's right to artificial insemination by a foreign donor. The woman's request is not simply that she be given access to reproductive technology. Her desire is that the paternity of the donor would not be recognized, and she be deemed the sole parent of the child that will be born. Thus, granting single women access to artificial insemination by a donor, involves broadening the exceptions to the biological definition of parenthood. That definition is intended to protect the welfare of children in general, as it establishes the responsibility of biological parents for the children they bring into world, even if the birth is unwanted. When a couple requests artificial insemination by a donor, we are less hesitant to create an exception to the biological definition of parenthood, inasmuch as the biological parent is replaced by a societal parent, namely the woman's husband takes the place of the sperm donor. In the case of a single woman, no one is there to take the role of substitute father, and we are called upon to approve the creation of a single-parent family. On the other hand, if single women are denied access to artificial insemination, we may pay a social price, such as the possibility that such women will be left no choice but to mislead men and involve them in unwanted pregnancies. Indeed, one may observe that the cases of contraceptive fraud are on decline as far as single women get free access to artificial insemination by an anonymous donor.

It follows that in general, a distinction should be drawn between limiting a person's freedom to realize his right to parenthood as he sees fit, and denying societal aid to that endeavour. The limits of positive societal aid are established, inter alia, through the changes in the legal definition of parenthood that society is willing to accept in order to meet individual desires. This distinction is relevant to the right of people to seek the aid of a surrogate mother. Again, two different issues present on this context. First, is it legal and moral to use the services of a surrogate mother in order to accomplish the wishes of childless couple? If the answer to the first question is on the affirmative, then we face the second question: would a court enforce the surrogacy agreement, should the birth mother changes her mind and wishes to keep the child. Many legal systems deny the liberty of people to reach a surrogacy agreement, or at least hold that such an agreement is repugnant to social order. We should admit that a complex of considerations is involved in the question whether one's right to parenthood encompasses the use of a surrogate mother. As all other reproductive technologies, the matter goes far from bodily integrity and right of privacy on intimate relations. We are not in bedroom but in a clinic that performs in

vitro fertilization. It involves the participation of other people, especially the surrogate mother herself. Moreover: the requesting parents wish to accomplish their desire by using another person, namely the surrogate mother, which serves for them as means only. She is expected to sell her womb and subjugate her body in order to satisfy other people needs. On the other side, it could be claimed that once we recognize the right of a woman to control her body and consequently allow her to terminate her pregnancy, we should, by the same token, to allow her to get pregnant although it is done for the sake of other people. It is submitted that even if we accept such a contention, respect is to pay to the surrogate woman free will. She may change her mind during pregnancy and decide to abort. Since she has an absolute right on her body, the requesting parents have no right to prevent her from doing it. We may face the contrary scenario: the couple, after they found that the fetus suffers from a genetic defect, wants her to abort, but she refuses. Again, the final decision is with the surrogate mother, and no one can force her to terminate her pregnancy, neither to control her activities during pregnancy. However, once a child is born he is no longer a part of his mother body. She could not claim, on the name of her rights on her own body, that she has the right to control the child and to raise him. But has her motherhood been deprived in virtue of the surrogacy agreement? It is the other aspect of the right to be a parent. As we said above, even if we admit one's liberty to realize his right to parenthood – even with the assistance of other people – it does not mean that necessarily society is ready to readjust the definition of parenthood in order to meet his expectations. It means that it is still an open question who is the mother of the child: the surrogate mother being the gestational mother or the intended mother who might be his genetic mother.

I would like to present Israel experience on this issue. Surrogate motherhood and surrogacy agreement are recognized, but restricted and regulated by law (The Embryo Carrying Agreement (Authorization Agreement and Status of the Newborn Child), 1996). In Israel only gestational surrogacy is recognized, as distinguished from traditional surrogacy in which the surrogate mother is his genetic mother as well. A gestational surrogate carries a child that is not genetically related to her. The embryo can be created through the intended mother's egg and intended father's sperm using in vitro fertilization. If the intended mother's ova are not viable, the embryo can be created from a donated egg and the intended father's sperm. It is then transferred to the gestational surrogate. The law demands a preconception agreement to include payments to be made to the surrogate mother. The agreement should be approved by a special committee. However, it should be emphasized that the intended parents do not become automatically legal parents of the child. Only after a court issues a "paternity decree", the intended parents become legal parents of the child. In other words: under the perception of Israeli law the child has two mothers, his intended mother and his surrogate mother. Generally speaking, paternity-decree is supposed to be granted in favor of the intended parents. Yet, under special circumstances, the court may reach the conclusion that the best interests of the child require that he will be raised by his surrogate mother. The mere fact that the surrogate mother has changed her mind is not a sufficient ground for preferring her. But new developments may be considered in that regard, such as the intended parents were separated, or one of them passed away, or suffers from a severe illness, or has been jailed for a long period of time. It follows that Israeli law is not ready to get rid of the traditional definition of motherhood that depend upon the identity of the woman who gave birth to the child, and in case of surrogate mother only ex post facto, by a special decree, parenthood can be transferred to other people, namely the intended parents.

## Reproductive technologies and reproductive rights

In Israel, the desire to assist childless couples to procreate takes predominance upon the contrary considerations, such as potential risks to the future child or misuse and exploitation of women from lower classes. Under Jewish Law, procreation is regarded as a religious commandment, that is, in biblical language, "to be fruitful and multiply". It goes without saying that if a career woman is looking for a surrogate woman just in order to avoid inconveniences of pregnancy, her request would be rejected. Israeli law sticks to the assumption that only a medical problem that prevents the intended mother to give birth, may justify using the services of a surrogate mother. As a result, Israeli Law limits accessibility to surrogacy to a couple consists of man and woman only. It follows that homosexual couples are denied from taking use of a surrogate woman. Even a single woman that have tried to attack the constitutionality of the 1996 Law, has failed. A new report of a governmental committee has recommended that law should be amended to the effect that even homosexual people will be given the possibility of using a surrogate mother, but the committee insists that only altruistic surrogacy should be allowed. The committee was afraid that to permit homosexual couples to pay the surrogate mother will lead to a harmful competition in the market at the expense of "normal" people that suffer from a medical problem that prevents them to procreate. The inevitable consequence was that gay people are trying to get recourse to surrogacy in other countries where it is not certain that legal supervision is guaranteed, and where it is doubtful whether safeguards against exploitation of women are always kept. Recently, the authorities in India decided to limit international surrogacy performed there to man and woman who are married and the marriage sustained for at least two years .As a result, gay people, single men and women, non-married couples, and also couples from countries where surrogacy is illegal are prohibited from hiring a commercial surrogate in India. It is difficult to say that the new regulations solve the problem of exploitation of poor Indian women by wealthy foreigners. Neither could we say that those limitations can assure us that surrogate babies are placed in stable homes. Rather, they reflect conservative notion on marriage as a union between a man and woman only, to the exclusion of others such as gay couples. In any case, Israeli couples and other couples are looking for mew options that might enable them to get abroad what is forbidden at home. If race to bottom is continued, only an international cooperation can put an end to it.

Earlier, we noted that for Nietzsche, man was for woman but a means for having a child. But he goes on to ask: "...but what is woman for man?" his answer is: "The true man desires but two things: danger and play. Therefore he desires woman, as the most dangerous plaything". In modern times, the woman may be nor a play, neither a risk, but the one that serves as a means for having a child for the man. We need a new discourse that will respect the honour and dignity of all parties involved, including the best interests of the future child.

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