人工生殖法律问题研究



张燕玲 著



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学位,2002年和2006年获母校法学硕士和法学博士学位,曾在《东岳论丛》、《法学论坛》、《山东社会科学》等核心刊物发表学术论文十余篇,合著著作一部,研究方向为债权法和婚姻家庭法。

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《中国民商法专题研究丛书》总序

我于1988年起担任中国社会科学院法学研究 所民法研究室主任,开始考虑学术发展和人才培养问题。时值90年代初,中国内地遭遇学术著作 出版难,尤其未成名的年轻学者的学术著作出版 更难。遂仿照王泽鉴先生担任台湾大学法律学系 主任时编辑出版《台大法学丛书》的办法,编辑出版《中国民商法专题研究丛书》。预计用二十年时 间,出版100部民商法专题研究著作。

其编辑宗旨是,从中国改革开放和发展现代化的市场经济的实际出发,广泛参考发达国家和地区民商事立法的成功经验和最新判例学说,深入研究民商法的基本理论和实践中的重大法律问题,为中国民商事立法的现代化和民商事审判实务的科学化提供科学的法理基础,提升民商法理论水平,推出民商法理论研究人才,使中国民商法理论研究尽快赶上发达国家和地区的水平。

著作之人选丛书,不论作者职称、地位、亲疏, 以学术性为惟一考量。不约稿、不组稿、不需推荐,

人工生殖法律问题研究

概由作者自荐。欢迎自荐博士学位论文。丛书虽以"民商法专题研究"为名,其人选著作并不以民商法学为限。涵盖民法、商法、民事诉讼法、仲裁法、经济法、环境法、国际私法、国际经济法、民商事国际公约惯例等领域,而与广义之"私法学"概念相若。

自 1994 年推出第一部著作始,迄今已有十余年了,已出版著作 50 部。出版社方面注意到本套丛书在国内外已产生良好影响和社会效益,决定自第 51 部著作始,重新设计、增大开本、改变装帧、更加精编精印。特补述丛书编辑缘起及宗旨,作为总序。

梁慧星 于北京城南清芷园 2005 年 12 月 8 日

中文摘要

人工生殖作为现代医学治疗不孕的重要手段, 对传统自然生殖方式有重要补救作用。

人工生殖在对传统伦理道德观念形成冲击的同时,也对现有法律制度提出挑战。本文采用比较法学研究方法和实证分析法,对人工生殖的主要法律问题即人工生殖的理论基础、人工生殖的法律关系、人工生殖子女的法律地位、代孕母的合法化以及复制研究的管制等问题进行深入理论研究,并结合我国的人工生殖立法现状,在检讨其不足的基础上,借鉴国外人工生殖的立法经验,提出关于人工生殖法的立法构想。全书共分八章:

第一章:人工生殖概述。

本章首先介绍了人工生殖技术的溯源、发展及 国内外的应用概况,并结合每种人工生殖方式的技术特点和社会接受程度的不同,将其分为人工体内 授精、人工体外授精、代理孕母和无性生殖四种。 无性生殖因改变了传统的依靠男女两性的结合孕 育生命的特点,遭到国际社会的普遍禁止,因此无 性生殖不作为本章讨论的范围。人工生殖代表着人类对自身生殖过程的认识和主宰,使众多不孕患者的生育梦想因此变为现实,同时也使得他们的生育选择权增加,具有重大的时代意义;但人工生殖技术作为治疗不孕不育的医学手段,它永远是人类不得已情况下的医疗行为,它属于非自然的通过人工拟制方式生育子女的行为,它体现的是人类的互助精神。

第二章:人工生殖的理论基础。

本章分别从伦理道德层面和法理学层面分析论证人工生殖的理论基础。人工生殖有利于促进不孕夫妻的婚姻美满和家庭幸福,医学实践证明人工生殖不存在遗传缺陷,其不仅不违背现代伦理观念,而且有助于实现伦理规范的终极目标——最大多数人的最大幸福。生育自由作为人的一项基本人权,其先于宪法而存在,无论宪法中有无生育自由的规定,均应得到宪法的保障;生育自由的内涵决定生育自由的保障范围,本文认为生育自由的核心在于保障人运用自身的生殖功能生育与自己有血缘联系的下一代,不孕症患者在征得他人同意的前提下,可以借用他人的生殖功能和生殖技术生育子女,人工生殖无损于公序良俗应当得到法律的许可,人工生殖将因法律的许可而成为宪法的保障范围,笔者认为其应当受到宪法的保护。

第三章:人工生殖的比较法考察。

通过对两大法系中人工生殖应用较广泛国家的相关立法例的介绍和比较,了解各国对于各种人工生殖方式的态度和管制模式,从而摸索当前人工生殖立法的主流趋势与走向,并以之为借鉴,为我国人工生殖法的构建提供立法经验和理论支持。综观各国立法:普遍允许实施人工体内授精和人工体外授精,人工生殖子女法律地位的确定基本遵循"分娩者为母亲,同意实施手术者推定为子女的父亲"的规则;为避免推定有误,通过亲子推定之否认制度补救亲子推定制度造成的事实错误。为了确保人工生殖的目的,生殖细胞捐赠者与所生子女不发生任何权利义务关系。立法的主要不同在于;1.关于认定父母身份的立法方式不同。英

美国家基本采取亲子推定原则确定子女的父亲,而大陆法国家则倾向以同意为条件推定分娩者的丈夫为子女的父亲。2. 是否开放代孕母和开放的条件存在较大不同。英美法系国家有限度开放代孕母,并通过法院听证与行政许可相结合的方式对代孕母实施有效管制;大陆法国家则明确禁止代孕母行为。3. 总的来看,英美法系国家较大陆法系国家立法进程快,对于代孕母持较为宽容的态度。国际立法例的介绍分析在启示我国尽快进行人工生殖立法的同时,也为我国的立法工作提供了直接经验。

第四章:人工生殖的法律关系。

本章主要分析探讨实施人工生殖所产生和形成的各种法律关系,基于人工生殖契约不同于普通医疗契约的特点所在,主要围绕人工生殖当事人应当具备的条件、生殖细胞的性质、权利以及人工生殖当事人的权利义务等内容进行研究,同时针对代孕契约的复杂性,从有利于保护代孕双方合法权益的角度探讨了代孕契约的性质和法律效力。

第五章:人工生殖子女的法律地位。

传统民法中父母子女关系的建立,血缘与怀胎是母亲同时具备的要素,法律上兼以两者作为认定母子关系的指标。随着医学科技的发达,人工生殖技术使得血缘与怀胎间的相连性不再理所当然,不孕夫妻可以借用他人的精卵通过体内或体外授精,使妻孕育分娩子女,甚至可以将不孕夫妻的受精卵植人他人的子宫怀胎分娩,使得人类的繁衍可以在血缘之外的母体进行。生殖科技对现行法律制度提出了诸多挑战,人工生殖子女之父母身份认定问题尤为突出。为避免因采用特殊规则形成人工生殖子女为特殊子女的不当认识,立法上应力求采用与自然生殖同样的父母认定标准确定人工授精子女的亲子关系,即依据出生事实确定谁是母亲,根据婚生推定及否认制度确定谁是父亲,丈夫的术前同意限制其对子女的婚生否认权的行使;立足于有限开放代理孕母的观点,确定代孕子女的父母身份时,法律应突破传统的分娩者为母亲的观念,通过特殊立法规定遗传父母为代孕子女之法律父母。

第六章:人工生殖的代孕母问题研究。

代孕是子宫有缺陷的妇女实现自己生儿育女愿望的唯一途径,但由于代孕母改变了传统伦理遗传母与怀胎母为一体的特点,遭到了理论界的多数反对和大陆法系国家的普遍禁止。禁止代孕是否符合法理精神和宪政理念?本章从宗教、伦理道德、女性主义、法理学等层面展开剖析论证,并结合英美等国开放代孕增进人类福祉的立法现实,通过法理学视角剖析开放代孕母的法理基础,分别从法理上的无伤害不禁止原则、正义原则及维护人的追求幸福权和家庭权几个方面深入论证代孕母的法理依据所在,并结合我国实际提出开放借腹代孕的立法建议。

第七章:人工生殖的复制问题研究。

复制是无性生殖,它通过人类的单细胞发育成胚胎,复制人没有父母亲。本章以复制技术的分类为基础,通过比较两种复制的不同特点、功能和国际立法态度,推导出我国应当反对生殖性复制、赞成治疗性复制的理由所在,并从伦理与法律等层面予以分析论证。文章认为:从国家利益和人民健康的需求出发,应该采取支持治疗性复制的研究和胚胎干细胞研究的态度,因为它对再生医学的发展、人类诸多疑难重症的治疗及人类生物医药的发展将产生突破性飞跃,前景非常可观。科学无禁区,但科学行为必须有规范,我们只要在科学、伦理与法律间找出合理的平衡点,形成它们的良性互动,就可实现对科学研究的有效指导,发挥法律对科学研究既保护又监督的作用。复制尽管与一般的人工生殖方式有着本质的不同,但其作为人工生殖方式之一确无争议,对复制技术的规制可一并在未来的《人工生殖法》中处理,既保持了人工生殖方式的完整性,又不致因另外颁布《复制法》而扩大立法成本。

第八章:代结论:我国人工生殖立法现状与检讨。

我国卫生部基于生殖科技发展的需要,颁发数个规章文件规范人工 生殖的管理和应用。文章在检讨现行立法存有不足的基础上,提出构建 我国人工生殖法的立法构想,并拟定了人工生殖法的条文。为确保人工 生殖技术安全、有效和健康发展.规范人工生殖的应用和管理,保护不孕 夫妇和人工生殖子女的合法权益,我国应立法规范人工生殖。立法应当在原有规章基础上完善以下内容:专设人工生殖管理局作为人工生殖的主管机关;限制开放不孕夫妇提供生殖细胞的借腹代孕;赠加人工生殖子女法律地位的规定;人工生殖子女享有一定的知情权;允许开展治疗性复制研究。文章最后,将就因人工生殖引发的对法律与伦理的关系问题的思考谈谈自己的认识:法律规制的真空地带依靠伦理发挥自身的协调、过渡作用,但伦理道德规范的局限性决定了其规制人工生殖的过渡性,实现伦理道德的法律化是完成过渡期的最有效方案。

【关键词】 生育自由 人工授精 代孕母 复制 立法

Abstract

As an important method of curing infertility in modern times, Assisted Reproduction is of important remedy for traditional and natural reproduction. While it challenges traditional ethics, Assisted Reproduction also puts forward challenges to nowadays legal system. This article makes a deep research on the following questions, that is, its theoretical basis, its legal relations, legal status of children, and the legitimacy of surrogate mother and the control of clone research in comparative methodology. At last, I put forward my legislation proposition on the basis of shortcomings of our present legislation on reproduction and by the reference of legislation experiences in foreign countries. The article includes eight chapters:

Chapter I: An Introduction to Artificial Reproduction.

I reviewed the first application, its development and the application of Assisted Reproduction in past decades. The high recognition and wide application not in China but in abroad indicated an even brighter future. According to the technology feature and different acceptance by the society, there were four types of AR, i. e. artificial insemination (AI), In Vitro Fertilization (IVF), surrogate mother and clone. I made an independent study on clone in addition, as it was featured as giving into birth by somatic cell nuclear transfer. Since infertile spouses could have their babies according to AR, it was meaningful to the society. However, it would always be a medical action, embodies the spirit of helping each other, and brought such problems as whether it should be promised. The dissertation was to probe into it in aspects of ethics and constitution. Then I concluded that it was morally undoubted and should be stipulated in law considering the realization of the most benefit to human beings.

Chapter II: Basis of Theory on AR.

From the basic of theory on AR from ethics and theory of law, we know that AR is helpful to stimulate happy marriage and happy family. It has proved that AR has not heredity shortcomings. It is beneficial to realize the final goal, the largest happiness of most people. Freedom of reproduction is a basic human right, it has been existed before the existence of Constitution, and so it should be protected by Constitution. The intention of reproduction freedom determines its scope of protection. I think the kernel of reproduction freedom is to reproductive children who have the same ties of blood by one's own reproductive organ. The infertilities can use others' organ to reproductive baby on condition of other's agreement. AR should be permitted by law because that it isn't harmful to the society and the masses. AR will be protected by constitution once it obtains law's permission.

Chapter III: Introductions of Assisted Reproduction Legislations.

In this section, I recorded and compared the legislations on AR in U. K., U. S. A., Germany, France and Japan, discussed the legislation trend

and tried to use their experiences for reference to settle controversies and problems rising in China. The related legislations were as following, Surrogacy Arrangements Act 1985 and Human Fertilization and Embryology Act 1990 in U. K., Uniform Parentage Act 1973, The Uniform Status of Children of Assisted Conception Act, Draft ABA Model S in U. S. A, Gesetz zur Anderung des Adoptionsevermittlungsgesetzes, Federal Embryo Protection/Embryonenschutzgesetz in Germany, Lagom insemination, Foraldrabalken and In Vitro Fertilisation law in Sweden. Besides, there also existed some works and dissertations.

Chapter IV: Legal Relationship of AR.

In this chapter, I analyzed the parties involved in application of AR as well as their rights and duties. In view of the hot dispute on surrogacy, I made a deep study on nature of surrogacy contract and the effect of surrogate contract.

Chapter V: Legal Status of Children Artificial Reproduced.

Consanguinity and pregnancy are two essential factors to be a mother and to establish a parent-child relationship in traditional civil law. Because of the development of medical technology, consanguinity would never be certainly related to pregnancy. Wives could pregnant and bear by AI or IVF. And infertile husband and wife could even be planted into uterus of others. Therefore multiply could be realized by mothers without any consanguinity. Medical technology has put forward a large challenge for our legal system, especially how to identify parent of such children. To avoid the improper opinion that children born by assisted human reproduction are peculiar because of the use of special rules, rules identifying their parents should be same as natural bearing, that is to say, to identify a mother according to the birth fact and identify a father according to whether it is born in period of marriage. A father's agreement before surgery will restrict his right of

denying the child. While identifying parent of children by surrogate mother, law should break the traditional view that mother is who delivered, and special rules should be settled that heredity parents are legal parents on the basis that surrogate mother is permitted to some degree.

Chapter VI: Legalization of Surrogacy.

Though surrogacy had brought gospel to many families, it had encountered restriction to different extent in all countries or even been totally prohibited because it had evoked too many ethics problems in law. Whether it accorded with legal spirit or constitutionalism? I analyzed it in aspects of religion, ethics, woman doctrine and woman status to make out its social bases and seed for its jurisprudential bases considering the legislation of U. K. and U. S. A. that permitted surrogacy. In view of the principles of restrictions on basic rights, no harming justice and right of pursuing happiness and family, I argued the theoretical bases of surrogacy and put forward my legislation suggestion on the problem in China.

Chapter VII: The Research on Clone of AR.

The main difference between clone and AR was that the former was not related to sex and correspondingly brought more difficult legal questions. In this section, I mainly discussed permission and prohibition of clone and its legislation. Based on analyses of reproduction clone and cure clone, I concluded that the latter should be sustained, as it would help to cure many serious diseases and benefit development of medicine. Considering the rapid progress in life sciences, it is necessary to enact a life ethics law as quickly as possible. However, the legislation has not been qualified, and we should begin such project in some special fields and technologies.

Chapter W: Status quo of Chinese AR Legislation and A Frame of Future Legislation.

The development of AR in China runs more slowly than many other

countries and main rules in this field were promulgated by Heath Department. In this section, I reviewed the defects of the rules and put forward my legislation suggestions using other countries' experiences as reference. In the end, I explained my opinion on relationship between future law and ethics caused by AR.

[Key Words] Reproduction Freedom, AI, IVF Surrogate Mother, Clone, Legislation.