Institution: London School of Economics and Political Science

Unit of Assessment: 20: Law

Title of case study: Reform of the pre-conception welfare principle

1. Summary of the impact (indicative maximum 100 words)

A core claim in Emily Jackson's 2001 book and 2002 article was that the process for assessing infertile people's fitness to parent before being allowed to have fertility treatment was unduly invasive and discriminatory.

As a result of this research, the process was changed. In the UK, infertile patients are now presumed to be fit parents, and withholding of fertility treatment on child welfare grounds is only possible if the child would be at risk of serious harm. The link between the research and the policy change is affirmed by Professor Lisa Jardine, chair of the Human Fertilisation and Embryology Authority (HFEA) between 2008 and 2012.

2. Underpinning research (indicative maximum 500 words)

Jackson joined the LSE Law Department in 1998, moved to Queen Mary in 2004, and returned to the LSE Law Department in 2007 (all of the underpinning research relied on in this case study was produced and published during her time at the LSE). In *Regulating Reproduction* (2001), Jackson developed an account of what reproductive autonomy entails and why it matters. In relation to assisted conception, her claim is that although there are more opportunities for external scrutiny of decisions to reproduce when people need external assistance in order to reproduce as compared with when they reproduce naturally, this does not mean that these opportunities should be taken. Decisions about whether, when and with whom to reproduce are of such critical importance to a person's life plan that the state needs a greater justification for interference with them than the fact that it can do so relatively easily.

This argument was developed further in the 2002 *Modern Law Review* article, 'Conception and the Irrelevance of the Welfare Principle', in which Jackson dismantles the pre-conception welfare principle, embodied in section 13(5) of the Human Fertilisation and Embryology Act 1990.

According to s. 13(5), clinicians must base their decisions to provide assisted conception services upon an assessment of the welfare of any child who might be born as a consequence. This is problematic because it means that the decision as to whether a child should exist should be based upon an assessment of whether it is in the child's best interests to exist. If interpreted literally, it could be used to deny access to infertility treatment only where non-existence would be preferable to the life that would be led by these would-be parents' offspring.

This was not the interpretation that had taken hold, however. In 2001, clinicians were instructed by the HFEA's Code of Practice to take into account factors such as the would-be parents' commitment to having and bringing up a child; their ability to provide a stable and supportive environment and their future ability to look after or provide for a child's needs.

This prompted Jackson, in her 2002 article, to criticize s. 13(5) further on the basis that it is in practice impossible for a doctor in a fertility clinic to carry out the sort of in-depth scrutiny of parental fitness that is routine in relation to adoption. Assessments of child welfare were not only often intrusive and unfair but also ineffectual since the clinicians charged with carrying them out did not have the training or resources to scrutinize prospective patients' domestic arrangements. She also criticized s. 13(5) for its inconsistency with existing legal principle – in relation to tort actions for 'wrongful life', the judiciary has been adamant that existence must always be preferred to non-existence – and because the application of the pre-conception welfare principle was random: it did not apply to all clinical decisions to offer assistance with conception. It would have been unthinkable for parental aptitude to be addressed before investigating whether a woman's fallopian tubes are blocked, or supplying her with an ovulation-predictor kit. Why, then, was it regarded as

axiomatic that parental fitness should be assessed before a clinician took certain other steps to help a couple to conceive?

3. References to the research (indicative maximum of six references)

(2001) E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing) 376 pp. http://eprints.lse.ac.uk/12980/

(2002) E. Jackson, 'Conception and the Irrelevance of the Welfare Principle', 65 *Modern Law Review* 176-203 DOI: 10.1111/1468-2230.00374 (shorter version at *Spiked* 11 June 2003 at: http://www.spiked-online.com/newsite/article/5272#.Uo9pGl9FDGg). http://eprints.lse.ac.uk/6967

Evidence of quality: *Regulating Reproduction* was the winner of the 2002 Society of Legal Scholars' Prize for Outstanding Legal Scholarship and has elicited over 200 known citations, and more than 10 positive reviews in scholarly journals. LSE Research Online ID: 12980. The journal article was peer-reviewed. National and international scholars' reliance on the article can be found at, e.g., (2005) 13 Med. L. Rev. 328; (2009) 17 Feminist Leg. Studies 333; and (2010) 32 J. Soc. Welfare & Family Law 275.

4. Details of the impact (indicative maximum 750 words)

Jackson was appointed to the HFEA in 2003, largely as a result of her published research, and most notably her 2001 book, *Regulating Reproduction*. From 2008 to 2012, she was the HFEA's Deputy Chair.

Since 2003, there has been a number of policy changes in relation to the pre-conception welfare principle, all of which have brought it more into line with the position advocated in Jackson's 2001 book and 2002 article (section 5, sources 1 and 2). In 2005, the HFEA changed its policy on the 'welfare of the child' assessments that clinics were required to carry out before offering treatment. These were transformed into 'welfare of the child *risk* assessments', in which the clinic is under a duty to consider whether the child is at risk of serious harm, rather than to assess whether the would-be parents would be likely to be good parents. The Human Fertilisation and Embryology Act was subsequently amended (2008) so that, instead of requiring clinics to take into account the child's 'need for a father' before offering treatment, the requirement is now to take into account the child's 'need for supportive parenting'.

The impact of Jackson's research can further be seen in the HFEA's 8th Code of Practice (which came into force on 1 October 2009). This stipulates that clinicians – so that they might address the supportive parenting requirement appropriately – should be subject to the following provision: 'It is presumed that all prospective parents will be supportive parents, in the absence of any reasonable cause for concern that any child who may be born, or any other child, may be at risk of significant harm or neglect.' (HFEA 8th Code of Practice, para 8.11).

Only if there is evidence to back up the assertion that any child to be born would be at risk of significant harm and neglect, perhaps because the couple have already had previous children taken into care, could a clinician justify refusing treatment to a couple or individual on child welfare grounds. This means that the process for people seeking fertility treatment is now less discriminatory and intrusive. Contrary to previous HFEA guidance, clinicians are no longer routinely required to approach a potential patient's GP to inquire about their fitness to parent.

The new process is also less bureaucratic. A recent major piece of empirical research, looking at the ways in which child welfare is currently assessed in fertility clinics (E. Lee et al, *Assessing Child Welfare under the Human Fertilisation and Embryology Act: The New Law* (section 5, source 4, p.19) cites Jackson's 2002 article as playing an important role in stimulating debates over the pre-conception welfare principle:

> As outlined in the previous section, the subsequent years saw on-going discussion about

> the problem of 'stereotyped opinions' (eventually resolved formally through the removal of 'the need for a father' as part of the wording of s13(5)), and additionally the development of both important debate about the desirability and plausibility of assessing 'the welfare of the child' before conception (see especially Jackson 2002, 2008) and protracted attempts to develop more meaningful guidance for clinics on welfare assessments on the part of the HFEA…. As noted previously, some have set out substantive objections to the meaningfulness and moral integrity of the statutory demand for 'welfare of the child' assessments prior to conception (Jackson 2002, 2008).

According to Professor Lisa Jardine CBE, Chair of the HFEA:

> "Arguments and material from [Professor Emily Jackson's] research have consistently underpinned and supported decisions taken by the Authority. She has drawn directly on her research to inform discussions both in committee, and in full Authority meetings. I and my members have on a number of occasions modified our discussion and decision-making based on interventions Professor Jackson has made. I can say with confidence that decisions of the HFEA during the period of her membership have depended directly on arguments drawn from her research. It is hard to imagine a more direct impact of academic research on public business and outcomes than this….
>
> The HFEA's guidance has shifted significantly over the course of Emily Jackson's membership of the Authority from a fairly restrictive model towards one in which all patients are presumed to be supportive parents, in the absence of evidence to the contrary. This shift has been driven by a number of factors, one of which is the increasing recognition – set out with particular clarity and force in Jackson's 2001 book and 2002 article – that it is unfair and potentially discriminatory to subject infertile people to special scrutiny before they are allowed to make the decision to start a family." (Section 5, source 1.)

Jackson's research on the pre-conception welfare principle has also been cited in policy documents in other jurisdictions, most notably Victoria, Australia (section 5, source 5), where a similar change has taken place: see, in particular, Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (No. 10 session, 2007), p. 27 (at http://www.lawreform.vic.gov.au/projects/art-adoption/art-and-adoption-final-report), citing Jackson 2001 and her 'Fertility Treatment: Abolish the Welfare Principle', *Spiked* 11 June 2003 at http://www.spiked-online.com/newsite/article/5272#.Uo9pGl9FDGg (a summarized version of the 2002 *MLR* article).

Why the impact matters. As a consequence of Jackson's research, the law has been altered so that infertile people seeking fertility treatment are now presumed to be fit to parent and so are no longer subjected to an intrusive and discriminatory assessment procedure.

5. Sources to corroborate the impact (indicative maximum of 10 references)

All Sources listed below can also be seen at: https://apps.lse.ac.uk/impact/case-study/view/43

1. Testimonial from Chair of HFEA, September 2012. This source is confidential.

2. House of Commons, Science and Technology Committee. *Human Reproductive Technologies and the Law Fifth Report of Session 2004*–05, volume I, paras 31-2:

> "The philosophical view that individuals should have the right to make private choices – such as reproductive decisions – free from the scrutiny of the state can be traced to John Stuart Mill:
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> > [...]the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others…. Over himself, over his own body and mind, the individual is sovereign.
>
> Its application to reproduction has been espoused by Professor Emily Jackson…. She has

written that "interfering with a particular individual's decision to conceive a child would usually involve violating their bodily integrity and sexual privacy. We do not sterilise people who have been convicted of violent offences against children because, however gruesome their crime, their person must remain inviolate … the freedom to decide for oneself whether or not to reproduce is integral to a person's sense of being the author of their own life plan…. This approach emphasises the importance of the individual, specifically the autonomy of the individual and the right to make private choices…. [D]ecisions which fall into the private domain are generally regarded as not of interest to the state. Certain exceptions to this maxim do, of course, exist but these generally arise in the sphere of criminal law. Thus, when the service to be provided is the implantation of an embryo with the intention of establishing a pregnancy, and in line with Article 8 of the European Convention on Human Rights … reproduction itself would seem to be firmly situated within the private domain. The primary consequence of this is that the right to private and family life espoused in Article 8 can be said to apply to reproductive decisions."

Source files: https://apps.lse.ac.uk/impact/download/file/1381

3. E. Lee et al., *Assessing Child Welfare under the Human Fertilisation and Embryology Act: The New Law* (ESRC summary report, September 2012) pp.6-7, at http://blogs.kent.ac.uk/parentingculturestudies/files/2012/06/Summary_Assessing-Child-Welfare-final.pdf
https://apps.lse.ac.uk/impact/download/file/1513

4. E. Lee et al., *Assessing Child Welfare under the Human Fertilisation and Embryology Act: The New Law* (ESRC full report, September 2012), p.19, summary at http://blogs.kent.ac.uk/parentingculturestudies/research-themes/pregnancy/wo/
https://apps.lse.ac.uk/impact/download/file/1514

5. Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (No. 10 session, 2007), p.27 (at http://www.lawreform.vic.gov.au/projects/art-adoption/art-and-adoption-final-report).
https://apps.lse.ac.uk/impact/download/file/1515