CHAPTER –II
RIGHT TO PROCREATION:
INTERNATIONAL AND
NATIONAL PERSPECTIVES
CHAPTE R II

RIGHT TO PROCREATION: INTERNATIONAL AND NATIONAL PERSPECTIVES

“If children were brought into the world by an act of pure reason alone, would the human race continue to exist?”

…Arthur Schopenhauer

The above question highlights the fact that children are brought into this world not purely based on reason alone but rather because of their need and significance. Children are considered necessary not for some ulterior motive and gain but are desired for achieving fulfillment and love in life. Children are the most beautiful gift of God and considered as a sacred treasure to mankind. They are the footsteps to the future of the present generation. When children are born into this world, various ceremonies are held to celebrate the joyous occasion and welcome them into this world. Gifts are given and offerings are made to God to express one’s thanks for the beautiful gift of life. It is considered that the birth of children makes the marriage of a man and woman more meaningful and secure. In fact, giving birth to a child establishes the real status of women in society and is also a proof of the virility of a man

However, children born to a lawfully wedded couple only receive legitimacy from society. The institution of marriage gives conjugal rights to the couple in the family and social legitimacy to their relationship which results in the procreation of children. Since pre-historic times the function of giving birth and bearing of children has been assigned to the institution of family through marriage.


In almost all civilizations, the marriage serves as the basic institution for reproduction, bearing and raising of children\(^3\). Procreation of children is the primary biological function of a marriage and it is the family which ensures the continuity of human race. The assumption is that conjugal relations should lead to the birth of children and if it is not done, the continuity of society would cease to exist\(^4\).

The reasons for the desire to have a child are many, viz. to love and to be loved by it, to educate and convey personal ideals and values, to get a sense of fulfillment and to contribute a part of oneself to the future generation\(^5\). This significance of children in a marriage and for a family is emphasized and elaborated in various religious scriptures and texts. Thus the procreation of children is an inbuilt element of marriage and family and this concept is accepted universally all over the world. With the emergence and development of the concept of human rights, this basic need of a human being to have children has been recognized as fundamental human right and incorporated as right to procreation. The modern human rights documents also recognize the significance of children and emphasize on the protection of right to procreation as a basic human right. This chapter highlights the need and importance of a child in the society in general and for the family and individual in particular from a religious, cultural, social, economic and legal perspective. It also elucidates the recognition of the need for a child as a basic human right and its incorporation as right to procreation at international and national level. Further it identifies infertility as the major barrier which prevents an individual from enjoying the right to procreation and the various measures available to overcome such barriers.

2.1 Children and the Religions

Children are the flowers in the garden of life. They bring cheer and joy into the family. Their innocent pranks and sweet smile spreads happiness. They are the future of the world and give hope to the society for a better tomorrow. They are considered

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as a means through which the parents fulfill their dreams and aspirations. The desire and need to have a child has been recognized since the dawn of human life on earth. The importance of having children has been emphasized since time immemorial in all cultures and all societies of the world. All the major religions of the world also highlight this importance and need of a child.

2.1.1 Children in Hindu Religious Philosophy

Hindu religion is one of the oldest religions in the world and the prominent religion in India. Various scriptures and texts of the Hindu religion explicitly mention the significance and need of a child for the parents, society and family. Hindus believe that children are gifts from God and are products of the previous Karma of an individual. It is presumed that children are related to an individual in their past lives or are their close friends. According to Manu, a man recreates himself through his own children. Since Hinduism firmly believes in rebirth, it views the life of an individual from a wider perspective as a part of a great cosmic cycle that encompasses not just the present life but many other lives that preceded it as well as that may succeed it. Therefore, Hindus have the belief that their relationship repeat themselves and that their life is intricately connected with many others who share the same destiny.

The desire for a child and particularly a male child is highlighted in almost all the scriptures. The Vedas and the ancient writers like Yajnavalkya and Manu refer to various methods for begetting a child and specially a male child. Most of these methods were very popular and practiced in ancient India and also permitted by the ancient laws. It is pertinent to point out here that these methods considered not only the begetting of a child in a conjugal relationship but also obtaining a child through non-conjugal relationships and other means. Some of these methods can be considered as the precursors of the modern artificial human reproductive technologies. For example Aurasa was said to be a legitimate child begotten by man

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with his own lawfully wedded wife. *Kshetraja* meant a son by another man appointed by husband. *Gudhaja* was a son by another unknown man, brought forth by wife secretly i.e. unknown adultery.\(^7\)

To have a son was considered a must for every Hindu. Begetting a son was one of the three debts that a Hindu was required to discharge in this world. In fact, a son is called as a ‘*Putra*’ because the son delivers his father from hell called ‘*Put*’. This concept is reflected in the *Baudhayana Sutra*, which proclaims that, “through a son he conquers the worlds, through a grandson he obtains immortality, but through his son’s grandson he ascends to the (highest) heaven”\(^8\). A son is generally preferred because he ensures the continuity of the family and its traditions. According to *Gautama Sutras*, “if a person does not have male children, he may ask his daughter to raise a son for him”. The Vedas declare, “endless are the worlds for those who have sons, there is no place for the man who is destitute of male offspring”\(^9\). The ancient scriptures thus emphasize on the need and importance of a child particularly a male child. With the passage of time however these ancient scriptures have been misquoted and mis-interpreted as giving importance to only male child. It is pertinent to point out here that the ancient scriptures highlighted the need for a male child because of religious necessities and cultural traditions. At the same time they also emphasized the importance and need for female child. This is reflected in the words of *Yajnavalkya*, “because continuity of the family in this world and the attainment of the heaven in the next are through sons, son’s son and son’s grandson, therefore women should be loved and protected”\(^10\). This clearly recognizes the significant role of women in the procreation of a child. Hence, orthodox Hindus do not approve childlessness and consider it to be very inauspicious. Newly married couples have to face various questions from the society and family if they are unable to give birth to children within a reasonable time after the marriage. Childlessness causes great pain

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and hardship to the married couples in Hindu families and women particularly have to face various problems like prohibition of participation in certain religious rituals.\textsuperscript{11}

### 2.1.2 Child in Christianity

Christian religion has given utmost importance to children and considers them as symbol of God. It is believed that one day Jesus took a young child on His lap and said, “Whoever humbles himself like this child is the greatest in the kingdom of Heaven. And whoever welcomes a little child like this in My name welcomes Me”\textsuperscript{12}. This reveals the high value which God has given to a child. The First Commandment given to man was to have children. After the flood, God blessed Noah and his sons and said unto them, “Be fruitful and multiply and replenish the earth\textsuperscript{13}”. Psalm says, “As arrows are in the hand of a mighty man, so are children of the youth. Happy is the man that hath his quiver full of them”. Thus, Christianity also recognizes the need and importance of children. In the New Testament, St. Paul advocated people remaining single during the persecution that would come to the church, but did not make being single or not having children a requirement\textsuperscript{14}. Similar to other cultures, religions and social classes, Christianity also recognizes the desire for a genetic heir as an instinctive and cognitive desire of an individual. At the same time it also accepts the fact that some men may not be able to have children due to various reasons and hence mentions different methods for bringing forth a child. For example, in the Bible, in a case where a married man dies without having children, his brother or nearest relative has an obligation to marry the widow and the oldest son is named after the deceased. If the brother - in - law refuses to marry the woman he is obliged to go through a humiliating public ceremony because of his unwillingness to establish his brother’s heirloom\textsuperscript{15}. In fact, King David is the grandson of Ovad, son of Ruth.

\textsuperscript{11} See <http://www.hinduwebsite.com> Visited on 10.3.2011.


\textsuperscript{14} See <http://www.minuteswithmessiah.com> Visited on 10.3.2011.

who was born according to this law\textsuperscript{16}. Three thousand years ago, this was the nearest possible way to have a ‘genetic heir’. In present times modern artificial human reproductive technologies can help an individual to have a nearest possible ‘genetic heir’.

2.1.3 Child in Islamic Religion

As per the Islamic teachings, children are a gift and a blessing from Allah the almighty. Some of the gifts that Allah has bestowed upon mankind are mentioned in the following verse, “And Allah has made for you spouses of your own kind and has made for you, from your wives, sons and grandsons, and has bestowed upon you good provisions”. Allah also said, “Wealth and children are the adornment of the life of this world”\textsuperscript{17}. Begetting children is considered to be of utmost importance and fundamental to the existence of community in Islam and therefore it forbids the acts of celibacy, monasticism and castration. This view is clear from the wordings of the Prophet, when he told those companions who were considering ascetic forms of life, “I pray and I sleep; I fast and I break my fast; and I marry women. Whoever turns away from my way of life is not from me”\textsuperscript{18}. Thus, the Prophet not only encouraged marriage but he also encouraged marrying those women who are child-bearing. He stated, “Marry the loving, child-bearing women for I shall have the largest numbers among the prophets on the day of Resurrection”\textsuperscript{19}.

Islam does not distinguish between male and female child and in fact both male and female child are considered as the greatest and most beneficial blessings of God. The Quran says that,”God has made for you mates and companions of your own nature, and made for you, out of them, sons and daughters and grandchildren, and

provided for you sustenance of the best”\textsuperscript{20}. The Prophet said that, “Worthy offspring are a bunch of sweet-smelling flowers which God has distributed amongst his servants. Worthy children are a bunch of sweet-smelling flowers from the Heavenly flowers”\textsuperscript{21}. The position of offspring is so important in life that Abraham requested for children from God in his old age and his prayer was answered\textsuperscript{22}. Thus in Islam a child is a great blessing, a source of goodness, nobleness and benefit in this world.

The major religions of the world thus emphasize on the need and significance of having a child. However it is necessary to mention here that significance and need of a child is not only due to religious beliefs but is also due to various interrelated and interdependent factors. It encompasses various aspects of human life such as social, religious, economic, personal and legal necessities. In addition to the religious motives, the following are the other major driving forces for begetting a child:

(i) \textbf{Social Motive}

A family is the fundamental and basic unit of a society and crucial for the existence and continuance of the society\textsuperscript{23}. Such continuation of the society is possible only if the family grows and develops and new families are formed through the birth of children.

(ii) \textbf{Family Motive}

Every family has the desire to continue its name and legacy. Children are considered as the only means to continue and carry forward the name and legacy of the family. They are also the inheritors of the family property, assets and traditions. In fact a family is considered to be complete only when children are born to a couple and it is through these children that the family further grows and develops.

\textsuperscript{21} Ibid.
\textsuperscript{22} Id. at p.189.
\textsuperscript{23} \textit{The Universal Declaration of Human Rights}, 1948, Article 16 (3). It provides that: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”. 
(iii) **Personal Motive**

The couples begetting the child get the joy and personal satisfaction. For men it is a proof of their manhood and virility and for women it is a symbol of their womanhood and a means to gain their place in the family and society. Children offer security to the parents in their old age\(^{24}\) and fulfill their dreams.

(iv) **Legal Motive**

Children inherit the rights and liabilities of their parents\(^{25}\). The property rights are often an issue of the inheritance by the children of their ancestral property. In the absence of a legitimate child, the law relating to inheritance of property is very complex and contentious. Hence every individual desires to have a natural offspring so that his property can be passed safely to his child.

In addition to the above mentioned reasons, the need and significance of a child also arises due to the fact that children are a means to fulfill the biological need and instincts of a human being. Begetting a child fulfills the paternal and maternal instincts and feelings of the men and women respectively. This desire to have a child is considered so important and fundamental that it is enshrined as a basic human right of an individual and recognized as the right to procreation in the international human rights documents.

2.2 **Procreation**

Procreation is fundamental to the existence and continuation of any species. It is a natural desire and biological instinct of every creature to reproduce and to have an offspring. Among human beings not only the natural and biological instincts play a major role, but there are also strong psychological and social needs to have children. The social concepts of love, family, community and mortality strengthen the

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\(^{24}\) See, Section 125 of Criminal Procedure Code, 1973, which provides the obligation to provide maintenance to his parents. Similar provisions are also there in The Hindu Adoptions and Maintenance Act, 1956, The Muslim Women (Protection of Rights on Divorce) Act, 1986, etc.

\(^{25}\) See, Indian Succession Act, 1925, Hindu Succession Act, 1956, etc.
biological drive for genetic procreation. The importance of procreation as a whole derives from the genetic, biological, and social experiences that comprise it. Thus reproduction is a basic instinct that supplies societies with enough members who maintain and perpetuate the social order and who provide services for others. It also satisfies an individual’s natural drive for sex and his or her continuity with nature and future generations. Reproduction fulfills cultural norms and individual goals about a good life, and many consider it the most important thing a person does with his or her life.

The beginning of family formation may be either marriage or parenthood or both. The positive element of the right to family planning and right to establish family is related to individuals and couples right to decide to have a child, i.e. it implicitly guarantees a right to procreate. The procreative right has a negative as well as a positive dimension. The narrow procreative right, which is a negative or “first generation” right, is linked to a bundle of fundamental negative rights regarding bodily integrity. The broader procreative right which is positive or “second generation” right, is linked to economic and social rights (or entitlements) like rights to reproductive education and actual means to choose family size. Claims of procreative freedom logically extend to every aspect of reproduction ranging from conception, gestation and labor, and childrearing.

2.3 Right to Procreation: Meaning and Content

Procreation means a biological process by which women gives birth to a child. The Webster’s Dictionary defines the term ‘procreate’ as “to produce (young); beget (offspring)”. To beget means, “To be the father of, to produce; cause.” According to

30 Supra n. 27 at p. 409.
Black's Law Dictionary procreation means the ‘generation of children’\textsuperscript{31}. These definitions are equally vague, and do not explicitly reflect a contemplation of whether, or to what degree, a genetic link is required. According to Bruce L. Wilder, the term procreation includes, “deliberate actions by an individual, which lead to birth of a child, whom that individual intends to raise as his/her child from the time of birth to maturity, and to be legally bound as the child’s parent, even when the genetic material was obtained by that individual from a source outside his/her body”\textsuperscript{32}. The developments in modern medical science, has coined a new definition to procreation, which says, ‘procreation is a reproductive process by which a person creates offspring who may or may not have genetic or biological ties to the intended parent or parents’\textsuperscript{33}. This expansive definition captures a full range of reproductive activity from coital reproduction to the sale of gametes to in-vitro fertilization and surrogacy arrangements. This definition says something new that the other definitions do not. Firstly, it identifies procreation as a process. Secondly, it makes no pronouncements about how that process is initiated, how many people it may involve, or the body in which the future child is created. Thirdly, it announces that this process ends in the creation of offspring, but makes no statement about whether that offspring is in the form of an embryo, foetus or child. Fourthly, the definition does not require a genetic or biological link between the offspring and the person who gives birth because that presupposes a certain avenue of child creation and birth, which excludes the multiple ways in which children can be created and brought into the world. Thus this definition serves to recognize human artificial reproductive technologies, in its many forms and in its component parts, as a type of reproduction for which constitutional protection is warranted\textsuperscript{34}.

Procreative rights are rights relating to reproduction and reproductive health

\textsuperscript{34} Supra n.31.
and include access to sexual and reproductive healthcare and autonomy in sexual and reproductive decision-making. These rights are human rights and are universal, indivisible, and undeniable. These rights are founded upon principles of human dignity and equality, and have been enshrined in international human rights documents. Reproductive rights embrace a bundle of core human rights, including the right to health, the right to be free from discrimination, the right to privacy, the right not to be subjected to torture or ill-treatment, the right to determine the number and spacing of one’s children, and the right to be free from sexual violence.

The United Nations Programme of Action of the International Conference on Population and Development, 1995 states that, ‘reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents’. Reproductive rights also include the right to the highest standards of sexual and reproductive healthcare.

Reproductive rights may include some or all of the following rights such as: the right to legal or safe abortion, the right to control one’s reproductive functions, the right to quality reproductive healthcare, and the right to education and access in order to make reproductive choices free from coercion, discrimination, and violence. These rights may also be understood to include education about contraception and sexually transmitted infections, and freedom from coerced sterilization and contraception, protection from gender-based practices such as female genital cutting (FGC) and male genital mutilation (MGM). Though there are numerous references regarding

the term ‘reproductive rights’, it has not yet been defined by any international human rights instruments. However, Art. 23 (1) (b) of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2006\(^{38}\) entails the right to reproductive health and education. At the regional level, Art. 14 of Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, 2003\(^{39}\) expressly articulates women’s reproductive rights as human rights.

Nonetheless, the content and scope of reproductive rights remains controversial. There are two views on this matter. Scholars supporting the narrow view affirm that reproductive rights rest only on the recognition of reproductive choice, and argue that binding reproductive rights are limited to Art. 16 (1) (e) of Convention on the Elimination of all forms of Discrimination against Women, 1979\(^{40}\) which safeguards the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, as well as to attain the highest standard of sexual and reproductive health.

This relatively restricted view on reproductive rights includes as its core elements: the right to found a family\(^{41}\); the right to decide, freely and responsibly, the number and spacing of one’s children\(^{42}\); the right to access to family planning information and education\(^{43}\); and the right to access to family planning methods and services\(^{44}\). Supporters of this narrow view do not exclude the possibility of other

\(^{38}\) The text was adopted by the United Nations General Assembly on 13 December 2006, and opened for signature on 30 March 2007. Following ratification by the 20th party, it came into force on 3 May 2008.


\(^{41}\) See, CEDAW, Art.16; International Covenant on Civil and Political Rights, 1966 (hereinafter referred to as ICCPR), Art. 32.

\(^{42}\) Art. 16 CEDAW, Art. 24 Convention of the Rights of the Child, 1989(hereinafter referred to as CRC), Art. 17 ICCPR, and Art. 12 ICESCR.


\(^{44}\) Art. 16 CEDAW, Art. 24 CRC, and Art. 12 ICESCR.
rights to be related to reproductive freedom or choice, insofar as the violation of that particular right affects reproduction. However, from this perspective, these general human rights are not constitutive per se of reproductive rights.

Regarding the second and wider view, reproductive rights ‘embrace certain human rights that are already recognized in national laws, international human rights documents, and other relevant UN consensus documents based on the recognition of reproductive choice in Art. 16 of CEDAW. Scholars and organizations supporting this view identify 12 rights within this group, viz. the right to life, the right to health, the right to personal freedom, security, and integrity, the right to be free of sexual and gender violence, the right to privacy, the right to equality and non-discrimination, the right to consent to marriage and equality in marriage, the right to employment and social security including the right to legal protection of maternity, the right to work in an environment free of sexual harassment, the right to non-discrimination on the grounds of pregnancy both in and out of the workplace, the right to education and information, the right to be free from practices that harm women and girls, and the right to benefit from scientific progress. Thus in short, right to reproduction means the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of

46 Article 3 of Universal Declaration on Human Rights, 1948 (hereinafter referred to as UDHR), Art. 6 (1) ICCPR, and Art. 6 (1) (2) CRC.
47 Art. 25 of UDHR, Arts. 10 (2), 12 (1), and (2) ICESCR, Arts. 12 (1) (2), 14 (2) CEDAW, and Art. 24 (1) (2) CRC.
48 Arts. 3 and 5 UDHR, Arts. 7, 9 (1) ICCPR, and 37 (a) CRC.
49 Arts. 5 and 6 CEDAW and Arts. 19 (1) and 34 CRC.
50 Art. 17 (1) (2) ICCPR and Art. 16 (1) (2) CRC.
51 Art. 2 UDHR, Art. 2 (1) ICCPR, Art. 2 (2) ICESCR, Arts. 1, 3, 11 (2) CEDAW, and Art. 2 (1), (2) & (5) CRC.
52 Art. 16 (1) (2) UDHR, Art. 23 (2) (3) (4) ICCPR, Art. 10 (1) ICESCR, and Art. 16 (1) (2) CEDAW.
53 Art. 23 UDHR, Arts. 6 & 9 ICESCR.
54 Art. 10 ICESCR, Art. 11 CEDAW.
55 Art. 11 CEDAW.
56 Art. 11 (2) CEDAW.
57 Art. 10 CEDAW.
58 Arts. 2 (f) and 5 (a) CEDAW. Art. 24 (3) CRC.
59 Art. 27 (1) UDHR, Art. 7 ICCPR, and Art. 15 ICESCR.
sexual and reproductive health. In addition, it also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. The right to use appropriate health care services so that women can enjoy safe pregnancy and delivery and couples can have the best opportunities to have healthy children is also included.

2.4 Right to Procreation *vis-a-vis* International Law

Human rights are vital to individual’s existence. They are the fundamental and inalienable rights, prerequisite to life as human beings. Human rights are moral, social, and political rights that concern respect and dignity associated with our lives as individuals and has their origin in natural law and in contemporary moral values. The inclusion of human rights law as part of international law is a relatively recent development. However, it is universally accepted that the way a sovereign treats individuals - both its own citizens and aliens - is a matter of international concern. The international community has established several instruments detailing the inalienable human rights. The various means to achieve or avoid procreation are viewed as integral to concepts of human dignity, personal identity and community.

The significance of reproductive rights is evident in its entrenchment in international law under four broad health-related categories, viz. (i) the right to found a family (ii) the right to decide the number and spacing of children (iii) the right to family planning information and services and (iv) the right to benefit from scientific advancement. The bundle of human rights provided in international law in various human right documents suggests the existence of a right to procreation and reproductive health.

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63 *Supra* n.26.
The United Nations Charter, the Universal Declaration of Human Rights and other international agreements provide the framework for analyzing reproductive freedom as an international human right. The Charter reaffirms, “the faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to promote social progress and better standards of life in larger freedom and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to employ international machinery for the promotion of the economic and social advancement of all people”\textsuperscript{64}. The Charter imposes a solemn duty on United Nations to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” and it pledges to its member states to ensure these rights and freedoms. This reference to duty of member states is wide enough to cover a duty to ensure reproductive freedom to an individual especially a woman. Inspired by the Charter, the United Nations General Assembly has adopted a code of human rights comprising of both civil and political rights and social, economic and cultural rights in 1948, i.e. Universal Declaration of Human Rights. This Declaration is the mine from which other conventions as well as national constitutions protecting the human rights have been and are being quarried\textsuperscript{65}.

The Declaration proclaims that the recognition of inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 16 of UDHR states that, “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family”. Family is the natural and fundamental group unit of society and is entitled to protection by society and the state”. This right lays the foundation for the reproductive rights in UDHR. Article 12 which ensures the right to privacy and non-interference by others to every individual can be interpreted to include the individual’s rights to determine the number and spacing of their


children. Further, the rights such as right to information, health and education can also be interpreted to give protection to the rights to family-planning information and services. The right to benefit from advancements of science can be considered as the repository for the use of modern scientific technologies for the enjoyment of reproductive rights. Though, the Declaration is a legally non-binding instrument, it has gained considerable authority as a general guide to the content of fundamental rights and freedoms as understood by members of the United Nations. It is treated as important in providing a connecting link between different concepts of human rights in different parts of the world. The impact of UDHR can be seen in various international documents adopted by the UN and its Specialized Agencies as well as Regional Human Rights instruments also.

### 2.4.1 The International Covenant on Civil and Political Rights, 1966

The first binding international human right document is the *International Covenant on Civil and Political Rights*. The state parties to the Covenant have recognized that the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic,
social and cultural right. Thus in keeping view of the obligations under the Charter of the United Nations to promote universal respect for and observance of, human rights and fundamental freedoms, the state parties have agreed, “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Like the UDHR, in ICCPR also there is no express provision regarding the right to reproduction. But the provisions relating to right to family and privacy are considered as the foundation for reproductive rights in ICCPR. Article 23 of the ICCPR provides protection for the right to found a family. The Human Rights Committee, the adjudicative body for the enforcement of ICCPR, states that Art. 23 should be interpreted not only to protect the right to cohabit and procreate, but also as a codification of national obligations to enact non-discriminatory family-planning policies. The Covenant provides that no person shall be subjected to illegal or arbitrary interference into their right to privacy. This right can be interpreted as protecting family autonomy and the right to decide on the number and spacing of children. Further, Article 19(2) can be interpreted as protecting the rights to family planning information under the rubric of the freedoms of expression and information. The interpretation of Article 23 provided by the Human Rights Committee confirms a positive right to non-discriminatory access to reproductive technologies. Thus, the ICCPR over and above the UDHR provisions highlights the importance of personal autonomy and access to reproductive information.

The Human Rights Committee in K.L. v. Peru held that, refusal to abort pregnancy in a circumstance that threatened a woman’s health and had no chance of

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76 See, Preamble to ICCPR.
77 See, Article 2 (1).
79 See, ICCPR, Art. 17.
80 Supra n.26.
survival will violate the right to privacy under the Covenant. Forcing her to carry such pregnancy to a term constituted a cruel, inhuman and degrading treatment. Though there is no specific discussion on reproductive right in this case, indeed this case is an example of using this Covenant for giving effect to civil and political rights in cases where violation of reproductive rights are involved.

2.4.2 The International Covenant on Economic, Social and Cultural Rights, 1966

The state parties to this Covenant undertake to take steps, individually or through international economic and technical assistance and co-operation, to the maximum of its available resources for achieving progressively the full realization of the rights recognized in the present Covenant. The state parties are also required to guarantee that the rights recognized in this Covenant will be exercised without any discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status of the individuals in question.

The Covenant recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This right includes the right to treatment for maternal and infant mortality and the promotion of children’s health within the rights to medical treatment for illness. According to Pecker, the right to decide the number and spacing of children and the right to access family-planning services has been found to exist in this right. Further, the right to education and personal development mentioned in this Covenant can be interpreted to include one of the element of reproductive right i.e. right to information relating to family planning, access to technologies and other relevant information’s related to reproduction. This Covenant also confers a right to enjoy the benefits of scientific

82 Hereinafter referred to as ICESCR. It was adopted by UN General Assembly on 16th December, 1966 and entered into force on 3 January, 1976.
83 See, Art. 2.
84 See, Art. 12.
85 See, Art. 12 (2).
87 See, Art. 13.
progress and its application to everyone\textsuperscript{88}. This right is having a significant impact over reproductive rights, because with the help of this right an individual can take recourse to modern scientific technologies for reproduction.

\textbf{2.4.3 Convention on the Elimination of All Forms of Discrimination against Women\textsuperscript{89}}

This Convention was adopted in 1979 by the General Assembly of the UN. CEDAW addresses specific issues of discrimination affecting women as well as social, political, religious and other practices that amount to or lead to discriminations against women. With regard to women’s reproductive rights, Article 12 of CEDAW states as follows:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this Article, State Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

The Committee on the Elimination of All Forms of Discrimination against Women has made it very clear in its General Recommendation No. 24\textsuperscript{90} that Article 12 must be interpreted broadly. The Committee recommended that policies related to reproductive issues should be undertaken from “the perspective of women’s need” or, as it has been developed in the literature, adopting a “women-centered approach”. This is the very central notion in the way reproductive rights are approached today. Under CEDAW, it is the States responsibility to prove that they have done everything they could to ensure “access to the range of services which are related to family

\begin{footnotesize}
\textsuperscript{88} See, Art. 15.
\textsuperscript{89} Hereinafter referred to as CEDAW.
\textsuperscript{90} CEDAW/C/1999/I/WG.II/WP.2/Rev.1.
\end{footnotesize}
planning, in particular, and to sexual and reproductive health in general\textsuperscript{91}. On a more broad level, the Committee recognized that women’s health – including reproductive rights – was central to the promotion of women’s well-being. Article 12 offers clear and strong protection of women’s reproductive rights through the recognition of their right to health care.

2.4.4 Reproductive Rights and International Conferences

The reproductive rights were specifically addressed also in various international human rights conferences. The first time during which reproductive rights were recognized internationally as human rights was at the International Human Rights Conference in Teheran held in 1968. At this time, the international community was primarily concerned by the rapid growth of population. It associated, quite exclusively, development and promotion of human rights with birth control in developing countries. As a consequence, when recognizing that “parents have a basic human right to decide freely and responsibly on the number and spacing of their children”, the Final Act of the Teheran Conference’s aim was to put pressure on developing countries to control their birth rate by using contraceptive means. It did not recognize an individual right to reproductive autonomy. At the Bucharest World Population Conference held in 1974, there was an important opposition movement from developing countries who denounced population growth control as a device used by the West for hidden economic purposes. Following difficult negotiations, it was finally agreed that population limitation was an important element in development. The right to decide freely and responsibly on the number and spacing of their children was extended to “couples and individuals”, a position that is still endorsed today by most of the stakeholders involved in reproductive issues.

The position was endorsed a year later at the 1975 Women’s Conference – that ‘officially’ launched the women’s rights movement – was much more clearly women-oriented. It used the notion of bodily integrity and control as a reference point to interpret the right to decide on the number and spacing of children. In 1984 in

\textsuperscript{91} Id. para. 23.
Mexico, circumstances had changed again since the previous conference on world population. The US made a complete U-turn from their population growth control position following the appearance of a powerful ‘right-life’ movement. While contraception, abortion and birth control techniques were suddenly rejected by the US, it also consecrated reproductive rights as individual rights$^{92}$.

The explicit reference to reproductive rights is conspicuously absent in major international human rights instruments, such as the Universal Declaration for Human Rights and the International Covenant on Economic, Social and Cultural Rights. The Convention on the Elimination of Discrimination against Women and other international conferences only provides for fragmented recognition of reproductive rights by singling out issues of family planning and maternal health. Against this background, the pronouncements at subsequent three international conferences in the 1990’s have been said to mark milestones in the recognition of reproductive health rights$^{93}$.

The first of these conferences, viz. the International Conference on Human Rights held in Vienna, Austria, in 1993, while reiterating on the universality, interdependence and interrelatedness of human rights, reaffirmed that the rights of women are an inalienable, integral and indivisible part of human rights. The conference among other things emphasized that human rights entailed a woman’s right to self determination and equality, and freedom from violence and exploitation. The conference also emphasized the need for women to enjoy the highest standard of health throughout their life span. This set the ground for more self-determination oriented pronouncements which were made at the 1994 International Conference on Population and Development$^{94}$ and the 1995 Fourth World Conference of Women held in Beijing$^{95}$.

$^{94}$ Hereinafter referred to as the ICPD Conference.
$^{95}$ Hereinafter referred to as the Beijing conference.
The ICPD conference extended women’s reproductive rights from merely serving the goals of population control to the respect for the rights of women as autonomous individuals with the capacity to decide on matters pertaining to their sexuality within their social, economic and political contexts. Remarkably, the Beijing Conference re-emphasized a holistic approach in defining reproductive rights. It underscored the point that issues of reproductive health should not be viewed in isolation from the underlying social, economic and other conditions.\footnote{Id. p.129-30.}

\section*{2.4.5 The Convention on the Rights of Persons with Disabilities, 2006\footnote{Hereinafter referred to as Disability Rights Convention. The text was adopted by the United Nations General Assembly on 13th December 2006 and opened for signature on 30 March 2007.}}

This Convention is the first comprehensive international human rights instrument that specifically recognized the right to reproductive and sexual health as a human right. This Convention under Article 23 declares that, “States parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

a. The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

b. Persons with disabilities, including children, retain their fertility on an equal basis with others”.

\section*{2.5 Right to Procreation and Regional Human Rights Instruments}

At the regional level, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa\footnote{Hereinafter referred to as Protocol on the Rights of Women in Africa. This protocol was adopted by the African Union on 11th July 2003 at its second summit in Maputo, Mozambique.} expressly articulates women’s reproductive rights as human rights, and explicitly guarantees a woman’s right to
control her fertility. It also provides a detailed guarantee of women’s right to reproductive health and family planning services. The Protocol affirms women’s right to reproductive choice and autonomy, and clarifies the duty of African states in relation to women’s sexual and reproductive health.\(^{99}\)

Under the Inter-American system of human rights protection, the basic reproductive rights such as right to found a family\(^{100}\), the right to decide the number and spacing of one’s children\(^{101}\), the right to access to family planning information and education\(^{102}\), and the right to access to family planning methods and services\(^{103}\) are specifically recognized. The European system of human rights protection also expressly recognizes various facets of reproductive rights such as the right to marry and to found a family\(^{104}\), the right to privacy\(^{105}\), and the right to access to information and education regarding family planning and reproductive health\(^{106}\).

Further, the UN Millennium Development Goals\(^{107}\) adopted in 2000, discussed the issue of right to procreation and the governments agreed that addressing women’s reproductive health was the key to promoting development. At the 2005 World Summit\(^{108}\), leaders from around the world made an explicit commitment to achieving universal access to reproductive health by 2015. As there is close alignment between the MDGs and the human rights framework, the MDG agenda provides yet another vehicle for advancing women’s reproductive rights\(^{109}\). From the above discussion, it

\(^{99}\) See, Article 14 which provides that, States parties shall ensure that, “the right to health of women, including sexual and reproductive health is respected and promoted. This includes: the right to control their fertility; and the right to decide whether to have children, the number of children and the spacing of children; also the right to choose any method of contraception”.


\(^{101}\) See, ACHR, Art.11; Art.10 Protocol of San Salvador, and Art. XI American Declaration

\(^{102}\) See, ACHR, Art.13; Art.10 Protocol of San Salvador and Art. XI American Declaration

\(^{103}\) See, Art. 10 Protocol of San Salvador and Art. XI American Declaration

\(^{104}\) See, ECHR, Art.12.

\(^{105}\) Id. Art.8.

\(^{106}\) Id. Art.10; Also see, *supra* n.62 at pp.321 – 325.

\(^{107}\) Hereinafter referred to as MDGs.

\(^{108}\) It was a follow-up summit meeting to the United Nation’s Millennium Summit, 2000, Representatives (including many leaders) of the then 191 (now 193) member states met in New York City.

can be concluded that right to procreation is an internationally as well as regionally protected human right.

2.6 Right to Procreation and National Laws

The right to reproductive freedom is recognized and protected in virtually every corner of the world. Domestic and international tribunals have increasingly found that the right to privacy includes such a right. For example, in Annapurna Rana v. Ambika Rajya Laxmi Rana and others,110, the Nepal Supreme Court held that women’s right to control over their own body is a part of fundamental right to privacy. Guarantee of fundamental rights to freedom of speech and information are extra advantages in protecting reproductive rights and which can be invoked to protect the right of all persons to access to full information on the benefits, risks and effectiveness of all methods of fertility regulation, in order that any decision they take on such matters are made with full, free and informed consent111.

In United States, the Supreme Court recognized the fundamental right to procreate nearly sixty years ago. The Court took the first step towards affording constitutional protection to the right in its 1942 decision, in Skinner v. Oklahoma112. In Skinner, the Court identified the right to procreate as “one of the basic civil rights of man” and invalidated a state statute requiring the sterilization of habitual offenders as an unconstitutional infringement on that right. The Court explained that, because “marriage and procreation are fundamental to the very existence and survival of the race,” forced sterilization of criminal offenders violates the Equal Protection Clause of the Fourteenth Amendment. Additionally, the Court required strict scrutiny of governmental attempts to impose involuntary sterilization113. In 1965, the Court gave further protection to the right to control one’s reproductive choices in Griswold v.

112 316 U.S. 535 (1942).
Connecticut. Griswold established the fundamental right to privacy for married couples and stands as the first of a series of contraceptive cases that built upon Skinner to firmly establish procreation as a fundamental right. Further, in Eisenstadt v. Baird, the Court noted that, for privacy to have any meaning, it must extend to individuals. Writing for the majority, Justice Brennan stated that “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”. The final case establishing the fundamental right to procreate is Carey v. Population Services International, Inc. In Carey, the Court followed the reasoning of Eisenstadt and expanded the right to contraceptive access and information to minors. The Court stated, “The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices regarding family and procreative autonomy/control.

In United Kingdom, the Human Rights Act, 1998 is the law which provides the legal framework for human rights. This Act incorporates European Convention for the Protection of Human Rights, 1950 into UK. It has adopted three major Articles such as Articles 8, 12 and 14 from ECHR which are the foundation for

114 381 U.S. 479 (1965).
119 Article 8 - Right to Respect for Private and Family Life: “Everyone has the right to respect for his private and family life, his home and his correspondence.” “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the 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 prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
120 Article 12 - Right to Marry and Found a Family: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”
121 Article 14 - Prohibition of Discrimination: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

reproductive rights in European Union\textsuperscript{122}. A close analysis of all these provisions in the Act suggest that there is a statutory right to reproduction and the state should not place unreasonable restrictions on people who wish to have children\textsuperscript{123}. In Canada, the right to reproduction is protected under the Canadian Charter of Rights and Freedoms\textsuperscript{124}. Sections 7\textsuperscript{125} and 15\textsuperscript{126} are wide enough to cover the various reproductive rights which are recognized under the international human rights law. The interpretations given by Canadian courts to these Sections in various cases established a right to reproduction and procreative autonomy in Canada\textsuperscript{127}. This right to procreation that has been recognized and developed at international level as well domestic level finds much support in the Indian Constitution.

The Constitution of India described as the conscience of the Nation and the cornerstone of the legal and judicial system came into effect on January 26, 1950\textsuperscript{128}. The Constitution doesn’t provide any explicit provision for ‘reproductive rights’. But it has wide scope for the materialization of this type of rights. Many Constitutional provisions can be invoked for this purpose. To begin with, the preamble comprises paramount objectives of the Constitution as to secure social, economic and political justice through protection of basic human rights\textsuperscript{129}. It can be meant in a way that

\begin{footnotesize}
\begin{enumerate}
\item See, the Human Rights Act, 1998, S. 6(1).
\item First part of the Canadian Constitution Act, 1982.
\item Section 7 of the Charter provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.
\item Section 15(1) of the Charter provides: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.
\item See, The Constitution of India, 1949, Preamble. It provides that, “We the people of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic, Republic and to secure to all its citizens - justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation”.
\end{enumerate}
\end{footnotesize}
reproductive rights are also integral parts of the basic human rights and without their protection and promotion the paramount goal of social justice cannot be secured.\textsuperscript{130}

The Fundamental Rights which are mentioned in Part III of the Constitution form the basis for incorporating a globally recognized reproductive rights framework into the Indian context. The key provisions for these purposes include, right to equality before the law and equal protection of the laws; prohibition of discrimination on the grounds of sex; protection of life and personal liberty - which the Court has interpreted to include the rights to human dignity, health, and privacy; and prohibition of trafficking in human beings.\textsuperscript{131} While interpreting these provisions the Courts have repeatedly stated that right to life “does not connote mere animal existence or continued drudgery through life”, but rather, implies “a right to live with human dignity” and “all that goes along with it, namely, the bare necessaries of life”.\textsuperscript{132}

The Judiciary in India has recognized the reproductive right of individuals as a basic right. In \textit{B. K. Parthasarthi v. Government of Andhra Pradesh}\textsuperscript{133}, the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as an aspect of his “right to privacy” and agreed with the decision of the US Supreme Court in \textit{Jack T. Skinner v. State of Oklahoma}\textsuperscript{134}, which characterized the right to reproduce as “one of the basic civil rights of man”. The argument for the contention that right to procreation is recognized in India is further strengthened due to the fact that, the Indian judiciary has abstained from stating that the right to procreation is not a basic human right. In \textit{Javed v. State of Haryana}\textsuperscript{135}, though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati

\textsuperscript{130} Supra n. 111 at p. 25.
\textsuperscript{131} See, The Constitution of India, 1949, Articles 14, 15, 21 and 23.
\textsuperscript{134} 316 U.S. 535 (1942).
\textsuperscript{135} A.I.R. 2003 S.C. 3057.
Raj election, it has not negatived the contention that there is a right to procreation in India\textsuperscript{136}.

Article 21 also guarantees fundamental right to privacy that could be invoked to protect the right of individuals to reproductive health care information\textsuperscript{137}, education and services to a degree of privacy, and to confidentiality with regard to personal information given to service providers\textsuperscript{138}. Recently, the Supreme Court of India in \textit{Suchita Srivastava \& Another v. Chandigarh Administration}\textsuperscript{139} has declared that, a woman’s right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreation. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected\textsuperscript{140}. In this case, the Court struck down the decision of the High Court to terminate the pregnancy of a mentally retarded woman against her will.

It can therefore be pointed out that right to procreation is one of the most fundamental and basic human right. However, a large section of individuals in the society are unable to enjoy this right and fulfill their dream for a biological child due to various barriers. The inability to beget a child has a very serious impact on the individuals and needs to be addressed properly.

\subsection*{2.7 Barriers to Right to Procreation and Parenthood}

Parenthood is undeniably one of the most cherished goals in adulthood, and most people have life plans that include children\textsuperscript{141}. Parenthood is a role which people

\begin{footnotesize}
\begin{enumerate}
\item \textit{Supra} n. 111 at p.23.
\item (2009) 9 S.C.C. 1.
\item \textit{Id. at para.11 and 15.}
\end{enumerate}
\end{footnotesize}
take it for granted and that they will one day assume is a vision deeply rooted in every culture and continually reinforced by social norms. Moreover, the biological link between parents and children is again taken for granted. Women are raised to see themselves as child-bearers; men to see themselves as generators/supporters of procreation. Such socialization has led to pervasive cultural themes: a woman must produce a child to give full resonance to her identity as a woman; a man must be able to produce a child to prove his virility and masculinity. A child must be raised by the biological parents to achieve the success and identity that comes from a genetic heritage. There are many reasons for the importance given to biological children in society. It is assumed that the desire to have children is normal and parenthood is part of the natural order of things. People also want children because it is almost like a biological need, as they want to see a part of themselves in their child.

Birth and death are the most basic of human events and reproduction transcends the boundaries of individual lives to signal the survival and continuation of the family and the species. Fertility is revered in almost all cultures and the ability to reproduce is perceived as a milestone in adult development. Reproduction frequently stands as the marker of adulthood; consequently men and women typically experience both internal and external pressures to have children. However some individuals may not be able to have children due to the problem of infertility. The infertility may be due to various medical or social reasons and it acts as a major barrier for exercising the right to procreation. Since the ability to reproduce is usually taken for granted, the realization of infertility problems, comes as a shock and has been labeled as a crisis in life.

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2.7.1 Infertility: Meaning and Definition

Infertility is a disease of the reproductive system which affects both men and women with almost equal frequency. It is a global phenomenon which affects some percentage of every human population. It is estimated that an average of 10 per cent of the global women population of reproductive age is unable to get pregnant or carry a pregnancy to term\(^{145}\). While there is no universal definition of infertility, a couple is generally considered clinically infertile when pregnancy has not occurred after at least twelve months of regular sexual relationship without the use of contraceptives\(^{146}\). A common definition of infertility is that, a couple has failed to conceive after 12 months of unprotected sexual intercourse or have suffered three or more miscarriages or still births\(^{147}\). However, the WHO suggests that there should be two years of unprotected sexual intercourse without conception before an infertility diagnosis is made\(^{148}\). To constitute a problem, such inability to produce a child must have continued over a certain length of time. It has been estimated that 63 per cent of normally fertile women having unprotected sexual intercourse with a fertile partner will conceive within six months, and 80 per cent will conceive by the end of one year\(^{149}\). Infertility has been described as the active but frustrated desire for a biologically related child\(^{150}\). Thus infertility means the inability to generate a pregnancy among people who wish to bear children. The problem may be short term, long term, or permanent. The infertility may lie primarily or solely with the male (such as a low sperm count) or with the female (such as failure to ovulate). In some


cases, both parties have a fertility problem. In some cases, the cause of the infertility cannot be determined, despite extensive testing\textsuperscript{151}.

Infertility includes: infecundity - meaning inability to conceive or impregnate; and pregnancy wastage - meaning failure to carry pregnancy to its term because of spontaneous abortion and still-birth. Infertility includes primary infertility, where a couple has never achieved conception, and secondary infertility, where at least one conception has occurred but the couple is currently unable to achieve pregnancy\textsuperscript{152}. Based on the reasons for causing infertility in individuals, infertility can be classified into two broad categories:

\textbf{i) Medical Infertility}

It refers the inability/failure of a couple to have a child even after one year or two years of regular sexual intercourse without any contraceptives, due to biological reasons. There are various biological and medical reasons for this type of infertility such as Diabetes Mellitus, Thyroid disorders, Adrenal disease, Kallmann syndrome, Hypopituitarism, etc\textsuperscript{153}.

\textbf{ii) Social Infertility}

It refers to the inability of individuals to have a child due to various social factors in their life\textsuperscript{154}. For example, lesbians, gays, divorced individuals, widowed person and single individuals. It is pertinent to point out here that the individuals belonging to this category may be fertile but because of their situation and way of life and social circumstances they are unable to have a child. For having a child there has to be a sexual relationship between a healthy man and a healthy woman. But in a


\textsuperscript{154} \textit{Ibid.}
lesbian relation which involves only same sex relationship in females, naturally they alone cannot have a child. Similar is the case of gays which involves only males. Likewise, the divorced individuals, widowed persons and single individuals cannot have a child unless they marry.

There can be yet another classification termed as forced infertility so as to include those individuals who are fertile but are forced to remain childless due to certain other reasons. For example, people who are disabled may not marry and remain single and thus are deprived of a child or even if married, in certain cases they may not be able to have a child due to their physical disability. The most unfortunate category of people is those who lose their child, in an age, in which they are unable to beget another child. For example, if a couple lose their only child or all their children in an accident or due to some disease, they are deprived of having a child because they may have undergone either tubectomy\textsuperscript{155} or vasectomy\textsuperscript{156} or may be above the childbearing age.

2.7.2 Infertility and its Impacts

For many couples, infertility is felt like a multi-pronged assault on their partnership, an attack on their sexual relationship, their plans, their dreams, their time and their finances. Infertility is always a ‘couple problem’, and while frequently both people have a diagnosis, in most instances only one among the couple may have an identified problem. Furthermore, many couples have difficulty in divulging their infertility. Women, in particular, complain that their mates appear emotionally unaffected by it, that they often seem to withdraw when their wives express sorrowful, angry, or jealous feelings. Although most marriages survive infertility and many are strengthened by it; the experience is certainly one that puts even resilient relationships to the test.

Both men and women suffer greatly from infertility, but the emotional impact of this crisis is very severe on women wearing away at their sense of feminity. Even

\textsuperscript{155} Tubectomy is a surgical procedure for permanent contraception to prevent future pregnancies in women.

\textsuperscript{156} Vasectomy is a surgical procedure for male sterilization and/or permanent birth control.
if it is the husband who has been diagnosed with infertility problem, the women is the ultimate sufferer. Majority of women irrespective of their social and professional status have a natural desire for motherhood and thus the inability to bear a child threatens their very object in life\textsuperscript{157}. The impact of infertility on male may not be seen apparently but nevertheless it is also having very serious repercussions on them. An infertile male may feel a sense of guilt and shame for not having a child. For some men it may be a blow to their ego and they may consider it as an impaired masculinity. In most of the cases of male infertility, the women are held responsible by the family members and have to suffer mental torture and harassment.

In reality, infertility is much more than just a medical diagnosis. Infertility is a stigma. For men, infertility is an assault on their manhood. For women infertility is equated with barrenness and viewed as a curse. Since the interpretation of the term infertility is socially constructed, the meaning of infertility has changed with the passage of time and changes in society\textsuperscript{158}. Throughout the world, infertility – the inability to have desired children – is stigmatized and viewed by fertile and infertile alike as a failure to achieve important cultural goals.

The concern with fertility is so intimately involved with other cultural institutions, interpretations and treatments. The social consequences of infertility will vary from one society to another society and from culture to culture\textsuperscript{159}. For example, according to the Abrahamic faith traditions which includes the religions of Judaism and Christianity, it is believed that ‘it is God who ‘opens’ a woman’s womb permitting her to conceive’\textsuperscript{160}. So infertility in these religions is considered as a gift of God, and must be accepted by the couples with utmost calmness and faith. It is also believed that infertility is the result of past sins and hence the man and woman must


\textsuperscript{158} Supra n. 144.


accept it. This belief is also accepted in the Islamic religion which accepts absolute sovereignty of God, as is clearly expressed in the Quran, viz.

‘God creates what He pleases; He grants to whom He pleases, females; and He grants to whom He pleases, males; He gives them in pairs, males and females; and He makes whom he pleases, barren; verily He is knowing, powerful.

In Hinduism and Buddhism, all the important events and circumstances occurring in life including fertility or infertility, are considered as the outcome of ‘karmic’ cycle. Infertility is interpreted as the result of misdeeds such as mistreating or aborting children in a previous incarnation. This inference is applied to both partners in an infertile couple even if the immediate cause of their infertility clearly lies with a single partner. This is because the marriage between the spouses is not thought to be a matter of chance but is considered as guided by ‘karmic cycle’ itself. Similar to the Abrahamic traditions, in these religions also infertility is viewed as a judgment or penalty for wrong-doing. At the same time Hinduism and Buddhism also have a different perspective towards infertility which is experienced as another type of crisis and a barrier in the path of liberation of a person, by the followers of these religious traditions. It is considered that the longing for children by the individuals is one of the desires which keeps them trapped in the cycle of birth and death. In order to advance towards the real human goal, the truly pious person would seek to overcome that longing for children through the use of the spiritual disciplines of meditation, ritual and pilgrimage. Thus, the procreation of child is essential in all the religions so as to prove to the world that they are not sinners in their past life or punished by God. In other words, the religious and cultural traditions make it a compulsion for individuals to have a child. This need is so compelling that the

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individuals who are not able to beget a child would try to adopt various means and methods to get a child. In the absence of a child such couples would also face social exclusion or withdraw themselves from the society.

The responses of the society and people towards an infertile couple may range from social stigma and blame, to social isolation and alienation. In some communities, infertile people are ostracized as they are perceived to be unlucky or the source of evil, or they become the object of public humiliation and shame. In other communities infertile men and women are often denied proper death rites. For women in developing countries, infertility may occasion life-threatening physical as well as psychological violence. Childless women are generally blamed for their infertility, despite the fact that men contribute to at least half of the cases of infertility around the world. In developing countries, especially, motherhood is often the only way for women to enhance their status within the family and community. In Asia, being childless has more negative social, cultural and emotional repercussions for women than, perhaps, any other non life-threatening condition. Thus infertility causes great hardship and difficulties to the infertile men and women. The overall impacts of infertility can be grouped into the following three broad categories:

a) Psychological Impacts

Infertility gives rise to feelings of depression among the individuals. It gives rise to reactions such as hopelessness, despair, feelings of failure and reduced self-
esteem, lowered life satisfaction, frustration, grief, fear, guilt, helplessness, reduced job performance, and marital duress\textsuperscript{169}. The levels of anxiety and depression tend to be higher in individuals diagnosed with infertility and in some studies higher in women than in men. Historically, idiopathic infertility, a state in which no medical cause can be diagnosed, was strongly associated with psychological dysfunction. More recently, however, research suggests that there are very few differences between couples with a medical diagnosis and those where no medical cause can be found. Infertility alters an individual’s perception of his/her self, of his/her concept of identity. As a result of the strong link between femininity and motherhood, women may experience an identity crisis as there is a conflict between their ideal sense of self as a woman who can become a mother and their real self as being infertile\textsuperscript{170}.

\textit{b) Social Impacts}

The inability to have children can be one of the greatest challenges that a person or couple will ever face in their social life. It can place tremendous stress on a couple’s relationship with one another and with their family and friends. It causes loss of social status, social stigma, social isolation and alienation, and community ostracism. All of these changes can make people feel emotionally distant and force them to cut themselves off from friends and family. They look for ways to avoid attending social gatherings and family events, fearing that they will be subjected to discussions about pregnancy, children, or infertility. Socializing with friends and family who have children or who are pregnant is a special challenge for them\textsuperscript{171}.

\textit{c) Legal Impacts}

The problem of infertility as seen above is a very sensitive and emotional issue affecting the couples. But it also has legal dimensions. A major concern of a childless couple is regarding the transfer and safety of their wealth and property. It is to be


noted that in the absence of a legitimate son or daughter, claims may be made by the nearest relatives resulting in property disputes and legal battles. The succession of property in most of the personal laws is very complicated and difficult. Similarly, the issue of maintenance of the elder persons is also a matter of great concern in the absence of a son or daughter.

Infertility and childlessness is thus a major problem which affects not only the life of the individual but also threatens the very bond of marriage and family in the society. In addition to causing physical and mental suffering to the couples especially the women, it also creates various social and legal problems in the society. Thus, infertility interferes with one of the most fundamental and highly prized human activities and thus presents a major life challenge to those who desire to have children. Hence, there is a need to find an appropriate solution to solve this problem of infertility and childlessness by all means.

2.8 Measures to Overcome Infertility and Childlessness

Since ancient times, mankind has always searched for finding solutions to overcome the problem of infertility. Childlessness was considered to be a curse or a judgment passed by the God on the couple. Therefore, various measures were undertaken to please the Gods and Goddess by people and many of these practices are still prevalent in India. For example, fasting, visiting temple, making offering to God, doing penance, giving alms to poor people, wearing charms, gems, and amulets, etc.

In primitive societies and subsequent successive civilizations, the aspiration for a child have been gradually transformed into rights and obligations, embodied and

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172 See, Indian Succession Act, 1925; Hindu Succession Act, 1956, etc.
174 Supra n. 145.
176 For example, Santhana Gopla Homa is a particular pooja for overcoming childlessness offered by most of the people in Lord Vishnu Temples in India.
protected by customary, religious and later on legal rules\textsuperscript{178}. Most of the ancient societies have been aware of the problem of some women failing to conceive either on account of inability of husband to perform copulation or normal coitus or on account of physical or psychological inhibitions of either party about sex. Also recognizing the need and importance of an offspring in a family and the natural desire for a child, the ancient societies had provided various measures to overcome childlessness. For example, the ancient Hindu society developed the method of ‘Niyoga’, in order to fulfill the desire of the couple to have an offspring. The institution of niyoga provided and approved the method by which the sperm, somehow or other, could reach inside the woman so that the ovum could be fertilized. This was how the ‘Ksetraja’\textsuperscript{179} son was begotten. The niyoga was practiced when a man was impotent or had an incurable disease or dead, and the family in accordance with its swadharma, authorized the husband’s brother or other sapinda to beget a son in his wife. This was done strictly by appointment of the family and was practiced with many restrictions. Thus, for the practice of niyoga, two conditions were essential, a) the husband must be impotent, diseased (in the sense of incapable of performing sexual intercourse) or dead; and b) the wife or widow must be authorized either by the husband during his life time or after his death, by the members of his family. The sole purpose of niyoga was the begetting of a son, and therefore, onerous conditions were imposed so that the institution was not misused\textsuperscript{180}.

In Biblical tradition procreation was given utmost importance and in case a man died childless, his brother was required to go to his widow and conceive a child to carry on the deceased brother’s line and in case of refusal to perform this duty he would be publicly humiliated\textsuperscript{181}. The \textit{Genesis}\textsuperscript{182} mentions the incident of Er and

\textsuperscript{182} The Book of \textit{Genesis} is the first book of the Hebrew \textit{Bible} and the Christian Old Testament.
Onan\textsuperscript{183}, in which, when God slew Er for his wickedness, Er’s father Judah ordered his second son, Onan, to go to Er’s widow and perform the duty of brother in-law to her\textsuperscript{184}. When Onan instead spilled his semen on the ground, God slew him also for not performing the duty\textsuperscript{185}. Thus in biblical tradition the instances of use of alternative methods of begetting a child can be seen. The Jewish tradition also dictates that a man can marry his brother’s widow if the brother dies childless. To do less would be to allow the brother’s genes to go un-transmitted, surely condemning him to true death\textsuperscript{186}.

In ancient Mohammedan societies, childlessness was considered as a punishment given by Allah and hence the couples would perform various prayers, undergo fasting and give offerings. In cases of childlessness due to male infertility the religious texts prescribed various prayers and rituals to be performed by the couple and also allowed medical treatments. However in case of childlessness due to female infertility, the husbands had the option to go for remarriage for obtaining and ensuring a child.

Thus it can be seen that even in the ancient societies the quest for overcoming childlessness and begetting a child was very much prevalent and various measures were followed. It is necessary to point out here that with the passage of time and development of civilization, most of these ancient methods and traditions have also undergone a radical change. This is due to the development and growth of the societies and the legal systems as well as advancements in the medical field.

The growth and progress of the society and formation of state led to the development of legal system and establishment of legal institutions. This in turn led


\textsuperscript{185} The biblical penalty for not giving your brother’s widow children was public humiliation, not death (Deut. 25:7-10). But Onan received death as punishment for his crime as he violated natural law by spilling the semen on the floor with the intention of not giving offspring to his brother.

\textsuperscript{186} A. Alta Charo, “And Makes Three or Four, or Five, or Six: Redefining the Family After the Repro-tech Revolution”, \textit{Wisconsin Women’s Law Journal}, Vol. 7:1(1992-93), at p.5.
to the evolution of various legal mechanisms and legal tools to regulate human conduct in the society in consonance with moral and ethical norms; and also to cater to the different needs of the individuals and the society. Though the ancient traditions and customs underwent a change with the passage of time, the importance and need for a child in a family remains undisputable and is an accepted fact in almost all societies around the world. The legal systems in most countries of the world also recognize this significance of a child for a family and hence have evolved certain mechanisms for helping childless couples or individuals to have a child. It is said that law is not for law alone but law is an instrument of social control. It originates and functions in a society, and for the society. Law and society are indivisible and are interlinked. The aim of law is to regulate human behavior in the society. The recognition of the significance and need of child for a family by the legal systems therefore led to the development of mechanism of Adoption as an alternative measure having a legal basis for those couples unable to have children.

2.8.1 Adoption

Adoption is the act of lawfully assuming the parental rights and responsibilities of another person, usually a child under the age of 18 years. A legal adoption imposes the same rights and responsibilities on adoptive parents as are imposed on and assumed by a parent when the child is naturally born in the family. Adoption therefore is the lawful transfer of parental obligations and rights. It grants social, emotional, and legal family membership to the person who is adopted. Adoption is not a new phenomenon, but it was practiced even in ancient societies. It is not solely a practice of the 20th Century but is a very old and constantly evolving institution. Societies have formally sanctioned the adoption of children, or closely similar arrangements, for more than 4,000 years, since the Babylonian Code of Hammurabi in 2285 B.C.—and probably before recorded history.

Adoption is also mentioned in the Hindu Laws of Manu, written around 200 B.C. Perhaps the earliest known adoption is mentioned in the Bible, which describes the adoption of Moses by the

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188 Id. at p.xxii.
Pharaoh’s daughter. The ancient Romans supported and codified adoption in their laws; in fact, Julius Caesar continued his dynasty by adopting his nephew Octavian, who became Augustus Caesar. The ancient Greeks, Egyptians, Assyrians, Germans, Japanese, and many other societies all practiced some form of adoption. 

Adoption offered many advantages to the childless couples. It satisfied religious requirements in some cases; for example, in the Hindu tradition an adopted son could perform the religious and cultural obligations and thus the mechanism helped to give some satisfaction to the childless couples. Similarly, in Shinto religion the significance of ancestral worship and the performance of certain religious rituals gave rise to institution of adoption. Adopted individuals could still carry on the family lineage and rituals when the family did not have biological children. In early Rome and in other ancient cultures adoption served a primarily religious function associated with ensuring a legitimate male heir to carry out sacred obligations.

The institution of adoption has been greatly influenced by the changes in the society. How adoption was and how it is now perceived in society; how it is now actually practiced, depends on a myriad of factors: social, economic, and political conditions. The societal attitudes towards orphans and deprived children, out-of-wedlock births, minimum standards of parenting, views on parental rights and children’s rights, views on the importance of property and inheritance, as well as other issues in the social order have greatly shaped the institution of adoption. Thus every country has developed its own adoption laws. It is pertinent to mention here that the mechanism of adoption as a measure to overcome childlessness has helped many couples and individuals to fulfill their desire to have a child. At the same time this mechanism has its own inherent weaknesses and flaws.

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189 Ibid.
190 Ibid.
192 Supra n.187 at p.xxii.
193 For example, The Hindu Adoptions and Maintenance Act, 1956 (India); The Children and Adoption Act 2006(UK); The Adoption Act, 1996 (Victoria), etc.
Weakness of Adoption

The issue of adoption is a very sensitive and emotionally charged issue which an infertile couple faces. Adoption can never fulfill the innate desire of an individual to have a genetic connection to a child or to have a child resembling them, unless and until the couples are adopting a child from their own family circle. Many couples look forward to having children that resemble themselves and their families and think of children as a way of passing on positive family traits, as well as the family name. The blood ties between parent and child have almost mythological significance in every culture. They represent both the act of procreation and the physical reflection of the parent’s body in the body of the child.

The importance of genetic ties is confirmed by research suggesting that many psychological attributes may also be influenced by genetic heritage, although environmental conditions may also influence. The emotional significance of the biological link is also enshrined in religious traditions. For example, Judaism believes that an individual lives on through his children and the memories which the children have about their parents continue the existence of the parents. This significance of the genetic connection between parent and child undoubtedly makes infertility a painful experience. While adoption may satisfy one’s desire to nurture a child, adoption cannot satisfy the yearning to create the child and to watch it develop as a version of oneself. Thus, though adoption provided solace to the childless couples it could not satisfy the natural desire to have a genetically related child. This urge for a biological child has tempted mankind to find out newer methods and search for alternatives for begetting a biological child.

Medical science has always tried to search for alternatives and treatments to help the infertile couples to beget a biologically related child so as to fulfill their natural desires. The advancements in medical science and technology have also led to developments and discoveries in the treatment of infertility. These developments

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195 *Supra* n.187.
offer various solutions to the childless couples and enable them to have children genetically related at least to one of them. These advancements, or procedures, can be grouped generally under the heading ‘assisted human reproductive technologies’.

2.8.2 Assisted Human Reproductive Technologies

Assisted Human Reproductive Technology is a term used to mention advanced and innovative medical interventions that help people realize their dream of giving birth to a child. It refers to the body of medical and scientific knowledge which when applied enables the creation of a child who could not have been born without the intervention and application of that technology. The American Black’s Law Dictionary defines, “assisted reproductive technology” as using any medical means to aid in human reproduction, especially by means of laboratory procedures.

Kindregan and Mc Brien defines ART, “as any technology that is employed to conceive a child by means other than sexual intercourse”. Centers for Disease Control and Prevention in the United States says that assisted reproductive technology includes all fertility treatments in which both eggs and sperm are handled. This generally involves the surgical removal of a woman’s eggs from the ovaries, combining them with the man’s sperm in the laboratory, and subsequently returning the resulting embryo to the woman’s body or giving them to a surrogate woman. In some cases, embryos are frozen rather than implanted. Section 2 (c) of the Draft Assisted Reproductive Technology (Regulation) Bill, 2010 in India defines the ART as:

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196 Hereinafter referred to as ART.
200 See for more supra n.187.
201 This method is popularly known as ‘Cryopreservation’. See, Ri-Cheng Chian, Patrick Quinn, Fertility Cryopreservation, Cambridge University Press, United Kingdom (2010), p.213.
“assisted reproductive technology, with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo in the reproductive tract”.

ART is thus a general term used to refer methods employed to achieve pregnancy by artificial or partially artificial means. It is a technique which is routinely used presently for the treatment of infertility. It includes a range of techniques for manipulating eggs and sperms in order to overcome infertility. It encompasses drug treatments to stimulate ovulation; surgical methods for removing eggs and for re-implanting embryos; in-vitro and in-vivo fertilization; ex-utero and in-utero fetal surgery; as well as laboratory regimes for freezing and screening sperm and embryos, and micro manipulating and cloning embryos.

2.8.3. Types of Assisted Human Reproductive Technologies

Assisted Reproductive Technology gives hope to couples who have been trying unsuccessfully since years to conceive and beget a child. It offers various solutions suitable to the needs and defects of those who are unable to procreate naturally. ART encompasses a wide variety of ways to conceive a child, including artificial insemination, in-vitro fertilization and surrogacy, etc. It also encompasses both old and new forms of assisted conception.

Artificial Insemination is widely considered as the oldest form of ART, while Gamete Intrafallopian Transfer (GIFT) and Zygote Intrafallopian Transfer (ZIFT) are considered as the newest forms of ART. There are six types of assisted reproductive technology treatments for infertility. Each of these methods may be implemented using donated eggs or a surrogate mother. The major types of ART methods are as follows:

203 Supra n.199 at p.207.
i) Artificial Insemination

It is one of the oldest and most common forms of alternative procreation. Artificial insemination means the injection by instrument of semen into the women’s reproductive tract for the purpose of procreation\(^{204}\). Insemination in literary terms means “the act of sowing (of seeds in the ground or figuratively, of germs in the body or ideas in the mind, etc)”. However, in the context of ART a more relevant meaning of the term would mean, “the introduction of semen into the genital tract of a female”. Hence, in broader terms, one can say that insemination can happen naturally as well as artificially. Natural insemination will, obviously, occur with the help of sexual intercourse. Artificial Insemination, on the other hand, is a process that does not involve sexual intercourse\(^{205}\). It means introduction of semen into a woman’s vagina, cervical canal or uterus through the use of instruments or other artificial means. According to Britannica Concise Encyclopedia, artificial insemination is the, “Introduction of semen into a female’s vagina or cervix by means other than sexual intercourse”\(^{206}\). So artificial insemination in its simplest form requires the donation of sperm from a man (usually obtained by his masturbation into a container) and the mechanical injection of it into the vagina of the woman\(^{207}\).

Traditionally, couples have been using artificial insemination, the oldest and simplest of the various techniques available to infertile individuals, when the male suffers from low sperm count, low sperm motility or premature ejaculation. Semen concentrated under laboratory conditions, is then inseminated into the women with a needle-less syringe at a favorable time in her cycle. Although husbands served as

sperm providers in early artificial inseminations, AI today often involves third-party sperm donors and is increasingly used by single women.208

In modern times artificial insemination can be practiced in three ways: Firstly, Artificial Insemination by Husband (AIH) or Homologous Artificial Insemination, in which a married woman is impregnated with the semen of her husband when normal copulation fails because of various medical reasons. Thus any child conceived and born through this method is biological offspring of both the women and her husband. Secondly, Artificial Insemination by Donor (AID) or Heterologous Artificial Insemination, in which a woman is impregnated with semen from a man who is not her husband in a simple procedure that can be accomplished with a syringe. Thirdly, Confused or Combined Artificial Insemination which is not as popular as the first two methods. In this method a married women is inseminated with a mixture of her husband’s and a donor’s sperm.209

ii) In-vitro Fertilization

Though not as old as artificial insemination, in-vitro fertilization210 is also a well-established assisted reproductive technology. In-vitro Fertilization first caught the public eye in 1978 with the birth of Test Tube baby Louise Brown.211 Since the first child conceived through IVF was born in England, the process has gained widespread popularity. IVF relies more heavily upon science and laboratories as compared to artificial insemination.212 In-vitro fertilization was the first “out-of-womb” conception technique perfected by reproduction scientists.213 In-vitro fertilization is so named because the fertilization actually takes place in-vitro.

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210 Hereinafter referred to as IVF.
(literally, “in the glass”), usually in a laboratory test tube or Petri dish.

The first step in IVF is the collection, or harvesting of healthy ova from the woman’s ovaries. For this, egg production is stimulated through the use of fertility drugs, which cause the woman to produce a higher-than-normal number of eggs and also allow a certain amount of control over the timing of ovulation to facilitate the optimal scheduling of the retrieval procedure. The second step in IVF is the fertilization of the successfully retrieved eggs with the man’s sperm in a Petri dish. In some cases, particularly those in which sperm motility is a factor, doctors may use a more invasive technique called micro–injection, injecting the sperm directly into the eggs in order to facilitate fertilization.214 In the event of successful fertilization, the embryo is implanted into a woman’s uterus, with the hope that pregnancy will result.215 The IVF procedure is sought by couples who wish to have a child but cannot reproduce successfully by means of sexual intercourse. The problem may stem from a number of reasons, such as low sperm motility, failure to produce ova (eggs), physical damage to the fallopian tubes or uterus, or when a woman has blocked fallopian tubes or when the sperm and ovum are unable to fuse in the reproductive tract.216 In order to overcome these obstacles, it is necessary to fertilize the ova outside the woman’s body and subsequently implant the resulting embryo in her uterus.217

ii) Surrogacy

Surrogacy is yet another alternative for those who cannot procreate in the traditional manner or choose not to procreate in the traditional manner. Surrogacy involves a woman acting as a surrogate or as an incubator for bearing a child for another person or couple. A surrogate woman conceives by using an egg from another woman or by using her own donated egg and the sperm of a donor. Typically the

217 Supra n.214 at p.260.
surrogate is acting for a married couple but it is not limited to them and may include gay and lesbian couples or single men or women\textsuperscript{218}. The surrogate mother agrees to be artificially inseminated and to carry the resulting foetus to birth and then relinquish to the intended parents all rights and obligations over the child. Generally, the sperm is that of a married man whose wife is infertile. This procedure is somewhat analogous to artificial insemination donor in that the resulting child will be the biological offspring of one member of the infertile couple. The concept of surrogate motherhood is not new and has been practiced since ancient times. The \textit{Bible} records that Sarah, unable to bear a child, directed Abraham to her hand-maiden, Hagar, who later bore Abraham his son Ishmael\textsuperscript{219}. The practice of surrogacy has developed with the passage of time and in the present century it has become the most popular form of ART.

\textbf{iv) Gamete Intra-Fallopian Transfer}

The most recently developed non-coital reproductive method is Gamete Intra-fallopian Transfer\textsuperscript{220}. It involves directly injecting an unfertilized mixture of sperm and egg into the fallopian tubes of an infertile woman\textsuperscript{221}. In this procedure, a physician administers human reproductive hormones to the woman and, just prior to ovulation, removes the eggs. Unlike IVF, however, the sperm and egg are not incubated together but are placed into a small catheter for transfer. The physician, through a laparoscopic incision, completes this procedure by inserting the tip of the catheter into the fallopian tube and gently discharges its contents\textsuperscript{222}.

\textbf{v) Zygote Intra-Fallopian Transfer}

Zygote Intra-Fallopian Transfer\textsuperscript{223} is a combination of IVF and GIFT. Zygote Intrafallopian transfer works like in-vitro fertilization; however, the embryos are

\begin{itemize}
\item \textsuperscript{218} \textit{Supra} n. 207 at p. 111.
\item \textsuperscript{219} \textit{Supra} n. 204 at pp.1653-54.
\item \textsuperscript{220} Hereinafter referred to as GIFT.
\item \textsuperscript{221} See, Asch, Balmacaan, Ellsworth & Wong, “Preliminary Experiences with Gamete Intra-Fallopian Transfer (GIFT)”, 45 \textit{Fertility & Sterility} 366-370 (1986).
\item \textsuperscript{223} Hereinafter referred to as ZIFT.
\end{itemize}
transferred to the woman’s fallopian tubes instead of her uterus\textsuperscript{224}. The sperm and eggs are combined in the lab. Once fertilization takes place, they are placed in the woman’s fallopian tubes, where they will hopefully travel to the uterus\textsuperscript{225}. ZIFT has the highest success rate of all of the ART procedures. It has a live birth rate of about 29% per cycle\textsuperscript{226}.

\textbf{vi) Reproductive Cloning}

Ian Wilmut, Keith Campell and Others startled the world when they announced in February 1997 that they had cloned a lamb using a cell nucleus taken from an adult ewe’s udder\textsuperscript{227}. They also startled a generation of researchers who believed it to be impossible to create whole new organisms from single adult cells\textsuperscript{228}. The accepted wisdom had been that cells from adult animals could not be reprogrammed to make a whole new body\textsuperscript{229}. Since the announcement of the birth of the first sheep cloned from an adult cell in February 1997, there has been intense speculation about the possibility of human cloning\textsuperscript{230}. Cloning though successful in higher mammals has not yet developed into a reproductive alternative in human beings. However it may become possible in the near future. Reproduction in human beings is possible in normal situation by the fertilization of eggs and sperms. But in cloning, embryo is formed by the removal of the nucleus of an egg cell and replacing it by the nucleus of a somatic cell\textsuperscript{231}. The United States Presidents Commission on Bioethics defined cloning as, “the asexual production of a new human organism that is, all stages of development, genetically virtually identical to a currently existing or previously

\begin{footnotesize}
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\item\textsuperscript{225} See for more, Nicole Rank, “Barriers for Access to Assisted Reproductive Technologies by Lesbian Women: The Search for Parity Within the Healthcare System”, 10 Hous. J. Health L & Pol’y 115-46 (2009), at p.120.
\item\textsuperscript{227} See, Ian Wilmut, \textit{et al.}, “Viable Offspring Derived from Foetal and Adult Mammalian Cells”, 385 Nature 810-813 (1997).
\item\textsuperscript{229} \textit{Ibid}.
\item\textsuperscript{231} \textit{Supra} n. 5 at p. 124.
\end{itemize}
\end{footnotesize}
existing human being. It would be accomplished by introducing the nuclear material of a human somatic cell (donor) into an oocyte (egg) whose own nucleus has been removed or inactivated, yielding a product that has a human genetic constitution virtually identical to the donor of the somatic cell”\textsuperscript{232}. This process can be of two types, reproductive cloning and therapeutic cloning\textsuperscript{233}. Though the process is same, in reproductive cloning the aim is to produce a child and the cloned embryo is transplanted into the womb to develop\textsuperscript{234}.

Over the past several decades, millions of people have used new reproductive technologies in their quest for biologically related children. Although reproduction traditionally has been regarded as an aspect of marriage, single persons and gays and lesbians also have interests in having and rearing offspring even if they are not married or are not attracted to persons of the opposite sex\textsuperscript{235}. This increased use of ART has given rise to an important legal and human right question, i.e. whether the right to procreation includes the right to procreate with the help of ART’s.

2. 9 Right to Procreation and ART

Right to procreation is recognized universally as a fundamental human right. This right is guaranteed by various international, regional and national human rights instruments as well as by many constitutions in the world. The fact that right to procreation is recognized and accepted all over the world as a basic human right, gives rise to the question whether this right includes the right to use ART. The answer to this question however, depends upon the interpretation of the scope of right to procreation guaranteed by various human right documents as well as the approach of various legal systems in the world. It is pertinent to point out here that all these


\textsuperscript{233} Reproductive cloning is for the purpose of creating a life and therapeutic cloning is for medical or research purposes. In therapeutic cloning there is no intent to produce a child. The cloned embryo is created in order to produce cells that will be transplanted into someone who suffers from some kind of disability or condition. The cloned embryo may also be created for research purposes.

\textsuperscript{234} Supra n.148 at pp.290-91.

\textsuperscript{235} The Ethics Committee of the American Society for Reproductive Medicine American Society for Reproductive Medicine, “Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons”, Fertility and Sterility, Vol. 92, No. 4 (2009).
documents, however do not directly provide a right to procreation, but rather the right to procreation is made an important facet of right to marry and found family, right to privacy, right to health and right to life\textsuperscript{236}.

Procreation is a natural biological process and generally takes place without any technological intervention and only requires minimum medical assistance. But in case of infertile and socially infertile couples, the process of procreation to beget a child would not occur without the intervention of science and technology. For such category of people it is reasonable that the advancements in medical science are to be utilized for their benefit and therefore they must be allowed to use ART. John A. Roberts, argues that,

\[ \text{“if coital reproduction is protected, then we might reasonably expect the courts to protect the right of infertile persons to use non-coital means of reproduction such as artificial insemination (AI), in-vitro fertilization (IVF), and related techniques so as to combine their gametes for the purpose of begetting a child. Infertile couples who use these techniques are trying to achieve the same goal of having and rearing offspring that fertile couples achieve through coitus. Therefore there is no valid reason not to grant them the same presumptive freedom to achieve that goal which fertile persons have. The use of such techniques may however be subject to certain limitations if use of those techniques affects the best interests of other individuals, child and society\textsuperscript{237}.“} \]

Thus right to procreation includes a right to use ART. This gives rise to another closely related and important question regarding who is having the duty to provide ART and related services. An important point to be noted in the context of rights and

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\item \textit{Supra} n.78.
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The traditional writers observe that every legal system is made up of both rights and duties and that the two are reciprocal and interdependent. Rights are essentially those interests which have been legally recognized and protected. According to Roscoe Pound, legal rights are essentially interests recognized and administered by law. It may mean the legally recognized and delimited human wants, demands or some conceptions by which the recognized interests are given from in order to be secured by a legal order. Every right implies the active or passive forbearance by others of the wishes of the party having the right. The forbearance on the part of others is called a duty. Thus every right or duty involves a vinculum juris or a bond of legal obligation by which two or more persons are bound together. There can be no duty unless there is someone to whom it is due. Likewise there can be no right unless there is someone from whom it is claimed. According to Hohfeldian analysis of right and duty relationship, there is no right without a co-relative duty. Rights are expressions of our dignity and shared humanity. When an individual asserts a right, it creates a corresponding duty not to interfere with his right and possibly to assist him in certain ways for the effective enjoyment of those rights. This implies that if there is a right to procreation there is also a corresponding duty on part of the state, individuals and society to facilitate its enjoyment. This duty simply means that the state or other individuals and society must not interfere in the reasonable exercise of right to procreation. Rather the state is under an obligation to provide all medical facilities for the protection and reasonable exercise of this right.

Another point to be noted here is that rights are of two types: positive and negative. Right to procreation is a positive right obligating others to support a person’s attempts to become a parent. In this context the doctors have a major role to

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play in supporting the attempts of childless couples/individuals to become a parent.\textsuperscript{245} When a patient is trying unsuccessfully to conceive a child, then certainly the physician who is treating the patient has a duty to provide the best possible treatment for infertility\textsuperscript{246}.

The right to use ART is also justified on the grounds of reproductive autonomy of an individual\textsuperscript{247}. Reproductive autonomy includes within its ambit all ideas relating to reproduction such as whether or not to have children, when to have children, where, how, and with whom to have children. These decisions are profoundly important and intimate for individuals. In fact for most people reproductive decisions are central to how they wish to live their lives. The state should therefore, as far as possible, assist couples who need treatment or help to have children. The state is under an obligation to provide treatment for those suffering from infertility. The right to use ART in fact is a part of reproductive autonomy which is essential for the exercise of right to procreation. However this right does not mean right to a child but it means right to use ART and right to access to facilities so that one can try and have a child\textsuperscript{248}. It includes the freedom to manipulate egg, sperm, or embryo to achieve the desired offspring, similar to the freedom to impede implantation or abort a foetus with undesirable characteristics\textsuperscript{249}. It must be emphasized here that procreative rights are not absolute and therefore reasonable restrictions can be imposed for the welfare of the child and in the interests of the society. This right can be restricted and regulated to secure the due recognition of the rights and freedoms of others, to meet the just requirements of morality, public order and general welfare in a democratic society\textsuperscript{250}.

\textsuperscript{246} Andrew M. Courtwright and Mia Wechsler Doron, “Is Restricting Access to Assisted Reproductive Technology an Infringement of Reproductive Rights?”, Virtual Mentor, Vol. 9, No. 9, 635-640 (September, 2007).
\textsuperscript{248} Supra n. 148 at p. 284.
So, individuals and couples are not free to alter genetic material in a way that would cause serious harm to the offspring as well as to the society\textsuperscript{251}.

Right to reproduction was held as one of the basic civil rights of man by the US Supreme Court in \textit{Skinner v. State of Oklahoma}\textsuperscript{252}. The Court held that right to reproduce would be protected as a fundamental human right. In India, the High Court of Andhra Pradesh in the case of \textit{B.K. Parthasarthi v. Government of Andhra Pradesh}\textsuperscript{253} established a right to reproductive autonomy under Article 21 of the Indian Constitution. Recently, the Hon’ble Supreme Court of India in \textit{Suchita Srivastava & another v. Chandigarh Administration}\textsuperscript{254} has declared that, the word personal liberty under Article 21 of the Constitution of India also includes within its ambit a woman’s right to take reproductive decisions. Thus it can be seen that, the judicial trends are also inclined towards the protection of reproductive autonomy and use of ART.

From the above discussion it can be seen that the right to procreation includes within its ambit right to procreate with the help of ART. Different countries have also adopted their own legislations to suit to their need for regulating the use and access of ART. For example, in the United States, though there is no federal legislation dealing with access to ART, more than 33 states have adopted their own statutes to regulate the use of and access to ART\textsuperscript{255}. Only one state in US i.e. New Hampshire has explicitly restricted access to ART\textsuperscript{256}.

In Canada, the \textit{Assisted Human Reproduction Act}, 2004 explicitly recognizes the right to use ART by all sections of society. However reasonable restrictions can

\textsuperscript{251} See for more \textit{supra} n. 247.
\textsuperscript{252} 316 U.S. 535 (1942).
\textsuperscript{253} 1999 (5) A.L.T. 715.
\textsuperscript{256} Under New Hampshire law, in-vitro fertilization and pre-embryo transfer are available only to a woman who is aged 21 years or more, and who has been medically evaluated and received counselling. In the remaining jurisdictions, none of the relevant statutes expressly prohibits access to ART by single women. See N.H. Rev. Stat. Ann. § 168-b: 13. See for more “Surrogacy: In-vitro Fertilization and Pre-embryo Transfer”, available at <http://www.gencourt.state.nh.us/rsa/html/XII/168-B/168-B-13.htm> Visited on 13.3.2011.
be imposed on this right for the welfare of the resulting child. In United Kingdom, utmost importance is given to the welfare of the child who may be born as a result of the treatment as well as need of that child for a father. The Human Fertilization and Embryology Act, 1990 specifically provides that, “A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth. It reflects the traditional view that family comprises of father, mother and the child and it is better for the child to be born in such family.

In Australia, majority of the states adhere to ethical guidelines given by the National Health and Medical Research Council (NHMRC) and the Fertility Society of Australia. In Western Australia, the Human Reproductive Technology Act, 1991 contains various provisions regarding access to ART. The Act however emphasizes that ART procedures are carried out only after proper assessment and counseling of the persons and only for the benefit of persons eligible under the Act. More importantly, the welfare of the child to be born as a result of the procedure is to be taken into account. In South Australia, the Reproductive Technology (Clinical Practices) Act, 1988, specifically states that ART procedures may be provided by the licensees only for the benefit of married couples in circumstances where the husband or wife or both appeared to be infertile or there appears to be a risk of transmission of genetic defect to a child if conceived naturally.

In India, there is no direct and specific legislation dealing with ART. The National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, adopted by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences, India in 2005 is the only guideline available for

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260 Ibid.
regulating ART practices in the country\textsuperscript{262}. Recently the Draft ART (Regulation) Bill, 2008 was replaced by a draft of the Assisted Reproductive Technologies (Regulation) Bill, 2010 prepared by ICMR and submitted to Government of India. This Bill is still under the consideration of parliament. Both the ICMR Guidelines and the Draft ART Bill allow the use of ART by an individual for begetting a child.

It is to be noted that the specific legislations enacted by different countries to regulate ART’s are not uniform in all the countries because they are made as per the social, cultural, religious, economic and political approach of that country. It is submitted that, in the contemporary world where the traditional norms of family and parenting is undergoing a drastic change and emphasis is given more to individual liberty and freedom, the right to use ART and access to ART must not be prohibited. At the same time, the right to use ART can be regulated in order to protect the best interests and welfare of child, as well as for preventing any harm to the individuals and to the society. Though ART offers an attractive option to infertile couples or any other individuals who wish to have a child, it also raises various legal and human rights issues which need to be addressed.

2.10 Conclusion

From the above discussion it can be concluded that there is a fundamental basic human right to procreation. The right to procreation is one of the most important and basic rights of human beings because the desire for a child is very strong and innate in them as compared to other living creatures. The significance of a child for the family and for the society originates not only due to the biological need and desire of human beings but is also due to the various religious and cultural traditions that they follow. Almost all religions of the world emphasize the need and importance of a child for the family and the ancient scriptures are replete with instances which highlight the significance of a child.

In countries where the national legislations do not expressly mention the right to procreation, it can be implied from the basic human rights to life, liberty, privacy,

\textsuperscript{262} Available at <http://www.icmr.nic.in/art/Prilim_Pages.pdf> Visited on 13.3.2011.
bodily integrity and security. It can be said that right to procreation is not an isolated single right but is a bundle of rights composed of eight basic rights which are the constituent elements of right to reproduction without which the right to reproduction is meaningless. These eight constituent elements are: (i) the right to marry and found a family; (ii) the right to decide the number and spacing of children and to have the information to do so; (iii) the right to modify conditions that discriminate against women; (iv) the right to be free from sexual assault and exploitation; (v) the right to privacy; (vi) the right to life, liberty and security; (vii) the right to enjoy scientific progress and to consent to experimentation; (viii) and the right to be free from gender discrimination.

However, due to the various reasons leading to infertility, individuals are unable to enjoy this very natural right to have a child. This involuntary childlessness is a barrier to the enjoyment of right to procreation and it has a very significant impact on individuals in their personal, familial as well as social life. To solve the problem of infertility and childlessness, various societies practiced different methods. It is to be noted that medical technology has come to the aid of such childless couples/individuals and various methods have been developed to overcome childlessness and to help them to have a child. These methods are collectively known as Assisted Human Reproductive Technologies, i.e. ART’s. Among all the methods of ART, surrogacy is the most controversial due to its special nature and involvement of not only the individuals who wish to have a child but also other individuals in the procreation process. It requires a woman to act as surrogate and carry the baby for full term and after its birth to hand over the baby to the parents who initiate the process.263 However, surrogacy raises various contentious issues relating to the stakeholders involved in surrogacy. Hence there is a need to examine the practice of surrogacy from a legal and human rights perspective. The next chapter focuses on surrogacy and the various issues surrounding it.