CHAPTER-III

REPRODUCTIVE RIGHTS: WITH REFERENCE TO RIGHT TO CONCEPTION AND FOUND A FAMILY

3.1 Introduction

The discussion about reproductive freedom primarily revolves around the institution of family. Family is an important and basic part of society, and institution of marriage is seen as strengthening family values. Every individual, therefore, has a right to choose a partner of his/her choice and lead a happy married life. Since the family is recognized to be the most natural and fundamental unit of society, therefore the right of all to marry and found a family is protected in human rights law as well. Human rights law upholds the positive right of all individuals to marry and found a family. It safeguards the ideal of equal and consenting marriage and tries to guard against abuses which undermine these principles. Human rights law does not dictate the types of family unit that are deemed acceptable in the world today as there are many diverse forms of families and marriages.¹

The institution of marriage is an oldest institution and provides a foundation on which whole superstructure of civilization and prosperity is built.² Marriage is one of the deepest and most complex webs of human relations. Radha Krishnan (1956) rightly remarks, “Marriage is not a mere convention but an implicit condition of human society. It is an adjustment between the biological purposes of nature and the sociological purposes of man.”³

Marriage is both ubiquitous and central. All across our country, in every region, every social class, every race and ethnicity, every religion or non-religion, people get married.⁴ A marriage is a legally recognized union

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between two people, generally a man and a woman in which they are united sexually, cooperate economically, and may give birth to, adopt, or rear children. The union is assumed to be permanent (although it may be dissolved by separation or divorce).\(^5\)

But in the opinion of the researcher, the definition of marriage is not universal and it varies from cultures to culture and from society to society as in many societies marriage can be performed only between two persons of the opposite sex, but some societies do legalize polygamous marriages, and some recognize same-sex marriages too. But in today's scenario, the concept of marriage has changed and a new concept has emerged which is an alternative to marriage i.e. live-in relationships. Live-in-relationship is an arrangement in which two persons live together in an emotionally or sexually intimate relationship without getting married.

### 3.2 The Right to Consent to Marriage and to Equality in Marriage

The right to marry and to establish a family has been recognized as a basic human right under international law. Article 16(1) of the Universal Declaration of Human Rights provides as under:-

1. 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. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.\(^6\)

Right of motherhood is included in the human right of founding a family under Article 16 of the Universal Declaration of Human Right. Article 10(1) of the International Covenant on Economic, Social and Cultural Rights stresses the importance of states ensuring protection and assistance for the

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‘establishment’ of the family and for ‘the care and education of dependent children’. It provides that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. ‘Marriage must be entered into with the free consent of the intending spouses.’ Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be awarded paid leave or leave with adequate social security benefits.7

Article 23(2) of the International Covenant on Civil and Political Rights states that the right of men and women of marriageable age to marry and to found a family shall be recognized, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights reiterates Article 23(3) of the Covenant on Civil Rights, whereby “.....marriage must be entered into with the free consent of the intending spouses.” Wording similar to that of Article 23(1) of the Political Covenant is found in Article 18 of the African Charter, requiring protection of the family. The protection provided under Article 23(1) is same as provided under Article 17(1) of the American Convention. Article 23(2) is slightly amended and made part of Article 17(2) of the American Convention. It states, “The right of men and women of marriageable age to marry and to raise a family shall be recognized......” The European Convention on Human Rights (ECHR) sets out a list of fundamental rights and freedoms which are believed to be common to all people. Article 12 defines an individuals’ right to marry. The ECHR states that all men and women, who have reached the age at which they can legally marry, have the right to get married and to start a family. It is pertinent to mention here that the persons who are entitled to this right should be men and women. Therefore, the marriages between the children and the marriages between the persons of the same sex are excluded from the domain of Article 12.8

8 Yuval Merin, “The Right to family Life and Civil marriage under International Law and its implementation in the State of Israel” available at: http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1077...icl cr (visited on November 6, 2011).
Whereas, Article 14 stipulates that: “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.” The function of Article 14 is ancillary: it prohibits discrimination only with regard to the rights set out in the Convention, but does not prohibit “discrimination” in general. Note also that ‘sexual orientation’ is not mentioned as one of the ‘suspicious’ grounds for discrimination. If “marriage” in Article 12 means a marriage between persons of the opposite sex, Article 14 ensures that the right to contract this kind of marriage is not withheld arbitrarily on any of the grounds mentioned. Obviously, if in a country the right to ‘marry’ a person of the same sex is given to no one; there is no discrimination if homosexuals do not enjoy such a right.9

CEDAW stresses the importance of equal rights within the family. Article 16 provides;

1. State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

a) The same right to enter into marriage;

b) The same right to choose a spouse and to enter into marriage only with their free and full consent;

c) The same rights and responsibilities during marriage and at its dissolution...

2. The betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of the marriage

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in an official register compulsory.\textsuperscript{10}

The right to marry and found a family is not always absolute, and may be circumscribed by, for example, laws against incestuous unions and particularly on legal minimum age of marriage. Laws setting a legal minimum age of marriage, if implemented, can help to ensure that young women are of sufficient age and maturity to be able to voluntarily consent to marriage, and to avoid the health risks of premature childbearing and the mental health consequences of early marriages.\textsuperscript{11}

Article 16 of the Universal Declaration of Human Rights directly associates the right to marry with the right to “found a family”. This link reflects the prevailing morality at the time of its adoption, but the continued association of marriage with the right to found a family has led to practices which are potentially damaging the reproductive health. For example, many family planning services are available only to married couples. In a number of settings, clinics insist on spousal consent before giving women access to methods of fertility regulation. Such restrictions limit women's choices in ways which are potentially damaging to reproductive health.\textsuperscript{12} The CEDAW does qualify the link between marriage and the family, by including non-discrimination on the basis of marital status in the definition of discrimination.\textsuperscript{13} The prohibition of discrimination “irrespective of marital status” permits a separation of the right to marry from the right to found a family.\textsuperscript{14}

3.3 Freedom of Women to Plan a Family

A happy and contended family is the foundation of a happy society and a strong country. The beginning of family formation may be either marriage

\textsuperscript{11} \textit{Ibid} at 180.
\textsuperscript{13} Article 1 of the UN Convention on the Elimination of All Forms of Discrimination against Women G.A. Res. 34/180 U.N. GAOR, 34\textsuperscript{th} Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980) states: Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
\textsuperscript{14} \textit{Supra} note 12 at 5.
or parenthood or both. Since procreation is fundamental to the very existence and survival of mankind. Therefore, questions relating to human reproduction are of vital importance and involve both the family unit and society as a whole. Since time immemorial the human being has striven to protect his most elementary instinct to procreate. In primitive societies and subsequent successive civilizations, these aspirations have been gradually transformed into rights and obligations, embodied and protected by customary, religious and later on legal rules.  

While there are indeed several important reproductive rights that have been articulated, distinguishing these reproductive rights from a right to procreate is both conceptually possible and necessary. Procreative rights literally means right to have children, as distinguished from reproductive rights that concern the timing and manner in which one reproduces. The area of procreative rights in itself is in need of greater conceptual clarity, as it has been asserted to include a right to make procreative decisions without governmental restriction including a right to procreate without discrimination by doctors, an equal right of infertile people to procreate with a right to be assisted in procreating; a right to engage in reproductive contracts or multiple-party interventions; and a right to have procreative assistance funded.

The right to make decisions about procreation is a basic human right, because it is essential to a contemporary concept of the free individual, and if a right is arguably necessary to the freedom of an individual, i.e. to have the power to direct his own life, it is to be considered fundamental. Nothing would advance women's welfare more than respecting their reproductive autonomy. Such autonomy must encompass and protect the personal intimacies of marriage, motherhood, procreation, and child rearing.

The contemporary understanding of reproductive freedom in

international law considers it as a composite right which comprises the right to marry and to establish a family, the right to family planning, the right to reproductive health, the right to equality and non-discrimination, the right to information and education, to physical integrity and to private and family life. These core elements are separate human rights on their own and they are to be found in different international instruments. Nevertheless, all of them interact with each other in a dynamic way, thereby strengthening women's reproductive freedom within the realm of international human rights law.\textsuperscript{19}

3.4 \textbf{Right to Decide the Number and Spacing of Children}

Article 16(1) of CEDAW directs the state parties to ensure, on the basis of equality of men and women the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights. Similarly Principle 8 of ICPD Programme of Action also directs the state parties that all the couples and the individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so. Similarly the Fourth World Conference on Women reaffirms that reproductive rights rest on the recognition of basic rights 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. Accordingly, women may in principle protect their health in reproduction by determining whether and when to plan pregnancy.\textsuperscript{20}

3.5 \textbf{Right to adopt Alternatives to Conventional Method of Conception}

From eight planet theory to life in Mars, from palmtops to sugar free potatoes and from white revolution to fertility revolution; science and technology is influencing every domain of human existence. The most controversial amongst these, ethically as well as legally, is the matter of fertility revolution.\textsuperscript{21} Before the advent of modern assisted conception techniques, the only way of human reproduction was by means of sexual

\textsuperscript{19} \textit{Supra} note 14 at 167.
\textsuperscript{20} \textit{Supra} note 10 at 176.
\textsuperscript{21} Rectu and Basabdutta, “Surrogate Birth” 96 \textit{AIR} 108 (2009).
intercourse, and the couples had to be prepared for the luck of the natural lottery. Now powerful new technologies are changing the reproductive landscape and challenging basic notions about procreation, parenthood, family and children.\textsuperscript{22} The decision to have or not to have children is, at some important level, no longer a matter of God or nature, but has been made subject to human will and technical expertise. It has become a matter of choice whether persons reproduce now or later, whether they overcome infertility, whether their children have certain genetic characteristics, or whether they use their reproductive capacity to produce tissue for transplant or embryos and foetuses for research.\textsuperscript{23} Even a Federal District Court in \textit{Lifchez v. Hartigan}\textsuperscript{24} held that the constitutionally protected right to make procreative decisions include the right of an infertile couple to use certain ARTs. The court opined as under:

It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to medical procedure that may bring about rather than prevent pregnancy.

These developments excite both huzzas of approval and homilies of despair. On the one hand, they are eagerly sought by persons who suffer from infertility, who risk offspring with genetic disease, or who wish greater control over the timing of children. But others decry their use as unnatural interventions into reproduction, and fear their effect on children, families, women and society.\textsuperscript{25}

Mankind’s newly acquired ability to manipulate the genes such as through gene splicing, as also the phenomenal rise in his capacity to temper with the nature’s process of reproduction and selection through normal sexual mating between two members of the opposite sex, i.e. a man and a woman, brought about by the successes gained by the physicians and the scientists in  

\textsuperscript{23} \textit{Ibid} at 5.
\textsuperscript{24} 735 F Supp 1361 (N.D. III 1990).
\textsuperscript{25} \textit{Supra} note 22.
diverse fields, such as amniocentesis and abortion, in vitro fertilization, semen-banking and artificial insemination, sex-choice techniques, cloning or sexual reproduction and the like.  

These genetic advances brought the radical transformations and have launched us into a bio-society. In such a society biological advances often dictate our life on their own terms, affecting the basic human rights and traditional social structure. Modern biotechnological advances relating to human genome have posed various new challenges before law, giving rise to a plethora of ethical, legal, social and cultural issues with far reaching implications for humanity. These have a great impact on basic human rights e.g. right to life, right to privacy, right to dignity, individual autonomy, procreative liberty.

3.6 Assisted Reproduction Techniques: For Relieving Infertility

The last two decades have witnessed a rapid increase in the number of technologies that assist reproduction, increasing the chances of conception and carrying a pregnancy to term. Assisted reproduction technologies have been proved to be a blessing for many infertile couples and helped them to have children that they would not have otherwise had. In the past, the childless couples resorted to adoption to achieve their parenthood dreams. This notion is now quite out dated as there are far more options for infertile couples as well as singles and homosexuals who want children.  

While issues concerning contraception and abortion have been with us for many years, the most visible aspect of the reproductive revolution is the treatments of infertility. In 1980 the field of assisted reproduction was unnamed and largely unknown. Today, it is a billion dollar industry and a main contributor to the revolution is the control of fertility. Infertility may result from disease, but it is not necessarily a disease. In fact, in many cases of infertility, no evidence of any disease may be found. Infertility per se does

30 Supra note 22 at 8.
not threaten life or endanger physical health. With the population problem at hand, is it appropriate that we continue to worry about the problem of infertility? The answer is that we should worry even more. The adoption of small family norm, through voluntary infertility, which is a desired target at country and at global levels, makes the issue of involuntary fertility more pressing. If couples are urged to postpone and too widely space pregnancies, it is imperative that they should be helped to achieve a pregnancy when they so decide, in the limited time they have available.31

For a gender equality perspective, treatment of infertility is even more pressing, because of its differential impact on the lives of women. As a consequence, the view that women's reproductive health includes services for treatment of infertility has gained greater acceptance today.32 Thus, some of the new technologies widen the choice for women and they have the potential to empower women. Much of this is because parallel to technical development the number and combination of mother roles is on the increase and it allows several alternative choices, i.e. when and under what conditions to become a mother. Instead of being subject to biological destiny, reproductive capacity is under such circumstances considered as a unique source of power.33

3.7 Right to Access Assisted Reproductive Technologies (ART)

Gift of child is the most precious one for a couple. Those who are deprived of this wonderful gift always feel inferior and frustrated. There are thousands of couples across the world facing humiliation because of not having any child. Assisted reproductive technologies such as artificial insemination, in vitro fertilization, surrogate motherhood have fulfilled the dreams of many infertile couples as well as singles and homosexual who wanted to have children.34

The concept of artificial insemination is not new and it was well known in the ancient world. There are some instances of it for example, in the Mahabharata, Gandhari, wife of king Dhritarashtra, conceived but the

31 Supra note 11 at 305-306.
33 Supra note 15 at 191.
34 Supra note 27 at 74.
pregnancy went on for nearly two years; after which she delivered a mass (mole). Bhagwan Vyasa found that there were 101 cells that were normal in the mass. These cells were put in a nutrient medium and were grown *in vitro* till full term. Of these, 100 developed into male children (Duryodhana, Duhshasana and other Kauravas) and one as a female child (Duhsheela).\(^{35}\)

There are other well-quoted examples that refer to not only IVF but also to the idea that a male can produce a child without the help of female. Sage Gautama produced two children from his own semen—a son Kripa and daughter Kripi, who were both test tube babies. Likewise, Sage Bharadwaj produced Drona, later to be the teacher of Pandavas and Kauravas.\(^{36}\)

Procedures collectively referred to as medically assisted reproduction range from simple artificial insemination, by husband or donor, to technologically sophisticated intra-cytoplasmic sperm injection (ICSI) and surrogate motherhood.\(^{37}\) In the recent past notable advance in the Biotechnology has been the possibility materializing offspring in subjects who are infertile in their normal conjugal life. It has created some legal questions. The process required the induction of ovulation by hormones, removal of egg, fertilization, in vitro husband can be employed or what is not uncommon is a donor unrelated to the woman for fertilization. The fertilized egg can be transferred either to the woman who contributed the egg or with equal facility to a foster or surrogate mother who may have no legal connection with either the mother or the father but who offers to be a paid volunteer to carry the gestation over 9 months and give rise to the birth of the child. Even the test-tube baby aspect-poses new socio-legal dimensions.\(^{38}\)

The world's first test-tube baby Louise Brown, who was born in 1978 in the United Kingdom, brought a revolution in the field of fertility. However India does not lag behind and its first “scientifically documented” IVF baby was born on August 6, 1986. Research and promotion of ARTs was undertaken in India as a government initiative, but it soon fled into the private

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\(^{35}\) Pratibha Ganesh Chavan, “Psychological and Legal Aspects of Surrogate Motherhood” 95 *AIR* 103 (2008).

\(^{36}\) Ibid.

\(^{37}\) Supra note 10 at 308.

\(^{38}\) Supra note 26 at 8-9.
health sector and has since then flourished as a private enterprise. The public sector eventually discontinued the programme, but the ART industry in India has continued to expand steadily ever since its introduction. Assisted procreation involves many different techniques which are being discussed as under:-.

3.7.1 Artificial Insemination

When the semen is deposited in the vagina, the cervical canal or the uterus by artificial means, such as instruments, this method of bringing about pregnancy in an otherwise healthy woman who is unable to conceive a child through sexual intercourse with her husband, is called artificial insemination (AI).

The indicators for AI are:

a) incurable defects in the husband’s semen, rendering him incapable for procreation;

b) mental disease in the husband;

c) hereditary disease in the husband of such a kind as to contraindicate paternity; and

d) rhesus incompatibility resulting in failure of children to survive because of erythoblastosis and the husband is homozygous Rhesus positive. Where the male genetic material of the husband is introduced artificially into the women's body, it is known as “Artificial Insemination Homologous” or Artificial Insemination Husband (AIH). Where the genetic material is obtained from male other than the woman's husband, it is called “Artificial Insemination Donor” (AID).

In case of AID, the donor should be unknown to both the woman and her husband, and conversely, the donor should not know either of them and

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41 *Supra* note 27 at 74.
should not know the result of insemination. The physician's involvement in AID consists in counseling the woman and her husband, in selecting the donors, and in carrying out the inseminations. It is also essential that both husband and wife should know about this and give their full consent in writing to the doctor.\textsuperscript{42}

3.7.1.1 Issues regarding the Anonymity of Gamete Donor

One of the most problematic human rights aspects relating to AID is concerned with the anonymity of gamete donor. At the international level, majority of countries endorse anonymous gamete donation and some countries such as France, Denmark and Norway do not allow offspring any information. In England, the Human Fertilization and Embryology Act, 1990 stipulates that gamete donation should be anonymous; the identity of the donor cannot be given to either the donor offspring or the couple receiving the gametes. There is, however, in recent years a discernible trend towards allowing the child access to identifying information about its gamete donor. The first country to remove the anonymity of gamete donor was Sweden, allowing the child, when sufficiently mature, to find out the identity of sperm donor. Austria also allows the child to gain identifying information. In the US, there is no legislation, at either federal or state level, that either prohibits or enforces anonymous gamete donation. The matter is regulated by non-legally binding professional guidelines, which recommend the anonymity of gamete donors.\textsuperscript{43}

In India, the Ministry of Health & Family Welfare and the Indian Council of Medical Research drafted the Assisted Reproductive Technologies (Regulation) Bill - 2010. The Bill stipulates that information about clients, donors and surrogate mothers should be kept confidential and that information about assisted reproductive technology treatment shall not be disclosed to anyone other than a central database to be maintained by the Department of Health Research, except with the consent of the person or person to whom the information relates, or in a medical emergency at the request of the person or persons or the closest available relative of such person or persons to whom

\textsuperscript{42} Supra note 40 at 860.
the information relates, or by an order of a court of competent jurisdiction.\textsuperscript{44}

3.7.2 In Vitro Fertilization (IVF)

In in-vitro fertilization, the eggs are surgically removed from the woman, fertilized with the available sperms in a dish and the embryo replaced into the womb of the woman who completes the carriage till delivery. Like artificial insemination, this may be done either from the germinative cells of a husband and wife or from fertilization of the woman's ovum from donor semen. When the donor semen is used, the same medico-legal problems will arise as with AID.\textsuperscript{45}

3.7.3 Embryo Transfer (ET) \textsuperscript{46}

In ET, the embryo created from the egg and sperm is transferred into the carrier’s womb. Carrier may or may not be the originator of the egg.

The embryos can be created by the following methods:

a) The extraction of ova from a woman; the impregnation of it within a laboratory by her lawful husband's sperm and the return of the fertile ovum to the mother.

b) Process is similar as in (a) above but the sperm is provided by a male other than the husband.

c) The ovum is extracted from a third party, and after fertilization by husband’s sperm, is introduced into his wife's body in order that she may in due course produce a child.

d) Third parties provide both the ovum and the sperm which is then inserted into the potential mother's womb.

e) The fertilized ovum of the lawful husband and wife can be introduced into the womb of a third party-surrogate mother ('hired womb').

3.7.4 Fertility Drug Therapy

While fertility drug therapy is a significant part of the IVF process, it can be used without the invasive fertilization procedure of harvesting and

\textsuperscript{44} The Assisted Reproductive Technologies (Regulation) Bill-2010.
\textsuperscript{45} See Supra note 40 at 869.
\textsuperscript{46} Ibid.
manually inseminating eggs or ova. Fertility drugs may be used in conjunction with either natural conception or artificial insemination. Drug therapy provides ovulation induction and ovulation hyper stimulation, both of which stimulate and increase the production of eggs or ova that can be fertilized. By this therapy both the chances of conception as well as the number of embryos which are fertilized is also increased. 47

Through drug therapy, one may choose to increase the probability of pregnancy when experiencing difficulty conceiving or when in a stage of infertility. On the other hand, drug therapy may be used to satisfy a desire for the conception of twins, triplets, or a higher order of multiples in one pregnancy. 48 As seen with IVF, fertility drug therapy poses serious maternal and foetal health risks apparent with multiples pregnancy; therefore, the public policy concerns related to intentionally induced multiple or high-order multiples pregnancies are also present with fertility drug therapy. 49

3.7.5 In-Vitro Fertilization- Embryo Transfer (IVF-ET)

In this technique fertilization of ovum by sperm is conducted outside the female body. It is used in the condition where there is the failure of conception due to the blocking of fallopian tubes. It consists of external fertilization and the subsequent transfer of fertilized egg to women’s uterus. 50

3.7.6 Gamete Intra-Fallopian Transfer (GIFT)

It is an improvement of the previous one. In this, both the extracted ovum and sperm are injected directly into the woman’s fallopian tubes for fertilization. Other techniques include direct injection of single sperm into an egg, ultra sound direct egg retrieval (TUDOR), improved techniques of ovulation induction, embryo culture and embryo transfer. 51

49 Mariama A. Jefferson, “Reproductive Choice: The Reproductive Choice Debate must include more than Abortion” 4 Charleston L. Rev. 800 (2009-2010).
51 Ibid.
3.7.7 Surrogate Motherhood

One issue, which is closely related to that of alternative methods of procreation and which at the same time is an especially controversial social innovation, is surrogate motherhood. Surrogacy is a reproductive alternative, which aims at overcoming involuntary fertility.\(^5^2\)

3.7.7.1 Meaning of Surrogacy

The word, 'surrogate' has its origin in Latin 'surrogatus', which means a substitute, that is, a person appointed to act in the place of another. According to the Black’s Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. The New Encyclopaedia Britannica defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual way.\(^5^3\) Under a Draft Assisted Reproductive Technology Bill, 2010, surrogacy has been defined as “an arrangement whereby a woman agrees to a pregnancy achieved through assisted reproductive technology, in which, neither of the gametes belongs to her or her husband, with the intention to carry it to term and hand over the child to the person or persons, for whom she is acting as a surrogate.”\(^5^4\)

There are number of feminists, who are in favour of surrogacy arrangements. The argument put forward by them, is that since women may decide on whether to have an abortion or not, they should also be allowed to offer their body for surrogacy if they want to do so. They, furthermore, claim that surrogacy as a reproductive alternative should be included in the right to found a family and to family planning. It has been maintained that the greatest gift a woman can give to another woman is a child. Thus, surrogacy is seen as an appreciation of pregnancy.\(^5^5\)

Despite controversial and ethical issues arising out of it, surrogacy has


\(^{53}\) Law Commission of India, Report No. 228, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy, August, 2009, para 1.3 & 1.4.

\(^{54}\) Section 2(aa), Draft Assisted Reproductive Technology (Regulation) Bill, 2010.

\(^{55}\) See Supra note 15 at 209.
been gaining popularity all over the world, especially in the west where adoption is not an easy option. Research has stated that one in six couples have problems with infertility.\textsuperscript{56} It is about the couples where the woman has undergone a hysterectomy or suffered multiple miscarriages or born without a womb where surrogacy comes to the rescue.\textsuperscript{57} The concept of ‘rent a uterus’ in fact may be readily acceptable in the more analytical frame of the mind with the argument “at least the baby is made with our gametes, even though nourished in a rented body.”\textsuperscript{58}

3.7.7.2 Instances of Surrogate Motherhood in the Ancient World

Surrogacy is a method which is not exclusively dependent on advanced technology. It was known and practiced in ancient times and there are plenty of examples throughout our history in regard to different types of surrogate motherhood. For instance, the seventh pregnancy of Devaki, by the will of the Lord, the embryo was transferred to the womb of Rohini, the first wife of Vasudev to prevent the baby from being killed by Kansa.\textsuperscript{59} Another example of surrogacy is that of Sarah, the wife of Abraham in the Old Testament of Holy Bible. Sarah could not have children in the beginning. She gave the handmaid Hager to Abraham to produce them a child. The method used was copulation. The outcome in this arrangement did not prove to be a productive one and ended in disaster. In this scenario the spouse became jealous, the surrogate became proud and refused to give up the identity of the child and consequently the spouse had both her and her child ousted.\textsuperscript{60}

3.7.7.3 Types of Surrogacy\textsuperscript{61}

Surrogacy is of two types:

1. IVF/Gestational surrogacy
2. Traditional/Natural surrogacy

\textsuperscript{56} Supra note 29.
\textsuperscript{58} Supra note 35.
\textsuperscript{59} Ibid.
\textsuperscript{60} Grayee P-Storey, “Ethical Problems Surrounding Surrogate Motherhood” available at: http://www.yale.edu/ynhti/curriculum/units.
3.7.7.3.1 IVF/Gestational Surrogacy

This is the more common form of surrogacy. In this procedure, a woman carries a pregnancy created by the egg and sperm of the genetic couple. The egg of the wife is fertilized in vitro by the husband’s sperms by IVF/ICSI procedure and the embryo is transferred into the surrogate’s uterus. So while the surrogate carries the pregnancy for nine months, the child is not genetically linked to the surrogate.

3.7.7.3.2 Traditional/Natural Surrogacy

The traditional type of surrogacy involves the surrogate mother being (AI) artificially inseminated with the sperm of the intended father or sperm from a donor when the sperm count is low. In either case the surrogate’s own egg will be used. Genetically the surrogate becomes the mother of the resulting child.

3.7.7.4 When Surrogacy may be advised

The circumstances under which the two different types of surrogacies are suggested depend according the range of factors.

3.7.7.4.1 IVF Surrogacy

1. Primarily, IVF surrogacy is indicated in women whose ovaries are producing eggs but do not have a uterus. For example:
   a) Congenital absence of uterus (Mullerian agenesis).
   b) Surgical removal of the uterus (hysterectomy) due to cancer, severe haemorrhage during a Caesarean section or a ruptured uterus.

2. A woman whose uterus is malformed (unicornuate uterus, T shaped uterus, bicornuate uterus with rudimentary horn) or damaged uterus (T.B of the endometrium, severe Asherman’s Syndrome) or at high risk of rupture, (previous uterine surgeries for rupture uterus or fibroid uterus) and is unable to carry pregnancy to term can also be recommended IVF surrogacy.

3. Women who have repeated miscarriages or have repeated failed IVF cycles may be advised IVF surrogacy in view of unexplained factors
which could be responsible for failed implantation and early pregnancy wastage.

4. Women who suffer from medical problems like diabetes, cardiovascular disorders, or kidney diseases like chronic nephritis. The long term health prospect for such women is good, but pregnancy could be life threatening.

5. Woman with Rh incompatibility.

3.7.7.4.2 Traditional Surrogacy

1. Women who have no functioning ovaries due to premature ovarian failure. Here egg donation can also be an option.

2. A woman who is at a risk of passing a genetic disease to her offspring may also opt for traditional surrogacy.62

3.7.7.5 International Position

There is plethora of views regarding the issue of surrogate birth in various countries. It is rather a tumultuous point of law as there are only a handful of nations recognizing it and there is also a lack of uniformity in the principles being followed in these nations with respect to the phenomenon of surrogate birth.63

On this issue the position in Japan is that the mother who gives birth to the child is the legal mother and the intending parents need to adopt the child to gain the legal status of being parents. In USA different state legislations have made different laws regarding the issue of surrogate birth. In Arizona, New York, North Dakota and Utah, the legislatures have taken a blanket approach, deeming all surrogacy contracts to be void and unenforceable. Kentucky, Louisiana, Nebraska, and Washington, on the other hand, have taken a less restrictive approach, passing legislation that voids only those surrogacy contracts that provide for compensation to that surrogate. In contrast Florida, New Hampshire, and Virginia have adopted the minority approach by making them legal and enforceable but they prohibit commercial

62 Ibid.
63 Supra note 21 at 109.
surrogacy, with an exception of expenses incurred as a result of pregnancy and childbirth. They also allow the surrogate an opportunity to rescind the contract. Surrogacy legislation in New Hampshire requires judicial preauthorization of all surrogacy contracts subject to three conditions viz. informed consent by parties, completion of psychological counseling and evaluation, absence of unconscionable terms in the contract and orientation towards best interests of the child.  

On this point, various Supreme Courts of these states have made different interpretations regarding surrogacy. The California Supreme Court, in the case of Johnson v. Calvert held that the gestational surrogate had no parental rights to a child born to her, as a gestational surrogacy contract was legal and enforceable. In this case a black woman was hired to bear a child for a woman who was unable to carry a child to term. The egg of the genetic mother was combined with the sperm of the genetic father. The resulting zygote was then placed in the womb of Anna Johnson, the black surrogate. After the birth of the child, Johnson refused to relinquish her paternal rights. The court eventually granted custody to the genetic parents; the surrogate mother was denied even visitation rights. In Re Baby M , the New Jersey Superior Court found that no state interest existed into surrogacy contracts. Further, the court found that a surrogate mother had the "constitutionally protected right to perform services by voluntarily entering into surrogacy contracts. Under this analysis, any legislation placing a complete ban on surrogacy contracts would be unconstitutional because it would violate an individual’s protected right to procreate and thus, the individual’s right to privacy.”

In Smith v. Jones , the court ruled that surrogacy constituted an exception to the presumptions of biology and paternity. The surrogate was considered, in effect, “human incubator” and the judge recognized no contribution to the development of the child other than providing the

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65 (1993) 5 Cal. 4th 84.
gestational environment for the child's physical development.\textsuperscript{68}

Further in Australia, traditionally the birth mother, i.e. the biological mother and her husband, are treated as the legal parents, but the legal presumptions are contradicted due to fertility regulation. The Capital Territory has the most liberal surrogacy laws among all Australian states. Amendments in legislation have enabled the intending parents to be the legal parents\textsuperscript{69} if at least one of the intending parents is the child's genetic parent.\textsuperscript{70} Whereas in Queensland both commercial and altruistic surrogacy agreements are invalid.\textsuperscript{71}

3.7.7.5.1 Legality of Surrogacy in other Countries\textsuperscript{72}

1. United Kingdom- Commercial Surrogacy arrangements are illegal in United Kingdoms. It is illegal to pay more than the expenses for a surrogacy. But Section 30 of the Human fertilization and Embryology Act, 1990 the court can make parental orders similar to that of adoption.

2. Australia- The surrogate mother is deemed by the law to be the legal mother of the child and surrogacy agreement relinquishing the child to the others is void.

3. France- Any surrogacy arrangement either commercial or altruistic is illegal.

4. Israel- Gestational surrogacy under Embryo carrying agreements law is legal. The state controls the surrogacy by approving the contract directly.

5. Japan- It is Illegal.

6. Netherland and Belgium- It is illegal.

3.7.7.6 The Indian Scenario

India does not yet have a legislation controlling surrogacy. As far as

\textsuperscript{68} Kush Kalra, “Surrogacy Arrangements Legal and Social Issues” 1 JOLTI 133 (2010).
\textsuperscript{69} Artificial Conception Amendment Act 2000 (ACT) gazetted on 28 September 2000.
\textsuperscript{70} Section 2(2), “Substitute parent agreement”, Artificial Conception Act 1985 (ACT).
\textsuperscript{71} See Supra note 21 at 110.
legality of the concept is concerned, Article 16(1) of the Universal
Declaration of Human Rights 1948 says, that “men and women of full age
without any limitation due to race, nationality or religion have right to marry
and found a family.” An analysis of Article 21 of Indian Constitution reveals
that this right encompasses a right to live with dignity and liberty. Right to
have a family and offspring can be easily read with Article 21 of the
Constitution of India. Even the right to choose the method of reproduction
also can be read as a part of liberties guaranteed by Article 21. The judiciary
in India too has recognized the reproductive right of humans as a basic right.
In B.K. Parthasarathi v. Government of Andhra Pradesh73, the A.P. High
Court held that, “the right of reproductive autonomy of an individual as a
facet of his right to privacy” and agreed with the decision of the US Supreme
Court in Jack T. Skinner v. State of Oklahoma74, which characterized the right
to reproduce as “one of the basic civil rights of man”. Even in Javed v. State
of Haryana75, though the Supreme Court upheld the two living children norm
to debar a person from contesting a Panchayati Raj election it refrained from
stating that the right to procreation is not a basic human right. Now, if
reproductive right gets constitutional protection, surrogacy which allows an
infertile couple to exercise that right also gets the same constitutional
protection.76

The Ministry of Health & Family Welfare and Indian Council of
Medical Research drafted the Assisted Reproductive Technologies
(Regulation) Bill, 2010 seeks to regulate surrogacy in India. At present, the
regulations are in the form of guidelines issued by the Indian Council of
Medical Research (ICMR) and the National Academy of Medical Sciences
(NAMC), who have released certain criteria for grant of accreditation to
Assisted Reproductive Technologies (ART) Clinics.77

These guidelines define surrogacy as “an arrangement in which a

73 AIR 2000 A.P. at 156.
74 316 US 535.
76 Rattan Singh, “Biotechnology and its effect on Human Rights- Some reflections with Special
77 National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India
(Guidelines for ART Clinics), available at: http://icmr.nic.in/art_clinic/art_clinic.htm (visited on
August 6, 2013).
woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate. The children born through these arrangements are considered those of the genetic parents and the surrogate mother must relinquish, in writing, all parental rights concerning the offspring. With regard to the legitimacy of child, the Bill provides that a child born to a married couple or a single person through the use of the ART shall be presumed to be the legitimate child of the couple or the single person, as the case may be and shall have identical legal rights as a legitimate child born through natural course. If the commissioning couple separates or get divorced after going for surrogacy but before the child is born, then also the child shall be considered to be the legitimate child of the couple. Bill further provides that the commissioning parents or parent shall be legally bound to accept the custody of the child irrespective of any abnormality that the child may have, and the refusal to do so shall constitute an offence. Under the proposed Bill, some duties are also imposed upon the ART’s clinics; one of such duties is to make couples or individuals, as the case may be, aware of the rights of the child born through the use of the ART. The duties also include the obligation not to determine the sex of the child to be born through the process of assisted reproductive technology.

Though an attempt is made to cover all the provisions in the Bill and all the questions are answered but the Bill suffers from certain loopholes i.e. there is a contradiction between two sections of the Draft Bill with respect to the Birth Certificate of the Surrogate child. As per Section 34(10) of the Draft Bill, the Birth Certificate in respect of the baby born to surrogacy shall bear the names of genetic parent/parents of the baby. Whereas Section 35(7) of the Bill provides that, Birth Certificate shall contain the names of the couple who seek ART. If the genetic parent of a child born through surrogacy is a donor, whose name should be written on the birth certificate or the name of the

78 Id, Chapter 1, para 1.2.33
79 Id, Chapter 3, para 3.10.1; also see para 3.5.5 of the Guidelines for ART Clinics.
80 Draft Bill 2010; Section 35(1) to (4).
81 Ibid, Section 34(11).
82 Ibid, Section 20(7).
83 Ibid, Section 25(1).
couple who sought ART? If the answer to this query is answered as ‘yes’, then this lead to further ethical and legal complexities, affecting even the marital relation arising out of the wedlock.\textsuperscript{84}

In India, the issue came into news when a Gujarati grandmother gave birth to her daughter's twins in January, 2004. There are reports that this is not the only incident of surrogacy in India and there certainly have been many more babies around the country borne by surrogate mothers. Most such cases remain hidden and anonymous in India for reasons of social repercussions due to its unacceptability.\textsuperscript{85} It is only through media reports that one could know how rural women are interested to become surrogate mothers. Many women accept surrogacy agreement because of monetary considerations\textsuperscript{86} to earn their livelihood.

In India, surrogacy is an area that bristles with ethical, moral and legal infirmities. Also, foreign citizens are finding it quite easy in India to “rent a womb” and “go back with a baby”. The Indian laws governing reproductive outsourcing are not tough. As it is, many western countries don’t permit commercial surrogacy. However, no clear-cut figure on how many foreigners visit India each year for surrogate birth is available.\textsuperscript{87}

This is due to a medical industry that welcomes profitable international ventures like “reproductive tourism”, even when infertility constitutes a small segment of domestic priorities. The reasons for this boom in medical tourism is the low cost factor but high quality treatment provided by health-care professionals, easy availability of surrogate mothers, abundant choice of donors with similar racial attributes and the preferably healthy lifestyle of Indian women which is needed during pregnancy and lack of any law to regulate these practices.\textsuperscript{88}

At the same time, the surrogacy arrangements are drawn up in a

\textsuperscript{85} Supra note 21 at 110.
\textsuperscript{86} In 1997 Nirmala forced by poverty and illness of her husband decided to rent out her womb for Rs. 50,000 to a couple who were unable to bear a child.
\textsuperscript{87} Radhakrishna Rao, “Is India Becoming A Hub For Reproductive Outsourcing” Women’s Era, May (Second) 2009 at 114.
\textsuperscript{88} Imrana Qadeer, Mary E John, “The Business and Ethics of Surrogacy” Economic and Political Weekly, Jan 10, 2009 at 10.
random fashion and can be exploitive, especially since surrogates are mostly from socio-economically weaker sections. It is imperative that the practice be legally regulated to prevent victimization of both the surrogate and the intending parents. The complicated case of Japanese baby Manji born to an Indian surrogate mother with IVF technology upon fertilization of her Japanese parent’s eggs and sperms in Tokyo and the embryo being implanted in Ahmedabad triggered off complex knotty issues. The case exposed the lacuna that exists in the current legal framework in India regarding commercial surrogacy.

To regulate the mushrooming growth of these ART clinics and surrogacy arrangements, the need was felt to have a legislation which will deal with various grey areas of law regarding the surrogacy arrangements and also, to ensure that any of the party in the agreement is not cheated and the middlemen don’t end up duping both the parties and specially the generally naive and gullible surrogate mother.

Taking into consideration the misuse of surrogacy and the possibility of exploitation by the foreigners, the Home Ministry altered the rules to protect the future of children born out of surrogacy agreements. In new rules, the government has mandated that only foreign couples who had two years of sustained marriage and whose countries of origin recognize commercial surrogacy will now be allowed to hire surrogate mothers in India for the purpose of having babies through this assisted reproductive technology

90 Supra note 68 at 128.
91 Baby Yamaji Manada v. Union of India and others, 2008 INDLAW SC 1554. In this case a Japanese couple hired a surrogate mother in Anand, Gujarat in India as commercial surrogacy arrangements are banned in Japan. The Japanese couple divorced and in between their baby was conceived by the surrogate mother and the mother disowned the infant. As until now the biological parents have to adopt the child from the surrogate mother in India. But unfortunately, the wife refused to help in this regard. Under, the Guardians and Wards Act, 1890, a single father cannot adopt a girl child and since he is only the biological father. The girls’ legitimacy will have to be proved. The government also seemed to be helpless in this matter as there were no laws governing the effect of surrogacy in India at that time. There were only guidelines by the ICMR, which couldn’t take the place of a law. The grandmother of the infant petitioned the Supreme Court challenging the directions given by the Rajasthan High Court relating to the custody of Baby Manji Yamada. The Apex Court instructed the government that a commission to be formed under the Protection of Child’s Act, 2005 to inquire into these kinds of complaints and to take notice of the same. In the absence of any complaint filed by any one before the Commission the writ petition stands disposed of and the government instructed to issue the passport to the baby and she flew back along with her grandmother to Japan.
92 Supra note 68 at 128.
(ART). Simply put, couples in same sex marriages (gays and lesbians) now stand barred from hiring Indian surrogates. Secondly, the new rules made it mandatory (as part of the visa documents) a letter from the embassy of the foreign country in India or of the foreign ministry of the country stating not just the fact that such a country recognizes commercial surrogacy but also that the child born to the Indian surrogate would be permitted entry to the foreign nation as a biological child of the couple that commissioned the ART service. Also, foreign couples would have to now furnish an undertaking along with their medical visa document that they will take care of the child thus born and the treatment will only be done at one of the ART centres registered with the Indian Council for Medical Research. “A list of such centres will be shared with the Ministry of External Affairs from time to time,” Home Ministry said. Last but not the least the rules require the foreign couple seeking surrogacy service in India to produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother and further foreign couples cannot exit India until they have ensured the safety of the child born through the ART. According to Home Ministry if any of these conditions as per the new rules, are unfulfilled, the visa application shall be rejected.93 This effectively sealed the door on gay couples, single parents, and live-in couples conceiving via surrogacy. However in June 2013, the Government again declared that it would consider allowing visas for single parents opting for surrogacy provided DNA tests were performed on parent and child while existing in country.94

As of now, even though surrogacy is an administrative concern and in the domain of Ministry of Health and Family Welfare (MoHFW), it has been decided that till the enactment of a law on the ART Bill, 2013, the guidelines issued by Ministry of Health Affairs (MHA) will prevail till then. Hence, foreign parent surrogacy is barred. In March 2014, the concerned departments and ministries of government of India proposed to revise the Bill with significant changes. The most crucial proposal is to restrict surrogacy in India to “infertile Indian married couples” only. Non-resident Indians (NRIs),

93 “Same- Sex Foreign Couples can’t hire Indian Surrogates” The Tribune, Jan 19, 2013 at 22.
Persons of Indian Origin (PIOs) and Overseas Citizens of India (OCIs) would be eligible but foreigners, unless they are married to Indian citizens, will not. The purpose of this is to prevent exploitation of Indian women who may be tempted to take the risk of surrogacy in the face of financial hardships.\textsuperscript{95}

\textbf{3.7.7.6.1 Surrogacy Contracts in India}

Section 23 of the Indian Contract Act provides that an agreement is unlawful if the consideration or the object of the agreement can be declared by the court as being opposed to public policy. Some argue that the object of the surrogacy agreement is against public policy so it is void and thus unenforceable. Further it can be said that it is prohibited according to Article 23 of the Constitution of India since apart of the consideration is to be paid to the surrogate mother for severing the ties with the child which amounts to trafficking in human beings.\textsuperscript{96} But in the opinion of the researcher, surrogacy agreements are not opposed to public policy. As the idea of public policy is not always constant and it goes on changing from generation to generation. It is dynamic, flexible and ever-changing. So we cannot say that the surrogacy agreements are against public policy. Further, infertility is often the cause of marital discord, whereas the birth of an offspring brings a couple together. Stability and harmony of marital relations is a part of public policy.\textsuperscript{97}

While drafting an agreement on surrogacy the following points are to be taken into consideration\textsuperscript{98}

1. Details about the surrogate.
2. The type of surrogacy is to be mentioned.
3. The question of motherhood must be finalized.
4. The agreement should mention about paternity.
5. No clause of the agreement should contravene the provisions of Indian law in force.
6. The intention of the parties should be clearly spelt out in the

\textsuperscript{95} Anil Malhotra, "Ending Discrimination in Surrogacy Laws" \textit{The Hindu}, May 3, 2014 at 5.
\textsuperscript{96} Section 23, Indian Contract Act, 1872
\textsuperscript{97} Manika Gounder v. Muniammal, AIR 1968 Mad 392.
\textsuperscript{98} Supra note 72 at 67.
agreement.

7. Compensation clause should be meticulously drafted.

8. Child’s custody with the intended parents must be the legal custody.


### 3.7.7.7 Legal and Ethical issues in Surrogate Motherhood

Surrogacy is an agreement that pose a series of social, ethical and legal issues. From the human rights point of view the underpinning issues involve right to individual autonomy, procreative liberty, right to dignity, right to privacy, commercialization of human body etc.  

There is always a risk of transmitting infections such as HIV or Hepatitis, to the surrogate mother from the infected parents. In full surrogacy, when more than one embryo is replaced into the surrogate mothers uterus, the risk of multiple pregnancy increases. Around 20 to 25% case in vitro fertilization result in a multiple pregnancy of twins or triplets, depending upon the number of embryos replaced. This carries associated risk for both mother and babies and there are serious implications for the intended parents of raising children from a multiple pregnancy.

In surrogacy, a situation may arise in which a party to an agreement changes its mind i.e. to take the baby or to give the baby. For instance, when the surrogate’s own eggs are used and genetically she becomes the mother of the resulting child; so she may refuse to hand over the child. The United States’ *Baby M* case has been touted by The Health, Labour, and Welfare Ministry as an example of this risk. In that case, a surrogate was artificially inseminated with sperm from the intended father and gave birth to a child to whom she was genetically related. The surrogate refused to relinquish custody of the child and a legal battle ensued and ultimately, the Supreme Court of New Jersey found the contract between the surrogate and the intended parents void. On the other hand the intended parents may refuse to accept the child in

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99 Supra note 27 at 76.
case resulting child is born with severe abnormalities.\textsuperscript{101}

As the foetus is a parasite and is fully dependent for nutrition from its host body i.e. the women carrying the baby. During pregnancy the pregnant woman requires extra diet and nutrition but in commercial surrogacy the chances are there that the woman may not take good diet as she is least concerned about the health of the child and more about the pecuniary benefits in such agreement. On the other hand though the mother might have a better diet during the pregnancy because of the money and care provided by the biological parents but her health is not good enough and she is not physically fit to reproduce as most of the women in the underdeveloped countries are not healthy because of the poor nutrition level.\textsuperscript{102}

In surrogacy contract, the surrogate mother is supposed to handover the child to the commissioning couple after delivering it. Thus, the child will be deprived of the breastfeed which is considered as the best food and very essential for the health of the child in its initial stages. Moreover, if the surrogate mother is in the habit of smoking and drinking, she may compromise with the health of the child putting it at risk by not following precautions because of her monetary interest in bearing the child.\textsuperscript{103}

Commercial surrogacy is looked at by some as a form of prostitution because the woman is paid as a consideration for the use of her womb and thus delivering a baby. If an individual does not have the ability to reproduce, technology should not be used to alter God’s plan. Normal parent-child relationship could not be formed, and it could leave the child feeling confused and alone.\textsuperscript{104}

As the child grows up, the child might experience anxiety about the identity of the surrogate mother. When the child discovers that gestation and birth involved another mother, the child may be affected by feelings of being different or of being deceived. The members of the Chalmers Committee in

\begin{footnotesize}
\begin{itemize}
\item[101] In Re Baby M, 537 A.2d 1227 (N.J. 1998).
\item[104] Supra note 102 at 228.
\end{itemize}
\end{footnotesize}
Tasmani called attention to the risk of serious psycho-socio harm to the child who later finds out that he or she was born as a result of a surrogate motherhood arrangement.\textsuperscript{105}

In considering the inter-related ethical, social and legal aspects of surrogacy, the society has in a long way had accepted the various functions and the role of a surrogate in relationship to this and alluding to common comparisons with adultery, prostitution and babysitting. In particular, the ‘birth mother rule’ ‘commercial surrogacy’ and restrictive legislation are explored and found to be inappropriate.\textsuperscript{106}

3.8 Beneficiaries of Artificial Reproductive Technologies

The researcher has felt that initially ART’s could help only married couples for relieving their infertility. But in today’s scenario where live-in relations are legalized and same-sex marriages are given legal recognition it is imperative that the right to procreate should not be limited to married couples only but should be extended to gays, lesbian couples, single men or women. So following are the beneficiaries of the new reproductive technologies:

3.8.1 Married and Cohabiting Couples

Infertile couples who use those techniques are trying to achieve the same goal of having and rearing offspring that fertile couples achieve through coitus. There is no good reason not to grant them the same presumptive freedom to achieve that goal, which fertile persons have, subject to limitations, of course, if the use of such techniques impairs important state interests.\textsuperscript{107}

Human rights may be equally invoked to protect choice of resort to reproductive technologies to overcome infertility.\textsuperscript{108} In the USA, the constitutional right of individual privacy that recognized a constitutional right

\textsuperscript{105} Chalmers Report, para 5.2.10.


\textsuperscript{107} In most instances, however, ARTs to have children do not cause the strong harm to others necessary to justify limitation of the right to reproduce See also J.A. Robertson, “Gay and Lesbian Access to Assisted Reproductive Technology” available at : www.utexas.edu/law/.../robertson.DARBYpdf (visited on August 16, 2013).

\textsuperscript{108} Supra note 10 at 106.
of abortion\textsuperscript{109} has been invoked to protect legal use of medically assisted reproduction. Further, in England, a women’s right to use her husband’s sperm recovered while he was unconscious and dying and without his prior consent given in conformity with the Human Fertilization and Embryology Act 1990 was recognized, over the refusal of the Human Fertilization and Embryology Authority, under principles of European Community law.\textsuperscript{110}

In India, the Assisted Reproductive Technologies (Regulation) Bill – 2010 provides the rules and regulations for the assisted reproductive technology. According to this Bill, both “married” and “unmarried” couples are eligible for ART. It clearly defines “couple”, as two persons living together and having a sexual relationship that is legal in India (Clause 2(h)) and “unmarried couple”, as two persons, both of marriageable age, living together with mutual consent but without getting married, in a relationship that is legal in the country/ countries of which they are citizens (Clause 2(dd)). According to Clause 2 (v) of the Assisted Reproductive Technologies (Regulation) Bill – 201 “married couple”, is defined as two persons whose marriage is legal in the country/ countries of which they are citizens. As per the above mentioned definitions both homosexuals and heterosexuals, irrespective of their marital status, are eligible to have access to these technologies in India.\textsuperscript{111}

### 3.8.2 Single Women

Besides affecting married and cohabiting heterosexual couples, infertility also affects unmarried person. It has been, therefore, maintained that even single persons should be given the possibility to have access to new reproductive technologies. Some persons may be unwilling or unable to marry, yet strongly desire to be parents. If an unmarried person’s right to procreate is not constitutionally recognized, states could limit access to infertility treatments on the basis of marital status, sexual orientation, disability, or other factors that are not prohibited by state or federal

\textsuperscript{109} Roe\textit{v.} Wade, 410 United States Reporter 113 (1973) (Supreme Court of the United States) on abortion.


\textsuperscript{111} Assisted Reproductive Technologies (Regulation) Bill- 2010.
antidiscrimination laws. Such a status could effectively bar some persons with valid interests in reproducing from access to non coital means of reproduction.\textsuperscript{112}

A single woman or same sex couple may wish to bring-up a child. Even a man may consider the possibility of rearing a child and also wish for decent without any involvement of any other sex.\textsuperscript{113}

Former Miss Universe 1994, Sushmita Sen inspires single women both in India and abroad to adopt children, breaking conventional taboos and age-old practices. Child adoption in India is a complicated issue. It is overburdened with legal processes and complicated lengthy procedures for those who want to give a new home and a new life to reported 12 million Indian orphans. Resultantly, those who cannot by law adopt and can be appointed only as guardians under personal Indian laws, turn to options of IVF clinics or rent surrogate wombs.\textsuperscript{114}

Single women’s right to procreate has not been so far explicitly acknowledged by international human rights bodies. Only CEDAW has produced an authoritative pronouncement of some relevance to this issue. In its General Recommendation No. 21 the Committee establishes, “decisions to have children or not, while preferably made in consultation with spouse or partner, must not, nevertheless, be limited by (these)”. It can be interpreted that it is the individual woman forming part of the couple, and not the person living as single, who should enjoy a right to reproductive freedom according to the Women’s Convention. This contemporary understanding holds true for the other human rights instruments.\textsuperscript{115}

Opponents to the view that the right of single women to procreate by means of AID be recognized; attach greatest importance to the well-being of the child. It is submitted that the desire to have a child should, therefore, not

\begin{itemize}
  \item \textsuperscript{112} Supra note 22 at 38.
  \item \textsuperscript{113} Supra note 35 at 106.
  \item \textsuperscript{114} Anil Malhotra, “Business of Babies” The Tribune, Dec. 14, 2008 at 3.
  \item \textsuperscript{115} In regard to the content of Article 23(2) of the ICCPR Professor Nowak promptly declares that: “At the core of the right to found a family is the right of two parents to have children”. CCPR Commentary at 26.
\end{itemize}
be satisfied at the expense of the interests of the child to be born.\footnote{Supra note 15 at 221.} The leading principle of the best interest of the child – as expressed in Article 3 of the UN Convention on the Rights of the Child ought to take precedence over other values. On the regional level, references are frequently made in this regard to the \textit{Jonston v. Ireland}\footnote{\textit{Johnston and Others v. Republic of Ireland}, ECHR Judgment of 18 December 1986, Ser. A, No. 112.} judgment delivered by the European Court on Human Rights in which the fundamental right of the child to have a normal family life was emphasized. The upshot of this case is that the states have an obligation under the European Convention to ensure that children born out of wedlock acquire dual affiliation.

Much of the above arguments reflect an attitude that for the healthy and harmonious development of a child’s personality both a mother and a father are necessary. Even though arguments have been presented in favour of the use of AI on single women by referring to the fact that the traditional family unit, comprised of a mother, a father and a child, is not always established in practice, or it might have a very short existence, since death or separation leave a great number of parents single. Hence, there is no guarantee whether the child is to be brought up by a father or a mother.\footnote{Supra note 15 at 221-223.}

\subsection*{3.8.3 Same – Sex Couples}

Once it is recognized that both married and unmarried persons have a right to reproduce, including the right to use different ART combinations when infertile or when necessary to ensure a healthy offspring, there is no compelling reason for denying that right to persons because of their sexual orientation.\footnote{Any legal category defined in terms of sexual orientation faces the difficult problem of how one ascertains and establishes what that sexual orientation is. This difficulty is one more reason for the law to avoid making distinctions on this basis. See \textit{Lofton v. Sec’y of Dept. of Children and Fam. Health Servs}, 358F. 3d. 825 (2004).} Gay males and lesbians too have a strong desire to have a child and have been brought up in families and in a society that identifies having and rearing children as an important source of meaning and fulfilment. They have in short, the same biological and associational interests as other persons do in having a child and the same general ability to be competent child-
A review of Internet websites indicates that today the right to marry continues to general debate, particularly in relation to the possible legal recognition of same-sex marriages in some countries. The right to found a family is also being cited with increasing frequency to justify access to in-vitro fertilization technology, where such access is the only option for founding a family. The advances in reproductive health technology were obviously not anticipated in 1948, but it is interesting to note that the language of Article 6 of the Universal Declaration of Human Rights is sufficiently broad to incorporate these developments.\(^\text{121}\)

On Feb 7, 1994, the European Parliament, in Strasbourg, voted a resolution assimilating the sexual orientation to a fact of birth, like the colour of skin or the gender, and asking for the total recognition of homosexuality. It includes the right to marry and to enjoy the same social advantage as heterosexual marriage, and the right to be parent through artificial insemination or through adoption.\(^\text{122}\)

A study undertaken in France in 1993 reveals that 39% of homosexual have a desire to have the child of their own. This fact assures us that, unless the trend of laws favourable to homosexuality is reversed, we will soon have many children from homosexual couples and homosexual communities.\(^\text{123}\) They have the same reproductive rights as person in heterosexual relationships; the State has no right to prevent them from having children if they choose. But their situation is, of course, \textit{reproductively} more complex. They need the collaboration of one more person. No one has an entitlement to another person’s reproductive gametes. But if a third person agrees willingly, competently, and autonomously to collaborate by providing his sperm, then women in a same-sex relationship are entitled not to be interfered with their decisions about when, where, and with whom to procreate or about how many

\(\text{121}\) \textit{Supra} note 12.
\(\text{122}\) I.K. Mangoo, \textit{Law Relating to Sexual Offences and Homosexuality in India} 293 (Capital Law House, Delhi, 2006).
\(\text{123}\) \textit{Ibid}.
children to have.\textsuperscript{124}

### 3.9 Barriers on Access to ARTs\textsuperscript{125}

Where the woman is unable to conceive naturally the science and technology may be called upon to repair the natural disorder through Assisted Reproductive Technology but there are several impediments in access to it. These may include cultural, religious beliefs, governmental policies, poverty, lack of information etc. Let us analyse these impediments in detail:

i. **Poverty**: No doubt, these technologies are boon for the infertile couples but these technologies are inaccessible by reason of financial constraints. These methods of reproduction by ARTs are very expensive and out of the reach of certain persons who otherwise want to have access to it.

ii. **Lack of Information**: As medical technology is advancing very rapidly, it is not feasible for the patients to be updated every time to have comprehensive information of the new developments. Infertility clinics and medical professionals which are involved in these processes do not provide impartial information. As a result, the persons who want to have access to it find it difficult to evaluable the benefits and risks involved in these processes.

iii. **Governmental Policies**: ARTs are always a controversial subject as it is affected by the governmental policies. In some countries it is legal and easily accessible but other countries lack statues explicitly recognizing ART and there is a prohibition on the access of it on account of religious barriers as it is not considered ethical there. For instance, in surrogacy every country is having different legislation and there is no uniformity.

iv. **Lack of Control over Treatment Decisions**: Like many other areas of medicine, reproductive medicine encompasses a range of treatment options. Patients make choices among the treatments available to them

on the basis of complex information in a context of uncertainty. It is common for patients to be offered a limited selection of treatment options as a pragmatic response to the realities of practice within a particular funding and policy structure. As a result many patients never become aware of options other than those disclosed by the physician. Hence, this is a barrier to access different forms of ARTs.

3.10 Conclusion

In the end it can be said that the Constitutions of various countries including India confer a right to reproductive autonomy that encompasses not only the right to avoid reproduction, but also the right to reproduce with the assistance of technology. As reproduction is one of the basic aims of marriage and the child is indispensable and sentimental demand of a couple. The same-sex marriages give way to end the reproduction process, so it is argued that the right to reproduce with the assistance of technology should be extended to homosexuals also.

Instead of criticizing the demerits of the assisted reproductive technologies what is required is that there should be check on technology so that it cannot be misused and should act as a facilitator and not a destructor.

Hence it can be submitted that even if assisted reproductive techniques oversteps the natural ways of procreation, only those who have been able to get a child from it knows the value of these techniques. At times, in a society like India, where barrenness is considered incompleteness for a woman, people have no option, but to resort to it to live peacefully in society. We cannot consider it against the unity of marriage, as even adoption is legally permissible then why not ARTs.¹²⁶

¹²⁶ Supra note 103.