

CHAPTER 3

ETHICAL DILEMMAS AND LEGAL ISSUES IN CASE OF REPRODUCTIVE RIGHTS

3.1. Introduction:

Technological innovations in the field of science and medicine have introduced the new processes of reproduction which enfold several burning issues. The science has touched every nook and corner of human life. Today, the scientific technology has made deep impact into the individual's life that it is no wrong to say that science is the reason for problems and solutions to many challenges before the people. One such challenge is that relating to reproductive rights of women brought by the reproductive technologies. In the complexities of problems and inadequacies of legal framework, it is imperative to study the legal, social and ethical issues of reproductive rights.

In traditional form of reproduction, there are natural mothers, natural fathers and natural children sharing biological relation with no intervention by any third party. On the other hand, there is a development of artificial reproduction through reproductive technology where there is intervention of a third party in the formation of a family. There are new challenges to the parenthood brought by these new reproductive methods, such as – In-Vitro Fertilization, surrogacy, cloning etc.¹

It is a natural instinct of every human being to procreate. It is because of this universal truth that man and woman live together in the institution of marriage which has the recognition of law. The right to marriage and right to procreate have been recognized under human rights instruments also.

¹ Mrs. V. Rajyalakshmi "*Reproductive Technology versus Women*" 1 Supreme Court Journal 48 (1996).

As long as procreation is complete by natural process there is no problem. However, if after the marriage, difficulties are created by either of the party to the marriage or their respective relatives causing obstruction to the process of natural consummation of the marriage then that amounts to matrimonial offence and therefore could be a case for judicial separation or divorce under the matrimonial laws applicable to the parties.² This is also violation of reproductive right of the parties.

But when the couple is not able to have children through the natural process, than, they may opt for the other methods of procreation (scientific/ reproductive technology). When procreation is conducted by any reproductive method, it raises various social, ethical and legal issues.

However, there is an estimate that out of 3.7 million babies born in 1990 in the United States, about 200,000 (about 18 percent) will owe their existence to infertility treatments. Nearly 200 infertility center performing in vitro fertilization are there. Half of infertile couple ends up with babies with such medical assistance.³

With the artificial reproduction, there are possibilities that a child would have five parents, an egg donor, a sperm donor, a surrogate mother who gestates the foetus and the couple who raise the child. However, there is an urgent need to determine the parenthood and legitimacy of children, as well as the rights and duties that flows from such status or relationship. Eventually, with these new methods of reproduction, there will be more visits to the courtroom than to the hospital.⁴

There is fear that these reproductive technologies may give rise to non traditional family units through homosexuals, unmarried single man/woman etc. There is question of

² Non-consummation of marriage is a ground of voidable marriage under various personal laws and thus gets matrimonial relief for instance, the Hindu Marriage Act, 1955 provides under section 10 judicial separation and divorce section 13 and also under Special Marriage Act, 1954 section 27.

³ Warren Freedman, *Legal Issues in Biotechnology and Human Reproduction 2* (1st Edition 1991).

⁴ *ibid* at pg. 29.

acceptance of babies procreated by homosexuals or by unmarried woman in the society. Whether society will accept those children as legitimate children? Or; whether unmarried women will have the acceptance in the society as legal mother? Whether homosexual are considered as husband and wife?

However, the developing community is also working on various aspect of sexual relationship. Like, Naz Foundation International (NFI) is an international non-governmental organization that advocates improving the sexual health, welfare and human rights for men who have sex with men. It aims at securing social justice, equity, health and well-being for socially excluded and disadvantaged males.⁵

Similarly, the highly ethical question has been raised before the judiciary when the *Naz Foundation case, Naz Foundation v. Government of NCT of Delhi*⁶ came before it. The Delhi High Court's decision in this case has further advanced the right to privacy. It has strike down provisions criminalizing homosexual's sexual conduct on grounds of invasion of privacy.⁷ Gay community comes under the cover of section 377⁸ of IPC, as a result of which basic fundamental human rights of such groups or individuals have been denied and they were subjected to abuse, harassment and assault from the society.⁹

The artificial mode of reproduction, thus, throws up many moral and ethical issues. Many such issues on reproduction are discussed below:-

⁵ <http://www.hivos.nl>

⁶ WP(C) No. 7455/2001.

⁷ <http://docs.google.com>

⁸ Section 377 provides "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or against, shall be punished with imprisonment for life, or with imprisonment of either discription for a term which may extend to ten years and shall also be liable to fine".

⁹ *Naz Foundation v. Government of N.C.T. of Delhi* (WP (C) No. 7455/2001).

3.2. Issues on Artificial Insemination (AI):

As already discussed in chapter III of this work, Artificial Insemination can be practiced in three ways. First, the artificial insemination homologous or husband (AIH) where the woman will be injected with the semen of her husband. Second is where the semen is used from the third party which is known as artificial insemination donor (AID). The third kind is where the seed of the husband and the third party is mixed together and called as Combined Artificial Insemination (CAD).¹⁰

As long as the first method is used where woman are injected with the semen of her husband, there is no problem but the use of other two methods bring new challenges. Artificial Insemination Homologous involves the three dimensional process of reproduction. Artificial Insemination Donor introduces third party in the role of a donor. It raises various questions relating to determination of paternity, matrimonial rights, the identity of a child etc. which are discussed as follows:

3.2.1. Adultery and Artificial Insemination:

The question may come about whether Artificial Insemination amounts to adultery or not. This issue has been raised for the first time in a Canadian case, *Oxford v. Oxford*¹¹. In this case the wife opted for artificial insemination without the consent of the husband. The court held that recourse to Artificial Insemination Donor without the consent of the husband amounted to adultery.

Also, in *Macilennan v. Macilennan*¹², the Scottish Court of Session provides that it is an offence by a wife to perform Artificial Insemination without the consent of the husband. The husband filed a petition for divorce on the ground of his wife's adultery. The wife alleged that the child she gave birth to was conceived by artificial insemination. *Lord Wheatley* contended that unilateral adultery is possible, as in the case of a married

¹⁰ Kusum "Artificial Insemination and the Law" 19:3 Journal of Indian Law Institute 283 (1977).

¹¹ 58 D.L.R.251 (1921); 49 Ontario L.R.15.

¹² 1958 Sess Case 105.

man who claims a woman not to be his wife. However, the court contended that the married woman committed a grave offence against the husband if she adopted for artificial insemination without the consent of her husband. In this case, the court granted the husband a divorce on the basis of the wife's adultery.¹³

For the offence of adultery the following contentions are necessary:-

- 1) There must be two parties physically present and voluntarily engaging in the sexual act.
- 2) To constitute the sexual act there must be an act of union involving penetration of the female organ by the male organ.
- 3) It is not a necessary concomitant of adultery that male seed should be deposited in the female's ovum.
- 4) If the placing of the male seed in the female ovum need not necessarily result from the sexual act, but is placed by another means, there is no sexual intercourse.

The logical argument therefore would be that if there is no voluntary sexual intercourse between a man and a woman who are not spouses to each other, then there is no adultery.

The court also provided that if AID is deemed as adultery, the question would come whether the donor whose seed has been used is also guilty of adultery? If so at what point of time adultery is committed? If adultery is deemed to take place at the time of the parting of the seed than, suppose the seed is never used? If the time is time when the seed is injected into the woman's body then suppose this is done after the donor's death (since the seed can be preserved for some time). In viewing all these, it was found that artificial insemination by donor does not constitute adultery.¹⁴

¹³ *Supranote* 10 at pg.288.

¹⁴ *Supranote* 10 at pg.289.

The main reason for adultery is carnal pleasure and emotional and physical satisfaction. These elements are not there in the medical-mechanical process of artificial insemination, it is opted for the purpose of begetting offspring.

Thus, this issue is almost settled and Artificial Insemination is no more amounted to adultery. In India also, the question of adultery does not arise as section 497 of I.P.C. clearly provides that there has to be sexual intercourse to commit the offence of adultery. Since penetration is a necessary element for a completion of sexual intercourse which is essential for adultery, therefore, Artificial Insemination Donor cannot be held to have committed adultery.¹⁵

3.2.2. Legitimacy of Assisted Reproductive Technology (ART) Child:

Another controversial issue that artificial Insemination poses is whether such a child is the legitimate child of the father or not and what are the father's rights and duties towards the child. Beside this, the interest of the child has also to be taken care of.

As long as there is use of husband's sperm is used for inseminating the wife, there is no problem in regard to the paternity of the offspring. But, the use of the sperm of the donor creates conflict with social and genetic truth. In the absence of any statutory guidelines the child is illegitimate, his rights being those enforceable against his genetic father i.e. a donor and his social father who is a legal stranger to him. This situation creates problems concerning inheritance rights.¹⁶

Under the English system, this problem has been resolved by enacting the Human Fertilization and Embryology Act, 1990. This Act provides that if a child is born as a result of artificial insemination or embryo transfer to a woman who was at the time of artificial insemination or transfer of embryo married, then her husband will be treated as the father of the child as held under section 28.¹⁷

¹⁵ K.R.Mythili "*Artificial Insemination –Legal Issues*" 39; 24 Journal of Indian Law Institute 348 (1997).

¹⁶ *ibid* at pg. 349.

¹⁷ *ibid*

In *Strnad v. Strnad*¹⁸ the issue was of the custody of an AID child which was considered by the New York Supreme Court. It was held that the husband has a right of visitation although the child was not his offspring biologically. The court observed:

“The child has been potentially adopted or semi- adopted by the defendant. In any event, in so far as, this defendant is concerned and with particular reference to visitation, he is entitled to the same rights as those acquired by a foster parent who has fully adopted a child if not the same rights as those to which a natural parent under the circumstances would be entitled.....” The court was of the opinion that the child in the said case is not illegitimate child.¹⁹

On the other hand, *Doornbas v. Doornbas*²⁰ took a different view. It provided that the act of AID is equal to adultery and it is opposed to the public opinion therefore any child born out of AID is called as an illegitimate child. Moreover, it lined that although artificial insemination is done with the consent of the husband yet he can not have rights to visit a child as the child not being his legitimate child.²¹

In, *People v. Sorensen*²² here, a divorced woman sued her former husband for non-support of their AID son. In this case, the defendant after fifteen years of marriage and a medical determination of his sterility, allowed his wife to be artificially inseminated. AID was administered and a child was born. For about four years prior to their separation, the defendant represented that he was the child’s father. The California Supreme Court held that the defendant was the lawful father of the child born to his former wife, that the child

¹⁸ 78 N.Y.S.2d 390 (1948).

¹⁹ Kusum “*Artificial Insemination and the Law*” 19; 3 Journal of the Indian Law Institute 291 (1977).

²⁰ 263 (1955); see also 23 U.S.L.W. 2308.

²¹ *Supranote* at 19.

²² 54 at 550 (1973-74)

was conceived by artificial insemination to which the defendant had consented and that his conduct carried with it an obligation to support.²³

Taking the plea of equity and good conscience, it is absolutely injustice to the child to label him/her as illegitimate just because he/she is not born through natural process. Why would a child suffer for something which he was not responsible for? Why would an innocent child suffer the stigma of illegitimacy? A child born out of AI is not by its individual choice. At the same time, it is also necessary to protect a donor from any kind of liability against a child or parental responsibility against the child. Taking the note of the psychological impact on infertile couple, the law should be made so that the donor must not even be granted visitation rights.²⁴

In the United States, every state that has legislation for AID has provided legitimacy to every AID child. As long as, there is consent to it of the husband, the child is legitimate. If the child is born out of the husband's sperm through insemination with the consent of the husband and to make the husband the legal father it would be necessary for the husband to adopt the child. Similarly, under English law, the Law Commission recommended that if there is consent of the husband for insemination, the child should not be deemed of the donor. The recommendation was partly adopted in the Family Law Reform Act, 1987, section 27(10) of the Act where it is provided that it will be deemed that the AID child is born with the consent of the father and thus the child be deemed as of the spouse. However, no clear law is there.²⁵ It is necessary to have written consent of the husband in case of insemination of the wife to avoid legal complications.

In India, there is neither statutory law nor case law to determine the legitimacy and the parentage of the AID child. Only this contention will be accepted that the child born during the subsistence of marriage will be deemed to be the legal child of the legally wedded spouses. There is also provision for acknowledgement by the father about the

²³ *Supranote 19* at pg. 292.

²⁴ Mrs. V. Rajyalakshmi "*Reproductive Technology versus Women*" 1 Supreme Court Journal 49 (1996).

²⁵ A.N.Ansari "*Artificial Insemination: Indian Perspective*" 1 Supreme Court Journal 18 (1995).

legitimacy of the child. But if the child is proved as illegitimate, there is no such provision which will make them legitimate.²⁶

Nevertheless, legitimacy of children is governed by the personal laws in India. There is no provision for legitimacy under the Indian Legal system. The Hindu Marriage Act, 1955 and Special Marriage Act, 1954 confer legitimacy on children of void marriage enumerated under those Acts alone and denies legitimacy to children of other void marriages which fall outside the purview of these Acts. An AID child will not come under the provisions enumerated under any of the Acts mentioned above. Hence, they will be illegitimate in the absence of any legislation legitimizing the AID children.²⁷

The same is the condition under the existing Muslim law where parentage is established only on Muslim parents and the child is born out of wedlock. Legitimacy cannot be conferred on an illegitimate child.²⁸

There is no such law existing in India which deals with the legitimacy and illegitimacy of the child born out of wedlock or outside wedlock or also when the child is born out of new methods of reproduction.

3.2.3 Artificial Insemination and Consummation:

The vital legal question that comes before the court or the law-makers on Artificial insemination is whether it amounts to consummation of marriage, especially when later in life when the wife seeks for a divorce on the ground of non- consummation or impotency of the husband.

It seems that when both the parties had agreed to the insemination and especially, when the seed is that of the husband, there is no reason why the parties should not have been stopped to plea non- consummation. Apart from this, it is very unfair that a child

²⁶ *Supranote 25.*

²⁷ K.R.Mythili "*Artificial Insemination-Legal Issues*" 39:24 *Journal of Indian Law institute* 350 (1997).

²⁸ *ibid*

who is in every manner legitimate being the biological offspring of both the parties and born within wedlock- should be labeled illegitimate by annulling such marriage on ground of non-consummation.²⁹

It is, observed in *Slater v. Slater*³⁰ that such cases has to decide on case to case basis depending on the circumstances of each individual case and definitely, nothing can be said whether artificial insemination amounts to approbation of the marriage. It cannot be said that such a marriage is physically consummated, if such a marriage is liable to be annulled on the ground of non-consummation, then the very purpose of the insemination would be defeated.³¹

There is no legal framework to spell out the position of a husband and a wife after having a child through the process of insemination and later claim divorce on the ground of non-consummation. Logically, the marriage has been consummated and both the husband and wife should not be allowed to plea non-consummation and get out of the wedlock. The legal complication arises in such cases where the wife is inseminated without the consent of the husband.³²

3.2.4 Right to know of Assisted Reproductive Technology (ART) Child:

Every child has a right to know about its origin which means that he must know about his parents. In artificial insemination by the donor's sperm, the identity of the donor being kept a secret, the biological father is kept out of the picture. If the donor's identity is revealed to the child there it will be opposing to the secrecy ascribed to the donation of gametes and it might also be unfavorable to the donor's interest.³³

²⁹ Kusum "*Artificial Insemination and the Law*" 19; 3 Journal of the Indian Law Institute 293 (1977).

³⁰ (1953) Probate Division 235

³¹ *Supranote* 29.

³² Kusum "*Artificial Insemination and the Law*" 19;3 Journal of the Indian Law Institute 294 (1977).

³³ K.R.Mythili "*Artificial Insemination –Legal Issues*" 39; 24 Journal of Indian Law Institute 350 (1997).

Various countries have law where an adopted child has right to know his parentage. As a child born by AID is not so different from an adopted child, can that child be given a right to know of its origin? If an AID child is treated equally as with the adopted child and granted the right to know of the donor's identity, it might be a host of complex problems. The right to know may be necessary in certain cases, like when the child wants to marry and also in cases where there is necessity to detect genetic diseases. So, whether the right to know can be given to an AID child and if given there under what circumstances has it to be determined by the legal system.³⁴

Under the existing legal system in Sweden, it is now possible for an AID conceived child to trace its origin. But in Switzerland, France and Canada, there is total anonymity and secrecy of the donor which is done in the best interest of the child. The participants at the International round table on artificial procreation genetics and the law after pointing out the lack of psychological data to prove which system is really better for the child, felt that an analogy between an AID child and an adopted child should not be made in the matter of tracing parental origin and so donor secrecy has to be maintained. On the other hand, it was felt that important data should always be maintained, especially, in case it is needed to deal with medical problems.³⁵

In United Kingdom, the Human Fertilization and Embryology Act, 1990³⁶ provides for access to knowledge as regards origin of a child conceived by artificial insemination from the authority. He is allowed to get information as to whether the person whom he is going to marry is related.

Under the Indian legal system, so far there is no statutory provision relating to right to know of a child of its origin. This area has been followed by the ethical principle of the inseminating physician. However, information is relevant to the child for medical and

³⁴ K.R.Mythili "*Artificial Insemination –Legal Issues*" 39; 24 Journal of Indian Law Institute 350 (1997).

³⁵ *Supranote* 33.

³⁶ Section 31.

matrimonial reasons. In marriage, degrees of prohibited relationships under which a person who falls under that degree is not allowed to marry another in the same degree.³⁷

There are no laws safeguarding the rights of a child to know his background or about his parents. It is necessary for the healthy development of a child to know his origin otherwise it will affect the psychological development of the child.

3.2.5 Issues on Liability for Negligence in Assisted Reproduction:

There are possibilities of negligence in the process of Artificial Insemination such as in the cases of³⁸ :

- i) mixing of the sperms of the husband or donor with that of someone else;
- ii) the transplant of gametes or embryo intended for someone else in the wrong patient;
- iii) use of the gametes or embryo which are discarded for implant in the woman;
- iv) The disposal of an embryo by mistake.

The super ovulatory drugs may develop hyper stimulation syndrome in a woman undergoing IVF. Other problems like contracting an injection are also always possible. Further, complication may arise in live births for both mother and child as a result of complications in premature delivery. The child might also suffer damages at birth or die in the pre-natal period.³⁹

'Wrongful life' claims have been allowed under certain legal system. Similarly, 'wrongful birth' claims may also arise. Here, it means that a child is born, where a child would not have been born or would not have born in an unimpaired condition if there would not be the negligence of the physician. In such circumstances, the child can claim for wrongful life or wrongful birth.⁴⁰

³⁷ The degrees of prohibited relationship have been enumerated in section 2(f), Hindu Marriage Act, 1955.

³⁸ K.R.Mythili "*Artificial Insemination –Legal Issues*" 39; 24 Journal of Indian Law Institute 351 (1997).

³⁹ *ibid*

⁴⁰ K.R.Mythili "*Artificial Insemination –Legal Issues*" 39; 24 Journal of Indian Law Institute 352 (1997)..

The practicability of allowing the remedy to be claimed by a child who suffers a handicap due to the use of faulty gametes or an embryo is a debatable issue. For this purpose, it is essential for the donor to reveal his genetic diseases; otherwise the problem gets all the more difficult. By strict adherence to the principle of donor secrecy, the child's claim for *wrongful life* or non-disclosure becomes impossible. In such a case, can the remedy be allowed against the doctor for his failure to find out the disease by testing and thus resulting the deformities to the child or can there be a slight deviation from the strict adherence to donor secrecy and in case of wrongful life, the child be allowed to claim damages from the donor for his failure to disclose diseases?⁴¹

In the Indian legal system the whole area needs to be governed by the general law relating to the settlement of disputes. 'Wrongful life' claim have not yet been recognized in India. So the child may go without any remedy if anything goes wrong while treatment is provided using IVF or other artificial reproductive techniques.⁴²

Though, the English System has dealt with the problem of the child for identity crisis for not being able to know his origin and provided for this remedy. That by *section 1A* the remedy available is against the medical staff and physician. Still, parents have to settle their disputes only under the general laws. Congenital Disabilities (Civil liability) Act 1976, sec 1 A inserted by section 44, Human Fertilization and Embryology Act, 1990 where Section 1 A (1) (b) states that *a child may sue under this Act if the child is born disabled and the disability results from an act or commission in the course of selection or the keeping or use outside the body, of the embryo, or the gametes used to bring about the creation of the embryo for a wrongful act against the person who was responsible for it.*⁴³

⁴¹ *Supranote* 38.

⁴² K. R. Mythili "Artificial Insemination –Legal Issues" 39; 24 *Journal of Indian Law Institute* 348 (1997).

⁴³ *ibid*

In addition, remedy is also available against the donor in cases where he fails to reveal genetic diseases or infection as provided under Human Fertilization and Embryology Act. In cases where a condition or a defect cannot be exposed by testing, and the doctor is not at fault and the donor is answerable for it, the child might seek to have redressed from the donor. In such cases, the ambiguity or confidentiality of the donor might be unnecessary for the child applying to the court for an order under section 35 necessitating the Human Fertilization and Embryology Authority to disclose information regarding the donor so that the child may sue under sec 1 A of the Congenital Disabilities (Civil Liability) Act 1976.⁴⁴

The availability of AI and IVF using donor gametes in India arouses various issues. Above all, non-existence of legislation on the said area makes the situation even worse. There is likelihood that the process might go wrong and result into disability, disease or deformity to the child. There is no remedy available to the child in case of any wrong done as a result of these practices. Hence, the situation justifies legislative intervention. Law should provide remedy to the child either from the donor or from the medical community whoever is on fault.

3.2.6 Artificial Insemination and the Donor:

The main issue is relating to the donation of gametes. Generally, the donor has to give their gametes free of charge but the fact is that donors always ask for money for the gametes. It is not unknown that donor demand a fee for their donation. The payment for gametes will certainly commercialise the whole thing and make donors of the sperm turn professional. On the other hand, non-payment of any gratification may lead to non-availability of people to come forward to donate gametes. These will obviously, affect the patient who goes for medically assisted conception. The Swiss Academy of Medical Sciences reverberates when it stated that the donation of gametes must be made free of charge (1990).⁴⁵

⁴⁴ *Supranote* 42 at pg. 353.

⁴⁵ *Supranote* 42 at pg 353.

On the other hand, one of the issues is to assist the inseminating physician in assessing whether he is a suitable donor or not. He should give details of his family history, especially, the genetic diseases of either self or genetically related persons. In case of voluntary non-disclosure, the donor has to undergo medical examination, if the physician asks for it.

It also has to tackle with many important matters like issue concerning the privacy of the donor. Here, the release of medical information constitutes a breach of confidentiality, however some legal and social interest permits physicians to release a patient's genetic information with the consent of the patient or when requested by an order of the court. The publishing of the medical information raises some important ethical principles. What is privacy of a donor and to what extent it can be taken as a defense against publishing ones genetic information given for artificial reproductive techniques are also sane concerns.

The rights of an individual to be protected against intrusion into his personal life or affairs or those of his family, by direct physical means or by publication of information is the clear violation of right to privacy. Privacy is a basic human right and the reasonable expectation of every person.⁴⁶

At this juncture, the right to privacy of a donor shall be considered in connection with the right to know of the child.⁴⁷ Here the issue is regarding the following:-

- (i) The right of the donor not to publish his genetic secrets.
- (ii) The right of the artificially reproduced child to know about his parents.
The donor of the egg or sperm has some rights not to publish their genetic secrets to any others.

⁴⁶ Article 21 under Indian Constitution and various other International instruments also provides for Right to Privacy.

⁴⁷ Dr. George Joseph "*Artificial Reproductive Techniques-The New Horizon of the Right To privacy and Right to Know*" 4:98 Journal of Indian Legal Thought 103-4 (2006).

Every child has a right to know his or her parents. The President's Council on bioethics held at Washington D.C., March 2004, saw a number of powerful reasons in respect of the child's right to know:

- 1) The health and well being of children who are born with the aid of AI.
- 2) The foundational value of human life and the respect owed to it in its various stages.
- 3) The necessity to protect the freedom of children from improper attempts to manipulate their lives through control of their genetic make-up or from unreasonable expectations that could accompany such manipulations.
- 4) The protection of human body and its parts, the dignity of important human relationship.⁴⁸

In India, the guidelines for the Bio-medical research of the Human Subjects have been drafted by the Indian Council of Medical Research. It evidently provides that the children who were begotten with the help of artificial reproductive techniques and their adopted or social parents have the right to know whatever medical or genetic information about the genetic parents that may be relevant to the child's health.⁴⁹

It is clear from above that the genetic information of genetic parents can be published to the child and that of his adopted parents, if such disclosure is necessary for the health of the child. These guidelines can also be said to be in consonance with Article 39 (f) of the Constitution. But the code of Medical Ethics made by the Indian Medical Council provides that a medical practitioner: "*Do not disclose the secrets of a patient that have been learnt in the exercise of your profession*".⁵⁰ This shows the

⁴⁸ *Supranote 47.*

⁴⁹ <http://www.bioethics.gov/>

⁵⁰ Dr. George Joseph "*Artificial Reproductive Techniques-The New Horizon of the Right To privacy and Right to Know*" 4:98 *Journal of Indian Legal Thought* 105 (2006).

contradictory views for which only judicial intervention would give the appropriate solution taking into consideration nature and circumstances of the case.

Nevertheless, in case of any problem it can be disclosed only in front of the court with the order of the court. For this issue, it is pertinent to discuss a landmark decision of the Supreme Court i.e., *Mr. X v. Hospital Z*.⁵¹ In this case, one Mr. X was diagnosed in hospital Z and found that X was HIV (+). The marriage of "X" was fixed with one "Y" but later called off due to the information from the Z hospital that X was found to be HIV(+). Against this, the appellant X approached the National Consumer Disputes Redressal Commission for damages against the respondent, on the ground that the appellant might seek his remedy in the civil court. The appellant contented that the principle of 'duty of care' as applicable to persons in medical profession includes the duty to maintain confidentiality and since the respondent violated this duty, they were liable for damages to the appellant. Furthermore, when the case came before the Supreme Court the information violates the right to privacy of X. Regarding this, court observed doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts might amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's right to be informed.

This case clearly shows that even the discloser of true private facts has the inclination to disturb a person's serenity and harmony. It may create many difficulties to him and could also lead to psychological problems. He may there after, have a disturb life all through. Nonetheless, this right is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of right and freedom of others.⁵²

⁵¹ AIR 1999 SC 495.

⁵² Dr. George Joseph "*Artificial Reproductive Techniques-The New Horizon of the Right To privacy and Right to Know*" 4:98 Journal of Indian Legal Thought 106 (2006).

Thus, the right of a genetic father not to disclose the genetic secrets is not absolute and his right can be restricted for the preventing crime, disorder or protection of health or even for the protection of the rights and freedom of others. However, genetic information sometimes can serve additional functions that are not therapeutic and can be used to prevent crime.⁵³

In England, the disclosure of genetic information for non-therapeutic purpose is possible with the help of the provision in the Human Fertilization and Embryology Act, 1990. Section 31(3) of the Act allows a person who has attained the age of 18 years to check records maintained by the authorities. In India, no such legislation is there authorizing a person to see his genetic records. On the other hand, in the light of the decision of the Supreme Court in Mr. 'X' versus Hospital 'Z', one can hope that such information can be obtained from the concerned authorities.⁵⁴

The right of a child to know his genetic information and the right of another person to maintain secrecy of his genetic secrets are very important rights. One can rightly say that these rights have a correlative duty. In India, the law regarding the right of a child to know his genetic origin and the right of the donor to protect his genetic secrets are not directly settled either by legislation or by the judiciary.

The genetic information that pertains to an individual is something to be treated differently from any other personal information of a person. One thing is sure that the use of genetic information may raise multifarious issues, ethical and legal. At least, the most serious issue will be if an individual is subjected to a DNA test for reproductive purpose. This is not only affecting the particular individual but also his relatives.⁵⁵

⁵³ *Supranote 52*

⁵⁴ *Supranote 52.*

⁵⁵ Dr. George Joseph "*Artificial Reproductive Techniques-The New Horizon of The Right To privacy and Right To Know*" 4:98 *Journal of Indian Legal Thought* 107 (2006).

Confidentiality is a cornerstone of a patient- physician relationship. While the disclosure of genetic information constitutes a breach of confidentiality, well being of the child or the interest of the donor must be the only compelling situations that allow physicians to release a patient's genetic information. Modern Indian jurisprudence also considers the right to privacy not as an absolute right. For instance, the Constitution review Commission headed by Justice Venkatachaliah has suggested that though right to privacy is considered as basic right of a person, it should be reasonably restricted in the interest and the security of state, public safety, prevention of disorder or crime for the protection of health and morals and the protection of the rights and freedom of others.⁵⁶

Another important point to be noted here is that the donor should be major. This is a mandatory provision.⁵⁷ It will be against the public policy to permit the Artificial Insemination to woman, if the husband or the donor as the case may be is a minor under the law to which they are subject.

The possibility of transmitting infections or genetic diseases by AI undoubtedly leads to careful scrutiny of screening procedure. The American Medical Association (AMA) in 1974 declared that there has to be "selecting and screening donor to control the transmission of infections and genetic diseases."⁵⁸

This way the right of a child to know his genetic information and the right of another person to maintain secrecy of his genetic secrets are essentially important. There is a chance of tussle between the two where the judicial intervention is required.

3.2.7 Liability towards a Child:

One of the issues is also that the donor should have no liabilities towards the child like:

⁵⁶ *Supranote 55.*

⁵⁷ A.H. Ansari "*Artificial Insemination: Indian Perspective*" 1 Supreme Court Journal 19(1995).

⁵⁸ Freedman Warren, *Legal Issues in Biotechnology and Human Reproduction* 27(1st Edition 1991).

- i) Parental responsibility over the child.
- ii) Maintenance of the child in case artificial insemination is done by an unmarried woman
- iii) Claim of inheritance rights by the child,⁵⁹

The gamete donor is normally divested of any liability towards the child. In United Kingdom, it has been laid down by the statute that the sperm donor will not be treated as father of the child born out of the use of his sperm when he had given consent to such use under the Act.⁶⁰

On the contrary, if the sperm donor is a person known to the woman who artificially inseminated herself without medical assistance, the issue of identity of the donor and his responsibility arise. It becomes more complicated if the woman is unmarried.

It is also prominent that the existing control caters only to the issues which arise when medical assistance is used in procreation. There is every possibility that artificial insemination will be done by the woman herself without medical assistance. In such cases, fixing of parental duties on the sperm donor will deter such prospective donors. Hence, in any case of Artificial Insemination either with or without medical assistance, the donor should be free from any responsibilities towards the child.⁶¹

3.2.8 Duties of Physician:

Usually, the physicians owe a duty of care towards their patients. In case of failure to take reasonable care doctors are liable under the existing legal system. But the propensity of the judiciary is that the better wisdom of the medical profession is to be respected and decision taken by them should not be questioned.⁶²

⁵⁹ K.R. Mythili "Artificial Insemination –Legal Issues" 39; 24 Journal of Indian Law Institute 355 (1997).

⁶⁰ K.R. Mythili "Artificial Insemination –Legal Issues" 39; 24 Journal of Indian Law Institute 356 (1997).

⁶¹ *ibid*

⁶² K.R. Mythili "Artificial Insemination –Legal Issues" 39; 24 Journal of Indian Law Institute 357 (1997).

Many complications arise in the treatment of patients when they go for medically assisted procreation. Communication between the doctor and his patient needs to be confidential and privileged where AID is being done, though the doctor is to stick on to the confidentiality aspect, he is at times compelled to defer and give valuable information about the donor⁶³:

- i) the recipients; and
- ii) Child at a subsequent stage.

Further, the duty of care and skill of the physician may be put to test when he selects the donors for artificially inseminating the woman. The duty of care of the doctor may be questioned when defective donor gametes are used for insemination.⁶⁴

The doctors concerned must be satisfied before performing insemination about the consent of the husband and that the person who has given consent is the husband. Through the tests, if any required, he must be satisfied about the suitability of the donor for the recipient. For suitability he must also ascertain about the religion and the blood relationship of the wife, the husband and the donor as there is religious injunction against the inter-religious marriage and marriage within the prohibited degree.

3.2.9 Artificial Insemination and Unmarried Person:

In *C.M v.C.C*⁶⁵, the unmarried couple conceived a child by semen of C.M. C.C. is denying the visitation right to C.M. just like a natural father. But the court found C.M. is the natural father and allowed the visitation right.⁶⁶

According to Indian Council for Medical Research (ICMR) code, there is no legal bar on an unmarried women going for AID. But the child will be illegitimate. In this regard,

⁶³ K.R. Mythili "*Artificial Insemination –Legal Issues*" 39; 24 Journal of Indian Law Institute 357 (1997).

⁶⁴ *Supranote* 62.

⁶⁵ 337 A 2d 821(N.J. Super 1997).

⁶⁶ Pranam Kumar Raut "*Futuristic Legal Aspects of Advanced Assisted Reproductive Technology*" 88 The Cuttack Law Times13 (1999).

ICMR code says *a child born to a woman with the sperm of her deceased husband should be considered as legitimate despite the existing law.*⁶⁷

In United States, all the State Statues (29 states have statutory law) sanction the use of AID by married woman. Several statues expressly limit it to the married women. Four of the states provide for situation in which AID is used in such a way that they can be interpreted as either disapproving it for the unmarried women or leaving the question open.⁶⁸

In U.K. the Warnock Committee 1984 and the Law Commission recommended for prohibition of AID for unmarried or divorced or widow woman. The socialist countries have statutory prohibition for it.⁶⁹

The reason which can be assumed for restricting the AID only to married women may be marriage institution, in the present set-up of the law and the society anywhere in the world is more important than right of a woman to have a child by any of the means. The child of an unmarried woman in all circumstances will be an illegitimate child. By law, legitimacy can be provided to him but will be least social acceptance of it and the child will be deemed as illegitimate child and he/she will have to bear rigors of the society because all the religions consider such a child as an illegitimate one.

When both husband and wife are present the child will not have psychological setback as he will have a father too. It will be easy for them (husband and wife) to rear the child. Moreover, in absence of the male partner, the woman alone will have to bear the expenses of the child, which will be an uncalled burden upon the donor of the sperm.⁷⁰

⁶⁷ *Supranote 66.*

⁶⁸ A.N.Ansari "*Artificial Insemination: Indian Perspective*" 1 Supreme Court Journal 15 (1995).

⁶⁹ *ibid*

⁷⁰ *ibid*

There is a growing trend to become an unmarried mother, though there is no special acceptance of these phenomena. But the AID child of an unmarried mother will be illegitimate.

If the woman is unmarried but avails of treatment together with a man whose sperm is not used for artificial insemination, he is to be treated as the father of the child. It is provided that the donor of the sperm to be used for artificial insemination is not to be treated as the father of the child. If the sperm of a man or an embryo created by that man's sperm has been stored and is used after his death he will not be treated as the father of the child.

If an unmarried woman avails of treatment then the child born will be without any father as social parentage cannot be assumed.

However, there is no Act to prohibit treatment to single and unmarried person. But it states that while treatment is being provided the well being of the child including the presence of a father has to be taken into account by the inseminating physician. This does not solve the problem of legitimacy of the child.

The most unique feature of Artificial Insemination is that AID makes the sexual intercourse separate from reproduction. This shows the way to the chance of the use of AI techniques by non traditional parties such as unmarried couple and lesbians giving scope for further complicated legal questions. Though, in India such situations are rare as legal specification allowing only the hetero- sexual couple to resort to AID would help as preventive measures in disallowing such deviant practices. Though, such legal situation may be attacked on the ground of being violation of right to equality (Article 14), such a measure can be justified on a biological urge as a social response and hence falls under the purview of reasonable restrictions clause.⁷¹

⁷¹ Mrs.V. Rajyalakshmi "*Reproductive Technology vs. Women*" 1 Supreme Court Journal 49 (1996).

3.3. Legal and social implications on Surrogate Motherhood

In surrogate motherhood, the process of pregnancy depends upon the arrangement involved. As already discussed the three processes are:-

- 1) Total Surrogacy .
- 2) Partial/Genetal Surrogacy
- 3) Commercial Surrogacy.

The surrogacy arrangement involves the crucial question as to what constitutes motherhood. Is it the process of gestation or bearing which constitutes the motherhood? This is an extremely problematic question that urgently require statutory framework.⁷²

Very few nations have been successful in framing their laws on these issues. It is of vital importance to analyse the complexities arising due to surrogacy. It is also significant to consider the need for the appropriate legislation on the subject. Further, it is also necessary to see whether the process of procreation will lead to commercialization of the ability to give birth or not.⁷³

Usually, in surrogate motherhood the most common form is where the woman in question is both the gestational and bearing mother, but, she gives up the child to the couple who has engaged her services for a pre-arranged fee. This process does not involve the difficult question of what constitute motherhood, but it brings in its own issues.⁷⁴

The surrogacy arrangement elevates a query as to whether the contract amounts to contract of service or contract for service. In a contract of service where somebody is employed as part of the business, the surrogacy arrangement falls under the law of

⁷² Mrs.V. Rajyalakshmi "*Reproductive Technology vs. Women*" 1 Supreme Court Journal 50 (1996).

⁷³ *ibid*

⁷⁴ *ibid*

contract category of service and hence would be out of the preview of the Consumer Protection Act, 1986.⁷⁵

The surrogacy contract has led to the many matrimonial challenges. For e.g., if the husband of an infertile woman engages the services of surrogate mother who has been artificially inseminated with his sperm, does it amount to adultery if his wife is opposed to such an agreement? As the AI does not involve actual sexual intercourse, it does not amount to adultery but will certainly amount to the matrimonial cruelty. The similar response may be extended to a situation where the surrogate mother has agreed to the arrangement without the consent of her husband.⁷⁶

Sometimes woman who has agreed to be a surrogate mother, refuses to be bind by the contract, than what will be the consequence of such a contract? Whether she will be guilty of breach of the contract? Can the man or couple involved claim upon the specific performance of the contract? This raises the essential question as to whether the contract is a valid contract or not? Public policy stresses that such contracts should be treated as void for two causes⁷⁷ -

- 1) Surrogate motherhood arrangement show the way to child trafficking.
- 2) Commercial surrogacy arrangements though offers respectable status comparing to prostitution, fosters physical, emotional and economic exploitation of women dropping their status further to be no more than being a commodity.

Here, it would be pertinent to refer New Jersey Supreme Court's statement in re *Baby M*⁷⁸ case where the court particularly held that the right to procreate very plainly is

⁷⁵ Mrs.V. Rajyalakshmi "*Reproductive Technology vs. Women*" 1 Supreme Court Journal 50 (1996).

⁷⁶ *Supranote 72*.

⁷⁷ *Supranote 72*.

⁷⁸ 100 N.J. at 448,537A zd at 1253.

the right to have natural children whether through sexual intercourse or artificial insemination. It is no more than that. The decision thereby had given sanction to AI but denied the same to surrogate motherhood. However, the distinction between AI and surrogate motherhood based upon 'naturalness' is deceptive. Both the techniques are equally natural or unnatural. The main reason for denial of legal sanction to surrogate motherhood arrangement is that it is opposed to public policy.⁷⁹

Therefore, the trend is towards declaring the intended or genetic mother as having rights over and above that of the surrogate mother. This also obliges on the spouse of the natural father in the case of genetic surrogacy has no claims or parental rights over the child until she legally adopts it.⁸⁰

Furthermore, there is apprehension that the surrogacy may turn out to be a profit making business especially in the light of the profit motivation, where the poor section of women may be attracted by offering huge amount of money. Thus, there is a need for the legal structure to balance between the technological innovations with that of the causes of human welfare.

There is a strong contention that paying someone to have a baby is equivalent to buying the baby. Whether the evil inherent in baby selling is present in surrogate motherhood? It is justified that surrogacy is no compare with baby selling. There has to be regulations in order to formulate the responsibilities arising out of surrogacy. In order to formulate such regulation, there is a need to understand the surrogacy.⁸¹

Another issue of concern is that women are often provided with false information regarding the success, the side effects or the treatment. There are also situations where women are unaware of the possible side effects and they go for a treatment as

⁷⁹ Mrs. Rajyalakshmi "*Reproductive Technology vs. Women*" 1 Supreme Court Journal 51 (1996).

⁸⁰ Radhika Kolluru, Gitanjali Lakhota "*Surrogacy :Legal and Social Issues*" 5 Law and Medicine 281 (1999).

⁸¹ *ibid* at pg. 284

experimentation. Consequently, where the consent given by the woman for undergoing treatment is obtained due to the absence of accurate information or due to false information either intentional or unsure, such consent can never be treated as informed consent. There is always possibility that professional judgement may not be clear and accurate as many times information given by professionals are given just to hide true information. Hence, it is very much desirable that the fixation of the legal responsibility on medical profession should proceed with due precaution.⁸²

In surrogate arrangement a woman accepts pregnancy and bears child either by way of artificial insemination or by way of implantation of in-vitro fertilized ova at the blastocyte state, till normal delivery for another woman who is incapable of carrying child.⁸³

It has been reported in Times of India Report that a 30 years old woman from Chandigarh named Nirmala intends to bear a child for an infertile couple in exchange for Rs50, 000. Nirmala's unconventional plan to raise money for her invalid husband's medical bills has been the wake up call for every one to envisage the possible social, ethical and legal issues of new reproductive technologies. In India, there are 186 members in ART. It shows the growth of ART in India.⁸⁴

Taking into consideration all the practical difficulties the Indian Council for Medical Research code has drafted through the Central Ethical Committee on Human Research of Indian Council for Medical Research under the chairmanship of former Supreme Court Chief Justice M.N. Venkatachalaia who has led down the following points regarding surrogate mother⁸⁵:

⁸² Mrs V. Rajyalakshmi "*Reproductive Technology vs. Women*" 1 Supreme Court Journal 52 (1996).

⁸³ Pranam Kumar Raut "*Futuristic Legal Aspects of Advanced Assisted Reproductive Technology (A.R.T.)*"

88 The Cuttack Law Times 14 (1999).

⁸⁴ *ibid*

⁸⁵ *Supranote* 83.

- i) Surrogate motherhood should be legal only when it is coupled with authorized adoption.
- ii) It should be irrefutably presumed that a woman, who carries the child and gives birth to it, is its mother.
- iii) The intending parents should have preferential right to adopt the child subject to six weeks post- partum delay for necessary maternal consent.
- iv) Surrogate motherhood should be legal only if it is medically certified as the only solution to infertility or any other medical bar on pregnancy by the intending mother.
- v) Abortion under the law (M.T.P. Act) on medical ground should be an inviolate right of surrogate mother and the adopting parents have no claim over the amounts already paid in the contract of surrogacy.
- vi) Here the only remedy for the genetic father then would be the claim for custody on the grounds of the best interest of the child.

It has been clearly stated in *re Baby M*⁸⁶, that the surrogate mother is the legal mother but the surrogate contract is invalid.

Sometimes, contracting couple divorced after the start of pregnancy might pressurize the surrogate mother to abort. If the medical ground will not allow aborting, then what will be the status of the child? Sometimes surrogate mother may try to abort or harm the child after getting the proper payment. These are some issues still to be solved through visible legal framework.⁸⁷

Surrogacy has aggravated the most intense opposition and the greatest public opposition, perhaps due to its very visible splitting of motherhood into genetic, gestational and social components.

⁸⁶ 537 A.2d-1227 CN. J 1988.

⁸⁷ Pranam Kumar Raut "*Futuristic Legal Aspects of Advanced Assisted Reproductive Technology (A.R.T.)*"

⁸⁸ The Cuttack Law Times 15 (1999).

Surrogacy is the practice where one woman carries a child for another with the intention that the child should be handed over after the birth. The use of artificial insemination and the recent development of in-vitro fertilization have eliminated the necessity for sexual intercourse in order to have pregnancy.

As discussed, in surrogacy the confusion to the society is concerning what constitutes the motherhood? Is it the child bearing or child rearing? It's beyond the question that the woman who gives birth to the child is through the law as the mother. But with the advanced reproductive techniques, it is now possible for a woman to give birth to a child yet not genetically related, for example, when the egg and the semen has been placed in her body from the third person. This grows the question of whether the woman giving birth or the genetic mother is the legal mother. In India, there is no state regulation on this aspect till now.⁸⁸

In England, section 27 of the Human Fertilization and Embryology Act, 1990 endow that the legal mother of a child is the woman who carries and gives birth to the child. This is the position even when the egg is being donated by another woman. So the genetic link is not implicated to the legal recognition of motherhood.⁸⁹

There are many other issues also such as what if the embryos are transferred to a woman other than the one who contributed the ovum? What happens if the surrogate mother wants to keep the child? What is the status of the child with reference to the wife of the person who contributed the genetic material? Is she the step mother, social mother or the adoptive mother? Hence, the status of surrogate mother is still not clear.⁹⁰

The additional intricacies occur with situation relating to biomedical research in embryos. Embryonic tissue itself can have therapeutic value. It has the capacity to relive Parkinson disease when transplanted into the brain of a sufferer. This raises a very

⁸⁸ R.Anita Rao "*Surrogate Motherhood- Legal Perspective*" 2 Andhra University Law Journal 100 (1996).

⁸⁹ *ibid*

⁹⁰ R.Anita Rao "*Surrogate Motherhood- Legal Perspective*" 2 Andhra University Law Journal 101 (1996).

serious issue of how to regulate the scientific patents and turn reproductive services into market commodities. There are complicated issues that need to be faced by the society. The new technological implications have a direct bearing on the human reproductive system which has left considerable space between individual and the state. Till now, there is no explicit law to control and regulate these processes.⁹¹

So in surrogacy, surrogate mother is a woman who carries the pregnancy for another woman. She might furnish the egg and the womb and be artificially inseminated with the semen of the partners of another woman or she might provide the womb to an embryo obtained by IVF in which both the egg and sperm will be furnished by donors.⁹²

Generally, law prevents any action that can be deemed to be dangerous to the well-being of the unborn child and thus any action of the woman trying to cause harm constitutes a breach and she will be forfeiting her fees. Various legal complications will arise after the birth of the child. On the birth certificate the name of the father and the mother will appear and the certificate will be destroyed many weeks later and the child will be later adopted by the potential step mother. The adoption cannot be taken straightway because it may amount to baby selling. After giving birth by the surrogate mother, the baby has to be legally adopted by the expected parents.⁹³

The court while deciding the cases on surrogacy has to take into consideration, the intention of the surrogate mother. The father may sue her for the amount he paid or if the child is not received by the parents, she (the surrogate), can sue the parents for the expenses, till the adoption. The Indian Contract Act is also silent regarding these contractual obligations. Does it amount to personal service which is not enforced in the court of law? Hence, the position is not clear.⁹⁴

⁹¹ *Supranote* 90.

⁹² *Supranote* 90 at pg. 102.

⁹³ *Supranote* 90.

⁹⁴ R.Anita Rao "*Surrogate Motherhood- Legal Perspective*" 2 Andhra University Law Journal 102 (1996).

It is essential to clear the public image of a surrogate mother. She must be distinguished both from the sexual prostitution and body selling. Is the surrogate mother a prostitute? Or is she instead a modern extension of a wet nurse? Is the surrogate arrangement like donating the sperm or simply giving the women the right to sell their reproductive capacity as men have done for years? Can women sell her reproductive capacity the same way as old time prostitutes sold their bodies?

It is the need of the hour that a woman who is willing to surrogate her womb must be allowed to do it without the stigma of prostitution because there is no physical contract. The surrogate is being paid for giving the men what his wife can't, i.e. begetting a child. This way, there is a necessity to provide legal protection to the status of a surrogate mother.

The issue which creates a grave problem is the status and the relationship of the surrogate mother. What is her relation with the child she is carrying? It is nothing but womb leasing or womb for rent and what are the custodial rights she has over that child? After the child is born she has no right to keep the child because she is neither the mother (where both ova and sperm are from two different people) nor a contractor of the genetic maternal. She is only a contractor who is willing to give the end product once the contract between her and the person is fulfilled.⁹⁵ Can she be referring with any other contractor and can the child be referring as subject of contract under law? These questions have to be resolved by the law-makers and the judiciary.

Andra Dworein has placed surrogate motherhood in the centre of her elegant model of the systematic exploitation of women. Motherhood has become a new branch of female prostitution with the help of reproductive technology. Looking from one angle surrogate motherhood involves separating woman from the naturalness of conception, pregnancies and birth by intestifying the control over there processes largely by bio

⁹⁵ *Supranote* 94 at pg.103.

medical techniques and it undermines women's confidence as a biological reproductive technique of creating the new life.⁹⁶

Is surrogacy an equivalent to organ-selling? Morally, comparing those who are needy to sell their kidneys to the rich patients and the surrogate mother who rent the womb to the infertile couple, can they be on equal footings?⁹⁷

In a country like India, surrogacy insists on commercialization which may become a tool on the hands of the wealthy people to exploit poor women by attempting to manipulate to sell their womb for monetary benefits ignoring their emotions, physical well-being etc. It might have ill-effects on the child also including the social and legal status, psychological and emotional disturbance in the life of the child.⁹⁸ All these aspects have to be taken care of by the legal fraternity in order to avoid complications.

3.4. Controversies on Human Cloning

Clone is defined as an organism that has the same genetic configuration as another organism. It is the method of obtaining a genetically identical duplicate of an organism which is largely called as cloning. Human Genetics Advisory Commission (HGAC) and Human Fertilization and Embryology Authority (HFEA) define cloning as "*copying and propagation without altering the genome*". When the genome complete genetic identity of any individual is cloned (or copied) a genetically identical individual is formed.⁹⁹

While advances are being made in exploring the possibilities of human cloning, the host of questions of moral, ethical, emotional and legal aspects should be addressed

⁹⁶ Supranote 94.

⁹⁷ Supranote 94.

⁹⁸ Radhika Kolluru, Gitanjali Lakhota "Surrogacy: Legal and Social Issues" 5 Law and Medicine 295 (1999).

⁹⁹ S.K.Verma "Cloning: Controversies and Law" 21(1-3) Indian Journal of Criminology and Criminalisation 197 (2000).

urgently to reform the critical situations of human cloning which may arise in future. There are certain advantages that are stress upon on the following points¹⁰⁰:-

1. Cloning can help those having problems of miscarriage, they can be treated by preparing effective new contraceptive by providing large number of morulas or ovums for medical experiment to be carried on.
2. Cloning can help those researching on cancer as cancer cells grow just like human morula cloning can lead cancer researchers to achieve success by providing large number of morulas for experiment.
3. Cloning can provide immense medical facilities-
 - i) It helps in providing human cells which may provide tissues including blood cells and skin useful for surgical or grafting in burn cases of humans.
 - ii) Treatment for damage to the brain or nervous system can be achieved by obtaining nerve cells through human embryo cloning.
4. Cloning helps to avoid hereditary disease providing cloned fertilized ovum to be tested.
5. Cloning can supply more eggs to IVF technology which will increase the possibility of pregnancy in case of infertility of women.
6. Reality of banks of organ for transplantation can be achieved only by various spare parts provided by cloning.

Cloning can be used as a new method of reproduction next to Artificial Insemination or In-Vitro Fertilization technology which may help humankind in various ways. However, this measure is also not free from side-effects. Some negative sides of cloning with relation to the questions of morality are¹⁰¹:-

- i) Sex determination of foetus by genetic screening test can be easily done.

¹⁰⁰ Pranam Kumar Raut "Human Cloning and the Law" 88 The Cuttack Law Times 33 (1999).

¹⁰¹ *ibid*

- ii) Creation of perfect human or master race will be a curse to human civilization and competition to survive can wipe out entire human race.
- iii) Genetic diversity will be seen. The general apprehension also arises that it could annihilate the animal kingdom one day.
- iv) Emotional problem can be an issue in family and society. Society can discriminate between cloned man and natural born man.
- v)
 - a) Cloned man may be born with abnormality.
 - b) Cloned man may suffer in long run due to mutation.
 - c) Cloned man may prone to diseases.
- vi) Ageing process of a clone reduce the life span when cloned from an aged cell as cloned cell's aged simply reflects the age of the cell from which it was originally cloned.¹⁰²

It may be possible to clone human but it is offensive against the law of nature. It has been argued that human cloning shall be banned to avoid evil practices. But regarding researches are concerned, there is always more people favoring the same and thus there is always some relaxation on it.

According to Article 12 of the Universal Declaration on the Human Genome and Human Right which has accepted by the general conference on UNESCO in November 1997, *Freedom of Research which is necessary for the progress of knowledge is part of freedom of thought*. The application of research must be for the improvement of humankind, their health and other related factors such as advancement of medicine requires for the survival of human being, to provide them relief from suffering etc. So, if cloning is for the betterment of human being than there is no harm. But, however, in the

¹⁰² *Supranote* 101 at pg. 34.

absence of statutory laws, it is difficult to regulate the research on human cloning and to prevent it from misuses.¹⁰³

There has been effort on giving freedom to the scientists on the matter of cloning. Nobody has right to stop anyone from gaining knowledge in the process of research. Ban on human cloning will totally hamper their freedom of research. According to Dr. Wilmot's words *you cannot blame the scientist for making these kinds of discoveries it is now up to society to decide how it should be used.*¹⁰⁴

If there is fear on the creation of cloning than the problem lies with the society itself as it is not ready to accept the changes and misuses these scientific technologies. On the eve of modernization of 21st century the world claiming to be in scientific age should accept the cloning technology.¹⁰⁵

Till 1997, it was not possible to produce a clone in higher animals and human beings, when a sheep (named Dolly) was cloned using a mammary cell of an adult ewe in Britain at the Roslin Institute in Edinburgh by Dr. Ian Wilmot. This initiated a debate and controversy that whether the research related to cloning should be allowed or not. The scientist in the United States have cloned a calf and thus in almost all the countries of the world including India, large number of projects are going on, to produce clones of various types of animals.

So far, no human clone has been created, but in early 1998 a Chicago physicist Richard Seed announced his intention to raise funds to clone a human. There are possibilities that in near future human clone can be created. The cloning experiments in animals imply that similar techniques might make it possible to clone humans. Such cloning would be used for many purposes such as- transferring a human ovum to a test tube removing its nucleus, replacing it with a somatic cell nucleus to differentiate to the blastula stage and

¹⁰³ *Supranote* 101at pg.38.

¹⁰⁴ *Supranote* 101at pg.39.

¹⁰⁵ *Supranote* 101 at pg.39.

than implanting it in a host uterus. The person using it on attaining maturity could be an identical genetic twin of the adult nuclear donor.¹⁰⁶

Cloning process has the capability to provide a clone to those individuals/couples in which other methods of reproduction have failed to provide healthy children. It is also a technique to select, control or alter the genome of offspring. Cloning may be adopted by couple who because of infertility, a high risk of severe genetic disease or other factors can not or do not wish to conceive a child. In place of sperm, egg, or gamete donation to infertile couples, they may opt for cloning of either of them, as the child would be biologically related to one of them, when this goal cannot be achieved through sexual reproduction.¹⁰⁷ Thus, cloning can help those unfortunate couple who even after adopting all the reproductive measures failed to have a baby or perhaps healthy baby.

Cloning can be used as an alternative to gamete donation. Sometimes couple has to remain childless because of complicated procedure of adoption or the couples at high risk of offspring with severe genetic diseases. If they already had a healthy child, they might choose cloning to create a later born twin of that child and in distant future it may also become possible to correct the genetic abnormality with gene therapy during cloning. Cloning may also be used to enable a couple to clone dead or dying child so that that child remain with them in closely related form.¹⁰⁸

The usual controversial application of cloning relates to obtaining tissue or organs for transplantation. There may be a situation where a child who needed an organ or tissue transplants might lack a medically suitable donor. Couples in this situation can conceive a child coitally in the hope that the child born would have the correct tissue to serve e.g. as a bone marrow donor for elder sibling. Cloning a person's cells up to the embryo stage might provide a source of stem cells or tissue for the person cloned. Using cloning it may

¹⁰⁶ S.K.Verma "Cloning: Controversies and Law" 21(1-3) Indian Journal of Criminology and Criminalisation 198 (2000).

¹⁰⁷ *ibid*

¹⁰⁸ *ibid*

also be possible to elucidate the mechanism that makes totipotent cells differentiate, which could allow diseased or damaged tissue to be encouraged to regenerate in vivo making transplantation; there is no risk of rejection of the organ.¹⁰⁹ This is highly useful purpose where cloning can be used for human transplantation.

A further probable area of use of cloning is in vaccine development. It has the chief advantage of not requiring cold chain which is a necessity for an effective present day vaccines. Efforts have been made to develop transgenic fruits which could be used as eatable vaccine. In India, attempts are being made to create the so called fertility control vaccine with cloned genes. Several labs are trying to isolate and then clone a gene from insect cells that would enhance cell life and thus make sure prolonged existence.¹¹⁰

Cloning has raised legal and ethical issues since early 1970s when Hans Jones noted that it does not matter whether an exact duplicate of an existing person is not possible. The important subject is that the person is chosen to be cloned because of some characteristic he or she possesses. He argued that cloning is necessarily a crime against the clone, the crime of depriving the clone of his or her right to existence relating to certain important phenomenon such as- the right of ignorance of facts about his or her origin that might affect him or her from becoming who he or she is.

Eugenic reproductive human cloning has been condemned all over the world as it is totally unethical and against the principle of nature. Various organizations and countries have started making legislation to ban/ regulate human cloning.¹¹¹

Article 11 of the Universal Declaration on the Human Genome and Human Rights (UNESCO, 1997) utter that practices which are contrary to human dignity such as reproductive cloning of human beings shall not be permitted. In January 1988, the

¹⁰⁹ S.K.Verma "Cloning: Controversies and Law" 21(1-3) Indian Journal of Criminology and Criminalisation 198 (2000).

¹¹⁰ *ibid* at pg.199

¹¹¹ *ibid* at pg. 200

European Convention on Human Rights and Biomedicine was amended to include a total ban on human cloning. The preparatory resolution affirms that “*cloning of human being for any purpose whatsoever cannot under any circumstances be tolerated by any society*”. It is a grave violation of fundamental human rights and contrary to the principle of equality. It is against human dignity and it requires experimentation of humans treating human being as spare parts or substitute.¹¹²

There is risk also if clones created are imperfect clones, who will take the responsibility of such clones is also a question to be answered.¹¹³ These controversies have to be sorted out first before human cloning actually takes place. For that there is a need for the visible laws to regulate these issues.

Cloning challenges the present human kinship and family structure. Is the original of the clone, its parent, or sibling? The donor is not the clone’s parent in the biological sense, but is simply an earlier offspring of the original parents. It challenges the traditional notions of reproduction and parenthood, and radically redefines them. The argument also fails to explain the social relationship of the clone with the earlier offspring. This has implications on the society.¹¹⁴

The question of individuality of the clone also comes. Though, the genome type of the clone is important, the environment in shaping personality cannot be underestimated. The nature of the parental motivation, the motives that people have for bringing a child into the world, these issues are underlying with the development of cloning.¹¹⁵ It helps same sex couples in fulfilling their desire for biological offspring. The inability or unwillingness to involve in sexual intercourse does not prevent an individual from enjoying her procreative right which is fundamental human right.

¹¹² *Supranote* 109 at pg. 200

¹¹³ *Supranote* at pg.201.

¹¹⁴ Naveen Sankaran “*Human Cloning – A Pandora’s Box*” 5 *Law and Medicine* 259 (1999).

¹¹⁵ *ibid*

3.5. Birth Control Measures and its Effects on Women

The use of contraceptive (birth preventive measure) creates many issues. What should be the level of knowledge of the doctor, if consulted and what degree of information is the woman consumer entitled to? Apparently, the doctor has to exercise reasonable care, that is to say, act in accordance with a due care and give medical opinion carefully, particularly when advice to be given to a woman about risks and benefits of various forms of contraception.¹¹⁶

In England, the Consumer Protection Act, 1987 made a drug company subject to strict liability for injuries consequential from any product released by it on the market.¹¹⁷ Thereby, in case of any injuries from the use contraceptive, the drug company is made liable.

As the family planning programme is there in the health policies of the government with the propose to tackle with the population explosion campaigning about the various birth control measures such as contraceptive pills. But, to what extent these policies and programmes are analysed from a prospective of woman's right and woman's health. There are various issues on this subject matter, such as-who are the decision makers in use of contraceptive? To what extent do women have informed choice in determining the contraceptive of their use?¹¹⁸

When talking about contraception, it is necessary to look into the real life situation. Though, with government effort to balance population explosion, there is availability of contraceptive, but, to what extent women's voice has been heard-whether it is decision regarding consumption of such contraceptive or while making state policy or simply

¹¹⁶ P.M. Bakshi "Contraception and Abortion: Some Legal Issues" 11(1) Lawyers Collective 21 (1996).

¹¹⁷ *ibid* at pg. 22.

¹¹⁸ Gwendoline M.Alphonso "Preventing Motherhood: The Medico-Legal &Ethical Dilemmas in Contraception" 5 Law and Medicine 2(1999).

while dispatching it in the market. Does anyone consider women's choice and women's health in such matter?¹¹⁹

Needless to say, the present contraceptive debate analyses that it prevents all women from realizing their reproductive rights. This has been reflective from the attitude of the societies towards women's health. Contraception, itself have serious repercussions on women's health. To what extent is choice therein is informed? What are the side-effects of such contraceptive on women's health?

The contraceptive is used for various reasons. The main reason is the choice or preference of the users. How much choice exercised is informed choice in terms of information given about risks; its side effects and its effectiveness etc. Legally, choice refers to informed consent of the user.¹²⁰ If the birth control measures are adopted without informed consent would it amount to the tort or a criminal offence? In India, there is no law to regulate informed consent of the user and there is hardly any difference made between choice and consent. Here, it has to be examined whether women are the decision makers in contraception or whether their choice is informed by medical practitioners and health care providers? This reflects the fact, how much women have control over their reproductive and sexual lives?¹²¹

There are various reasons for the use of contraceptive like to prevent pregnancy, to space pregnancy and to avoid pregnancy. Generally, the risk to the user of controlling fertility is very less when simple method of contraception is used. But there are other contraceptive measures also, such as-IUDs, condom and diaphragms and coitus interrupts. The problem for women is that the more reliable methods the more they have less control over the decision of reproductive rights.

¹¹⁹ Gwendoline M.Alphonso "*Preventing Motherhood: The Medico-Legal &Ethical Dilemmas in Contraception*" 5 Law and Medicine 2(1999).

¹²⁰ *ibid* at pg. 7.

¹²¹ *ibid* at pg. 8.

The IUD introduced in India in the year 1965 and promoted widely, though at first popular, but later on failed because of the reasons stated below¹²²:

- Careless insertions by para-medical staff;
- Women are not informed about the side effects;
- No proper back-up medical care.

Another important issue in this respect is the economic disparity in the society which has its effects on the use and acceptability of such measures. Those women with economic ability can opt for proper facilities in case those measures create any problems. They can assist with back up medical care in case of failure of such measures.

One more area of concern is how much information do a doctor provides to a person who choose the use of contraceptive best suited to her needs? This issue also needs to be addressed under proper legal framework. It is found that the doctors dismissed side effects as irrelevant as they are not life threatening to women. It is largely seen that women's health has been ignored when contraceptive is concerned. Though women are having unaccounted side effects because of such methods such as- nausea, vomiting tendency, weight loss/gain, bleeding, loss of fertility etc.

Even if woman is suffering from side effects doctors would not acknowledge it. No doctor would be held negligent if he/she did not take cognizance of side effects as told by the woman, even if those unattended side-effects later caused injury/harm to the woman concerned.¹²³

The contraceptive is sometimes used not only by the married woman but unmarried adolescent girls also. The reason for the use of contraceptive by adolescent woman is totally different from that of the married woman. The awareness programme such as the

¹²² *Supranote* 118 at pg.12.

¹²³ Gwendoline M.Alphonso "*Preventing Motherhood: The Medico-Legal &Ethical Dilemmas in Contraception*" 5 *Law and Medicine* 15 (1999).

family planning programme of developing countries as a component of Mother and Child Health (MCH) programmes fails to reach out to youth who are not acknowledged to be sexually active.

The social structure of the society where it is presumed that sex and reproduction must be confined to the traditional family structure, which would ensure only after marriage, is the reason for the lack of knowledge on contraceptives. The level of educational attainment is also associated with the proper use of contraceptive and informed consent.

There are some new products has been arrived in the market known as “morning after pill”. This new form of contraception has also crop up various issues before the society. This drug is approved for general use which is to be taken within 72 hours of sexual intercourse to ensure that any fertilized ovum will not implant in the womb. If more than 72 hours elapse after unprotected intercourse before the woman seeks help “menstrual extraction” can be used at or just after the due date of her next period to avoid chances of pregnancy.¹²⁴

The question has been raised whether the morning after pill is a species of abortion. The answer should be in the negative for the following reasons¹²⁵:

- a) The fundamental concept of abortion contemplates that kind of conduct which leads to the expulsion of the foetus from the uterus before its full maturity.
- b) From above, it is clear that the abortion requires three conditions to be satisfied:
 - i) There must be expulsion.
 - ii) There must be a conduct which acts on the foetus.
 - iii) There must be expulsion of the foetus from the uterus.

¹²⁴ P.M. Bakshi “*Contraception and Abortion: Some Legal Issues*” 11(1) Lawyers Collective 21 (1996).

¹²⁵ *ibid*

None of the requirements as stated above appears to be satisfied by a drug called as morning after pill as referred above and therefore that drug cannot be regarded as an abortifacient.¹²⁶

Regarding other types of method, so far, no successful prosecution has ever been brought in respect of the use of an intra- uterine device, adopted as a means of births control after sexual relations. In 1983, in England, the Attorney General articulated his opinion that prior to implantation, there is no pregnancy and hence the means used to prevent implantation do not constitute the act of procuring miscarriage.¹²⁷ Thus before conceiving there is no abortion.

Although, the use of the morning after pill can be legitimately regarded as outside the sphere of abortion, a problem arises in regard to certain mere medical devices of family planning. One such device is known as menstrual extraction. By this technique, an instrument attached to a vacuum is used to remove the endometrium within a few minutes, including, if it exists, the product of any unwanted conception. Firmly observing, by the time this procedure is utilized, the ovum will have an implanted embryo and the action taken to remove the embryo by the vacuum method seems to fulfill the essentials of abortion and thus constitute induced abortion.¹²⁸

Another drug called as Mifepristone (RU 486), may render menstrual extraction obsolete. It is consumed orally in the first twelve weeks of pregnancy and in most women it is expected to induce a complete miscarriage within 48 hours. It is true that the development of the product cannot change the law of abortion and such a procedure can be lawful only if the requirements of the Medical Termination of Pregnancy Act, 1971 are satisfied.¹²⁹ Thus, in order to check use of contraceptive under this Act, there has to be amendment of the Act.

¹²⁶ *Supranote* 124 at pg. 22.

¹²⁷ *Supranote* 124 at pg 22.

¹²⁸ P.M. Bakshi "*Contraception and Abortion: Some Legal Issues*" 11(1) *Lawyers Collective* 22 (1996).

¹²⁹ *ibid*

Generally, birth control is a measure which may be considered as embracing all the processes (scientific or otherwise) by which a child is only born if and when it is desired by its parents' and not otherwise. As a national policy, it is a process of controlling population growth, with all the dynamics in order to ensure a healthy, enlightened population and a high standard of living for all people.¹³⁰

3.6. New Horizon in Cases of Sterilization Operation

There are numerous complaints regarding failure of sterilization operation where the woman underwent tubectomy was unsuccessful and subsequently, she again become pregnant and gave birth to a child. In such cases, earlier there was no remedy before the law but now, court has set a new trend, the aggrieved party now go to the court to demand compensation for bringing up unwanted child.¹³¹

Medically, it is said that no method of female sterilization is absolutely reliable. All methods have a certain failure rate and the risk is inherent in the procedure.

Every doctor who enters the medical profession has a duty to act with reasonable degree of care and skill. This is what is known as the implied undertaking by a member of the medical profession that he would use a fair, reasonable and competent degree of skill. Thus, even after due care of the doctor if there is failure of sterilization operation than doctor will not be liable. Here, the question arises who will determine the liability of a doctor?

¹³⁰ M. Adekunle Owoade *"The Legal Implication of Contraception in Contemporary Nigeria"* 14 Indian Socio- Legal Journal 68 (1988).

¹³¹ Surya Malik *"Failure of Sterilisation Operation-Whether Medical Negligence?"* AIR Journal 292 (2004).

The doctors were not made liable for the failure of such operation for long time. The Medical experts have led down the following reasons of failure.¹³²

- a) slipping or tearing of the ring
- b) recanalisation of the cut ends of the fallopian tubes by the natural process of union
- c) Tubo-peritoneal fistula formation
- d) Inappropriate application of the ring due to deep adhesion among the nearby structures, when identification of the tube becomes difficult
- e) Diseased condition of the lower abdomen such as PID Endometriosis.

The court has in the case of *Archana Paul v. State of Tripura*¹³³, held that “*failure of sterilization is the nature’s overpower on human conduct to maintain the nature’s rule Of progency*”. The year 2000 saw a sea change in the trend- setting judgment of *State of Haryana v. Smt. Santra*.¹³⁴ The court has granted compensation for the birth of an unwanted child due to the failure of sterilization operation because of the negligence of the doctor.

Various case laws reveal that on failure of sterlisation operation, the claim of the complainant was rejected. The reason is obvious one. There are natural and unwanted and unavoidable circumstances that can lead to a failure of the operation, though done with due care and caution.¹³⁵

In Santa’s case there was prima facie negligence of the concerned doctor. Expert evidence confirmed this. The doctor should be held liable if¹³⁶,

- i) Sterilisation operation is incomplete.

¹³² *Supranote* 131.

¹³³ AIR 2004 Gau 7.

¹³⁴ 2000 (3) SCALE 417.

¹³⁵ Surya Malik “*Failure of Sterilisation Operation-Whether Medical Negligence?*” AIR Journal 295 (2004).

¹³⁶ *ibid*

ii) The doctor fails to inform the patient that

a) Even though the operation was successful, there might be a conception (since every person has the right to decide if they wish to undergo this treatment where pain, inconvenience and at times, money are vital factors).

b) If the woman misses her monthly menstrual period, a medical check-up at the earliest opportunity is a must.

iii) Despite a medical check-up the doctor fails to detect the conception at a time when pregnancy could be medically terminated.

Thus, liability of the doctor/ hospital does not end with the operation. In fact it begins from the time when a couple comes to the hospital and is informed about the procedure and continues till the woman concerned reaches her menopause.¹³⁷

Therefore, the legal issue is whether the 'proper guidance and due information' before as well as after sterilization is shown by the doctor or not. This is necessary to avoid liability. The crucial question is whether there was informed consent or not on the part of the doctor/hospital to the patient and the family concerned? It is the duty of the doctor to inform the patients elaborately about the procedure, alternatives and the success rate.

However, in India medical service providers do not lay much emphasis on taking an informed consent of the patients. The reasons are ample, chiefly being, lack of legal awareness of rights in the people and a primarily uneducated society.¹³⁸

3.7. A Socio-Legal Outlook on Abortion

Abortion is an issue clouded with the question of morality, ethics, religious beliefs and women's rights. Today, some 50 to 60 million abortions occur every year throughout

¹³⁷ *Supranote* 135.

¹³⁸ *Supranote* 135.

the world, up to half of them illegal and dangerous, killing about half a million women yearly. Apart from this, at least 500 million women around the world are placed at the risk of repeated pregnancies with serious health problems.¹³⁹

To what extent abortion should be permitted, encouraged, restricted or severely repressed, is a social issue that has divided theologians, philosophers, legislators and general public. Today the most important reasons of abortion are as follows:-

- a) To prevent the completion of a pregnancy that has resulted from rape.
- b) To preserve the life or physical or mental well-being of the mother.
- c) To prevent the birth of a child with serious deformity, mental deficiency or genetic abnormality,
- d) To exercise birth control, that is to help from having a child for social or economic reasons.

In India, it is illegal to terminate a pregnancy unless it is carried out under the terms of the Medical Termination of Pregnancy Act, (MTPA) 1971. The grounds are the same as stated above.¹⁴⁰The MTP Act provides for termination of pregnancy upto 20 weeks. Thereafter, legal abortion is not allowed.

Recently, there has been the observation of a division bench of the Bombay High Court in a case where it is being heard by them concerning a pregnant woman of 25 weeks carrying a foetus in which an anomaly was discovered in the 24th weeks, the foetus was diagnosed with congenital heart block.¹⁴¹Here, the most doctors refused to perform an abortion as it would be a clear violation of the MTP Act.

The gynecologist, this woman and her husband has challenged the provisions of the MTP Act or at best plead a case of exception with the Mumbai High Court for the basic

¹³⁹ Subhash Chandra Singh "*Right to Abortion: A new Agenda*" AIR Journal 129 (1997).

¹⁴⁰ *ibid*

¹⁴¹ Anubha Rastogi "*Is Abortion Right?*" Jan-April Combat Law 100 (2009).

reason that a number of cases of similar nature were being observed. Since, a legal termination cannot be conducted after 20 weeks of pregnancy, in such cases these women were either go for illegal and unsafe abortions or carry the burden of unwanted child.¹⁴²

The case was heard on the plea of emergency and was argued for a week. An expert committee of government doctors formed by the court observed both aspects of an existing anomaly that was likely to result in early death of the child, if born, and in that case the child would have to be dependent on medical support all its life. Unfortunately, the report concluded by saying that there is no specific indication that the child was not likely to survive if born.¹⁴³

In view of the present development of technologies, MTP Act needs to be reviewed. The MTP Act does not cater to the modern technologies that are in existence and therefore, does not address an issue like the present one where the anomaly is detectable only after the 24th weeks of pregnancy and not before. Further, it is a well established medical stance that due to the technological and scientific advancement, safe abortions can be conducted way beyond the limit of 20 weeks.¹⁴⁴

The rationale behind setting the 20 weeks limit in 1971, when the MTP Act was enacted, was the fact that at that time the methods of abortion available would pose a danger to the life of the pregnant woman if used beyond the second trimester, but now the situation has drastically changed. Today, with the amount of medical and technological advancement it is possible and preferred to regularly observe the growth and well-being of the foetus. Though, foetal growth can be detected minutely only at the 24th 26th week, it remains pointless, as the woman cannot opt for a safe legal abortion, it being in violation of the law.¹⁴⁵

¹⁴² Anubha Rastogi "Is Abortion Right?" Jan-April Combat Law 100 (2009).

¹⁴³ *ibid*

¹⁴⁴ *ibid*

¹⁴⁵ *ibid*

Even though the Mumbai court denied pregnant woman liberty to abort the foetus with a fatal anomaly, uproar kick started publicly. But she had miscarriage due to the stress that she has gone through fighting for her right to decide whether to have child or not.

This case highlighted the harsh reality that women have no say whether she wants to have a child or not. The appeal has been made to the Supreme Court, the main issue of the petition was to raise the bar from 20 to 26 weeks by an amendment to the MTP Act. Notice has been issued to the State and the petitioner has been asked to produce progressive legislations from other countries.¹⁴⁶

The decision to bear a child or when to bear it or whether to continue with pregnancy should primarily be that of the woman of the couple for the reason that it is the woman's life that gets altered with this decision, be that for the nine months of pregnancy or the lifetime that she spends in nurturing her offspring.

Another crucial question is should we allow a woman to make a unilateral decision for an abortion? Should not her father or husband have a right to say in the matter? It is settled principle that abortion cannot be forced upon an unwilling minor girl who wants to complete the terms of pregnancy and give birth to a child. A father's consent is necessary only when a minor decides to terminate her pregnancy.¹⁴⁷

What about the spousal consent in terminating the pregnancy? In terms of the woman's right argument, which would leave the decision solely up to her, the husband would not have the right to make such a demand. But there are many family situations in which it would be the husband who would have to bear the economic support of the child to which she gives birth.

¹⁴⁶ *Supranote 142.*

¹⁴⁷ Subhash Chandra Singh "*Right to Abortion :A new Agenda*" AIR Journal 129 (1997).

Forced pregnancy resembles in many ways a modified form of servitude, in which the body of a woman is owned by other for sexual and reproductive purposes. The Right to Abortion featured dominantly in the nine- day Cairo over the morality of abortion and other secondary issues instead of adopting any concrete resolution on adoption issue.¹⁴⁸

The Medical Termination of Pregnancy Act has adopted very liberal and possibly vague criteria for abortion. As the concept of mental health or foreseeable environment of pregnant women are extremely vague and certain to be abused. Abortion is permitted if it fits into the circumstances laid down by section 3 (2) of the Act. While these circumstances appear to be questions of fact to be determined by the physician according to his medical knowledge, the other provisions seem require the doctor to take non-medical factors for example, Explanation I to section 3 provides that where pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation II provides that where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. Thus, it is obvious that in the above two circumstances abortion is permitted. But, how it is asked, can a doctor decide about a pregnancy alleged to be the result of rape as required by Explanation-I to section 3. To make the abortion decision dependent on the proving of a serious criminal offence (rape) raises more problems than it solves.¹⁴⁹

Further, no woman will approach doctors for abortion immediately after rape. They themselves come to know of pregnancy much later and by that time any evidence possible on the question of rape will have vanished. For all practical purposes, the

¹⁴⁸ *Supranote 147.*

¹⁴⁹ Chidananda Reddy "*Does Abortion Law Need a Second Look?*" 14 *Cochin University Law Review* 128 (1990).

explanation enables a person to have abortion on the basis only of an allegation of rape.¹⁵⁰

Again when doctor are asked to provide abortion in cases of contraceptive failure without there being any reliable medical test for it, the law is, in effect, making abortion available on demand. This may, doctors' fear, will increase the demand for abortion phenomenally.

Thus, the Act has conferred almost immunity to the unscrupulous professional medical abortionists. If commercialization is going on with increased demand for abortions, there will be more illegal abortion in the colour of failure of contraceptives. This Act will act as a protective cover to the criminal acts of medical abortionist.

The above conclusion is further protected by the blanket provision in section 8 of the Act which declares medical practitioner is not liable for any damage caused or likely to be caused by anything which is done or intended to be done in good faith under the Act.¹⁵¹

Thus, abortion in India has become available on demand, for, any abortion that is carried out can be given the colour of legality as discussed above. Why such a loose policy prone to abuse in every respect was adopted by the parliament? The Act has been systematically violated everywhere.

Another issue is that the exponents of right to privacy say that it is the right of the individual, married or single, to be free from unwarranted governmental intrusion in the matters fundamentally affecting a person such as whether to bear or beget child. It is argued that human being is a sociological concept before becoming a biological concept. A pregnant woman should not become the prisoner of the embryo which has no

¹⁵⁰ *Supranote* 149.

¹⁵¹ Chidananda Reddy "*Does Abortion Law Need a Second Look?*" 14 *Cochin University Law Review* 129 (1990).

sociological meaning when she has not accepted it. Thus she should be able to choose whether to have or not to have a child.¹⁵²

Whether pregnancy is a relationship between two human beings, one dwelling within the other? Whether embryo determines the status of personhood or not is of ethical issue?¹⁵³

There has been ethical debate going on the proposition that embryos are not persons in being for the purpose of the law but are recognized as enjoying a status deserving protection, requires justification. Embryos may not enjoy rights but duties are owed to them. Is this compromise rationally sustainable? Certain schools of thoughts have given there opinions which are as follows¹⁵⁴:-

- 1) Embryos command moral respect as human reproductive products;
- 2) At the moment of fertilization when the sperm and ovum unite a unique individual is created with its own genetic pattern. From that point onwards the individual is arguably entitled to respect; and
- 3) Just as brain death is now generally accepted as marking the ending of life, so brain life marks the beginning of life.

If we believe on religious faith where human life as such, the human organism, commands respect necessarily must accept that an embryo within mother's womb enjoys a status equal to her own. But in a democratic society, no one has a right to compel freedom on the basis of a belief that she does not share. The proponents of the view that

¹⁵² *Supranote* 151 at pg. 131.

¹⁵³ *Supranota* 151 at pg.131

¹⁵⁴ Chidananda Reddy "*Does Abortion Law Need a Second Look?*" 14 *Cochin University Law Review* 141 (1990).

the embryo is human cannot force that view on women who reject it because of the disputed status of embryo.¹⁵⁵

A foetus is treated in certain cases as a live child. In the context of dividing an inheritance, a foetus should be given the same constitutional protection as an infant. In the context of execution of death sentence, if the woman sentenced to death is found to be pregnant, a duty is imposed on the High Courts to order the execution to be postponed or to commute the sentence to imprisonment for life, if it thinks fit. In torts, in relation to pre-natal injuries, there is no law in India. Why the law should not protect the same person's interest when it comes to the point of abortion?¹⁵⁶

If it is accepted that foetus has certain interest worthy of protection, the question will arise whether a foetus is a person or whether it should have legal protection. The judicial status of developing humans has historically depended upon their capacity for a separate and independent existence. It is not necessary to abandon that traditional understanding, we must only revise its application in the context of greater scientific knowledge.¹⁵⁷

In the context of modernization and change through which the society is presently passing, one may ask the question whether M.T.P. Act which makes abortion available on demand has any justification to remain in the statute book. Thus, the prima facie ineffective M.T.P. Act is obviously in need of a second look.¹⁵⁸

¹⁵⁵ Chidananda Reddy "*Does Abortion Law Need a Second Look?*" 14 Cochin University Law Review 141 (1990).

¹⁵⁶ *ibid* at pg.143.

¹⁵⁷ *ibid* at pg. 143.

¹⁵⁸ Chidananda Reddy "*Does Abortion Law Need a Second Look?*" 14 Cochin University Law Review 144 (1990).

3.8. Legal and Moral Questions on Pre-Natal Diagnosis:

In India, there is a strong preference for a son everywhere whether remote or urban area. The sharp decrease in under seven sex ratio in the northern states of India is commonly assumed to be the result of the rapid spread of the use of ultrasounds and amniocentesis for sex determination/selection, followed by sex selective induced abortions. Haryana, a developed state has one of the lowest sex ratios as well as a decreasing trend in child sex ratio in the last two decades.¹⁵⁹

In India, there is a lack of evidence on sex selective abortions because most of the abortions are illegal and not reported and there is hardly any documentation on the magnitude of sex selective abortions. One of the many key factors that influence the child sex ratio in our country is sex selective abortions through easy accessibility and affordable procedures for sex determination during pregnancy. Apart from accessibility of these services, socio- economic factors, domestic violence, prevalence of the dowry custom and financial pressure on parents further contribute to the scenario of increasing sex selective abortions. Therefore, it is no wrong to say that modern technologies have brought with them the creation of new hurdles for women.¹⁶⁰

If abortion is conducted under safe, affordable and stigma-free conditions, it is neither a necessary evil nor a matter of private choice. Rather, it is a positive benefit that society has an obligation to provide to all who seek it, just as it provides education and health benefits.¹⁶¹

A preliminary look at the census data 2001 reveals a grim scenario of the worsening situation. The sex ratio of the child population (0-6 years) has declined by 18 points at the national level from 945 in 1991 to 927 in 2001. In fact all states and Union territories

¹⁵⁹ Sayeed Unisa, Sucharita Pujari, R. Usha "Sex Selective Abortion in Haryana" Jan 6 Economic and Political Weekly 60 (2007).

¹⁶⁰ *ibid*

¹⁶¹ Anandhi S "Women, Work and Abortion" March 24 Economic and Political Weekly 1054 (2007).

except Kerela, Tripura and Mizoram have reported fewer girls than boys less than six years.¹⁶²

In India, medical techniques developed to discover birth defects are increasingly used to determine the sex of the child before birth, so that the pregnancy can be terminated if the foetus is female.

The question of how extensively such techniques are used in India is important but difficult to answer conclusively. One indication is from estimates of the sex ratio at birth. However, the use of the modern techniques has been quite widespread amongst the well to do families in India as a trend towards pre-natal diagnosis for the purpose of sex selection techniques, such as, amniocentesis characteristics of an infant before birth such as certain genetic or developmental abnormalities. If the tests reveal severe malformation or gross malfunctioning in the foetus, an abortion is considered. These tests can also reveal the sex of the child in advance. There is now in India also use of IVF technology which will refine the sex pre-selection technique by removing genetic material from the fertilized pre-embryo eight cell stage and testing them for X-bearing spermatozoa which showed signs of female formation.¹⁶³

If the finding of such tests reveals that a female child has been conceived, the foetus is being invariably terminated. According to the Indian Medical Association, for instance, five million female foetuses are aborted every year. The female selective abortion is a serious problem that deserves high priority from International and National policy makers.¹⁶⁴

Various states has passed a law outlawing the use of pre-natal diagnosis for sex selection and made it illegal to reveal the sex of the foetus even when the procedure is

¹⁶² Dr. Subhash Chandra Singh "New Reproductive Technology and Female –Selective Abortion" All. L. Journal 86 (2003).

¹⁶³ *Supranote* 162.

¹⁶⁴ *Supranote* 162.

done for legitimate medical reason. At national level, the Pre-natal Diagnostic techniques (Regulation and Prevention of Misuse) Act, 1994 was passed, which made sex determination or sex selection test a cognizable, non-bailable and non-compoundable offences.¹⁶⁵

The Act has not helped much as there is hardly any condition where women may take decision of pre-natal sex determination on their own wish. In fact women in our society are the oppressed victims of tradition and patriarchy and are often forced to undergo abortion of a female foetus by their families. Sons are a major obsession throughout India. The rising levels of education, economic opportunities and the constitutional guarantees of equality have not helped to raise the status of women significantly.

From the ethical and human rights perspectives, female foeticide has led to a controversy surrounding the ethics of and right to opt for abortion. In India, the MTP Act, 1971 permits abortion under certain conditions. Here, the question arises that if abortion is legal in our country why should a democratic state interfere in a couple's decision to abort a female foetus? Clearly, the right to abortion and the right to end female foeticide are in a complex interrelationship within feminist discourse. It is argued that if abortion is a right over one's body, how are feminists to deny this right to women when it comes to the selective abortion of female fetuses?¹⁶⁶

For many decades now maternal health has been recognized as a crucial area of concern. Access, safety and legality issues regarding abortion and abortion services in India have assumed serious dimension in the context of women's reproductive health needs.

The growing popularity of abortion raised many an eye-brow. Its moral and ethical aspects have been the topic of heated dialogue between social workers, medical men,

¹⁶⁵ Dr. Subhash Chandra Singh "New Reproductive Technology and Female –Selective Abortion" All. L. Journal 87 (2003).

¹⁶⁶ *ibid*

administrators, politicians and also the commoners. The MTP Act is the only condition where a woman is allowed to take the decision solely on her own and it is a happy sign that she really makes use of this facility and at the hospital level the case is treated as most confidentially.¹⁶⁷

There is little mention in the research literature of the right of women to determine for themselves how many children they wish to have and when they want to have them. The right to self determination is increasingly espoused throughout the world. For many women requesting abortion, this right is often sharply reduced for reasons relating to socio-economic status, personal conviction of physicians and the perceived mood of dominant segments of society. Unwanted pregnancy is not only a personal but also a social problem¹⁶⁸.

The question arises can a mother abort her child even when she has no grounds available under law? This is a very serious issue because life and death of a foetus depends upon the mother. It is the mother only who takes care of the child after birth as well as before birth because it is she only through whom a foetus gets nourishment while in womb. She must have the liberty to decide at what time she wants to get conceived that means she must be free to conceive as well as free to abort at any time.¹⁶⁹

But there is a problem that if such a liberal attitude will be shown towards right to abortion of the mother, then what will happen of a right to birth of a foetus which is not recognized anywhere under law. Thus, a balance has to be maintained between these two rights i.e. right to birth of the foetus and right to abortion of the mother.¹⁷⁰

¹⁶⁷ V. Hemalatha Devi "Abortion Law in India –Socio-Legal Implications" Supreme Court Journal 53 (1990).

¹⁶⁸ *ibid*

¹⁶⁹ Dr.H.R.Jhingtaq, Kusum Chauhan "Foetus,Abortion and Right to Life :Some Basic Issues" X (II) M.D.U. Law Journal 2 (2005).

¹⁷⁰ *ibid*

3.9. Conclusion:

The advancement in medical science and awareness of the reproductive techniques made it possible to the couples to resort for various reproductive devices. These technologies pave the way for new family structures. With the emergence of these family structures many moral and legal issues might come (as discussed above). There are no guidelines to tackle those issues by the state mechanism.

Therefore, it is necessary to regulate these reproductive technologies through some regulations. In the absence of legal framework various technical difficulties might come. It may also disturb the peace and harmony of the society. Hence, it is required that suitable statutory framework is to be made to regulate the use of reproductive technologies and also other vital issues relating to reproductive rights of women.