CHAPTER-6

PRIVACY AND MATRIMONIAL RIGHTS

A. Right to Marry

B. Right to Procreation of Children

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The right to privacy has an important role to play in the area of matrimonial life. In this respect there is need to strike a balance between the individual's decision to marry and procreate children and the permissible limits in the society as an institution. Although the international standard of the right provides for the individual right to marry it has been hard to guarantee this right in any Constitution in view of the social factor, on the one hand, and in view of the other conflicting rights, on the other hand. The right to procreation of children as a part of the right to privacy is another controversial area which cannot be possibly allowed to operate in view of the higher national goal of population-control. The relevant provisions in the Constitution and other laws are discussed here.

A. Right to Marry

Family is the lowest unit of the society and for the existence of society the existence of family is a must. The free consent of the parties is essential for entering into marriage relationship. Article 16 of the Universal Declaration of Human Rights, 1948 recognizes the right to marry.[1] Similarly Article 23 of the International Covenant on Civil and Political Rights, 1966 provides for the protection of family by the society and the state. It also recognises the equality of the rights of the spouses.[2] Further, Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 states:

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1. Article 16 of the Universal Declaration of Human Rights provides:

1) Men and women of full age without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.

2) Marriage shall be entered into along with the free and full consent of the intending spouses.

3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. Article 23 of the International Covenant on Civil and Political Rights provides:

1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2) The right of men and women of marriageable age to marry and to found a family shall be recognised.

3) No marriage shall be entered into without free and full consent of the intending spouses.

4) State Parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and it its dissolution. In the case of dissolution, provisions shall be made for the necessary protection of any children.

"Men and woman of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

Article 17 of the American Convention on the Human Rights, 1969 more elaborately summarizes the right to marry and provides:

(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

(2) The right of men and women of marriageable age to marry and to raise a family shall be recognised, if they meet the conditions required by domestic laws, in so far as such conditions do not affect the principle of non-indiscrimination established in this Convention.

(3) No marriage shall be entered into without free and full consent of the intending spouses.

(4) The State parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provisions shall be made for the necessary protection of any children solely on the basis of their own best interests.

(5) The law shall recognise equal rights for children born out of wedlock and those born in wedlock.

Thus states can neither decline to recognise, in principle, a right to marriage as a formal institution with legal effects, nor can they introduce regulations which make these rights illusory for large groups. Legal restrictions on marriage must be conditioned by special and relevant circumstances. The usual ones, which aim at upholding monogamy, protecting very young persons against their own immaturity and raising

certain obstacles in cases of bad health or blood relationship are, of course, acceptable.[3] Marriage has always been regarded as a central institution in American society. Alongside its strong symbolic meaning to the partners, marriage bestows concrete legal advantages on the couple: tax benefits, standing to recover damages for certain torts committed against the spouses, rights to succession, and insurance benefits, to name a few. Thus, states have recognised the special importance of marriage to society. The American Supreme Court also has affirmed the special status of marriage. In *Grisworld* vs. *Connecticut,* [4] the Court declared that marriage "is an association that promotes a way of life, not causes, a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." [5] Moreover, in *Loving* vs. *Virginia* [6] and *Zablocki* vs. *Redhail,* [7] the Court firmly established marriage as a "'basic civil right of man' fundamental to our very existence and survival".[8]

The issue presented in *Loving* vs. *Virginia* [9] concerned the validity of the Virginia anti-miscegenation statutes, the central features of which are the absolute prohibition of a "white person" marrying any person other

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3. A. H. Robertson (ed.) *Privacy and the Human Rights*, 1970, 191.

4. 381 U.S. 479 (1965).

5. *Ibid*, at 486; *see* also *Maynard* vs. *Hill*, 125 U.S. 190, 211 (1888) (declaring that marriage is the foundation of the family and of society.).

6. 388 U.S. 1 (1967).

7. 434 U.S. 374 (1978).

8. *Loving*, 388 U.S. at 12 (Quoting *Skinner* vs. *Oklahoma*, 316 U.S. 535, 541 (1942); *see* also, *Zablocki*, 434 U.S. at 373 (stating "the right to marry is of fundamental importance.").

9. *See*, *Ibid* note 6.

than a "white person". A husband, a "white person" and his wife, a "coloured person" within the meanings given to those terms by a Virginia statute, both residents of Virginia, were married in the District of Columbia pursuant to its laws, and shortly thereafter returned to Virginia, where upon their plea of guilty, they were sentenced, in a Virginia state court, to one year in jail for violating Virginia's ban on inter-racial marriages. Their motion to vacate the sentences on the ground of unconstitutionally of these statutes was denied by the trial court. The Virginia Supreme Court of Appeals affirmed. On appeal, the Supreme Court of the United States reversed the conviction. In an opinion by Warren, Ch. J., expressing the view of eight members of the court, it was held that the Virginia statutes violated both, the equal protection and the due process clauses of the Fourteenth Amendment. Stewart, J., concurred in the judgment on the ground that a state law making the criminality of an act depend upon the race of the actor is invalid. The Court observed that the freedom to marry is one of the vital personal rights protected by the due process clause of the Fourteenth Amendment as essential to the orderly pursuit of happiness by free man. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. The Fourteenth Amendment requires that the freedom of choice to marry, not be restricted by invidious racial discriminations; the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the state.

In *Zablocki* vs. *Redhail,*[10] under the terms of a Wisconsin statute providing that any resident of Wisconsin having minor issue not in his custody and which he is under an obligation to support by any court order

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10. *See, Ibid* note 7.

or judgment was not to marry, within Wisconsin or elsewhere, without first obtaining a court's permission to marry which permission could not be granted unless the applicant submitted proof of compliance with the support obligation, and in addition, demonstrated that the children covered by the support order are not then, and are not likely thereafter, to become public charges. A Wisconsin resident, who was under a court order to support his illegitimate child was denied a marriage licence by the county clerk of Milwaukee county on the sole ground that he had not obtained a court order granting him permission to marry. Thereafter, the applicant, who would have been unable to satisfy either of the statutory prerequisites for a court order granting permission to marry, brought a civil rights class action in the United States District Court for the Eastern District of Wisconsin, asserting that the Wisconsin statute violated the United States Constitution. The three judge District Court held that the statute was unconstitutional under the equal protection clause of the Fourteenth Amendment.

On direct appeal, the United States Supreme Court affirmed. In an opinion by Marshall, J., joined by Burger, Ch. J., and Brennan, White and Blackmunn, JJ., it was held that the statute violated the Fourteenth Amendment's equal protection clause, since (1) the Wisconsin statute classification significantly interfered with the exercise of the fundamental right to marry, and (2) the classification could not be justified on the basis of a state interest in (a) counselling marriage applicants as to the necessity of fulfilling prior support obligations, (b) protecting the welfare of out-of-custody children, or (c) protecting the ability of marriage applicants to meet support obligations to prior children. The Court observed:

"The freedom to marry is one of the vital personal rights protected by the due process clause of the Fourteenth Amendment as essential to the orderly pursuit of happiness by free men"

It was further observed:

"Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. The right to marry is part of the fundamental right of privacy implicit in the Fourteenth Amendment's due process clause".

Judicial recognition of a fundamental right to marry represented two major constitutional moves. The first was towards protecting intimate adult unions from societal prejudice. Thus, in *Loving*, the Supreme Court held that a state miscegenation law was unconstitutional. The second move was towards removing unreasonable burdens on an individual's decision to marry. Thus, in *Zablocki*, the court invalidated a statute that implicitly tied the ability to marry to a person's wealth. Yet, despite these two moves, which together connote a respect for the importance to the individual of the right to marry, states – the traditional regulations of marriage – universally have denied this right to persons of same sex. Marriage statutes either expressly prohibit the same-sex marriage, or courts interpret them to contain such a prohibition [11].

Principles Informing the Right to Marry

At least three constitutional principles inform the right to marry, and each compels extending the right to same-sex couples. First, the right to marry derives in large part from the right to privacy . In *Cleveland Board of*

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11. Sexual Orientation and the Law, 102 *HLR* 1508, 1605-06.

Education vs. *La Fleur,*[12] the Court declared that it "has long recognised that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment".[13] Autonomy in this area nurtures personhood and individuality. Choice in intimate relationships is no less critical for homosexuals than for heterosexuals. Thus, in so far as the right to marry derives from the right to privacy, it should extend to heterosexuals and homosexuals alike [14].

A complementary perspective on the right to privacy also supports the protection of same-sex marriages. Freedom of intimate association, a fundamental element of personal liberty, can be understood more as limiting state authority than protecting spheres of personal autonomy. As the court explained in *Roberts* vs. *United States Jaycees,*[15] freedom of association extends to "certain kinds of highly personal relationship" that "act as critical buffers between the individual and the power of the state ."[16] Under this theory, the state simply has no authority to pressure individuals into heterosexual relationships, by giving only those relationships the benefits and protections of the law.[17]

Marriage is also constitutionally protected because it promotes familial and societal stability. This functional view of marriage suggests that any stable and significant relationship between two consenting adults

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12. 414 U.S. 632 (1974)

13. *Ibid*, at 639-40

14. *See*, *Ibid*, note 11 at 1606.

15. 468 U.S. 609 (1984)

16. *Ibid*, at 618-19.

17. *See Ibid*, at 618-19.

should be accorded constitutional protection. Indeed the court's functionalism has moved it to expand rather than limit its definition of family. Thus, in *Moore* vs. *City of East Cleveland* ,[18] the Court invalidated a city ordinance barring extended families from living in a single unit and held that the scope of the privacy right in family matters extends to families comprised of closed relatives who coalesce out of choice, necessity and duty.[19] Protecting family in this sense promotes social stability by protecting the right of the extended family "to come together for mutual sustenance and to maintain or rebuild a secure home life". [20] Similarly, the courts functionalism should move it to expand its definition of marriage. To the extent that marriage is a vehicle for stability, because of the commitment it embodies, gaymen and lesbians in stable, committed relationships should be no less entitled to marry than their heterosexual counterparts. [21]

Just as courts and legislatures addressing this issue should acknowledge the principles that inform the right to marry, they should recognise which principles do not animate the right. The American Constitution does not protect marriage because of its link to procreation, while not directly addressing the issue, the court's holdings in *Griswold* vs. *Connecticut,* [22] *Eisenstadt* vs. *Baird* [23] and *Roe* vs. *Wade,* [24]

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18. 431 U.S. 494 (1977).

19. *Ibid*, at 505.

20. *Ibid.*

21. *See*, *Ibid* note 11 at 1607-08.

22. 381 U.S. 479 (1965).

23. 405 U.S. 438 (1972).

24. 410 U.S. 113 (1972).

clearly suggest that marriage can be understood independently of procreation. The state cannot force married persons to have children, nor can it forbid infertile persons to marry. Even if marriage is protected because it often involves procreation, the argument that gay and lesbian couples should, therefore, be denied the right to marry is without merit. Given the current advances is reproductive technology, in particular, artificial insemination and surrogacy, gaymen and lesbians can easily produce off-springs. Thus, allowing gaymen and lesbians to marry would not be inconsistent with policies favouring procreation.[25]

In sum, same-sex marriages are wholly consistent with the theoretical and policy justifications behind the right to marry. If the court is serious about the interest promoted by protecting the right to marry – self-determination, autonomy from the state, and societal and familial stability – then it should value them for heterosexuals and homosexuals alike and recognise that the fundamental right to marry should extend to gay and lesbian couples. [26]

State Justifications for Prohibiting Same-sex Marriages

Once courts and legislatures acknowledge a constitutionally protected right to marry for same-sex couples, the next inquiry is whether a state's interests in prohibiting same-sex marriage justify a substantial burden on that right. Under *Zablocki*, courts must apply strict scrutiny in testing the validity of the state restrictions that "significantly interfere with decisions to enter into the marital relationship". Two arguments further support applying strict scrutiny to same-sex marriage prohibitions. First, gay and

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25. *See, Ibid* note 11, at 1608.

26. *Ibid.*

lesbians should constitute a suspect class ; and second, same-sex marriage prohibitions arguably burden the associational rights of gaymen and lesbians under the First Amendment. States have argued that prohibiting same-sex marriage encourages procreation and promotes traditional values. For reasons explained above, the procreation argument is flawed. Furthermore, same sex marriage prohibitions, as instruments through which procreation interest is served, are over inclusive because gay and lesbian couples can have children. In addition, they are under-inclusive because many married heterosexual couples cannot, or elect not to, have children. [27]

The second preferred state interest - the invocation of traditional values – is nothing more than appeal to eliminate diversity, an interest explicitly rejected by the American Supreme Court.[28] As Justice Blackmun has noted, the legitimacy of secular legislation depends on whether the state can advance some justification for its law beyond its conformity to religious doctrine.[29] Neither the length of a time a majority has held its convictions, nor the passion with which it defends them, can withdraw legislation from the court's scrutiny.[30] Moreover anti-homosexual biases are nurtured by ill- founded assumption about gay and lesbian relationships. Gaymen and lesbians can and do have stable and long lasting relationships. Furthermore, they can and do create favourable environments in which to raise and educate children. Because the state interest in promoting majoritarian morality is based on "irrational

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27. *Ibid*, at 1609-10.

28. *See ,Moore*, 431 U.S. at 505-06.

29. *Bowers* vs. *Hardwick*, 478 U.S. 186, 211 (1986)

30. *Ibid*, at 210.

prejudice and fear of unconventional activities and lifestyles, it is illegitimate".[31]

Same-sex marriage prohibitions significantly interfere with the exercise of fundamental constitutional rights and do not withstand even a relatively low level of scrutiny. Courts should, therefore, strike them down. At least courts should recognize that the legal rights of gay and lesbian partners should not depend on marital status classifications.[32]

The Supreme Court of India had the occasion to deal with the right to marry as an aspect of the right to privacy in the leading case of *Mr. 'X'* vs. *Hospital 'Z,*[33] where the apex court observed that every youngman, or for that matter, a woman, has a right to marry. But such right cannot be claimed to be absolute. Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how the life goes on and on, on this planet.[34] Mental and physical health is of prime importance in a marriage, as one of the objects of marriage is the procreation of equally healthy children. That is why in every system of matrimonial law; it has been provided that if a person was found to be suffering from venereal disease in a communicable form, it will be open to the other partner in the marriage to seek divorce.[35] Once the law provides the venereal disease as a ground for divorce to either husband or wife, such a person who was suffering

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31. *See, Ibid* note 11 at 1610-11.

32. *Ibid,* at 1611.

33. AIR 1999 SC 495.

34. *Ibid,* at 502.

35. *Ibid,* at 502.

from that disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease. If the disease, with which he was suffering, would constitute a valid ground for divorce, was concealed by him and he entered into marital ties with a woman who did not know that the person with whom she was being married was suffering from a virulent venereal disease, that person must be injuncted from entering into marital ties so as to prevent him from spoiling the health, and consequently, the life of an innocent woman.[36] Such a person is under a moral, as also a legal duty, to inform the woman, with whom the marriage is proposed, that he is not physically healthy and that he is suffering from a disease which is likely to be communicated to her. In this situation, the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person. Such a right for these reasons also, would be an exception to the general rule that every "right has a correlative duty". Moreover, so long as the person is not cured of the communicable venereal disease or impotency, the right to marry cannot be enforced through a court of law and shall be treated to be a "suspended right." [37]

The Rajasthan High Court in *Mukesh Kumar Ajmera* vs. *State of Rajasthan*,[38] observed that right to privacy and liberty are not absolute rights. A law imposing reasonable restrictions upon it for compelling interest of state must be held to be valid. The disqualification provided in Section 19(L) of the Rajasthan state Panchayati Raj statute due to increase

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36. *Ibid*, at 502.

37. *Ibid*, at 502.

38. AIR 1997 Raj 250 ; *see* also *Smt. Saroj Chotiya* vs. *State* ,AIR 1998 Raj 28.

in the number of the children in the family of *Panch* or member to more than two cannot be said to be against the basic human dignity or against the right to life and personal liberty. The restriction imposed in Section 19(L) does not outrage the dignity of the individual. The object of this provision is to control population growth and family planning and such type of interference is necessary in a democratic society in the economic welfare of the country. The Court further observed that what is guaranteed under Article 21 is that no person shall be deprived of his life and personal liberty except according to procedure established by law. Right to marry and right to procreation of third and subsequent child is neither a common law right nor a right recognised or embodied in the Constitution. Thus in view of population growth control measures and family planning measures looking to the limited resources available with the country the right to marry and procreate children cannot be unrestricted. The above restrictions have been laid down with a social purpose, i.e., to fulfill the mandate given in the Directive Principles enshrined in the Constitution.

B. Right to Procreation of Children

Parenthood is an integral part of the life most individuals envision for themselves.[1] Reproduction may be seen as an interest worthy of special consideration: a perspective on human rights which would elevate the protection of procreative capacities to the status of a principle of morality, exceptions to which would require particular justification. Moreover, if reproduction is an interest worthy of special protection, then emphasis could legitimately be placed on assisting reproduction by, for example, the use of modern technology. [2]

It is seen that the history of the debate in this area has depended on the elevation of procreation from a mere capacity which cannot be interfered with, to a kind of right which depends on an element of choice, albeit that such choices may be closely linked with freedom from intervention. It was claimed by the early feminists that there was a right to control reproduction, vested in the individual, which was analogous to a right of privacy, guaranteed constitutionally in some countries. Whilst the major debate in the twentieth century revolved around the morality and legality of compulsory non-procreation, primarily through the device of compulsory sterilization, it was not merely the question of bodily integrity which was at issue. For example bodily integrity can be protected in medical situations by the existence of rules concerning the type of consent

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1. Medical Technology and the Law, 103 *H.L.R.* 1519, 1525.

2. Tom Campbell, David Goldberg, Shiela McLean, Tom Mullen and Basil Blackwell (ed), *Human Rights – From Rhetoric to Reality*, (1986). U.S.A., *See*, Shiela McLean, *The Right to Reproduce*, 99.

which renders medical intervention lawful. If this were all that the debate was about, then it would be possible to argue that the compulsory sterilization of, for example, the mentally ill, who lack legal capacity to consent, would not be unlawful or distasteful. However, although the groups on whom compulsory sterilization was practised were primarily those whose capacity was in doubt, the compulsory removal of their reproductive capacities was nonetheless ultimately condemned. Indeed, even though, it might be thought undesirable that these same groups should reproduce, either because of the potential to pass on genetic problems or because they might be deemed unfit for parenting, the practice of preventing reproduction was nonetheless seen as morally opprobrious.[3]

It is submitted that the compulsion not to reproduce was distasteful partly because of the discriminatory way in which it occurred, but primarily because the freedom to reproduce, if one so desired, was regarded as an aspect of being human which should not be denied. In other words, freedom of choice was vital to the protection of the individual's right. Moreover, the question of reproductive rights also has its roots firmly entrenched in the individual's freedom *not* to reproduce. Just as it is seen as offensive that people should be precluded from having the freedom to choose *to* reproduce, so it would be offensive should people be forced to reproduce.[4] Of course, the existence of a right to reproduce does not also imply a duty to reproduce. Indeed, as an English case put it:

The policy of the State ..... is to provide the widest freedom of

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3. *Ibid*, at 100-101.

4. *Ibid*, at 101.

> choice. It makes available to the public the means of planning their families or planning to have no families. If plans go awry, it provides for the possibility of abortion. *But there is no pressure on couples either to have children or not to have children or to have only a limited number of children.* [5]

Viewed in this way, it can reasonably be assumed that the state interference which contributed to the reference to the human rights in this area was condemned not only because it constituted unlawful use of force against the individual, nor merely because it denied the pleasures of parenthood to those involved, but also because it removed from them the freedom to make choices about whether or not, and when, to procreate. Indeed, interference by states with the freedom *not* to reproduce has itself generated considerable debate in relation, for example, to the legalization of voluntary sterilization, abortion and the free and legal availability of access to birth control. Although the element of choice remains crucial in these areas, the state may ultimately limit its availability by denying it where other important interests compete: as it may with all human rights. Thus, if it is accepted that the core of the right to reproduce is the individual's choice about when or whether to breed, state interference by limiting access to birth control or outlawing voluntary sterilization would amount to the kind of interference which is challengeable as a denial of fundamental rights. [6]

Modern technology generates further problems. Whilst the U.K. Report of the Committee on Human Fertilization and Embryology proposes methods whereby the availability of procedures such as

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5. *Thake* vs. *Maurice* [1984] 2 All.E.R.513, 526 (*emphasis added*).

6. *See, ibid*, note 2 at 101-102.

surrogacy can be limited, it might equally be argued that whereas regulation might be appropriate in order to ensure the safety and efficacy of these procedures, the limitations on commercial contracts and the limited availability of resources in this area of medical practice deny the freedom of choice which is central to the right to reproduce .[7]

Reproduction has no lengthy history of being accorded the status of human right. To use the example of the USA, it can be seen that the law did have an important role in this area in the twentieth century. By precluding access to birth control in the past, the law had always played a major part in controlling the struggle for choice in reproductive practices. However, the role adopted by the law in the twentieth century has been more intrusive in reproductive capacities. Rather than protecting the liberty of the individual, the law, in some states at least, aligned itself with those whose priority was the protection of society from the offspring of certain groups. In short, there was no recognition of a universal right to reproduce. The legal approach in America to compulsion in this area is amply demonstrated by the following comments made by the Court in *Buck* vs. *Bell* [7a]:

> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state, for these lesser sacrifices, often not felt to be such by those concerned, in order to avoid our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for imbecility, society can

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7. *Ibid*, at 102-103.

7a. (1927) 274 U.S. 200.

prevent those who are manifestly unfit from continuing their kind."

Whilst apparently feeling the need to justify compulsion in this case and a number of others, the courts nonetheless did not recognize any universal human right to reproduce. Moreover, by dismissing the impact of the removal of capacities from certain people on the grounds that they may not in any event recognize their worth, the court also minimized the status of reproduction as a human right. For example, awareness that a human right exists is not necessarily central to the existence of the right, although it may predicate its exercise. Indeed, overt doubt was expressed in some cases as to whether or not such a right could be said to exist, or if it did, what was its status in the hierarchy of competing rights. As has been seen, many thousands of people were sterilized on a compulsory basis, the justification being the overriding interest of the state and by implication the low status accorded to freedom of choice in reproductive matters. Those whose breeding was seen likely to produce strong, healthy children, were encouraged to do so in the interests of the state, while other groups had their reproductive capacities removed without their choice. If there was a right to reproduce recognized and protected by the law, then it was selective and not universal. Moreover, it was unusually vulnerable to perceived state interests. [8]

From prohibiting the spread of birth-control information, the law had then moved into a second stage which simultaneously allowed voluntary control (at least for those with the education and social status to seek and obtain it) and permitted the compulsory removal of reproductive capacities in other groups. There is still at this stage no recognition of a

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8. *Ibid*, at 107-108.

fundamental non-discriminatory right to reproduce vested in individuals. As is the case today, people - and, in particular, women - in certain economic positions were permitted freedom of choice in these matters. For example, while at present the developed and the rich countries in the world are free to concentrate on certain aspects of the 'right' to reproduce, and to develop increasingly complex technology to facilitate reproduction, the economic and social situation of many, most notably in developing countries, continues to leave them vulnerable to biological roulette. Control of reproduction (including the right not to reproduce) which is now apparently well-established in most developed countries, remains out of the reach of many. Indeed the pressure to reproduce in certain situations continues to reflect not only a lack of information about how to control procreative capacity, but relate also to, for example, the economic dependence on producing children capable or working for the family income and providing support for old age. [9]

Using the interests of the State as the crucial yardstick, continued interference with the individual's choices about reproductive freedom was justified. In *North Carolina Association for Retarded Children et al.* vs. *State of North Carolina et al.,*[10] the Court reflected that mental retardation was an identifiable category, and that since such persons are in fact different from the general population they may rationally be accorded different treatment for their benefit and the benefit of the public. The compulsory prevention of the birth of a defective child or of a child whose parents could not properly care for it could be justified as reflecting a compelling state interest and therefore as not breaching the

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9. *Ibid*, at 108-109.

10. 420 F. Supp. 451 (1976).

Fourteenth Amendment to the American Constitution. [11]

Whilst debate on the issue of reproductive control has seldom reached the courts in the UK, the issue of non-voluntary sterilization was considered in the case of *Re D (a minor).*[12] In this case, the right of a child not to be sterilized without her own consent was upheld, but this was at least partly influenced by the impression that the child would – on reaching adulthood – not be sufficiently retarded as to be legally incapable of making other major decisions such as getting married. The Court referred in its judgment to a fundamental right to reproduce, but it is unclear what would have been the decision had the evidence shown that the girl in question would not have been able legally to consent to marriage at the appropriate age.[13]

Moreover, it has been suggested that the Court's reference to the existence of a right to reproduce should be taken in tandem with the rights guaranteed under international and European agreements. Article 12 of the European Convention on Human Rights guarantees the right to 'marry and found a family'. The Universal Declaration of Human Rights guarantees in Article 12 that there shall be no 'arbitrary interference with ..... privacy', and in Article 16 that 'Men and women of full age ..... have the right to marry and found a family'. It may be noted that both these declarations do not *per se* make reference to, or provide for, an individual human right to reproduce. Rather they seem to protect only the rights of those who are married (and those who, by implication, are capable of legally entering into this state). The individual as such is not protected by

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11. *See, ibid*, note 2 at 112.

12. [1976] 1 All E. R. 326.

13. *See, ibid*, note 2, at 112-13.

this: merely the nuclear family, which is 'the natural and fundamental group unit of society', is protected. However, whilst such apparently limited protection as is offered by those agreements might seem to deny the validity of any claim that choice and not status is central to right to reproduce, it is submitted that on closer inspection this argument does not work. The terms of the agreement cannot be, and are not, used to justify compulsorily terminating the pregnancies of those who are unmarried, for example. Whilst laws reinforcing incest taboos may make certain sexual relationships illegal, or proscribe marriage, they do not equally permit the forced termination of incestuous pregnancies. In other words, the agreements may encompass the prevention of certain relationships, and perhaps reinforce the value of traditional family groupings, but do not explicitly deny the right to reproduce itself. On a practical level 'even the one-parent family, whether or not that exists through choice, or through misfortune, is given substantial assistance'. The assertion that the right to reproduce is an individual one, dependent on freedom of choice seems therefore to maintain its force.[14] Recent American decisions seem to have made this clear by their interpretation of reproductive freedom as an aspect of the individual right of privacy. The Supreme Court of America first acknowledged reproductive autonomy as a fundamental right in 1942 in *Skinner* vs. *Oklahoma.*[15] Striking down as an equal protection violation a statute permitting sterilization of certain felons, the Court proclaimed the right to reproduce "one of the basic civil rights of man".[16] Twenty-three

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14. *Ibid*, at 113-14.

15. 316 U.S. 535 (1942).

16. *Ibid*, at 541.

years later, in *Griswold* vs. *Connecticut,*[17] which found unconstitutional a statute barring the use of contraceptives by married couples, recognized reproductive autonomy within marriage as a fundamental right protected by the due process clause. The Court reasoned that the statute concerned a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.[18] The Court extended the zone of privacy beyond marriage in *Eisenstadt* vs. *Baird* [19] when it upheld the right of unmarried individuals to use contraceptives. The Court stated:

> "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[20]

Carey vs. *Population Services International* [21] cemented the right to reproductive autonomy. Striking down a statute preventing the sale and distribution of contraceptives to minors under sixteen, the Court identified the right to reproductive autonomy rather than the existence of a marital relationship or an equal protection violation as the dispositive factor in creating the zone of privacy.[22] Finally, in *Roe* vs. *Wade* [23] the Court found this right of privacy broad enough to encompass a woman's decision

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17. 381 U.S. 479 (1965).

18. *Ibid*, at 485.

19. 405 U.S. 438 (1972).

20. *Ibid*, at 453.

21.431 U.S. 678 (1977).

22. *See, ibid*, at 687.

23. 410 U.S. 113 (1973).

whether or not to terminate her pregnancy.[24] These reproductive autonomy cases have established that the state cannot through statutes or regulations, prevent individuals from deciding whether or when they wish to procreate.

As aforesaid, parenthood is an integral part of the life most individuals envision for themselves. The biological link between parents and children is a fundamental part of this vision. Most people assume that someday they will have their "own" children. Women are raised to see themselves as future child bearers; men, to understand fertility as central to masculinity. As a result of this socialization, most people consider biological parenthood as essential component of a fulfilled life. Not everyone, however, can "naturally" fulfill this expectation. Reports indicate that roughly one-sixth of all people of childbearing age in the United States suffer from infertility. The psychological frustration of the socially constituted desire to produce children devastates many individuals. Determined to fulfill their desperate will to become parents infertile individuals avidly pursue "new reproductive technologies" that purport to hold out the final, tantalizing possibility of biological parenthood. Women are artificially inseminated; men seek surrogate mothers; embryos are fertilized in petri dishes.[25]

Although the desire to achieve biological parenthood is understandable, it must be evaluated against the many other factors involved in and interests affected by the development of reproductive technology. By focusing on women's reproductive capacity, the technology furthers stereotypical notions of women valued primarily as

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24. *Ibid,* at 153.

25. *See, ibid*, note 1, at 1526.

child bearers. The costs of infertility treatment heavily burden would-be parents and society. The technology may also harm children: no one can predict its "imponderable impact" on the children born of it. Moreover, the development of reproductive technology reinforces the value of genetic links and obstructs a reconceptualization of parenthood based on social relationships. As a result infertile individuals may feel pressure to pursue biological parenthood and may turn to noncoital reproduction without first giving serious thought to remaining childless or adopting. Such pressure limits the range of reproductive choices for all people by devaluing adoptive and foster child relationships, harms children whose welfare depends on finding adoptive parents, and promotes institutional biases favouring biological parenthood. [26]

Judicial attitudes towards the new reproductive technologies are symptomatic of the social premium placed on genetic parenthood by the traditional parent couple. Judges have repeatedly responded to parental disputes by choosing solutions that implicitly favour biological over social relationships. Legislation also reinforces this societal bias: intentionally or not, legislatures have created incentives skewed towards biological parenthood and against adoption. Though in accord with existing societal values, such judicial decisions and legislative choices further entrench the limited view of parenthood.[27] In America at least three state courts have heard due process challenges to state regulation of new reproductive technology. These courts have considered the issue of paid surrogate arrangements and agreed that state prohibition of such arrangements does not improperly infringe upon the right of privacy. The courts have also

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26. *Ibid,* at 1527.

27. *Ibid*, at 1527-28.

similarly assessed the extent to which regulation of such novel arrangements as surrogacy has implicated the right of privacy. *In re Baby M*,[28] the New Jersey Supreme Court held that the right of privacy did not extend to child and consequently did not protect procreation through surrogate motherhood contracts. The court specifically held that the right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that. In *Doe* vs. *Kelly*,[29] a Michigan Court briefly considered the right of privacy in surrogate arrangements. Though noting that the petitioners were entitled to have the child as planned, the Court objected to the alteration of a child's legal status through monetary payments. It thus found that state prohibition of paid surrogate arrangements did not impermissibly infringe upon any right of privacy. More recently, in *re Adoption of Paul,*[30] a New York Court, citing the reasoning in *Kelley* found no constitutionally protected right to participate in surrogate parenting arrangement which would contravene application of New York's ban on payment for adoption .

The state courts' limited reading of the right to privacy and refusal to extend protection to affirmative exercise of procreative rights is consistent with recent Supreme Court jurisprudence. Although the lower court cases have been limited to analysis of paid surrogacy arrangements, the Supreme Court is likely to view similarly the extent to which the other reproductive technologies implicate the right of privacy. The Court has

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28. 109 N.J. 396, 537 A.2d 1227 (1998).

29. 106 Mich. App. 169, 307 N.W. 2d 438 (1981).

30. No. A 12749/89 (N. Y. Fam. Ct. Jan 22, 1990) (1990 N.Y. Misc. LEXIS 30).

historically hesitated to extend the right of privacy to new relationships and activities. The current court is even more committed to a conservative reading of privacy and liberty interests protected by the Constitution, and it will likely greet with hostility any expensive characterization of the right of privacy. As a result, the Court is unlikely to stretch the due process clause to include the use of the new reproductive technologies.[31]

Of the courts that have considered the right to reproductive autonomy, the *Baby M* court's discussion is the most extensive. The court's delineation of the right, however, is problematic because the court focused on the constitutional status of the means used to achieve parenthood rather than on parenthood itself. Under this methodology, courts must gauge the "naturalness" or "unnaturalness" of various techniques as they develop. The *Baby M* court sanctioned artificial insemination as a means of having "natural children" but refused to sanction surrogate motherhood similarly. This designation, notwithstanding the judicial ease with which it was executed, might not have been so obvious to courts several years ago. Because this technology turns on a temporal understanding of societal norms, as determined by the judiciary alone, results are likely to be both arbitrary and unfair. Individual's choosing a relatively new technology may be denied constitutional protection, even though a later court may choose to extend such protection .[32] The methodology also intimates the court's acceptance

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31. *See, ibid*, note 1, at 1530-31.

32. The Court's emphasis on methodology over result lead to its controversial decisions in *Bowers* vs. *Hardwick*, 478 U.S. 186 (1986), and *Michael H.* vs. *Gerald D.*, 109 S.Ct. 2333(1989). In *Hardwick*, the Court upheld a sodomy statute despite its infringement of the right to intimate association, on the grounds that sodomy was not an intimate association traditionally

of a conception of parenthood that equates "natural" parenthood with "biological" parenthood. [33]

Rather than focus on modes of procreation, courts should protect the procreative right and the underlying values of privacy right jurisprudence. Courts should simply characterize the right to the use of reproductive technology as the right to "parent" a child rather than the right to achieve and maintain a biological tie with a child through any particular means. Courts can then recognise artificial insemination and surrogate motherhood as just two of many paths to parenthood. Under this alternative view of the right to reproductive autonomy, courts can focus on whether state regulations serve legitimate state interests instead of assessing the "naturalness" of new and evolving technologies. This analysis is far less capricious because it does not allow courts to reject protection for novel methods out of hand. Furthermore, the alternative view sets aside the constricting concept of parenthood as a function of biology, or "natural" procreation. Because the protected right is *parenthood,* the establishment of a genetic link in parenthood ceases to be a central concern. By de-emphasizing the importance of biological ties in parent-child relationships, courts could clear a conceptual path for a theory of family that turns on an existence of social relationships between

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accorded constitutional protection. *See* 478 U.S. at 191-94.Similarly, in *Michael H.*, the Court focused on a specific relationship rather than on the underlying right to maintain familial ties in denying protection to the filial relationship of a daughter and a father when the daughter was born while the mother was married to another man. The Court reasoned that their relationship fell outside of the traditional marital family. *See*, 109 S.Ct. at 2341-44 (plurality opinion).

33. *See, Ibid,* note 1, at 1531.

individuals. Judicial de-emphasis of biology may then play a valuable role in a broader societal move toward "re-expressing parenthood" and may enable individual's to make parenting choices free of strong societal pressure.[34]

The Rajasthan High Court in *Mukesh Kumar Ajmera vs. State of Rajasthan* [35] considered the disqualification under section 19(L) of the Rajasthan Panchayati Raj Act, 1994 on account of increase in number of children in family to more than two. The Court observed that the above disqualification is not against basic human dignity or against right to life and personal liberty.[36] The Court further observed that growing population is one of the major problems which India is facing today. Population progresses by geometrical progression while the resources increase only at an arithmetical rate. Bertrand Russell has stated "Population explosion is more dangerous than the hydrogen bomb". The legislative power to deal with the population matter effectively, purposely, meaningfully, objectively and efficiently stem basically from the social policy contained in the Directive Principles of the State Policy enshrined in Articles 39(e), (f), 41, 43, 45 and 47 of the Constitution of India. This social policy is designed to secure social order for the promotion of welfare of the people, adequate means of livelihood, raising the level of nutrition and standard of living, improving public health etc. These objectives can be achieved if the rapidly increasing population is controlled and the rate of population growth is essentially minimized otherwise all these policies will remain in vacuum. Imposing the conditions by providing the disqualification in the

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34. *Ibid*, at 1531-32.

35. AIR 1997 Raj 250.

36. *Ibid*, at 259.

election of the Panchayat Raj Institution is a first step to achieve this goal.[37]

The Court also pointed out that right to privacy and liberty are not absolute rights. A law imposing reasonable restrictions upon it for compelling interest of state must be held to be valid. The restriction imposed in Section 19(L) does not outrage the dignity of the individual. The object of this provision is to control population growth and family planning and such type of interference is necessary in a democratic society in the economic welfare of the country.[38] The Court referred to the judgment of the apex Court in *Air India* vs. *Nargesh Meerza* [39] where considering the danger of over- population and the necessity of family planning programme it was observed that in the first place the provision preventing the third pregnancy with two existing children would be in the larger interest of the health of the air hostesses concerned as also for the good upbringing of the children. Secondly, as indicated above, while dealing with the rule regarding prohibition of marriage within four years, same considerations would apply to a bar of third pregnancy where two children are already there because when the entire world is facing the problem of population explosion, it will not only be desirable but absolutely essential for every country to see that family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled may lead to serious social and economic problems throughout the world. The Court further observed that law is enacted to serve the need of the society. It has

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37. *Ibid*, at 259.

38. *Ibid*, at 260.

39. AIR 1981 SC 1829.

to keep pace with the aspirations and need of the society as well as to take into consideration the changing concept of the value. It is only with an intention to serve the social purpose, namely, to control the problem of population explosion that these provisions have been enacted. There is no invasion of any constitutional right of any person. There is, also, no invasion on the part of Legislature into the marital right of a person concerned or a right of procreation of children .[40]

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40. *Ibid,* at 260 ; *see,*also, *Smt. Saroj Chotiya* vs. *State,*AIR 1998 Raj 28.