PROCREATION IN THE "RIGHTS" MILIEU & THE CORRESPONDING THEMES: A JURISPRUDENTIAL UNDERSTANDING

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***Abstract*:** This research explores the jurisprudential framework surrounding human reproduction and its evolving legal status as a fundamental right. It examines the intersection of reproductive autonomy, individual rights, and state governance, particularly in the context of assisted reproductive technologies (ART). The study investigates how reproductive rights, traditionally seen within the confines of personal liberty and privacy, have expanded with technological advances, raising complex questions regarding the role of the state in regulating procreation. It delves into the foundational principles of human reproduction as a right, considering the moral, social, and legal dimensions that govern procreative behavior. By critically analyzing the constitutional protection afforded to reproductive autonomy and the ethical dilemmas posed by non-coital reproduction, this doctrinal research highlights the competing interests of individual autonomy and state intervention in reproductive matters.

Keyword: Reproductive autonomy, Assisted reproductive technologies (ART), Jurisprudence of procreation, Reproductive rights and governance.

INTRODUCTION: LAYING THE JURISPRUDENTIAL CONTEXT

Articulating around human reproduction and individual control over the "beginnings of human life" presents a unique challenge within contemporary social history and institutional life. It is especially so within the countries that value and uphold the democratic ideals[3]. The legal academia has often found itself grappling with the

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normative clashes that a discourse on reproduction generates. Since the legal and policy questions concerning human reproduction have sprawled over several disciplines, a concrete stance of the law presenting a singular view has been a rather difficult task. The academic debates surrounding the reproductive sphere have thereby created a jigsaw of sorts with many of the pieces still left un-arranged. Take for instance, the issues relating to "abortion" which still poses difficulty in arriving at a consensus beyond the period of early abortion. The theorizing on abortion also fall into so many segments that it is difficult to converge the fragments into one composite whole.

The context from where human reproduction emerges as a subject of legal scrutiny is directly proportional to the control that human being gained over his/her reproductive process. When an individual could do little to control his fertility or infertility, law was of comparatively little importance.[4] As the reproductive process has been opened up to more intensive scrutiny, and as the opportunities for its external manipulation multiply, law has assumed an ever greater significance.[2] In addition to some important statutes and developments in the common law, there is also now an expanding body of diverse regulatory practices that are directed towards the *governance* of human procreation[5].

The need for governance arises essentially when the subject matter gives rise to rights, or to be specific, competing rights. Recognized as the fundamental of all human rights the right to life is considered a peremptory norm of general international law or *jus cogens*.[67] Within the wide ambit of this right to life there are many layers- right to health, privacy, dignity and autonomy *et al.* all of which constitute the foundational elements of right to life. The heft with which human rights movements have generated the rhetoric on reproduction makes it one of the most impactful and elaborately pronounced agenda

[4] Emily Jackson, *Regulating Reproduction: Law, Technology & Autonomy*, Hart Publishing, 2001, pg. 1.

[5] Okom, Michael P., and Rose Ohiama Ugbe. "The right of establishment under the ECOWAS protocol." *International Journal of Law* 2.5 (2016).

[6] *Ibid.*

[7] Smith, *Scientific Freedom, Fetal Experimentation, and Collaborative Reproduction*, Kluwer Law International, 2000, p. 38.

within the language of rights. There are equally compelling right-to and right-against components of autonomy hence they concern both a study of pro-reproduction and anti-reproduction technologies[8]. When a right is assigned to an act like reproduction it inevitably acknowledges the intimacy between pregnancy and self-sufficiency of the individual (women) thus giving rise to the question of autonomy, which makes it an important jurisprudential principal to evaluate.

So, as it is noted, that the act of creating and rearing ***biological*** descendants has been regarded as immensely significant for individuals and for society. The process of reproduction conceives a range of values with deep social-cultural significance. A simple understanding of "reproduction or procreation"[9] goes as **creation of biological descendants through gametic fusion with a partner, gestation by the female, and usually rearing by one or both of the procreators[10].** It is this social dimension that determines and allocates value to reproduction as an inevitable human desire to replenish its next generation.

Since reproduction is linked with the concepts of autonomy, liberty and self-determination and theorized upon heavily in the courts of law, it seems almost indisputable that every person has a right to become a parent[11]. This right to be a parent and make off-spring emerges from one of the primeval and elementary desires and interests that a person may have. Such interests, it would be fair to assume, constitute with much significance a person's self-identity and sense of belonging to the living

[8] OWA, DR OWA EGBARA, et al. "Nigeria's External Relations: Dynamics And Challenges." *Journal of Namibian Studies: History Politics Culture* 33 (2023): 3019-3038.

[9] The researcher shall use the term almost inter-changeably throughout the discussion.
[10] John A. Robertson, *Non-coital Reproduction and Procreative Liberty*, Constitutional Rights, Law, and Public Policy, pg. 250, From section II of Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction, Southern California Law Review59 (1986), pp. 939-1041. Reprinted with permission of the Southern California Law Review.
[11] *Ibid.* at p.251.

society[12]. Furthermore, it is also argued that humans have a basic reproductive instinct derived from "guiding principles of evolution". This biological instinct of a human being is transmitted over generations and across cultures as an essential (human) physiological dimension.

It therefore seems as a logical derivation to accord persons a certain degree of liberty in creating and rearing biological descendants. Within marriage, which is a socially accepted sexual union recognized, is highly plausible and has been widely accepted. Thereby, stretching the corollary a bit further, it also seems equally reasonable to grant some degree of liberty to reproduction to such couples and stretching it to even noncoital (and collaborative) reproduction[13]. Noting the immense importance of reproduction for individuals and societies, it is not surprising that many cultures have elaborate rule systems for how and when reproduction should occur, and who may reproduce with whom.[14] Reproduction is today evolved as an area of legitimate medical intervention with the involvement of both simple and complex techniques.

In this work, the researchers shall examine the emergence and establishment of "reproduction" as a "right" and the wide-ranging choice that this right entails; it analyzes the legal basis of reproduction and state interests in governing the procreative behavior of the individuals. While deliberating on a larger theme, the chapter aims at establishing the basic theoretical framework for the ART discourse- the distinctions and dilemmas that they are laden with.

HUMAN REPRODUCTION AS A JURISPRUDENTIAL SUBJECT

Human Reproduction as a jurisprudential subject represents many things under one umbrella- it is a "matter of moral principle, distributive justice, gender justice, social

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[12] Daniel Sperling, *"Male and female he created them": Procreative liberty, its conceptual deficiencies and the legal right to access fertility care of males*, International Journal of Law in Context, 2011, p. 1

[13] Owa, Owa Egbara, et al. "Impact of the 2014 Pension Reform Act on Workers' Commitment, Retention and Attitude to Retirement in Cross River State, Nigeria." *Ianna Journal of Interdisciplinary Studies* 6.2 (2024): 293-301.

[14] See *supra* note 5 at p. 252.

policy and democratic values"[15] among others. These multiple meanings and the parallel developments across the disciplines, technologies and national as well as international policies, make reproduction a comprehensive subject to examine. It thus becomes significant to understand the dilemmas faced in legislating human reproduction in the present technological context and de-construct the commonalities and differences of the varying issues within the reproduction paradigm.

While formulating extensively on other aspects of reproduction, the subject of assisted conception and third party collaboration in a procreative context still finds itself influenced by the ideologies set forth by the other wings of reproductive discourses[16], hence it becomes important to analyze the boundaries of reproductive choice from a broader and all-encompassing perspective[17]. Therefore, in the following segment, an attempt has been made to trace procreation within the rights-governance scenario and try to locate the socio-political values that call for such a considerable state interest in this most private of human conduct in the present ART context. The discussion considers the development of reproductive rights, scope of reproductive autonomy and the extent of constitutional protection for non-coital conception and its collaborative variations.

THE DEVELOPMENT OF LEGAL RIGHT TO PROCREATE ARTICULATING "RIGHTS" IN THE REPRODUCTIVE REALM: THE HISTORICAL UNDERPINNINGS

It is rather difficult to pinpoint with certainty as to when exactly the procreative conduct of an individual started to generate state interest and develop itself into a full-fledged area of legal enquiry. Tentatively speaking, the law and policy on reproduction had skewed beginnings and could be chronologically traced to the later part of the 19th

[15] Cohen, *Abortion and Reproductive Rights*, The Oxford Handbook of Legal Studies, 2005, p. 674
[16] Therese Murphy (ed.), *The Texture of Reproductive Choice: Law, Ethnography and Reproductive Technologies*, in New Technologies and Human Rights, pp. 198-199 OUP 2009.
[17] Owa, Owa Egbara, et al. "Impact of the 2014 Pension Reform Act on Workers' Commitment, Retention and Attitude to Retirement in Cross River State, Nigeria." *Ianna Journal of Interdisciplinary Studies* 6.2 (2024): 293-301.

century, when some legislations and moral reformers campaigned for the criminalization of abortion in England and the United States and witnessed the passage of several legislations that prohibited not only the practice but also dissemination of information about abortion or contraception.[18] The first echoes of reproduction as a legal area of enquiry could thus be tentatively tracked to the regulatory invocation of collective morality from the mid-19th century to until the post-World War era and the various court orders and judgments that connected the constitutional principles to reproduction. The documentation of this period echoes the presence of considerable state interest in preserving the morality of the community at large. With this intention of preserving the moral fabric and under the influence of the Church, led the states to don its paternalist character and enforce as well as criminalize private human conduct including human sexual as well as procreative behaviour. Thus, various aspects of reproduction were regulated around this time as a result of the invocation of community morality. This was roughly around the mid-nineteenth century until 1930s when some of the initial attempts of constitutional challenges went in vain. The regimes during this time drafted several laws pertaining to reproduction alone, however as and when the political changes took place, these laws started receiving opposing views and emerged as the ground for basing the rights discourse.

For analytical coherence and understanding the unfolding of reproduction as a complex area of normativity, the researcher has preferred to divide the developments into broadly four phases. The division of these phases is not necessarily in the chronological order by the calendar, (as many of the developments unfolded almost parallel in point of time) but it is made to highlight the clusters of issues into which reproduction developed over the period, both conceptually and legislatively.

Phase: I Foundations: This phase refers to the developments in the mid-nineteenth century, which saw an almost similar tone of regulation in both the US and England with

[18] See *Supra* note 11 at p. 675.

respect to reproduction with the prime objective of enforcing morality by seeking to establish a link between extra-marital sex and sinful behavior.[19] The legislations of this period criminalized adultery, categorized children into legitimate and illegitimate, and discouraged interracial marriages between blacks and whites.[20] The statutory enactments contravened reproductive autonomy of women and brought into force a wide range of laws exclusively pronouncing the aforementioned ideologies.

The first judicial junction in this phase was reached in 1927 with the historic ***Buck v. Bell***[21]decision of the U.S. Supreme Court- a case that brings forth the early position pertaining to sterilization and is considered as the starting point of the long and tumultuous journey covered by the advocates of reproductive rights.

This case basically emerged as a challenge to a statute that permitted sterilization of feeble minded persons in the best interest of themselves and the society[22]. In 1924, the Commonwealth of Virginia adopted a statute authorizing the compulsory sterilization of the mentally retarded for the purpose of eugenics[18]. Mr. Justice Holmes went on to write the majority opinion and upheld the validity of the statute and recited that the petitioner "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and society's welfare will be promoted by her sterilization."[23] It was maintained that Buck, the petitioner represented a genetic threat to society. This case invited consistent criticism for the court's cruel extremity and conservative inflexibility in undermining involuntary sterilization and leaving out the scientific rationale to no examination at all.[24]

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[19] See *Supra* note 11at p. 674.

[20] Cohen, *Comparison Shopping in the Marketplace of Rights"*, review of Mary Ann Glendon, Abortion and Divorce in Western Law, Yale Law Journal, 1998, p. 1235-76.

[21] Supreme Court of the United States, 1927. 274 U.S. 200, 47 S.Ct.584, 71 L.Ed.1000

[22] Michael & Roy, *Genetic Control and Procreational Autonomy* in Bioethics and Law- Cases, Materials & Problems, American Casebook Series, West Publishing Company, 1981, p. 396 [18] *Id* at 397.

[23] *Ibid*.

[24] See *Supra* note 11 at p. 676.

This case led to the vocalizing of eugenics as a potential field of procreative contestation. This judgment therefore, marked the onset of numerous debates on procreative autonomy vis-à-vis the interest of state that was conditioned by the principles of eugenics. Although, *Buck* invited its share of consistent criticism, its impact was clear in the understanding of state-interest in governing the reproductive decisions of its people. This case, a one of its kind, laid the foundation of challenges that a legislative scrutiny on reproduction can present. All the cases after this one offered a much more careful a scrutiny in matters concerning human reproduction.

Skinner v. State of Oklahoma[25]: Few years later, the position laid down in Buck v. Bell was put forth again in a different era in the 1940s in this case. The time-period of Skinner is of some significance: this was the beginning of the post II World War period when the Western world had recognized dignity and peaceful coexistence as the most cherished virtues of the human civilization. The articulation on human rights had also taken off and various international human rights instruments had started to find its place in the chronicles of this period.

In the light of this backdrop, it becomes significant to appreciate Skinner. The opening lines of the judgment read… "This case touches a sensitive and important area of human rights…*a right which is basic to the perpetuation of a race- the right to have offspring"*[22]. Thus, it brought in rights within the reproductive realm. In the present matter, the issue of involuntary sterilization was brought for deliberations again wherein a local statute was involved that permitted the sterilization of a habitual criminal convicted for felonies involving moral turpitude. This statute was held to be unconstitutional on the ground that it violates the due process clause of the American Constitution. The Supreme Court of the United States opined that the act of procreation is one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. In evil or reckless hands, the power to sterilize, if exercised, can cause races or types which are inimical to the dominant group to wither

[25] Supreme Court of United States, 1946.316 U.S.535, 62, Sup. Ct. 1110, 86 L.Ed. 1657 [22] Emphasis supplied by the researcher.

and disappear[26]. The remarkable distance that the court covered in *Skinner* from its stance in *Buck v. Bell* indicates a normative re-thinking with respect to the significance of reproduction. The court worried about involuntary sterilization as being in the nature of a deprivation of a "basic liberty".

This case went to on to establish in subtle yet very clear words the notion that the "right to procreation" is fundamental. *Skinner v. State of Oklahoma* goes on to indicate strongly that procreational autonomy is a constitutional value entitled to more than passing protection. The aspect that went unnoticed however is the potential of the technology of eugenic sterilization that largely vests control over human procreation in the hands of the state and the conflict of interests that may arise in the wake of such technology.

Phase-II: The democratic ideals: The turn of events in the post-World-War era brought about the human rights ideals laid the foundation of a lot of norm writing and carving out principles primary to human existence and growth. The principle value of "autonomy", although could be traced back to the writings of Kant and Mill, came to light on a massive scale in the 20th century. The international human rights documents and reverence towards legislative authority established a closer connection between reproduction and notions of privacy, liberty, autonomy, dignity[27] amongst others. The UDHR laid foundation of human rights by recognizing the worth of every human being.[28][29] The UDHR also prompted the courts to move towards a "right" based examination on aspects concerning private human affairs. This move came to prominence with another landmark decision of the US Supreme Court in *Griswold v. Connecticut*[26],

[26] Michael & Roy, Genetic Control and Procreational Autonomy in Bioethics and Law- Cases, Materials
& Problems, American Casebook Series, West Publishing Company, 1981, p. 400
[27] Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Montreal Law Review, (2004) p. 15 to 26.
[28] Article 1 of the Universal Declaration of Human Rights (UDHR) states that- all human beings are born free and equal in dignity and rights.
[29] US 479 (1965)

wherein the Court struck down a statute that banned the use of "any drug, medicinal article or instrument for the purpose of preventing contraception." The Court extended a heightened protection against government interference with certain fundamental rights and liberty interests[30].

In *Griswold,* the Court ruled that a state regulation prohibiting the use of contraception violated an implicit "zone of privacy" found within the "penumbras" of the Bill of Rights that surrounds "the sacred precincts of marital bedrooms"[3132]. While the Court has constructed an extensive reading of fundamental rights, the specific bases on which the Court identifies such rights remain unclear and the Court differed in several surrounding matters from case to case. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[29]the Court described due process rights as those "involving the most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity and autonomy*"; thus, "the right to define one"s own concept of existence, of meaning, of the universe, any of the mystery of human life" was declared to be "central to the liberty protected by the Fourteenth Amendment."[33]

This trend of the US courts in embracing a libertarian view towards the regulation of individual life and bringing the aspects of procreative process within the constitutional realm marked the beginning of a new vision in constructing reproductive rights. Similar and parallel developments were taking place in other parts of the world as the international and regional conventions had started to gain its momentum and thus propelled the shaping of international customary consciousness about reproductive rights. The western articulation of human rights found its way to the public psyche with the adoption of the Universal Declaration of human rights (UDHR) in 1948, the first international legal document to delineate human rights. The UDHR for the first time in modern history spelled out basic civil, political, economic, social and cultural rights that

[30] *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997).
[31] *Griswold*, at p. 484–86
[32] U.S. 833, 846 (1992)
[33] *Id.* at 851.

all human beings should enjoy.[34]The UDHR does not mention reproductive rights, it lays down the foundation of the basic principles of humanity on which the conduct of world civilization be based. All the other instruments have to comply with the grund-norm that the UDHR sets. This Declaration enumerated treaty obligations that were designed to give legal force to the UDHR[35]. The International Covenant on Civil and Political Rights (ICCPR) is one such instrument.

The ICCPR in Art.23 recognizes the right to marry and found a family[36]. The Human Rights Committee, in its General Comment on Art 23, stated that "the right to found a family implies, in principle, the possibility to procreate"[37]. Some commentators have argued that this includes, at least for different-sex couples, the right to use reproductive technologies, subject to those prohibitions necessary to protect the rights of others[38]. Thus, in this phase a fundamental framework had not only been put in place but a lot of activity surrounding the framework had begun. The parallel dynamics emerging in the feminist debates acted further as catalyst towards streamlining normativity in this area.

Phase-III: The Feminist Agenda: The priority of the feminist agenda was the creation of an adequate space for women"s right and well-being in prior human rights enunciations by innovating general and specific norms.

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[34] International Human Rights Law, Office of the High Commissioner for Human Rights, http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx (accessed Oct. 31, 2012).

[35] Rebecca Cook et al., Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law, Clarendon Press, 2003, 148.

[36] Article. 23 of ICCPR states that (i) the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. (ii) The right of men and women of marriageable age to marry and found a family shall be recognized.

[37] UN Human Rights Committee, *General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art 23)*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/Gen/1/Rev.8 (8 May 2012) 188.

[38] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 413–14. See also Stephen P Marks, *Tying Prometheus Down: The International Law of Human Genetic Manipulation*, (2002) 3 Chicago Journal of International Lawp. 115-133.

The scripting of reproductive rights as a distinct body of human rights law marks a revolutionary break[39] from pre-existing human rights. As the case laws emerging specifically in the U.S. had regularly marked the public as well as political sphere with its moral overtones, reproductive rights, very subtly, began to appear on stage as a subset of human rights in the year 1968 with the Proclamation of Tehran, which endorsed the basic dimensions of the right to procreate and stated: "Parents have a basic right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect." This right was affirmed by the UN General Assembly in the 1974 Declaration on Social Progress and Development which went on to declare "The family as a basic unit of society and the natural environment for the growth and well-being of its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community." The 1975 UN International Women"s Year Conference echoed the Proclamation of Tehran. However, it is to be noted that till now, the term "reproductive rights" has not been specifically defined. It is rather taken as a conglomeration of various rights that can come under its purview. Number of regional conventions and protocols took up the task of enlisting what all could be crafted under the broad penumbra of reproductive rights.[40] In this agenda of formulating reproductive rights, the feminists took *two* almost parallel routes: *one*, in case of pre-existing human rights emanations, the feminists carved an integral space by embracing the already existing human rights into the women's rights fold and innovating general and specific norms in the main text of the document[38] and *two,* by invoking the *presence* in early human rights texts by deducing

[39] Baxi, Gender and Reproductive Rights in India: Problems and Prospects for the New Millennium, UNFPA, p.3

[40] Art. 23 (1) (b) International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities entails the right to reproductive health and education and, on a regional level,

Art. 14 Protocol to the African Charter on Human and Peoples" Rights on the Rights of Women in Africa („Maputo Protocol") expressly articulates women"s reproductive rights as human rights. [38] See *Supra* note 36.

logic and affirmatively interpreting the language of reproductive rights[41]. They converted an ***absence*** into a ***presence*** by reading in the more established categories of right to life, immunity from torture or degrading treatment, the rights to the highest attainable standards of health, education, information, autonomy and self determination, privacy, and dignity.[42] So basically, the two pronged route helped in creating newer room for inculcating specific norms as well as connecting the already existing superior norms to the feminist discourse. In the 1980s, the discourse on reproductive rights had thus begun to formulate itself as a major agenda in the feminist movements and featured as a starred subject in most of the feminist deliberations. These normative developments, coupled with the phenomenal breakthroughs in the discipline of bioethics led to the creation of wide space for the reproductive question to base itself on.

Vibrant women's health movements in many countries, as well as active international networking amongst them had a visible impact on national and international policy making on women's health. Following the International Conference on Population and Development (ICPD),[43]at Cairo, the definition of reproductive health moved out of the confines of the genitals. The language and formulation from Tehran to Cairo had matured up immensely wherein the latter asserted that the governments have the responsibility to meet individuals" reproductive needs, rather than demographic targets.[44] This wider perspective, adopted by both policy makers and non-government organizations (NGOs), has led to a more holistic view of women's reproductive health. In fact, Cairo Program remains the first policy document to define reproductive health stating: *Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes*. Reproductive health therefore implies that people….have the capability to reproduce and ***the freedom to decide if, when and how to do so.*** Implicit in

[41] *Ibid.*
[42] *Id.* at p. 5
[43] International Conference on Population and Development, held in Cairo, 1994 is a significant step towards streamlining the population concerns especially of the third world countries.
[44] See *Supra* note 36 at p.6

this last condition are the right of men and women to be informed about and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods for regulation of fertility which are not against the law, and the right to access the appropriate health care services.

With a wide representation of countries, it was adopted by 184 UN member states.[45] Nevertheless, many Latin American and Islamic States made formal reservations to the program, in particular, to its concept of reproductive rights and sexual freedom, to its treatment of abortion, and to its potential incompatibility with Islamic Law. Till now however, the notion of reproductive rights had emerged as a bundle of interests granting latitude to women in certain activities with respect to reproduction, it was in 1995 at the Beijing Platform for Action that cemented an all-encompassing commitment towards sexual freedom and reproductive self-determination in a more vehement tone.[44] It brought forth the revered virtues like right to life, liberty and equality for women for all purposes including reproductive decision-making and exercising "choice" in all matters affecting her being.

Phase-IV: Non-Coital Reproduction

Although the question of reproductive rights for women have developed within the space of health, human and women's rights the question of reproduction owes its significance to not only the core act of procreating but also the branching dimensions that

[45] The ICPD did not address the far-reaching implications of the HIV/AIDS epidemic. In 1999, recommendations at the ICPD+5 were expanded to include commitment to AIDS education, research, and prevention of mother-to-child transmission, as well as to the development of vaccines. [44] CEDAW, popularly known as the Women‟s Convention was all-encompassing in its approach. Specific rights enshrined in this Convention are: Art. 10(h) Access to education, information and advise on family planning; Art. 11(1)(f) Workplace safety, safeguarding the reproductive function; Art. 11 Adequate provision of health care, maternity leave, special protection of women from harmful conditions of work during pregnancy, child care and related assistance to working parents; Art.12 Elimination of gender based discrimination in provision of health care, including family planning, adequate nutrition, and "free services where necessary"; Art. 14 Special provision for health care to rural women; Art.16 Reproductive Autonomy described as the right of men and women to decide freely and responsibly on the number and spacing of children and access to information and means to exercise these rights.

the rights seek to address. In matters of non-coital reproduction the texts of the international conventions have generally been silent but the norms that they have articulated upon have created a substantial margin of appreciation in terms of formulating the questions on reproductive choice and situations where the right can come into play. The outcomes of these international human rights rhetoric have been creation of breathing space for the possibility of newer and emerging rights. Hence, in the dynamics of reproduction there could be multi-dimensional questions involving individual and familial decisions, like[46]:

(i) Having children *at all*.

(ii) Having a certain number of children, possibly at certain preferred times.

(iii) Having children of a certain sex, possibly in a certain order.

(iv) Having children some of whose characteristics (other than sex- see point (iii) above) are planned. The "planning" may encompass different degrees of precision (considering the advances in genetics)

(v) Having children with the aid of certain technologies- fertility drugs, IVF etc.

(vi) Reproducing asexually

(vii) Sterilization (with or without the consent of the spouse, if any)

(viii) Abortion

The list is not exhaustive and the language of concerns that the conventions brought forth is broad enough to embrace other emerging aspects within its fold. However, the problematic aspect in assessing these different enterprises revolves around separate cases involving different reproductive circumstances and the aspect of a situational validity. For example questions pertaining to the prospective parents whether they are married, single, belonging to the same-sex etc. in cases of third party procreation like surrogacy, or issues concerning procreation by women of who have crossed their reproductive age etc. can under all these situations technology could be resorted to as a matter of right?

[46] Shpiro & Spece, *Genetic Control & Procreational Autonomy*, Bioethics and Law: Cases, Materials and Problems, West Publishing Company, p. 392-93.

The most alarming and unique aspect about the developments of these techniques has been that more than thirty years after the first IVF birth, there is still no regulation covering ARTs directly or extensively in India.

The countries the world over are grappling with the challenges that these technologies have posed and therefore confusing set of laws and uncertain judicial outcomes have emerged adding further to the unevenness in the legal spectrum. These and many other compounding questions have started to emerge with no exact answer and definite boundaries, so it becomes essential to draw linkages from the corollary arguments and deduce justifications for *interfering with* or *granting of* such a right. Therefore, a discussion on the boundaries in cases of non-coital reproduction is called for to understand the emerging questions within its fold.

THE IMPACT OF "TECHNOLOGY" IN THE DISCOURSES ON PROCREATION

With the growth in the reproductive technology, a yet another dimension calls for attention towards the dialectics of procreation and law. It is the technological interface with the reproductive process. Generally speaking, technological growth and scientific expertise wields an ever-increasing volume of power over the various societal components[47]. It tends to create a separate domain surrounded by the walls of expertise, which is inhabited by the experts and into which the lay person cannot enter. This raises serious concerns regarding its consistency with democratic principles; in the sense that it creates an exclusive zone of operation for a selected few, and those few might not be acquainted with the larger interests of the state. The new reproductive technology formulates an apt case-study in this regard, whereby the unleashing of scientific technology over the private procreative realm provides for the potential of distancing a human being from an act which was quintessentially his own private and autonomous sphere. It has created, like any other technology does, a rather unique space for itself within the social order. This space is marked by the opaque walls of ignorance and lack

[47] C.G. Weeramantry, *Justice Without Frontiers: Protecting Human Rights in the Age of Technology*, Kluwer Law International, Vol.2, pg. 3.

of scientific know-how of the law makers, which in turn creates difficulty in laying down the scope and framework for such technology to operate. The unknown potential of technology has to be thus viewed from the lens of the institutional standards, cultural values and the societal morality at large.[48]

With the accelerated progress in the sciences, the traditional legal concepts have seen a re-structuring and often call for an inter-disciplinary understanding of the established framework. The obligations placed upon the legal professionals by these developments in science and technologies are therefore urgent, and unparalleled in many centuries of the legal profession. The humanity thus seems to proceed towards an era of uncharted waters of unprecedented technological magnitude, so much so, which no prior system of jurisprudence has ever been called upon to face.

This anomaly thus creates a new dimension of power which, like all other dimensions of power, must look for an answer in law and thereby must be subject to law.[49] However, so fast and unpredictable has been the progress of technology that law and lawyers have been late in responding to the new challenge, by which time the new technologies had gone down to the task, it was only to find that the legal structures, legal procedures and legal concepts were scarcely geared to face the new challenges thus confronting the law. Science today has undermined these basic assumptions, but the apparatus of the law remained anchored to its ancient framework. Taking the Hindu concept of *sapindaship*, for example; it is based on the rules of exogamy and eugenics and draws its reverence from the Shastric texts. In the era of collaborative reproduction, and technological intervention in procreation such concepts are not given any space for deliberation within the legislative framework.

The International Consciousness

International consciousness of these problems alerted the United Nations Human Rights Commission (UNHRC) that passed resolutions for the affirmative use of scientific

[48] *Id.* at p. 137
[49] *Id.* at p. 30

and technological achievements to foster fundamental democratic rights and freedoms. Article 27(1) of the UDHR also states that every individual has the right to benefit from scientific progress[50], including progress in the area of human reproduction and not to be subject of experimentation in the same area.

In the period between 1971 to 1976 a series of reports reached the UNHRC from the Secretary General and the specialized agencies, primarily on the biological, medical and bio-chemical denigrations of personality dealing *inter alia,* with artificial insemination, prenatal diagnostic procedures etc.[51] The concerns also enlisted about the preservation of cultural values and the achievement of a balance between scientific and technological progress, on the other hand, and the intellectual, spiritual, cultural and moral values of humanity on the other.[52] Apart from the limitations that these resolutions highlighted, the international declarations noted the responsibilities of states: to extend the benefits of science and technology to all strata of the population and to protect them from possible harmful effects of the misuse of scientific and technological developments.[53]

International consciousness of the impact of technology in the third world countries altered the international community to activity and thus it moved forward to another milestone- the *Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind.*[54] The Western countries abstained from voting on the Declaration. These political dynamics did not however obscure the importance of the problem. They rather highlighted its gravity and urgency, for they made it evident how far-reaching and many-faceted the impact of technology could be. The Declaration noted, as the prior documents had already done, that scientific and technological developments could better the human condition, they could also threaten

[50] Art. 27(1) UDHR, Art. 7 ICCPR and Art. 15 ICESCR
[51] *Supra* note 46 at p. 81.
[52] *Id* at p. 30
[53] *Id.* Also see Sadako Ogata, Introduction: United Nations Approached to Human Rights and Scientific and Technological Development" in Human Rights and Scientific And Technological Development, Weeramantry (ed.), UNU Press, p.3.
[54] General Assembly Resolution 3384(XXX) of 10 November 1975.

fundamental human rights and freedoms. The nine provisions of the Declaration were, significantly, cast in terms of mandatory state obligation, and can thus form the basis for an eventual recognition of these duties as part of customary international law. Although, this duty finds its place only in the Declaration and not as a multilateral treaty, but nonetheless, it echoes the growing international sentiment to be binding on the frequent violators of these norms.[55]

Thus, Principle 8 requires states to take "effective measures, *including legislative measures*, to prevent and preclude the utilization of scientific and technological achievements to the detriment of human rights and fundamental freedoms and the dignity of the human person."[56] The duty does not end there. Principle 10 requires all states, whenever necessary, to "take action to ensure compliance with legislation guaranteeing human rights and freedoms in the conditions of scientific and technological developments."[57]

The Declaration received further recognition when the Commission on Human Rights[58] welcomed the adoption of the Declaration by the General Assembly. A strong case can thus be made that the terms of the Declaration, and with it the obligations it imposed upon states, are now built into the current body of human rights norms. The need to study the impacts of a technology before deciding to implement it received attention in Nairobi in 1976.[59] It was acknowledged that one has reached a stage in the spread of technology where various new developments automatically tend to be received into countries of the Third World without an assessment of their "overall cost" to the society concerned, including the cost in terms of their cultural values- the IVF technology is one such example.

These international declarations and pronouncements drew attention to the important facet of the relationship between science, technology and human rights and

[55] See *Supra* note 46 at p. 133.
[56] *Ibid*.
[57] *Ibid.*
[58] Resolution 108 (XXXIII) of 11 March 1977
[59] *Supra* note 48 at p. 133

urged the governments to direct the scientific enterprise towards the needs, skills and knowledge of the majority of the underprivileged peoples of the world, especially those in the "third world".

Therefore, it is evident that internationally the onset of technology has been seen from the lens of right to development[60] and any obstacle to such a right is unanimously discouraged. Nevertheless, the inadequacy of law to cater to the needs of the emerging techniques and predict the societal response has generated an impact that does not have a legal counterpart. Thereby it functions in legal vacuum. It hence becomes essential to streamline the technology catering to a well-defined code of conduct for the experts, who operate such technology and streamline it with the larger social objectives that a democratic welfare state aims to achieve.

NON COITAL REPRODUCTION & LIMITS TO PROCREATIONAL AUTONOMY

The subject of "reproduction" features as one of the fewer principles that have been accepted universally as featuring within the province of autonomy. This makes autonomy a major value to reckon with and a basis for conceptual analysis. In fact, the question of reproductive autonomy formulates one of the most vocal questions of the women"s rights discourse.

Determining the scope of the right to procreate in cases of ARTs therefore depends on exploration of two issues - the *first* is the extent to which the basis for valuing reproduction applies when conception occurs non-coitally or collaboratively. The *second* concerns the meaning and scope of *responsibility* in reproduction, and thus the circumstances in which reproduction can justifiably be limited. While discussing "autonomy", this aspect of *responsibility* operates continuously almost as an alter-ego in de-limiting the operative extent of "Autonomy" in the procreational context.

[60] Article 6(3) of the Declaration on the Right to Development, 1986

The Value that is Autonomy:

The origins or the genesis of the concept of Autonomy could be located in the writings of J.S. Mill and Emmanuel Kant, according to which, every individual has a right to selfdetermination and relates to the basic and nearest form of liberty[61]. Autonomy can also be thus, considered as a *right* to make certain personal decisions without undue interference from others.[62] Reproduction, for that matter, becomes the most personal decision in this regard governing the most private of all human endeavors.

The term "reproductive autonomy" comprises of two distinct phenomena: 1) Procreation; and 2) Autonomy (a value closely associated with self determination).

Beginning with the second component first- "Autonomy". At the most basic, the liberal concept of autonomy has its roots in the idea that says, provided others are not harmed, each individual should be entitled to follow their own life plan in the light of their beliefs and convictions.[87] It is an unsaid declaration of an individual about some sphere of her own life, when she is denying that anyone else has the authority to control her activity within this sphere; she is saying that any exercise of power over this activity is illegitimate unless she authorizes it herself.[63] Autonomy basically refers to an individual"s independent sphere of functioning with complete cognitive abilities and socially conducive opportunities.[89]

According to Kant, autonomy is a catalyst for moral growth and social enlightenment.[64] Lawrence Haworth defines autonomy as having what he calls "critical competence" by virtue of which, the active person is sensitive to the results of his own deliberation; his activity is guided by purposes he has thought through and found

[61] Jennings, *The Oxford Handbook of Bioethics*, Steinbook ed.OUP, 2007, pp. 72-74
[62] William J. Talbott, *Autonomy Rights*, in Which Rights should be Universal? OUP, 2005, pp.113
[87] *Id.*
[63] *Supra* note 1 at p.5 [89] *Ibid.*
[64] *Id.* at p. 82.

reasons of his own pursuing.[65] These philosophical views of autonomy are widely shared in intellectual circles.

But this is not to say that the concept of autonomy within the liberal tradition has had a single, unitary meaning. On the contrary, a variety of different ideas concerning moral independence, self-governance, freedom from external constraints , tolerance, pluralism and liberty have all crystallized around the notion that an individual's life may be enriched by her capacity to direct the course of her life according to her own values. The point is that while the virtue of autonomy in procreation is recognized as a universal norm, there is however a lack of understanding of the broad principle which is both descriptively accurate and normatively desirable. It therefore does not present a single idea but a cluster of closely related, overlapping ideas.

Ronald Dworkin has distinguished between experiential preferences for various activities of pastimes that might make lives pleasurable and what he describes as "critical interests"[66]. The jurists are unison in their views that reproductive freedom is sufficiently integral to a satisfying life that it should be recognized as a critical "conviction about what helps to make a life good"[93]. Insofar as it is now possible for individuals to decide if, whether or when to reproduce, depriving them of this control significantly interferes with their capacity to live their life according to their own beliefs and priorities. In relation to women, a lack of respect for their reproductive autonomy may even involve infringing their bodily integrity, as has been argued while articulating on right to abortion.

Realization of autonomy is therefore the pinnacle of human well-being. The statement takes two forms: (I) the strong form exemplified by Mill, who argued that autonomy was essential to human well-being[67]; and (II) the weaker form exemplified by Joseph Raz[95], who argues that institutions in Western societies are so designed that the development and exercise of autonomy are practically, if not logically, necessary for living a happy life under them.

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[65] *Id.* at p.78.
[66] See *Supra* note 86 [93] *Id.*
[67] See *Supra* note 1at p.6 [95] *Ibid.*

Both Mill and Raz in their respective accounts concur, that other things being equal, in liberal societies, autonomous lives are usually happier than non-autonomous lives.

The women's rights agenda illustrate a recurrent theme in the development of basic human rights: *the rebellion of an oppressed group against limits on their autonomy, enforced by oppressors who claim to know what is good for them*. In sum, there are several key tenets that give autonomy its extraordinary moral power and appeal. One is *moral individualism,* the belief that the human individual is the center of the moral universe, the subject of ultimate worth. Another is *moral constructivism*, the notion that the basic features of society are ultimately products of human choice and artifice, and as such the social world is the human world, a world which is fashioned by the human being. The final root idea underlying autonomy is the doctrine of *moral voluntarism* or *consent*.[68] This is the tenet of autonomy that is invariably cited to build a case for commercial surrogacy. The question that invariably arises at this point is, if the reverence of autonomy is so highly placed, on what basis can any limits to the exercise of individual autonomy be set? Mill makes an attempt to answer this in the following passage from *On Liberty*[69]: the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. This shifts the question from the definition of rightful choice to the definition of harm. The difficulty that arises is however the difficulty in defining the term *harm*. What is the gradation between harm, offence, annoyance and inconvenience? Where the line should be drawn?

Generally speaking, the species of harm that has most pre-occupied bioethics is precisely the denial of autonomy or negative liberty of the other. Closely related and of special importance in medicine, is the right to privacy and bodily integrity which culminates into the practice of informed consent. Since the 1960, the US Supreme Court has been engaged in defining such a sphere. Through liberal and conservative courts, the scope of the right to self determination and bodily integrity has gradually expanded, even

[68] *Supra* note 85 at p. 81
[69] *Id.* at p 83-84

though no such right appears in the U.S or for that matter even in the Indian Constitution. The historic *Roe v. Wade*[98] judgment established a personal right over one"s procreational decision making within the *first* trimester pregnancy.

The attempts of the courts in upholding the value has been consisting of the negative goal of warding off interference or the metaphoric base of "space". Therefore, the essence of a framework on autonomy is to realize that not every liberal theory necessarily presuppose that every individual already has the freedom to choose between a set of genuine and valuable alternatives, rather this may be a principal *goal* of theories of redistributive justice. In order to treat individuals with dignity and respect, they should be therefore given both the freedom to exercise reproductive choice, *and a set of realistic and valuable reproductive opportunities* i.e. a person must not only be given a choice but he must be given an adequate "range of choices." It is not only negative but also positive in terms of accessibility.

AUTONOMY IN COLLABORATIVE PROCREATION: SOME INADEQUACIES

The scope, contour and operative extent of autonomy however finds itself inadequate in the morally pluralistic societies, which gives rise to many areas of ethical disagreements where a public policy decision has to be made.[99] The gives rise to the "social connections and networks" interpretation of autonomy.

Although the feminists clearly and almost unanimously admit that the pure theory of autonomy values self-sufficiency. However, a certain strand of feminism has accused this commitment to self-determination of excessive individualism and a lack of attention to the importance of "connection" with others. They claim that a commitment to autonomy is synonymous with an understanding of an individual's inevitable interdependence. This is the core value that makes surrogacy a controversial ethical issue and finds feminists divided substantially on the varying understanding of autonomy. In surrogacy, the individualistic understanding of autonomy will not suffice as it largely

connects two women and their bodily functioning and decisions pertaining to it will affect the other.[70]

The basic inadequacy of autonomy is its failure to describe women's "lived-experience" of maternity. The principle in black and white assumes that being a woman is synonymous with possessing the capacity for pregnancy, which leaves out the other aspects that are equally valuable in the pregnancy. Like, for example, Robin West has said that "the experience of being human, for women, differentially from men, includes the counter autonomous experience of a shared physical identity between woman and fetus, as well as the counter-autonomous experience of the emotional and psychological bond between mother and infant."[71] To add to this understanding, it is the undeniable connection between all the components of a pregnancy that forms the basic requirement in understanding the value of autonomy.

The fact of the matter is that women are connected to life and to other human beings during some of her critical experiences like pregnancy, heterosexual penetrative sexual intercourse, menstruation and breastfeeding. This connection with life, in the present context, need not be essentially within the body, but it could also be stretched to the connection established with the embryo outside one's body- either in test-tube or inside the surrogate's body. Failure to take into consideration these connections, formulates an inadequacy in appreciating the value of autonomy. The second feminist critique of autonomy is grounded in the communitarian insight that an individual's identity and desires are largely determined by their membership of various social groups or communities.

While it is true that individuals cannot exist in social and cultural vacuum, with needs and interests that emerge and can be satisfied without reference to the needs and interests of others. Reproductive decisions, in particular, will obviously be informed by the rich network of relationships and cultural expectations within which each individual

[70] *Id.* at 276
[71] *Supra* note 1 at p.7

is situated,[72] wherein the individual control over her body and decision making with respect to her pregnancy is dependent on such expectations. A surrogate for that matter cannot be considered as a maker of choice. Some feminists argue that being able to sell reproductive labour is empowering for women in general; to deny women this right would be to treat them in a manner that is inconsistent with their status as autonomous persons.[73] By contrast, other feminists claim that allowing women to sell reproductive labour is degrading, and hence ultimately disempowering, for women. They call it a case of disguised subordination. Since commercial surrogacy reaches deeply into the woman"s self, the value of autonomy takes on multiple layers. It is claimed that in cases of surrogacy regardless of her initial state of mind, she is not free, once she enters the contract, to develop an autonomous perspective on her relationship with the child. The immediate criticism flowing from this line of argument is that this in itself denies women"s autonomy by suggesting that their minds waver too much in pregnancy or by implying that "sacred bonds" inevitably develop during pregnancy.[104] Although, considerations of the social, economic and emotional connectedness are inevitable in reproductive decision making, it is not a pre-condition to jettison the whole concept of autonomy. Rather this understanding gives rise to the need to reconfigure autonomy in a way that is not predicated upon the isolation of the self-sufficient subject. Thus, autonomy needs to not only be checked but also re-configured to embrace within its fold aspects not directly limited to the physicality of a person. Like, without the provision of assisted conception services, infertile people may have no valuable reproductive options from which to choose. Insofar as infertile individuals" lives *can* be enriched by the provision of assisted conception services, the endeavor should be to maximize their reproductive options. In sum, respect for reproductive autonomy may mean both fostering individuals" capacity to form their own conception of the good, and providing them with a range of life-enhancing procreative choices.

[72] See McLeod *Supra* note 99 at p 263
[73] *Ibid*. [104] *Ibid*.

Thus, it could be safely argued for a strong moral or value basis that is accorded to procreation and its immense meaning from a societal point of view. Also, the rationale and social setting compelling protection of the right to reproduce coitally, also, almost, exist in cases of non-coital reproduction. By the same token, the use of sperm, egg, uterus donors may also be necessary for the person to have or rear biological descendants. While the possibility of harms unique to IVF procreation should be explored, a plausible argument to extend procreative liberty to transactions involving extracorporeal embryos can nevertheless be made.

As far as the question of reproductive responsibility is concerned it is apparent that reproductive decisions though are individual or partner centric but they primarily affect children. Since the ARTs makes women of advanced age, parents with certain medical conditions like HIV/AIDS, and also single parents to conceive at any stage in their lives, including posthumous reproduction which can adversely affect the off-spring. Yet there have been very few efforts to assure such reproductive responsibility, and the idea of reproductive responsibility is seldom addressed in countries without a population problem. In a country like India as well, where the growth of the ARTs have been unbridled, and unequal, access to the ARTs by the rich *bourgeois* brings into question the unevenness of resource distribution and accessibility of services. In assessing reproductive responsibility in use of non-coital technologies, concerns about offspring harm, risk to the surrogates, maternal behavior during pregnancy, and the ability to parent competently must be distinguished and analyzed thoroughly. The limits of acceptable behavior will depend on the burdens and benefits of particular techniques and on the emerging meaning of reproduction as these techniques filter into common use. A participatory model of development is what seems like a plausible and an embracing approach in establishing a legal framework dealing with non-coital collaborative procreation for streamlining the rights and obligations of the participants involved.

Conclusion

In this work, the researcher attempted to analyze the complex relationship between law and human reproduction in the present technological context. It has been noted that ARTs offer a wide-ranging choice of procreation for the patient undergoing treatment. With this "choice" comes responsibility which in turn opens up the possibility of legal scrutiny to a substantial degree. These innovative technologies add on substantially to an already existing voluminous body of principles that guarantee "reproduction as a matter of right".

The philosophical and technological concerns about reproduction coupled with the emerging legal aspects of enquiry have triggered a discussion at several levels. The organic growth of newer and equally compelling norms at the national as well as international levels has encouraged the identification of multiple discourses within the grand theme of reproduction. While the revered value of autonomy seems to possess an eminent potential in serving as the foundational principle to base reproduction on, it is however, the boundaries of autonomy that needs to be articulated in the context of noncoital technological reproduction. The boundaries, in the present case, are not the traditional boundaries of paternalism, but more appropriately, the walls that other equally significant principles like the "best interest of the child" and others have placed in ordering the technology and streamlining the traditional concepts of autonomy, liberty etc. The latitudinal conception of procreation has to be placed with the larger social values that cater to the fulfillment of individual and societal goals in this regard. There will be times when one person"s procreative freedom might be incompatible with other important social values, but the very intimacy of reproduction means that such circumstances are likely to be rare. The right to reproductive self-determination is not an absolute right rather it is a right to have one"s reproductive choices treated with respect. This means that the law should strive, as far as possible, to expand procreative freedom, and protect moral agency.

Despite all these individual perspectives, there needs a continuing and conscious move to create an adequate self-regulatory monitoring mechanism to closely follow the

scientific and normative expansions and streamline them in accordance with the pre-determined social objective of democratic social ideals.

After analyzing the myriad of dimensions and jurisprudential concerns, the researcher, in subsequent deliberations, attempts to indulge in the analysis of individual aspects that ARTs-Surrogacy raise. Comprehending the jurisprudential questions in the context of the existing medico-legal aspects shall help in formulating the basis of a viable legal framework for the dynamics of reproduction to thrive.

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