

**ART (ASSISTED REPRODUCTIVE TECHNOLOGY) AND
ITS LEGAL INNUENDOS:
A Challenge for a Statutorial Renovation**

Jesusa R. Lapuz*

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* '09 LL.B., candidate, University of Santo Tomas Faculty of Civil Law. *Managing Editor*, UST Law Review.

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*“For most of human history...
being a father was a matter of conjecture, and
being a mother was a matter of fact.”
Now nothing can be known for sure.”¹*

PROEM

In this modern world, copulation is no longer the exclusive method for humans to reproduce. A new group of medical options, known as “assisted reproductive technologies” or ART, are challenging the people’s understanding of parenthood and biological relationships.² Those who choose to use these technologies include those who are infertile for both medical and social or situational reasons.³ Infertility is defined as a disease or condition of the reproductive system often diagnosed after a couple had one year of unprotected, well-timed intercourse, or if the woman has suffered from multiple miscarriages. Not only age can be a factor in infertility, but also sexually transmitted infections, several reproductive diseases, exposure to certain chemical agents, tobacco and alcohol use, and excessive weight gain or loss.⁴ The relationship between technology and the law in this context is symbiotic. If the new technologies are the plants, growing toward the sky and leading into new medical, scientific, and ethical realms, then the legal terrain is the soil, dictating which practices can develop and thrive and which

¹ J. Arons, Center for American Progress, Future Choices: Assisted Reproductive Technologies and the Law, December 2007, at 20 citing Mundy, Everything Conceivable (quoting an adoption lawyer) at 101.

² *Id.* at 1.

³ *Id.* at 2.

⁴Frequently Asked Questions About Infertility, http://www.resolve.org/site/PageServer?pagename=lrn_wii_faq (last accessed 27 May 2008).

must wither away. Every decision to regulate or not creates unique incentives and disincentives for the fertility industry and those it serves.⁵

In the United States (U.S.), the widespread use of intrauterine insemination by unmarried opposite sex couples and same sex couples is largely unregulated and legally problematical, creating problems for courts throughout the country which have struggled with issues relating to parental rights, custody, visitation and child support in the absence of legislative guidance.⁶ Also, it has real-life consequences for thousands of people and ripple effects on other areas of the law, from adoption to abortion, from health insurance to inheritance.⁷

Regulation of assisted reproductive technology has evolved in different ways in different countries. Some countries have passed laws aimed at "controlling" the technology (e.g., restricting the number of embryos transferred), whereas others have official regulations set by national scientific societies. In the late 1980s in the United States, the Society for Assisted Reproductive Technology (SART), an affiliate of the American Society for Reproductive Medicine (ASRM), established a voluntary registry through which all programs that provide assisted reproductive services can share information and results.⁸ In Australia, the Donor Conception Support Group, founded in 1993, is a voluntary organization made up of people who considers or uses donor sperm, eggs or embryos, those who already have children conceived on donor programs, adult donor offspring, and donors. Its website includes an annotated list of books, videotapes, and other materials; product reviews; information sheets for potential gamete donors;

⁵ *Supra* note 2.

⁶ C. Kindregan, Jr., Thinking About the Law of Assisted Reproductive Technology, 27 WISCONSIN JOURNAL OF FAMILY LAW at 123 (2007).

⁷ *Supra* note 2.

⁸ R. Rebar & A. DeCherney, Assisted Reproductive Technology in the United States, <https://content.nejm.org/cgi/content/full/350/16/1603> (last accessed 27 May 2008).

information for gamete offspring; and updates on legislation in Australia related to ART. On the other hand, the United Kingdom has Human Fertilisation and Embryology Authority, which is an organization acting as an independent regulator overseeing safe and appropriate practice in fertility treatment and embryo research. Its website provides online information for consumers, donors and donor-conceived people and their families, clinic staff, and the media.⁹

However, no similar association has been created in the Philippines. It only has Philippine Council for Health Research and Development (PCHRD) which is the primary focal point for health research activities in the Philippines by virtue of Executive Order No. 128.¹⁰ It is an agency of the Department of Science and Technology and is responsible for coordinating and monitoring research activities in the country.¹¹ Moreover, while progressive countries like the U.S. are continuing to update their laws in the area of ART, the Philippines had started and seemed to have stopped with the provisions regarding artificial insemination.¹²

The times are rapidly moving, affecting the way the people live, how they communicate with each other, how they spend their leisure time and even how they procreate. Accordingly, advanced technologies demand for a legal amelioration. Even in the Philippines, more and more people, married or not, are opting to resort to artificial reproductive procedures. A Sperm Bank/Clinic in Malate was established in 1991 primarily for long-term storage of sperm. Some of the medical institutions that are performing such

⁹ Maternal and Child Health Library, Assisted Reproductive Technologies (ART) and Families: Selected Resources, <http://www.mchlibrary.info/guides/ART.html> (last accessed 27 May 2008).

¹⁰ 30 January 1987. Reorganizing the National Science and Technology Authority.

¹¹ Harvard School of Public Health, Global Research Ethics Map, <https://webapps.sph.harvard.edu/live/gremap/view.cfm?country=Philippines> (last accessed 27 May 2008).

¹² FAMILY CODE, art. 164, 166.

procedures are Victory, A.R.T. Laboratory Phil., Inc.¹³ in Makati City and St. Luke's Medical Center¹⁴ in Quezon City. In no time, all of the hospitals will be offering such highly advanced reproductive services. When that time arrives, disputes regarding custody, inheritance and filiation will indubitably arise. The problem will be exacerbated if, at that time, the legislature has not as yet provided the necessary laws in order to regulate the practice and govern the issues which will naturally come about. For instance, what is the status of the children born out of such procedures? The existing Philippine laws are silent on this point. The parties to the dispute will be put in such a dreadful situation where the courts will painstakingly apply Article 164 of the Family Code by analogy as authorized under Article 9 of the New Civil Code, where Judges, in a little way, are allowed to fill in the gaps in the incommensurate laws.

Article 164 of the Family Code provides:

Children conceived or born during the marriage of the parents are legitimate.

Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.

Article 9 of the New Civil Code provides:

No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws.

The best remedy, however, is to alert the Congress of the Philippines to amend Article 164 by expanding its coverage so as to include those children born out of reproductive technologies.

¹³ IVF Clinics- Asia, http://www.ivf.net/ivf/asia-b401_0-en.html (last accessed 28 May 2008).

¹⁴ St. Luke's Medical Center, <http://www.stluke.com.ph/index.php?page=article&pageID=157&parentID=19> (last accessed 28 May 2008).

This article will serve not only as an eye-opener for the legislators to arouse them from their slumber so they can start formulating a statutory amendment more harmonious with the modern times, but also as a guide which will show what matters in law need more concentration and how it is being brought into play in the United States, under whose constitution the Philippine government had been patterned.

ELUCIDATION

Assisted Reproductive Technology (ART) is a general term referring to methods used to achieve pregnancy by artificial or partially artificial means. It is used in infertility treatment, which is the only application routinely used today of reproductive technology.¹⁵ It includes a range of techniques for manipulating eggs and sperm in order to overcome infertility. It encompasses drug treatments to stimulate ovulation; surgical methods for removing eggs and for reimplanting embryos; *in vitro* and *in vivo* fertilization; *ex utero* and *in utero* fetal surgery; as well as laboratory regimes for freezing and screening sperm and embryos, and micromanipulating and cloning embryos.¹⁶

The field's first major success came in 1978 with the birth of "test-tube baby" Louise Brown, engineered by Steptoe, Edwards, *et al.*, of England. At the outset, these methods were mainly used to alleviate infertility problems among couples. As the technologies spread, however, they increasingly are being employed for purposes beyond infertility, i.e., to reduce the risk of, or avoid passing on, hereditary disease and to select for

¹⁵Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Assisted_reproductive_technology (last accessed 30 May 2008).

¹⁶Online Medical Dictionary, <http://cancerweb.ncl.ac.uk/cgi-bin/omd?assisted+reproductive+technology> (last accessed 30 May 2008).

the infant's gender. Further uses that would aim at improving the "quality" of offspring, which have raised profound and ethical questions, have also been widely considered.¹⁷

ART IN FOCUS

There are various types of ART being practiced worldwide, but the most frequently used and more relevant in the Philippine jurisdiction are the *In Vitro* Fertilization, Artificial Insemination, Surrogacy, and Posthumous Reproduction.

In Vitro Fertilization (IVF)

This literally means "fertilization in glass." It is a fertility treatment in which eggs are removed from the woman's body and fertilized with her partner's sperm in the laboratory. The resulting embryos are then returned to her uterus in the hopes of fostering a pregnancy. IVF is also used for mothers who wish to use donor eggs because of ovarian failure or repeated pregnancy losses.¹⁸

Artificial Insemination (AI)

Artificial insemination is just one of those options that may be considered prior to attempting more involved treatments, such as IVF.¹⁹ It is the most commonly known method of assisted reproduction which has been defined as "the introduction of semen into the vagina other than by coitus."²⁰

¹⁷ *Id.*

¹⁸ About.com, <http://miscarriage.about.com/od/pregnancylossbasics/g/ivf.htm> (last accessed 30 May 2008).

¹⁹ Medindia.com, http://www.medindia.net/patients/patientinfo/Artificial_Insemination_about.htm (last accessed 01 June 2008).

²⁰ Renee H. Sekino, Posthumous Conception: The Birth of a New Class, <http://www.bu.edu/law/scitech/volume8/Sekino.pdf> (last accessed 02 June 2008).

In majority of the cases, the husband's sperm is used.²¹ The sperm is artificially placed into a woman's cervix (intracervical insemination) or uterus (intrauterine insemination). During artificial insemination treatment, the woman's menstrual cycle is closely monitored using ovulation prediction kits (OPK),²² ultrasounds, and blood tests. The semen to be implanted is "washed"²³ in a laboratory, which increases the chances of fertilization while removing unnecessary, potentially harmful chemicals. The semen is inserted into the woman, and if the procedure is successful, she conceives.²⁴

Success rates for human artificial insemination vary based on the type of fertility problem being treated and the age of the patient. Most women who choose artificial insemination have a 5 to 25 percent chance of becoming pregnant with each menstrual cycle.²⁵

*Classification of Artificial Insemination According to the Source of the Seeds (Sperm):*²⁶

1. **A.I.H.** (Artificial Insemination Husband or Homologous Insemination) – the sperm comes from the husband.
2. **A.I.D.** (Artificial Insemination Donor or Heterologous Insemination) – the sperm comes from a donor.
3. **A.I.H.D.** (Artificial Insemination Husband Donor or Confused Artificial Insemination) – comes from the combination of the sperm of the husband and a third party donor.

Surrogacy

²¹ *Supra* note 19.

²² These kits detect hormones which are produced in large quantities shortly before ovulation and can be found in the urine. Malpani Infertility Clinic, <http://www.ivfindia.com/book/chapter13b.html> (last accessed 22 July 2008).

²³ Sperm washing is a procedure used to separate a man's sperm cells from his semen, helping to get rid of dead or slow-moving sperm as well as additional chemicals that may impair fertilization. Shared Journey, http://www.sharedjourney.com/iui/sperm_washing.html (last accessed 22 July 2008).

²⁴ Docshop.com, <http://www.docshop.com/education/fertility/treatments/artificial-insemination/> (last accessed 01 June 2008).

²⁵ *Id.*

²⁶ E. Pineda, Problems in Paternity and Filiation, U.S.T. L. REV. Vol. XLVI, at 30 (1997).

Surrogacy is a procedure whereby a woman carries a child for someone else, usually an infertile couple. There are two different types of surrogacy: traditional surrogacy and gestational surrogacy.²⁷

Traditional

In traditional surrogacy, the surrogate mother is artificially inseminated with the of the intended father or sperm donor. The surrogate's own egg will be used, thus she will be the genetic mother of the resulting child.²⁸

Gestational

In gestational surrogacy, the surrogate mother is not genetically related to the child. Eggs are extracted from the intended mother or egg donor and mixed with sperm from the intended father or sperm donor *in vitro*. The embryos are then transferred into the surrogate's uterus. Embryos which are not transferred may be frozen and used for transfer at a later time if the first transfer does not result in pregnancy.²⁹

Posthumous Reproduction

A posthumous child is an infant who is born subsequent to the death of the father or, in certain cases, the mother. Sperm and eggs may be preserved in a frozen state to give way to reproduction past the lives of their donors.³⁰ In particular, cryopreservation is a particularly popular technique of posthumous conception, whereby human semen, ova, and embryos may be frozen and preserved at very low temperatures for extended periods of time

²⁷ <http://www.surromomsonline.com/articles/define.htm> (last accessed 01 June 2008).

²⁸ *Id.*

²⁹ *Id.*

³⁰ The Free Dictionary, [http://legal-dictionary.thefreedictionary.com/Posthumous +child](http://legal-dictionary.thefreedictionary.com/Posthumous+child) (last accessed 01 June 2008).

after extraction from the donor source.³¹ Because of the lengthy period of time over which these may be preserved, children may be conceived after the death of a particular donor.³²

CONCEIVABLE CONTROVERSIES

In Vitro Fertilization

There is no provision under the Family Code or any other Philippine law which relates to *in vitro* fertilization. Under this procedure, when more embryos are created than needed to successfully impregnate a woman, the excess embryos are usually frozen and stored in a fertility clinic until they can be used for future pregnancy attempts, donated to others seeking to have a child, or for clinical or scientific research, or thawed and discarded. Sometimes the disposition of such embryos has been arranged by contract. But regardless of whether a contract exists, disputes can arise over what will happen to the embryos, how they can be used, and how they are to be treated.³³ Said disputes will be apparent even more in case of a change of heart in either or both of the spouses, or in case the spouses resolve to part ways.

Only a fistful of states in the U.S. have enacted statutes that provide for the disposition of frozen embryos. Florida alone demands the physician and the couple to enter into a written agreement pertaining to the disposition of gametes and embryos “in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.”³⁴ This statute, however, also provides that absent a written contract, the couple shall exercise joint authority over

³¹ *Supra* note 20, citing Monica Shah, Comment, Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception, 17 J. Legal Med. 547, 550 (1996).

³² *Supra* note 20.

³³ *Supra* note 1, at 6.

³⁴ *Supra* note 1, at 15 citing FLA. STAT. § 742.17 (2007).

the embryos, which may not be of much use should the couple encounter a dispute as regards the control of said embryos. And even if there is a written agreement pursuant to the statute, it is still possible that a court would re-evaluate such agreement if a dispute arises out of the terms of the contract itself.³⁵

Only New Hampshire and Louisiana made some pronouncements as to what may or may not be done with the embryos. New Hampshire merely mandates that an embryo which has not been implanted may not remain unfrozen for more than fourteen (14) days beyond fertilization. It likewise places a ban on transferring an embryo to a uterus if the embryo has been donated for research purposes.³⁶

Louisiana, on the other hand, defines a human embryo as a fertilized ovum that will develop into an unborn child and classifies it as a juridical person (one with legal rights to sue and be sued) prior to implantation and at any other time rights attach to an unborn child. The law allows IVF patients to express their identity or to forfeit their rights as parents, be treated as gamete donors, and to make their embryos available for adoptive implantation.³⁷ Under Louisiana law, a viable embryo may not be intentionally destroyed and the physicians and medical facilities that perform IVF are charged with safeguarding the fertilized ova in their care. The judicial standard to be applied to any disputes that arise is the best interest of the *in vitro* fertilized ovum, which is the same standard used when determining the custody of children. The unmistakable implication of this law is to treat embryos as if they were born children thereby undermining

³⁵ *Supra* note 1, at 15.

³⁶ *Id.* citing N.H. REV. STAT. ANN. § 168-B:15 (2007).

³⁷ *Supra* note 35.

abortion rights protected in said state.³⁸ Beyond abortion law, Louisiana's regulatory framework raises a number of other significant constitutional issues. It transforms fertility patients into gamete donors, it potentially violates their right not to procreate, and it deprives them of their right to determine the disposition and use of their own genetic material.³⁹

Left without statutory guidance, courts have struggled to determine whose interest shall prevail when disputes arise between couples as to the disposition of their unused embryos.⁴⁰ In *Davis v. Davis*,⁴¹ the Tennessee Supreme Court decided that it must first categorize the human embryo. Rejecting suggestions that embryos are either persons or property, the court found that they inhabit an interim category that entitles them to special respect because of their potential for human life. The court declared that any contract regarding the disposition of stored embryos should be presumed valid, binding, and enforceable.⁴² However, because there was no such contract in the *Davis* case, the court engaged in a balancing test, where it weighed the interests of the parties against each other.⁴³ The court determined that the essential question was whether the parties would become parents, thereby implicating their constitutional right to privacy and the related right to procreate or to avoid procreation. Despite the increased stress and discomfort that women undergo in the process of IVF, the court found that women and men must be seen as entirely equivalent gamete providers. Moreover, unlike with the question of abortion, the case did not involve interference with a woman's bodily integrity; therefore her interests would not automatically trump the man's.⁴⁴ The court also found that the state's interest in the potential life embodied by the embryos was at best

³⁸ *Id.*

³⁹ *Supra* note 1, at 16.

⁴⁰ *Id.*

⁴¹ *Id.* citing *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

⁴² *Id.* at 597.

⁴³ *Supra* note 39.

⁴⁴ *Supra* note 41, at 601.

slight and not sufficient to justify any infringement upon individuals to make their own decisions about whether to allow the IVF procedure to continue.⁴⁵

In this case, the couple divorced and the husband wanted to prevent the embryos from being implanted. The wife initially wanted to use the embryos herself, but by the time the case reached the state Supreme Court, she wanted to donate the embryos to a childless couple. The court determined that unwanted parenthood for the husband was a greater burden than the wife's knowledge that the IVF process would be rendered futile and the embryos she helped create would never become children. The court noted, however, that it would have been a closer case had the wife wanted to use the embryos herself. In that event, the court said, an additional factor to take into consideration would be whether she could achieve parenthood by other reasonable means, like adoption.⁴⁶

In the case of *Kass v. Kass*,⁴⁷ the highest court of New York held that agreements between couples regarding their unused frozen embryos should be enforced unless those agreements are contrary to public policy or unless the couple's circumstances have significantly changed. It further said that advance directives both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.⁴⁸

The Supreme Courts of New Jersey and Iowa also concurred in saying that such contracts should be upheld, but subject to a large caveat: the right of either party to change his or her mind prior to the use or destruction

⁴⁵ *Id.* at 602.

⁴⁶ *Supra* note 39.

⁴⁷ *Supra* note 1, at 17 citing *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

⁴⁸ *Id.* at 180.

of the embryos.⁴⁹ This model, known as the “mutual consent” model, requires that both parties must contemporaneously agree in order for any action to be taken.⁵⁰

According to the New Jersey court, when a couple disagrees as to the disposition of the embryos, the interests of both parties must be evaluated (effectively a balancing test).⁵¹ In Iowa, on the other hand, when the parties disagree, the *status quo* must be maintained until they can reach resolution or until the fertility clinic is no longer contractually bound to keep the embryos, with the expenses for maintaining the embryos to be shouldered by the party opposing their destruction.⁵²

Although the courts have adopted a variety of tests to resolve such issues, thus far they have consistently ruled in favor of the spouse who opposes use of the embryos for procreative purposes. Massachusetts, New Jersey, and Iowa all based their reasoning in part on the fact that advance agreements to procreate or form other family relationships violate their states’ public policy and are unenforceable.⁵³ Tennessee, in contrast, was reluctant to announce any bright-line rule and strained to point out that its holding should not be read to provide an automatic veto to a party seeking to avoid parenthood.⁵⁴

In *Roman v. Roman*,⁵⁵ the Texas Court of Appeals followed a contractual approach as well. It observed that there was an emerging

⁴⁹ *Supra* note 1, at 17 citing *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001), *In re Witten*, 672 N.W.2d 768 (Iowa 2003).

⁵⁰ *Supra* note 1, at 17.

⁵¹ *Id.* citing *J.B.*, 783 A.2d at 719.

⁵² *Supra* note 1, at 17 citing *In re Witten*, 672 N.W.2d at 783.

⁵³ *Supra* note 1, at 17 citing *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000); *J.B.*, 783 A.2d at 717-18; *In re Witten*, 672 N.W.2d at 781.

⁵⁴ *Supra* note 41, at 604.

⁵⁵ *Supra* note 1, at 17 citing *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006).

majority view that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable so long as the parties have the opportunity to withdraw their consent to the terms of said agreement.⁵⁶ The court also gleaned from a handful of Texas statutes that do address assisted reproduction that the public policy of the state would support this approach.⁵⁷

What all of these courts have emphasized is that such disputes should be governed by existing statutes and that each case must be decided according to its own particular facts.⁵⁸ On the one hand, it makes sense to require any person who contributes genetic material to an embryo with the intent to become a parent to designate, beforehand, what should happen to that embryo if it is not used for its initial purpose. The process alone should help couples think through future scenarios and commit themselves to a particular course that may reduce the likelihood that a dispute will arise. To that end, further regulation may be helpful.⁵⁹ On the other hand, it is in the clinics' best interests to have patients fill out consent forms and it is likely that they now routinely collect information about what is to be done with unused embryos, obviating the need for legislative mandates.⁶⁰

As regards child custody disputes, fights over embryos in the U.S. can be incredibly fact sensitive. Suits of this nature will definitely benefit from legislative guidance which must reflect progressive values and will not violate or thwart constitutional protections.⁶¹

⁵⁶ *Id.* at 48.

⁵⁷ *Id.* at 53.

⁵⁸ *Supra* note 1, at 18.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Supra* note 1, at 19.

Artificial Insemination

There is no problem if the spouses have authorized or ratified the insemination in a written instrument which they signed freely and voluntarily without deception before the birth of the child. For then, the status of the child is indubitably legitimate by express provision of law.⁶² However, what will happen if the wife was subjected to artificial insemination without her consent or against her will? Certainly, the child resulting therefrom will be illegitimate because it is a patent violation of the law⁶³ which requires the consent of both the husband and the wife to the procedure of artificial insemination. But what is the remedy of the aggrieved wife? Can she file an action for any crime? In the case of *Oxford v. Oxford*,⁶⁴ the Supreme Court of Ontario, Canada made the *obiter* that the process of insemination undergone by the woman against her will is tantamount to “sexual intercourse” and this might constitute rape. In the Philippines, there is still no direct rule and jurisprudence on the matter. At most, the crime that could be charged is coercion, but the same is not commensurate to the gravity of the invasion of the woman’s reproductive organs. But surely, the woman is entitled to damages under Articles 20 and 21 of the New Civil Code:⁶⁵

Article 20. Every person who, contrary to law, willfully or negligently causes damage to another, shall indemnify the latter for the same.

Article 21. Any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

⁶² FAMILY CODE, art. 164. Children conceived or born during the marriage of the parents are legitimate.

Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.

⁶³ *Id.*

⁶⁴ 58 D.L.R. 251.

⁶⁵ *Supra* note 26, at 33.

Now, it may happen that it is the husband's consent that is wanting. If the wife had herself inseminated with the sperm of a donor without the consent of the husband and a child was born as a result thereof, can she be held criminally liable?⁶⁶

On this, one may argue that there is no specific penal or criminal law punishing the act. Adultery is defined under Philippine criminal law as being committed by any married woman who shall have sexual intercourse with a man not her husband and by the man who has carnal knowledge of her, knowing her to be married, even if the marriage be subsequently declared void.⁶⁷ The woman needs to be married who shall have sexual intercourse with a man not her husband. The essence of adultery is sexual intercourse; there will be as many counts of adultery as there are sexual acts.⁶⁸ Therefore, one may conclude that no crime had been committed by the wife who had herself inseminated with the sperm of a donor without the consent of her husband for there had been no sexual contact, and there is no crime where there is no law punishing it (*nullum crimen nulla poena sine lege*).⁶⁹

However, it was the submission of a distinguished authority⁷⁰ in Civil Law that the wife may be held guilty of adultery. Allowing the principle of *nullum crimen nulla poena sine lege* to apply will encourage married women to resort to artificial inseminations through donation to the damage and prejudice of the husband as a *foreign* blood is introduced into his family.⁷¹

⁶⁶ *Id.* at 31.

⁶⁷ REV. PEN. CODE, art. 333.

⁶⁸ L. BOADO, COMPACT REVIEWER IN CRIMINAL LAW 388 (2d ed. 2007).

⁶⁹ *Supra* note 66.

⁷⁰ Former Dean Ernesto L. Pineda, Problems in Paternity and Filiation, U.S.T. L. REV. Vol. XLVI, at 29 (1997).

⁷¹ *Supra* note 26, at 32.

The voluntary surrender of the wife's reproductive powers or faculties to another through artificial insemination is adulterous because of the possibility of introducing into the family of the husband a child not of his own blood.⁷² In *U.S. v. Mata*,⁷³ the rule is that the controlling factor in adultery is *not* the actual contact of the sexual organs but *the introduction of spurious heirs in the family*. Likewise, in the aforementioned case of *Oxford v. Oxford*, the *ponente* of the decision said:

“In my judgment, the essence of the offense of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person, and any submission of those powers to the service or enjoyment of any person other than the husband comes within the definition of ‘adultery’.

The fact that it has been held that anything short of actual intercourse, no matter how indecent or improper that act may be, does not constitute adultery, really tends to strengthen my view that it is not the moral turpitude that is involved but the invasion of the reproductive function. So long as nothing takes place which can by any possibility affect that function, there can be no adultery; so that unless and until there is actual sexual intercourse, there can be no adultery. But to argue from that, that adultery necessarily begins and ends there is utterly fallacious. Sexual intercourse is adulterous because in the case of the woman, it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would therefore be adulterous. That such a thing could be accomplished in any way other than the natural manner probably never entered the heads of who considered the question before. Assuming the plaintiff's story to be true, what took place here was the introduction into her body by unusual means of the seed of a man other than her husband. If it were necessary to do so, I would hold that in itself was ‘sexual intercourse’. It is conceivable that such an act performed upon a woman against her will might constitute rape. Mr. White (counsel for the wife) was driven, as a result of his argument to contend that it would not be adultery for a woman living with her husband to provide by artificial insemination a child of which some man other than her husband was the father. A monstrous conclusion surely. If such a thing has never before been declared to be adultery, then, on the grounds of public policy, the court should now declare it so.”

In yet another foreign decision, it was held that “heterologous artificial insemination” (AID) with or without the consent of the husband is

⁷² *Id.*

⁷³ 18 Phil. 490 (1911).

contrary to public policy and good morals and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and therefore is illegitimate.⁷⁴

Surrogacy

Perhaps the most famous surrogacy case in the U.S. is that of “Baby M.” In 1985, William Stern and Mary Beth Whitehead entered into a contract in which, for and in consideration of the sum of \$10,000, Ms. Whitehead agreed to be inseminated with Mr. Stern’s sperm, become pregnant, carry the pregnancy to term, deliver the child to Mr. Stern and his wife, and terminate her maternal rights. The payment was not to be made until the child was surrendered and Ms. Whitehead’s rights were terminated. Initially, Ms. Whitehead complied with the contract and turned the child over to the Sterns. The next day, however, she returned and begged to have the child for one more week. The Sterns agreed, but after several unsuccessful attempts to retrieve the child for four months, they obtained a court order to get the child back. Instead of returning the child, Ms. Whitehead and her family fled to Florida. Eventually, the child was found and returned to the Sterns.⁷⁵

The aforementioned case garnered considerable media attention and prompted several states to enact laws governing surrogacy. A review of the relevant statutes and case law reveals that the reactions to the practice of surrogacy are, literally and figuratively, all over the continent.⁷⁶

⁷⁴ *Supra* note 26, at 33 citing *Dornbus v. Dornbus*, No. 51, S. 13 875 (Super Ct., Cook Country, No. 1954; 12 Ill. App. 2d. 473, (1956).

⁷⁵ *Supra* note 1, at 24.

⁷⁶ *Id.*

Arizona and the District of Columbia ban those laws. Washington bans contracts for compensation beyond certain expenses. Michigan and New York void surrogacy contracts and impose penalties. States that declare the contracts void will simply refuse to enforce the agreements. If people enter into such contracts and disputes arise, they will have to sort out the disagreements on their own. In contrast, the states that ban surrogacy contracts do not allow such contracts to be made and sometimes will penalize anyone involved in making the contract.⁷⁷

The states that allow surrogacy vary greatly in terms of whether the surrogate may receive compensation beyond necessary expenses, whether she has a period of time after the birth to change her mind about surrendering the child, whether a court must approve the agreement, and the number of requirements the parties must satisfy ranging from medical and psychological evaluations to home studies.⁷⁸

The vast majority of statutes in the United States require the intended parents to be married, but a few do not. If the surrogate is married, the statutes invariably require that her husband consent and be a party to the agreement. The states also vary as to whether at least one of the intended parents must be genetically related to the child and whether the surrogate may use her own eggs.⁷⁹

The majority of the states still lack any statutory guidance on surrogacy agreements. When asked to resolve surrogacy disputes, the courts have looked to statutes related to adoption, custody, paternity

⁷⁷ *Supra* note 1, at 25.

⁷⁸ *Supra* note 1, at 26.

⁷⁹ *Id.*

determinations, termination of parental rights, and “baby selling”; the federal and state constitutions; and public policy considerations.⁸⁰

In *Baby M.*, the New Jersey Supreme Court ruled that payment of money to a surrogate mother was illegal, perhaps criminal, and degrading to women.⁸¹ The court also said that paid surrogacy agreements violated the state’s statutes prohibiting the use of money in connection with adoptions, requiring proof of parental unfitness or abandonment before termination of parental rights, and making surrender of custody and consent to adoption revocable in private placement adoptions. Furthermore, the contract violated the state’s public policy, namely that a child’s custody should be determined by an analysis of the child’s best interests; that natural parents have equal rights with regard to their child; that consent to adoption be informed, voluntary, and meaningful; and that the sale of a child pernicious.⁸²

The court clearly acknowledged the respective constitutional rights of the parties -- for Mr. Stern, the right to procreate, for Ms. Whitehead, the right to companionship of one’s child. The court, however, made a determination that neither Mr. Stern nor Ms. Whitehead suffered a constitutional deprivation. Mr. Stern did exercise his right to procreate and voiding the surrogacy contract did not in any way interfere with the exercise of such right. With regard to Ms. Whitehead, the court found that there was no basis to terminate her parental rights. Ultimately, the court declared that both were the child’s natural parents, but the child’s best interests warranted the grant of custody to the Sterns and visitation rights to Ms. Whitehead.⁸³

⁸⁰ *Id.*

⁸¹ *Supra* note 1, at 27 citing *In the Matter of Baby M.*, 537 A.2d 1227 (N.J. 1988).

⁸² *Id.*

⁸³ *Id.*

On the other hand, California has its landmark case of *Johnson v. Calvert*,⁸⁴ wherein its Supreme Court set forth what has come to be called the “intent” test when addressing surrogacy issues.

In this case, Anna Johnson agreed to carry and deliver the genetic child of Mark and Crispina Calvert. However, relations turned sour during the pregnancy, and by the time the child was born the parties were already in court asserting their competing rights as parents. The court said that although the California Uniform Parentage Act did not specifically address surrogacy, it applied to any case in which parentage was in dispute. The court determined that under the Act, both women had established grounds for maternity, Anna by giving birth, and Crispina by providing genetic material but California law recognized only one natural mother for every offspring.⁸⁵

The Court, using the “intent” test, concluded that when the roles of genetic consanguinity and giving birth do not coincide in one and the same woman, the one who intended from the outset to procreate and raise the child is the natural mother under California law. This holding effectively precludes a gestational surrogate from ever changing her mind about a surrogacy agreement.⁸⁶

The court likewise found that the surrogacy contract in this case was not contrary to public policy because gestational surrogacy differed in crucial respects from adoption and was not subject to the adoption statutes; it did not constitute involuntary servitude; it did not treat children as commodities; and it did not exploit or dehumanize women, including those women of

⁸⁴ *Supra* note 1, at 28 citing *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

⁸⁵ *Id.*

⁸⁶ *Id.*

lower economic status. However, the court made an opinion that the better forum for resolving these questions was the legislature, and not the courts.⁸⁷

Lastly, the court determined that, because Johnson was not the legal, natural mother, she had no constitutionally protected liberty interest based on her status as a mere “birth mother” and therefore no right to the companionship of the child. A woman who agrees to be a gestational surrogate is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service to a couple who are exercising their right to procreate a child genetically related to them by the only available means.⁸⁸

The California Court of Appeals applied this ruling in *In re: Marriage of Buzzanca*,⁸⁹ where the child was at risk of having too few parents rather than too many. In this case, a gestational surrogate carried a child created with gametes from anonymous donors for a married couple who were the intended parents. When the couple divorced, the husband attempted to claim no responsibility because he was not biologically related to the child. Outrightly rejecting that position, the court held that both the husband and the wife would be deemed the legal parents because they had initiated and consented to the assisted reproduction that brought about the birth of that child.⁹⁰

The California Court of Appeals has determined, though, that the intent test is only to be used when the birth mother and the genetic mother are different women. When a surrogate mother uses her own eggs, then she

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Supra* note 1, at 28 citing *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

⁹⁰ *Id.*

will be considered the natural and legal mother notwithstanding the intent of the parties.⁹¹ Because genetics and birth coincide in the same woman, there is no need to use intent to break the “tie” between two mothers, as there was in the *Johnson* case. Without a formal consent to adoption, the intended mother has no right to the child.⁹²

In contrast, Ohio has rejected forthrightly the *Johnson* intent test in favor of a test that relies primarily on genetics. In *Belsito v. Clark*,⁹³ the court found that the intent test was unworkable for a number of reasons, including the difficulty of proving the intent. It found genetics to be a much more reliable and established method for determining parentage. Therefore, the presumption in Ohio is that the genetic mother will be the legal mother.⁹⁴

The court noted, however, that genetics should not be the exclusive test for determining parentage and that birth can be used as a secondary test. Under the birth test, the birth mother could still be found to be the legal parent if the genetic parent consented.⁹⁵ Of course, if that is the case, it is unlikely the parties would end up in court unless there is a problem with the birth certificate.⁹⁶

Legal scholar Dorothy Roberts of Northwestern University School of Law in Chicago, Illinois has argued that, even in *Johnson*, a major factor in these cases involves establishing the primacy of genetics over gestation, and she contends that a racial subtext often drives such decisions. To cite an instance, in *Johnson*, the surrogate was African-American, the wife was

⁹¹ *Supra* note 1, at 28 citing *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1004).

⁹² *Id.* at 29.

⁹³ *Supra* note 1, at 29 citing *Belsito v. Clark*, 644 N.E.2d 760 (Ohio Ct. Comm. Pleas 1994).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Supra* note 1, at 29.

Filipina and the husband was white. The press, however, focused much more attention on the surrogate's race than on the wife's and portrayed the child as white.⁹⁷

Roberts worries that gestational surrogacy doubly disadvantages economically challenged women of color who cannot afford a court battle and who are unlikely to gain custody of a white child.⁹⁸

One set of academics has noted that surrogacy agencies intentionally select surrogates who are primarily white, Christian, and married with children in order to give the impression that the practice does not exploit low-income women, yet the majority of surrogates fall within the lower-middle socioeconomic class. Most earn just above the poverty line, and 40 percent are otherwise unemployed, receiving financial assistance, or both.⁹⁹

Posthumous Reproduction

Until the advent of reproductive technologies, it was possible for a child to be born after the death of a genetic parent in only one situation -- when the father died while the child was still *in utero*. In a twist that seems purely science fiction, children can now not just be born but conceived after the death of one or both of their parents, sometimes years later. Frozen gametes and embryos are the main vehicle for this trend, but sperm (and one day eggs) could likewise be collected from a recently deceased body in extreme circumstances.¹⁰⁰

⁹⁷ *Id.*

⁹⁸ *Id.* citing Dorothy Roberts, "Race and the New Reproduction," in *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (New York: Pantheon Press, 1997).

⁹⁹ *Supra* note 1, at 29 citing Katherine Drabiak, *et al.*, "Ethics, Law, and Commercial Surrogacy: A Call for Uniformity" *J.L. MED. & ETHICS*, 300, 304, 306-308 (Summer 2007).

¹⁰⁰ *Supra* note 1, at 30 citing Arthur Caplan, "Should Kids Be Conceived After a Parent Dies?" *MSNBC.com*, June 27, 2007.

In addition to whatever emotional fall-out may occur, this new practice has created ripples in inheritance law and posed new questions for government programs that manage Social Security and other benefits.¹⁰¹ A notorious case in the 1980s raised the issue briefly. Elsa and Mario Rios, a wealthy couple who lived in Los Angeles, had undergone IVF treatment in Australia and had two frozen embryos stored there when they died in a plane crash without a will and without any instructions as to their unused embryos.¹⁰²

Suddenly people were faced with questions such as who gets to decide the embryos' fate and would they be entitled to inherit the money? It spurred clinics asking their patients for written indications of their wishes, but 20 years later most states in the U.S. still have not amended their laws to address this type of situation.¹⁰³

The issue will become more and more pressing as families begin to learn of this reproductive option. Increasingly, soldiers who are already involved in IVF programs are storing their sperm before heading off to war; concerned that they may receive wounds in combat that affect their fertility or worried they may not come home at all.¹⁰⁴

Only a handful of states in the U.S. have addressed whether a child created by assisted reproduction after the death of a genetic parent shall be entitled to inherit or receive government benefits from that parent.

¹⁰¹ *Supra* note 1, at 30.

¹⁰² *Supra* note 1, at 31 citing Claudia Wallis, "Quickening Debate over Life on Ice," *Time*, July 2, 1984.

¹⁰³ *Supra* note 1, at 31.

¹⁰⁴ *Id.*

Normally, they require the decedent to have demonstrated some intent to be a parent of a child that may be created after his or her death.¹⁰⁵

For instance, in Florida, a child conceived from the gametes of a person who dies before placement of gametes or embryos in a woman's body is not eligible for a claim against the decedent's estate unless the decedent provided for such a child in his or her will.¹⁰⁶

In Virginia, if a genetic parent dies before the implantation of an embryo, there are two ways he or she will be found to be a legal parent of a resulting child: if implantation occurred before notice of death could reasonably be communicated to the physician, or if that person consented in writing to being a parent prior to implantation.¹⁰⁷ It should be noted though that Virginia's statute does not expressly require contemplation of posthumous implantation; it appears that general consent to assisted reproduction is sufficient.¹⁰⁸

The remaining seven states¹⁰⁹ that address the issue follow a provision that was originally included in the Uniform Status of Children of Assisted Conception Act and now appears as section 707 of the Uniform Parentage Act.¹¹⁰ According to that section, the deceased must have specifically consented in a record to becoming a parent through assisted

¹⁰⁵ *Id.*

¹⁰⁶ *Supra* note 1, at 31 citing FLA. STAT. § 742.17 (2007).

¹⁰⁷ *Supra* note 1, at 31 citing VA. CODE ANN. § 20-158, 64.1-5.1, 64.1-8.1 (2007).

¹⁰⁸ *Supra* note 1, at 31.

¹⁰⁹ *Supra* note 1, at 31 citing COLO. REV. STAT. § 19-4-106 (2006); 13 DEL. C. § 8-707 (2007); N.D. CENT. CODE § 14-20-65 (2007); TEX. FAM. CODE § 160.707 (2007); UTAH CODE ANN. § 78-45g-707 (2007); WASH. REV. CODE § 26.26.730 (2007); WYO. STAT. ANN. § 14-2-907 (2007).

¹¹⁰ *Supra* note 1, at 31 citing UNIF. PARENTAGE ACT § 707, at 67 (amended 2002).

reproduction that might occur after his or her death in order to be considered the legal parent of any resulting child.¹¹¹

In *Gillett-Netting v. Barnhart*,¹¹² the federal government denied Social Security benefits to children conceived by IVF after their father's death because they were not his dependents at the time of his death. The Ninth Circuit, however, found that they were considered legitimate children under Arizona law. Hence, they could be deemed his dependents and did not have to demonstrate actual dependency.¹¹³

Similarly, in *Stephen ex rel. Stephen v. Barnhart*,¹¹⁴ a child was conceived after his father's death and again was denied Social Security benefits because he was not a dependent child at the time of the parent's death. The District Court applied the Florida law that says a child conceived after a parent's death is not eligible for a claim against the estate unless provided for in the will. Because the child in this case was not included in his father's will, he had no claim to the Social Security benefits. The court distinguished the case from *Gillett-Netting* because Florida had a statute that specifically deals with posthumous fertilization while Arizona did not.

REPRODUCTIVE TECHNOLOGIES AND THE ROMAN CATHOLIC CHURCH: The Point Of Congruity

The Roman Catholic Church says that research aimed at reducing human sterility is to be encouraged, on the condition that it is placed at the service of the human person, of his inalienable rights, and his true and

¹¹¹ *Supra* note 1, at 31.

¹¹² *Supra* note 1, at 32 citing *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004).

¹¹³ *Supra* note 1, at 32.

¹¹⁴ *Id.* citing *Stephen ex rel. Stephen v. Barnhart*, 386 F. Supp. 2d 1257 (M.D. Fla. 2005).

integral good according to the design and will of God.¹¹⁵ The gift of life which God the Creator and Father has entrusted to man calls him to appreciate the inestimable value of what he has been given and to take responsibility for it: this fundamental principle must be placed at the center of one's reflection in order to clarify and solve the moral problems raised by artificial interventions on life as it originates on the processes of procreation.¹¹⁶

The Church's Magisterium does not intervene on the basis of a particular competence in the area of the experimental sciences; but having taken account of the data of research and technology, it intends to put forward, by virtue of its evangelical mission and apostolic duty, the moral teaching corresponding to the dignity of the person and to his or her integral vocation. It intends to do so by expounding the criteria of moral judgment as regards the applications of scientific research and technology, especially in relation to human life and its beginnings. These criteria are the respect, defense and promotion of man, his primary and fundamental right to life,¹¹⁷ his dignity as a person who is endowed with a spiritual soul and with moral responsibility¹¹⁸ and who is called to a beatific communion with God.

Most of the citizens of the Philippines are catholicized¹¹⁹ making it relevant to consider the technologies which are taken by the Catholic Church as moral and those looked upon as profligate.

¹¹⁵Reproductive Technologies: Catholic Teaching, http://www.geocities.com/seapadre_1999/reproductive-technologies.html (last accessed 25 January 2009).

¹¹⁶ Respect for Human Life (*Donum Vitae*), <http://www.cin.org/vatcong/donumvit.html> (last accessed 25 January 2009).

¹¹⁷ *Id.* citing Pope John Paul II, Discourse to those taking part in the 35th General Assembly of the World Medical Association, October 29, 1983: AAS 76 (1984), 390.

¹¹⁸ *Supra* note at 116, citing Cf. Declaration *Dignitatis Humanae*, no. 2.

¹¹⁹Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Roman_Catholicism_in_the_Philippines (last accessed 25 January 2009).

*Technologies Compatible with Catholic Teachings:*¹²⁰

1. Observation of the naturally occurring signs of fertility (Natural Family Planning). Time intercourse on the days of presumed (potential) fertility for at least six months before proceeding to medical interventions.
2. General medical evaluation of both spouses for infertility.
3. Post-coital tests to assess sperm number and viability in “fertile type” mucus. These tests are undertaken after normal intercourse.
4. Appropriate evaluation and treatment of male factor deficiency. Seminal fluid samples can be obtained from a non-lubricated, perforated condom after normal intercourse.
5. Assessment of uterine and tubal structural competence by imaging techniques (e.g., ultrasound, etc.).
6. Appropriate medical treatment of ovulatory dysfunction.
7. Appropriate (usually surgical) correction of mechanical blocks to tubal patency (the state of being open).

*Technologies in Conflict with Catholic Teachings:*¹²¹

1. Obtaining a sample of seminal fluid by masturbation.
2. Artificial insemination by a non-spouse (AID), or even by the husband (AIH) if the sample is obtained and handled by non-licit means (masturbated specimen).
3. *In vitro* fertilization (IVF), zygote intra-fallopian transfer (ZIFT),¹²² and intracytoplasmic sperm injection (ICSI),¹²³ ovum donation, “surrogate” uterus.

¹²⁰ Pro-Life Activities, Reproductive Technology (Evaluation & Treatment of Infertility) Guidelines for Catholic Couples, <http://www.usccb.org/prolife/issues/nfp/treatment.htm> (last accessed 27 October 2008).

¹²¹ *Id.*

¹²² Zygote intra-fallopian transfer is an infertility treatment where a blockage in the fallopian tubes prevents the normal binding of sperm to the egg. Egg cells are removed from a woman's ovaries, and *in vitro* fertilized. The resulting zygote is placed into the fallopian tube by the use of laparoscopy.

*Procedures neither “approved” nor “disapproved” (still under discussion):*¹²⁴

1. Gamete intra-fallopian transfer (GIFT).¹²⁵
2. Intrauterine insemination (IUI) of “licitly obtained” (normal intercourse) but technologically prepared semen sample (washed, etc.).

In order to determine whether a reproductive technology is morally right under the Catholic doctrine: any procedure which assists marital intercourse in reaching its procreative potential is moral while procedures which add a “third party” into the act of conception, or which substitute a laboratory procedure for intercourse, are not acceptable. In other words, the Catholic Church does not accept any technology that puts human life, from conception to natural death, in danger, but only that which protects life and guards it.¹²⁶

CONCLUSION

Veritably, ART is permitting filial bonds to be created where no such have ever existed before. This may appear to be as simple as planting the seed, growing the plant and harvesting the fruits right after. However, interference with the creation of human life necessitates serious

Wikipedia, http://en.wikipedia.org/wiki/Zygote_intrafallopian_transfer (last accessed 27 October 2008).

¹²³ Intracytoplasmic sperm injection is a micromanipulation technique developed to help achieve fertilization for couples with severe male factor infertility or couples who have had failure to fertilize in a previous *in vitro* fertilization attempt. UCSF Center for Reproductive Health, <http://www.ucsfivf.org/ucsf-icsi.htm> (last accessed 27 October 2008).

¹²⁴ *Supra* note 120.

¹²⁵ Gamete intra-fallopian transfer is a technique in which the male and female germ cells required to begin formation of a human embryo are injected into a woman's fallopian tubes of the female for fertilization. MedicineNet.com, <http://www.medterms.com/script/main/art.asp?articlekey=12288> (last accessed 27 October 2008).

¹²⁶ http://www.catholic-church.org/kuwait/seminar_cairo.htm (last accessed 25 January 2009).

contemplation and intense preparation, and in reality, is far more complicated than cultivating crops.

The increasing demand for ART in the Philippines calls for the amendment of some of its existing laws. For one, Article 164 of the Family Code should be corrected as to include not only artificial insemination, but also other artificial reproductive methods such as *in vitro* fertilization. Otherwise, the status of children born out of ART other than artificial insemination will be put in serious doubt. It is likewise questionable if Article 164 can just simply be applied in analogy with respect to ART other than artificial insemination. First, because the law¹²⁷ itself expressly states of children conceived as a result of artificial insemination, and second, each reproductive technology has its own unique procedures, such that the rule for one may not be applicable to the other. Under Article 164, it is enough for the child to be legitimate that the husband and the wife authorized or ratified the insemination in a written instrument executed and signed by them before the birth of the child, and that said instrument shall have been recorded in the civil registry together with the birth certificate of the child. However, said rule is obviously not applicable to surrogacy where the consent of a third person—the surrogate, is necessary.

On the other hand, Article 40¹²⁸ of the New Civil Code should be interpreted as to include both intrauterine (within the womb) and *in vitro* (outside the womb or literally means within the glass) conceptions. Such interpretation will vest personality even on embryos in laboratory dish, preventing their convenient and reckless disposal, thereby regulating these reproductive procedures.

¹²⁷ *Supra* note 62.

¹²⁸ CIVIL CODE, art. 40. Birth determines personality; but the conceived child shall be considered born for all purposes that are favorable to it, provided, it be born later with the conditions specified in the following article.

Likewise, the employment of these artificial reproductive measures should be construed as amounting to sexual intercourse.¹²⁹ Such that if, for instance, the husband forces the wife to undergo artificial insemination against her will, the husband's act might constitute rape.¹³⁰ However, if it is the wife herself who goes through artificial insemination or *in vitro* fertilization using the sperm of a donor without the consent of her husband, she may be held guilty of adultery. The essence of adultery is sexual intercourse.¹³¹ Sexual intercourse is adulterous because in the case of the woman, it involves the *possibility* of introducing into the family of the husband a false strain of blood.¹³² Of course, it must be understood that at the time of the enactment of the Revised Penal Code or in 1932, the only way by which said introduction of foreign blood could be accomplished was through actual sexual contact; the concept of ART was not yet born. At present, however, "sexual intercourse" must not be limited to the actual contact of the sexual organs; it must be interpreted as to likewise include other means which may possibly result to the introduction of spurious heirs into the family, although there may not be any actual sexual contact.¹³³ Thus, any act on the part of the wife which may result to the introduction of foreign blood into the family must be considered adulterous.¹³⁴ A different interpretation would result to absurdity, so that a married woman who had sexual contact with a man other than her own husband, may be held guilty of adultery, although no child may have resulted from such act, while a married woman who underwent artificial insemination using the sperm of a donor without the consent of her husband may not suffer the same criminal liability for the simple reason that there was no sexual contact, although a stranger

¹²⁹ *Supra* note 64.

¹³⁰ *Id.*

¹³¹ *Supra* note 68.

¹³² *Id.*

¹³³ *Supra* note 73.

¹³⁴ *Supra* note 64.

had been brought into the family. This clearly puts the second woman in a better position, to the damage and prejudice of the husband.

The following questions may serve as a leash to the seemingly limitless power of assisted reproductive technologies:

- Who are qualified to avail of ART? May an unmarried individual legitimately resort to it or is a valid marriage necessary?
- What family structures are most beneficial for children?¹³⁵
- What are the legitimate limits on the right to be a parent?¹³⁶
- How far can the State intervene in regulating the family?¹³⁷
- How can we achieve recognition and proper protection for new and evolving family structures?¹³⁸

Of course, the aforementioned queries cannot be answered instantaneously. Grave cogitation must be effected taking into account the customs and traditions in the country, the desire to balance apprehension about exploitation and respect for individual autonomy, the sympathy for biological and intended parents, and most importantly, the concern for the well-being of the children produced.¹³⁹

The Filipino people, at the moment, are less than ready to embrace some of these reproductive technologies like abortion and surrogacy. A

¹³⁵ *Supra* note 1, at 33.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Supra* note 1, at 29.

remaining few refuses to succumb to contraception. Possibly, this apprehension may be mainly due to the fact that Filipinos, in general, are traditional and conservative, and are specifically anxious to accede to ideas which may run counter against their moral beliefs. Nevertheless, it must be noted that this paper does not intend to establish the morality or immorality of these procedures, it merely adjures for a substantial amendment of the existing laws on paternity and filiation, and for the necessary rules for the proper regulation of these technologies and their unavoidable consequences. These amendments and regulations are going to principally provide for the means to protect children born of such methods, determining their status so that the same would not be doubtful and uncertain, but may not necessarily mean an approval of said practices; similarly, the existing Philippine laws have always determined the status of illegitimate children but that does not mean that the same approve of children born out of wedlock.¹⁴⁰

While the fertility industry affects only a small percentage of people at present, the demand for ART is constantly growing and its use is becoming more normalized. Closing our eyes to the conceivable problems is not an option, neither is simply letting the “brave new world” arrive, or trying to staunch scientific and technological progress. Sooner or later, some amount of regulation and oversight will be necessary, leading to a clear realization that the current patchwork approach is unsustainable.¹⁴¹

¹⁴⁰ A. SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES, 260 (June, 2003).

¹⁴¹ *Supra* note 1, at 33.