

prohibition on foreign couples' using Indian surrogate mothers, who are in process at present but restrictions apply for new foreign aspirators.

So from plain reading of this notice one can understand that Indian Government prohibited foreign couple from taking surrogate services but not for all ART treatments. In case of Indian ART seekers Government maintaining status quo at present. Moreover Central Government and some State Governments providing maternity leave for both intending as well as surrogate mother.

Conclusion

It is fact that people are seeking ART services without boundary barriers. Which many are calling as reproductive tourism or reproductive exile but they are not reflect patients' reality, in particular the stress an exertion involved, Infertile couple emotion to avoid there social stigma as infertile and to have child of their own. In fact these terms made them as offenders. As said by

law commission in its 228th report infertility is a cause for several problems for couple like in India²⁷. Just prohibiting these services on vague moral grounds without a proper assessment of social ends and purposes would be irrational²⁸. Prohibiting foreign couples from surrogacy arrangements may violation of equal rights for all persons (persons includes citizens as well as non-citizens) under Article 14 and denying their reproductive choice on vague grounds without proper law may violation of Article 21 of the Indian Constitution. As said by *Jeremy Bentham*, law should be an instrument for securing the "greatest good of the greatest number", in each and every aspect there will be positive as well as negative issues. So it is better to provide better law to regulate ART services including surrogacy to all, rather than simply denying. Every desired and deserved couple has to enjoy the sweetness of parenthood without neglecting best interest of the child for better future.

THE POSITION OF INDIAN LAW ON THE ASSISTED REPRODUCTIVE TECHNOLOGY

By

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Introduction

The desire to procreate is a very fundamental attribute of the human race. Sadly many are denied the joy of parenthood due to several reasons like biological, medical or otherwise. Infertility though not life threatening causes intense mental agony and

trauma that can only be best described by infertile couples themselves¹.

For families facing infertility, decisions about family building become complex. Infertility has traditionally been an area of medicine in which physicians had limited means to help their patients. One of the ways to have children through medical intervention is Assisted Reproductive

27. See Law Commission of India 228th report, Para 1.2. at Page 9.

Available at : <http://lawcommissionofindia.nic.in/reports/report228.pdf>

28. See Law Commission of India 228th report, cover letter Para 4.

Available at : <http://lawcommissionofindia.nic.in/reports/report228.pdf>

1. As stated in National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 framed by Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS), Chapter-1- Introduction, Brief history of ART and Requirement of ART Clinics first paragraph first lines.

Technologies (ARTs), with the advancement in human reproductive (medical) sciences has made it possible for couples and others to have biologically their own children through the ART.

ART is currently a common place technology that has successfully treated millions of infertile couple the world over.² Day-by-day ART seekers as well as providers increasing tremendously worldwide for which India is also not an exception. Moreover India has emerged as a favorable destination for Assisted Reproductive Technology (ART) seekers by local and even by foreigner, which is evolved into a billion rupee business annually in India; the Law Commission in its 228th report described it as “a gold pot”³. Though ART has been giving hope to millions of couples suffering from infertility, it also has presented new ethical, legal and social questions that society must address.

Historical perspective

Assisted Reproductive Technology (ART) has been defined under the ART (regulation) Bill (in India) as “assisted reproductive technology”, with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive tract of a woman⁴;

Although it is generally perceived that Assisted Reproductive Technologies (ARTs)

are a recent development, the practice of artificial (non-coital) insemination became common in the mid twentieth century. The first known example of artificial insemination dates as far back as 1785 and was conducted by a Scottish surgeon, *John Hunter*⁵. But ART was popularized in the year 1978. On 25 July 1978, world’s first human test tube baby *Louise Joy Brown* was born at Oldham General Hospital in England. Architects were *Robert Edward* and *Patrick Steptoe*. Officially it was the beginning of ART in the world. By the birth of *Louise Brown*, the world celebrated the start of a new era of assisted human reproductive technology. *Edwards* was awarded the Nobel Prize in Medicine in 2010 for his efforts⁶.

The world’s second and India’s first IVF baby *Kanupriya Agarwal* alias *Durga*, was in Calcutta on October 3, 1978, about two months after the world’s first IVF baby, *Louise Brown*. This was achieved by the Great scientist and Creator of the India’s first (in fact unofficial) test-tube baby, Dr. *Subhash Mukhopadhyay*. In this research *Mukhopadhyay* was assisted by *Sunit Mukherji* and *S.K. Bhattacharya*⁷.

Eight years after the birth of ‘*Durga*’, India’s second Test-tube baby (officially first) *Harsha Chawda* was born at the state run hospital K.E.M. Hospital in Mumbai on 6 August 1986. Some records say that *Harsha* is the ‘first’ Test-tube baby because of the controversy involving around *Durga* birth⁸.

2. “the Ethical, Legal and Social Issues Impacted by Modern Assisted Reproductive Technologies” by *Paul R. Brezina* and *Yulian Zhao*, Hindawi Publishing Corporation, Obstetrics and Gynecology International, Volume 2012, Article ID 686253, 7 pages, doi: 10.1155/2012/686253. Available at : <http://www.hindawi.com/journals/ogi/2012/686253/>
3. 18th Law Commission of India (report No.228), August, 2009.
4. The Assisted Reproductive Technologies (Regulation) Bill, 2014, Section 2(c).

5. Wilder, B. (2002), Assisted Reproductive Technology: Trends and Suggestions for the Developing Law. *Journal of the American Academy of Matrimonial Lawyers*, 18, 177-209. Available at: <http://www.jiarm.com/MAY2014/paper12962.pdf>
6. Available at: http://www.nobelprize.org/nobel_prizes/medicine/laureates/2010/
7. Available at: [https://en.wikipedia.org/wiki/Subhash_Mukhopadhyay_\(physician\)](https://en.wikipedia.org/wiki/Subhash_Mukhopadhyay_(physician))
8. “The forgotten hero of IVF”, *Anindita Ghose’s* tweet share (on Thu, Oct 14, 2010. 10:33 p.m.). Available at: <http://www.livemint.com/Leisure/d7RdCFT0yw5Gms0C6OgvO/The-forgotten-hero-of-IVF.html>

Baby *Harsha* created by Dr. *T.C. Anand Kumar*, a reproductive biologist, with his team. He has known for having created India's first test-tube baby. However after baby *Harsha's* birth, the field of assisted reproduction has developed rapidly in our India with newer techniques, modifications of existing ones and new approaches. In fact ART is a field that is dynamic and ever changing⁹.

There are many different types of Assisted Reproductive Technologies (ART's) available today; they are IVF, GIFT, ZIFT, ICSI, Donor eggs or sperm and more importantly Surrogacy¹⁰. Which is not a technique, but an arrangement¹¹, is also included under the umbrella term of ART¹². ART technology

commonly known as 'test tube baby technology'¹³. For the most part, ARTs do not treat the biological problems that give rise to infertility but circumvent them—most ARTs offer ways to create children despite underlying fertility problems. More importantly, ARTs sometimes require the use of reproductive resources—sperm, eggs, or wombs—from third parties who are not expected to play a role in raising the resulting children.

It is well known fact that each and every issue has its own merits and demerits. So in case of ART also there are number of problematic issues which are in fact inevitable. No doubt assisted reproduction is a great scientific achievement. But it has been raising numerous controversies, in which lion share occupied by legal issues.

Legal perspective

Reproductive rights began to develop as a subset of human rights at the United Nation's 1968, International Conference on Human Rights¹⁴. States, though, have been slow in incorporating these rights in nationally legal binding instruments, therefore remains at the level of advocacy¹⁵. But in general today reproductive rights are recognized as basic human rights. But because of absence of clear legislations it is not clear that seeking ART is a part and parcel in reproductive

9. "The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies" by *Paul R. Brezina* and *Yulian Zhao*, Hindawi Publishing Corporation, Obstetrics and Gynecology International, Volume 2012, Article ID 686253, 7 pages, doi:10.1155/2012/686253. Available at: <http://www.hindawi.com/journals/ogi/2012/686253/>

10. The Assisted Reproductive Technologies (Regulation) Bill, 2014 Section 2(zq) defines surrogacy as "surrogacy" means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the commissioning couple for whom she is acting as a surrogate; Section 2(zr) says about "surrogate mother" and Section 2(zs) says about "surrogacy agreement" means.

11. There are two main types in surrogacy they are traditional or straight and host or gestational. Traditional or Straight Surrogacy: The surrogate mother is impregnated with semen from the intended father or sperm donor and uses her own eggs. This means that the surrogate mother is genetically related to the child. The insemination procedure can be conducted at home, using an insemination kit, or can be performed by a fertility clinic.

Host or Gestational Surrogacy: The more popular and effective method, this procedure involves In Vitro Fertilization (IVF) with the eggs of the intended mother or those of an egg donor, here the surrogate mother is not genetically related to the child. This method is more complicated medically; it tends to be more expensive than traditional surrogacy.

12. <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/Pages/art.aspx>

13. "Surrogacy in India and its Legal and Ethical implications", by *Shaista Amin*, Research Scholar, Dept. of Law, University of Kashmir, Srinagar, India and *Asma Rehman*, Lecturer, Kashmir Law College, Nowshera, Srinagar, India, published in journal of international academic research for multidisciplinary, Impact Factor 1.393, ISSN: 2320-5083, Volume 2, Issue 4, May 2014

14. Freedman, Lynn P; *Stephen L. Isaacs* (Jan-Feb 1993). "Human Rights and Reproductive Choice". Studies in Family Planning (Studies in Family Planning, Vol.24, No.1) 24(1): 1830. doi: 10.2307/2939211. JSTOR 2939211. PMID 8475521. Available at: https://en.wikipedia.org/wiki/Reproductive_rights

15. Available at: https://en.wikipedia.org/wiki/Reproductive_rights

rights, Later because of judicial contributions seeking ART became a human right as well as fundamental right under constitutions in respective countries to constitute biological family because these rights are mainly concern with privet persons and least to the community.

Internationally there are two main different approaches to the regulation of ART. Some countries such as the UK, Germany and most of Scandinavia have passed laws covering most aspects of ART. Many other countries such as the USA have fewer laws in this area, and the regulation of fertility treatments is overseen by professional bodies. There is much debate in the field of assisted reproduction as to where the balance should lie between professional standard setting and legislation¹⁶. Unfortunately, the issues underlying the reproductive rights debate have not received sufficient focus by Indian legal system like parliament and Courts.

In India since 2002, ART has been recognized as infertility treatment under the Government of India Ministry of Tourism Policy¹⁷. In the year 2005 Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) by the order of the Ministry of Health and Family Welfare, Government of India, have come out with National Guidelines for accreditation, supervision and regulation of ART clinics in India for the first time¹⁸. After this it came out with a draft on Assisted Reproductive Technology (Regulation) Bill and Rules 2008.

On 5th of August, 2009 the 18th Law Commission of India submitted the 228th

Law Commission Report titled “Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy” to the Union Minister of Law and Justice, Government of India. By this commission supported surrogacy in India. But it is not favourable towards commercial surrogacy. It said that Infertility is seen as a major problem as kinship and family ties are dependent on pregnancy. Herein surrogacy comes as a supreme saviour¹⁹.

Commission also held that infertile couple has constitutional protection to have ART services by referring *B.K. Parthasarathi v. Government of Andhra Pradesh*²⁰, *Jack T. Skinner v. State of Oklahoma*²¹ and *Javed v. State of Haryana*²² cases where Courts accepted right to reproduce as “one of the basic civil rights of man”. Report had taken an example case of *Baby Manji Yamada v. Union of India*²³ for expressing constitutional validity of surrogacy in India. In which case the Supreme Court upheld surrogacy even commercial surrogacy.

For the first time the State Government of Delhi has enacted the Delhi Artificial Insemination (Human) Act in 1995 which legalized the donation of semen and oocytes to infertile couples. Semen banks have been recognized under the supervisory authority or officer appointed by State Government²⁴. One of the most important issue is that this Act prohibited the segregation of X and

16. Textbook of Clinical Embryology, ed. Kevin Coward and Dagan Wells. Published by Cambridge University Press. © Cambridge University Press 2013. Available at: <http://ebooks.cambridge.org/ebook.jsf?bid=CB09781139192736>

17. Available at: <http://lawzmag.com/2015/08/28/commissioning-surrogacy-in-india/>

18. Available at: http://icmr.nic.in/art/art_clinics.htm

19. 18th Law Commission of India, August 2009 (report No.228). (lost lines of 3rd paragraph from attached letter to report to the then Union Minister of Law and Justice of India, Dr. M. Veerappa Moily by law commission)

20. AIR 2000 AP 156

21. 316 US 535

22. (2003) 8 SCC 369

23. JT 2008 (11) SC 150

24. The Delhi Artificial Insemination (Human) Act 1995, Section 4

25. The Delhi Artificial Insemination (Human) Act 1995, Section 2(j), “Supervisory Authority” means the Director of Health Services, Government of National Capital Territory of Delhi.

Y chromosome for favouring the conception of a desired child through artificial insemination²⁶.

The Supreme Court judgment in *Baby Manji Yamada v. Union of India* case in 2008 took due notices that in cases of “commercial surrogacy,” an intended parent may be a single male and accepted commercial surrogacy. The Court had the occasion to consider the petition of a Japanese grandmother wanting issuance of a travel document for her Japanese divorced son’s daughter.

In another matter decided by the Gujarat High Court in *Jan Balaz v. Union of India*²⁷, 2009, the decision of the High Court holding — that babies born in India to gestational surrogates are Indian citizens and are entitled to Indian passports — has been stayed by the Supreme Court. However, the twin German children in the case were permitted to leave India upon the directions of the apex Court. The main issue of nationality and citizenship, being of grave importance, is still undecided.

The Ministry of Home Affairs (MHA), according to the guidelines of July 9, 2012, restricted surrogacy to foreign nationals; *i.e.*, a man and a woman married for at least two years would be required to take a medical visa for surrogacy in India. Hence, foreign single parent surrogacy is barren.

In fact restricting surrogacy to infertile Indian married couples only, and debarring all foreigners other than OCIs, PIOs and NRI married couples, is a turnaround in the thought process. It is controversial to the Central Adoption Resource Authority (CARA) guidelines, the Juvenile Justice (Care and Protection of Children) Act, 2000, the Guardian and Wards Act, 1890 and The Hindu Minority and Guardianship Act, 1956

*etc.*²⁸, more over in *Stephanie Joan Becker v. State*²⁹, *Shabnam Hashmi v. Union of India*³⁰, 2014, the Court upheld the recognition of the right to adopt and to be adopted as a fundamental right. It held that every person, irrespective of the religion he/she professes, is entitled to adopt. In *National Legal Services Authority (NALSA) v. Union of India*³¹ 2014 recognizing transgender as the third gender also.

In mean time *Jayashree Wad*, an Advocate on record in Supreme Court since 1976 field a Public interest litigation petition³² by impleading herself in the *Jan Balaz* case³³ (German Couple’s Case) and she requested the Court to ban commercial surrogacy.

A Bench of Justices *Ranjan Gogoi* and *N.V. Ramana* issued notices to ministries of home affairs, law and justice, health and family welfare, commerce and external affairs as well as the Medical Council of India (MCI) and the Indian Council of Medical Research (ICMR) and asked them to respond to the PIL filed by *Jayashree Wad*.

The Government of India, in a hurried move, released information to the Press that

26. The Delhi Artificial Insemination (Human) Act 1995, Section 14(e)

27. JT 2008 (11) SC 150

28. Available at: <http://www.thehindu.com/todays-paper/tp-opinion/ending-discrimination-in-surrogacy-laws/article5971774.ece>

29. *Stephanie Joan Becker v. State*, (2013) 12 SCC 786
Available at: http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45335

30. *Shabnam Hashmi v. Union of India* (ILC-2014-SC-CIVIL-Feb-5)
Available at: <http://www.indianlawcases.com/ILC-2014-SC-CIVIL-Feb-5.aspx>

31. WP (Civil) No 604 of 2013, Date of decision: April 15, 2014 (Bench: *K.S. Radhakrishnan* and *A.K. Sikeri*, JJ).

Available at: https://en.wikipedia.org/wiki/National_Legal_Services_Authority_v._Union_of_India

32. *Jayashree Wad v. Union of India*, WP (C) No.95 of 2015 yr

Available at: <http://www.familiesthrusurrogacy.com/wp-content/uploads/2016/05/Indian-Surrogacy-Bill-Background-latest-developments.pdf>

33. *Jan Balaz v. Anand Municipality and 6 Ors* on 17 June, 2008 (AIR 2010 Guj. 21)

it looks for disallowing commercial surrogacy for foreign nationals. Also, ICMR sent out the notification to all ART Clinics on 27 October 2015 requesting them not to “entertain” foreign nationals for surrogacy arrangements in India³⁴.

Submitting its affidavit in the Court, the Government said only “altruistic surrogacy” to needy infertile married Indian couples will be provided after their cases are examined by a competent authority. According to the draft of the new law, The ART Bill, 2014, various provisions relating to surrogacy and rights of the surrogate mothers have been incorporated and the consultation process was underway to finalize the Bill. Moreover, under the new law, penalty on couples refusing to take custody of a surrogate child born with disabilities has also been proposed. “The respondent (Government) is in the process of bringing a comprehensive legal framework for not only protecting the rights of surrogate mothers but also for prohibiting and penalizing commercial surrogacy. In order to do so, the respondent will require sometime,” pleaded the Government³⁵.

Further, in view of objections by the Health Ministry, the Government said the Commerce Ministry has restricted the import of embryo for research purposes; it cannot be imported for commercial surrogacy any further.

During the pendency on hearing of PIL, taking after the SC query on the status of the draft legislation on surrogacy, the Government has recently proposed a novel legislative proposal of Surrogacy Bill 2016 as distinguished the new Government narrowed down the proposed Assisted Reproductive Technology Bill (ART) by proposing for a distinct separate, new

Surrogacy Bill 2016 solely to address, deal with the issues related to “surrogacy” in exclusion of other ART Techniques, Surrogacy Bill 2016³⁶.

Those arguing against surrogacy saying that it will make good money to doctors and agents and will not simply give up but carry on. The trade has been left to self-regulate with guidelines of the ICMR. Most surrogate mothers are semi-literate/Illiterate surrogates rely on agents or clinics to explain the nature of the written contracts they sign, and few surrogates ever get a copy of the contract.

In fact it is true that even today ICMR 2005 guidelines regulating ART clinics in India. Thereafter, the draft Assisted Reproductive Technology (Regulation) Bill 2008 (ART Bill 2008), which was replaced by ART Bill 2010 and the ART Bill 2013, which was not circulated or placed in the public domain for discussion, comment or opinion, whilst the Bill never became a law. The ART Bill 2014 circulated or placed in the public domain for discussion, comment or opinion. The ICMR Guidelines 2005 provide the only non-statutory provisions which are neither justiciable not enforceable in a Court of Law.

Conclusion

It is also fact which one has to accept that regulation of assisted reproduction may be particularly problematic for several reasons. Firstly, science in this area continues to develop at a rapid pace. Consequently, by the time laws are debated and passed, new techniques may become available that could not have been envisaged when the laws were designed. Second reason is the diversity of opinions regarding how technologies should be applied. In addition to above, what is culturally, socially and

34. Notice Number: 5/10/8/2008-RHN, Dated : 27/10/2015. Available at: <http://instarorg.blogspot.in/>

35. Available at: <http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples/#sthash.PE5PB9nq.dpuf>

36. Press Trust of India, Draft Surrogacy Bill to be placed before GoM for consideration, New Delhi May 6, 2016.

Available at: http://www.business-standard.com/article/pti-stories/draft-surrogacy-bill-to-be-placed-before-gomfor-consideration-116050600928_1.html

ethically acceptable may change over time and view of what is acceptable may be radically different between different nations or communities within the same nation.

Though regulation of ART is difficult, for well being of the people and for future

generations regulation of any system including advanced medical treatment for infertility by sovereign power is inevitable and acceptable. In India the struggle for making law to regulated ART started in the year 2005 but even today it was not fulfilled.

EVIDENCE RELATING TO ELECTRONIC RECORD – CHALLENGES IN ADMISSIBILITY

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Introduction :

The last few years of the 20th Century saw rapid strides in the field of information and technology. The expanding horizon of science and technology threw new challenges for the ones who had to deal with proof of facts in disputes where advanced techniques in technology was used and brought in aid. Storage, processing and transmission of data on magnetic and silicon medium became cost effective and easy to handle. Conventional means of records and data processing became out dated. Law has to respond and gallop with the technical advancement. He who sleeps when the sun rises, misses the beauty of the dawn. Law did not sleep when the dawn of information and technology broke on the horizon. World over, statutes were enacted. Rules relating to admissibility of electronic evidence and it's proof were incorporated¹.

In India, the Information and Technology Act, 2000 was enacted showing the stand of India to the accept Technology within its legal framework. Apart from the principal statute in form of Information and Technology Act, 2000, several necessary amendment by inserting new provisions in the Indian Penal Code, 1860, the Indian Evidence

Act, 1872, the Banker's Books Evidence Act, 1891, the Reserve Bank of India Act, 1934, were enacted by virtue of Sections 91 to 94 of the Information and Technology Act, 2000, in order to make the Indian laws keep pace with changing technology.

The fact that every second case now requires appreciation of electronic evidence on the part of the Judge, it thus becomes imperative that a Judge need to wear a hat of technocrat as well! Applying technology and getting desired results is one thing, but appreciating the value of the evidence is another. One may lose evidence not because of 'lack of technology', but because of 'lack of appreciation of technology'².

Indian Evidence Act, 1872 – Techno Savy Amendments:

More than a century old statute, the Indian Evidence Act, 1872 was amended by virtue of Section 91 of the Information and Technology Act, 2000. These amendments to the Indian Evidence Act, 1872 has given a techno savy look to Evidence Act by including "electronic record, digital signature, certifying authority, etc., within it. The term document under Section 3 of the Act include the electronic record. The meaning assigned to

1. *State v. Mohd. Afzal and others*, 107 (2003) Delhi Law Times 385 (DB)

2. Information Technology Law and Practice, *Vakul Sharma* Fourth Edition Page No.361