



INDIAN
NATIONAL
BAR
ASSOCIATION



Report on Medical Concerns

PREFACE

In recent past, India has become the hub for Medical Tourism across the world. There have been several existing laws affecting the conduct and operations of the medical industry. However, considering the latest judgements of various courts and the societal changes, Indian National Bar Association undertook an initial study of the issues which need statutory provisions within the parameters of Indian Jurisdiction. INBA communicated these concerns to the sub-sections of the Association and thereafter, a committee was setup to study these concerns in detail. The expert team was headed by Mr. Kaviraj Singh (General Secretary, Indian National Bar Association), Ms. Smriti Sharma (Secretary, Young Lawyers' Section) and Ms. Isha Tyagi (Co-Convener, Student Section) . Dr. Raj Bhayani (Chairman, Medical Professional Association, New York) has been a special adviser for this report.

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I AM A DONOR: LEGAL ASPECT OF SPERM DONATION

INTRODUCTION

Background of study

"With films and media attention, there is more awareness now, so there is a bigger pool of qualified donors".¹

Until five years ago, sperm donation was almost unheard of. But all of a sudden, it has become fad, thanks to a handful of recent Bollywood and Hollywood movies. Sperm donation is the name of the provision (or 'donation') by a man, known as a sperm donor, of his semen with the intention that it be used to achieve a pregnancy and produce a baby in a woman who is not the man's sexual partner and with whom the man does not have sexual intercourse. Attempts are made to impregnate a woman with the donor's sperm using third party reproduction techniques notably artificial insemination.

A sperm donor may donate his sperm directly to the woman recipient, at a clinic known as a sperm bank or through a third party which brokers arrangements between sperm donors and recipient women, known as a 'sperm agency'.²

Under this paper the concept of Legality of Sperm Donation has been immensely acknowledged with due consideration to the Donor. Not just restraining to the provisional and procedural aspect involved in the study, the paper focuses to the reality of the theories highlighted.

Significance of the study

Beyond the scientific progress in assisted reproductive technologies (ART), it is necessary to discuss the legal considerations behind these advances. Legal issues concerning sperm donation have been considered and discussed by government and non-governmental agencies, the public, media and academic institutions in many countries. Recommendations and guidelines concerning sperm donation issues vary from country to country and between professional groups within countries.³ Legal principles must respect

¹ Dr Anoop Gupta, medical director, Delhi IVF and Fertility Research Centre.

² "Sperm Donation" by Delhi IVF Fertility Research Center, available at http://www.delhiivf.com/sperm_donation.

³ Review on "An overview on ethical issues about sperm donation", Asian Journal of Andrology (2009) 11: 645–652

the interests and welfare of persons who will be born as well as the health and psychosocial welfare of all participants, including sperm donors.⁴ The subject matter for this paper is an analysis of the legal aspect of sperm donation in India. This paper is an attempt to cover all the important parts of the provisions related to the topic. The perfect equality of logic and reasoning with respect to the legal provisions gives the impression that everyone with the basic knowledge of statutory interpretations can traverse without any trepidation.

CONCEPTUAL REVIEW

Assisted reproductive technology (ART) has become increasingly popular over the past several decades. The advances in human sperm cryopreservation in the past 50 years and the creation of sperm banks have facilitated the increase in artificial insemination with donor sperm.⁵ In cases of severe male infertility, the use of donor sperm is the only approach to infertility treatment.⁶ Although the legal concern with introducing a third party into the fertilization procedure by means of donor sperm must be considered as controversial, careful counseling and informed consent by all parties related should help to resolve many of the dilemmas.

According to estimates of the WHO, 13-19 million couples in India are infertile. Infertility due to reproductive tract infections and genital tuberculosis is preventable and amenable to treatment, and an estimated 8 per cent of infertile couples opt for medical intervention involving the use of advanced Assisted Reproductive Technologies (ART).⁷

⁴ ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION, INST.AM. VALUES 5 (2010), available at http://www.familyscholars.org/assets/Donor_FINAL.pdf.

⁵ Sherman JK, Bunge RG. Effect of glycerol and freezing on some staining reactions of human spermatozoa. Proc Soc Exp Biol Med 1953; 84: 179-80.

⁶ Botchan A, Hauser R, Gamzu R, Yogev L, Paz G, et al. Results of 6139 artificial insemination cycles with donor spermatozoa. Hum Reprod 2001; 16: 2298-304.

⁷ Shenoy Vidhya S. Artificial insemination & in vitro fertilization and challenges caused to legal system, legal service India.com; and Rao Kamini A and Brinsden Peter R, The infertility manual, 1st edition, Jaypee and FOGSI publication; p 348-497; and Murthy Laxmi, Subramanian Vani, ICMR guidelines on Assisted Reproductive Technology: lacking in vision, wrapped in red tape, Indian journal of medical ethics (National bioethics conference).

Brief ICMR important guidelines

- Use of sperm donated by a relative or friend of the wife or husband not permitted.
- It will be the responsibility of the ART clinic to obtain sperm from appropriate banks; neither the clinic nor the couple shall have the right to know the identity of the donor.
- The clinic and the couple have the right to have the possible information on the donor such as height, weight, skin colour, profession, family background, freedom from diseases, ethnic origin and the DNA fingerprint.
- It will be the responsibility of the semen bank and the clinic to ensure that the couple does not come to know the donor's identity.
- The ART clinic will be authorized to appropriately charge the couple for the semen provided and the tests done on the donor semen.
- The accepted age for a sperm donor shall be between 21 and 45 years

How does sperm donation work?

An infertile couple can approach a fertility clinic where they are told their various options. These include the various assisted reproduction techniques and one of them is getting a sperm donor. There are various ways to get sperm donors.

The traditional Indian Council of Medical Research (ICMR) procedure dictates that a sperm donor can only be approached through a sperm bank. The fertility clinic has to obtain sperm from appropriate banks though neither the clinic nor the couple should know the identity of the donor. However, it shall have the donor's entire information like height, weight, skin colour, educational qualification, ethnicity, profession, etc. The sperm is usually inseminated using various artificial reproduction techniques.

Sperm donation is a process involving masturbation by the donor to produce a semen sample which is then subject to the "*transfer of parental rights*" away from the donor to the person or persons who plan to raise the consequent offspring.⁸

⁸ National Bioethics Consultative Committee (Australia), 1990, p. 32

Who can opt for donor help?

- Heterosexual couples with abnormal, few, or a lack of spermatozoa.
- When the father may transmit genetic disorders or contagious diseases.
- Repeated failure in assisted reproduction treatment on using semen from the couple themselves.
- Women partners.

Consents, Agreements and Contracts for Conducting ART Procedures⁹

As prescribed in Section 20 of the ART Bill, 2010¹⁰ (ART Bill, herein after), the ART clinic shall obtain a written consent from the couple before conducting ART procedure, as specified in Form D, in a language that the couple understands. The couple's written consent for artificial insemination or intrauterine insemination with husband's semen or sperm shall be taken in Form E. The couple's written consent for artificial insemination or intrauterine insemination with donor semen or sperm shall be taken in Form E. Consent for donation of semen / sperm shall be taken in Form L. Information on semen donor shall be provided on Form M. The results of screening of semen donors shall be recorded by the ART bank on Form N. Records of use of donor gametes by an assisted reproductive technology clinic shall be maintained on Form O.

Semen analysis record shall be maintained as in Form Q. Contracts (including the financial arrangements) between the ART bank on the one hand, and the semen donor, patient, or the assisted reproductive technology clinic on the other hand, shall be signed on Form R, S and T, respectively. The oath of fidelity and secrecy by members of the National Advisory Board and the State Boards, and by others where required, shall be on Form V. Other forms, where necessary, may be designed in accordance with the provisions of the existing related form(s) and these Rules, by the ART clinic, the ART bank or the State Board.

All the State / UT Governments may issue translations of Forms A to V in languages used in the State / UT. Where no official translation in a language understood by the couple seeking treatment is available, the ART Clinic may translate the consent form(s) into a

⁹ ICMR rules and regulations available as icmr.nic.in/guide/ART%20REGULATION%20Draft%20Rules%201.pdf

¹⁰ presently in the form of guidelines by ICMR and under the draft committee of prsindia.com

language the couple understands. In the case of illiterate patients, the Counselor will, directly or through an interpreter, and in the presence of a third party chosen by the patient / couple if so desired by the patient / couple, read out and explain all the contents of the consent form(s) to the patient / couple.

No ART clinic shall use a technique on a patient for which expertise does not exist with the staff of the Clinic.

Rights and duties of patients, donors, and children

Under the ART bill chapter VII discusses the rights and duties of parents, the donors and the child born out of the procedure.

Under section 32 of ART Bill, elaborates the rights and duties of Patients. Subject to the provisions of ART Bill, rules and regulations, assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples. There must be informed consent from both the parties. The parents of a minor child have the right to access information about the donor, other than the name, identity or address of the donor, when and to the extent necessary for the welfare of the child. All information about the patients shall be kept confidential and information about assisted reproductive technology procedures done on them shall not be disclosed to anyone other than the central depository of the Department of Health Research, except with the consent of the person or persons to whom the information relates, or by a court order.

Under section 33 of ART Bill, elaborates the rights and duties of Donor. Subject to the provisions of the ART Bill, rules and regulations, all information about the donors shall be kept confidential and information about gamete donation shall not be disclosed to anyone other than the central database of the Department of Health Research, except with the consent of the person or persons to whom the information relates, or by an order of a court of competent jurisdiction. Also, the donor shall have the right to decide what information may be passed on and to whom, except in the case of an order of a court of competent jurisdiction. A donor shall relinquish all parental rights over the child which may be conceived from his gamete. No assisted reproductive technology procedure shall be conducted on or in relation to any gamete of a donor under this Act unless such donor has

obtained the consent in writing of his or her spouse, if there, to such procedure. The identity of the recipient shall not be made known to the donor.

Under section 35 of the ART Bill, the status of the child is determined. Subject to the provisions of the ART Bill, rules and regulations, a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse. A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties. In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man. In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the legitimate child of the couple. A child born to a woman artificially inseminated with the stored sperm of her dead husband shall be considered as the legitimate child of the couple. The donors shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed and all other communicable diseases which may endanger the health of the child. The birth certificate of a child born through the use of assisted reproductive technology shall contain the name or names of the parent or parents, as the case may be, who sought such use.

If a foreigner or a foreign couple seeks sperm in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.

Under section 36 of ART Bill, elaborates right of the child to information about donors. Subject to the provisions of the ART Bill, rules and regulations, a child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor. The legal guardian of a minor child may apply for any information, excluding personal identification, about his / her genetic parent when required, and to the extent necessary, for the welfare of the child. Personal identification of the genetic parent or parents may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents.

Provided that such personal identification will not be released without the prior informed consent of the genetic parent or parents.

Proceedings before State Boards to be judicial proceedings

Every State Board shall be deemed to be a civil court and when any offence as is described in this Act is committed in the view or presence of the State Board, the State Board may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, forward the case to a Magistrate having jurisdiction to try the same, and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973.

Every proceeding before a State Board shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Board shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

Real View

- In a sperm bank, the donor signs a contract to donate sperm for a specific period of time.
- Sperm banks usually seek a batch of 10 samples, which is quarantined in liquid nitrogen for 90 days and checked for motility, infections and diseases.
- Sperms are used after six months, during which diseases, if any, are detected.
- For each donation, a donor is paid from Rs.1,000 to Rs.2,000. Annually, he can earn up to Rs.40,000

SUMMARY OF FINDINGS

ICMR guidelines although had defined certain issues very meticulously but has certain controversial views. Researches permitted are those which are in public interest, but it fails to define “public interest”. It has redefined legitimacy of Indian Evidence Act 1872 that limits legitimacy of a child born to only within 280 days after dissolution of marriage (by death or divorce).¹¹

Chapter 3 of the guidelines, talks only about written consent, but fails to make informed consent mandatory.

Off-spring should not be allowed to know the donor even after 18 years just like adopted children.

Use of sperm by a relative or a known friend of couple should be permitted, as these are the commonest sources of donor in IVF clinics all over the world today, and this will decrease the cost of treatment. The Doctors should discuss their charges with the patient and not display it. Requirements to have 13 separate rooms to run ART clinics is a big concern since the cost of IVF would go up drastically. Small space can be used for good results.

The guidelines are more or less like the one followed in the UK, which should not be the case considering the Indian mindset and scenario.

The Legal guidelines should go beyond technicalities and build effective safeguards so that the unequal power relationship between the providers and users of new technology is minimized. It is critical to envision future trends and lay down an ethical framework for biomedical research, especially in the new frontier of human reproduction that could change the very face of humanity.

Whatever shape this guideline takes when it comes out of the parliament in the form of an act the doctors should make it a practice to absorb certain precautions , so as to prevent various ethical social and legal issues which may arise pre and post-delivery like- Should

¹¹ Sen Nirupa, ICMR spurs public debate on infertility clinic, current science, vol-83, No. 10, 2002 Nov. 25; p 1185 and Thomas S. Same sex couples should not adopt, says CARA. TNN, Times of India, Mumbai ed. 2009 Dec.8; section-Times Nation, p.3.

obtain signed request from wife & husband; Written informed consent from both and also from donor and his wife; Detail clinical records to be well preserved; Details of donor should be kept secret in AID; Female attendant nurse should be present at the time of insemination. The agreement made with the donor is that if the child birth resulted, donor would have no parental rights and obligation associated with child in terms of any subject matter ie. Property etc..

PATENTS AT THE PRICE OF LIFE?

This is the patent age of new inventions,
For killing bodies, and saving souls,
Are ways to benefit mankind, as true
Perhaps killing them at Waterloo. – Lord George Byron

Lost in my thoughts of emancipation of mankind, I dream of the dawn of a new era, an era which is patent free, an era which embraces life and not materialism, an era which has no shackles of subtle colonialism, an era devoid of legal boundations in the field of such emancipation.

We live amidst, a universal pandemonium, where everything is in a flux, dazed by the sun of transition, and at this time of universal peril, a part of the learned intellectuals' society thinks that patent rights somehow are beneficial to mankind as a whole. Let's imagine a scenario, an epidemic, a deadly disease, spreads like forest fire. There is a medicine which has been developed, which could save lives. But wait again. There's another twist to it. In this materialistic world, as propagated by the aforementioned mentality, you don't have a right to live, if you don't have pockets large enough to pay. Isn't that a big question mark on your and my consciousness?

It's not about how you do it; it's about why you do it! The net cost of such protectionism exceeds at least the double of the visible benefits it brings to a privileged class of protected industrialists and lawyers. Patents just lead to monopoly distortions.

Patents harm the patient's health. Let us break it further. What are patents? A patent is property carried to the highest degree of abstraction – a right in rem to exclude, without a physical object or content, as defined by Oliver Wendel Holmes. Why would someone conduct research for? Because the medicine is in demand or has a great worth on a global level. It's in demand, not because people like it, but because people need it!

This implies to the fact that the medicines so developed, are powerful and evident enough to play the role of a boon in the craving society. Now can we allow a handful of people to control what masses crave for? Isn't it mere monopolistic blackmailing?

But this effect is achieved only at the cost of a *double* negative effect on both the consumers and the competitors. Indeed, the increased wealth of the monopoly does not magically appear; the only way a monopoly may enrich someone is by preventing someone else from proposing a competitive service. Patents DON't propagate innovations. They obstruct new researchers to bring up something beneficial because they might, in due course of their research, violate absurd patent rights.

I'll take my readers to the past. 1997 is an important year. Two significant things happened. Firstly, I was born, which indeed called for a celebration! And secondly, and more importantly, in 1997, the Indian Council of Scientific and Industrial Research succeeded in getting revoked a patent on the use of turmeric powder (haldi) as a wound healing agent. The patent was granted in 1996 to two scientists at the University of Mississippi Medical Centre.

In Another instance, in 2005, India won a decade-long battle against the granting of a patent to a neem based crop fungicide by the European Patent Office (EPO). The battle to reclaim the benefits of neem took the Indian government almost 10 years – one report said that combined the legal battle to have *patents over haldi and neem medicines revoked* cost it about \$5million (over Rs. 30 crore today). The Indian side argued successfully that these properties have been part of the traditional knowledge of Indian farmers and the scientific community for centuries.

Now the point is, that something as minute as neem and haldi, yet having the essence of India's great and rich culture fell prey to modern-colonialism policy. And what was the weapon used? Patents! Patents, however defied by the pecuniary circumstances, indeed pose a great threat to anything and everything which would work towards betterment of mankind as a whole.

My question is, if something of such paradoxical interest is not safe, then what is? Are we waiting and arguing for the day when everything we're proud of, everything which has been read and inferred in the scriptures regarding medicinal procedure will soon be a matter of legal anxiety because some xyz wants to have patent rights over it?

According to Patents Amendment Act (2005) , “ An invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or

which causes serious prejudice to human, animal or plant or to the environment” . All these things couldn't be patented.

Now, the question is, since something so derogatory to human or animal life cannot be patented this means that we do hold the concern for protection of their lives. This further implies something which is outrageous and coaxes humanity or natural justice to suburbs of mediocrity is not acceptable. Then how can we anyhow support medicinal patent rights when they themselves act as a barrier for any human/animal to get quality service. Isn't this in itself denying them the right to life?

According to sec (4), clause (b) , of the Act, any process for medicinal, surgical , lucrative prophylactic (diagnostic or therapeutic) or other treatment of human being or any process for a similar treatment free of desire to increase their economic value or that of their product, cannot be patented. When the law itself presupposes the duty of being the guardian of the natural justice philosophy, then how can patent support rights be counseled for?

Section 3 of the Indian Patents Act specifies that anything which is frivolous and defies natural law cannot be patented. I, thereby condemn, patents themselves as something which defy natural law of justice itself. Anything, which acts as an obstruction for development of humanity as a whole, something which is as crucial as being procured for emancipation of mankind, how can it be held in the shackles of patent rights.

The basic premise that arises is that how and why should patents be there? This is because someone who is investing into medical sciences expects it to reap it for them. But are we, as humans, okay with materializing human lives themselves? Medicines which require serious and supposedly lucrative patent rights are indeed the ones which the mankind needs with utmost urgency. This is the reason any organization is ready to invest into its genetic decoding so that its extravagant brandishing reaps in long run.

But isn't that fooling our own selves. Just like we have environmental laws because we cannot let any human make money on the cost of our most revered environment, then how can we allow organizations to obtain patent rights over a particular product so that they large heavy amount over it, and make it impossible for a patient to access it, thereby defying our own concern for wellness of mankind? Patents on medical and

surgical procedures might also encompass surgical or diagnostic instruments and drugs. Now since the all these spheres come under patent right restriction, then how do we expect medical sciences to penetrate through the technical advances when all its centric and peripheral growth aspects¹² have been hampered within.

I propose government funded research initiatives, which on one hand facilitate quality research devoid of prejudice and moreover the burden will be subtle as it'll be supported by the cushion of taxpayers' slabs which have been demarked on the basis of income structures. This will further obviate the need to restrict medicinal procurement as and when in need. For instance didanosine, lamivudine, nevirapine, stavudine, and zidovudine , being major drugs for anti-AIDS medicines were developed by public head finance.

I request, let apathy be a curse.

I conclude by saying that the patent system is thus pure destruction of riches and prevention of innovation at both the first and second order. INNOVATE. CREATE. EMANCIPATE.

¹² Schonfeld & Associate, Report: 38th Annual R&D Ratio & Budget (June 2014)

SURROGACY - A BOON

INTRODUCTION

'Surrogacy', a boon for the needy which has its roots since ages, and its been in constant practice which privileges the infertile, unhappy and incomplete parents by rewarding a precious gift called 'child'. In surrogacy, a woman bears a child for someone else. In the past, the typical surrogacy occurred when a wife could not bear children for her husband. The husband would then impregnate another woman who would bear the child. From the period of Mahabharata to this modern 21th century, Surrogacy plays its key role across the globe.

In Hindu culture, surrogacy was known in the name of "NiyogiPratha" in Mahabharata, Gandhari the wife of king Dhritrashtra conceived, after which she delivered a mass, these cells were put in a nutrient medium and were grown in Vitro till full term. Sage Gautama produced two children from his own semen, a son Kripa and a daughter Kripa, who were both test tube babies, like wise sage Bhardwaj produced Drona , later to be the teacher of Pandavas and Kauravas¹³.

METHODS OF ASSISTED HUMAN REPRODUCTION

- A. In Vitro Fertilization
- B. Artificial Insemination
- C. Surrogacy

SURROGACY

The initial type of surrogacy arrangement was created when the ovum of the surrogate mother was artificially inseminated with the sperm of the intended father. The child resulting was genetically related to the intended father and the surrogate mother. Another form of traditional surrogacy occurs when the intended parents use the sperm of an anonymous donor to fertilize the ovum of the surrogate mother. In this arrangement, the surrogate mother has a genetic relationship with the new born, but neither of the intended parents. In gestational surrogacy, the intended parents use the

¹³ Concept of NiyogiPratha : Dr. P.V. Kane

sperm of an anonymous donor and the ovum of an anonymous donor, use IVF to create pre-zygotes, and have the pre-zygotes artificially inseminated into the uterus of the surrogate. This method means that neither the intended parents nor the surrogate have any genetic relationship to the child.

ETHICAL ISSUES IN INDIA

According to the traditional surrogacy is similar to prostitution and is intrinsically immoral because it requires female reproductive labour. The very well-known American feminist Andrea Dworkin states that, "motherhood is becoming a new branch of female prostitution with the help of scientists who want access to the womb for experimentation and power."¹⁴ According to her the only difference that remains in case of surrogacy is that the womb and the vagina are not being sought. But this kind of analogy between surrogacy and prostitution is certainly not sufficient enough to show that surrogacy is unethical and therefore passionate opinions of do not pose hindrance in the process of legalizing surrogacy. The disagreement of liberal feminists is that surrogacy is an expansion of women's reproductive labour and personal autonomy is legitimate. Therefore if females could contract freely to sell their productive labour for some lucrative amounts, then they should be at privilege to sell their reproductive services.¹⁵

The involvement of third parties and various agencies in a surrogacy agreement for the sake of material benefits is yet another issue of concern. The very motive and focus of the generous purpose fails when we pass on the responsibility to certain money makers thereby reducing the subject matter of the agreement, i.e. the newborn, into a commodity, the surrogate mothers into salesperson, henceforth and the whole arrangement into commerce. In the United Kingdom the Surrogacy Arrangements Act 1985 prohibits third parties such as commercial surrogacy agencies or brokers to benefit financially and intervene into the surrogacy arrangements and imposes criminal liabilities. It does not outlaw surrogacy per se and appears to favour altruistic arrangements, charitable agencies, and the direct payment of finances by the commissioning parents to the surrogate mother.¹⁶ Since surrogacy is a very chronic

¹⁴ Dworkin A. *Right-wing women: the politics of domesticated females*. London: The Women's Press, (1983)

¹⁵ Jaggar's Alison, *Feminist Politics and Human Nature*, (1983)

¹⁶ Andrews, Lori. B. 1988. *Surrogate motherhood: The challenge for feminists*. In *Surrogate motherhood: Politics and privacy*, ed. Larry Gostlin. Bloomington, IN: Indiana University Press.

issue, the society needs to figure out how it can handle the scenario. Infertile couple will not be able to have child if surrogacy is banned. Parenthood is a significant part of life, without it there would be a vacuum in one's life. However, legislation needs to address legal guidance of surrogacy in order to confront continuous conflicts.

THE RISE OF REPRODUCTIVE TOURISM

India has become one of the most popular places all around the world for surrogacy being carried out. It provides a solutions to infertility and childlessness, the people. The first reported gestational surrogacy in the world came in 1984 when a woman without a uterus got her eggs transferred to her friend's uterus who gave birth to the child with whom she had no genetic relation.¹⁷ Thereafter, doctors began using IVF to fertilize the male sperm with donated eggs so that couples in which the wife was infertile could have a child.¹⁸ India's first gestational surrogacy took place in 1994 in Chennai.¹⁹ Now, IVF and other fertility clinics have been set up in both rural and urban areas of almost every state in India.²⁰ Surrogacy in India has become very popular as people for all-over the world come to India. India is a hub of surrogacy to 14 per cent of the world's estimated 80 million infertile couples.

In 2003, *India's finance minister, Jaswant Singh called for India 'to become a global health destination' and encouraged measures to promote a medical tourism industry including improvements in airport infrastructure.*²¹ The CII (Confederation of Indian Industry) estimated that 150,000 medical tourists came to India in 2005 and it also estimated that the number of tourists would increase to 450,000 by 2008.²² One estimate also calculates India's rapidly growing commercial surrogacy industry is worth

¹⁷ WH Utian et al., Successful Pregnancy After an In-vitro Fertilization-embryo Transfer from an Infertile Woman to a Surrogate, 313 NEW ENG. J. MED. 1351 (1985).

¹⁸ SHANLEY, Making babies, making families: what matters most in an age of reproductive technologies, surrogacy, adoption, and same-sex and unwed parents 103 at 83-84 (2002)

¹⁹ Padmanabhan Geeta, Hope in the Test Tube, THE HINDU, January 19, 2006 available at <http://www.thehindu.com/thehindu/mp/2006/01/19/stories/2006011900540200.htm>.

²⁰ Gardner Hannah, Long-distance babies spur outcry, THE NATIONAL, July 14, 2008 available at <http://www.thenational.ae/article/20080714/PAGETHREE/567226060/1119/BUSINESS> (quoting a commissioning father as saying, "Westerners are fed up with draconian western rules. . . . India is a delight and so are their surrogates.")

²¹ Chinai Rupa & Goswami Rahul, Medical Visas Mark Growth of Indian Medical Tourism, 85 BULL. OF WORLD HEALTH ORG. 161, June 2007, available at <http://www.who.int/bulletin/volumes/85/3/07-010307/en/index.html>.

²² Chinai & Goswami,; India turning affordable, quality options for medical tourists, THE ECONOMIC TIMES, Nov. 18, 2008, available at http://economictimes.indiatimes.com/Healthcare/India_turning_affordable_quality_option_for_medical_tourists/articleshow/3729654.cms

U.S. \$445 million every year.²³ The reproductive segment of the Indian medical tourism market is valued at more than \$450 million a year.²⁴

INDIAN SURROGACY IS CHEAPER

Lower cost involved in surrogacy as compared to other countries attracts foreigners to travel to India to get rid of their infertility issues. Commissioning parents can expect to pay \$14,000 to \$18,000 to a gestational surrogate in the United States.²⁵ Total cost for contracting with a surrogate mother in the United States varies from \$59,000 to \$80,000.²⁶ India's current costs are markedly lower than the American standards. In a nation where annual per capita income is \$500, fees for surrogates are estimated to range anywhere from \$2,500 to \$7,000.²⁷ The surrogates in India are paid in installments over a period of nine months.²⁸ Many couples come through travel agencies that specialize in medical tourism.

LEGAL ASPECTS OF SURROGACY

Surrogacy is the conflicting issue in the primary unit of a society i.e. a family, so allowing or restraining surrogacy without any proper reason would be irrational. Jurisprudentially,

²³ "Surrogacy a \$445 mn Business in India." The Economic Times , August 25, 2008

²⁴ See Cheaper Overseas: Surrogate Mothers, In-Vitro Fertilization is \$6,000 in India and \$60,000 in the U.S., ABC NEWS, Sept. 28, 2007, available at <http://abcnews.go.com/GMA/story?id=3664065&page=1> [hereinafter Cheaper Overseas] (600 IVF clinics in India bring more than \$400 million a year into the local economy); Randeep Ramesh, British Couples Desperate for Children Travel to India in Search of Surrogates: Ethics under Scrutiny as Would-be parents are Enticed by Lower Costs and Relaxed Laws, GUARDIAN, Mar. 20, 2006, at 26, available at <http://www.guardian.co.uk/world/2006/mar/20/health.topstories3> (noting that fertility market is worth about 250 million pounds per year).

²⁵ L. Watson Jennifer, Note, Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for Their Services?, 6 WHITTIER J. CHILD & FAMILY ADVOC. 529, 551 (2007) (noting that surrogates should earn \$33,372 if paid at minimum wage); see also McEwen, at 292 (noting that if a surrogate is paid \$10,000, it works out to an hourly wage of \$1.54).

²⁶ Jamie D. Brooks, Biopolitical Times, Oprah on Renting Wombs in India: "It's Beautiful" Oct. 11, 2007, <http://www.biopoliticaltimes.org/article.php?id=3713> (\$70,000); Mike Celizic, TODAYShow.com, More and More Couples Finding Surrogates in India February 20, 2008, <http://www.msnbc.msn.com/id/23252624/> (\$80,000 in U.S. for surrogacy).

²⁷ Haworth Abigail, Surrogate Mothers: Womb for Rent, MARIE CLAIRE, <http://www.marieclaire.com/world/articles/surrogate-mothers-india> (last visited Oct. 31, 2008) (Indian surrogates are paid between \$5,000 to \$7,000, the equivalent of upwards of 10 years' salary for rural Indians); see also The Feminist eZine, Is Paying the Poor to Have Children Morally Wrong?, <http://www.feministezine.com/feminist/international/Wombs-for-Rent.html> (last visited Oct. 21, 2008) (claiming that Brahman surrogates can garner more in fees than those in lower castes); Surrogate Mothers Lined Up in Gujarat, THE HINDU, Mar. 2, 2006, available at <http://www.thehindu.com/2006/03/02/stories/2006030201872400.htm> (surrogates get paid between 1 and 2 lakhs); Celizic, "Wombs for Rent" Grows in India (Marketplace radio broadcast Dec. 27, 2007), http://marketplace.publicradio.org/display/web/2007/12/27/surrogate_mothers/ (\$6,000 to \$10,000);

²⁸ Insight: Outsourcing to Indian Surrogate Mothers, CNN television broadcast ,Oct. 17, 2006, available at http://transcripts.cnn.com/TRANSCRIPTS/0610/17/i_ins.01.html.

Roscoe Pound has expressed the need for a law in terms of claims or wants or desires which men assert de facto and about which the law must do something if organized societies are to endure.²⁹

Surrogacy involves the concept of demand and supply which requires a womb that can be rented for the people who need one and are ready to pay to get a child. The contractual activities are done under ICA 1872 (Indian contract act) which states that all agreements are contracts if they are made by the free consent³⁰ of parties competent to contract, for a lawful consideration and with a lawful object.³¹ The real issue comes in surrogacy when it is to be decided that, Is it against the public policy and if the consideration or money is involved under sec 23 of ICA 1872.

228th Report- A new draft Surrogacy Bill

The law commission of india submitted its 228th report with 50 clauses under 9 chapters on “Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy.”³² . Article 16(1) of the Universal Declaration of Human Rights 1948 says, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and start a family”. The Judiciary in India has recognized the reproductive right of humans as a basic right.³³

THE ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL, 2010

Commercial surrogacy though banned in several developed countries may soon become a reality in India through a bill to legalise commercial surrogacy which has been drafted by the Indian Council of Medical Research in short ICMR8 . The bill is called as the Assisted Reproductive Technology (Regulation) bill and Rules 2010.

²⁹ Roscoe Pound, Jurisprudence (Law Book Exchange Ltd., New Jersey, vol. III, 1959) p.15.

³⁰ Sec 14, The Indian Contract Act, 1872

³¹ Sec 23, Id.

³² A 228th Report of Government of India, “ need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy” Para 2.3, pg 17. (August 2009)

³³ Vide B. K. Parthasarathi v. Government of Andhra Pradesh, the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as an aspect of his “right to privacy” and agreed with the decision of the US Supreme Court in Jack T. Skinner v. State of Oklahoma, which characterised the right to reproduce as “one of the basic civil rights of man”.

Some novel measures that have been suggested in this Act are as follows:

- Surrogacy Agreement
- Rights Of The Surrogate
- Rights And Welfare Of The Child
- Sex Eligibility
- Birth Certificate
- Certificates By Foreign Couple

POSITION OF ARTIFICIAL REPRODUCTIVE TECHNIQUE IN GLOBAL WORLD

There are countries popular with parents for surrogacy arrangements are the US, India, Thailand, Ukraine and Russia. Mexico, Nepal, Poland and Georgia are also among the countries described as possibilities for surrogacy arrangements.³⁴ Costs vary significantly from country to country, and also depend on the number of IVF cycles needed, and whether health insurance is required. Commercial surrogacy is prohibited in European countries such as France, Greece, Denmark and the Netherlands. Germany, Sweden, Norway and Italy prohibit every kind of surrogacy arrangements.³⁵

ADVANTAGES OF SURROGACY

- For infertile woman who can't conceive, surrogacy creates an opportunity for her and her partner to parent a child who is their genetic offspring at least partially (if they use the father's sperm and the surrogate's egg) or wholly (if they ask the surrogate to carry an embryo created from the mother's egg and the father's sperm).
- A Homosexual couple can also have their own child (such as the Israeli gay couple who got their baby through surrogacy)³⁶
- Single parents can also have children.

³⁴ Surrogate babies: Where can you have them, and is it legal? By Helier Cheung BBC News
<http://www.bbc.com/news/world-28679020>

³⁵ Available at: www.lawyersclubindia.com/articles/print_this_page.asp?article_id=3319

³⁶ Yonatan and Omer Gher's dream - to have a baby of their own - come true. Yonatan was the donor. Available at: www.lawyersclubindia.com/articles/print_this_page.asp?article_id=3319

SUGGESTION

- The commissioning parents should accept the custody of the commissioning child by the surrogate regardless of the deformity, or any physical problem to the child. If they refuse to do so then it should be considered as an offence.
- Surrogate agreements should be considered under ICA 1872 and A surrogacy contract should be enforceable only if is approved by the court with an especial committee for it.
- Surrogate mother should be a married woman with experience of pregnancy an she should be released from all the legal acts after the birth of the child and the birth certificate should only include the name of the commissioning parents.
- If the commissioning couple separates or gets divorced after going for surrogacy but before the child is born, then also the child shall be considered to be the legitimate child of the couple.
- Surrogacy should be last option for the couples and its application should be approved only upon the medical evaluation.

CONCLUSION

Through the thorough analysis of the concept like legislation, application, national and international aspects, ethical and social issues , role of science and technology, judicial responses with regards of surrogacy, it is clear that Surrogacy turned out to be a boon for the needy. India has also emerged as a hub for the surrogacy and it has provided a stage for the lost and depressed couple a hope for a complete family which is a final and ultimate step towards a happy world.

Hence, the concept of Surrogacy should be dealt with the proper legislations and guidelines so that this Godsend could be regulated in more efficient and better way.

SEX WORKERS AND AIDS – AN UNENDING MISERY

Shiny psychedelic bulbs in utter contrast with the spit-masterpieces, that adorn the filthy compounds, foul stale smell mixes with fresh incense breeze and laments over the perishing of marigold and roses, bound in the shackles of the rusted iron gates. Women with heavy make-up, flashy dresses, bright lipsticks and kohl-lined tired eyes, call out from inside the cell-like, suffocative rooms or compounds, passing lecherous comments addressing the passer-bys. And as your mental horizons tend to imbibe the aforementioned literary portrait, your mind is driven to the general stereotype brothel area (or red-light area, as it is called). Prostitution is not new to India. The nation of *Kama Sutra* and *Sad Baranis* was ironically, always daunted by the stigma and resilient to the idea of acceptance. A lot has been written about the plight of the sex workers. Cold, yet brilliant literary and cinematic works put forth the plight so faced. But there is more to their existent, unending sufferings. The rise of HIV AIDS, casted upon the society, a multi-faceted shadow, a shadow so dark that every suspected and vulnerable (even assumed) strata, was ostracized, pushed to the periphery and neglected to the doom. Same happened with the sex workers too. And even today, despite of the fact that India, as a country has somehow moved a great leap forward in spreading awareness about the Syndrome (given the Colonial mediocrity that hovered upon the nation, if I may, still continues to).

The story of Munni was heard by the world, in her interview to United Nations Office on Drugs and Crimes (UNODC). According to her, an area, holding as miniscule significance as *Sonagachi* in Kolkata has about several hundred multi-story ill-ventilated buildings, a home to about 10,000 sex workers. An excerpt from the conversation is powerful enough to cast light upon the brewing hazard (if that's the word to be used for something as dangerous and deadly as AIDS). :

“UNODC: We hear Non Governmental Organizations (NGOs) work on prevention of HIV and AIDS among sex workers in Sonagachi. Are you aware of this?

Munni: There are many NGOs here in Sonagachi. They regularly organize shows, gatherings and events on HIV and AIDS and sex worker's rights. We were also taught to insist on the clients to wear condoms, which is important to be safe from the killer disease (HIV and AIDS). They also set up a testing camp of HIV and AIDS. Even if we insist on

condoms, customers pay an extra 25 percent as a bribe to the aunty. We are not allowed to go to the camps.”³⁷

According to UNAIDS Gap Report 2014, in India in 2013, about 2.1 million people had HIV and the nation had about 1,30,000 AIDS related deaths. According to a study analysis, which itself engulfed a plethora of existent research works, it is to be noted that out of estimated 8,68,000 female sex workers, about 2.8% of them are HIV positive. It is to be noted that there exists a distinction between HIV and AIDS, the absence of knowledge of which, further leads to stigma emboldening. HIV is a Virus. AIDS is a syndrome. Continuing with the analysis, these figures are scarcely disproportionate and distinctly existent in different states. Further, Male sex workers have equally fallen prey to it. HIV existence up to 33% could in a suburban Mumbai based male sex worker group.³⁸

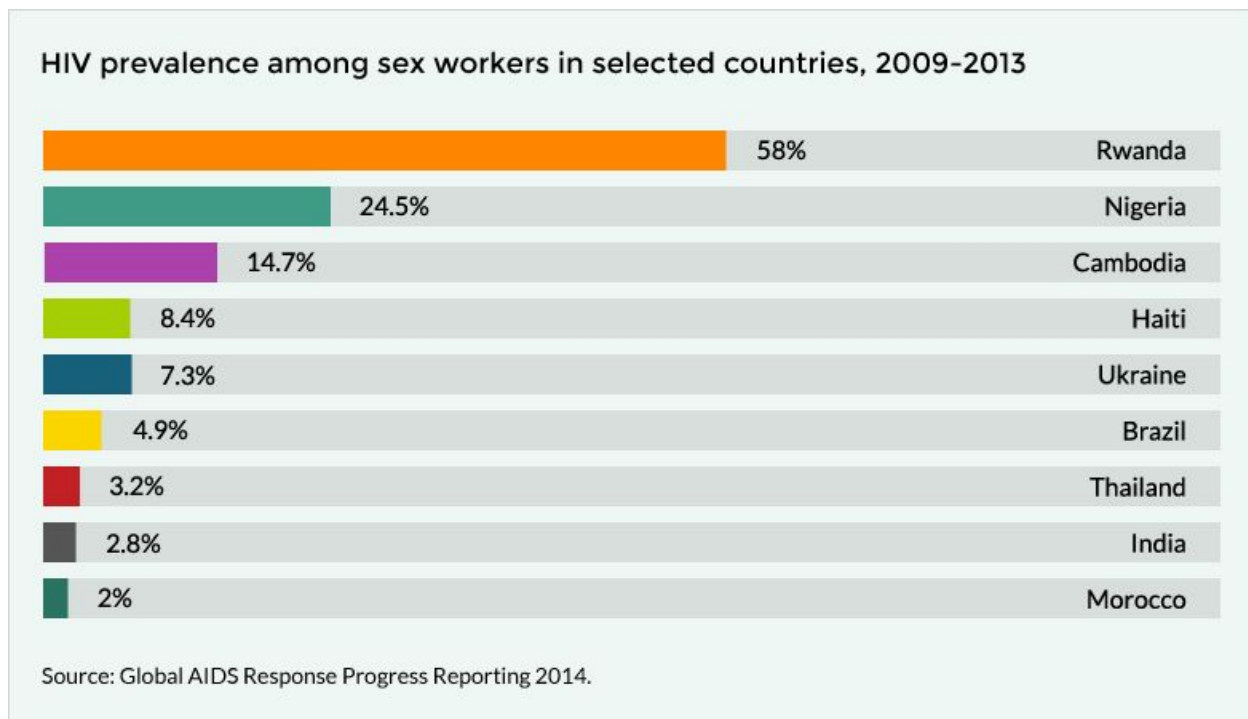


Fig: HIV Prevalence among sex workers in selected countries, 2009-13.³⁹

And now, the question arises, as to why do sex-workers become a primary prey to the syndrome. There exist many reasons such as – multiple sex partners, inconsistent use of

³⁷ India: My life in the 'red lights' of Sonagachi; retrieved from: <https://www.unodc.org/southasia/en/frontpage/2010/March/red-lights-of-sonagachi.html> on 22-11-2015 at 4:51 p.m.

³⁸ HIV and AIDS in India; retrieved from: http://www.avert.org/professionals/hiv-around-world/asia-pacific/india#footnote5_ogpqmpk on 22-11-2015 at 5:15 p.m.

³⁹ Retrieved from: <http://www.avert.org/professionals/hiv-social-issues/key-affected-populations/sex-workers>; on 22-11-2015 at 5:16 p.m.

condoms, lack of awareness regarding both the syndrome [or other Sexually Transmitted Diseases (STDs)] and modes of prevention, lack of organized surveillance, ill dispensation of laws etc. lead to mushrooming growth of such disease.

It's high time that we realize that even if one section of society is left neglected, the society as a whole is rendered paralyzed. This paralysis is psychological, social and physical. Dual facets of psychological perishing is that on one hand, when these sex workers fall prey to discrimination thereby embarking upon a state of oblivion and social neglect, on the other hand, it's the society that continues to marinate in the realms of stagnation. This, thus forms a never ending cycle, adds on to the misery and fastens the clutches of diabolism. It's therefore necessary to strengthen our efforts to bring the peril to an end and take necessary measures to curb the trident of aforementioned parasites.

EGG DONATION LEGAL PROTECTION - NEED OF THE HOUR

We make a Living by we get; we make a Life by what we give. -Wintson Churchill

A woman is a mother, a sister, a wife and a daughter. In one lifetime she lives many relations. Fulfilling her role, in all of these in a very beautiful way. The most important role she plays in her lifetime is to give birth. But this blessing is now turning to become a curse.

Bollywood film 'Vicky Donor' may have popularized sperm donation, but the donation of eggs is equally commonplace. With more and more childless couples seeking the help of fertility clinics, the demand for egg donors has gone up.⁴⁰ The use of donor eggs in assisted reproductive technology (ART) has increased rapidly since the first birth following the use of this technology to a woman experiencing primary ovarian failure in 1983.⁴¹ While the benefits of oocyte donation in assisting reproduction of women who are unable to produce eggs are clear, many aspects of oocyte procurement and use remain controversial. Indeed, with the introduction of egg donation for research and cryopreservation of eggs, the controversies are increasing,⁴² especially the legality. In cities like Delhi and Mumbai or Gujarat where surrogacy is a thriving business, college students, young professionals and mothers in need of money are walking in to donate eggs. A premium is placed on women who are mothers as *fertility* is guaranteed. Another "hot bed" for donors is Indore.⁴³

The Assisted Reproductive Technology (ART) Bill was drafted in 2010 to govern the grey but thriving area of infertility treatment in India. It has specific regulations on egg donations. However, the Bill has failed to make it through Parliament. In 2010, 17-year-old Sushma Pandey died two days after she had donated eggs at a leading infertility clinic in Mumbai. Her death still shrouded in mystery, the Bombay High Court pulled up police recently and, last month, they began fresh investigations. Days after the HC's reprimand, Delhi saw its first such known death, when a woman died on January 29 in a small IVF (in-vitro fertilisation) clinic operating out of two floors of a building in Lajpat Nagar soon after the first extraction of her eggs. Pandey and the 23-year-old Delhi woman are the only two known deaths with links to the country's egg donor industry that has seen a spurt in the past five

⁴⁰ Time for law to protect egg donors, article by Times Of India, available at www.timesofindia.indiatimes.com

⁴¹ Lutjen P, Trounson A, Leeton J, Findlay J, Wood C, Renou P. The establishment and maintenance of pregnancy using in vitro fertilization and embryo donation in a patient with primary ovarian failure. *Nature*. 1984;307(5947):174-175.

⁴² Statistic from Times of India available at www.timesofindia.com

⁴³ The great Indian egg bazaar, article by Indian Express, available at www.indianexpress.com

years. Giving an idea of the numbers, Gaurav Wankhede, director of Becoming Parents, an international company dealing in surrogacy, sperm and egg donation, says: "There may be 50-80 IVF clinics in Mumbai. Every clinic would need at least one donor every week. Every second couple (in need of IVF) requires a donor." A Vadodara-based doctor talks of a jump of 80 per cent in couples seeking infertility treatment. Thus, in absence of a law to regulate them, malpractices are on the rise. India is among just a handful of venues including Georgia, Russia, Thailand and Ukraine and a few US states where women may be paid to bear another's child. Low-cost technology, skilled doctors, absence of regulation and a plentiful supply of donors and surrogates have made it a preferred destination for fertility tourism, attracting people from Britain, US, Australia, Japan and other nations of the world.

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Despite the fact that the industry enjoys the fruits of increased domestic and foreign income that flows in through fertility tourism, it stumbles onto many legal and ethical obstacles that could be detrimental for its growth. This is because we do not have any formal regulations that can play as a watchdog for this thriving baby-making industry and there is ample scope for legal manipulations and corruption. So the question here is, should the industry celebrate the economic gain that this market brings in or should we be more circumspect about the lack in regulations? On one hand the industry is battling with ethical and legal squabbles and on the other hand the growing number of western couples seeking donors and surrogates in India has prompted critics to view the practice of egg donation and surrogacy as exploitation of poor women. Since fertility tourism continues to be fraught with questions concerning reproductive autonomy, free-will and coercion, it is vital for all IVF providers and practitioners to follow certain guidelines provided by the ICMR. Nevertheless, there is no record as to how many IVF centres in India follow these guidelines. According to the ICMR draft guidelines -

- All clinics involved in infertility treatment that involves the use and creation of embryos outside the body and conducting research on embryos, must be registered.
- A code of practice lays down the qualifications for personnel in these clinics.

⁴⁴ Pattinson SD. The value of bodily material: acquiring and allocating human gametes. *Med Law Rev.* 2012;20(4):576-603

- No treatment is to be attempted without the written consent of the couple. The patients must also receive information and counselling beforehand.
- No human embryo should be placed in a non-human animal and all research projects must be approved by the Institutional Ethics Committee.

All in all, these legal wranglings and public debate surrounding this sector point out that a binding law which can fulfill the needs of all the parties involved is a must. As things go by, we must understand that when a law comes into existence, so comes in the red tapeism and bureaucracy. Therefore, the industry needs to be more vigilant in terms of their practice. Reflecting on the absolute need for a law, Dr Malpani says *"I think the ART Bill 2010 is a useful starting point. I am sure it will evolve over time, as we get additional inputs from patients and society. Like every bill, it does have certain lacunae, but it's far better than operating in the current vacuum which exists at present"*. Agreeing on this the same can be concluded that there cannot be a perfect law and like practice, the law also needs to evolve with time.⁴⁵

⁴⁵ Healthcare, Article by Express Indian, available at www.expressindia.com