

## ASSISTED REPRODUCTIVE TECHNOLOGIES (SURROGACY): A MULTIFACETED STUDY AND WAY AHEAD

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### ABSTRACT

*The Surrogacy Act and the Assisted Reproductive Technology Act ("ART Act") are two pieces of legislation that legalize surrogacy and assisted reproductive technology (ART) and provide complete benefits for babies born via ART. Following decades of attempting to legalize both surrogacy and assisted reproductive technology (ART), we now have two laws that govern and regulate them both. The legislation that regulates fertility banks and clinics is the Assisted Reproductive Technologies Act. It accomplishes so by establishing a national registry to monitor how they function, the regulations for gamete donation, such as who may be a donor, and the laws for administering ART therapy. This article discusses the Assisted Reproductive Technology Act and the Surrogacy Act legislation. Furthermore discussed are the issues that arise when surrogacy services and other ART treatments are regulated similarly.*

**Keywords:** Surrogacy, Assisted Reproductive Technology, Children.

### INTRODUCTION

Assisted Reproductive Technology (ART)<sup>1</sup> is often related to man and women's infertility, as well as assisted reproductive technologies. ARTs are a variety of fertility treatments that aid infertile couples or those who want to get pregnant artificially. ART refers to any method of conception involving the modification of eggs or embryos<sup>2</sup>. ART entails clinically extracting eggs from a female's ovaries, mixing them in a laboratory with sperm, and then delivering or returning the eggs to the woman. The Indian government has created regulations covering two types of ART treatments: IVF and surrogacy.

**In vitro fertilization (IVF)**- The first test of IVF as an ART occurred in 1890 when a rabbit embryo was transferred from one rabbit to another. IVF is not a novel idea in India, however,

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<sup>1</sup> Assisted Reproductive Technology (Regulation) Act, 2021

<sup>2</sup> J.D Biggers, Walter Heape, 'FRS: a pioneer in reproductive biology, Centenary of his embryo transfer experiments(1991) 93 (1) Society for Reproduction and Fertility

<[https://rep.bioscientifica.com/configurable/content/journals\\$002frep\\$002f93\\$002f1\\$002fjrf\\_93\\_1\\_019.xml?t:ac=journals%24002frep%24002f93%24002f1%24002fjrf\\_93\\_1\\_019.xml](https://rep.bioscientifica.com/configurable/content/journals$002frep$002f93$002f1$002fjrf_93_1_019.xml?t:ac=journals%24002frep%24002f93%24002f1%24002fjrf_93_1_019.xml)> accessed 11 March 2023

it was not used to generate a child until 1978. In 2005, the ICMR published "Regulatory Guidelines" for ART therapies. Following then, this practice became more prevalent. IVF is a sophisticated set of procedures aimed to boost fertility, avoid genetic problems, and facilitate delivery<sup>3</sup>.

**Surrogacy**-This is the practice of hiring a woman to bear a child for another couple. In 2002, India approved commercial surrogacy, sometimes known as "Rent a Womb." This is yet another prominent Indian art form. A surrogate mother gives birth on behalf of another individual or couple. The surrogate pledges to deliver the baby to the considered parents after delivery. A surrogacy agreement states that a woman will carry and give birth to a child for another couple.<sup>4</sup>



In this paper, Section II explains the key features of both bills i.e highlighting the bills<sup>5</sup>, Section III presents challenges to consider: overlap in surrogacy and other art services regulations. It is analyzing the issues which have to be taken into account. Section IV highlights the findings of the study i.e the observations and results of the survey conducted in the past years. Section V discusses the rights of a child born through various art technologies which are the legal aspects related to the child born. Section VI outlines the probable impact of the proposed bills which includes both positive and negative impacts. Section VII expounds on the 228th law commission report of India. Section VIII is discussing on providing ART services to the economically weaker sections of society. The article concludes with suggestions and recommendations by the authors on measures to be undertaken while actually implementing these methods.

## KEY FEATURES OF THE ART BILL

**The offering of ART services:** This bill defines "assisted reproductive technology" (ART) as the type of treatment that aims to produce pregnancy by modifying sperm or an oocyte (an immature egg cell) outside of the body and transferring the gamete or embryo into the

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<sup>3</sup> Sharma RS, Saxena R, Singh R, 'Infertility & assisted reproduction: A historical & modern scientific perspective' (2018) 148 The Indian journal of medical research <<https://pubmed.ncbi.nlm.nih.gov/30964077/>> accessed on 11 March 2023

<sup>4</sup> Ibid

<sup>5</sup> Mehaak Jaggi, Vishavjeet Chaudhary, Assisted Reproductive Technology (Regulation) Act, 2021: A timely legislation for a timeless problem, 7<sup>th</sup> March 2022 <<https://www.barandbench.com/columns/assisted-reproductive-technology-act-a-timely-legislation-for-a-timeless-problem>> accessed on 8 March 2023

reproductive system of a woman. ART is also known as "test-tube baby" technology. Some examples of this practice include providing sperm or eggs, creating a kid in a laboratory, or having a woman bear a child for another individual on their behalf. The collection, examination, and storage of gametes will be handled separately by ART clinics and ART banks<sup>6</sup>.

**Enrolling of ART clinics and banks:** The National Assisted Reproductive Technology and Surrogacy enrollment procedure is something that must be adhered to by all types of assisted reproductive technology institutions as well as surrogacy banks. The National Registry, a centralized database that would contain information on all ART clinics and banks in the nation, would be established as a result of this proposal if it is passed. Participation will be restricted to just those medical clinics and blood banks that can meet certain conditions. This registration is good for five years and may be renewed after each of those years. The national and state governments will choose the appropriate individuals to assist with tasks such as the registration of assisted reproductive technology clinics and banks, as well as the cancellation and renewal of registrations<sup>7</sup>.

**Boards:** This Act created National and State Boards to govern assisted reproductive technology (ART) services on a national and state basis. The National Board's primary responsibilities are to advise the central government on policy issues concerning assisted reproductive technology (ART) and to manage organizations established as a result of the Bill. State Boards will be responsible for assuring compliance with ART standards as instructed by the National Board.

**Eligibility for commissioning parties:** If the woman is between the ages of 21 and 50, and the man is between the ages of 21 and 55, ART treatments are available to married men and women. Married couples must also be sterile, which implies they cannot get pregnant after a year of unprotected coitus or have another medical condition that hinders pregnancy.

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<sup>6</sup> Aditya Kumar, PRS Legislative Research, 'Issues for Consideration: Assisted Reproductive Technology (Regulation) Bill 2021', <[https://prsindia.org/files/bills\\_acts/bills\\_parliament/2020/Issues%20for%20Consideration%20-%20ART%20Bill.%202021.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2020/Issues%20for%20Consideration%20-%20ART%20Bill.%202021.pdf)> accessed on 10 March, 2023

<sup>7</sup> Dr.D.Radhika Yadav, Pavan Kasturi, 'A Comprehensive Analysis on Reproductive Health and Surrogacy in India: A Study on the Law, Policy, and Practice'( March 2022) <<https://www.scconline.com/post/2021/09/27/reproductive-health-and-surrogacy-in-india/?amp=>> accessed 12 March 2023

**Eligibility criteria for donors:** A bank may collect sperm and eggs from men and women aged 21 to 55 and 23 to 35, respectively. The female can only give birth once throughout her lifetime, and only seven of her eggs may be recovered. A bank is unable to distribute gametes from one donor to several recipients.

**Circumstances for offering services:** Only if the written consent of both the payer and the giving physician is taken, is the ART treatment provided. Employers of egg donors must get insurance in the egg donor's name. Clinics are required to check for genetic abnormalities before implantation and are not allowed to prescribe medications based on the gender of the embryo.

**Rights of a child born through ART:** A child born by assisted reproductive technology will be regarded as the genetic child of the couple who paid for it, with the same rights and benefits as a child born normally. The donor cannot provide for the child.

**Obligations of ART Clinics and Banks:** The National Registry mandates that ART clinics and banks disclose information regarding commissioning parties and donors, ongoing treatments, and procedure results. In addition, before reporting information to the National Registry, they must keep records of all contributions for a minimum of ten years. ART facilities and banks that employ human gametes and embryos are required to follow standards controlling egg harvesting and the implantation of a specific number of eggs or embryos into a woman's uterus.

**Wrongdoing and Punishments:** The law makes it unlawful to abandon or exploit children created by assisted reproductive technology (ART), to sell, buy, trade, or import human embryos or gametes, or to harm the couple, woman, or gamete donor in any way. When one of these violations is committed for the first time, a penalty of 5 to 10 lakh rupees is levied. If you continue to violate the law, you might face three to eight years in prison or a fine of ten to twenty lakh rupees. A court will not investigate a crime unless a National or State Board files a complaint.

## ISSUES TO CONSIDER: OVERLAP IN THE REGULATIONS OF THE SURROGACY SERVICES AND OTHER ART SERVICES

Surrogacy laws were introduced in 2016. The Act required clinics to register, defined eligibility requirements for intended couples and surrogates, and established National and State Boards to advise the government on how to regulate surrogacy. The Standing Committee which holds power on Health and Family Welfare was in charge of analyzing and providing recommendations on this idea. But, since the sixteenth Lok Sabha had been dissolved, the law was no longer in force. In 2019, a replacement bill was presented. This legislation was submitted to a Rajya Sabha Select Committee for study. After reviewing the Bills, both Committees decided that surrogacy cannot be accomplished without assisted reproductive technology (ART) and that institutions that provide both surrogacy and other ART treatments often do both. As a result, they advocated for basic laws governing clinics that provide assisted reproductive technology (ART) treatments to be enacted first, followed by a separate law addressing surrogacy-specific concerns. As a result, the 2020 ART Act was introduced<sup>8</sup>.

The Surrogacy and ART Act, on the other hand, imposed different requirements on clinics depending on whether they practiced surrogacy or other ART therapies. Individuals who desire to have children must follow various rules depending on whether they use assisted reproductive technology (ART) or a surrogate. Also, various fines are enforced for the same kind of infringement (e.g. sale of gametes). Other ART facilities must be registered for five years, while surrogacy clinics only need to be licensed for three years. A couple that has not used contraception for a year and is still unable to conceive may seek assisted reproductive technology (ART) treatment but must wait five years before employing a surrogate. The ART Bill of 2020 has been sent to the Standing Committee on Health and Family Welfare, which will provide a report in March 2021. According to the Committee, ART and surrogacy services should be regulated by the same registration organizations and boards. Several of these concerns were addressed during the Lok Sabha debate on the ART Bill<sup>9</sup>.

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<sup>8</sup>News Desk, 'The First Recorded Surrogate Mother', *The Washington Post* (May 2019), <https://www.washingtonpost.com/archive/opinions/1987/04/25/the-first-recorded-surrogate-mother/8c036610-d1c7-4b7b-b14d-e79d7803af73/>.

<sup>9</sup> Aditya Kumar (n 5)

## KEY FINDINGS OF THE STUDY

ISAR (Indian Society for Assisted Reproduction) has taken every precaution to simplify the data-gathering process for all ART programs in India. After the failure of the web-based online data collection strategy, ISAR was compelled to gather data retrospectively from a variety of ART clinics. During the past three years, there has been significant growth in both the number of facilities that administer ART treatments and the numerical figure of clinics that report their cycle data to ISAR. In 2007, 113 clinics were registered to do IVF procedures but did not perform them. Since then, the number of clinics has increased by 16%. There were 132 clinics in 2009, an increase from the previous year. The numerical figure of babies born as an effect of intracytoplasmic sperm injection (ICSI) increased from 101 to 121 between 2007 and 2008. Over the three-year research period, the number of clinics providing additional services like cryogenics and surrogacy grew. Between 2009 and 2007, the number of clinics providing gamete intrafallopian transfer cycles fell by 11.1%.

ART research and marketing began as a government program in India but has now shifted to the commercial health sector and grown into a private enterprise. Notwithstanding the government's final abandoning of the endeavor, the ART treatment sector in India has grown steadily since its inception. According to conservative estimates, the potential market is worth roughly 25,000 billion rupees. In addition, facilities from Mumbai to Guwahati now provide assisted reproductive technology (ART) procedures. According to the Indian Council of Medical Research (ICMR), there are around 250 IVF clinics in India. In 2007, the number of these clinics will more than double.

**Surrogacy-** In 2007 and 2009, the number of transfer cycles utilizing the surrogate uterus increased more than thrice. During these rounds, embryos derived from the gametes of the commissioning couple are placed in a gestational carrier. The most accurate predictor of surrogate cycles was the recurrence of unsuccessful implantation attempts over three years. From a low of 40.8% per transfer in 2007 to a peak of 53.60 percent per embryo transfer in 2009, the annual pregnancy rate has steadily increased. In comparison to 2007, abortion rates were 3.44 percentage points higher per transfer in 2009. The number of pregnancies resulting in multiple

births more than doubled between 2007 and 2009. The data presented made no mention of the rate of births, the outcomes of perinatal care, or the incidence of maternal illness<sup>10</sup>.

## **RIGHTS OF A CHILD BORN THROUGH VARIOUS ART TECHNOLOGIES**

Even if the child was produced with the use of assisted reproductive technology, it is still regarded as the couple's legal child since it was born within the parameters of a legally recognized marriage and with the consent of both parents (ART). The child has a right to both parents' financial support, an inheritance, and any other advantages that are generally given to children born via sexual activity. The right to receive any medical or genetic information about their biological parents that may be crucial to the kid's welfare belongs to both the child and their so-called "adoptive" parents, including those who helped create the child using donor gametes.

Children who are the product of donor conception do not have the right to know who their biological parents are. When the minor kid reaches the age of majority, he or she will be given access to any information about donors. Although the spouse is not required to provide "other" information to the kid, they will not make any effort to hide it if they are questioned about it. The regulations that govern ordinary conception would be applied if a child was born via the use of a donor program, regardless of whether the sperm or the ova came from the donor.

## **PROBABLE IMPACT OF THE PROPOSED BILLS**

### **(A) Positive Impact**

The proposed bills have the following advantages:

1. **Benefits for Infertile couples-** In the majority of cases, having a child is one of the strongest desires shared by a man and a woman. Nonetheless, there are instances in which individuals are unable to achieve their objectives owing to conditions such as infertility. Both of these efforts, which are disguised gifts, will be of great assistance to infertile couples in India. They help infertile couples to conceive children via surrogacy and other assisted reproductive

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<sup>10</sup> Dr. D. Radhika Yadav, Pavan Kasturi (n 6)

technologies, such as in vitro fertilization. The treatments will make it possible for the couple to have their kid, which is preferable to adoption<sup>11</sup>.

**2. Boon for Surrogate Mother** - The Law restricts women to a single opportunity to serve as surrogate mothers during their whole lives, so safeguarding them from exploitation. By prohibiting commercial surrogacy, these new laws aim to improvise the way of living life of the woman whose body is used as a surrogate. The ART Bill and the Surrogacy Bill both require that the surrogate mother be informed of the risks connected with surrogacy and that the intended parents have her written permission before beginning the process. As a consequence, a surrogate mother will be more equipped to make decisions based on credible information.

**3. Revamping the Sex Ratio of the Country** - The regulations imply that the practices of determining a child's sexual orientation and gender should be forbidden by applying severe penalties. This might potentially enhance the nation's gender balance.

**4. Stringent Punishment for Contravention**- In addition to prohibiting surrogate child exploitation, the sale and importation of embryos, and other practices of a similar kind, the laws impose severe penalties for noncompliance.

### **(B) Negative Impact**

**1. Situation of Same-sex couples** - In India, there exist legal loopholes for couples of the same sexual orientation who want to use assisted reproductive technologies or surrogacy services. The Surrogacy Law specifies explicitly that potential parents must be married for a minimum number of years to qualify for the eligibility certificate. Even though Section 377 of the Indian Penal Code of 1860<sup>12</sup> was removed, same-sex weddings are not legally recognized in India. Under both the ART Bill and the Surrogacy Bill, the term "couple" refers to a legally married Indian man at least 21 years of age and a legally married Indian woman at least 18 years of age. Both proposals consistently use this definition of "couple." Under both the surrogacy law and the assisted reproductive technology bill, the word "infertile couple" must be exhaustively defined. According to these statutes, the word "couple" refers only to heterosexual partnerships, precluding same-sex relationships. It is very unlikely that same-sex couples will accomplish their goal of having a child via surrogacy. Moreover, men and women above the ages of 50 and

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<sup>11</sup> Vidisha Joshi (n 7)

<sup>12</sup> Indian Penal Code 1860, Sec 377



45, respectively, are not eligible for ART therapy. Article 14 of the Constitution of India<sup>13</sup>, which stipulates that all individuals must be treated equally, has been flagrantly disregarded, and this provision has been violated<sup>14</sup>.

**2. Lack of Background-** Acceptance of the Proposed Couple is that no issue addresses the need for premarital or background checks. The absence of instructions on investigating the selected spouse's criminal history, age, family history, etc., is a severe flaw in the law that might compromise the safety of the kid.

**3. Exploitation of Surrogate Mother-** At least one-third of India's rural population lives in poverty, according to the survey. Hence, a significant number of females from rural regions travel to metropolitan areas in quest of better employment possibilities. Surrogacy is a realistic option for several rural women. Sometimes, surrogacy is referred to as "renting a womb." Several women attempt to hide their medical background to increase their surrogacy earnings. As a result of this tragic event, both the mother and the kid perish. Both the Surrogacy Bill and the Art Bill are quiet on the subject of medical malpractice, endangering the lives of India's economically disadvantaged and marginalized female population. In addition, this may result in the commodification of India's disadvantaged women. The restrictions might result in the development of an unofficial industry for surrogate mothers<sup>15</sup>.

**4. Condition of Single Women-** The ICMR Guidelines made it possible for unmarried women to get ART treatments, however, the two laws now being considered make no mention of this possibility. So, barring individuals of a specific age, sexual orientation, or marital status from the list of those "eligible" to use assisted reproductive technology would violate Article 21<sup>16</sup>. (ART). Article 14 of the Constitution<sup>17</sup> prohibits certain limitations because they breach its equality criteria.

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<sup>13</sup> Constitution of India 1949, Art 14

<sup>14</sup> Ibid

<sup>15</sup> National Human Rights Commission, *A Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi* <[https://nhrc.nic.in/sites/default/files/Report\\_NHRC\\_Surrogacy\\_24122018.pdf](https://nhrc.nic.in/sites/default/files/Report_NHRC_Surrogacy_24122018.pdf)>

<sup>16</sup> The Constitution of India 1949, Art 21

<sup>17</sup> The Constitution of India 1949, Art 14

**5. Possibility of Unethical Practices-** In several instances, harsh sanctions lead to the propagation of unethical conduct. When heavy punishments are implemented, the likelihood of misconduct and corruption rises, which may render both laws ineffectual

## **228TH REPORT OF THE LAW COMMISSION OF INDIA**

Since the intended parents are legally recognized as the parents of surrogate children, adoption is not necessary for these situations. The parties to the surrogacy arrangement are required to sign a contract that outlines the conditions of the agreement. This contract should outline the surrogate mother's readiness to carry the child, the medical procedures that will be performed, the husband's and other family members' consent to the surrogacy arrangement, the surrogate mother's readiness to deliver the child to the commissioning parents, and any other pertinent details. On the other hand, the objectives of this contract are not commercial. On the birth certificate of a surrogate kid, only the information of the biological parents should be included.

The legislative proposal from the ICMR is inadequate, if not rife with omissions. But, it is a reminder that more regulations are needed to cover all parties engaged in a surrogacy, including the rights of the surrogate child, in addition to ART facilities. Surrogacy involves a collision of competing interests and has profound effects on the family, the fundamental social unit. Since the law is meant to act as a passionate defender of individual freedom and a system for distributing 24 positive entitlements, it would be improper for it to stay out of this sticky situation. Thus, it would be illogical to forbid surrogacy on speculative moral grounds without carefully considering the societal objectives and interests it could serve. The effective use of the new technology, ART, and the abandonment of the prior cocoon-like approach to surrogacy permission need aggressive legislative engagement. An important precondition is to allow charitable surrogacy agreements while outlawing for-profit ones<sup>18</sup>.

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<sup>18</sup>Law Commission, need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy(Law Com No 228, 2009) pg nos 17-19  
<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081094-1.pdf>

## **PROVIDING ART SERVICES TO THE ECONOMICALLY WEAKER SECTIONS OF THE SOCIETY**

The development of a contemporary ART clinic and its proper administration is a costly endeavor that demands the employment of devoted personnel capable of delivering long-term service. It is essential to investigate the viability of creating ART facilities in the public sector where none exist today. In addition to investigating the factors that contribute to the high cost of ovarian stimulation hormones, the relevant Ministries need to promote and assist local pharmaceutical enterprises in their attempts to begin producing human menopausal gonadotropins on their own. This would guarantee that the treatment of our patients who suffer from infertility is governed by the necessities of the country as a whole, as opposed to the financial interests of global pharmaceutical firms<sup>19</sup>.

### **SUGGESTIONS AND CONCLUSION**

Given the size of India and the frequency of similar events there, the Act is unquestionably a step in the right direction. But, ongoing oversight is necessary to make sure that the law maintains pace with fast-evolving technology, moral standards, and cultural norms. This legislation will need to be continuously scrutinized over time to assess how it functions, its advantages and disadvantages, and potential areas for improvement. The way things are done in this industry moving forward will undoubtedly be impacted by this important piece of legislation. In many, if not all, respects, the drafted legislation of the ICMR is flawed. This is a call to action for politicians to enact regulations controlling ART facilities as well as the rights and responsibilities of all individuals involved in surrogacy, including the surrogate child. The following concerns about the duties and rights of the parties to surrogacy as well as the rights of the surrogate child need to be addressed by the law that is being considered: A contract between the parties will continue to govern the terms of surrogacy agreements and will specify all requirements for the surrogate mother's consent to carry a child, the consent of her husband and other family members for the same, medical procedures for fertility therapy, and compensation. Nevertheless, it is not recommended to use this arrangement for profit. The surrogacy agreement should provide financial support for the surrogate kid if the commissioning couple or person passes away before the child is born, or if the intended parent's divorce and no one wants custody of the child. According to the surrogacy agreement, the

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<sup>19</sup>Dr Radhey S Sharma, Dr Pushpa M Bhargava, Dr Nomita Chandhiok, Shri Nirakar C Saxena (n 9)

surrogate mother's life insurance must be maintained. At least one of the intended parents must also be a donor as a child's biological relationship develops their link of love and loyalty. Also, there will be a lower likelihood of the several forms of child abuse that have been linked to adoption situations. You must utilize a surrogate if one of the intended parents is also a donor. Adoption is the only choice if the biological and adoptive parents are not able to live together. Even in the lack of an adoption decree or even a formal guardianship declaration, the law should recognize a surrogate kid as the biological child of the commissioning parent. On the birth certificate of the surrogate child, only the commissioning parents' names should be included. Protection of the donor and surrogate moms' right to privacy is crucial. It ought to be against the law to utilize a surrogate for a certain sex.

