

**THE DRAFT ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION)
BILL, 2014: A LEGISLATIVE ANALYSIS**

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ABSTRACT

The use of Assisted Reproductive Technology (“ART”) in India has seen steady but unregulated growth. The placeholder Indian Council of Medical Research (“ICMR”) Guidelines of 2002 have been sought to be replaced by a succession of Draft ART (Regulation) Bills, from 2008-2013 but none has attained the force of law. The 2014 Draft ART Bill was released in September 2015 for the purpose of receiving stakeholder comments.

This paper analyses significant provisions of the Bill to gauge their implications on stakeholders: the surrogate, the child, the commissioning parents and the ART clinics and banks. Furthermore, lacunae within the Bill as to what remains to be done to protect the rights of vulnerable parties have been highlighted as well. The merit of the 2014 Draft Bill lies in having safeguards in place, albeit to varying extents, for all of its stakeholders. The vulnerable position of the surrogate, prejudice against certain kinds of parents, insufficiency of measures to ensure child welfare and overwhelming bias towards ART clinics are contentious issues that still seek to be resolved.

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I. INTRODUCTION

IVF clinics have been mushrooming across India since the birth of the first test tube baby in India in 1986.² These clinics went mostly unregulated until the ICMR developed draft National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India in 2002. However, even after, these guidelines were not being followed, as they are not legally binding.

Alarmed by the burgeoning, and mostly unregulated, growth of this industry, the first Draft ART (Regulation) Bill was released for public comment in 2008. Based on comments received from various stakeholders, revised versions of this draft Bill were released first in 2010 followed by one in 2013. While the 2008 and 2010 drafts were subjected to intense public debate, the 2013 Draft Bill was never circulated or put in the public domain for discussion, which is why the latter has not been discussed here.³

The 2014 Draft ART Bill was released in September 2015 for a thirty-day comment period. This paper analyses the rights and obligations for each stakeholder under this legislation and attempts to present an objective analysis of the legislative intent behind this Bill. There is a possibility of overlap between the different categories. An effort has been made to highlight only the main provisions affecting the particular stakeholder category.

² R. S. Sharma, *Social, Ethical, Medical & Legal Aspects Of Surrogacy: An Indian Scenario*, 140(1) INDIAN JOURNAL OF MEDICAL RESEARCH 13-16 (November 2014).

³ Anil Malhotra, *Rewriting Surrogacy Law*, LAWYERS UPDATE (June 2014).

II. THE SURROGATE

The surrogate mother must be 21-35 years of age. This narrow age gap is intended by the legislature to ensure that the surrogate does not undergo pregnancy at a particularly young or old age, so her health is not compromised and there are fewer chances of medical complications.⁴ The 2014 Bill has curtailed the number of cycles of medications (three) that the surrogate can be expected to undergo during her surrogacy.⁵ This protects the surrogate from the whims of paranoid parents. While the number of live births is restricted to one (i.e. a surrogate may only participate in one surrogacy agreement in her life),⁶ there is no limit placed on how many times a surrogate can unsuccessfully undergo ART cycles. It would prove beneficial to curtail this as too many rounds of ART cycles are harmful for the surrogate's health.⁷

The surrogacy agreement is, arguably, the most crucial part of the surrogacy as it determines the monetary compensation to be paid to the surrogate. However, as the weaker party⁸ in the transaction, the surrogate stands a good chance of accepting terms without fully understanding the consequences and/or consenting to an insufficient amount as compensation

⁴ Priyattama Bhanj, *The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities?* Journal of Indian Law and Society Blog (July 17, 2014), available at https://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/#_ftn1 (Last visited on March 12, 2016).

⁵ Section 60(5)(b), Draft ART Bill, 2014.

⁶ Section 60(5)(a), Draft ART Bill, 2014.

⁷ Aarti Dhar, *Gaps in Surrogacy Bill*, THE HINDU (October 27, 2013). See SAMA 2010 Report, *supra* note 25, at 3.

⁸ Amrita Pande, *WOMBS IN LABOUR-TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA*, 16-25 (Columbia University Press, 2014).

out of desperation. No mandatory or stipulated terms of contract have been provided by the Draft Bill, meaning that the parties are free to contract as they please⁹ although, an appropriate formula and compensation mechanism is due to be given by the Rules.¹⁰ Another issue that should be provided for is that no part of the promised payment must be forfeited due to miscarriage or still births or other medical complications.¹¹

This is an area where interests appear to be unbalanced. A couple commissioning surrogacy must enter into a surrogacy agreement with the surrogate. There is no provision in the law for the surrogate to have state-provided legal aid in case she is unable to afford legal help of her own (a likely scenario, considering the usual economic demographic of commercial surrogates).¹² It is however provided that the ART bank shall act as the surrogate's legal representative and also fight any legal case which arises during the course of surrogacy agreement, free of cost.¹³ However, from the perspective of the surrogate, there arise two issues.

First, a surrogate can participate in only one successful live birth in her life,¹⁴ and will thus not be of any utility to the ART bank after that surrogacy. Therefore, can the ART bank be deemed to have any interest in the surrogate's

⁹ Section 60(3)(a), Draft ART Bill, 2014.

¹⁰ Section 60(3)(b), Draft ART Bill, 2014.

¹¹ *Surrogate Motherhood*, CENTRE FOR SOCIAL RESEARCH Report, *supra* note 19.

¹² Staff Reporter, *Surrogate Mothers Underpaid, Undercared for* (July 17, 2013), available at <http://www.deccanherald.com/content/345338/surrogate-mothers-underpaid-uncared-for.html> (Last visited on March 11, 2016).

¹³ Section 60(28), Draft ART Bill, 2014.

¹⁴ Section 60(5)(a), Draft ART Bill, 2014.

welfare? Hence, is it thus an able legal representative for the surrogate? *Second*, the bank's period of liability can arise only during the subsistence of the surrogacy agreement. While this suits the ART bank as it puts a cap on its period of legal representation, this is disadvantageous for the surrogate as there could be medical issues related to the surrogacy which arise in the future also. There should be a provision for legal representation or legal aid for this period too.

A greatly affected stakeholder in surrogacy transactions is the surrogate's own family as both the spouse and child/children of the surrogate struggle to manage without her. The surrogate also emotionally suffers as she is often far from her family.¹⁵ The legislature has tried to safeguard at least the child(ren)'s rights by requiring the surrogate's spouse to give an undertaking that he will take care of their existing child/children during the subsistence of the surrogacy agreement.¹⁶ However, more elaboration on what 'taking care' of the child/children will legally entail is desirable.

Another provision meant to strengthen the position of the surrogate is that of the insurance cover. The surrogate is insured for medical expenses in the eventuality of any medical emergency (this will also be extended to the oocyte donor) or any medical complications that have arisen during pregnancy and appropriate compensation to the family of the surrogate in the case of her

¹⁵ Pande, *supra* note 33, at 267-270.

¹⁶ Section 60(19)(b), Draft ART Bill, 2014.

death.¹⁷ It is, however, unclear as to what is ‘appropriate’ and who will decide so.

Possibly the most contentious issue in the Bill has been the question of the parental rights of the surrogate. The Bill has unequivocally denied any parental rights to the surrogate.¹⁸ This has been a stand consistently taken right from the 2008 Draft Bill. To foreclose the possibility of any competing claims over the baby, the Draft ART Bill 2014 has made it clear that the only kind of surrogacy permitted under the Bill is ‘gestational surrogacy’¹⁹ or ‘in vitro fertilization surrogacy’ (IVF) or ‘host uterus surrogacy’.²⁰ This means that the egg involved in the pregnancy is not from the surrogate,²¹ thus ensuring that she has no genetic links with the child she is carrying.

However, it must be noted that gestational surrogacy is more invasive than artificial insemination and will take a greater toll on the health of the surrogate. While this definitely puts an end to the ambiguity in this area, concerns have been raised about this. Many surrogates form emotional bonds with the child in their womb.²² Such a scenario raises questions surrounding what might be the best way to accommodate the surrogate’s emotions along with the parental rights of the commissioning couple.

¹⁷ Section 2(w), Draft ART Bill, 2014.

¹⁸ Section 60(4), Draft ART Bill, 2014.

¹⁹ Jwala D Thapa, *Analysing the status of the surrogate mother under The Assisted Reproductive Technologies (Regulation) Bill, 2010*, NUJS Working Paper Series NUJS/WP/2012/01 (2012), available at <http://www.nujs.edu/workingpapers/analysing-the-status-of-the-surrogate-mother-under-the-assisted-reproductive-technologies-regulation-bill2010.pdf> (Last visited on March 11, 2016).

²⁰ *Id.*

²¹ Section 2(zq), Draft ART Bill, 2014.

²² Pande, *supra* note 33, at 264-267 and 271-281.

Even an oocyte donor, who actually shares genetic linkages with the baby, has no parental rights. This means that only the commissioning couple, who is paying money to obtain a child, can claim to be parents. From a long-term policy perspective, anthropologists fear that this essentialized perspective of parenthood might lead to the process of birth being viewed as a mere manufacturing process, thus commodifying the baby and creating a business of ‘baby-selling’.²³

III. THE CHILD

In case of an OCI/PIO/foreigner married to Indian, the commissioning parents must appoint a local guardian. He/she will be responsible for the well-being of the baby, in case the couple fails to take delivery of the child. The guardian may decide to bring up the baby or give it up in adoption if the commissioning couple has not claimed the baby within a month.²⁴ In addition, the 2014 Bill provides for a penalty provision for the commissioning couple who neglected to take custody of the child without sufficient cause.²⁵ However, this is merely a stop-gap measure as, ideally, the welfare of the child should not be the sole discretion of the guardian. A mechanism should be put in place by the state to objectively gauge the best course of action to be taken, along with provisions for follow-up and

²³ *Surrogate Motherhood*, CENTRE FOR SOCIAL RESEARCH Report, *supra* note 19.

²⁴ Section 60(21)(c)(i)(a), Draft ART Bill, 2014.

²⁵ Section 60(21)(c)(i)(d), Draft ART Bill, 2014.

monitoring.²⁶ At all points, the child's best interests should be the paramount concern as it is the vulnerable party in this equation.²⁷

The law has mandated provision of insurance for the development and growth of *only* a child in whom abnormalities are detected during the gestation period.²⁸ While the legislative intent behind this is clear, in as far as ensuring that a child with unique medical needs does not languish for want of care in case of death of commissioning parents, it would be beneficial to extend insurance cover for all children, up to a certain age. What happens in the case of death of commissioning parents (Indian citizens or NRIs) before custody of child? There is no provision for insurance cover or appointment of guardian, like there exists in the case of OCI/PIO/foreigner married to Indian citizen.²⁹ It seems that while legislature is being over-cautious vis-à-vis non-Indians, it is failing to adopt the same strict scrutiny for Indian couples.

Additional safeguards have been adopted in the 2014 Bill, such as that the foreigner must necessarily be visiting on a medical visa³⁰ (and not on a tourist visa, as was the norm) and OCIs, PIOs and foreigner married to an Indian citizen will require an 'exit' permission from the concerned authorities for the child or children born through surrogacy before leaving India.³¹ Children born to these three groups of persons will not be considered citizens

²⁶ SAMA 2010 Report, *supra* note 26, at 3.

²⁷ Article 3, United Nations Convention on Rights of the Child, 1990.

²⁸ Section 60(11)(c), Draft ART Bill, 2014.

²⁹ Section 60(21)(a)(v), Draft ART Bill, 2014.

³⁰ Section 60(12), Draft ART Bill, 2014.

³¹ Section 60(15), Draft ART Bill, 2014.

of India, and will bear the citizenship of the place of residence of their parents. They shall be entitled to Overseas Citizenship of India under Section 7A of the Citizenship Act, 1955.³² Clarifying this has ensured that the parties will not suffer from the hassles of having an indeterminate nationality.³³

IV. ART CLINICS & BANKS

The Bill intends to set up ART Boards at the State and Central level. The National Advisory Board is expected to (1) develop new policies in the area of ART and (2) assist the State Boards in accreditation and regulation of services of ART clinics and banks in the country.³⁴ The State Board is supposed to lay down the policies for assisted reproduction in the State.³⁵

A supplementary institutional measure is the creation of the National Registry to act as a central database of ART clinics and banks in the country.³⁶ The Registration Authority, constituted by the State government,³⁷ is instrumental in this, as it will grant a certificate of registration to ART clinics and banks, without which neither can practice.³⁸ Anyone aggrieved by the Registration Authority can appeal to the State Board³⁹ and then to the National Board for relief.⁴⁰

³² Section 61(7), Draft ART Bill, 2014.

³³ See *Jan Balaz v. Anand Municipality*, Letters Patent Appeal No. 2151 of 2009 in Special Civil Application No. 3020 of 2008 (Gujarat HC).

³⁴ Section 17(1), Draft ART Bill, 2014.

³⁵ Sections 33(1) and (2), Draft ART Bill, 2014.

³⁶ Section 18 r/w Section 21, Draft ART Bill, 2014.

³⁷ Section 35(1), Draft ART Bill, 2014.

³⁸ Section 36, Draft ART Bill, 2014.

³⁹ Section 44, Draft ART Bill, 2014.

⁴⁰ Section 45, Draft ART Bill, 2014.

An ART clinic is one which can provide infertility treatment,⁴¹ use, create, process and store embryos and carry on research in the area of ART.⁴² An ART bank, on the other hand, acts mainly as a repository of sperm or semen, oocytes or oocyte donors and links surrogate mothers to the ART clinics or their patients.⁴³ ART Clinics and banks are additionally obligated to maintain the confidentiality of their patients and surrogates.⁴⁴ They are allowed to advertise for surrogates, once registered.⁴⁵ These provisions clearly intend to make ART clinics a central figure in all surrogacy-related activity.⁴⁶

V. THE COMMISSIONING PARENTS

This Bill restricts the option of availing ART procedures to only a married couple consisting of a man and woman, where the woman has been proven to be unable to conceive by natural means.⁴⁷ This excludes four categories of potential parents: homosexual couples, single men or women, couples in live-in relationships and the third gender. A potential Constitutional challenge could lie under this, in the event that this Draft Bill became law, as it adversely affects the rights of four groups of stakeholders.

⁴¹ Section 36, Draft ART Bill, 2014.

⁴² Section 36 (Explanation), Draft ART Bill, 2014.

⁴³ Section 2(d), Draft ART Bill, 2014.

⁴⁴ Sections 52(12), 58(4), 59(1), 60(16), Draft ART Bill, 2014.

⁴⁵ Section 46(16), Draft ART Bill, 2014.

⁴⁶ Dilip Rao, *The Draft ART Bill, 2008*, LAW AND OTHER THINGS (October 10, 2008), available at <http://lawandotherthings.blogspot.in/2008/10/draft-art-bill-2008.html> (Last visited on February 29, 2016).

⁴⁷ See Sections 2(zg), 46(10) and 58(1), Draft ART Bill, 2014.

It is difficult to pinpoint the legislative intent behind this. Perhaps fears of child abuse and child trafficking (easily commissioned by single men or women or live-in couples) have triggered this. One positive motive is to not give opportunities to rich couples, who do not suffer from infertility but still choose to not undergo pregnancy and opt to conceive ‘designer babies’ through surrogacy.⁴⁸

As for the national identity of the commissioning couple, they can include Non Resident Indians (NRIs), Overseas Citizens of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen.⁴⁹ This entirely excludes a foreign couple from commissioning surrogacy in India. It is quite clear that the legislature means to avoid making India an international destination for surrogacy. In the short-term, this will greatly affect the earning capability of commercial surrogates, but in the long-term, this will reduce chances of commodification of babies, forced surrogacy and will prevent India from being viewed as a ‘baby-farm’ globally.⁵⁰ It is also possible that cases like *Baby Manji Yamada*⁵¹ have led the legislature to err on the side of caution where foreign couples are concerned.

In all cases, the child born through surrogacy will be considered the legitimate child of the commissioning couple, and shall have identical legal

⁴⁸ Rao, *supra* note 15. See *Feminist Perspectives of Surrogacy*, Feminist Legal Theory (October 24, 2012), available at <http://femlegaltheory.blogspot.in/2012/10/feminist-perspectives-on-surrogacy.html> (Last visited on March 11, 2016).

⁴⁹ Section 60(11)(a), Draft ART Bill, 2014.

⁵⁰ *Surrogate Motherhood – Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH (2010), available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf> (Last visited on March 11, 2016).

⁵¹ *Manji Yamada v Union of India* [2008] 13 SCC 518 (SC)

rights as a child born through sexual intercourse,⁵² as will any child born to a woman through ART procedures.⁵³ This is true even if the commissioning couple separates or divorces after commissioning the surrogacy but before the child is born.⁵⁴

Counselling for patients and surrogates has been a fixture in the previous drafts, as it is in the 2014 Bill.⁵⁵ However, counselling for the commissioning parents is a new addition under this Bill. In the interest of the couple, the ART clinic must inform the couple about all the implications and chances of success of ART procedures, the accompanying advantages, disadvantages, costs involved, their medical side effects and risks, the possibility of adoption, and any other matter which might aid the commissioning couple to arrive at an informed decision which would be in their best interest.⁵⁶ This balances the information asymmetry between the clinic/bank and the parents, and will limit chances of the former giving false hopes or misleading information to desperate couples.

However, adoption as a favourable option for infertile couples had not been given sufficient attention.⁵⁷ In fact, it has been portrayed as a *back-up*

⁵² Section 61(1), Draft ART Bill, 2014.

⁵³ Sections 61(2) and 61(4), Draft ART Bill, 2014.

⁵⁴ Section 61(3), Draft ART Bill, 2014.

⁵⁵ See Sections 49(5) and 60(28), Draft ART Bill, 2014.

⁵⁶ Section 46(6), Draft ART Bill 2014.

⁵⁷ SAMA, *The Assisted Reproductive Technologies (Regulation) Bill & Rules (Draft) – 2010 Issues and Concerns* 1-4, at 3 available at http://www.communityhealth.in/~commun26/wiki/images/0/0d/Sama_ART_Bill_Policy_Brief_2010.pdf (Last visited on March 11, 2016).

measure, should the couple fail to conceive through ART.⁵⁸ It also must be appreciated that since counselling regarding the infertile couple's options is to be provided by the ART clinic,⁵⁹ and not a neutral state-appointed counsellor, there is little chance of adoption being shown in a positive light by a stakeholder who has a lot to lose or gain based on the couple's decision. But, seen objectively, adopting children reduces the use of government resources to main them in state-owned orphanages, along with a drop in population-proving beneficial to the society in the long-run.

VI. CONCLUSION

The merit of the 2014 Draft Bill lies in having safeguards and procedures in place, for a great many of the stakeholders. The prejudice against certain kinds of parents, the insufficiency of measures to ensure material well-being of children and overwhelming bias towards ART clinics and banks are contentious issues. The position of the surrogate, vis-à-vis parental rights and the surrogacy agreement particularly, appears to still be vulnerable. If the legislature has chosen the policy of allowing commercial surrogacy, it must uplift the position of the surrogate-the central figure in this highly lucrative⁶⁰ and potentially exploitative industry.

⁵⁸ *Id.*

⁵⁹ Section 46(6), Draft ART Bill 2014.

⁶⁰ *Surrogate Motherhood*, CENTRE FOR SOCIAL RESEARCH Report, *supra* note 19, at 3.