

Comparative Law on Medically Assisted Procreation and Surrogacy (summary)

Fumio TOKOTANI

Professor of Law, Osaka University

The object of this article is to examine how new reproductive techniques have extended the available human procreation options for childless couples and how the law regulates these technologies on a comparative study basis. Generally speaking, the regulation of medically assisted procreation and the law on the status of the child born with help of artificial insemination, in vitro fertilization or surrogacy contract vary from country to country.

1. Semen donation is now practiced worldwide. Donation of eggs is still forbidden in many countries, for example, in Germany, Switzerland, Austria and Norway, although as long as there is no agreed to payment in exchange for the egg, countries such as France, England, Denmark, Sweden, Belgium, the Netherlands and Spain allow donation.

Donation of embryos is also forbidden in Switzerland, Austria, Norway, Denmark and Sweden, although donation of embryos, which are not used by the original couple, is allowed in England, Belgium, the Netherlands and in Spain. In France, permission of the court must be obtained for the donation of embryos.

Surrogacy with or without egg donation is also forbidden in many countries, but non-commercial surrogacy is practiced in countries such as England, Belgium, the Netherlands and Spain.

2. Donor insemination and IVF are in many countries restricted to married couples or those living together in a quasi-marriage relationship. The husband or partner must consent in writing to the donor insemination or IVF of his wife or partner. Thereafter, he (the husband) is legally treated as the father of the child born as a result of assisted conception with all attendant parental rights and obligations. If he is not married to the mother of the child, he (the partner) must acknowledge the child as his own child, for example with respect to child support. If he does not, a court may determine that he is the father of the child and require him to perform all attendant obligations.

3. Situations involving an egg donated by another woman or donated em-

bryos create difficult issues from the standpoint of motherhood. Who should be treated as the legal mother of the child born from the treatment, the woman who gave birth to the child or the woman who donated the egg? If surrogacy agreements are not prohibited or considered an illegal practice, the competing interests between the surrogate mother and the intended mother should be addressed by entering into such agreements. Current legislation regarding maternity makes it a rule that the woman who gives birth to a child coming into existence by artificial reproduction is the mother of the child. For example, in Germany, Switzerland, Austria, England, Sweden and the Netherlands such legislation has been introduced. The legal situation in France is also the same. However, the rule is only applied in practice without it being set forth in an explicit regulation.

In England, in the case of non-commercial surrogacy the intended parents may apply for a special court order (Parental orders in favor of gamete donors), and as a result of the order the child is to be treated in law as the child of the married couple. In Germany, a child born through surrogacy can be adopted as the child of the intended parents. On the contrary in France, the intended parents would not be allowed to adopt such a child.

4. A semen or egg donor cannot legally be held as the father or mother of the child.

5. There is a great question as to whether a child born following medically assisted procreation has a right to know his or her origin. There is a tendency in countries such as Sweden, Austria, Switzerland, Germany and the Netherlands to give the child the opportunity to receive information concerning the donor. As a result of such a right to access to donor information coming into general acknowledgment, the number of donors may become smaller. However, in many countries the interests of the child to know his or her origin are considered to be superior to either the interests of the donors or that of childless couples for whom the unencumbered participation of donors is essential. In contrast, in France the identities of donors are not made available. Sperm cells, eggs and embryos should be treated as anonymous gifts from one citizen to another.