

“OUTSOURCING MOTHERHOOD” THE GIMMICK OF PAUCITY OF LEX

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ABSTRACT

We have entered a new age. Now it is scientifically possible for a baby to be created in a Petri dish from the sperm of a man and the eggs of a woman, and the resulting embryos can be transferred into a second woman to gestate. Through the use of fertility drugs and careful monitoring, these embryos can grow to full term babies, which are then given back to the persons who commissioned the process, which are not necessarily those who originally donated the eggs and sperm for the event. We know this Scientific Procedure is more than possible; in fact, it's quite common, which is known as Surrogacy or Outsourcing Motherhood.

Surrogacy is an option for those who cannot conceive in a traditional manner. Infertility, old age or the absence of a partner can hinder the growing desire to become a parent. Through Surrogacy, couples with health problems or the general inability to conceive still have the option of experiencing the joy of creating new life. It also allows single fathers or alternate lifestyle couples the chance to have a baby of their own without going through the adoption process. Surrogacy involves a woman agreeing to carry a child and give birth for another person or couple. In India Surrogacy has become a booming Business. My research paper throws light on the factors responsible for the growth of Fertility tourism in India.

KEYWORDS

Petri Dish, Surrogacy, Fertility tourism, Paucity of Lex, Outsourcing Motherhood

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INTRODUCTION

“Neither flesh of my flesh, nor bone of my bone, but still, miraculously my own.”

Yes, this is the magic of Outsourcing Motherhood but can we call it magic in true sense. It is a debate of our head and heart. **‘Outsourcing’ and that too ‘Motherhood’!** Doesn't it impinge you? Former one is a buzz in business and the later, in our hearts. And to give it a respectable name we combine both the buzzes and call it **“Surrogacy”**.

The practice of renting a womb and getting a child is similar to Outsourcing Pregnancy. Despite the legal, moral and social complexities that shroud Surrogacy, there is nothing stopping people from exploring the possibility of becoming a parent. Women who may choose to ‘Rent’ their womb for a Surrogate Pregnancy are slowly shaking off their inhibition and fear of social ostracism to bring joy to childless couples. Under this chapter the researcher has discussed the Social Scenario of Surrogacy in India especially in Gujarat, Maharashtra, Rajasthan and Madhya Pradesh, from its inception till the present time. The chapter further unveils the reasons for the growth of the Multi –Million Surrogacy industry in India.

INDIAN SCENARIO

Over the past few years, India has seen an explosion of fertility services that promise a cure for the allegedly increasing rates of infertility. Assisted Reproductive Technologies (ARTs),¹ a group of technologies that assist in conception or in the carrying of pregnancy to term, have proliferated unchecked, becoming a veritable **‘Fertility industry’**.

This industry is an integral part of the country's expanding medical market and medical tourism industry. Within this, surrogacy, particularly Commercial Surrogacy, the practice of gestating a child for another couple or for an individual through the use of ARTs and in return for remuneration, has drawn much attention and raised several ethical concerns. In the absence of any kind of Regulatory or Monitoring mechanism for the ART industry in India including a national registry, it is difficult to arrive at the exact statistics pertaining to the existing Surrogacy industry. However, the sharp rise in the number of Surrogacy arrangements based on media reports and anecdotal evidence is a significant indicator for estimating the

scale and spread of the Commercial Surrogacy market. An exponential growth in the industry is evident from the comparative figures over the years that was estimated it to be an industry worth more than USD 400 million till 2008.²

But, still it's not clear how big the Indian Surrogacy market officially is, how many Surrogate Children are birthed each year or how many ART clinics there are. ***Birthing a Market, A Study on Commercial Surrogacy (2012) by Delhi-based Sama - a resource group for women and health – was supported by the United Nations Population Fund India;*** it quotes figures from the National Commission for Women to peg the number of clinics in India offering Surrogacy services at about 3000. There has, however, been no confirmation from the Government on these figures.

At present, the volume of this trade is estimated to be around \$ 5000 million and the numbers of cases of Surrogacy are increasing rapidly.³ On the other hand, the Confederation of Indian Industry (CII) figures identify Surrogacy as a 2.3 billion dollar industry annually. The CII study estimated that 10,000 foreign couples visit India for reproductive services. It's not just foreign couples alone but the demand for Surrogates from Indian couples is also growing. Estimates by Doctors indicate that up to 40 per cent of their clients are foreign couples/Indians living abroad, implying that a significant proportion of clients are resident Indians. As the researcher pointed before that the exact extent of this practice in India is not known, but inquiries have revealed that this practice has doubled in the last few years. There is a growing demand for fair-skinned, educated young women to become Surrogate Mothers for foreign couples. Often, couples have to wait for as long as eight months to a year for their turn. Normally women from small towns are selected for outsourcing pregnancy.⁴ In places like Anand, Surat, Jamnagar, Bhopal, Indore, a large number of couples from both within India and abroad travel to fulfill their desire for a child. Several American, Russian and British women are duly registered with the Akankshya Clinic of Anand and the Bhopal Test Tube Baby Centre for the procedure.

Leading fertility expert **Dr Firuza R Parikh, Director** - Department of Assisted Reproduction and Genetics at the Jaslok Hospital and Research Centre in Mumbai, points out that Indian IVF Clinics have good results, which create huge potential for expansion “India can become a very big **Hub for Surrogacy** if the ART bill gets tabled in Parliament and if international and Indian clients have clarity on the issue.” She adds that



transparency of all processes and having a law rather than a bill, would help all concerned.

As we emerge as a hub for surrogacy, there may be further refinements in the ART bill, but delays are not helping, ” adds

Parikh.⁵ She estimates that around 2500 to 4000 Surrogacy cycles per year are performed in India. One successful cycle of Surrogacy in India can cost anywhere between Rs 11-20 lakh (between 25-35,000 USD). In smaller cities, it can be cheaper.

According to the **National Commission for Women (NCW)**, there were about 3,000⁶ clinics in early of last decade which has now crossed over two lakh across India offering Fertility treatment and out of them many are providing Surrogacy services to couples from North America, Australia, Europe, and the other continents. These figures reflect the status of India as the most favored destination for Commercial Surrogacy. This comes as a boon to childless couples all round the world. At the same time it raises serious ethical and legal concerns and mirrors the plight of the poor in an underdeveloped country, who are willing to sell something as sacrosanct as their Women’s Motherhood.

CONSERVATIVE TO PROGRESSIVE APPROACH

“In India, it is estimated that approximately 15 to 20 per cent couples suffer from infertility, “says **Dr Anoop Kumar Gupta, Medical Director and Infertility Specialist** of the Delhi In-Vitro Fertilization (IVF) Center.”

The figure is on the increase due to increased urbanization, pollution, stress, a competitive work environment and a fast-paced lifestyle,” he adds. Various surveys reveal that the figure of childless couples is increasing at an alarming rate unanimously in all the countries. For the treatment of fertility various Artificial Reproduction Techniques are developed and Surrogacy is the latest out of them. Surrogacy is a complex and challenging topic that is plagued with controversies for the past several decades. There are many legal, social and ethical aspects of a pregnancy involving a Surrogate Mother.

There have been some famous cases which garnered public attention and have given rise to endless debates in favor of as well as against the procedure. India created history by being the first country to legalize Commercial Surrogacy in 2002. Internationally, India has become the preferred destination for couples desiring pregnancy through Surrogacy although it is difficult to estimate the prevalence of Surrogacy in India. Today Surrogacy is a booming business in India which leaves behind the traditional values and ethics. Surrogacy is prevalent from ancient era but with the march of time the conservative outlook towards Surrogacy has changed into a progressive outlook.

Mythological Surrogate Mothers are well known in India. **Yashoda** played mother to Krishna, although Devki and Vasudeva were Biological Parents. Likewise, in Indian mythology **Gandhari** made Dhritarashtra the proud father of 100 children, although he had no biological relationship to them.⁷ No doubt, Surrogacy was prevalent in earlier time even but it was not having a social acceptance.

With the lapse of time and progress of society the old concept of Surrogacy has totally capsized. The primordial urge to have a biological child of one’s own flesh, blood DNA, aided with technology and the purchasing power of money, and coupled with the Indian entrepreneurial spirit, has generated the ‘Reproductive Tourism Industry’, estimated at Indian rupees 25,000 crores (US\$5000 million) today. In 1984 the world saw the first successful birth through Gestational Surrogacy. Ten years later, in Chennai,

this happened for the first time in India. Three years after that, in 1997, an Indian acted as a gestational carrier, and got paid for it, in order to obtain 'medical treatment for her paralyzed husband. But India's Surrogacy boom began in January 2004 with a grandmother delivering her daughter's twins. The success flashed over the world, literally spawning a virtual industry in the State of Gujarat in India.

In the past couple of years, the number of births through Surrogacy doubled with estimates ranging from 200 up to 350 in 2008 alone. Today, while Iceland has the first openly Gay woman politician as its Prime Minister, India boasts of being the first country intending to legalize Commercial Surrogacy, in 2002, to legitimize both Intra and Inter-country Surrogacy, which is rampant. The term Surrogacy which was till last decade heard once in a blue moon is now no more an unheard term in India. It has not only marked its inception in metros but has with very swift pace moved towards the small cities like Badwani, Indore etc. The outlook of masses towards Surrogacy has undergone a vital change in last decade. This progressive change towards Surrogacy can be witnessed from the mushroom growth of fertility clinics dealing in Surrogacy in small cities as well as from **the numerous advertisements published in Newspapers for hiring a Surrogate by the intended parents from time to time.**



In the Indian context, the following factors have created a conducive environment for the expansion of the industry: lack of regulation; comparatively lower costs in relation to many developed countries for instance, Canada, the United Kingdom (UK), and the United States of America (USA); shorter waiting time; the possibility of close monitoring of Surrogates by CI (Commissioning Parents); availability of a large pool of women willing to be Surrogates, and infrastructure and medical expertise comparable to international standards.

The motivations of women's in India to enter into Commercial Surrogacy arrangements stem from the emergent conditions of survival or deprivation. Their choices and engagement in this and other options of work are also steeped in their perception of their roles and responsibilities towards their children and families. Contrary to the more popular discourse of altruism of giving the gift of motherhood to an infertile woman, the idea of a good and responsible mother for their children and responsibility towards their

families is what seems to be gearing women into not just considering but also, often, convincing their husbands into agreeing for them to enter such arrangements.

Some Surrogates have also chosen Surrogacy over other available work options, for instance, domestic work or other kinds of work that are too arduous and have long working hours, or have stated a preference for remaining at home and earning money. Their choices are thus a reflection also of the constraints of the larger context of work availability or unavailability and of the factors that influence the employability of women from a particular class and that hence structure their lives. These processes of constituting new subjectivities are seen to take place in the context of the growing popularity of Surrogacy as an option for working-class women, and of the scale achieved by the industry in a short span of time. The nature of labour in developing countries like India in an international regime of globalization and liberalization has made the flourishing of this industry possible.

As briefly addressed before, India is rapidly becoming the most popular country for 'Fertility Tourists', which is due to a number of interrelated factors which includes; relatively low-cost medical services, the easy availability of Surrogate wombs, an abundant choice of donors with similar racial attributes, and the lack of any law to regulate these practices is attracting both Foreigners and Non-Resident Indians (NRIs) to sperm banks and Surrogate mothers in India.

Now let's us discuss these reasons for the growth of the proliferating Multi-million Surrogacy industry in India in lucid and elaborated manner.

- ❖ **Low Cost Surrogacy**
- ❖ **Easy Availability of Pool of Willing Surrogates**
- ❖ **Abundant Choice of Donors**
- ❖ **Lack of Regulatory Laws**
- ❖ **Expertise Medical Services**

❖ Supportive Machinery

LOW COST SURROGACY

Surrogacy in India is a hot topic right now. Intended parents are interested in the low costs of International Surrogacy, and many are considering Surrogate Pregnancy in India. There are many many success stories on Surrogate babies born in India. Hundreds of happy parents have brought their children home without the least bit of difficulty, while being able to afford Surrogacy, something they may not have been able to do in their own Country. For those seeking a Gestational Surrogate Pregnancy, who will be using their own eggs, the number one incentive to Surrogacy in India is the price. It would be silly to imply that there was any other major reason for choosing to go through International Surrogacy or Surrogate Parenthood in India. ***The reason that Intended Parents go to India is 100% because of the cost, quoted at \$20,000-30,000 of the entire Surrogacy process.*** On the contrary, it is estimated that in the United States, the payment for hiring a Surrogate Mother ranges between US\$15,000 and \$30,000, the whole procedure can cost \$45,000 to \$60,000 plus.⁸

The fees for the rest of the process including fertility clinics; lawyers; medical fees; and agencies and/or egg donors, if they're used, generally cost more than the fee going to the Surrogate. Gestational Surrogacy costs more than Traditional Surrogacy, since more complicated medical procedures are required. Surrogates who carry a baby for a family member i.e., sister or daughter usually do so for expenses only.

Here it is docile to mention the argument of Qadeer who argues that there is no way to put a value on a human baby but arbitrarily, and asserts that therefore this value has to be the same everywhere in the world, including in the third world where poor women who become Surrogates provide cheap labor. She compares the situation in India with the situation in the United States, where hiring a Surrogate is many times more expensive and where she is better provided for in terms of medical expenses, health insurance including for her family, expenses for maternity care and clothing, and the hiring of an independent lawyer.

She compares Surrogacy with Human-Organ Donation to demonstrate that, unlike the former, the latter has been restricted to a non-commercial transaction by the state. According to her, this “distinction between human body parts donated and those rented, and the equating of goods and living beings in Commercial Surrogacy” is irrational.⁹ This logic obscures the difference between the product of social human labor, such as any consumable commodity, and the product of women’s procreative labor, a baby.

Hence, India is foremost in Surrogacy because of the low cost treatment and availability of women opting to be Surrogate for childless couples. ***According to the 228th report of the Law Commission of India, “NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY”*** the usual fee for Surrogacy in India is \$25,000 to \$30,000 which is almost one third to what it would cost in USA.¹⁰ Moreover laws in US and UK do not allow the Surrogate woman to charge the childless couple; whereas in India there are no laws preventing a Surrogate woman in accepting compensation for renting her womb. A Childless couple offer Rs.3,00,000 to Rs.4,00, 000 or more and sometimes even funds for education to the children of Surrogate woman and still save thousands of dollar as compared to their own country. Thus, the entire process of Surrogacy in India is very cost effective and this is the prime factor behind the flourishing Indian Surrogacy industry.

EASY AVAILABILITY OF POOL OF WILLING SURROGATES

There are several reasons why a couple from the developed world might want to travel to India for Surrogacy. UK law dictates that Surrogacy must be altruistic, which has led to a severe shortage of women willing to be Surrogates. The amount of money legally payable to Surrogates to cover expenses tops out at around £10 000—nowhere near enough of a financial incentive. Not only that, Surrogacy agreements is not enforceable in the UK. This means that after months of searching for the right Surrogate and waiting for the baby to be born, the prospective parents might be left bereft of their baby. This can happen in the USA too.

In India, meanwhile, these problems are almost non-existent. For one thing, the Surrogacy agreement is legally binding. Cultural and Financial factors also mean that Surrogate Mothers rarely want to keep the baby. The taboo around Surrogacy means that most women keep their pregnancy largely a secret. Indian Surrogates are often struggling to provide for the family they already have; they can't afford not to get paid. **Fertility Doctor Kaushal Kadam, at the Corion Fertility Clinic in Mumbai,** says that if anything, Surrogates ask her “you are sure they are going to take the baby, right? I can't afford to raise three children”.¹¹

Indian Surrogates earn between \$5000 and \$7000—an enormous sum for women would normally only earn about \$300 a year. The women's financial desperation has led some ethicists and women's rights groups to feel that Surrogates are being exploited. Yet it is precisely because the women have so few alternatives to earn money that some doctors feel they cannot take a moral high ground. “I really don't see any exploitation”, says Kadam. “It's a mutually beneficial situation where the couple is getting their baby and the Surrogate is getting benefited in the end.”

In this scenario, Commercial Surrogacy is often portrayed as a win-win situation. It is seen to give 'Desperate and Infertile' parents the child they want, and to provide poor Surrogate women the money they need. In the face of this growing globalization of capital and shrinking local avenues for jobs and resources, women from marginalized communities and regions find themselves more impoverished, powerless and vulnerable. For these women, access to work and occupations has decreased over time, while new markets have opened up for both their sexual and reproductive labor. Commercial Surrogacy for the domestic and international markets is one such avenue and it is gaining ground in many urban and semi-urban areas in India today and a huge pool of women from such areas are eager to act as Surrogates.

The women who engage in Surrogacy are usually poor. They agree to conceive on behalf of another couple in return for a sum of money that would otherwise take many years to make. It is important to understand that these women generally do not have many career prospects as they are predominately uneducated, often engaged in casual work, sometimes migrants in search of better job opportunities and living in slum areas with inadequate housing facilities. They come from lower middle class backgrounds,

are married, and are in need of quick money in order to, among other purposes, maintain their families, buy a house or pay for the children's higher education or to settle up a business for her unemployed, drunkard husband. The need for money is often felt so deeply that childless couples often negotiate a better price as a result of the competition.

There is a growing demand for fair-skinned, educated young women to become Surrogate mothers for foreign couples. Nevertheless, reasons for foreigners coming to India in search of Surrogate mothers vary, but the easy availability of women acting as Surrogates in abundance is another very important factor responsible for attracting international clients. Women from lower socio-economic backgrounds readily agree to become a Surrogate mother in India in return for payment, as hiring a surrogate in the western countries¹² is not only difficult, but, the treatment is also immensely costly.

ABUNDANT CHOICE OF DONORS

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India is fast becoming the hub for IVF and Surrogacy as the country's market value is expected to touch INR 14.2 Billion and register a CAGR of 14 percent approximately over the next five years. India has witnessed an unprecedented and unregulated growth of IVF/Infertility/Assisted Reproduction Technology (ART) clinics and hospitals. With the estimated number of around 3,000 fertility clinics across the country and new clinics being added every day, India has occupied a place of prominence on the world IVF map. The present boom, witnessed by the IVF segment, is a result of various factors. The easy availability of Surrogate Mother, Gamete Donors and Low-cost Infertility Treatments have made India a favoured destination for Reproductive Medical Tourism or better known as Fertility Tourism.¹³ During the fertility treatment the Prospective parents need to honestly look for a reasonable Donor. The donor can be known, such as the Prospective Mother's Husband or a friend. He might be an anonymous or "willing to be known" donor to a sperm bank.

Many Prospective Parents work with sperm banks because the donors generally cannot seek legal parental rights, such as visitation. Others are comfortable with, for example, a donor who plays an uncle-like role in the child's life. Whatever boundaries the parents and the law draw, however much or little contact he has with the child, the donor will be a lifelong presence within any AI-created family. Even when happy about their upbringings, most AI-conceived people are curious about their Biological Fathers. And therefore the selection of donor is a crucial part in Surrogacy.

The would-be parents from the Indian Diaspora in the US, UK and Canada, and Foreigners from Malaysia, the United Arab Emirates (UAE), Afghanistan, Indonesia, Uzbekistan, Pakistan and Nepal are descending on sperm banks and In-Vitro Fertilization (IVF) Centre's in India looking for the South Asian genetic traits of perfect sperm donors.¹⁴ There is an abundant choice of donors with similar racial attributes available in India. This is another very important factor contributing to the Surrogacy industry of India.

LACK OF REGULATORY LAWS

India has surreptitiously become the booming centre of a fertility market with its 'Reproductive Tourism' industry. Assisted Reproductive Technology (ART), as it is clinically known, has been in vogue in India since 1978. The 'Rent a Womb' industry in India is witnessing a boom, with infertility affecting one in every six couples.

Commercial Surrogacy, of which Gujarat is a known hub, was legalised in India in 2002. In India, while the exact numbers are not recorded, guess estimates put the number of children born to Surrogates at 25,000, with 50 per cent of the clients coming from the West. Accepting that India is fast being recognized as an "Attractive Option" for Commercial Surrogacy centre, human rights activists maintain that while Commercial Surrogacy in itself is welcome "Where persons unable to have children are aided by willing Surrogates to have their biological children, problem comes in due to the exploitative nature of the business and lack of regulation in the industry".

If we talk about the Surrogacy laws in other nations, in Canada, Surrogate Mothers are not allowed to accept payment but unfortunately this has driven the practice underground. In Japan, it is the woman who delivers the baby, and not the woman who provides the eggs, who is considered the Baby's Mother in a Surrogate birth. In Australia not all states have laws on Surrogacy but the ones that do are Queensland, where Surrogacy is illegal, Tasmania where it is an offence to make or receive payment for Surrogacy and contracts are not legally binding, and in South Australia and Victoria where Surrogacy contracts are illegal. In South Africa, paying Surrogate mothers is illegal.¹⁵ ***Thus in maximum countries Surrogacy is considered to be illegal and therefore many infertile couples from west turn towards India for Surrogacy as in India it has been legalize in 2002 by Supreme Court but still it is much unregulated.***

India has become a Paradise of Surrogacy, but, the fact remains that it is still unlegislated and largely unregulated, despite being judicially recognized. This is one of the reasons of so many foreigners coming to India for Surrogacy. In India, the IVF market is largely monopolized by small niche players and sole-practitioners, as the loose regulatory environment is promoting constant mushrooming of such players. The IVF industry in India is completely unregulated. Anyone can open an infertility or Assisted Reproductive Technology (ART) clinic and start performing procedures the same day, as there is a lack of centralized regulatory body with complete visibility over the whole market. Although the Indian Council of Medical Research (ICMR) reports 3,000 clinics particularly dealing in Surrogacy around the country, certain market forecasters estimate that there could be as many as 15,000 sole practitioners who focus on Surrogacy only. Currently, the industry stick to guidelines set out by the ICMR that includes when, and by whom IVF can be performed. The guidelines do not lay down any rules for the setting up of ART clinics, Compensation to be paid to the Surrogates, no. of Embryos to be implanted in the Surrogate etc. And this is the reason why infertile couples from across the globe are turning to India.

In India Surrogacy is legalized but unregulated and therefore the medical practitioners are involved into Mal Practices. It is observed that in maximum Surrogacy arrangements Surrogates are considered as objects and attention is paid only to the desires of Intended Parents. The Medical practitioners and even the guidelines of ICMR seem to support the desirous couples. There is no Monitoring of the ART Clinics. Clinics function in tight cliques, with unrelated centre's like Dental Clinics sometimes assisting Fertility

Clinics. Although there are no fixed rules related to the amount of compensation for the Surrogate Mother, it is arbitrarily decided by the clinics. Often the woman who delivers the baby is paid very less for it. Though the couple who wants to have a baby through Surrogate mothers pays anything between Rs.2 lakh and Rs.5 lakh to agents, the woman **Dr** who delivers the baby gets only Rs.75, 000 to Rs. 1 lakh.

Dr. Ranjana Kumari, Director, the Centre for Social Research says:

“No fixed compensation structure, no laws that cater to the health and number of births that a surrogate can support and usually incomplete advertisements of the services by medical establishments work against the interest of the women involved in the case”.¹⁶


Fertility experts are also concerned that ICMR guidelines, which say that Surrogates can be implanted with a maximum of three embryos, are being flouted. **Fertility Doctor Kaushal Kadam, at the Corion Fertility Clinic in Mumbai,** says that she knows of some Indian clinics that implant Surrogates with more than they should, one clinic reportedly with five or six embryos. Kadam's assertion was borne out in numerous conversations that the researcher had with fertility experts in India. **Gillian Lockwood, medical director of the Midland Fertility Services, West Midlands, UK,** which deals with Surrogacy, is shocked that doctors would implant such “Dangerously high numbers of Embryos”. For Surrogate mothers, she says, “there is already an increased risk due to the immune mismatch, which can lead to conditions like pre-eclampsia or gestational diabetes”.¹⁷

Implanting so many embryos increases the risk of multiple births, which have substantial health risks. Even a twin pregnancy strains organs such as the liver, kidneys, and thyroid. Multiple births can mean babies are born prematurely, which leaves them at a higher risk for health problems later on in life. Ironically, Prospective Parents might view implanting high numbers of embryos as a good thing. For “many couples, if they see this is their only chance for a family, adopt a sort of buy one, get one free approach. Given that it doesn't cost any more to have a Surrogate Mother have twins for you, they can sometimes see it as a weird economy of scale. Bobby Bains, who with his wife Nikki, has now had two children through Surrogates in India, revealed that Surrogacy in India worked out so much cheaper precisely because clinics implant more

than the two embryos that is standard in the UK. In one of their Surrogacy attempts in 2007, their potential Surrogate was implanted with six embryos. Thus, the lack of regulation in the process of Surrogacy in India is being capitalized by the Medical practitioners for earning huge profits by supporting the Intended parents especially from west as in their countries either Surrogacy is banned or is under strict monitoring of the Government.

EXPERTISE MEDICAL SERVICES

Surrogacy and ART offer solutions to infertility. The existing demand for these services distorts priorities in the organization of health-care services as pressure is built to set up hi-tech reproductive techniques within open markets and public sector service infrastructure without building the basic facilities that help to prevent the infertility. The poor have to either sell their assets to access the facilities or use the opportunity to earn by selling their own reproductive potential the women that are pushed into this process carry the maximum risks to their health. Over the past 10 years or so, our country has seen a mushrooming of fertility clinics. This has inspired the medical tourism, where Surrogacy has important place in its list of attraction as couples from abroad come seeking easy access to Surrogate mothers. According to private providers, first world comforts and quality is available at these Indian Institutions at the third world prices.



A 2012 study by the Confederation of Indian Industry estimated that nearly 10,000 foreign couples visit India yearly for reproductive services and nearly 30% are either single or homosexual.¹⁸ The relatively low cost involved an average Surrogacy package costs almost 50% less as compared to other countries, easy availability of a large pool of Surrogates, good medical infrastructure with more than 2 lakh IVF clinics and legal freedom which does not restrict single, gay or unmarried couples from availing this form of ART, has taken India to spiraling heights in the field of International Surrogacy. These factors have pushed the Surrogacy beyond its legitimate place. The technology which has evolved to give the joy of parenthood to infertile couples has now become a business leaving behind the traditional values and ethics. In India, IVF treatment is available at an affordable cost which is nearly one-quarter of the cost in developed nations. Fertility clinics in countries like UK, Israel, Australia, France, Spain, and Denmark are finding it more and more difficult to fulfill the demand for donor eggs and hence turning to India. Furthermore, India is also home to some of the finest International IVF Centres and top-notch IVF Doctors.

Most of the major global IVF stakeholders have recognized the size of this opportunity, and some have already entered the market. For instance, a renowned UK IVF operator, Bourn Hall has established its two clinics in Gurgaon and Kochi. Despite this monumental growth and expansion, the IVF sector is not without a catch. There are glitches, pitfalls and dilemmas which can prove to be deleterious for its growth in the long run.

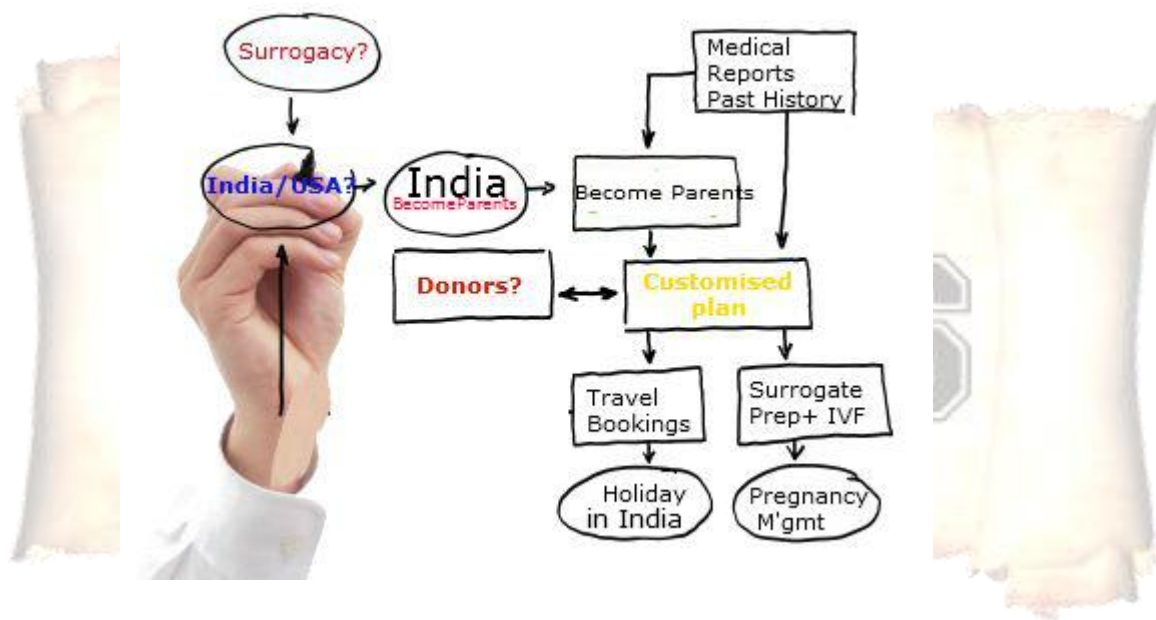
But while such circumstantial ambiguities persist, on the medical side, with internationally trained Indian doctors, state-of-the-art facilities, high end diagnostics, thoroughly screened Surrogates and qualified staff, the multi-million dollar Indian Surrogacy industry could well turn out to be the largest in the world. Young doctors studied from top medical colleges are providing their services in Surrogacy Clinics. The Indian Fertility Clinics are running without any regulation and are not even following the ICMR guidelines properly as there is no monitoring authority at National and State level. Because of lack of regulation the medical experts are supporting the intended parents in return of huge profits.

Hence, the world class Medical amenities and Hi- tech Medical Infrastructure with Expert Medical Practitioners and Services available in India are another very prominent factors augmenting fertility tourism in India.

SUPPORTIVE MACHINERY

With the globalization of trade in services, and the rise in Medical Tourism, India has emerged as an attractive destination for medical services, and more recently, reproductive services. As corporatized health care pushes Medical Tourism, the Indian state is also extending its support to this burgeoning sector. For the last few years, India's 'Fertility Industry' has experienced rapid expansion, with the country emerging as one of the leading Global Destinations for 'Fertility Tourism' or 'Reproductive Tourism' today.

In India, Assisted Reproductive Technologies (ARTs), including for Surrogacy, have achieved the proportions of an industry. Multiple Factors drive the demand for Surrogacy in India. Out of them one such factor is the Supportive Machinery for Surrogacy available in India. Commercial Surrogacy for the domestic and international markets is the new avenue and it is gaining ground in many urban and semi-urban areas in India today at an alarming rate. Many ART clinics in India have tied up with foreign hospitals and agencies to solicit 'clients' globally in a bid to expand their clientele. These are included in the Medical Tourism Services that are supported and incentivized under international agreements such as the **General Agreement on Trade in Services (GATS)** under the **World Trade Organization (WTO)**.



The industry functions through actors and collaborators at various levels, in an environment characterized by lack of binding standards or regulations, where these multiple stakeholders stand to profit enormously. ART clinics are not the only players in the business of promoting 'Reproductive Tourism' in India. Other players include a wide array of organizations catering to clientele both at the national and international levels. These range from ART consultants, medical tour operators, surrogacy agents, the hospitality industry, and tourism departments to other organizations specializing in the promotion of medical tourism.

The Indian Government promotes medical tourism by offering incentives such as low interest rates for loans provided for establishing hospitals and subsidized rates for buying drugs, importing equipment, and buying land for clinics. In addition, the General Agreement in Trade in Services (GATS) includes trade in medical services, thus enabling private hospitals treating foreign patients to receive financial incentives; these incentives include the ability to raise capital at low interest rates and the eligibility for importing medical equipment at low rates of duty.

As **Qadeer and Reddy** assert, Medical tourism is an industry that thrives on cheap air fares, Internet and communication channels in developing countries, and hi-tech super-specialty medical services for people who can afford it, whether foreign or national medical tourists. It also effectively deploys and markets Indian exotica, and packages health care along with other traditional therapies and treatment methods. To create demand, ART providers argue that with infertility being 'Rampant and rising steadily' in today's world, ARTs have become the 'need of the hour'. They cite higher rates of infections and ensuing complications, particularly in the absence of adequate Gynaecological and Obstetric services, as factors that contribute to the high levels of infertility in India. Providers thus claim that they are merely responding to the demand of women 'desperate' to become mothers. There is an increasing medicalization and pathologization of the condition of infertility, with the industry pushing for early medical intervention.

The medical practice is motivated most by the need to keep up the 'Success Rate' and to ensure the satisfaction of the Commissioning Parents, wherein the rights of the Surrogates do not feature as a concern. Various studies revealed that several decisions taken in the course of the treatment" such as those of opting for IVF in all cases, transferring multiple embryos, performing foetal reduction, deciding on the time of delivery and preference for caesarean sections, denying Surrogates to breast feed, are motivated by the concern for ensuring conception and relinquishment on the terms of the Commissioning Parents. The fact that these decisions translate often into unnecessary invasive procedures, can result in lasting effects on the body has no bearing. Of equal significance is the fact that while such decisions are supported by the Commissioning Parents' intent as well as payments for the "treatment", Surrogates may find themselves left to their own selves and resources when it comes to facing and dealing with health consequences post-pregnancy.

Privileging the financial interests over considerations of Surrogates' health, while evading any scrutiny by grounding all decisions in being "Medically indicated", poses a great challenge to ethics of medical practice, where "treatment" for one party, infertile couples can come at the expense of health and participation of the Surrogate, who lacks the privileged status of the client. The process lacks any transparency and the use of technology, and the rationale for it, is seen to take into account the wishes of the Commissioning Parents. Such skewed priorities and decisions in provisioning healthcare are not surprising when the channel is that of profit-run, private enterprises that are more concerned with the satisfaction of their 'Consumers' and stand completely unaccountable.

The Commercial Surrogacy arrangement is located in health care settings characterized largely by private profit-oriented centres and hospitals offering services for infertility, including Surrogacy. In this scenario, the Commissioning Parents have the power to set the terms of the Surrogacy arrangement; their position as 'Paying Customers' for the services accessed is accepted as legitimate and thus privileged. This creates a perception of the Surrogate as merely an appendage to the Commissioning Parents. This is further amplified by the class differences that characterize the arrangements, with Surrogates being able to enter the spaces of these facilities by virtue of being Surrogates, spaces that are otherwise inaccessible to and unaffordable for them. The health care extended to them is conditional on their role as Surrogates and on the health of the children to be born through Surrogacy. In such setups, the administration and providers are left completely unsupervised and unaccountable for situations when decisions are taken at the expense of the health of the Surrogate. The inferior status of Surrogates in the Surrogacy arrangement is evident from the process of information transaction, which is largely under the control of Commissioning Parents, Hospitals, and agents. Access to, and flow of, information and participation in the decision-making process are predicated on the hierarchies of knowledge, expertise and class that structure the Surrogacy arrangement.

The contract and the process of 'Counseling' are tools designed to serve the interests of the Commissioning parents, the Hospitals and the Surrogacy industry. In current practice, the contract does not embody the interests and conditions of the arrangements and are not set by all 'parties' equally. It is merely an affidavit signed by the Surrogate agreeing to hand over the child after birth and to relinquish all rights

over the child. Nor are all the 'parties' obligated equally through this contract, resulting in an extremely biased contractual agreement. **'COUNSELING'**, too, is practiced as an informal interaction between Surrogates and Doctors/Agents. It is aimed at building a particular perspective among Surrogates that is designed to 'Convince' them initially of the benevolence of becoming Surrogates, and thereafter of the need to relinquish the child. The practice is also seen to reflect compliance with, and the strengthening of, the prevailing social hierarchies by catering to the demand for specific oocytes, to the demand for specific kinds of women as Surrogates based on caste, religion, or class identity, and to the demand for practices of selecting embryos on the basis of sex or against disability. In nutshell, in India the Surrogacy industry and especially the infertile couples are supported by numerous actors such as Surrogacy Clinics, Surrogacy Hostels, Agents, Surrogacy Centers, top class Medical Practitioners, various Hospitals, Legal Practitioners, Medical Tour Operators, Indian Tourism Department etc. This is again ***one of the major reason of the growing Surrogacy industry in India as it is very easy and convenient for infertile couples to come down to India and have their own Genetic Child with the help of the available Support System.***

CONCLUSION

In India the concept of Surrogacy was ushered two decades ago. At the outset it marked its existence only in metros like Delhi, Bombay etc. But with the march of time it has now reached to small towns like Badwani, Ujjain etc. And this displays the change in people's mindset, **a move from Conservative to Progressive outlook**. In our country where people considered marriage a sacred sacrament and child the result of marriage, has now been changing to a progressive outlook where a third party is involved in reproducing a child.

An exponential growth in the industry is evident from the comparative figures over the years that estimate it to be an industry worth more than USD 400 million.¹⁹ According to the National Commission for Women (NCW), there are about 3,000 clinics across India offering Surrogacy services to couples from North America, Australia, Europe, and the other continents,²⁰ although other estimates place the number at 200,000 clinics across the country.²¹ These figures reflect the status of India as the most favored destination for Commercial Surrogacy.

In the Indian context, the following factors have created a conducive environment for the expansion of the industry:

- ❖ **Lack of regulation;**
- ❖ **Comparatively lower costs in relation to many developed countries for instance, Canada, the United Kingdom (UK), and the United States of America (USA/US);**
- ❖ **Shorter waiting time;**
- ❖ **The possibility of close monitoring of Surrogates by Commissioning Parents;**
- ❖ **Availability of a large pool of women willing to be Surrogates, &**
- ❖ **Infrastructure and medical expertise comparable to international standards.**

Thus, Surrogate Motherhood has come a long way in the history of Surrogacy. From rarely spoken of Traditional Surrogacy's of centuries past, to family members acting as Surrogate carriers and Commercial Surrogacy of today, the road has been long, and many miracles and hardships have been faced along the way. It will be interesting to see what will happen to the history of Surrogacy in the next 20, 50 or 100 years.

ENDNOTES

1 Assisted Reproductive Technologies (ARTs) are a group of technologies that assist conception and pregnancy. These technologies are designed to increase the number of eggs and/or sperm, or to fertilize them, resulting in the improved 'probability' of conception/pregnancy that is not otherwise possible. The technologies used for assisting reproduction range from simple or 'low-tech' methods such as intrauterine insemination (IUI) to 'high-tech' methods such as in vitro fertilization (IVF) in all its variations. Although surrogacy is an arrangement, it has been included in ARTs.

2 Warner, J., *Outsourced Wombs*, New York Times, 3 Jan., (2008). and Kohli. N., *Moms Market*, *Hindustan Times*, 3 Jan., (2011)

3 [http://www.mightylaws.in/outsourcing-motherhood may 2012.htm](http://www.mightylaws.in/outsourcing-motherhood%20may%202012.htm)

4 Surrogate mothers: Outsourcing pregnancy in India' article by Joseph Gothia, 26th June 2008, link: [http://india.merineews.com/cat_Full.jsp?articleID= 136421](http://india.merineews.com/cat_Full.jsp?articleID=136421)

- 5 <http://indiatogether.org/what-surrogate-parenting-entails-in-india-laws>
- 6 Kannan, S., *Regulators Eye India's Surrogacy Sector*, 2009, BBC World News, 18 March.
- 7 Anil Malhotra & Ranjit Malhotra, All aboard for the fertility express, *Commonwealth Law Bulletin*, 38:1, 31-41, (2012) DOI: 10.1080/03050718.2012.646733 <http://dx.doi.org/10.1080/03050718.2012.646733>
- 8 http://www.delhi-ivf.com/india_surrogacy.html
- 9 Supra note 38, Chapter III, at 102
- 10 <http://lawcommissionofindia.nic.in/reports/report228.pdf>
- 11 <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2812%2961933-3/fulltext>
- 12 Shuriah Niazi, *Surrogacy Boom*, October 14, 2007, by arrangement with WFS, Source: <http://www.boloji.com/wfs6/wfs1027.htm>
- 13 Elets News Network (ENN), *India's baby making business: The Growth Story*, August 2014, available at <http://ehealth.eletsonline.com/2014/08/indias-baby-making-business-growth-story/>
- 14 Anil Malhotra & Ranjit Malhotra, All aboard for the fertility express, *Commonwealth Law Bulletin*, 38:1, 31-41, (2012) DOI: 10.1080/03050718.2012.646733 <http://dx.doi.org/10.1080/03050718.2012.646733>
- 15 <http://nitawriter.wordpress.com>
- 16 B. S. Perappadan, *Clamour grows for stringent regulation of surrogacy*, THE HINDU, (New Delhi edn., August 25, 2014) available at <http://www.thehindu.com/news/cities/Delhi/clamour-grows-for-stringent-regulation-of-surrogacy/article6348956.ece>
- 17 Supra note 11
- 18 Krishnan V. India's draft surrogacy bill bars homosexuals, live-in couples. <http://www.livemint.com/Politics/ZsS2zs7KvqHlk4FCguW0EN/Draft-surrogacy-Bill-bars-homosexuals-livein-couples.html> (Last accessed August 26, 2013)
- 19 Warner, J., *Outsourced Wombs*, NEW YORK TIMES, 3 Jan, 2008 & Kohli. N., *Moms Market*, HINDUSTAN TIMES, 3 Jan 2011
- 20 Kannan, S., *Regulators Eye India's Surrogacy Sector*, BBC WORLD NEWS, 18 Mar, 2009
- 21 Malhotra, A. (2010, July 25). More questions than answers over rent-a-womb market. THE HINDU. Retrieved May 10, 2011, from <http://www.hindu.com/op/2010/07/25/stories/2010072553401600.htm>