

REPRODUCTIVE TOURISM – INDIAN PERSPECTIVE

By

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Introduction

Humans, like all other creatures, have urges which lead to reproduction. The desire to procreate is a very fundamental attribute of the human race. Sadly many are denied the joy of parenthood due to several reasons like biological, medical or otherwise.

Infertility, though not life threatening causes intense mental agony and trauma that can only be best described by infertile couples themselves¹. In these cases the new modern science advanced technology called Assisted Reproductive Technology came as savior or blessing to infertile to have their biological or own child. This newer technology paved the way for reproductive truism.

The Assisted reproductive technology

If coupled do not become pregnant after treatment with medical and surgical techniques, then may choose to undergo more complex procedures, called “Assisted Reproductive Technology” (ART). This ART technology commonly is known as ‘test tube baby technology’². Though ART procedures are invasive, expensive and even they have side

effects many infertile couples are choosing it as best chance of having their biological child then to prefer adoption. In the late 1970s, these treatments became commercially available in industrialized countries for the first time. Soon the demand for ARTs started to rise.

Assisted Reproductive Technology (ART) has been defined under the ART (regulation) Bill (in India) as “assisted reproductive technology”, with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive tract of a woman³.

Reproductive tourism

Because of various reasons now-a-day’s people are used to travel other countries or in the same country other than their residence place, to have two party (within spouses relation) or third party (for donor egg or sperm or for both donor egg and sperm or to take aid of surrogacy) Assisted reproductive treatment, this phenomena named by scholars as reproductive tourism.

“reproductive tourism” named by different scholars differently so it is also has number of synonyms like “fertility tourism”,⁴ “procreative tourism”,⁵ “maternity tourism”,⁶

1. As stated in National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 framed by Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS), Chapter 1- Introduction, Brief history of ART and Requirement of ART Clinics first paragraph first lines.

2. “Surrogacy in India and Its legal and ethical implications”, by *Shaista Amin*, Research Scholar, Dept. of Law, University of Kashmir, Srinagar, India and *ASMA REHMAN*, Lecturer, Kashmir Law College, Nowshera, Srinagar, India. Published in Journal of International Academic Research for Multidisciplinary, Impact Factor 1.393, ISSN: 2320-5083, Volume 2, Issue 4, May 2014.

3. Section 2(c), The Assisted Reproductive Technologies (Regulation) Bill, 2014

4. Matorras R (December 2005). “Reproductive exile versus reproductive tourism”. *Hum. Reprod.* 20 (12): 3571; author reply 3571- 2. doi: 10.1093/humrep/dei223.PMID 16308333.

5. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3854005/>

6. <http://www.thefeministwire.com/2011/04/reproductive-tourism/>

“birth tourism” *etc.* It may be regarded as a form of *medical tourism*⁷.

“Procreative tourism”⁸ was first named by bioethicists Knoppers B.M.⁹ and Lebris in 1991 to describe the practice of citizens exercising their personal reproductive choice in less restrictive states¹⁰.

In simple *Guido Penning*, a professor of ethics and bioethics at Ghent University (Belgium) and director of the Bioethics Institute Ghent (BIG) had defined “Reproductive tourism is the travelling by candidate service recipients from one institution, jurisdiction, or country where treatment is not available to another institution, jurisdiction, or country where they can obtain the kind of medically assisted reproduction they desire”.¹¹

Flexibility in tourism because of globalization paved the way for reproductive tourism. But reasons for reproductive tourism by people are different from nation to nation, individual to individual. Information on the extent of ART seeker worldwide is

scarce indeed. This is due to the absence of robust national and international reporting system regarding use of ART by whom and for what purpose. But some of the common reasons for reproductive tourism are : The treatments aren't legally available in their home country, or availability is extremely limited, Some types of patients aren't eligible for treatments by law of their home country, including gays, lesbians, single people, and members of certain religions, Some countries have waiting lists that are too long to make childbearing a reality, The cost of the treatment is significantly lower in another country, even after the travel expenses are factored in, The donor options are greater in another country, or a specific country can provide a desired genealogy, Certain countries have better options for control over fertilization results. For example, the United States permits *Pre-implantation Genetic Diagnosis* (PGD) of *in vitro fertilization* embryos, allowing couples to pick and choose which embryos will be implanted in the uterus based on genetic factors, including chromosomal deficiencies and sex. PGD used for sex selection is illegal in some countries that offer in vitro fertilization¹². All these are only illustrative but not exhaust.

From above information in general these medical or reproductive tourists can be divided into three. One is Quality-sensitive, second one is Price-sensitive and most importantly lost but not least one is to avoid legal restrictions of one's own country.

Indian legal perspective on reproductive tourism

It is fact that origin of ART has been providing hope for infertile couple to have their own child. Indeed, the international fertility trade is now big business, for which India is also not an exception. Moreover it has emerged as a favourable destination for

7. “fertility tourism”. available at: http://en.wikipedia.org/wiki/Fertility_tourism/
8. Knoppers, BM, Lebris, S. Recent advances in medically assisted conception. *American Journal of Law and Medicine*. 1991; 17:329-361. And available at [http://www.rbmjournal.com/article/S1472-6483\(10\)62028-7/references](http://www.rbmjournal.com/article/S1472-6483(10)62028-7/references).
9. *Bartha Maria Knopper*, Ph.D., Ad.E., O.C., Q.c is famed bioethicist, her role in creating frame works for the advancement of stem cell research is critical at a time of intense debate about the ethics of medical science. As both bioethicist and lawyer, she is past chair of the Ethics Committee of the Human Genome Organization (HUGO). She is also occupied chair of the Ethics working Party of the International Stem Cell Forum, as will as Director of the Centre of Genomics and Policy at McGill University in Montreal and Canada Research in Law and Medicine.
10. “Reproductive tourism as moral pluralism in motion”. *G Pennings*, Department of Philosophy, Free University Brussels, Pleinlaan2, lokaal 5C 442, B-1050 Brussels, Belgium; gpennings@vub.ac.be. and available at : <http://jme.com/content/28/6/337.full>
11. “Reproductive tourism”, available at : <http://ncbio.org/nordisk/arkiv/macklin-ppt.pdf>

12. This is the main reason for Indians to be reproductive tourist to US according to legal scholars.

ART seekers. In fact evolved into a billion rupee business annually in India; the Law Commission in its 228th report described it as “a gold port”.¹³

Reproductive tourism has emerged as a vast subset of multibillion dollar industry of medical tourism India, which is gradually earning a comfortable space in the health care sector. Most important driver factor is economical/financial issue that is ‘first world treatments’ at ‘third world pricing’¹⁴. It means substantially lower costs than in industrialized countries, Advanced privatized tertiary healthcare, English-speaking providers, An apparently ample supply of Indian women interested in serving as surrogates, Expertise doctors at best cost, A business climate that encourages the outsourcing of Indian labour, World-famous tourist destinations, Possibility of closely monitoring surrogates and most importantly the absence of binding industry regulations provides powerful incentives to foreign consumers of fertility services.

These are some important reasons for fertility tourists¹⁵ come to India in search of surrogates from a wide range of countries, including Britain, France, US, Canada, Korea, Singapore, Japan, Australia, the middle East, Nigeria, Kenya, Nepal and Israel *etc*.¹⁶

In India since 2002 ART has been recognized as infertility treatment under the

Government of India Ministry of Tourism Policy¹⁷. In the year 2005 Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) by the order of the Ministry of Health and Family Welfare, Government of India, have come out with ‘National Guidelines for accreditation, supervision and regulation of ART clinics in India’ for the first time¹⁸. In fact it is true that even today ICMR 2005 guidelines regulating ART clinics in India. But these are only non-statutory provisions, which are neither justiciable nor enforceable in a Court of Law. Thereafter, the draft Assisted Reproductive Technology (Regulation) Bill 2008 (ART Bill 2008), which was replaced by ART Bill 2010 and the ART Bill 2013 and very recently by the ART Bill 2014 which was circulated or placed in the public domain for discussion, comment or opinion. The struggle for proper law to regulate ART services are not fulfilled upto now.

Even 18th Law Commission of India (in its 228th report) supported ART services for local as well as to foreigners in India and they held that Infertility is seen as a major problem as kinship and family ties are dependent on pregnancy. Herein surrogacy comes as a supreme savior¹⁹. And it described ART business (reproductive tourism) as “a gold pot”²⁰.

Though by journalists, bioethicists, feminists, scholars, and others this concept has been addressed in print as well as electronic media, there is no accurate statistics how many people are traveling for reproductive care within India and from

13. 18th Law Commission of India (report No.228), August, 2009.

14. Reproductive Tourism in India : Ethical and Legal Concerns. Panel held at European conferences on Modern South Asian studies, University Bonn, 29 July 2010. Available at : [http://www.asia-europe.uni-heidelberg.de/fileadmin/Documents/News/Programme Transnational Surrogacy in India Bonn.pdf](http://www.asia-europe.uni-heidelberg.de/fileadmin/Documents/News/Programme%20Transnational%20Surrogacy%20in%20India%20Bonn.pdf).

15. But now surrogacy arrangements were prohibited to foreigners.

16. “Reproductive Tourism in India: Issues and Challenges”. *Sarojini N*, Sama Resource Group for Women and Health, India.

Available at: [http://www.med.uio.no/helsam/english/research/global-governance-health/news/sarojini-reproductivetourism-2012\(1\).pdf](http://www.med.uio.no/helsam/english/research/global-governance-health/news/sarojini-reproductivetourism-2012(1).pdf)

17. Available at: <http://lawzmag.com/2015/8/28/commisioning-surrogacy-in-india/>

18. Available at: http://icmr.nic.in/art/art_clinics.htm

19. 18th Law Commission of India, August 2009 (report No.228). (lost lines of 3rd paragraph from attached letter to report to the then Union Minister of Law and Justice of India, Dr. *M. Verrappa Moily* by law commission)

20. 18th Law Commission of India (report No.228) August, 2009.

India. Some commentators view reproductive tourism writ large as unethical, while others see it as an extension of historic colonialism. For them, renting a womb is seen as the worst kind of human exploitation and an especially pernicious way in which women's bodies are exchanged for another's profit. Some say it will make good money to doctors and agents and in case of surrogacy it will not simply give up but carry on. Most surrogate mothers are semi-literate/illiterate surrogates rely on agents or clinics to explain the nature of the written contracts they sign, and few surrogates ever get a copy of the contract. Some people also arguing these as clinical trials or experiments opposed to nature.

But some it is quite good, for example *Winfrey*²¹, in her TV shows held that surrogacy is practice as a glowing example of "women helping women" across borders, and some says ART procedures are 'win to win process' that means those who needs money (through donation of egg or sperm or providing surrogate services) they can get and intending parents may blessed by their own child.

Even the Supreme Court of India in *Baby Manji Yamada v. Union of India*²² case and the Gujarat High Court, as well as the apex Court of India in *Jan Balaz v. Union of India*²³, up held the ART services but directed the Indian Government to enact proper law for better understanding of the issue and to avoid misuse of this advance technology.

Taking into the different groups voice against ART for some people like gay, lesbian and to single foreign man or to woman, the Ministry of Home Affairs (MHA), according to the guidelines of July 9, 2012 restricted surrogacy to foreign nationals; i.e., a man and a woman married for atleast

two years would be required to take a medical visa for surrogacy in India. Hence, foreign single parent, same sex couples barren for surrogacy arrangements in India.

After this *Jaysree Wad*, an advocate on record in Supreme Court since 1976 filed a public interest litigation petition²⁴ by impleading herself in the *Jan Balaz* case²⁵ (German Couple's Case) and she requested the Court to ban commercial surrogacy.

A Bench of Justices *Ranjan Gogoi* and *N.V. Ramana* issued notices to ministries of home affairs, law and justice, health and family welfare, commerce and external affairs as well as the Medical Council of India (MCI) and the Indian Council of Medical Research (ICMR) and asked them to respond to the PIL filed by *Jayashree Wad*.

The Government of India, in a hurried move, released information to the Press that it looks for disallowing commercial surrogacy for foreign nationals. Further, in view of objections by the Health Ministry, the Government said the Commerce Ministry has restricted the import of embryo for research purposes; it cannot be imported for commercial surrogacy any further. Moreover ICMR sent out the notification to all ART Clinics on 27th October 2015 requesting them not to "entertain" foreign nationals for surrogacy arrangements in India²⁶.

Against to the directions of Government many PIL petitions filed by surrogates, ART clinics in Supreme Court. In means time High Court like Mumbai High Court on 3.11.2015 has temporarily lifted a Government

21. An American media proprietor, talk show host, actress, producer, and philanthropist.

22. JT 2008 (11) SC 150

23. JT 2008 (11) SC 150

24. *Jayashree Wad v. Union of India*, WP (C) No.95 of 2015 yr

Available at: <http://www.familiesthrusurrogacy.com/wp-content/uploads/2016/05/Indian-Surrogacy-Bill-Background-latest-developments.pdf>

25. *Jan Balaz v. Anand Municipality and 6 others* on 17 June, 2008 (AIR 2010 Guj. 21)

26. Notice Number : 5/10/8/2008-RHN, Dated : 27/10/2015. Available at : <http://instarorg.blogspot.in/>

prohibition on foreign couples' using Indian surrogate mothers, who are in process at present but restrictions apply for new foreign aspirators.

So from plain reading of this notice one can understand that Indian Government prohibited foreign couple from taking surrogate services but not for all ART treatments. In case of Indian ART seekers Government maintaining status quo at present. Moreover Central Government and some State Governments providing maternity leave for both intending as well as surrogate mother.

Conclusion

It is fact that people are seeking ART services without boundary barriers. Which many are calling as reproductive tourism or reproductive exile but they are not reflect patients' reality, in particular the stress an exertion involved, Infertile couple emotion to avoid there social stigma as infertile and to have child of their own. In fact these terms made them as offenders. As said by

law commission in its 228th report infertility is a cause for several problems for couple like in India²⁷. Just prohibiting these services on vague moral grounds without a proper assessment of social ends and purposes would be irrational²⁸. Prohibiting foreign couples from surrogacy arrangements may violation of equal rights for all persons (persons includes citizens as well as non-citizens) under Article 14 and denying their reproductive choice on vague grounds without proper law may violation of Article 21 of the Indian Constitution. As said by *Jeremy Bentham*, law should be an instrument for securing the "greatest good of the greatest number", in each and every aspect there will be positive as well as negative issues. So it is better to provide better law to regulate ART services including surrogacy to all, rather than simply denying. Every desired and deserved couple has to enjoy the sweetness of parenthood without neglecting best interest of the child for better future.

THE POSITION OF INDIAN LAW ON THE ASSISTED REPRODUCTIVE TECHNOLOGY

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The desire to procreate is a very fundamental attribute of the human race. Sadly many are denied the joy of parenthood due to several reasons like biological, medical or otherwise. Infertility though not life threatening causes intense mental agony and

trauma that can only be best described by infertile couples themselves¹.

For families facing infertility, decisions about family building become complex. Infertility has traditionally been an area of medicine in which physicians had limited means to help their patients. One of the ways to have children through medical intervention is Assisted Reproductive

27. See Law Commission of India 228th report, Para 1.2. at Page 9.

Available at : <http://lawcommissionofindia.nic.in/reports/report228.pdf>

28. See Law Commission of India 228th report, cover letter Para 4.

Available at : <http://lawcommissionofindia.nic.in/reports/report228.pdf>

1. As stated in National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 framed by Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS), Chapter-1- Introduction, Brief history of ART and Requirement of ART Clinics first paragraph first lines.