

MEDICOLEGAL ASPECTS OF SURROGACY IN INDIA

Deshmukh Renuka Y¹ Maske Pallavi G² Upadhyay Rajesh S³

ABSTRACT:

Surrogacy is an artificial reproductive method which is becoming more common in India due to increase in urge of parenthood of infertile couples. India is also being known for commercial country for surrogacy since 2002. It mainly includes legal, social and ethical aspects of pregnancy. For its various socio-economic reasons, surrogacy has become a topic of deep interest amongst the government of different nations, medico legal luminaries as well as public at large. Thus, this article aims to give adequate knowledge about surrogacy and its laws, rules and regulation.

Key Words: Surrogacy, laws, regulations, ART, ICMR guidelines.

INTRODUCTION:

The term 'surrogacy' means 'to substitute', which is derived from Latin word 'subrogare'. Surrogacy is an arrangement where a woman agrees to become pregnant and deliver for a contracted party. She may be the child's genetic mother the more traditional form of surrogacy or she may act as a carrier, carry a pregnancy to delivery after have been implanted with an embryo.

However, Surrogacy in India is unregulated. The Indian Council of Medical Research has set national guidelines to regulate surrogacy. Surrogacy being a sensitive issue, the health practitioner must possess adequate knowledge of medico – legal aspects of surrogacy. This paper aims at providing adequate knowledge of different laws and ethical aspects related to surrogacy, so that the possible litigations can be avoided by health practitioners.

Now a days, the number of infertile couples has increased due to problems such as - Untreated diseases, Poor health care, Mal-nutrition, More use of intra-uterine devices, Frequently seen pelvic inflammatory diseases, postponing child bearing for career prospects leads to less fertile because of age related biological factors etc^[1].

Therefore urge of parenthood leads them to seek alternative solutions including Artificial Reproductive Technologies (ART), in-vitro fertilization & surrogacy, whereas surrogacy is becoming more common in India and factors influencing for it are as follows

A. Medical tourism (Reproductive tourism):

India is emerging as a popular destination for surrogacy arrangement for many rich foreigners & reason for foreigners coming to India are chief medical facilities,

advanced reproductive technologies known, couples with poor socio-economic conditions^[1].

B. Medical Market profit

C. Medical profession to exploit the economical needy.

As there are some legal issues related to surrogacy, it is necessary to study the laws and regulations related to the surrogacy.

DEFINITION OF SURROGACY:

According to the Artificial Reproductive Technique (ART) Guidelines,

Surrogacy is an "arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a „surrogate mother“ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents”^[2].

In common language, a surrogate mother is the person who is hired to bear a child, which she hands over to

¹PG Scholar, ²Associate professor, ³Professor and HOD. Department of Agadtantra Avum Vidhi Vaidyaka, C.S.M.S.S. Ayurved Mahavidyalaya, Aurangabad, Maharashtra. Corresponding author email address: drrenuka2310@gmail.com Access this article online: www.jahm.in Published by Atreya Ayurveda Publications under the license CC-by-NC. Received on: 11/04/15, Revised on: 17/04/15, Accepted on: 07/05/15

her employer at birth.

Medically “A surrogate mother is one who by contract agrees to accept and bear pregnancy either by artificial insemination or by the way of implantation of in-vitro fertilized embryo (blastocyst) till delivery, on behalf of another women who is incapable of carrying pregnancy; and after giving birth, is promisingly bound to handover the baby to its biological father and his wife. As per contract the surrogate mother cannot claim the child afterwards. This knows as surrogate pregnancy”^[3].

TYPES OF SURROGACY^[4]:

Surrogacy is classified into 2 types:

1. **Traditional surrogacy:** It is done via artificial insemination where with the surrogate using her own egg and another man’s sperm.
2. **Gestational surrogacy:** It is done via in vitro fertilization where fertilized eggs from another woman are implanted into the surrogates’ uterus.

HISTORY OF SURROGACY IN INDIA:

In India we found descriptions related to surrogacy in epics like Mahabharata wherein Rohini bore a child for Vasudev and Devaki^[5]. Maharaja Kansa, the king of Mathura killed all the six issues of his sister Devaki as one of her sons was to kill him according to some forecast. So Goddess Yogamaya had made some miracle for her seventh issue, while Devaki was pregnant. Yogamaya extracted the foetus from the uterus of Devaki while she was eight months pregnant and placed it inside the uterus of Rohini^[6].

Surrogacy came known to people when the world’s second and India’s first IVF baby was born in OCT 3, 1978 in Calcutta but it created history by being the first country to legalise commercial surrogacy in 2002^[7].

LEGAL PROBLEMS OF SURROGACY^[8]:

The legal problems related to surrogacy commonly seen are as follows.

- Questions like paternity, maternity, biological paternity, guardianship, inheritance of property.
- What happens if the surrogate mother changes her mind and refuses to hand over the baby or blackmails for custody?
- Who will take the responsibility of the child if the commissioning parents refuse to take the child?
- What would happen if the child is born disabled?
- What would happen if the sex of the child is not to the liking of the commissioning parents?
- Whose name will appear on the birth certificate?

- How will the commissioning parents claim parenthood?

LAWS AND REGULATIONS:

1. In India:

To address such issues and to regulate surrogacy arrangements, the Government of India has taken certain steps

- ◆ In 2006, The Indian Council of Medical Research (ICMR), Part of the Ministry of Health & Family Welfare, published non binding national guidelines for Accreditation, Supervision & Regulation of ART clinics in India.
- ◆ A draft ART Regulation Bill & Rules has been developed in 2008 & revised 2010.

ICMR Guidelines^[9]:

In 2006, the Indian Council of Medical Research (ICMR) published guidelines for accreditation, supervision and regulation of ART clinics in India. Below are the main points from these guidelines:

- DNA tests are compulsory to determine that the intended parents are indeed the genetic parents. If this is not the case the child must be adopted instead.
- Surrogacy should normally only be an option for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term.
- The payments received by the surrogate mothers should be documented and cover all genuine expenses associated with the pregnancy.
- The responsibility of finding a surrogate mother should rest with the couple, or a semen bank, not the clinic.
- A surrogate mother should not be over 45 years of age. The ART clinic should ensure possible surrogate woman satisfies all the testable criteria to go through a successful full-term pregnancy.
- No woman may act as a surrogate more than three times in her lifetime.
- The surrogate mother must declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank.
- A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple.

The draft ART (Assisted Reproductive Technology) Bill [2].

- It regulates the practice of surrogacy aiming to avoid some of the pitfalls of the ICMR guidelines discussed above.
- ART bill particularly concerning the surrogacy arrangement, rights of the surrogate mother, the child, etc.
- ART Regulation Bill, 20106 lays down few guidelines which are discussed as follows:

- A. Rights and duties in relation to surrogacy
- B. Determination of status of the child
- C. Right of the child to information about donors or surrogates

A. Rights and duties in relation to surrogacy:

1. Both the couple seeking surrogacy through the use of ART, the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable.
2. All expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.
3. A surrogate mother shall relinquish all parental rights over the child.
4. No woman less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act, provided that no woman shall act as a surrogate for more than five successful live births in her life, including her own children.
5. Any woman seeking as a surrogate mother shall be medically tested for sexually transmitted disease or all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months.
6. A surrogate mother shall register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate mother, and provide the name or names and addresses of the person or persons, as the case may be, for whom she is acting as a surrogate.
7. The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of

individual / individuals who commissioned the surrogacy, as parents.

8. The person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act.
9. All information about the surrogate shall be kept confidential, except by an order of a court of competent jurisdiction.
10. If surrogate mother is married, the consent of her spouse shall be required before she may act as such surrogate.
11. A surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them.
12. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple/ individual. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate
13. A foreigner seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy.
14. A couple or an individual shall not have the service of more than one surrogate at any given time.
15. A couple shall not have simultaneous transfer of embryos in the woman and in a surrogate.
16. Only Indian citizens shall have a right to act as a surrogate, and no ART bank/ART clinics shall receive or send an Indian for surrogacy abroad.

B. Determination of status of the child:

1. A child born to a married or unmarried couple through the use of ART shall have identical legal rights as a legitimate child born through sexual intercourse.
2. In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man.
3. In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the ART treatment but before the child is born, the child shall be the legitimate child of the couple.

4. A child born to a woman artificially inseminated with the stored sperm of her dead husband shall be considered as the legitimate child of the couple
5. If a donated ovum contains ooplasm from another donor ovum, both the donors shall be medically tested for sexually transmitted disease or all other communicable diseases which may endanger the health of the child, and the donor of both the ooplasm and the ovum shall relinquish all parental rights in relation to such child.
6. The birth certificate of a child born through the use of ART shall contain the name or names of the parent or parents, as the case may be, who sought such use.
7. If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.

C. Right of the child to information about donors or surrogates:

1. A child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother.
2. The legal guardian of a minor child may apply for any information, excluding personal identification, about his / her genetic parent or parents or surrogate mother when required, and to the extent necessary, for the welfare of the child.
3. Personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother, provided that such personal identification will not be released without the prior informed consent of the genetic parent or parents or surrogate mother.

2) Legal parameters in other countries: ^[10,11,12]

Sr. No.	Countries	Types of surrogacy – Permitted/Banned	Regulation and laws
1.	Germany	banned	Under German civil code & German Law
2.	France	banned	Under Article 17/6 of civil code
3.	Switzerland	banned	By Federal acton Medically Assisted Reproduction

4.	Italy	banned	Italian civil code 1942, Act 1325
5.	United Kingdom	Commercial surrogacy banned & Altruistic surrogacy legally permitted	Under strict Rules by surrogacy arrangement act
6	Russia	Legally permitted	By family code of Russia(art 51-52)& law on act on civil states (art 16)
7.	Ukraine	Legally permitted	By clause 123of the family code of Ukraine and Order of ministry of health
8.	Australia	Altruistic surrogacy permitted	Under parentage act 2004 & art act 2008
9.	New Zealand	Altruistic surrogacy permitted	-
10.	Singapore	Banned	-
11.	Japan	Banned	By Science Council of Japan, 2008.
12.	China	Gestational Surrogacy banned	-

DISCUSSION:

Surrogacy is a form of reproduction that fulfils the dream of childless couples to have child. Therefore there is increased in demand of method in India in a commercial way like Medical tourism, Medical market profit, Medical profession to exploit the economical needy.

In many countries like Germany, France, Italy, etc. all forms of surrogacy are banned, because surrogacy agreements are against their public policy. While some countries like U.K., Australia, New Zealand allows only strictly regulated altruistic surrogacy is legally permitted & commercial surrogacy is banned. In Russia & Ukraine, surrogacy is legally permitted. While in India it is regulated by ART Bill & ICMR guidelines. Some countries demand for genetic relationship of child with at least one parent, whereas in India there is no such demand.

In India there is low cost for ART technology & also surrogacy payment, medical & hospital charges are less near about 1/4th to other countries, so commercial surrogacy is being increased in India.

As every coin has two sides, surrogacy also has positive & negative aspects. It is favourable for infertile couples to have a child and also help to improve lower economic status of surrogate mother. Unfavourably this may lead to violation of surrogacy agreement due to no legal enforcement or punishment available. It may also lead in increase in commercialization and marketing of women for their Reproductive capacity. It exploits the emotional and physical state of mother and there is no legal provision to safeguard the mother.

CONCLUSION:

Surrogacy is boon for childless couples. But nowadays there is increase in surrogacy in India for various purposes like commercialization, tourism, etc. So there is need to increase public awareness on various aspects of surrogacy. Advertisements of surrogacy through various media should be done to aware people that legislation & clear guidelines are available for involving parties. And to get people that surrogacy can provide an instance of happiness, fulfilment and satisfaction to infertile couple.

As well government should form regulatory committees at state levels for regulating whole surrogacy programme. Also it is necessary to examine and regulate medical fitness and medical attention should be given to surrogate mother till 3 months after delivery. There should be establishment of enforcement or punishment to avoid exploitation made by involving parties. As per my view, commercial surrogacy should be stopped or should be regulated under strict provisions made by law to ensure wellbeing of economically backward women participating in it.

REFERENCES:

1. Imran Qadeer; Social & ethical basis of legislation on surrogacy; Indian Journal of Medical Ethics; Vol. VI; No.1; Jan.- March 2009; page no. 28.
2. Available at http://www.icmr.nic.in/About_Us/Guidelines.html Accessed on 26 Feb. 2015.
3. R.N. Karmakar; Forensic Medicine & Toxicology; Ch. No. 9; Sex offences & associated aspects; Academic publishers; 2013; 507.
4. R.N. Karmakar; Forensic Medicine & Toxicology; Ch. No. 9; Sex offences & associated aspects; Academic publishers; 2013; 508.
5. Aruna Nigam; Surrogacy: An Indian perspective; Tropical Clinics of Obstetrics & Gynaecology; 7 Oct 2013.
6. Available at http://www.orissa.gov.in/2010/87_90.pdf Accessed on 2 March 2015.
7. Available at http://www.surrogacylawsindia.com/index_inner.php Accessed on 2 March 2015.
8. Compile Surrogacy Report by Centre for Social Research; Surrogate Motherhood – Ethical or Commercial; Ch. no. 1; 1.2 need of the study; page no. 8-9.
9. Compile Surrogacy Report by Centre for Social Research; Surrogate Motherhood – Ethical or Commercial; Ch. no. 2; 2.5.1 Jurisdiction in India; page no. 24.
10. The Ethical Case Against Surrogate Motherhood: What We Can Learn From the Law of Other European Countries - by the Iona Institute. Available at www.ionainstitute.ie. Accessed on 2 March 2015.
11. Compile Surrogacy Report by Centre for Social Research; Surrogate Motherhood – Ethical or Commercial; Ch. no. 2; 2.4 Legal issues; page no. 21-22.
12. Available at <http://www.familylaw.com.ua/index.php> Accessed on 3 March 2015.

Cite this article as: Deshmukh Renuka Y, Maske Pallavi G, Upadhyay Rajesh S. Medicolegal Aspects Of Surrogacy In India, *J of Ayurveda and Hol Med (JAHM)*.2015;3(2):25-29.

Source of support: Nil, Conflict of interest: None Declared.