

ICMR Guidelines and Surrogacy Boom in India: A critical Evaluation

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Abstract

The last two decades have been witness to a rapid increase in the number of techniques that assist reproduction and carrying a pregnancy to term. The advent of New Reproductive Technologies has evoked debates on politics of reproduction and bioethics. The legalization of commercial surrogacy in India in the year 2002 resulted in emergence of boom in medical tourism. Indian Council for Medical Research has established guidelines and hold commercial surrogacy legal in India. This has been a big boost to surrogacy in India.

The Indian Council of Medical Research has laid down guidelines to regulate surrogacy practices in India considering the fact that India has been seen as a major center by childless couples across the world to realize their dream into reality through a child born out of surrogacy. However it remains to be seen whether the guidelines as laid down by ICMR relating to Surrogacy are being practiced and implemented in Principle or not.

A close inspection of the ART Bill, 2008 which draws from the ICMR guidelines of 2005 which was propogated in regulating surrogacy and protecting the intended parents from unethical practices involved in the process exhibits it did not play any role in protecting the surrogates from the risks and the dangers of these reproductive technologies. The surrogates rights have not been taken care off in the bill. This paper urges to take up the issue of surrogacy in public dialogues for formulation of surrogacy policies in near future.

KEYWORDS: Surrogacy, ICMR, NRT's

Introduction:

The last two decades have been witness to a rapid increase in the number of techniques that assist reproduction and carrying a pregnancy to term. The advent of New Reproductive Technologies has evoked debates on politics of reproduction and bioethics. The legalization of commercial surrogacy in India in the year 2002 resulted in emergence of boom in medical tourism. Indian Council for Medical Research has established guidelines and hold commercial surrogacy legal in India. This has been a big boost to surrogacy in India.

Research and promotion of ARTs was undertaken in India as a govt. initiative, but it soon fed in to the programme, but the ART industry in India has continued to expand steadily ever since private health sector and has since than flourished as a private enterprise. The public sector eventually discontinued the conservatively at an ICMR publication published in 2005, "There are an estimated 350 IVF clinics in India today. There will be many more. The number of surrogacy case is believed to have doubled over the last few years.

Another implication of the growth of ARTs is that rise in membership of the Indian society for Assisted Reproduction, which was set up in 1997. The web site of the society lists more than members in 2007. In addition, there are "Infertility centres" in smaller towns and rural areas that work in co-ordination with referral ART centres located in tertiary institute in cities. (SAMA TEAM; 2007).

Surrogacy Destination - India

India is coming up as a preferred destination for surrogacy. It has become the "surrogacy capital" of the world as the facilities provided are of international standards and have world accreditation. As some providers say "it is like accessing first world treatment at third world price (SAMA; 2006).

Not only it's cheaper, quality-controlled, and relatively free of red tape..... The laws and ethical guidelines around surrogacy in India are not at present as stringent as they are in first world countries..... it sounds pretty easy too; One can book an online consult with the clinic to start the process, and Fed Ex takes care of delivering the necessary intergradient's (Boyagod Randy; 2010).

Infertility treatment by choosing surrogacy in India has greater success rate than any other infertility treatment. The hospital which is providing surrogacy in India at Madras, Gujarat and Kerala are well developed with advanced technologies which help to bring positive results. Risk factor in surrogacy is very less as compared to its benefits. Many gynaecologists in India are educated from U.S.A or U.K and have been in practice for last several years. (Khobragade prarabdha) Indian surrogates have been increasingly popular with infertile couple in industrialized nation. Indian clinics are at the same time becoming more competitive with latest technology and skilled doctors, not just in pricing, but in the hiring and retention of Indian females as surrogates. (Free Press Release.com)

The baby shoppers love India also because the doctors here, can converse with them in English and sooth their fears and clear their doubts (Moudgil Reema; 2008) The fact that there is no waiting period and one is taken care by highly qualified medical personnel, and even too old patients with complicated medical history being considered are added advantage (Dinesh; 2008)

Further, the implanting of embryos in to the womb of a surrogate mother is permitted as many as five times, compared to a For e.g., the current laws require the surrogate mother in India to sign away her rights to the baby as soon as she has delivered it. (Ghosh Jayanti; 2007) Also couples don't have to fear that Indian surrogates will refuse to give up children they bear

In India, most surrogates are from the middle and lower classes. As undertake surrogacy for some extra money, it is unlikely that they would stake a claim to the children they bear. (Watta Pronoti; 2010) thus five - star hospitals staffed with qualified doctors and nurses and the much less expensive system of privileged health facilities with a large number of available women of reproductive age, are potent combination effectively pushing for emergence of "reproductive tourism" business in India. It has become a billion dollar business and is fast growing industry. (Chetty Anjana). The fact that there is

no waiting time and one is taken care of by highly qualified medical personal who are fluent in English are added advantages.

Thus the heightened medicalization of reproduction at around one-third rate of western developed countries which cater to an understanding of politics of reproduction surrounding surrogacy in India. Surrogacy is fulfilling the desire of the foreign couples to have their biological couple at any cost especially when the women in desperate economic conditions are easily available to fulfill their cherished desire. Surrogacy tourism has grown steadily here as word gets around that babies can be incubated at a low price and without government red tape.

All the illegality surrounding surrogacy gets sideline by the media frenzy success stories which fail to take cognisance of the fact that there are innumerable failures of tedious IVF cycles and highly complicated and risky pregnancies before any success surrogate delivery. In the view of the medical and technologically invasive procedures and highly stratified context of ART there is a need for clear legal rights and responsibilities of various parties involved in the 'baby creating business'. (Reddy and Patel; 2012).

Many western countries have either ban surrogacy or have allowed it under strict regulations. Countries like German, Austria, France, Switzerland, Sweden, Norway, Italy and Bulgaria have completely prohibited all surrogacy agreements (1). Surrogacy agreements are against **public policy** in those countries. While those who oppose surrogacy want to put a ban on surrogacy, the supporters want it to get fully legalised.

ICMR Guidelines

In the view of the medical and technologically invasive procedures and highly stratified context of ART there is a need for clear legal rights and responsibilities of various parties involved in the 'baby creating business'. In this regard the ICMR guidelines have been critically evaluated by both social activists and feminist work on surrogacy and IVF. This aims at empirical research findings on ARTs and processes of surrogacy in India at present and discuss suggestion for the ART bill 2010 as it hopefully turns into an Act sooner than later.(Reddy and Patel;2012)

The Indian Council of Medical Research has laid down guidelines to regulate surrogacy practices in India considering the fact that India has been seen as a major center by childless couples across the world to realize their dream into reality through a child born out of surrogacy. However it remains to be seen whether the guidelines as laid down by ICMR relating to Surrogacy are being practiced and implemented in Principle or not.

A **critical evaluation** of these guidelines needs to be undertaken to understand the reality.

There are no guidelines for people other than married couples who want to bear children like gays, transsexuals, single mothers and divorcees. Unlike UK and Australia where laws have been clearly defined to regularize the practices, the Indian system is still open to lacuna's and loop holes which gives breed to unethical practices, besides unanswered questions in terms of legal status towards Inheritance, right to property and legitimacy amongst others.

1. **Communication** – Although there are clinics which release advertisements about surrogacy services to childless couples which serve as an attractive proposition, they do not clarify the technicalities involved once the child is born. In India as we do not have clear laid down norms for foreigners who become surrogate parents, in terms of taking back the child to their home country.
2. **Legitimacy** –The ICMR guidelines have not been re evaluated in terms of the norms of legitimacy, where a child born on account of wedlock to a couple is legitimate whereas a child born to a surrogate is not considered legitimate. Even the courts in India have not given any judgments nor has any amendment been made in the constitution as it held that the child was conceived out of wedlock and is therefore illegitimate.
3. **Medical process involved in surrogacy** - The guidelines clearly states that proper counselling needs to be done of the intended couple and the surrogate about the pro's and cons relating to anathematic procedures like laproscopy etc. Doctors also need to explain about the possibility of multiple pregnancies which may take place, premature birth of the child, infant mortality rate as well as problems which may be related to growth of the child. However it has been found that doctors seldom divulge all these minute details to the intended couple and the surrogate and keep them in the dark about the darker realities of life – wherein the couple and the surrogate are made to sign numerous documents, wherein they agree to certain aspects of the document which is written without their knowledge.
4. **Financial implications** : The guidelines of ICMR has specified many norms relating to the conduct of doctors and the medical support staff in terms of entering into financial transactions with prospective surrogate couples.
However the reality is far from different. As there are no legal provisions in India to safe guard the interest of the surrogate mother, the child and the intending parents, this has given rise to rampant commercialization of this practice wherein agents and doctors have been found to have drowned themselves in the large for making huge amounts of money thus making it a commercial business.
Many a times, doctors and agents take advantage of the surrogate mothers who are most of the times poor women and make them sign contracts with questionable terms and conditions for payment and custody. Those contracts require the women to undergo all the rigors of childbearing, and eventually they have to give the child away The surrogate mothers are often unaware of their legal rights and due to their financial situation they cannot afford the services of lawyers who charge heavy fees to fight their cases.

Moreover couples have taken advantage of the legal loopholes and the guidelines (since it does not have legal backing) and made the surrogate's to forcefully terminate the pregnancy if the sex determination tests, and have acted against the contract by abandoning the new born child if he / she is born with certain defects and have also filed court cases against the surrogates stating that she has broken the contracts

5. **The rights of the surrogate mothers** – ICMR guidelines have laid down guidelines like **No woman** may act as a surrogate more than thrice in her lifetime regardless of the procedure used, however agents rarely take active concerns and convince the women to face the dangers for the sake of few thousands of rupees.

The contract of surrogacy needs to be made between the intended couple and the surrogate, who needs to be the only beneficiary, however due to absence of any stringent laws the money received from the intended couple is fleeced by the agents and doctors and the poor surrogate is given a very minor share of the amount.

The guideline also has not laid any timeline for the new born child to be kept with the biological mother. The doctors and the agents take away the child soon after the delivery in a short span of time, where by the child does not get the opportunity for breast feeding thereby causing detrimental risk to the life of the new born.

Emotional trauma for the separation of the child who has been in the womb also leaves a deep mark on the mind of the surrogate.

Conclusion:

In the light of the government initiatives like the Artificial Reproductive Technology which is in practice today, it throws lights on the critical facts like absence of documentation of the procedure, no standardization of the drugs used, insufficient information for patients about the side-effects of the drugs used, and no limits to the number of times a woman may be asked to go through the surrogacy procedure. The agents along with doctors do not disclose the fact that a successful cycle need not lead to a baby being born.

Surrogacy laws world wide are in its initial stage. Commercial surrogacy is illegal in most of the western countries but legalised in India since 2002, despite the fact that the commercial surrogacy in India too, is against public policy enshrined in Article 23 of the Constitution of India and Section 23 of the Indian Contract Act, 1872. The courts are still to grapple with the legal implications of surrogacy agreements and the state of law, as a whole, remains inadequate due to complex ethical and moral questions involved. Thus, as Sharma (2007) has rightly mentioned, there is a need for the legislature to shed its odious inertia and balance individual rights against public policy considerations through legislation.

The prevailing norms of the society have been emphasising on significance of ones own biological and genetically linked child. A close inspection of the ART Bill, 2008 which draws from the ICMR guidelines of 2005 which was propagated in regulating surrogacy

and protecting the intended parents from unethical practices involved in the process exhibits it did not play any role in protecting the surrogates from the risks and the dangers of these reproductive technologies. The surrogates rights have not been taken care off in the bill. Surrogacy is emerging as another form of exploitation of poor women's labour in the hands of foreigners, and male technocrats who are exploiting them in order to fulfill their greed. Thus it is extremely necessary that these issues of surrogates are taken up in public dialogues for formulation of surrogacy policies in near future.

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