Surrogacy

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Abstract: The views of the Japan Society of Obstetrics and Gynecology (JSOG) on surrogacy are outlined. The JSOG does not approve of surrogacy, either its implementation or its support, based upon the principles that: the well-being of the unborn child should be given highest priority; surrogacy is accompanied by both physical risk and mental burden; surrogacy contributes to complicated family relationships; and surrogacy contracts are not viewed as ethical by society. Surrogacy is similarly not recognized by other professional societies including the Japanese Society of Fertility and Sterility, the Japan Federation of Bar Associations, and the National Institute for Research Advancement. Very few foreign countries approve surrogacy. The United States and Great Britain, two countries that approve surrogacy, have encountered a variety of legal and ethical problems surrounding surrogacy-related issues. Thus strict bioethical foundations—based upon legal, ethical and medical guidelines—need to be established for assisted reproductive technologies because these medical procedures, including surrogacy, involve the creation of a new life with separate character and human rights. The JSOG will continue to review and amend its views on surrogacy based upon changing public consensus and social perspectives.

Key words: Surrogacy; Assisted reproductive technology; Bioethics; Japan Society of Obstetrics and Gynecology

Introduction

Following Japan’s first reported case of surrogacy in May 2001, the Japan Society of Obstetrics and Gynecology (JSOG) published a draft policy statement based on a two-year review entitled “JSOG Viewpoints on Surrogacy”; this was approved by a special board meeting held on April 12, 2003 and was formally adopted by the 55th JSOG General Assembly. During this period, discussions were held based on a report submitted by the JSOG Ethics Committee (chairperson: Shiro Nozawa), a draft statement was prepared by the committee, the views of JSOG members and other relevant academic societies were compiled, and a final draft revision was carefully reviewed and approved by the Board of Directors according to formal procedures. Concurrently, the Health Sciences Council of
the Ministry of Health, Labor and Welfare held formal discussions on the same issues with its committee of experts and members of the assisted reproductive technology section during this period. Thus these viewpoints of the JSOG reflect the expert opinions of a society of professionals.

The aim of this paper is to elucidate the viewpoints of the JSOG as well as the views of the national government and other relevant professional organizations and also to introduce guidelines that have been adopted in other countries. This paper should serve as a point of reference in understanding the viewpoints of the JSOG towards surrogacy.

**Definition of Surrogacy**

Presently, there are two types of surrogacy in actual clinical practice. One method transplants the fertilized egg of an infertile couple into the uterus of a third party female (host mother). A second method artificially inseminates the egg of a third party female (surrogate mother) using the sperm of the client husband. In the majority of overseas cases, the former is the mainstream method; this method is referred to as surrogacy or *in vitro* fertilization (IVF) surrogacy. Based on previous survey findings, this method is more socially accepted in Japan; but similar to other countries, many ethical, legal, social, and medical problems remain with regard to the unborn child, the client couple, the host mother and the families of the host mother. However, it is the opinion of a segment of the JSOG membership that if surrogacy is the only method available for infertile couples who desire to have a child, it should be recognized under certain pre-sanctioned conditions.

**Background History of the JSOG Statement**

Laws and guidelines that regulate assisted reproductive technology do not exist in Japan. JSOG physicians practice assisted reproductive technology for married couples according to criteria established by the JSOG. However, public concern has risen concerning the merits and demerits of surrogacy following the advent of Japan’s first surrogacy case in May 2001 and mediation by overseas surrogacy organizations.

Thus, in view of the rising public concern and the many existing inherent problems, the JSOG Ethics Committee (chairperson: Shohei Yonemoto) deliberated the merits and demerits of surrogacy in May 2001. The nine-member committee, consisting of six non-member experts (an ethics scholar, a member of the clergy, a legal expert, a lawyer, a pediatrician, and a journalist) conducted five committee meetings starting August 17, 2001 and submitted its committee report entitled “Ethics Committee Review — Opinions on Surrogacy” on December 12, 2001.

Based on a review of this report, the draft statement, “Views of the Ethics Committee on Surrogacy”, was compiled and publicly announced in February 2002. This statement was published in the JSOG Journal (Vol. 54, No. 4) and the JSOG website, and the opinions of JSOG members and relevant societies were solicited for a three-month period until June 30, 2002. Widespread and diverse input of opinions led the ethics committee to hold further discussions to revise and clarify section 4) of the statement on surrogacy to read from “surrogacy contracts conflict with public morals” to “surrogacy contracts are not ethically approved by all sectors of society”. In addition, item 2) of the future considerations list was also revised to read “a segment of the JSOG membership supports the move to recognize surrogacy”, based on the diverse viewpoints regarding the merits and demerits of surrogacy that currently exist. Furthermore, the views of the JSOG statement were reported at a liaison meeting with other affiliated societies (November 26, 2002). These efforts consequently led to a complete support by the Japan Association of Obstetricians & Gynecologists and the Japa-
JSOG’s Views on the Merits and Demerits of Surrogacy

Based on careful deliberations, the JSOG Ethics Committee concluded that surrogacy could not be recognized for the following four reasons. In addition, any acts that mediate, implement, or assisted surrogacy were also prohibited.
1) The well-being of the unborn child should be given highest priority.
2) Surrogacy is accompanied by both physical risk and mental burden.
3) Surrogacy contributes to complicated family relationships.
4) Surrogacy contracts are not ethically approved by all sectors of society.

These four reasons are explained in detail below.

Public Views on Surrogacy

There are no laws that regulate assisted reproductive medicine in Japan. Artificial insemination and in vitro fertilization for married couples have been carried out according to voluntary limitations adhered to by JSOG physicians. But recently, cases of JSOG physicians engaging in assisted reproductive technology that clearly contradict JSOG principles have emerged. Additionally, a recent court verdict supported the husband’s right to deny the legitimacy of a child born through artificial insemination using donor semen (AID) conducted without the husband’s consent; this verdict highlights the problem surrounding the welfare of children born through assisted reproductive technology. The advent of commercial enterprises that engage in surrogacy mediation services also reflects the diversity of the problems that stem from assisted reproductive technology. Subsequently, there is growing public need to arrive at a consensus concerning creation of a system that will be able to cope with related issues, including surrogacy, and implementation of appropriate measures.

In view of these circumstances, a committee of experts was created under the auspices of the Health Sciences Council, Evaluation Section for Advanced Medical Care, and assisted reproductive technology was intensively analyzed from a diverse professional standpoint. Discussions on surrogacy, the use of donated sperm, egg cell, and embryo were carefully conducted at a total of 29 meetings over a period of two years and two months. In December 2000, the committee prepared a statement on assisted reproductive technology using donated sperm, egg cell, and embryo.

The committee reached a consensus on the following six basic concepts.
1) The well-being of the unborn child will be given highest priority.
2) Humans should not be treated solely as a means of reproduction.
3) Safety must be adequately considered.
4) The concept of eugenics will not be allowed.
5) Commercialism will not be allowed.
6) Human dignity will be protected.

Based on these basic concepts, surrogacy (both surrogate and host mothers) was prohibited. The conclusion of the committee was based on the reasoning that surrogacy utilized the physical body of a third party as a means of pregnancy and delivery, and it directly violated the basic concept that people must not be treated solely as a means of reproduction. Moreover, the considerable risk caused by pregnancy and delivery, as well as the possible risk to the life of the surrogate mother for the approximately nine months of pregnancy also violated the concept that “safety must be adequately considered”. Therefore, surrogacy could not be approved based on these view-
due to the social, ethical, and legal complexities surrounding surrogacy, the society was unable to reach a clear conclusion on its implementation. The following four reasons were given in support of this conclusion.

1) A disparity exists between social and ethical indications and medical indications.

2) Discussions have been inadequate concerning the medical risks for the host mother that accompany the insemination, pregnancy, and delivery process as well as the inherent social and psychological problems that exist since surrogacy centers on processes surrounding a child born outside of a marital relationship.

3) Legal solutions would be difficult to achieve.

4) Unsolved problems remain concerning monetary exchange or mediation by third parties in surrogacy.

It was further noted that there is a need to obtain a social consensus concerning these issues.

2. Japan Federation of Bar Associations (JFBA)

The Japan Federation of Bar Associations has repeatedly discussed the legal conflicts surrounding assisted reproductive technology; these issues include the various adverse effects that would stem from a continued neglect of these issues in a country where statutory regulations on assisted reproductive technologies (ART) do not exist. To prevent the abuse of and to protect human rights, the JFBA announced its proposal on legal regulations concerning the use of assisted reproductive technology in March 2003.

In this proposal, the JFBA advocates banning both surrogate and host mothers (proposal 11). This conclusion was based on concerns that a surrogate mother would be the biological mother and that the host mother would be perceived as an expedient “means of borrowing a uterus”; for both women involved in this birth process, there are overwhelming physical and mental long-term effects. In addition, it
was feared that there would be a violation of women’s rights in addition to commercial exploitation.

3. National Institute for Research Advancement (NIRA)\(^7\)

The National Institute for Research Advancement was founded by 145 key individuals from the industrial, academic, and labor sectors in accordance with the National Institute for Research Advancement Act. It is an independent, government-approved policy research institute. Its objectives are to conduct independent research of the highest quality which will contribute to the resolution of various complex issues facing contemporary society.

In its legal draft proposal on bioethics entitled “Developments in the Life Sciences and the Law”, Clause 14, the NIRA announced its views to ban surrogacy contracts that approve of delivery and birth of children from third-party women.

Public Consensus on Surrogacy

What is the public consensus about surrogacy in Japan?

Based on our findings, a number of diverse surveys has been conducted on various segments of society since 1990.

1. Survey conducted by Yasuko Shirai (1990)\(^8,9\)

The findings of Yasuko Shirai’s survey conducted in 1990 are described in the “Bioethics on the Birth of Life” by Kiyoko Kinjo (published by Nippon-Hyoron-Sha, Co., Ltd.). This survey showed that only 4.4 percent of both men and women supported surrogate mothers and only 4.7 percent supported host mothers.

2. Questionnaire survey conducted by the Japanese Society of Fertility and Sterility (1992)\(^10\)

A survey conducted by the Japanese Society of Fertility and Sterility of its board of directors and society members showed an approval rate of 11.6 percent for surrogate mothers and a 40.4 percent approval rate for host mothers. Moreover, the approval rate for the use of surrogate mothers by couples undergoing infertility treatment was approximately 16 percent, while the approval rate for host mothers was 43.3 percent among husbands and 49 percent among wives of infertile couples.

3. Survey conducted by the Japan Public Opinion Poll Association (1996)\(^9\)

“Bioethics on the Birth of Life”, by Kiyoko Kinjo (published by Nippon-Hyoron-Sha, Co., Ltd.) reports the public survey findings of the Japan Public Opinion Poll Association in 1996 with regard to the question, “what is your opinion about surrogate mothers”. The survey showed that 8.7 percent of the respondents replied that “they would use surrogacy if no other fertility options were available”, 29.8 percent responded that “they would not use surrogacy, but were not opposed to other couples using surrogacy”, and 56.3 percent stated that “they were opposed to the use of surrogacy because the child produced was not the biological child of the couple”. If the first two responses are interpreted as an affirmative response, the approval rate is 38.5 percent and the non-approval rate is 56.3 percent.

4. Questionnaire survey on ART by Takumi Yanaihara, Chief Researcher, Health Sciences Council Special Research Group\(^11\)

The 1999 questionnaire survey on ART conducted by Takumi Yanaihara, chief researcher, Health Sciences Council Special Research Group, had a total of 6,006 respondents of which 4,000 were members of the general public. This was Japan’s first significant and large-scale survey on assisted reproductive technology.

With regard to the approval of surrogacy, 7.0 percent responded that surrogate mothers “should be recognized”, 36.7 percent responded that “surrogate mothers should be recognized
under certain conditions”, and 37.4 percent responded that “surrogate mothers should not be recognized”. Concerning host mothers, 9.2 percent responded that “host mothers should be recognized”, 43.6 percent responded that “host mothers should be recognized under certain conditions”, and 29.7 percent responded that “host mothers should not be recognized”. Among physicians at registered in vitro fertilization facilities, other obstetricians/gynecologists, and pediatricians, the majority opposed recognizing surrogate and host mothers; this rate was higher than that of the general public. The rate of disapproval for host mothers by these physician groups was 41.0 percent, 42.5 percent, and 47.3 percent, respectively.

In addition, with regard to actual use of surrogacy and host mothers, 82.4 percent and 68.8 percent of the general public responded that “they would not utilize surrogate mothers even if their spouse requested it”. Among infertility patients, 84.7 percent and 70.3 percent responded, “they would not utilize host mothers even if their spouse requested it”. Thus, the results indicate that the demand for surrogacy among the general public and infertility patients is not very high.

5. Questionnaire survey on ART by Zentaro Yamagata, Chief Researcher, Health Sciences Council Special Research Group (2003)\(^{12}\)

A questionnaire survey on 5,846 randomly chosen subjects in 200 locations throughout Japan was conducted in 2003. As a result, the approval/disapproval rate of the general public for surrogacy showed that about 33 percent disapproved of surrogate mothers, which exceeded the 30 percent of respondents who approved of surrogate mothers. Approximately 40 percent of the respondents approved of host mothers, but the approval rate did not exceed 50 percent. In addition, more than 30 percent responded as “did not know” and this rate also did not exceed 50 percent. Overall, among the respondents who stated that they would recognize surrogacy, 30 percent responded that “they would approve of surrogate mothers under certain conditions” and 34.2 percent responded that “they would not approve of surrogate mothers”. Concerning host mothers, 44.3 percent responded that “they would approve of host mothers under certain conditions” and 23.9 percent said that “they would not approve of host mothers”.

The results of this survey suggest that there is a tendency to tolerate host mothers rather than surrogate mothers; however, compared to the findings of the 1999 questionnaire survey on ART (conducted by Takumi Yanaihara, chief researcher, Health Sciences Council Special Research Group) there is a decrease in the approval rate towards both surrogate and host mothers (an approximately 47 percent approval rate for surrogate mothers in the Yamagata survey; similarly, an approximately 53 percent approval rate for host mothers in the Yanaihara survey and an approximately 44 percent approval rate in the Yamagata survey), although it must be kept in mind that different questions were used and the target population differed.

Among the general public that replied that “they would not use surrogate and host mothers even if requested by their spouse”, the response rate was 76.2 percent for use of surrogate mothers and 58.7 percent for use of host mothers. Thus the majority of the general public responded that they would not utilize either surrogate or host mothers even if their spouse desired it.

Based on these findings, it can be concluded that there is no evidence that supports a general public trend towards the acceptance of surrogacy over the last few years.

Situation in Other Countries

1. The merits and demerits of surrogacy in other countries\(^{13}\)

Is surrogacy widely practiced in other coun-
tries throughout the world?

According to the findings of the International Federation of Fertility Society Surveillance (IFFS) survey in 1999 on IVF surrogacy in 37 countries, IVF surrogacy was practiced in only 15 countries. The majority of the countries surveyed had banned the practice. Thus, the perception that surrogacy is widely practiced worldwide is erroneous.

2. Surrogacy in the United States

The United States is the most representative example among advanced nations where surrogacy is practiced, but it is not allowed in all states.

According to the findings of the Health Sciences Council Special Research Group (chief researcher: Shinya Matsuda) on the present status of assisted reproductive technology using donated ovum, sperm, and embryo, there were only 11 states that had statutory laws recognizing surrogacy contracts (Alabama, Arkansas, Florida, Illinois, Iowa, Nevada, New Hampshire, Tennessee, Virginia, West Virginia, and Wisconsin), while 11 states did not recognize the legality of surrogacy contracts (Arizona, Washington D.C., Utah, Indiana, Kentucky, Louisiana, Michigan, Nebraska, New York, North Dakota, and Washington). Many of the latter states have banned surrogacy contracts due to conflicting public policy; while the invalidity of surrogacy contracts is not necessarily enforced, monetary remuneration is prohibited. Violations are punishable by civil law or criminal charges.14)

Although surrogacy is recognized in some states, a variety of problems stemming from surrogacy have emerged. This is exemplified by the famous Baby M case of New Jersey in 1986 described in Masahiko Hiroi’s report.15) The surrogate mother of Baby M refused to relinquish the infant after birth. Although the Family Court recognized the surrogacy contract, the Supreme Court annulled its validity. The Court decision was based on the reasoning that the surrogate mother’s dignity had been damaged and further ruled that the transfer of money to adopt a child was illegal. The infant was placed in the custody of the client in the best interests of the child’s welfare and the surrogate mother was given free visiting rights. In 1990, a surrogate mother who gave birth through a donated embryo filed suit for exclusive parental rights; however the courts did not recognize her parental rights and she was denied the right to see or visit the infant. These two cases exemplify the disputes that may occur between the clients and a surrogate mother over the infant. In addition, there have been cases where the unborn child was discovered to be physically handicapped or had been infected with HIV through an HIV-positive surrogate mother and disputes between the clients and the surrogate mothers over the refusal to claim the infant have also occurred. In 1995, a 26-year-old single male in Pennsylvania, who claimed the child of a surrogate mother, killed the five-week-old infant in anger when it cried all night. Yasunori Yoshimura reports that there have been more than 40 cases of surrogacy-related court disputes over the adoption of the unborn infant,16) and the perception that surrogacy in the United States is free of controversy is inaccurate.

Tadahiro Fujikawa reports in “Policy Research—Developments in the Life Sciences and the Law”7) that Dr. LeRoy Walters, Director of the Joseph P. and Rose F. Kennedy Institute of Ethics at Georgetown University suggests that surrogate mothers tend to come from economically poor backgrounds and are, in essence, selling children. Thus, surrogacy conflicts with public policy. In addition, when the surrogate mother was the sister of the client, it was pointed out that if the client mother were to eventually tell the child that “she was not his/her natural mother”, the surrogate-client relationship between family members may prove more difficult than in the case of a commercially-contracted surrogate mother.

The American College of Obstetricians and
Gynecologists (ACOG) ethics guidelines on surrogacy\textsuperscript{17} report that only a few states have approved of the surrogate mother system but only in cases where certain conditions have been met.\textsuperscript{18} The guidelines recognize that proper informed consent is necessary for surrogate mother cases as it is possible to release the child after birth, when there is the possibility that the risk to the child’s well-being is greater than any advantages that may be gained. The guidelines also recognize that diverse opinions on surrogacy exist and that physicians may oppose surrogacy. The guidelines also delineate the ethical responsibilities of obstetricians and gynecologists who participate in the surrogate mother system at various levels. In addition, preventive measures that should be taken to avoid medical, psychological, and legal damage to the client couple, surrogate mother, and the unborn child are also described. It should be noted that in Japan, mental health counseling services and other support systems do not exist. Moreover, the ACOG guidelines clearly state that physicians have the legitimate right to refuse participation in the surrogacy process for either ethical or medical reasons.

3. Surrogacy in Europe

According to the findings of the “Study on the System and Conditions Related to Assisted Reproductive Technology Utilizing Donated Ovum, Sperm, Embryos in Other Countries” conducted by the Health Sciences Council Special Research Group (chief researcher: Shinya Matsuda), the advanced European countries of France, Germany, and Sweden do not recognize surrogacy. In France, civil law states that surrogacy contracts, in which surrogate mothers give birth to an infant and then yield all mother-child rights to another woman, are invalid. In Germany, surrogacy is legally banned under its anti-mediation law. Mediators are punishable by an imprisonment of less than one year or by fines and penalties, those who gain monetary profit are punishable by an imprisonment of less than two years, while those who engage in surrogacy as a commercial enterprise are punishable by an imprisonment of less than three years.

In contrast, Great Britain is one of the countries in which surrogacy is recognized. Non-profit surrogacy mediation services, surrogacy contracts, and involvement in these processes are not considered illegal. However, Michiko Ishii’s paper, “Policy Research — Developments in the Life Sciences and the Law”,\textsuperscript{7} reports that the Ministry of Health in Great Britain has prepared guidelines on the remuneration and costs related to surrogacy, which is seen as a last-resort measure for infertile couples. The historical context of the current 1985 law on childbirths is based on the public antipathy toward third parties who utilized surrogate mothers for profit-making motives. An awareness of the legal and ethical problems surrounding surrogate mothers exists and the British government has attempted to control the practice as much as possible.

These circumstances reflect the fact that there is a shared awareness of the many problems inherent to surrogacy in both Great Britain and the United States, two nations in which surrogacy is practiced.

Why the JSOG Does Not Recognize Surrogacy

The ACOG guidelines state that studies that assess the damages and profits related to surrogacy are limited.\textsuperscript{17,19,20} The inadequacy of such data, even in the few states in the United States where surrogacy is recognized, has been pointed out, as well as the need to conduct such research. In view of these circumstances, the evidence necessary to assess the socio-ethical problems associated with surrogacy is inadequate. However, based on a diverse evaluation of the problems inherent to surrogacy as medical treatment, the JSOG has decided not to recognize surrogacy based on the following four reasons.
1. The well-being of the unborn child should be of highest priority.

In reviewing assisted reproductive technology, including surrogacy, society in general as well as the physician and the patient place the greatest emphasis on the happiness and well-being of the conceived child. The same views are supported in the research of Yuri Aono and Tomoko Sakota.\(^{21,22}\) The MHLW Health Sciences Council Special Committee report also supports the idea that “the well-being of the unborn child takes precedence over all other issues”. In a special “Reproductive Biology” issue of Science, Dr. Peter Braude discusses the importance of studying these issues from the unborn child’s perspective in the opening editorial,\(^{23}\) which is similar to the views of the JSOG, and states that the importance of the unborn child’s well-being should take precedence over the client’s rights or the surrogate mother’s right to self-determination. Significant priority was placed by the JSOG on this issue as it selected the phrase, “to give highest priority” to reflect the shared viewpoint of the client and surrogate mother that the unborn child’s well-being took precedence over all other issues.

With respect to children’s rights, the Convention on the Rights of the Child (adopted by the U.N. General Assembly in 1989) states that “parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form” (Article 35). In surrogacy, the surrogate mother is contracted to bear the burden of pregnancy and to give birth, yet she relinquishes the child to the client. This act in itself ignores the mother-child ties that are created through pregnancy and birth and is considered to violate the child’s well-being. In addition, according to Kayoko Saito’s paper, surrogacy violates Clauses 3, 8, 9, and 21 as well as Clause 35 of the Convention on the Rights of the Child (adopted by the U.N. General Assembly in 1989).\(^{24}\) This is especially true if the one of the two parties does not abide by the surrogacy agreement, i.e., the surrogate mother refuses to hand over custody of the child or the client refuses to accept custody of the child as the child does not meet the client’s expectations. In the United States, more than 40 such court cases have been reported. In these situations, not only do the child’s living conditions become notably unstable, but the child’s formation of proprioception and self-identity as well as emotional development are hindered. Therefore, in these regards surrogacy is not recognized due to the deep emotional suffering foreseen for the child.

2. Physical risk and mental burden accompany surrogacy.

Physical risk accompanies pregnancy and the birth process — this is an undeniable fact. The medical risks that exist for the surrogate mother have been clearly stated in the ACOG guidelines for surrogate mothers, in the Japanese Society of Fertility and Sterility’s “Views on Surrogacy”, as well as by the JSOG. In surrogacy, the physical and mental burden that accompany pregnancy and birth are forced on a third party female who is essentially unrelated to the pregnancy and birth; this situation undermines human dignity. Kenichi Tatsumi summarizes these problems.\(^{25}\) Irrespective of whether a surrogacy contract is based on a thorough explanation and agreement of its content by the parties involved, there is the risk that the surrogate mother may experience unanticipated psychological hardship and emotional distress. Thus, surrogacy exceeds the limits of allowable fertility treatment.

3. Family relationships become complex.

Throughout the world, it is generally regarded that the woman who becomes pregnant and gives birth is that child’s mother. In Japan, this fact is also legally recognized according to the Supreme Court ruling (civil law April 27, 1962, Volume 16, No.7, page 1247) and substantive enactment to that effect is expected in the near future. At that time, it is anticipated that
surrogacy contracts will add to the complexity of family relationships and become a source of needless friction and confusion to social order.

There is the viewpoint that due to the rising divorce rate in Japan, family relationships have already become diversified and complex. Meanwhile, there is the opinion that parent-child ties are formed throughout the pregnancy and birth process. Mitsuhiro Sugimoto states that 26) “the biological mother”, “the birth mother”, “the custodial mother”, and “the legal mother” are undesirable examples of the complex parent-child ties that are created by surrogacy. He points out that in Japan, the well-being of the child may be sacrificed in surrogacy due to the complex parent-child ties that exist prior to the child’s birth. Social conventions and laws, which ensure that the complex parent-child ties created by surrogacy do not hinder the unborn child’s well-being, are necessary; but in present-day Japan, such legal or social guarantees do not exist. Therefore, surrogacy cannot be sanctioned.

4. Society does not ethically sanction surrogacy contracts.

The surrogacy contract commercializes the maternal body for financial compensation and recognizes the trade in children, which places the surrogate mother in physical and mental subjugation. Even without financial compensation, society still view surrogacy contracts as violations of public order and morality (Civil Law, Article 90). 9,27–29) “Public order and morality” is a legal term, which is generally unfamiliar and susceptible to misunderstanding, so the wording was revised to “society does not ethically sanction surrogacy contracts”. For surrogacy contracts to be accepted, the general consensus of society must not oppose this argument. Presently, these conditions do not exist, and likewise surrogacy contracts cannot be recognized.

If this position is further neglected, third parties who provide for profit surrogacy mediation services will appear to economically exploit vulnerable women, consequently triggering a trade in children; thus, surrogacy mediation was also prohibited.

5. Other issues

(1) Importance of voluntary compliance to JSOG’s ethics ruling

As a professional organization, the JSOG strongly hopes that each member will abide by its ethical guidelines, and recognize that irrespective of the legal debates, the diverse and inherent ethical, legal, and medical problems posed by surrogacy affect not only the client couple, but also the unborn child, surrogate mother, and their respective families, in addition to society as a whole.

(2) Future issues

The JSOG concluded that it would not recognize surrogacy. However, it recognizes that there are those members who would sanction the practice of surrogacy under specified conditions (e.g., based on third-party reviews, legal revisions that define parent-child relationships, etc.), if surrogacy is the only means of conceiving a child. It also recognizes that as social perspectives change, tolerance for surrogacy may also rise. Thus, it is important that the recognition of medical practices such as surrogacy is based on consensus of society as a whole. If such a consensus were to be realized, the collective opinion of the JSOG would be to review the issues as required in only exceptional cases in which it would be detrimental to unilaterally prohibit surrogacy from a medical standpoint.

It was also concluded that such a review must be based on an awareness that surrogacy may deviate from orthodox social perspectives concerning parent, child and family relationships traditionally held in Japan. In addition, the well-being of the unborn child must be adequately protected. Thus, various measures, including the creation of an investigatory body, must be undertaken prior to recognizing a limited number of surrogacy cases.
Reproductive Rights and the Right to Self-Determination

Among the viewpoints that support the recognition of surrogacy, are those views that support the reproductive rights of infertility patients and their right to pursue happiness, as well as the patient and surrogate mother’s right to self-determination. The most representative of these viewpoints are those of Kazumas Hoshino and Kiyoko Kinjo. But there are also many academic scholars who oppose these views. In his book, “Reproductive Revolution and the Law”, Tadahiro Fujikawa (published by Nihon Keizai Hyoron Sha) states that Noriko Mizuno questioned “whether reproductive rights should be called rights”; these issues were discussed at the symposium on life ethics draft laws held in March 2001. Akiko Nagaoki states that reproductive rights and the right to self-determination are terminology that originated from a woman’s resistance to third-party interventions of her reproductive functions and her physical body. These terms were used to question a society that would allow third-party intervention of individuals. She points out that the terminology did not denote the freedom to do whatever an individual desires with regard to her physical body. Masayoshi Tarui states that a woman’s right to utilize ART should not be taken in the same context as social rights such as the right to education and health care.

The JFBA's “proposal on legal restrictions on the use of ART” states that although reproductive rights is one aspect of the right to self-determination, the JFBA standpoint is that restrictions exist with regard to reproductive rights because it directly concerns the unborn child conceived through ART, including surrogacy.

Among the various authors mentioned above, Tadahiro Fujikawa’s opinion is that in view of the unborn child, the reproductive rights of a parent should be restricted. Similarly, Naoko Kakee also believes that the creation of a new life or a separate individual through reproductive assistance technology, exceeds the limits of an individual’s right to self-determination. In addition, there are those who advocate the surrogate mother’s right to self-determination. However, there are also opposing viewpoints. Takao Yamada states that the right to self-determination of a childbirth-substitute such as a surrogate or host mother cannot be supported. The underlying reason is that the right to self-determination is appropriate only when such rights do not go against the interest of others. Surrogacy greatly affects the client and their families as well as the unborn child.

Conclusion

The historical background and content of JSOG’s “Views on Surrogacy” have been examined in this paper. The greatest issue that must be addressed with regard to assisted reproductive technology as well as surrogacy is that this process differs from other types of medical transplantation as it involves the creation of a child with a separate character and human rights. Therefore, surrogacy is not an issue that can be decided solely on agreements between physicians and patients, but requires the consensus of the general public as well as a social order that protects the unborn child.

The JSOG will continue to observe the gradual changes in public consensus and social perspectives; and if society heads in the direction of recognizing surrogacy, the JSOG will review its viewpoints as required. It is hoped that this paper will help further the understanding of JSOG’s viewpoints on this issue.

REFERENCES

3) Views on Surrogacy (draft): April 12, 2003. (in Japanese)
Japanese)


5) Japanese Society of Fertility and Sterility Ethics Committee: The Board of Directors’ Views on the Issue of Surrogate Mothers. (in Japanese)


