

# assisted reproductive technologies and surrogate motherhood

## critique of proposed bill

Assisted Reproductive Technologies (ARTs) have been the subject of intense debate worldwide, as rapid scientific advances create an ever increasing range of ways in which human reproduction can take place artificially, and governments struggle to regulate their use. Intended to help infertile couples to have their own child, in India these technologies have become a part of 'reproductive tourism', akin to medical tourism, particularly with respect to surrogacy. (For a brief description of these technologies, see box).

Infertility is an age old problem and societies have evolved social ways to deal with it, such as adoption and foster-parenthood. However, there continues to be a strong social stigma attached to infertility. In this context, there is an obvious appeal to seek technological solutions in so far as individuals are concerned. Yet as a society, we can work towards removing the stigma associated with infertility, as also the factors that cause it.

### WHAT ARE ARTs?

ARTs are technology intensive procedures meant to 'assist' reproduction. For example, when the man can produce sperm but there is a problem in successful conception, his semen can be deposited artificially in the woman's womb so that her egg can get fertilised. This is called artificial insemination and can be done with the partner's sperm or sperm of an anonymous donor. In some cases both parties have some problems, but the man's sperm and woman's egg can be put together outside their bodies in controlled conditions so that the egg is fertilised. This fertilised egg is then deposited in the woman's body prepared by giving drugs beforehand to receive it. This is called in-vitro fertilisation (IVF). There is another way in which a couple can get their biological child - they can donate their sperm and eggs, get IVF done and instead of the donor woman, another woman gets the fertilised egg implanted in her body, carries the pregnancy to full term and hands over the baby to the couple after the delivery. This form of reproduction is called surrogate motherhood. In yet another situation, if a woman is unable to produce eggs, and/or bear a child, she can use the egg of a donor, which can be fertilised with her husband's sperm through IVF, and then the fertilised embryo can be implanted in a surrogate mother.

In addition to these basic forms of ARTs there are further variations and combinations. As the years go by, newer techniques and modification of existing techniques are fast developing, including cloning and artificial wombs. All these technologies (ARTs) do help some infertile couples to bear their own biological child, but they may cause a change in our relationship to child bearing, both individually and as a society. There are also many other concerns about ARTs which we need to address.

ARTs have been used in the country since the 70's, and India's first IVF baby was born in 1978. Since then, the number of ART clinics has increased rapidly, even in small towns, indicating a high business potential. The trend is worrisome as it is reminiscent of the spread of clinics offering sex determination even in small towns. Presently it is mostly the private sector which provides ARTs in India. Over the years it has been seen that many clinics make tall claims of success, do not provide adequate information to customers, indulge in unethical practices, charge exorbitant fees and exploit the vulnerabilities of the prospective parents. Under these circumstances, it was considered necessary to formulate guidelines which would bring in some uniformity in procedures and prevent their misuse, as well as exploitation of women and hapless couples. In 2002 Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMS) came out with draft guidelines to regulate the practice of ARTs and surrogate motherhood. Many concerned individuals, health activists and women's groups gave their suggestions. Saheli had also submitted its critique and a short write-up about it was published in our newsletter (Sep-Dec 2002). Final guidelines were notified in 2005, but as these were not legally binding, the next step by the government was to draft a legislation. This Draft Bill, made public in September 2008, states the following as its intention: 'to provide for a national framework for the regulation and supervision of assisted reproductive technology and matters connected therewith or incidental thereto.' Once again comments and suggestions were invited.

In response to this Bill, Saheli sent in general comments, as well as point-by-point criticisms and suggestions. The gist of it is as follows:

'Although the Bill attempts to incorporate issues related to gender inequality, it still falls short on many fronts. The Bill must go beyond technicalities and build effective safeguards so that the unequal power relationship between the providers of new technology and users is minimised. The Bill should also keep in mind the unequal gender balance, and ensure that the rights of women users of these technologies are not compromised in any manner.

'The field of Assisted Reproduction is a rapidly developing one. Newer techniques, modifications of existing ones and developing new approaches characterise this specialisation. In this context, particular care needs to be taken to ensure that the rights of women subjects of research as well as consumers of these techniques are articulated and protected. For instance, infertile women, given the social pressure to reproduce as well as their own intense desire to conceive, are particularly vulnerable to commercial interests. Likewise, the vulnerabilities of surrogate mothers, who are generally from a lower socio-economic background, must not be taken advantage of. A law regulating ART must be drafted with foresight and a long term vision, as well as safeguard their interests'.

The reason foresight is needed in drafting the law is based on our experience with earlier campaigns and struggles for legal interventions for the betterment of women's health. For instance, our campaign to prevent sex-selective abortions, did result in a law in 1994, but it was so toothless that no legal action could be initiated against anyone for years. Only after the modification of the original Act in 2003 has the situation changed somewhat for the better. In the present situation also we feel the ART clinic owners have too much freedom to influence prospective clients.

## **SURROGATE MOTHERHOOD**

The need for a surrogate mother may arise in various circumstances. It may be necessary because the woman desirous of having a baby is medically unable to carry a pregnancy to its successful conclusion or because the baby is desired by a single or gay man. But this option may also be exercised by women biologically capable of producing their own children.

One common form of surrogacy practised in India is to artificially inseminate the surrogate mother with the semen of the potential father (also called altruistic surrogacy). While this is technically the least harmful procedure amongst ARTs, the surrogate is also the biological mother and she is expected to give away the child immediately after birth. This creates a lot of debate amongst health and women's rights activists on the ethicality of the procedure because of the passion and emotions that motherhood is associated with. This form of surrogacy is now outside the purview of the Draft Bill.

According to the Assisted Reproductive Technology (Regulation) Bill, 2008 by the Government of India, 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 of another woman, implanted in her to carry the pregnancy to full term and deliver the child to its biological parent(s).

This is called commercial surrogacy and is not legally permissible in many countries. However, in India it has become very common, as economically vulnerable women find this a way to make money. In effect, the government is not averse to permitting commercial surrogacy, but seeks to regulate the practice. Hence, the Draft Bill suggests drawing up a legal agreement between the prospective parents and the prospective surrogate mother. This agreement in addition to paternity rights will include 'compensation' for the surrogate mother. Commercial nature of surrogacy has given rise to some new issues and concerns.

## **COMMERCIAL, LEGAL AND ETHICAL ASPECTS OF SURROGACY**

If renting a womb for nine months fetches money equivalent to 5-10 years of income in a poor rural or urban household, should women use this avenue for income generation? Should we as a society

*The Bill  
should  
keep in  
mind the  
unequal  
gender  
balance,  
and ensure  
that the  
rights of  
women  
users are  
not com-  
promised*

*Should an adult woman need consent from her husband to become a surrogate mother?*

condone and encourage it? How do we ensure that women are not exploited by husbands who may coerce them into surrogacy for immediate financial gain? There are many reports already, documenting women from economically underprivileged classes in Gujarat near Anand using this as a source of income. These women are lending their wombs to mostly non-resident Indian parents or non-Indian parents. Is this not exploitation of the women? Or can this be seen as women providing services and charging for the labour involved at the market rate? Is there a qualitative difference in the case of men providing semen for use in artificial insemination? Is it like selling kidneys and getting compensation? While there are different risks involved in each of these situations and there is scope for exploitation because the body part for sale or rent is coming from socially or economically underprivileged person, we feel the principles are similar.

The Draft Bill makes it mandatory to have the consent of the husband before a married woman undertakes surrogacy. Should an adult woman need consent from her husband to become a surrogate mother? While an instinctive feminist answer would be no, there are very many nuances to the situation that such a woman will be in. Though the woman herself should be able to decide on whether to offer herself for surrogacy, she is likely to face legal, economic and social problems if she does not consult her husband and the family, in addition to consulting a lawyer. Going against her husband's wishes can invite adultery charges unless he consents and there is a legal document to prove the paternity of the child. Unlike semen donation, which can be done behind a partner's back without formal consent and without leaving a trace, pregnancy is a long-term undertaking and hence acceptance of the husband and the family, which will hopefully care for the surrogate mother's wellbeing, appears desirable. If the surrogate mother is undertaking surrogacy for the money, she will see that as beneficial for the family and thus will expect active support from the family. Thus, it appears that the surrogate mother may need consent from the family for all practical purposes and not just from her husband, however inappropriate it may sound.

The wide economic gap between seekers of surrogacy and the surrogate mother would put the latter at a disadvantaged position to negotiate the deal and there is every likelihood that the deal would be exploitative of the surrogate. A Chennai-based law firm called Indian Surrogacy Law Center offers services: it helps find surrogate mothers for prospective parents, helps draft and execute agreements and claims to be the first and the only expert reproductive law consultant in India. How partisan they are to the prospective parents and how concerned they are for the surrogate mother is not clear from the information available on their website, but it goes to show how new niches evolve for professionals to make money. [<http://www.indiansurrogacylaw.com/?gclid=CPCHoo2ss5kCFZUwpAod1EO24w>]

While the Draft Bill mentions that the agreement will have legal standing, the safety and security issues of the potential surrogate mother do need to be mentioned as mandatory parts of the agreement. This has not happened. For example, will the woman be covered for an extended duration of health care in the form of insurance? In the unfortunate situation of miscarriage, what will be the compensation package for the mother? Will she be deprived of any monetary benefits which were to come her way? If the baby turns out under-weight or is born with congenital defects what safety clauses should be in place to prevent harassment of the surrogate mother? If the parents back out of the process halfway or after the baby is born, what are the options for the surrogate mother? While there is a reference to some of these concerns in the Draft Bill, the minimum essential structure of the agreement which will include such clauses so that surrogate's security is ensured are missing.

**SOCIETAL CONCERNS**

ARTs, including surrogate motherhood, do offer infertile couples and people who are outside the conventional family and sexuality norms in our society the option to have their



own child. But will this lead to more and more people clamouring to have their own 'flesh and blood' child and relegate adoption, a socially desirable, non-invasive and safe choice, to a non-option? Unfortunately, in some countries like Japan, this is proving to be the case. It is crucial for any society to understand infertility as a social problem and not merely as a biological one. Efforts must be made to make alternatives to having one's 'own' children, such as foster parenting, adoption etc. socially more acceptable. A wider perspective, balancing societal needs and the individual 'right' to bear a biological child at all costs has to be evolved.

Many of these technologies involve a great degree of invasiveness and medical manipulation of women's body systems. They can pose grave risks to women's health, not to mention, the mental trauma and tension associated with such a venture. In addition, they also involve large monetary investments. Which leads us to crucial questions of who owns these technologies, and who profits from them? Do all 'needy persons' have equal access to them? And how proportionate is the amount of money spent on such research? There are those within the women's movement who vociferously argue that it would be wiser if such money was spent on researching preventive health measures that could avoid some of the causes of infertility such as sexually transmitted diseases, or even on cleaning up the polluted environment and toxic workplaces which are increasingly proving to cause infertility.

At another policy level, the government of India is keen to promote medical tourism in all forms, and reproductive tourism as well. Should the country's limited medical resources, private or public, be used to serve the needs of foreigners or of Indian nationals?

The Draft Bill can be welcomed as a step towards regulating what threatens to become a runaway situation with the proliferation of ARTs and ART clinics. Yet it does little for the surrogate mother who is the weakest stake holder in the chain. Could it be that this bill is a back door attempt at legalising renting of an organ in a society where sale of organs is prohibited?

Society is inexorably moving towards a situation where it will be possible to design a human being to exact specifications - of physical attributes, colour and sex. We find it highly objectionable to have such discriminatory selection processes. We have already seen how sex-determination has resulted in the elimination of female fetuses. We do need to work towards ensuring prevention of further disempowerment of vulnerable sections of society due to technological advances rather than supporting their harmful uses.