

Gender and Economic Policy Discussion Forum

'The Baby Market: Gendered Implications of Assisted Reproductive Technologies and the Surrogacy Industry in India'

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BRIEFING NOTE 23

HIGHLIGHTS / KEY POINTS

- India has emerged as one of the major centres of global infertility with an unprecedented rise in ART clinics and ART practices, particularly surrogacy.
- Technological developments concerning women's reproduction fail to address and recognize the question of women's choice and agency as much as the women who undergo these procedures.
- Following social norms and societal demands the market, medical establishment, and society gains, but no women gain and all excluded from "normal" processes of reproduction gets excluded yet again.
- Legal changes to transnational surrogacy have more to do with the fear of the rise of the 'alternate' family, rather than issues of the surrogate's health and well-being.
- There is need for more research and dialogue on ethical issues related to women's health and bodies with regard to invasive assisted reproductive techniques and surrogacy.

The Rise of ARTs and the Surrogacy Industry in India

The twenty – third policy forum in the series of Gender and Economic Policy Discussion Forums was organized by the Institute of Social Studies Trust in collaboration with Heinrich Böll Foundation (HBF) on 'The Baby Market: Gendered Implications of Assisted Reproductive Technologies and the Surrogacy Industry in India'. It was held on the 3rd of August, 2017 at India Habitat Centre. The speakers at the forum comprised Anindita Majumdar Assistant Professor at the Indian Institute of Technology (IIT), Hyderabad; Chayanika Shah, a queer feminist activist based in Mumbai working for Forum Against Oppression of Women and LABIA – A Queer Feminist LBT Collective and Professor Indu Agnihotri, Director at the Centre for Women's Development Studies (CWDS), New Delhi. The session was chaired and moderated by Professor Mohan Rao – Professor at the Centre of Social Medicine and Community Health (CSMCH), School of Social Sciences, Jawaharlal Nehru University. The panel addressed the problems inherent with the current framework for regulation of ARTs in general and surrogacy in particular. It examined the legal understanding of the practice of surrogacy and the rights of the surrogate, the government's role in legislation and regulation of the use of ARTs. It also focussed on the social, medical, legal, ethical and economic implications of these technologies and arrangements on women in particular, and society at large.

Technological advancements in the sphere of health, especially women's health, have come to (re)shape conventional scripts of sexuality, pregnancy, child birth and parenting. The past few decades have witnessed a proliferation of

technologies that assist reproduction, increasing the incidences of conception and pregnancy. Technologically assisted reproduction is not a new phenomenon with procedures like AID (artificial insemination by donor) dating back to the nineteenth century and IVF (in vitro fertilisation) being first used in the 1970s (The Economist, 2017). However, technologies assisting reproduction “as a distinct group of procedures designed to assist conception by correcting or circumventing infertility is relatively recent” (Marwah and Sarojini N., 2011).

In India, an estimated 27 to 30 million couples in the reproductive age suffer from lifetime infertility. While female factor accounts for 40% - 50% of infertility, male factor, which is believed to be on the rise in India, accounts for 30%-40%¹. India has emerged as one of the major centres of global infertility with an unprecedented rise in ART clinics and ART practices, particularly surrogacy. ARTs encompass “all treatments and procedures that include the in vitro handling of human eggs (oocytes), sperms and embryos for the purpose of establishing a pregnancy” (Chakravarthi, 2016). It includes intra-uterine or artificial insemination (IUI), in-vitro fertilisation (IVF), and more recently intracytoplasmic sperm injection (ICSI), in which a sperm cell is physically inserted into an egg, specifically for male factor infertility, mitochondrial transplantation, embryo freezing, etc. Surrogacy which is one of the infertility treatments is also included within the ambit of ARTs.

Surrogacy has been a booming industry in India possibly due to low costs and easy availability of surrogate mothers and gamete donors (Sama Team, 2009). A World Bank study conducted in 2012 estimated the surrogacy business to be worth almost \$400 million a year, with 3,000 fertility clinics across India (Garg, 2016). However, the debate regarding commercial surrogacy came to the forefront when, in 2008, a Japanese couple contracted an Indian woman to serve as a surrogate in a small town in Gujarat. But before the woman could deliver the child, the couple got divorced and the child was legally parentless as well as without citizenship. Though the child was finally handed over to her grandmother, it opened questions about a practice that had continued unabated for a number of years. This incident resulted in the culmination of India’s draft

Surrogacy (Regulation) Bill that was approved by the Cabinet in August 2016.

“Sanskaari” Markets and Medical Practice: Reproductive Technologies in a Neo-liberal Market Economy

The unprecedented rise in fertility treatments and fertility clinics that promise to cure the increasing “problem” of infertility today, Chayanika Shah posited, has its roots back in the 1980s when issues related to what is now known as the Pre – Conception and Pre – Natal Diagnostic Techniques (PC&PNDT) were in the forefront of feminist dialogues on women’s health and technology. She pointed out that when the ideas for assisted reproduction were first initiated, little attention was paid to them because in a country like India where “there is so much stress on controlling birth, it was thought that assisting birth is not going to be something that is going to be focused upon”. Moreover, having a baby through IVF, especially through the arrangement of surrogacy at that time was fraught with stigma (Gupta, 2017). However, with the beginning of the neo-liberal era in the nineties, marked by the demolition of the welfare state, there arose the need for a child to complete the “family”. This need for a family arose purely out of economic concerns, posited Chayanika – concerns involving – “If I don’t have a child, who is going to take care of me? If I don’t have children, who do I give this wealth to?”

Having a genetic child became important to uphold the institution of the family and such families as Chayanika Shah has argued elsewhere “are assumed to be the essential material and emotional support for all people. They are also the only social security available to many people and therefore difficult to forego” (Shah, 2009). According to her, it is here that ARTs came in to play a big role in addressing such concerns in order to preserve caste and community through genetic lineage for those heterosexual couples who cannot bear their own child. Heterosexual married women who are unable to bear children are stigmatised by the socio – cultural normative framework of society (Gupta, 2017)². As Jyotsna Agnihotri Gupta (2017) argued, “fertility and motherhood are irrevocably linked with cultural notions about womanhood...Motherhood is

considered central to adult feminine identity, for women are defined generally in relation to their actual or potential maternity". For these women then, resorting to the help of technology in realising their desire for motherhood becomes the only plausible option to "cure" the "problem" of infertility³. It is noteworthy to mention that ARTs are technologies that assist reproduction and are not treatments for infertility⁴. Chayanika Shah clarified that they may, in rare cases, assist the infertile but not cure them of infertility or treat them for it. She reiterated that ARTs can help people with many kinds of biological and social infertilities or inabilities to have their own genetically related children. However, they are not a treatment of any biological causes of infertility but rather provide technological solution to the social problem of not having a child of "one's own" – "a child that bears a genetic imprint of oneself" (Shah, 2009). In this regard, there is a need to raise questions such as: Why is it so essential to have a biological child? Why is infertility in marriage such a stigma? Such concerns need to be focussed upon and brought to the forefront of policy debates and deliberations, emphasized Chayanika Shah.

Citing the Draft Assisted Reproductive Technology (Regulation) Bill, 2008 and the Indian Council of Medical Research (ICMR) guidelines regarding ARTs issued in 2005, Chayanika Shah highlighted that both the Bill and the ICMR guidelines outlined that when the gametes are not provided by the commissioning parents, anonymity of donors must be maintained so that the rights of the child are protected. However, in today's altruistic surrogacy arrangement such a concern of inheritance claim seems to have been dismissed. Moreover, the practise of ARTs today, as Chayanika Shah highlighted are characterised by lack of standardisation of the drugs used, lack of proper documentation of the procedures, insufficient information for patients about the side effects of the drugs used, and no limit to the number of times a woman may be asked to go through the procedure⁵.

Chayanika Shah raised the concern that these discoveries in technology, that are mostly viewed as wonderment performed by doctors or are flaunted as major scientific achievements, ironically, invisibilise the

role of the women involved in the procedures. For example, the Delhi Artificial Insemination (Human) Act, 1995, outlined that the practitioner has to make sure that the donor (whether donating semen or ovum) needs to be screened for HIV/ AIDS (Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome) so that it is not passed on to the child that is about to be born. It further went on to specify that the sperm can only be accessed by married couples. This is to say, as Chayanika Shah highlighted, that artificial insemination should not be undergone by single women through medical intervention as per legislation. Thus, technological developments concerning women's reproduction fail to address and recognize the question of women's choice and agency as much as the women who undergo these procedures. Not only are married heterosexual women left with no choice of having a child – free life, the single women who wish to have a child outside marriage are denied of such choices. In addition, the neo – imaginations of the family – of same sex couples who want to have a child and thereby a family – is questioned and characterized by conflict and anxiety. Voicing her concern about the upkeep of the traditional family structure, Chayanika Shah commented that

"We don't want to deconstruct the family - the anxiety is only there. How do we retain this wonderful family structure which is essential in a state which is becoming more and more individual – more and more market oriented – how do we retain this family so that all needs of the family are taken care of within the family? There is no expectation from anywhere else."

Chayanika Shah opined that in an urge to maintain the caste and community structures through the institution of the family, the market which she terms as "samskari" is exceeding. Even without commercial surrogacy arrangements money is flowing into the ART industry due to its popularity and easy access, across classes and castes. According to her, ARTs, underline the importance of genetically linked families. In that sense, they provide individual solutions to a wider social problem. By feeding into the normative notions of family and support, they necessarily weaken all struggles to redefine the problem itself.

Arguing against genetic lineage within marriage as the only way of creating a family, Chayanika presented her views on how the market and medical entrepreneurship used the non-normative potential but gave up the possibility of challenging social norms by acceding to demands of a normative society and State. As a result the market, medical establishment, and society gained, but no women gained and all excluded from “normal” processes of reproduction got excluded yet again. She strongly felt that technology can never be a solution because technology will bend itself to suit societal needs.

The Question of the Family: Commercial Surrogacy and the Unsettling of Kinship

Anindita Majumdar in her presentation highlighted that conversations on surrogacy have previously looked into the idea of labour, women’s rights, and the legal implications of having commercial surrogacy in India. However, one of the conversations that is happening but perhaps doesn’t get much focussed on, but is the underlying theme to all of these, is the idea of how something like commercial surrogacy destabilises the notions of the family. Many of these conversations, in her opinion, get focussed on in the media but are actually behind many of the legal conversations that have happened since 2008.

To a large extent, the anxieties regarding assisted reproduction, particularly commercial surrogacy are linked to the idea that a woman who gestates a pregnancy and gives birth eventually gives up a child to another couple. Concerns related to two men having a child creating the notion of a new family also characterize commercial surrogacy in India. Borrowing from Viviana A. Zelizer, Anindita Majumdar argued that the main theme to commercial surrogacy has been the meeting of the hostile realms of commerce and intimacy. Every relationship - intimate, economic, social or otherwise in her opinion have the underlying theme of economics to it. However, there is considerable silence on this notion due to the sense of purity that is attached with intimacy and the family, which when associated with commerce seems to be polluted. According to Anindita Majumdar, commercial surrogacy lies at this very juncture of caring and commerce.

Drawing on examples from her research work, Anindita commented that

“A lot of my respondents in my research work were gay fathers, who are now using their status as a family to push for the right to get married... So it the whole idea of the family and kinship - there are so many things to this - there is biology, there is the idea of what we think is a biological family and what constitutes a family and the different sets of people who come into this.”

Anindita Majumdar, XXIII GEP Forum, August 3, 2017

Anindita Majumdar posited that in the midst of all the debate regarding the question of family and kinship, the rights of the surrogates with regard to the child is hardly ever addressed because of the commercial nature of the arrangement. This has raised further concerns about commercial and altruistic surrogacy practices. She referred to a recent incident in Hyderabad where the police raided one of the fertility clinics where a lot of pregnant surrogates were living in a small hostel. After putting the clinic under the scanner, the Hyderabad High Court passed a judgement declaring that the babies once born will remain with the surrogates. However, the surrogates are not keen on keeping the babies with them till the matter is resolved. In the light of this context, altruistic surrogacy, where a family member should step in as surrogates, is being advocated. However, a number of important concerns emerge from this, as Anindita Majumdar rightly pointed out. Some of the concerns that she voiced were: What do we think of motherhood then? Now how does that happen? Who decides what? Is there going to be coercion? Can we accept that a family member might be coerced into doing it? What does it say about the family?

Anindita highlighted that a lot of doctors she has spoken to have said that - a wife’s sister can be a surrogate but not the husband’s sister- because there are tones of incest to it. There are also tones of how somebody who gives a wife cannot suddenly be in an equal relationship with someone who takes a wife- because if you are exchanging reproductive relations then you’re at an equal standing. So a husband’s sister

is not a logical surrogate. But a wife's sister is because she is already in that relationship of giving. So these complicated ideas actually form the crux of what we think legally of commercial surrogacy. And the supposed ban is part of this keeping it within the family.

Invoking the question of women's choice, Anindita highlighted that the formal contract the husband is expected to sign. And if the husband is not there then I found this happening regularly if the husband is missing, the surrogate has not told her husband then somebody from her own family- her father may as well be a signatory. Or her in-laws will be signatories. This is very interesting – at the end of the day she just does not have the right to call the shots. Somebody will control the rights to it. So the question of how we think through biology, reproduction, the configuration of the household and family is essential to surrogacy and now with the Hyderabad High Court insisting that the surrogates keep the children I wonder what is going to happen with the intended parents who have invested in the arrangement-because they are not always the villains as we make them out to be. They are also going through a pattern of deciding to do all this- the couple come together to decide to have a child with this other woman.

Therefore, surrogacy arrangements, which were initially meant to help infertile heterosexual couples to fulfil their desire for their own genetic child, are now increasingly challenging traditional understandings of parenthood and have far – reaching repercussions for ideas regarding family and kinship (Gupta, 2017). ARTs are also being used for building 'alternate' families facilitated through surrogacy.⁶ Thus, through her presentation, Anindita Majumdar focussed on the ways in which the legal changes to transnational surrogacy have more to do with the fear of the rise of the 'alternate' family, rather than issues of the surrogate's health and well-being.

Women's Reproductive Health and Technology: Stories from the Women's Movement in India

Professor Indu Agnihotri positioned her talk on the women's movement and its long engagement with

issues of technology. The engagement of the women's movement with technology, she highlighted, can be traced back to the post – Emergency period, from mid – 1970s onwards when growing debates over issues like amniocentesis (sex – determination test) were in the forefront of feminist dialogues. In July 1982, the first meeting on amniocentesis was held in Delhi and was attended by established doctors with a strong grounding in medical issues and committed to women's rights. From this time onwards the women's movement has faced reactions from medical practitioners and the scientific community on grounds that it is not responsive to the openings and possibilities that scientific and technological advances offer. Even though fraught with continuous tension, this phase is marked by interesting shifts in theory and practise, noted Professor Agnihotri. In her opinion the surrogacy debate and the whole flourishing market of ARTs has proceeded along with the marketization of the economy and changes in government structures. Drawing on a conversation with a drug controller in the health ministry office in Nirman Bhawan, Professor Agnihotri highlighted the impact of neo-liberalism and how it enforces certain kinds of closures. The major focus in terms of closure in this period in the movement has been to look at the question of the family – in terms of – social and ideological construction and the new imaginings. However, it is important to locate the family in the larger structures of society.

Another important issue that Indu Agnihotri underscored, that needs consideration, is that of the surrogate not just as a worker but as a woman worker. Highlighting the condition of the neo – liberal Indian economy, especially the rural economy, with less or no jobs, especially for women, Indu Agnihotri talked of how women's choices are being narrowed down to more circumscribed choices. The limited choices affect the institution of the family. According to her, in the present times the family is being fractured because it cannot be kept together as it is not being sustained by the economy. It is this larger macro structure and macro policy framework within which women's choice situated. According to her this is a major concern because the working of neo – liberal economics is short-changing women and women's work, women's health

and life. In fact, a surrogate's pay does not even amount to minimum wages and neither is she guaranteed a lifelong health insurance. If the time frame over which the surrogate woman carries the child in her womb is taken into consideration, the wage does not account to her security, choice or welfare. It is within this framework within which the fertility industry has grown and fertility tourism has contributed to the country's GDP.

However, the surrogate's health considerations have been neglected by the economy. Professor Indu Agnihotri voiced her concern for the lack of research on the malpractices that are perpetuated by the fertility industry. She is of the opinion that the fertility industry has violated the rules and regulatory practises that one could conceive of, in spite them being mentioned in the ICMR guidelines, in order to render "this great service to the nation because infertility is a problem". There is no evidence based research on the long term impact on the bodies of the women who are subjected to long-term treatments under the pressure of surrogacy. She voiced the need for more research and dialogue on ethical issues related to women's health and bodies with regard to invasive assisted reproductive techniques and surrogacy.

Professor Agnihotri underscored that these debates are necessary because the ART industry in itself and the surrogacy industry particularly show us what neo-liberalism can do to the delegation of any kind of government structures and regimes and flourish into a multi-billion industry. She raised the futility of a discussion on regulation of ARTs and commercial surrogacy mentioning that she supports a ban on surrogacy. According to her the great concern for infertility and for opening up the family in different ways are issues that need to be addressed. Moreover, questions need to be raised and addressed on women's body and her capacity to reproduce and on the ways in which women's bodies are used as vehicles or instruments to open up new ways of constructing the Indian family. In essence, Indu Agnihotri felt "what we are actually doing is we are reinforcing motherhood, we are reinforcing women's roles as mothers, we are reinforcing her role as the reproducer and the reproducing individual and we are not challenging patriarchy at its roots or challenging the choice, the kind

of baby that is wanted, the sex selection that is inherent in much of this – all of this only reproduces the social hierarchies and we are trying to collapse the woman into one". She highlighted that patriarchy doesn't just reside only in the individual family or the household but it resides in our society, in our policy regimes and it has to be challenged there as well – not in the context of the individual family.

The Way Forward

Professor Mohan Rao shared a news item which he had come across in the newspaper and had written to the National Human Rights Commission stating that they must take suo moto recognition of this case. However, in his knowledge, no action had been taken about this case.

The news relates to a police complaint and a dying declaration made by Shakuntala – a 27 year old Schedule Caste woman who was assaulted with a knife by her husband, Navaraj, at Kumarapallyam – considered the kidney donation racket capital – battling for life at the Salem general hospital. Shakuntala mentioned to the news correspondent that forced by her husband she had donated her kidney in 2006 – three months after her marriage. This was in Coimbatore hospital and they got one lakh rupees for it. He had also forced her to be a surrogate mother- later her husband and mother – in – law forced her into egg donation – she had donated eggs 18 times in Vallapery, Salem, Coimbatore and in Kerala but she could not remember the names of the hospitals in which she had donated eggs. Egg donation involved 10 days of injection and the eggs would be removed on the 13th day- the hospitals paid them between 18,000 – 30,000 each time. She had earned about 3 lakhs from it but her husband and mother-in law have not deposited the money in her account or saved it in the name of her daughter. She was being forced to undergo another round of surrogacy when she fled her home and took refuge in a woman shelter and her husband attacked her.

Prefacing his talk on the news item, Professor Rao highlighted that the Paris Declaration of European feminist has come up with a very strong declaration against all kinds of surrogacy – both altruistic and commercial. Following that the CEDAW Declaration has looked upon surrogacy as violence against women. In India, however, Professor Rao emphasized that in women are frequently being lured into surrogacy by being told that they are an “empty vessel”, contributing labour to the birth of something beautiful. In other words, that there is no genetic link between the gestating mother and the baby.

Professor Rao clarified that research has shown that this is not true. Even though genetically the woman has not contributed her egg there is a very close connection between the mother and the baby because there is a lot of genetic material which is crossing the placental barrier and there is a great deal of scientific evidence to show that.

Talking of the regulation of ARTs and surrogacy industry, Professor Rao emphasized that the focus of policy debates should not solely rely on ARTs and surrogacy but must be linked up with, what Chayanika Shah also emphasized in her presentation, the global pharmaceutical industry which is dependent on body parts that can only be harvested from women – this ranges from stem cells to the kind of R&D that is going on and how biocapital is being raised. Raising his concern, Rao commented that “In India itself we must link it to the completely unregulated embryonic stem cell therapy industry that is going on. What is being regulated in India is embryonic stem cell research. What is not being regulated is therapy and this woman,

Shakuntala – her eggs were harvested to be used in embryonic stem cell therapy industry and this is huge”.

This unregulated use of embryonic stem cell research, Professor Rao posited, promises a future which does not exist in all kinds of cases. He further went on to highlight that it is not just being used in the treatment of cancer but is also being used to treat people who have children with problems for which there is no cure. It is also being used to treat mental retardation; cerebral palsy and a whole lot of conditions for which science does not in fact have an answer and this is a growing market in the country. Finally, he emphasized that it is not enough to talk of women’s reproductive rights for in his opinion “it is leading us up a blind alley”. What must be focussed upon is not reproductive rights but reproductive justice. There is a need to raise questions about what is reproductive justice? Does technology contribute to reproductive justice? Does it in fact lead to reproductive wrongs in the name of reproductive rights?

In conclusion, it can be said that women are actively using reproductive technologies to give shape to their lives, although it is difficult to determine how far these are informed choices and whether they are acting as agents in their own right or making certain choices under familial and societal compulsions. They are embracing biomedical modernity through consuming reproductive and genetic technologies while simultaneously holding on to traditional ideologies and practices. In straddling the space between both worlds, the traditional and the modern, are young new middleclass women having the best or worst of both the world? This is a question that certainly requires further research.

Endnotes

¹(Malik, 2016) Retrieved from <https://health.economictimes.indiatimes.com/health-files/the-art-of-art-assisted-reproductive-technology-the-india-story/1630>

²Also highlighted by Chayanika Shah at GEP Discussion Forum XXIII, 3rd August, 2017

³Chayanika Shah at GEP Discussion Forum XXIII, 3rd August, 2017

⁴Chayanika Shah at GEP Discussion Forum XXIII, 3rd August, 2017

⁵Also see Shah, 2009.

⁶Anindita Majumdar at GEP Discussion Forum XXIII, 3rd August, 2017

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Speakers at the Forum

Anindita Majumdar, IIT, Hyderabad

Chayanika Shah, LABIA

Indu Agnihotri, CWDS

Chair

Mohan Rao, Centre of Social Medicine and Community Health (CSMCH), JNU

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INSTITUTE OF SOCIAL STUDIES TRUST

Core 6 A, UG Floor, India Habitat Centre, Lodhi Road, New Delhi - 110003

Phone: +91-11-4768 2222 Website: www.isst-india.org

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**HEINRICH BÖLL STIFTUNG
INDIA**

C-20, Qutab Institutional Area, New Delhi - 110 016

Phone: +91 11 26854405, 26516695 Website: <http://in.boell.org>