

Opinion on ethical problems arising out of artificial reproductive techniques. Report.

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Opinion

The National Consultative Ethics Committee was consulted on various ethical issues arising from the use of certain techniques for artificial reproduction, and decided to consider an aggregation of problems connected to infertility.

The following proposals do not attempt to deal exhaustively with the question. They simply aim to clarify some of the data presented by scientific and ethical debate only just emerging within French society. Furthermore, the Committee deems it both necessary and possible to adopt a position on one precise circumscribed point.

1. In modern societies, infertility is the object of therapeutic treatment. It is out of the question, merely because it is not a disease, to refuse treatment or reject progress. These patients have a right to treatment and to expect full assistance from their doctors. However, such assistance requires more and more frequently the use of artificial reproductive techniques.

2. To provoke a birth with the help of these techniques is an act which raises ethical issues. They are not due to prejudice against anything artificial. The new situation which arises, and which society does not yet know how to deal with, is due to the fact that by dissociating the different phases of the process of reproduction, these new techniques compel us to consider separately the best interests of patients, potential parents, and of the future child.

Traditionally, we have tended to interfere as little as possible in the supreme liberty : a couple's decision to have or not to have a child. The whole system revolves around the notion that parents, with the advice of their doctor, are solely in charge of any decision making.

These new techniques open up uncharted territory. Procreation, that complex act, is dissociated. This act, which hitherto was decided and accomplished together by a man and a woman, conducted to its term by the association of the embryo and that woman, can now be a decision which is taken separately and at a different time. Others may play a role, sperm or oocyte donors, or surrogate mothers who accept gestation of another's embryo, and physicians and intermediaries who, for various reasons, attend this birth, for a long time in some cases.

More often than not, the doctor is asked a question which he cannot answer alone.

Provoking a birth, not therapy, is now the issue. Does everyone have a right to have a child whatever the consequences ?

To answer that question, the future child's interests must be a criterion. Asking that question means consideration not just of the right of individuals to be parents, but also of the relationship between the man or woman who participates in reproduction and those who will bring up the child. And soon the question becomes: is it rightful to give away a child ? Is there not a risk that the child will be treated as means to an end rather than the end itself ?

Further, the embryo gains a brief period of existence during which he has so far, no status.

3. The magnitude of these questions prompts the Committee to reflect on the scope of its mission. It is founded on science and research, and by its very composition the Committee is most suited to deal with truly scientific issues. The experience of its members only partially enables it to pronounce itself on the questions above which are only remotely connected with research at this point and, on the contrary, more concerned with ethics and society. These questions are directly related to the manner in which French society views the status of the family.

The Ethics Committee has come to believe that this debate on the interests of a future child and the rights of parents should take place in a more open forum and that consultation and audition of all sectors of opinion should be more formally organised. The full spectrum of citizens should participate in the process.

As has been the case abroad, ample public consultation would help to sharpen thinking on these subjects and would be an ethical undertaking.

It would obviously require administrative instruments of a different dimension than those the Committee has been using so far. If resources were provided, the Committee would be prepared to undertake the task of organising and animating such a consultation.

4. French society would, in this way, avail itself of the means and the time required for necessary reflection. However, it is already abundantly clear that action and research arising out of artificial reproductive techniques must cease to be conducted elsewhere than in approved non-profit units. Approval would be granted after a competent ethics committee has been consulted. It would imply as a counterpart that such units would contribute to the common effort of disseminating scientific and research information needed because of the use of new techniques of artificial reproduction.

5. In such a setting which should enable French society to consider with more composure some divisive issues, one question which has been put to the Committee on "surrogate mothers" demands an immediate response.

This expression, as others which have been used in France ("carrier mothers", "uterus loaning") try to designate, probably inaccurately, the following practice : a couple who want a child turn - usually through a medical unit - to a woman who is willing to conceive a child by artificial insemination with the sperm of the husband in the infertile couple, and then to carry the child and give birth to it. This woman, who carries to term a child born of the insemination of her ovum is naturally that child's mother. However, once born, she gives the child to those who will then consider themselves its parents(1) .

This solution to the problem of infertility is not connected to new technical developments. The new element is that third parties play a role : the woman who accepts surrogate motherhood and the intermediary who organises the procedure and follows her up for several months.

In the present state of the law, this practice is illicit. It achieves the "sale" of a child. Any such contract or commitment is considered to be null and void because of its object, and is entered into in violation of the law on adoption. Adoption is authorised by a judge's

responsible decision after taking into account the child's interests and assessing by enquiry whether adoption is opportune. A judge would not be under any obligation to authorise adoption by a woman who wishes to rear a child conceived and carried by another woman.

Furthermore, the intermediary, member or not of the medical profession, could be considered guilty of abetting child desertion in violation of article 353-1 of the *Code Pénal*.

This is the law, and it must not be changed.

On the contrary, the Committee wishes to persuade all those who have shown interest in this method to refrain from using it.

In fact, as described, this ominous practice inducing a birth represents a risk for all participants acting in good faith.

A woman who agreed to give away her child can be exploited financially and psychologically. It is unacceptable to begin with that the operation should be lucrative. Further, no satisfactory method of organisation would appear feasible to guarantee the reliability of the intermediaries, even in the absence of any monetary transaction. The prospective parents cannot have any certainty of a successful outcome.

Finally, in all modesty in the face of a problem still not totally resolved in scientific terms, it is clear that the central issue, the interests of the future child, has no solution. No one can be sufficiently certain that the notion of provoking a birth with the intention from the start of separating the child from the mother who bore him, from the true mother, is in the child's best interest. Finding a family for a forsaken child is another matter entirely. In that case, society is confronted with a *de facto* situation which requires no soul searching. The child is looked after, adoption is authorised and experience shows that in this way a great many problems are happily settled although there is still room for improving procedures. A child in those circumstances gets a good start.

There is no way of being sure in the present state of our knowledge that this would be the case for a child who has been deliberately conceived with the sole purpose of being given away by his mother at birth.

The Committee therefore proposes that existing legislation should continue to apply and that no effort should be made to adapt it to render legal a solution to infertility which contains the seeds of insecurity for the child, for the parents who want a child, for the woman who gives birth, and for those who serve as intermediaries.

Working document on ethical problems raised by "surrogate motherhood".

Because of recent scientific and technical developments, new scope has arisen for human beings to impact on their environment. Our own reproductive process is involved.

Artificial insemination makes it possible for a child to be conceived without the man and woman who decided to do so ever having to meet. The genetic father may rear the child together with the woman who bore him. The father may be an identified or an anonymous donor. In a manner which is for the time being more difficult and less frequent, an oocyte may be collected from a woman who will agree either in view of immediate treatment of her infertility or because she wishes to have the added security of supplementary oocytes. In this way, the idea of giving away some of the supplementary oocytes was arrived at. It is important to remark here that this already benign procedure is now being replaced by more sophisticated techniques which are less aggressive and thereby much more acceptable and likely to be used increasingly. Furthermore, it has become possible, in the few days

following fertilisation, to remove an embryo which is not yet dependant on the mother's uterus and transfer it to another woman.

Fertilisation can take place *in vitro* and the embryo which is the result of this fertilisation can survive for several days without implantation in the mother's uterus. There is some agreement on a two week limit, but as always in biology, this is an average length which does not cover every specific instance.

The embryo can then be transferred artificially into the uterus and normal gestation will follow, thanks to improved understanding of hormonal mechanisms. However, such progress has not, by far, made it possible to fully determine the interdependence which builds up between embryo and mother during gestation. Ordinarily, the genetic mother was afflicted by sterility due to an obstacle in the fallopian tubes preventing the passage of the oocyte. But the oocyte can also be transferred to a woman who cannot produce one herself, but will receive this donation and gestate to term. Finally, it is possible for a woman to be artificially inseminated by an anonymous donor or to accept transfer to herself of an embryo resulting from *in vitro* fertilisation, which she will then carry to term but with the purpose of giving the child at birth to be brought up by other parents, in which the father may be the genetic father or someone else.

Added to these possibilities, are all those made available by storing techniques. Sperm banks open the way to long term storing, and it is also possible to freeze embryos. These possibilities have helped develop artificial reproductive techniques since hormonal cycles are no longer an impediment. But they can be carried to further extremes since quite a lengthy period of time may now elapse between the initial encounter between sperm and oocyte and the start of gestation. Another point is that these techniques lead to storing excess embryos, which are or could be used for the same purpose as the initial fertilisation, but could also remain in excess with no final destination.

Medical and scientific research which develop in line with therapy for infertility, could thus become the primary object of storing excess embryos, or even for that matter of creating them in the first place. Such research is still linked to an immediate therapeutic purpose when the object is to analyse a surplus embryo to gain more insight in the fate of the transferred embryo, or to intervene *in utero* to remedy a defect.

The link is more tenuous when research aims only at using the brief period of autonomous existence of the embryo to find the answers to the numerous scientific questions which remain pending. At this point ideas such as comparing embryos produced by cloning come to mind and also a great many other possibilities in which the fine line between science and fantasy begins to blur.

This summary presentation must not serve to oversimplify.

From a scientific point of view, the various techniques have attained very different degrees of maturity. It is therefore very chancy to try and anticipate what problems will arise and extremely difficult to discuss them in the present state of their impact on practices and principles without falling into the trap of inequitable generalisation or science fiction.

In what has been described, two techniques appear to be very simple, or at least their scientific complexity has been reasonably well defined :

These are artificial insemination on the one hand, and perhaps more surprisingly, what has been called "surrogate motherhood". At least we believe we can state this confidently in the circumstances which alone have been discussed in any depth in France and which are the most frequently encountered, i.e. the case where a woman carries to term a child conceived by artificial insemination of her own ovum, which she subsequently gives at birth to an infertile couple. Medical intervention is limited to avoiding any contact between the father and the natural mother who does not intend to rear the child.

In this situation, technical questions are minimal, there is very little science, and no research. At least for the time being, since nothing is known as yet about the comparative development of children born of artificial insemination and others, and there is every reason to believe that scientific protocols which could provide that knowledge will be difficult to design. On another level, to which we shall refer again, there still persists such a degree of ignorance about what takes place between mother and embryo during gestation and about the physical and psychological impact of a break with the mother on the child's development, that the scientific community makes almost no mention of problems, real or imaginary, related to gestation.

This same scientific community is on the contrary very alert to problems connected with *in vitro* fertilisation, survival of the embryo, and avenues of research opened up by these techniques. Though such prospects are vast, only a few thousand interventions of this nature have been performed in the laboratories of the industrialised world. Furthermore, difficulties connected to the implantation process are far from solved. It is impossible at this point to know whether we are thinking ahead for tomorrow or for ten or twenty years in the future. But paradoxically, the precautions which accompany intervention leading to the birth of a child are less intimidating in many minds when the concern is to claim for scientists the right to gain more knowledge about an embryo a few days old, but unused or frozen. No one knows exactly for what research, but few scientists from a purely technical point of view, exclude a priori that a non transferred embryo can be a subject of research.

As to concern in certain quarters about eugenics, it should be clear that for the time being choosing a genetic heritage is far from our grasp. Those who want "Nobel prize children" will have to make do for some time to come with the kind of uncertainty which is close to what nature provides.

The questions meet with equal diversity of response in all countries. In France, sperm banks were created in a spirit of tolerance granted to well defined trustworthy units.

They have operated in compliance with two rules, exclusion of any lucrative component, and anonymity. As there was a lack of donors, the criteria which in fact condition acceptance or refusal of requests had no need to become public. Recently, however, the need for some legislation on this subject has begun to appear.

In vitro fertilisation is evolving, exclusively in the hands of the medical units specialised in treating infertility. However, present developments are forcing these units to deal with problems connected to preservation of embryos which in turn raise the issues of the rights of donors, recipients, and researchers which in the context of sperm banks had been left pending. These units are spontaneously asking for some guidance.

As regards "surrogate mothers", it is astonishing to observe that although from a technical point of view this is a simple solution, it has not been seriously considered by physicians dealing with infertility. In France, there are only two instances in that direction, a medical initiative and one from a women's association. And yet, this has been feasible for quite a while.

A comparison with the situation in other countries will doubtless reveal two points, unless necessary further study contradicts this belief, which are the following : a very different view is taken in a country depending on whether or not an intervention which involves a human being is allowed to be lucrative. The example of the United States which is advanced in the field of artificial insemination, and which certainly originated a process of imitation for "surrogate mothers", is part of a background of considering that new techniques give rise to financial reward. As a result, we can see that these developments which we find astonishing or even shocking, contain prospects of which we did not even suspect the existence. It would certainly be essential to draw a line between what is a source of profit or income and what is an anticipation of social evolution that may await us in France.

Another fact is evidenced in a survey published by the Warnock Commission in the United Kingdom. In spite of the stronger influence of the United States on British thinking, the Commission concludes with the same kind of cautious findings as those briefly described above and makes a special point of the evolutionary nature of the issues arising.

We are therefore confronted more with virtual possibilities than with actual practices. Furthermore, *an Ethics Committee whose task it is to study the conditions of scientific development, should not start its work in a spirit of a priori mistrust of anything artificial*, as though opposed to the laws of nature. Its very mission implies dealing with artifice, even if its members individually may have other personal preferences or convictions.

Artificiality is introduced into reproduction, which is a complex process, by dissociation.

This act, which so far was decided and accomplished together by a man and a woman, conducted to its term by the association of the embryo and that woman, can now be a decision which is taken separately and at a different time. The decision can be made, and deferred to a later time. Genetic parents may have no obligation to the unborn child. A mother may limit her responsibility to gestation. Children can be born with a single parent, or they may be born long after the death of their father. Genetic parenthood, gestational parenthood, educational and emotional parenthood, may go their separate ways. These virtual situations are far removed from simply controlling fertility which has existed for a long time and was mostly confined to birth control. They awaken in human beings the temptation to totally control procreation by creating birth when and where it would not have happened.

Added to this, as a by-product of this control of procreation, there is the availability of embryos whose genetic parents have not considered what would become of them if they were not needed for implantation.

Bearing in mind these general considerations, it is time to turn to the specific problem that was put to us.

The Minister of Health and the Medical Association (*Ordre des Médecins*) were opposed to the possibility of infertile couples using "surrogate mothers" who would be artificially inseminated and then be prepared to carry a child to term and subsequently give it at birth to the couple who wished to bring it up.

The issue raises a number of questions :

Who is truly concerned ?

Can the problem conceivably solve itself ?

Can it be treated independently of the whole issue of new reproductive techniques ?

How should the Ethics Committee take part in the debate ?

I. Who is concerned by the problem ?

The actual problem we are dealing with, as previously pointed out, is recent, although this method of reproduction is not the direct consequence of the most advanced techniques. It is therefore quite possible that the hundred or so requests that have been formulated in projects in Marseille and Paris are no more than the result of fleeting interest prompted by the media.

However, in our opinion, it is necessary to prepare for possibly substantial demand which may be difficult to analyse.

Parents will apply, as is always the case with new techniques, because of progress in the treatment of infertility.

All practitioners strongly emphasise the importance of this aspect of public demand for health. The distress of the infertile couple motivates ever greater efforts on their part to find a remedy, and "surrogate motherhood" is one of the remedies open to those for whom there is no medical solution. This recourse to therapy to overcome infertility responds to a deep-seated and obstinate need. It is sustained by the spectacular side of scientific discoveries and the interest which doctors take in prospects of further progress. It may also be supported by the elimination of some taboos. "Surrogate mothers" seem to be both a last hope when all else has failed, and the speediest and least stressful solution for a couple seeking a remedy. After all, it is possible to have a child fathered by husband or companion without having to undergo difficult and complicated treatment, and after all, a child can be adopted without remaining in as extreme ignorance of its origins and possible hereditary problems as hitherto. Judging by the number of unfulfilled requests for adoption (10,000 - 20,000 ?), and what we are told by those who attend consulting patients, evaluation of demand should be on the high side.

However, the demand is a complex one because it is only too easy for therapy to give way to aggressive or obsessive therapy, or for a genuine desire to find remedy for the body's defects to be replaced by eagerness to control procreation.

In many of the couples concerned, the woman's infertility has found no cure. But in some cases, the cause may be that she is past the age of child-bearing. Nor is there any principle to the effect that inducing birth is reserved for legitimate couples or even couples. A single woman may wish to bring up a child or a man may consider the possibility, and this would meet the approval of those who wish for descent without any involvement of the other sex or any association involving obligation.

By comparison with the greater majority of couples who tend to delay the age of marriage, practise birth control, choose to have at the most one or two children, such techniques may seem to be ideal to those who are sufficiently prosperous to bring up a child, particularly keen to have a child in their home, and claim the right for almost anyone to have a child. They may wish to live as a family at a different time of their lives than is usual, or in another relational context. Without formulating any kind of judgment on such thinking, we must remember that at some point, the question of whether single people or same-sex couples have the same rights will be unavoidable.

In the United Kingdom, there has been some outright support of the notion that women's rights - after the revolution brought about by contraception - should be extended on request to artificial insemination or recourse to "surrogate mothers".

In the French context the rights of applicants have to be dealt with although there is no certain evaluation of possible difficulties. These problems of course are common to all the couples who resort to new techniques, but they are more immediate in the case of surrogate mothers because of the obligation to define overtly the relationship between potential parents and the mother carrying the child.

Furthermore, in spite of the absence of any practical precedent, it is likely that prospective parents would find women ready to consent.

In fact, there already have been a few, and public opinion has been slow to criticise. This may seem astonishing, but it is quite possible that women with an entirely different outlook on their role in the reproductive process, prefer to carry a child to term and give it away than choose abortion. They may be motivated by a zest for life, a wish to demonstrate fertility. By using the expression "gift of a child" instead of "abandoning a child", those in favour of these practices were fairly clear-sighted and may have found themselves in

harmony with non-conformist attitudes of genuine generosity in younger women, or for that matter of other generations.

It may not be a purely negative attitude to carry a child for nine months with the person wishing to rear the child inevitably supporting the mother throughout her pregnancy. If we are to believe the media, in the United States, surrogate motherhood reaps substantial benefits.

French supporters of such systems reject the word "payment" but they do accept the idea of a contribution or a compensation.

Therefore, there can be both demand and supply, in which case all that is needed is an intermediary to organise an encounter. He is also necessary to conduct the operation. He must make sure that the child is handed over to the would-be parents, and that connection to the natural mother is severed. It is also the task of the intermediary to harmonise the want of a child of one party and the protection of the other party, whether the operation proceeds smoothly or is plagued by difficulty. To sum up, an intermediary is a necessity, and we shall revert to this point when we express an opinion on whether any community action is required.

However this encounter aims at voluntarily bringing about the birth of a child. In the same way as the child's interests are the sole reason for the community to step in when parental authority is absent, in the same way as legislation in favour of children and adoption are also based on the child's interests, there is one person, the child, who is primarily concerned by a process which brings about both his birth and his separation at birth from his natural mother. The unborn child has no say in the matter, but should have, and the conclusion is reached very early in a preliminary analysis of the situation that ethical problems arise precisely from the fact that those who claim for themselves the right to have children or to decide the fate of their own bodies, must accept concessions regarding the interests of the future child.

If it comes to a choice to be made by society, the interests of the child must take first place.

To complete this survey of those concerned, one fact is patently obvious. An infertility clinic is where the operation begins. But a therapist is not very much involved as such since his patient is choosing a solution where medical technique takes second place. Although the doctor appears sometimes to be one of the parties involved, this is really because he is acting as an intermediary, outside his usual sphere. There is nothing special about the expectant mother in this case (2) , and it is only the child's physician or psychologist who may have to deal with consequences. Even the research scientist is totally uninvolved, and it is therefore a paradox that the Committee should be called upon to deal with a matter which may be particularly offensive to some, whereas its members' experience is of little help in this undertaking and it might even be blamed for exceeding its purview.

II. Can the problem conceivably solve itself ?

III. Can it be treated independently of the whole issue of new reproductive techniques ?

No indication connected to research obligations motivates the Committee to formulate ethical rules applicable to this practice. Furthermore, it is our belief that when individual privacy is so much in the forefront the Committee should resolutely reflect on whether it should express an opinion.

After much thought, it seems the answer should be in the affirmative, because the problems

arising will not abate of their own volition. If the community has to take decisions, *ethical issues which are important to the Committee will arise, and choices made will have a profound bearing on the context in which the new reproductive techniques will evolve*. In fact, replies to questions II and III are interconnected. There can be no alternative to formulating an opinion on surrogate mothers, because as is the case for all problems connected to artificial insemination, this problem arises in the same place and time.

The common context is treatment for infertility. Using surrogate mothers appears to be one of the solutions to a therapeutic problem which arises in an infertility clinic.

Taken as a whole, this therapeutic problem has ethical implications which French society has not yet addressed. After a brief summary of the situation, we shall see that surrogate mothers add a further set of problems which cannot be solved in such a way as to satisfy all existing views.

One principle should be adopted as the starting point, and it is pleasing to note that a British commission chaired by Dame Mary Warnock also uses it as the cornerstone of its proposals : *it must be taken for granted that infertility is the object of therapy in our modern societies, and for as long as possible, attempts should be made to deal with the problem as though it was any other kind of therapy* .

It is out of the question, for the sole reason that the particular problem is infertility, to oppose progress and refuse treatment. As long as that will be possible, the free choices of conscience should take precedence and decisions remain within the bounds of the discreet relationship between patient and physician. Free and open access to new possibilities must be allowed with as a prime concern the interests of the patient.

So far it has been possible to do so because of the limited development of these techniques.

As long as sperm or oocyte donation, in vitro fertilisation, and implantation are linked directly to treating a couple's infertility, the same ethical rules apply as in any other therapeutic endeavour. They imply essentially technical guarantees and are settled by agreement between doctor and patients. Apparently, the doctor does all that is required with, as the only limit, his patient's interests.

There has been no obligation on the doctor to say whether in this case or that, he considers a treatment unwise. In any case, his silence will not give rise to reproach, taking into consideration the risks of avant-garde techniques. It is clear, however, that not all patients have equal access to all techniques, even abundantly proven techniques such as artificial insemination. But society is not sufficiently shocked by this fact to call insistently for a legal definition of the status of such services. Still in the context of therapy, it has not been a necessity so far to define a status for the embryo during the few days between conception and implantation. If there is no implantation, the embryo does not develop, and this interruption of development is only one aspect of the mother's infertility. Failure of a therapy is not presented as an ethical problem.

However, the situation will not remain at a standstill for two reasons essentially which motivate the Committee to suggest that without further delay *modern in vitro fertilisation therapy must be confined to approved non-profit making units* .

The first reason is that the very natural path for a scientist which leads from therapy to research very soon raises ethical problems. Secondly, society must fill the legal void regarding affiliation of children born by the process of artificial fertilisation, the status of the embryo, and the rights of parents who use these various techniques.

These are awesome problems which cannot be allowed to mature solely within an Ethics Committee whose main vocation is scientific. As has been the case in other countries, they call for a broad consultation of opinion.

We shall mention only some of the salient points.

If artificial insemination were the only issue, regulation could probably have waited until thinking had matured. But with in vitro fertilisation, problems aggregate. To stay within the discreet bounds of therapy, one first step could have been to drop the idea of storing surplus embryos which presently offer better chances of a successful outcome. In this way, temptation to subject this being to research following other criteria than those applied to humans, would have been foiled for a time.

On the contrary, the possibility of storing makes it mandatory to evolve a status for embryos as regards those who produced them, who have them in their keep, who can transfer them to their genetic mothers or another mother, terminate storage, or make them available to researchers.

This potential human person, whatever one believes about the time when conscience is awakened, deserves respect, if only because the embryo is a fragment of the human heritage. This means that laissez-faire is not an option. To begin with, if implantation is deferred, it is important to determine how parental consent is arrived at. If preservation is to be prolonged, it becomes very difficult to obtain consent from the two parents who originally wished to treat infertility. Another paradox is apparent here : whereas the relationship between embryo and mother after implantation are such that an interruption of pregnancy is the mother's decision, her rights are less extensive over an un-transferred embryo if the father claims paternity.

Therefore obligations arise in respect of the parents of an embryo which cannot be regulated unless a limit is set on length of preservation.

However, whether it is sufficient to define parents' rights or whether these are limited in the name of higher principles by legal status of the embryo which remains to be defined, is an unanswered question.

No-one supports the view that the rights of parents could be overturned with the aim of doing research on an embryo. But here again, the primary question, that is the principle itself of such research, will no doubt arouse passionate controversy between those who wish it to be banned and those who have no objection as long as the agreement of those who gave life to the embryo is secured and research is carried out by fully responsible recognised medical teams who would guarantee its final destination.

Another point is that it would be out of the question to refuse legal status to children born of artificial insemination. On the contrary, everything must be done to ensure to a maximum degree similarity with natural birth. But however strong the wish not to interfere in this supreme liberty which is the right to have children, society inevitably has to broach the subject of the rights of parents. Is society ready to state that anyone at all has the right to become a parent, be he or she part of a couple or single, with no conditions set as regards capacity to rear a child? The feeling is clear that it is necessary to speak in the name of the child, but the distinction between the interests of a future child and those of its parents is so weighty that most of those who have considered these matters have not come to conclusions.

The above considerations fully justify that firstly, *modern fertilisation techniques must be confined to approved non-profit making units* , and secondly, *a sweeping and structured consultation of opinion must be organised concerning societal problems which artificial fertilisation raises.*

These proposals should enable French society to avoid being confronted with a fait-accompli situation, and to realise to what extent these technical advances raise issues as regards the status of families, parents, and children. They should also help to view these problems in a sober light.

On the one hand, as techniques develop, practitioners will be asking specific ethical questions about real cases or projects, and the principle according to which in France, donation of blood or organs is not a source of financial benefit will not be undermined by concessions accepted under pressure from prospective parents.

On the other hand, solemn consultation would oblige those who speak for various sectors of opinion to formulate structured statements, giving due weight to the various arguments aligned, and by doing so in writing would make a clear commitment to those they intend to represent.

IV. Specific nature of problems raised by surrogate motherhood

In this context and after giving the matter some thought, the Committee considered the wisest course would be to discourage the practice.

This particular form of response to infertility adds to an already extremely difficult situation the *supplementary risks entailed by reliance on third parties*. Nor is there any argument in favour of the child's interests which could lead to proposing that legal and social efforts be made to remove these risks.

It is not just a question of prospective parents and surrogate mothers meeting. Even to make arrangements for artificial insemination which should be fairly simple, there have to be intermediaries who supervise the technical safety of sperm banks, and who insure through donor anonymity a clean break between the recipient couple for insemination and the genetic father. Further, the principle which is sturdily recognised in France to the effect that products of the human body must not be traded for profit, leads to restricting the right to intercede to only a few individuals. In the present case, the matter is far more complex since a surrogate mother entails one simple procedure, artificial insemination, followed however by many months of gestation. It is during that protracted time that the intermediary has the burden of responsibility. Then, at birth, separation from the biological mother leads to a host of problems : she may want to keep the child, the "host" couple may refuse the child, or the biological mother refuses to be cut off from the child's future and wants to make herself known to the "host" couple.

The separation requires a contract, which in fact is not licit under present law, and keeping a secret which is far more difficult than in the case of artificial insemination. Added to this, the mother has to subsist during the nine months of pregnancy and even if there was no question of payment, there is the problem of her maintenance which conditions the satisfactory development of the child.

In order to bring together, and then separate the parties to this birth, to shoulder responsibility for the following nine months, there has to be an intermediary. Such a person could be untrustworthy and a source of considerable risk to mothers who could be exploited, or to prospective parents who could find themselves deprived of the child they wanted or in unenviable personal and legal difficulty. Or else, the intermediary may end up with an unwanted child.

No more than is the case for homeless children, society cannot remain aloof from such events. If intermediaries are to be approved officially, society will be faced with an impressive list of problems to solve and above all, it will need to base its responses on criteria which lead to a legitimization of the practice.

At present, any such practice takes place in a totally unsafe legal environment. Contractually, such a covenant would contravene public law and order. It would therefore be null and void. As regards law of affiliation, generally the child is adulterous. He can be recognised by his father, but the host mother must rely on the judgement of civil courts to

decide adoption. The courts are in no way bound by the wishes of the parties. There is nothing to prevent the biological mother from recognising her child and no contract could possibly entitle her to give up her right to do so. As for the intermediary, his activities could lead him to prosecution with reference to article 353-1 of the *Code Pénal* which sanctions any action which could bring about abandoning a child.

Prospective parents confidently rely on the circumstances of birth remaining secret, but it is only preserved by secrecy concerning birth. In fact, neither the biological mother giving birth, nor the intermediary, are sworn to secrecy. If there were any moves to legislate on that obligation, they would be in opposition to the trend towards giving the truly deserted child the right to know his origins and in particular, through that procedure, some elements of his genetic heritage. Furthermore, what is known to date about mutual influences between mother and embryo during gestation inspires great caution before systematically allowing a break between a child and the mother who bore him. Finally, in view of present thinking it is likely that a child will at some point be told the truth about the circumstances of his birth and will then have to face the unpalatable thought that his mother bore him to give him away or be separated from him. In this respect also, psychological research has not reached a level where it can cope with all the problems which spring to mind, in particular if at a later time, that child was to have a difficult relationship with his foster parents.

It would of course be possible to enact so that these legal obstacles were removed, and to organise "surrogate motherhood" in such a way that payment is banned and intermediaries are made to give certain guarantees. However, in that event, it would be difficult to leave out any mention of support for the mother during pregnancy, and to give legitimacy to a contract without any reference whatsoever to money.

Where is one to find such a non-profit making intermediary ? Some doctors see themselves undertaking this task, but they have never considered the problems they would encounter if one of the donations failed. The gift one woman presents to another meets with some sympathetic approval, but reactions might be less favourable if a woman were to make a habit of giving away a child. One cannot help feeling that exploitation, perhaps more psychological than tangible, is a distinct possibility.

It is also clear that in spite of a natural desire on the part of a couple to keep its want of a child private, with therapists keeping to their own role, in fact in this case society is obliged to define novel activities of third parties who become involved.

This brings us back to the primary issue : it has always been necessary to care for children who have been deprived of a mother, but is it wise to deliberately bring about the birth of children knowing in advance that they will be separated from their mothers ? We are well aware that in the extreme diversity of situations created by a changing society, with more divorce and second marriages, children adapt remarkably. But we cannot resign ourselves, in the name of the welfare of the future child, to encourage and enable such decisions.

That questions is the most important one, but there is also the matter of whether the host family is suitable. This can hardly be disputed when the person is the genetic father. But should the intermediary be compelled to accept all requests, or should he make sure that the family can take on responsibility for the child, as is the case for adoption ? Would he be free to allow the child to go to any couple, of any age, or to a single man or woman ?

It does appear to us that this manner of responding to the desire to have children is not, by its very essence, able to safeguard the interests of the future child, and that attempts to solve the problem of intermediaries do not address the essential question of principle which is ethically distasteful.

Is it necessary to go to the other extreme and propose specific legislation to ban "surrogate motherhood" by reinforcing the *Code Pénal* so that it deals not only with abandoning a child but also with giving away a child ?

As things are at present, this does not seem necessary. The impediments which in any case in the present state of legislation make any such contract null and void are an adequate deterrent. Also, public opinion might be shocked by coercion since it is very clear that the question is not finalised and that technical progress may well make this complex procedure totally obsolete in the near future by giving couples access to other solutions. Thinking on this subject must be given time to mature, and those concerned with bringing remedies to infertility have nothing to gain by seeing the matter discussed in Parliament from its most controversial angle. It would be more advisable to devote additional resources to research on infertility so that sterile couples can avail themselves of less hazardous methods.

However, consideration must also be given to the consequences of reserved or negative response from the Ethics Committee on the subject of surrogate motherhood.

Simply because it would be the first to interfere in a subject which is of a highly intimate nature, a negative response could shock public opinion and might be thought insensitive to certain trends and therefore more provocative than convincing. It might also judge, or seem to make a premature judgement on the basis of a very exceptional case and therefore with a bias, about issues which are common to all new reproductive techniques.

If one adopts the principle - as we are very naturally inclined to do - that the first priority is the future child's interests, that is equivalent to setting a limit to the right for everyone to have a child using all the facilities offered by technology. And yet everyone is also ready to agree that for infertility, like any other condition which may benefit from therapeutic possibilities, free choice and access to those possibilities will be acceptable if it is in the patient's best interests, and with those best interests as the only limit. Furthermore, as soon as the Committee broaches, if only to discuss the point, conditions of access and the rights of potential parents, the result will be to focus reactions of disquiet and resentment based on modern thinking whereby the right to control one's body, sexuality, and fertility cannot be questioned. Until now, control of fertility was demanded in a negative sense. It can now become positive.

The Committee therefore should not express reservations about this aspect of new reproductive techniques without acceptance also of the alarm they may thus be creating. The Committee must also simultaneously state as a principle that there is no question of refusing to treat infertility, or to put these therapies in a category of their own in order to limit their use or development. It must suggest to the authorities that a consultation should be organised about the societal problems which are raised by this aspect of scientific progress which go well beyond the bounds of research ethics.

Legal aspects of surrogate motherhood

I. Contract or covenant with the mother

1. The contract between the couple in which the woman is sterile and the mother, is null and void because its object is illicit. Since the object would be to dispose of a child or a commitment to conceive and carry a child for a third party, such an agreement cannot have any legal value whatsoever, and therefore cannot be enforced, be it concluded without charge or for retribution (article 1128 - *Code Civil*).

2. The intervention of a third party to :

- a) incite parents or one parent to abandon an existing or future child,
- b) to persuade future parents or one parent to subscribe to a document whereby they agree to abandon a future child, to be in possession of such a document, or make use of it,

c) for financial gain, to negotiate taking custody of, or adopting a child, is an offence as defined and sanctioned by article 353-1 of the *Code Pénal* .

Supposing that no such offence has been committed, with due regard to specific circumstances, the only legally acceptable manner in which a child may be handed over, if that child has in fact been abandoned by his mother, is adoption, for which the following conditions apply:

1) a child less than two years of age must be entrusted to the care of social services (article 348-5 - *Code Civil*);

2) in any event, judiciary decision on whether adoption is in the child's best interests.

Consequently, surrogate motherhood is illicit by object and cause, and it is also a violation of legislation relating to adoption.

II. Affiliation problems

All kinds of situations are conceivable, depending on the mother's attitude or the couple's, and on the marital circumstances of all the parties.

1. The procedure which was worked out by associations created for this purpose or private individuals, **can only be effective if :**

a) voluntary implementation of the agreement between the two parties does not lead to any kind of difficulty,

b) the judge decides in favour of adoption.

Even so, the process may appear disputable since it built on questionable foundations.

This is so because :

a) childbirth whilst keeping secret the mother's identity is allowable according to the *Code de la Famille et de l'Aide Sociale* (Code concerning families and social welfare), but is a singularity of French law which quite a strong body of opinion disputes in the name of the child's right to know its origins,

b) for the child's affiliation to be acknowledged by the father before birth, which is required to establish paternity, the mother's name must be given. Maternal affiliation cannot therefore be kept secret. Legally, the child is the father's illegitimate offspring (adulterous, if the father is married); recognition of affiliation is irrevocable, unless this is contested in court as being untrue, if the child is not the biological offspring of the man who recognised affiliation. The net outcome is that if the mother were to refuse to hand the child over and that child had been recognised by the father, natural paternal affiliation would be definitively established and adoption become impossible because the mother had not abandoned the child.

2. If the procedure, as contrived, does not work out , several possibilities may arise :

a) THE INFERTILE WOMAN REGISTERS THE CHILD AS HER OWN (which of course implies that the real mother is not claiming the child) so as to avoid the uncertainties of the adoption procedure. This is in fact an offence "*supposition d'enfant* " (false statement about a child's status) which is sanctioned by article 345 of the *Code Pénal* (5 - 10 years prison sentence).

b) THE REAL MOTHER REFUSES TO RELINQUISH THE CHILD

She has a perfect right to do so and no-one can force her to abandon her child. Even if she has given birth without revealing her identity, she is at liberty to claim maternal rights as long as the child has not been given for adoption, and that is not possible until a deadline for the mother's claim has elapsed.

In that situation, *if the mother is single*, she is perfectly free to claim the child as her own and she is invested with full and exclusive parental authority.

If the mother is married, the child will be the object of a conflict of paternity between the husband, legally presumed to be the father, and the real father if the latter has in fact claimed affiliation for the child. Solving such a conflict may become very intricate legally if the mother's husband does not disclaim affiliation within six months of birth.

If the mother and her husband decide to keep the child, the real father's recognition of paternity of his illegitimate child will be considered null and void (article 334-9 - *Code Civil*).

If legal proceedings are set in motion to solve the conflict of paternity, the outcome will depend on biological proof of paternity. Validity of the claim of affiliation of the illegitimate child, which can be disputed by anyone concerned, will rest on whether the child was in fact sired by the man who inseminated the mother.

If the mother has relations with other individuals during the period legally defined for conception, she can dispute the claim of paternity and request that the child should be connected to another man.

c) THE COUPLE IN WHICH THE WOMAN IS STERILE, IS UNMARRIED .

When surrogate motherhood is alleged for an unmarried couple, full adoption is a possibility for the infertile woman, but the drawback is that any connection of affiliation to the male partner is severed, since there can be possibility in this case of adoption of the child of a spouse which would be the only pertinent relationship (article 356 - *Code Civil*).

Furthermore, if the child is not the male partner's, adoption by the unmarried couple is impossible since one cannot be adopted by several people unless they are man and wife (article 346 - *Code Civil*).

d) SOLUTIONS ARE NO DIFFERENT IN CASE OF WOMB "DONATION" OR "LOAN" by one woman to a genetic mother; an embryo conceived from the oocyte of woman A is implanted in woman B who promises to give the child back to his mother at birth. Civil law only recognises one mother, the woman who gives birth to a child, and it never entered anyone's mind that she might not be the genetic mother. Should this technological opportunity be taken ? The adage "*materna semper certa est*" does not simply have legal merit; it is also worthy of respect for psychological and social reasons, and should not be undermined without exercising the greatest circumspection.

Notes

1. Three agents play a part in the process of reproduction : ovum, sperm, uterus. In this case, which should properly be termed "donor mother", sperm comes from the husband of the infertile couple, ovum and uterus come from the donor mother.

The situation is entirely different when the sperm comes from the husband in the infertile couple, the ovum belongs to the wife in the infertile couple who cannot carry a child, and only the uterus belongs to a woman who is not part of the couple. Here, the genetic

heritage of the embryo is entirely the couple's, and the embryo is then transferred to the woman external to the couple.

In the first case, the child has only one mother, the one called "donor". In the second case, the child has both an ovular and a uterine mother.

This Opinion intends to consider only the first case. The second case, which has not yet come up in France, should be discussed together with all the problems connected with in vitro fertilisation according to the procedure outlined in paragraph 3.

2. The consequences of an accident or sickness affecting the "surrogate mother" should not however be totally neglected by those who organise her relationship with the intermediary or with the "host" couple.