



Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi

submitted to
National Human Rights Commission

by
Dr. P M Arathi

Assistant Professor,
Council for Social Development, New Delhi

COUNCIL FOR SOCIAL DEVELOPMENT, NEWDELHI

**A Study to Understand the Legal Rights and Challenges of Surrogates
from Mumbai and Delhi**

FINAL REPORT SUBMITTED TO NATIONAL HUMAN RIGHTS COMMISSION

Dr. P M ARATHI

Contents

Acknowledgements

Introduction

Chapter I: Methodological Note

Chapter II: Understanding Contexts, Concepts and Ideas

Chapter III: The Legal Struggles

Chapter IV: Profile of the Research Participants

Chapter V: Voices, Stories and Narratives of Surrogates

Conclusions and Way Forward

Bibliography

Annexure I

Annexure II

Acknowledgements

Working with the most vulnerable sections of women was a new learning experience for us to unlearn and relearn many ideas. During this study we met women who struggled to fight their financial difficulties with the complex way of renting their wombs. We listened to them. Their voices are generally unheard. Through this study we tried our level best to do justice to their lives, their reasons to be a surrogate, their demands for legal protection and better remuneration. So this study might have its own biases and we do not claim that it is a neutral and impartial work. This report takes a stand with surrogates. Hopes and despair in their eyes put us in dilemma and made us to think what you do when you do academics and how do you do justice to the time we live in through doing academics. Through this study we are supposed to learn about surrogacy practices and legality of it in two major cities in India. More than what we learned about it, we learned from surrogates about their struggles of survival. We owe heavy gratitude to the respondents of this study and value the time they shared for this work. To the respondents of this study we owe heavy gratitude for the valuable time they shared with us and we assure them that we will carry forward in the future works as well

This project was [financially supported by National Human Rights Commission. Special interest was shown on this specific topic by the Justice H.L Duttu, Chairperson and Shri S.C Sinha and Smt. Jyotika Kalra (members of the commission). We are thankful for their inputs during the presentations at NHRC. Thanks are due to Dr. Satya N. Mohanty and Shri.Ranit Singh for their inputs. We are grateful to the academic team at NHRC, especially Dr. Muni Dev Singh Tyagi (joint director Policy Research, Projects and Programme), who took special interest in the topic of research and facilitated the interaction between CSD and NHRC. The

former joint directors Dr Savita Bhakhry and Shri. J.S Koccher also shown keen interest in this project which has facilitated the work immensely. The junior research consultants Ms. Kanika Gupta, Samra Irfan and Surabhi Awasthi coordinated the work.

On a personal level I express my gratitude to the academic team at Council for Social Development, New Delhi for the valuable discussion we had at different stages of this study, both formally and informally. President of the Council Professor Muchkund Dubey provided the inspiration to take the challenges of this academic work. I owe him special thanks. Director of CSD Professor Ashok Pankaj, supported this work from conception to the end and helped us to come out of different logistical and other crisis we faced during the field work. I acknowledge his valuable contribution in shaping this work. I thank Professor Imrana Qadeer for our discussions on the topic, during and after fieldwork and her insights immensely benefited this work. The article we wrote together on the issue of surrogacy “Words, Ideas and Ideology in Shifting Sands of Market” helped me conceptualising this project. Her academic rigour is always an inspiration. Professor KB Saxena also helped us to understand the legal nuances and developments during the course of conducting this study. I thank the interest shown by Professor Manoranjan Mohanty, Mannika Chopra and my beloved colleagues- Anamika Priyadarshini, Poornima Manoharan, Sushmita Mitra, Mondira Bhattacharya, Antora Borah and Jayalakshmi Nair showing their interest at various stages of this study. We thankfully appreciate the help we got from Ramandeep Kaur and Taarika Singh in conducting preliminary survey at a Delhi IVF clinic. I thank the contribution of intern Vyshali M, a student of Law in VIT university, Chennai for her help in compiling the later legal developments.

The administrative support at the council to conduct this study was unparalleled. I thank the Administrative officer Sheela Sabu, Finance officer Izhar Ali, Account Assistant Parveen Bharadwaj for the fabulous facilitation of this work without any obstacles and tackling the unprecedented logistical difficulties.

This research would not have been completed without the help of two research associates of this project. Bedadyuti Jha(Mumbai) and Ramya Palavajjhala (Delhi) facilitated the work with their meticulous field work. Both Dyuti and Ramya did fabulous interactions with the surrogates, clinician, agents and surrogacy hostel owners to facilitate this work. Their contributions immensely enrich this work and they deserve ample credits for that. Ramya needs a special mention for the discussions we had in every day basis and her additional help that I received in preparing field notes and participatory observational notes.

I thankfully acknowledge the academic discussions with Prof. Mohan Rao (JNU), Surabhi Sharma(film maker) , Sharmila Sreekumar(IIT Mumbai), Bindu Lakshmi(TISS Mumbai). The support Ratheesh Radhakrishnan(IIT Mumbai) offered during the field work at Mumbai is fondly remembered. At different stages of the work I got opportunity to discuss the crisis and dilemma of it with my friends Ameet Parameswaran, Satheese Chandra Bose, Rachel A Varghese, Veena Hariharan, Ardra Neelakandan Girija, Navaneetha Mukkil, Udayakumar, Meera Gopakumar, P.N Gopikrishanan, , Athira PM and Sreejith Divakaran,. I affectionately remember all those conversations.

For the copy editing of this report, I got the assistance from Aparna Eswaran, for the cover of the report the painting we used is done by Dr. Amritha Shajin and designed by Ajith E.A. Thank you all for making this report read and look better.

We hope the collective efforts to bring out this report will benefit those women, who gave time for us to discuss their experiences. Their eyes have hope that this study can bring minor changes to their lives. We have not promised anything but still we could see that hope. The readers of this report can be diverse like legislators, policy makers, academics and activists. We hope the observations and findings in this report will benefit your understanding to work towards the cause of these women.

Dr. P M Arathi

INTRODUCTION

Surrogacy Debate and Research in India

The public debates on the high-tech obstetrics practice of surrogacy in India among the women's rights movements and health rights activists is primarily in the context of booming markets¹ and they demand for a new legislation to regulate the practice. Surrogacy is a complex situation of application of technology to assist reproduction where multiple actors of diverse social and economic conditions are involved at multiple levels. The politics of technologies have to be understood within these complexities. Like any other instrument of the ruling elite the new reproductive technologies can also act in binary opposite ways- either to control female sexuality or to emancipate women from the reproductive burden. Professor Qadeer observes the nuances of it as,

Technology has on the one hand been the instrument of the ruling classes to dominate, and on the other technological innovations have constantly challenged the social organisation of work, or of other spheres of civil society. In doing so it offers human societies a chance to re-examine their own humanity and create better, more inclusive and egalitarian society (Qadeer 2010: 6).

However, the emergence of market as a key role player in the field of new reproductive technologies makes the debate further intricate. Recent academic works clearly suggest the inter-linkage of patriarchy and market forces (Rao 2010 & 2012; Sexton 2010; Srinivasan 2010; Qadeer 2010; Hartmann 2010; Sarojini 2010) in the case of reproductive technologies and specifically on surrogacy in India. These studies examine the interconnectedness among social structures, the scientific establishment and the market, and its impact on the development of new technologies in the biomedical field. Present study inquires how all these processes are facilitated by law /absence of law operate and whose rights and interests are being protected in the context of surrogacy practices.

In India, surrogacy has become a major concern in the context of commercialisation (Sarojini & Das, 2010). Qadeer poses certain important questions related to technology- "Why is the

¹The ICMR, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India 2005* estimates show that 250 IVF clinics are functioning in India.

potential of technology subdued today? Why has this man-made asset been so trapped in the wheels of commercialisation and free markets, that its progressive potentials have been obfuscated?”(Qadeer 2010:6). These questions are asked with the understanding that the reasons for these are as much rooted in the social process as in the origin of technology itself. The pertinent question that comes up in this study is how the growing role of the market in surrogacy will encourage the exploitation of lower class/lower middle class women by using them as cheap labour as surrogate mothers. Like any other market function in the neoliberal political economy, in this context as well, the state influence is minimal and totally unregulated. Another issue involved in surrogacy is the question of the identity of the new born and how the social and legal understandings of parenthood are redefined in the changing situation. The remark of apex court on the necessity of a law regulating surrogacy was made mostly considering the ambiguities on identity of the new born.

Glorification of motherhood of married women is central to all patriarchal societies. The notion of reproduction as the primary responsibility of women stigmatises infertility in the Indian context. SAMA's (2006) study on infertility in India emphasizes that infertile women are not considered feminine. Study observes that infertility threatens the social acceptability of women and legitimizes the role of the wife in ensuring marital stability, security, bonding to family and the role of women in family, community and other social spaces. Motherhood is portrayed as central to the social construction of womanhood. Thus, childlessness becomes a social problem or a social crisis in patriarchal societies. This has an impact on the growing demand for ARTs and medical treatment for infertility. During this study, it became evident that the trauma associated with childlessness and infertility acts as a major reason to identify surrogacy as the final resort to many couples in both research sites.

The expansion of the obstetric practice of surrogacy and the commercialisation of the practice became the topic for many social science researchers in India in late 1990s and early 2000s. These surrogacy practices have become research questions for different disciplinary backgrounds like anthropology and kinship studies (Mazumdar 2017), public health (Madge 2011), legal studies (Pande 2010), sociology (Banerji) and gender studies. Among these many of the studies tried to map the lives of surrogates and the nuances of surrogacy practices through empirical exploration (Pande 2014; Bhattacharjee 2016).

The Evolution of a Definition of Infertility

The global estimate on infertility is mainly produced by the World Health Organisation (WHO)². The estimate by the WHO shows that 8 to 12 percent (50 to 80 million people) of the couples in the world face difficulty in conceiving a baby. The Indian Council of Medical Research (ICMR)³ and The National Family Health Survey (NFHS)⁴ data support the WHO estimates. Most of the above discussed scholars who challenge reproductive technologies point out that 'increasing infertility' is a constructed assumption. The estimation of infertility is in relation to its definition. Over a period of thirty years, the WHO definition of infertility has changed thrice (SAMA 2006). Before 1975, a couple was declared infertile if they did not conceive within five years and in 1975 the WHO reduced the time period into two years and in 2005 further reduced it into one year (Ibid.). The ICMR guidelines of 2005 reiterate the WHO's definition of infertility i.e., a couple who engages in unprotected sexual activity and cannot conceive within a period of one year can be considered infertile. This changing definition of infertility provided the medical establishment and other vested interests like the market with an opportunity to strengthen their claim that infertility is an epidemic.

Qadeer observes:

[i]nfertility on the basis of a one year period is at least double that of the two year period estimates as it pushes up the prevalence by including women who would normally give birth in the second year. Instead of using the relevant socially perceived definition based on two year period of failure to conceive, the Indian experts have stuck to the one year period. Thus, instead of helping to change social perceptions on scientific basis, they fall in the trap of using least sensitive cultural norms that contribute to women's anxieties, medicalisation of her life and professional control of her reproduction, and commercialisation of infertility. (Qadeer 2010:16)

²<http://www.who.int/reproductive-health/infertility/11.pdf> accessed on 30.05.2016

³The ICMR National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 estimates 250 million individuals are attempting parenthood in India. http://www.samawomenshealth.org/ow_intartcons.html. accessed on 30.5.2016

⁴NFHS conducted during 1998-99 found that 3.8 percent of women of 40- 44 age group have not had children and 3.5 per cent of currently married women are infertile.

The changed definition of infertility is even more problematic in the context of India where child marriage or teenage marriage is common. Age of marriage for women mentioned under all the marriage laws is 18 years. If a girl get to marry at the age of 18 (assuming an ideal situation of adherence to law), unless she delivers her first child by the age of 19, the couple will fall under the definition of infertile couple. The empirical evidence from this study shows that most of the marriages happened before the consented age of marriage in the case of respondents covered under this study. The health impacts of teenage/ early pregnancy should be viewed in the context of the WHO's definition for 'infertility'. The measures by the WHO to address maternal mortality and morbidity conflict with the WHO's definition of 'infertility' in the context of early/child marriage of girls in patriarchal societies.

Surrogacy: Definitional Issues

None of the existing law in India defines surrogacy. The etymology of the term "surrogate" derives from the Latin word "surrogates"(past participle of surrogate) implicates "a substitute":a person supposed to act in the place of another. According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person and the "Surrogate parent" defined as the term applied to a parent who is not a natural parent of the child but assumes the role of⁵. The New Encyclopaedia Britannica defines "Surrogate motherhood" as the "practice in which a woman (the surrogate mother) bears a child for a couple unable to produce children in the usual way, usually because the wife is infertile or otherwise unable to undergo pregnancy". In so-called traditional surrogacy, the surrogate mother is impregnated through artificial insemination with the sperm of the husband. In gestational surrogacy, the wife's ova and the husband's sperm are subjected to in vitro fertilization, and the resulting embryo is implanted in the surrogate mother⁶. Normally, in either procedure, the surrogate gives up all parental rights, but this has been subject to legal challenge. The practice of surrogate motherhood, though not unknown in previous times, came to international attention in the mid-1970s when a

⁵<http://thelawdictionary.org/surrogate-parent/> accessed on 16th November 2017

⁶The Black' Law Dictionary categorizes surrogacy into two classes: 'gestational surrogacy' and 'traditional surrogacy'. They are defined as follows:

Gestational surrogacy: A pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the foetus and gives birth to the child.

Traditional surrogacy: A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the foetus and gives birth to a child for another person(Ibid.).

reduction in the number of children available for adoption and the increasing specialization of techniques in human embryology made such methods a viable alternative to the lengthy and uncertain adoption procedures or childlessness. Surrogate motherhood has raised a number of issues, such as the matter of payment for services (which, taken to the extreme, has implications of considering children as a commodity) and the rights of all of the individuals involved should any aspect of the procedure go awry”⁷. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.

However, this report uses “surrogacy” as a term which implicates both **gestational as well as commercial** surrogacy. All the interviews done as part of the present study are in the category of commercial surrogacy. One of the limitations of this study is that we could not conduct interviews with neither traditional surrogacy nor altruistic one. Hence this report is limited to the aspects of the commercial surrogacy only.

“In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent for that. The usual fee is around \$25,000 to \$30,000 in India which is around 1/3rd of that in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice. ART industry is now a 25,000 crore rupee pot of gold”(Gol 2009:11).

This report is an outcome of a qualitative research conducted at two major cities in India- Mumbai and Delhi. This study is conducted in a time span of eight months (2017 April to November) and is supported by National Human Rights Commission.

Context and Significance of the Study

The immediate and primary concerns of this study are broadly two as mentioned below:

⁷<https://www.britannica.com/topic/surrogate-motherhood> (LAST UPDATED: 9-14-2017) accessed on 16th November 2017.

1. In the widespread expansion of the surrogacy industry, this is mostly unregulated and how it impacts the most vulnerable in the entire process, which are surrogates.
2. The existing ambiguities related to law and how the concerns of surrogates can be placed aptly.

Expanding Market

The law commission report submitted by Justice AR Lakshmanan in 2009 titled *“Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy”* reiterates the growth of IVF industry in India. The growth in the Assisted Reproductive Technologies (ART) methods is a recognition of the fact that infertility as a medical condition is a huge hindrance in the overall wellbeing of couples and cannot be overlooked especially in a patriarchal society like India. In a traditional hetero-normative family, a woman is respected as a wife only if she is the mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues. The law commission report uses this quote, “The parents construct the child biologically; while the child constructs the parents socially” by mentioning that “some authors put it”. (However, we could not find the clear source for this observation). When the parents are unable to construct the child through the conventional biological means, they either voluntarily or due to societal and familial pressure resort to infertility treatment.

“Infertility is seen as a major problem as kinship and family ties are dependent on progeny. Herein surrogacy comes as a supreme saviour” (GoI 2009:6). Therapeutic interventions to cure infertility had become limited and the technological fix as a one-time solution to produce children through the infertility treatment regime became preferred in India. The larger epidemiological questions to address the pathological reasons for infertility are neglected and the social determinants of reproductive health are sidelined in the entire debate. Hi-tech obstetric practices became popular among treatment seekers and the clinics categorically intervened by over projecting the “success rates” and surrogacy is one among such practices.

With advances in assisted reproductive technologies, popularly known as new reproductive technologies, surrogacy has emerged as a popular method of assisted reproduction. Currently, India is one of the few countries that allow commercial surrogacy on conditions.

The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978.⁸ The legal uncertainty of surrogacy in India promoted the interests of medical tourism.⁹ India thus emerged as an important international destination for commercial surrogacy. Despite the ban on foreign couples in 2015 (through a circular by the Ministry of Home Affairs and then through the Surrogacy Bill 2016), the Indian surrogacy industry has grown exponentially as the demand was driven by affluent Indians/ Non-resident Indians struggling with infertility. Although the precise worth of the surrogacy industry is not yet known, as per a study backed by the United Nations in 2012, it was valued at more than \$400 million, with over 3,000 fertility clinics nationwide.¹⁰ The most recent studies estimate the surrogacy industry in India to be worth between \$500 million and \$2.3 billion annually¹¹, with approximately 5,000 surrogate babies born in India every year.¹² The rapid expansion of this industry in India can be attributed to a combination of factors such as rising infertility rates, comparatively lower cost of medical procedures, easy availability of surrogates and lack government procedures due to the market being largely unregulated. The ambiguities on the existing regulations of clinics and practices in surrogacy created a conducive environment for the expansion of market and the booming of surrogacy as an industry.

Legal Ambiguities

The 228th law commission report gave emphasis on the importance to have proper protective legislative measures to regulate the usage of new reproductive technologies and thereby address ethical violations and moral dilemmas emerging out of a new technology related to human reproduction.

“The legal issues related to surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves a conflict of various interests and has an inscrutable impact on the primary unit of society viz. family. Non-intervention of

⁸ Law Commission of India, Report No. 228, August 2009,

<http://lawcommissionofindia.nic.in/reports/report228.pdf>

⁹ <http://mea.gov.in/images/attach/surrogacy03112016.pdf>;

<http://www.mea.gov.in/surrogacy-matters.htm>

¹⁰ <http://www.businessinsider.com/india-surrogate-mother-industry-2013-9?IR=T>

¹¹ <http://www.livemint.com/Politics/D6DPV19pN0eYYJoGHY8Efl/Anguish-over-Indias-move-to-ban-surrogacy-industry.html>

¹² <http://www.bbc.com/news/world-asia-india-34876458>

law in this knotty issue will not be proper at a time when the law is to act as an ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, a prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART, and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones” (GoI 2009:6&7).

Structure of the Report

After the introduction, the chapters of the report follow as:

The first chapter vividly explains the research methodology of the study and discusses certain methodological difficulties experienced during the field work. This chapter also marks the limitations of this study. The second chapter deals with the theoretical and conceptual aspects of commercial surrogacy. It does a brief literature review of theoretical positions and develops a criticism of the inherent exploitations in surrogacy arrangements. The third chapter inquires the legal aspects of the surrogacy across the globe and discusses the trajectories of legal changes in India. Chapter four discusses the socio-economic background of the respondents of this study and the fifth chapter at length engages in a narrative analysis of the surrogates, covering the different aspects of this study. The last chapter is a brief discussion of the different and newly emerging concerns out of this study and concludes the report with a way forward which discusses the possibility of the best practices.

Chapter I

METHODOLOGICAL NOTE

The Specific Context of the Study

In the past one decade, many empirical studies were conducted in different parts of India among surrogates to capture diversified aspects of their lives and practices of surrogacy. Two specific situations make this study unique and unprecedented. One situation concerns the ambiguities around the legal status of the practice of commercial surrogacy in India and the other one is the structural changes in the network of the surrogacy practices and arrangements. However, the legal confusions were multi-fold; while the study was planned in August 2016, the Surrogacy Bill, 2016 which had banned commercial surrogacy practice, was tabled in parliament in November. During the field work, one parliamentary committee was set up by the government of India to look into the matter and when we were winding up the study the aforesaid committee came up with a suggestion to not ban commercial surrogacy (August 2017). These confusions and ambiguities about the legalities and how it impacts the most vulnerable in the practice- the surrogates- was one of the focal points of inquiry of this study. This legal ambiguity created a lot of difficulties in getting approval to access most of the IVF clinics. Secondly, the study marks the major transition in the field of surrogacy practice in India and identifies the role of ART bank owners, which is a relatively new phenomenon. Earlier it was the hospitals or the IVF practitioners who arranged the surrogates for the infertile couple, but now the hospitals keep their hands clean from arranging surrogates and the complexities involved in it. So, the field of recruiting surrogates is completely regulated either through ART bank owners or through the agents (either recruited by ART Bank owners or independent) and they exercise complete control over surrogates regarding the terms and conditions of the arrangements. The agents and owners of the ART bank earn more than the money earned by surrogates in each surrogacy arrangement. Again, contacting ART bank owners were a major difficulty which this study faced. Both these situations of legal uncertainty and the role of agents and ART bank owners made the access to surrogates a tedious task. Clinics and hospitals were worried about the legal status and refused to even admit that they practiced commercial surrogacy. The hospitals and clinics, which were cooperating with the study, helped us to reach agents and

ART bank owners; however, many times they were also reluctant to give contacts of surrogates. Concerns and context of the study can be listed as follows:

1. The growth in the number of ART clinics in last few years especially in small cities and towns.
2. The issue of commercialization and the growth of surrogacy as a multi-crore industry.
3. Inequalities based on the affordability in access to surrogacy as there is no regulation of prices for availing ARTs and surrogacy. It is out of reach to most of the women. It is not available in the public health care system.
4. Growth of medical/ reproductive tourism in the context of surrogacy and ARTs.
5. The reductionist view of the human body as specific parts like gametes, uterus etc. leading to the question of who owns body parts and the products thereof.
6. Surrogacy as reinforcing patriarchy- the premise that a woman's life is incomplete without having a biological child of her own.
7. The possibility that surrogacy promotes eugenics and sex selection in the community leading to further decline of the sex- ratio in favour of the male?
8. Possible exploitation of poor women as oocyte donors or/and surrogate mothers.
9. Ethical issues surrounding gamete and embryo donation, surrogacy and stem cell research.
10. Does surrogacy promote the notion of motherhood as essential to womanhood? Should the draft Surrogacy Bill address this issue? If so, how?
11. Is there a need to regulate medical technologies? Does the draft Surrogacy Bill regulate ARTs? If not, which legal document will cover this aspect?
12. Does the draft Surrogacy Bill address the growing commercialization of surrogacy?
13. What issues must the draft Surrogacy Bill address to truly meet women's needs and safeguard their interests?

14. Should commercial surrogacy be allowed? In that case, how can women's interests and commercialization go together?
15. Should infertility be viewed as a public health problem? Should ART services and surrogacy be offered as part of the public health system?

Research Design

Before the field research began, Council for Social Development (CSD) had developed an ethical guideline for the study (See Annexure I). Two research associates were employed in both research sites to conduct the field work. The study design initially developed three models to reach the respondents: a) to reach the respondents directly through their communities where they live through grass root level organisations working in the field of women's health; b) through IVF clinics and hospitals specialised in infertility treatments; c) through surrogacy agents and ART bank owners. Initial plan was to use the combination of above mentioned models to reach respondents of the study. However, in the field testing of these models in one of the research sites (Mumbai), the first two models failed and we have resorted to the last model. However, the hospitals gave us the contacts of the surrogacy agents and ART bank owners which helped us reach the respondents in the study.

Research tools: This study, considering the nature of research questions, employed **purposive sampling** as a method by using **snowballing technique**. A purposive sample is a non-probability sample that is selected by the researcher based on the characteristics of the population and the objectives of the study. Whereas snowballing is another method of sampling (non-probability) in sociology and statistics research where existing study subjects recruit the future study subjects from their acquaintances

The present study used **participatory observation** for data collection. Participatory observation is one type of data collection method typically used in qualitative research. It is a widely used methodology in disciplines like sociology and anthropology. Participatory observation is the effort of an investigator to gain entrance into and social acceptance by a foreign culture or alien group so as better to attain a comprehensive understanding of the internal structure of the society which is alien to her. It helps the researcher to attain a better a comprehensive understanding of the internal structure of the society which she explores. The observation notes of field researchers on their experiences and assumptions

with clinics, doctors, surrogacy agents and surrogate women other than their direct interactions helped this study to understand hidden nuances in the intricate relationships between the different role players in the field. The diversified practices in different research sites mainly emerged through this method. Since the topic of inquiry in this research is very sensitive making it hard to get accurate responses, the study benefited from participatory observation to explore the complexities involved.

As part of the data collection this study used the research tool of interviews of different categories such as **structured, semi- structured and in-depth interviews** with surrogates, doctors, agents and owners of ART banks (For interview schedules of different categories see Annexure II). The structured interview is also known as a formal interview in which the questions are asked in a set / standardized order and the interviewer will not deviate from the interview schedule or probe beyond the answers received. The questions are structured and closed-ended. This study used this technique for more formal interactions with clinicians and among all the surrogates surveyed as part of it. Semi-structured interviews are conducted with a fairly open framework which allow for focused, conversational, two-way communication. This method can be used both to give and receive information. Unlike the questionnaire framework, where detailed questions are formulated ahead of time, semi structured interviewing starts with more general questions or topics. This technique was employed to reach out to the surrogacy agents and ART bank owners. A qualitative data collection method, in-depth interviews offer the opportunity to capture rich, descriptive data about people's behaviours, attitudes and perceptions, and the unfolding complex processes. They can be used as a standalone research method or as part of a multi method design depending on the needs of the research (here we used it as part of a multi method design). This research tool was employed in this study with selected surrogates when the circumstances permitted us to have a deep conversation, mostly with past surrogates.

Other than interviews and participatory observation, we have conducted one **Focus Group Discussion (FGD)** in Delhi with ten surrogates. A focus group discussion (FGD) is another way to gather data where people from similar backgrounds or experiences sit together and discuss a specific topic of interest. The group of participants is guided by a moderator (principal investigator and one research associate) who introduces topics for discussion and helps the group to participate in a lively and natural discussion amongst them. In the FGD

we have followed a pattern of taking one question each in a round and discussing that matter in detail. The venue of the FGD was in a surrogacy hostel and there was hardly any interference from the hostel authorities/ART bank owners. Participants were fearlessly responding to the questions and generated a meaningful discussion on the reasons to be a surrogate and from where they had received information about surrogacy; how secret the surrogacy practice is and reasons for that; payment and process involved in the surrogacy practices; how the surro-pregnancy is different from their own normal pregnancy; their relationship with IPs and knowledge about law and the surro-pregnancy contracts. During the FGD, the participants developed an opinion and consensus on the legal aspects of surrogacy (what law ought to be) and articulated the rationality behind their requests to the government to not ban commercial surrogacy, with an expectation that this study will be able to help their voices reach the concerned authorities. (Though the researchers did not give any promise in this regard, it was communicated that we will submit this report to NHRC and hopefully they will take the responsibility to reach their voices to appropriate government platforms). Both from the structured/semi- structured and in-depth interviews and from the FGD, this report uses **narrative analysis** as a method to explain and describe the stories. This report does not want to interpret the voices of surrogates but attempts to amplify their own voices.

Apart from all these research tools this study reviewed some primary documents like surro-pregnancy contracts and legal documents (Law Commission Report¹³, ART Bills, Surrogacy Bill 2016, Parliamentary Committee Report¹⁴); secondary literature covering review of laws across globe, empirical studies on surrogates in India in the past one decade and policy research papers on surrogacy law were reviewed along with theoretical studies on surrogacy.

Outreach of the study

To begin the study the research team contacted IVF clinics through email and phone. We have contacted 56 clinics in Delhi and 32 in Mumbai.; Many of the clinics declined with the response that they don't entertain researchers; many of them were unresponsive even after

¹³ Government of India (2009). Report number 228 Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy.

¹⁴ Gol (2017) Report number 102 on The Surrogacy (Regulation) Bill, 2016.

several attempts to contact and many of them postponed the appointment several times. Out of which 17 IVF clinics cooperated with this study (Delhi 11 and Mumbai 6). Interestingly Mumbai Leelavati Hospital and Jaslock hospital which are the major players in the IVF industry in India and pioneers of practising surrogacy denied that they conduct surrogacy anymore. However, the IVF specialists in their interviews in newspapers and YouTube proudly claim that they do surrogacy! Taking the name of NHRC at times facilitated the study and at times it acted counterproductive as well.

Number of Surrogates contacted during the study are **45** in which we have conducted interviews with **36 (28 Delhi and 8 Mumbai)**. Total ART bank owners/ agents contacted are 13 (5 in Delhi and 8 in Mumbai). To reach surrogates we conducted interviews with 24 doctors /IVF specialists (10 in Delhi and 14 in Mumbai). Interview with only one Intending Parent (IP) in Delhi was conducted to capture the other side of the story.

Objectives of the Study

Broad Objectives:

- ❖ **To understand the impact of the new proposed law on the surrogacy practice in two cities of India- New Delhi and Mumbai**
- ❖ **To explore the challenges and difficulties faced by surrogate mothers in seeking justice regarding the violation of their rights.**
- ❖ **To develop best practices in the domain of surrogacy to minimize the exploitation involved in both commercial and altruistic surrogacy.**

Specific Objectives:

- To understand the surrogacy practices in two major cities of India, New Delhi and Mumbai
- How do women who undergo surrogacy understand/perceive this obstetrical practice of surrogacy?
- What are the cultural, social and economic reasons behind the decision to be a surrogate?
- What are the difficulties surrogates' faces within their respective families, clinics and in the neighbourhood?

- What is the legal nature and content of surro- pregnancy contracts?
- What are the legal protections that the surrogate mothers anticipate/ expect from the clinics and from the governments?
- Explore if they have initiated any legal proceedings against clinics or compounding couple:
 - If yes, what are the grounds or for what remedies they approached the courts or any other dispute redressal platforms?
 - What are the difficulties they face during the proceedings?
- Identify those situations when surrogate mothers experienced their rights' violation and yet decided not to approach the court
 - If the research identifies such situations, explore that reasons that refrain them from approaching court.
- Explore if there are any alternate dispute redressal platforms existing in both cities. If so, underscore differences and general practices.

Area of Study

The study sites were the **selected IVF clinics in Mumbai and Delhi (NCR)**. Surrogacy is not limited to the major cities in India; it has expanded to other cosmopolitan cities and small cities as well. Considering the aspect availability of the respondents and the anonymity given by the big cities which is considered as an advantage explains the rationalities behind the selection of the research sites. Considering the feasibility of completing research in the given time period of eight months, this study was limited to two research sites; the two metropolitan cities are representative of western and north India. Though the geographical locations limited to these two cities, the respondents of the studies belong to other parts of north, central and west of India.

Stages of the study

The total time period: 8 months

- I. **First Phase (one month):** Background work of the study, preparation for the field work, constituting the research advisory committee, constituting the research team at Mumbai and Delhi(NCR)

- II. **Second Phase (four months):** Rigorous ethnographic field research in selected IVF clinics in Mumbai and Delhi NCR.
- III. **Third Phase (One month):** Compiling the ethnographic research reports from Bombay and Delhi(NCR) and if needed final round of field visit
- IV. **Fourth Phase (One month):** Writing Report
- V. **Final Phase (One month):** Consultation and discussion with experts and groups and submit final report.

Limitations of the Study

Surrogacy practices as well as the surrogacy industry are commonly used as a homogenous term. The experience of conducting research in two metropolitan cities clearly indicates that it varies according to space and time. The practices change over years. Different practices are followed in different geographical locations as well. This study attempted to capture the differential practices but did not completely succeed in it since we could not get enough and equal sample size in both cities. Thus, the comparative element of the study is very limited. There are two major differences we identified during the study. First, in the network practice of agents/ART banks in Mumbai, most of the agents are females; mostly =surrogates in the past, they work for ART banks to recruit new surrogates. Whereas in Delhi it is more organised and mostly done by ART bank owners directly through their male agents deployed in different rural areas of north Indian states like Bihar, UP, Chhattisgarh, Jharkhand etc. Second difference is in the relationship between IPs and surrogate mothers. In Mumbai most of the clinics do not allow any interpersonal interactions between them whereas in Delhi, IP visits surrogates for every check-up, take them for fortnightly check-ups, bring them food etc. Most of them make frequent phone calls as well. But the interactions immediately stop after the surrogate delivers the baby and in most of the cases IPs change their phone numbers to avoid further communication.

However, the elements of exploitation of surrogates remain the same. Nobody was given a copy of the contract, informed about the money transactions, the procedures of handing over of the baby or about the punishments of breaching the contract. Most of them are depending on agents for help if any legal issue comes up. Though the agents act mostly in favour of IPs, the surrogates find no other person to be relied on but the agents. None of the surrogates had ever interacted with a lawyer while signing/drafting of the surro-

pregnancy contract. Pattern of contract vary and is different in different clinics. Since the legal validity of surro- pregnancy contract is void under Indian Contract Act, the consent is obtained through undue influence or coercion. The IP we interviewed also knew that the contract does not have any legal validity. However, making the surrogate sign on a stamp paper along with witness signatures etc make them feel that they are legally liable towards the conditions of the contract. The study found that in Mumbai there is a practice of pre-dated contracts, considering the possibility of a future legal ban!

The varied experiences from two different cities indicate that it is difficult to draw generalisations in the pan Indian context. Though there can be many common features in the surrogacy practice and generalise in the similar socio- economic backgrounds; this study limits its inferences to the two research sites we explored.

The data we collected through the interviews and interactions with the surrogates mostly happened in the presence of ART agents, doctors and ART bank owners. This is a major constrain in getting free and fearless responses from the subjects of the study. Hence the narrative this report uses to analyse is limited in its nature.

Chapter II

UNDERSTANDING THE CONTEXT, CONCEPTS AND IDEAS

In an unequal global system of knowledge production and use often lay the trap of neo-liberal thinking within which well-meaning defenders of human rights working against exploitation tend to fall. Other than the dreams of social security net and knowledge society, there was also a direct effort to transform existing knowledge itself. Concepts and ideas evolved according to the social ethics of the past that no more suited the dominant ideology and were transformed to fit into the neo-liberal frame. When public health and medical care was forced to open up to the market and public institutions accepted private investments and partnerships, two interesting conceptual shifts occurred. One, the definition and nature of health care systems changed, from an organised complex whole consisting of interdependent components that are in a dynamic relationship to achieve the goal of the system, to a complexity where disparately unconnected elements with differing objectives were brought together in ways that permitted some to dominate. Thus, evolved the public-private partnerships and the strategy of unquestioning inclusion of the private sector along with the public sector in the definition of health system despite their dissimilar objectives and structural disconnectedness.

Interestingly, all these shifts in ideas helped relieve the state of its responsibility towards production and provision and give impetus to non-state providers. They also tend to disintegrate complexities of public health, isolate single intervention points amenable to technological solutions and thus, help move away from their contextual constraints. Thus, health is no more the complexity arising out of living and working conditions of biological entities, but a pure clinical challenge amenable to technological medical markets.

This shift of ideas is not simple; its tumultuous route if not grasped can lead to uncritical acceptance of words that acquire new meanings or lose their original meaning and hence may serve very different purposes than intended. Often their use, wittingly or unwittingly, rationalises or accepts undesirable ideological positions or strategies. To illustrate this, we take the example of the debates around reproduction and labour of women with surrogate pregnancy where both the words have had a long journey through history. Words such as

production, reproduction, labour and work are central to the understanding of the working of societies in different social formations. For the early economists, *social reproduction* meant recreating conditions of life necessary for society and its social relations.

In this journey, the word 'procreation' which means 'begetting and generating' and commonly used for pregnancy and delivery, acquired new connotations. The progressives interpreted it as 'recreating labour', a part of social reproduction, but the neo-liberal stream took the literal meaning of 'bringing into existence' rather than recreating. In the process the popular use of procreation and the broader connotation of social reproduction, both were compromised and reproduction became devoid of consciousness - emotional or intellectual. The potential of uniqueness embedded in the psycho-biological vulnerability of human procreation, the connotation of creativity and connectedness necessary for survival, the need for coming together, to be tolerant, compassionate and empathetic (human altruism) was marginalised and lost to the majority.

These ethical and moral issues shaped the terms and conditions and policies for commercial surrogacy over the late 20th century in the west where the rights of a surrogate mother and her status were more explicit and better recognised (Stumpf 1986; Ber 2000). In the developing world, the conception of a new family, where relationships are built on individual's own terms, and not on patriarchal traditions, with bonding, responsibility and security, is not a common practice. Such a conception of family if it does exist is largely limited to small sections where women have other avenues of freedom and not among the larger section still bound to poverty, deprivation, tradition and antiquity, from where the surrogates come. The fast-changing world is redefining ethics and morality, and altruism which was earlier defined as 'an act that helps others without rewards even if at a cost' (pure altruism) has now expanded its scope to include acts which may 'serve self-interests such as reputation, popularity, recognition, gratification, saving taxes' (Collett et. al. 2007). Yet when it comes to surrogacy, altruistic surrogacy is associated with no rewards and when a commercial transaction is involved in the service to rent the womb, it is called commercial surrogacy. The academic debate surrounding surrogacy underplays the creative potential of procreation and the expression of its non-exploitative potential. It assumes that the driving force of human behaviour of people with rising basic needs and high levels of poverty is only

their monetary interests. In dominantly patriarchal societies, where women's self recognition is rooted in their service to family and their caring role, what defines the limits of self-interest? Does their gratification follow from fulfilling their commitment to the family, the gifts they produce, or the quantum of financial gain to the family? Who defines the boundaries beyond which their decisions and actions become commercial and where is their altruism located - towards their family or the IPs? These questions are never debated. State policy of high growth rates and higher revenues (reproductive tourism being one source) and consumer interests (IPs in the case of surrogacy) and the inherent focus on money has not only pushed women into impossible situations where surrogacy becomes a way out but have also shaped the debates without ethical clarity. Neglect of ethical yardsticks to define work and altruism makes it easy for technology markets to take over procreation, fix a reward, but remove the tag of altruism and denigrate the surrogate as she enters into an ill-defined exchange process. Procreation is fragmented into genetic, biological and social components making them amenable to technological manipulation, while the surrogate and her family lose their integrity and human dignity. Social psychologists argue that for a better analysis of altruism (emotional arousal and a cost and reward analysis of helping) a more sociological approach is required to understand how and why egoistic altruism becomes a part of a social structure where individual dispositions interact with context and structures (Collett 2007).

Market and Labour

The freedom to offer surrogacy services in India, without any legislation and only under non-binding guidelines formulated by the Indian Council for Medical Research (ICMR), has opened a huge market for high-tech obstetric practice of surrogacy. Unlike organ transplant, where commercialisation has not been permitted, in surrogacy women are being contracted under conditions (through surro-pregnancy contracts) that are neither ethical nor legal. Several critics of commercial surrogacy concede that it is work. While some have focused attention on the dangers and risks surrogates face that have been ignored by the ICMR guidelines and legislative drafts, and demand better legislation, others have asked for a complete ban. On the other hand, there are those who argue that women have a right to use their bodies as they wish. This set takes the neo-liberal position where a worker is free to sell her labour. Women are perceived as willing volunteers offering their bodies for

surrogacy and earning more than what they could over several years. They see surrogacy as cheap labour as any other labour in developing countries which is cheap. Her low remuneration is thus rationalised. As labour is sold in the market, the use of the word 'labour' for child birth is taken advantage of to ease off as well as to justify its commercialisation. It also justifies the division between the women of the two worlds - North and South.

What is interesting is that, even when ideologically apart, both streams of thought use the word 'work' and 'labour' to argue their positions. One considers commercial surrogacy as work that is legitimate and is a way out of poverty for families. The other sees it as exploitation and demeaning work that needs to be banned. Indian society offers several demeaning, alienating and dirty occupations to people and ignores their existence as it is convenient and the people involved have not been able to acquire their rights to have better options and better conditions of work. Hence, a moral stand from a position of strength, however valid, does not offer a way out for the women in need. Yet, labelling her role as 'work' has given the state a certain advantage to pull her into the market. Such intellectual positions then become counterproductive and insensitive towards surrogates, their real life conditions, their constraints and their lack of information. In fact, in the contemporary situation a ban which the Surrogacy (Regulation) Bill 2016 offers may actually push surrogacy underground.

"Labour" in surrogacy

Though labour exerted ends up as work, and work is defined as labour applied on nature/matter to produce a commodity or motion - goods and services, it does not necessarily fit the socio-biological process of birthing. The word labour as pointed out earlier has two very different meanings; one an abstract noun (labour invested in commodity production), the other a verb, the last stage of birth process of a baby. Using labour and work interchangeably compounds the confusion as 'human physical labour' necessary for the 'production of commodities and services' collapses with the last stage of birth. Birth per-se has ante-natal, natal, and post-natal phases over ten months (in medical terms) which surrogacy covers. It in fact constitutes 13 months if the preparatory phase of surrogacy is included. Of these, only the natal period is called labour which cannot be equated to the

period of surrogacy and its use is confounding, misleading and hides the period of her exploitation.

Surrogacy as work inevitably transforms the baby into a commodity which it is not. If anything could be low in price, it is the technological interventions in surrogacy and the medical services, not the biological investments and labour of the surrogate. Reducing the baby to a commodity by declaring procreation as work has taken away the rights of the child along with the surrogate. The right of the surrogate to safety (unwillingness for pregnancy reduction or abortion of disabled foetus is linked to unjustified abortion and denial of disability rights in multiple pregnancy and foetal deformities that are not) acceptable to the IPs.

Theoretical Critiques of Surrogacy

Surrogacy is criticised by the Marxist and feminist groups in the context of exploitation associated with surrogacy agreements/ contracts and medical procedures and the power relationship existing between the parties associated i.e. the IP (also known as the contracting couple, the compounding couple) and the surrogate mother. The primary concern of the feminist critique is the exploitation of the female body. It challenges the concepts of informed consent and reproductive autonomy in the context of a patriarchal society. The feminists are skeptical about the new reproductive technologies and argue that these technologies, rather than curing infertility, create a 'technological fix' to address the issue. The Marxist critique, on the other hand, comes from a class analysis of the relationship between the surrogate and the IP and criticises the liberal framework of the right-based approach which hides gender and class issues.

This section of the chapter uses the discussion of case laws of similar or related issues- *Evans vs. the United Kingdom*¹⁵(hereafter the *Natalie Evan's case*)and the *Matter of Baby M*¹⁶from the US- for the purpose of analysis.

¹⁵<http://www.bailii.org/cgibin/markup.cgi?doc=/eu/cases/ECHR/2006/200.html&query=genetic+and+discrimination&method=all> accessed on 28.05.2011

¹⁶109 N.J. 396, 537 A.2d 1227, 1988 N.J.77 A.L.R.4th

The Women's Question on Reproductive Autonomy: Myth or Reality?

The feminist critique of surrogacy analyses majorly through the arguments of Donchin (2008). She challenges gender neutrality, which frames the debates/discussions of regulatory practice as unjust since it does not give appropriate considerations to the different positions of men and women in the reproductive process. These differences in position have an impact on their respective options in invoking autonomous choices. "What does reproductive autonomy amount to where one person's exercise of it denies it to someone else?" (Chadwick 2007 as cited in Donchin 2008: 28)

The question that Chadwick raises in the context of *Natalie Evan's case*¹⁷ illustrates the complexity of the notion of reproductive autonomy. The formal concept of autonomy that prevails in judicial and medical decision making differs from the feminist formulation of autonomy and demands for safeguarding the agency of individuals without serving the conditions of their embodiment, social relationships or political or legal contexts that shapes their options. In the *Natalie Evan's case*, the European Court of Human Rights (ECHR) observes the UK's legislation had struck 'a fair balance' between the competing interests at stake, including those of the community as a whole, which is entitled to have laws giving certainty in what is often a contentious area of medicine (Ibid. :29). Further, the court identifies the lack of provision for withdrawal of consent by either of the parties during the course of the IVF in *Human Fertilization and Embryology Act, 1990* of the UK.

The empirical experiences from the present study as well affirm the role of law in balancing the process of conflicting interests existing in a complex situation of surrogacy where many

¹⁷ *Evans v. The United Kingdom* is popularly known as the *Evans's case* or *Natalie Evan's case*. Natalie Evans and her male partner Howard Johnston were undergoing in-vitro fertilisation treatment and during the course of treatment she was diagnosed with pre-cancerous condition. Her ovaries were removed and Ova were retrieved and fertilised with partner's sperm. Evans was told to wait two years for being healthy for implantation and she wanted to freeze the unfertilised eggs, but the hospital didn't have that facility. Her partner assured her that they were not going to separate, but they split up in six months. Her partner sent a letter to withdraw the consent and destruct the fertilised eggs. His withdrawal prevented Evans from using embryos under the UK Act called *Human Fertilisation and Embryology Act, 1990*. Under this Act, consent from both the parties is required at each stage of the external fertilisation process and again after fertilisation and before implantation. Human Fertilisation and Embryology Authority (HFEA) took a decision against Evans and she approached the House of Lords and again got a negative ruling. Finally, she approached the European Court of Human Rights (ECHR) by claiming that the British ruling violated her human rights under Article 8: right to respect for private and family life and Article 14: freedom from discrimination and Article 2: right to life to embryos (protection of right to life) (Donchin 2008:29). Also see. <http://www.bailii.org/cgi-in/markup.cgi?doc=/eu/cases/ECHR/2006/200.html&query=genetic+and+discrimination&method=all>

interests collide. For example: conflicting interests between the IPs; conflicting interests between the IPs and the surrogate mother; conflicting interests of the egg donor/ sperm donor(in case where external egg/sperm donor is necessary) with the other parties in surrogacy contract/ agreement- either the intending couple/ the surrogate mother; conflicting interests between the technology providers/ institution of medicine; conflicting interests between all/ any of the parties in surrogacy with the interests of the rest of the society. Thus, the multiple levels of conflicting interests in case of surrogacy reveal how difficult it is to have informed consent and autonomous decisions in this area. In such complex situation social hierarchy matters and always the benefit is acquired by the influential class.

However, the complexity of surrogacy is internalized by the judicial institution also and it is reflected in the judicial decision in the *Evan's case*.

“[T]he dilemma between Natalie Evan’s right to have a child and her former partner’s right not to become a father should not be resolved on the basis of such a rigid scheme and the blanket enforcement by the UK law of one party’s withdrawal of consent.” (*Evans v. The United Kingdom* 6339/05 ECHR as cited in *Ibid.*:30)

The court suggests in the *Natalie Evan’s case* and in the similar case of *Diane Blood*¹⁸ that the judiciary should take a case-by-case approach. Universally, laws related to surrogacy follows two major approaches (*Ibid*) one that favours mandatory regulations and shows skepticism towards commercial surrogacy as in the UK and the second that favours a market- based approach to surrogacy as in some states in the US and certain countries in Eastern Europe.

The case laws discussed in this section give priority to individual-based solutions to infertility. This may further underline the concept of ‘bodily ownership’ and this concept is criticised by Petchesky (1995). “Instead of discarding the rhetoric of property, persons and

¹⁸*Diane Blood* persuaded a physician to extract her husband’s sperm by electro ejaculation while he was in an irreversible coma from bacterial meningitis. HFEA refused to do inseminations due to the specific provision that explicitly bars posthumous artificial insemination without written consent of both the parties. After lot of media campaigns and introduction of a private member bill ‘Diane Blood’s Right to Medical Service’, HFEA made an exception to the regulation and granted her permission to take the sperm outside the country for insemination which it permits without the consent of the posthumous partner. (*Ibid.*: 31)

bodies, we need to enlarge its frame of reference, to broaden who and what count as owners and the moral and communal spaces in which they define their selves”(Petchesky 1995: 400).

Socialist feminists demand that the social contribution of women be taken into account, by counting the role of reproductive labour. Another argument identifies infertility as a social problem and demands social solution for it. This argument questions the way in which ARTs legitimize genetically linked families. By feeding into the normative notions of family and support, they necessarily weaken all the struggles to redefine the problem (Shah 2009).

Promotion of adoption as an alternative for ART adds to the argument of social solution and it is suggested that it will help to break the norms of caste and lineage in a caste ridden, hierarchical, patriarchal society like ours. Though the Draft ART Bill suggests adoption as a right, it underplays adoption in every day medical practice (Ibid.).

The Marxist Critique: The Limitation of the Liberal Framework

The Marxist analysis of surrogacy poses two levels of arguments. One is the criticism that the democratic liberal frame work of rights and obligations on which surrogacy debates are formulated conceals class and gender issues (Oliver, 1989). This argument further extends the critical evaluation based on class analysis of the principle of ‘best interest’. The second level of argument is based on Marx’s distinction of ‘estranged’ and ‘alienated’ labour¹⁹. Oliver’s (1989) paper is one of the early works in surrogacy and central to the paper is the class analysis of surrogacy. She uses the US case law *Matter of Baby M*²⁰ for analysis. Her argument is that child birth may be alienated labour, but surrogacy is estranged labour. Her paper criticises the ‘pseudo- feminist argument’ of portraying surrogacy as one woman

¹⁹“It is crucial to note that this distinction is not as available to English readers of Marx. The English translations, while some are more faithful than others, all tend to translate “entfremdung” and “verausserung” both as “alienation”. In German “entfremdung” means foreign while “verausserung” means outer. I learned this important distinction from Gayatri Spivak in her lectures on Marx at University of Pittsburgh, Fall 1987...” (Oliver 1989 endnote no:12)

²⁰ This is case filed by a surrogate mother for demanding the custody of the baby. The surrogate mother refused to hand over the baby to the contracting father. The Supreme Court observed that the surrogacy contract is valid since it is signed by the contracting father and the surrogate mother. Hence the custody of the boy should go to the contracting father. The contracting father had approached New Jersey Supreme Court for the custody of *Baby M* and for the enforcement of the surrogacy contract. Both were awarded to him. In the appeal the Supreme Court held that the surrogacy contract was invalid whereas the custody of *Baby M* was awarded to contracting father (Ibid. footnote no:112).

helping another to have children and the suggestion that the infertile couple has the right to procreate (Ibid.: 97). Marxist-feminists are critical towards the notion of equal consideration of all the parties involved in a surrogacy agreement/ contract and the legal field. Their argument is that, in a capitalist society the market forces women to undertake surrogacy. The autonomy of women or the notion of freedom of choice is strongly opposed by the Marxist-feminists. They view the willingness to be a surrogate mother as part of the social, economic and political situation constructed by the state which forces women to sell their reproductive capacity for their survival (Dworkin 1983 as cited in Ibid.).

Informed and Voluntary Consent in Surrogacy

In the light of the *Matter of Baby M* case, Judge Wilntez discusses the fantasy of informed and voluntary consent involved in surrogacy contracts/agreements.

Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes totally voluntary, informed decision, for quite clearly any decision prior to baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by pre- existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary (537 A 2d.1227 N.J 1988:1248 as cited in Oliver 1989: 98).

Marxist analysis criticises the wide acclaimed 'benefits of surrogacy' and identifies them as "...the illusions created through the presuppositions of the liberal framework operating within a capitalist patriarchal society." (Ibid.:98)

Marxists further challenge the premise that assumes people as equal with equal rights bearing citizens and raises the issues in identifying surrogacy contract as an agreement between two or more people having equal rights. The very existence of surrogacy contracts/agreements is based on class and gender differences. The present day situation in India also attests that surrogate freedom is an illusion. The well-known documentary "Made in India" (Haimowitz& Sinha 2010) portrays the class difference between surrogate mother and the compounding couple and how the existing socio- economic factors of the country act as

forcing factors for being a surrogate mother. Health rights activists criticise the different drafts of ART Bill and Surrogacy (Regulation) Bill 2016 pointing out that it actively promotes medical tourism in India for reproductive purposes (Sarojini & Sharma 2009).

Injustice in 'Balancing Interests'

The basic premise of the liberal framework is the prioritisation of the individual over the society and the assumption that all individuals are equal and free. The class/ caste/ ethnicity/ race/ gender/ region construction of the individual is not considered. Surrogacy litigations mostly consider the conflicting interests of the surrogate mother and the compounding couple. However, it is difficult to balance the conflicting interest of two unequal parties in a judicial process. The structure of surrogacy contracts and the existing laws which deal with surrogacy specifically tend to protect the rights of the IPs in the pretext of considering all the parties as equal. This could be reflected in the judicial process of 'balancing the interest' in favour of the IPs as opposed to the surrogate mother. Women's health rights movements in India²¹ identify surrogate women as the most marginalized and vulnerable in the triad- the IPs, the surrogate baby and the surrogate woman- of surrogacy. The whole judicial process of balancing the interest in this situation is questionable when the parties concerned are from different positions in terms of power and in terms of social status. As discussed in the previous part of this section the emotional conditions of the surrogate mother and the lack of informed consent- not obtained in its absolute sense- render the 'balancing process' even more complicated. Unexpected emotional changes after the delivery have an impact on the surrogate mother's decision on claim of the baby. Most of the cases regarding the custody of the baby are decided by the court by considering the 'best interest' of the baby.

The Best Interest: Determining Factors

In cases like *Matter of Baby M* and *Surrogate Parenting Associates v. Common Wealth of Kentucky*²², the court ruled that the custody disputes would be decided on the basis of the best interest of the child irrespective of the question of validity of the surrogacy contract.

²¹Forum Against Oppression of Women, Mumbai and SAMA Resource Group for Women and Health, New Delhi.

²²704 S. W. 2d 209(Ky. 1986)

The Marxist critique is that because the very structure of the surrogacy agreement guarantees the IPs the custody of the baby, the whole judicial process of deciding 'best interest' for the custody of the baby does not serve any purpose. In the *Matter of Baby M*, the court decided the 'best interest' for the custody of the baby based on the fact that before the conception of the baby itself, the IPs motivation was for the custody of the baby and the claim of the surrogate mother came only after the delivery (Oliver 1989). The reasoning for best interest questions the motive of the surrogate mother, i.e., by entering into the medical process of surrogacy she was ready to give up the child. The court suggested that a mother who was ready to give up her baby for money cannot act in the 'best interest of the baby' and was not eligible for the custody of the baby (Ibid.). Thus, the role of the surrogate mother turns out to be counterproductive as a determining factor for the custody of the baby in the context of the 'best interest' of the child. Another important factor in deciding the 'best interest' for the custody of the baby is financial security. This factor also turns negative for surrogate mothers since the primary reason for entering in to a surrogate contract is financial insecurity. In almost all the cases, the IP is financially more secure than the surrogate woman. The judicial decision in the *Matter of Baby M* substantiates the above-mentioned arguments of financial security and attitudes of the parties involved in surrogacy agreements. Thus Oliver (1989) argues that class issue is at the heart of surrogacy agreements. In the decision in the *Matter of Baby M*, the understanding of the best interest was based on financial security, access to education and development of other abilities like music. The lower class background and the financial insecurity of surrogate mothers impact their access to legal help as well (Ibid.). Thus, the social position of surrogate itself jeopardizes her in the legal and judicial processes.

The use of the Marxist analysis provides us with some insights obscured by the liberal framework. In a Marxist understanding parties to the surrogate contract s are not equal and autonomous. Each party in the contract enters into the contract from a particular context and they have a particular relationship to the 'means of production'. The formation of contract is in a capitalist- patriarchal setup and it tries to hide these relationships (Ibid.).

Marx's differentiation of alienated labour and estranged labour is an analysis point for Oliver (Ibid.) and she claims that surrogacy is a quintessential example of what Marx means

by estranged labour²³. Surrogacy contract covers up the social context which constructs these individuals and in which they operate; hence it is estranged. Unlike any other labour, surrogacy demands a full day job with complete involvement of life and the body²⁴.

The four characteristics that Marx attributes to estranged labour agree perfectly with surrogacy. First, the worker is estranged from the nature and her products. In case of surrogacy, the surrogate is estranged from the 'product'- the baby and the 'nature'- and her own organic body. Second, the worker is estranged from herself and the process of production. In surrogacy treatment, the surrogate is treated as a machine whose services can be exchanged for money²⁵. In surrogacy, the child appears as a commodity that can be purchased or sold. The surrogate has no control over her body and hence she is estranged from her own body and her own pregnancy. Third, the worker is estranged from the social aspect of her work and her life. The surrogacy contract covers up the social constitution of reproductive practices. Further the emphasis on the free choice of individual or on autonomy masks the social context of the surrogacy agreement (Ibid.). Fourth, the worker is estranged from other people. In surrogacy, all children are regarded as commodities and the surrogates as producers of these commodities. This is a distorted picture, since the relationship between a mother and a child is not that between a producer and a commodity. The Marxist analysis of surrogacy as an example for estrangement of *labour* identifies surrogates as products of the socioeconomic situation which leads to the surrogacy agreement. Thus, the Marxist argument is that reproductive technology which appears to liberate women may actually oppress women.

Qadeer (2010) observes that, in the Indian context, the implications for socio- economic life of surrogacy and ARTs is an important area to examine. The questions related to epidemiological characteristics, limitation of health service infra structure, legislation, state

²³ "According to Marx, we must first be able to separate ourselves from outside world. The alienated relationship is what enables the human being to see itself, ultimately, as a social being, as species being. However, when this relationship is inverted and separation of self exists for the sake of covering up species-being, then the relationship is one of estrangement." (Oliver 1989)

²⁴ Oliver calls it as 'doubly estranged', since the product of the *labour* also an organic body.

²⁵ In *Capital* Marx explains "in the exchange of human *labor* for money within capitalism, the human being is treated as a machine. Capitalism turns the worker into a fragment of a person, an appendage of a machine" (Marx, 1977, as cited in Ibid. :106)

policy and ethical biases need to be discussed as part of it. Qadeer differentiates the contexts in the west and in the Asian countries in terms of the philosophical and ethical debates which are rooted in the socio- cultural, political, economic and epidemiological settings. In the West, the focus of the debate is within the human rights frame (individual's right to reproduce), but in India the focus is given to the increased need resulting from the high incidence of infertility (Ibid.). John and Qadeer (2008) see surrogacy in the age of science and globalisation as an opportunity to challenge the patriarchal conceptions of the family and social perceptions of infertility. They argue that the different versions of legislative drafts do not address the unethical practices and exploitation sufficiently. They demand the need to initiate public debate on issues like protection of the interests of the baby, the rights of the surrogate mother, the role of the adopting parents and on how the above three actors can be brought together within an ethical framework.

"It gives us the greatest joy to share with you the good news of the birth of our baby boy. This baby is especially dear to us because he was born to us after a long wait and some difficulty. Due to medical complications, we were advised to have a baby through IVF-surrogacy, and we feel very grateful to the Almighty that all has gone well. We are humbled by the greatness of God, the miracles of science, and the kindness and love of our families and friends in being there for us while respecting our privacy. We seek your good wishes and blessings for our child"²⁶

This is the thanks giving and acknowledgment statement by the celebrity couple, Kiran Rao and Aamir Khan, on having a surrogate boy late in 2011. In this acknowledgment we do not find space for the surrogate mother, whose labour has produced the baby. Most of the leading IVF specialists in India, like Indira Hinduja who is officially credited with the first test tube baby from India, complimented Aamir Khan. "It's nice of Aamir Khan to talk about it. He is a top star and people may now no longer mind undergoing a surrogacy treatment and talking about it."²⁷

²⁶<http://timesofindia.indiatimes.com/entertainment/bollywood/news-interviews/Aamir-Khan-Kiran-Rao-blessed-with-a-baby-boy/articleshow/10990518.cms>, accessed on 06.01.2012

²⁷http://articles.timesofindia.indiatimes.com/2011-12-06/news-interviews/30481131_1_surrogacy-infertile-couples-kiran-rao, accessed on 06.01.2012

Aamir's 'speaking out' was widely acclaimed by infertility specialists in India. Dr. Malpani mentioned, "Celebs play a big role in influencing societal attitudes and the fact that Aamir Khan has used surrogacy to have a baby and has issued a press release stating this publicly means that many other infertile couples will want to learn more about this option,"²⁸

The 'speaking out' of celebrities impacts only the ART industry positively. The question is how the human rights and women rights movements are going to address the intentional absence and neglect of the surrogate in this context and what kind of legal protection has to be offered to the most vulnerable in the triad of surrogacy, which is explored through this study.

Dilemma of taking positions on behalf of surrogates

Those participating in this debate need to think whether they have the right to impose their morality on all women (however convincing it might be to them)! We argue that neither a ban nor the money in the hands of a few thousand surrogates is an answer to women's compulsions for which structural changes are required. In absence of this structural change, in order to provide for the basic needs of their families (which they consider an obligation in the Indian context), women, as Amrita Pande argues, negotiate their lives through the maze of operating class, gender, race and citizenship constraints and also find ways to resist their alienation and stigmatisation (Pande 2014). A women's movement that helps nurture this resistance by helping them see the linkages within the forces they negotiate, that undermines their resistance, will also help them question these forces more effectively. For example, the benevolent 'Madam' (the doctor) that Pande's surrogates succumb to, refuses to let them bargain with the accept contract money she fixes with the IPs, and thus perhaps guards her own profits. Similarly, little changes in her patriarchal family relations once the IPs without her mediation (Pande 2014: 182). She compels them to the contract is over. Commercial surrogacy today is a market facilitated legal exploitation that requires support of ex-surrogates in clinics to wipe out the sense of disintegration and indignity and to become the perfect mother machines in the interests of clients and doctors. A women's movement that questions and explores all actors involved, helps women gain higher levels

²⁸Ibid.

of autonomy and better chances of gaining their rights to integrity as workers and citizens against exploitative work, legislation and clinics. This alone lays the ground for questioning commercial surrogacy, a first step towards containing it. She then has a better chance to experience and nurture the non-exploitative aspects of procreation.

By not standing up for the rights of commercial surrogates, we are pushing gestational motherhood into the hands of technology and its markets and accepting that it is a purely technological feat that ordinary people can marvel at. By asking for a ban on commercial surrogacy we are not addressing the women's immediate problem, rejecting a technological potential that offers help to some, a certain tolerance of sexualities, and helps open up the patriarchal world of family where lineage, inheritance, parenting and control can all be questioned and redefined. Demand for a better deal for the surrogates pushes, on the one hand, welfarism which, in the present neo-liberal frame, creates pressure by cutting the profits and interfering with the development of unethical medical tourism at the cost of the needy women in the developing world. On the other hand, it draws women into the ambit of a larger arena of praxis that alone can enrich the debate on surrogacy by clarifying to what extent commercialisation destroys the potential for human realisation of self, inherent in procreation and, how it masks altruism.

Kumkum Sangari(2015) sketches the emergent practice of commercial surrogacy, its location in post- Fordist production, the symbiosis between assisted reproduction technologies and post –Fordist organization of labour and wages within a specific class-determined domestic and transnational market configuration. Sangari perceives these in relation to the restructuring of both state and social reproduction as well to the instrumentality of waste, debt and poverty.

Sangari(2015) places her argument against commercial surrogacy in the logic of added sex selection of the foetus(female foeticide) , domestic labour markets and the present asymmetry of the surro-pregnancy contract as opposite to the libertarian feminist arguments of free labour contract, reproductive autonomy and the intentional family.

“As an organ of reproduction, the womb is isolated as a serviceable bio-medical site, and pulled into the orbit of the transnational redistribution of reproductive services drawn largely from global south... contracted wombs become analogues of the special

economic zones that dilute or suspend economic and labour laws to facilitate foreign investment in the mutual aid or regulated and unregulated sectors”(Sangari 2015:72).

Commercial surrogates, often characterized by the medical market as ‘womb providers’ seem relatively both less inscribed and lowest in the production chain. Given capital’s historic dependence on the production of geographic unevenness, this scenario was latent in the class, social market relations within which the technology of assisted reproduction unfolded.

With neoliberal globalization, the racialised, imperialist exploitation of women differing in origins by a transnational market which normalizes extraction of resources or cheaper services from less developed nations and enables the purchase of economically vulnerable women’s procreative labour and custodial rights, became apparent. Commercial surrogacy was located, along with migrant domestic work and the global care chain, as another form of stratified reproduction in the multiple inequalities of reproductive labour market.

Much of women’s employment in India remains in the informal/unorganized sector that includes home-based works and piece rate contracts linked to both domestic and export oriented production chains as well as low paid service sector. The purchasing individual/couple is embedded in the political form of property, as in the form of ownership of the child and family as the right to reproduce it- formed in the historical matrix of class, caste and colonial extraction, invigorated by the market, transnational circuit of capital, exchange and manufacture, and facilitated by the state. Legal laxity allows and consolidates the practice.

The pressure of debt economy is producing subjects and agents of what Kumkum Sangari calls as self directional violence. A surrogate, who in most of the cases belongs to a debt – controlled family bears the health risks and the social costs.

In most of the cases surrogates have only one complaint, that they are less paid. This partially unpaid labour is transformed through the concerted market discourse of brokers and clients into gifts or donation, which Sangari terms as imputed altruism, saves and moralizes a market transaction as well as expels from the market transaction what the market has refused or failed to pay.

“No use value but has exchange value”- commercial surrogacy in India is largely predicted on conventional procreative dispositions which stand as yet at a border both inside and outside capital, these revaluating designations of waste, excess or surplus seem to be edging towards full subordination of bodily materials and reproductive labour by what Kaushik Sunder calls Bio Capital.

The surro-pregnancy contract encapsulates social exchange and class relations, but it does not signify a relation of symmetrical mutuality or legal autonomy. Most of the cases, surrogates are married and a surrogate is not fully individuated contracting party, but signs a joint contract with her husband. A legal party to the contract, the husband becomes a marital proprietor and his signature serves to guarantee his consent and the performance of his wife. Since half of the surrogates were not literate, and their husbands too were often not literate or minimally so, for all practical purpose this was a semi- verbal contract. Our study indicates that most commissioning parents possessed a signed copy but surrogates were rarely given a copy of the contract, and often were unaware of monetary and other clauses in it and some contracts did not even mention payment.

Tracing the legal history on surrogacy in India (see chapter III) and the critical approaches in surrogacy poses certain questions .How reactionary is the idea of surrogacy itself by undermining the possibility of adoption? It's not just discouraging adoption, it is encouraging the worst kinds of patriarchal ideas, like the child is my blood, my line. How do we understand voluntary childlessness as an idea? During the course of my field work, all women who go in for IVF shared enormous social pressures to have a baby, from the family, and from society at large. What are the measures the state has taken to understand the epidemiological reasons of infertility? What will be the impact of banning commercial surrogacy in the present social scenario? How do you define altruism in the context of a patriarchal family? How limited is the instrument of law to regulate the largest and least regulated medical care industry in the world?

Chapter III

THE LEGAL STRUGGLE

The legal battle for surrogacy unfolds in three different feminist positions in the West. Firstly, that women's rights does not include the right to sell one's own procreative services (Anderson 1990; Overall 1987; Warnock 1985; Field 1990; Corea 1985); secondly, that all surrogacy agreements are inherently exploitative and reasserting the existing gender stereotypes (Raymond 1990); and finally, the freedom for women includes freedom to contract for labour (Posner 1992; Shaler 1989; Sly 1982 and 1988). The experience from the West, at the beginning of in vitro fertilisation (IVF) industry, especially in the US, UK and Australia, raised scepticism and led to regulated fertility treatments based on ethical concerns and reasons. In Spain and Canada, the right to motherhood is restricted to the woman who bears the child. In the US, however, motherhood in the Assisted Reproductive Technology (ART) process is legally defined as the woman who intends to procreate, regardless of physical role in the procreative process²⁹. This is the first instance where law played a role to define 'what is biological'. In the traditional surrogacy, the major legal questions and judicial interventions were located in the possession of the child and in defining the biological parent. The history of case-law in US clearly sided with the commissioning couple. The emergence of gestational surrogacy reduced the legal battle and gave more choices to the consumers of the IVF industry. The courtrooms and law-making bodies remained silent in most of the countries about the emotional changes it brought to the women who bore the child and hence, the difference between traditional and gestational surrogacy.

In today's context, transnational gestational surrogacy practice gets legal sanction through the agreement, which is fundamentally a contract based on the notions of formal equality and does not take into consideration the obvious hierarchies based on class, caste, race, religion and region/nation. The practice of commercial surrogacy, however, denotes that the 'willingness' of being a surrogate comes mostly from those parts of the world where social and cultural options are skewed due to economic disparity. Recently the Government of India decided to ban the practice not based on the ethical questions involved in it, but

²⁹Johnson v. Calvert Supreme Court of California made this decision in the year 1993

based on the questions arising out of patriarchal morality like the possibility of same sex couples and single parents from abroad using the surrogacy services.

The national laws on medical procedures, commercial transactions, adoptive processes and international trade merge when legal formulation on surrogacy is initiated. Spar observes the lack of regulation in “thousands of babies born as a result on shaky legal legs... most of these children were born in the market as well as the womb, the product of desire combined with the ability to pay” (Spar 2005:287). She argues that commercial surrogacy must be approached as a commercial relationship as, fundamentally, it is an issue of political economy. She criticises the prohibition of surrogacy by law, as it worsens the exploitation and demands rules to guide the transaction, regulations to prevent abuse, and a global framework for transnational trade (Spar 2005). Majumdar(2013) argues that the Transnational Commercial Gestational Surrogacy is a billion dollar industry and hence the term ‘regulation’ is much more complex as it involves different national laws and money transfers. These authors, thus, critique the nature of law that regulates commercial surrogacy, which is mostly silent on the legal categories/definitions involved in surrogacy. For example, the role of the surrogate and legal acknowledgement of her contributions, the categorization of money transactions, and the exchange value of the product (‘price of the child’?) is never made explicit.

With advances in assisted reproductive technologies, popularly known as new reproductive technologies, surrogacy has emerged as a popular method of assisted reproduction. Currently, India is one of the few countries that allow commercial surrogacy on conditions. The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978.³⁰ The legal uncertainty of surrogacy in India promoted the interests of medical tourism.³¹ India thus emerged as an important international destination for commercial surrogacy. Despite the ban on foreign couples doing surrogacy in 2015(through a circular by the Ministry of Home Affairs and then through the Surrogacy Bill, 2016), the Indian surrogacy industry has grown exponentially as the demand was driven up by affluent Indians/ Non-resident Indians struggling with infertility.

³⁰Law Commission of India, Report No. 228, August 2009,

<http://lawcommissionofindia.nic.in/reports/report228.pdf>

³¹<http://mea.gov.in/images/attach/surrogacy03112016.pdf>;

<http://www.mea.gov.in/surrogacy-matters.htm>

Although the precise worth of the surrogacy industry is not yet known, as per a study backed by the United Nations in 2012, it was valued at more than \$400 million, with over 3,000 fertility clinics nation-wide.³² The most recent studies estimate the surrogacy industry in India to be worth between \$500 million and \$2.3 billion annually³³, with approximately 5,000 surrogate babies born in India every year.”³⁴ The rapid expansion of this industry in India can be attributed to a combination of factors such as rising infertility rates, comparatively lower cost of medical procedures, easy availability of surrogates, and low levels of government red-tape due to the market being largely unregulated. The ambiguities on the existing regulations of clinics and practices in surrogacy created an environment conducive for an expansion of the market and the growth of surrogacy as a booming industry.

A legal definition of infertility is not available under any of the laws in India. In practice, law borrows the medical definition of infertility. In reality the changed definition of ‘infertility’ reinforced medicalisation of women’s bodies and opened the market for reproductive technologies. The over/ false estimates of infertility based on the changed definition had an impact at the policy level also. Infertility was recognised in policies for the first time and was included in the Reproductive Child Health Programme (RCH) through the Ninth Five Year Plan (Qadeer 2010). Lack of epidemiological data is a hindrance in understanding infertility as a public health issue and to demand appropriate policies to address the basic reasons for infertility.

The World Health Organization (WHO) defines infertility in three categories: (i) clinical; (ii) epidemiological; and (iii) demographic:

- i. Clinical definition - “a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse” or “the inability of a sexually active, non-contracepting couple to achieve pregnancy in one year. The male partner can be evaluated for infertility or

³²<http://www.businessinsider.com/india-surrogate-mother-industry-2013-9?IR=T>

³³<http://www.livemint.com/Politics/D6DPV19pN0eYYJoGHY8Ef/Anguish-over-Indias-move-to-ban-surrogacy-industry.html>

³⁴<http://www.bbc.com/news/world-asia-india-34876458>

subfertility using a variety of clinical interventions, and also from a laboratory evaluation of semen.”³⁵

- ii. Demographic definition - “An inability of those of reproductive age (15-49 years) to become or remain pregnant within five years of exposure to pregnancy” or “an inability to become pregnant with a live birth, within five years of exposure based upon a consistent union status, lack of contraceptive use, non-lactating and maintaining a desire for a child.”³⁶
- iii. Epidemiological definition - “(for monitoring and surveillance) Women of reproductive age (15–49 years) at risk of becoming pregnant (not pregnant, sexually active, not using contraception and not lactating) who report trying unsuccessfully for a pregnancy for two years or more.”³⁷

It is estimated that infertility affects 10 to 14% of the Indian population, with 22 to 33 million couples in the reproductive age suffering from lifetime infertility.

Subfertility

“Subfertility generally describes any form of reduced fertility with prolonged time of unwanted non-conception. Infertility may be used synonymously with sterility with only sporadically occurring spontaneous pregnancies.”³⁸

“Sub-fertility is the inability to conceive after 1 year of intercourse with the same partner without contraception. Conception should occur in 80-90 percent couples within 12 months of ceasing contraception and in 95 per cent by 2 years. Primary sub-fertility affects couples who have never conceived. Secondary sub-fertility applies to couples who have had a pregnancy previously although this may not necessarily have had a successful outcome. Most couples who present have

³⁵ <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/>

³⁶ <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/>

³⁷ <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/>

³⁸ C. Gnoth and others, Human Reproduction, Volume 20, Issue 5, 1 May 2005, Pages 1144 1147, <https://doi.org/10.1093/humrep/deh870> accessed on 17 December 2017)

relative sub-fertility (reduced chance of conception) rather than absolute infertility.” (Jones ND: 904) ³⁹

WHO uses the word subfertility in the following context: “Couples living with HIV in developing countries have been found to have higher rates of infertility (inability to become pregnant despite a desire for a healthy child outcome) or subfertility (e.g. higher rates of spontaneous miscarriage)”. ⁴⁰ The condition of being less than normally fertile though still capable of effecting fertilization ⁴¹

Logic and Politics of Regulatory Practices

On a different plane, Donchan (2009) argues that the gender neutral contexts to frame regulatory practices is unjust unless it gives appropriate considerations to the different position women and men occupy in relation to the reproduction process and their options for autonomous choices. These choices are determined and shaped by the relations among the individuals and their social, political and economic environment. Commercial surrogacy has a social context where women come from non-homogenous categories and each woman involved in the different medical procedures requires differential treatment with an intersectional approach to the question of exploitation to ensure ethics and justice. When a new law has to address the newly emerging social situations, ideally the law should take a protective role for the most exploitative in the milieu and in this context, evidently, it is the surrogates.

Regulatory frameworks across the globe

The regulatory framework on surrogacy can be categorised into three ⁴²:

1. Prohibition of all Surrogacy (France, Germany, Italy, Norway, Singapore, Sweden, Vietnam)
2. Prohibits commercial surrogacy, but allows non-commercial surrogacy: Canada ,China, Israel and UK prohibits commercial surrogacy and allows non commercial surrogacy; certain

³⁹ R. Jones, Oxford Textbook of Primary Medical Care, Volume 2, pg. 904, Oxford University Press

⁴⁰ http://www.who.int/reproductivehealth/publications/infertility/9789241505000_annex3.pdf?ua=1 accessed on 24 November 2017

⁴¹ <https://www.merriam-webster.com/medical/subfertility> accessed on 24 November 2017

⁴² Points, K (2009) in SAMA (2012: 8)

states in Australia are silent on non-commercial surrogacy but bans commercial surrogacy. In the US, commercial surrogacy is banned in some states but allowed and regulated in California, Arkansas, Florida, Illinois, New Hampshire, Texas, Utah and Virginia.

3. Allows all surrogacy: India, Russia, Ukraine

As pointed out by the critics, none of the laws that facilitate or allow commercial surrogacy are clear about the legal status of surrogates: are they workers? How much money do they receive in the procedure? Many of the laws provide a dubious or unclear provision to the commercial part of the transaction. Evaluations of the laws that permit commercial surrogacy across the globe indicate that this ambiguity is intentional and legally facilitates the exploitation. The one and only clear aspect relating to the surrogate is the complete relinquishment of gestational motherhood and the documented evidence for the same. All the legal provisions for procuring the birth certificates and pre-birth orders clearly state that it should not carry the name of the surrogate mothers. It is evident that the intention of the regulatory framework and practices is the absolute invisibilisation of the surrogates.

When it comes to the question of money transactions, the term used is 'compensation', without any clarification on what is being compensated (India, Russia and Ukraine). Another term used is 'cost' (California and India) which covers different aspects in different countries and there is no mention about the 'wage' or the 'minimum wage' or the 'salary'. Legislation across countries then does not define surrogacy either as 'work' or 'labour' or 'employment' or 'production'.

Regulatory Framework in India

In India, however, we have only a guideline prepared by the ICMR and National Academy of Medical Sciences (NAMS) - 2005. The clinics neither follow any standard treatment protocols nor do they have any protocols and standards for the costs and procedures, which are commonly practiced in the absence of law. The Law Commission report (*Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*) focuses on the rights of the infertile couple and are silent on the 'legal status' of the surrogates. The report discusses the financial support for the surrogate child in exceptional cases such as the death of intending parents or their

divorce, whereas for the surrogates, the only directive is to take care of her life insurance coverage (GoI 2009 para 4.2 (2 and 3)).

The Preamble of the Draft Assisted Reproductive Technologies (Regulation) Bill, 2010 identifies infertility as “the most highly prevalent medical problem” without any scientific explanation. This crude utilitarianism became the justification for law for the authors of the Bill while stating, “[i]n the Indian social context specifically, children were also a kind of old-age insurance” (MHFW& ICMR 2010: 1). The preamble states that the intention of law is to prevent the unethical practices which can adversely affect the recipient of the infertility treatment, ‘medically, socially and legally’ and it keeps a complete silence on the obvious exploitation of the donors and surrogates. The Bill takes a clear position in favour of the infertile couple and states without reservation that the procedures to ensure that “... the legitimate rights of all concerned are protected with maximum benefit to the infertile couples/individuals with a recognised framework of ethics and good medical practice” (Ibid). Therefore, the legal protection is not equal and takes no note of the exploitation of surrogates and donors. The draft legislation in fact promotes exploitation of surrogates in several ways, not limiting the number of surrogacy one has to undergo, refusing to address the issues around foetal reduction and non- protection from AIDS etc.

This paradigm shift in the basic principles of public health law making is reflected in the draft Bill, 2010. Preamble of this Bill states that the primary goal of the law is to regulate hitherto unregulated assisted reproductive technology clinics which have had an ‘exponential growth’ in the last 20 or more years. There is no explanation for the lack of regulation or the delays in regulating the “mushrooming of such clinics around the country” over the past three decades. There are different versions of the draft Bill and some versions are distinctively available in the public domain for consultations and discussions, but some of it is ‘strictly confidential’. However, Majumdar (2013) while tracing the discourse by national media on the ‘reworking’ of different drafts argues that this exercise has not led to any significant changes in the primary perspective of the Bill which gives no thought to the term ‘regulation’ in the context of transnational commercial surrogacy. Analysis of definitions of surrogacy⁴³, surrogate mother⁴⁴ and surrogacy agreement⁴⁵ in the Bill shows

⁴³ Section 2(aa) of the Bill defines that ““surrogacy” means an agreement in which a woman agrees to a pregnancy , achieved through assisted reproductive technology , in which neither of the gametes belong to her

that it clearly retains its ambiguity to facilitate exploitation of the less powerful. The definitions clearly state that surrogacy is legally neither 'work' nor 'labour' in India.

Analysis of Surrogacy Bill 2016

A much delayed Bill to address the issues surrounding surrogacy has been reportedly cleared in a cabinet meeting of the present NDA Government on 24th August 2016. This Bill is based on the HFEA [Human Fertilisation and Embryology Authority] guidelines of the UK and 129th Law Commission Report of 2009. There has been a long standing demand from many organizations and groups for a separate law to ensure that women, especially from the poorer sections are not exploited by the increasing pressures of this multi-million dollar medical industry. However, women's movements and people's health movement are concerned with its underlying conservatism, which excludes single parents, live-in partners, same sex couples, etc from altruistic surrogacy. It displays a regressive mindset that makes negative value judgements about certain categories of citizens, thereby violating their fundamental constitutional right to be treated equally before the law. The same conservatism is expressed in confining 'altruistic' surrogacy to the same caste and community by restraining the practice to immediate kin. It is also not clear why couples who already have a child have been excluded.

Moreover, the Bill does not pay adequate attention to the protection of the surrogate mother even in 'altruistic' surrogacy. Providing appropriate safeguards, insuring her against long term consequences on her health and well being, etc should form an intrinsic part of the Bill.

The Surrogacy (Regulation) Bill is considered to be an important step towards regulating surrogacy practices in India. In the name of regulation, the Bill suggested absolute ban on commercial surrogacy. The Bill comprises of various aspects of surrogacy such as its legal

or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate".

⁴⁴ Section 2 (bb) defines the surrogate mother. "'Surrogate mother' means a woman who is a citizen of India and is resident in India, 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 viability and deliver the child to the couple /individual that had asked for surrogacy".

⁴⁵ Section 2 cc reads "'surrogacy agreement' means a contract between the person(s) availing assisted reproductive technology and surrogate mothers".

certification process, insurance for the surrogates, nature of the surrogacy, fee for the same process and so on. Even with the existence of the ART Bill that has a wide regulation on surrogacy, there had been a need to bring out a separate Bill on surrogacy. But the question is whether the Bill has served its intended purpose?

The major objectives conveyed by the Surrogacy (regulation) Bill 2016 are:

- Surrogacy is an arrangement whereby an intending couple commissions a surrogate mother to carry their child.
- The intending couple must be Indian citizens and married for at least five years with at least one of them being infertile. The surrogate mother has to be a close relative who has been married and has had a child of her own.
- No payment other than reasonable medical expenses can be made to the surrogate mother. The surrogate child will be deemed to be the biological child of the intending couple.
- Central and state governments will appoint appropriate authorities to grant eligibility certificates to the intending couple and the surrogate mother. These authorities will also regulate surrogacy clinics.
- Undertaking surrogacy for a fee, advertising it or exploiting the surrogate mother will be punishable with imprisonment for 10 years and a fine of up to Rs 10 lakh.

The adoption of Surrogacy (Regulation) Bill, 2016 establishes a regulatory framework for good surrogacy practices in India. However, the proposed ban imposed by the Bill on commercial surrogacy and exclusion of foreign couples from availing surrogacy services are considered as the biggest flaw of this Bill. The possibility of exploitation of surrogate women and protection of interests of surrogate and surrogate child could have been effectively ensured through proper framework. Some of the criticisms that are obviously visible from the regulatory Bill are discussed in the below paragraphs.

Benefit of the surrogate mother

As mentioned above, the Bill specifies that no other payment other than reasonable medical expenses can be made to the surrogate mother and that the surrogate mother has to be a close relative who has been married and has a child of their own. Not only has the Bill not mentioned who exactly is a close relative, but has also failed to consider that the surrogate mother has to go through nine months of painful process without any benefits. Though the surrogate mother is a close relative, it is not easy for her to sacrifice nine months where everyone else involved in the process, like the surrogacy clinics and intending parents, gain profit except her. Though this regulation was imposed in order to ban commercial surrogacy and to avoid surrogacy from becoming a form of business, it has to be criticized because the surrogate mother receives nothing from the process. The Bill also does not talk about the maintenance of the surrogate mother after her pregnancy period in case she suffers from any health conditions due to the pregnancy.

Rehabilitation for surrogate mothers

The Bill on the other hand can be assumed to be very rational. Surrogacy being a very emotional and human process needs to be dealt with in depth. The Bill focuses only on making the process altruistic, but does not talk about the condition of the surrogate mother and the surrogate child. Surrogacy is not only the gestation period, but also concerns the effects after the delivery of the baby. The surrogate mother goes through a lot of emotional changes during the pregnancy period. She may naturally develop an attachment towards the child at the end of the pregnancy though she was mentally prepared to be a surrogate mother. These mental issues can be handled by providing rehabilitation facilities to surrogate mothers to give them a psychological guidance. The Bill has to give space for protection and care of surrogate mothers, where the law decides to legally accept surrogacy as an option. The Bill suggests total anonymity of surrogates and there is no legal recognition of their status being carriers of the babies.

Citizenship

Also the Bill has not exclusively spoken about the status of a surrogate child except its abandoning. . Since surrogacy is not just for the time being process, it has its effect even years after the birth of the child. There needs to be an insertion of clauses that deals with issues of citizenship of the surrogate child. If the surrogate mother is an NRI who decides to

act as a surrogate for her sister who is a close relative, what will be the legal status of her acting as a surrogate in India? What will be the procedure for such applicants? This kind of citizenship issues need to be covered by the Bill.

Ban on commercial surrogacy

Using human rights jurisprudence as a base, one can claim the right to use surrogacy and be an intended couple as a part of the right to personal liberty, the right to procreation and the right to found a family. The reason for the ban on commercial surrogacy is due to the exploitation of surrogate mothers. India being one of the major destinations for foreigners for ART services, particularly for surrogacy practices, has an annual turnover of billion dollars. It has been reported that in June 2017, “surrogacy rackets” were uncovered in Hyderabad and Bhongir, where women acting as surrogates were illegally confined. This was despite the Surrogacy Bill of 2016. These women come forward to act as surrogates to survive their financial circumstances. Though the Bill objects to or bans commercial surrogacy, its existence is something that cannot be abolished. It is important to know that there are various fields that include activities of exploitation and the best way to prevent such exploitation is not prohibiting the activity, but imposing a strong regulation. The ban on commercial surrogacy on the grounds of exploitation maybe irrational and a direct encroachment on the couple’s right to reproduction. On the other hand, a woman who opts to be a surrogate comes from a background of pressing financial needs due to under employment or unemployment. Without addressing the ground reality on employment and wages in India, where women are force to do the ‘3D’ - difficult, dangerous and dirtiest- jobs to meet the two ends of their lives, banning commercial surrogacy is neither a solution nor an answer.

Definition of close relative

The Bill says that no person other than a close relative of the intending couple shall act as a surrogate mother. This is a very plain clause with no explanation as to who the close relative can be. The term close relative has not been defined in the Bill. There may be circumstances where no close relative of the intending couple are ready to act as a surrogate. In such cases the intended couple fail to enjoy the benefits of the surrogacy procedure and also fail to enjoy the opportunity of having a child.

Also when such a process happens within the family, there are chances of problems arising out of it as the surrogate mother and the surrogate child will have to meet each other with the knowledge of the birth. This may lead to certain psychological issues. When such a surrogate is a third person, it will be easier for the family to manage the affairs related to the life of the surrogate child.

The term “ever married”

To be a surrogate mother not only should the woman be a close relative of the intended couple, but should also be “ever married” as per the Bill. This means that a woman can be a surrogate mother only if she is with her husband. Surrogacy is a voluntary process and this Bill prohibits a single mother to come forward to be a surrogate. This clause seems unfair to the divorced and widowed mothers. A surrogate mother being able to give birth to a child, having the willingness to be a surrogate should be more than enough a qualifying criterion and ignoring the single mothers seems to infringe their rights. This clause was added to safeguard women from the social stigma. However single mothers who are ready to volunteer should not be deprived of their rights.

Period for availing the surrogacy service

It is medically evident that the inability to achieve pregnancy can be found within a year or two of trying to conceive. There is no reason for the couple to wait for five years to avail the surrogacy service. Especially when the couple gets married after 30 years of age, it is not fair for them to wait for five years to get a child. Hence, provisions in this regard can be clarified further, to meet the requirements of intending couple who have crossed 30 years of age.

Rights of IPs

In surrogacy practice the following rights of the intended couple have been identified as essential, (a) the right to select surrogate mother of their own choice subject to restrictions by the state on grounds of public interest; (b) right to impose reasonable restrictions upon surrogate mother as they are necessary for normal development of the child; (c) right to information and visit surrogate mother during pregnancy; (d) right to custody of the child within 72 hours of its birth. However, the Bill does not make any reference to these rights.

The need to regulate this \$2-Billion industry arose from incidents where the contracts were not honored. In particular, it was the case of the Japanese doctor couple that commissioned a surrogacy in 2008, but was divorced by the time the baby was born, leaving the baby parentless and without citizenship (Baby Manji vs Union of India). Another trigger for the government was the case of an Australian couple that, in 2012, abandoned one of the twin babies born out of their commissioned surrogacy because that baby was born with Down syndrome.

Though the Bill has a good intention, a flawed mechanism can be identified within it. Now that the Bill intends to legalize surrogacy in India, it is important for the law makers to make sure that the subject is dealt with in depth. Since surrogacy is a matter of life and involves various emotions it cannot be treated rationally, alone. This Bill seems to be very narrow not providing space for a wider interpretation. The content of the Bill is only focused on preventing exploitation of women from commercial surrogacy, but does not bother to interfere in the ethical aspect of the subject.

If the intent of the Bill is to protect surrogate mothers and the children born out of surrogacy, then the legislation must provide a legal framework that restricts the exploitation of the surrogates and the children, and penalize those who do not honor contracts. The government should ensure that the surrogates are properly counseled about the medical and economic implications of surrogacy. It should also ensure that all surrogacy contracts must mandatorily cover the medical care, hygiene, and nourishment of the surrogates, not just during the pregnancy, but also in the post-partum period.

Features of the Parliamentary Committee Report on the Surrogacy (Regulation) Bill

Soon after the Surrogacy (Regulation) Bill, 2016 was approved by the Cabinet for introduction into Parliament in 2016, it was submitted for review to a Parliamentary Standing Committee on Health and Family Welfare. The 102nd Report on the Surrogacy (Regulation) Bill, 2016 was laid on the table of the Lok Sabha and presented to the Rajya Sabha on August 10, 2017. It contains hearings with stakeholders and witnesses and a review of relevant documents and related legislation. The comments of the Parliamentary Standing Committee are wide ranging and pertinent, seeking to fill the gaps, and to explain and rationalize the statute. It includes responses from the Department of Health Research.

The committee, keeping in mind the objectives of the proposed legislation, decided to collect views from various stakeholders and the general public on the Bill through a press release inviting suggestions and views from all the concerned people. The Committee also held extensive interactions with the representatives of Associations/Organizations/Councils/Institutes as well as the renowned experts and professionals from the assisted reproductive industry and the benefactors. These included representatives from Ministry of Women and Child Development, Ministry of Home Affairs, Ministry of External Affairs, National Commission of Women, Federation of Obstetric and Gynaecological Societies of India (FOGSI) and Indian Society of Third Party Assisted Reproduction (INSTAR). In this discussion panel, different organizations and councils had different opinions where some supported the objectives of the Bill, while the rest had counter opinions to each objective.

The committee has put in extensive efforts to examine the Bill and scrutinize all the submissions and viewpoints put forth before it. The report has given suggestions to amend the Bill by scrutinizing every clause under question which makes it a reliable report. The report has given fair and strong suggestions. The salient features of this parliamentary standing report on Surrogacy (Regulation) Bill is as discussed in the succeeding paragraphs.

- The committee has excellently dealt with the issue of “close relative” being a surrogate. Though the object of this provision was to prevent exploitation of surrogate mothers, it becomes complicated for only close relatives to act as surrogates. The committee explained that infertility is a taboo in India and for couples to come forward and undergo ART procedures and surrogacy procedures is frowned upon. In such a situation, to force couples to only be able to have close relatives as surrogates is arbitrary and in violation of their basic reproductive rights. Also in the context of the surrogate mother, it would be unfair for her to see the child repeatedly which would have an emotional effect on the surrogate mother and the child. The committee has recognized these factors and suggested that considering only close relatives is unworkable and has no connection with the object to stop the exploitation of surrogates. Therefore, the Committee recommends that this clause of "close relative" should be removed to widen the scope of getting surrogate mothers from outside the close confines of the family of the intending

couple. In fact, both related and unrelated women should be permitted to become a surrogate.

- ART and surrogacy procedures have emerged essentially due to increasing infertility in the society. The current Bill defines infertility as the inability to conceive after five years whereas the previous draft Bills, of 2008 and 2014, defined it as the inability to conceive after one year. The Committee has compared this definition of infertility with that given by the WHO and suggested that since conception has many interplay functions, a five-year time bar would add to the misery of already distressed intending couples. The five-year waiting period is therefore arbitrary, discriminatory and without any definable logic. The Committee, therefore, recommends that the definition of infertility should be made commensurate with the definition given by WHO. This recommendation is based on the right to reproduction and the right to privacy. The government should set a criterion that is not rational and arbitrary.
- In one of its recommendations, the committee observes the “inordinate delay” in the follow up to the ART Bill, which includes provisions for the regulation of ART/surrogacy facilities. The committee raises the lack of clarity on the “reasons behind bringing a fresh Bill specifically on surrogacy, when a detailed, comprehensive and all en-compassing Bill on ART services had already been drafted by the Department”. The committee asks to be apprised of the reasons behind the decision to draft a separate legislation for surrogacy. It, moreover, opines that bringing the “ART Bill before the Surrogacy (Regulation) Bill, 2016 would have been an ideal attempt for regulation of such clinics.”
- The committee, recognizing surrogacy as reproductive labour, says, “Permitting women to provide reproductive labour for free to another person but preventing them from being paid for their reproductive labour is grossly unfair and arbitrary...Pregnancy is not a one minute job, but a labour of nine months with far reaching implications regarding her health, her time and her family.” It raises its concerns with regard to the proposed altruistic surrogacy arrangement. The report also mentions that a close relative of the intending couple may be forced to act as a surrogate mother which is another form of exploitation. The committee

recommends, therefore, that altruistic surrogacy be replaced with the “compensated surrogacy model”.

- The committee has also dealt with minute points like redefining the term “abandoned child” appropriately.
- It was also pointed out by the committee that the Supreme Court has recognized the status of live-in partners as a "relationship in the nature of marriage" and the proposed Bill in an unreasonable and discriminatory manner fails to recognize the rights of live-in partners to surrogacy. Therefore, a mechanism should be established which can incorporate everyone in the ambit of surrogacy regulatory framework.
- Various other stakeholders present in the panel discussion were in support to allow the individuals who are single including unmarried, separated, widows, trans-genders, single parents to exercise their right to parenthood. They argued that if single individuals are financially capable of taking care of their children and if they have family support, they should be fully entitled to have children through surrogacy. They felt that restricting the people to commission surrogacy on the basis of their marital status, would be in violation of their human rights.
- Various stakeholders in their written comments furnished to the Committee, have stated that the Surrogacy Bill does not define 'certificate of essentiality'. The maximum time duration, the criteria or the grounds on which this certificate may be granted or denied, grievance redressal or recourse in case of rejection or refusal of such certificate etc are not provided. The committee felt that the purpose behind the certificate was not clear to the intended couple and hence suggested that the certificate of essentiality be removed.
- The committee has also noted that the term 'written informed consent' is not defined in the Surrogacy Bill. The Bill only provides for written informed consent of the surrogate mother, but exempts her husband and the intending couples from such consent. Secondly, there is no provision for securing consent under the Surrogacy Bill.

Apart from these points the committee has scrutinized the Bill critically for amendments. The committee has given space for wider participation of various groups related to the subject. This has helped in critically evaluating the Bill where all rational decisions made in the Bill were criticized for a change. A committee that has taken in concern the moral jurisprudence of the subject can be relied upon for valid amendment suggestions as that “moral concern” was one of the major things that was missing from the regulatory Bill. The Bill seemed to have focused on banning the commercial surrogacy and protecting women from exploitation but has not intended in the main subject matter of surrogacy. This report had broken down each aspect and has given a thorough examination in order to bring out an effective amendment to the Bill.

Rights of Surrogates

Unlike other countries where the state has the responsibility for pre-surrogacy legal counselling for women, in India the legal enforceability of surrogacy is ensured through an agreement between two private parties - the intending couple and the surrogate. The validity and enforceability of this contract are governed by the Indian Contract Act, 1872.

The agreement consists of monetary coverage of expenses and insurance related to pregnancy care⁴⁶. An additional provision of Section 34(3) gives the surrogate mother the right to receive “compensation” from the couple or individual, for “agreeing to act as such surrogate”. The compensation is meant for ‘agreeing’ and not for the working hours, or any other loss, damage or exchange during the process. The existing provisions of labour laws in India (Industrial Disputes Act, 1947; The Factories Act, 1948; Maternity Benefit Act, 1961) relate to the compensation applicable only to wage labourers. So the surrogates (or, in case of death, the family) are not protected with compensation for the damages suffered.

The contractual obligation is between the contracting parties and one cannot invoke any legal responsibility on the state, IVF clinics, physician or any other players in the operationalisation of surrogacy. Contractual obligation is between the parties; there too the relationships between the parties are structurally unequal. This is a legal situation against

⁴⁶ Section reads as “all expenses including those related to insurance if available of the surrogate to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy”.

the natural principles of law. Unless there is a possibility of state intervention in the contract, like the tripartite contracts in labour law, the present form of law actually permits exploitation of surrogates, i.e. exploitation of the most exploited.

Legal Ambiguities and its Implications

The draft legislation calls commercial surrogacy 'a service for the advancement of science'. The money paid thus, becomes a dole from the commissioning parents to the surrogates. Thus the wages for the service are called compensation and no compensation is legalised as defined by the Workmen's Compensation Act, 1923. Avoidance of the term wages for the time of engagement then requires no standardisation and is left to the will of the commissioning clients. Thus while the debating intellectual calls birth as work, the proposed legislation does not say so. It does not ensure information on the nature of risks; nothing is done to make the process less unsafe and less alienating. It offers no clarity on legal definitions of the types of payments to be made (wages, compensation, medical coverage, travel costs, family insurances, death compensation to family etc.), or on the duration of the surrogate woman's bodily involvement and her psycho-biological investments, vulnerabilities and risks. Her rights, including that of legal support through the state, are ignored and flouted (Qadeer 2009a).

The proposed legislation, through immediate separation of the baby, refusal to permit breast feeding, and not permitting contact, undermines the self-respect, dignity and integrity of the surrogate that lies in nurturing the psycho-biological bond with the baby. Preventing her name from being on the birth certificate further ruptures this relationship and perpetuates secrecy and the sense of loss captured in their narratives. The priority of genetic parenthood is fixed to create a notion of ownership of those who can pay for a woman's dirty work. Her altruism, if it is there at all, is also completely unrecognised or disrespected and the payment is assumed to have resolved all conflicts. The Indian state, thus, denies the surrogate her gestational motherhood and blocks the chances of individuals born out of surrogacy arrangements to discover their complete identity as adults.

Surro- Pregnancy Contracts and Legal Validity

Legal definition of an agreement

As per S. 2 of the Indian Contract Act 1872 (“Act”): *(e) Every promise and every set of promises, forming the consideration⁴⁷ for each other, is an agreement.*

Legal enforceability of an agreement

“While all contracts are agreements, all agreements are not contracts. An agreement that is legally enforceable alone is a contract. Agreements which are not legally enforceable are not contracts, but remain as void agreements which are not enforceable at all or as voidable agreements which are enforceable by only one of the parties to the agreement.”⁴⁸

What constitutes a valid contract? What are the conditions?

1. An offer or proposal by one party and the acceptance of that offer by another party resulting in an agreement-consensus-ad-idem.
2. Intention to create legal relations. (The Indian Contract Act, 1872 does not seem to expressly recognize the requirement of an intention to create legal relations. However, a number of English and Indian cases have held this to be a requirement)
3. Free consent- Two or more persons are said to consent when they agree upon the same thing in the same sense. (S. 13 of the Act)

Consent is said to be free when it is not caused by—

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake. (S. 14 of the Act)

When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose

⁴⁷ (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something, such an act or abstinence or promise is called a consideration for the promise.

⁴⁸ <http://lawtimesjournal.in/wp-content/uploads/2016/08/Law-Times-Journal-Indian-Contract-Act.pdf>

consent was so caused. (S. 19 and 19A of the Act) Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. (S. 20) A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. (S. 22)

4. Competency-Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject. (S. 11 of the Act)
5. Lawful consideration and object -The consideration or object of an agreement is lawful, unless—
 - it is forbidden by law or
 - is of such a nature that, if permitted, it would defeat the provisions of any law or
 - is fraudulent or
 - involves or implies, injury to the person or property of another or
 - the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. (S. 23 of the Act)

4. The agreement should not be in restraint of marriage, trade or legal proceedings. Such agreements are void. (ss. 26-38 of the Act)
5. Certainty- Agreements, the meaning of which is not certain or capable of being made certain are void. (S. 29 of the Act)
6. Agreement should not include an impossible act—
An agreement to do an act impossible in itself is void.

Difference between an agreement and a contract

As per S. 2 of the Act:

(h) An agreement enforceable by law is a contract;

Moreover, S. 10 states:

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Consideration

As per section 2 (d) of the Act:

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

According to Explanation 2 of Section 25 of the Act:

An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given

Legal Enforceability of Surrogacy Agreements

The 2008 ART Bill acknowledges the legal enforceability of the agreement. This would ensure surrogacy agreements on par with any other contract under the Indian Contract Act, 1872. Now, if reproductive rights get constitutional protection, surrogacy which allows an infertile couple to exercise those rights also gets the same constitutional protection. However, jurisdictions in various countries have held different views regarding the legalization of surrogacy.

The 2008 Bill acknowledges the legal enforceability of the agreement. This would ensure surrogacy agreements are on par with any other contract under the Indian Contract Act 1872.

Legal Status of Surrogacy as discussed in the law commission report clearly mentions that the vacuum of law does not make any practice illegal. It further reiterates the role of guidelines as a regulatory instrument in legal practices.

“In the absence of any law to govern surrogacy, the 2005 Guidelines apply. But, being non-statutory, they are not enforceable or justiciable in a court of law. Under paragraph 3.10.1 of the Guidelines a child born through surrogacy must be adopted by the genetic (biological) parents. However, this may not be possible in case of those parents who cannot adopt in India” (GoI 2009: 21&22).

“Surrogacy in India is legitimate because no Indian law prohibits surrogacy. To determine the legality of surrogacy agreements, the Indian Contract Act would apply and thereafter the enforceability of any such agreement would be within the domain of section 9 of the Code of Civil Procedure (CPC). Alternatively, the biological parent/s can also move an application under the Guardians and Wards Act 1890 for seeking an order of appointment or a declaration as the guardian of the surrogate child”

“Under Section 10 of the Contract Act, all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions, it is a contract. Thereafter, under section 9, Civil Procedure Code, it can be the subject of a civil suit before a civil court for adjudication of all disputes relating to the surrogacy agreement and for a declaration/injunction as to the relief prayed for” (GoI 2009: 22).

Chapter IV

PROFILE OF THE RESEARCH PARTICIPANTS

Who makes the decision to rent the womb? How difficult is the process of that decision making? What are the factors influencing that decision making? These are the questions which research scholars working on the empirical field of surrogacy get frequently asked. What are the social and economic backgrounds which propel a woman to make the difficult choice to be a surrogate? One can assume from the existing social reality that economic compulsions could be a primary reason for it. The social stratifications existing in a society impacts every spheres of decision making in everyday living. However, we find it is important to understand the nuances and complexities involved in that decision making to be a surrogate. This chapter tries to capture that aspect while discussing the data we have gathered in the study through the interviews of the surrogates and a note on ART banks from our participatory observation. To discuss the socio- economic profiles of the respondents of this study, we primarily rely on the Focus Group Discussion (FGD) conducted as part of the study and the information gathered through interview schedules with all 36 respondents. The response we gathered has its limitations since we were allowed to conduct these interviews only in the presence of clinicians/agents/ART bank authorities. The site where interviews were conducted would have significantly impacted many of the responses and we consider that as one of the limitations of this study.

Table 4.1: Interview Site

Interview Site	Number of Surrogates
Mumbai Clinic	6
Delhi/NCR Clinic	9
Surrogacy Hostel Delhi/NCR	18
Surrogacy Hostel Bombay	
Others(specify)	1(Delhi- telephone)1(Mumbai- residence of the surrogate) 1(Mumbai - coffee shop)

Field notes of the filed researcher clearly indicate that there is a close relationship between the location from where the interviews were conducted and the response of the surrogates.

The owner of the surrogacy hostel- Mr. Yugal Kishore Upadhyay gave me a very different picture of Gurinder. I first met her briefly when she came to the office space of the hostel to ask a question to Mr. Yugal. Mr. Yugal's mother, who is the caretaker of the hostel lives with the surrogates in the hostel. Gurinder came to the office space with a packet and asked Mr. Yugal- "Dadi puch rahi hai ki ise phakna hai?" Mr. Yugal Kishore asked her to sit and introduced her to me. He said that she had a love marriage. She was in a lot of trouble. She only had 2 options- either to get into "galat kaam" (prostitution) or to divorce her husband and go back home. Surrogacy gave her a good solution. It saved her marriage and now she is happy. When I asked her for how long she has been living in the hostel. She looked at Mr. Yugal and then answered my question. She seemed to seek approval from him before answering my question. She was very conscious of Mr Yugal's presence.

Her answers during the second meeting gave me a very different picture, compared to what Mr. Yugal gave me about her. Gurinder is a petite girl and has a very pleasant face. She was very friendly and confident. During the interviews with surrogates during my second visit, Mr. Yugal at first allowed us to interview surrogates without his presence. However, he later came and said that he hoped they were saying good things or else the police would come to the hostel. Gurinder replied- "aapko kya lagta hai? Hum aapke bare mein kuch bura bol sakte hai?" (What do you think? Can we say anything bad about you?)

Socio- Economic Backgrounds

We have asked direct questions about the monthly income of the family to understand the financial background of the respondents. However during the field work we found it to be a difficult question and only ten surrogates responded, and the rest of the 26 respondents were either vague in their answers or the interviewer avoided the specific question for the smooth conducting of the interview. Income of the surrogates and their husbands combine to form the monthly income of the family. It varied between 4000/5000 INR to 13000/14000 INR per month. The average monthly income of the respondents is around 10000INR. There are certain indirect questions we had framed to understand the socio-economic back ground. There were questions on surrogate's occupation and their husband's occupation as well. They were also asked questions on the reasons behind their decision to

become surrogates, for e.g. “why did you decide to become a surrogate? What are some of the factors that influenced your decision?” Their responses to these questions gave us a broad understanding of the economic background of the respondents.

Table 4.2: Occupation

Category of Work	Number of surrogates
Tailoring in expert garment industry ⁴⁹	4
Security guard in malls	2
Cook at surrogacy hostel	3
Handicraft work	1
Employee at ART bank	1
Sales persons at cosmetic shop	1
Non- income generating work ⁵⁰	17
Domestic help	1
Surrogacy agent	2
Accountant	1
BPO worker	1
Egg donor ⁵¹	8

The answer about the occupation of the spouses of surrogates varied and most of them are from the unorganised sector, casual or contractual labourers. During the FGD, the responses to the question of own work lightened the discussion. One of the more assertive surrogates who had a good sense of humour, sarcastically mentioned about domestic work as “Jhadu pochha, aur kya kaam?” Ghar pe kya kaam hota hai- “bache ko dekhna aur khana banana (everyone laughed). (Cleaning the house, taking care of kids, what else? There is not much to do at home except looking after kids and cooking, right?). Interviews in Bombay revealed that many of the past surrogates act as current surrogacy agents or as egg donors and continue in the network of ART business. The network of past surrogates brings present surrogates and egg donors to the clinics from their respective localities and among their

⁴⁹Includes the work of quality check, embroidery work and tailoring

⁵⁰This category includes household activities, cooking, cleaning, and taking care of children and elderly.

⁵¹ Some of the egg donors are also following under other categories of work such as non- income generating work, domestic help etc. For that reason, total number could exceed more that total number of respondents.

peer groups. This act was considered by them as kind of a philanthropic intervention to help their acquaintances. One of the surrogacy agents, who herself had gone through surrogacy twice, had a better off and well to do living condition compared to rest of the surrogates we interviewed. However in contrast in Delhi, the business is run in a cruder and professional way, involving mostly male agents and some of them being women as well. They belong to an economically better background compared to that of surrogates and some of them had turned rich through this business.

Age

The age of surrogates vary between 22- 35. Most of them are from the range of 23-27 years. This is the reported age of the respondents; this study did not countercheck it with documentary evidences.

Table 4.3: Age

Age	Number of surrogates
22	1
23	2
24	5
25	6
26	4
27	5
28	5
29	2
30	1
31	1
32	2
35	1
Not mentioned	1

All the surrogates are married and among them one surrogate was separated, another one divorced and a third one was twice married. Marriage is one of the criteria which all the

regulatory documents including ICMR guideline and the different versions of ART Regulation Bills and Surrogacy Bill, 2016 ensure. Along with this, another mandatory condition prescribed for being a surrogate is having one's own child/children. Section 4 (iii)(b) of the Surrogacy(Regulation) Bill, 2016 prescribe the conditions to obtain the certificate to be a surrogate as "no woman, other than an ever married woman having a child of her own and between the age of 25 to 35 years on the day of implantation shall be a surrogate mother"(GoI 2016:7). Table 4.3 indicate that many of the clinics are not strictly following the age criteria; it is hard to follow as well, since many of the surrogates do not have their identity cards. FGD response to directly asking the age created mixed responses like "Pata nahi, 26 jitnahoga" (Not sure, around 26.) Others said to this respondent "bata dijiye" (Tell them), to which she replied, "kya batau? Bata to diya" (What will I say, I told them already). She was reluctant. Another one asked "umar puch rahe hai, address nahi puch rahe" (They are asking for your age, not your address.) One of them jokingly said 31 years. To which another promptly said, "jhootbolrahi hai" (She is lying) and told her "sach bataona" (Tell the truth) and then told me "24-25 saal hoga" (around 24-25.) She then again jokingly said 28 years and others started laughing again.

Some of the clinics follow the direction to have *aadhar* cards and to have bank accounts to be a surrogate which is not a criterion according to the legal documents available.

Table 4.4: Number of Children

Number Children	Number of Surrogates
1	11
2	14
3	7
4	1
Not reported	3

The surrogates those who are having the highest number of children unlike our popular imagination do not fall in the religious background of Islam. All of them belong to Hindu community. In the interview schedule there were questions on religion and caste; however during the interview we found it extremely difficult to ask caste background of the

respondents. Interviewers put that question only to those respondents who found it comfortable being asked the question; otherwise the question was avoided.

Table 4.5: Religion

Religion	Number of Surrogates
Sikh	2
Hindu	27
Muslim	6
Buddhist	1

Regarding the question of caste, only 13 surrogates responded, in which three of them had clearly mentioned that they are from lower caste background (Scheduled Caste). Among the respondents from lower caste back ground, one of them reported “Buddhist, Jai Bhim-Dalit”. Rest of the castes are reported in the table 4.9. However we are not in a position to do a caste analysis with such a small sample. Many of the names mentioned may not be rightly spelled since checking the spelling and asking the question again and getting clarification about it was difficult. Our field work indicates that irrespective of the caste and religious background, the women make the choice to be a surrogate to address their familial financial needs. In surrogacy hostels, even though the participants in this study did not openly mention about the discrimination they faced, our participatory observation point towards preferential treatment for women who were “better looking” in the provisioning of food and access to entertainment choices. FGD responses reiterate the same. “Mostly we spend time in bed and eating (The hostel owner intervenes and says, “24 hours they watch TV and fight each other, at times, when they really get bored”). Surrogate responds that it is a form of fun, and times pass. “Whatever tensions we have in our minds, we tried to get it out of all these small fights.”

However, we fail to corroborate the caste and religious identity with the monetary benefits they receive against surrogacy. The surro-pregnancy contract we review did not suggest so. Since there is a huge demand for surrogates in both research sites, our participatory observation informs that there is no discrimination at the level of selection. In case of egg donation, the skin tone, hair features, education play a role in determining their

remuneration for gametes and it varies between 15000 INR to 1.25 lakh INR(Interview with Surrogacy Agent at Gurgaon, Delhi dated 21.09.2017). But all these criteria for fixing the remuneration are predominantly a proxy for caste and class in the Indian context.

Stages of surrogacy

Our study covered surrogates who have done surrogacy in the past, are currently surrogates and are intending surrogates- whom we met in the clinics, who wish to do surrogacy and came to the clinic for preliminary medical examinations. Previous surrogates were bit more open in their conversations and would like to do surrogacy again to improve their quality of life. Current surrogates were more anxious about their health as well as the amount they are going to receive at the end.

Table 4.6: Stages of Surrogate Pregnancy

Category of Surrogate	Months of Pregnancy/years after doing surrogacy	Number of surrogates
Current Surrogate	2 months	5
	3 months	2
	5months	1
	6months	3
	7months	2
	8months	3
	Embryonic transfer done and waiting for confirming pregnancy	3
Past surrogate	2008	1
	2012	2(1- second time)
	2013	1
	2014	2
	Two days after delivery	1
Intending surrogate		5(among them 1 is second

		time)
--	--	-------

Future Plans with the money received through surrogacy

During the FGD, a couple of current surrogates expressed their interest to do surrogacy again. “It’s my first time. If I will be alive, will do again”. “*Hum logo kaumar kam haina, to do bar karsakte hai.*” (We are young right. So we can get it done again.) “*India mein bahot garibi hai. Kuch na kuch to karna hi padega na*” (We have such poverty in India. We have to do all kinds of work.) Then, there is an understanding that emerged through the discussion that those who have a house, they would need the money for their daughter’s wedding. Then those who do not have house and are yet to get their daughters married, they might need to do surrogacy work again to meet both these needs.

Table 4.7 Future Plans with the money received from surrogacy⁵²

Plan	Number of surrogates
Buy land in their respective villages	6
Construct house	3
Children’s education	5
Daughter’s marriage	3
Treatment for a family member	2
Repayment of Debts	2
Start Business	4

Education

Many of the research participants have either not gone to schools or attended school only till the lower primary classes, and were not able to read and write their mother tongue. Many of them who had gone to school till high school were unable to read or write other than their names. They are using finger prints for their signature.

Table 4.8: Education

⁵²This table is based on only FGD responses with 10 research participants and does not include the entire 36 participants. And one single respondent was given the option to choose multiple answers.

Education Level	Number of surrogates
Graduation(BA)	1
Till 10 th Standard ⁵³	15
Till 12 th	3
Not gone to school	15
Not asked	2

In the FGD, when we asked the question on surro- pregnancy contract and whether they understand the terms and conditions of it, there responses were univocal. The exact question was “have you all signed the agreement? While signing the agreement have you read it? Has anybody explained you about it?” To which they replied “We are illiterate, we just put the finger prints” (*hum unpad hai, khali anguta dabadiya, buss*).The entire surro-pregnancy contract we came across was drafted in English, with a legal language. Agents and surrogacy hostel owners helped them to understand the agreement. In the specific hostel, where we conducted FGD, the owner showed us a small notice, which gives the directions in Hindi, though the agreement is drafted in English. However, most of the surrogates are illiterate and it is difficult for them even to read Hindi. Most often this small pamphlet served the purpose of informing their husbands/ relatives who engaged with the hostel owners to understand the process of surrogacy and their liabilities, but not the rights of surrogates. A surrogate responded thus, “Sir and Madam(owners of the surrogacy hostel) explained things to our husbands, and they made us to put our finger prints in the document”. “But the copy of it is with hostel authorities. They keep all other documents of ours like voter id and *aadhar* card, etc. and all our medical reports are also with them. If we need a copy, they will give us. But what will we do with the copy of it!” (Narratives from FGD)

The table below gives the complete corresponding details of all the surrogates we interviewed.

⁵³Most of them fall in the category ‘till lower primary class’

Table 4.9: Profile of Surrogates

S. No.	Name	Age	Religion	Caste	Place of residence	Place of origin	Marital Status	Number of children	Education	Occupation	Monthly Income (Rs.)	Stage in the surrogacy process
1.	T1	24	Either Hindu or Sikh	-	Gurgaon	Bhatinda, Punjab	Married	1 boy	9 th Grade	Tailoring in the garment exports industry	13,000-14,000 (of the surrogate)	2 months (first-time)
2.	T2	27	Hindu	-	-	Bihar	Married	2 girls (aged 8 and 9)	8 th Grade	Security Guard in a mall	9000 (of the surrogate)	7 months (first-time)
3.	T3	32	Hindu	-	-	Nepal	Married	3 children (2 boys and 1 girl)	9 th Grade	Cook at surrogacy hostel	-	Past surrogate (twice)
4.	T4	26	Hindu	-	-	Uttar Pradesh	Married	2 boys	12 th Grade	Quality checks for exports	8000 plus extra payment for overtime work (of the surrogate)	4-5 days (post embryo transfer) (first time)
5.	T5	24-25	Muslim	-	Mustafabad, Delhi	-	Married	2 children (girl aged 6 and boy aged 4)	9 th Grade	Handicrafts	4000 to 5000 (of the surrogate)	Intending surrogate (first time)
6.	T6	26	Either Hindu or Sikh	-	Kapashera	Bihar	Married	3	7 th Standard	Non-income generating work	-	Intending surrogate (second-time)
7.	T7	24	Hindu	-	Kapashera	-	Married	1	No education	Non-income generating work	10,000-15,000 (of the husband)	1-1.5 months pregnant (first time)
8.	T8	28	Hindu or Sikh	-	Kapashera	-	Married	2 (son aged 7 and daughter aged 3)	Literate	Non-income generating work	10,000 (of household)	6 months pregnant (first time)
9.	T9	23	Muslim	-	Kapashera	-	Married	1 (aged 2)	10 th Standard	Non-income generating work	-	Intending surrogate (first time)
10.	T10	25	Hindu	Barhi	Kapashera	Kapashera	Married	2	1 st Standard	Non-income generating work	-	Intending surrogate (first time) (former egg-donor)
11.	T11	28	Hindu	Scheduled Caste	Kapashera	Kannauj, Uttar Pradesh	Married	2 (son and daughter)	5 th Standard	Non-income generating work	-	Intending surrogate (first time)
12.	T12	30	Hindu or Sikh	-	Gurgaon	-	Married	2 (aged 4 and 7)	-	Non-income generating work	-	Intending surrogate (first time)
13.	T13	24	Hindu	Phoolmala	Kapashera	Kapashera	Married	1 (aged 2)	5 th Standard	Non-income generating work	-	Intending surrogate (first time)
14.	T14	23	Hindu	Saha (Takur)	Gurgaon	Kailali, Nepal	Married	1 boy	8 th Standard	Employee at the ART Bank	-	5 months pregnant (first time)
15.	T15	25	Muslim	-	Khanpur, Delhi	Aligunj, UP	Married	2 boys	12 th Standard	Non-income generating work	-	7 months pregnant (first time)
16.	T16	22	Hindu	Khatri, Kshatriya	Gurgaon	Kailali, Nepal	Married	1 girl	8 th Standard	Non-income generating work	-	6 months (first time)
17.	T17	29	Hindu	Baniya	Harinagar, Gurgaon	Sajjanpur, U.P.	Married	4 boys	Illiterate	Non-income generating work	-	8 months (first time)
18.	T18	25	Hindu	Not asked	Kapashera	Kapashera	Married	1 boy	Illiterate	Tailor in export garments factory	-	3 months pregnant (first time) Egg donor
19.	T19	26	Hindu	Not asked	Kapashera	UP	Married	Not asked	Illiterate	Tailor in export garments factory	-	1 month pregnant (first time)
20.	T20	28	Hindu	Not asked	Gurgaon	Bihar	Married	3 children	Illiterate	Guard at Reliance Mall	-	8 months pregnant (first time)
21.	T21	26	Hindu	Not	Kapashera	Bihar	Married	Not asked	Illiterate	Guard at a	-	2 and a half

				asked						mall		months pregnant (first time)
22.	T22	26	Hindu	Not asked	*Gurgaon	Bengal	Married	Not asked	Illiterate	Non-income generating work	-	2 months pregnant (first time)
23.	T23	24	Hindu	Not asked	Gurgaon	Bihar	Married	Not asked	Illiterate	Cook at a bungalow (kothi)	-	3 months pregnant (first time)
24.	T24	25	Hindu	Not asked	Malviya Nagar	UP	Married	2	10 th Standard	Sales person at a cosmetic store	-	5 days (post embryo transfer)
25.	T25	25	Muslim	Not asked	*Gurgaon	Assam	Married	2	Illiterate	Non-income generating work	-	Going to do embryo transfer in a week's time
26.	T26	31	Hindu	Not asked	Gurgaon	Bihar	Married	2	Illiterate	Cook in a bungalow (kothi)	-	Past surrogate (2 days before)
27.	T27	27	Hindu	Not asked	Kapashera	Bihar	Married	2	Illiterate	Cook at the surrogacy hostel	-	Past surrogate (more than a year before)
28.	T28	-	Hindu	Sharpa	Siligudi	Siligudi	Seperated	2 sons	-	Aaya (egg donor)	-	Past surrogate (delivery in 2012)
29.	B29	25	Hindu	Moria	Mankhurd Mandala, Mumbai	Mankhurd Mandala, Mumbai	Married (twice)	3	Illiterate	Domestic help (and egg donor)	-	Past surrogate (delivery in 2013)
30.	B30	29	Hindu	Valmiki	Mankhurd, Mumbai	Mankhurd, Mumbai	Married	3 (2 daughters and 1 son)	7 th Standard	Home nurse and Aaya	-	Past surrogate (delivery in 2011)
31.	B31	35	Hindu	Baniya	Thane	UP	Married	3	Illiterate	Surrogacy Agent	-	Past surrogate (twice in 2008 and 2012)
32.	B32	27	Hindu	Maratha	Wadala	Dahisar	Married	1	Graduate	Former employee at finance company Currently works as an Aaya Lost her job as she got involved in a financial fraud	-	6 months pregnant (first time)
33.	B33	28	Buddhist	Jai BhimDal it	Ulhaasnagar	Ulhaasnagar	Married	2 daughters	Illiterate	Surrogacy Agent	-	Past surrogate (delivery in 2014)
34.	B34	27	Hindu	Maratha	Ambarnaath, Mumbai	Akaalkot, Maharashtra	Married	1	5 th Standard	Non-income generating work	-	8 months pregnant (first time)
35.	B35	32	Muslim	Not asked	Sion	Sion	Divorced	1 daughter	12 th Standard	Accountant	10,000 (of surrogate)	1 month pregnant
36.	B36	27	Muslim	Not asked	Malad	Ambarnath	Married	2 (1 daughter and 1 son)	Illiterate	Non-income generating work	-	Past surrogate (in 2014)

Note on ART Banks/Agents

Agents/ART banks identify and recruit surrogates, and monitor them during their pregnancy. The agents are often the first point of contact for the surrogates to get any information about the surrogacy process or to be able to access the IVF clinics/ hospital or the intended parents. The agents play the important role of negotiating the payment to be made to the surrogate. Moreover, many of the agents run their own surrogacy hostels, where their basic needs of food, laundry, and medicines are taken care of. They are also responsible for taking

the surrogate to the IVF clinics for regular check-ups or during emergencies. They are also made responsible to ensure that the surrogate does not leave the town during her pregnancy. Surrogates that reside in hostels are under constant surveillance by the agents (for example, with the help of CCTV cameras or by other employees of the hostel).

During the study, 14 agents/ART Banks were contacted either by phone or email and interviews were conducted with 7 agents (of which 5 were male agents) operating in Kapashera, Janakapuri, Ghaziabad, and Gurgaon areas of Delhi (NCR). These interviews were conducted either at IVF clinics or at surrogacy hostels run by the agents. Some of the agents were interviewed more than once in order to get more information and narratives. Some of these agents have worked in hospitals/IVF clinics for 5 to 17 years and have Post Graduate degrees in Hospital Administration, while others have finished their high school education or higher secondary education and have been engaged in businesses such as running a dairy. Agents have strong networks of doctors, lawyers and past/intending surrogates and egg-donors. The agents often have a better economic status compared to the surrogates and recruit surrogates from their neighbourhood.

Out of the 7 agents interviewed in Delhi, only 2 were female and operated their surrogacy hostels in partnership with their husbands. One of the male agents interviewed from Kapashera described how his wife played a key role in identifying potential surrogates and explained the concept of surrogacy to intending surrogates for the first time. Another male agent's mother lived with the surrogates and was a caretaker of his hostel in Gurgaon. Two other male agents had a partnership with their brothers.

The doctors have clear preferences for particular agents. They depend on agents to recruit surrogates and to take complete responsibility for surveillance of surrogates and to ensure their compliance. In the narrative of an interview conducted with a parent of a surrogate child, it was revealed that the agent would often keep half of the food or medicines that were given to the surrogate by the parent. The IP we interviewed in Delhi described the agent as someone who was very dubious and someone who looked like a "pimp". She preferred to be in touch with the surrogate directly. However, realizing the importance of the agent in the arrangement, she kept the agent in the loop and also promised to pay him an amount for every time he let the surrogate visit the IVF clinic.

Some of the intending surrogates had a strong sense of trust in the agent. One of them asked- “Where would he go with my money?” (translated). The agents get paid about INR 4-5 lakhs for the arrangement, while the surrogates received about INR 3 lakhs.

Chapter V

VOICES, STORIES AND NARRATIVES OF SURROGATES

Most of the surrogacy research interprets the voices of surrogates with a pre-conceived notion about the surrogacy practices. It is influenced by many factors including the inherent bias of the researchers towards commercial surrogacy due to their socio- economic backgrounds and their previous understanding about the field. During this research we found a huge gap between the understanding of researchers on the concepts like exploitation and well-being with that of the respondents. The difference in the lived experiences of both researchers and respondents was reflected in their respective understanding about the field of research. We went to the field to understand and assess the level of exploitation surrogates go through. However, they were already going through a tough life and in most of the cases they considered doing surrogacy as a less risky and relatively a better option in survival. As researchers we experienced Marxist perspective of false consciousness which denotes people’s inability to recognize inequality, oppression, and exploitation in a capitalist society because of the prevalence within it of views that naturalize and legitimize the existence of social classes. However, this empirical experience reminded us of the necessity of refraining from interpreting their voices, and to instead amplify it to capture social realities as it is. Their voices are hitherto unheard voices and it is important to make these voices loud enough to make the rest of the world pay attention. In this chapter we use their narratives to explain how this field of commercial surrogacy function in the context of India- specifically in Mumbai and Delhi NCR. In this chapter the

narratives are organised under certain specific as well as broad questions like what are the reasons to be a surrogate and how did they get the information about surrogacy; how secretive is the decision to a surrogate; the mode and methods of payment for surrogacy; how the experiences of surrogate pregnancy is different from that of their own pregnancy experiences; their relationships with IPS and their understanding about the legality of it.

In this chapter, we have used proxy names for the surrogates instead of numbers for a better readability of narratives. In the end we use the narrative of one IP (a mother, from Delhi) to get a comprehensive picture by narrating the other half of the story.

Reasons to be a surrogate

Captivatingly, the reasons to be a surrogate were answered in two occasions during the interview in two different ways. When we ask the direct questions to get the reasons to be a surrogate, most of the responses reflected an effort to put forward a balanced answer that combined both the financial need and the philanthropic relevance. But, the question on the legal ban of commercial surrogacy and their opinion on it evoked a different language of rights, reiterating surrogacy as a source of generating money, which helps to meet the needs of everyday life. The language of rights and denial of basic needs is loud at this moment in almost all the narratives.

In response to the question about the reason to be a surrogate, Rita (Mumbai) said that financial crisis was one reason but not the only one. She time and again emphasized throughout the conversation about surrogacy not only being the work to earn money, but also to provide happiness to the childless couples. She said, *“Bolte hain na, jinke bachche nahin hote, unko dena bhi ek achchi baat hai, uska bhi kuch bhala ho jaaye, mera bhi bhala ho jaaye, dono taraf sochke maine kari kaam. Khali apna hi nahin dekhi main”* (Don't they say, it's a good thing to give children to the childless. It is good for them and it is good for me as well. I always think of both sides, not just about my gains). She bought some things for her home, kept some of the money in the bank as fixed deposit in the names of her two

daughters, and got her 7 year old son admitted in school⁵⁴. Rita had been married twice; the children are from her first marriage. She does not have any children from the second marriage. When we had a follow up conversation with her, this matter came out. This information may or may not have something to do with her husband's reaction to her decision to do surrogacy.

The aspiration for better life of next generation play a role in the decision making to be a surrogate in many cases. What they were not able to achieve, they would like to have it for their children; being a surrogate and the one time money they receive act as a reservoir to fulfill their dreams. Gurinder (Delhi), an intending surrogate⁵⁵ has been working in Gurgaon in the business of garment exports. She learned about surrogacy through a past surrogate in Gurgaon. Moreover, her neighbor has also been an egg donor. She contacted an agent- Zakir Khan. *"Jo sapne mere pure nahi hue, mere bacche ko mile", "bacho ke bhavishya ke liye"*. (Dreams that didn't come true for me, my children can achieve them now. This is for my kids' future) The reason she decided to become a surrogate was to be able to start her own business in *silai* (tailoring) and cosmetics. She then added, *"meri vajah se kisi ki godh bhar rahi hai"*. (Someone's got a child because of me). Before the embryo transplant, the surrogates have to go through tests for their uterus lining. If by chance the results of the tests were not positive and if she was not chosen to become a surrogate, her second option would have been to buy a big sewing machine and continue her work in exports of garments.

Many of the women opt to be a surrogate to address the financial needs of their husbands and family, especially when their husbands do not have a proper job. They act as saviors of their familial financial needs through doing surrogacy. Meena (Mumbai) got to know about surrogacy from a past surrogate residing in the same area whom she referred to as Akka.

⁵⁴ She arched her both hands in 180 degrees and told us proudly, that all these things you see around is from the money I earned from surrogacy. When you follow her hand these are the things you see- a thatched roof with asbestos, un-plastered walls, some kitchen utensils, a gas stove, Colour TV, second hand washing machine, a sari curtained bathroom and two plastic chairs.(Field notes of the principal investigator, July 21st 2017)

⁵⁵ Interview was conducted when she came for the preliminary investigation at the clinic in the presence of the agent.

She had been a surrogate long back and acted as an agent though not a formal one. She presently works as a care giver for women post delivery. She got her in touch with Anisha⁵⁶, who was Rita's agent. She first started as an egg donor, but later decided to take up surrogacy. Her husband was initially opposed to this, but later agreed after going to the hospital and seeing how it's done. The primary concern of the husband is the idea of pregnancy happening only through sexual relations. Often husbands agree to their wives' decision for there is no kind of sexual intimacy involved.

A neighbour of Anisha introduced her to surrogacy. She calls her Akka and she could not reveal her real name. She had done surrogacy earlier. And she now works as a house keeper at the Baba Atomic Research Centre, Mumbai. The reason she took up surrogacy was financial. She needed money. Her elder daughter had an operation, and her husband's income wasn't enough. So she thought of earning a bulk amount and then buying an auto rickshaw for her husband to have better earning opportunity. *"Socha tha paise mil jayenge toh riksha le lenge, mera aadmi chalayega toh paise aayenge thode."* (I was thinking of buying a rikshaw when the money comes in so that my husband can ride it and earn something)

Poverty and landlessness becomes the single most important factor which influences the decision to be a surrogate. Rukmini (Mumbai) got to know about surrogacy from a neighbour. "I heard it from an aunt, who told me 'I bought a house by doing this and you could also do this if you want to. It's up to you'". The reason that she opted for the work was majorly financial. She said, "Life was very difficult with lots of problems, I had nothing. With the meagre income of my husband, it was difficult to look after three kids. We didn't have any land back in the villages. I was hoping to do something to better this situation when I got this opportunity and I did it.)

Seema (Mumbai) also had a similar story to narrate. She heard about surrogacy from a neighbour who had done it and at that time was donating eggs. She told her to do it. Seema's husband was out of work for a long time and they needed the money to sustain the household. Her neighbour told her that from egg donation she can earn INR 25,000 at one

⁵⁶ She herself was once a surrogate and then opted to be an agent for surrogacy and egg donation.

time, but surrogacy was much more useful to her given how much money she needed at that point of time. She needed to buy a house as previously they were staying in a rented accommodation near Mumbra, which was on the hills. There was severe water problem, electricity was also very irregular and they had to walk a good distance down to access any service. She says “My house was on a hill. In the monsoon season, it was very difficult for us. The road wasn’t made properly, it is very steep. It was too slippery for walking too.) She discussed this with her husband. The husband spoke to the friend, after which he met the agent and approved of her decision.

Leena (Mumbai) knew about surrogacy from her sister in law’s friend. *“Wo meri nanad hai na, uski dost ne kar rakha tha, ke aisa aisa hota hai, doosre logon ko bachcha dene ka mauka milta hai, ismein kuch galat nahin hai. Humara condition bhi thoda kharaab tha tab, toh usne bola ke kar sakte hain yeh.”* (I heard about this from my sister-in-law’s friend and she told me that there is nothing wrong in helping people with no children. Our condition was a bit bad too and she said it could be a way out). Her *nanad*’s friend introduced her to the agent. The reason for her taking up surrogacy work was that there was a financial crisis in the family. They needed to buy a house. That is why she opted for surrogacy, after she gets the entire amount, they will pay for the house.

Laila (Mumbai) also has similar experiences. She got to know about surrogacy from a friend who had opted for it previously, about three-four years back. Then she introduced Laila to an agent. Laila is staying in a rented house with her mother and daughter, and is the only one earning in her family. Whatever money she was earning from her accountancy job was not enough to sustain the household. “We are living in a rented house, and I couldn’t manage everything with just my job. If we could pay the rent amount as a heavy deposit then we could spend my salary on other household things”. Heavy deposit is the practice of paying rent meant for longer period (more than one year) together in advance, so that one does not need to monthly pay rent anymore. She further explained, “My daughter is studying now, her school fees and tuition fees are to be paid soon. Otherwise it wouldn’t be possible”

Nazreen (Mumbai) too has analogous narrative. The wife of her husband’s colleague in the restaurant introduced her to surrogacy. She had done it earlier and advised Nazreen to do it when her family was in need of money to rent a home. The reason Nazreen took up

surrogacy was completely financial. They used to stay in a rented room in a slum and the atmosphere there was not very nice for her or her children. She was scared that it will affect her children's upbringing and she wanted to leave from there. Renting a flat in a chawl would need a huge amount of security deposit that was well out of their capacity. So she thought of doing surrogacy and moving out of the slum and getting her children admission in schools with the rest of the money. "*Bachche logon ka future kharaab ho jata wahan rehte to. Log theek nahin the wahan. Gunde mawali the sab.*" (My children's future will be ruined had we stayed there. The people weren't good. All were thugs and loafers.)

Sunita (Delhi) got to know about surrogacy through someone in the company she worked for. She worked as a security guard which earned her Rs. 9500 per month. She decided to become a surrogate considering the future of her kids. She revealed that there was no other option. She was neither paid her due salary nor for overtime work at the company. Proper pay (even for overtime work) is given to *thekedaars* (middlemen), but not to a female security guard. She was not even paid INR. 280 per month- "*company bhi paisa kha rahi hai*". (Even the company takes a share from it) Prior to making her decision she consulted one lady, an agent and her husband. She was a bit sceptical about surrogacy initially- "*dar tha ki kahin kuch nuksaan na ho*". (I was scared of any possible danger.) She learned about surrogacy through a *Nepali* agent about 15 years ago and thought that it was "*ganda kaam*" (Indecent job). She eventually decided to become a surrogate for the education of her kids.

Gulnaaz (Mumbai)) was introduced to the idea of becoming a surrogate by her *bhabhi*, who is an egg donor. Her *bhabhi* then introduced her to Sahil, the agent. Gulnaaz first thought of becoming an egg donor. However, due to need of more money, she decided to become a surrogate. Gulnaaz knows no other surrogate in her neighbourhood. She met a surrogate named Baby in the clinic. She was a past surrogate and wanted to become a surrogate again. However, after the tests, she was not selected. Gulnaaz chose to become a surrogate so that she could buy property for her kids. She further added, "*mehengai badhti hi ja rahi hai. Jo karna hai abhi karna hai*" (inflation continues to rise. What has to be done has to be done now).

Rinky (Delhi) knew a lady who had been a surrogate and personally knew the agent for the past 7 years. She first decided to become a surrogate so that she could buy a house in the

village for her family. She decided to become a second-time surrogate in order to construct the roof of that house. She lives with her husband. The house for which she wishes to construct a roof will also be occupied by her father-in-law, mother-in-law, brother-in-law and sister-in-law, who presently live in the village.

The Out-of-Pocket expenditure to meet medical needs pushes many families to below poverty line in India. The case of Nisha (Delhi) validates the same. She decided to enter into surro-pregnancy arrangement to repay a debt incurred through a medical emergency of her mother-in-law. She first learned about surrogacy through a relative of Sunil (agent) who is her *mami* (aunt). She was explained about surrogacy by Sunil's wife- Sabita. Sunil runs this business with his brother Anil.

Nita (Delhi) learned about surrogacy through someone in the *bazaar*. She had donated eggs before and she was at the clinic to consider both options- egg donation and surrogacy . After speaking to the doctor, she decided to donate her eggs again. She wanted to speak to her husband before making any decision about being a surrogate. She is considering surrogacy in order to pay for the education of her kids. She was introduced to the clinic by Sunil.

Satya (Delhi), again first got to know about surrogacy through Sunil (agent), who is her neighbour. She does not know anyone else who is a surrogate mother. She wants money through surrogacy as an additional source of income to be able to get her daughter married and educated. There is no other source from which she can get this additional income. Unlike other sources, in surrogacy she can get a fixed income without any investment. In other occupations one needs to invest some money. She took the decision to become a surrogate after discussing it with her family. She also consulted Sunil before she made her final decision. She stays with her husband and he is supportive of the decision. She would not want to become a surrogate very frequently because it may negatively affect her health.

The reason Renu (Delhi) considered becoming a surrogate was because her husband had injured his leg and was unemployed. She said, "*agar koi zarurat nahi hoti, to yeh koi kyon karta*"? (if there was no need, why would anyone do this?). She was introduced to the concept of surrogacy and to the clinic through Sunil *bhaiya* (agent). Sunil *bhaiya* lives in her neighbourhood and knows her family. Her husband and family were supportive of the

decision. She knew many others in the neighbourhood who had been surrogates - all through Sunil (agent). Similar was the experience of Priyanka as well.

How secretive is the process of commercial surrogacy?

Though many women make a limited choice of surrogacy over many “difficult and dirty jobs”, it does not mean that being a surrogate is a socially accepted choice. The trauma associated with surrogacy is quite evident in a highly sexualized, moralist and patriarchal society. Many of the women prioritize distant IVF clinics over nearer ones within the cities in Mumbai. Whereas many women from rural Bihar and UP travel to Gurgaon, Noida and Delhi and stay in surrogacy hostels for a year to finish one cycle of surrogacy and go back to their respective villages. Another set of women, who are working in Delhi, take a break for a year and earn this one time sum by doing surrogacy without informing their parents and relatives in the rural villages, from where they are originally. On the other hand, where infertility is a trauma, many of the small town IVF clinic, send their infertile couple to hospitals in major cities to do surrogacy and to maintain the anonymity. Many of the couple travel cross borders nationally to do surrogacy. One of the infertile couples from Kerala got their surrogate from Mumbai and did the surrogacy in a surrogacy hostel in Noida, NCR. (Personal Telephonic Interview of the Couple, 22nd October 2017).

While conducting the study, the ambiguity about the legal status of commercial surrogacy made it more secretive by the clinicians, agents and the hospital. The secrecy around commercial surrogacy impacted this study adversely in accessing more respondents and in availing more information from those who cooperated with the study.

During the in-depth interview we asked an indirect question- While taking this decision, who all you did discuss it with? Responses to this question can be classified into six

1. Immediate family members know about it
2. Not mentioned to natal family members
3. Not mentioned to husband's family
4. Only mentioned to a sister, no other family members knows about it
5. Only husbands knows

6. Couple of friends know

Rita's family members both in her natal home and marital home know about this. They were in the beginning apprehensive about this, but later had agreed. About the reaction of her neighbours, she said that though there is a general attitude of disapproval of such work, nobody out rightly ostracized or showed very negative reactions to them. She said, "*Main surrogacy karke apna ghar chala rahi hu, woh to nahin chalayenge na?*" (I am running my household by doing surrogacy; they wouldn't do it for me, right?)

In case of Seema, except the neighbour no one in her locality knew and she did not even mention it to anyone from her natal family. In her marital home, there are four sisters-in-law and one brother in law, and none of them knew about it. All of them stay far and there is not much interaction between them due to family feuds.

Nisha, while making her decision whether or not to become a surrogate, consulted her husband, the past surrogate and the agent. The agent made her and her husband understand the process of surrogacy and she was told that if she felt nervous, she could always speak to the agent.

Gurinder has not revealed the fact that she is a surrogate to her family. The only person she has shared this with is her sister. She told her mother that she is doing *silai (tailoring)* for exports. Her husband was initially sceptical about the idea of her being a surrogate. But he himself came to drop her to the hostel and meet the agent and the doctors. He then became comfortable with the idea of his wife living in the surrogacy hostel. She shares a good relationship with her husband.

Seema spoke to her husband and her mother in law before taking the decision. No one in her natal home knew about it. Her marriage was a love marriage and there was not much interaction between her and the members of her natal family. She used to stay in Belapur during that time, so there was hardly any meeting between the members of the two families and no one in her locality at Belapur knew her family members. After the surrogacy, she moved to Mankhurd. She has a sister who knew about it, and now after she has done surrogacy, her parents also have got to know about it recently. "*Pata to chal hi jata hai, chhupe rehne ki cheez to hai nahin*" (Eventually, people do get to know. This is not

something that can be kept a secret, right?). She had not initially gone for surrogacy and wanted to do egg donation, but because she needed to rent a place and there also was a need for extra money at home due to her daughter's illness, she chose to do surrogacy as it pays more amount in bulk. A couple of her neighbors who were into egg donation also knew. To others, she said that she wanted to give the baby to her brother in law who was childless for a long time after his marriage.

Rukmini did not contact a lot of people during her decision making regarding surrogacy. She only asked her husband. Her husband heard about it in detail, and approved. "*Mere pati se poocha maine, usne kaha sab sunne ke baad ki, kar lo, ismein bura kya hai?*" (I asked my husband, and after listening to everything he said, do it, nothing's wrong with this.) She also looks at surrogacy as a noble job. "*Is mein sach mein bura kya hai? Hum gareeb log hain, humko paisa mila, hum kisi maa ka godh bhar rahe hain. Kisi ke ghar mein deepak jala rahe hain, kya galat kar rahe hain?*" (After all, what is wrong in this? We are poor, we are getting paid. We are also making a woman into a mother. We are helping to bring light to a home, what is wrong in this?) Sunita also spoke to her parents about it. Everyone in her natal and marital family knew about this. They initially asked a lot of questions about the process regarding how it's done and what is the procedure. But they did not react negatively. She says, "*Mera mister ka saath tha, to mujhe kisi aur se kya lena dena.*" (My husband was with me in it. What do I care about others?) Her neighbors also knew, and no one said any hostile things to her as such. "*Kisi ne kuch nahin bola, koi kuch bolta to main poochti na, mere ghar pe khaane ka paisa tum dega kya?*" (No one said anything, had they asked I would have asked back if they would pay for my family's meals). Then she says, "*Jo samajhdaar rahenge woh to kuch nahin bolte, jinke dimag mein kuda hai, woh hi galat sochte hain.*" (Those who understand will not say anything. It's only those with dirty minds who consider it wrong).

Mridul (Mumbai) has done surrogacy twice, first time from Hiranandani, second time from Duru Shah's clinic. Except for the neighbor, no one in her locality knew, she did not tell anyone from her natal family. Everybody in Renu's marital home knows about it, but in her natal home only her mother knows. Her father has been told that it's their own child, her siblings have been told the same. She stays in her marital home with her husband, her mother in law and her mother in law's sister. All the three and her sister in law know about it. "*Papa nahin karne denge na, isliye nahin bataya.*" (My father wouldn't have allowed, so I

didn't tell him). When Nita decided to become a surrogate, there was not much reaction or resistance from her mother-in-law. She had Told Nita, "*Agar tum donon ka haan rahega to karo, humari mat socho.*" (If you both think it is okay, go ahead. I have no issues). No one in her neighborhood knows it either. In her locality, people won't take her opting for surrogacy in a good way, they will make another meaning out of it, that she had sexual relationship with someone else. So they have told the neighbors that it's their own child.

Nazreen did not talk to anyone else except for her mother. "*Maine bola mere paas apna problem solve karne ka ek option mil raha hai, aisa aisa hai, kuch galat nahin hai.*" (I told that I have gotten an opportunity to solve my problems, and these are the details and there is nothing wrong in doing this). Her mother agreed after hearing in detail about the process from her. "I couldn't have done anything without my mother's support. I did this because she supported." She does not plan to tell her daughter in future either. No one in the neighbourhood or relatives knows about it. Because she is divorced, she can't tell the neighbours or the relatives of the child being her own, so she has spoken to the doctor and the doctor has assured her of support and told her that she can come and live in the surrogacy home whenever the bump begins to show.

Smita spoke to her husband only before taking the decision. They have had a love marriage and both their families have broken ties with them as the marriage was against their will. Their families are from a village near Ambarnath, on the outskirts of Thane. They moved away to Malad after getting married in order to avoid the familiar people and the stigma of an eloped marriage. After the wife of his husband's colleague told her about this, she spoke to her husband, the colleague also spoke to him to convince, the wife told him about the process in detail and then he agreed.

In the case of Laila, no one in their neighborhood in the slum knew. They told them that the pregnancy was their own and since they are Muslims, nobody asked them many questions. "*Musalmaan hone se bachcha wachcha leke zyada sawal nahin karte, humare ghar pe itna kisi ka jaana aana bhi nahin tha.*" (Since we were Muslims, nobody asked too many questions. We didn't have many visitors at our place either.)

No one in Kusum's family and neighbourhood knows about it. She has told them, "*kuch kaam pad gaya hai*" (Got some work). Her husband and family do not know that she has been a surrogate. Only her brothers know about it. Before making the decision to become a

surrogate, she only consulted an agent. For Seema while deciding to become a surrogate, she only took the opinion of her husband. No other family member knows about this decision. It took her 2-3 months to decide for surrogacy after being assured that it's the 'right thing'. Her in-laws live in Ghaziabad and do not know about this decision. Prior to making this decision, she consulted her husband and took about 2 to 3 days to decide. Her husband has supported her decision and would be joining her after 2 days.

Gudiya lives in a joint family (with husband's elder brother's family). Everyone in her family and neighbourhood were happy about her decision. Her parents and neighbourhood are not aware about the fact that she is a surrogate. She took this decision after consulting her husband, *devar* (brother-in-law), *nanad* (Sister-in-law), and father-in-law. Her family is supportive of her decision. Her family accepted her decision as long as there was no threat to her health. She said she wants to help others (by being a surrogate)

Payment and Process

Payment and mode of payment vary according to the clinics and the agents. In most of the cases, there exist three instalments which are clearly mentioned in the surro-pregnancy contracts. The first instalment will be on the day of the embryo transplantation (25% of the total amount), second instalment on the day of the pregnancy confirmation (25% total amount) and the rest of the 50% on the day of the delivery after handing over the baby. Monthly transfer for sustenance of INR 5,000- 10,000 is another practice, which will be deducted from the final amount. There are extra payment for caesarean sections and additional payment for twin babies, which vary from case to case.

Sunita got paid 3.5 lakh INR. along with INR 25,000 for c-section. Two lakh fifty thousand rupees in cheque was handed over after the delivery. After the ET, she got INR 10000 and after the pregnancy test came out positive, she got another INR 10000. Each month during the pregnancy she was paid INR 5,000 in cash. The money that was spent on her food and nutrition during the period of pregnancy was deducted from the entire amount. The agent left after dropping Nita to the hostel. He is not longer in contact with her or her husband. One of the things that concerned her was that her original ID proof was with the agent/surrogacy hostel owner. She said that this would cause inconvenience if ever she

needs an ID proof. She would receive INR 3-3.5 lakhs in total. In case she delivers twins or has a C-section, she would receive an additional amount of INR 30,000. She receives INR 10,000 per month. She sends some money home every month and also spends some for her own needs. The hostel serves food that does not always appeal to them and they have cravings to eat food that tastes better. After the surrogate receives the lump sum payment after the delivery, she will save INR 50,000-60,000 in an account for her son.

Seema was paid a total amount of INR 3 lakhs. After the ET, she got INR 20000 and she received INR 10000 each month in cash. *“Abhi to rate thoda badha hai, jab hum kiye the to 3 se 3.5 hi milta tha. Abhi to 4-4.5 tak bhi mil jata hai kuch kuch jagah par.”* (Now the rates are slightly higher. When I did it, it was 3-3.5 Lakhs rupees. Now in some places it has gone up to 4-4.5 lakh rupees.) She did not stay in a surrogacy hostel. After the embryo transfer, she stayed in the hospital for a month while her husband and the daughters stayed home. In that time, with the money that they got and with some loan, her husband rented a small room in one of the slums in Mumbra on the plains. She stayed there for the larger duration of her cycle and one month before the delivery she was admitted in the hospital again. Two days after her delivery, she came home and within one week was paid the remaining amount in her account.

The process of surrogacy was different from others for Anisha. She initially was an egg donor at Jaslok hospital, Mumbai. And when she decided to do surrogacy, she had to run around with various tests. *“For three months I ran around for different tests and got tired. Every week they did my sonography and later they said I can’t be a surrogate; I was so distressed. My husband was not earning much and from that I spent 50 rupees for commuting. Then when they rejected me, I was so sad. I had to run around with my baby and it was more difficult. Later, Akka gave me another agent’s number who took me to Duru Shah where I did it). In Gynaecworld, her medical checkup was done and she spoke to her husband and mother in law. They wanted to know the procedure in detail and after that, they agreed. After she was given medication, her embryo transfer happened. She carried the child of a black couple. After her screening and selection was done, the doctor explained to her how the process happens and how much money she will be offered. She was paid INR 2.5 lakhs*

and after deducting everything the final payment was of around INR 1.8 lakhs. That seems fairly less in comparison with the other surrogates that we have interviewed.

After the embryo transfer, Smita stayed in a surrogacy hostel in Dombivli. She was there for one month after the transfer, after which she returned home. For most part of the duration of her cycle, she stayed at home along with her husband, mother in law and three children. Her mother-in-law was taking care of the family and the household chores. After her screening and selection was done, the doctor explained to her how the process happens and how much money she will be offered, and that she will have to be in the hospital for the last three months of the pregnancy.

Satya is supposed to get paid a total amount of INR 3.5 lakhs. Her ET happened in October and she had received INR 25000 in cash. Since then she is getting INR 10000 per month. She stayed in the hospital for one month after the transfer after which she went back home. She stayed at home until her 6th month. In the meantime, she was coming to the clinic once in every two weeks for USG. During her 7th month, she was admitted in the hospital.

Rekha and Anita were living together in the Thakur hospital together. She says, whenever she needs money, she gets it as per her requirements, *“Jab jaisa zaroorat hota hai, dete hain.”* (They give money whenever I need it for anything). After her delivery the rest will be deposited in her account via a cheque.

Nisha is supposed to get paid a total amount of INR 3.5 lakhs. It's just been a month since her ET. She has received INR 25000 after the transfer in cash. The clinic, as she says, is fairly helpful. *“Yahan ke jo doctors hain, sisters hain, wo regular phone karke mere haal chaal poochhte hain”* (The doctors and nurses at the hospital, they regularly call and check on my well being). When we asked how much she is going to be paid each month, she said it hasn't been decided yet. After her transfer, she was in the hospital for 15 days in Nirmal Nursing Home. She plans to shift to the surrogacy home when the bump begins to show, but she hasn't decided a time as of yet.

Razzia was introduced to the agent by the wife of his husband's colleague. He took her to Jaslok. Because he was in the business for almost 6-7 years by then, it was not much of a problem to get a contract for Razzia. Her medical checkup and that of her husband was done. After the paperwork, her embryo transfer was done. She was in the hospital for a week after the transfer. *“Ek hafta hi rakha mujhe, waise zaroorat nahin tha, par jinka bachcha tha woh bol rahe the kamse kam ek hafta hospital mein rehne ke liye, ab poora kharcha unka hai,*

bachcha unka hai, baat to maanna padega na?" (I had to stay at the hospital for just a week. Even that wasn't needed in fact. But the parents of the baby insisted on me staying in the hospital for at least a week. After all, it's their baby and they are spending the money on everything, so I couldn't have refused, right?) After keeping her in observation for a week, the doctors discharged her and she was back home. She stayed at home for most of her cycle. He got admitted to the hospital one week before her delivery. Her agent Pradeep was very regular in taking her to the doctor for check up and the USGs. She was paid INR 3.5 lakhs in total from the surrogacy. After the transfer, she got INR 30000 in cash, and then she took INR 50000 in advance to pay the security deposit of the rented flat. She did not take the monthly expenditure for 6 months as she took the bulk amount in the beginning itself. After that she was getting INR 10000 each month for three months for taking care of her household while the rent was being paid from her husband's salary. After her delivery, she got the rest of the amount in cheque and INR 30000 in cash for her delivery was a C section. *"Paisa sab barabar mil gaya tha, usi se bhi jo aap dekh rahe ho sab ho paya."* (I was paid reasonably well. Whatever you see around here was managed by that money.)

Nitya was paid INR 4.5 lakhs for each delivery and was given INR 10,000 per month. She received the entire money within five to ten days of delivery.

Nina has been promised INR 2.5 lakhs for the arrangement. She has been told that all the expenses will be paid by the intended parents. Since she is at an early stage in the surrogacy process, certain things have not yet been confirmed- the route of payment or whether the payment will be in instalments. And Rukmini would receive 3 lakhs from the arrangement and was being paid Rs. 10,000 per month by the commissioning couple. She would get INR 3.5 lakhs after the delivery. Laila is not yet sure how much she would be paid, but it would be around INR 3 lakhs. Other details such as route of the payment and whether it would be paid in instalments has not yet been discussed. She is clear that she would live at her own house during pregnancy.

Surro- Pregnancy Experiences

All the respondents in this study reported a difference between own pregnancy and surro-pregnancy. It has been manifested in two levels- biological and emotional experiences of it.

Since the surro-pregnancy involved lots of clinical and bio-medical interventions physically, it is altogether a different experience- all of them explained.

Gurinder regularly visits Bishnoi nursing home for her checkups. She received injections with a 3-day gap. These injections she said were for the growth and proper development of the baby. *"Baby ko safe rakhna hai"* (To keep the baby safe.) The medicines, she said, were for the uterus lining. She said that egg donors get around 10 injections in a week.

Their emotional responses jumbled with their intimate reality of parting the child in certain cases. Satya said, *"Khushi ho rahi hai. Is baby ke saath pure jeevan to nahi reh sakti. Yahi mahine hai- jitna pyaar de sakti hoon, abhi hi dena hai"*. (I won't be able to live with this baby all my life, right? So it's just these months, I shall give it as much love as possible.) When we prompted what she thinks about the baby, she answered that the baby is like her own child. She had consulted an astrologer, who had told her that she'll have 4 children and all will be boys. She has one son. However, Gurinder has always wanted a girl. She wonders what if there is only one girl in her *naseeb* (destiny), and what if that one girl turns out to be the baby currently in her womb. Then, she would have to part with the only girl in her *naseeb*. For these reasons, she really hopes that the baby (that she parts with) turns out to be a boy. But later she also states that she wishes the child is a boy as she too wishes that *"unka vansh aage badhe"*. (Their family name will go on). She further stated, *"bas dar lagta hai ki operation na ho."* (I just hope that surgery won't be necessary). Her first delivery was normal. She hopes that this delivery is also normal as she does not want any marks on her stomach. She is scared that in case of a mark due to C-section, her relatives might become suspicious and ask her questions for which she will have no answer. None of her relatives and family members, other than her sister, knows about her surro-pregnancy. She wishes that her son also could live along with her in the hostel.

Nita questions why she can't see the baby after the delivery. We could see her eyes become a little moist. She feels that after the delivery, a surrogate should be given a chance to meet her child at least once or twice as *"maine baby ko itne pyaar se rakha hai"* (I have been keeping the baby with such love). She thinks she should be shown at least a photo. But she understands why the couple might feel uncomfortable with it as it may lead to a possibility of the surrogate developing an emotional bond with the child. She said, *"ye cute sa baby"*

unke jeene ka zariya hai". (This cute baby is their sole path of life.) This pregnancy has been different from her first one- *"Ye alag hai. Khushi se kood bhi nahi sakte."* (This is different; I can't even jump in joy). She needs to follow rules. She then said *"chahe baby unka ansh hai, abhi mein ma hun. Abhi bacha mere pet mein hai"* (Even if the baby is their progeny, for now I am the mother, it is in my womb.) She feels responsible to make sure that the child does not die. She says that it is important to feel positive-*"positive sochenge to positive hoga"*. (If I think positive, the result will be positive.) Tara says there is a huge difference. "For our own pregnancy, we didn't have to take this much medicine, but in this pregnancy baby is born out of medicine. There are lots of discomforts, like vomiting, tiredness. For our own pregnancy we don't eat this much, we used to have a normal routine, here, we have to be sedentary all the time. For our own pregnancy we did all the work till the end of nine months, but this time, there is restriction on every single movement."

In surrogacy hostels, the authorities give a thorough orientation regarding handing over the baby and is advised not to build any emotional attachment towards the unborn. While signing the surro-pregnancy contract also the one condition reiterated again and again was about handing over the baby. In the hostel, if Renu has any problem like a stomach ache or a head ache or has any questions, she asks other more experienced surrogates in the hostel. If they feel there is any serious concern, they inform the surrogacy hostel owner/agent. If he cannot diagnose the problem, he calls up a clinic. She was initially uncomfortable with the idea of surrogacy and she would question their decision wondering if it was *"galat"* (wrong). However, coming to the hostel really helped her. She could see other surrogates going through similar experiences and they were on the same journey. It helped her feel reassured that there was nothing wrong with being a surrogate. In her words- *"punya ka kaam hai"* (an act of blessing). She has made friends in the hostel and they are like a family.

Anisha did not seem as happy with the experience as the other surrogates. Her grievances were even clearer in the two follow up visits⁵⁷. Anisha was very dissatisfied with the fact that the surrogates are not always treated nicely. They are yelled at for being even a little late, while the doctors often make them wait for long hours before seeing them. While they wait, they are not even offered water or some small amount of food. They are often asked

⁵⁷ We conducted the interview not in the premise of clinics and she being a past surrogate was willing to open up, than the current surrogates at the clinic premises

to sit outside and not inside the clinic while they are waiting. In Anisha's personal experience, Anisha was very weak during the first two months of her cycle. She had excessive vomiting from all the medicines that she was taking including the pregnancy related nausea and lack of appetite. She was getting the monthly expenses of INR 5000 per month after the embryo transfer. But she does mention that it helped her settle her life as well as the fact that the money was not enough to do what she had planned to do with it. Her experience of having the child was same as carrying her own child. She was very attached to the baby. She had cried a lot when she gave away the baby after delivery. She was in the hospital for three days after the delivery and the baby was also kept for observation. She cried and screamed a lot and begged them to let her see the baby. Anisha finally was allowed to see the baby once before the IPs left. After her experience she worked as an agent for two years, but now she has stopped doing that since the past three years as there is a lot of hassle in managing patients, and her husband has started earning a little more and her children have shifted to Delhi, the expense is less. She doesn't need to earn as much as before.

Mridul has been very satisfied with her experience with surrogacy. She has repeatedly said this in the two follow up meetings as well. She repeatedly mentions about the doctor who treated her in Hiranandani and lists her contributions in easing the crises of her life- how she helped her get a house, and get her children admitted in schools. Also how there were never any kind of bad or rude behaviour from the clinic's side or the doctors. She repeatedly said that the experience of carrying her own children and the experience of carrying two children as a surrogate was different. The amount of care she received during her surrogacy was never there during her own pregnancies. The love and care for the babies she was carrying as a surrogate was like the same for her own children. But she knew that she would have to give them away. So she prepared herself. While the first time it was difficult, the second time it did not feel as bad because she already had an experience of it.

For Neelam, her experience was not very different than Mridul's. She was happy to do a noble work to earn money while she was in need. *"Madam, kuch galat to nahin kiya na humne, paise chahiye the bahut, ye nahin karte to dhanda karna padta, ye to achcha hai mujhe iske baare mein pata chal gaya. Warna kuch aur kaam karke itna nahin kama sakte."* *"Meri do ladki hai, unke shaadi byah ka bhi sochna hai na madam."* (Madam, there is nothing wrong in doing this, right? I was in need of lots of money. If not for this, I would

have ended up in prostitution. I am thankful that I came to know about this. No other job would have fetched such money. I have two daughters; I had to think of their weddings as well, right Madam?). Neelam was very happy to be allowed to stay at her own home. She says, “*Maine to doctor ko bola tha ke ghar pe rehne doge to hi karungi, mera aadmi hai, do chhoti beti hai, main nahin rahungi to ghar nahin chalega. Wo to ek do mahina kaise kaise rahe hain jab main bharti thi.*” (I had told the doctor that I could do it only if they let me stay at my home. I have a husband and two kids and if I don’t stay there the house won’t function. The first two months when I was admitted at the hospital, they had to struggle so much). She says that the doctor allowed her to stay in her own home and arranged for some money for her husband to rent a place because the previous house she was living in on the hillside would have been very risky for her while pregnant. She said, “*Main dukhi rahegi to bachche ke sehat par asar padta na? Isliye bachche ke maa baap ne bhi nahin mana kiya.*” (If I stay sad, that would affect the baby’s health right. So the parents also didn’t disapprove.) She says that she had taken good care of the baby while she was carrying. “*Barobar khana khati thi main, meri agent bahut dhyan rakhti thi, aati jaati rehti thi, bagal hi mein ghar tha uska. Thoda thoda khana bachche logon ko bhi khilati thi, par zyada main khati thi. Apne bachchi k time itna nahin khaya tha.*” (I used to eat well, my agent used to take good care of me. She used to live near us and frequented to our place during my pregnancy. Though I used to feed my kids also with the good food, I ate the most. For my own pregnancy I did not do that.) She was happy with her agent also. Our participatory observation indicates that in Mumbai, the agent-patient relationship is mostly cordial, almost like a family relationship.

Meenu felt sad while giving away the baby, but that did not last for long. “*Bachcha to unhi ka hai, maine to bas rakha tha apne paas.*” (The baby is theirs. I was just keeping it for some time.) She says that knowing the happiness of the IPs, her sadness went away. The IPs thanked her over the phone. She did not get to see the baby.

Nita has been happy with her experience. She says, “*Theek hai sab, achcha hai, doctor log madad karte hain.*” (Things are alright, it’s good, the doctors help with things.) She says that her experience with this is different from her own pregnancy. She was not under such

medical supervision when she had her own child. But the feeling of carrying the child is still the same. *“Apne bachche jaisa hi lagta hai, dhyan bhi nahin aata ke kisi aur ka hai. Main bhi to maa hi hoon iski.”* (I feel it’s my own baby, didn’t care that it’s someone else’s baby. I am, also its mother, right.) Regarding her obligation to hand the child over to the IPs, she is not sure about how she will feel at that point of time. *“Mujhe pata hai dena hai unko, unhi ka hai, par bura to lagega. Lekin kuch kar nahin sakte na, usse apne ko hi takleef ho jayega sab jaan boojhkar hi kiya hai.”* (I know the baby is theirs and I will have to give it to them. But it does feel bad. I cannot do anything about it, it would make things worse for me. I did everything voluntarily after knowing the details, right?) She wants to see the baby after the delivery, but is not sure if she will be allowed to.

Nazreen has not had much of an experience into the life of a surrogate as of yet. She says, *“Abhi tak ka to sab sahi hi tha. Doctor kaafi helpful hain, agent bhi theek hi hai. Koi pareshani nahin hui hai abhitak.”* (Till now everything is fine. Doctor was really helpful so was the agent. Not troubles so far.) About the baby, she says that she is keeping the baby as if it’s her own, but simultaneously she has to remind herself that she will have to give it away. *“Dhyan to apne bachche jaisa hi rakhungi, par ek amanat ke taur par rakhungi.”* (I will take care of the baby just like my own kids. But I will treat it like a treasure). Her lines resemble the general statements of the doctors and the clinicians when they tell the surrogate about the clause of handing over the child without ever laying any claim on him/her. She says, *“Thoda bura to lagega par kuch nahin kar sakte na, jo hai, wahi hai. Jo bhi process hai unhone sab pehle se bata diya.”* (I will feel a bit bad, but things are the way they are. We can’t do anything. I was told about the whole process at the beginning itself.) She feels good about being a mother for the second time. Because after her divorce, she had no hopes for ever becoming a mother again. *“Doosri baar mauka mila, achcha hi lagega na?”* (I got another chance, of course it feels good.)

Razzia was fairly satisfied with her experience as a surrogate in Jaslok. The only thing that she kept on mentioning was how she got the INR 50000 in advance to pay the security deposit of her new home. In the beginning she had bouts of nausea, but she was familiar with it from her own two pregnancies. The only unfamiliar thing was the looking after by the agent and the medical attention that she was getting regularly from the clinic. She was also very happy with her agent. She calls him Mama (Maternal uncle). She stayed at her home

with her children for the larger part of her pregnancy. The agent only told the doctor that it would be better for her to stay with her family for a healthy pregnancy. In the follow up visit with her also, she did not differ from her initial statements.

As a response to the question whether this experience has been different compared to her earlier pregnancies Sunita replied, *“zyada bhari lagta hai” (It feels heavier)* because of more medicines. In the hostel, the surrogates do not always get to eat food according to their taste. They find the food in the hostel very bland. From the INR 10,000 that they earn each month, they spend some money to eat the kind of food they like or to buy things for their own needs. During these 9 months, they do not have to pay for rent and could save some money, which they send to their families. They receive the remaining lump-sum amount at the end of the month. They receive INR 3 lakhs in total. Her husband is in Madras and her kids are in Bihar with her mother.

Renu would wish that she keeps receiving news about the surrogate child- *“bas khabar milti rahe.”* But she knows she won't be given any news. She said that some intended parents also change their contact details to make sure that the surrogate cannot get in touch with them or the kid. On asking how she felt about the surrogate child she answered, *“jo ab hamara hi nahi...jo mamta apne bache main aati hai, use kayi zyada mamta is bache ke liye aati hai”.* (As this baby is no longer mine, I feel more affection for this one than my own children.)

Rukmini mentioned, *“dukh to hoga lekin unki (intended parents) khushi dekhkar khush ho jaate hai”.* (I did feel sad, but after seeing the happiness of the parents I also felt happy). She further stated, *“humari amanat nahi hain, kisi aur ka hai”.* (It is not my asset right. It's someone else's.) It was evident that, from the very beginning, the surrogates were given the narrative by the persons of authority in the arrangement (doctors and agents) that they had no right over the child and that this child belongs only to the IPs.

Smita was openly informed right from the beginning that she would be staying in the hostel during the pregnancy. If they miss their families a lot, they are permitted to visit their homes for 2-3 days. The hostel makes sure that the surrogates are happy. After moving to the hostel, she became more convinced that her decision to become a surrogate was not wrong- *“honsla mila. Sab karte hai to hum bhi kar sakte hai”.* (I got the courage. If everyone else can do it, I can also do it). It gets boring to be in the hostel the entire day. They watch

movies or read books about children. She often likes to go out and share responsibility to buy groceries and fruits for the other surrogates - *“is bahane bahar ghoom lete hai”*. (It is an excuse to roam around.) She feels that after moving to the hostel her health has improved. She wanted to keep her kids with her, but could not. Her kids can come and visit her. Usually, one or two year old kids can live with the surrogates in the hostel. She feels pained that she is away from home. However, she is happy about her decision- *“andar se acha feeling hai, khushi hoti hai”*. (It feels good from within. I feel happy.)

Tara has just been lying in the bed since she moved to the hostel after the embryo transfer. She is still unsure whether or not she has become pregnant after the transfer- *“pata nahi positive aayega ya nahi”*. She said it was too early for her to comment on whether it is different from other pregnancies, since she wasn't even sure if she is pregnant.

Relationship with IPs

Almost all the clinics we studied in Mumbai did not allow the IPs and surrogates to interact. IPs gets to see the pictures and profiles of surrogates to make the selection. No whereabouts of IPS and surrogates are passed to each other. According to an agent in Mumbai, “to keep the scene clean, this would be necessary. The financial crunch of surrogates would create unnecessary burden on IPs if we allow them to interact. Surrogate might demand more money from IPs and even IPs by seeing the poor situation of surrogates might end up spending more money. We try our level best to avoid it. Anyway, their relationship won't last beyond a point” (Field Notes 11st May 2017). In contrast to Mumbai, in Delhi many of the clinics insisted limited level of interactions between them for a health relationship between IPs and surrogates.

However, Rita got to see the IPs after delivery. She mentioned that they had a language barrier. They were English speaking foreigners, white. So they did not speak. They saw her, spent some time and left. She got a thanks card from the IPs, written “thank you very much” (*very* is underlined) and she cherished it like a certificate. (Which she had kept it in the almarah's safe, like a precious thing, with all other important documents)

Smita feels really happy that the IPs promised her an insurance policy. She said that usually couples do not do this for surrogates. She meets the IPs very often when she visits the hospital for checkups. The couples live very close to where the surrogate lives in Gurgaon.

For this reason, they preferred that the surrogate move to a hostel. The proximity of the surrogate's residence to their residence could lead to the risk of the surrogate wanting to get in touch with the intending parents or making demands after the birth of the baby. The intending parents also come to the hostel some times to meet the surrogate. They show concern about what the surrogate eats, etc.

Anisha stayed at a surrogacy hostel for barely a month. The hostel was in Dombivli and was a very small one. During the time of her stay, the injections were given by other fellow surrogates, and she fell sick from being injected by untrained people. Her husband went and told this to the clinic. For the rest of the days, the nurses came to give injections. And after a few days Anisha shifted to her home. The food was bland and cooked in the hostel itself. There was one TV, but most of the time it would not be working. They mostly spent their time taking rest and taking medicines as scheduled.

Mridul⁵⁸ had spoken to the IPs over the phone on both the occasions and seen them after the delivery on both the occasions as well. But they were not present in the time of the contract signature. And a major part of the communication of the surrogacy was happening via the doctors. The commissioning couples in her case were very generous both the time; they were sending her gifts for herself as well as for her own biological children. They sent her a thank you note too in both the cases that she has kept.

Nita hasn't spoken to the commissioning couple even over the phone. They were not there during the time of signing the contract either. The clinic makes sure that there is no direct face to face interaction between the surrogates and the IPs before the child is handed over. All the conversations were mediated through the clinic. Renu has communicated with the commissioning couple on the phone. They visit the hostel often and get clothes. She said, *"hamari khushi se zyada unki khushi hai"*. (Their happiness is greater than mine.) She is happy with the care and treatment she is receiving. She said, *"patient kitna paisa laga rahe hai. Treatment mein koi kami nahi hai"*. (The patient is spending so much money. Treatment has been very good.)

⁵⁸ Done surrogacy twice

Seema has met the commissioning couple. When asked what she thought of them, she replied, *“ache hai”*. She has spoken to them directly. They said to her, *“dhyaan rakhna...koi pareshani ho, mein puri karungi”*. (Take care. If there are any issues, we will sort them out.) She has been given no information about the commissioning couple since she is still at an early stage of the process. Nisha has met the intended parents. She thought that they were very nice. They asked her whether she’ll be able to take this responsibility- *“kya aap kar sakoge?”* She trusted the intended parents- *“mujhe to bharosa hai”*. Rukmini met the intended parents every month. During their meeting, the intended parents would give her food like dry fruits. She said that the intended parents did not feel like strangers- *“apne jaise the”*. She did not know where they were from.

Nisha visited the clinic every week for checkups and was usually joined by the intended mother and the intended grandmother, who took very good care of her. They would get her food each time they met her. Nazreen knows that the intended parents of the surrogate baby are from Dubai.

Knowledge about law and the contract

All the ambiguities around the legal status of commercial surrogacy in India and the confusions emerged during the study period created lots of confusions among not only the surrogates, but among the agents and clinicians as well. The clinics create surro- pregnancy contracts⁵⁹ and were not sure about the legal validity of it. However, they misinform the surrogates and their family members that there would be serious legal consequences which they would have to face, if they breach the contract at any point of time. No reported legal case is filed before any legal or quasi legal authorities to challenge the terms and conditions of the surro- pregnancy contract from either sides so far. The knowledge about the contract is limited for surrogates; they mainly are informed about the amount they receive and the modalities about it. Another clause which every surrogate is clear about is handing over the baby to the IPs without any contest on the ownership of the babies.

⁵⁹ Most of the clinics were reluctant to share the copy of the contract but informed us that they follow the format given in the ICSSR website.

One of the surrogates we interviewed did not have a copy of the contract⁶⁰. Nobody has given a copy to them; though many of the surrogacy agents and surrogacy hostel owners keep all the documents with them until the surrogacy cycle gets over. Most of them are depending on agents, in case any legal issue comes up. Though the agents act mostly in favour of IPs, the surrogates find no other person to be relied on but the agents. None of the surrogates interviewed under this study ever interacted with a lawyer while signing/drafting of the surro- pregnancy contract.

Pattern of the contract varies; different formats were used in different clinics. We got couple of copies of surrogacy agreements/ surro-pregnancy contracts. The contract is signed by surrogates, IPs and one of the guardians of surrogates⁶¹. In one of the clinics in Delhi, we saw two contracts being made- one between agent and IPs and another one signed by agent, IPs and surrogate⁶².

Surrogate's education background and English literacy act as another hurdle to understand the terms and conditions of the contract. Most of the surrogates fully rely on the agents and sign where ever they had pointed to without knowing the details. Surro-pregnancy contract is mostly 10-20 pages long document, written in difficult legal language, even hard to understand for graduates. Some of the clinics make it in the 100 rupees stamp paper. Our participatory observation at a clinic in Mumbai suggested that the agent uses threatening language to the surrogates and her family members saying that the police will arrest them if there is any single violation of the terms and conditions (Field Notes 22nd July 2017).

Rinki was just told that she will carry the child and after the delivery she will have to give it away to the commissioning couple. She was told about the financial clauses of the contract. The amount she would be paid, the breakdown of it, the payment procedure etc.

Gurinder was aware about a possible ban on surrogacy. The Surrogacy hostel owner gave her this information. If commercial surrogacy is banned, "*jinko bacha milna hai, unke liye*

⁶⁰ The field experience of the principal investigator of this study in Kerala's IVF clinics (2013) suggest contrary that all the surrogates interviewed then had a copy of the contract with them and they are very clear about each and every aspect of the surro-pregnancy contract.

⁶¹ Mostly husband does this signing; however in one of the copies of the contract we obtained, it had named the father of the surrogate as the guardian. But that contract is signed by her younger brother as the guardian. She herself is 22 and her younger brother acts as the guardian in the surro- pregnancy contract, being responsible for all the consequences of the act!!

⁶² Since the surrogacy agent was not ready to share the copies of the agreement, we could not gather the exact details of the two different contracts and to understand the purpose of it.

raasta band ho jaayega". (Those childless couples will not have a way out.) Gurinder signed the contract. She says that she has been lucky that the intending parents wanted everything to be done with her consent. They explained the terms and conditions of the contract to Gurinder. She does not have a copy of the contract. She understands the importance of having a copy with herself. The copy of the contract is with the surrogacy hostel owner and her husband would soon be asking him for a copy.

Nita didn't know of the ban proposed before speaking to us. But even after knowing, she was not in favor of an absolute ban. She said, "*Thoda izzat milna chahiye hum logon ko, band karne se kuch nahin hone wala, doctors ko samjhao ke sahi se kaam kare, thoda paise badhayen, band karne se kuch nahin hoga, gareeb aadmi marega, gareeb aurat ko dhanda karna padega*." (We should get some dignity. Tell the doctors to do things correctly. Let them increase the payment also. There is no point in stopping it fully. The poor men will die and their poor wives will have to be prostitutes.)

Alisha had signed a contract at the time of her surrogacy, but she did not have a copy. The terms were not explained in detail to her except for she was told that she will have to give away the baby as soon as it's delivered and she won't get to see the baby.

Sunita knew of the ban proposed albeit not in detail. After speaking to me about the details of the law change she said, "*Sarkaar gareebon ke pet mein laot maar rahi hai, sab kuch itna mehenga kar diya hai, aur paise bhi nahin kamane de rahe. Pichle saal note band kar diya, kitna mushkil hua, ab bolte ye band kar denge, gareeb aurat karegi kya?*" (The government is making the poor suffer. Everything is so expensive and they don't let you earn enough. Last year they banned the currency and now they say this (surrogacy) would be banned. What should the poor women do?) She was very vehemently against the ban. According to her there was no point of the ban, "*surrogates ki chinta hai to paise badhao, band kyon karna hai? Kitne log jude hain isse, sabke ghar pe khana band ho jayega. Ye nahin karenge to karenge kya, kaunse sab bade pade likhe hain?*" (If they are concerned about the surrogates, then let them increase the payment. Why ban? So many of us are involved in this, all our families would starve. If we don't do this, what else is there to do? We aren't that educated, right.)

Alisha was upset about the proposed ban as it would affect her job as an agent, and put her in financial risk. She has no idea what she would do if the ban is implemented as there is no other work she has any clue of and no other job will pay her as much. She has a daughter and she is worried about her marriage too.

Mridul had signed a contract both the time; she had both the copies, but at home. She could not read it, but in both the cases, the doctors explained the terms and conditions to her, especially that regarding handing over of the child. There was no lawyer contacted or present when she did sign the contract and she also hadn't contacted any lawyer.

Tara said that banning of commercial surrogacy is not the solution to anything. There is repeatedly the comparison between sex work and surrogacy and how surrogacy is better than sex work. She says, *"Kitnon ko dhanda karna padta hai madam, iske chalte mujhe kabhi wo sab karne ka sochna nahin pada."* (Many of these women are forced to do sex work and because of this (surrogacy) I didn't have to even think of it.) She had no clue about the ban before she heard it from the clinic when they told her about being interviewed for this study. She knew that for foreigners it has been prohibited, but about the proposed absolute ban on commercial surrogacy, she wasn't aware of. *"Gareebon ke peechhe kyon padi hai sarkaar? Sabkuch itna mehenga ho raha hai, oopar se kaam bhi chheen rahe hain."* (Why is the government hell bent on making the poor people's life worse? On the one hand, such severe price hike and on the other they are taking our jobs away.)

Laila did not have any knowledge of the details of the ban proposed. She said, *"Bolte rehte the log beech beech mein. Par ye ho raha hai aisa pata nahin tha."* (People were talking about it (the ban) at times. But I never knew this is going to happen.) According to her the complete ban on surrogacy is not right. She says that if the money increases for surrogates, it will be a good step. *"Sudhaar lana chahiye na, aise band thode hi karne se kuch hoga. Kaanoon badlo, par achche ko badlo. 3.5 lakh thoda kam pad jata hai, kamse kam 5 tak to milna chahiye, kharcha itna badh raha hai har cheez mein, sarkaar ko sochna chahiye."* (This needs reform, what's the point in banning it altogether. Change the law, for better amount of money for the surrogates. 3.5 lakh rupees is not enough. At least INR 5 lakh should be given. The government needs to think more about this, especially with all this inflation.) She thinks that the ban will snatch employment options from so many women in financial crisis. *"Kya karenge zaroorat ke time pe? Kisi ki tabiyat kharaab ho gayi, kitne logon ki to ghar*

mein dhanda (business) shuru hua hai surrogacy ke paise se. Hum agar ghar le payenge to bas iske paise se. Aise band thode hi na kar sakte hain." (What will we do in times of necessity? What if someone fall ill? You, know how many women have started businesses with the money from surrogacy? If we could buy a house, that is from this. They can't just stop it all of a sudden.)

Smita is not sure of the effect of the ban on her life. She says, "*Abhi to aise kuch zyada nahin hoga, mera to ho jayega delivery. Lekin baad mein kabhi zaroorat pada to rasta rehna chahiye na, wo band nahi hona chahiye, kisi aur cheez se itna paissa nahin milta.*" (Now, my delivery will happen. But, in the future when we need money, there should be some way out right. No other job brings in such big money.)

Rita signed a contract, but she does not have a copy. She hasn't read the contract. The doctor has told her that she will be offered 3.5 lakh rupees in total. And has explained the partial payment system to her, and mostly emphasized on her role of handing over the child and laying no claim over the child, not even demanding to see it. She said that banning commercial surrogacy is not the solution to anything. According to her there is no reason for a complete ban on it. She says, "*Ye physical nahin hai, ye to technology hai, isse kitne logon ka ghar chalta hai. Aisa nahin hona chahiye.*" (This is not physical⁶³, right. This is technology. How many people live off it? It shouldn't be banned.) She did not have any idea about the existing law or the proposed change. She says that the government is taking the joy of motherhood from the women who can't conceive themselves. When I told her that the government plans to keep altruistic surrogacy and explained the terms of the law to her, she said, "*Par koi aata to nahin khudse rishtedaar, aapne kabhi dekha? Agar aate hi to surrogates ki zaroorat hi nahin hoti, bina paise ka koi kyon itni tension lega?*" (But, no one does it for free, even relatives. Haven't you noticed it? If one doesn't have any need for the money why do we do it? And if there is no money for it, who will take so much tension?)

Nazreen signed a contract, but she does not have a copy, her agent has. She herself read the contract before signing. She had no complaint about the contract. She says she read it thoroughly and clarified her doubts before signing it. She didn't know of the proposed ban before speaking to me. But she was not in favor of this. She repeatedly said how it helped

⁶³ She might have intended to say sexual, which has a moral taboo to use, but used the word physical instead.

her when she was in need. *“Surrogacy nahin hota to wahan se nikalne ka soch hi nahin sakte the humlog. Wahin rehna padta, pata nahin kaise bachchon ko bada karte, kya hota.”* (We couldn’t have survived from such a plight if not for surrogacy. We would have to stay there. I don’t know how we could have managed to raise our children [without surrogacy] But she does not think the ban will affect her as she is fairly determined not to do surrogacy again.

Nita had signed a contract at the time of her surrogacy, but she did not have a copy. Instead her agent had. She said, *“Padhna likhna nahin aata, hum rakhke kya karte?”* (We are illiterates, what is the point in keeping a contract then?) The terms were not explained in detail to her except that she was told that she will have to give away the baby as soon as the delivery is over.

Nima opined that commercial surrogacy should not be banned. She heard about the proposed ban through the media. She feels the government proposed to ban commercial surrogacy as very little money actually reaches the surrogate. When asked what would be the repercussions of her decision to become a surrogate mother on her life, she replied that she would never forget these 9 months. She strongly suggested that the law should ensure that surrogates receive more money in the arrangement- *“paisa jitna milna chahiye nahi milta. Agents kha lete hai”*. (We should get more money. Now, agents take a lot of it).

Anita did sign a surro-pregnancy contract. However, she does not know the terms and conditions stated in the contract. She does not have a copy of the contract. According to her, the law should not ban commercial surrogacy. She was informed about a possible change in the law by her agent.

Seema opined that commercial surrogacy should not be banned- *“jo humare paas hai, logo ke paas nahi hai...jo unke paas hai, humare paas nahi hai...ant mein dono party ka solution ho jata hai”* (what we have, some people do not have, what they have we do not have; in the end, this offers a solution for both parties). She does not have an alternate employment option in mind. She has not yet signed the contract. She will be signing the contract after 2 days (i.e. the day of the ET and also the day her husband will be joining her).

Pinky did not have a copy of her previous contract. It was with the agent in her office. She hadn't read the surro-pregnancy contract before signing it and didn't know the terms and conditions in the contract. She said her husband knew more about the details of the terms and conditions.

When we asked whether Renu knew that a change in the law has been proposed, she replied that she had no idea about it. When further asked about the repercussions of this change on her life, she replied *"Jiski godh sooni hai, uske liye buri baat hai. Baaki hum madad karna chahte hai"* (It's bad news for the parents who would no longer be able to have kids. She wishes to help them.)

If the family are okay with it they go ahead with it. *"Sahi hai ye kaam. Band kyon ho raha hai?"* (This job is good. Why are they stopping it.) She added, *"Garib log ke liye sahi hai. Jinko aulad nahi hai unke liye bhi sahi hai"* *"wo bhi khush hai, hum bhi khush hai"* *"ghar mein beti ke tilak ke liye paise nahi hai"* (there is no money for dowry) *"surrogacy band karvayegi to yeh bhi band ho jayega"*. (This is good for the poor and also good for the childless couples. Intending parents are also happy with the arrangement. They arrange all the facilities for us, just needed to hand over the baby *"sahi salamat"* and then you take your route, don't disturb us, after that.)

The Other Side of the Story

We were given the contact details of Priya (proxy name) by a leading gynaecologist of an IVF clinic in South-West Delhi, and cooperated with this study very well. We were told that she had a long-standing communication with the surrogate after the delivery of her children. The interview took place in a busy coffee shop in South Delhi.

The conversation started with Priya describing her childhood years. She was a very diligent and hardworking student. She narrated how she was the kind of student who would refer to revision sheets even minutes before her exams. She did very well academically, studied economics and was offered her first job at American Express. Her first job was a matter of great prestige for her family. She then spoke about how she was always stressed during her school years and as a professional. She believes that this has affected her health to a great

extent and is probably the reason she had difficulty in conceiving a baby. She then described how her sister's attitude towards life was very different compared to hers. Her sister would barely pass in her exams and lived a comparatively stress-free life. She felt that this was the reason why her sister had a comparatively healthy life and got pregnant within months of her marriage. At this point of the interview, she was in tears.

Priya then spoke about her struggle to get pregnant for years after the marriage. Both she and her husband were very desperate to have a child. Her feeling was that her husband always wanted a kid of his own, even as a child. She tried every possible treatment and three cycles of IVF, but they all failed. It cost her INR 2-3 lakhs per IVF cycle. She described parts of her reproductive system as not being in their right place and being stuck to other organs. She consulted a number of doctors and even described a horrific experience with an untrained doctor. The doctor used to inject Priya's husband's blood into her body. The couple had also gone to an adoption agency. However, they would have had to wait for more than a year, for which they were not prepared. Priya recollected her desperation to have a baby, "I would have grabbed any kid from the street". They preferred surrogacy as an option because they wanted their kids to resemble them.

After consulting a number of doctors, she then took the opinion of with her doctor. Doctor suggested that they try one more IVF cycle with Priya and along with one cycle on surrogate as well. Priya further stated that her doctor perhaps knew that there was very little chance of her becoming pregnant, but she did not mention this to her so that Priya also felt that she is a part of the process and was trying her best. Her IVF cycle failed, while the Embryo Transfer (ET) on the surrogate was successful. This is how they got into the surrogacy arrangement in 2011. Even after the positive ET to the surrogate, Priya wanted to try another IVF cycle, thinking she would have one baby though surrogacy and another baby by getting pregnant herself. However, after she learned about the news that the surrogate was carrying twins, she decided not to go ahead with another IVF cycle.

Priya then described the difficulty in finding a surrogate. At first, she was made to meet 4-5 surrogates through Sonu (an agent). She found the agent to be very dubious and as someone who looked like a 'pimp'. She described these surrogates as being very thin and weak. Most of these women were from Loni in Ghaziabad, a low-income neighbourhood and a place she described as a 'dump'. She finally decided on one surrogate from a Muslim family. However,

the prospective surrogate's husband did not feel comfortable with the idea of surrogacy. Priya's entire family including her mother and father-in-law visited the surrogate's house to convince her husband. Despite this, the surrogate did not come to the clinic on the day of the ET. The couple then selected another surrogate who also did not turn up on the day of the next ET. Doctor then recommended an intending surrogate-Gita (proxy name), who had been an egg donor at the clinic and thus it was assured that her medical records were good. She described Gita as being very strong both mentally and physically, which according to Priya were both the qualities she, herself lacked. Priya described the clinic as not being very organized- "sab kuch bhagwan ka bharose hota hai". Priya being very meticulous and involved in the process repeatedly asked to see Gita's medical records. After the ET to Gita, Priya got a chance to see Gita's test reports after repeatedly pursuing the clinic staff to show the same to her. To her horror, the reports stated that the surrogate was Hepatitis B positive. She called up doctor and informed her about the results. Doctor on the phone stated that it was not possible and then came down to the ground floor of the clinic to see the results. Then on seeing that Gita was indeed Hepatitis B positive, Doctor asked Priya and her husband what they wanted to do. Priya asked to conducted special tests on the surrogate to find out whether the infection was active or passive and to know the extent of the infection. On being assured that it was passive and would have very little impact on her children, Priya decided to go ahead with the surrogacy arrangement by inducing specific additional medications to keep the safety part.

Priya stated that they only told their close friends and family about the surrogacy arrangement. She mentioned that during the time of the surro-pregnancy she had gone into hibernation. A lot of their other relatives still wonder how she is so fit after bearing twins. She also had difficulty in explaining to their domestic help about surrogacy. She explained to them that it was not like the movie Chori Chori Chupke Chupke, in which the husband has to have sex with the surrogate and that it is actually very 'scientific'.

Priya mentioned that about four embryos were transferred to Gita. However, a foetal reduction was carried out and the number of embryos was reduced to two. One strong recommendation by Priya was that the number of embryos transferred should be restricted to avoid foetal reduction. According to her, foetal reduction is not ethical.

Moreover, Priya was aware that the surro-pregnancy contract was not legally valid in any court of law. She gave a copy of the contract to the surrogate to give her the impression that the couple knows what they are doing and that the surrogate cannot breach the agreement. The surrogate feels that she is doing something not fully legal, and yet when she signs on the contract/ receives a copy she gets the impression that it is legal and that she cannot revoke it.

Priya very meticulously monitored every stage of the surrogacy process. As she did not trust the agent, she gave a mobile phone to both the surrogate and her husband. The agent, Sonu, was responsible for bringing the surrogate to the hospital/clinic for checkups or any problems. Priya stated that when she would give food/dry-fruits to Gita when they met at the clinic, on the way back, Sonu would ask Gita to show her everything that Priya gave her and would keep half of the things with himself. Priya also paid Sonu additional money, every time he brought Priya to the hospital/clinic. This was to make sure that Gita was taken care of every time she experiences pain. Priya was informed that Gita's husband had lost his job and was unemployed. Priya decided to hire Gita's husband and agreed to pay him as much as he got in his previous job. She told him that his job was to take care of his wife and do the domestic work at his own house and let his wife to take rest and watch TV. If she was in pain or needed anything he should immediately call Priya. Because Priya was in regular contact with the surrogate and her husband, the agent started to feel insecure about losing control over the arrangement.

The couple paid some amount to the surrogate's husband at the time of signing of the contract, on the day of the ET, some amount in instalments every month after the ET, and the lumpsum after the delivery. When Gita was in the 7th month of her pregnancy, her mother died. She asked Priya whether she could go to her village for her mother's funeral. Since it was a twin pregnancy, Priya did not want to take any risk and did not allow Gita to go to the village. Priya felt relieved once she had her children in her hands.

During the surro-pregnancy, the couple was informed by the doctor that they were expecting twins. Priya insisted that it was the right of the surrogate to know that she was carrying twins. However, Doctor advised that it is best for Gita to not know about it until the time of delivery. Since the surrogate had never carried twins before, knowing about her twin pregnancy would have probably made her panic. Within a few month of pregnancy, the

surrogate had a big bump and as Priya stated, the surrogate thought that “modern logo ke bache itne bade hote honge”. (The kids of modern people will be this big, may be.) After the delivery, the surrogate told Priya, “acha hi hua aapne pehle na hi bataya” (it was good that she was not informed about it earlier), perhaps she did not know how her husband would have reacted. Priya voluntarily decided to give the surrogate INR 7 lakhs for the twins (since she had agreed to pay INR 3.5 lakhs for one baby). The money was transferred in the husband’s bank account. The husband became a part of the arrangement as he was educated and literate, while Gita was not. Priya continued to remain in touch with the surrogate. She later discovered that the surrogate’s husband, who Priya had employed to take care of the surrogate, used to beat her up even when she was pregnant. After the delivery, Gita’s husband left her and married another woman, leaving no money for Gita. Gita then requested Priya for some money and Priya paid her another Rs. 2 lakhs. Before entering into the arrangement with Gita, Priya wanted to give more than Rs. 3.5 lakhs to Gita. However, Sonu told her that by paying Gita more, Priya would be increasing the rate/expectations from others.

Gita is now in the north-east part of India and often travels to work with children. Her children live in a hostel. The surrogate mentioned to Priya that the couple had helped her a lot – “itna to mere mummy papa ne bhi nahi kiya jitna aapne kiya hai”. (Not even my parents helped me as much as you have.) Priya replied that they hadn’t done anything at all. For Priya, Gita was a God-like figure. For Priya, her life completely changed after getting her kids. She said that she used to be a very negative person, and now she felt very positive. After the entire process of surrogacy, she said that she does not feel that she was not pregnant and did not give birth to her children. She has continued to keep in touch with Gita after the delivery in 2012 (for five years). While Priya praised Gita greatly, she described how paranoid she was during the surro-pregnancy. While she had faith in Gita, Priya described how anxious she was during the surro-pregnancy, “now how do you trust them? They may run away with my children”. Priya wished to hire Gita as a nanny in her house for her twins as she felt there wouldn’t be a better person to look after her kids than Gita. However, her husband was very clear that he did not want Gita inside his house.

Priya and her husband wish to disclose their children about their status as surrogate babies, but waiting for time, when they are able to understand the process completely.

CONCLUSIONS AND THEWAY FORWARD

Why do women in developing countries end up doing the most dangerous and in most of the cases what is termed as the “dirty jobs”? A recent International Labour Organisation (ILO) study (2017) clearly shows that the work participation of women in India has gone down severely from 35% (1990) to 27% (2017) when compared to its neighbouring countries⁶⁴. The jobless economic growth phase India is currently undergoing most adversely affected the vulnerable groups, especially women from the socially and economically backward groups. They were forced to do lower income jobs with poor and hazardous working conditions.

The agrarian crisis forced rural women to migrate to urban areas and undertake more vulnerable jobs for their survival. The expanding markets use the anonymity of big and small cities to exploit women’s labour and opens hitherto inexperienced fields for their rapid profits and growth. Privatisation of medical care and opening up of new medical technologies, especially new reproductive technologies, created new livelihood opportunities for many women, who came to cities for their everyday survival. Surrogates constitute such a category. The women from both rural and urban settings who hail from lower and lower middle class backgrounds opt it as a measure to make one time money to address their immediate financial needs or to save for their future needs, which are otherwise difficult to meet through their normal jobs.

Law plays a crucial role to transform a society within the given structural inequities. For women, historically, law acts as an instrument of transformative potential in their everyday life. Many of the feminist legal scholars argue that the law takes two opposite roles either to oppress them in a patriarchal world or to help them to improve their lives with positive

⁶⁴ <https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS> accessed on 21st January 2018

discriminations. What should ideally be a law which governs surrogacy in India? How to formulate a law which helps and improves the most vulnerable in the triad of surrogates- IPs and the surrogate child? There are many legal and other issues which came up during this study. In this concluding chapter, we compile those issues and analyse what are the best practices to address these questions effectively as part of the way forward.

Asking the *Women's Question*

In the field of surrogacy law in India, the completion of this study reiterates the importance of 'asking the women's question'. The repeated, regular, asking of a question marks a method. Across the disciplines the feminists ask a set of questions and which constitute the *women's question*. To Bartlett (1991), women's question in law is that "... which is designated to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective...In law asking the *women's question* means examining how the law fails to take into account the experiences and values that seem more typical of women than men, for whatever reasons, or how the existing legal standards and concepts might disadvantage women" (Bartlett 1991:371).

Over the past two decades feminists have expanded the women's question into new emerging areas like the queer question to address the issue of how the law fails to incorporate the experiences of people of different sexual orientations. Several feminist legal scholars ask the women's question in this broader sense and try to address the issue of the non incorporation of certain experiences within the judicial system. We argue in the Indian surrogacy law that asking the women's question and incorporating the experiences of surrogates is primary. Bartlett (1991) suggests three feminist methods while 'doing law' by feminist analysis of case laws. One is to ask the 'women's question' to expose the substance of law which otherwise may silently and without justification submerge the perspectives of

women and other excluded groups; second method is 'feminist practical reasoning' that expands the traditional notions of legal relevance to make legal decision making more sensitive to those features of a case that are not already reflected in legal doctrine and the third method is 'conscious raising' which is a means of testing the validity of accepted legal principles through the lens of the personal experiences of those who are directly affected by these principles (Ibid: 371). Using the 'women's question' as a method and politics has helped feminist legal scholarship to use critique as an integral method to legal analysis to check the precedential value of a case, stating of the facts of the application of law to the facts in the selected case laws and the assumption of gender neutrality in judicial process. "Feminists' substantive analyses of legal decision making have revealed to them that the so called neutral means of deciding cases tend to mask, not eliminate, political and social considerations from legal decision making. Feminists have found that neutral rules and procedures tend to drive underground the ideologies of the decision maker, and that these ideologies do not serve women's interests well. Disadvantaged by hidden biases, feminists see the value of modes of legal reasoning that expose and open up debate concerning the underlying political and moral considerations" (Bartlett 1991: 381).

Our understanding from the experiences of working with surrogates on one hand and academic exercises of analysing the process of legal development in India on the other suggests that essentially the legal process in India lacked to incorporate the surrogate experience or there is a clear omission to integrate the same. However, we suggest that based on this report, it is important to listen to the voices of surrogates, while redrafting Surrogacy (Regulation) Bill, 2016 based on the Parliamentary Committee Report (2017).

National Human Rights Commission and State Commissions should take initiatives to conduct consultations with surrogates while developing the new law to govern

commercial surrogacy in India. Incorporating their experiences will definitely help to develop best practices in the field with least ethical violations.

Surrogates during FGD insisted that we should inform the government to come and talk to them. “Whatever we speak, will it reach the government?” Participants would like their voices to reach the government. All of them felt that the government has a responsibility to listen to them, before they take any legal action on surrogacy. Many of them expressed that government representatives should come and meet them to get their opinion. Ask the government to come and meet us. Or else invite us for a conversation, we are ready to go. Even if we are done with this arrangement, people who come after us doing this will go on behalf of us and speak to the government to place our arguments (We assured that we will write their opinion in the report, and make sure that this will reach the government)

Then we asked them, what would you tell the government representatives, if they come for a conversation? Listing below different responses we got in FGD for this question:

“We will tell them, *garibom keliye fayada hai* (this is useful for poor people). “We will be able to send our children to school, get our daughters married, those who do not have land they will be able to buy land, those who do not have houses they will be able to construct houses”. “If we work for 2 hours per day, we used to get ten thousand rupees. You please tell us how is one going to make a living with that money nowadays” “Tell us, if we do not do this job, how are we going to run our family needs?” “If the government is ready to meet our needs, we won’t do this as a job” “Nowadays, everything is expensive. We have to pay 5000 rupees as the rent, monthly ration for five member family would be 2500, minimum, even we have to buy water to drink, there is no safe drinking water available in our location, and then electricity bill- you please tell us how much can be saved out of this? How are we going to make both ends meet?” “*agar sarkar zamin hame denge to yeh kaam dubara nahi karenge*” (If the government is ready to give us land, we won’t do it again) “We don’t even

have room to sleep not even bed to lie down, where will we go? “We have to leave our kids back at home and come to the city and work for 12 hours per day, just to survive. If we can go back and buy land, we could have at least stayed with our own kids. Here they come to visit us for half an hour, then say hi-hello, what is the benefit of it. If we bring our children here, we won’t be able to send them to school, that means we are ruining their education and future. We have to keep them back at villages, considering their future”.

Success Rates and Foetal Reduction

Multiple embryo transfer during the implantation of foetus on the surrogate body is a common practice to improve success rates. The popularity of ARTs mainly relied on ‘success rates’. Srinivasan (2010: xix) observes that “Success rates reported by infertility specialists can be misleading.” Qadeer (2010: 18) opines that the “even generously defined success rates are not very impressive”. Both of them criticise how a success rate is defined. The reported ‘take home baby rates’ are relatively low in comparison to infants born or pregnancy positive rates. Scholars challenge the method used to calculate the success rates. High rates can be shown using a suitable population as denominator (like selecting only ART done for younger women) to calculate the rates. The key factors that determine success rate like the quality of the clinic, the period of infertility, age of the woman and the sample selected are not mentioned in any of these claims (Ibid.). Our interview with different clinicians and IVF practitioners confirm this. The interview with IP, done as part of this study also reaffirms this fact. This might lead to foetal reduction⁶⁵ in many of the surrogates. Even otherwise they are going through such a complex medical procedure and this extra surgical intervention of foetal reduction will add to it. More than that, in a patriarchal society like India, where son preference is so common and in many States, the PCPNDT Act does not function efficiently, it might lead to sex selection⁶⁶.

⁶⁵ This is the practice of reducing the number of foetuses in a multi-foetal pregnancy, say quadruplets, to a twin or singleton pregnancy. ... Selective reduction can also be used to reduce a twin pregnancy to a singleton one

⁶⁶ We don’t have any evidence to produce from this study, since it is too hard to capture this fact. Many of the surrogates did not know the sex of the new born. Then it is very hard to prove the fact.

National Human Rights Commission has to work hand in hand with Indian Council for Medical Research to develop best ethical practices to avoid multiple ETS and foetal reduction to protect the health of surrogates as well as to avoid sex selection during the process of commercial surrogacy in India.

Differential Practices in Mumbai and Delhi

The structure of the commercial surrogacy network

One of the major differences is regarding the structure of the practice of commercial surrogacy in both cities. In Delhi, the practice of surrogacy is more organised, highly secretive which makes it less accessible for researchers in gathering information freely from surrogates. In Mumbai, the everyday functioning of the surrogacy is done in relatively informal ways. In Mumbai, practice of surrogacy agents, mostly past surrogates became local agents, connected to an ART bank- chain/network, whereas in Delhi we did not observe this practice. In Delhi, the local agents linked to the surrogacy/ hostels and the ART banks are mostly owned and ran by men.

The below field note from Mumbai shows the differential experiences.

Mridul is different than most of the surrogates I have met, she has this air of authority and experience about her. Probably because of her long stay in the business and making fair amount of money. She is better off than most of them. And she has been in the business for longer than any other surrogate I had spoken to. Her opposition of the law was also very vocal. She also made repeated references to the government, the price hike and demonetization. And in the follow ups also she never mentioned of any discomfort or ill treatment faced by the surrogates except for the fact that there should be an increase in the payment instead of a complete ban.

Neelam did not do her surrogacy from the same clinic I was interviewing her at. She did it at Jaslok. So her experience of being through the process of surrogacy sounded honest to me, Rana's presence did not matter to her much. She has started acting as an agent from this year only, and Anita is her first patient. She still hasn't procured a second patient after Anita and was in dilemma regarding continuing it as a profession as there is fairly tough competition in the field and being a newcomer it was difficult for her. She was getting paid around INR 55000 for Anitha, per month INR 5000 and in the end after delivery 10000 rupees. She seemed fairly comfortable around Rana too. She did not seem to have any

complaints about this particular clinic per se, but she mentioned that in some clinics the doctors treat the agents as well as the patients with rudeness, for being a little late, make them wait for long hours without offering them refreshment or rest as she has heard from other agents.

Some of them act as agents, not only at the clinic where they have done their surrogacy, but even with other clinics in Mumbai. This practice of involving peers as part of the network appears more accessible for surrogates to clear their anxieties and queries, compared to that of Delhi.

This recent emergence of ART bank owners, surrogacy agents and surrogacy hostel owners as the recruiting agents of surrogates in the field of commercial surrogacy India is completely an unregulated field. There is no uniformity in the practice as well, which affects even the process of fixing remuneration/ compensation for surrogacy. These agents act as middle men in the scenario and extract maximum money out of it. National Human Rights Commission should involve in developing rules for surrogacy agents and agencies to ensure reduction in exploitation in the field. Develop a code of conduct for them with the help of legal and medical experts in the field of commercial surrogacy by exploring the ground realities.

Relationships with IPs

In Delhi most of the clinics insist a cordial relationship between surrogates and IPs during the surro-pregnancy. IPs come to visit surrogates at hostel and bring food and goodies which make surrogate feels better during their pregnancy time. Some of the clinics insist that the IPs should be present for every clinic visit of the surrogates. They exchange phone numbers and are in communication. This gives a better feeling for surrogates. However in most of the cases that relationship seizes immediately after the delivery of the baby. Many of the IPs changed their phone numbers so that the surrogate won't be able to be in touch with them. Whereas in Mumbai, most of the clinics do not permit to build a relationship between IPs and surrogates, especially since the ambiguities about the legal status of commercial surrogacy began. This makes the surrogates more vulnerable during their pregnancy. ***To legalise the relationship between the IPs and surrogates, at least while signing the contract both the parties should meet. Clinics should take appropriate steps to build healthy relationship between IPs and surrogate and help them to continue the***

relationship. National Human Rights Commission should conduct consultations with IPs and IVF clinicians to develop guidelines for a better and healthy practice of commercial surrogacy in India.

Place of residence of surrogates

In Mumbai, most of the surrogates we interviewed had been living within the city for some time for their earning a living. They have their contacts, friends and networks within the city. They reach to the surrogacy arrangements through that network. That gives them a relative empowerment in dealing with the surrogacy arrangements. In Delhi most of the surrogates are not living in Delhi, but came to the city to do the surrogacy. Many of them are from rural villages of Uttar Pradesh and Bihar. They stay in surrogacy hostels during the entire time period of surrogacy. This category of migrant surrogates appeared more vulnerable than the native surrogates in the interactions with surrogacy agents and with the IVF clinics. The migrant surrogate requires an extra support system. ***Deliberations needed at local and national level to develop a better support system for migrant surrogates.***

Women as the Economic Anchors of the Family

Most of the women have the opinion that they would like to do surrogacy again, due to many financial needs in their respective lives. Those who do not wish to do it again, don't opt for it due to medical reasons from having a c-section or because they have already done with the financial needs so far. Almost all of them expressed that they would suggest this as an option to other women to make money to deal with their financial crisis. Only one woman expressed that she will neither suggest this to other women nor do it again herself, was an educated woman and from a better social background. The narratives suggested that there no end to the financial needs. Going through complex surrogacy cycles again will adversely impact the health status of women. The government should create employment opportunity to absorb surrogates to the formal workforce and help them to have a meaningful existence without continuing to do the surrogacy again and again. ***The financial requirements due to which the women opt surrogacy are primarily basic needs like better education of their children, housing, buying land and to meet the medical expenditure etc. The state's responsibility of universalisation of primary, secondary and higher secondary schooling, better housing for all, land redistribution and universalisation of healthcare***

should be prioritised. The rampant privatisation of healthcare education will further push the respondents of this study to do more vulnerable jobs to meet their everyday needs of life. All the concerned government departments should act in a synchronised way to address these needs.

Way forward and Best Practices

In the surrogacy practice, where multiple layers of exploitation exist, would it be possible to think about an ethical practice, supported by legal norms? Will these best practices be able to ensure a situation where minimal exploitation and maximum safeguard is ensured to the most vulnerable in the entire process of surrogacy which is surrogates?

- There should be a limit on the number of embryos that could be transferred during one ET session. It will help to avoid the process of foetal reduction in surrogacy, which in the Indian context might end up in sex selection. Take appropriate measures by NHRC with ICMR to address this issue.
- Make PCPNDT act applicable to foetal reductions of the surro- pregnancies.
- Surrogates should get a choice to decide whether to see the child or not. To avoid emotional trauma many of the hospitals do not allow surrogates to see the newborns. Most of the surrogates interviewed under this study also did not express their interest to see the babies. However the decision, whether to see the baby or not has to be taken by the surrogates.
- A proper system needs to be in place regarding the handing over of the baby.
- Regarding the number of children- surrogate has to get equal right to information at the moment of diagnosis about number of babies. Barring surrogates from knowing if it is twins or triplet and letting them to know just before delivery is injustice and it might develop anxiety and other physical and emotional issues. Many of the past surrogates under this study reported their own and their fellow surrogates experiences where they got to know the number of babies just before they go to the labour room.
- Surrogate's right to information about every single risk on their progress of pregnancy has to be ensured. The information about the medicines they get prescribed, each technological and medical process they undergo need to be explained properly in an understandable language.

- If it is more than one child, the surrogate should get additional compensation (Double/ triple) according to number of babies delivered.
- If there is a revert back of contract from IP, there should be a time line for that. (first trimester). All the surrogacy-pregnancy contracts we examined clearly give penalties for surrogates if they revoke the contract and there is no single mention of IPs reverting from the contract. There should be penalties for the IPs as well and there should be a time period prescribed since it has an impact on the stage of pregnancy of the surrogate. Since first trimester (12 weeks of pregnancy) is the time period prescribed for legal termination of pregnancy under Medical Termination of Pregnancy Act, 1971, the surro-pregnancy contract also should adhere to this time period.
- There should be a provision in the contract, conditions for IPs to revert contract, and there should be provisions for surrogates as well which gives conditions for reverting the contract.
- There should be a condition for surrogates to continue with the surrogacy, even if the IP reverts, if the surrogates wish to do so.
- Legal literacy programmes among surrogates to enhance their understanding about their rights and duties in a commercial surrogacy arrangement.
- Speed up the parliamentary process to bring a law in place to remove the ambiguities existing in the field.

Bibliography

Anderson, E. (1990). 'Is Women's Labor a Commodity?' *Philosophy and Public Affairs*, Vol.19, pp.71-92.

Anu, Kumar, P., Inder, D., Sharma N. (2015). Surrogacy and Women's Right to Health in India: Issues and Perspective, *Indian Journal of Public Health*, Vol. 57. Issue 2, pp. 65-70.

Arnold, D. (1993). Colonizing the body, State Medicine and Epidemic Disease in Nineteenth-Century India. University of California Press, California.

Arora, I. (2002). Wombs for Rent: Outsourcing Surrogacy to India, Prospects, *Journal of International Affairs at UCSD*. <http://prospectjournal.org/2012/01/10/wombs-for-rent-outsourcing-surrogacy-to-india-2/> accessed on 13.7.2015

Banerji, S. (2012). Emergence of the Surrogacy Industry. *Economic and Political Weekly*, Vol. XLVII, No. 11. pp. 27-29.

Beechey, V. (2013). Women and production: a critical analysis of some sociological theories of women's work. *Feminism and Materialism*, pp. 155-97.

Beneria, L. (1979).: Reproduction, production and the sexual division of labour. *Cambridge Journal of Economics*, pp. 203-225.

Beneria, L., & Sen, G. (1981). Accumulation, reproduction, and "women's role in economic development": Boserup revisited. *Signs*, pp.279-298.

Ber, R. (2000): Ethical issues in gestational surrogacy. *Theoretical Medicine and Bioethics*, 21(2), pp. 153-169.

Brahams, D. (1987). The hasty British ban on commercial surrogacy. *Hastings Center Report*, 17(1), pp.16-19.

Brown, J. K., O'Laughlin, B., Remy, D., Williams, J., & Young, S. (1974).: Engels revisited: Women, the organization of production, and private property. *Woman, Culture, and Society*, p. 207.

Cahn N. R., (2001). Children's Interests And Information Disclosure: Who Provided The Egg and Sperm? Or Mommy, Where (And Whom) Do I Come From? http://scholarship.law.gwu.edu/faculty_publications accessed on 12.7.2015

Centre for Social Research (2012). Surrogate motherhood ethical or Commercial, Mongraph, CSR New Delhi. Also available (without the year of publication) at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf> accessed on 5.7.2015

Cherry, A.L. (2014). The Rise of the Reproductive Brothel in the Global Economy: Some thought on reproductive tourism, Autonomy and Justice. *Global University of Pennsylvania, Journal of Law and Social Change*, Vol. 17(3). <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1170&context=jlasc> [file:///D:/Surrogacy/The%20Rise%20of%20the%20Reproductive%20Brothel%20in%20the%20Global%20Economy-%20Some.pdf](http://D:/Surrogacy/The%20Rise%20of%20the%20Reproductive%20Brothel%20in%20the%20Global%20Economy-%20Some.pdf) accessed on 7.7.2015.

Collett, J L. & Morrissey, C A., The Social Psychology of generosity: The state of current interdisciplinary research, Dept. of Sociology, Univ. of Notre Dame, 2007 https://generosityresearch.nd.edu/assets/17634/Social_psychology_of_generosity_final.pdf accessed on 16.11.2014

Corea, G. (1985). *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*, New York, Harper & Row.

David, J. (2012). The designer baby factory: Eggs from beautiful Eastern Europeans, sperm from wealthy Westerners and embryos implanted in desperate women. <http://www.dailymail.co.uk/news/article-2139708/The-designer-baby-factory-Eggs-beautiful-Eastern-Europeans-Sperm-wealthy-Westerners-And-embryos-implanted-desperate-women.html> accessed on 7.7.2015

Dolgin J.L, (1990). Status and Contract in Surrogate motherhood: An Illumination of the Surrogacy Debate. http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1418&context=faculty_scholarship

Donchin, A. (2010). Reproductive tourism and the quest for global gender justice. *Bioethics*, 24(7), pp.323-332

Drabiak, K., Wegner, C., Fredland, V., & Helft, P. R. (2007). Ethics, law, and commercial surrogacy: a call for uniformity. *The Journal of Law, Medicine & Ethics*, 35(2), pp. 300-309.

Ferguson, A. and Hennessy, R (2010). "Feminist Perspectives on Class and Work", *The Stanford Encyclopedia of Philosophy* (Winter 2010 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/win2010/entries/feminism-class/>. accessed on 8.10.2014

Field, M. (1990). *Surrogate Motherhood*, Cambridge: Harvard University Press.

Folbre, N. (1983). Of Patriarchy born: The political economy of fertility decisions. *Feminist Studies*, pp. 261-284.

Fromm, E (1961): The Nature of Man <https://www.marxists.org/archive/fromm/works/1961/man/ch04.htm> accessed on 8. 10. 2014

Fromm, E (1971). The revolution of Hope Towards a Humanized Technology, pp. 58-70, A Bantam Book/published by arrangements with Harper & Row Publishers,

Gangolli, L. V., Duggal, R., & Shukla, A. (2005). Review of health care in India, Mumbai, Cehat. <http://www.cehat.org/publications/PDF%20files/r51.pdf> accessed on 21.7.2015

Government of India (2009). Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and obligations of Parties to a Surrogacy, Report No. 228. GOI, New Delhi

Government of India (2010). The Assisted Reproductive Technologies Regulation Bill, Ministry of Health and Family Welfare and ICMR, New Delhi

Gupta, J.A. (2012). Reproductive Biocrossings: Indian Egg Donors and Surrogates in the Globalized Fertility market. *International Journal of Feminist Approaches to Bioethics*, Vol. 5(1): pp 25-51.

Hickel, H. (2014). A Short History of Neo-liberalism (and How We Can fix it) www.newleftproject.org/index.php/site/article_comments/a_short_history_of_neo-liberalism_and_how_we_can_fix_it accessed on 5.10.2014

Karkal, M. (1997). Surrogacy from a Feminist Perspective. *Indian Journal of Medical Ethics*, Vol. 5(4). <http://www.issueinmedicalethics.org>

Kollontai, A. (1984). Make way for the Winged Eros, in *Bolshavik Vision*, Ann Arbor Paperbacks, The University of Michigan Press, 1984, US http://books.google.co.in/books?id=7JeUwFST2e0C&pg=PA84&lpg=PA84&dq=kollontai+make+way+for+winged+eros&source=bl&ots=mvjD8QPGWs&sig=SgzEZowIdCYHS_11ytcyRXbYhb4&hl=en&sa=X&ei=blxsVIPxMYuVuQTrIDoCA&sqi=2&ved=0CE8Q6AEwCA#v=onepage&q=kollontai%20make%20way%20for%20winged%20eros&f=false accessed on 27.11.2014

Kumar, D. (2001). Social History of Medicine: Some Issues and Concerns, In Deepak Kumar (Ed.), *Disease & Medicine in India: A Historical Overview* (pp. ix-xxiii). New Delhi, Tulika Publication.

Mail Online 14.july 2015, The Baby Factory in a huge clinic in India, available on <http://www.dailymail.co.uk/news/article-2439977/The-baby-factory-In-huge-clinic-India-hundreds-women-paid-5-000-Western-couples-babies.html> accessed on 14 July 2015.

Majumdar, A. (2013). Transnational Surrogacy the 'Public' Selection of Selective Discourse. *Economic and Political Weekly*, 48(45-46), pp24-27.

Marx, K. (1844). Economic and Philosophic Manuscripts of 1844, Progress Publishers, Moscow, 1959 <http://www.marxists.org/archive/marx/works/1844/manuscripts/labour.htm> accessed on 15-11-2014

Miller, A. (1984). *Thou shalt not be aware: Society's betrayal of the child* Farrar, New York, Straus and Giroux.

Ministry of Women and Children, GOI, (2014): *Reproductive Tourism in India: An ethnographic study of Surrogacy in India*, Ministry of Women & Children, New Delhi. wcd.nic.in/research/jjnu2014.pdf accessed on 7.7.2015

Mohapatra, S. (2012). Stateless Babies and Adoption Scams: A bio-ethical Analysis of International Commercial Surrogacy, *Berkley Journal of International Law*, Vol.30, issue 2, p. 412. <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1420&context=bjil> accessed on 07.07.2015.

MOHFW (Ministry of Health & Family Welfare) & ICMR (Indian Council of Medical Research) (2005): *National Guidelines for Accreditation, Supervision and regulation of ART clinics in India*, New Delhi, ICMR & National Academy of Medical Sciences.

MOHFW & ICMR. (2010). *The Assisted Reproductive Technologies (Regulation) Bill – 2010*. New Delhi, MOHFW & ICMR.

Overall, C. (1987). *Ethics and Human Reproduction: A Feminist Analysis*, Boston: Allen and Unwin.

Pande , A., *Wombs in Labor, Transnational Commercial Surrogacy in India*, Columbia University press, 2014, NY.

Pande A. (2009). Not an 'Angel, not a 'Whore': Surrogates as Dirty Workers in India, *Indian Journal of Gender Studies*, Vol.16(2), pp.141-173.

Pande, A. (2010). 'Commercial Surrogacy in India: Manufacturing a perfect Mother-Worker'. *Journal of Women in Culture and Society*, Vol. 35(4) pp. 969-992.

Posner, R. (1992). *Sex and Reason*, Cambridge: Harvard University Press.

Prasad, N. P., & Raghavendra, P. (2012). Healthcare Models in the Era of Medical Neo-liberalism. *Economic & Political Weekly*, 47(43), 119.

Qadeer, I. (2001): Impact of Structural Adjustment Programme on Concepts in Public Health, in I. Qadeer, K. Sen and K.R. Nayar (eds) *Public Health and the Poverty of Reforms: The South Asian Predicament*, pp. 117-156, New Delhi, Sage Publication.

Qadeer, I. (2002). Primary Health Care: from Adjustments to Reform in K.Seeta Prabhu and R.Sudarshan, *Reforming India's Social Sector: Poverty, Nutrition, Health and Gender*, pp 221-231, New Delhi, Social Science Press.

Qadeer, I. (2009). 'Political and Economic Determinants of health: The Case of India' in Harold J. Cook, Sanjoy Bhattacharya, Anne Hardy (eds), *History of the Social Determinants of Health Global Histories Contemporary Debates*, Hyderabad, Orient Black Swan Private Limited.

Qadeer, I. (2009a). Social and Ethical Basis of legislation for Surrogacy: Need for Debate, *Indian Journal for Medical Ethics*, VolVI, No.1, pp 28-31

----- (2010). Benefits and threats of international trade in health: A case of surrogacy in India. *Global Social Policy*, 10(3), 303-305.

Gaikwad, R. (2014). The Hindu, 28th Sept. 2014, <http://www.thehindu.com/sunday-anchor/they-need-the-baby-she-needs-the-money/article6453307>. accessed on 17.7.2014

Rao, M. (2012). Why All Non-Altruistic Surrogacy Should Be Banned, *Economic and Political Weekly*, Vol - XLVII No. 21,

Raymond, J. G. (1990). Reproductive gifts and gift giving: the altruistic woman. *Hastings Center Report*, 20(6), pp.7-11.

Rimm, J. (2009). Booming Baby Business: Regulating Commercial Surrogacy in India, <http://scholarship.law.upenn.edu/jil/vol30/iss4/1> accessed on 7.7.2015

Rothman, B. K., *Recreating Motherhood: Ideology and Technology in a Patriarchal Society*. W.W. Norton, NY.

Ruddrappa, S. (2010). Making India the “mother destination”: Outsourcing labor to Indian surrogates, in, *Gender and Sexuality in the Workplace*, (edit.) Christine L. Williams, Kirsten Dellinger, (Research in the Sociology of Work, Volume 20) Emerald Group Publishing Limited, pp.253 – 285

SAMA Resource group for Women & Health. (2006): *ART Assistance in Reproduction or Subjugation*, Sama Resource Group for Women & Health, New Delhi.

SAMA Resource group for Women & Health. (2012). “Birthing Market-A study on commercial surrogacy”, sama Resource group for Women & Health, New Delhi

Shalev, C. (1989). *Birth Power: The Case for Surrogacy*, New Haven, Yale University Press.

Shenone, K. (2012). Health Care a Public or Private Good? <http://ewp.rpi.edu/hartford/~stoddj/BE/Schenone.pdf> accessed on 5.7.2015

Sly, K. M. (1982). Baby-Sitting Consideration: Surrogate Mother's Right to Rent Her Womb for a Fee. *Gonz. L. Rev.*, 18, 539.

Spar, D. (2005). For love and money: the political economy of commercial surrogacy. *Review of International Political Economy*, 12(2), pp.287-309

Stark ,B. (2015). Transnational surrogacy and International human rights law, available on hrcolumbia.org/gender/papers/stark_transnational_surrogacy.doc accessed on 7.7.2015,

- Stuhmcke, A. (2011). The criminal act of commercial surrogacy in Australia: a call for review. *Journal of law and medicine*, 18(3), 601.
- Stumpf, A. E. (1986): Redefining mother: A legal matrix for new Reproductive Technologies. *Yale Law Journal*, 187-208.
- Sunstein, C. R. (1992): Neutrality in constitutional law (with special reference to pornography, abortion, and surrogacy). *Columbia Law Review*, 1-52.
- Sydie, R A. (1994): Natural Women and Cultured Men A feminist Perspective on Sociological Theories, pp. 118-119, Vancouver, UBC Press..
- UNESCO (2005): Towards Knowledge Societies, Published by UNESCO, Paris, <http://unesdoc.unesco.org/images/0014/001418/141843e.pdf>., accessed on 8.10.2014.
- Unnithan, M. (2013). Thinking through Surrogacy in India: Reflection on Relational Consent and rights of infertile women. *Journal of Legal Anthropology*, Vol. 1. No.3, pp.287-313,
- Vidlička, S.R., Hršić D., Kirin Z. (2012). Bioethical and legal challenges of Surrogate motherhood in the Republic of Croatia⁴
- Warnock, M. (1985). A Question of Life: The Warnock Report on Human Fertilisation and Embryology, Oxford: Basil Blackwell.
- WHO (1996). 'New Challenge for Public health': Reports of Inter-regional Meetings, Nos. 27-30, 1995. Geneva: WHO. (WHO, HRP 96.4)
- Wilkinson, S. (2003). The exploitation argument against commercial surrogacy. *Bioethics*, 17(2), pp.169-187.
- Zyl, L.V. & Niekerk, A.V. (2009). Interpretations, perspectives and intentions in Surrogate Motherhood. *Journal of Medical Ethics*, <http://jme.bmj.com/content/26/5/404.full>, accessed on 8.10.2014.

ANNEXURE 1

Ethical Guidelines for Field Researchers for the Study to Understand Legal Rights and Challenges of Surrogates from Delhi and Mumbai by Council for Social Development, New Delhi (Sponsored by National Human Rights Commission)

Research is a systematic, socially organised quest for new and better insight. Scientific knowledge is of value in and of itself. Many research results can also be useful for improving social conditions. The ultimate responsibility of research is to seek the truth. Accordingly, scientific integrity is a key aspect of research ethics.

Research ethics refers to a complex set of values, standards and institutional schemes that help constitute and regulate scientific activity. Ultimately, research ethics is a codification of ethics of science in practice. In other words, it is based on general ethics of science, just as general ethics is based on commonsense morality.

Practical suggestions: The purpose of this set of guidelines is to provide a positively oriented set of practical suggestions for maintaining integrity in research. Not only does the ethical conduct of science satisfy a scientific moral code, it also leads to better scientific results because the adherence to ethical research practices leads to more attention to the details of scientific research, including qualitative analysis and quantitative and statistical techniques, and to more thoughtful collaboration among investigators. Also, the credibility of science with the general public depends on the maintenance of the highest ethical standards in research. Observance of these guidelines will help an investigator avoid departures from accepted ethical research practice and prevent those most serious deviations that constitute research misconduct.

Research misconduct is defined as fabrication, falsification, or plagiarism, including misrepresentation of credentials, in proposing, performing, or reviewing research, or in reporting research results.

These guidelines can be used as a common repository of generally accepted practice for experienced researchers and as an orientation to those beginning research careers.

Integrity of Data: Fabrication and falsification of research results are serious forms of misconduct. It is a primary responsibility of a researcher to avoid either a false statement or an omission that distorts the research record. A researcher must not report anticipated

research results that had not yet been observed at the time of submission of the report. In order to preserve accurate documentation of observed facts with which later reports or conclusions can be compared, every researcher has an obligation to maintain a clear and complete record of data acquired.

Meticulous record-keeping is a sound scientific practice which provides an accurate contemporaneous account of observations that become a permanent reference for the researcher, who otherwise might not remember several weeks, months later exactly what had been observed or what methods had been used. An accurate record also serves others who may want to replicate the observation or to apply a method to other situations.

Research integrity requires not only that reported conclusions are based on accurately recorded data or observations, but that all relevant observations are reported. It is considered a breach of research integrity to fail to report data that contradict or merely fail to support the reported conclusions, including the purposeful withholding of information about confounding factors. A large background of negative results must be reported. Any intentional or reckless disregard for the truth in reporting observations may be considered to be an act of research misconduct.

Ownership of and Access to Data: Research data obtained in the studies performed at the *Council for Social Development, New Delhi* are not the property of the researcher who generated or observed them or even of the principal investigator of the research group. They belong to the CSD, which can be held accountable for the integrity of the data even if the researchers have left the council.

Storage and Retention of Data: Data should be stored securely for at least three years after completion of the project, submission of the final report to a sponsoring agency, or publication of the research, whichever comes last. Some agencies that sponsor research may specify a longer period for which data must be retained.

CSD will follow six key ethical principles in social science research:

1. Research should be designed, reviewed and undertaken to ensure integrity, quality and transparency.

2. Research staff and participants must normally be informed fully about the purpose, methods and intended possible uses of the research, what their participation in the research entails and what risks, if any, are involved.
3. The confidentiality of information supplied by research participants and the anonymity of respondents must be respected.
4. Research participants must take part voluntarily, free from any coercion.
5. Harm to research participants must be avoided in all instances.
6. The independence of research must be clear, and any conflicts of interest or partiality must be made explicit.

Annexure II: Interview Schedules

Interview Guide for Surrogates

- Name:
 - Age:
 - Marital Status:
 - Education:
 - Occupation:
 - Income:
 - No. of members in the family:
 - Annual income of family:
 - No. of children (if any)
 - Religion:
 - Caste:
 - Residence:
 - Stage in the surrogacy process:
 - Have you been a surrogate before?
-
- When did you first hear about the practice of surrogacy? How? What were your initial reactions?
-
- Why did you decide to become a surrogate? What are some of the factors that influenced your decision?
-
- How did you become a part of the surrogacy arrangement? Have you registered with an ART bank or a surrogacy agency?
-
- What expectations did you have while entering into this arrangement?
-
- What information were you given about the process and your rights/benefits? What were your sources for this information?

- Are you supervised during pregnancy? Describe your living conditions.
- What do your family members/neighbourhood/community think about your decision?
- Have you interacted with the commissioning couple? If yes, describe your interaction(s) and how you felt.
- What information have you been given about the commissioning couple?
- How does it feel to be a surrogate?
- What changes would this bring to your life/ has it changed your life in any way?
- Describe your interactions with the doctors, agents and lawyers (if any).
- How do you view your relationship with:
 - the baby
 - the commissioning couple
 - doctors
 - agents
 - other surrogates
- What would be the amount of payment you would receive? Describe the expenses covered. Are there any expenses that are not covered?
- Have you received any legal aid and counselling during the process?

- What were the problems you faced during the process?

Interview Guide for Art Banks/Agencies

ART bank/Agency Particulars:

- Name of the ART bank/agency:
- Name of the In-Charge:
- Address:
- Designation of the respondent:
- Duration for which the ART bank/agency has been working in the field of surrogacy:
- Services that the ART bank/agency offers:
- Ownership structure of the agency:

Network:

- Which are the clinics/hospitals/doctors that the ART bank/agency works with?
- Are there legal firms/lawyers that the ART bank/agency works with?

The Process of Surrogacy:

- Who are the different players in a surrogacy arrangement?
- What is the role of the agency in a surrogacy arrangement?
- Describe the interactions between various players (doctors/lawyers/surrogate/in the surrogacy arrangement. Does the ART bank/agency play any role in facilitating these interactions?
- How do these different players come into contact with the ART bank/agency?
- What is the step by step process followed by the ART bank/agency in the process of recruiting surrogates?
- What is usually the profile of commissioning couples?
- Where do surrogates live during pregnancy? Does the ART bank/agency have hostels for surrogates?

- What are the facilities provided in the surrogate's place of stay during pregnancy?
- Please describe the process of supervision and monitoring of surrogates during pregnancy.
- How much does a surrogacy treatment cost? Approximately, what is the remuneration received by:
 - doctors/IVF clinics
 - lawyers
 - ART banks/ agencies
 - Surrogates
- How are these payments negotiated?
- Do the surrogates and the commissioning couples receive any counseling by the ART bank/agency?
- What support/guidance does the ART bank/agency provide to the commissioning couple and the surrogate?
- How many surrogacy cases do you mediate on an average in a year?

Legal aspects:

- Who prepares surro-pregnancy contracts? What role does the ART bank/agency play in the process of preparing and signing of surrogacy contracts?
- Usually, what are the terms of a surrogacy contract?
- Is there any legal assistance provided to the commissioning couple and surrogate? If yes, by whom?
- Are the surrogates provided with legal and psychological counseling before signing the surro-pregnancy agreements?
- What is the kind of information given to the surrogates before entering into the agreement and during the process of surrogacy? By whom?
- Have there been any incidents where surrogate mothers intended to revoke the agreement? If so, what have been the reasons for that?
- Are there any protocols/guidelines/standards which are followed by the ART bank/agency?

Surrogates:

- What is the general profile of the surrogates? Which parts of the country are they usually from?
- Are there any specific requirements/qualifications needed to be a surrogate? If so, what are they?
- Are there specific demands from the commissioning couple in selecting surrogates?
- How is the surrogacy arrangement explained to a first time surrogate? By whom?
- What are the interactions which the ART bank/agency has with the surrogates' families?
- In case the commissioning couple or surrogate have any questions or need any information, who is their point of contact?

Perception on Commercial Surrogacy and the Change in the Law:

- Why is there such a huge demand for commercial surrogacy?
- What are the problems faced by the ART bank/agency?
- Do you know about the proposed change in the law that seeks banning of commercial surrogacy?
- From where did you get to know about it?
- What do you know about the proposed changes?
- Do you think it will impact your business?
- If yes, how?
- What do you think can be the reason of such a change in policy?
- Do you think the policy change is necessary?
- Yes/No, Why?

Interview Guide for the Surrogacy Clinics

Clinic/Doctor Particulars:

- Name of the Clinic:
- Name of the in-Charge:
- Address:
- Designation of the respondent:
- Duration for which the clinic has been working in the field of surrogacy:

- Services that the clinic offers:
- Nature of the clinic(single owner/ management/ownership pattern)
- Does the clinic have ICMR accreditation?

Networks:

- Are there other ART banks or agencies that this clinic works with?
- Are there any legal firms that this clinic works with?
- Are there any overseas ART banks that this clinic works with (to help international clients)?
- Are there any medical tourism agencies that the clinic works with?

The Process of Surrogacy:

- When is the option to use surrogacy prescribed?
- Are there any specific requirements/qualifications needed to be a surrogate? If so, what are they?
- What is usually the profile of commissioning couples?
- How much does a surrogacy treatment cost?
- How much compensation does a surrogate normally receive?
- How many surrogacy contracts does the clinic get in a year?
- What role does the clinic play in the entire process of surrogacy?
- What is the step by step process followed by the clinic in the process of a surrogacy treatment?
- Does the clinic provide legal assistance to commissioning couple?
- Who prepares surro-pregnancy contracts?
- Does the clinic provide counseling service to commissioning couple?
- What protocols/guidelines/standards are followed by the clinic?

Surrogates:

- How are surrogate mothers recruited?
- Does the clinic recruit them directly or does it work with other organizations or agencies that recruit them?

- What is the general profile of the surrogates?
- Are there specific demands from the commissioning couple in selecting surrogates?
- What is the step by step selection process of recruiting surrogates?
- Is there any kind of supervisory treatment provided to the surrogate during the pregnancy?
- Are the surrogates provided with legal and psychological counselling before signing surro-pregnancy agreements?
- What is the kind of information given to the surrogates before entering into the agreement and during the process of surrogacy?
- Have there been any incidents where surrogate mothers intended to revoke the agreement? If so, what have been the reasons for that?

Perception on Surrogacy and the Change in the Law:

- Why is there such a huge demand for surrogacy?
- What are the problems faced by the clinic while providing surrogacy services?
- Do you know about the proposed change in the law that seeks banning of commercial surrogacy?
- From where did you get to know about it?
- What do you know about the proposed changes?
- Do you think it will impact the business of fertility clinics?
- If yes, how?
- What do you think can be the reason of such a change in policy?
- Do you think the policy change is necessary?
- Yes/No, Why?

