

Reproduction, Body and Agency:

A Study of Surrogacy in India

Thesis submitted to Jawaharlal Nehru University

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DOCTOR OF PHILOSOPHY

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DECLARATION

I hereby declare that the thesis titled, “**Reproduction, Body and Agency: A Study of Surrogacy in India**” submitted by me to the Centre For Political Studies, School of Social Sciences, Jawaharlal Nehru University, New Delhi, for the award of the degree of **Doctor Of Philosophy** is my original work. The thesis has not been submitted in part or in full for this or any other degree to this University or any other University.

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CERTIFICATE

We recommend that this thesis be placed before examiners for the award of the degree of Doctor of Philosophy in this University.

PROF. SHEFALI JHA

(Chairperson)

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(Supervisor)

You were the great mountain that majestically rose in my heart and showed me how I might get home when everything else fell apart!

In life I Loved you **Papa** and today I do so even more!

You were the deep music that magically and melodiously told me all is right when I would awaken frantically with the terrors of the night!

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This one is dedicated to you from your ever little girl.

I love you!

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ABBREVIATIONS

ART'S: Assisted Reproductive Technologies

AI: Artificial Insemination

AID: Artificial Insemination by Donor

CSR: Center for Social Research

GIFT: Gamete Intra Fallopian Transfer

ICMR: Indian Council of Medical Research

IP: Intended Parents

IUI: Intra Uterine Insemination

IVF: In Vitro Fertilization

IVF-Et: In Vitro Fertilization and Embryo Transfer

MCI: Medical Council of India

PCOD: Poly Cystic Ovarine Disease

WTO: World Trade Organization

ZIFT: Zygote Intra-Fallopian Transfer

GLOSSARY

- **Altruistic Surrogacy:** Altruistic surrogacy refers to those surrogacy agreements where the surrogate does not receive monetary compensation. In most altruistic surrogacy agreements, the surrogate is a close relation to the intended parents (family member/close friend).
- **Artificial Insemination:** It is the procedure of transferring semen into the reproductive system of a woman. This technique comprises of artificial insemination with husband's (AIH) or with donor sperm (AID).
- **Assisted Reproductive Technologies (ART's):** Any medical technique that attempts to obtain a pregnancy by means other than by coitus is defined as ART. In other words, these techniques manipulate the sperm and oocyte outside the body, and the gametes or embryos are transferred into the uterus.
- **Commercial Surrogacy:** Commercial surrogacy refers to any surrogacy arrangement in which the surrogate mother is compensated for her services beyond reimbursement of medical expenses.
- **Egg Donor:** A woman who undergoes surgical process in order to have her eggs removed. The fertilized eggs are later implanted in another woman's uterus.
- **Embryo:** Embryo is defined as the fertilized ovum that has begun cellular division and continued development up to the blastocyst stage till the end of eight weeks.
- **Embryo Crypto-preservation:** Procedure in which embryos are preserved by freezing.
- **Embryo Transfer:** the transfer of an embryo from an in vitro culture into the uterus.
- **Gametes:** In a mature sex cell, the ovum of the female or the spermatozoon of the male.
- **Gamete Donation:** Gamete Donation is a process by which a person voluntarily offers his or her gametes for the process of procreation.
- **Gestational Surrogacy:** Gestational surrogacy is an arrangement in which a woman carries and delivers a baby for another person or couple.
- **Intrauterine Insemination (IUI):** Placement of washed sperm into the uterus.
- **IVF-ET (In vitro Fertilization-Embryo Transfer):** it is the fertilization of an ovum outside the body and the transfer of the fertilized ovum to the uterus of a woman.

- **Oocyte Retrieval:** Process of removal of the egg by the technique of aspiration from the ovaries.
- **Polycystic Ovarian Syndrome:** Development of multiple cysts in the ovaries due to arrested follicular growth.
- **Sperm Count:** It is the measurement of number of sperms in a sample
- **Sperm Donor:** It refers to a man who donates his sperm to a single woman couple so that they can procreate. Usually he signs away all paternal rights to the child born as a result of sperms donated.
- **Surrogacy:** It is an arrangement in which the woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she was acting as a surrogate.
- **Traditional Surrogacy:** Traditional surrogacy is in which the surrogate either undergoes artificial insemination or IVF with sperm from the male or from a sperm donor. The surrogate herself provides the eggs and is therefore genetically related to the child.
- **Uterus:** it is the female reproductive organ that carries and nurtures a foetus until birth.
- **ZIFT:** Zygote Intra Fallopian Tube Transfer or ZIFT refers to the placement of the zygote in to the fallopian tubes.
- **Zygote:** Fertilized egg prior to first cell division is called zygote.

Chapter 1

Chapter 1: INTRODUCTION

1.1 Introducing the Theme

Globalisation as a process has become the dominant theme around which a host of socio-economic, politico-legal and cultural phenomena across disciplinary boundaries have been contextualized. According to David Held and Anthony McGrew, "*globalization denotes the expanding scale, growing magnitude, speeding up and deepening impact of interregional flows and patterns of social interaction.*"¹ With its technological advancements that have facilitated the forging of a 'complex web of interconnections', there has been an unprecedented level of interaction between individuals and nations.² These innovations in science and technology which while on the one hand have compressed spatial and temporal dimensions have not necessarily meant a 'flattening of the world' for all.³ Alternatively globalization in the capitalist era in many respects is exclusionary in nature thereby bringing forth various kinds of contestations.⁴

While there is a broad consensus that it is a multi-dimensional process with social, cultural, political and economic aspects, *economic globalization* is considered to be at the forefront of the entire phenomenon.⁵ One of the most prominent manifestations of *economic globalization* is how we understand *work* and *value*. Academic analysis over the years has highlighted that while *economic globalization* has led to creation of a level-playing field⁶, it does have a differential impact on various social groups with respect to class, caste, race and gender. It is thus that feminists have emphasized on understanding this process as gendered and one that has a differential impact on men and women. While it has led to *feminisation of labor* there has been an increasing *flexibilisation* and *casualisation* of the workforce⁷ which indicates the structural

¹ David Held & Anthony McGrew, *The Global Transformations Reader: An Introduction to the Globalization Debate*: (Cambridge, Polity Press, 2000).

² Andrew Heywood, *Key Concepts in Politics*: (London, Palgrave Macmillan, 2000).

³ Rohini Benschman, 'Globalisation, Women and Work: What Are We Talking About?,' *Economic and Political Weekly* 39, No. 10 (2004): 1030-1034.

⁴ David Held & Anthony McGrew, *The Global Transformations Reader: An Introduction to the Globalization Debate*: (Cambridge, Polity Press, 2000).

⁵ V. Spike Peterson, *A Critical Rewriting of Global Political Economy: Integrating Reproductive, Productive and Virtual Economies*: (London, Routledge, 2003).

⁶ Thomas L. Friedman, *The World is Flat 3.0*: (New York, Picador, 2007).

⁷ Martha Gimenez, *Globalization and Third World Women: Exploitation, Coping and Resistance*: (Surrey and Burlington, Ashgate, 2009).

vulnerabilities that women face and how they put up with deplorable working conditions for lack of options.⁸ Thus the contemporary global political economy is marked by various manifestations of marginalisations and vulnerabilities, often leaving individuals with constrained choices between the bad and the worse. The most marginalized individuals and communities often negotiate between ways of ensuring a lesser degree of exploitation for themselves since ways of radically changing and escaping conditions of exploitation are not immediately conceivable.

This research would attempt to engage with these issues by specifically looking at women's work when it earns remuneration. Work and employment as history testifies have been a significant theme in political theory. Employment is considered to be quintessential for reducing poverty and in thus alleviating the status of women so that they can emerge as active agents in a position to claim their rights and liberties. Employment gives one the right to spend as one chooses as also live a life of self-respect. All of this euphoria surrounding employment and its effects on women however can only be considered positive when it improves their well bring and in turn gives impetus to their capabilities. On the contrary, in contexts where it is characterized by agony, it holds the possibility of making their conditions even more deplorable.

Liberal political theorists like Harold Laski had propounded that whatever man mixes his labour with becomes rightfully his. However this was implicitly true only of man. Women's labour has historically been 'economically and socially undervalued' as compared to that of men's. This has been facilitated by the presence of a patriarchal *public-private dichotomy* that while ensures that men occupy the 'public', relegates women to the 'private' sphere thereby ensuring a *sexual division of labour*. Men were occupied with 'production', while women were limited to 'reproduction' functions. According to Carole Pateman the justification of this division finds exemplification in the portrayal of the economically dependent woman as being the ideal for all respectable classes of society."⁹

⁸ Mukul Mukherjee, 'Women and Work in the Shadow of Globalisation', *Indian Journal of Gender Studies* 11, No. 3 (2004): 275-290.

⁹ Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory*: (Stanford, Stanford University Press, 1989).

As undervalued as it has been, women's labour in the 'private sphere' involved performing biological as well as social reproduction functions, which have been imperative for the unhampered functioning of the 'public sphere'. According to **Parrenas**, reproductive labour is "*the labour needed to sustain the productive labour force*".¹⁰ Women's reproductive labour is most critical due to its function of 'socialization.'¹¹ **V. Spike Peterson** elaborates this aspect as "*Childrearing is economically important because it involves socially necessary labor to produce human beings who are then able to work.*"¹²

However, this *public-private dichotomy* has not been a uniform construction. For instance, in the post-industrial Revolution era, the need for more obedient working hands saw the emergence of women and children as a prized 'supplementary labour force' that could be paid less and made to work more. While women's joining the *remunerated labour* force on the one hand may be seen as liberating from being relegated to the *private sphere*, on the other hand this inclusion into the 'public' and the 'economic' was not on equal terms with men and was certainly not a part of any emancipatory agenda. Earning remuneration did not radically change women's status in the 'private' household where the man still remained the primary bread-winner, and the woman's income only supplementary. Even the economic sphere was informed with this understanding and hence the prevalence of differential wages for men and women. Moreover, women were seen as a dispensable 'reserve army of labour' that can be put in service and pushed back when the need be to suit capitalist interests.¹³ Women even then struggled not only for citizenship rights but also for other crucial rights like "labour rights, the right to work, equal remuneration and childcare facilities amongst other so as to enable women to work."¹⁴

A related concern regarding women's remunerative work in the 'public' has been the inadequate attention to their labour in the 'private'. Women, who hold remunerative work outside the home, often shoulder a double-burden, that of coming back from work and then performing housework

¹⁰ Rhacel Salazar Parreñas, 'Migrant Filipina Domestic Workers and the International Division of Reproductive Labor,' *Gender & Society* 14, No. 4 (2000): 560-80.

¹¹ V. Spike Peterson, *A Critical Rewriting of Global Political Economy: Integrating Reproductive, Productive and Virtual Economies*: (London, Routledge, 2003).

¹² V.S. Peterson, *A critical rewriting of global political economy: Integrating reproductive, productive and virtual economies*: (2003), 81.

¹³ Jane Freedman, *Feminism*: (New Delhi, Viva Books, 2002).

¹⁴ Ibid

too.¹⁵ Interestingly even when women hold remunerative work, the hierarchical distinction between *production* and *reproduction* does not change.

Clearly, even when women have entered the public realm with remunerated work, oppression has continued to remain a characteristic feature. This beckons us to critically look at what is it that they are doing as remunerated work. If one begins to understand the domains of women's work it becomes evident that on the one end of the spectrum are jobs that are essentially male-bastions, for instance factory work, wherein women are expected to perform tasks which were traditionally male centric, and on the other hand, women are performing tasks like care-giving for a wage which have been socio-economically devalued for centuries when performed within the household. Thus, in the 'public' women are faced with two ironical choices: either to emulate masculinity or to denaturalize their social reproduction functions by performing it for non-relatives for a wage. This provides the framework to contextualize the provision of *surrogacy* services as it problematizes an understanding of remuneration for natural functions performed by women when denaturalized.

Surrogacy can be defined as an arrangement under which, "a woman bears a child for someone else who is incapable of carrying the child herself."¹⁶ In the absence of technology, the process would involve sexual intercourse between the intending father and the surrogate and hence be bound by the stigma and moral apprehensions. However, with development in medical technology, these stigmas have begun to erode, thereby making the industry of reproductive technologies "a 25,000 crore rupee pot of gold" in India itself.¹⁷ With growth in medical technology, newer ways have emerged to deal with all kinds of fertility issues. For instance, in cases where "women cannot conceive an embryo but have healthy ovaries, *in vitro fertilization (IVF)* is considered to be the most viable way of ensuring that she is genetically related to the child."¹⁸ Similarly, yet another woman in certain situations can donate ova which in turn is

¹⁵ Mariarosa Dalla Costa & Selma James, *The Power of Women and the Subversion of the Community*: (Bristol, Falling Wall Press, 1972).

¹⁶ Tung Le Xuan, *Ethical and Legal Aspects of Surrogacy – Recommendations for the Regulation of Surrogacy in Vietnam*: (Thesis for University of Southampton, June 2016).

¹⁷ Law Commission of India, 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy Contract', Report No. 228, New Delhi, 2009.

¹⁸ Sharyn Roach Anleu, 'Surrogacy: For Love But Not for Money?' *Gender & Society* 6, no. 1 (March 1992): 30-48.

fertilized outside the womb.¹⁹ Another instance where the technique of, “*Embryo transfer (ET)* can be used is when a woman is incapable or reluctant to undergo a pregnancy but healthy enough to conceive. In this situation, the conceptus is flushed from her uterus and consequently transferred to the surrogate mother.”²⁰ Sharyn Anleu elaborates on this in the following words, “*The reverse can also occur-the surrogate conceives and the embryo is transferred to the commissioning woman.*”²¹ It is this that makes Susan Markens to argue that,

*“usually, it is assumed that a child's genetic, birth, legal, and social mothers are the same person, but when surrogacy involves in vitro fertilization a child can have four mothers: different women can provide the ovum, gestate the embryo and give birth, be defined in law as having maternity rights and obligations, and provide parenting.”*²²

According to a recent report in leading national daily, *The Hindustan Times*, the ‘industry of reproductive outsourcing’, referring to commercial gestational surrogacy in India, is “estimated to be worth over [rupees] 2000 crores.”²³ In economics literature, an ‘industry’ has been defined as one, “*which consists of all businesses which operate processes of a sufficiently similar kind and possessing sufficiently similar backgrounds of experience and knowledge so that each of them could produce the particular commodity under consideration.*”²⁴ In consonance with both these definitions,²⁵ Assisted Reproductive Technologies and surrogacy may be characterized as ‘industry’ as ART clinics and medical tourism companies involved in creating their clients ‘biologically own’ children operate in fairly similar manners in terms of technical knowledge and operational factors. Besides, the scale of commercial transaction involved in the process qualifies its characterization as ‘business.’

¹⁹ Under such a situation, the woman acting as the surrogate carries the embryo till birth thereby renting her uterus to the intending couple.

²⁰ Sharyn Roach Anleu, ‘Surrogacy: For Love But Not for Money?’ *Gender & Society* 6, no. 1 (March 1992): 30-48.

²¹ *Ibid*

²² Susan Markens, *Surrogate Motherhood and the Politics of Reproduction*: (Berkeley, Los Angeles, University of California Press, 2007).

²³ Namita Kohli, ‘Moms on the Market,’ *The Hindustan Times*, 13th March, 2011.

²⁴ John Nightingale, ‘On the Definition of ‘Industry’ and ‘Market’,’ *The Journal of Industrial Economics* 27, No. 1 (1978): 31-40.

²⁵ Assisted Reproductive Technologies is a term used to collectively refer to those technologies that have come to artificially assist the reproductive process.

The deepening of the roots of the surrogacy industry in India has impinged upon us the pressing need to deliberate upon the growing commercialization of women's reproductive labour. Deliberation on the question of women's bodies becoming objects in the market has led to the voicing of opposing perspectives on surrogacy. On the one hand, are the proponents of surrogacy who consider it as being beneficial for all considering that the intending couple get a 'biological' child and the woman working as the surrogate gets financial rewards. On the other hand, are the opponents who refute the myth of 'voluntary consent' in surrogacy contracts, and in fact call it exploitative. Of their many contentions, is the fact that the booming surrogacy industry cashes on 'infertility', thereby further essentialising biological motherhood both of which are at odds with the feminist agenda. Secondly, it is argued that while the surrogate is the key factor in this process, as she stands at the bottom of the hierarchy. Infact in most instances, she is unaware of the enormous health hazards involved in such a process. Thirdly, for a strand of feminists this phenomenon represents an instance of *commodification and objectification* of women. Further, the limitations encountered by the Indian state are evident from even a cursory overview of the laws that exist on surrogacy. It is argued that most of these laws are biased against the surrogate. It represents a legal approach towards surrogacy which is *prohibition of commercial surrogacy* but *legalizing altruistic surrogacy*.

This discussion becomes much more pressing with the *Surrogacy (Regulation) Bill 2016* being first passed by the cabinet and more recently by the Lok Sabha²⁶ by a voice vote.²⁷ This bill seeks to regulate the 'surrogacy industry' in India which has emerged as the biggest hub of *surrogacy* across the globe. With the intent to uphold the rights of the woman acting as the surrogate and of the child born out of a surrogacy arrangement, this bill once passed by the parliament would ban all forms of commercial surrogacy arrangements.²⁸ It would only allow altruistic arrangements to married couples of five years with written proof of infertility from a doctor. Under this new arrangement, only 'very close' relatives can act as a surrogate.²⁹ This law also bans surrogacy for live in and homosexual couples as also for singles, Non Resident Indians

²⁶ Lok Sabha or the House of People is the lower house of the Indian Parliament.

²⁷ Derived from the Latin word, Viva voce, voice vote is a mechanism that is used in the legislative assembly to take the mandate on a motion by responding orally. Also known as *avaji matdan*, it entails parliamentarians saying a yes or a no orally on a particular bill.

²⁸ Sushmi Dey, 'Lok Sabha clears Bill banning Commercial Surrogacy', *The Times of India*, 20th December, 2019.

²⁹ Vaibhav Tiwari, 'Surrogacy Regulation Bill Passed In Lok Sabha: 10 Points' *NDTV India*, 19th December, 2018.

(NRI), People of Indian Origin (PIO) and foreigners.³⁰ It also imposes a cap on the number of surrogacies a woman can take up to just one. This bill has been both welcomed and criticized. The bill has been opposed fundamentally premised on the argument that in the particular context of India, prohibition would make matters even worse as the industry would begin to operate in a more concealed manner which would increase women's exploitation even more. It is also argued that it takes away from women their right to make choices and thus denies to them financial independence. On the other hand are the proponents who adopt the stand that there are various bioethical concerns with surrogacy that need to be done away with. They are critical of the industry for reducing women to commodities in the market. With this bill coming in with so many divisions, the debates and questions on surrogacy acquire mammoth proportion.

Within this context, one can argue that *surrogacy* in India is characterized by confusion, divided opinion and dilemma. While on the one hand with increasing number of celebrities taking to surrogacy has meant its growing popularity on the other hand, reports of much tougher surrogacy laws make the reproductive option seem impossible. *Surrogacy* succinctly helps us to understand women's relation to 'waged employment.' In this milieu, this research seeks to understand surrogacy and its implications for how we understand 'women's paid reproductive work'. Looking at this issue also presents an opportunity to examine whether commercial surrogacy compromises or augments women's agency. The research will begin by exploring the meaning and types of surrogacy arrangements, the booming assistance in reproductive technology mechanisms, and the ethics involved in surrogacy each of which merits research and analysis. The research will further extrapolate the theoretical underpinnings of a feminist understanding of the issue along with the Marxist contention with regards to surrogacy.

To substantiate the theoretical discussions with empiricism, field research is undertaken so as to bring forth the perspective of key stakeholders in the phenomenon of surrogacy. Herein the voices of the surrogates, intending parents, legal attorneys and medical practitioners are put forth. An attempt has been made to understand surrogacy from the perspective of the child so born. The contestations in feminist literature are also evident in laws on surrogacy across the

³⁰ Express Web Desk, 'What is the Surrogacy Regulation Bill 2016', *The Indian Express*, 19th December, 2018.

globe. This has been dealt with at length in the penultimate chapter with particular focus on the legal framework on surrogacy in India. Having surveyed the context, the analytical focus and the field research of, this work in the concluding section will conclude with key observations that reflect on the literature.

Before discussing the structure of this work, it is important to delve into the title of my work. *Reproduction, Body and Agency: A Study of Surrogacy in India*. Surrogacy is intrinsically tied to ideas of Reproduction, Body and Agency all of which, at once point towards the lived experiences of women. 'Reproduction' conventionally is seen as a duty that women are born with and is hence associated with the ethos of love, care and nurture. When this reproductive function of women which is premised on the gestational labour of their 'bodies' comes out in the domain of market, and is transacted for in exchange for money, it raises various issues like empowerment, victimhood, commodification and liberation amongst others. In the current work, I attempt at understanding if reproduction done by women commercially, grants them 'agency.' If yes, I seek to understand what is the nature of this agency and its effects on women's empowerment? While my work focuses on the commercial aspect of surrogacy in much depth, the altruistic arrangement of surrogacy provides the lens to understand commercial surrogacy in all its dimensions. Thus as my title evocates, this work explores women's agency through commercial reproduction or surrogacy.

1.2 Hypothesis

I began this research with the following hypothesis:

In the context of economic gains, surrogacy is a form of voluntary and mutually advantageous enterprise. Depending on the regulatory framework under which it operates, surrogacy as remunerative work can result in empowerment for women working as surrogates.

1.3 Research Questions/Problems

The major research questions that are sought to be explored in this research are enumerated below:

- In context of surrogacy, does this *remunerative work* enable women working as surrogates to assert their rights? If yes does this enable them to create empowering spaces for themselves and how?
- Have developments in *Assisted Reproductive Technologies* or *ART's* been liberating for women or has it led to their further oppression? How does an investigation of surrogacy as a *waged employment* for women contribute to the existing feminist research on *ART's*?
- What are the *legal frameworks* governing surrogacy arrangements in India? Do laws/contracts uphold the rights of women working as surrogates or does it merely represent the interests of the better placed actors in the surrogacy industry?
- Considering that surrogacy juxtaposes empowerment with oppression, what is the most viable way of dealing with it: abolition or regulation through contracts?

1.4 Objectives of the Study

Surrogacy as a form of *remunerative work* raises various crucial concerns as far as women's lives and physiological and psychological health is concerned. This is juxtaposed by a large number of women opting for surrogacy and infact campaigning for it to be recognized as work. In this perspective, one of the objectives of this study is to understand if surrogacy with all its ramifications enables women to carve out empowering avenues for themselves.

Further, the purpose of this work also is to explore what the developments in assisted reproductive technologies have meant to for 'biological reproduction.' Considering that with the spurt in reproductive technologies, there has been a consequent 'medicalisation of the society' due to which more and more individuals are taking to medical intervention in their bodies, my attempt is to understand if assistance in reproductive technologies have been *empowering* or have they furthered the cause of patriarchy and capitalism thereby reducing women to merely

‘experimental sites.’ My endeavor is to analyze if these technologies increase choices for women or do they curb them further. Towards this end, my work primarily focuses on how these technologies have intervened into the lives of the *surrogate* and the *intending couple*.

Surrogacy raises a lot of ‘ethical dilemmas’, from the standpoint of the surrogates, the intending mother as also the child so born of the procedure. I thereby try to highlight them succinctly. In so doing, I particularly discuss the ethical dilemmas that emerge from the perspective of the child, a vantage point that often goes unnoticed.

Finally, there has been evident an unsettling predicament on part of the state to formulate a *legal framework* that can address surrogacy in all its dimensions. My attempt thus is to study and categorize laws on surrogacy that exist across the globe. In so doing, my focus shall be to critically study surrogacy laws in India. Towards the end I would attempt at exploring if laws can emerge as a potent instrument of empowerment. If yes, what should be the nature of such a law will be at the center of my analysis.

1.5 Methodological Reflections

The research methodology is two pronged. The theoretical dimensions have been dealt by relying on rich literature that has developed over the years. What became most evident while undertaking literature review was that the biggest obstacle in understanding surrogacy is the lack of empirical studies. It is thus that field research became a significant part of my research design. To substantiate this, qualitative empirical research has been undertaken.

I began by finding out areas that have a vibrant surrogacy industry. Secondary research brought forth *Anand* in Gujarat as my first area of investigation.³¹ Anand often considered synonymous with Amul is hailed as the ‘Milk Capital of India’. Another identity that is related to Anand but is often obscure is that, it has emerged as a prosperous hub of the ‘surrogacy industry’ in India that has for long attracted couples from across the world battling infertility. Functioning under the

³¹ Anand is located around 80km of Ahmedabad in the state of Gujarat. It is popularly known as the center of the white revolution that took place in the 1960’s.

aegis of *Sat Kaival Hospital* and *Akanksha Fertility Center*, it runs under the supervision and control of *Dr. Nayana Patel* and produces approximately thirty children every month.³² From featuring in the Oprah Winfrey Show to making India one of the most favored surrogacy destinations of the world, Dr. Patel runs a well-established ‘business of outsourcing babies’. It has two campuses, one at Naya Padkar Lane and a bigger one at Lambvel, Akanksha Fertility Center. The latter was housing nearly fifty five surrogates during the period of my research.

Having briefly understood the operation of a surrogacy hub in an otherwise remote area of Anand, I decided to select my second field area in a different setting. Therefore I began looking for a more urban setting: Mumbai, Bangalore, Gurugram emerged as possible options. Due to greater access and feasibility, I narrowed down on Gurugram as my second field area.³³ This is a crucial area of study for a number of reasons. To begin with there is a large availability of potential surrogates in and around the city. For instance a large number of surrogates come from amongst the poor *Gurugram* immigrants residing in the area around Kapashera.³⁴ Further, located very close to the national capital, there is greater access and connectivity to Gurugram. This is also due to presence and further development of world class medical infrastructure in the National Capital Region.

In Gurugram, *Vansh Surrogacy Consultants* became my specific point of investigation. It is a company that works in the sector of assisting in reproduction to issueless couples, same sex couples as also single parents. Vansh Services do not only provide surrogates but also render other services like providing egg and sperm donors to various private hospitals and clinics in Delhi and adjoining areas. It is one of the first complete surrogacy clinics in the city and is owned by *Bajrang Singh*.

Anand and Gurugram are home to thriving surrogacy centers and thus share a lot in common like they attract clients both from India and abroad; have a lot of functional similarities; have a widespread network of agents, counselors, doctors; follow typical surrogacy procedures to name

³² Nayana Patel is a fertility specialist based in Anand, Gujarat who is known to have established India as a surrogacy hub.

³³ Gurugram is a city located in the state of Haryana and is at the border of Delhi-Haryana border.

³⁴ Kapashera is a place located in the south west region of Delhi.

a few. However they are also different in a number of ways. While Akanksha Fertility Center at Anand is a multi-specialty hospital with a three stories building where all the procedures ranging from initial counseling of the surrogate to the eventual birth of the baby takes place, Vansh at Gurugram is much more segregated. While the clinic is at one place, the surrogates live at another and the final birth of the baby takes place at yet another place. Further, while the surrogates at Akanksha live at the same place and are hence given all medical facilities at the same station, the surrogates at Vansh are taken to nearby clinic whenever needed. Also while at Anand, principally surrogacy related services are provided, at Gurugram based Vansh affiliated services like egg and sperm donation also take place. Interestingly, Akanksha is one of the first and very few milk banks in the country. A closer analysis also made it evident to me that while Akanksha is more systematic, hygienic and thus provides much more qualitative facilities to the surrogate and their families, Vansh has a more concealed way of working.

I began with a pilot study in between April 2017 to June 2017 followed by another one between July 2018 and October 2018. My sample from Anand and Gurugram consists of a total of seventy four surrogates; twelve men who were husbands of these women working as surrogates; forty people from the medical team including doctors, counselors, nurses, ward boys, cleaners, watchmen, ambulance staff, auto drivers, nearby vendors all of which work close work with the surrogate and constantly engage with them; six agents working with the clinics and in charge of recruiting the surrogates; thirty intended parents including same sex couples, married heterosexual couples, single parents, NRI couples as also foreigners who took to surrogacy in India before 2014 as also five legal experts who closely work with framing of the contract signed by the two parties.

The method has been a combination of structured questionnaires to ascertain the characteristics like caste, religion, place of origin, marital status, number of children, number of times surrogacy done, money received amongst others and in depth interviews to know about what brings them to surrogacy; how do they look at their work; if it has brought changes to their lives; what have they done with the money received; does their family, friends, neighbors know about it; if yes, have they accepted it; if they are in touch with the baby and the intending party; what do they prefer altruistic form of surrogacy or commercial or both and how do they want the law to be.

In depth interviews, case studies and oral narratives were conducted with specific pre-defined subjects namely, women into the business, the family members of the surrogates, the intended parents, healthcare professionals who have spearheaded the spread of surrogacy, as also legal attorneys working to formulate contracts. Since some of my respondents particularly Intended Parents were foreigners who got surrogacy done before 2014 and others were NRI couples, interviews were conducted over telephone, emails and messages. I also attempted at reading through the written accounts given by them to the hospitals so as to understand surrogacy from their perspective. Almost all of my respondents agreed to exchange their views on condition of anonymity and hence the names mentioned have been changed to keep their identity hidden.

The technique has been of *Snowball Sampling* method.³⁵ This empirical study immensely helped me in unearthing the gap that exists between theory and praxis. My methodology being a combination of *structured questionnaires* and *oral unstructured interviews*, this mixture of two was helpful to my design for it helped me to not only bring out the crucial details but also to understand in depth how this form of work operates. These will be outlined at considerable length in the chapters that follow. Interviews with medical professionals and legal attorneys are limited to the two hospitals where primary data was collected. However, it is crucial to point out that the data is not too vast to make generalizations on the basis of it.

Apart from field investigation, for the empirical data I would also rely on secondary data using resources such as project reports, surveys, and government documents, testimonies of women in the professions published as novels and autobiographies, documentaries and the like.

³⁵ Snowball sampling is a non-probability sampling technique under which one respondent helps in recruiting another one who is their acquaintance. It is in this manner that the sample group expands.

1.6 Chapterisation

My thesis consists of seven chapters, the brief outline of which has been discussed here:

Chapter 1: Introduction:

In the first introductory chapter, I outline the causes that can be attributed to the rise of *surrogacy* practices in contemporary times. I trace it to women's relation to *waged employment* and how surrogacy as a particular form of *feminized labor* complicates the scenario. This chapter briefly outlines the various facets of surrogacy thereby seeking to outline the inherent harms that surrogacy carries with itself. I go on to outline how the coming in of newer developments in science and technology has altered conventional ways of looking at reproduction, motherhood and family. In so doing, this work at length discusses the feminisation of labor and the various issues around it. I particularly focus on the ramifications it has on women working as surrogates. This chapter contextualizes the ongoing debate on surrogacy in the particular framework of my hypothesis and research questions as have been outlined above. In this chapter I also outline at length the methodology undertaken in the research along with the objectives of my work.

Chapter 2: The Industry of the Disposable Mothers: Meaning, Mechanisms, and Ethics in Surrogacy-

In the second chapter, I grapple with the meaning of *surrogacy*, the *pull and push* factors, various kinds of *surrogacy arrangements* in vogue, the meaning of *Assisted Reproductive Technologies* (ART), and the question of *ethics* involved in surrogacy. The chapter begins by highlighting the various ruptures in the surrogacy story all of which point towards the fact that any account on surrogacy is neither static nor uniform. It is rather heterogeneous based on the subjective experiences of each of its actors. Herein, I also try to point out that surrogacy in many ways erodes the myth of women being sisters considering that on the one hand are women of relative power and resources who use another woman from a relatively poor economic background.

This chapter deals with the Assisted Reproductive Technologies or ART's as they are popularly known as, at extensive length since they have facilitated the use of more advanced techniques in reproductive procedures. A careful study of ART's is crucial considering that they have obliterated the difference between various aspects of an individual's body that can be sold in the market. In this context, I seek to explore if it leads to *alienation*³⁶ of women's surplus reproductive labor thereby benefitting someone at the cost of their own degradation. Herein, I contextualize ART's within the framework of 'enclosures' in England that had led to accentuation of the capitalist mode of production.³⁷ It is herein that I outline the feminist debates of women's degradation and exploitation which are vehement in arguing that women's bodies under surrogacy have become 'experimental sites.' Borrowing from Martha Gimenez who sees surrogacy as being a link between patriarchy and capitalism³⁸, it is argued that surrogacy has ensured that women are never liberated from the 'tyranny of reproduction.' It has in fact created a reproductive imperative that essentializes motherhood as being mandatory for all women. They therefore argue against surrogacy considering that surrogacy makes available women's bodies in the market for male use for profit making.

Arguing from the other end are the advocates of surrogacy who put forth a benevolent account of ART's considering that it has helped couples deal with infertility. Further they believe that surrogacy is an *empowering enterprise* for it has enabled women to use their bodies for their own advantage. They also argue that it is an 'occupational choice' women make and hence should not be considered coercion. Liberals believe that it has been emancipatory considering that it has placed men and women on the same platform since '*objectification*'³⁹ no longer is a characteristic feature of women's lives alone. These debates have been outlined at length.

³⁶ Alienation according to Marxism is the process by which an individual is made to part with the products of her own labor.

³⁷ Enclosures refer to pieces of land which were encircled and closed in a manner that they became the exclusive property of the rich and elite thereby subjecting the common people to be merely their property. Being devoid of rights over property, they were forced to take up jobs in the factories which according to Marx explains the beginnings of capitalism.

³⁸ M. E. Gimenez, *Marx, Women, and Capitalist Social Reproduction*: (The Netherlands, Leiden, 2018).

³⁹ Objectification is a central tenet of feminist critique of patriarchy. It is understood in sexual terms and is used to imply the reduction of women and their subsequent equation to merely objects.

In this chapter I have also tried to outline the various types of surrogacy arrangements like partial, donor sperm, donor embryo, traditional surrogacy, gestational surrogacy, altruistic surrogacy, commercial surrogacy.⁴⁰ In so doing, I briefly lay out the historical trajectory of surrogacy with particular reference to India. Understanding the history of surrogacy enables us to highlight that there has been a historical emphasis on child bearing and that surrogacy or outsourcing of pregnancy is not a new phenomenon.

Another area dealt with at length is the question of ‘ethics in surrogacy’ so as to understand if there is anything intrinsically immoral about surrogacy. This becomes crucial considering the feminist viewpoint that compares *surrogacy* to *prostitution*. Mary Warnock⁴¹ and Andrea Dworkin⁴² amongst others believe that motherhood under surrogacy is emerging as a kind of female prostitution that is being assisted by doctors who have reduced women’s bodies to sites of experimentation. It is equally significant to note that under surrogacy, women sell their reproductive capacities in the same manner as prostitutes sell their sexual services. Alternatively, as vagina is sold in prostitution, uterus is sold in surrogacy. Further similar to prostitution, there is no emotional or personal relationship in surrogacy. It is in fact marked by ‘material exchanges.’ This view is refuted by others who believe that all of the above are in fact characteristics of all transactions where physical labor is traded for mutual compensation.

Ethical issues have also been flagged from the vantage point of the child and also from the perspective of the intending mother. There are explicit concerns as to whether the child will be taken care of just as its own parents would have. Early separation from the birthing mother is argued to have serious ramifications for the child as it would be denied the right to breast feeding. From the perspective of the intending mother, there are concerns if she has any power at all in deciding about surrogacy arrangements and its very nature. It is also believed that in taking to surrogacy, the intending mother is made to realize that she is infertile at every step. All these and more lead to upholding of patriarchal stereotypes that the feminist movement has for so long tried to do away with.

⁴⁰ All of these have been defined and discussed at length in the subsequent chapters of this research.

⁴¹ Mary Warnock, *A Question of Life: the Warnock Report on Human Fertilization and Embryology*: (Oxford and New York, Basil Blackwell, 1985).

⁴² Andrea Dworkin, *Right-Wing Women: The Politics of Domesticated Females*: (London, The Women's Press, 1983).

Having introduced the various seminal facets of surrogacy, the next chapter focuses on the contending debates around surrogacy.

Chapter 3: Contending Debates on Surrogacy and its Various Facets: Interpreting Motherhood in Context of Money and Market-

Reproduction is conventionally understood as a duty that women are born with and hence it is fundamental to their existence. Being natural to their existence, it is arguably the most selfless form of love and care that they are expected to give. What happens when the duty is out sourced? Does this outsourcing involve reducing women to mere commodities and is this exploitative? Further, is there a definitive caste class analysis dimension to surrogacy? It is in trying to answer these very relevant questions, that this chapter undertakes a detailed analysis of the four areas that are significant in understanding the operation of surrogacy. These are: (i) Feminist Contention to Women's Right to Choice; (ii) Surrogacy, Market and Commodification of a Good and Marx's Conception of Estranged Labor and Surrogacy; (iii) Caste, Class, Region Analysis of Surrogacy.

The first part of the chapter begins by outlining at considerable length the *feminist contention with surrogacy*. On the one hand of the ideological spectrum are the radicals like Carole Pateman⁴³, Catherine Mackinnon⁴⁴ and Christine Overall⁴⁵ amongst many others are explicit in arguing that surrogacy stands at the bottom of the hierarchy of male supremacy. They premise their arguments on the ground that any form of 'sexual labor' is in itself harmful for it is deeply embedded in objectification and commodification⁴⁶. This act of reducing women to mere objects and commodities is extremely harmful for women irrespective of the conditions under which they work. It is further argued that contrary to the celebratory account of surrogacy that labels it as emancipatory, it is in fact an attempt to control women's freedom and lives and to reduce their

⁴³ Carole Pateman, *The Sexual Contract*: (Blackwell, 1988).

⁴⁴ Catherine Mackinnon, *Issues in Political Theory*: (Oxford University Press, 2012).

⁴⁵ Christine Overall, *Ethics and human Reproduction: A feminist analysis*: (Winchester: Allen and Unwin, 1987).

⁴⁶ In the feminist terminology, commodification explains the strategic reduction of women's bodies as commodities in the market thereby adding to their exploitation.

bodies to commodities. It is argued that as is evident under surrogacy, women working as surrogates are left to live in isolation completely at the disposal of the intending couple who hence become their masters. These surrogates lose all the rights to freedom over their actions and are forced to blindly follow the rules made for them by another man. It is this that bids the feminists to argue that calling surrogacy a form of work is highly misleading.

This view is contested by *liberal proponents of surrogacy* who defend surrogacy principally because it is a choice women make. They discern that not acknowledging their freedom to makes choices would then defeat the very agenda of the feminist movement. They further argue that surrogacy has in fact broken the age long understanding of biological parenting which is a big step towards ‘de-constructing patriarchal notions and internalizations.’⁴⁷ Surrogacy has found largest proponents in the defenders of agency and autonomy. They say that surrogacy has enabled us to create spaces which are liberating and is hence a productive and constructive endeavor.⁴⁸

Surrogacy as a form of labor is deeply embedded in societal settings for it is functional at the *intersection of gender, caste and class*. This chapter thus goes on to highlight the Marxist perspective on surrogacy. Herein, I highlight the key contentions raised by the Marxist scholars. This is because of the fact that the reproductive labor of women is being stratified along racial and class lines cannot be undermined. Amrita Bannerjee terms this as ‘transnational reproductive caste system’ which she believes upholds global inequities and hence cannot be overlooked. In understanding the various dimensions of surrogacy, my research also attempts to establish the fact that caste and class are crucial makers that significantly shape surrogacy arrangements.⁴⁹ As concealed and invisible as they are, the gender, class and caste discrimination is deeply embedded in surrogacy arrangements. These three crucial markers in fact combine to create newer forms and means of exploitation.

⁴⁷ Elly Teman, ‘The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood,’ *Social Science and Medicine* 67, No. 7 (2008): 1104–1112.

⁴⁸ Brenda Baker, ‘A Case for Permitting Altruistic Surrogacy,’ *Hypatia* 11, No. 2 (Spring, 1996): 34–48.

⁴⁹ Amrita Banerjee, ‘Race and a Transnational Reproductive Caste System: Indian Transnational Surrogacy,’ *Hypatia* 29, No. 1 (2014): 113–128.

In countries like India that are obsessed with ‘ascriptive ties’⁵⁰, there is a clear preference for women of upper castes so as to keep the family lineage clean. Caste is a crucial though implicit marker when selecting the surrogate. To substantiate, while thirty one of my respondents did not disclose their caste, from those that did the largest belonged to the Brahman community.⁵¹ It also became evident from interactions that women of the upper castes are in a better situation to negotiate money and other others.

Having laid out the broad contours on surrogacy, the next chapter of this current work attempts to understand surrogacy as it exists on the field.

Chapter 4: Surrogacy: Story of Happy Breeders or Hapless Victims?: Contours from the Field-

The theoretical debates, contestations outlined in the earlier chapters clearly points to the fact that surrogacy is an intriguing form of work that calls for careful analysis. The overwhelming observation that stems from the literature review, points towards the detrimental impact that’s surrogacy has on women. This theoretical position however lies in contradiction with the fact that a large number of women are taking to surrogacy and are also demanding its recognition as a form of work. With this convening of opposing standpoints, it thus seemed pertinent to understand what women in the field working as surrogates feel about their work. Thus substantiating the theoretical postulations with insights from the field became imperative. This chapter hence is entirely based on *field work* conducted with surrogates in Anand (Gujarat) and Gurugram (Haryana) and healthcare professionals at Anand and Gurugram. The reason for clubbing the two together in this chapter is that these two actors work very closely in the surrogacy process. Other documented sources are also used as secondary data. This is crucial for more often than not the debates have systematically excluded the voices of women who work as surrogates.

⁵⁰ It refers to an identity that is not determined by achievement and is on the contrary based on birth conditions.

⁵¹ This data is based on the field research conducted as a part of this research project.

In this chapter I have tried to bring out data pertaining to the age of surrogates so as to ascertain if the minimum age standards are adhered to. As will be explained at length in the chapter, the respondents during my field investigation were adult women who were between the age of 24 years and 35 years. There was also an attempt to understand if the marital status of women had anything to do with their opting for surrogacy. Contrary to my primary assumption, most surrogates were married and their husbands had supported them in choosing this line of work. The reason behind this support however is a matter of contestation. Interestingly, one of the essential qualifying conditions for women who want to work as surrogates was that they should at least have a child of their own. This was crucial because, in a market driven industry that seeks to maximize its profits and minimize its losses, the agencies do not wish to invest their resources on women who are not favorably disposed in terms of their reproductive health. My interactions at the field also ascertained to me the fact that surrogacy industry indeed is a classic example of excessive demand and coequal supply.

In this chapter I have also attempted at outlining the procedure that underlines the surrogacy process. Herein I discuss at length the entire process beginning with the agents who mark out the possible future surrogates to their counseling, followed by their induction and medical examinations. The most crucial stage is matching *Intending Party*⁵² with the surrogate after which the procedure of renting the womb begins. This chapter also discusses the procedure that takes place once the child is born both medically and legally. Once the pregnancy is confirmed the woman who henceforth is the surrogate, is made to part from her family and hence live inside the clinic till she delivers the child. These very crucial aspects have been outlined so as to bring forth the psychological effects that the process has on surrogate women.

Having spelt out the procedure at considerable length, the chapter discusses the religion, caste, domicile and educational status of women. There emerges a clear majority of illiterate or partially literate women who take to surrogacy so as to earn money. This points towards the paucity of meaningful choices due to which women who are not qualified enough to take to the

⁵² It is used in this work to refer to the couple who hires a woman as their surrogate. In the vocabulary of surrogacy and more so in that of the surrogates, they are known as the intending party.

job market are forced to take to non-standard employments.⁵³ In this chapter, I attempt to outline the relations that these women working as surrogates form with one another and what it holds for them.

One of the very crucial aspects is the economic aspect that surrogacy entails. To understand these various dimensions ranging from how much money the surrogate gets to what does she do with the money received, have been dealt with in this segment of my research. It is herein that this work highlights how women are taking to surrogate pregnancies again and again in quest for money and how this has a bearing on their mental, physical and emotional well-being. These very little details about the lives of the surrogate have been tackled with so as to understand how these women look at their work and has it meant empowerment for them in any way possible. On this note, I have also tried to gauge if these women working as surrogates understand the difference between various forms of surrogacy that are in vogue. The objective is to understand if money is the only driving force that pushes women to take to surrogacy. Not surprisingly, it is indeed money that pulls them towards renting out their wombs. Majority of the respondents out rightly reject the idea of willingly doing surrogacy without money. Alternatively, altruistic form of surrogacy clearly had no buyers. This is a crucial point to take note of particularly in context of the government's bid to regulate altruistic arrangements while outlawing commercial surrogacy.

Having flagged these serious issues, this chapter goes on to also put forth accounts of women working as surrogates who have borne the pain of giving up the child as also rejoiced the material rewards they received in this transaction. Their accounts are a telling story of the gaps that are bound to essentially exist in any universal account of surrogacy. While majority of my respondents had a happy account to share, some of them pointed towards the darker side of the industry.

The next part of this chapter goes on to understand the surrogacy process and the pervasive surrogacy industry from the position of the medical professionals who are the most pertinent line

⁵³ Alternatively known as vagrant work, peripheral work, non-standard work or disposable work, they are different from standard forms of full time continuous work that is performed in relatively concealed conditions.

of link in the surrogacy chain. Hailing their way as a 'win all' situation for all, this section of the work focuses to bring out why the medical professionals demand the normalization of the surrogacy process. To them, exploitation and commodification are all misnomers that have been falsely created. Herein attempt has also been made to put forth their perspective on the proposed law that intends to outlaw commercial surrogacy arrangements and highly regulate the altruistic forms of surrogacy. The loud call for abolition has been dealt with the response from the medical representatives who believe that instead of abolition, the need is for regulation.

In this chapter thus I have sought to study surrogacy from the perspective of the sellers of the womb. In this next section, I attempt at looking at it from the perspective of the intending parents and the legal attorneys who create and regulate the demand for surrogacy.

Chapter 5: Demystifying the Various Dimensions of Surrogacy: Implications for Intended Parents, Children and Legal Attorneys-

Having discussed the operation of surrogacy from the standpoint of the surrogate and the medical professionals, it seemed imperative to understand what makes surrogacy such a popular choice that more and more women are willing to become surrogates and further an increasing number of clinics providing surrogacy facilities are coming up. Having dealt with the supply side, it became quintessential to understand the demand for surrogacy. Thus this chapter seeks to comprehend surrogacy from the outlook of the intending parents as they are popularly known as in the surrogacy industry. Yet another actor who has emerged as a key factor in the surrogacy arrangements nowadays is the lawyer who frames out the terms of the agreement. Finally, the most significant entity in the surrogacy story is the child itself. However not much is spoken about the child born out of surrogacy despite the fact that the entire industry revolves around it. All of these actors are dealt with in this chapter by carefully analyzing what surrogacy holds for each of them.

The first section of the chapter outlines the surrogacy process from the standpoint of the intended or the commissioning parent. Intended couples can be single men and women, same sex couples; heterosexual couples dealing with infertility. In this section I put forth the journey of these

couples or individuals before they take to surrogacy. This journey for heterosexual couples begins with trying to conceive naturally failing which they undergo the painful procedure of IVF. When nothing works, the two options available are adoption and surrogacy. Considering the undying urge to have a child of their own blood and flesh, adoption is never a favored option. For those who can afford the expenses in surrogacy, take to it as their most preferential choice. The same holds true for single parents or same sex couples for whom, adoption is a much more difficult and risky process. This has become even more pronounced with the coming in of newer technologies that have reduced the pain and have increased the success ratio manifold times. This section of the chapter outlines why they choose surrogacy.

Having outlined this, the chapter goes on to put forth the surrogacy process of the commissioning parents from making critical choices with regards to what form of surrogacy they prefer to choosing an agency and finally finding a surrogate. Henceforth they become the ‘party’ in the surrogacy story. Once the pairing is done, they sign up a contract that spells out the payment terms along with other crucial guidelines which they have to abide by. This section also deals with surrogacy vis-a-vis the LGBT Community.⁵⁴ The debate centers on the contention of the community over being excluded from the legitimate right to resort to surrogacy and to a patriarchal and homophobic understanding of parental love.

In this context, references from the field are explained in considerable detail. Herein the age, caste, religion, domicile of the intending couple are put forth so as to see if there is any link between these crucial markers. Interestingly, as it becomes evident from the field data, a large number of them are either NRI couples or foreigners who took to surrogacy. The data points towards the fact that India has become a preferred destination for surrogacy across the globe. Another point that is explained in detail is the apprehensions of the commissioning couples with regards to interacting with their surrogate during the pregnancy period and their hesitations in keeping in touch with their surrogate after the child is born. All of these help us to understand the surrogacy industry in its totality.

⁵⁴ Being used since the 1990’s, LGBT refers to people belonging to the Lesbian, Gay, Bisexual and Transgender community.

The next section of the chapter discusses the increasingly important role that the attorneys have come to play in the surrogacy process. Considering that both the surrogate woman and the intending parents are investing in this process, they witness serious concerns with regards to the surety of the process. For this some form of agreement with legal binding becomes significant. It is herein that the role of attorney's usher in. They are solely responsible for framing out the details of the agreement and giving it a legal shape. In case of any party going back on its consent, this legal document can act as a testimony in a court of law as has been evident in a lot of cases worldwide like Baby M case.⁵⁵ Discussing their role thus was important to understand the surrogacy procedure.

Lastly, this chapter seeks to highlight an often overlooked theme, that of the child born out the agreement. This section hence deals with what surrogacy holds for the child more so considering that her or his consent is never taken and can never be taken when making such contracts. In this background, my work attempts at outlining whether there are any emotional, physical and psychological ramifications for the child inherent in the surrogacy procedure. Herein arguments have been borrowed from Richard Posner⁵⁶, Margaret Radin⁵⁷, Melinda Roberts⁵⁸ amongst others. Thus examining surrogacy from the perspective of the child's rights has been of much significance to this work. Finally this chapter goes on to outline the positives and negatives that are evident in surrogacy so as to have a balanced perspective on its relevance in contemporary times.

Having understood surrogacy from the theoretical and empirical perspectives, there emerged a contradiction. While on the one hand there are pressing concerns with regards to surrogacy and its effects on the actors particularly the surrogates, on the other hand there is an evident desire on part of the surrogate and the intending couple to have surrogacy arrangements considering that it fulfilled their desires. Positing these two strands together in context of my hypothesis, my research focused on understanding if there was a way to reach a common ground. My work thus

⁵⁵ Baby M is a famous case that took place in 1986 with regards to the legal parentage of a baby born out of the surrogacy arrangement between the Sterns and Whitehead.

⁵⁶ Richard A. Posner, 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood,' *Journal of Contemporary Health Law and Policy* 5, No. 21 (1989): 3.

⁵⁷ Margaret Radin, 'Market-Inalienability,' *Harvard Law Review* 100, No. 8 (1987): 1849-1937.

⁵⁸ Melinda Roberts, 'Good Intentions and a Great Divide: Having Babies by Intending Them,' *Law and Philosophy* 12, No. 3 (1993): 287-317.

attempted to analyze if the legal framework of the state was a viable answer. Herein I would like to argue that while my work does not wish to be too optimistic about the possibility of a state formulated law, it does wish to press the point that state formulated laws are the only instrument with the possibility of a universal implementation. The next chapter thus focuses on studying the efficacy of law with regards to surrogacy. My attempt is to understand if well framed and judiciously implemented laws can make surrogacy a viable option.

Chapter 6: Surrogacy, Law and Contract: Legal Recourse to Surrogacy in India-

In the discussion undertaken in the above chapters, the attempt was to understand what surrogacy is, the various debates and contestations on surrogacy; the ethics of surrogacy and most significantly the voices of all stakeholders. The sense that emerges from the above discussion is that while surrogacy has positively impacted the lives of both, the surrogate and the intending couple, this is not without flaws.

What divides academia and women in the field also divides the way laws across the globe look at surrogacy. This becomes much more nuanced when we see the increasing number of countries outlawing surrogacy. It is in this context that it is imperative to study the *potential of law*, more so in context of a ‘non-standard work’ form, surrogacy. Do laws eliminate the harm inbuilt in surrogacy or do they only forward the cause of the powerful parties in the arrangement? This analysis becomes even more relevant considering that while on the one hand there is globally a wave of ‘medicalization of reproductive processes’, it is far from being standardized or uniform. This becomes even starker in the wake of the absence of a legal framework. To make matters worse, of the laws that do exist, either they are highly inadequate or gravely biased. It is in this context that this chapter focuses on studying the legal issues that significantly impinge any debate on surrogacy.

This chapter begins by discussing the potential of laws and the *efficacy of contracts*. It goes on to examine the surrogacy laws as they exist across the world. In so doing it delineates countries on the basis of their outlook to surrogacy. While some countries draw out a distinction between altruistic and commercial arrangements and hence outlaw one while regulating the other, other

countries have imposed a blanket ban on all forms of surrogacy. There are yet other countries which have allowed surrogacy. This differentiation bids us to understand why do laws worldwide have such a sense of dilemma while looking at surrogacy? My attempt in undertaking this analysis is to try and understand why are increasing number of countries outlawing it despite the fact that more and more women are favoring it as a form of work they wish to take to. Is there something fundamentally wrong with surrogacy as argued by feminists that even law does not wish to consider surrogacy as a form of work that can be called legitimate?

In the second section of this chapter I attempt at recasting the debate in context of surrogacy related regulations in India with particular focus on Surrogacy Regulation Bill 2016 recently passed by the Cabinet and the Lok Sabha which proposes to ban commercial surrogacy and regulate altruistic surrogacy.

The third section critically studies these laws so as to highlight the gaps in the vocabulary of law that are detrimental to both the surrogate and the Intending Parent while leaving the medical agencies completely free from all regulations. I particularly study the Indian Council of Medical Research Guidelines; Baby Manji and the Intervention by the Judiciary; the Draft ART (Regulation) Bill 2008; the Draft ART (Regulation) Bill 2010; the Draft ART (Regulation) Bill 2013; the Draft ART (Regulation) Bill 2016.⁵⁹

It has been evident from an analysis of these laws that they have not been able to guarantee fundamental rights like those of fair remuneration, good medical facilities and unionization amongst others. Further, all of these laws seem to be divorced from the Indian social reality and hence are inadequate. These laws also violate fundamental provisions of the Indian constitution, the careful study to all of this then become the subject matter of the current chapter.

The next section of the chapter goes on to understand what could be the best way to deal with surrogacy: *abolition* or *legalisation/contractualisation*? This debate becomes immensely relevant in the contemporary times in the wake of emergence of neo liberalism which has brought back

⁵⁹ Mehak Paliwal & Deepanshi Mehrotra, 'Surrogate Motherhood: Rights and Legal implications,' *Pragyaan: Journal of Law* 7, No. 1 (2017).

the debate on the relevance of contracts in a big way. Contracts have been variously viewed. On the one hand are the liberals who call for state regulation and on the other hand are the neo liberals who argue for complete elimination of the state. Liberals in making a strong case for laws believe that no contract can exist in vacuum. The need is for a state directed law within which contracts between the surrogate woman and the intending party can be chalked out. This view is however refuted by feminists who see no potential in a contract considering that it goes on to establish a form of ‘fraternal patriarchy’. However this view is not shared by the likes of Nivedita Menon and Susan Moller Okin who amongst others believe in the empowering potential of a contract. It is in this context that this work bids to understand if a contract or a law can be effectively used to eliminate the harm in surrogacy and thereby make it truly empowering.

Chapter 7: Conclusion

In the concluding chapter, I attempt at re-visiting my hypothesis and research questions in context of the discussions undertaken in the earlier chapters.

1.7 Relevance of the Research

Surrogacy is a personification of a ‘form of feminized labor’ that juxtaposes concepts of *reproduction, body and agency*. With varying voices put forth by radicals and liberals, growing technological interventions in women’s bodies, shift in notions of sexuality and family, it is imperative to revisit the question of *women’s relation to particular form of waged labor namely surrogacy*. This shall enable us to probe into the question of when should women be seen as agents making meaningful choices and when as victims in quest of protection.

These contending issues become more crucial in the wake of the limited range of economic opportunities available to women. Within this scenario, surrogacy in recent times has become at the center of debate and deliberations. It impinges upon us the question, can surrogacy be seen as voluntary in nature; if yes, should it be considered a concealed altruistic familial arrangement or should it be accepted as a commercial work women are engaged in; if so, can they be better

regulated rather than prohibited; the juxtaposition of ideas of money, mother and market also call for an analysis of whether technological developments are oppressive or emancipatory? These innumerable issues have broadened the horizon of debates on surrogacy thereby transcending the conventional focus on pull and push factors.

Surrogacy raises not only critical issues in the realm of academia, the legal and policy implications around it are complex, diverse and mostly unsettled too. Sharyn Anleu in this context suggests that, “Numerous government reports examining surrogacy generally condemn contractual arrangements involving financial exchange. In contrast, they have been reticent to recommend outlawing private, or altruistic, arrangements.”⁶⁰ Moreover, medical practitioners advocate such family arrangements as a way of 'treating' infertility.”⁶¹ Countries across the globe are grappling with the dilemma of how they should treat surrogacy. The various options run across the gamut of regulation, contractualisation, criminalisation and abolition. This dilemma becomes further profound when law begins to differentiate between commercial and altruistic arrangements. India is no exception, more so considering that it has come to become the global hub of surrogacy. While Commercial surrogacy has enjoyed a legal status in the Indian subcontinent since 2002, only recently has there has been growing deliberation over abolishing commercial surrogacy and regulating altruistic surrogacy. It is in this context that it becomes quintessential to meticulously examine *the Surrogacy Regulation Bill 2016*.

Within these developments, my research shall enable me to engage and meaningfully contribute to the ongoing academic research with regards to surrogacy. What makes my work of particular use is my attempt to juxtapose theoretical claims with empirical research. Therefore while I have gained insightful academic understanding through my reading of seminal literature in the area, my work on the field with women for whom surrogacy is a lived reality; with intended parents who have redefined conventional understanding that linked reproduction to parenting; with members of the LGBT⁶² community for whom surrogacy is the means to realize parenthood and

⁶⁰ S. L. Roach Anleu, 'Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,' *Acta Sociologica* 33, No. 1 (1990): 63–74.

⁶¹ Ibid

⁶² Referring to Lesbian, Gay, Bisexual, Transgender community.

medical professionals who have found newer domains to access women's bodies with the coming in of reproductive technologies has further accentuated my understanding of the issue.

My research engages with surrogacy, a form of feminized labor that women across the globe are employed in. These predominantly female dominated forms of labor juxtapose a plethora of themes: gender, sexual oppressions v/s empowerment, law and contractualisation, technological developments. Amidst the expanding domain of science and technology, it has become a crucial form of labor that needs meticulous research which is the purpose of the current work. Surrogacy, in crux is a deviation from the conventional understanding of women's reproductive labor thereby raising critical issues that are central to the everyday reality of women. It is this wide engagement with the issue that makes my research relevant in current times.

1.8 Concluding Remarks

In retrospect, it can be argued on the basis of the above account that though the institution of surrogacy is not new, it has acquired all together new and widespread proportions in contemporary times. This to a large extent has been possible due to rapid developments in 'procreative technologies' that have gone a long way in expanding the possibilities for surrogacy arrangements. This has been further facilitated by the capitalist market that has made such an exchange possible through mediators and agents. Arguably, the newer horizons in medical science have created a whole gamut of possibilities for people who wish to have a genetically related child.

However, this advent of science and technology in the capitalist market has brought about various problems and complications that have affected human life in numerous ways. While these techniques have instilled hope into many couples, its greatest challenge stems at the harm inherent in this form of work and is further exacerbated at the regulatory level. It has been argued that these technologies pose stringent health hazards like HIV, Hepatitis, chances of multiple pregnancies to the surrogate mother. Apart from these innumerable physiological effects, are the emotional and psychological ramifications on the surrogate which are equally pertinent to take note of. Despite the numerous surrogacy success stories that are frequently reported, it is argued that one cannot overlook the risks and dangers that are embedded in surrogacy arrangements.

When this cycle is repeated over and over again for profit motive, it simply reduces women acting as surrogates to their reproductive labor while simultaneously essentialising reproduction as a mandatory function that all women must perform.

All this is further problematised by the absence of an effective legal framework which while acknowledging the positive role of surrogacy, ensures that it is effectively regulated and does in no way oppress women further. It is in this context that Richard Epstein argues that, “legislation to regulate ART’s as well as the rights and obligations of parties involved in surrogacy should be enacted.”⁶³ Epstein continues, “This becomes most apparent in contemporary times when all surrogacy arrangements are governed by individual contracts within parties in question. Still, as the Supreme Court judgment in the Manji case proved, the legal environment in India remains favorable to surrogacy. Adding to it is the cost advantage that India has.”⁶⁴ The country that is becoming a hub of fertility tourism cannot afford to jeopardize the interests of children and the surrogate mother.⁶⁵ It is thus imperative to undertake meticulous study of surrogacy in India and in turn put forth a framework that can guarantee rights to all parties concerned.

In so doing my work, has attempted to extend on the existing debate on surrogacy by combining theory and praxis. In this work I have tried to put together various dimensions of surrogacy in an inter related manner that enables one to grasp a much more holistic understanding of the surrogacy industry and thus contribute not only to feminist scholarship but also to national and international advocacy for the same.

⁶³ Richard A. Epstein, ‘Surrogacy: The Case for Full Contractual Enforcement,’ Virginia Law Review 81, (1995).

⁶⁴ Ibid

⁶⁵ Ibid

Chapter Two

Chapter 2: The Industry of the Disposable Mothers: **Meaning, Mechanisms, and Ethics in Surrogacy**

2.1 Introducing the Theme

“When I was 27 years old, I gave birth to a set of twins. But they weren’t mine. They were the biological children of a couple who had suffered many miscarriages, and had decided to try IVF. The day the treatment was supposed to start, the commissioning mother found out that she had breast cancer. On account of her treatment, the doctors advised her not to become pregnant for at least 5 years. Five more years of waiting for a baby meant five more years of her body aging, and the more real probability that IVF would not work for her. In a quest to have one of their own, they decided to opt for Surrogacy and that’s where I was needed. There were a lot of sacrifices at the personal and professional level but the best part is that through my labor of love I could provide to families what otherwise left them in sorrow and pain while enabling me also to afford both the necessities and a few luxuries of life.”⁶⁶

- **Anonymous**

“My husband was fighting cancer. The treatment was long and expensive. We borrowed a lot of money which made our situation worst as debt kept piling up. But none of this could save my husband’s life. Leaving me in debt and with three children to take care of, he passed away. I tried various odd jobs like selling vegetables and working for people. But I was unable to pay my debt and take care of my children. At that moment, I got to know about surrogacy. Money was all I needed and hence I left my children with my mother and signed up to being a surrogate. My family was unconvinced and they were very angry with me during my pregnancy. When the pregnancy began, I felt it was just another work I am doing for money. But soon the mother inside me made me attached to the child I was carrying. I had to constantly tell myself that it is not my child. While I never laid eyes on the baby, it was hard to give him up.”⁶⁷

- **Anonymous**

⁶⁶ Sama Resource Group for Women and Health, *ART’s and Women: Assistance in Reproduction or Subjugation?*: (New Delhi, Sama Resource Group for Women and Health, 2006), 10.

⁶⁷ This is based on an account from the field

Stories are the best ways to grasp the various realities that are a part of our existence. Our own lives are likely to remain obscure without the knowledge of the prominent stories of our times. One such story is that of *surrogacy*. Surrogacy describes an arrangement that involves a woman renting out her womb. Like the opening accounts exemplify, this story is neither static nor uniform. It is rather *heterogeneous* and diverse based on the subjective experiences of each of its actors. Surrogacy, with its varied ‘social, ethical, economical, physiological and psychological implications’ has invited much attention from all quarters, each of which forwards a particular disquiet or contentedness with how this phenomenon has acquired such mammoth proportions.

Surrogacy in contemporary times has been a much debated and a highly controversial institution. It raises a plethora of questions majorly premised on *whether surrogacy should be considered a concealed familial arrangement or should it be seen as work women are engaged in*. ‘Work’ then is a crucial intervention in the lives of women and hence ‘women’s relation to waged labor’ is the larger framework of this work. It has been argued that while ‘paid work’ can empower women in innumerable ways, this depends on the *conditions of work*. It is thus interesting to see how work is negotiated in the context of a particular form of feminized work namely *surrogacy*.

What makes the surrogacy story more encapsulating is that it weaves together various dimensions of the lived experiences of a major section of our population: *Women*. Significantly surrogacy is another of those instances that goes on to point towards the fact that women as a class are diverse. As the literature suggests, not many women opt for surrogacy. These are women who are poor and are in need of money. This found substantiation from the field analysis wherein almost all of my respondents were women from the lower class. A background analysis of their lives points towards the fact that most of these women lived in rented houses located in the destitute localities of the city. Not being in a position to educate their children and struggling to provide to their families a comfortable life, there was always an attempt to earn more money. This however was not an easy endeavor considering their low levels of literacy. Under these circumstances, increasing number of women began exploring the option of earning money through surrogacy. One of my respondents, a 32 year old woman living in the surrogacy clinic at Anand stated, “*At one point, our poverty became unbearable and there were no other job avenues. I tried all the possible options from selling vegetables to doing manual labor but*

*nothing could help me. Then somebody told me about surrogacy. I could not believe I could earn so much money at once.*⁶⁸ This sense of economic empowerment was the most succinct reason why these women took to surrogacy.

While both literature and field work suggests that surrogacy has indeed emerged as one of the most lucrative jobs, there are a host of reasons that go on to explain this phenomenal growth in the surrogacy industry, chief amongst which has been the recent spurt in ‘development of assistance in reproduction technologies.’ It is argued that the ART industry has cashed on the ‘social stigma of infertility’ on the one hand and women’s economic backwardness on the other, to deepen the roots of this ever increasing industry. From the epistemic position of the potential surrogate woman, surrogacy is one of those rare jobs entry into which is relatively easier, work is less menial and the remuneration received is greater than any other form of work they could take to. From the perspective of the state, the law with regards to surrogacy varies immensely across the countries. While some of the countries ban it, others allow it to take place in a commercial form. This in part can be attributed to the poverty in these countries.⁶⁹ Finally, because many intending couples deal with the patriarchal pressures to have a child of their own blood and flesh, surrogacy emerges as the most conducive answer. This however is only half of the picture, the other half as has been highlighted by the critics of surrogacy is that of the *physiological* and the *psychological* impact it has, particularly on the woman acting as the surrogate and the child so born.⁷⁰ A survey of the rich literature that has developed over the years suggests that surrogacy divides its on lookers.

On the one hand are those who argue that surrogacy entails the use of women’s bodies for a sort of procreation that ‘transcends the conventional understanding of motherhood.’ Instead of being premised on emotions of *love, care, nurture and attachment*, it is in fact based on the ideas of *money, need, obligations* that arise out of bonds and detachment. Alternatively, this celebratory account seeks to suggest that surrogacy arrangements radically question the very meaning and

⁶⁸ Anand is the administrative capital of district Anand in Gujarat, India. Due to it being a thriving hub for surrogacy in India, it is often referred to as the global surrogacy capital.

⁶⁹ It is also crucial to point out here that poverty is relative. The level of poverty in countries like India and Nepal is much starker than it is in other developed countries, thereby explaining why at times surrogacy is also considered to be a work that middle class women also take to.

⁷⁰ Pratibha Chavan, ‘Psychological and Legal Aspects of Surrogate Motherhood,’ *AIR Journal* (2008): 103.

understanding of family and marriages that are based on societally recognized contracts called marriages between heterosexual couples. The institution of Surrogacy points towards a 'job' which has been central to the lives of women: *Reproduction*. The advocates of surrogacy particularly use the term 'job' so as to suggest that even within marriage, having a child is not always a voluntary choice that women make. In many cases, it is also familial and societal pressure that coerces them to have children and 'complete' their families. Surrogacy in a radical way seeks to question the traditional understanding of a woman's body being solely linked to producing babies out of love.

They go on to argue that surrogacy has helped in radically redefining the conventional understanding of 'women's reproductive labor.' While child birth is considered a virtue for some women, others with the inability to perform their 'natural role' are considered a bane for the family. For women like these undergoing the agonizing frustration of remaining childless and considering *adoption* as being distressingly inadequate, resorting to medical technology for 'control over their infertility' seems the most feasible and desirable option. In so doing, *surrogacy has enabled them to break the link between biology and motherhood* which for is one of the fundamental tenets of patriarchy.

This view has been contested by the opponents of surrogacy who believe that its only 'essentializes reproduction' as a mandatory function that women must perform. They attribute its pervasiveness not to growing infertility amongst couples or to poverty amongst women surrogates but rather to the unprecedented development in reproductive technologies. Sarojini Nadimpallya and Deepa Venkatachalam in this context point towards a crucial trend which is that the expansion of surrogacy is a part of the larger enterprise of Assisted Reproductive Technologies. They suggest that "a closer look at the ART industry makes it explicit that it is a *distinct group of procedures designed to circumvent infertility* by assisting in conception and carrying pregnancy to term."⁷¹ Evidently this expansion is largely private in nature and it meticulously harps on the societal taboo around infertility and childlessness. This is further

⁷¹ Sarojini Nadimpallya & Deepa Venkatachalam, 'Marketing Reproduction: Assisted Reproductive Technologies and Commercial Surrogacy in India,' *Indian Journal of Gender Studies* 23, No. 1 (2016): 87–104.

exacerbated by the lack of public's access to infertility care in the state sponsored health services.

Critics of surrogacy suggest that if one breaks down surrogacy to its fundamentals, it is perhaps both a response and a stimulator of the 'demands of the market.' The infertility care market has sought to brilliantly capitalize on the widespread patriarchal norms and internalizations to sustain and further its perpetuation. The market is governed by the justification that they are merely serving to fulfill market demands. This is refuted by critics of surrogacy arrangements who point to the fact that surrogacy is a classic example where taboos and stigmas are upheld rather than being refuted. To elaborate, the argument is that in patriarchal societies there is a general inclination to have children with whom parents can share a 'genetic belonging.' These *social internalizations* are harped upon by the market to promote ART's. Clearly then, the social and medical factors collaborate to delivering a child 'bypassing the infertility instead of curing it.' Madhav Govind and Rajesh Kalarivayil put forth a crucial interjection in this context when they argue that surrogacy puts forth a classic case where scientific phenomenon and social actors intertwine to invoke legal and economic issues like 'human rights', 'ethics', 'legalization', 'criminalization', 'empowerment' amongst others.⁷²

If one was to put together both these viewpoints, it becomes evident that surrogacy brings together various crucial issues on the table. While on the one hand there is risk with regards to the woman acting as surrogate, there is fulfillment on part of the commissioning couple; the scientists and practitioners hail it as path breaking, the human rights and women's groups see it as being detrimental to the interests of the unborn child. While feminist scholarship and women's rights groups believe that there is immense risk in the use of ARTs considering that they go on to reinforce the patriarchal norms, notions of motherhood, social compulsion to have children and thus sustaining the notions of patriarchal family and furthering the exploitation of women's bodies and reproductive capacities. Further they view surrogacy as causing irreversible harm to the surrogate's bodies and psyches. This is juxtaposed with the accounts of those who view surrogacy as being just an exchange that is mutually beneficial.

⁷² S.S. Nair & Rajesh Kalarivayil, 'Saved a Generation: Campaigns against Hazardous Contraceptives in India,' *Asian Journal of Social Science* 45, (2017): 126-148.

Clearly then surrogacy brings within its ambit a plethora of issues that need a well conceptualized understanding. In seeking to understand this debate holistically, a rich survey of literature that has developed over the years has been undertaken. To substantiate in-depth interviews of surrogates, medical practitioners, legal experts and commissioning couples along with critical analysis of secondary literature in reproductive and social sciences, websites contents of ART clinics and research reports by non-governmental organizations, is embarked on so as to explore this debate in all its nuances. In the current chapter, I begin by exploring certain very crucial concepts in surrogacy namely: the meaning and nature of *Assisted Reproductive Technologies*, interpreting surrogate motherhood in context of its market, the meaning and types of surrogate motherhood arrangements, historicizing surrogacy in India; mapping the recent developments in surrogacy in India, the pull and push factors in the surrogacy story and Ethical Issues impinging Surrogacy.

2.2 Empowering or Subjugating: Understanding Assisted Reproductive Technologies in India

a) Meaning of Assisted Reproductive Technologies and Surrogacy:

The *World Health Organization (WHO)* report of 2012 estimated that 60 to 80 million couples globally suffer from infertility. In India 8.8 percent women face lifetime primary or secondary infertility problem, out of which three-fourth suffered from primary infertility.⁷³ It is indicated that childlessness in India is primarily due to the problem of infertility and not because couples choose to remain childless.

In the background of these statistics, one can contextualize the profound expansion in the number and types of assisted reproduction technologies that are ‘marketing’ themselves on their ability to increase the possibility to conceive and deliver a baby. Collectively known as *Assisted*

⁷³ Maya N. Mascarenhas, Seth R. Flaxman, Ties Boerma, Sheryl Vanderpoel & Gretchen A. Stevens, *National, Regional, and Global Trends in Infertility Prevalence Since 1990: A Systematic Analysis of 277 Health Surveys*: (2012).

Reproductive Technologies, these technologies include various procedures including *IUI or Intra-Uterine Insemination* and *IVF or In-Vitro Fertilization*. Though considered new, their trajectory goes back to the 16th century.⁷⁴ Apart from this euphoria, it also means that ART's raise various complex issues linking health, society and technology more so in context of the twin forces of patriarchy and capitalism.⁷⁵ In this scenario it is essential to study the relation between social structures, scientific establishments and the market.⁷⁶ This will enable us to understand the impact it has on the creation and proliferation of ART's and in turn on the deepening of the surrogacy industry. It is this that makes these technologies a crucial lens to understand surrogacy in its totality.

Reproductive Technologies have not remained static. The earlier ones known as *old reproductive technologies* were constituted by contraceptive pills, various intrauterine devices, sterilization, and abortion. Over the years new and advanced techniques have been added that have helped not only in preventing conception but also for aiding it. These are popularly known as *new reproductive technologies*. The ushering of these new assisted reproductive technologies has also meant a radical re-conceptualization of surrogacy arrangements. To elaborate, taking the instance of surrogacy, initially surrogacy arrangements were restricted to only close relatives, family members or friends who were motivated by philanthropy. However with the coming in of more advanced procedures, surrogacy has begun to be 'outsourced'⁷⁷ and thus the 'industry' has expanded its reach beyond the confines of family, community, state, and countries. This technological development it has been hailed as having brought about a radical alteration in the surrogacy industry by bringing the 'reproductive labor of love' in the domain of the 'market and money.'

⁷⁴ Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Womb*: (New York, Harper and Row, 1985).

⁷⁵ Sama Resource Group for Women and Health, *ART's and Women: Assistance in Reproduction or Subjugation?:* (New Delhi, Sama Resource Group for Women and Health, 2006), 5.

⁷⁶ S. L. Roach Anleu, 'Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,' *Acta Sociologica* 33, No. 1, (1990): 63–74.

⁷⁷ Outsourcing of surrogacy means hiring another woman's womb for procreation in return for economic transaction.

Within this framework, Michelle Stanworth argues that the purpose of reproductive technologies is to *intervene in the process of human reproduction*.⁷⁸ She categorizes them as follows:

- The foremost in this classification are those that are related to fertility control i.e. ones that aim at controlling the possibilities of conception or terminating cases of pregnancies for example, contraceptive technologies.
- The second is concerned with the procedures that assist in labour and childbirth'.
- The third in this list are those technologies that work towards the healthy development of foetuses and of new-born babies.
- The last and the most emerging set of technologies include those that assist in reproduction in cases of infertility.

Thus as the aforementioned discussion suggests, scientific progress and technological know-how has opened up the avenues for various reproductive arrangements. As a result, today there are multiple ways of having a biological child. For those considering assistance in reproduction, the most popular method is known as *in vitro fertilization* or *IVF*. In generic terminology, it is an 'artificial way of fertilization' which involves the extraction of eggs, retrieval of sperm followed by combining the two in a laboratory. The final step in this procedure entails the transferring of the embryos in the uterus. The other ways of doing it is through *gamete intra-fallopian transfer* also known as *GIFT*⁷⁹ and *zygote intra fallopian transfer* popularly called *ZIFT*.⁸⁰ IVF is a long procedure which is painful and yet success is not guaranteed.

The particular cases where IVF as a procedure can be used are those when the fallopian tube is either blocked or is damaged, there is a decreased sperm count amongst the males, women are diagnosed with ovulation disorders or premature ovarian failure. The IVF cycle as it is popularly known as is a multi-step process involving various procedures all of which make IVF an extremely lengthy and painful procedure. It has various side effects. Some side effects after IVF may include loss of blood, cramps, bloating, constipation, breast tenderness, headaches, mood

⁷⁸ Fritz K. Beller, Robert F. Weir, *The Beginning of Human Life*. Dordrecht: (Boston, Kluwer Academic Publishers, 1994).

⁷⁹ It is a process in the assisted reproduction through which eggs are removed from a woman's uterus and placed in her fallopian tubes along with the eggs from a man.

⁸⁰ ZIFT is an associated method in procreative technologies through which an embryo is transferred in the fallopian tube.

swings, abdominal pain, hot flashes and abdominal hyper-stimulation of Ovaries amongst others.⁸¹ Further, IVF is considered to be highly risky. *Some of its prominent risks include:*

- The process of retrieving eggs carries the risk of excessive bleeding, damage to the bladder or to infection of varying intensity.
- IVF procedures also increase the chances of vomiting, nausea, stomach pains, bloating, shortness of breath, faintness being the most prominent ones.
- One of the most prominent effects of IVF treatment is that it may lead to multiple pregnancies.
- IVF also carries the increased risk of premature delivery, under developed babies and low birth weight amongst children.
- Assisted Reproductive Technologies like IVF are also characterized by increased chances of miscarriages. This rate further goes up depending upon the maternal age.
- Apart from the physiological effects, assisted reproductive technologies have various emotional and psychological ill effects on the women. In cases where the IVF is unsuccessful, these effects further multiply.
- One of the most prominent ramifications of IVF is that it is extremely expensive and more often than not is not covered under insurance schemes.

What makes this entire procedure most traumatic is that it does not guarantee assured success. According to a statistics, only 30% to 35% couples who try the IVF technique actually succeed.⁸² There are very many factors that influence the possibility of success. These factors range from the reproductive health of women, their age, cause and degree of infertility, lifestyle issues being the most critical ones. It has been pointed out by many that the need is to distinguish between pregnancy rate and live birth rate instead of equating them as equal.

When IVF also fails to give the desired outcome or where IVF is not even a possibility, the couples are left with three choices: to not have a child; to opt for adoption or to choose surrogacy. The first two options are often quite futile considering the urge to have their 'own

⁸¹ NDTV Desk, 'IVF: Side Effects And Risks You Must Know,' *NDTV*: (May 04, 2018).

⁸² Sanchita Sharma & Anonna Dutta, '40 years of IVF: See how fertility tech has changed the world and India,' *Hindustan Times*: (Jul 21, 2018).

children' which shall be dealt with in the subsequent sections of this research. Thus, in current times on account of a host of reasons, more and more couples find surrogacy the most viable option. Where families are supportive, couples choose surrogacy with the consent of their parents while in others they keep it under wraps till the child is born after which they take the baby as their own born.⁸³

Sharyn Anleu suggests that, “a surrogacy arrangement can be achieved through coitus or artificial insemination.”⁸⁴ Under this type, there exists a ‘genetic connection’ between the surrogate and the resulting child. This is the traditional way of achieving a surrogacy achievement and is hence termed as ‘traditional surrogacy.’ With the development in medical technology, newer ways of achieving a surrogacy has come up. Thus in cases where a woman cannot conceive an embryo but has functioning ovaries, IVF enables a woman to genetically contribute to the child. In yet another possibility, the ova can be donated by a third woman, which in turn is fertilized in vitro. Herein, the surrogate mother is known as a ‘Gestational Carrier’.⁸⁵

Reproductive labor poses various sorts of challenges. There have also been possibilities of cases where a woman can conceive but cannot carry the child. This can be due to natural causes or due to choices of women who do not wish to undergo the stress of pregnancy. In these instances, the conceptus is taken out from her uterus through medical procedures and is then transferred to the surrogate mother. Traditional notions of reproduction and body are premised on the belief that a child has just one mother. This woman is recognized as the child’s genetic, birth, legal, and social mother. However, under surrogacy arrangements where in vitro fertilization takes place, the resultant child can have *four mothers* considering that one woman provides the ovum, second gestates the embryo, third woman gives birth to the child, and the fourth is defined by law as having rights and obligations over the child and thus being the parents.

⁸³ This intervention is based on field research where most couples who had informed about their decision to their parents suggested that their parents and families were supportive. Others narrated how they have hidden it from their families. They were thankful that the baby looks like them hence nobody will have any suspicion.

⁸⁴ Sharyn Roach Anleu, ‘Surrogacy: For Love But Not for Money?’ *Gender & Society* 6, No. 1 (1992): 30–48.

⁸⁵ Ibid

Considering that more and more women are resorting to ART's over adoption critics argue that this represents the existing social context and power relations. It highlights the 'essentialization of women', who on failing to 'perform their natural role and responsibility of reproduction' subject themselves again and again to the procedures of ART's rather than adopt a child. Despite the fact that the procedures are physically, psychologically and emotionally stressful, there have been an ever increasing number of individuals taking to reproductive assistance so as to push their bodies to compulsorily perform their reproductive functions. The antagonists of these technologies thus conclude by saying that there has been a deliberate attempt to create an *imperative around fertility* which in turn is posed as problem that can be dealt with medically. In this background, medical technologies are posited as the most viable solution. Evidently, the concept of 'rent a uterus' has infact found wider acceptance based on the argument "*at least the baby is made with our gametes, even though nourished in a rented body*".

From the vantage point of the surrogate mother, the question of *commodification and essentialization* is equally perturbing. It means treating her as a 'baby producing machine' and the intervention into her body establishes her as a commodity. Despite this there has been a spurt in the supply of women willing to become surrogates. The demand and supply side of infertility treatment are raising important issues related to the efficacy of technology, health risks, socio economic and ethical-legal problems.

With the demand and supply of surrogacy being in place, it is increasing at an alarming rate. It is argued that India is turning in to a 'surrogacy outsourcing capital' of the world considering that not only resident couples from India but also those from abroad are being attracted towards the surrogacy industry in India. . This 'outsourcing of pregnancy' has not only been restricted to India alone. With traditional surrogacy arrangements being replaced by more robust technological developments, the industry has begun to spread like never before. Earlier an Indian woman would have meant a child with Indian features, but with the ushering in of new technologies it became possible for an Indian woman to give birth to a white child. It is widely believed that the impetus relieved by the *medical tourism* sector to a great extent can be attributed to the flourishing surrogacy industry that is attracting people from round the globe.

This is also coupled with the fact that facilities in India are less expensive. All of these factors, it is argued explain the rise of surrogacy industry in India.

b) History of Surrogacy:

Surrogacy has a long history of research. In mid-19th century it began on the non-mammalian species.⁸⁶ The first significant event that in many ways explains the rise of the process of surrogacy came in the year 1935 when Gregory Pincus conducted an experiment on a rabbit. The purpose of conducting this experiment was to determine the essential conditions necessary in mammal's oocytes to develop.⁸⁷ The next seminal event in this trajectory came in the year 1959 when Min Chueh Chang brought forth the point that there was a possibility that oocytes can be fertilised in vitro and thus it was possible to create well developed embryos.

This procedure required greater impetus in the 1950s when Robert Edwards at the National Institute for Medical Research brought forth various elementary discoveries.⁸⁸ His research at length discussed the process of when and how the human eggs mature as also the effect various hormones had on the maturation procedure. He also outlined that there was a particular stage wherein the eggs are most susceptible to be fertilized. In the year 1965, Edwards sought to discover the accurate conditions that helped in the maturation of egg cells.⁸⁹ This discovery opened up the possibility of a 'treatment for infertility' in humans.⁹⁰ In many ways the success of the IVF procedure today is attributed to these seminal developments.

Mapping out the trajectory of surrogacy in the Indian subcontinent, the birth of the first IVF baby in India took place some months after *Loise Brown* was born.⁹¹ The second IVF baby, *Durga* was born in a fertility clinic in Kolkata by Dr. Subhas Mukherjee. However due to lack of documentation, the first registered case came in 1986 with the birth of *Harsha*. The course of the

⁸⁶ Ashley Kate, 'History of Surrogate Motherhood,' <http://www.ezinearticles.com>;(July 17, 2017).

⁸⁷ *ibid*

⁸⁸ *ibid*

⁸⁹ *ibid*

⁹⁰ Mary Brick, 'Modern Reproductive Technologies and Motherhood: The Search for Common Ground and the Recognition of Difference,' *Virginia Law Review* 62, (1994).

⁹¹ Preeti Bhardwaj, 'Surrogacy in India- An Analysis,' *Gender Issues in India: Sensitisation, Reflection and Solutions* 113, (2012).

surrogacy industry's growth has been dominated by the private sector initiatives in India today as is evident from the fact that there is a whole gamut of fertility centers, hostels across the rural and urban areas of India.

While surrogacy has travelled a long and extremely enchanting journey, in the recent times it has drawn attention to the various challenges posed by it. Surrogacy became a topic of intense discussion with the emergence of *Baby M* case in 1984.⁹² *Baby M* case represents what lies at the essence of debates on surrogacy as a practice. It is a story of an intending couple who wished for a child and hence opted for surrogacy and a woman who initially consented to carry the child for them in return for money but later found it tough to give up the child she had borne for nine months and felt it so closely. As a result she denied giving up the child and also refused to accept the payment. In her bid to keep the child with her ran away to another city. She was soon caught and was directed to return the child. When the matter arrived before the New Jersey Superior Court in 1987, it upheld the 'contract' that was signed between the two parties i.e. the Stern's and Whitehead. As a result, the Stern' got all rights over the child while Whitehead was denied even visiting rights.

The most characteristic conclusion from the **Baby M** decision was that it led to many state in the United States to bring in *legislations* with regards to surrogate motherhood. This therefore led to the addition of a new dimension to the institution of surrogacy i.e. of 'regulation and an overarching legal framework to regulate its operation.' However as is evident from the judgment too, it was pronounced keeping the intending parents in mind and thus it was critiqued by surrogacy groups for favoring the intending couple over the surrogate.

c) Issues with Surrogacy Arrangements:

The constant developments in the trajectory of surrogacy led to a new question. Who should be the *signatories to a surrogacy contract*?⁹³ While some defined the contract narrowly to include only the intended parents and the surrogate mother, for others the need was felt to also bring with

⁹² In re *Baby M.*, 217 N.J. Super 313, (1987).

⁹³ Hugh McLachlan & Kim Swales, 'Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts,' *Law and Contemporary Problems* 72, No. 3 (2009).

the contractual ambit the consent of the spouse of the surrogate mother to ensure his acknowledgement. Considering that in certain cases, when the intending couple fell apart, the fear of the child's future remained uncertain. It was thus argued that the surrogacy contracts should feature a clause to address such situations. As a result it was recommended that when the contracts are being framed, the intending couple ought to designate a person who shall be liable to take care of the child if they were to fall apart.

Another issue that has been often raised with surrogacy arrangements is that there is no standard *method of determining remuneration*. Therefore it has been argued that one of the salient features of a surrogacy contract should be that it ought to include all details pertaining to the fees structure, the manner of payment, medical tests involved, details about other medical procedures amongst others. Another question that needed to be grappled with was who had the right to *resort to surrogacy*.⁹⁴ It was argued that only those women could resort to surrogacy arrangements who were unable to carry a child to term due to following reasons:

- Failure of embryo transplantation process
- Recurring miscarriage
- Hysterectomy or pelvic disorder
- Ailments like extremely high blood pressure
- Other critical diseases like those of the heart or liver

In wake of the growing discussions on the subject, it was also realized that the institution can only thrive and sustain if certain prerequisites are fulfilled. This led to the ushering in of a *standard criterion* that is considered essential for a surrogate to fulfill.⁹⁵ This criterion includes the following⁹⁶:

- (a) The woman being inducted to be a surrogate should be healthy
- (b) Surrogate mother should have at least one child of her own.

⁹⁴ Walter Glannon, *Biomedical Ethics*: (Oxford University Press, 2005).

⁹⁵ Fretwell Wilson, 'Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements,' *American Journal of Law & Medicine* 29, No. 2/3 (2003).

⁹⁶ Read the PRS Legislative Assembly, The Surrogacy (Regulation) Bill, 2016

- (c) The choice of surrogacy should be out of her consent
- (d) She should be below age of 35 years.
- (e) She should have the consent of her spouse

To conclude our discussion on ART, suffice it is to say that while Artificial Insemination in humans has been in vogue since 1870's, the latter half of the 20th century has provided a thrust to their further use and development. This has had a significant impact on how we view pregnancy, reproduction and motherhood. Thus it is crucial to understand the interlinking of health, society and technology. In a study conducted by SAMA, it was argued that, "*ART's do not only assist in reproduction but also carries with itself various sorts of disadvantages and harms.*"⁹⁷ The next section thus tries to understand the opposing views on ART's. Such an understanding becomes crucial considering the fact that science and social norms influence each other in a myriad ways.

2.3 Debates around Assisted Reproductive Technologies

Assisted Reproductive Technologies have been a putting together of opposing perspectives. While on the one hand they have been hailed as positive intervention in the lives of many, on the other the various contentions raised over them have raised critical concerns for women's rights groups. This dilemma has been evident in the feminist scholarship too. Martha Gimenez in this context argues that,

*"Some writers stress the role of patriarchy in oppressing women through New Reproductive Technologies, while others stress the interaction between patriarchy and capitalism. Regardless of theoretical orientation, feminists share a common concern with the fact that these technologies have undermined hitherto taken for granted relationships between biology, women's identity and the meaning of motherhood."*⁹⁸

Marie Mies in this context suggests that one cannot undermine the historical fact that "*technological innovations within exploitative and unequal relationships lead to an*

⁹⁷ *Assisted Reproductive Technologies: Assistance in Reproduction or Subjugation? A Study by Sama:* (New Delhi, 2006).

⁹⁸ Martha Gimenez, 'The Mode of Reproduction in Transition – A Marxist-Feminist Analysis of the Effects of Reproductive Technologies,' *Gender and Society* 5, No. 3 (1991): 334-350.

intensification, not attenuation, of inequality, and to further exploitation of the groups concerned.”⁹⁹ For **Gena Corea**, there ought to be a total rejection of modern reproductive technologies because they staunchly reinforce the existing unequal social relations.¹⁰⁰ Pointing towards the various pitfalls in the manner in which these technologies were being implemented it has been further argued by the feminists that the assisted reproductive technologies did not liberate women from the ‘*tyranny of reproduction*’. On the contrary, the coming in of these techniques has reiterated the patriarchal belief that reproduction as a function is essential for women to perform whatever the cost maybe. Taking this argument further, Gena Corea argues that these techniques infact reduce ‘women’s bodies’ to merely ‘experimental sites’ that can be accessed freely. This exposure of women’s bodies to infinite procedures has been exploitative and has gone on to further perpetuate the, “classist, racist, and heterosexist beliefs of patriarchal stereotypes.”¹⁰¹

This view has been further developed in 1986 by **FINRRAGE** which considers the emerging Reproductive Technologies as, “*a manifestation of patriarchal domination and exploitation of women’s bodies by men who envy women’s procreative power.*”¹⁰² These technologies, it has argue have made available women’s bodies for male use and for extracting out profit. Further, under these technological innovations, women and their bodies have become the ‘property of misogynist science’ that can misuse women to serve the capitalist patriarchal agenda. It argues that considering that technology is racist, sexist and eugenic in nature, it undoubtedly is ghastly for women. The manifesto of FINRRAGE articulately states:

“We, women [...], declare that the female body, with its unique capacity for creating human life, is being exploited and dissected as raw material for the technological production of human beings. For us women, for nature, and for the exploited peoples of the world, this

⁹⁹ Maria Mies, ‘Sexist and Racist Implications of New Reproductive Technologies,’ *Sage* 12, No.3 (1987): 323-342.

¹⁰⁰ Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Womb*: (New York, Harper and Row, 1985).

¹⁰¹ Nadia Mahjouri, ‘Techno-Maternity: Rethinking the Possibilities of Reproductive Technologies,’ *Third space: A Journal of Feminist Theory and Culture* 4, No. 1 (2004).

¹⁰² Known as Feminist International Network of Resistance to Reproductive and Genetic Engineering , FINRRAGE was established in Netherlands in the year1984.

development is a declaration of war. Genetic and reproductive engineering is another attempt to end self determination over our own bodies.”¹⁰³

FINRRAGE thus has launched a vehement critique against these technologies for they have “*divided, fractured, and separated the female body into distinct parts for its scientific recompilation, thereby fragmenting women’s identity.*”¹⁰⁴ Members of FINRRAGE further contend that these technologies have been shaped by and hence reinforce social mores. In their account, contrary to their proclamation, reproductive technologies have emerged as a potent tool for oppressing women and have served the patriarchal agenda of taking away from women the control over their bodies.

There have been explicit critiques of the ‘language’ used in medical discourse on surrogacy. There have been vehement critiques of the *benevolent and altruistic language* that is used in promoting ART’s. It is believed that in so doing the attempt is to inculcate a false sense of fairness with regards to assistance in reproduction. It is argued that in this propaganda, by elevating the woman as a donor, they are equated with ‘miracle providers’ who are performing a noble deed by enabling ‘desperate women to embrace motherhood. The reference to procedures in reproductive technology being a gift is the most explicit bid to personify the technology as being glorious and emancipatory. Further, it is argued that there is a ‘depersonalisation of women’ involved in it considering that women are reduced just to their reproductive capacities. Critics argue that in ART’s and their celebratory accounts, women’s painful experiences are eulogized falsely so as to justify these techniques and their ill effects. Clearly then, Gena Corea points out that, “*the intrusion into the female body and its experimental invasion by these technologies that are referred to as treatments and cures is infact a façade.*”¹⁰⁵ Janice Raymonds goes on to argue that ART’s help *patriarchy* to benefit out of women’s infertility thereby reducing it to a disease.¹⁰⁶

¹⁰³ Stevienna de Saille, ‘Knowledge as Resistance,’ *The Feminist International Network of Resistance to Reproductive and Genetic Engineering*: (UK, Palgrave Macmillan, 2017).

¹⁰⁴ Nadia Mahjouri, ‘Techno-Maternity: Rethinking the Possibilities of Reproductive Technologies,’ *Third space: A Journal of Feminist Theory and Culture* 4, No.1 (2004).

¹⁰⁵ *Sama, ART’s and Women: Assistance in Reproduction or Subjugation?*: (New Delhi, Sama Resource Group for Women and Health, 2006).

¹⁰⁶ Janice Raymonds, *Woman as Wombs*: (Harper Collins, 1993).

There has been another perspective to understand ART's. They are often compared to the process of forming 'enclosures' which was a dominant feature of Britain. Enclosure was the legal process in England through which small holdings of land was consolidated into larger farms.¹⁰⁷ Once it was enclosed, "*the land could be solely used by the owner and henceforth it ceased to be a common land.*"¹⁰⁸ To elaborate, the process of forming enclosures entailed the fencing of a piece of land for the exclusive use of one or more owners. As this phenomenon spread, it radically altered the English agricultural structure during the 16th century. Due to the growing of enclosures, by the 19th century, open spaces had shrunk and became restricted to a few remote areas like infertile pastures in the mountainous areas and to lowlands.

It is therefore argued that rich landowners used their control of state processes to appropriate public land for their private benefit.¹⁰⁹ In the Marxist schema, the formations of these enclosures define the ushering in of 'capitalist mode of production' considering that it left the workers at the disposal of rich factory owners and thus coerced them to work for a wage. Referring to this, Marx wrote in the Capital, Volume 1,

*"The historical movement which changes the producers into waged workers appears on the one hand as their emancipation from serfdom and from the fetters of the guilds, and this side alone exists for our bourgeois historians. But on the other hand these new freedmen became sellers of themselves only after they had been robbed of all their own means of production and all the guarantees of existence offered by the old feudal arrangements. And the history of this, their exploitation is written in annals of mankind in letters of blood and fire."*¹¹⁰

¹⁰⁷ James M. Rubenstein, *The Cultural Landscape: An Introduction to Human Geography*: (Ohio, Pearson Publishing, 2011).

¹⁰⁸ James M. Rubenstein, *The Cultural Landscape: An Introduction to Human Geography*: (Ohio, Pearson Publishing, 2011).

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

Further, the enclosures were not a one-time process. On the contrary, it was a regular phenomenon that led to ‘accumulation of surplus labor’¹¹¹ and consequently to exploitation which in time would culminate into a *class struggle*.¹¹² As a result, common people were forced to join industries for work. The rest is a story of alienation of their labour as also exploitation of their surplus value all of which led to exploitation. This conception becomes evident when we begin to look at the story of globalism and the integration of the world into one entity beyond territorial and economic barriers.

This meaning of enclosures has been contextualized in the surrogacy debates wherein the recent developments in technology are referred to as *new enclosures*. Elaborating on this, Donna Dickenson recasts ‘enclosures’ and infact terms it as “*new enclosures*” to refer to the *development in science and technology* that have facilitated the use of more advanced techniques in reproductive technologies.¹¹³ The developments in *Assisted Reproductive Technologies* (ART’s) have muddled the difference of what is external and what is internal to human body and hence what is alienable and what is not. If these new enclosure are recast in the erstwhile understanding of enclosures, they raise issues of not just commodification but also *accumulation of surplus reproductive labor* thereby benefitting one at the cost of others. If we were to contextualize these arguments in surrogacy debates, it could be seen that women working as surrogates become somebody else’s property and this is where their exploitation commences. When this sale and purchase takes place over and over again, it leads to their *degradation*. Clearly then in surrogacy when the surplus reproductive labor of a woman comes under another person’s control, exploitation ushers it.

While one strand of feminism expresses contention with ART’s for being patriarchal and pronatalist, others stress on women’s *agency* and the *ameliorating impact* these technologies have had on the lives of women. Contrary to the postulations of the critics are those of the advocates who believe that these new forms of technology have helped women deal with

¹¹¹ In criticizing the political economy, Marx used the term accumulation of surplus labor to refer to the surplus labor that proletariat class was subjected to in his or her job beyond what he was earning for. It was an unpaid form of labor the accumulation of which was a defining characteristic of capitalism.

¹¹² In the Marxist ideology, the relation of antagonism between the workers and the ruling class was termed as class struggle.

¹¹³ Donna Dickenson, *Property in the Body: Feminist Perspectives*: (Cambridge University Press, 2007).

infertility which was long considered as their inadequacy. Further, they argue that it has been *emancipatory* in that some aspects of objectification which were till now restricted solely to female experiences have now also become a reality of the lives of men.¹¹⁴ Thus they believe that these steps have revolutionized the society which has begun to look at surrogacy as the most viable and feasible solution for the infertile individuals who have the impending desire to have children of their own.

Consequently a stand of feminists welcome these technologies as being progressive. In their conceptualization, it is not these technologies that are wrong rather the problem is with the context in which they operate that make them a boon or a bane. Arguing from this perspective, Shulamith Firestone puts forth an empowering picture of these reproductive technologies when she argues that, “*they have the potential to unshackle women from traditionally imposed duty of motherhood.*”¹¹⁵ In so doing, these technological interventions have ‘liberated women’ from the age old stereotypes thereby leading to their *emancipation*.¹¹⁶ The year 1972 witnessed Shulamith Firestone’s articulate advocacy for artificial reproductive technologies as being the focal point through which women could be freed from the *tyranny of reproduction* by every means possible.¹¹⁷ This according to Shulamith would help forward the agenda of women’s movement and the feminist scholarship to establish an egalitarian order ruled by fairness and not biology and will hence enable women to participate in the work force. This she feels will usher in a ‘social change’ whereby both men and women will equally share the burden of child rearing¹¹⁸ However it is important to understand that Firestone at no point makes a case for surrogacy. Her advocacy is merely for reproductive technologies which she believes will liberate ‘all women’ from the burden of reproduction.

¹¹⁴ Donna Dickenson calls it *feminisation*.

¹¹⁵ *Sama, ART’s and Women: Assistance in Reproduction or Subjugation?*: (New Delhi, Sama Resource Group for Women and Health, 2006).

¹¹⁶ Shulamith Firestone, *The Dialectics of Sex*: (New York, Penguin Books, 1971).

¹¹⁷ *Sama, ART’s and Women: Assistance in Reproduction or Subjugation?*: (New Delhi, Sama Resource Group for Women and Health, 2006).

¹¹⁸ *ibid*

These two standpoints were countered by a third strand constituted by *sex difference or corporeal feminists* like Luce Irigaray,¹¹⁹ Moira Gatens¹²⁰, Gayatri Spivack¹²¹, Elizabeth Grosz¹²², and Hélène Cixous¹²³ who critique both of the above stand points. It has been argued that both the above views *misconstrue the female body*. Repudiating the two positions, it argues that women's bodies ought not to be considered an impediment that has to be overcome or be assumed to be a source of feminine power that women could resort to. This school of thought argues that women's bodies must be dealt with not as a brute and passive entity that can be simply explained in terms of social forces.¹²⁴ On the contrary it should be looked at as being created through the inter linkages between 'systems of representation, meaning, and signification'. They contend that it is only by adopting this approach, can one ascertain a holistic understanding of women's experiences in its multi dimensional context. According to Grosz, for corporeal feminists, the *body* is viewed as the crucial term. It is analyzed as a site of contestation, in a number of politico-economic, sexual and intellectual struggles. In this context, they have sought to understand reproductive technologies by keeping the female body as their lens of analysis.

In retrospect, in context of the developments in technology and the consequent spurt in the instances of surrogacy, there is a wide array of questions about the family, parenthood, role of women, the rights of child born out of these arrangements and on whom should the onus of managing fertility be amongst the others that require a careful analysis. ART's have opened up opposing perspectives on their nature and role.

¹¹⁹ Sama, *ART's and Women: Assistance in Reproduction or Subjugation?*: (New Delhi, Sama Resource Group for Women and Health, 2006).

¹²⁰ Moira Gatens, *The Oxford Handbook of Political Theory*: (Oxford University Press, 2008).

¹²¹ Mridula Chakraborty, 'Everybody's Afraid of Gayatri Chakravorty Spivak: Reading Interviews with the Public Intellectual and Postcolonial Critics,' *Signs* 35, No. 3 (2010): 621-645.

¹²² Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism*: (Bloomington, Indiana University Press, 1994).

¹²³ Susan Sellers, *The Hélène Cixous Reader*: (New York, Routledge, 1994).

¹²⁴ Eleanor Amico, *Reader's Guide to Women's Studies*: (Chicago And London, Fitzroy Dearborn Publishers, 1998).

2.4 Re-conceptualizing Surrogacy: Juxtaposing the Three M's of Mother, Money and Market¹²⁵

Etymologically the word surrogacy has been derived from the Latin term, “*surrogatus meaning appointed to act in place of.*”¹²⁶ In its literal sense it implies ‘substitute’. As the above account suggests, surrogacy has emerged as the most viable option when on the one hand there is an urge to have one’s own child¹²⁷, on the other end is the failure of IVF procedures or the impossibility to have IVF. In these situations, the two possible avenues so as to embrace parenthood are *adoption or surrogacy*. For the many who do not wish to opt for the former due to the want to having a child of their own flesh and blood or consider adoption as a lengthy, tiring and uncertain option, surrogacy has emerged as the most viable answer.

By “*surrogate mother we mean a woman who is hired to bear a child whom she turns over at birth to her employer who has been facing fertility issues.*”¹²⁸ Hilde Nelson and James Nelson extend this definition by suggesting that, a surrogate woman is one who “*supplies the egg while the man who purchases her services provides the sperm, but the egg need not be hers.*”¹²⁹ Surrogacy is an exemplification of a particular kind of labor relation *whereby “the employee is the woman who becomes the surrogate and the commissioning couple and more so the commissioning father is the employer for he is the one who takes all the critical decisions.”*¹³⁰ Alternatively, as Sharyn Anleu suggests “*surrogate mother contracts involve a woman agreeing to become pregnant and to relinquish the child to the commissioning couple at birth when they pay her for her gestational services.*”¹³¹ It is this that has led to surrogacy being referred to as ‘mothering by proxy’. This has been a big contention for anti-surrogacy activists and feminists

¹²⁵ A phrase used by Preeti Nayak in her essay *The Three M's of Commercial Surrogacy in India: Mother, Money and Market in Globalization and Transnational Surrogacy in India*, edited by: Sayantani Dasgupta and Shamita Dasgupta.

¹²⁶ Priyanka Acharya & Juhi Mittal, ‘India’s Surrogacy Laws in International Context,’ *Alexis Review* 1, No. 1 (2017).

¹²⁷ Maureen McNeil & Ian Varcoe, Steven Yearley, *The New Reproductive Technologies*: (London, Palgrave Macmillan, 1990).

¹²⁸ Nelson & Nelson, ‘Cutting Motherhood in Two: Some Suspicions concerning Surrogacy,’ *Hypatia* 4, No. 3, (1989): 85-94.

¹²⁹ *ibid*

¹³⁰ Pauline Everett, *A Relational Defence of Surrogate Motherhood, Durham theses*: (Durham, Durham University, 2011).

¹³¹ Sharyn Roach Anleu, ‘Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,’ *Acta Sociologica* 33, No. 1 (1990): 63-74.

alike who see it as giving of child custody to the contracting couple and more explicitly to the contracting father.¹³²

Women and their reproductive functions for a long time meant that the biological mother of a child was also its social and legal mother and the husband would be the father. Reproduction and body were considered to be intrinsically tied to one another due to the procreative labor undertaken by women. With the coming in of surrogacy arrangements, this procreative labor which till now had been a constituent of the private sphere came out in the open. Advocates of surrogacy argue that it enabled women; both the intending mother and the surrogate woman to exercise *agency over their body* and consequently de-link this intrinsic tie between reproduction and one's body. As this account suggests, the practice of surrogacy has given a blow to the conventional understanding of motherhood considering the fact that it has broken the link between reproduction and motherhood. Premised on this argument, it is believed that it is wrong to call the surrogate a mother considering, 'that the surrogate has no rights over the child',¹³³ nor does she have the ability to keep in touch with the child she bears thereby alienating motherhood from a surrogate. Infact it is argued that the term "*surrogate mother*" obfuscates the reality involved in its practice.

Notwithstanding the many concerns raised with regards to surrogacy, what is most noteworthy is that surrogacy as a possibility and surrogacy as an industry is increasingly deepening its roots all across the length and breadth of the globe. Depending on one's epistemic position, some might thus view surrogacy as an uncomplicated altruistic act and others considering the whole gamut of complications it entails would reject it as a not so easy course of action. From the standpoint of the commissioning couple while surrogacy is the most viable answer to their dreams of having a child of their genetics, for them too it raises plethora of concerns ranging from the cost involved to the success of the procedure. Despite these various conceptions two observations can be delineated without exaggeration¹³⁴:

¹³² Mohan Rao, 'Why All Non-Altruistic Surrogacy Should Be Banned,' *Economic & Political Weekly* XLVII, No. 21 (2012).

¹³³ Laura Harrison, 'I am the baby's real mother, Reproductive Tourism, Race and the Transnational Construction of Kinship,' *Women's Studies International Forum* 47, (2014): 145-156.

¹³⁴ Chintamani Rout, 'Surrogacy- A Conceptual and Legal Analysis in 21st Century,' *Orient Journal of Law and Social Sciences* 26, (2012).

- Even within the most altruistic of arrangements, there is some form of transaction involved, material or otherwise.
- The coming in and development of Assisted Reproductive Technologies has meant that commercial surrogacy has become the norm as against altruistic arrangements.

What adds to the difficulty of the institution is the very task of defining it. According to Bernard Dickens what makes surrogacy a complicated procedure is that one cannot discern a predictable pattern in it. Further, he argues that there is an absence of a uniform universal legal vocabulary that can explain and justify the relationships created by surrogacy arrangements.¹³⁵ There have been various attempts by various agencies to define surrogacy. Some of them are as follows:

In the words of the American Law Reports,¹³⁶ “*a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child’s birth.*”¹³⁷ The New South Wales Law Reform Commission defined surrogacy as, “*an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer custody at or shortly after birth.*”¹³⁸ The Assisted Reproductive Technologies (Regulation) Bill of India, 2010 defines “*surrogacy as an agreement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her 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.*”¹³⁹ In defining the surrogate mother the bill lays down that she should be a citizen and resident of India and that she should agree to implant in her, an embryo

¹³⁵ Bernard Dickens, ‘Legal Developments in Assisted Reproduction,’ *International Journal of Gynecology and Obstetrics* 101, (2008): 211-215.

¹³⁶ Read more in American Law Reports “Validity and Construction of Surrogate Parenting Agreement” 77 *A.L.R 4th* 70 (1989).

¹³⁷ Surrogacy: Is it Your Right?, visited on 10.5.2017

¹³⁸ *Artificial Conception - Discussion Paper 3: Surrogate Motherhood:* (Sydney, New South Wales Law Reform Commission, 1988): 6.

¹³⁹ Daisy Deomampo, ‘Transnational Surrogacy in India: Interrogating Power and Women's Agency,’ *Frontiers - A Journal of Women's Studies* 34, No. 3 (2013).

that has been formed by another man's sperm and another woman's oocyte and that she should willfully agree to carry the pregnancy to term.

Other crucial terms that are used in understanding surrogacy are 'commissioning parents' and a 'parental order.'¹⁴⁰ The commissioning parent or the intending parent refers to *the couple or person who undertakes surrogacy to have a child*. The reference to intended parents earlier included Indian citizens, Non-Resident Indians (NRIs) or Foreigners, Single Individuals, heterosexual couples. However this definition is undergoing continuous changes with the coming in of new rules and regulations. When discussing surrogacy, it is increasingly being argued that the rise in the proportions of the industry can be attributed to the fact that more and more couples belonging to well income families who can afford the cost of undertaking surrogacy. They acquire parental rights over the child through a *parental order* for which an application to the courts is made. Though it looks like adoption, what gives it an edge over adoption is that it is faster, easier and allows a genetic link between the intending couple and the child so born.

A *parental order* requires one to fulfill the following pre requisites:¹⁴¹:

- i) Traditional surrogacy arrangements are not allowed and hence to be able to have the child through surrogacy, there should be a genetic link of the child with one or both of the commissioning parents.
- ii) Surrogacy is only allowed for heterosexual couples who conform to the marital norms in Indian law. For instance, the couple should be above the marriageable age permissible in India.
- iii) The woman carrying the child and her spouse should by choice agree to such an arrangement.
- iv) There should not be any financial transaction apart from the medical expenses incurred in the process.

¹⁴⁰ Natalie Gamble, 'Made in the U.S.A.—Representing U.K. Parents Conceiving Through Surrogacy and ART in the United States,' *Family Law Quarterly* 46, No. 1 (2012): 155-167.

¹⁴¹ Dar, 'Surrogacy: a legislative Update,' *Off Our Backs* 19, No. 2 (1989): 2.

Surrogacy also entails the viewing of a child as a *gift*. It is believed that it is a special kind of gift that creates a custodial or guardian relation between parent and child. Surrogacy imposes moral obligations not only on the mother but also on the commissioning parents who have prior agreed to assist in the discharge of functions related to the child. What makes turning over the child to someone else post birth an extremely serious matter is the fact that with birth of a child an inescapable custodial relation is established between the mother and the child. This sense of custody is what prompts certain women who initially opted for surrogacy but in time vehemently resisted surrendering their babies.

In crux it can hence be argued that Surrogacy is a thriving practice across the globe. What makes the pervasiveness of this phenomenon most surprising is that it is juxtaposed by a large number of countries including India outlawing it? It is hence crucial to understand why despite its spread across the globe why are so many countries opting for its abolition. Clearly then surrogacy is not an easy one to pin down an exact definition and understandings. It has innumerable layers and dimensions each of which warrants detailed understanding. This shall be facilitated through an understanding of the various models of surrogacy in vogue in the current times.

2.5 Surrogacy Arrangements: Towards a Deciphering of its Typologies

The pervasiveness of surrogacy as a phenomenon has also meant, the ever increasing ways through which it can be achieved. Depending on the medical condition and choice, the intending couples can choose from the wide range of options available.¹⁴²

- (i) ***Traditional or Partial Surrogacy***: In this form of arrangement, there exists a genetic connection between the surrogate and the child. Under this method, the surrogate is artificially inseminated with the intending father's sperm through IVF or IUI. Considering that here the surrogate's own egg is used, it establishes a genetic link between the surrogate, the intending father and the child.

¹⁴² Faith Merino, *Adoption and Surrogate Pregnancy*: (U.S.A., Infobase Publishing, 2010): 20.

- (ii) ***Donor Sperm Surrogacy***: This is different from the earlier one considering that herein, the sperm is donated by an external donor and not the commissioning father. Thus the donated sperm and the surrogate's eggs are used to conceive the child. Under this arrangement the child so born is genetically related to the sperm donor and the surrogate mother instead of the commissioning couple.
- (iii) ***Gestational or Total Surrogacy***: It is a kind of surrogacy arrangement where the child is genetically linked to the surrogate mother. Under this arrangement, the intended mother's eggs are used along with intended father's sperms and the resultant embryo is carried by the surrogate.
- (iv) ***Gestational Surrogacy and Egg Donation***: In the absence of an egg from the surrogate mothers, a donor is used to get an egg which is combined with the sperm of the intended father. The resultant embryo is infused in the surrogate's uterus who then carries the child. Thus the child born is genetically related to the intended father and the surrogate mother has no genetic relation.
- (v) ***Gestational Surrogacy and Donor Sperm***: As in the above type, in case there are no sperms from the intended father, a donor provides sperms which are used with the intended mother's eggs to create an embryo. This embryo is then carried by the surrogate. Under this method, the surrogate has no genetic connection with the child.
- (vi) ***Gestational Surrogacy and Donor Embryo***: This kind of surrogacy arrangement involves an embryo that is donated from a third party and placed in the uterus of a surrogate. This surrogate then carries the embryo till birth. Therefore the child is neither related to the intended parents nor to the surrogate.

*According to another classification surrogacy can be categorised as either altruistic (non-commercial) or commercial*¹⁴³:

¹⁴³ Sharyn Roach Anleu, 'Surrogacy: For Love but Not for Money?,' *Gender and Society* 6, No. 1 (1992): 30-48.

- a) **Altruistic Surrogacy:** Altruistic surrogacy arrangements are those that require no monetary exchanges. Under this form, a close relative or friend carries the child to term without any monetary reward or compensation. In this form, only basic medical expenditure is paid for by the intending couple.
- b) **Commercial Surrogacy:** In contrast to altruistic arrangements, commercial surrogacy involves payment of a large sum of money to a woman who is hired for the purpose of carrying the money. The characteristic feature of this is that it is marked by economic transactions. It is this commercial nature that makes it a business opportunity¹⁴⁴ and has led to it being referred to as ‘wombs for rent’, ‘outsourced pregnancies’¹⁴⁵, ‘baby factories’ or ‘baby farms.’¹⁴⁶ It is argued that in this form of surrogacy the one entity that profits the most is the agency or the fertility clinic that ‘brokers’ the entire transaction. Their role has come under the scanner considering that, they gain at the cost of the surrogate.¹⁴⁷

The above discussion evidently points to the fact that surrogacy no longer remains an obscure and murky phenomenon. With changing mental construct and relaxation in social attitudes, unwanted pregnancies and taboo of remaining childless has relaxed. This has received further impetus with the growing openness of the society that freely talks about hiring a womb and development in science and technology that has facilitated this task. The developments in medical technologies have been a new dimension for couples who consider *adoption as distressingly inadequate*. With the urge to have a biological offspring, they have started to explore the possibilities of these reproductive assistance technologies.

2.6 Conceptualizing the History of Surrogacy in India

The trajectory of surrogacy, India’s new form of *outsourcing*, dates back to our earlier forms of civilization. The history of surrogacy can be traced back to biblical times. Commentators argue

¹⁴⁴ Heidi Malm, ‘Paid Surrogacy: Arguments and Responses,’ *Public Affairs Quarterly* 3, No. 2 (1989): 57-66.

¹⁴⁵ J.P.S. Sirohi, *Criminology and Penology*: (Allahabad Law Agency, 2011).

¹⁴⁶ Debora Spar, ‘For Love and Money: The Political Economy of Commercial Surrogacy,’ *Review of International Political Economy* 12, No. 2 (2005): 287-309.

¹⁴⁷ This aspect of surrogacy where the money is unequally shared is discussed in a later section of this work.

that its earliest beginnings can be traced to Sarah and Abraham. While some consider it to have existed even before that, others argue that it began as a social arrangement in ancient times as is manifested in the stories of Rachel and Jacob.¹⁴⁸ Similar was the story of Rachel and Jacob.

Surrogacy has been a prominent feature of Indian history. Tracing the trajectory of surrogacy in India, its roots can be traced back to a practice known as *Niyog Pratha* which implied that a woman who was childless because of her husband's infertility was allowed to get pregnant from her brother-in-law.¹⁴⁹ Just like the surrogacy arrangement, the child does not belong to the brother in law who herein was the sperm donor. Rather, the child belonged to the couple alone. Therefore, *Niyog pratha* was a system of surrogate fatherhood.

The central tenets of this process are as follows:

1. The only reason for such an arrangement to be valid was to have a child
2. The child born out of Niyog pratha would be the heir of the couple and not the brother-in-law.
3. A man could become a surrogate father for a maximum of three times.
4. Niyog pratha would be premised on Dharma and not lust or passion. Thus it was considered to be justified and not immoral.

While no authentic sources exist on Niyog pratha, its knowledge is derived from myths and epics.¹⁵⁰ One such instance is found in the Mahabharata where Queen Satyawati forced her son Vyasa to enter into a Niyog pratha system for the widow of her sons Vichitravirya. Another instance is that of Dhritarashtra's wife Gandhari, who delivered 100 male children namely Duryodhana, Duhshasana and other Kauravas from a mass mole.

¹⁴⁸ Sharyn Roach Anleu, 'Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,' *Sociological*33, No. 1 (1990): 63-74.

¹⁴⁹ Ashley Kate, 'History of Surrogate Motherhood,' <http://www.ezinearticles.com>.

¹⁵⁰ *ibid*

Writing from a subaltern perspective, Mahashweta Devi in her story *Breast-Giver or Standayani* represents the real context of female existence in India in the 19th century. Devika Ramanna in discussing about Stanadayani argues that,

*“the voiceless figure of female has her own consciousness that grows along with her stories. Standayani is the story of a woman, Jashoda who is oppressed by not only the man in her life, but also by other women as well who exploit her economically, socially, and psychologically. She is oppressed in that she is treated as a commodity rather than an actual human being. Jashoda, the ‘breast-giver,’ is in most ways a powerful woman overcoming the oppression that womanhood entails.”*¹⁵¹

She is projected as a strong woman who uses her own body, works outside of the four walls of domesticity and begins to work with her body. While she works outside to sustain her family, she also has to perform all the responsibilities within the household thereby putting her through double stress.

Standayani in many ways is a seminal text that brings to light how a woman named, Jashoda questions and challenges the patriarchal construction which views men as the providers for the family, and designates them as the heads of the household. She reverses the understanding of the *public and private* by taking up to work and took care of her family while her husband Kangalicharan led the home. Her act established her at par with her husband and the other men of the society. This ‘empowerment’ however is juxtaposed by ‘oppression’ that she faces from the women for who she was a breast feeder. This act reduced her to a commodity thereby denying her all the dignity and respect. For those who hired her services, she was just a woman they hired and in return paid for. The women who hired her exercised absolute control over her and thus when she was no longer of need for them, she was left alone to fend for herself without a thought for her well-being or the survival of her family.

¹⁵¹ Ramana Devika, ‘Feminist Study of Mahasweta Devi’s Breast Giver (Standayini),’ *South Asian Journal of Multidisciplinary Studies* 3, No. 4 (2016).

Standayani is a reflection to the lives of surrogates. While they find empowerment outside their homes with the use of their bodies, they are constantly *juggling between the child they carry for someone else and the children they leave behind at home*. Further, it is argued that even if for a moment one considers that that surrogate has escaped the oppression within her family, she is now left at the disposal of the commissioning couple who see her just as a commodity and infact discard once their job is done. While the surrogates consider it as empowering, the sexist nature of the job cannot be undermined. Thus, just as commercial breast feeding, women within surrogacy are objectified and subjected to exploitation and harm. Such a gendered form of labor goes on to uphold and further perpetuate women's subordinate status in the society.

The inception of surrogacy in current times is often traced back to the late 1800's when the American Indians began the surrogate history. History suggests that under this system men who could not have children with their own wives, would impregnate another woman with the permission of the tribal chief. The child so born would not be related to the intending mother. In many countries, surrogacy has been around since before records. However, instances of surrogacy were not restricted to the American Indians. In the European history there are numerous instances of kings fathering sons through surrogates. While the king and Queen were hailed as the parents of the child so born, the Queen in reality was not the biological mother of the child.

All of these accounts point towards a number of things at the same time. These are:

- To begin with, the emphasis on child bearing has a historical underpinning. There is a visible emphasis a genetic link with one's child.
- The practice of surrogacy or even outsourcing of reproduction is not a new phenomenon and has infact been in vogue for time immemorial.
- There is an evident stigma related to sex. For instance, in Niyog there was a purification process for which ghee was used on the bodies to not let the element of lust creep in.
- While the Hindu tradition resorted to surrogacy arrangements from time immemorial, Islam has repudiated surrogacy as an amoral and not permissible enterprise

- Arguably, much more modern reproductive technology emerged, surrogacy in some form or the other continued to exist. It has travelled a long journey from Niyog pratha to ART's today
- All of these accounts point towards a significant aspect of the gender relations which revolved around procreation. Women were considered as agents of carrying forward the family lineage which in today's times finds echo in the desire to 'carry forward the vansh.' Wherever women failed to perform their natural roles due to their own or their partner's issues which were considered 'inadequacies', they resorted to natural assistance to conceive.
- Infertility was not an issue limited to women. In many cases, the men are incapable of reproducing in which case sperm donation is resorted to.
- Clearly then the use of assisted reproductive technologies including surrogacy find manifestation and also sanction in mythological as well as secular texts.
- Despite these stories of mutual benefit, what cannot be undermined is the fact that assistance in reproduction, naturally or technologically reduces women to their reproductive roles thereby upholding the view of their inferior status.

Arguably, in spite of these various issues related with intervention and assistance in reproduction, its spread has been at an unprecedented rate so much so that India has come to become a hub of reproductive tourism. This beckons us to understand the history, existence and continued spread in the Indian subcontinent.

2.7 Constructing Conceptions: Mapping Recent Developments of Surrogacy in India

The question of surrogacy in India, presents a complex dilemma. While the *Transplantation of Human Organs Act, 1994* has put a ban on the sale of human organs, organ loaning, it continues to exist in another form namely surrogacy. This paradoxical juxtaposition is on account of very many factors. To begin with, the socio- cultural milieu of Indian society is embedded in a typically patriarchal mindset that attaches unparalleled significance to procreation and expanding the family through one who carries forward the family blood.

Further, the fact that India has increasingly become the thriving hub of surrogacy across the world can be attributed to the medical industry that welcomes profitable international ventures like ‘reproductive tourism’. According to the *Indian Society of Assisted Reproduction*, “infertility currently affects about 10 to 14 percent of the Indian population, with higher rates in urban areas where one out of six couples is impacted. Nearly 27.5 million couples actively trying to conceive suffer from infertility in India.”¹⁵² “Infertility is an under-researched condition that is wrecking marriages and even people’s lives,” elaborates Dr. Sama Bhargava, consultant IVF expert at Fortis Hospital, NOIDA.¹⁵³ “Childbearing is considered an essential role in life and a yardstick by which women’s worth is measured. So infertility invites social stigma. It is time we recognize it as a perilous personal and public health issue and deal with it effectively.”¹⁵⁴

The doctor states, “That the problem isn’t gender-specific. Both male and female partners can be equally responsible for the inability to conceive a child. “For long, infertility was a cross that women had to bear. But we’ve found that less than 30 percent of Indian men have normal semen characteristics leading to conception problems for women,” states Bhargava.¹⁵⁵ Dr. Sonia Malik, director of the Department of Fertility at the CK Birla Hospital for Women, Gurgaon, writes in a paper that, “in Indian villages, fertilizers and pesticides are contributing to declining fertility.”¹⁵⁶

Significantly, it is argued that lifestyle ailments are increasingly playing villain too, especially obesity and diabetes. Over 40 percent of women attending infertility clinics are found to be obese.¹⁵⁷ In men, obesity brings down semen quality. Sexually transmitted infections, polycystic ovarian syndrome, fibroids, and genital TB are other new areas of concern among women. A rise in unprotected sex had led to sexually transmitted infections (STIs) and widespread use of both emergency contraception and surgical abortions, which can trigger serious infections that may cause irreversible infertility.¹⁵⁸ Similarly, rapid urbanization, hormonal changes, especially in

¹⁵² Neeta Lal, *India's Hidden Infertility Struggles*: (The Diplomat, May 30, 2018).

¹⁵³ *ibid*

¹⁵⁴ *Ibid*

¹⁵⁵ *Ibid*

¹⁵⁶ *Ibid*

¹⁵⁷ Census of India, ‘Estimates Of Fertility Indicators’.

¹⁵⁸ Neeta Lal, *India's Hidden Infertility Struggles*: (The Diplomat, May 30, 2018).

prolactin levels¹⁵⁹, which are found in many infertility cases, job pressures, vehicular pollution and postponing parenthood are quoted by the doctor as other salient reasons for infertility in India.¹⁶⁰

Another significant cause is the fact that a large section of the population in India is stuck in a poverty-unemployment vicious cycle and therefore finds themselves arrested in abject poverty. With the failure of development to trickle down uniformly to all sections of the population, some are left with no option but to sell their bodies to make ends meet. India has thus emerged as the favorite destination for infertile couples from across the globe owing to the lower cost and availability of surrogate mothers.

It has been widely argued that the surrogacy industry in India seems ideal on account of the very *less restrictive laws* that give more autonomy and liberty to resort of surrogacy arrangements in India. With no monitoring mechanism in place, the industry is currently governed by a set of guidelines that aren't legally binding. This creates a fertile ground for exploitative agencies to hoodwink trusting couples in their innocent quest for a family.

What provides further impetus is the fact that contemporary era has witnessed innumerable strides being made in the development of science and technology. A whole gamut of agencies have sprung up offering affordable and developed avenues. This ease of operation is further compounded by the *lack of regulation* of ART clinics. Medical breakthroughs in reproductive health have facilitated the preservation of sperms and eggs for future use — popularly called 'fertility preservation.' Stem cell therapy is also poised to discover ways to re-form the eggs and sperms through what's called 'fertility rejuvenation.'¹⁶¹ While these developments have been a bane for many, it also has its repercussions. For instance, couples are increasingly bypassing other ways of conceiving and are instead directly approaching infertility specialists, even though 80 percent of such cases can be managed with simple, routine treatments.

¹⁵⁹ Prolactin (PRL) helps in production of milk amongst mammals.

¹⁶⁰ Sheth, Joshi, Rao, Moodbidri. 'Serum Prolactin Levels in Fertile and Infertile Men,' *Andrologia* 5, No. 4 (1973): 297-298.

¹⁶¹ Neeta Lal, *India's Hidden Infertility Struggles*: (The Diplomat, May 30, 2018).

Surrogacy has gathered much attention of late due to the increase in the number of couples opting for surrogacy as well as of the women acting as surrogates. The fertility market is estimated at Rs. 25,000 crores today. With India fast emerging as a favored destination for surrogacy, commercial surrogacy raises a host of issues as evident from the judgment of the Supreme Court. While hearing a petition filed by a German couple (Jan Balaz and Susan Anna Lohlad) with regard to grant of Indian citizenship for their surrogate twins, it made pertinent queries thereby posing new challenges to the operation of surrogacy.¹⁶² Similarly, the complicated case of Japanese *baby Manji* born to an Indian surrogate mother with IVF technology upon fertilisation of her Japanese parents' eggs and sperms in Tokyo and the embryo being implanted in Ahmadabad, triggered off complex knotty issues.¹⁶³ In this context the Supreme Court echoed concern about the absence of a law regulating surrogacy, so that there should not be any repetition of such cases.

The aforementioned situation in India explicitly indicates that while the surrogacy industry is expanding at a rampant rate, and is often characterized by cases which bring forth the darker side of the industry, there is a general lax in the laws thereby posing stringent threats to the rights and liberties of the woman acting as the surrogate. For instance, while the medicalization of reproductive processes worldwide has become the norm, it is far from being even or uniform. Due to this, there is no standard procedure in deciding the minimum remuneration that a surrogate should be made to the surrogate. As a result, there is a huge distinction between what a surrogate is paid in Anand and what she is paid in Gurgaon.¹⁶⁴

Further, in the absence of a well structured system, the women often undertake many pregnancies which subject their lives to risk. The surrogates, during my field research were of the opinion that they were willing to do as many surrogacies as possible as long as they were

¹⁶² The twins born to an Indian surrogate mother for a German intending couple in January 2008 were stateless citizens, who were denied citizenship of both Germany and India. With the The German authorities having denied their visas, had been steadfastly refusing visas to Nikolas and Leonard (said twins) on the ground that the state law did not recognise, it affirmed that surrogacy as a means to parenthood.

¹⁶³ It's a famous case of surrogacy where for the first time the intending father and mother separated during pregnancy thus pushing the child's future in disillusionment. The grandmother of the infant petitioned the Supreme Court challenging the directions given by the Rajasthan High Court relating to production and custody of baby Manji Yamada.

¹⁶⁴ This is based on observations from the field research.

being paid for it. The only condition was that they could not have a pregnancy post two C-Sections. While some clinics and surrogacy homes follow the parameters, secondary data suggest that it is easily bypassed in surrogacy clinics that operate in smaller places and even those in bigger cities who have no fear of being caught and punished. The brunt of multiple pregnancies on the health of the surrogate is nobody's interests: neither of the intended couple nor the clinics and not even the surrogate's families. It is only the surrogate who is at loss but unfortunately is oblivious about it. To substantiate, three of my respondents who were now in their 40's and 50's, were diagnosed with forms of cancer which were due to the intake of medicines and injections.

Yet another issue with this growing industry of surrogacy in India is that there are *no standard medical procedures* that are nationally abided by. Thus for instance, while some surrogacy clinics were well equipped to provide best medical treatment to the surrogate, others just existed for the sake of formality. One of my respondents narrated a chilling story where during her stay in the surrogacy hostel when she suddenly went into labour, two nurses who were no better than midwives were the one to help her have the child. As a result, she developed complications and had to undergo C-section. The stitching post the surgery was not done right due to which many complications developed and she had to undergo another surgery to heal it. Today, ten years since, her stomach is cut up and the wounds still pain. She recalls the story of neglect, where after the child neither the intended parents nor the hospital helped her and all the money she had earned through the surrogacy went into her treatment. This is just one story amongst the many that point towards the negatives of the industry which is largely unregulated and unreported.

It is crucial to note that there are no basic standards in the conditions within which the surrogates live. IVF and Surrogacy clinics have acquired the status of a lucrative business venture and hence operate at every corner of the country. While some hospitals are more hygienic than others, secondary data suggests that most are in absolute apathy with closed dingy rooms and stinking washrooms. All of this significantly affects the mental, physical and psychological health of the surrogate. This can be largely attributed to the different costs surrogacy can be done at. While some intending parents like Shah Rukh Khan and Amir Khan can afford to pay hefty amounts, other who are not so well off and yet desire to have their offspring opt for the cheapest surrogacy

package. In this entire equation it is the woman working as a surrogate and the child so born that suffers.

Another issue with surrogacy is the mental trauma that it causes on the surrogate. To begin with she has to live away from her family and most importantly her children for the nine months of her pregnancy which is a huge sacrifice that no amount of money can compensate for. Further, closed within the four walls of their hostels, surrogacy is often disastrously depressive for these women. These women are effectively imprisoned for nine months unlike normal pregnancy tenures and are allowed to leave the premises occasionally only when they have to go for their checkups. Their lives are confined to just one floor in a premise where they spend day in and day out in their rooms which are often small and dingy. This leaves a forever mark on their mental health that cannot be measured in terms of money. It also needs to be reiterated that the pain of parting with the child she bears for nine long months is immense thereby causing psychological damage to the surrogate. In the current situation, the surrogate has no protection against these impinging issues.

Surrogacy despite its phenomenal existence in India as the above account unequivocally suggests is not treated as a form of labor that is looked at with dignity. Infact it is not even considered as work. The most striking manifestation of this is the absence of any union of the surrogates that can bargain for their rights. Due to its concealed nature, the surrogacy industry has failed to organize itself. The surrogates are thus unaware of their rights and hence lack the power to fight for their liberties. This also explains why there are no insurance benefits available to the surrogate.

Amidst all of this, the distinction that is made between altruistic and commercial surrogacy, to my mind further detriments the cause of the women who become surrogates. While the very binaries of altruistic and commercial is a misnomer considering that even in the most altruistic of arrangements, there is some amount of commercial transaction. The need is to replace the altruistic model with a compensatory model if the rights of the surrogate are to be upheld. Further, limiting it only to 'close relatives' is grossly unfair and hence will not be in any way beneficial for the surrogate mother and will infact further exploit her. To add, one cannot deny

the power dynamics that exist within the family coupled with the fact that it is extremely tough to regulate the affairs within the family which constitutes the private domain of an individual's life. Hence if surrogacy is reduced to only its altruistic types, the rights of the surrogate will further be jeopardized.

These issues are evident across the globe but become much starker closer home due to the deplorable economic plight of the surrogate. Clearly then while on the one hand is the rapidly spreading surrogacy industry which surrogates believe has added positively to their lives and on the other are the various elements of harm which are embedded in the practice of surrogacy. It is in context of this that one wonders if laws can guarantee rights to these women by eliminating the element of harm inherent in it. As divided as the academic discourse is in theorizing about surrogacy, so are the countries across the world which are grappling with the question of what is the most ideal way of dealing with surrogacy. While a majority of countries permit only *altruistic surrogacy*, only a handful allow for the existence of both altruistic and *commercial surrogacy* arrangement. In context of India, there has been a long list of failed attempts at regulating the industry and upholding the rights of the surrogates.

The earliest bid to regulate it came with the Indian Council for Medical Research Guidelines followed by the Draft ART Bills, all of which have failed to do the needful. The limited scope of the *ICMR guidelines, the Draft Assisted Reproductive Technology (Regulation) Bill 2008, 2010, 2013, 2016*¹⁶⁵ have all pushed the issue of surrogacy further by highlighting the gender bias of the law against women working as surrogates. What has been evident in most legal pronouncements on surrogacy as also on the contracts that are framed with the surrogate is that these are always framed keeping the commissioning couple and more so the commissioning father in mind. This alternatively has meant a denial of the rights of the surrogate. This gender bias nature of the law has impinged upon us the need to contextualize it within the framework of rights of surrogate mothers which will be discussed at length in the latter part of this work.

¹⁶⁵ The Surrogacy (Regulation) Bill 2016 is the most significant amongst these bills more so because of the Lok Sabha having recently passed it. Once passed by the Rajya Sabha, it will radically alter the contours of surrogacy in India. A detailed discussion of this shall is undertaken in a later section.

2.8 The Forces behind Surrogacy in India: Pull and Push Factors

The institution of surrogacy is not a discrete phenomenon and hence does not operate in a vacuum. There are a diverse set of factors that explain the demand and supply for surrogates. In popular parlance, these are known as the pull and push factors.¹⁶⁶ The various factors range from operation of patriarchy, widespread poverty, hapless state of unemployment, lack of livelihoods, urge for a biological child and stigmatization of infertility amongst the many others. All of these social realities complicate the situations on the ground.

There are many reasons why a couple might choose to take the route of having a baby through a surrogate mother the most prominent of which are¹⁶⁷:

- **Personal Decision:** Modern lifestyles are premised on the autonomy of the individual to make choices. One such choice which is fundamental to an individual is his or her right to use their bodies the way they like. Consequently, for some women, surrogacy is not a medical choice, but a social choice. Alternatively it can be argued that pursuing surrogacy as a means to grow a family isn't reserved for couples with genetic challenges, infertility, and medical conditions alone. Surrogacy is available to any couple who desires to embark on this journey, as long as there is a demonstrable medical issue or a biological impediment to pregnancy.
- **Age:** it is widely believed that healthy procreation is possible only up to a certain phase in an individual's life. Those couples, who find themselves beyond the fertile age group, and desire to have their own kin, consider surrogacy as the most apt possibility.
- **Impossibility:** In case of same sex male couple, the only way to beget a biological child is surrogacy. Further, even for heterosexual couples with infertility issues, surrogacy is the most popular choice to have a child.
- **Lack of a Uterus:** For women to perform their reproductive functions, the uterus and its healthy state is mandatory. For those women who suffer from some sort of uterus related infertility issues, surrogacy is the only way to have a child of their own,

¹⁶⁶ Lael Foster, 'An Exploration of the Motivational Factors in Surrogate Motherhood,' *Masters Theses* 1911, (2014).

¹⁶⁷ Fiona MacCallum, Emma Lycett, Clare Murray, Vasanti Jadvā & Susan Golombok, 'Surrogacy: The Experience of Commissioning Couples,' *Human Reproduction* 18, No. 6 (2003): 1334-1342.

- **Other Medical Condition:** In the wake of certain conditions not directly related to fertility like heart disease, kidney disease, or severe diabetes, carrying a child can be extremely tough. Under such circumstances reproducing a baby is not possible. Surrogacy thus emerges as the answer.
- **Infertility:** in contexts of proven infertility, surrogacy offers couples the opportunity to grow their family despite obstacles.
- **Genetic Challenges:** In certain rare cases, parents have some form of genetic challenge which they do not want to pass on to their child and thus opt for surrogacy.
- **Medical Conditions:** If a mother has medical conditions that would not allow her to safely carry a child or go through the birthing process, a surrogate pregnancy may be an excellent alternative. The above account is suggestive of the various factors that push an individual to resort to having a biological offspring through surrogacy. However it is also pertinent to analyze the factors that contribute to women taking the decision to become a surrogate. In this context, **Parker** highlights three broad arguments¹⁶⁸:
 - the perceived desire and need for money,
 - the perceived degree of enjoyment and desire to be pregnant, and
 - the perception that the advantages of relinquishment outweighed the disadvantages

Parker describes this third factor as including both the desire to give the gift of a baby to an infertile couple and the unconscious attempt to master unresolved feelings stemming from a previous loss of a child.¹⁶⁹ Parker found that the fee became less important as the pregnancy progressed and the surrogate developed a relationship with the parental couple. After delivery, Parker observed that the surrogates "usually felt a sense of duty and a need to please the parental couple by relinquishing a healthy baby for them to 'parent' in a loving and caring way therefore, concludes that the fee is unimportant as a motivation for relinquishment, and he suggests that the fee cannot adequately account for the decision to become a surrogate mother.

This however has been opposed by many who believe that the principle incentive for surrogates is to earn money. They argue that no woman would like to undergo the pain of reproduction for someone else if it wasn't for the monetary gains that it brought. It is therefore crucial to

¹⁶⁸ P.J. Parker, 'Surrogate motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy,' *Bulletin of the American Academy of Psychiatric Law*, (1984): 21-39.

¹⁶⁹ Ibid

understand what are the factors that push women into becoming surrogates for someone else? Some of the most pronounced reasons are as follows¹⁷⁰:

➤ **Family History**

In certain familial set up's, surrogacy runs as a matter of hereditary custom. It is a celebrated tradition both within and outside of the family. These women see surrogacy as a way to continue the tradition of helping others. The underpinnings are not merely benevolence and love, but also the material rewards that surrogacy brings to its woman. For those who struggle to make ends meet, they consider surrogacy as economically rewarding without the need for any particular skill set. This understanding runs down through ages and gradually settles as a norm.

➤ **Understanding the Fertility Struggle**

Infertility is one of the most challenging things that involves mental, emotional and physical challenges. Realizing the beauty of motherhood and acknowledging its challenges, some surrogates feel called to do more and choose to become a surrogate.

➤ **Wanting to Give Back**

Many women take pride in the ability to help another family's dreams come true and become a surrogate to help someone else in a big way.¹⁷¹

➤ **Helping a Friend or Family Member**

Surrogacy does not always mean unknown parties prior to the surrogacy contract. Many surrogates are friends or family of the infertile couple.¹⁷² They choose to become a surrogate based upon their love. There are countless stories of friends, sisters, and even mothers volunteering to be surrogates.

➤ **Emotional and Financial Rewards**

¹⁷⁰ P J, Parker, 'Motivation of surrogate mothers: Initial findings,' *American Journal of Psychiatry* 140, (1983): 117-118.

¹⁷¹ Zsuzsa Berend, 'The Romance of Surrogacy,' *Sociological Forum* 27, No. 4 (2012).

¹⁷² Ibid

While the choice to become a surrogate is selfless, it is not without reward. There are both financial and emotional incentives for gestational carriers as well as medical care.¹⁷³

The debate on what prompts women to opt for surrogacy is an extremely heated one. While the predominant understanding is that it is monetary gains that push women to become surrogates, others argue that a culture in which nearly everything can be had for a price may find it difficult to trust or even understand claims of custody, attachment and motherly instincts. The latter argue that the motive behind surrogacy is much more diverse than what is adhered to by the market and money perspective. They argue that most of the fees are so small that it is unlikely that money would be the reason. They infact stress on the idea that surrogates understand their activity at least in part as that of giving the commissioning couple a gift that they are unable to make themselves.

Clearly then there is not a single factor that can solely explain why some women resort to surrogacy and why some others take it up as an occupation. There is a whole gamut of causes that explain this phenomenon. Interestingly, what it also reiterates is that the institution of surrogacy divides women themselves. While some are commissioners, others are providers of ‘babies’.

2.9 The Business and Ethics of Surrogacy: Understanding Women’s Reproductive Labor

Surrogacy raises questions of not only meaning but more so of how ethical a practice is it. Therefore it is crucial to grapple with a decisive question which is: *is there anything intrinsically immoral about surrogacy arrangements?* This question becomes further pronounced in context of the various charges levied against surrogacy chief amongst which is the claim that ‘surrogacy is similar to prostitution’ in that it reduces women's reproductive labour to a form of *alienated* and *dehumanized* labour just as sex work or pornography does.¹⁷⁴ This ethical dilemma becomes

¹⁷³ Debora Spar, ‘For Love and Money: The Political Economy of Commercial Surrogacy,’ *Review of International Political Economy* 12, No. 2 (2005): 287-309.

¹⁷⁴ Anton van Niekerk, Liezl van Zyl, ‘The Ethics of Surrogacy: Women's Reproductive Labour,’ *Journal of Medical Ethics* 21, (1995): 345-349.

much more pronounced if one begins to look at laws across the globe most of which have banned and outlawed it.

To begin with it is important to see what does the term '*ethical concern*' connote? The term ethical is synonymous with a host of expressions that have increasingly gained popularity in the contemporary times. It stands synonymous with the terms equitable, fair, and just dealing when interacting with people. This definition is underpinned with a certain degree of flexibility and pragmaticity according to the situation and times. However at all times it ought to conform to self-imposed high standards of public conduct. Once practically interchangeable with 'moral,' this term has acquired quasi-legal connotations and has moved closer to 'legitimate' following the recent schism between private morality and public morality.

The understanding of ethical however is not static. It keeps changing with evolution in human knowledge and practical experiences. As societies advance and grasp newer forms of knowledge, the existing ethical norms are challenged. Ethical thinking therefore is not a linear process. It is rather a juxtaposition of contested ideas and interests, in which social responsibility, dignity and well-being must all find a place.

This being the larger ambit, it is explicit that surrogacy has grappled with a lot of ethical questions and concerns. Therefore, Holly Donahue Singh argues, "*surrogacy should be seen as an opportunity to strengthen and widen our deepest ethical concerns by questioning patriarchal norms of the family and the stigmatization of infertility. At the very least, its miraculous potential should not be used to reinforce regressive ideas about blood and inequality or rationalize it as a way to address women's economic marginalization.*"¹⁷⁵

The ethical aspects can be dealt from the perspective of all stakeholders namely the surrogate, the commissioning parents and of the child. This is done in context of a larger concern pertaining to the issue of the child's commodification and the issues of what moral are surrogacy contracts. With regards to the surrogates, the most fundamental opposition comes from the feminist school of thought which sees surrogacy as 'exploitation of women.' They premise their arguments on

¹⁷⁵ H. D. Singh, 'Fertility Control: Reproductive Desires, Kin Work, and Women's Status in Contemporary India,' *Medical Anthropology Quarterly* 31, (2017): 23-39.

the ground that there exists striking similarities between surrogacy and prostitution. To begin with, Mary Warnock describes surrogacy as “*a form of exploitation similar to prostitution.*”¹⁷⁶ Similarly Andrea Dworkin opines that,

“*Motherhood is becoming a new branch of female prostitution with the help of scientists who want access to the womb for experimentation and power Women can sell reproductive capacities the same way old-time prostitutes sold sexual ones but without the stigma of whoring because there is no penile intrusion. It is the womb, not the vagina that is being bought.*”¹⁷⁷

It is believed that just as prostitution entails the ‘sale of sexual labour’, surrogacy involves the sale and ‘purchase of reproductive labor.’ The various ways in which surrogacy is found similar to prostitution are as follows:

- Both in surrogacy and prostitution, what is made available by women is her *physical service*.
- Like prostitution, surrogacy too entails a *lack of emotional commitment* in the transaction.
- Surrogacy and prostitution both involve the availability of *material compensation* in exchange of physical services.
- Both of these forms of transactions are generally conducted between men of relative economical and social privilege and women of relatively no influence thereby adding a *power dynamics* to the transaction.

It is argued that all these reasons are big enough to highlight the fact that surrogacy is as exploitative and ripe with subjugation as sex work is. This view is however rejected by those who see no parallel between the two. Miroslav Prokopijevic refutes these arguments calling them, *superficial and relatively unimportant when they are compared to the differences that exist between the two forms of work.*’ He argues that all of the aforementioned characteristics are infact, “defining features of most transactions where physical labour is traded for material

¹⁷⁶ Mary Warnock, *A Question of Life: the Warnock Report on Human Fertilization and Embryology*: (Oxford and New York, Basil Blackwell, 1985).

¹⁷⁷ Andrea Dworkin, *Right-Wing Women: The Politics of Domesticated Females*: (London, The Women's Press, 1983).

compensation.”¹⁷⁸ For instance it is but a regular feature that, “we trade money for services without forming a deep personal or emotional relationship with each other.”¹⁷⁹ The proponents of surrogacy believe that, “*those who claim that surrogacy is similar to prostitution on these grounds and that it is therefore immoral seem to be living in an illusion.*”¹⁸⁰ Therefore they suggest that labeling surrogacy as unethical merely because it looks similar to prostitution is inadequate.

Donna Dickenson argues that, “exploitation is a much more subjective concept than the objective criterion of exploitation in terms of disparity of value, yet it is imperative to count it to counter responses that come from the Indian surrogate mother.”¹⁸¹ She goes on to argue that, “Whereas the difference between the price of the baby by the intending parents for the entire process and the wage received by the surrogate is as great as it can be in India, exploitation is evident to the surrogate, yet since the conditions of her days are much better than her everyday grind, the India surrogate denies that she is being exploited.”¹⁸²

Heather Widdows in this context argues that it is extremely unethical for someone with lack of choices and in desperate bid to keep their body and mind together to be exploited in such a manner. It is clear *subordination, coercion and subordination.*¹⁸³ Carol Pateman adds, “*Subordination is the relation that makes exploitation possible.*”¹⁸⁴ This argument clearly challenges the liberal proposition of choice, which in reality is the absence of the possibility of making choices.

Carol Pateman argues that “*When women’s bodies are on sale as commodities in the capitalist market, the law of male sex-right is publicly affirmed, and men gain public acknowledgment as*

¹⁷⁸ Anton van Niekerk, Liezl van Zyl, ‘The Ethics of Surrogacy: Women's Reproductive Labour,’ *Journal of medical ethics* 21, (1995): 345-349.

¹⁷⁹ Priyanka Acharya, Juhi Mittal, ‘India’s Surrogacy Laws in International Context,’ *Alexis Review* 1, No. 1 (2017).

¹⁸⁰ Anton van Niekerk, Liezl van Zyl, ‘The Ethics of Surrogacy: Women's Reproductive Labour,’ *Journal of medical ethics* 21, (1995): 345-349.

¹⁸¹ Donna Dickenson, *Property in the Body: Feminist Perspectives*: (Cambridge University Press, 2007).

¹⁸² The movie, *Made in India* depicts a scene where the American Commissioning couple is told that the surrogate is receiving \$7,000 in addition other facilities, she tells the filmmakers that she was paid merely \$2,000.

¹⁸³ Heather Widdows, *Gender, Agency, and Coercion: Thinking Gender in Transnational Times*: (London, Palgrave Macmillan, 2013).

¹⁸⁴ Carole Pateman, *The Sexual Contract*: (Cambridge, Polity Press, 1988).

women's sexual masters—that is what's wrong with prostitution.”¹⁸⁵ Borrowing from Catherine Mackinnon's arguments on prostitution, it has been variously argued that, ‘*surrogacy reduces women to objects of reproduction.*’¹⁸⁶ Wherever women's bodies are reduced to commodities that can be bought and sold in the market, it leads to their systematic exploitation and subjugation.

Elizabeth Anderson attempts to bring forth an in-depth discussion of the objection that surrogacy is wrong because it commodifies women's reproductive labour.¹⁸⁷ She suggests that the blind application of economic criterion to the domain of women's work is based on a prerequisite that, “*the surrogate mother is to repress whatever parental love she feels for the child, these norms convert women's labour into a form of alienated labor.*”¹⁸⁸ Anderson continues, “*By manipulating and denying legitimacy to the surrogate mother's evolving perspective on her own pregnancy, the norms of the market degrade her.*”¹⁸⁹ Further it is argued, that, “the contract does not require the surrogate mother to feel in certain ways, but rather to act in certain ways. The contract may require her to act against her feelings to fulfill its terms, and that to this extent her labour might turn out to be alienated labour.”¹⁹⁰ All of this, Anderson believes, alienates the surrogate's labor.”¹⁹¹

Surrogacy also entails, “a change of perspective that many surrogates experience as their pregnancy develops: whereas at first they might feel that pregnancy is simply a form of physical labour, that they will have no difficulty giving up the child, and that they are simply performing a service for an infertile couple, these women often realize as the time of delivery nears, that they are expecting a child, in the full social and psychological sense of knowing that they are going to give birth to a human being that is closely tied to themselves. The problem with surrogacy arrangements is therefore that it causes a woman to be pregnant while expecting her not to

¹⁸⁵ Ibid

¹⁸⁶ Catherine Mackinnon, *Issues in Political Theory*: (Oxford University Press, 2012).

¹⁸⁷ Elizabeth Anderson, ‘Is women's labor a commodity?’, *Philosophy and Public Affairs* 19, No. 1 (1990): 71-92.

¹⁸⁸ ibid

¹⁸⁹ ibid

¹⁹⁰ Alienated labour here is understood in the twofold Hegelian sense, i.e., as 1. The situation when the product of labour is separated from its producer, but 2. Where it is separated from the producer precisely because the producer surrendered it to someone else and, more generally, to the market.

¹⁹¹ Anton van Niekerk, Liezl van Zyl, ‘The Ethics of Surrogacy: Women's Reproductive Labour,’ *Journal of Medical Ethics* 21, (1995): 345-349.

acknowledge the fact that she is expecting her child. It tries to divorce pregnancy from the conscious knowledge that you are going to give birth to your child. In this way the surrogate becomes a mere 'environment'.¹⁹² Therefore aggressive Surrogacy as a practice evidently perpetuates inequality. Contract or legalization, they are of little rectification for it only renders harm invisible.

So as to address the ethical concerns from the perspective of the women who become surrogates, it is crucial to ensure certain things. To begin with, Mary John argues that, “*the state must strive to create an environment free of secrecy and anonymity.*”¹⁹³ Secondly, considering that these women are relatively in a powerless situation, to ensure ‘informed consent’ they should have avenues for counseling and legal assistance. Thirdly, complete healthcare, insurance and compensation must be ensured to these women. Fourthly, Imrana Qadeer and Mary John also make a strong argument in favor of the *surrogate’s name being registered on the child’s birth certificate*. It is after this that parentage should be legally transferred to the intending parents. Fifthly, a surrogate should continue to exercise her fundamental rights to freedom, privacy and autonomy over her body. Sixthly, contention is raised over the fact that surrogacy entails the end of the surrogate woman’s rights over the child.

Further, this institution also violates moral and legal strictures against exchanging persons for money. Seventhly, Michelle Moody argues that surrogacy contradicts moral and legal principles that condemn as impermissible any attempt to treat reproduction as a marketable commodity.¹⁹⁴ Eighthly, ethical dilemma also stems from the fact that surrogacy is premised on a particularly degrading and dehumanizing fiction that equates a pregnant women merely with her womb. This assumption is not just reflective of bad science but also is a manifestation of the attitude that is embedded deep in our society and culture that assumes that a woman has no role to play in procreation and if she does, it most assuredly is subordinate to that of the man. This asymmetry while is characteristic of all forms of pregnancies, it is most pronounced in case of the surrogacy

¹⁹² *ibid*

¹⁹³ Imrana Qadeer, Mary John, ‘The Business and Ethics of Surrogacy,’ *Economic and Political Weekly* 44, No. 2 (2009): 10-12.

¹⁹⁴ Michele Moody, ‘On Surrogacy: Morality, Markets, and Motherhood,’ *Public Affairs Quarterly* 5, No. 2 (1991): 175-190.

set up. *Ninthly*, it is argued that surrogacy cannot be viewed in a disembodied perspective because there can be no service without the body performing it.

The proponents believe that surrogate contracts have been a source of empowerment considering that they have enabled women greater right over their own reproductive labor. Carmel Shalev takes this viewpoint ahead by arguing that, “*prohibiting such contracts fails to give due respect to the choices women does make.*”¹⁹⁵ They have vociferously argued over the years that, “*if a woman freely enters into a contract to produce a child, it is paternalistic and demeaning to prevent her choice.*”¹⁹⁶ Defenders of commercial surrogacy consider it non-comparable to baby selling because under it, children are not sold as commodities, but rather women's reproductive services are for sale. They have instead questioned, “*Since we allow men to sell their sperm, why should women be prevented from participating in an analogous transaction?*”¹⁹⁷

Another argument that is often forwarded by the proponents of surrogacy is that it is similar to any other occupation be it an athlete or an opera singer. In this context while exploring its sui generis nature, Michele M. Moody and Adams argue that this is a faulty perception for very many reasons.¹⁹⁸ To begin with, a surrogate mother cannot perform the service at all unless she undergoes a specific medical procedure carried out by an agent of the commissioning couple. While a professional athlete, for instance, might be required to undergo a drug test, no such test is a physical prerequisite of performing the contracted skill. Further, the contribution which the surrogate mother's embodied labor makes to the end result of that labor differs from that required by the performance of any other task. Surrogate parenting agreements typically spell out, in great detail, regulations to govern the conduct of the surrogate mother during the pregnancy. No analogous circumstances confront the athlete or the opera star. Finally, the surrogate mother's service is of ‘full value’ to the commissioning couple only in virtue of its connection to the end result of the service- namely, the baby. This is not true of the services of a professional athlete or

¹⁹⁵ Carmel Shalev, *Birth Power: The Case for Surrogacy*: (Yale University Press, 1991).

¹⁹⁶ Anton van Niekerk, Liezl van Zyl, ‘The Ethics of Surrogacy: Women's Reproductive Labour,’ *Journal of Medical Ethics* 21, (1995): 345-349.

¹⁹⁷ Debra Satz, ‘Feminist Perspectives on Reproduction and the Family,’ *The Stanford Encyclopedia of Philosophy*, (2017).

¹⁹⁸ Michele Moody, ‘On Surrogacy: Morality, Markets, and Motherhood,’ *Public Affairs Quarterly* 5, No. 2 (1991): 175-190.

an opera singer: we pay to see these people engaged in a process or an activity, and the relevant interest is met only in this way.

The adherents of the surrogacy strand also put forward an interesting argument by comparing surrogacy to other forms of donation particularly that of blood. It is argued that surrendering a child as part of a surrogate agreement is, in principle, similar to giving blood. It is also argued that our society allows people to exchange blood for money. Many commentators contend, further, that allowing a marketplace in blood and blood products is not only morally acceptable, but also ensures efficient distribution of a needed resource. Why isn't it permissible to treat paid surrogacy in the same way? The opponents refute this claim arguing that this analogy fails because the good being circulated when one donates blood is qualitatively different from the entity being surrendered when a surrogate mother gives up a baby.

Evidently then, the commissioning couple in a surrogate agreement has no intrinsic interest in watching the surrogate go through the pregnancy. Indeed, their interest in the pregnancy is merely incidental to their interest in the end result. This is immensely degrading to the bodily integrity and wholeness of women.

The institution of surrogacy also raises ethical dilemmas from the standpoint of the child born of this arrangement.¹⁹⁹ Yet another ethical concern stems from the fact that, in surrogacy there is a deeply embedded bias against the baby as the newborn if separated from her birth mother right at birth thereby leading to ill effects on baby's immunological and psychological health. It is argued that breast feeding which is every child's right and necessity is denied to these babies born out of surrogates. These issues raise crucial ethical concerns which remain unanswered considering the fact that the burden is shifted to the one who cannot protest. The children born out of surrogacy ought to have the same rights and liberties that are vested on children born out of 'normal processes'.²⁰⁰ From the perspective of the commissioning parents, it is also argued that their role should not be restricted to just buying a baby. They should on the contrary be active participants in the upbringing of the child.

¹⁹⁹ Melinda Roberts, 'Good Intentions and a Great Divide: Having Babies by Intending Them,' *Law and Philosophy* 12, No. 3 (1993): 287-317.

²⁰⁰ Ibid

2.10 Concluding Remarks

In retrospect it can safely be argued that the institution of surrogacy is not new. Although it has been a long part of human history, in recent times its scope and ambit have enlarged considerably. This has also meant that there has been a newer surge to map out its contours and pin down its definitions. Surrogacy has thus become a dominant theme in the realm of society, laws, medicine and technology. What makes this particularly significant is it being synonymous with the lives of women.

To begin with the very definition of surrogacy has been constantly worked and re-worked to put forth an accurate understanding. In the existing times rapid developments in procreative technologies have further expanded the possibilities for surrogacy arrangements. In the past three decades, there has been a spectacular change in the field of reproductive technologies. Reproductive sciences have come up with techniques like donor insemination, in vitro fertilization and embryo transfer methods which have completely revolutionized the reproductive environment.

The developments in procreative technologies have led to the possibility of more options of having a child for all people including. It has become possible for them to have a child of their own genetics. Unfortunately complications like risk of transmitting infection, such as HIV or Hepatitis, to the surrogate mother from the infected parents have also arisen once these methods were combined with surrogacy arrangements. Further, embryo transfer can lead to multiple pregnancies which in turn have ramifications for the surrogate, intending parents and the child. Apart from the risks involved, there is infinite mental and physical strain on the surrogate mother.

Surrogacy not only entails questions of meaning and technological development but also of how ethical a practice it is. This question can be answered differently depending on what epistemic position one uses. From the perspective of the surrogate, the biggest ethical dilemma surrounds the commodification and objectification of her body coupled with the agony of parting with the

child she is most deeply connected with. From the viewpoint of the child so born, it is argued that the child is the most aggrieved entity in this arrangement for he or she does not even have the voice to express their resentment. The separation from the mother has emotional and psychological ramifications on the child. Further it also jeopardizes the responsibility of the child in a situation where the commissioning parents separate or deny taking custody of the child.

From the standpoint of the commissioning parents, the system is inherently biased against the 'commissioning mother' who has to live with the stigma of not being able to bear a child: a responsibility that is naturally endowed on her. Further more often than not the terms of the surrogacy arrangements are determined by the father thereby denying both the surrogate and the commissioning mother the right to agency. For the feminist scholarship therefore surrogacy does not merely mean the exploitation of one woman namely the one playing the role of the surrogate but rather two women which includes the commissioning mother who more often than not as very little role in making decisions relating to the process. Further, the choice of having a child through surrogacy also essentializes the role of women who are reduced merely to their reproductive labor. Surrogacy then does not do away with the social taboo that surrounds infertility it rather bypasses it by putting forth other ways of procreating.

Surrogacy as an institution also highlights the haplessness of women both as a surrogate and as a commissioning mother. The choice of surrogacy in India more so is situated and contextualized in the poverty and desperate economic realities of women. With increasing feminisation of vagrant labor, women are finding themselves in a situation where the choices available to them are severely restricted: domestic work, sex work, surrogacy to name a few. Surrogacy from this view point is seen as the quintessence of capitalist patriarchy's estranged construction of motherhood. The other side of the picture however is not as dismal as this. Commodification of pregnancy leads to a form of estranged labor. To my mind, the feminisation of these atypical work profiles can also be seen as empowering women and giving them the right to be their own agents and decide what they like to do with their own bodies. To quote the liberals, surrogacy like any other feminized labor institution points towards the occupational choice of women that till now were denied to them. Therefore surrogacy should not merely be seen as oppressive, for it also holds emancipatory potential.

From the vantage point of the commissioning mothers, surrogacy holds a double edged meaning. While on the one hand it highlights their inability to perform their conventional duty of procreation which itself reeks of patriarchal stereotypes. The sense of dejection that infertility brings to them gets further highlighted when they tirelessly and painfully resorted to ART's. Surrogacy arrangements essentialises women's reproductive roles and infact reduces them to just that. From the other end of the spectrum surrogacy is empowering in that it challenges the conventional notions of motherhood and family. It offers women the choice to decide whether they wish to procreate on their own or hire a womb for that. Surrogacy has added meaning and value to women's reproductive capacity and labor.

To conclude it can be argued that, with the restricted avenues of economic opportunities to surrogates and the imbalance in power relations between the surrogate and the others makes the claim of this job being voluntary questionable. However it is important to not dismiss it instantly. The need instead is to evaluate the choices women make to participate in the labor market so as to understand surrogacy as work in its holistic form.

Chapter Three

Chapter 3: Contending Debates on Surrogacy: Various Facets

Interpreting Dynamics of Commercial Motherhood

3.1 Introducing the Theme

For the innumerable couples unable to carry a child due to one reason or the other, surrogacy is often viewed as a viable alternative. Considering the significance attached to a ‘genetic link’ between the parents and the child, surrogacy has emerged to be a preferable option over adoption. Speaking from the position of women who become surrogates, in the earlier part of this research it has been established that their entry into this industry is principally on account of two factors. While women have always worked, their work has not received much economic worth or social acknowledgement. With the development in ART industry, newer domains have opened up for them to earn money out of their reproductive labour.²⁰¹ Secondly, with increasing mechanization of jobs in the wake of *economic globalization*, more and more women are left to engage in casual labor which is not as rewarding and are characterized by increasing casualisation. With these two factors juxtaposed surrogacy industry has indeed acquired mammoth proportions considering that while entry into it is easier, remuneration is greater and faster.

While in literal sense 'surrogate' connotes 'substitute' or 'replacement', “a tentative mother in so far as that she conceives, gestates and delivers a baby on behalf of another woman who is subsequently to be seen as the 'real' (social and legal) mother of the child²⁰², it is pertinent for this research to move beyond the visible literal understanding of the surrogate woman, to explore the various crucial dimensions that define her life and status more vividly. Thus in pursuance of this, the current chapter focuses on understanding the crucial markers that significantly shape the life of the woman acting as the surrogate.

²⁰¹ D. R. Reilly, ‘Surrogate pregnancy: A guide for Canadian prenatal health care providers,’ *Canadian Medical Association Journal* 176, No. 4 (2007): 483–485.

²⁰² Anton van Niekerk & Liezl van Zyl, ‘The Ethics of Surrogacy: Women's Reproductive Labour,’ *Journal of Medical Ethics* 21, (1995): 345-349.

To begin with, the surrogate is essentially a *woman* who, belongs to a relatively *lower economic class* and thus resorts to surrogacy arrangements for financial reasons.²⁰³ In context of stratified countries like India, where caste and class identities overlap, she might also be a woman of a lower caste and be residing in certain peripheral underdeveloped regions. Evidence from the field suggests that while some intending parents do have a demand to find a surrogate of a higher caste, this is not always the case. A large section of my respondents both in Anand and Gurgaon were women of upper castes who were working as surrogates. My respondents were also intending parents who suggested that after battling with infertility and childlessness for so long, caste is not even a consideration for them. Further, since the child is not related to the surrogate anyhow, the caste ties seem even more futile. However this is not always the case as is manifested during some of my interviews where the intending couple was fixed on hiring a woman of the upper caste. Interestingly, in such cases they were tied by the wishes of their parents and families.²⁰⁴ Surrogacy brings to forth the complexities of a woman's life which can be understood through a caste, class, region analysis of this particular form of feminized labor.

Her agreement to bear a child for another woman who is incapable or unwilling to do so herself, makes it essential for this research to understand women's relation to paid work.²⁰⁵ Herein I endeavor to understand remunerative work in context of a specific form of work that is premised on selling of reproductive labor. This ushers in discussions surrounding her commodification, objectification and subsequent exploitation. The issue has become a matter of intense debate and deliberation amongst feminists. While one school of thought namely the liberals, view it as an occupational choice of women, the other view propounded by the radical feminists see it with suspicion and resentment, for the harm it carries with itself is unparalleled and irrevocable.²⁰⁶ What complicates this set-up further is the existence of a market that mediates this sale and purchase of reproductive labor thereby ushering in the dimension of commodification of women's bodies as also of the unborn child.²⁰⁷ This form of labor raises concerns both for the

²⁰³ Heather Dillaway, 'Mothers for Others: A Race, Class, and Gender Analysis of Surrogacy,' *International Journal of Sociology of the Family* 34, No. 2, (2008): 301-326.

²⁰⁴ This is based on the field research conducted in Anand (Gujarat) and Gurugram (Haryana).

²⁰⁵ Priyanka Acharya & Juhi Mittal, 'India's Surrogacy Laws in International Context,' *Alexis Review* 1, No. 1 (2017).

²⁰⁶ Sharyn Roach Anleu, 'Surrogacy: For Love but Not for Money?,' *Gender and Society* 6, No. 1 (1992): 30-48.

²⁰⁷ Heidi Malm, 'Paid Surrogacy: Arguments and Responses,' *Public Affairs Quarterly* 3, No. 2 (1989): pg. 57-66.

conservatives who see it as destroying the traditional family set-up and the radicals who see it as estrangement of labor and its subsequent alienation.

Clearly then, the canvas of surrogacy is not a homogenous one. It is embedded in a whole gamut of social realities and phenomenon that further go on to complicate this relatively new and unconventional form of labor. Surrogacy brings forth very many crucial questions like how do we understand the process of women's reproductive function getting paid? Is there something inherently violent in surrogacy? How does law conceptualize this emerging business? Does new form of outsourcing alter ideas of motherhood and parenting? If yes, what are its contours?

Surrogacy with its spread has become a crucial form of feminized labour that begets proper analysis. Surrogacy due to its feminisation also raises concerns for the feminists who see it as being an avenue for women's objectification and commodification. The aim of the current chapter is to hence map out the contending viewpoints on surrogacy so as to acquire a holistic understanding of the subject in its various complexities. Further, while the debates on surrogacy have for long focused on the issues of meaning, nature, pull and push factors, to answer to these plethora of more complex and complicated questions, what is also needed is closer introspection of the various identities that mark the lives of surrogates.

For a well conceptualized understanding of the institution, this work thereby attempts to grapple with all its dimensions including the caste, class underpinnings to surrogacy which are used as strong reasons why surrogacy entails suppression and exploitation of women acting as surrogates. This chapter of the present work hence deals with the following issues that are central to the understanding of surrogacy:

- *Analysis of Women's relation to remunerative labor*
- *Feminist Contention to Women's Right to Choice with regards to Surrogacy*
- *Surrogacy, Market and Commodification of a Good: Marx's Conception of Estranged Labor and Surrogacy*
- *Caste and Class Analysis of Surrogacy*

3.2 Women's Remunerative Work: Examining Women's Relation to Waged Employment

All societies are characterized by both women and men working, albeit with differing extent. Not only do the conditions of work change over time owing to a wide variety of reasons, but perceptions of what constitutes 'work' also vary between people and over time.²⁰⁸ While women have always been 'working' throughout history, it has been characterized by a subordinate status: be it economic devaluation of household work due to its 'natural' characteristics or the unequal assimilation of women into capitalist wage work. Feminists have probed various facets of conceptualising "women's work", particularly when it was remunerated.²⁰⁹ Thus one of the fundamental issues that have been at the center of feminist scholarship is women's relation to 'remunerative work.' In this research, I attempt at undertaking a brief review of literature that has developed on women and work.

To begin with, Amartya Sen in his *Development as Freedom* puts forth an insightful way to understand women's remunerative work.²¹⁰ Sen contends that there exists a positive correlation between 'women's agency and social change.' Arguably, "Sen distinguishes between two elements that have been on the agenda of women's movements of the world namely, a 'welfarist' or well-being approach and an agency approach."²¹¹ While the former according to him, primarily focuses on eliminating inequalities to ensure women's well-being, the latter views women as "active agents of change".²¹² Though, the two approaches overlap, viewing women as 'agent's necessarily distinct from viewing them as 'patients' or recipients.

Thus, the focus on women's agency is imperative according to Sen because it contributes towards the holistic view of the 'personhood' of women and one of the major factors that augments women's agency is taking up remunerative work outside the home, which makes them less dependent on others and hence improves their position within the family and in the society at

²⁰⁸ U. Kalpagam, *Labour and Gender: Survival in Urban India*: (New Delhi, Sage Publications, 1994)

²⁰⁹ Jane Freedman, *Feminism*: (New Delhi, Viva Books, 2002).

²¹⁰ Amartya Sen, *Development as Freedom*: (New Delhi, Oxford University Press, 2000).

²¹¹ S. Roseneil, B. Halsaa & S. Sümer, *Remaking Citizenship in Multicultural Europe. Citizenship, Gender and Diversity*: (London, Palgrave Macmillan, 2012).

²¹² Ibid

large as they can have more 'voice'. Though women's unpaid work within the household is critically important, it is often ignored and hence women's taking up of remunerative work outside the home and contributing in terms of an income gives prominence to their role in the prosperity of the family. This improvement in their social and familial standing also leads to a corresponding enhancement in women's status vis-a-vis intra household resource distributions. The agency women might derive from having remunerative employment also potentially gives them bargaining power while negotiating their daily struggles primarily within the family. On similar lines, Lim²¹³ and Hensman²¹⁴ argue that having an income does allow women some power to negotiate and bargain within the household and outside.

Sen's argument that taking up remunerative work outside the home and earning an independent income augments women's agency which contributes to their well-being by giving them more voice has been critiqued by scholars like Christine M. Koggel.²¹⁵ She appreciates the way Sen conceptualises the intersectionality of various 'freedoms' but is unconvinced that having remunerative employment outside the home inevitably enhances women's agency in all spheres, especially in the context of globalisation and feels that power and oppression working at multiple levels from the global to the local are not adequately acknowledged in Sen's analysis. Moreover, there are issues of "double burden" that fall on women of working outside and then coming back to take care of household work as well

Koggel emphasises that the need is to understand whether women are working in the formal or informal sector with favorable working conditions do they have control over their work. Koggel thus concludes that having remunerative employment is necessary but not sufficient for an enhancement in women's agency.²¹⁶ Thus it is argued that joining the 'productive' work force in the market does not eliminate all the discriminatory conditions in which women's lives are embedded.

²¹³ Linda Y. C. Lim, *Persistent Inequalities: Women and World Development*: (New York and Oxford, Oxford University Press, 1990).

²¹⁴ Rohini Bensusan, 'Globalisation, Women and Work: What Are We Talking About?,' *Economic and Political Weekly* 39, No. 10 (2004): 1030-1034.

²¹⁵ Christine M. Koggel, *Capabilities, Freedom, and Equality: Amartya Sen's Work from a Gender Perspective*: (New Delhi, Oxford University Press, 2007).

²¹⁶ Ibid

It is therefore significant to understand if having some kind of employment when none was available before albeit in exploitative circumstances augments women's agency. To understand these dimensions of women's remunerative work, the lens of surrogacy has been adopted. Placing surrogacy between the arguments of Sen and Koggel, the endeavor of my research has been to understand which of the two perspectives weigh heavier when we look at surrogacy. In so doing I borrow from the writings of Bedford and Rai²¹⁷ who argue that labour paves a way for women's *empowerment*. Within this framework, it is interesting to see analyze commercial surrogacy which has brought about women's participation in the market in a big way albeit with commercialization of their reproductive capacities. To that end, it is first important to clarify what the term "empowerment" holds.

The first thing that strikes about the term empowerment is, 'power'. Evelin Husk attempts at analyzing what it implies in the context of India.²¹⁸ While Husk does so in a bid to understand what it holds in context of representation and participation of women in local self governing bodies or panchayats, the analytical framework which she employs will enable this research to look at surrogacy. Husk's work is premised on Naila Kabear's distinction between different notions of power. She believes understanding this is crucial if one has to make sense of the term empowerment. In so doing she lays down three meanings of power namely 'power to', 'power over' and 'power within'.²¹⁹

Husk goes on to borrow from the writings of Jo Rowlands who has argued extensively that the dominant paradigm in understanding empowerment as has been done in the western civilization is to create avenues for women to be able to take hold of positions of power particularly in context of their ability to make decisions in the politico-economic realm. However, Rowlands argues that this understanding of power is problematic considering that just as power can be bestowed on certain people, so can it be withdrawn and taken away from them by the same

²¹⁷ Kate Bedford, Shirin Rai, 'Feminists Theorize International Political Economy,' *Signs* 36, No. 1 (2010): 1-18.

²¹⁸ Evelin Hust, *Women's Political Representation and Empowerment in India: A Million Indiras Now?:* (New Delhi, Manohar Publishers, 2004).

²¹⁹ Ibid

process. As long as this continues, the structural imbalances in power will continue to mar our presence.²²⁰

In taking this understanding further, the work of Kamla Bhasin, a much celebrated feminist and activist for women's rights, provides crucial insight. She argues that it is imperative to see empowerment in a quintessentially political context considering that it is directed towards altering the power distribution.²²¹ She goes on to lay down the following definition of empowerment:

"women's empowerment is an ongoing and dynamic process that enhances women's ability to change the structures and ideologies that keep them subordinated. This process enables them to gain more access to resources and decision-making, more control over their own lives, more autonomy, self-respect and dignity which improves their self-image and social-image."

Further, if one seeks to understand the meaning and implications of empowerment, it has to be placed within the particular context of patriarchy because it is patriarchy that shapes women's lives and experiences. It is the patriarchal stereotypes and internalizations that have pushed women to the realm of the household and has systematically excluded them from the public domain of politics and economy. This understanding of empowerment in the particular context of gender acquires greater proportions in the context of India considering that gender as a binary is intrinsically related to caste and class. This then makes it evidently clear that in understanding women and empowerment, one must not consider the category of women as being homogenous. There are various ruptures along very many lines, each of which changes how empowerment is conceptualized. The understanding of empowerment can be further elaborated upon borrowing from the writings of Ernesto Laclau and Chantal Mouffe. In their schema, "empowerment is a journey towards a horizon that one aspires to reach."²²² This view finds resonance in the

²²⁰ Ibid

²²¹ Kamla Bhasin, *A Commitment to the World's Women: Perspectives on Development for Beijing and Beyond*: (New York, UNIFEM, 1995).

²²² Ibid

arguments of **Nivedita Menon** who idealises "political practice as the perpetual *attempt* to eliminate oppression rather than the *achievement* of this elimination."²²³

If we were to take the above framework of empowerment as our lens of analysis, the question that then seems pertinent is how do we conceptualize a phenomenon like surrogacy that stands in between the arguments of empowering and exploitative. A review of the rich literature that has developed over the years does not push us in either direction to find a conclusive answer to the above question. This to a large extent is on account of the fact that the multi dimensional conditions in which women leads their loves, calls for a much more nuanced understanding. Thus simple conclusive answers cannot be drawn. Herein, Martha Nussbaum's idea seems imperative to outline. Nussbaum out rightly refutes any attempt to put forth a generalized and over simplified account of women's lives and their positions. She suggests that it is not right to label them as either 'victims' or 'agents' for maybe they are neither or that they are both in different contexts.²²⁴ Thus in her account, the interconnections between women as victims and women as active agents have to be carefully analyzed. It is only then that one can conceptualize about their lives in all their dimensions and complexities.

From the above account it can be argued that any attempt to look at surrogacy from the feminist and Marxist perspective should not lead us to instantly draw conclusions about agency and victimhood. These terms are embedded in the context in which women's lives exist and thus need to be understood in congruence with all its dimensions. Understanding these varying perspectives on surrogacy is the purpose of this current chapter.

3.3 Contextualizing the Emergence and Pervasiveness of Surrogacy Industry

In contemporary times, while men and women are presumably considered to be equal there are inequalities of various kinds ranging from economic discrimination to social and political marginalization that continue to mar our societies. Distinctions on the basis of caste, creed, color, religion, language and gender continue to underpin our lives. Of these categories, gender is

²²³ Nivedita Menon, *Recovering Subversion*: (Delhi, Permanent Black, 2004).

²²⁴ Martha C. Nussbaum, *Sex and Social Justice*: (New York, Oxford University Press, 1999).

perhaps extremely pervasive because it binds all the others together. This multiply oppressed status of a particular gender namely Women has been juxtaposed by low levels of literacy amongst them and high levels of economic dependence on their male counterparts thereby leading to their further oppression and subjugation.

Over the years, women have grappled with their continued suppression and have hence explored various avenues to gain autonomy and independence. Taking to waged employment became a necessity which over the years has led to feminisation of labor. Feminized labor essentially refers to forms of work which are pre dominantly women centric. Alternatively it refers to the increased participation by women and their integration in the workforce.²²⁵ However the fact that a term like ‘feminisation of labour’ exists itself bears testimony to the bias against women that has been a part of our society since time immemorial. “Masculine superiority proclaims that it is inappropriate for women to work outside their homes since paid employment would insult the rightful obligation of men to provide for their families.”²²⁶

It is largely believed that, “*consequently there was a visible disparity between the participation rates of men and women until the 1990s considering that women’s interests found very little credibility in the structuring and restructuring that took place in India following its independence, in the socio-political-economic spheres.*”²²⁷ This relegation of women in the private sphere, defenders of 21st century neo-liberal economy argue, has however been done away with the coming in of the post 1991 structural reforms. With the opening up of the market, the coming in of private players and the integration of the Indian economy with the global economy, it was believed that huge employment would be generated. This, it was argued, would translate into a lot of women finding employment in a much easier manner than they did earlier. Consequently, it would lead to economic growth and a better standard of living.

However while these developments have increased employment opportunities, it has not been on fair terms. What has infact taken place is establishment of newer power structures under which

²²⁵ Nandita Shah, Sujata Gothoskar, Nandita Gandhi & Amrita Chhachhi, ‘Structural Adjustment, Feminisation of Labour Force and Organisational Strategies,’ *Economic and Political Weekly* 29, No. 18 (1994): WS39-WS48.

²²⁶ Sohini Chatterjee, ‘Globalization and Women Workers in India: A Troubled Relationship?,’ *Feminisms in India*, (2014).

²²⁷ Ibid

the “weak immobile labour has been left at the mercy of mobile and powerful capital. Flexible labour practices in the liberalization era have worsened women worker’s vulnerability.”²²⁸ Thus while they are tapped as cheap efficient labor they are principally concentrated in the informal sector that has emerged as a site for physical, sexual, emotional and economic abuse.²²⁹ Clearly then capitalism and patriarchy have worked hand-in-glove in this regard.

Further, since capitalism and globalization made way for a more specialized and refined form of labor, more and more women have found it impossible to take to formal labor. As a result women are restricted to informal forms of work. Govind Kelkar argued that “there are definitely clear trends that can be observed in the twenty years since India’s economy has undergone liberalization.”²³⁰ She opines that women’s economic activity rate has increased in two sectors: in the agricultural and in the realm of the informal economy, however in neither do they possess any ownership, or management rights which is weakening and oppressing their agency.

According to a 2011 paper of the International Labour Organization, “83.8 % of South Asian women are engaged in so called ‘vulnerable employment’. While the percentage of women employed in the informal economy remains high, the number of Indian women engaged in formal, secure and recognized labour is still minimal. Only 14-15% of workers in the formal sector are women, their numbers hardly rising over the past years.”²³¹ It is on account of the vulnerabilities that dominate India’s informal labour market namely, an absent universal social protection system; poor housing facilities for the family; lack of access to decent work; prevalence of unsafe transit; human trafficking; and gender-based violence that the informal forms of labor have increasingly raised concern for the feminist movement across the globe.²³²

This has been juxtaposed with the increasing technological advancement that has extended the array of possibilities. One such very prominent development has been the sophistication and

²²⁸ Ibid

²²⁹ These gender-specific wage differences can be regarded as a symptom of the patriarchal structure of the society we are living in, where a women’s work generally seems to be of lesser worth than a man’s.

²³⁰ Govind Kelkar, ‘Informalisation of Women’s Work in India,’ interview by Almut Büchsel, 25. May 2012. Govind Kelkar is the Senior Adviser: International Center for Research on Women, and Rural Development Institute, New Delhi, India

²³¹ Almut Büchsel, *Informalisation of Women’s Work in India*: (Heinrich Boll Stiftung, 2012).

²³² Ibid

globalization of reproductive technologies.²³³ This rapid spurt in the development of medical technology in the form of various means of assisted reproductive technologies have opened up and further perpetuated newer forms of feminized labor. Surrogacy arrangements involving technological intervention into women's bodies have become a widespread phenomenon across the globe. This has become much more pronounced with recent developments in procreative technologies that have expanded the possibilities for surrogacy arrangements. Where a woman is unable to gestate an embryo but has functioning ovaries, in vitro fertilization (IVF) enables her to contribute genetically to the child.²³⁴ Alternatively, a third woman may donate ova to be fertilized in vitro.²³⁵ "Embryo transfer (ET) might also be used if a woman is unable or unwilling to undergo a pregnancy but is able to conceive, and the conceptus can be flushed from her uterus and transferred to the surrogate mother. The reverse can also occur-the surrogate conceives and the embryo is transferred to the commissioning woman."²³⁶

Usually, it is assumed that a child's genetic, birth, legal, and social mothers are the same person, but when surrogacy involves in vitro fertilization a child can have four mothers: different women can provide the ovum, gestate the embryo and give birth, be defined in law as having maternity rights and obligations, and provide parenting.²³⁷ Discussing the surrogacy industry, Sharmila Rudrappa²³⁸ and Sheela Sarvananan suggest that "*it is the availability of ample wombs that can be cheaply leased, the biddability and fungibility of surrogates that makes the industry to thrive in India.*"²³⁹ Usha Rengachary Smerdon goes on to add that, "*the presence of skilled intermediaries and cutting edge technologies coupled with loose or non-existent regulations that have made India world's capital of transnational gestational surrogacy.*"²⁴⁰

²³³ Madhav Govind & Rajesh Kalarivayil, 'Assisted Reproductive Technologies and Socio-ethical Issues: Analysis of Risk Perception among the Different Social Groups in India,' *Social Research Foundation*, (2016): 14-28.

²³⁴ Sneha. Banerjee, 'Emergence of the 'Surrogacy Industry,' *Economic & Political Weekly XLVII*, No 11 (2012).

²³⁵ In these instances, the surrogate mother gestates the embryo and gives birth, thus "leasing" her uterus to the commissioning couple.

²³⁶ Sharyn Roach Anleu, 'Surrogacy: For Love But Not for Money?' *Gender & Society* 6, No. 1 (1992): 30-48.

²³⁷ David Watts, 'Surrogacy,' *British Medical Journal (Clinical Research Edition)* 295, No. 6593 (1987): 332.

²³⁸ Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India*: (New York, New York University Press, 2015).

²³⁹ Sheela Sarvananan, *A Transnational Feminist View of Surrogacy Biomarkets in India*: (Singapore: Springer, 2018).

²⁴⁰ Usha Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India,' *Cumberland Law Review* 39, (2009).

What sets this form of women's labour distinct is that it is not only informal but also unreported, unregulated and underground.²⁴¹ Surrogacy is a form of employment which women are increasingly taking to despite social taboos attached to them. These non standard, part-time, temporary and contract work arrangements have hence become important topics of research in the academic realm.²⁴² Such has been the interest in these newly emergent forms of women's labor, that they are also being theorized as alternative work arrangements by some, market mediated arrangements by others²⁴³; non-traditional employment relations by yet others²⁴⁴. Sometimes they are called flexible staffing arrangements²⁴⁵ and at others as an atypical employment.²⁴⁶ Those looking at these equations from the epistemic position of oppression and vulnerability, prefer using crude terms like vagrant²⁴⁷, peripheral employment²⁴⁸; vulnerable work, precarious employment²⁴⁹, disposable work²⁵⁰, new forms of employment and contingent work.

A common thread that runs through all these terms is the recognition that these works are a variation from the standard work arrangements which meant full time continuous work that was performed at the employer's premises. While women in the profession are strong advocates of their line of work and are joined in by liberals in their advocacy, both the radicals and the conservatives reject it out rightly as being oppressive and violent and thus call for its abolition. All of these issues it is argued, "raise a plethora of questions about the family, the nature of parenthood, particularly motherhood, the role of women, the rights of children and who should make decisions about managing infertility. Surrogacy therefore raises all these questions and

²⁴¹ Arne Kalleberg, 'Nonstandard Employment Relations: Part-Time, Temporary and Contract Work,' *Annual Review of Sociology* 26, (2000): pg. 341-365.

²⁴² Ibid

²⁴³ KG Abraham & SK Taylor, 'Firms' use of outside contractors: theory and evidence,' *Journal of Labor Economy* 14, No. 3 (1996): 394-424.

²⁴⁴ M. Ferber & J. Waldfogel, 'The long-term consequences of nontraditional employment,' *Monthly Labor Review* 121, No. 5 (1998): 3-12.

²⁴⁵ S.N. Houseman, 'Part-time employment in Europe and Japan,' *Journal of Labor Research* 16, No. 3 (1995): 249-262.

²⁴⁶ E. Cordova, 'From full-time employment to atypical employment: a major shift in the evolution of labour relations?,' *International Labour Review* 125, No. 6 (1986): 641-57.

²⁴⁷ CW Summers, 'Contingent employment in the United States,' *Comparative Labor Law Journal* 18, No. 4 (1997): 503-22.

²⁴⁸ Ibid

²⁴⁹ T. Treu, 'Labour flexibility in Europe,' *International Labour Review* 131, No. 4-5 (1992): 497-512.

²⁵⁰ DM. Gordon *Fat and Mean: The Corporate Squeeze of Working Americans and the Myth of Managerial 'Downsizing'*: (New York, Kessler Books/Free Press, 1996).

consequently has engendered polemicised controversy.”²⁵¹ In context of this larger debate, the feminist strand stands divided between two vying schools of thought which shall be studied in the following sections.

3.4 Liberal Perspectives on Surrogacy: An Advocacy

A central paradigm which is frequently adopted in advocating in favor of surrogacy is that it has enabled the destruction of the *public/private dichotomy*. In so doing it has repudiated the assumption that it is a duty of woman to procreate and rear the child. This in many ways rejects the age old link between women and the private realm. This subsequently leads to undervaluing of women’s labor. In this context, surrogacy is seen as a means through which revaluation of women’s reproductive role in society takes place. Brenda Barker suggests that, “*the ability to separate oneself from one’s reproductive capacity is a liberating experience that increases one’s sense of personal autonomy.*”²⁵² Surrogacy it is argued places economic value on gestation and thus recognizes reproductive labor as a source of economic power and social status. The payment refutes the values that epitomize the self sacrificing domestic woman. Further, it is argued that during their stint as surrogates, women take to vocational training that prepares them for work when they move out of the hospitals. Thus surrogacy not only provides to them economic empowerment but also creates avenues for skill development which enable them to create better conditions for life.²⁵³

The advocates of this ideological spectrum thus argue that insofar as contract pregnancy disengages women from the stereotypical notion and role of motherhood, it challenges their essential domesticity and in turn enhances their autonomy. Thus if women are to be seen as commercial reproductive services providers, then their ability to market their capabilities in the public sphere marks them as ‘economic agents’, the payment by another party goes on to verify them as economic agents. This alternatively also leads to *revaluing reproduction* as a core

²⁵¹ Sharyn L. Roach Anleu, ‘Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,’ *Acta Sociologica* 33, No. 1 (1990): 63–74.

²⁵² Brenda Baker, ‘A Case for Permitting Altruistic Surrogacy,’ *Hypatia* 11, No. 2 (1996): 34-48.

²⁵³ Ibid

economic resource of any society and women are compensated for their contribution.²⁵⁴ The ability to make informed decisions thereby gives an impetus to their autonomy. This positioning of the surrogates leads to a shifting the boundaries of the public/private dichotomy, driven by the fact that there exists an economic benefit. This argument becomes interesting particularly in context of the fact that women have been historically excluded from the realm of production and this has led to their subsequent oppression and subjugation.

Parallel to the earlier articulation, is the one put forth by queer theorists, liberals arguing from the work position perspective, cultural analysts and pro Surrogacy organizations. In this version surrogacy has become a 'norm breaking' and subversive practice that challenges outdated conservative models. According to Torbjorn Tannsjo, surrogacy 'dissolves the natural idea of motherhood, of fatherhood and of what a family is.'²⁵⁵ Kutte Jonsson further states that surrogacy can challenge the norm of biological parenthood and function as "a battering ram against conservative family traditions, where the heterosexual nuclear family represents the norm".²⁵⁶ Elly Teman believes that surrogacy as a work form, threatens dominant ideologies and challenges the "ideology of motherhood".²⁵⁷ She writes, "*Surrogacy threatens, challenges, breaks, and revolts and sets these active verbs against dominant ideologies, the western world, prejudice and traditional motherhood.*"²⁵⁸ Thus Teman successfully aligns feminism, post colonialism, queer theory, liberalism and a kind of rebellion on the same pr-surrogacy strand.

Feminists while looking at surrogacy from the liberal epistemic position of work seek to understand if commercial surrogacy that enables infertile couples to become parents be considered as work? Barbara Katz Rothman considers motherhood as a form of productive labor situated within contexts of patriarchy, capitalism and technological ideology.²⁵⁹ Therefore motherhood is considered as work and children as products of labor.

²⁵⁴ Suze Berkhout, 'Buns in the Oven: Objectification, Surrogacy, and Women's Autonomy,' *Social Theory and Practice* 34, No. 1 (2008): 95-117.

²⁵⁵ Torbjorn Tannsjo, 'Our Right to In-vitro Fertilisation – Its Scope and Limits,' *Journal of Medical Ethics* 34, (2008).

²⁵⁶ Kajsa Ekman, *Being & Being Bought: Prostitution, Surrogacy & the Split Self*: (Spinifex Press, 2013).

²⁵⁷ Elly Teman, 'The Social Construction of Surrogacy Research: An anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood,' *Social Science and Medicine* 67, No. 7 (2008): 104–1,112.

²⁵⁸ Ibid

²⁵⁹ Barbara Rothman, *Recreating Motherhood*: (Rutgers University Press. 2000).

Kutte Jonsson argues that surrogacy both altruistic and commercial uphold freedom for women. It is argued that if motherhood in surrogacy is seen as a job, it can emerge as a way for women to challenge the traditional roles that have been assigned to them and simultaneously transgress its boundaries. This according to her lies in sync with one of the fundamental goals of feminism: emancipation. Therefore, Jonsson argues that it is wrong to prohibit women from being surrogates.²⁶⁰ There is no oppression if women lend their bodies to others who wish to have children. This argument is premised on the right of every individual to self-determination of how she wishes to utilize her body.

For Jonsson, surrogacy as an institution in many ways lies central to the feminist focus on women's liberation and their freedom.²⁶¹ Highlighting that traditionally women's roles and duties are unpaid or at best poorly paid, with the coming in of surrogacy arrangements their jobs are increasingly being acknowledged as labor that ought to be paid for. This transgressing of boundaries helps the feminist movement in realizing their objective of emancipation. Therefore she argues that it is wrong to prohibit women from becoming surrogate mothers and to lending their bodies to others who wish to have children fundamentally because, "every capable, competent and consenting adult has the right of self-determination over how she wishes to utilize her body".

Christine T. Sistare postulates the idea that surrogacy creates freedom for women, by allowing women to exercise their free will.²⁶² In her essay, Reproductive freedom and women's freedom: Surrogacy and Autonomy, she goes on to state:

"The acceptance and practice of surrogacy would reveal a meaningful respect for maternity. It would do so in capitalist mode of paying well for what is deemed rare and

²⁶⁰ Kajsa Ekman, *Being & Being Bought: Prostitution, Surrogacy & the Split Self*: (Spinifex Press, 2013).

²⁶¹ Ibid

²⁶² Christine Sistare, 'Reproductive freedom and women's freedom: surrogacy and autonomy,' *Philosophical Forum* 19, No. 4 (1987): 227-240.

*precious. It would also encourage recognition that women really do enjoy the experience of pregnancy and giving birth”.*²⁶³

Sistare categorically advocates for the recognition of surrogacy as work. She believes that there is nothing inherently wrong with selling one's body. Considering that we as a society allow our individuals to treat their bodies as property in a number of ways like selling of blood, of antibodies, sperms. Surrogates infact are more a laborer than a seller of body parts, since she really only sells her services while renting out her body. It is believed that there is no need to see the payments made to the surrogate as a rent considering that the customer does not acquire a space over which he has control. The customer per se cannot do whatever he wishes to do with and therefore there is no permanent damage. On the contrary the woman is paid for her to use her body in a way that benefits him. Alternatively, the woman as the surrogate is being compensated for her services. However at no point of time the body of the surrogate is treated as an object of commerce, neither is the surrogate considered any less a person as compared to a situation where a surgeon is made for performing an operation, or a cabby to drive a car or a model to pose for a statue.

In his analysis Shekhar Bhatia suggests that contrary to popular perception, with the coming in of assistance in reproduction, it has no longer remained the prerogative of the rich.²⁶⁴ It is increasingly evident that the privileged have now been joined by infertile couples, single parents and same sex couples amongst the others are opting for surrogacy considering that it has become much more affordable for even the middle classes. In other words, the democratization of assisted reproductive technologies has been facilitated by the easy availability of ART's and also the permeability of national borders to international business ventures that bring in hard currency. This makes Kishwar Desai, to suggest that the surrogacy industry in India is a minimum two billion dollar industry, catering to both domestic clientele along with couples from Europe, North America, and Middle East, Australia amongst others.²⁶⁵

²⁶³ Ibid

²⁶⁴ Shekhar Bhatia, 'Revealed: How more and more Britons are paying Indian women to become surrogate mothers,' The Telegraph, May 2012.

²⁶⁵ Kishwar Desai, *The Sea of Innocence*: (UK, Simon & Schuster, 2014)

Stephen Wilkinson goes one step further by questioning the very concepts of harm, exploitation and consent which are central to any critique of surrogacy. In his book, *Bodies for Sale: Ethics and Exploitation in the New Human Body Trade*, he makes an unequivocal defense of surrogacy trade in human organs and patents on DNA. He also aims to question and reinterpret concepts like commodification, objectification, consent, exploitation, welfare and force. Refuting the term exploitation, he coins the term “*mutually advantageous exploitation*” he believes ‘exploitation should be allowed because the exploited are better off with it than without it.’²⁶⁶ Jonsson echoes this thought when he suggests that there are advantages in being exploited more so when the surrogates are living in absolute drudgery.²⁶⁷ Under these circumstances, commodification is not degrading except on a symbolic level.

Yet another contention raised with regards to surrogacy is labeling it as child trafficking. Jonsson explicitly refutes this claim he believes that the ‘child did not exist when the transaction was sealed. It is therefore not a question of child trafficking. Martha Ertman claims that the child is not what is being sold. In fact what is being sold is parenthood. She suggests that even though it is largely believed that parenthood should not be a commodity that can be bought and sold, a parenthood market under certain situations is in fact a good thing.’²⁶⁸ Ulrika Westerlund and Soren Juvas stretching this line of thought argue that prohibition of surrogacy is a proof that “we have a biological, heteronormative, couples oriented view of parenthood and family”.²⁶⁹ Aseia Gonchari reiterates this when she argues that the prohibition is simply an expression of the conservative view of gender roles and traditional motherhood we still find today’²⁷⁰.

Helena Ragone, often hailed as a pioneer in the construction of the story of surrogacy claims that it can encourage people to question the inequality that women are subjected to and in turn enable women to be liberated from these traditional hegemonic roles.²⁷¹ She believes that both traditional as well as gestational surrogacy enable women to transcend the limitations of the roles that family and society ascribe to them thereby gaining autonomy and personal fulfillment. She

²⁶⁶ S. Wilkinson, *Bodies for Sale: Ethics and Exploitation in the New Human Body Trade*: (London and New York, Routledge, 2003).

²⁶⁷ Kajsa Ekman, *Being & Being Bought: Prostitution, Surrogacy & the Split Self*: (Spinifex Press, 2013).

²⁶⁸ Martha Ertman, ‘What’s Wrong with a Parenthood Market?’, *N.C. L. Review* 82, No. 1 (2003).

²⁶⁹ Kajsa Ekman, *Being & Being Bought: Prostitution, Surrogacy & the Split Self*: (Spinifex Press, 2013).

²⁷⁰ Nelson James Lindemann. *Feminist perspectives in medical ethics*: (New York, Hypatia Inc., 1992).

²⁷¹ Helena Ragone, *Surrogate Motherhood and American Kinship*: (Oxford, Blackwell, 2004).

further goes on to suggest that surrogacy also counteracts racism. She argues, “ class and race differences also tend to be set aside when infertility and childlessness are at issue” thus even class divisions also get eroded considering the fact that intended parents are also in agreement to accept a lower caste and class women to be the surrogate who would bear their child.²⁷² Contextualizing this with regards to international surrogacy arrangements it can be argued that surrogacy is the path to social utopia, where notions of caste, class, region, religion have all begun to iron out. Alternatively with the eroding organic unity of the fetus and the mother, even rudimentary social divisions seem to be getting redefined.

Liberalization, privatization, globalization have been juxtaposed with a fourth dimension which is the growing development in medical science and technology, all of which have been crucial for women. ART's or Assisted Reproductive Technologies have added a new dimension to the ongoing debate on women's waged employment. New Enclosures as Donna Dickenson calls them refer to the development in science and technology that have facilitated the use of more advanced techniques in reproductive technologies.²⁷³ It is argued that these scientific innovations have been emancipatory in that some aspects of objectification which were till now restricted solely to female experiences have now also become a reality of the lives of men.

Yet another argument forwarded in favor of surrogacy is that it de-essentialises the idea of biological parenting which is extremely patriarchal in construction. It is argued that surrogacy successfully dismantles the rudimentary understanding of family and kinship structures. In addition, surrogacy involves the use of reproductive technologies which are seen as spaces which are transgressive and which hence provide space to interrogate gender, sexuality, genetics and biology. Bodies in this context are seen as owned as property and thus can be used as one desires. An individual is considered rational and autonomous with the freedom and ability to make choices. Lori Andrews argues that to discount women's ability to choose surrogacy is equivalent to disregarding their ability to determine what happens to their bodies and ignore their agency altogether.²⁷⁴

²⁷² Ibid

²⁷³ Donna Dickenson, *Property in the Body: Feminist Perspectives*: (Cambridge University Press, 2007).

²⁷⁴ Lori Andrews, 'Surrogate Motherhood: The Challenge for Feminists,' *The Journal of Law, Medicine & Ethics* 16, No. 1-2 (1988).

Ushering in the idea of contract and law that binds surrogacy arrangements, philosopher H.M. Malm suggests that the idea of entering into a contract with regards to one's body confirms a person's status as an individual. Here in she borrows the idea from the Hobbesian social contract theory according to which a person is someone who owns his or her body.²⁷⁵ Torbjon Tannsjo argues that commercial surrogacy should be legalised regardless of the fact that it carries health hazards for women because it would be wrong to restrict the right of an individual woman to decide whether or not she wishes to use her body in exchange for payment.²⁷⁶ According to Christine Sistare, surrogacy creates freedom for women, showing self respect for motherhood and allowing women to exercise their free will.²⁷⁷

The above account suggests that Surrogacy exemplifies economic agency, decisional capacity and the social valuing of women's reproductive capacities. This transformative power of surrogacy goes beyond the lived experiences of individual surrogates to encompass the enhancement of autonomy of women more generally. It breaks through the conventional understanding of productive versus non productive labor and brings about a validation of a woman's right to interpret and control her reproductive capacities. Keeping these arguments in mind, it is pertinent to also understand the contentions that have been raised by the critics of surrogacy towards which the next section is directed.

3.5 The Wrongs of Surrogacy: Radical Opposition

From a diametrically opposite standpoint to the liberals come the articulations of radical feminists and proponents of abolition of surrogacy, who argue that at the core of surrogacy is that it has led to commodification of women's bodies which in itself is disrespectful to women and their bodies. While in the liberal account, these non-standard forms of women's work have meant economic empowerment for women, radical opponents argue that what is stark is that these 'professions' by their very nature are detrimental to the psyche of women. The element of

²⁷⁵ Heidi Malm, 'Paid Surrogacy: Arguments and Responses,' *Public Affairs Quarterly* 3, No. 2 (1989): 57-66.

²⁷⁶ Kajsa Ekman, *Being & Being Bought: Prostitution, Surrogacy & the Split Self*: (Spinifex Press, 2013).

²⁷⁷ Christine Sistare, 'Reproductive freedom and women's freedom: surrogacy and autonomy,' *Philosophical Forum* 19, No. 4 (1987): 227-240.

harm inherent in them is both visible in the form of bodily harm and invisible as manifested in the emotional and psychological ramifications it has on women engaged in these jobs.

Suzanne Martin begins her account on surrogacy by suggesting that there are two initial parties in surrogacy and they are intrinsically tied to one another.²⁷⁸ One of those parties is the wealthy couples with the desire to have a biological child outsourced and the means to make their wish true. People who seek a surrogate have a very specific desire. It is not sufficient for them to know a child or to help raise a child who is already alive, nor is it enough to adopt an orphaned child. Their specific need is to have a child who is genetically linked to them. Their desire is supplemented with money to convert it into a demand. Ulrika Westurland writes in this context that surrogacy is a typical case of wanting a woman to act as an absentee mother and in so doing it is more of a need and a choice.²⁷⁹ This demand is further reformulated according to suitable argumentation and thus lands in the realm of being a right.

What makes it even worse is the coming in of market which has led to exploitation and subordination getting multiplied manifold times and gets systematically organized. They object to the fact that women are reduced to commodities and this leads to their objectification. They also raise concern from the vantage point of the child so born who is never in a position to make choices as crucial as its own life. They carve out a distinction between biological parents and legal/social parents thereby arguing that parents feel a sense of greater responsibility for that which they have brought to the world on their own. If this is considered to have any merit, it puts the life of the child born to immense and irreversible risk which is a significant moral issue.

Sayantani Dasgupta in this context argues that, “*parenthood is no longer achieved only through conception from sexual intercourse, gestation, adoption, or traditional surrogacy, but also with the help of complex reproductive technologies, where up to five parents can participate in the birth of a child.*”²⁸⁰ Shamita Das Dasgupta further states that, “*in a globalized world economy, where the movement and transfer of people and commodities are becoming increasingly common*

²⁷⁸ Kajsa Ekman, *Being & Being Bought: Prostitution, Surrogacy & the Split Self*: (Spinifex Press, 2013).

²⁷⁹ Ibid

²⁸⁰ Sayantani Dasgupta & Shamita Dasgupta, *Globalization and Transnational Surrogacy in India: Outsourcing Life*: (New York, Lexington Books, 2014).

to serve the interests of capitalism, gamete donation and surrogate birth can traverse innumerable geographic, socioeconomic, radicalized and political border lands.”²⁸¹

Jyotsna Aghnihori Gupta puts forth a crucial interjection when she argues that women’s bodies, body parts (including wombs and ova), and private reproductive functions are being transformed into usable raw materials and opened up for public consumption.²⁸² Clearly then, reproduction itself can be easily outsourced and has over the years has acquired a global proportion. Barbara Katz Rothman suggests that, “it is this outsourcing that has given a significant impetus to the demand and therefore the industry has expanded at an unprecedented rate and pace by identifying and securing cheap and abundant labor in the global south so as to ensure a smooth supply base.”²⁸³

This international gestational outsourcing is evidently a by-product of globalisation as well as capitalism and is midwife by economic and political power differentials between countries. Transnational surrogacy has given rise to a thriving international industry where money is being legally exchanged for babies and reproductive labor has acquired a pertinent commercial connotation. In the absence of economic and legal structures, parenthood for infertile individuals has become as simpler as travelling to another nation to ‘rent a womb.’ They have expressed disillusionment with the potential of a contract in eliminating the detrimental effects of surrogacy. They believe that as well worded as a liberal notion of contract is, it only renders harm invisible. Therefore they vehemently call for the doing away of such feminized labor institutions.

This re-constructionist argument premised on the notion of autonomy and revaluation of women’s labor is repudiated by many a feminists who see it more as an impediment. It is argued that infact autonomy fails to be enhanced due to the notions about women’s reproductive roles that surrogacy arrangements uphold and reinforce. Suze G. Berkhout argues that the negative effects of surrogacy are indirect too. She refers to them as surreptitious manifested in the form of

²⁸¹ Ibid

²⁸² Jyotsna Agnihotri, ‘Reproductive Biocrossings: Indian egg donors and Surrogates in the Globalized Fertility Market,’ *International Journal of Feminist Approaches to Bioethics* 5, No. 1 (2012): 25-51.

²⁸³ Barbara Rothman, ‘The Legacy of Patriarchy as Context for Surrogacy: Or Why Are We Quibbling Over This?’, *Taylor and Francis Online*, (2014): 36-37.

objectification.²⁸⁴ To her understanding these are more harmful and far-reaching. It is argued that the re-constructionist approach does not pay attention to the need to engender the attitude that not having children is a valid reproductive choice for women. Surrogacy continues to be a gendered practice for it continues to be characterized by norms and stereotypes regardless of the ways in which babies are produced. These ideological tools are a part of a larger patriarchal construction that essentialises women and their roles. The reconstruction project fails to alter the social climate within which autonomy is situated.

With regards to question of rational choice and bodily integrity, it is contended that while these are positive developments, these are severely hindered by the nature of surrogacy contracts. Such contracts it is argued have denied women the right to have input into decision making for the language and terms of the contract are determined by the commissioning parents. Failure on part of the surrogate to abide by these terms leads to fines or withholding of payment till the birth of the child. The contractual restrictions are demonstrative of the scope of limitations on the surrogate mother's ability to have input into the course of pregnancy. This raises pertinent questions about any possibility of autonomy on part of these women.

Interestingly according to conventional understanding, this juxtaposition estranges child bearing from motherhood, which is hailed as human cultural activity. It can be argued that even in situations where children are increasingly valued the social worth of mothers is severely restricted. This becomes evident in the case of surrogacy wherein while the child is privileged, the maternal rights of the surrogate are abrogated. Catherine Walby and Melinda Cooper point out to the fact that even where medicine, body and technology intersect, women's reproductive labor is cheapened by its categorization as natural and unskilled.²⁸⁵ It is doubly devalued in the sense that it defies standard industrial methods of labor evaluation.

These myriad of explicit and implicit limitations suggest that in reality women as surrogates do not find the opportunity to freely contract with the social parents. Shifting our attention to the

²⁸⁴ Suze Berkhout, 'Buns in the Oven: Objectification, Surrogacy, and Women's Autonomy,' *Social Theory and Practice* 34, No. 1 (2008): 95-117.

²⁸⁵ Melinda Cooper & Catherine Waldby, *Clinical Labor: Tissue Donors and Research Subjects in the Global Bioeconomy*: (United States, Duke University Press, 2014).

social matrix within which surrogacy takes place suggests that a move to a laissez faire conception of surrogacy is an unsuitable alternative. The power dynamics that exist between the surrogate and the commissioning parents intrinsically carries restrictions to the autonomy of women surrogates. As a form of labour that is specific to women, surrogate pregnancy continues to be profoundly gendered. Surrogacy clearly is a site for contested and hegemonic ideology about the control over women's bodies, women's place in the social order and the effects of objectification on women's possible ways of being and doing.

Contrary to the liberals, the abolitionists adopting a sexual subordination approach place surrogacy at the bottom of the hierarchy of male supremacy. Vital to their objection to any form of sexual labor, is harm i.e. a sort of objectification and commodification whereby goods are bought and sold in the market leading to commodification.²⁸⁶ Commodification in itself and of itself is harmful, making the conditions under which surrogates commodify irrelevant. Christine Sistare has written that a "*fundamental moral issue in the surrogacy debate is the nature and extent of women's freedom: their freedom to control their bodies, their lives, their reproductive powers, and to determine the social use of those reproductive capacities*".²⁸⁷ *It is simple commodification.*²⁸⁸

Christine Overall suggests, "Two ways in which women's control over their lives is impaired by surrogacy."²⁸⁹ Overall examines models that are frequently used in thinking about surrogacy-the free market model and the prostitution model-and comes to the conclusion that neither is adequate, because both see surrogacy as a job when in fact it is nothing of the kind. In her view, a job implies the selling of a service or other commodity, and it also implies that the worker has control over the work.

²⁸⁶ Martha M Ertman & Williams Joan Chalmers, 'Freedom, Equality and the many Futures of Commodification,' *Utah Legal Studies Paper* 05-32, (2005): 1-12.

²⁸⁷ Nelson & Nelson, 'Cutting Motherhood in Two: Some Suspicions concerning Surrogacy,' *Hypatia* 4, No. 3 (1989): 85-94.

²⁸⁸ Martha Nussbaum defines objectification as a plurality of denials imposed on human subjects: denials of their agency, autonomy, uniqueness and dignity.

²⁸⁹ Christine Overall, *Ethics and human Reproduction: A feminist analysis*: (Winchester, MA, Allen and Unwin, 1987).

Janice Raymond adds yet another dimension to the debate. She states that surrogate motherhood, situated in the larger context of women's inequality, is not simply about the commercialization of women and children. On a political level, it reinforces the perception and use of all women as a breeder class and the gender inequality of women as a group.²⁹⁰ In addition, Gena Corea and Harper argue that within these reproductive arrangements, women's needs and rights become subordinate to fetal needs and rights protected by the medical establishment and the state.²⁹¹ Harper goes on to argue that within surrogacy arrangements, "Women have become baby machines, treated like little repositories for little uteruses that contain little fetuses, all of which are subject to the control of the physician". According to Hoff, feminist scholars protest that reproductive technology is turning the female body into "the biological laboratory of the future"—often under the guise of aiding infertile women to reproduce or of providing married and single women and men with a baby purchased from some happy breeder.

Refuting the liberal claim that surrogacy is an occupational choice of a woman and hence selling sexual or reproductive services is similar to selling of intellectual labor in a university, the opponents contend that in surrogacy there exists no specialization involved, nor does it involve any form of growth: spiritual or intellectual in the person who is paying the fee. It is argued that in reality surrogacy is similar to selling of a service. Further it is argued that unlike any other forms of labor, in surrogacy, the surrogate has no control over what she is selling. Pregnancy and birth are not volitional processes; they are simply natural bodily functions she cannot help. Overall quotes Mary O'Brien's application to motherhood of Marx's distinction between the architect and the bee, "the mother cannot use her skills and her imaginative vision to create the baby; like the bee, she cannot help what she is doing"²⁹²

Sayantani Dasgupta and Shamita Dasgupta make a crucial interjection herein. They argue that it needs to be reiterated that women's consent cannot be constructed as voluntary, in the wake of

²⁹⁰ Janice Raymond, 'Reproductive technologies, Radical Feminism, and Socialist Liberalism: Reproductive and Genetic Engineering,' *Journal of International Feminist Analysis* 2, No. 2 (1989): 133–142.

²⁹¹ Debora Spar, 'For Love and Money: The Political Economy of Commercial Surrogacy,' *Review of International Political Economy* 12, No. 2 (2005): 287-309.

²⁹² Mary O'Brien, *The politics of Reproduction*: (Routledge & Kegan Paul, 1981).

the fact that these choices are made on account of economic needs.²⁹³ Rachael Blatt argues that self determination at best becomes a façade when operating under the pressures of penury, socialization and lack of possibilities of financial advancement under a patriarchal mindset.²⁹⁴ Evidently then surrogacy brings together various ideas that have been central to the feminist scholarship like empowerment, ownership and integrity of the female body and the compulsion of motherhood all of which require in depth understanding.

Closely analyzing the classical liberal values of freedom, self-fulfillment, individual dignity, and the equality of opportunity to pursue one's own interests, scholars like Alison Jaggar are express their pessimism with this liberal premise of "abstract individualism"-a model of autonomous, self-interested entities interacting contractually in pursuit of their own goods.²⁹⁵ She argues that this is an oversimplified account that overlooks the socio-economic realities into which an individual is embedded. In the case of surrogates this contract seems of little help.

Critics also argue that the celebratory account of surrogacy does not highlight the race and class differences that mark the relationship between the surrogate and the intending parents. It is this power syndrome that has led to the restriction of women's autonomy. It also has meant that privileging of the intending party over the surrogate. It is argued that even the best of contracts, are incapable of providing a "substantive conception of the good life and a way of identifying genuine human needs".²⁹⁶ Surrogacy it is argued carries other significant issues like what happens to the child after the contracting parents split, who owes the moral responsibility to rear the child. Therefore the opponents contend that, "the assumptions that underlie the practice seem to hold an impoverished view of the full significance of women's freedom, and an inadequate recognition of the child's moral stake in the matter."²⁹⁷

²⁹³ Sayantani Dasgupta & Shamita Dasgupta, *Globalization and Transnational Surrogacy in India: Outsourcing Life*: (New York, Lexington Books, 2014).

²⁹⁴ Rachel Blatt, *Wombs For Rent?*: (Brown University, 2009).

²⁹⁵ Alison Jaggar, *Feminist Politics and Human Nature*: (NJ, Rowman and Allenheld, 1983).

²⁹⁶ Even the most meticulously worded contracts cannot protect surrogate's freedom because a contract fundamentally implies the relinquishing of an individual's control over her body.

²⁹⁷ Nelson & Nelson, 'Cutting Motherhood in Two: Some Suspicions concerning Surrogacy,' *Hypatia* 4, No. 3 (1989): 85-94.

They are rather pessimistic of the emancipatory potential of surrogacy contract. Opponents of the liberal trust on contracts see it as only a veil that hides the rue reality. Susan Ince for instance argues that the surrogate arrangements are always written to favor the commissioning fathers.²⁹⁸ It is believed that, “acting from a position of relative wealth and power he hires a lawyer to ensure the preeminence of his own vested interests over not only the surrogate mother but also his infertile wife. Therefore the contract seeks to ensure that the 'child has the sperm and name of the buyer.”²⁹⁹

To their minds, such a contract only renders harm invisible. They thus opine that, “the central problem with contract according to Carole Pateman is the idea of property in the person: that one can contract out one's services without actually contracting out oneself.”³⁰⁰ This ‘myth’ enables contractarians to assert that those who are in subordinate positions are there by choice³⁰¹; and since their positions are a product of choice, they have expressed their freedom rather than limited it by joining in the employment, slave, or sexual contract.³⁰² Thus ‘the 'individual’ is a patriarchal category; the individual as owner of property in the person who can contract out that property - and, indeed, finds meaning as an "individual" only through such contracts -is a conception that derives from institutionalized relations of oppression disguised as freedom.

Martha Nussbaum while pointing out the social meaning of transactions involved in surrogacy, argues that the fundamental problem with surrogacy is that it turns reproductive capabilities into objects for the use and control of men. In so doing it demeans women. Mary Douglas goes on to argue that, “*buying or selling of sperms and eggs using one’s reproductive capacities violates the social order.*”³⁰³ It is this fear amongst surrogates of their work being labeled as ‘corrupt’ or polluted that forces them to put it behind the garb of philanthropy rather than financial gain.

²⁹⁸ Susan Ince, *Test-tube Women: What future for motherhood?:* (London, Pandora Press, 1984).

²⁹⁹ Nelson & Nelson, ‘Cutting Motherhood in Two: Some Suspicions concerning Surrogacy,’ *Hypatia* 4, No. 3 (1989): 85-94

³⁰⁰ Nancy J. Hirschmann, ‘Books in Review,’ *Political Theory* 18, No. 1 (1990): 170–74.

³⁰¹ Carole Pateman, ‘Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts,’ *Journal of Political Philosophy* 10, No. 1 (2002): 20-53.

³⁰² Ibid

³⁰³ Elly Teman, ‘My Bun, Her Oven (or: Surrogacy as a Cultural Anomaly),’ *Anthropology Now* 2, No. 2 (2010): 33-41.

To sum up, at the core of the criticisms of surrogacy is the economic issue of whether a woman should be paid for this service. Secondly, it has been argued that surrogacy is baby-selling and is harmful to the children born to surrogates; thirdly, that surrogacy entails the wrongful commodification³⁰⁴ of persons or relationships, or that it violates the Kantian maxim that persons should never be treated merely as means but always as ends-in-themselves. Fourthly, that it exploits the surrogate mothers and that such exploitation is grounds for prohibiting commercial surrogacy.

Women in the profession and pro commercial surrogacy advocates alike argue that such a conception is premised on the application of pervasive gender norms specifying that an individual's motivations to have children should be solely based on emotions, selflessness, and caring and not on self-interest, financial incentives, or pragmatism. It is application of these societal constructed and imposed norms and stereotypes that renders commercial surrogacy as deviant, but altruistic arrangements more acceptable. Gender norms relate to presentation of self, marriage, maternity, sexuality, and occupational choice and define and limit the roles and behavior considered appropriate for women. Commercial surrogacy contracts are designated deviant because they are deemed to contravene gender norms that specify women's place in the private sphere of the family, not the competitive market place. Thus it is argued that differences between commercial and altruistic arrangements, in fact reflect a process of interpretation, definition, and deviance designation, rather than an objective description.

While the contention of noted feminists like Simon de Beauvoir³⁰⁵ about women's bodies being seen as objects is apt, there also seems to be an imperative need to move beyond these conventional feminist views of bodies as merely objects. This makes it essential to also deal with the subject-object and objectification-commodification³⁰⁶ distinction to understand the commodification of human tissues and genes.

³⁰⁴ Hughes argues for an enlarged conception of commodification to include all capitalized economic relations between humans in which human bodies are the token of economic exchanges that are often masked as something else-love, pleasure, altruism, kindness.

³⁰⁵ Alicja Tiukalo, 'The Notion of the Body and Sex in Simone de Beauvoir's Philosophy,' *Human Movement* 13, No. 1 (2012): 78–85.

³⁰⁶ It is argued that while commodification has both use and exchange value and objects usually have just use value.

The discussions on commodification is premised on the Marxian thought that commodification is wrong in itself. This however is not a universal understanding as suggested by Donna Dickenson³⁰⁷. Scholars like Carolyn McLeod and Françoise Baylis note that neither objectification nor commodification is intrinsically malign in Marx or anywhere else.³⁰⁸ What is wrong is the commodification or objectification of something that is said to have value in itself. Commodification is permissible or impermissible depending on:

- (i) Is this commodification compatible with its intrinsic value?
- (ii) Are there moral constraints to this alienation of the thing from the person?
- (iii) And whether the consequences of this alienation are favorable.

While Immanuel Kant recognises the right to commodify the body in such a way as to preserve one's life for example by amputating a diseased limb, he prefers to avoid commodification of that which has intrinsic value. Nevertheless, Kantian perspective is willing to tolerate this level of objectification.³⁰⁹ However the problem arises when these things of intrinsic value are bought and sold to keep the body and soul together. This is what makes surrogacy acquire more complex dimensions than blood donation.

Dismissing the popular rhetoric that surrogacy is an erosion of traditional familial and marital norms, John A. Robertson writes that surrogacy in fact 'may shore up rather than undermine the traditional family' and thus serves the purpose of marital union. Additionally he claims that it helps infertile women to fulfill their longing for children.³¹⁰ This longing in itself is an attribute of the patriarchal construct that lays so much of emphasis on fertility and the idea of a complete ideal family. Helena Ragone believes that surrogacy is "a reaffirmation of the importance of the family" and is consistent with the kinship ideology in the sense that biogenetic relatedness is achieved".³¹¹

³⁰⁷ Donna Dickenson, *Property in the Body: Feminist Perspectives*: (Cambridge University Press, 2007).

³⁰⁸ Carolyn McLeod & Françoise Baylis, 'Feminists on the Inalienability of Human Embryos,' *Hypatia*, (2006): 1-4.

³⁰⁹ For instance blood as an object can be transferred, tested and measured if it is for social solidarity and does not include the use of money. This demonstrates citizenship and solidarity which are attributes of subject and not object.

³¹⁰ John Robertson, 'Surrogate Mothers: Not So Novel after All,' *The Hastings Center Report* 13, No. 5 (1983): 28-34.

³¹¹ Helena Ragone, *Surrogate Motherhood: Conception in the Heart*: (Westview Press. 1994).

In crux, following are the central concerns that have been raised by radicals against any bid to acknowledge and regulate the surrogacy industry:

- The first contention of the opponents with regards to the euphoria that surrounds surrogacy is that, in the entire narrative of happiness and completeness that surrogacy brings about, what is completely ignored is the fact that the surrogate cannot partake in the happiness associated with these children, because she doesn't have access to them. Further the story of women stepping out of their traditional roles, infact appears like a trap for women.
- Further, if it is argued that if one were to take Jonsson's claim that surrogacy works only if women are completely informed, capable of making sound decisions and fair treatment seriously, the radicals put forth the question that can a person ever be completely informed of something she has never done before?
- To add, they argue in separating an individual's body and his or her labour, the implicit assumption is that the child is not a part of the woman and anything that happens in her body does not happen to her. Further, in this conception, the freedom of the self stands in contrast to the freedom off the body.
- A lot of scholarship considers surrogacy as an extension of prostitution in the sense that someone, most often a man pays for the use of the woman's body. As is the case with prostitution in surrogacy too, the needs of the male take the center stage while the woman is merely reduced to as a means of achieving it. The only difference that exists between the two as highlighted by Andrea Dworkin is that while prostitution involves the sale of a woman's vagina, in surrogacy what is sold is infact the woman's uterus.³¹²
- The pro surrogacy philosophers argue that pregnancy should be treated as just another job. Pregnancy in this framework is seen as a service much like factory work or lawn mowing. However these assumptions are repudiated by the critics of any form of surrogacy arrangement as being highly problematic. They suggest, to begin with if pregnancy is a job, then what is the product? If the product of surrogacy is tangible- a new born baby. If pregnancy is work in the same sense as is working in a factory then the child is comparable to a car or a piece of furniture. As soon the woman hands over the child and receives the

³¹² Andrea Dworkin, *Right-Wing Women: The Politics of Domesticated Females*: (London, The Women's Press, 1983).

payment she gives up all claims to the child. This they contend is equivalent to human trafficking?

The contention between the two ideological strands is further problematized by women working as surrogates who put forth celebratory accounts of their work. They emphasize the fact that surrogacy has opened channels of economic empowerment for them. This economic empowerment has not only meant a better standard of living and economic self worth, it has also enabled them to move out of the four walls of domesticity and interact with more and more women. This has also meant an upward mobility within the family hierarchy. They contend that in their less than ideal conditions, surrogacy is the best line of work they can take to. It has empowered them to become agents making choices for themselves. It has meant greater power and agency to them in the other realms of their lives. Apart from the unwaged work that they are involved in at their homes, surrogacy has meant a substantial waged employment for them.

They argue that surrogacy has opened up the avenue for women to work from their bodies and become autonomous agents. Their bodies have meant their emancipation coupled with a service to the commissioning parents thereby ensuring ‘social solidarity.’³¹³ Therefore they see no harm in the practice of surrogacy and in fact vehemently advocate for its continuous existence.

To conclude while surrogacy does give women a wage apart from their unwaged labor at home, just getting a wage does not change the situation completely. Waged work is juxtaposed with complications. This relation will be dealt with at a later stage in context of the observations that emerge from field research.

3.6 Surrogacy as Estranged Labor: Marxist Analysis

The liberal framework with its postulation of an autonomous individual with equal rights justifies surrogacy arrangements and calls for their better codification. Critics argue that this also conceals the class and gender markers which play a significant role in defining the nature of surrogacy. This concealment takes place behind the illusion of formal equality in contract. This

³¹³ Natalie Fixmer-Oraiz, ‘Speaking of Solidarity: Transnational Gestational Surrogacy and the Rhetorics of Reproductive (In)Justice,’ *Frontiers: A Journal of Women Studies* 34, No. 3, (2013): 126-163.

research seeks to argue that understanding the liberal concealment through Marx's conception of estranged labor is imperative to understand the crucial issues that impinge the phenomenon of surrogacy.

Courtroom battles take place between the surrogates and intended parents based on the liberal notions of rights and obligations. Once the rights and obligations of both parties to the surrogacy contract have been arbitrated, custody disputes are always decided based on the 'best interests' of the child. Liberal proponents of surrogacy argue that an infertile couple has the right to procreate and a woman has the right to use her body as she pleases. This however is not a simple equation, feminists have vehemently argued considering that surrogacy in reality upholds the man's right to procreate. The wife of the father of the child produced as a result of surrogacy arrangement remains infertile. Surrogacy thus does not benefit the infertile wife." Further, in case of same sex female couples, wherein one of the partners can carry the child, in most instances they do not for they do not wish to undergo the pain that surrogacy entails. From the Marxist perspective surrogacy thus, enables a man or a woman of relative privilege to use another woman for their own interests.

Surrogacy is often compared to semen donation. It is argued that since according to the universal norm, the semen donors are expected to relinquish their parental rights, similarly womb and egg donors ought to relinquish parental rights as well. This argument has been successfully used in many surrogacy trials. However feminists do not agree to such arguments. Andrea Dworkin for instance points out a crucial flaw in the analogy between donating sperm and surrogacy. She argues that there is no comparison between an ejaculate of the body and the body itself.³¹⁴ She compares collecting semen to collecting tears from the eye and surrogacy to taking the eye itself

Surrogacy is also defended by the liberals on the premise that it benefits not only the "infertile couple" but also the women who serve as surrogates. It is argued that 'these women have the right to use their body as they wish, to freely engage in any contracts which they wish, to make money in any way in which they wish to.' In the end, what they argue is that we live in a

³¹⁴ Andrea Dworkin, *Right-Wing Women: The Politics of Domesticated Females*: (London, The Women's Press, 1983).

capitalist society where market demands dictate propriety. This view however has been refuted by critics considering that it overlooks the fact that market exploits the economic needs of women who do something which they would not otherwise do if they had more meaningful options available. Further surrogacy unlike many other forms of labor, is a twenty four hour job wherein every act in which the "surrogate" engages may come under the scrutiny of the contracting couple- what she eats, drinks, and how she plays. This account suggests that surrogacy unlike other professions entails a job wherein women are never off-duty.

What further complicates the liberal notion of choice is in fact the absence of choice. Another contention that is related to the element of choice is the fact that women cannot give completely informed consent to relinquish parental rights to their babies before they are born. Andrea Dworkin expresses her suspicion in the following words:

"Again, the state has constructed the social, economic, and political situation in which the sale of some sexual or reproductive capacity is necessary to the survival of women; and yet the selling is seen to be an act of individual will-the only kind of assertion of individual will in women that is vigorously defended as a matter of course by most of those who pontificate on female freedom. The state denies women a host of other possibilities, from education to jobs to equal rights before the law to sexual self-determination in marriage; but it is state intrusion into her selling of sex or a sex-class-specific capacity that provokes a defense of her will, her right, her individual self-defined strictly in terms of the will to sell what is appropriate for females to sell."

Thus, Marxist epistemology argues that many of the supposed benefits to the surrogate are illusory. The illusion is created through the presuppositions of the liberal framework operating within a capitalist patriarchal society. The problem with the liberal framework according to critics is that it is based on the assumption that all people are equal with identical rights. It is premised on the belief that they all operate autonomously and have the freedom to exercise their rights as long as they don't interfere with the rights of others. In this framework, the surrogacy contract is seen as an agreement between two or more equal parties and consequently it is

believed that herein lays an exchange on equal terms, money paid by the commissioning couple for services rendered by the surrogate.

Marxist framework points out that in its bid to paint an egalitarian order, the liberal framework goes on to emphasize on equal rights thereby overlooking important gender-specific and class differences between the parties to the surrogacy contract. What it ignores is that without the class dimension, the contract would not exist. The contract undermines the very notion of equality between parties. Within this framework, it is argued that the surrogacy contract is always biased in favor of the financially secure male i.e. the commissioning father. Varada Magde makes a crucial argument in this context. Noting particularly in context of India, she particularly looks at the detrimental phenomenon of exploitation, stigmatization and violence against women. She highlights the fact that in an economically unequal world order, technology rather than liberating women, in fact brings forth more and more ways of oppressing them.

Amrita Pande in context of the particular practice of surrogacy in India, argues that most of the surrogates come from a deprived background.³¹⁵ They are mostly uneducated women belonging to the working class. They consider surrogacy a lucrative enterprise considering that it promises a substantial amount of money in a relatively short period of time. It is poverty that pushes them into exploitative work and makes them highly dependent on the commissioning parents and the doctors of the surrogacy clinics. It is this dependency that makes them devoid of any agency to negotiate better for long term healthcare, higher compensation as well as for other forms of workers' rights.

Marxism with its economic interpretation points towards the fact that surrogacy simply means a survival strategy that allows hapless women to make ends meet. The opportunity cost of this is that while accepting surrogacy arrangements in exchange for money, they also invariably accept varying degree of risks. Kabeer says that for women with class deprivations, surrogacy is lucrative and easily accessible for it requires no skills or capital investments. These women, it is argued become vulnerable to exploitation because of their abject poverty and emotional needs.

³¹⁵ Amrita Pande, *Wombs in Labour: Transnational Commercial Surrogacy in India*: (Columbia University Press)

These dire insecurities are used by the brokers, clinics and intended parents for realizing their purpose at the lowest possibly economic remuneration.

In Marx's conception, what sets human beings distinct is that “they can act not only for the good of themselves and their species, but also for the good of all species.”³¹⁶ Human beings, the Marxist schema argues, “are in the fractured position of being both individual beings and social beings at once.”³¹⁷ In the Marxist sense, this unique position is known as ‘species-being.’ It is argued that one of the fundamentals to see oneself as a species it is imperative to separate oneself from the outside world. This sense of alienation would enable an individual to view themselves as a social being.³¹⁸ Contrary to this, in contexts where, this relationship between the self and the world is inverted, it leads to a situation under which the self merely exists to cover up for the species being. This according to Marxism tantamount to a relation of estrangement with the self.³¹⁹ This estrangement provides the broad contours within which Marxist conception of surrogacy can be understood.

In defending surrogacy, one of the fundamental arguments is that, the parties to a surrogacy contract are all rational, autonomous being with the ability to make decisions for themselves. This is premised on the assumption that these individuals also have the freedom to make decisions pertaining to their lives. However in so doing, there seems to be a deliberate attempt to obfuscate the context in which these individuals operate and the settings that shape them up.³²⁰ Such a view of surrogacy wrongfully assumes that individuals can be divorced from their social settings. This therefore is a highly atomistic understanding of the individual and thus this cannot serve as a logical ground to defend surrogacy and a surrogacy contract.³²¹

Further, this account fails to acknowledge the fact that surrogacy is an exemplification of the power structures that exist. It does not cater to the myriad of socio-economic forces that are imbedded in the institution of surrogacy. In context of this fallacy, the Marxian school of thought

³¹⁶ Oliver Kelly, ‘Marxism and Surrogacy,’ *Hypatia* 4, No. 3 (1989): 95-115.

³¹⁷ *Ibid*

³¹⁸ *Ibid*

³¹⁹ Karl Marx, *Early writings*: (NY, Random House, 1975).

³²⁰ Oliver Kelly, ‘Marxism and Surrogacy,’ *Hypatia* 4, No. 3 (1989): 95-115.

³²¹ Karl Marx, *Early writings*: (NY, Random House, 1975).

presses upon us the need to carefully study the social factors that ‘make the autonomous individual.

To understand this better, it is imperative to bring forth the distinction between estranged labor and alienated labor as had been sketched out by Marx himself. Marx argued that, “it is natural and necessary that humans take that which they produce to be outside themselves.”³²² Marx also acknowledged that this capacity of an individual to produce puts them in special place in relation to the world. Alienation for him exemplified the species-being of humans. Further, he believed that as a species being, individuals ate, slept, procreated, stayed alive so as to conform to their role as a social being.

Marx opined that not all labor essentially is estranged labor. Marx believed that certain forms of labor like those that took place before the advent of capitalism or those that were premised on exchanges in labor were not estranged. In the Marxist analysis, forms of labor other than surrogacy have a use value apart from an exchange value which can be used without estrangement. However in surrogacy this does not exist and hence it is an estranged form of labor. Oliver Kelly elaborates on this with the help of an example. She takes a hypothetical situation and argues, “a friend can cook a meal for you without becoming estranged from her labor. On the other hand, if she works as a cook in the cafeteria, when she cooks meals there, she is estranged from her labor.”³²³ This Marxist framework very succinctly explains the reasons why surrogacy as a practice has been repudiated. It is argued that no other form of labor holds the kind of estrangement that is inherent in surrogacy. It is infact argued that owing to the, ‘relationship between the body and labor in surrogacy, the surrogate is doubly estranged.’

In *Economic and Philosophical Manuscripts*, Marx lays down that there are four characteristics that are very significant to understand estranged labor:³²⁴

- The estrangement of the worker from nature and her products.
- Her estrangement from herself and the process of production.

³²² Oliver Kelly, ‘Marxism and Surrogacy,’ *Hypatia* 4, No. 3 (1989): 95-115.

³²³ Ibid

³²⁴ Karl Marx, *Early writings*: (NY, Random House, 1975).

- The worker is also estranged from the social aspect of her work and her life.
- The worker is estranged from other people

When these conditions are contextualized in the wake of surrogacy, following conclusions can be discerned:

- Since the worker's very subsistence is dependent on the product, she is, in some sense, a slave to her product. In the case of the paid surrogate, if she doesn't produce, she doesn't get paid. Marx argues that the product does not appear to the worker as the result of her "dialogue with nature". On the contrary, it seems hostile to her. Marx suggests that human beings can engage in a dialogue with inorganic nature. Marx argues that Nature constitutes of our "inorganic body." In estranged labor, we are estranged from our inorganic body. It becomes a set of commodities which we must produce on demand. The surrogacy contract creates the resulting baby as a commercial product which exists for the sake of the exchange.
- The second characteristic of estranged labor is that the worker is estranged from herself and the process of production. Viewing this contention from the point of view of the surrogate, it is evident that within the surrogacy arrangement, the "surrogate" is treated as a machine whose services can be exchanged for money. As Marx maintains, in the exchange of human labor for money within capitalism, the human being is treated as a machine.

Capitalism, argues Marx, "turns the worker into a fragment of a person, an appendage of a machine."³²⁵ When applied to the debates on surrogacy, it appears that the woman acting as the surrogate is viewed by others and by her own self as an object that can be reduced to her womb and her eggs. In this manner, her body is equated to a mere machine which can be an easily rented out. Surrogacy it is argued is the worst form of estrangement considering that unlike other forms of works where the worker is an appendage, the woman under surrogacy arrangements is no more than just a machine. Her body becomes a baby making machine that the woman has no control over. Her body becomes the property of another person who uses it as and when they feel like. What makes it even worse is that she has no co-equal powers with her owner.

³²⁵ Karl Marx, *Capital Vol. I.*: (NY, Random House, 1977).

Clearly then, the role of the surrogate under the arrangement is a passive one. In so doing, all liberal ideas of empowerment appear to be a sham to the Marxist critics of surrogacy. This is further exacerbated by the fact that under surrogacy arrangements, the woman is reduced to 'an incubator' designated with the task of producing a 'flawless product' for her hirers. There is no concern for the physical or psychological ramifications that this transaction hold for the surrogate mother.

Further, the notion of 'consent' is refuted by critics on surrogacy as a sham. Adopting the Marxist framework they argue that consent in reality is lack of any consent. To elaborate, under the contract that is signed by the surrogate woman, she loses all the rights over her own being. For instance, she does not have the freedom to decide on her pregnancy, to opt for abortion, to move, eat and do anything according to her own wishes. The contract limits their rights so much so that she is left to live at the disposal of the intending parents and the fertility clinics. This loss of control over her own body is evident from the fact that she does not even have the rights or the liberties to decide the method of delivering the baby. Thus in many instances, there are reports of them being forced to take to cesareans even if they do not wish to do so. This clearly points towards the estrangement that the surrogate undergoes under the arrangement.

Another aspect of estrangement is evident from the fact that under surrogacy the woman is estranged from her existence as an asocial being. Marx argues that, "Whereas alienation reveals the "species-being" of humans, estrangement conceals "species-being. In the case of surrogacy, the social constitution of the animal functions is covered up.' The surrogacy contract covers up the social constitution of reproductive practices."³²⁶ Under surrogacy, the life of a woman is reduced to just being a means to bringing another life. This is evident from the routine that a surrogate follows. She eats what is good for the 'party's' baby, sleep's when it is healthy for the baby, undergoes the main of medication for the well being of someone else's baby.

In crux, under surrogacy she is reduced to being means to an end. The surrogacy contract only gives her act a concrete form. It is this that bids scholars like Gena Corea to argue that, only if one was to adopt a definition of liberation from purely animal functions, can surrogacy be

³²⁶ Karl Marx, *Early writings*: (NY, Random House, 1975).

considered to be liberating. They vehemently argue that what appears to have empowered women, has in fact disempowered her. Thus to assume that the surrogate freely exchanges her services for a sum of money under equal conditions of work as is suggested by the liberal framework is indeed a fallacy. On the contrary the Marxist perspective argues this exchange distorts the reality of the exchange. Marxist critique, argues that surrogacy under capitalism both distorts the human as social being and human as individual being.

The Marxist analysis of surrogacy also points towards the fact that, in harping on the notion of free choice and consent, the liberal framework fails to acknowledge the social context within which surrogacy contracts are framed. The liberal framework it is argued premises its arguments on the belief that all individuals are equal and hence can be inter-changed. In so doing it obfuscates the social differentials like caste and class that have a crucial role to play in any transaction. Based on this argument, it is evident that surrogacy contracts can hardly be based on equality considering that the women who work as surrogates belong to lower caste and class as compared to their party.

The fourth feature of estranged labor according to the Marxist schema is that it is underpinned by the worker's estrangement from other people. In case of surrogacy, the children are reduced to commodities, while women are seen as producers of children. Both children born out of surrogacy and the woman see themselves as being a product of a commercial transaction. The social setting around them too sees them only in terms of this transaction. It rejects surrogacy on the grounds that under it the woman is neither free nor autonomous. Arguably, she is not an autonomous participant in the contract equal to other participants. Rather, she is caught up in her socioeconomic situation which leads to the surrogacy arrangement.

This argument put forth my Marxism, designates the surrogate as the real mother of the child. It repudiates the construction of the surrogate as a baby making machine. It brings forth the point that the relation between the mother and child is not that of a producer and a commodity. It also highlights the partisan nature of the contract under which all decisions are taken by the agents and the party even when they relate to her body and life. It brings forth an in depth analysis of

the liberal framework and thus points out the gaps in the charitable account of surrogacy forwarded by the liberals.

The most seminal contribution of the Marxist framework is in highlighting that surrogacy is structured along class lines. It highlights the power dynamics which is embedded in the story of surrogacy from its very inception and thereby erodes the myth that surrogacy liberates women. On the contrary, it is argued by Marxist scholars that surrogacy arrangements and contracts in reality oppress women. This oppression of women becomes much more pronounced in wake of the development of medical technologies that have brought newer ways of assisting in reproduction.

Marxian framework is extremely critical of the reproductive technologies which they feel have forwarded the patriarchal capitalist agenda. Donchin argues that, “these Reproductive technologies which appear to liberate women, in reality end up perpetuating the element of their oppression.”³²⁷ Corea suggests that, “this is especially true when medical institutions import the discourse of economics. For example, when doctors and scientists talk about guaranteeing a better product as a result of cesarean sections, women become machinery and children become products. Or, in the case of surrogacy, women become womb renters, supposedly, in order to alleviate infertility in the infertile couples.”³²⁸ They therefore argue against both surrogacy and assisted reproductive technologies.

To conclude, undertaking the Marxist analysis has enabled this research to look into the lacunas of the liberal postulation on surrogacy.³²⁹ It also impinges upon us the need to use the existing analytical frameworks in new ways so as to create new frameworks that can enable us to understand women’s oppression and exploitation which have for long remained concealed. Feminism ought to re-examine its existing frameworks so as to better conceptualize women’s oppression. It is imperative that it continues to change with changing circumstances. Marxist

³²⁷ Donchin, Anne. "The Future of Mothering: Reproductive Technology and Feminist Theory." *Hypatia* 1, no. 2 (1986): 121-38.

³²⁸ Gena Corea, *The Mother Machine*: (New York: Harper & Row Publishers, 1985).

³²⁹ Heather E. Dillaway, Mothers for Other: A Race, Class and Gender Analysis of Surrogacy, *International Journal of Sociology of the Family* 34, No. 2 (2008): 301-326.

framework can be a possible tool for feminism to study women's relation to remunerated works and in so doing enable it to better conceptualize surrogacy.

Having studied surrogacy through the lens of gender and class, another factor that is equally relevant to understand when looking at surrogacy is caste. As has been argued above, surrogacy is impinged by the presence of women belonging to lower class. What is true of class is also true about caste. All of these markers significantly shape how surrogacy operates. To understand this, the following section shall endeavor at undertaking a study of surrogacy from the perspective of caste.

3.7 Ascriptive Ties and Surrogacy: A Caste Analysis of Surrogacy in India

Surrogacy as has been discussed above is often considered analogous with *slavery*. What makes this more pressing is that it weaves together various identities of an individual thereby leading to exploitation at various levels. This analogy between *surrogacy and slavery* is telling, in that it refers to the 'exploitation of a specific race or ethnicity of women under surrogacy 'contracts-for example, Black women as surrogates for white couples.'³³⁰ The choice of these black women stems from a number of reasons primarily that they are disproportionately poor. Further, a black woman seems to be the perfect surrogate mother for an upper-middle-class couple consisting of a white male and an Asian-American woman, considering that lack of genetic connection with the baby is evidently visible. Corea³³¹ and Collins³³² argue that, '*gestational surrogacy invites the singling out of Black women for exploitation because of their already-defined other status.*' In this way surrogacy fosters long standing traditions of racial oppression, what held true with regards to slavery, continues to be applicable even today. Upper class, white, infertile couples are still capable of controlling Black women's fertility via surrogacy arrangements. The only difference is that, under slavery Black slave women were producing a Black laboring class and receiving no payment whereas now, with advanced technology, Black women can produce the white capitalist class instead.

³³⁰ Ibid

³³¹ Gena Corea, *The Mother Machine*: (New York: Harper & Row Publishers, 1985).

³³² Patricia Hill Collins, *Black Feminist Thought*: (New York: Routledge, 1990).

Surrogacy has a regional variation too. Corea and Arditti³³³ have rightly outlined the fact that there is *higher possibility that women in Third World countries could be induced to provide baby-bearing services for far less money than women have come to expect in the developed world* making the procedure attractive to those who could not otherwise afford it. In other words, this regional variation has thrown open the doors of surrogacy arrangements to considerably less wealthy couples who can exploit Third World women. Richardson says that, '*Third World women will become targets for baby producing, considering that these women require potentially less capital outlay and fewer legal difficulties for corporate surrogacy enterprises.*'³³⁴ Entrepreneurs in the baby business seize these opportunities so as to reduce the costs.

All of these issues raise a pertinent theme within the practice of surrogacy namely: 'perfect baby'. This understanding of a *perfect baby is socially constructed and socially embedded*. What is true of black women's demand in advanced societies, translates into demand for 'beautiful high caste women in India.'

'Beautiful and fair': words traditionally synonymous with brides are being used for renting a womb. For, not only are "healthy, beautiful, fair and higher caste or Brahmin" surrogates in great demand, they also receive good payment in cash and kind from the commissioning parents after delivery. A newspaper article read the demand for a surrogate mother in the following words: "*the egg donor had to be under the age of 25 yrs, fair, beautiful and educated. But most of all, she had to belong to their caste.*"³³⁵ This was further confirmed by a study conducted by Sama, a Delhi-based resource group working on women's and health issues, wherein doctors and agents confirmed, 'that there were preferred criteria set by the commissioning parents, such as 'higher caste an class,' This argument became further nuanced during my interaction with my respondents. While nobody explicitly admitted to the presence of such a phenomenon, there was an overwhelming majority of Hindus. Further, the staff at the clinic suggested that intending couple sometimes do demand of women from a particular caste a religious background.

³³³ Rita Arditti, *The Surrogacy Business*: (Social Policy, 1987): 42-6.

³³⁴ Herbert Richardson, *On the Problem of Surrogate Motherhood: Analyzing the Baby M case*: (Lewiston, NY, The Edwin Mellen Press, 1987).

³³⁵ The Global Post, September 21

Ramana Rao, an agent in India's southwestern port city of Vishakhapatnam was quoted by the newspaper saying "*Couples are very particular about the caste hierarchy of the prospective mother or even the surrogate carrier.*"³³⁶ A good-looking surrogate of a higher caste could command a higher price when compared to a woman situated lower down the caste ladder, Rao adds. Samit Sekhar, an assisted reproduction specialist in the eastern city of Hyderabad suggests "*Alongside looks, skin color and height and education, prospective couples look for egg donors of the same caste and religion,*" Goral Gandhi, laboratory director at the well-known fertility clinic, Rotunda quotes, "*In Mumbai, couples ask for similar family background.*" "Family background" is often the euphemism for seeking out particular castes and sub-castes that number in the hundreds in India's intricate social system.

"Indians are obsessed with religion, caste and fair skin. Even when they are told that the baby won't have any of the surrogate's characteristics, they still feel that some mingling of blood and tissue in the womb will affect the outcome," says Deepa Venkatachalam, Sama's programme coordinator. In Bangalore, fertility specialist Kamini Rao who runs a successful practice said that "*some infertile couples recruit egg donors and surrogates of their own caste before arriving at my doorstep for procedures.*" Sociologist Carol Upadhya at the Bangalore-based National Institute of Advanced Studies says caste is ingrained among many Indians as that which preserves the purity of the race. "*They feel caste is rooted in the body, in the genetic material,*" she said. It is thus that even the highly educated want specific genes because they want to pass on the caste and community genes to their future generations.

The above account succinctly lays down the fact that prospective parents openly advertise for egg donors and surrogates by caste in the classified sections of local newspapers and this adds to the institution of surrogacy in India a very distinct attribute. These specific requirements of couples are also a manifestation of the collision between cutting-edge medical treatments for infertility and age-old biases about the social order. This advertisement succinctly sums up the growing demands for designer babies, albeit an Indian touch. What makes IVF treatments particular to India, is that many infertile couples demand egg donors and surrogate mothers of a

³³⁶ Rao recruits egg donors and surrogates to-order for childless couples and fertility clinics in cities like Hyderabad, Chennai and Bangalore. He has enlisted and provided the services of 70 egg donors and 150 surrogates so far.

particular caste and sub-caste when they seek in vitro fertilization treatments or surrogacy services.

The literature review had made it evidently clear that there does exist a caste baste characteristic to the phenomenon of surrogacy. How stark is it then was the subject of my analysis when I undertook my field research? While this has been dealt with at considerable length in a latter segment of this work, to briefly lay out the caste and religion underpinning in the surrogacy industry as was evident from my field study, I put forth the following statistics.

Caste is India’s ancient system denoting a person’s social standing — with the Brahmins at the top of the heap and the dalit untouchables at the very bottom. Despite the tall claims of development, modernization and economic growth, caste still continues to capture the very psyche of Indians. It is no surprise that caste plays a crucial determinant in issues relating to marriage and politics. Caste in India to a great extent denotes class and thereby continues to touch vital aspects of an individual’s life.

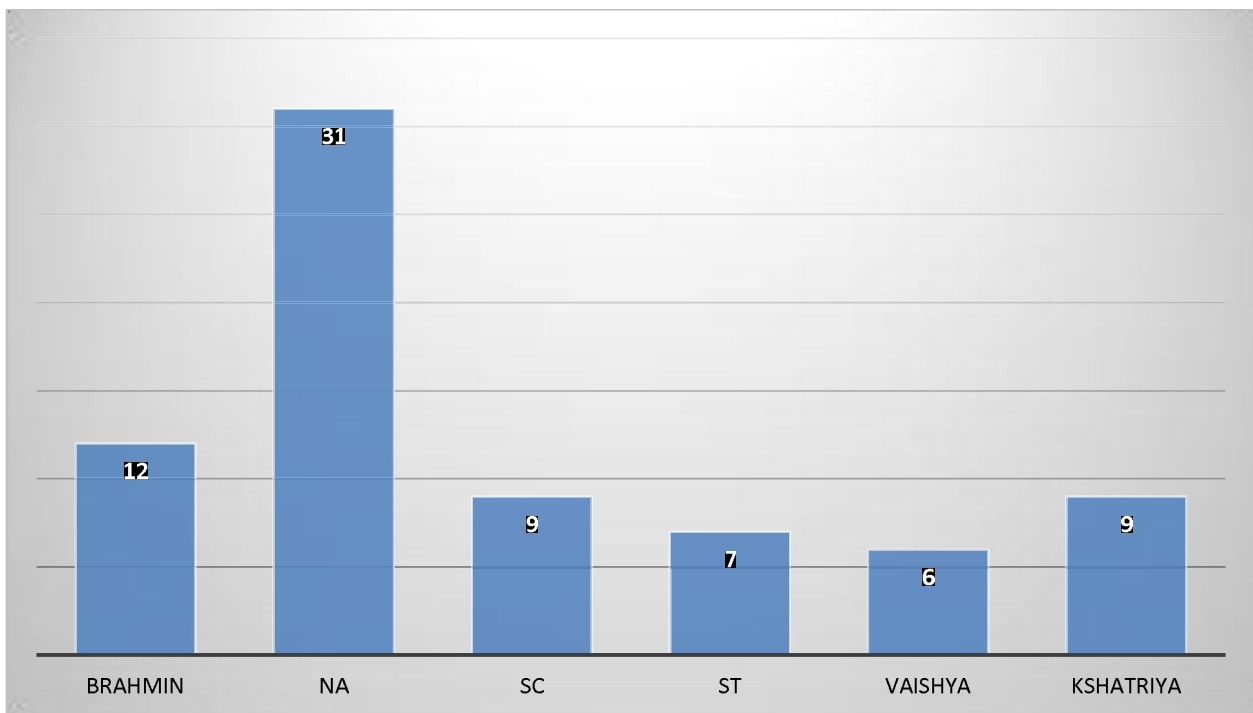


Figure 3.1: Caste of Respondents

With regards to their caste background, 31 of the respondents did not wish to disclose their caste. Further, 12 were Brahmans; 9 each belonged to the Kshatriya clan and the Scheduled Caste community; 6 to the Vaishya and 7 to the Scheduled Tribes. Interestingly, contrary to my assumption, the medical agencies said that very rarely do intended couples consider caste as a criterion while choosing their surrogate. Despite this there was a clear preference to those belonging to the upper caste. If a surrogate belonged to the upper castes she was in a better position to negotiate the amount paid and mostly went with more.

On questioning the medical team at both the field areas as also the surrogates and the intending parents if caste was a criterion for them when they chose the surrogate, the answer was a resounding no. The commissioning couples were of the opinion that caste of the surrogate was of no consideration for them. While narrowing down on the surrogate the only concern for them was that she should be healthy and prepared to carry their child. Only two of my respondents suggested that caste did play a determining criterion but it was not for their own sake but for that of their parents and families who wanted the child to be born from a woman of a higher caste. Similarly the surrogates suggested that their caste was never the focus area however, they had to fill in their caste status while filling in the basic information form. The medical teams that links the surrogates with the intending parents too were vociferous in stating that caste is not the primary concern when the match the two parties.

However in very few cases where the commissioning couple specifically asks for it, they consider the caste of the surrogate as a matter of concern and significance. Apart from this, they never consider caste as a factor ever. However if one undertakes a careful analysis of the data as is evident from the figure above, it becomes clear that caste definitely plays a crucial role in surrogacy arrangements. As is the norm, most intending couples prefer women of the upper castes. What is also visible is that, higher caste women working as surrogates are paid better as compared to the ones belonging to the lower castes. It is only a garb to hide their parameters when couples say that they did not consider caste as a factor at all.

As regards the religious belief of the surrogates, following table illustrates a strikingly large number of Hindu women acting as surrogates for others. Around 80% of my respondents were

Hindus, while 11% were Christians and an even lesser 7% belonged to the Muslim community. My respondents seemed to be more fixed on finding a woman of their religion. One of them said, “We are not so fixed on religion but our parents are and for them we want to make sure that we find a Hindu woman to be our surrogate.” Yet other argued, “Our child will live in her womb for nine months. It is said that the child begins to learn when he or she is in the womb of the mother. We want our child to learn philosophies of our religion and hence we want to have a Muslim woman as our surrogate.” A third respondent suggested something very intriguing, “after all we are paying for the baby. What is wrong if we have particular requirements?”

My respondent from the medical team at Vansh suggested that the demand to have women of a particular religion is more than the demand for women of a particular caste. He argued, “This could be because most women we have as surrogates belong to lower caste and class therefore the choices are restricted.” However parties do want women of their religion. He added, “Finding women of a particular religion is not much of a concern, we have a database and it has women of all religions. We simply match the intended party with the surrogate they prefer.

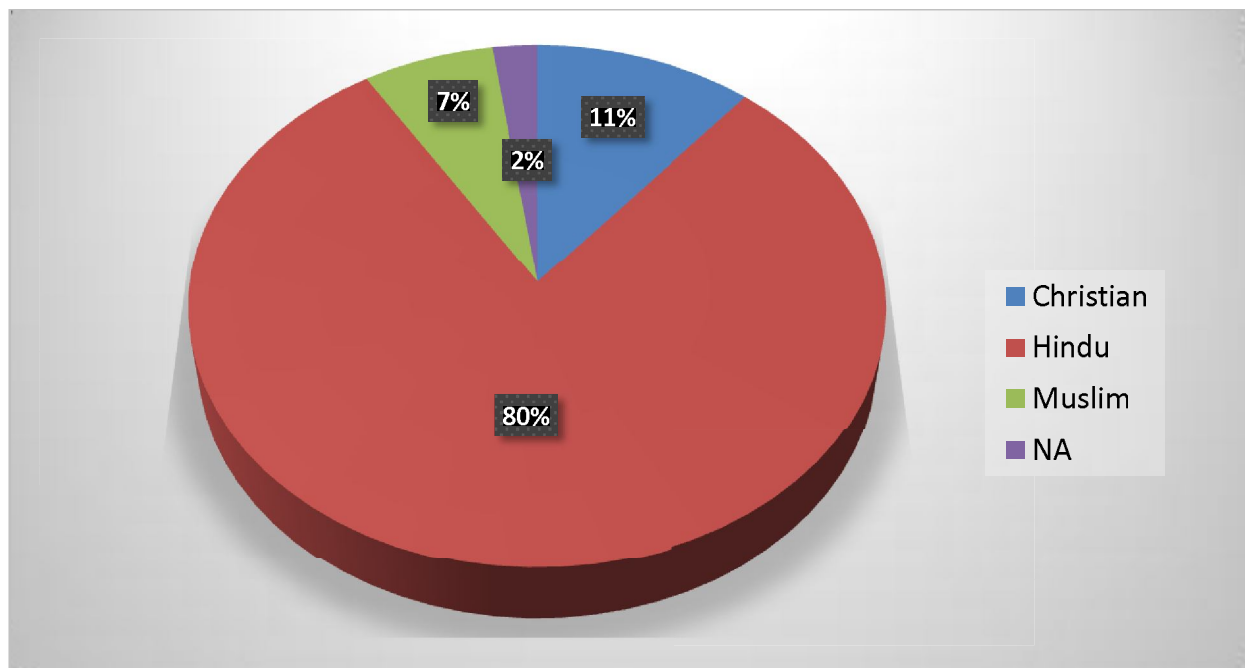


Figure 3.2: Religion of Respondents

As the above data indicates, there is a religious underpinning amongst women who choose surrogacy. This could be because of both, the demand for more Hindu women or the supply of more Hindu women. Drawing from the above figure, 80% of my respondents were Hindus while 11% were Christians and 8% were Muslims. Another 2% of my respondents did not wish to disclose their identity. Another observation was that more women were open about revealing their religion than they were about their caste.

3.8 Concluding Remarks

Feminized labor institutions are more complicated than what appears superficially. It is a particular kind of labor that is deeply embedded in the social settings. Discourses on women's labor in a global scenario thus have to include within its ambit the intersections of crucial identity markers namely gender, caste, class in order to arrive at a comprehensive understanding of women's lives engaged in these 'vagrant jobs'. The fact that women's reproductive labor is becoming increasingly stratified within the global economy along racial and class lines cannot be undermined. It is this phenomenon in the global setting that leads Amrita Bannerjee to coin the term *transnational reproductive caste system*, which she argues "ends up reifying various social hierarchies and sustaining existing global inequities." She goes on to suggest that these differential layers of social stratification are not an easy factor that can be overlooked. Rather, she opines that these are suggestive of the violence that surrogates are subjected to in their everyday lives.

In understanding the various dimensions of surrogacy thus, this work seeks to highlight that caste and class are crucial markers that go on to significantly determine the nature of surrogacy arrangements. The reason that this chapter of the present work specifically looks at the contending issues around gender, class and caste dynamics of surrogacy is on account of the fact that these identity markers are inherent in surrogacy arrangements today. Despite this, they are less visible to an average individual due to their socially embedded and concealed nature. Gender, class, and caste discrimination not only overlap or intersect within surrogacy they are

infact forever intertwined. Richardson³³⁷ and Collins³³⁸ infact press to point that "*Class, gender and [racial and ethnic] divisions combine to create new forms of exploitation*".

With regards to the effects of gender, women's wombs can only be "rented out" principally due to the devalued role that women are assigned by the social fabric in the reproductive process. Surrogates rent their wombs and donate eggs for couples from in-country and abroad principally for economic reasons. Along with the labor of giving blood and sweat to gestate the fetus in their bodies, the surrogate creates kinship ties with the baby. Nonetheless the efforts of the nine months tend to go unrecognized and thus as soon as the baby is delivered, the women end up being treated as disposable commodities. It is this that leads, Amrita Pande to suggest that the work of the surrogates remains highly stigmatized.³³⁹

Bringing class into the picture, it is evident that economic deprivation is a major reason that pushes women to opt for surrogacy. This then is an apt example of absence of meaningful choices. Alternatively, the majority of women only rent their wombs when in an impoverished financial position; poor women are more likely to become surrogate mothers. And of those women entering surrogacy contracts, wealthier women are more likely to be the intended "mothers" of resulting children. This means that a gendered experience of pregnancy and motherhood is affected by women's class locations, and that gender and class locations shape individual experience simultaneously.

Finally, in context of the western world, Weber highlights that black women are disproportionately found in the lower economic strata in society and, thus, the effects of class become magnified for this group of minority mothers.³⁴⁰ Black women are visually different due to their lack of a genetic connection than the white children that they may gestate, and confront an automatic disadvantage when claiming that they are the natural mother of that child. This equation changes significantly in context of societies like India that are assign ascriptive

³³⁷ Herbert Richardson, *On the Problem of Surrogate Motherhood: Analyzing the Baby M case*: (Lewiston, NY, The Edwin Mellen Press, 1987).

³³⁸ Patricia Hill Collins, *Black Feminist Thought*: (New York: Routledge, 1990).

³³⁹ Amrita Pande, *Wombs in Labour: Transnational Commercial Surrogacy in India*: (Columbia University Press)

³⁴⁰ L. Weber, *Understanding Race, Class, Gender and Sexuality: A Conceptual Framework*: (New York, McGraw Hill Publishers, 2001).

identities and particularistic norms. The preference for surrogates in India is for women belonging to upper castes. With the desire to keep the lineage pure, women of the higher castes are not only preferred but are also paid better.

Alternatively, on account of the special combination of caste and class locations, gendered experiences are subject to change. From another angle, we see that the natural father is more likely than genetic or gestational mothers to win legal cases concerning surrogacy and this is a result of both his gender and class positions in society simultaneously. The intersecting nature of the effects of surrogate mothers' gender, class, and caste locations becomes clear. All women are exploited as surrogate mothers, but poor or working class and lower caste women may be exploited more than upper caste upper class women within third party reproductive arrangements. This exploitation is a direct result of the cross-cutting nature of race, class, and gender in an individuals' life.

Collins³⁴¹ and Weber³⁴² suggest that the effects of any one social location or inequality (e.g., gender) are mediated by other locations or inequalities (e.g. caste, class) at all times. Clearly then, a "matrix of domination" exists, in that gender is never experienced separately from caste or class and the inequalities that individuals and families face are always multiple and cross-cutting. For every individual inequality that we recognize as affecting individuals' life changes, there are most likely other inequalities operating behind the scenes to cement or change the effects of that one, more public inequality. Caste and class inequalities thus further go on to heighten a surrogate's experience of gender inequality.

Chesler very articulately underlines how many intertwined inequalities exist within surrogacy arrangements, and thereby infers that it is not only casteism, but also gender (patriarchy) and class (money) that are at issue here, all of which require critical investigation. These intricacies are best summed up by **Chesler** in the following words³⁴³:

³⁴¹ Patricia Hill Collins, *Black Feminist Thought*: (New York: Routledge, 1990).

³⁴² L. Weber, *Understanding Race, Class, Gender and Sexuality: A Conceptual Framework*: (New York, McGraw Hill Publishers, 2001).

³⁴³ Phyllis Chesler, *Mothers on Trial: The Battle for Children and Custody*: (New York, McGraw-Hill Book Company, 1986).

‘Social Background is the issue, and why thousands of babies are 'unsuitable.' Ownership is the issue, and the conceit of patriarchal genetics. 'Barren women' are the issue, and why some women must come to feel an excruciating sense of failure because they cannot bear a child...And guilt and money, and how women can earn both, are the issues that need honest attention.’

In retrospect it can be concluded without exaggeration that surrogacy with its multifaceted nature and multi-pronged dimensions is not easy to understand. Surrogacy in India has provided a clearer lens to study if technology coupled with materialization of body carries the potential to exploit poor women and their reproductive abilities for the benefit of transnational market. Does surrogacy create a market whereby babies are not born but are rather bought and sold and mothers are considered as ‘workers’, who’s manufactured ‘products’ can be sold to those who can afford it? If yes, then considering that despite its toil, surrogacy does help women to become empowered agents can it be better regulated through contract and law?

These plethora of rather complex and inter-twined questions manifested in surrogacy are crucial to unravel if the institution of surrogacy is to be understood in its totality. The feminist, Marxist and Subaltern scholarship as evident from the aforementioned arguments, have thus been tremendously helpful in succinctly mapping out the contours of Surrogacy in the world in general and in India in particular.

Chapter Four

Chapter 4: Surrogacy: Story of Happy Breeders or Hapless Victims?

Contours from the Field

4.1 Introducing the Theme

Surrogacy puts forth the imagery of an intriguing form of *feminized labor*. An entry into the majestic and green porch of one of the most well known fertility centers in Anand housed with a myriad of surrogates all at various stages of their pregnancies showcases an interesting picture of women giving birth to somebody else's children, often that of foreigners too.³⁴⁴ Some of them in their second surrogacy terms now, spoke about accounts from their earlier pregnancies or from their experiences about women who carried children for white foreigner couples. They narrated accounts of excitement and disbelief seeing a white child out of brown skinned surrogates. Once the child was born, these women rendered custody over the child to the intending couple often with a heavy heart but never with the intent to keep the baby with them. What is true about foreigners is equally true for Indian nationals and Non-Resident Indians also.

This transaction which involves the surrendering of the child's custody also involves an exchange of money. Costing from about Fifteen Lakhs to Thirty Lakhs, this payment can be equivalent of ten years salary which is a big incentive for poor women in want for avenues to earn money.³⁴⁵ Out of this entire amount, only a certain portion is given to the surrogate while the remaining is the profit earned by the fertility agency. The buyers are Indian couples unable to conceive, single parents and members of the LGBT community and Non-Resident Indians.

A plethora of studies conducted on surrogacy in India suggest that 'compulsions of life' are the single most striking reason that push women towards surrogacy arrangements whereas it's the obsessive focus on fertility and uncontrolled urge to have one of your own that inclines couples with decent economic resources to hire a surrogate to bear their child. Sunita Thakur in her work,

³⁴⁴ Anand is located in the state of Gujarat and is hailed as the Global Surrogacy Capital.

³⁴⁵ This entire amount is inclusive of what is paid to the surrogate, the expenditure incurred on her medical care, food and nutrition as also the process of delivery.

Mothers for only Nine Months talks about one such woman, who took to surrogacy to save her own child suffering from a heart disease.³⁴⁶ In an interview on BBC, this woman called Rubina said that “bearing a child for an American couple was the only way she could afford the operation to save her own child.”³⁴⁷ She went on to express her surprise as to how could she manage to deliver such a beautiful American totally white baby.³⁴⁸

Historically, the trade in *pregnancy originated in the USA back in the 1970's*. During the initial phase this practice of ‘hiring a woman’s womb’ in exchange for money took place in a rather obscure and minor scale. Soon this translated into being a commercial enterprise with more and more agencies being set up that began to connect fertile women with childless couples. With this came the acknowledgement that many couples had the inclination and the ability to spend as much money as was needed to get a child of their own genetics. This was juxtaposed by the presence of many women who wanted to transact their fertility in exchange for money.

As I have discussed in an earlier chapter, the first watershed event came in 1986 in the *Baby M case* when the surrogate, Mary Beth Whitehead, who had initially consented to ‘bear the child’ for the Sterns in return for a payment of 10,000 dollars, was later struck by the *motherly instinct* in her to keep the child with herself. She therefore denied giving the baby to the intending parents.³⁴⁹ Thus began a long legal struggle involving battle between the two. It also highlighted the contestation between the *lower class versus upper class* and *blood versus contract* amongst other binaries. Legal rights activists, feminists, media persons all got involved in the debate. The courts squashed the contract, however they gave the custody of the child of the Sterns considering that they were economically more stable and thus more fit to be parents. In this background a lot of countries began to ‘outlaw commercial surrogacy.’

At this point another breakthrough came with a newer technological development. In the early 1990’s, it became possible with the help of medical procedures to transplant an embryo into the

³⁴⁶ Sunita Thakur, ‘Mother for only nine months,’ *BBC*, 21st March, 2008.

³⁴⁷ *Ibid*

³⁴⁸ As the BBC reported, Rubina Mandal first heard of surrogacy and rushed to Anand to become one. Both her children suffered from a condition known as heart-murmur needed surgery. Though Rubina and her husband together were bringing in around 15,000 rupees a month, the costs of surgery are far higher.

³⁴⁹ Katy Ruth Klink, ‘The Baby M Controversy: A Class Distinction,’ *18 Oklahoma City University Law Review* 113, (1993).

uterus of another woman. Thus the surrogate could now bear a child who had absolutely no genetic connection to her. This came to be known as ‘gestational surrogacy’,³⁵⁰ which was strikingly different from the traditional form wherein the surrogates own egg was used.³⁵¹ It is at this juncture that countries like India began to venture into the surrogacy industry. With development in ART’s, it became a possibility for an Indian woman to give birth to a ‘child with western features.’ This came with the added advantage that in case of India, the *price was strikingly lower*. With these developments, surrogacy industry started gaining ground all over the world.

Surrogacy became much more popular amongst people when celebrities such as *Sarah Jessica Parker, Angela Basset, Michael Jackson, Elton John, Ricky Martin, Nicole Kidman and more recently closer home Karan Johar, Shah Rukh Khan, Tusshar Kapoor, Amir Khan* began taking to surrogacy. Newspaper and Magazines increasingly began to report of how surrogacy as a practice became the source of making families happy and complete.

These narratives picture surrogates as happy and contenting parties whereas buyers are projected as well-established, stable, upper middle class couples who will give the child the best possible upbringing. In this entire story, it has been variously argued, the irony is that “the woman who gives birth is never presented as the child’s mother or even a person with a background and a will of her own.”³⁵² On the contrary, she is portrayed as a *kind soul, a fairy godmother* who helps these people who pay for the child. The fact that money was paid is only mentioned in passing, without any reference made to the actual amount of money involved.

These grand stories never highlight the fact that this could mean the surrogate being *reduced to just her body*, being coerced to sign away the custody for money or could this be tantamount to trafficking in babies. The aforementioned account is clearly indicative of the fact that surrogacy as a reality speaks to us from every possible direction. People who extend their support to surrogacy are considered as upholders of women’s oppression and those who stand against

³⁵⁰ Under gestational arrangement, the surrogate is only the carrier of the baby. The baby is not genetically related to her.

³⁵¹ In gestational surrogacy, a woman carries and delivers a baby for another person or couple.

³⁵² Pauline Everett, *A Relational Defence of Surrogate Motherhood*, *Durham theses*: (Durham, Durham University, 2011).

surrogacy are accused of being conservatives. Clearly then surrogacy is a very intriguing practice for the simple reason that it is able to speak to people of all ideologies and perspectives at the same time and to repeatedly contradict itself. As a result there is immense confusion that surrounds the practice.

It is this sense of confusion that was my first conclusion while reviewing the literature. On the one hand were the *liberals* who put forth a ‘very promising account of why surrogacy should be legalised.’ On the other hand are the *radicals* who raise a plethora of ‘concerns with regards to women, their bodies, agency, commodification, objectification and the subsequent harm and violence’ that have been characteristic features of the lives of these multitude women. This then also raises various questions with regards to *ethics* of the practice as also what could be the most ideal way for the state to look at it: *regulate and legalise it or criminalise and abolish it?* This becomes an important factor of analysis considering that a lot of countries across the globe are banning it. Whether this ban is premised on the contention of the women’s groups with regards to harm caused to women or is it under pressure from conservative groups for surrogacy upsets the conventional setting is a question that needs to be dealt with.

With this dilemma in mind and greater engagements, it became evident that perhaps the biggest lacuna that confronts academic interest in surrogacy is *lack of empirical studies*. While the subject has in recent times witnessed unparalleled academic inclination, the popular media too has not been far behind. An Oprah Winfrey telecast on surrogacy in India³⁵³ had so effectively captured the imagination of audience across the globe that suddenly surrogacy came to the center of household discussions too. However what have been conspicuous by its very absence are the ‘voices of these women on the field’ for whom surrogacy is their everyday reality.

Therefore at this stage of the research it seems imperative to bring forth the voices of these women. This chapter will be entirely based on field work that was conducted in *Anand (Gujarat)* and *Gurugram (Haryana)*.³⁵⁴ The respondents include *surrogates, intended or commissioning parents, spouses of the surrogates, professionals at Transnational Surrogacy Clinics, Surrogacy*

³⁵³ For reference see https://www.youtube.com/watch?v=y6Zqt_vFnkY

³⁵⁴ Gurgaon has been renamed as Gurugram and hence I would use the latter for the purpose of this research.

Homes like Vansh in Gurgaon and Akanksha Fertility Clinic, Anand. Other documented sources shall also be used as secondary data. This is crucial for more often than not the debates have systematically excluded the voices of women who work as surrogates

4.2 Sellers of the Womb or Laborers?: Significant Aspects

When I began discussing my dilemma with colleagues most wondered why they had not heard about this thriving practice that has taken roots in all corners of the country. The perception that I had was of surrogacy clinics in crowded and dingy streets wherein women with swollen stomachs, illiterate and victims of poverty, bad marriage lived. From the media reporting's I was hopeful of finding a shy surrogate, a beaming doctor and a euphoric couple holding the baby in the surrogacy centers. With this in mind I began looking for my probable fieldwork site. After some research, *Anand in Gujarat* and *Gurugram in Haryana* emerged as my research fields.

The city of *Anand* is the seat of power in the district of Anand. It is known in popular memory as the nerve center of the famous Amul industry.³⁵⁵ Anand is also home to the Head Office of Gujarat Cooperative Milk Marketing Federation Ltd, Institute of Rural Management Anand (IRMA), Vidya Dairy and the widely know agricultural university at Anand. Anand is surrounded by various villages like Karamsad, Chikhodra, Lambhvel, V. V Nagar, Bakrol, Mogri and others which are significant for they provide a constant influx of women who want to become surrogates.

Apart from Amul and IRMA, Anand is also the center for India's thriving surrogacy industry. Working under the aegis of *Dr Nayana Patel*, popularly known as *Nayana Ben* and her husband Hitesh, the *Sat Kaival Hospital* and *Akanksha Infertility Clinic* have produced hundreds of babies for couples in India and abroad. While it began its operation in a by lane near the Anand Railway station, with it becoming the hub of *global surrogacy tourism*, it has expanded to a bigger set up, that houses more than sixty surrogates at a time.

³⁵⁵ Amul also known as Anand Milk Union Limited is a path breaking development in the Indian dairy sector. It is a milk cooperative based in Anand in Gujarat.

Having studied surrogacy as it exists in the rural-urban set up of Anand, my research design consciously attempted for a setting with was different from the earlier one. Thus I began looking for more urban settings that have a flourishing presence of surrogacy. From the various options that emerged, I chose Gurugram as my second site of study. Gurgaon, officially named as Gurugram is a city in the state of Haryana. Being located at the Delhi Haryana border, it is known to be a part of NCR or National Capital Region. Gurugram has emerged as a major economic and industrial hub that is house to the biggest multi-national companies. This identity of Gurugram is juxtaposed with immense poverty as is evident from the lives of daily wage laborers, migrants and others living in and around the city. Being a satellite city of Delhi, it has witnessed rapid development in all spheres including medical technology. Thus it has come to become a prominent location for surrogacy clinics.

With this diverse setting, Gurugram and Anand became my field areas. Before we elaborate on the process of surrogacy and echo the voices of surrogates met in these two areas, it is pertinent for this research to map out a brief profile of these two centers.

1. Akanksha Fertility Center, Anand:

The compound of the Akanksha Fertility Center operating under the umbrella of Sat Keval Hospital Pvt Ltd is surrounded by a green field and trees all around. While this campus is located at Lambhvel, the older one is situated at Naya Padkar Lane, Station Road. The older one earlier also used to house surrogates, but now it is restricted only for OPD and general consultation. Located in the middle of the city it is not as huge or as green as the Lambhvel campus, but it is here that the entire process of recruiting surrogates and connecting with infertile couples begins.

Situated in the outskirts of the city, Akanksha Fertility Center is a multi story building with an imposing entrance. Right at the entrance is a reception area where there are a number of staff wearing a badge and hailing themselves as assistants. On the left of the reception is a pharmacy that has all the requisite medicines. Next to it is a prayer room, where both surrogates and visitors were seen offering their prayers. Adjacent to it was a huge lobby area with innumerable seats for the visitors. It also had a huge screen that displayed the achievements of the hospital, pictures of babies born through surrogacy, happy stories of surrogates who found empowerment

in ‘their work’ along with messages of gratitude from the couples who thanked the hospital and particularly ‘Nayana Ben’ who helped them *experience parenthood*. On the right side of the reception was a huge administrative area that was responsible for handling the functioning of the hospital, dealing with the staff, publicity amongst others.

The first floor is a high specialty clinic that houses the physicians, counselors, administrative staff and a large number of nurses and cleaners who give the center an elaborate set up. This floor also has a separate wing that is single handedly devoted to research and development and is called Block B. It is here that all the research work is carried out by large number of scientists and researchers. The head of this hospital Dr. Nayana Patel and her husband, Dr. Hitesh Patel are situated here with a wide ambit of doctors, counselors and other staff. At all hours of the day, this is the most vibrant and dynamic area with patients flowing in and out. This area is known as Block A. Both the blocks, A and B are different sections of the same building, though they are meant for different purposes.

The second floor is where all the medical procedures take place. It has the IVF Unit, Observation Ward, Operation Theatre, VIP Waiting Lounge, Library, Labor Room, L.D. Room, Central Sterile Supply Department, Neonatal Intensive Care Unit, and Post Labour Care. This therefore constitutes the most closed area of the hospital where entry is strictly restricted. This is because excess movement of people can be a source of infection. Secondly, considering that’s sometimes surrogates spend a week to ten days here post delivery, entry of outsiders can threaten their wish to remain anonymous. Thirdly, a large number of commissioning parents for whom surrogates have conceived visit this section to meet the child born and also to sometimes meet the surrogates. More often than not these couples want to keep their choices private and hence do not appreciate outsiders. There is also a ‘milk bank’ at the Akanksha Fertility Center which is open not just to children born in the hospital but also to others who need it.

The third floor of the hospital is the most extravagant section of the entire premises. This is where intended parents stay when they come. These intended parents mostly come during the time of delivery. Some of them also come during the duration of pregnancy. During their visit they stay in these rooms that look like a luxurious room of a five star hotel. These rooms are

Gold, Silver, and Diamond and accordingly their price varies from ten thousand rupees a day to thirty thousand rupees a day. Couples who come during the delivery prefer to stay here till the time the child is ready to go with them. The newborns are also allowed to live with the intended parents in these rooms under the continuous supervision of a physician. This area also has a canteen, a gym, prayer room and an entertainment section with a television.

However the most vibrant part of the hospital is the ground floor for it is here that the surrogates live. As one approaches this area it is a peculiar sight at the first instance with so many women all at different stages of their pregnancies walking around, giggling, eating and talking. These women are all clad in similar apparel known as a *maxi or a gown*. The most striking part about this piece of cloth is that it is loose and therefore is extremely comfortable for the surrogates as was explained by one of my respondents, Daya.

The ground floor is divided into various big halls and a central hall which serves as the dining and chatting area of these women. It is here that food is laid out during different times of the day. There is also a canteen so that these women can buy whatever they wish to. Joined to this dining area is a prayer room and an office room. All around this hall are other halls of bigger size with six beds each. It is here that the surrogates live. As we enter these halls, the first sight is of pregnant women lying on their beds and glued to television. All of these halls have a television for their entertainment. Each hall has approximately six beds, each bed has a small cupboard and table next to it along with a chair. The rooms are clean and are constantly cleaned to ensure there is hygiene. In between two halls are washrooms for the surrogates.

2. Vansh Health Care, Gurugram, Haryana:

The first question that needs investigation is why has Gurugram been at the center of such thriving practice of surrogacy? One way to explain it could be the large availability of potential surrogates in and around the city. This is because of two major factors, migration towards Delhi NCR in large numbers and the prevalence of immense poverty amongst them. The second reason for its spurt in this part of the country is due to the development of

world-class medical infrastructure. Thirdly, better connectivity within and from outside further explains the emergence of Gurugram as a hub of ART's and surrogacy.

Bindu Garg, who gave Gurgaon its 'first test tube baby' in 2003, and is the co-founder of the Neelkanth Group of Hospitals, said: "There is a sudden increase in the number of surrogacy cases. Earlier, we had one such case in six months, now we come across six cases in a month. The increase can be attributed to increase in infertility due to late marriages, easy access to medical facilities and affordability."³⁵⁶ She added: "The number of ART clinics in Gurgaon has increased from just one a year ago to ten, and many more are coming up."³⁵⁷ She suggested that childless couples from Australia, the United States, and European and Arab countries came to India in large numbers to get their surrogacy done here.

"India is among the few countries in the world where commercial surrogacy is legal. Favorable legal environment and low cost make India an attractive destination for childless couples," said Sandeep Talwar, senior consultant at Bourn Hall Clinic in Sector 40, Gurugram.³⁵⁸ He added: "Now, with India even allowing import of frozen embryos, the number of queries from foreign clients has doubled over the past two months."

Kapashera is located on the Delhi-Gurgaon border and is inhabited by a large number of construction workers, daily wage earners. It is from here that most surrogates travelling to Vansh emerge. "With more and more women from Kapashera acting as surrogates to support their families, awareness and acceptability in the area has increased. These women now come on their own to opt for surrogacy," said an agent.³⁵⁹

Surrogacy clinics generally provide a combination of all the services like IVF treatment, medical treatment for surrogates, surrogacy hostel, legal counsel, delivery and post delivery care that are essential components of the surrogacy process. They also work in tandem with other IVF Clinics in Delhi so as to provide a reliable and affordable surrogacy treatment to the patients located all

³⁵⁶ Ashok Kumar, 'Wombs for rent in Millennium City,' *The Hindu*, 12th February, 2014.

³⁵⁷ Ibid

³⁵⁸ Ibid

³⁵⁹ On condition of anonymity he discussed with me how most of the women he got to the clinic to become surrogates were from this area in Gurugram.

over the world. Within this context, it is easy to explain why Vansh Surrogacy Care has not all established itself but has also been a lucrative venture.

Established in 2012 in Gurugram, *Vansh Surrogacy Consultants* provides all the facilities required in the surrogacy process. The centre is also the mediator, providing egg donors to 15 private hospitals and clinics in Delhi and NCR. The 30-bed Vansh Surrogacy Centre, the first surrogacy home in the city, handled 20 cases last year.

Then clinic is headed by Mr. Bajrang who suggested that with increasing knowledge about surrogacy, it is not tough to find women who want to opt for it. He adds, “Earlier, we had to hunt for potential surrogates through agents and counsel them for weeks before they would agree to it. But now women are coming on their volition. We now have a database of 50 such women with all their medical investigations done. Also these women are better informed and need little counseling.” Clearly then, on the one hand there is demand for surrogates and on the other there is a voluntary supply of surrogates. This explains its thriving practice in Delhi NCR.

The field on surrogacy puts forth a picture that seems to be completely in disjunction with what we read in theory. There is a visible willingness on part of women to take to surrogacy. However if this willingness is conscious or is it shaped by their life conditions remains a question to be answered. If it is a product of genuine willingness on their part, then undoubtedly there does exist a gap between surrogacy in theory and surrogacy in practice. However, if this willingness is shaped by their life conditions then it conforms to the contentions about surrogacy that have been raised in earlier segments of this work. To understand this question better, my work undertook an analysis of the life of the surrogates. Following are the key findings with regards to the background of the women interviewed:

The agencies dealing in Surrogacy, *Akanksha Fertility Center* and *Vansh* in this case vociferously argue that potential surrogates are carefully and meticulously investigated. It is suggested that there are certain pre fixed *criteria's that the women who consent to be surrogates have to fulfill*. These are:

- The woman should be between the age of 24 years and 35 years
- They should be married. Divorced women and widows were also allowed
- They should have at least one child of their own

This condition laid down was affirmed during sample collection. A majority of women in my sample at 62% were married, while 16% were divorced and 22% were widows. In the cases of married women, the consent of the husband was imperative. Most of my respondents said that their husbands thought that there was nothing wrong or dirty in taking to this work and hence easily agreed. While the respondents who were separated from their husbands did not care much about how they would react, those whose husbands had died sometimes felt guilty of having done wrong to them.

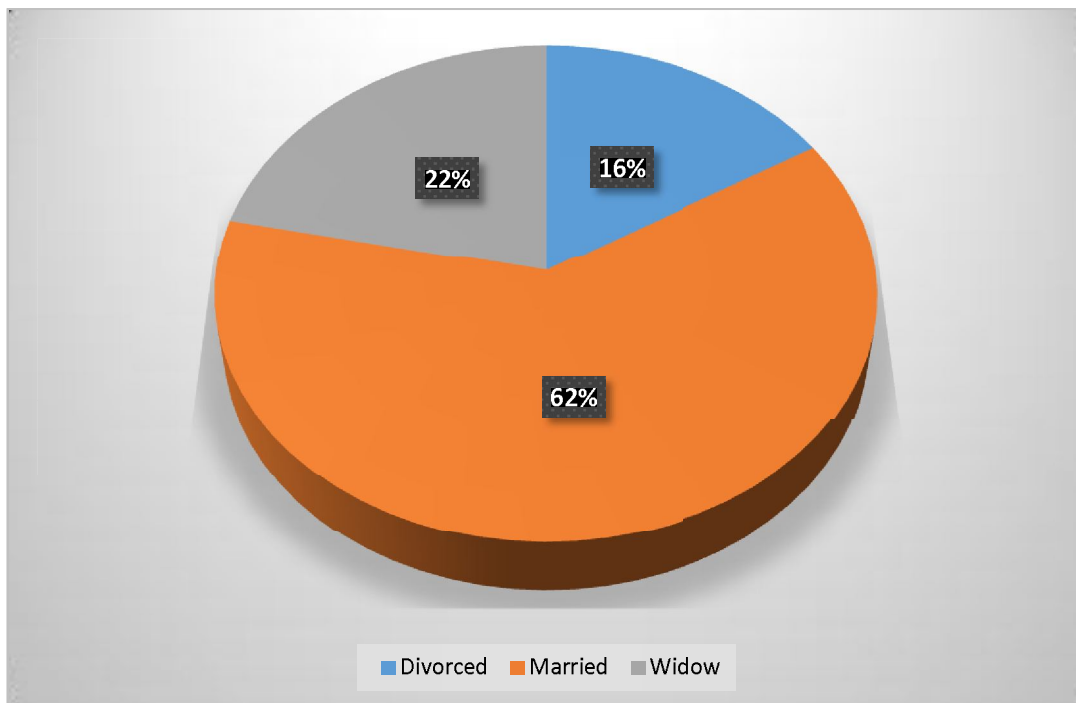


Figure 4.1: Marital Status of Respondents

All surrogacy clinics generally lay down that one of the essential criterion for one to become a surrogate is that they should *have at least one child of their own*. This criterion enables them to ascertain the reproductive health of the woman. This was explicitly evident in my field investigation. Thirty eight of my respondents had two children while eighteen each had one or

three. Some of these children were sons others were daughters and sometimes both. There seemed to be no urge in the surrogates to have a child of any particular gender.

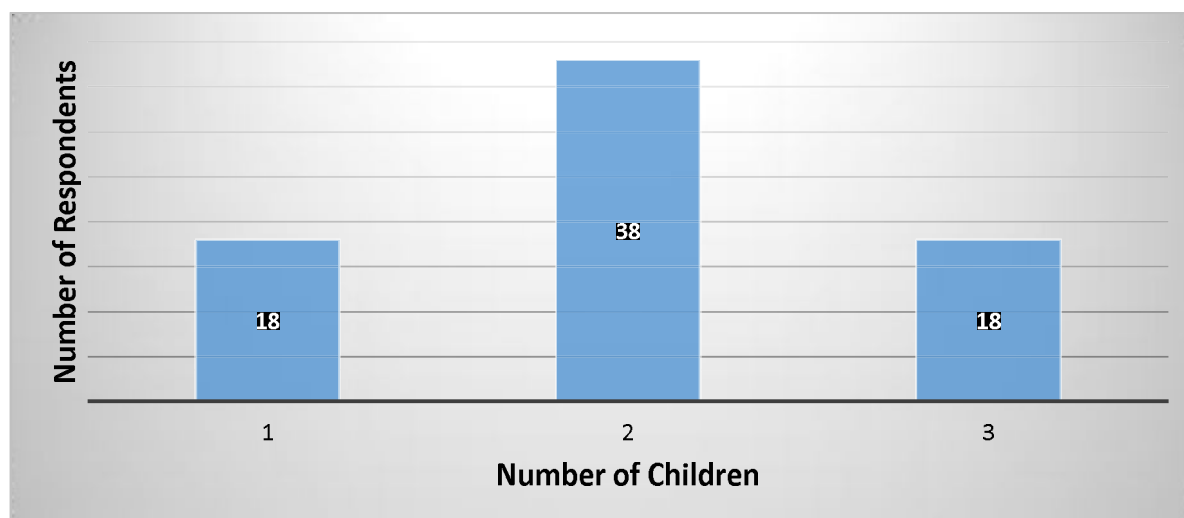


Figure 4.2: Children of Respondents

Only when these women fulfill all these basic minimum criteria can they be ‘accepted’ as surrogates. Daniel Spider in this context, comments: “*Surrogates are middle class women, have their own children and see it as a chance to help others and simultaneously earn a few bucks. Most of them are connected to a clinic where everything is taken care of, via lawyers and a supportive medical team.*” In context of India, this observation varies considering that while all of my respondents were lower class women, the principal reason they took to surrogacy was not to help others but to earn money and afford a better life for themselves and their families.

However how these events roll out in reality is significantly different. Susan Ince, a journalist by profession revealed this when she went as an undercover potential surrogate mother in the USA. In ‘*Inside the Surrogate Industry*’, she describes what happens when a woman applies to become a surrogate.³⁶⁰ When I entered my field in Anand and Gurgaon, Ince’s account provided crucial insights. The entire procedure is a classic *story of demand and supply*. On the one end are the women who caught in the cycle of poverty and deprivation look out for avenues to earn money that can act as an additional means to meet their family requirements. Considering that they are

³⁶⁰ Susan Ince, *Test-tube Women: What future for motherhood?*: (London, Pandora Press, 1984).

illiterate, skilled employment is difficult for them to find. As has been discussed earlier, the coming in of assisted reproductive technologies has opened up newer avenues for women to explore. In this changed scenario, sexual labor seems to be the most potential avenue for them. On the other end are upper middle and upper class couples who have after recurrent attempts to conceive naturally and through means like IVF still remain childless. With the urge to have one of their own blood and flesh, adoption does not seem to be their choice. In crux, while the former provides supply, the latter creates demand. The only thing that is missing is a link that can connect the two. This link is provided by the ‘surrogacy agencies’ who have established huge *paraphernalia of doctors, nurses, and administrative staff and most importantly agents* who target these women in search for financial gains.

This entire process begins with these ‘agents’ who have their local networks across various areas of a village, city, state and country. They are on constant lookout for women who are looking for avenues to make money. They recruit women who become surrogates. The entire course starts with agents approaching poor women on lookout for work. They give them and their husbands an initial briefing about what surrogacy means, what are its benefits to them, how could it change their lives for the better and so on.

The next step is taking these potential baby carriers to the fertility centers where all preliminary investigation is carried out on them. During this period they stay at their own places and are called only when the results are out. If the results are positive i.e. they can carry the child, they are inducted as surrogates in the entire system. The most crucial step at this stage is to ascertain if they want to opt for being a surrogate. Becoming a surrogate as is described by many can be a life-changing decision in terms of economic gains, but it is not without its challenges. Apart from the *physical toil, mental stress and psychological bearings*, Surrogacy also requires commitment on part of a woman to move away from her family and undergo various medical procedures. During this time, their bodies are subjected to the pain of labor for a child who they would have no right over. It is thus that surrogacy calls for a thoughtful decision on part of the surrogate.

With supply being in place, the need is to match it with demand. With growing awareness as also manifold mediums of knowhow, surrogacy as an option has become immensely popular amongst

childless couples seeking to have their own kin. Becoming a parent by way of surrogacy poses various challenges and issues for them too. Thus before one opts for a surrogacy arrangement as intended or commissioning parents, it is crucial that they educate themselves about the risks and benefits of surrogacy. Only when this thorough thinking and contemplating is undertaken can they be in a position to fully commit to the process.

Consequently, Surrogacy Clinics are not only thriving at an unprecedented scale, they have also become immensely popular. Every city beams with huge posters of IVF Clinics and Surrogacy Centers. Some of these are more famous than the others. Akanksha Fertility Clinic is one amongst them. These clinics attract large number of couples who undergo various treatments and procedures so as to conceive. These couples popularly termed as *Intended Parents or Commissioning Parents*, are then told about perspective women who are ready and fit to become surrogates for their child. It is amongst these options that the couples make choices.

When both, the surrogate and the intended parents have decided to opt for surrogacy, the next step is to decide the kind of surrogacy arrangement they want. As has been discussed above, there are two options available. The first is that of *traditional surrogacy* wherein the sperm is taken from the intended father or a donor and the egg belongs to the surrogate. According to the guidelines of the *Indian Council of Medical Research* either of the two parents essentially has to be a donor and thus be genetically connected to the child. The other is *gestational surrogacy* under which the surrogate is only the carrier of the baby and hence the baby is not genetically related to her. Considering the biological relationship that exists between the woman who is the surrogate and the child so born in traditional surrogacy arrangement, they are considered to be more problematic. Consequently, most states including India prohibit traditional surrogacy agreements.

Once these decisions are made the next step is to draw out a carefully framed agreement or contract. This is prepared by a '*Surrogacy Attorney*' who completes the legal work. The contract so drawn is signed by the surrogate couple, the intending parents, and a witness. The contract explicitly mentions the terms of the agreement. Some of the provisions that are crucial to it are:

- The health of the surrogate is of principal concern. Alternatively in case of a threat to her life, the child she carries will be subsidiary. The commissioning couple in this case cannot sue the surrogate or the agency.
- There shall be no sex selective surrogacy arrangement. At no stage of the surrogacy period can the commissioning couple push for determining the sex of the child.
- Once the child is born, the surrogate cannot keep the baby. The surrogate and her husband have to essentially render the custody of the child failing which legal action can be taken against them.
- The child so born has to be accepted by the commissioning couple irrespective of any complications in the child. The contract categorically states that even if the child is an especially abled one, the intended parents cannot deny taking it.
- Even if the agreement is for one child, in case of twins or triplets neither can the surrogate deny carrying them nor can the intended couple deny taking them.
- The intended couple has to bear all the expenditure failure to do which can terminate the contract and also lead to legal action against them.

Having completed the legal documentation, the process of surrogacy begins. The first step is to undertake medical examinations of both the intending couple and the surrogate so as to ensure they are healthy to undergo the process. Once this has been ascertained, the first step is to synchronize the menstrual cycle of the intending mother and the surrogate so that the IVF process can begin. The purpose of this step is to stimulate the biological mother's ovaries for production of eggs. Another way of doing it is with the frozen embryos of the biological mother if they have been kept aside earlier. Once the eggs have been retrieved, they are combined with the male sperm from the intended father or a donor. Simultaneously the surrogate's *uterine lining* is 'prepared' by giving her supplementary progesterone. Once the embryos are developed, one or more are transferred to the surrogate's uterus. From the date of transferring, two weeks are calculated following which the surrogate takes a pregnancy test.

If the result is positive, the surrogate is sent to the 'specialized homes' to be kept under the constant watch of the doctors. Another way in which it is done is that for the initial ten to twelve weeks the surrogate stays at her home and keeps visiting the doctors. It is only after that when

chances of success go up, are they brought to the surrogacy homes or hostels. To elaborate on it further, there are various ways of treating the surrogate once she has conceived. My field had two types of set ups. The one at *Anand, Akanksha Fertility Center* housed around sixty surrogates and was a multi facility hospital and residence for surrogates. The second is *Vansh Hostel in Gurugram, Haryana* which is just a home or a hostel for surrogates. While the surrogates in Anand were provided medical care at the institution itself, the ones at Gurugram were taken to the nearby affiliated surrogacy clinic whenever needed. After a period of nine months, once the surrogate delivers the baby, the child is handed over to the commissioning parents while the surrogate returns to her own family.

My field consists of two places, Anand in Gujarat and Gurugram in Haryana as has been spelt out above. The total number of *surrogates* interviewed is 74. Apart from them, my sample consists of *12 men who are husbands of these surrogates; 40 doctors and medical staff; 6 agents and around 30 intended parents*. My methodology is a ‘combination of structured questionnaires and oral unstructured interviews.’ This mixture of two was helpful to my design for it helped me to not only bring out the crucial details but also to understand in depth how this form of work operates. These will be outlined at considerable length in the sections that follow.

4.3 Surrogate Motherhood: Reflections from the Field

The lives of surrogates put together conflicting imageries. While for the childless couples for whom they carry the baby, these are *Goddesses* in human face, the society sees their work as demeaning, unethical and something that should be outlawed. It is this irony that makes surrogates an interesting subject for analysis in feminist literature. As has been outlined in the introductory chapter, my methodology was a combination of pre structured questionnaire and in depth interviews. With the help of the former, certain objection markers about the women working as surrogates were outlined. Following are the key observations based on an analysis of these objective criteria.

Background of the Bearers:

1. Age Status:

There is a definitive pattern in the age of the surrogates. As was reiterated time and again by all the fertility centers, they prefer to recruit women between the age group of 23 years and 35 years. It is believed that these are the best years of fertility and bodily capability. Therefore mostly all of the surrogates in my sample belong to this age group. As is evident from the figure below, seven of them were in the age group of 20 years and 24 years; twenty nine were between 25 years and 29 years; thirty two were in the category of 30 years and 34 years and finally six were between 35 years to 39 years. While none of the agencies or the surrogates explicitly said if their age was in any way related to their ability to carry the child, there seems to be more women between the age of 15 years and 34 years suggesting that women in this age group are most preferred.

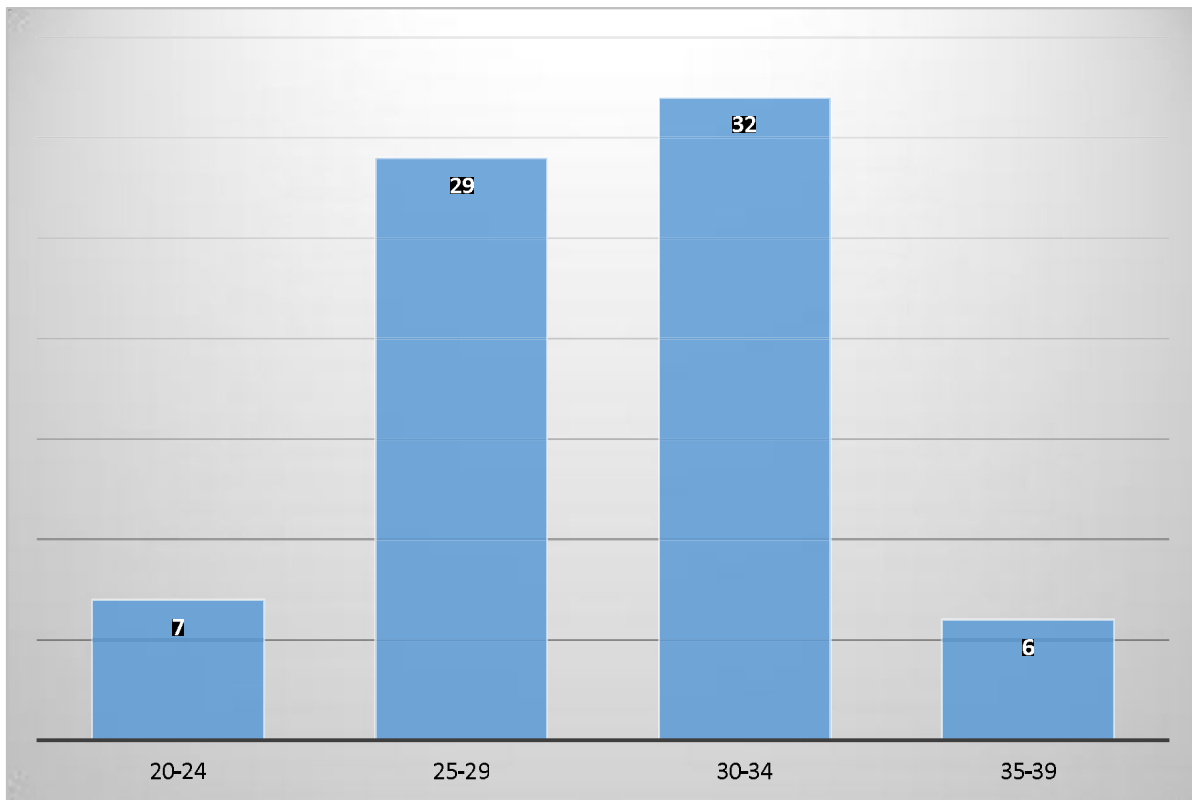


Figure 4.3: Age of Respondents

2. Caste Status:

With regards to their *caste background*, 31 of my respondents did not wish to disclose their caste. From the remaining, 12 were Brahmans; 9 each belonged to the Kshatriya community and the Scheduled Caste community; 6 to the Vaishya community and 7 to the Scheduled Tribes. Interestingly, the medical agencies said that it is only very rarely that intended couples consider caste as a criterion while choosing their surrogate. Despite this if a surrogate belonged to the upper castes she was in a better position to negotiate the amount paid and mostly went with more.

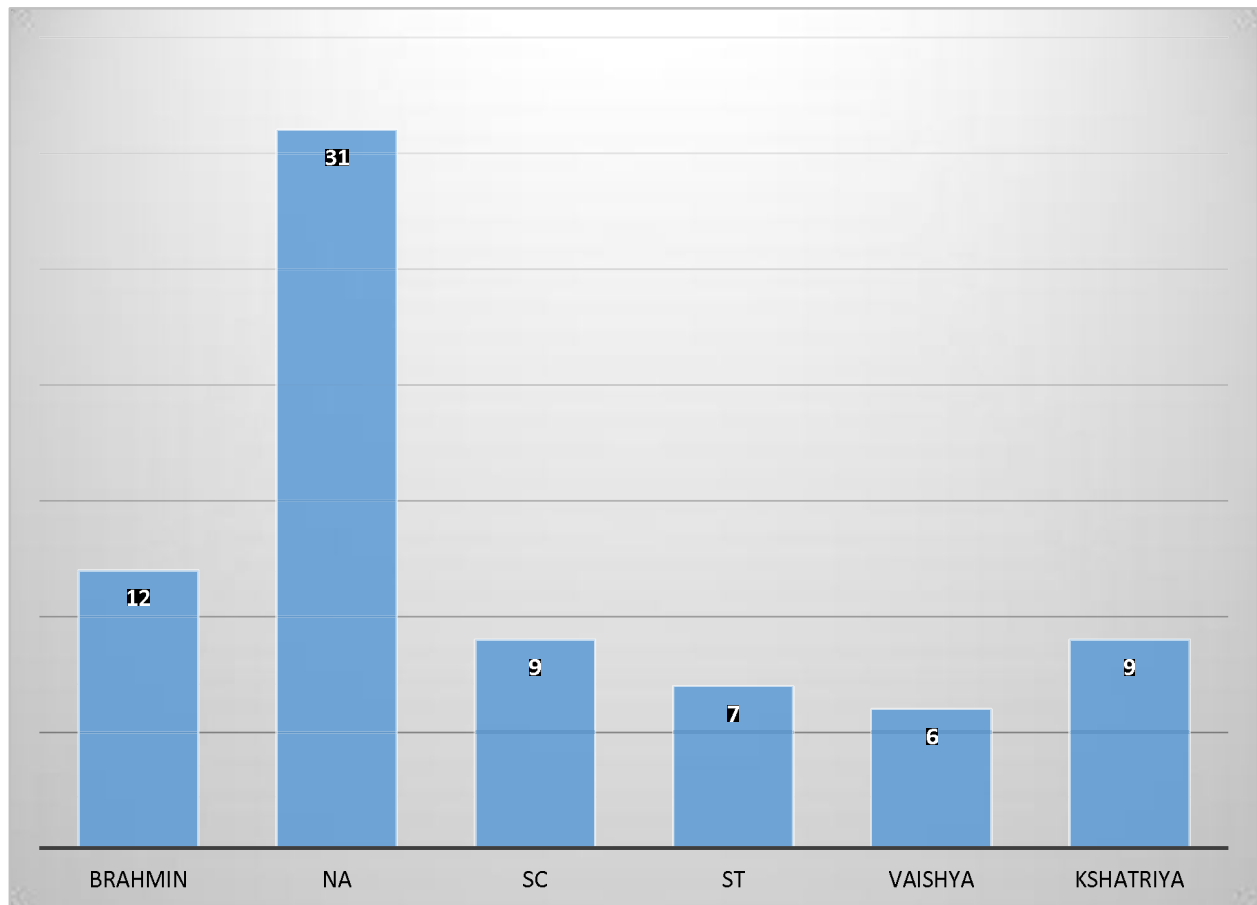


Figure 4.4: Caste of Respondents

3. Religious Background:

As regards the *religious belief of the surrogates*, following table illustrates a strikingly large number of Hindu women acting as surrogates for others. Around 80% of my respondents were Hindus, while 11% were Christians and an even lesser 7% belonged to the Muslim community.

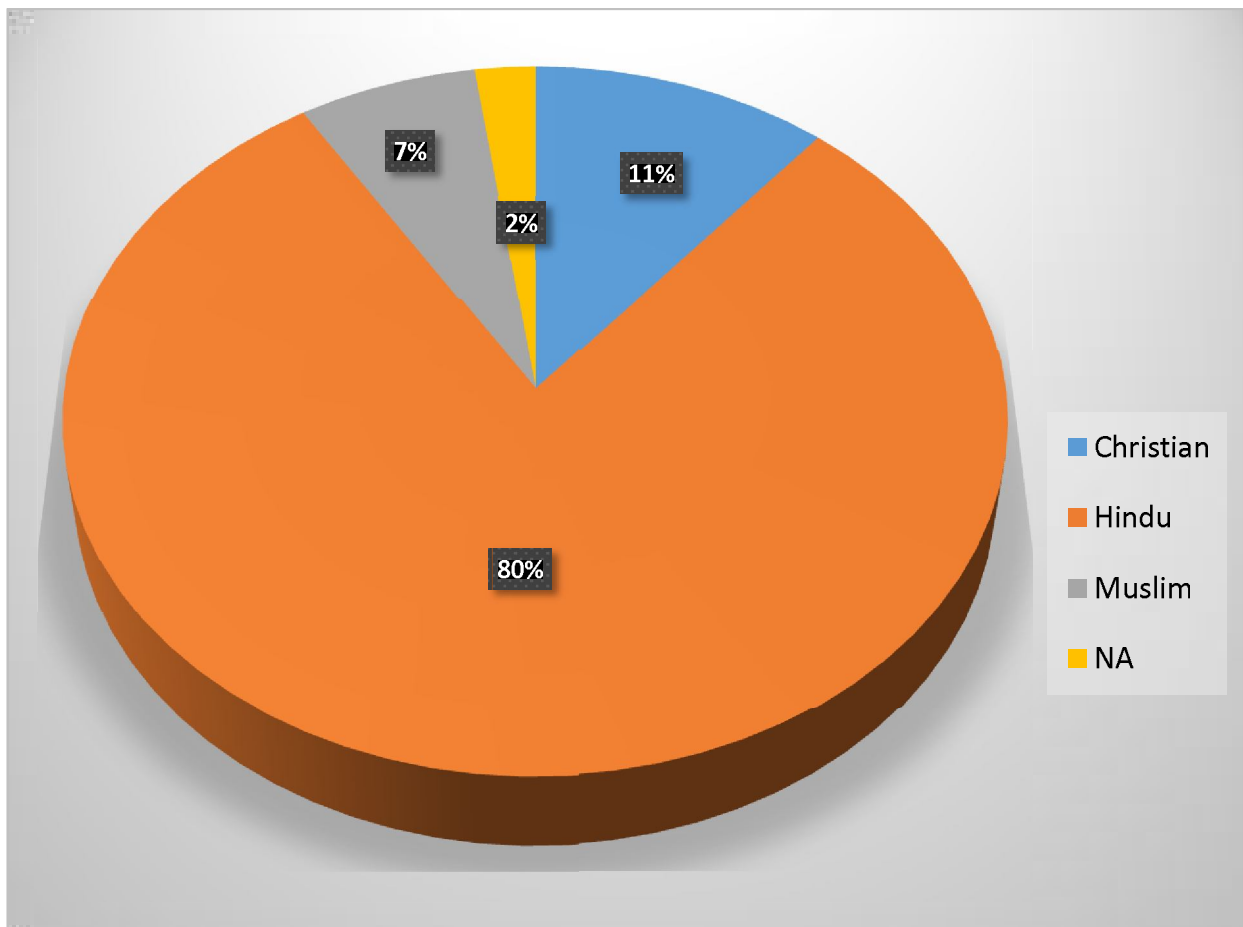


Figure 4.5: Religion of Respondents

4. Data Regarding Domicile:

With regards to their *domicile*, the data I must admit does not reflect much considering that most of my respondents were housed in the surrogacy home at Anand. Therefore a majority of them, i.e. 44 of them are Gujaratis while the second largest belong to state of Rajasthan that adjoins both Haryana and Gujarat. Others belong to West Bengal, Uttar Pradesh, Madhya Pradesh, Haryana and Bihar. I was told that there are also women from Nepal, and Bangladesh who become surrogates. However none of my respondents were from these countries.

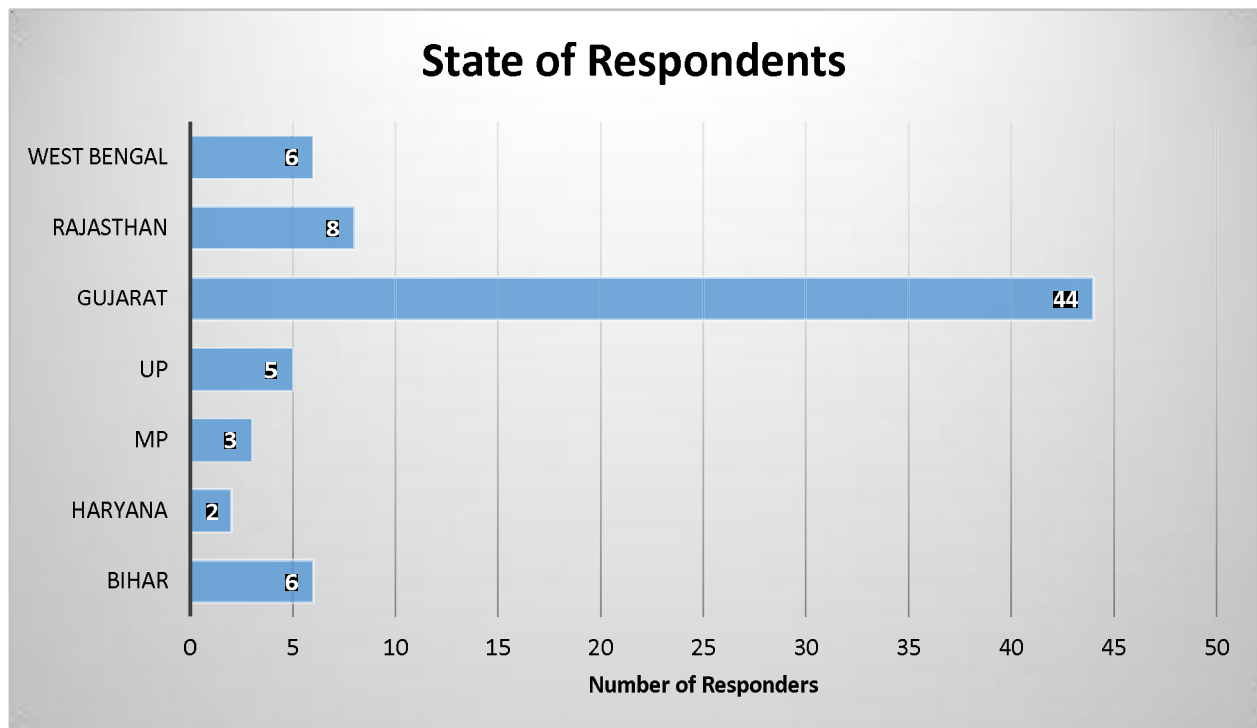


Figure 4.6: State of Respondents

5. Daily Routine in a Surrogate's Life:

The day for a surrogate starts with meditation or prayer as the surrogate's desire following which the breakfast is served. The diet for each surrogate is categorically laid down by a nutritionist. The breakfast essentially comprises of milk and fruits. The morning breakfast is generally accompanied by long hours of chatter. After the breakfast, the surrogates are left to do as they wish. Some of them continue with their conversations, some get ready while others watch the television. Some surrogates are also taken upstairs for their regular checkups, sonography and other tests as and when needed. At around 12:30 in the afternoon, lunch is laid out. Post lunch session also varies across surrogates. Some prefer to sleep while others sit down to talk or watch television.

Around four o'clock it is time for tea. Herein again the surrogate is provided all that is essential for her and the child's health. From the tea time till dinner, the women are left to do whatever they wish to do. At dinner, the food is laid out in the same area after which the surrogates retire to their rooms. An essential part of their meals are fruits and milk which is provided to them at regular intervals. During the period of nine months the surrogates are barred from consuming liquor, cigarettes or any sort of drug that can be injurious to their health. It is also to be noted that the surrogates seemed to be well cared for they do not have to wash their utensils or clothes. Their diet is well planned as per their requirements and they are constantly under medical supervision. One of my respondents, Vimla who has two children of her own was quick to add that during her own pregnancies she was not as well cared for as she was during her surrogacy stint in the center.

The surrogates spend the period of nine months here at the center. During this period they become friends with fellow surrogates.' When the pregnancy is complete, the surrogate delivers the baby and it is given to the commissioning parents, while the surrogate goes back home to her own family.

6. Educational Background of the Women working as Surrogates:

Considering that most of these *women were not well educated*, they had remained unemployed till they became surrogates. Therefore they felt that with their level of education this was the best line of work they could avail. Further it was not a permanent thing; it is just an occupation that they briefly engage in. 21 of my respondents were uneducated, while 35 of them were educated up to or less than high school. Only 7 of them were graduates and 5 had acquired specialized education in form of B.Ed. Following table illustrates the educational background of my respondents:

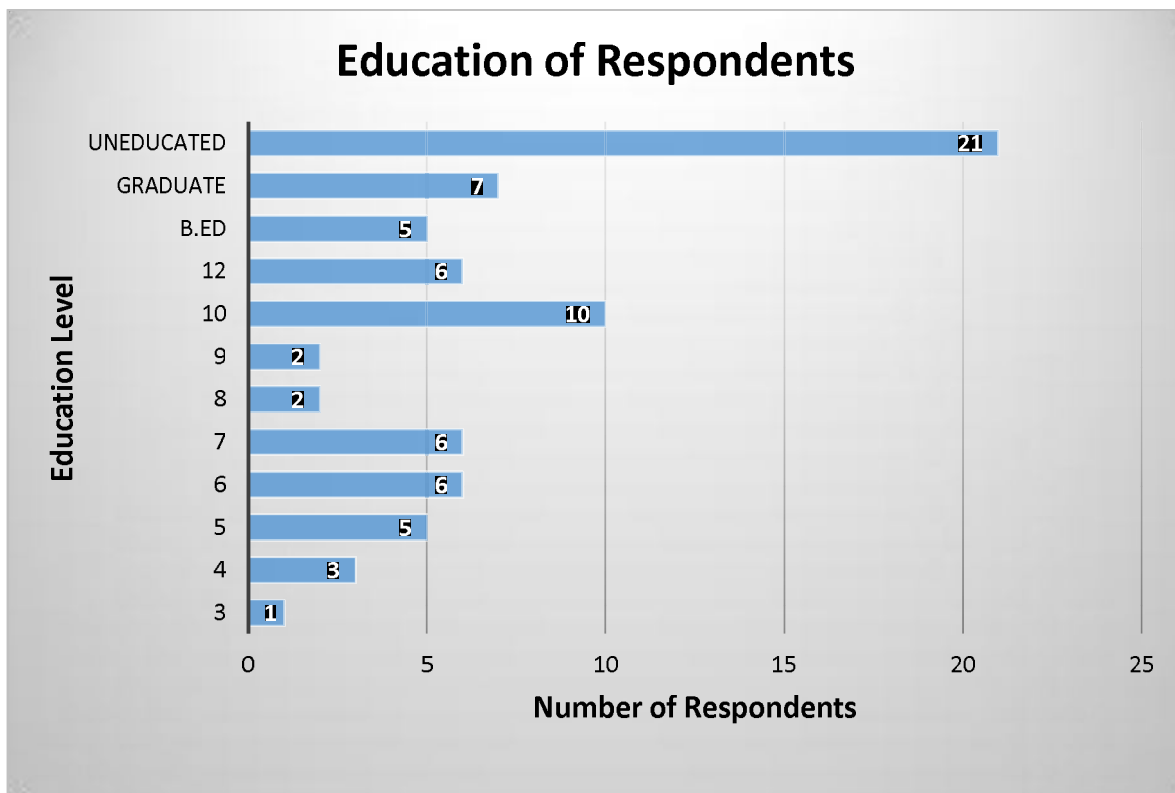


Figure 4.7: Education of Respondents

To make up for this lack of education and to provide them '*skill training*' that could help them find work after they go back, post lunch there are vocational training exercises like stitching, knitting, paper bag making, English communication and so on. Some surrogates prefer to engage in these so that they can find a source of remuneration once they have conceived the child.

7. Amount and Nature of Compensation Received:

This brings us to the all significant issue of money and the nature of compensation. Gopal Bhai who handles these things tells me the exact manner in which payment is unfolded. He begins by stating that the exact amount is mentioned in the contract therefore at no point can the intended parents go back on their words. The surrogates are provided *four thousand rupees every month* till the nine months, after which they are paid *four lakh rupees or five lakh rupees* as is promised. In case of 'twins, the price automatically goes up by minimum one lakh of rupees. Apart from this a three lakh rupees *medical insurance* is provided the premium for which is given by the intended couple for three years. Apart from this the surrogate and her family gets medical coverage for life.

This data was confirmed to me during my interaction with the surrogates. While 42 of my respondents went home with rupees Four Lakhs at the end of the term, 25 of them also got above Five Lakh rupees. This was majorly because of two reasons: either they had twins or they were surrogates for a foreigner or an NRI couple who pay better. Now that international surrogacy is closed, the surrogates feel it has been a loss for them. Those who received around three lakh of rupees had either done it before the new rates or the agency cheated on them.

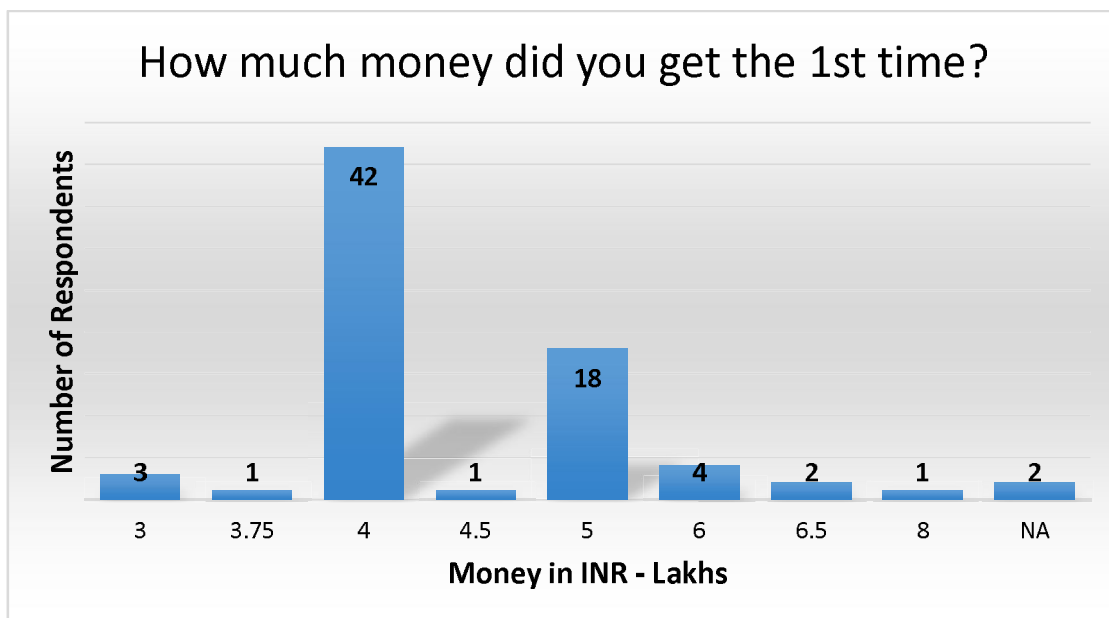


Figure 4.8: How much money did you get the 1st time?

This money helps them to start their lives with fresh optimism and happiness. Some of them come back for a second surrogacy while others do not. Of those amongst my respondents who came back, 29 got around 4 lakh of rupees while, 12 got Five lakh or above. Strikingly, the 33 of my respondents who were in their first surrogacy wanted to come back to make more money more so now when rates have gone higher up.

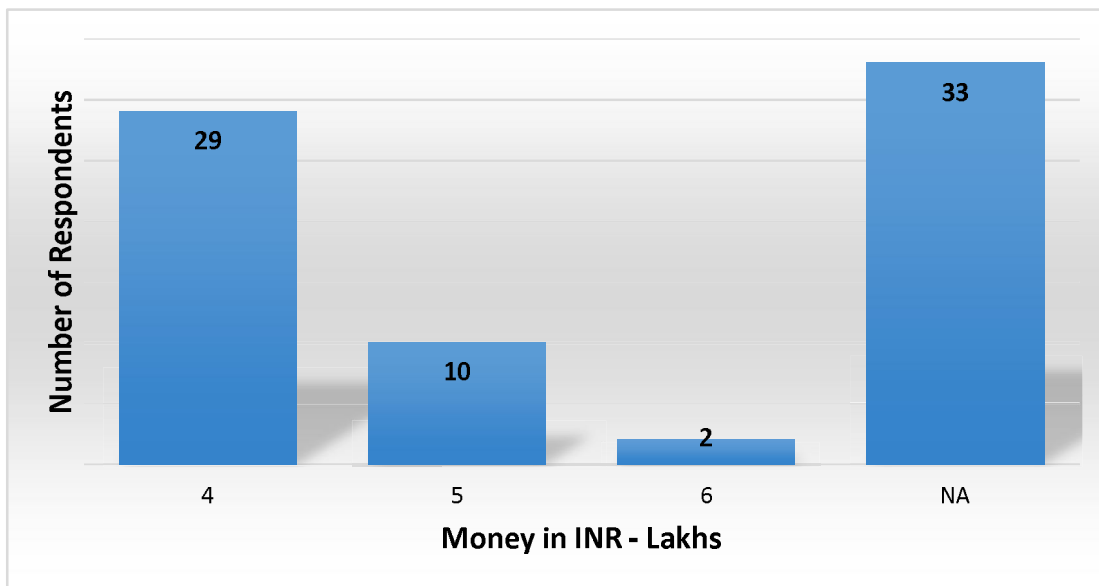


Figure 4.9: How much money were you paid the 2nd time?

It is crucial to point out two things here. First, of the total amount that is charged from the intended couple, a very *small section is given to the surrogate*. A certain amount of it is used for their food, medicines and health care. The remaining is the *profit that is shared by the clinic, lawyer and the agent*. Second, even in the most beneficial of commercial surrogacy arrangements, the surrogate has a minor share of the profit. It is the *surrogacy agency that is the biggest winner in the entire transaction*. I tried asking my respondents if they considered this division of profit unfair, most of them said that they were very happy with what they got. Some of them were not aware of this *unequal distribution* but did not complain about it on the grounds that if it was not for the clinic as their mediator they would have never been able to find an intending party. They said that they have been taken good care of and hence they do not have

any complains. Only five of my respondents said that they desired a more equal division of profit because fundamentally it was their labor on which the entire transaction was based.

The above account is only with regards to the two areas that this work researched in. As is largely known there exist a large number of surrogacy clinics across the country. While some of them follow standards laid down by ICMR, others do not. In the case of those that do not, there is no certainty of how the division of money takes place. It has been often reported that more often than not *surrogates are not paid even the minimum that they are promised*. Under these situations, there exploitation further increases. Despite this considering that even a small segment of the profit considerably changes their life conditions, surrogates advocate for its continued existence whole heartedly. This hints at us the possibility that *once more standard norms come in force perhaps a more equitable division would be possible* which in turn would go a long way in empowering the surrogates and ‘making this transaction truly meaningful for them.’

8) Informed Consent:

In my data, I tried to ascertain if women undertaking surrogacy had ‘informed consent.’ By informed consent my reference is to, “*full knowledge and fair understanding of all the potential medical, social and emotional outcomes and risks that may follow the use of ART’s.*”³⁶¹ If standard practices are followed, this form is generally signed along with the contract. In some instances, it is a part of the contract and not separately. Out of the 74 surrogates interviewed both in Anand and Gurugram, 40 said that their informed consent form was a photocopy of the ICMR guidelines which were explained to them. This form was both in English and the local language and was attached to the agreement papers. However they had no copy of it to provide to me during the interview. Another 20 of my respondents did not remember of it. They were explained about it they suggested and that was enough. Further fourteen of my respondents said that they did not sign any such form. It is only after the procedure started did they get to know about what it entailed.

³⁶¹ Sama Resource Group for Women and Health, *ART’s and Women: Assistance in Reproduction or Subjugation?:* (New Delhi, Sama Resource Group for Women and Health, 2006), 5.

9) Nature of Counseling:

It is widely acknowledged that, “*one of the fundamental prerequisites to medical treatment is that complete information should be provided so that one can make an informed choice.*”³⁶² This must include knowledge about the side effects of the treatment and the various complications that are possible. ‘Counseling’ is equally important to emotionally and psychologically prepare an individual to undergo the treatment. On questioning my respondents, it became evident that while in Anand there was a well functioning counseling procedure in place, in Gurugram it was not so much a norm. At Anand, four of my respondents said that the doctor was too busy to talk to them about the effects it could have on their psyche. Around fifty of the respondents said that the entire focus of the counseling procedure was to reiterate to them that the child did not belong to them. The remaining twenty said that the counseling procedure was helpful to them for it mentally and emotionally prepared them to part with the child.

4.4 Goddesses for Some and Prostitutes for Others

Insight into How do Surrogates Perceive their Work?

As has been outlined above, my sample consisted of seventy four women who were working as surrogates. My endeavor during the field research was to ascertain qualitative data from my respondents. Towards this end, as has been discussed at length in the methodology, in depth interviews were conducted with my respondents.

Based on the interviews, the accounts can be delineated along the following themes:

1) Reasons for Choosing Surrogacy:

Interestingly, as is widely believed surrogacy is not something that women take to voluntarily. More often than not it is the absence of meaningful choices that push them to take up surrogacy. This was evident from my field research. On the basis of it four reasons

³⁶² Ibid

emerged: benevolence, children, family and money. Fifty two of my respondents said that the need for financial security was why they chose to become surrogates for someone else. Further ten of them said it was for their children while seven attributed it to their family. Interestingly, refuting the liberal claim of it being a gesture of benevolence, only five surrogates said they would do it out of benevolence for a childless couple.

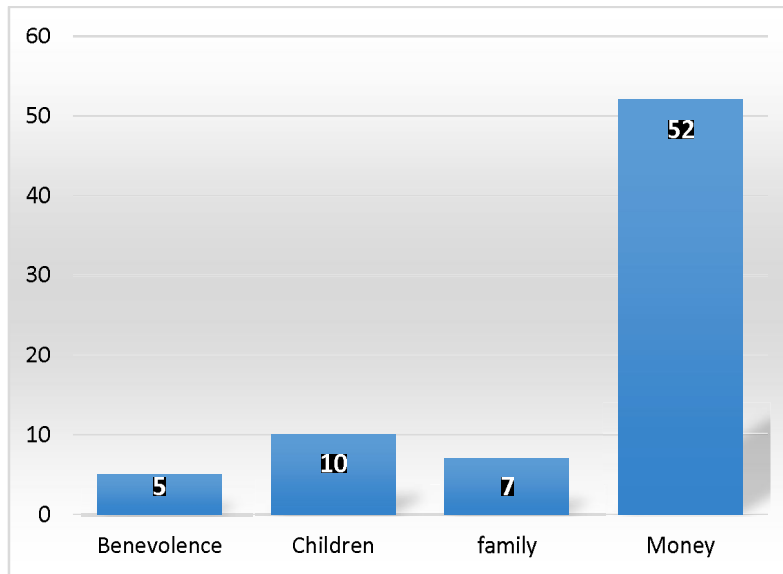


Figure 4.10: Why did you choose Surrogacy?

As the above data suggests, there are very many reasons for a woman to choose surrogacy. These range from the *need for money to wishing to help someone*. The most significant aspect that became a recurring cause for women to take to surrogacy was the ‘need for money’ as the above data points out. This is exemplified from the accounts of my respondents.

For a 22 year old egg donor hailing from Rewa in Madhya Pradesh, now a homemaker settled with her husband in Gurugram, *financial requirements* brought her to the surrogacy clinic in Gurugram. My first reaction was why does she want to do it when she herself was so young and perhaps on her own family way. With her eyes beaming with excitement, she said “My husband does not earn too much. We want to build a house and for that we need money. Only once we have a house will we plan our family.” On being prodded as to why she chose to donate her eggs instead of finding some other work, she stated that any other *employment needs long hours of work which I am not prepared for*. “In Delhi it is not such a taboo. My husband only told me that through this work we will be able to help someone while also build a house for ourselves.” She

was quick to add that it is a give and take relation that does not harm anybody. For a 29 year old woman who was under debt *surrogacy was the best means to earn money*. Realizing that this could solve all her problems, she decided to become a surrogate. She says, “I want to become a surrogate again. The money is too good, I have to do not work here and I am taken care of in ways I had never experienced.” For her Nayana Ben is a Goddess. On being asked if she would opt for surrogacy without money, she says “who will do it without money.”

Another of my respondent was a 25 year old girl named Rehnumai from Malda in West Bengal. This was her first stint as a surrogate and was currently living in the hostel meant for surrogates. Her account of taking to surrogacy was far from a benevolent one. Her motive was purely to get some *money*. Having been married at a really early age, she had migrated to Delhi with her husband who was a tea seller. One day while on work, he received severe burn injuries five years ago. She says, “I heard about surrogacy last year from a neighbor who had undergone the procedure, and came to Vansh to know more about it.” She suggested that both she and her husband were counseled and with mutual consent, she decided to go ahead with it. She was however quick to add that neither her family nor any of the relatives knew about it. On being asked what made her choose this work which is so concealed and often looked down upon, she added, “If I work as a daily laborer, I will earn Rs 5,000 a month at the maximum and will have to undergo endless toil. Instead, I have put my six-year-old son in school; I want to make him a teacher. I am young and healthy, and if the procedure is done under supervision, there are no risks. It has enabled me to run my family and also educate my child. How can this be wrong, she quickly asks me with self approval look on her face?”

According to Girija, a 26 year old hailing from Araria in Bihar and now settled as a daily wage laborer in Gurugram, *economic empowerment* has also meant much more respect within the family and enhanced ability to make decisions with regards to her own life and that of her children. She was of the opinion that earlier having worked as a vegetable vendor, she found no dignity. However with surrogacy she has been able to not only take care of her family but also feels more empowered and capable of living a life of self worth. She added that while her only reason is *money* and she would not do it for altruistic reasons, whenever she sees women at the clinic with children in their arms, she feels happy that she could give someone the bliss of

parenthood. She remarked, “The neighbors in my village think I am doing something murky, but I have nothing to hide,” says Girija, who received support from her husband and family.

A Delhi based homemaker was another of my respondents at the Vansh Fertility Center. She was very young when she lost her husband. She had two daughters to take care of and a home loan of Rs 7 lakh to pay off. She narrated how difficult it was to make ends meet with her limited Rs 7,000 of income every month. “It was five months after my husband died that I had to make a choice. That is when my friend, who had been a surrogate, suggested surrogacy as an option. At first, I felt I was betraying my husband, but the doctors explained that it did not mean I was going to be ‘impure’. And my identity would be a secret,” she says. She went on to say, “I was required to take medicines every day, many intravenously. I was worried, as the first time was painful, and I was confined to bed for three days with severe abdominal pain, fever and vaginal bleeding. But within a week I had recovered and if I look at it now, I consider it nothing for the *positive changes* it has brought to her and her daughters lives.”

For a 34 year old mother of two, 150 rupees a day is the maximum she earns. Her husband takes up off jobs that do not pay well enough. As a mother of two, she narrated daily accounts of the difficulty in making ends meet. To make matters worse, she has a debt of 1,50,000 rupees. *Economic hardships* had kept her kids out of school. One day, she saw a friend in the neighborhood who had just come back from the Surrogacy home. She says, “I could not believe that could earn so much in one go. When I proposed to my husband that I could make 2,00,000 rupees for surrogacy, he was upset, he thought I was going to do something immoral. But then when the procedure was explained to him, he understood it and agreed. While I was in the hostel, my family was allowed to visit only once a month and that was very hard for me. I was warned that whatever happened, I couldn't go home, but then thankfully nothing untoward happened which required me to visit them. My son was only four at the time and he asked me if I was going to have a baby. I told him that I was ill and that's why my stomach was swollen and I had to be admitted to hospital for treatment. My son bought my story, but if it was my daughter she would have asked me lots of questions. She is very inquisitive, but thank god, she was only three then and too young to understand.”

One of my respondents at the Vansh Clinic was a 28 year old egg donor hailing from Kanpur but settled in Delhi. Dressed in her best, at the first glance she did not at all seem to be a donor and infact was mistaken as an intended parent. She worked as an employee in an event management company. According her, *she had seen her sister struggling with infertility and childlessness*. It is then that she got to know about the possibility of donating eggs. She went on to say that indeed *money is an added incentive*. She discussed it with her husband who saw nothing wrong in doing this work along with her job. She suggested 'I heard about egg donation from my cousin, who had been a donor. My husband did not have a problem.' She has been donating eggs at the Vansh Center for a year now and feels no change in her body. She suggested that she felt extremely satisfied.

For Divya, a 34 year old widow who is an intermediate pass but is *unable to find work, surrogacy is a lucrative avenue*. Having lost her husband to cancer, she has a child to take care of. Failing to find employment, an agent of the Vansh Center told her about the possibility of being a surrogate. Her primary concern was where her child will stay during those nine months. She was assured by the center that it would not be objectionable if she desired to keep her child with her in the surrogacy home. She expressed gratitude for her intended parents from Japan who supported her at every juncture and took immense care of her in every way possible. She expressed happiness for having completed their family.

For Taraben, a surrogate some years back and now a sweeper at the center, she says *money was the reason for her*. However when she use to see the intended parents looking so happy and excited about getting a child, she would feel proud of her choice. She says, motherhood is bliss and *she feels God chose her to gift this happiness to someone who really needed it*.

One of the surrogates residing in Anand was 36 years years and this was probably her last stint as a surrogate. She attributed her choice of becoming a surrogate to her *unending tale of poverty and deprivation*. She added, "My husband is an auto driver who earns approximately Rs. 8,000 every month." This was not enough to sustain a family of three children and parents. She began working as a worker in the leather factory. One day on her way to the factory, she had a chanced meeting with *Nirmala Ben*, the agent who recruits most of the surrogates to Akanksha. When

Nirmala told her about the possibility of earning in lakhs at the surrogacy center, she realized that she would not be able to earn so much in years working at the factory. It is this thought which pushed her to convince her family. This was her second surrogacy. In the first she carried twins for a Canadian couple. The money she got, helped her buy a house. She hopes in this second stint too, she can have twins and with that money ensure the future of her children.

2) How did they get to know about Surrogacy?

There are certain key actors or factors that have made the spread of the surrogacy industry. The most important ones are agents, internet, friends, and relatives to name a few. In my sample, a large number of respondents spoke about agents. In Anand, Nirmala was the well known person who connected women wanting to be surrogates and agencies recruiting them. Interestingly, Nirmala who herself was a surrogate earlier now recruits a large number of surrogates.

In an attempt to understand the source that matches the demand for surrogates and its supply, one of my questions was the considering that surrogacy is such a concealed form of work how does one get to know about it? On field, five options emerged. The most popular amongst them was through an *agent* with 33% of my respondents saying that they got to know about surrogacy through an agent of the like of *Nirmala Ben* and *Aftab Bhai*. This points to a problematic direction considering that these agents are almost always at task to catch hold of women and take advantage of their conditions. An interesting observation from the field was the fact that, nearly 31% of my respondents got to know about it from a relative who had earlier been a surrogate. Further 23% of them were introduced to it by a friend while 12% attributed the knowledge of it to a neighbor. This is an intriguing trend considering that we often assume that it is a concealed and looked down form of work. Only 1% of my respondents said that they got to know of it from internet.

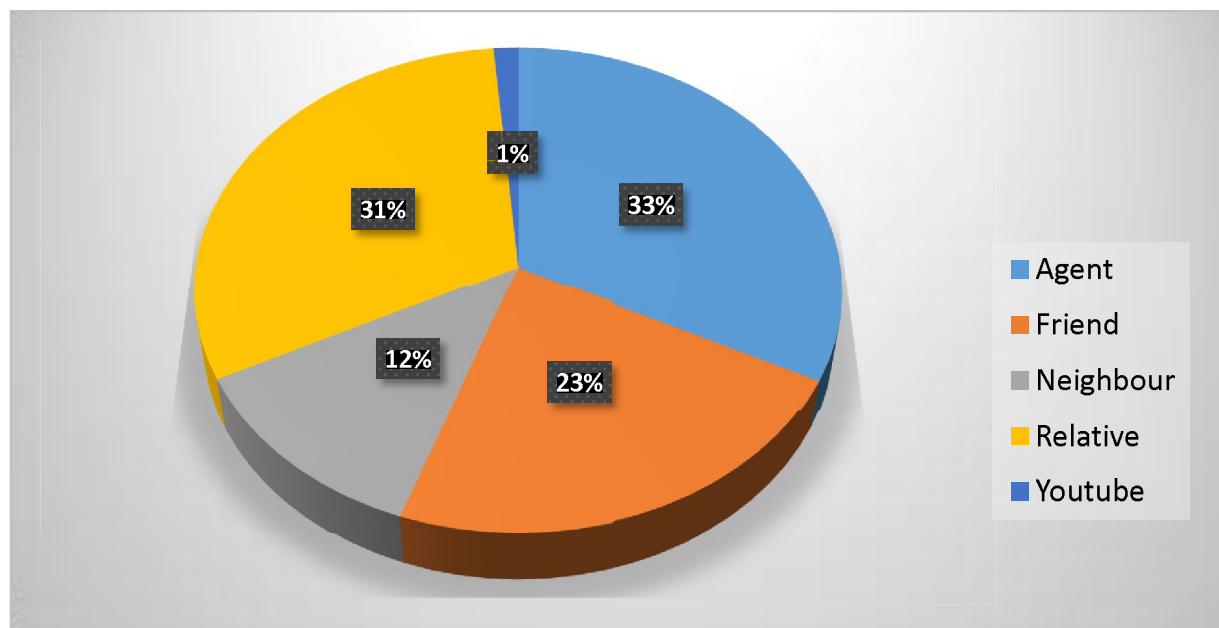


Figure 4.11: How did you hear about Surrogacy?

These figures find substantiations in the following accounts. Tripti, a 26 year surrogate and a single mother, her story of surrogacy started when she met someone who had earlier been a surrogate and now works as an agent recruiting women to the clinic. She says, “He told me that I could earn 200,000 rupees being a surrogate mother. I knew two other women in my neighborhood who had been surrogate mothers so I agreed.”

Interestingly many women, once they go back home, also become publicists of the center and spread the message about surrogacy amongst women in their families and neighborhood. Kavita, one of respondents was here for her second stint as a surrogate. She got to know about it from her sister and law who was earlier a surrogate here. Kavita further recruited a neighbor and her husband’s sister as a surrogate. This pattern was not just specific to Kavita, but a large number of my respondents had opted for surrogacy seeing the experience of a neighbor, friend or relative and had in turn also spread the message amongst others.

Having interviewed close to seventy women, the one thing that was reiterated again and again was that either it was a relative or a friend or a neighbor or an agent who first told them about surrogacy. Interestingly even if it was a relative or a friend or a neighbor, the first point of

information for them was an agent. “Most agents are ex-donors or ex-surrogates. For every donor registered through him or her, the agent gets Rs 10,000-15,000 from a clinic,” sources said.

3) If Relatives and neighbors know about their work:

Considering that surrogacy is associated with various taboos and stigmas, an important aspect was to ascertain if women working as surrogates kept their *work concealed or not*. In many cases, my respondents had disclosed to their husbands and immediate family members, while in the remaining even the friends and neighbors knew about it. It is also important to outline that in terms of my two field areas there seemed to be some divide as far as opening up about their work was concerned.

While most of my respondents at the surrogacy center in Anand said that they had faced no objection from the family and neighbors and hence had been open about their decision, almost all at the Vansh Center in Gurugram felt that nobody would understand why they did it and hence will look down upon. It is thus that they had hidden it from their families, relatives and neighbors. Their absence from home for a period of nine months was camouflaged in one excuse or the other. Overwhelming 77% respondents said that their families easily accepted while 8% said they did not. In case of the remaining 15%, while some family members knew and accepted the others did not.

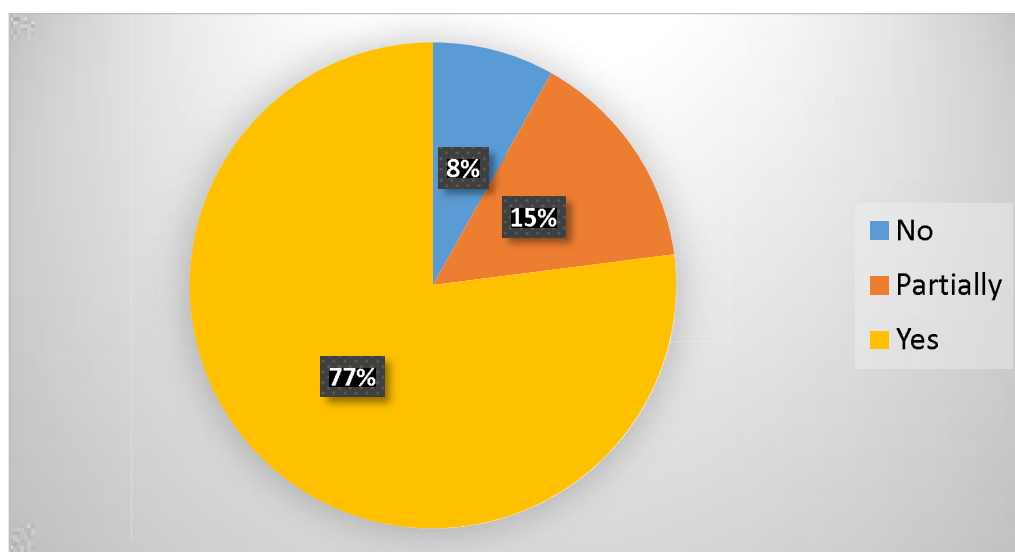


Figure 4.12: Has your family accepted?

Yet another factor that is crucial in understanding surrogacy is, considering the taboos attached to it, how open women were in sharing about their work with the *members of their villages*. Contrary to my assumption 53% said that they had been open about it and hence the entire village knew about it. Arguably, most of these villages were those that housed a large number of surrogates and therefore surrogacy as a whole was not considered a taboo here. Of the remaining 47%, most of them were from states like Uttar Pradesh, Bihar which are known to be conservative patriarchal belts therefore it was not easy for these women to be vocal about their choices.

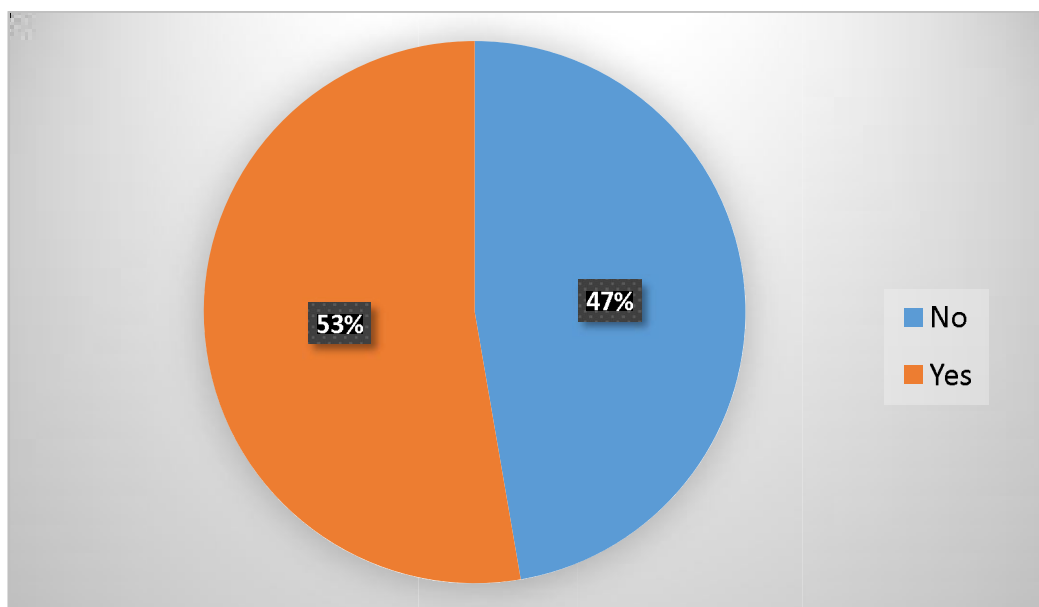


Figure 4.13: Does your village know about it?

This finds substantiations from my filed accounts. A 23 year old surrogate living in the Akanksha Fertility Center at Anand, who became a surrogate through an agent called, Nimala Ben. On being asked, is their acceptability once she goes back, she happily says that all her family, friends and neighbors know about her work and they do not consider it wrong. She goes on to add that a lot of women in her village have become surrogates earlier and some of them are even today. She adds, “I miss my family and they miss me too. But it is important to build a house so we had to do this.”

Rabeya was a 27 year old cheerful looking woman who kept moving from one ward to the other. Despite being in her final trimester, she happily answered all my questions. This being her second surrogate pregnancy, she said, "The first time I did it for my children's education. This time I want to keep the money to buy a house." she says. When I asked her if has faced opposition and boycott from neighbors and family, she said, "Not at all," "It's very popular among women in my locality. A lot of them are doing this at different clinics and hospitals. There is no shame in it. Our husbands also support us in this."

In other instances, women narrated how they had only told their immediate families about it as is testified in another account. Having worked in a textile factory earning 2,500 rupees a month, another of my respondent's husband was a hawker with no fixed income every month. Some years back her husband disappeared after a fight making it impossible for her to even feed her children. It is then that she got to know through a friend about surrogacy. She began by donating an egg at a fertility clinic in Gurugram. It is here that she got to know everything about being a surrogate. Hence she decided to do it, this time as a surrogate. She says, her neighbors and extended family do not know about it. Only her mother and mother-in-law knew about it. Initially they were unconvinced and hence they did not speak to her during her pregnancy. But she was convinced that this was the only way to give a good life to her child.

Tripti, a 26 year surrogate and a single mother, her story of surrogacy started when she met who worked as an agent for a surrogacy clinic. On being asked if she was alright of hiding it from her family and village, she says "they did not help me when my husband left me for another woman. Why should I think of them now? I thought, I have a child, to take care of, I am young and can easily carry a child for someone." Further she added, "I felt good that I can help someone who cannot have any. I was thinking how horrible it would be if my daughter couldn't bear children. I believe everyone should have children and I wanted to help."

4) How do they look at their work: benevolence or ethically wrong

Tripti was an important respondent because she now worked at Akanksha Fertility Center as a caretaker. She was educated as high as a B.Ed and hence easily understood issues of

commodification and objectification that surround feminist contention on surrogacy. She believed that renting a womb was a *matter of choice and not of subordination*. She was vehement in putting forth her view that said, “*What is wrong in selling services of the uterus*”. She added, “Not everyone can teach and not everyone can be a doctor. What then is wrong in choosing this line of work? She also said that the biggest drawback of the surrogacy regulation bill is that it does not represent the voices of the women who opt for surrogacy.

A young woman, sitting on her bed looking outside the window and waiting for the day she will go back to her family, 29 year old Sherin feels that surrogacy is beneficial to everyone. While the surrogates get money that help them shape a good life for themselves and their families, the intended parents get to celebrate the joy of parenthood and the child is guaranteed a happy and safe future. She therefore sees no problem with surrogacy.

5) Are they in touch with the baby? If not, do they miss it?

One contention that keeps recurring in academic debates, policy formulations and even dining hall discussions is that taking away the child from a woman who carries it for nine long months is extremely painful. Preeti one of my respondents was 28 year old and was a widow. On being asked if she felt any sort of pain in giving away the child she says, “I never met the real parents and have no idea who they are. I was still under sedation when they removed the baby. I never set eyes on it. I have no idea whether it's white or black, whether it's Indian or foreigner, I don't even know whether it's a boy or a girl! When I gained consciousness, my first words to my mother were, 'Did you see the baby? Is it a boy or a girl?' She said he hadn't seen it. I asked my doctor, but she didn't answer my question. 'You are a surrogate mother, you shouldn't ask these questions,' she said. But I want to know about the baby. I want to know where he or she is and what it is studying. For three months after giving birth, I spent sleepless nights, I would get headaches thinking about the baby and I had to take medicines to calm down. Every year, on 4 November, the day the baby was born, our family celebrates its birthday. I do all the rituals that I do for my other children. I fast in the morning, I cook kheer and share it with my family and neighbors, and I visit the temple to pray for the baby's well-being and long life. I've always wondered if the baby is like any of my other children. I really do miss the baby and would give

anything to see it once. I know it's not my baby after all, but I know that if I'd seen the baby, I wouldn't have given it away. But then, we are a poor family and in difficult times, we think that perhaps the baby's better off in a wealthier family. I hope the baby is happy and fine wherever it is.”

It is this sense of craving to know about the whereabouts of the child that pushed me to understand as to how many of my respondents were in touch with the babies that were born out of their womb. As was evident during my interactions with surrogates, 68% of my respondents were not in touch with the baby and hence know nothing about it. Neither its color nor how it was doing now. Only 32% said that the intended couple, now parents to those children uses to keep in touch by sending pictures and videos and sharing stories about those with these women. One of my respondents told me that she conceived for a gay couple, who took her with them for five years to take care of the baby after which she came back.

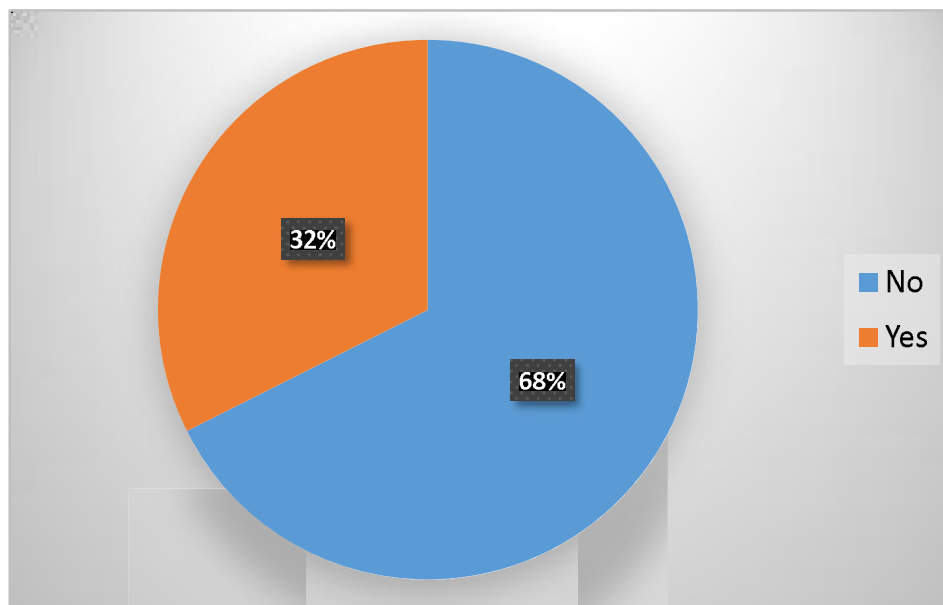


Figure 4.14: Are the respondents in touch with the baby?

Another of my respondent said she felt attachment with the child and that made her restless. She narrated how she wanted to see the child at the time of birth but the doctor did not let her to that. She narrated an account of the initial few months when she missed the child but could not get in touch with him. It was her husband who kept reminding her that the child never belonged to her. Gradually she accepted it and now recounts how surrogacy enabled her to pay off her debts and

rent a house. She wants to become a surrogate again so that she can secure a good life to her children.

Jyoti, a second time surrogate has three children of her own. She says during the first pregnancy, she felt broken for having given away the child she carried for nine months inside her womb. But she says after a few days, she accepted the fact that it was not her child ever. She says throughout the process of pregnancy, the counselors, the nurses and even the doctors during ultrasound sessions, keep reminding the surrogates that the child belongs to someone else. Therefore she says gradually the surrogates internalize it and do not feel guilty or sad. Another of my surrogate, on condition of anonymity went on to say, “why will I feel bad, that child was never mine.” She goes on to add that the reason that brought them to the clinic is their own children. They take to surrogacy to give a good life to their own children. Therefore there is never any urge to keep the baby. They only need the money so that they can go back to their family happily.

A majority of my respondents said that they never had the urge to keep the baby with themselves. While they do not deny that it was hard to give up the baby, keeping it with themselves was not an option. One of my respondents adds, “For about two-three years, I felt very bad and I lost a lot of weight. But now I don't want to see it. At home, we don't talk about it. I even discourage my husband from talking about it because I know it belongs to someone else. I have made peace with myself.”

In the Vansh Hospital, there was a mechanism in place to ensure that the surrogate did not get attached to the child. The first step in this was to keep surrogates away from where the baby was kept after the birth. “You don't want a bonding of any sort,” one of the hospital staff said. For that reason, it is recommended that the surrogate does not see the baby after birth.

6) What kind of surrogacy do they prefer?

Witnessing vibrancy of one of my respondents named Rabeya; I opened up to ask her if she would have done it without money. To which she bluntly says, “No! Without money, who would want to live away from their families, leave their children and go through the pain of

pregnancy?” On asking her about how much money she will get, Rabeya said that she would be paid an allowance of Rs. 4,000 every month along with an amount Rs 4 lakh when she delivers the baby. In case of twins an extra Rs 1,00,000 would be paid while for a Caesarian section, there was a clause in the agreement under which she would be paid an additional amount. Sitting with her was her friend Jigna, who echoed Rabiya’s voice in saying that without money surrogacy is not possible. Being more educated and informed as compared to the other surrogates, she knew well about the governments bid to abolish commercial surrogacy and allow only altruistic arrangement, she said “why will they think about us, we are not important for them.”

For Neelja, surrogacy without money nobody would do. Being a graduate, she works at the Vansh Center and was a surrogate earlier. She outlines why abolishing commercial surrogacy is problematic. She says finding a surrogate within family is tough. Further it leads to a lot of strain in family relations as years pass by. For Anshulata, altruistic surrogacy can be very painful for the child when he or she grows up. She adds that even within altruistic arrangements, there is some amount of transaction involved. Hence a purely altruistic arrangement is not possible.

Sitting on a bed, clad in loose, colorful home-gowns, lazing around, watching TV or chatting, Guriya tells me that money is the only reason why they agree to become surrogates and why it is easier for them to give away the child. She adds, “Money is important for living. I could not have earned so much of money in any other job.” Based on this, she unequivocally furthers the cause of surrogacy. For Lado, money is a life changing reality. Having lived in a rented house for years worrying about the future of her two children, Lado had spent sleepless nights till she got to know about surrogacy. On asking her if she considered surrogacy right or wrong she says, “What is wrong with surrogacy? How can you equate it with baby selling? Why is it dirty? She impinges on me the point that they are not sleeping with anyone so there is no cheating and nothing immoral. She says, “If we are capable of producing babies then why should we not. If we get paid for it then why is it considered wrong?”

The majority of the surrogates clearly favored commercial arrangements. For a very few like Soniya, even altruistic surrogacy is a possibility. She says, “If we can do it for outsiders, why not for our own family.” She says if her sister or someone close to her is suffering from

childlessness, she would happily carry a child for them. Soniya, a vibrant young girl from Delhi therefore is one of those rare women who consented to both commercial and altruistic surrogacy arrangements.

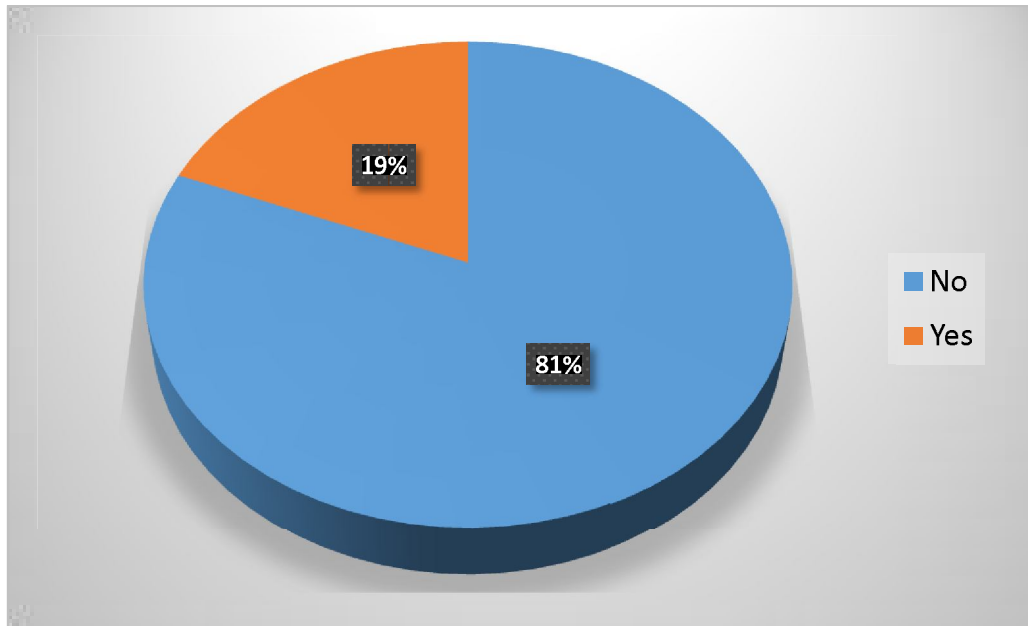


Figure 4.15: Do the respondents prefer both types of Surrogacy?

Clearly evident from my data is the fact that very few women are open to the idea of doing altruistic surrogacy. For a majority of them, money is the prime and only reason why they would chose to be a surrogate. As the above figure illustrates, only 19% of my respondents said that they would be alright to do both forms of surrogacies. A large chunk that is about 81% denied opting for altruistic arrangements.

7) Their views on Law and Contract

Amongst my respondent, a majority of them said that they did not possess copies of the agreement they signed. While all of them did affirm to signing an agreement, they said they did not keep it with them. One of my respondents added, “We trust Nayana Ben and thus we did not feel the need to keep the agreement with us.” Another of my respondents, Tripti was all praises for a contract. According to her, contract spells out all the provisions in black and white terms and hence it leaves no scope for any sort of conflict.

For Lali, whose husband is a primary school teacher, law holds scope to uphold the rights of the surrogates. She expresses disillusionment over the absence of laws that can regulate the surrogacy industry. She believed that the biggest reason for not having laws in place is the fact that the governments do not care about them. This was elaborated on by Rehnumai, who believed that if there were laws in place they could claim their rights just as women in other professions do. However on asking them, what in their conception was the most ideal framework for a law, most of my respondents had to decisive answer.

8) What do they do after their stint of Surrogacy?

Another thing that particularly struck my attention was the fact that a large number of women who worked at the Akanksha Fertility Center, either as attendants, sweepers, nurses or administrative staff were surrogates earlier. Once they can no longer bear children, they seek work at the center in other capacities. One of my respondents, Bela was quick to add, “Sister Nayana is like a Goddess for us. It is because of her that we could build a house, educate our children and give them a good life.”

On being asked if they feel uncomfortable being in the same place where they had handed over their baby to someone else, another of my respondent, Asifa commented, “That child was never mine. I gave it to whom it belonged.” Hetal, who was here as a surrogate twice, and now works as a sweeper remarked, “For us, Akansksha is our home. Whenever we have any problem, Sister Nayana helps us. We understand this place well and work here with love and dedication. If ever we can give back to this place a percentage of what it has given to us, we will be very lucky.” However this was not the only sentiment. Another of my respondents, Rosy who had been a surrogate once when it had just started had come here to seek work. She was quick to add, “now that I am of no use to them, hence they do not help me.” Therefore while those who were still attached to the center had a very rosy picture to paint, while those who had lost touch, expressed a sense of resentment.

An interesting aspect of women’s life in the surrogacy home is that they create a sense of sisterhood amongst themselves. While conducting my interviews, what was evident was a sense

of mutual care that these women had towards one another. One of my respondents during the interview told me how all of them shared their worries and happiness with each other. Another sense that prevailed from the field was that women felt they were better taken care of during their surrogate pregnancies. To elaborate they said that the nutrition and rest they had received during their surrogacy was very good. Their only complaint was that they felt too confined in these surrogacy homes. They had no access to the outside world which was a very isolating experience. While their families could visit them on Sundays, it was too short a span of time for them. My respondents also narrated instances of vocational training like making paper bags, candles, and handmade products amongst others. These they suggested would help them in starting their own work once they deliver the baby and go back home.

9) Does surrogacy based pregnancy have any ramifications on their bodies?

Surrogacy is not only an emancipatory story. Instances reported in the media often highlight the repercussions it has on women. To ascertain this, I asked my respondents if they feel any stress in their bodies on account of surrogacy. One of my respondent opined that it is like normal pregnancy normal and hence there is no pain. She did not know of any sort of complications that her pregnancy could hold for her. She suggests, “I was told I should not walk or do strenuous activities, and I should not eat very spicy food.”

In 2010, 17 year old, Sushma Pandey who had donated eggs at a fertility clinic in Mumbai lost her life just two days after donation of eggs. In an interview to the Indian Express, her mother Pramila noted, “My daughter was healthy. She was tapped by an agent, Noorjahan Munir.”³⁶³ When the police prodded Munir, she said that she had met Pandey at the local and that is how she had inducted Pandey into the system. This death also resonated in Delhi where a 23 year old girl lost her life. She had undergone egg donation at a clinic in Lajpat Nagar in Delhi. What was most unfortunate is that the clinic did not take the responsibility for it. She in fact pushed it to some unknown disease that this year had. With their deaths, various questions emerged bringing surrogacy at the center of intense debate and controversies.

³⁶³ Pritha Chatterjee, Mayura Janwalkar, ‘The Great Indian Bazaar,’ *The Indian Express*, 9th February, 2014.

The majority of the surrogates will have caesareans. “We have to cut our stomachs for money,” says Paru, a blunt 32-year-old surrogate. “It’s not a bad thing, is it?” If it helps to improve conditions of their lives, most of my respondents saw no problem with being a surrogate.

The entire process of surrogacy has not been an easy one for Daisy, a 35 year old surrogate. According to her, when she first came to the Vansh center, she had a baby she was breastfeeding. The doctors told her that she had to stop breastfeeding if she was to become a surrogate. She needed money and hence she was given medicines to stop her producing milk. After that she was taken to the clinic for the procedure by her agent. However, nearly two months after the procedure, in an ultrasound it was realized that the foetus in her womb had no heartbeat. She had to thus undergo an operation. From here the story of her agony began. While she wasn’t paid anything for it, the operation conducted led to complications, the side effects of which she bears till date. Daisy’s story resonated with that of another surrogate mother who undertook surrogacy for an Australian couple. She described her labour as being extremely traumatic considering that she lost a lot of blood. Her cuts led to infection and the worst was that she received no care from the hospital once the baby was born.

Further elaborating on the emotional ramifications, one of my respondents suggested that, “Having lived at the center for the nine month, she says while all the facilities were good, the most difficult part was living away from the family for so long.” While the surrogates make friends and their families are also allowed to visit them, it is tiring and ‘boring’ to live like this cut off from everything. This was an extremely isolating experience for them. This view has been elaborated upon by medical anthropologist Elly Teman who found “that being thanked was crucial for surrogate mothers.”³⁶⁴ According to Teman’s research, when surrogates were not thanked, they grieved.³⁶⁵

³⁶⁴ Abby Rabinowitz, ‘The Trouble with Renting a Womb,’ *The Guardian*, 28th April, 2016.

³⁶⁵ Ibid

4.5 Voices from the Operators and Staff of Surrogacy Centers

Surrogacy from the Perspective of Medical Practitioners

While there is an evident demand for surrogates considering the fixation of couples to have one of their flesh and blood coupled with an ever increasing strata of people who due to compulsions of life find surrogacy the most viable line of work, what is of principal significance is an agency or an entity that can match this demand with supply.

It is here that the role of medical practitioners becomes crucial. Their role is neither white nor black, infact they have the greyest role to play in the entire process. While on the one hand feminist contention with exploitation of women surrogates, begin by targeting these agencies that create a market for the sale and purchase of women's bodies thereby perpetuating harm and violence against them, on the other hand are the policy makers who seek to tighten their grip on these agencies so that they do not become arbitrary. It is this multi casting of these agencies, doctors, nurses, agents and staff that make it imperative to understand how they function and how they interpret this work. It is only when this is done, can we argue in favor of them or in their opposition.

With this in mind, my first area of analysis was Akanksha Fertility Center based in Anand the details of which have been mentioned at length in the section laid down above. Operating under the aegis of *Dr. Nayana Patel*, *Akanksha Fertility Center* has radically restructured the surrogacy industry in India. As a consequence a number of surrogacy clinics have opened up in India. Her popularity is exemplified by her featuring on TV programs including Oprah and NBC's Today show.

On my way to the Surrogacy Center to interact with Dr. Nayana Patel, I had a meeting with an auto driver, Vithal bhai whose wife had earlier been a surrogate here. According to him, Nayana Ben has 'revolutionized' their lives. He said she is like a 'representative of God' for a large number of men and women in and around Gujarat. Surprisingly, this was the impression that most people had be it a bus conductor I travelled with, an auto driver who needed no directions beyond "Nayana Ben's clinic" or a nearby restaurant owner. All of them found nothing wrong

with being a surrogate or in ‘dealing in babies’. What was most stark for me was that all these people I interacted with were men who found nothing ethically wrong in carrying someone else’s baby. However their patriarchal mindset was evident in this too. Their acceptance to it was conditioned on the firm assurance that these women did not have ‘sexual access to other men.’ That is what is right with surrogacy and this is what is wrong with prostitution, one of my respondents unapologetically claimed.

With this grand narrative of Dr. Patel in mind, I approached her office. With an extravagant infrastructure and spacious cabin, the first image of Dr. Patel is that of a woman who exhibits immense poise. Clad in a saree, she sat opposite me and began curiously asking about student politics at my university and about my work in some detail. This having broken the ice, I began my discussion on surrogacy with her that lasted for over an hour.

Patel once wrote: “At one end of this world, there is one woman who desperately needs a baby and cannot have her own child. And at the other end, there is a woman who badly wants to help her own family. If these two women want to help each other, why not allow that?” Hence I began my interview by asking her from where did her journey began. She says the genesis of the idea came from a UK couple wherein the grandmother gave birth to a child for her granddaughter. When this pregnancy became successful, people from far and wide began approaching her for the same. This made her start surrogacy services at her clinic for it would help both the childless parents and the surrogates in improving their lives. She says she started with the premise that she would provide *quality care and standard medical services* to the surrogates while also helping those who do not have children.

Nayana Ben as she is famously referred to claims to have set in place the hub of surrogacy in the country. She says it is a myth that only poor women get into egg donation. “I also have women who are bankers and high-ranking executives. But we make sure that the women are counseled and willingly consent to taking injections for 10 days. We take appropriate care and discourage young girls coming forward to be egg donors. It is best to take in a woman who has at least one child of her own,” she says.

My next question to her was pertaining to the feminist contentions of commodification and objectification of women's bodies that is a rule in the phenomenon of surrogacy. She began by counter questioning me: "*How is it commodified?*" She went on to add that unlike other medical procedures like kidney donation or blood transfusion, in surrogacy the surrogate woman's uterus is safe and healthy. She argued that what is the harm in being a surrogate, when it is for a good cause. The process is similar to normal pregnancies and at the end a baby is born, a family is completed and the other family is ensured a much more financially enabling life. For her, *commodification, commercialization are all misnomers.*

In context of the proposed ART Bill, she began by expressing her concern, apprehensions and worries with regards to it. She was quick to suggest that, "*There is never an absolutely true altruistic arrangement.*" Therefore outlawing commercial surrogacy and allowing only altruistic makes no sense. She believes, this very distinction is infact a false one. According to her, some sort of transaction is always involved and that there is nothing free even in an altruistic model of surrogacy. She argued that infact the term commercial in 'commercial surrogacy' is infact an exaggeration. It is rather a '*compensatory form of arrangement*' which does not involve any buying or selling. There is only exchange which is compensated for.

In context of the proposed bill's attempt to deny surrogacy to single parents and those from the LGBT community, she questions this on the ground that there might be some who do not have inclination to fall within the conventional path of marriage or do not have 'normal sexual orientation'. However this does not mean that they would also not have the urge or instinct to have a child of their own. Since they cannot conceive biologically, surrogacy is the only option for them to realize their dreams. She was unequivocal in saying that this move would leave the dreams and wishes of so many unrealized.

Dr. Patel vehemently rejected the idea of abolition that is being forwarded by the state. On the contrary, she *advocated for some form of regulation.* To her mind, regulation can be of extreme significance because monitoring can eliminate those who do not function in accordance to the standard procedures. She says, "there are all types of colleges and universities. Some do great work while others are dismal. But this does not mean you put a blanket ban on all". Similarly

some clinics operating in surrogacy practices are harmful to women but this should not be taken to draw the generalization that all are the same. Further banning will lead to its operation under ground.

Extending this thought, she recommends a blueprint of how regulation ought to look like. To begin with, there should be a national registry in place that has record to all clinics operating across the length and breadth of the country. This will enable the regulation of clinics and ensure that they keep up to the basic minimum standards. This will also help build a uniform criterion that all have to abide by. Further, one of the most contentious aspects of surrogacy is that the amount paid to the surrogates is often extremely low when compared to the kind of labour that their work involves. Therefore, it is imperative to fix a ‘minimum remuneration’ of the like of a Minimum Wages Act. Yet another change that is needed is to regulate the living conditions and medical facilities that are provided to surrogates. This is crucial for both the child and the surrogate. She concludes by saying, “these are some things that are imperative and only regulation can bring them about.”

Patel says “laws governing surrogacy in the US, for example, are weighted too much in favour of the surrogate. There are so many cases where you are the genetic parent and [the surrogate] are blackmailing you. Couples write to us saying that the legal liabilities are so much there, that after paying so much money, they still don’t know if they’ll be able to hold their baby... and that’s what India has taken care of.” Therefore any bill on surrogacy should keep in mind the fact to not commit the kind of mistakes other countries have made.

Concluding on this note, she reiterates that while she roots for regulation in India, she also emphasizes on ethics as being very important. “*See, sex determination—it’s illegal in India but it’s rampant. So whatever you do, there’s going to be unethical behavior. It’s the ethics of the couple, surrogate and doctor, which counts and this can be ensured via regulation.*”

Dr. Nilofar, a gynecologist at the Akanksha Fertility Center took the discussion further with me. She pointed out the process of surrogacy cycle begins with the intended parents. After having failed to conceive naturally, they try IVF which in itself is not a guaranteed way of getting

pregnant. Some couples keep trying this even six to seven times. After failing so many times, surrogacy is their only option. On being asked, why Akanksha is such a sought after destination, she says we are a big name now because of the efforts we have put in and the quality of medical care we provide to the surrogates. She says it is this that has taken their work far and wide by word of mouth. She goes on to refute the contention that surrogacy hampers the health of the women. She says it is like normal pregnancy. Further to ward off any sort of psychological trauma, the surrogates and their families are counseled throughout the period of nine months.

Dr. Sonal goes on to add that debates of commodification emerge only when we do not know the actual condition of surrogates. Economic deprivation is the single biggest reality of their lives. It is their blindness that does not let them acknowledge the positive impact that surrogacy has made in their lives. She admits that parting with the child that they carry for nine months can be tough. For this counseling is provided to them at every stage. They are told time and again that the child belongs to someone else and this helps them in not getting attached to the child. Further, since she does it for her own family and children, she has no urge to keep this baby. Dr. Sejal, a counselor at the Akanksha Fertility Center highlights the fact that there is no genetic connection between the surrogate and the child. This also helps in emphasizing that the child is someone else's. Further, to keep in touch with the surrogate or not is decided by the commissioning couple without any interference from the clinic.

According to Dr. Vipul Parekh, banning is not the solution. He outlines the following:

- The option of altruistic surrogacy is not open for all.
- Social stigma around infertility more often than not deters couples from opening up about their surrogacy. In such a situation, they cannot avail altruistic options.
- Families are increasingly shrinking in size. And hence nobody has time to spare a year from their own lives to carry a child for their relative.
- Absolute absence of any form of exchange is not possible even in the best of altruistic arrangements.
- Further surrogacy within family can lead to stress in family ties.

Sugandh Bhosle, resonates these arguments when she suggests that banning commercial surrogacy will only 'push its operation underground.' This will make it worse for the surrogates who will still resort to it to make money. It cannot be overlooked that surrogacy is a source of economic empowerment for these otherwise hapless women. She went on to state that to ensure that the agreement is on equal terms, a contract is signed between the surrogate and her spouse and the commissioning parents.

Dr. Gunjan Shah, another doctor at the center finds feminist questions of commodification baseless. She is quick to point out that the women are *never treated as commodities*. Infact they are taken extreme good care of. They are the priority throughout the procedure even before the child. Counseling becomes easier because the surrogates already come with the thought in mind that they are going to give birth to someone else's child. Considering that they have their own child waiting for them at home, never ever has a surrogate denied to hand over the child once it is born. She went on to add, "We also counsel the intended couple. Mostly they are prepared to experience parenthood and are more responsible than normal couples because of having to face childlessness for so long." Dr. Gunjan Shah, goes on to outline that surrogates take to it twice or thrice at the maximum. However, if two caesarians are done already, third surrogacy cannot be done. The health and happiness of the surrogate is of prime significance. While the health is ensured by wholesome diet and good medical care, for their happiness a lot of actions are undertaken. For example, all their kids are allowed to stay with them during their summer breaks. The center also celebrates its activities like distributing stationary to the children of surrogates every year before the opening of the academic session.

For Deepali, a research assistant, all medical procedures are highly efficient. The aim is to 'develop as high end technology' as possible. For this the center has a separate research and analysis wing that ensures highly specialized technology is available. According to Namitha, a researcher and a care taker for the surrogates, the most conducive age for potential surrogates is 23 years to 35 years which is the peak of their reproductive years. For the commissioning parents, it ranges between mid 30's to late 40's. Most of the surrogates at the Akanksha Center are from Gujarat itself. While children of the surrogates stay back at home with their families, when they are too young they are allowed to stay at the center with their mothers. There is a

constant effort to give meaningful skills to the surrogates that can help them start a new life when they go back home. Surrogates also feel at home considering that they forge close bonds with fellow surrogates.

Jayati, a former surrogate and now the in-charge for the food of the surrogates living in the center, the *surrogates do not consider the government of any help*. She says that nobody has ever spoken to them, nobody has voiced their opinions and thus any law made by such a state makes no sense to them. She is quick to highlight the fact that since these very poor women do not constitute to the vote bank of any politician, they are forever taken for granted. This demonstrates the restricted and biased mindset of the policy makers.

The next set of medical professionals I interviewed was at the Vansh Fertility Clinic at Gurugram, Haryana. Vansh provides all forms of surrogacy related ‘services’, including sperm donation, egg donation, IVF, surrogates and the like.

On condition of anonymity, my first respondent at the center was the manager of the surrogacy wing at Vansh. She began by highlighting the various achievements of their center in bringing happiness and empowerment to a multitude of women. She stated, “Millions of people across the world yearn for a child and when natural conception or conventional fertility treatment options like IVF fail, then surrogacy becomes an important alternative. By offering comprehensive Surrogacy solutions, we intend to transform the lives of such aspiring couples.”

Interestingly Vansh Surrogacy Centre divides its donors into two categories. One is the regular and the other is the premium category. Dr Priyanka Satija from Vansh says, “If there are specific requirements, like the recipient wants a very tall or fair donor or a foreign donor, we have to look at our premium list. A regular donor gets about Rs 30,000-35,000 per procedure here, while those in the premium list draw Rs 50,000-60,000.”³⁶⁶ Dr Satija in an interview with the Indian Express, claimed “to have an MBBS graduate, airhostess, and young entrepreneurs in her donor registry, running up to 100-150.”³⁶⁷ Dr Satija further stated in her interview that the team at

³⁶⁶ Pritha Chatterjee, Mayura Janwalkar, ‘The Great Indian Bazaar,’ *The Indian Express*, 9th February, 2014.

³⁶⁷ Ibid

Vansh makes it mandatory for a woman to be married and have at least one child considering that this would reflect their fertility and ability to carry a healthy baby. “While it is true that many women donate for financial reasons, the image that they are poor, ignorant, exploited is absolutely false. Women come forward with nuanced queries before donating,” she adds.³⁶⁸

A professional entrusted with the responsibility of spreading awareness about the work of Vansh, Mr. Avinash says, “We are the frontrunners in taking the initiative to organize & corporatise the Surrogacy sector in India & making it medically, legally, socially & ethically accountable through our Pioneering Surrogacy Protocols – PSPs.” According to founding father of the center, Mr. Bajarang, the Director of the Center in one of his interviews had said, “we have developed Standardized Operating Procedures (SOPs) for screening, recruiting, monitoring, compensating & housing the surrogate mothers through a specialised Three Tier Co-ordinationg System.”³⁶⁹ He also mentioned having a large database of healthy, pre-screened surrogate mothers. He further said, “We house our surrogates in our own Surrogate homes where a dedicated team ensures their safety, security, nutrition & compliance with important medical norms.”³⁷⁰ They have an in house team of Legal experts that is adept at catering to the specific legal requirements of clients from various countries across the globe.³⁷¹

Mr. Bajrang further went on to discuss the process of surrogacy at length. While the IVF procedure takes place in Fortis Hospital, Gangaram Hospital and Max Hospital, once the procedure is over and the surrogate conceives she lives in the surrogacy hostel meant for surrogates. According to him the cost ranges from around thirteen and a half lakhs to seventeen lakhs depending on various factors like whether it’s a single child or twins, if it was a C-section or normal delivery amongst other factors. Elaborating on the contract he suggested that a contract is signed between the two parties on the day of egg transfer. On asking him what he thinks about the bill passed in the Lok Sabha, he said it will be the end of commercial surrogacy. However he added that it will only increase women’s exploitation as the unethical operators in the industry will create ways through which they will continue in operation. This however would

³⁶⁸ Ibid

³⁶⁹ Ibid

³⁷⁰ Ibid

³⁷¹ Ibid

be further to the detriment of the surrogate. He opined that once the bill is passed in the Upper House of the parliament, only those surrogacies that take place within the window provided by the government will be able to operate.

According to Mr. Satish, who manages the Vansh clinic, there are only 10% people in the industry who work ethically and 90% function through unethical ways. It is because of these 90% that everyone will have to suffer. On being asked what do they do if ever a situation arises where a pregnancy threatens the life of the surrogate, he said that they cancel the pregnancy even at the last minute. The health and well being of the surrogate is most important for them. On further asking him, if there exists a caste religion perspective to intended parents' choice of a woman who would be there surrogate, he said religion sometimes is a parameter but caste does not come in so much.

According to Dr. Saluja at the center, Vansh as the name suggests has done pioneering work in bringing happiness to lives of many not only in India but across the world by giving them a family. She says, "We assist the patients who are travelling to India as Advantages of medical treatment in India include reduced costs, the availability of latest medical technologies, growing compliance on international quality standards, foreigners are less likely to face language barrier in India."

Echoing the voice of Dr. Nayana Patel at the Vansh, the doctors, counselors, administrators and staff believed that terms like baby selling, baby factory, rented womb are all a result of misinformed judgment. According to Dr. Gandhi, these are all fashionable words that are used by those who are oblivious to the life both the surrogates and the intended parents. He argued, "How is having a baby for someone else equal to selling it?" According to him, it is only an exchange that is mutually beneficial and rewarding."

Another of my respondent at Vansh, who has been counseling surrogates and parents for many years now, with much anger and disgust, told me that the term 'baby factory' is so much an 'exaggerated lie'. She adds, "We are not producing identical stuff in bulk." Instead she said, "We are creating babies for those who really value them". She says that over the years she has come

to the conclusion that intended parents having suffered from childlessness for so long, are much more responsible for the child they take home.

As for the surrogates, Dr. Krishnan says there is no exploitation whatsoever. The surrogates willingly take to this. She questions me, “why don’t you consider it as their choice instead of demeaning it as coercion?” He says surrogates are not always illiterate women arrested in poverty. Even if they are, it is choice they made amidst the various options and alternatives that are available to them. It is imperative for us as a society to accept, acknowledge and respect it. One of my respondents at Vansh had earlier been a surrogate and now worked as the warden of the hostel where the surrogates lived. Having been a tuition teacher earlier, she was much more informed and opinionated. She says the *problem with much of the surrogacy is story is* that it is almost always *constructed by outsiders*. The voice of women in these jobs and couples seeking to it is not catered to. In so doing we unconsciously abide by the same societal stereotype that we had begun to break down.

Not all accounts put forth by doctors and those in the field are so optimistic. For instance, Dr Sukhpreet Patel, working as an IVF doctor in Mumbai, in one of her interviews had said “I am often troubled by the number of women returning to my clinic for second surrogacies.”³⁷² In her interview, she was articulate in saying that repeated pregnancies are dangerous for the women. The desire amongst women who to take to surrogacy pregnancies again and again also reflect the fact that the entire system has failed to alter the life conditions of these women. As an endeavor to work towards it, she said that “I want to teach surrogates skills such as embroidery and accounting. I think they come with that hope that we can make their lives better and this is our responsibility to not break their dreams.”³⁷³

“Every surrogate pregnancy is a high-risk pregnancy,” said Dr Anita Soni, an obstetrician who has earlier worked with the Hiranandani hospital in Mumbai.³⁷⁴ On the basis of her study on nearly 900 surrogate deliveries, she argued that surrogacy arrangements exemplify the risks that are a characteristic feature of the lives of poor women. She went on to suggest in her interview

³⁷² Abby Rabinowitz, ‘The Trouble with Renting a Womb,’ *The Guardian*, 28th April, 2016.

³⁷³ Ibid

³⁷⁴ Ibid

that due to the permission by ICMR to undertake multiple embryo implantations, “42 % of the surrogates had multiple births, which carry an increased risk of premature labour. Sixty-eight to 70% had caesarean sections, which are more dangerous than natural deliveries.” This prompted the interviewer to ask her if surrogacy should be banned. Soni replied, “Not at all. Infact what I argue for is a form of regulation.”³⁷⁵

In an interview with the Telegraph, infertility specialist Dr. Hinduja had commented, “Abuse is bound to happen. Overdoing anything is bad, and will naturally lead to exploitation and malpractices, as has happened in the case of kidney donation,” she says.³⁷⁶ She further adds, “with surrogacy becoming such an attractive reproductive option, to the extent that many well-to-do women are looking to outsource their pregnancy simply because they can afford to the use of the technology is bound to become even more rampant.”³⁷⁷ This impinges upon us the question, if the poverty of one class of women is being exploited by another class for their own vested interests.

It is argued that surrogacy has expanded and deepened immensely. This becomes evident from the account of Dr Indira Hinduja who says “that whereas five years ago I did no more than one surrogacy case a month, today I do three or four every month. While that may be a good thing in cases where surrogacy is medically indicated, it's also spawned a class of women who seeks the process simply to bypass the ordeal of pregnancy. While most of them are women in high-powered careers or those in showbiz, there is the odd homemaker too. It's become much more acceptable now,” she says.³⁷⁸

According to one of my respondents who happens to hold an MBA and has now been working as an agent that caters to the demand and supply of surrogacy services across the country puts forth a fresh argument. She says, “It’s a bit like employing a wet nurse to breastfeed your baby, something that upper class women in the West used to do once upon a time, this works at a much

³⁷⁵ Ibid

³⁷⁶ Shuma Raha, ‘Make my baby for me. And, oh, I'll pay extra for twins,’ *The Telegraph Online*, 21st January, 2013.

³⁷⁷ Ibid

³⁷⁸ Shuma Raha, ‘Make my baby for me. And, oh, I'll pay extra for twins,’ *The Telegraph Online*, 21st January, 2013.

more organic level.” She feels while this can be exploitative, this is the case always. The need is to properly regulate its functioning and she feels after that everything will be fine.

This trend towards resorting to surrogacy as an easy option has led to a lot of apprehensions with the surrogacy industry. In this context, Ranjana Kumari, director, *Centre for Social Research (CSR)*, Delhi says, "Just as we appoint maids to do our household work, some women are now appointing surrogate mothers to bear their children for them. It shows the degradation of our value system."³⁷⁹

An interesting dimension that needs to be underlined herein is that none of my respondents amongst surrogates and medical practitioners said that they provide surrogacy services to those who can conceive but do not due to their ‘lifestyle choices.’ Most of them were vehement in outrightly stating that they do not cater to surrogacy requests from couples who can conceive but do not wish to do so. They stated that all of their cases are of couples who cannot reproduce a child on their own. However, they also did not deny the fact that a lot of inquiries these days are from married or unmarried couples who so not want to undergo the pain of IVF. Despite this, what explains the spread of the sprawling business of surrogacy is testimony to the fact that it's being obviously overused as an easy option.

Having heard the perspective of so many medical practitioners, the most overwhelming demand is for *regulation and not criminalization*. All of them forwarded a position that advocated for legalization and regulation as compared to abolition. “You see, you cannot eliminate what is the reality of life for many”, one of them remarked. “If it is abolished it will begin to operate secretly and that will be very harmful” said another. In the absence of a clearly chalked out policy, women carry on donating eggs and performing surrogacies. Not all clinics follow standard procedures and this is of immense harm to the surrogate mothers. They may or may not possess the confidence to raise concerns with medical procedures, or ask for information. The need therefore is to regulate it. Some form of regulation will not only eliminate the harmful effects, it will also regularize it and thereby give it the dignity that any form of work deserves.

³⁷⁹ Ibid

4.6 Concluding Remarks

While reading up accounts of surrogacy from across the world, two stories that I particularly found interesting have immensely helped me construct some sort of an argument here by way of conclusion.

The first one is of a gay couple Edward and Paul who together had two daughters born of an Indian surrogate. In an interview with them over email, they expressed immense happiness for having completed their family as also providing financial gains to another woman whose family is happier today. Edward and Paul expressed their gratitude to her for completing their family. Paul expressed his desire to send money to the surrogate every year to help her live better but was not sure if they had a bank account or any other medium. Edward was happy knowing that their surrogate opted to do a second surrogate pregnancy which to him is suggestive of the fact that her experience in the first was not an awful one.

The other story is of Shanti, a two time surrogate who had cut up her tummy, borne unparalleled pain and mental trauma to earn the eight lakh of rupees that she did. Today she feels, it was not worth it. Shanti was a bright girl from the southern state of Karnataka who had a chance meeting with an agent once while travelling. He convinced her that surrogacy would ensure a bright future to her. Her first experience she today feels was a ‘honeymoon of sorts.’ She says, “I lived in an air conditioned room, monitored every day, fed good food and paid for it handsomely. It was like a dream sort of life.” Little did she realize that she was caught in a trap from where there was no escape. Gradually she became habitual and instead of finding herself some other work she went in for her second stint of surrogacy. This one however was no less than a nightmare. Early on in the pregnancy she developed complications. As a result she was put to heavy medication that would keep her drowsy. Her misery had just begun. The labor began prematurely and she had to undergo a C-section, the cut of which still pains. Once the child was born, it was taken away even before she could have a look. In a physically dismal state she came back to her husband who rejected her for being impure. He soon left her to marry someone else. What is even more painful is that he took away their only son with him. Shanti now has no

house, no job and no child despite getting pregnant thrice. She is physically in no state to manage her life and is just waiting for the day she dies.

Both of these stories stand at opposite ends of the spectrum. On the one hand is a happy tale of a surrogate and her intended parents and at the other is of a woman with no clue of where her intended parents or the babies born of her are. This juxtaposition most aptly represents the irony that was visible to be during my field research. While on the one hand there were surrogates who had very happy and celebratory stories to share and on the other there were those who found themselves right from where they had begun albeit with a cut up stomach.

This juxtaposition helped me draw my first observation from the field which is there is no uniform way in which the story of surrogacy and surrogates can be mapped out. Each account has its own particularity that needs to be acknowledged and catered to in we are to understand the institution holistically.

Further, what came out as a striking observation is the fact that surrogacy is not something that women take to just once. Infact the only thing that forbids them to do it again and again is the guideline that deters them from becoming a surrogate if they have had two C-sections. Had this not been a requirement, women would become surrogates for endless turns just so as to earn more money. As is evident from the figure below, 55% of my respondents had become surrogates twice while 45% of them had taken to it only once. Interestingly of this 45%, majority of them were young and did plan to opt for it for the second time too.

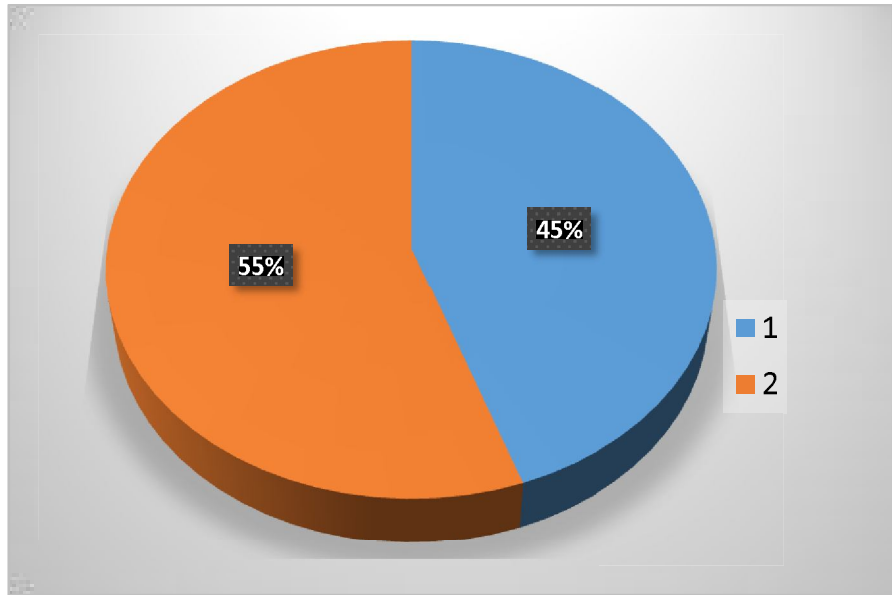


Figure 4.16: How many Surrogacies have you had?

An important consideration that is significant to understand is considering that majority of women said they do it for money, the question arises what does one do with the money they get? My interactions at the field reaffirmed by notion that, ownership of some form of property is a big factor in the lives of Indians as is evident from the following data:

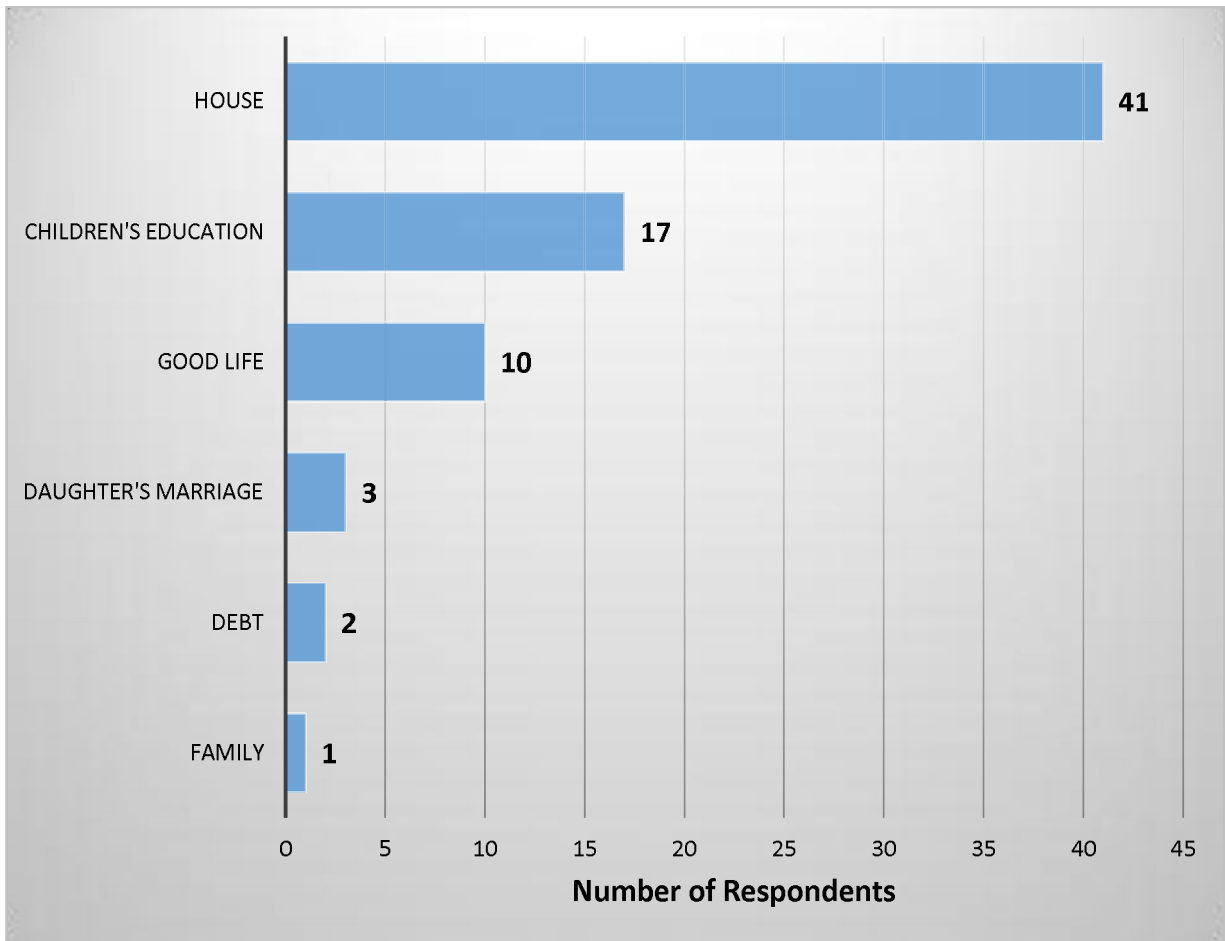


Figure 4.17: What did you do with the money 1st time?

Out of the total respondents, 42 said that they were tired of living in a rented house. Their husband's income was only sufficient to feed them. On occasions they were at the disposal of the landlord for not being able to pay the rent. Therefore from the money they received they have built houses for themselves. These women said that it has not only meant security of living but also meant a far better standard of life and dignity. Further, 17 of them said that in their current income was not sufficient to educate their children. Thus with the money received they have sent their children to better schools in the hope of giving them a better life.

Interestingly, once the house was build the surrogates found themselves caught in the urge to earn more. Surrogacy seemed to them as the most easy and lucrative option. The next time around they used the money for another pursuit that could improve the quality of life for them and their children as is testified from the data below. While 25 of them fixed it for their

children's education, 5 wanted to save it for their daughter's wedding. 33 of my respondents who were only one time surrogates said if they get a chance to become surrogates again they will use it for their children, their education and marriage.

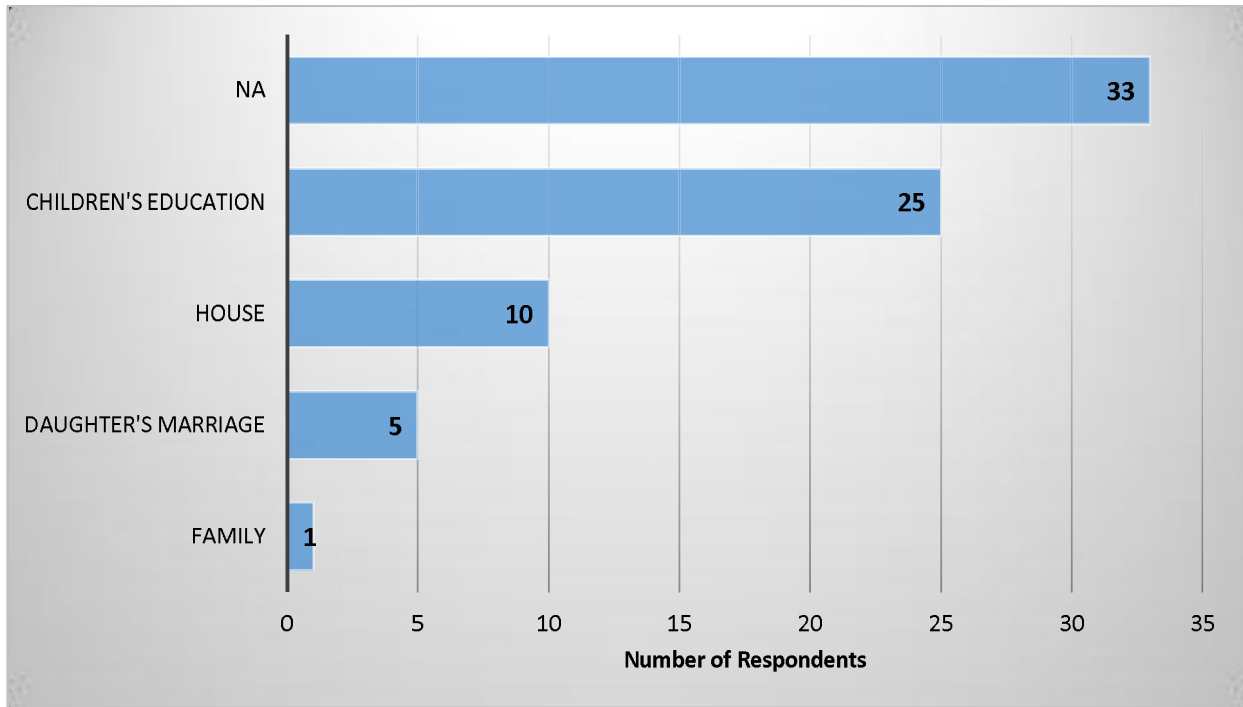


Figure 4.18: What did you do with the money 2nd time?

The most impinging issue with regards to surrogacy today is between altruistic and commercial surrogacy. While some refute it as a false demarcation, others argue in favor of both and yet others make a case only for altruistic arrangements. This debate has acquired deeper horizons with the coming in of ART Bill through which the government seeks to abolish commercial arrangements while regulating altruistic ones. Amidst this long ensuing debate what is not catered to are the voices of women who work like surrogates. It is pertinent to see how they feel about it. My field was diverse and hence while some being closer to the metro city of Delhi were acquainted with terms like altruistic and commercial, those in the land of Amul did not quite know about it. On explaining to them the difference between the two, the response was much as I had anticipated. As is illustrated above, 95% of my respondents preferred paid surrogacy while only 5% did not agree to it.

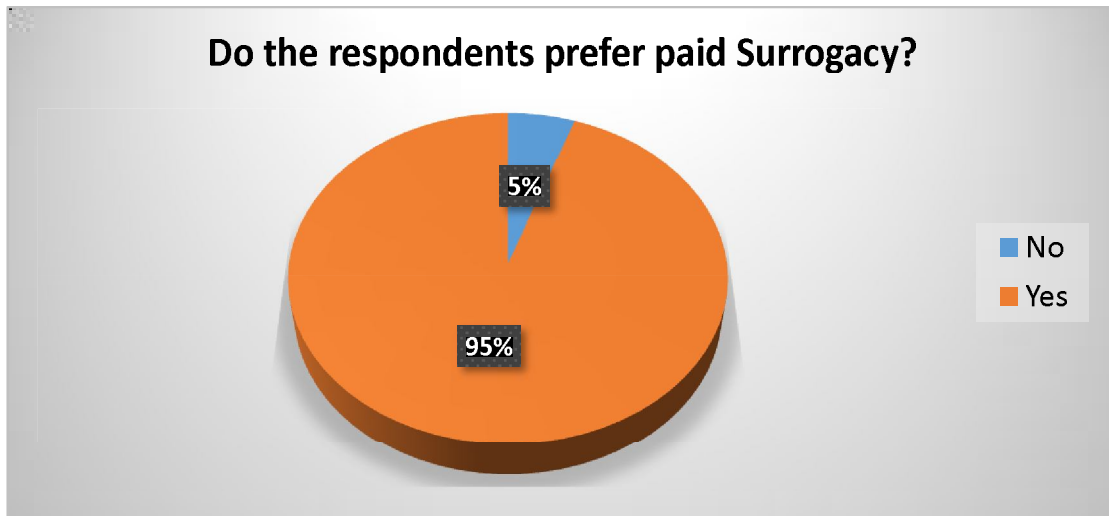


Figure 4.19: Do the respondents prefer paid Surrogacy?

Further, only 22% said yes to altruistic arrangements as against 78% who were against it.

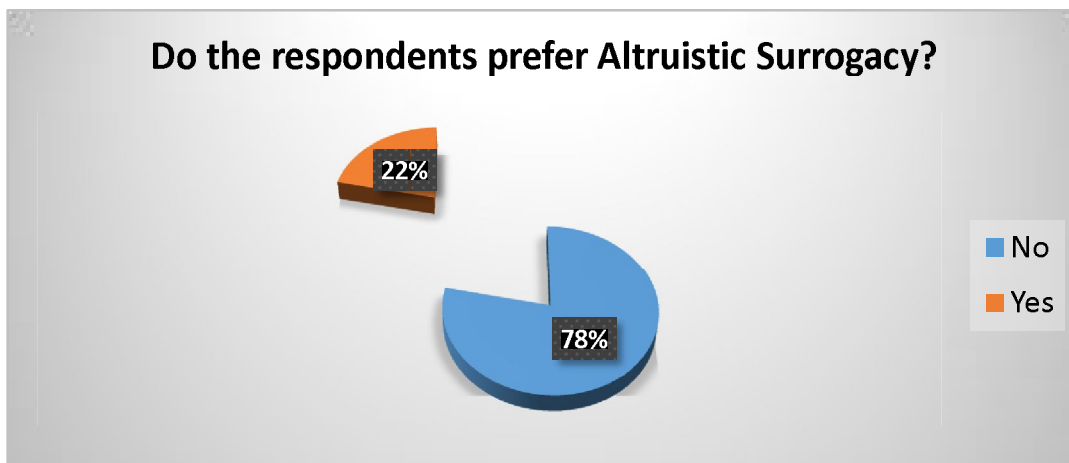


Figure 4.20: Do the respondents prefer Altruistic Surrogacy?

Yet another observation that is crucial is with regards to the contract or agreement. All surrogates spoke of a piece of paper that they signed along with their husbands on the one side and the 'party' i.e. the commissioning parents on the other. None of my surrogates had kept a copy of it. It was mostly kept with the legal department of the surrogacy clinic. On investigating, it was evident that while some surrogates knew and understood the terms of the contract, others had just blindly signed it. In some cases a translator was present when it was signed where in the others the doctor or the lawyer spelt out the conditions.

This makes the agreement extremely problematic perhaps reaffirming to the feminist critique of the very idea of a contract. Because it is framed by the lawyer who represents the clinic or the intended couple, it is highly skewed in favor of them. Secondly, due to illiteracy most surrogates and their husbands do not understand what a contract means. Thirdly, in the absence of a translator they do not gauge its meaning and conditions. Lastly since it remains with the clinic they can alter it as per their wishes without the surrogate even getting to know. Therefore one of the very crucial domains that a regulatory law should look into is how should an effective and mutually advantage bill be framed.

It is also crucial to put forth the fact that there is *huge difference and distinction between how various surrogacy clinics operate*. My observation from between the center at Anand and that at Gurugram is that while the former was much more systematic and hygienic with better health provisions and living conditions, the latter had many lacunae. Long conversations with the surrogates also reflected on me that the general state of happiness of these women was much better than those at Vansh. Alternatively, all surrogate clinics cannot be placed within one umbrella. There are internal distinctions that need to be understood before any policy mechanism can fix its functioning.

Further, with regards to the medical practitioners, it was evident that surrogacy with its magnitude of operation is difficult to do away with and perhaps not conducive too. What was instead needed is its 'regulation.' "The government should remove that ban," one of them said. "The government is not giving any sort of loans to poor people – they are not helping with anything." She added, "Surrogacy is the source from which these women are earning for the future. Maybe only a little bit, but something."

The aforementioned account explicitly highlights how surrogacy with its various forms has come to become a thriving phenomenon in India. While my work focused on its operation in Anand and Gurgaon, it ought to be highlighted that it is a widespread phenomenon in other cities too, namely: Chennai, Garv in Madhya Pradesh, Mumbai and Bangalore are some of the thriving surrogacy hubs in India.

While the primary reason for opting for surrogacy is to get money out of it, this transaction cannot be just understood in monetary terms. Contrary to what is popularly believed, surrogacy cannot be seen only in terms of a commercial exchange. My respondents narrated about the bond they felt with the babies they had carried for nine months which explains the pain they went through when they parted with the baby. The surrogates said that they have never felt the urge to keep the baby with themselves because they always knew that it is not theirs. Further having signed the contract they are not in a position to breach it. If they do so, neither would they get the money nor can they afford the jurisprudence cost that will follow. Therefore they are convinced that at the end of the nine months they will give away the child and go back to their own families and children with the money. Surrogates were also vocal of the improvements that their lives have witnessed with the money they got.

However despite this, on account of being unregulated, surrogacy raises concerns of exploitation. A *CSR report* entitled "*Surrogate Motherhood: Ethical or Commercial*", undertook a survey of 100 surrogate mothers and 50 commissioning parents in the metro cities of Delhi and Mumbai. They found out instances where the surrogate was duped and not given the amount promised to them.³⁸⁰ According to the findings of this report, many surrogates were not provided a copy of the contract they had signed. Further, despite the fact that money was the driving factor for them, in many cases, the entire amount promised was not provided to the surrogate. CSR's head, Ranjana Kumari argued, "There are instances where though they were promised Rs 3-4 lakh, what they finally got was only Rs 1-Rs 1.5 lakh. Mostly, it is the middleman or the agency which cheats them."³⁸¹

To conclude then, it is sufficient to say that there is no one way to look at surrogacy and to theorize about it. One has to meticulously understand it with all its dimensions and compulsions before we can say if it should be abolished or regulated.

³⁸⁰ *Surrogate Motherhood: Ethical or Commercial*, Center for Social Research (CSR),

³⁸¹ *Ibid*

Chapter Five

Chapter 5: DEMYSTIFYING THE VARIOUS DIMENSIONS OF SURROGACY

Implications for Intended Parents, Children and Legal Attorneys

5.1 Introducing the Theme

Society and culture are held together by various institutions. One such institution which enjoys permanence across the globe is ‘marriage.’ Though the marital age varies across societies and communities, a general trend which is visible is the desire to ‘settle down.’ In case of India, as soon as young people touch a certain age, there is immense pressure to get married and settle down. While marriage is considered to be the one stop solution for happiness, stability, love and care, one of the fundamental objectives is to carry forward the family lineage. Clearly then, marriage is considered imperative by society as a whole to beget a child.

While in liberal societies, marriage is not considered a prerequisite to having a child; in culturally less flexible societies like ours procreation is considered acceptable only after marriage. Therefore there exists an intrinsically woven relationship between ‘marriage and procreation.’ It is thus that we see the pressure to have children after marriage. While some couples give in to this pressure, others voluntarily decide to have children. This entire equation becomes problematic in case of those couples who face problems in trying to bring forth children. Over the years, despite numerous attempts when they fail to conceive, couples begin to explore other options. For a long time, as unacceptable as it was, *adoption* was considered as the only available option.

However, adoption is *not always* considered adequate. The desire to have ‘one of their own blood and flesh’ impinges the need to explore other options. With the advancement of *science and technology*, there have emerged newer ways of conceiving thereby providing couples with

the option to have a child biologically related to at least one of them. Of the various options, *surrogacy* has come to be increasingly accepted. This explains why more and more couples are resorting to ‘surrogate parenthood’ bringing the phenomenon at the center of discussion.³⁸² Various causes like the rapid increase in the instances of infertility, immense difficulty and lengthy procedure entailed in adoption, development of newer forms of medical technology, thriving commercial surrogacy agencies amongst other factors have led to increasing publicity and hence public interest in surrogacy arrangements.³⁸³

Having discussed about the surrogates and the medical practitioners in the earlier chapter, the purpose of this chapter is to put forth the voices of the *intended parents, lawyers and the child* all of who play a seminal role in the surrogacy procedure. The first part of this chapter would outline the meaning and types of intended parents. Herein a detailed account of the various types of intended parents, their journey from marriage to realizing their infertility and from trying the various stages of IVF to finally opting for surrogacy and thereafter is discussed at length. The second section would completely put forth the analysis from the field by putting forth the perspective of the intending parents. The attempt is to map out how they perceive surrogacy, surrogates and being parents. The third section of this chapter will deal with an entity which more often than not is conspicuous by its very absence in surrogacy the debates: the child so born through surrogacy. Herein I shall pit the debate between those who prioritize child’s rights against those to speak from the vantage point of the infertile couple. In the fourth section, I attempt to put forth an account of the growing role that the legal attorneys have come to play in the surrogacy process. Here I shall juxtapose theoretical arguments with substantiations from the field by putting forth accounts of lawyers. In the fifth and penultimate section, I will attempt at discussing the relative merits and demerits of surrogacy. The chapter will end by putting forth the key observations that emerged from the field in way of conclusion with statistics that make the debate much more intriguing.

The *methodology* is that of *interviews* conducted with *thirty intended parents* and *five legal counsels*. Some of my respondents were foreigners or NRI couples, with whom interviews were

³⁸² Anita Stuhmcke, ‘For Love or Money: The Legal Regulation of Surrogate Motherhood,’ *Surrogate Motherhood: Law and Legislation* 2, No. 3 (1995): 27.

³⁸³ Nandita Adhakari, *Law and Medicine*: (Central Law Publication, 2012).

conducted through emails. Further to gauge data related to their marital status, caste, religion a pre structured questionnaire was used. Almost all of my respondents agreed to exchange their views on condition of anonymity and hence the names mentioned have been changed to keep their identity hidden. This empirical study immensely helped me in unearthing the gap that exists between theory and praxis. However, it is crucial to point out that the data is not enough to make generalizations on basis of it.

5.2 Surrogacy for the Intending Parents: Meaning, Nature and Types: Journey from Infertility and IVF to Becoming Parents

Expansion in the range of methods that assist reproduction has led to several seminal changes in the human reproduction process. Of these various developments, *surrogacy* is the most prominent one in contemporary times. The *Indian Society of Assisted Reproduction*, points out that “currently infertility affects about 10 to 14 percent of the Indian population, with higher rates in urban areas where one out of six couples is impacted. Nearly 27.5 million couples actively trying to conceive suffer from infertility in India.”³⁸⁴ From amongst this large section of the population, people who fail to conceive either naturally or through the in vitro process, take to the expensive process of surrogacy.

As has been previously discussed in this work, surrogacy involves a woman renting her womb to another couple. In the parlance of surrogacy, while the former is known as the surrogate, the latter are called the intended parents. There is no conventional kind of couple or individuals who constitute the category of intended parent. They can be:

- Married Heterosexual couples battling infertility and thus are unable to carry a child
- Single men desiring to have a child of their own
- Single women who cannot or do not wish to carry a child.
- Same-sex male couples
- Same-sex female couples who cannot or do not wish to carry a child themselves

³⁸⁴ Neeta Lal, ‘India's Hidden Infertility Struggles,’ *The Diplomat*, (2018).

While intended parents who are older are more likely to struggle with infertility, many intended parents are younger as well. It is imperative to point out here that infertility is not solely attributed to females. In the last two decades, 'reproductive health of men' has come to become a matter of serious concern owing to a host of factors, including lifestyle and eating patterns. From about 20%-25% male led infertility some years back, it has now risen to be almost 50% today. As far as the intended parents are concerned, these are generally those couples who are married but have remained childless. One of the fundamental reasons, why the society in general and individuals in particular are obsessed with the idea of marriage is to have children and carry forward the family lineage. It is precisely for this reason that there is such an emphasis on marrying at the right age, because otherwise 'carrying children becomes tough.' However when this dream does not seem to be coming true, there is immense stress within the family as also in the marriage.

Sometimes the children are planned and most of the times they are unplanned. In case of planned pregnancies couples begin to having unprotected sex. The problems stem when they realize that they are unable to have a baby even after a year of unprotected sex - which is the parameter to define infertility. The most common is a kneejerk reaction of denial. Soon the denial turns to anger. Most couples feel their bodies have let them down, their doctors have let them down and finally God has let them down. Children are so central to a family that the couples resort to all sorts of options ranging from working on their lifestyle to conducting *Havanas, pujas and pilgrimages* to appease God. One of my respondents who hailed from Jaisalmer told me who her family took her to every possible religious guru in the vicinity and beyond. She was beaten with peacock feathers, forced to go on fasts, plant flags in strange places and even feed a particular black dog with a *chapaati* for a month. When none of this works many contemplate suicide others are pushed towards divorce or remarriage.

All this goes on to suggest that infertility is 'considered by some' as a curse in India owing to internalization and social stigmas. After all, to be childless in India is almost a curse. "It's not just a problem between husband and wife, it's a social problem," says Dr Prabha Manchanda, a leading Delhi gynecologist. Dr Rajesh Parikh, a psychiatrist at Bombay's Jaslok Hospital, puts the problem in a historical perspective: "*When we made the transition from an agrarian society*

to an industrial one, we failed to make the psychological transition. We have been left with a village mentality where more hands matter to the future."³⁸⁵

Apart from the social and psychological problems, childless couples are faced with other dilemmas – what should be the course of action? Is adoption a choice? If yes, is it acceptable in the family? If no, what is an alternative? More often than not, if they decide to go in for infertility treatment, there are various religious sanctions, that forbid them from doing so. The use of donor sperm, for instance, raises some touchy theological questions. The Roman Catholic Church rejects artificial insemination by a donor (AID) on the grounds that it is based on masturbation and is, technically, adulterous. The Islamic view is no different: AID is adulterous and as such condemned.

The next best option available to them is to opt for *assisted reproductive technologies* that can assist them in conceiving. For those who choose it, in vitro fertilization popularly known as IVF is the popular choice. However the road to IVF is not an easy one and is infact an exhausting and expensive process. On an average it costs approximately one lakh to three lakhs depending upon the technology used. When their IVF process is unsuccessful, intended parents are usually faced with a difficult decision: pursuing a biological child, turning to adoption or choosing to live child-free. After having tried many rounds of IVF, they have to decide which parenthood process they would want to invest in next: ‘surrogacy or adoption.’

Many intended parents who are certain that they need a *biological child*, go ahead with choosing surrogacy, more so in situations where they have remaining embryos from the IVF process. While it is a significant financial investment, some intended parents decide to try one surrogacy attempt with a remaining embryo as a last chance for a biological child. For these parents, surrogacy is not just their last chance at a biological child, but also their last chance at being involved in the entire pregnancy and knowing that a baby will be theirs after nine months. It is pertinent to emphasize here that not all of the infertile people opt for IVF. On the contrary they directly resort to surrogacy. Usually, single parents and same-sex couples desiring a biological child opt for surrogacy as their first and only resort. One of the two partners in the same sex

³⁸⁵ Arun Katiyar, ‘Childless couples: Social stigma biggest problem with infertility in India,’ *India Today*, (2013).

couples legally adopts the child while the other becomes the co-parent so as to abide by law. There are differences even within intended parents. There are three main types of intended parents: *traditional couples, same-sex couples, and single intended parents*.³⁸⁶

Traditional Intended Parents: In the vocabulary of surrogacy arrangements, this is the most popular category of intended parents. It refers to *married hetero-sexual* couples that have been *married* and have failed to procreate. In these cases, one of the two intended parents is the biological parent of the child conceived, while in most cases, both are the biological parents of the child. This sort of a couple is most acceptable socially and legally. The only opposition faced by them is from their families. Once they overcome it, there are comparatively lesser constraints in begetting a child.

Same sex couple: commissioning Fathers understood as gay couples who wish to become parents have to seek help from a woman who then becomes their surrogate. In this case, one of the two partners supplies the sperm which is used along with an egg received from a donor. There are some circumstances where a set of homosexual intended mothers would seek a surrogate mother. Where such a scenario does exist, either the woman is unable or doesn't wish to carry the child.

Single intended parents: there are also instances when an unmarried individual, man or woman does not wish to get married but desire to have a child. They thus opt for surrogacy. Their journey is tougher as compared to heterosexual couples. For instance, in case of single parents, they face a lot of opposition and challenges in single handedly raising the child. Same-sex couples too are victims of societal prejudice based on their sexuality, overcoming which becomes a major challenge. Further, explaining this to the child as they grow up also becomes a difficult issue.

Researching the background of the intended parents, it becomes evident that mostly all of these are individuals or couples belonging to the upper echelons of the society. One of the most

³⁸⁶ Soumya Ramesh, *The journey of surrogacy for Intended Parents*: (2013).

fundamental requirements in opting for surrogacy is to have the adequate financial resources that can help them afford the procedure. The cost of surrogacy starts from somewhere between 15 Lakhs to 40 Lakhs depending on how, when and where it takes place in the country. International Surrogacy is much more expensive and this explains why both foreigners as also NRI's choose India as their surrogacy destination.

Having tried to conceive naturally and considering adoption as not a choice, the most popular method adopted by intending parents across the globe is the resorting to reproductive technologies.

Once the decision to go with surrogacy has been made, they begin consulting the doctor, undergo tests, and procedures and finally they are ready for surrogacy to begin. Having chosen surrogacy, there are some crucial steps that all intended parents have to go through. These are as follows:

1. Choose if Surrogacy is the Viable Choice:

The foremost question that all intended parents need to meticulously grapple with is, whether they are certain that surrogacy is the most perfect way for them. Considering that this is a journey loaded with emotional and psychological turmoil, surrogacy calls for immense commitment and strength. This begins by carefully researching the various facets of surrogacy, its merits and demerits; risks and benefits; ascertain their ability to bear the cost of surrogacy amongst others. One must not proceed with surrogacy unless all their questions are answered. In case of confusion there are counselors who guide parents through it.

2. Prepare for Surrogacy:

Having decided to go for surrogacy, it is pertinent to chalk out their goals, objectives and expectations from such an arrangement. This begins by first choosing the kind of surrogacy they wish to opt for: traditional or gestational.³⁸⁷ Second step is to choose if they wish to undertake this arrangement all by themselves or through a surrogacy agency and an attorney. In case they choose to do it through an agency, they need to research and decide which agency serves their

³⁸⁷ Traditional surrogacy arrangements entail a biological connection between the surrogate and the child born.

purpose the best.³⁸⁸ It is also required at this step to find out whether they need a donor sperm or eggs

Once all this has been decided the next crucial step is to undergo a complete screening process of their health following which the process of surrogacy begins.

3. Finding a match:

Finding the correct match is a very crucial step in the surrogacy process. If the intended parents already have a surrogate in mind, the next step is to chalk out a legal agreement with the help of lawyer specializing in assisted reproductive law. However, for those who have not decided on who will undertake the process for them, surrogacy agencies undertake this job of matching surrogate's with the requirements of the intended parents.

4. Fulfill the Legal Requirements:

Once the intended couple is matched with a surrogate and both consent to the terms of the agreement, the need is to formalise it with a legal instrument. There are many ways of executing this. In some instances both the parties have their own lawyers, while in others there is just one lawyer who represents both parties. Once the contract has been framed and approved by all, the embryo transfer process begins. Prospective Intended Parents are briefed by the attorney about their rights and obligations within surrogacy arrangements. Mostly, a translator is available during this process to ensure that the terms of the contract are defined to all. Once the contracts are signed, the next step commences with it will fertilization and pregnancy.

5. Begin the Fertilization and Embryo Transfer Process:

After the contracts are signed the next step is to begin the medical procedures as has been discussed at length in an earlier section of this work. This entire process is undertaken by the clinic. These procedures include the fusing of the egg and the sperm, the placing of the embryo

³⁸⁸ A Surrogacy Agency can provide all of the services like finding a surrogate, matching it with the intending couple, embryo transfer and so on or just specialize in some of these.

in the surrogate's uterus to name a few. A number of embryos are transferred because the intended couple wants to be sure that at least one of the embryos successfully leads to a live birth.

Gunjan Shah, one of my respondents at Anand came to Akanksha Fertility after years of trying to conceive naturally and through IVF. She said that she refrained from keeping in touch with her surrogate much during the pregnancy and much about her was not revealed to the surrogate, the reason being they wanted to keep their identity hidden. Shah added, "There is always the threat of being blackmailed for more money." It is thus that generally intended couples are encouraged to meet the surrogate mother only after the delivery. Medical anthropologist *Daisy Deomampo*, having extensively worked with surrogates in Mumbai brings forth an interesting term the '*deceitful surrogate*' which is used to refer to the surrogate.³⁸⁹ For Deomampo, "*Transnational surrogacy thrived in India in part because it relied on the fact that surrogate mothers and intended parents rarely, if ever, met face-to-face.*"³⁹⁰

6. Birth of the Baby marks the end of the Surrogacy Process:

After the long surrogacy process, as the time for delivery approaches it is mostly seen that the intended parents come as they desire to participate in the process. After the birth of the baby, the surrogate returns to her family while the baby goes home with their intended parents who now become their legal and social parents.

However this is a long and bureaucratic process. Once the intending parents got the baby, the process for custody begins. If the babies are born healthy, they soon walk out of the hospital with the commissioning parents to the hotel. After all the formalities are done, they take the baby home. This process is a little more complicated for the foreign clients considering that they require an approval from their country's consulate to take the baby with them. The most crucial aspect here is that the intending couple has to prove a biological link with the child. Once this is

³⁸⁹ Abby Rabinowitz, 'The Trouble with Renting a Womb,' *The Guardian*, 28th April, 2016.

³⁹⁰ Ibid

accomplished, an exit visa is issued. It is only after this that they can take the baby home with them.

5.3 Intending Parents: Outlining the Crucial Markers

India has been considered as an inexpensive destination for surrogacy on account of the development of medical facilities coupled with a large presence of young and healthy surrogates. Further in the absence of law, the entire fertility sector functions only on the basis of the ICMR guidelines which are inadequate.

However it has been variously argued that the functioning of the surrogacy industry underwent significant changes after the year 2012 when the Indian government disallowed single and same sex couples from resorting to surrogacy. In this context, the Chief Consultant at the Indian Surrogacy Law Centre, Chennai, Hari G. Subramanian, commented, “*Prior to 2012, a majority of the foreign nationals who came to hire a surrogate in India were either gay or single parents.*”³⁹¹ *Though there are no proper statistics, he said that, “this category of intending parents from abroad formed a sizable part of the clientele for Indian clinics. Many clinics, in fact, serviced only gay or single intended parents.*”³⁹² Despite these changes in law, India continues to be a global surrogacy destination and therefore it is an important field of study that requires in depth analysis.

It is with this sense that my work tried to engage with the various facets of surrogacy. Having dealt with the subject theoretically, my attempt was to substantiate them with field observations. My field comprised of intending parents including married heterosexual, same sex couples and single parents and lawyers working within the surrogacy industry. My attempt in this chapter has also been to put forth the voices of the babies that are at the center of all surrogacies arrangements and yet have not been adequately catered to in the long pursued discussions on surrogacy. This has been done with the help of existing literature that raises the question of

³⁹¹ Gita Aravamudan, ‘Burden of Surrogacy,’ *The Hindu*, (2015).

³⁹² Ibid

ethics in surrogacy from the perspective of the child. Following are the most striking *observations* that emerged from the field:

1. Age of the Intending Parents:

One of the most striking observations with regarding the *age of the intending parents* was that most of them were above thirty years of age. As the figure below illustrates, approximately 77% of the respondents were above the age of thirty. This can be explained in terms of their failed attempts to conceive naturally and through IVF. When nothing worked out, they took to surrogacy so as to have a child.

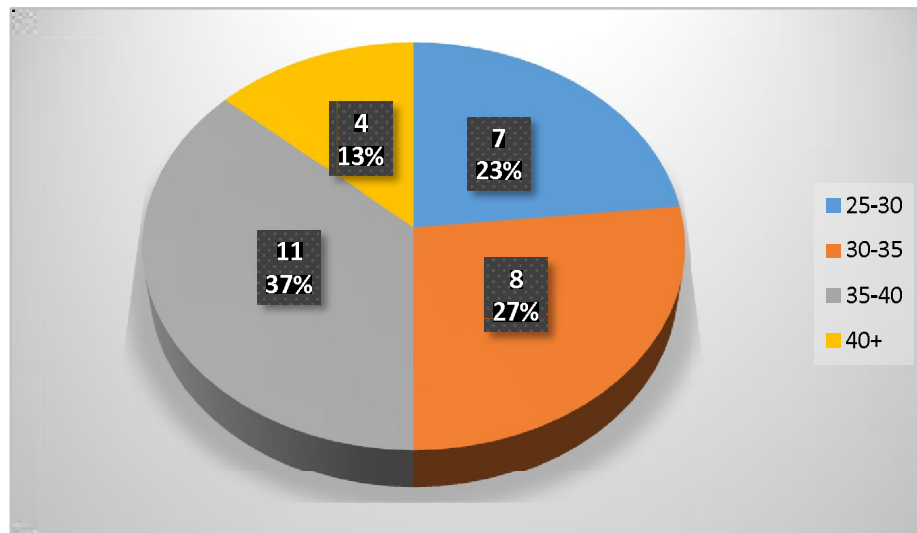


Figure 5.1: Age Range for Intended Parents

2. Data on Religious Background:

Religion is considered to be a defining feature of an individual's life in countries like India. With this premise, in order to find a co relation between religion and surrogacy, I asked my respondent about their religious believes. The trend that emerges suggests that a large number of Hindus take to surrogacy, while amongst the Muslims it is most rare. 23% of my respondents did not wish to talk about their religion arguing that it was a part of their private life, which they did or

did not essentially practice and therefore it did not have anything to do with their decision to go for surrogacy.

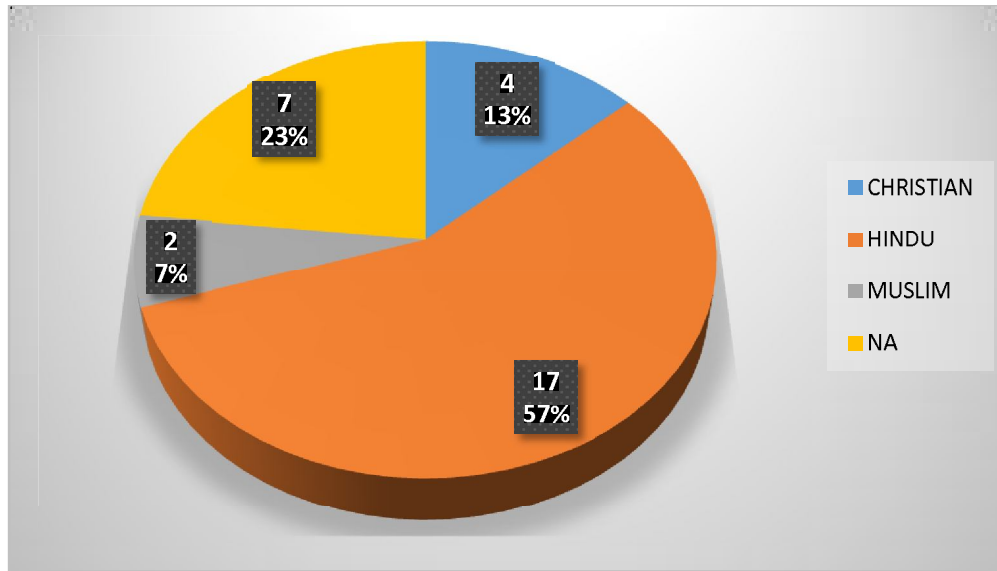


Figure 5.2: Religion of Intended Parents

3. Caste Status of the Intending Party:

With regards to the *caste* of the respondents, while a large section of the respondents did not wish to talk about it, majority belonged to the upper castes. As is demonstrated by the data below, majority of them belonged to the upper castes.

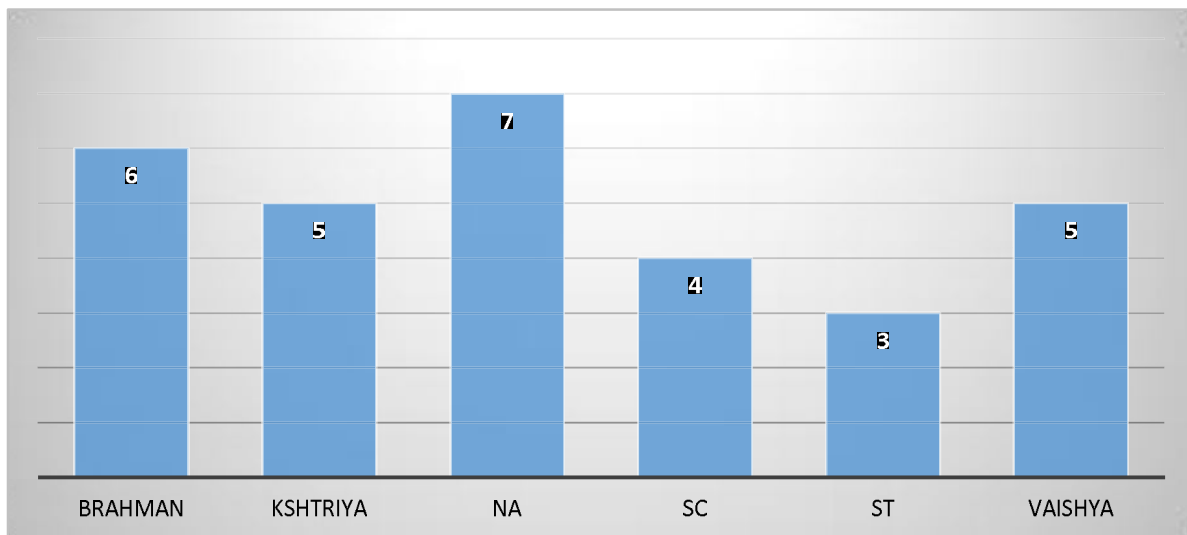


Figure 5.3: Caste Data for Intended Parents

An interesting dimension emerged with caste and religion. Most of my respondents said that the only condition they or their families had was of a particular caste and religion. There was an overwhelming preference for surrogates belonging to upper caste and class. Their families and in some cases even the couples believed that since the child would grow inside the surrogate it was important for the surrogate to be pure. Towards this end, they preferred to have a woman belonging to upper caste and Hindu religion.

4. Data on the Sexual Choices of the Intending party:

With regards to their sexual choices, there seemed to an overwhelming presence of heterosexual couples amidst intending parents. A striking approximately 64% of my respondents were heterosexual couples who resorted to surrogacy when all other options were exhausted without success. Merely 36% of my respondents were same sex couples who chose surrogacy to have a child. However, with the coming in of the recent Supreme Court judgment that decriminalises same sex relations, it can be hoped that the social taboo around it will also erode and would allow more individual to come out in the open to make their choices.

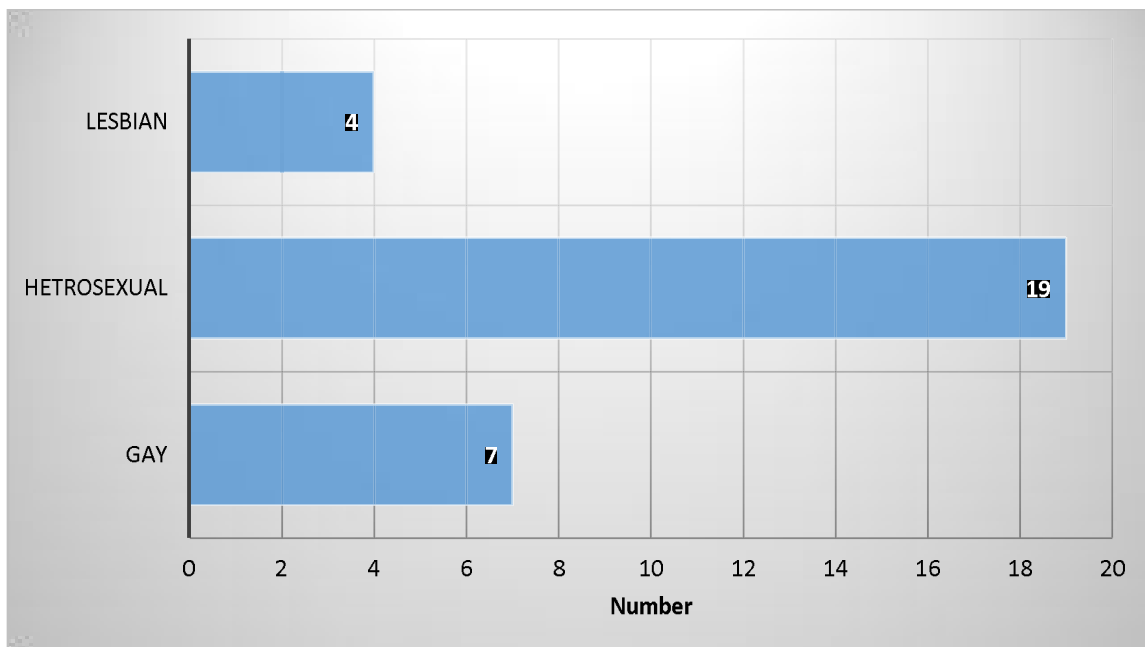


Figure 5.4: Sexual Orientation of Intended Parents

On a related note, my respondents from the Lesbian and Gay community suggested that the coming in of the proposed Surrogacy Regulation Bill, 2016 is a threat to them. Therefore they decided to pre-plan the baby before it could be criminalised. One of my respondents from Bangalore commented, “We were initially planning to have the baby after some years but when the law began to be discussed we thought now is the chance to complete our family or else remain childless forever.” Therefore a surge in surrogacy can also be linked to this sense of concern and apprehension.

5. Marital Status of the Intending Parents:

With regards to their marital status, surrogacy is mostly resorted by married couples unable to conceive and desperately aspiring for a child. A large number of my respondents were also single individuals who chose to be unmarried but still wanted to have a child of their own.

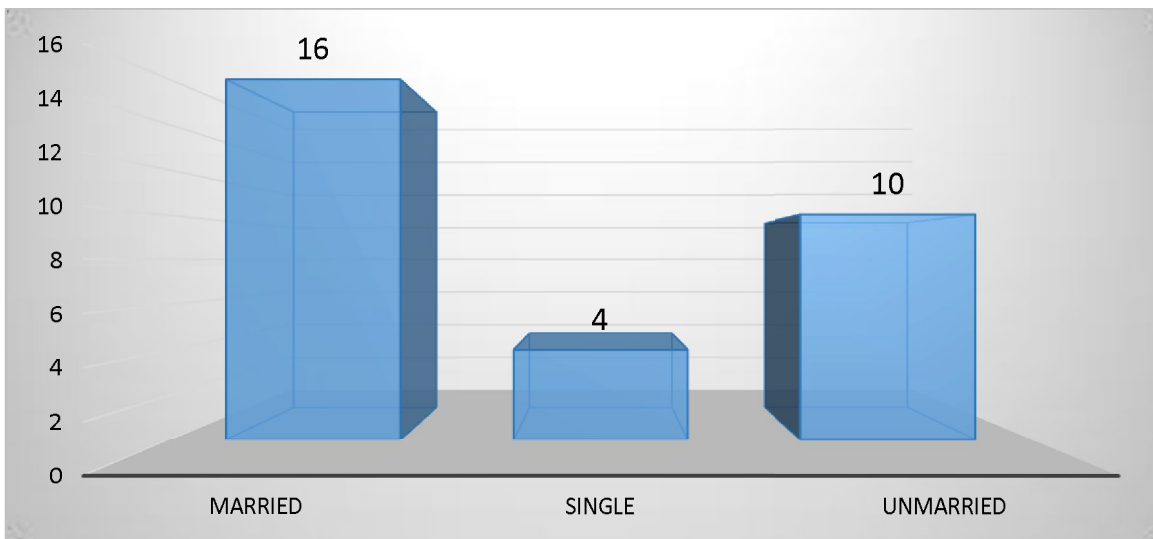


Figure 5.5: Marital Status of Intended Parents

6. Domicile Status of the Commissioning Couple:

The intending parents belonged to different cities and countries. This data is collected on basis of responses from both the surrogates about their ‘parties’ as also the intending parents themselves. Contrary to popular perception, the intending parents do not belong to big metro cities alone.

From my sample it is evident that, the surrogate's parties were also from tier II and tier III cities like Bhopal, Lucknow, Baroda, and Surat amongst others.

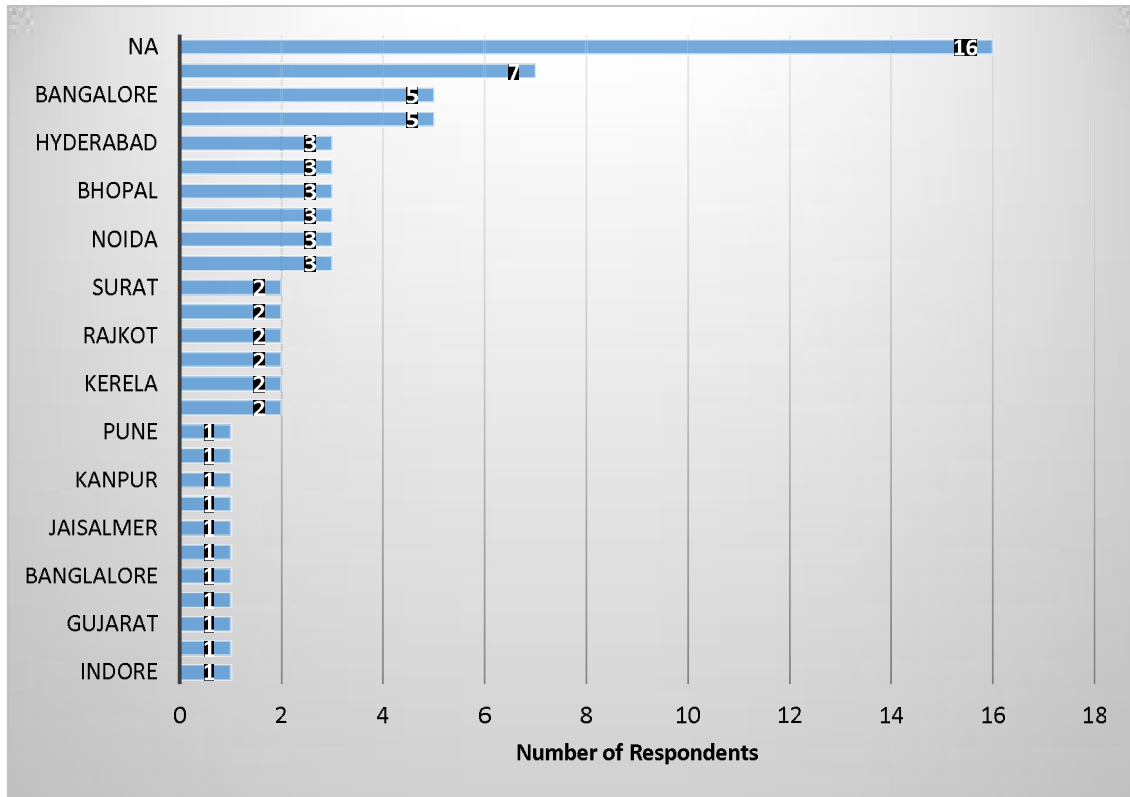


Figure 5.6: Which part of India are the Intended Parents from?

Further, it becomes explicit from the figure below, that India indeed has become the hub of global surrogacy due to availability of advanced medical facilities at relatively very low prices. While these figures have become almost negligible since 2012, a large number of NRI couples still choose India as their destination when it comes to have a surrogate baby. From the account of the surrogates who were in their second periods of surrogacy, it came to light that in their first ones, the party was mostly a foreign couple from the United States, Dubai, Australia, Africa, Japan, Canada amongst others. Interestingly, the surrogates preferred foreign parties for they treated them better and also gave them generous tips. An added incentive was to see a white child being born from their otherwise brown selves.

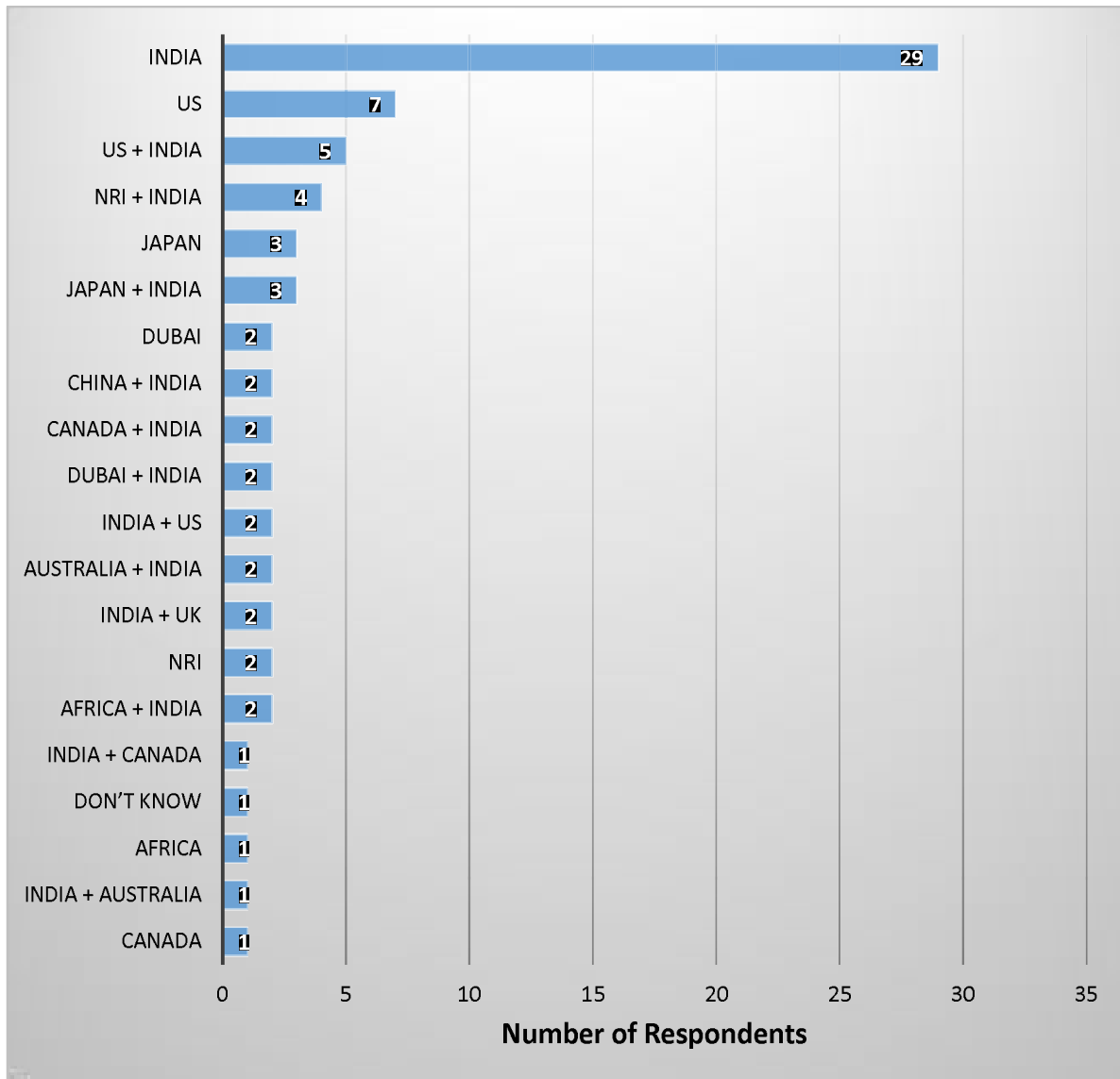


Figure 5.7: Which Country are the Intended Parents from?

7. Knowledge about the Surrogate's Life Conditions:

One of the most striking observations during my field interaction with the intended parents was the fact that these couples or single parents knew almost nothing about the surrogate. They had no idea about the kind of lives they lived apart from the general assumption that they were poor. It was surprising to note that they knew so little about the women who carried their child in their wombs. They blindly trust the fertility center as far as the medical treatment and nourishment of these women goes. Very few of my respondents, answered in affirmation when I asked them, if

they were in touch with the surrogate during the period of nine months. Infact, coming from a philanthropic perspective they all expressed their happiness knowing that with their money, the surrogate could start her life anew.

8. Worth of the Surrogate Woman for the Intending Party:

Further, the health of the surrogate was of principal significance. All of the respondents suggested that they were prepared to let go off the child if it affected the health of the surrogate woman. One of my respondents said, “She is a human first and our surrogate later, how can we play or be casual about her health.” Further, they were prepared to take home the child as it was, be it a girl or a boy, differently abled or not, dark or fair, single child or twins or more. The child was theirs and they would not make choices. All of my respondents said in unison that they were prepared to bear the expenses and therefore there was no chance that they would not pay for the surrogate’s expenses.

9. Source of Information about Surrogacy:

Another observation that emerged from the field is the growing usage of internet as a medium of information. Ten of my respondents attributed their knowledge of surrogacy to the internet. One of them said, “My wife read it on some social media website and from there we began discussing it. YouTube guided us through it. Once we had done all our research, we started looking for an agency.” Another adds, “Internet has made it easier to access information without having to actually go to every place.” Apart from internet, in some cases families informed them about surrogacy. For instance, in case of a couple from Mumbai, her mother in law who lived in Ahmadabad told her about the fertility clinic in Anand and it is from here that their journey of surrogacy began.

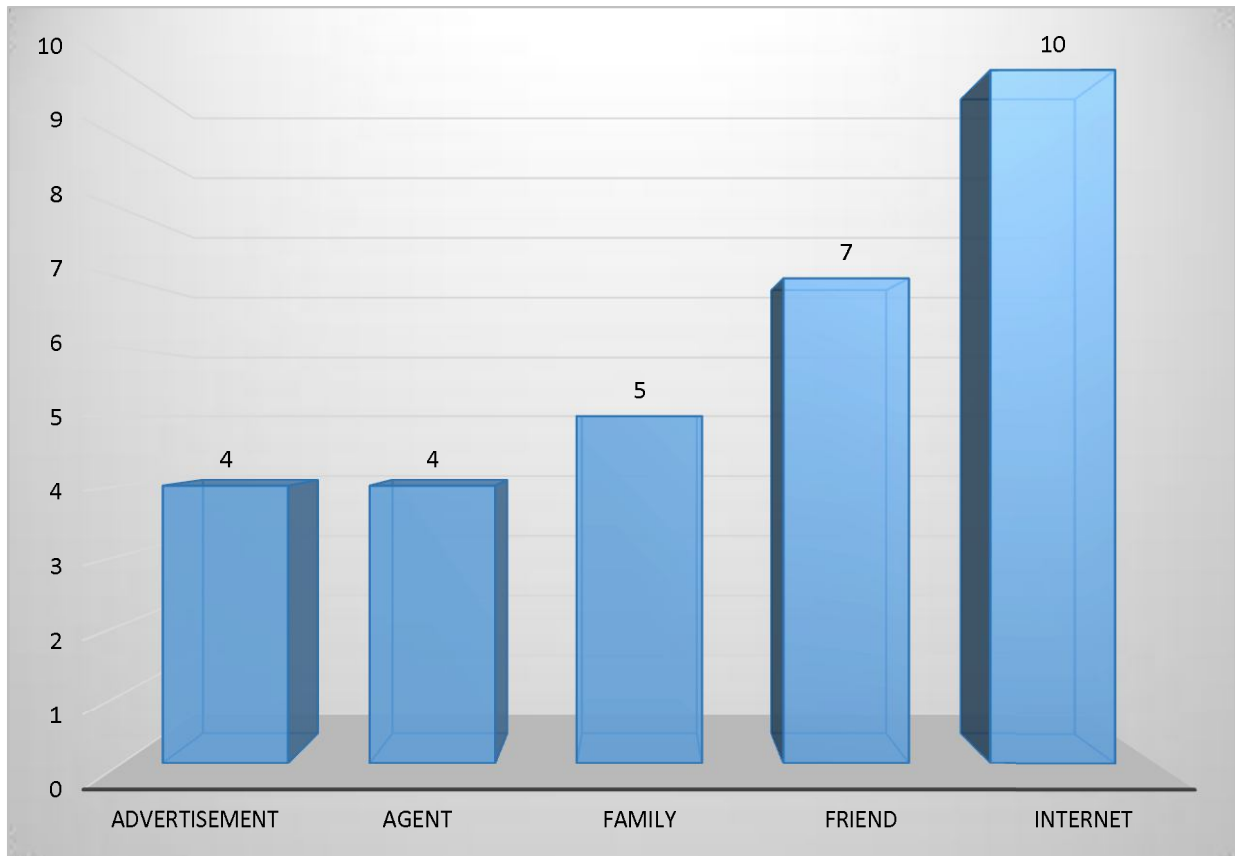


Figure 5.8: How did you know about Surrogacy?

Interestingly, the reach of agents was not as pervasive with regards to these couples as it was when it came to women who became surrogates. Other points of information were friends and advertisements.

10. Did their Families know about their Choice of Surrogacy:

Crucial it is to note that, as compared to the surrogates, the intending couples were more secretive about taking to surrogacy. About 63% of my respondents had hidden it from their families and friends that they were bringing home a baby through surrogacy. The major reason for this was the fear that their decision might not go down well with families, or that friends might tease them or that the child might not be accepted. To keep it hidden, they had moved away from the families so that nobody could know that they were not pregnant.

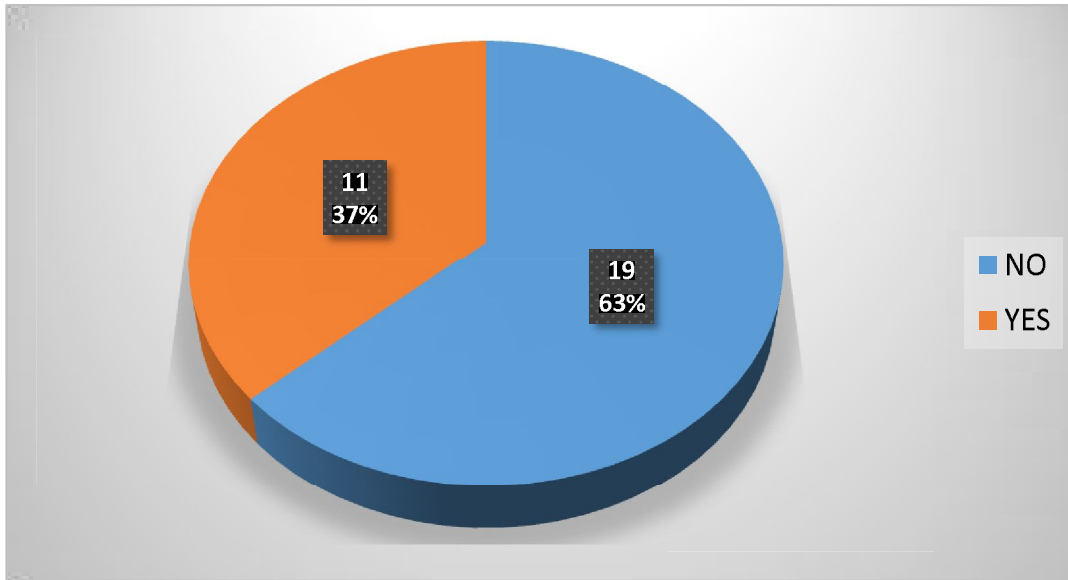


Figure 5.9: Does your Family know?

Strikingly, one of the fear that lurks in the heart and mind of these parents is how would the child react when he or she gets to know about it. Fearing it, they wish to keep it hidden from the child or tell them themselves as and when they feel the time is ripe.

11. Economic Background of the Commissioning Party:

As has been previously mentioned, surrogacy has a definitive class angle. Considering that surrogacy requires a minimum of ten to fifteen lakhs of rupees, not everyone can afford it. One of the starting requirements to even think of opting for it is to have the requisite amount of money for surrogacy treatment. While the cost for it approximately between 10 lakhs to 15 lakhs, in case of foreign couples it goes as high as 30 lakhs to 35 lakhs.

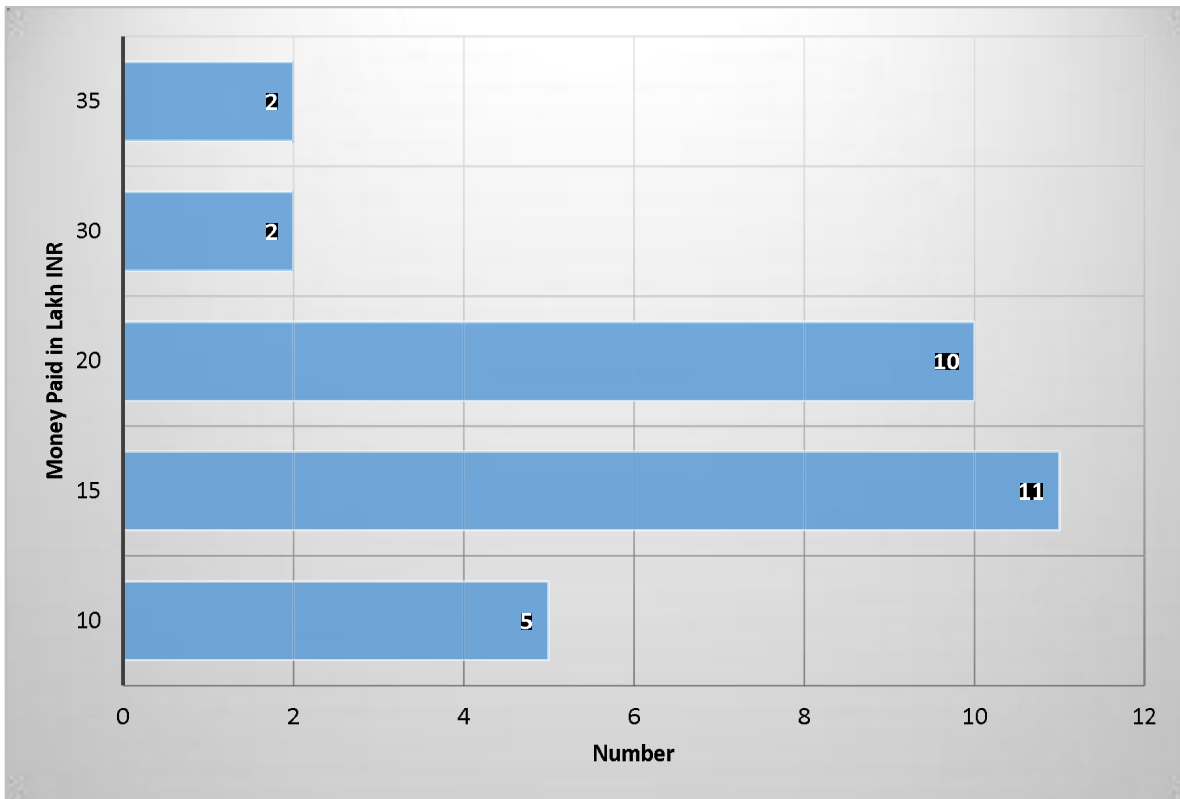


Figure 5.10: Money paid by Intended Parents

While for couples residing in India, the cost is somewhere between 10 lakhs to 15 lakhs, for NRI couples it goes up to 20 lakhs to 25 lakhs. The expenditure covers the money that the surrogate is paid at the end of the term which is somewhere between 4 lakhs to 6 lakhs; the monthly remuneration paid to her; the insurance cover cost; cost of medical treatment amongst others. The cost goes up in case the surrogate expects twins.

12. Relationship Shared with the Surrogate:

With regards to the relation with the surrogate, while all of my respondents had celebratory account of friendship to narrate, what was striking is that very few of them were in touch with her after the baby was born. An overwhelming 53% of the respondents said that they were not in touch with the surrogate and that they had last seen her when she had delivered the baby. This can be attributed to a sense of fear that the surrogate might come someday and want the baby back or that she would reveal it to the family or worst to the child when it grows up.

Further 27% of them said that they were in touch with the surrogate while the remaining 20% said that they interacted with the surrogate once in a while like during birthdays when they would send the surrogate pictures of the child. This however was completely at the discretion of the intending couple and hence they could start or stop it whenever they wished.

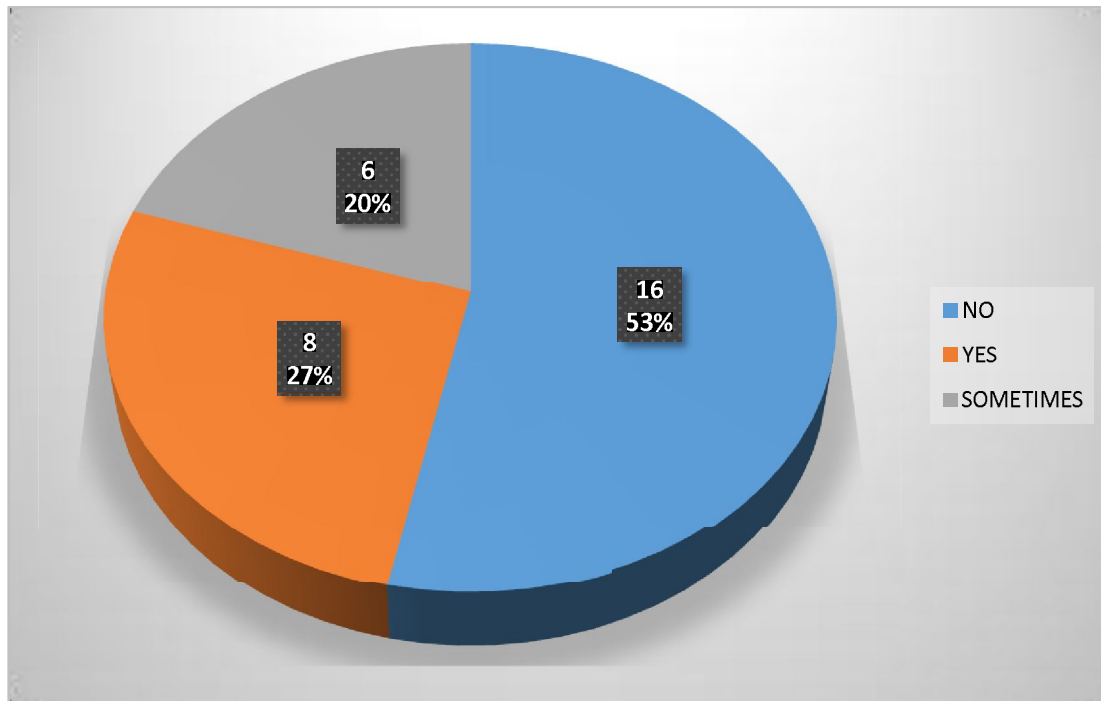


Figure 5.11: Are you in touch with Surrogate?

Having ascertained this crucial data from my field, my prerogative was to bring out qualitative details about the intending parents and their decision to take to surrogacy. On the basis of these observations, the next section brings out the prominent themes that emerged from the interviews conducted by the intending couples.

5.4 Voices from the Field: The Intending Parents Speak

Surrogacy involves various actors, chief amongst which are the intended or commissioning parents. While much of the debate on surrogacy has centered on the surrogates, the voices of the intending parents has often remained concealed. Missing out on this crucial aspect is problematic considering the significant role they play in the entire phenomenon. Gillian Douglas argues that,

*“in the entire procedure, deciding who is to be recognized as the parents of the child is an important matter because it provides the starting point for determining who has the right to bring up. The development of assisted reproduction techniques whereby the genetic, gestational and social aspects of motherhood can be separated has complicated this decision, and has required new legal provisions to settle the ascription of parental status.”*³⁹³

Shoshana L. Gillers in this context argues that, *“the right to raise one's child free from the intervention of the state is a fundamental liberty that has been for long guaranteed by constitutional law.”*³⁹⁴ This liberty however is premised on the assumption of legal parenthood. Determining this legal parenthood becomes difficult in instances like surrogacy whereby a sense of ambivalence prevails. He argues,

*“While the development of scientific technology has made it relatively easier to determine biological parenthood, the question of legal parentage continues to remain in obscurity. However in determining legal parenthood, courts and legal commentators often turn to non biological factors such as marital ties, contractual ties, the best interests of the child, or parental desert too. While each of these factors on its own, or in some combination, could provide a coherent theory of legal parenthood, current law does not reflect such a coherent theory, but rather stumbles between the various possibilities.”*³⁹⁵

Following are the most significant observations that emerged from the field research with intending parents.

1. Reason for Choosing Surrogacy:

While there are many reasons why one chooses surrogacy, the most prominent factor that emerged from my field research was infertility and problems in conceiving naturally. This is well reflected in the accounts of my respondents. For forty year old Jaya, failure to conceive for the

³⁹³ Gillian Douglas, ‘The Intention to Be a Parent and the Making of Mothers,’ *The Modern Law Review* 57, No. 4 (1994): 636-641.

³⁹⁴ Shoshana L. Gillers, ‘A Labor Theory of Legal Parenthood,’ *Yale Law Journal* 691, (2001).

³⁹⁵ Ibid

second time despite innumerable efforts, made her opt for a surrogate arrangement. *Harish and his wife Meeta, narrated the story of their long struggle with trying to have a baby without any success. When all their efforts were exhausted someone told them about having a baby through surrogacy. They reached the Vansh Center and that is how their search came to an end.*

For a business class couple staying in the skyscrapers of Noida, the battle with infertility was a long and painful one. They say, when numerous attempts with IVF failed, they decided to investigate surrogacy. She says, “We researched about a lot of clinics. We were sure we do not want it in Noida since it would be too close to home. We explored Delhi but it was pretty expensive. We then came across an advertisement and that is when we started exploring Gurugram. Our search stopped at Vansh where all our parameters met and that is the start of our surrogacy journey. On the 24th December 2015 we received the call from them that a surrogate was willing to help us. We were overjoyed and began to ‘get to know’ her and her family.” During my interaction they told me that for the entire period of nine months, they constantly kept in touch with the surrogate who lived at the surrogacy hostel. They ensured that best care was given to her and she faced no emotional trauma. The couple adds that for them the labour was the most wonderful experience of their lives as they waited to welcome their twins into the world.

For 27 year old Padmini and her doctor husband, having their own children was impossible. She begins our interaction by telling me, “I have MRKH which means I was born without a uterus and therefore, I’m unable to carry a child. I found this out at just 17 years old. I struggled to understand my condition so focused on other things then, 11 years ago; I met my husband who helped me to accept my diagnosis. We both wanted children and, as I still have ovaries, we started to look into surrogacy. We heard about Surrogacy from an MRKH support group that we had attended.”

For Jayati and Shyamal, a Lucknow based couple who after some months of their marriage began planning their family. It is here that Jayati realized that she was suffering from PCOS, which made getting pregnant on her own very difficult. After several unsuccessful attempts, she finally became pregnant with the help of IVF. With some complications they finally had a baby. After some years they began trying again to have another baby. However even IVF could not

help them this time around. When all their efforts failed, they turned to a fertility specialist in Delhi to discuss their options. It was during this discussion that the couple decided to explore using a gestational surrogate and that was the beginning of their journey to become parents again.

2. Source of information about Surrogacy:

For 32 year old Vanya hailing from Mumbai, she was first introduced to the idea of surrogacy by her mother in law. She says, “We considered adoption too but that was a long process. While contemplating, we always felt the urge to have a baby that looks like us.” Adoption could not have satisfied this urge and therefore surrogacy seemed the most fitting solution to our problem.” Having reached this decision, they soon began their search. Dr. Patel, she says helped them find a surrogate matching their criteria. Soon the medical investigations and procedures began and their surrogate got pregnant.

An Ahmadabad based couple, came to Anand with the hope of completing their family. They came to know about surrogacy from a family friend. Their families knew about the entire situation and did not object to it. Bhopal based Kaveri and Alok, got to know about surrogate on the internet. They did all their research on goggle and saw documentaries on YouTube to know the intricacies of surrogacy. Their first thought was, how will they afford it? Having worked out on the financial aspect, they decided to travel to Delhi away from home so that it could be kept concealed. After several meetings with the team of doctors and numerous tests they finally found a match.

3. Surrogacy as a Lifestyle Choice:

One of the contentions of the traditionalists has been that surrogacy is increasingly being misused by couples and particularly women who do not wish to spoil their way of living. They argue that surrogacy has come to become a fashion statement whereby couples or single parents who can afford it are looking at surrogacy as the means to have a child without having to go through its labor. Citing instances of Bollywood stars like Amir Khan, Sohail Khan, Nicole

Kidman, Sarah Jessica Parker of *Sex*, Matthew Broderick, Robert De Niro and ShahRukh resorted to surrogacy because of their lifestyle choices. They argue that for couples like Shah Rukh Khan and Sohail Khan who already have children, surrogacy is no necessity. It is mere misuse of technology. Surrogacy, they argue ensures that they do not have to step back from one's career and they also do not have to worry about the post-partum fat.³⁹⁶ This however is believed to be a highly generalized view of surrogacy.

One of my respondents was a couple who did suggest that surrogacy was a choice they made for a whole lot of reasons one amongst which also was to not let their careers get affected. On condition of anonymity, one of my respondents was a woman who had been in the entertainment industry. At the age of 38 years, she felt the need to have a baby of her own. However she did not wish to compromise on her career or take a break from it. She was unapologetic in adding, "In our industry, we cannot play with our bodies. I have worked hard to get some roles and I cannot spoil all my hard work at this stage." However this was juxtaposed with a strong urge within her and her husband to have a baby they could call their own. Someone told them about surrogacy in Vansh Fertility, Gurugram and they took the plunge. On being asked if she considers it alright to have a baby through surrogacy, the couple were articulate in saying that there is nothing wrong with it. It is a matter of choice both for them and for the women they were hiring. Nobody had the right to interfere in how they wished to choose their bodies.

4. Do their Families know about their choice of Surrogacy:

Unlike the surrogates, who were more open in sharing their surrogacy experience with their families, the intending parents preferred to keep it hidden. Like a majority of my respondents, Gayatri and Arpan kept it a secret fearing their families might object or create hindrances. They told me that once the surrogate was tested positive for pregnancy, they moved out to stay alone and created the impression amidst everyone around that they were expecting a child. There were others like Shyamal who were open about it with their families. He added, "With changing times even mindsets are changing." He tells me that they introduced this idea to their families through

³⁹⁶ They believe that it has given surrogacy an aspirational aura, something that one thinks of as being cool and thus something they too should emulate

a Bollywood movie called Chori Chori Chupke Chupke wherein Salman Khan and Rani Mukherjee, the protagonists of the movie hire a surrogate to help them have a baby. Initially their families had a knee jerk reaction, but gradually they understood and agreed. Their only concern was how the extended family would react? As a solution, they moved to Delhi for a year. Jayati adds, “The baby looks just like us so there is no possibility of anyone having suspicions. They conclude by hoping that the society too will change one day to understand and happily accept surrogacy as a cure for infertility rather than something sinful and demeaning.

Interestingly, all my respondents who kept it hidden from their families found comfort in the fact that the child looked just like them and not the surrogate, therefore there were miniscule of chances that anyone would ever get to know about it

5. Any specific demand:

It is often believed that when opting for surrogacy, intending parties have specific demands with regards to both the surrogate and the bay. To find out about this, I asked my respondents if they had any pre-determined criteria in mind when they chose their surrogates, the most prominent answer was that they wanted women of their religion and of an upper caste.

To substantiate, for Divya, like most of my respondents the only thing her husband and she wanted was to have a Hindu upper caste woman as their surrogate. While in case of Divya, her parents and in laws were adamant about it, in case of other respondents either it was their familial wish or personal choice. This also explained why most of my respondent surrogates were Hindu upper caste women. The supply had to meet the demand. Radhika adds, it is important because our child lives within her womb; therefore her ‘purity’ is essential to ensure. However others like Kaveri and Deepika had no consideration for the caste, class, religion, domicile of the surrogate. They were grateful just for the fact that she had consented to complete their families, everything else was immaterial.

6. Experiences of Same Sex Couples:

In spite of the regressive laws and social taboos surrounding same sex relationships, India has a vibrant LGBT community.³⁹⁷ Despite being mythologically sanctified, this community for long has lived a life of marginalization and has thus lived in a ‘hidden and concealed space’. Living on the peripheries for years, the LGBT community has now begun to come out in public to reclaim their identities with pride. The advent of the social media has also facilitated the formation of communities for LGBT persons, reducing to some extent the ostracism faced by them. In this changing scenario, the purpose of my research was to find out how many same sex couples took to surrogacy and how often did they keep it concealed from everyone. With this in mind, I deliberately included same sex couples in my sample, the accounts of which are outlined as under.

Dev, 36 years old Mumbai based IT professional and his partner struggled for years to find acceptance within their families. However they say, they do not care any longer. Dev added, “Patrick and I struggled for years before we could be together. Even now we feel harassment both socially and legally. When we saw celebrities taking to surrogacy, we felt the urge to bring home our own child.” He adds, *“We would go and pick up a baby on the street,” says 38-year-old Patrick. “That’s the kind of desperation that we were witnessing. Soon we started researching about various options and soon surrogacy emerged as the most conducive answer.”*

For 40 year old Harsh, a stylist, he and his partner Darpan were long feeling a sense of incompleteness after years of their relationship. It is then that someone told them about surrogacy in Anand. Harsh says, “First we were not sure if this could actually happen. So we decided to go to Anand and find out for ourselves.” Darpan adds, seeing so many surrogates carrying somebody else’s child in their womb gave them hopes that changed their lives forever. They both immediately decided to go for surrogacy and started the procedure.

One of my respondents was an American gay couple in their thirties who had undertaken surrogacy in 2012. Reluctant to talk about it initially, they agreed to respond through emails. On

³⁹⁷ The acronym itself stands for ‘Lesbian, Gay, Bisexual and Transgender’.

asking them what kept them away from the surrogates that carried their child, they said they did not wish to interfere with the privacy of the woman who was giving them all the happiness they had been wishing for. They were not sure how much she would like to interact with them. Further, they said that since they were in the United States for the entire of their pregnancy period and because the surrogates were not too technologically equipped, there were genuine barriers to their interaction.

Another of my respondent was a Japanese same sex couple who suggested that their biggest hesitation in interacting with their surrogate was due to their sexual preferences. They were unsure of how acceptable the surrogate would be of it and hence feared she might back out knowing that their sexual preferences. To avoid any interaction, they decided to not come to India as frequently as they wished to. Similarly there was a Chinese gay couple who are certain that they will tell their child about their parent's sexual choices as also about how they were born. They feel it is imperative for the children to know how precious they are for them and to take pride in their identity. Yang adds, "Early on, they will know they were in the surrogates belly and that they have two dads. Eventually, they will understand about the egg donor and a little more about the process. Hopefully, they will come to understand how much they were truly wanted, and the sacrifices that our surrogate and egg donor went through so that we can be a family."

Same sex couples also expressed their discomfort in openly talking about their orientation fearing that no agency or woman would be ready to carry the child for them. She tells me, "Initially we were hesitant in approaching a doctor as a lesbian couple. We finally mustered the courage and today we are so happy we did. Our doctor was very friendly and guided us through it. She told us that one of us could donate our eggs, and for the rest a sperm donor and a surrogate will be matched to us." Their surrogate like all other surrogates stayed at the hostel. She considered herself lucky that she could help a couple while also fulfilling her own families needs. Deepika, says "family was not a concern for us because we are no longer in touch with them. Our choices did not make them comfortable and so we decided to break ties." Deepika and Jassi would meet their surrogate often to ensure she was happy, healthy and satisfied. Jassi adds, "Our surrogate use to be so happy. She would express happiness over the fact that she was being

taken care of so well. Deepika says, it is a relation of mutual obligation. However they do not wish to keep in touch with the surrogate fearing she might want the baby back.

7. Surrogacy for Single Parents:

Just as same sex couples, single parents too face innumerable challenges in their way to become parents. This was personified during my field interactions. For 38 years old marketing professional Vivek who is based in Delhi, being single was a choice. He says, “There was a time when there was a lot of pressure to get married and I was almost on the verge of succumbing to it, but then I realized I am not the person who can offer that sort of commitment to anyone.” He went on to say that he was too focused on his career and being single was a choice he voluntarily made. However he always loved children and wanted to have his own one day. He added, “As years progressed I started missing a child around me. I was settled in my career and thought it was the right time to have a baby.” Vivek was one of those rare respondents who was not fixed with the idea of having a biological child. But when he faced a lot of issues with adoption due to his single status, he started thinking about hiring a surrogate. According to him when he saw surrogates in Anand, he realized it was also a good change to contribute to their upliftment. He found the possibility of changing the very trajectory of both his and the surrogate’s life and that is when he decided surrogacy is the right choice.

For 32 year old Kripi, a lawyer by profession residing in Delhi, being tied to marriage was not a choice ever. She felt that it called for a lot of compromises she was not willing for. She tells me, “as I grew up and started dating men, I realized none of them were what I wanted and I was sure I will not settle for something I am not prepared for. Therefore being single was a conscious choice.” She argued against the traditional view that only married couples have the right to have children. On the contrary she was of the view that being a parent has nothing to do with one’s marital status. For her, having a child was independent of marriage. She too tried adoption but her unmarried status raised a lot of eyebrows. It is during her repeated attempts of adoption that she got to know about surrogacy in Fertility Centers at Gurgaon. She adds, “When I researched and spoke to the doctors, I realized I can have a baby with the help of a sperm donor and a

surrogate. I immediately knew it was the right thing to do.” Today she has a one year old and is extremely happy in taking care of the child all by herself.

8. Relation with the Surrogate:

The most complicated aspect of the process is the relation between the surrogate and the intending party. Some of my respondents believed that they did not want to interact with the surrogate as it could be dangerous for them. Alternatively, once the child is born the surrogate might keep coming back either to meet the child or to hold them to ransom demanding for more money. It is thus that they did not keep in touch with the surrogate once they walked home with the baby. While they were thankful to God they were scared of interacting with her too much fearing they might lose the baby. *For Meeta, for instance the surrogate was no less than God. She commented, “We went from hospital to temples but nothing helped us. When we met our surrogate, we knew we found hope in her and hence she is our God.” Harish adds, “We send the surrogate messages and photographs of the baby but we have never met her since then. His wife quickly adds, “We are scared to meet her, what if she wants the baby back?”*

Contrary to this, a second respondent named Jaya suggested that she constantly remained connected with her surrogate throughout and does so even today. She keeps sending her the photograph of the child every year on her birthday to ensure that she too felt a part of the child’s growing up. On asking her if they ever felt scared that the surrogate might want to take away the children, they said that throughout the period of pregnancy the surrogate would refer to the children as “their children” and not her “own”. Once the babies were born, the surrogate voluntarily gave them away. So there is no reason to be scared.

For an NRI couple originally from Bangalore, surrogacy is not possible for all. To those that it is an option are generally educated and would never demean or ill-treat her. An engineer by profession, Namita tells me, “I would not say that I connected with my surrogate when I first met her but from the time I knew about her I felt so much gratitude towards her.” As months passed, they continued talking to the surrogate and gradually they warmed up to her. She adds, “We were able to go out to eat with our surrogate and her children and spend some time with them

around the holidays. We were in the room with her before, during, and after the birth and got to know her even more. After we got home to New York we texted with her almost daily and we feel that to this day we still get close to her from this far away. We text a few times a week and send pictures of each other's children. It is our hope that we remain close and follow her as her children grow up, with a potential to meet up with both of our families someday."

Animesh, a software professional believes that not for a second did they consider the surrogate as an object that they would use and throw away. For them, she and her family was God sent and therefore they always kept her health and her family's well-being as priority. On being asked if they plan to keep in touch with the surrogate and to tell their child one day about the entire procedure, they say, "we plan to be in touch with our surrogate as our friend and to help her in whatever way we can." As about informing the child, they say they would want to but it all depends on how the child grows up and if by then they feel it essential.

During my interaction with the couple, Kaveri puts forth a detailed account of the time when they first meet the surrogate. She says, "I first met her at my fertility doctor's office. Her long black hair was pulled back from a face with almond-shaped eyes and a casual smile, as if the idea of carrying my baby in her body was no bigger deal than a night of babysitting. With five failed IVFs, a trio of miscarriages, and my 41st birthday behind me, I didn't know whether to shake the hand of this potential surrogate mother or hug her, so great was my fear that she would disappear if I made one wrong move." Alok adds, "I met her husband and he seemed to be supportive of his wife's decision. He told me, we already have three children at home. We do not need a fourth, do not worry this child will be all yours. With the money you give me, we will give our children a comfortable life."

9. Is Surrogacy Ethical in their View?

The most impinging question that is raised about surrogacy is with regards to how ethical a practice it is. To know more about it from the perspective of the intending parents, I questioned them about ethical according to them surrogacy was. Fatima, an NRI provided meaningful insights to the discussion. On asking her if she thinks surrogacy is a fair deal or does it favour

one against the other, she tells me, *“There’s no perfect system, but given what we have and under the circumstances, Patel’s clinic definitely helps create miracles.”* She went on to argue that surrogacy is just like any other transaction where exchange takes place which is mutually advantageous. She adds, *“We needed a baby, they needed money. It is a life changing transaction for both.”*

Yet another of my respondent Saikat was quick to contend, “Why do you have so many questions about the wrongs of surrogacy? Why do you not look at how it is helping too families fulfill their needs.” When I spoke to him about the concern regarding objectifying a woman by technological intervention, he brought forth examples of blood donation and kidney donation thereby arguing that medical sciences has progressed and it would be futile unless it is used to help people. Saikat says that they were all along focused on the surrogate. At no point did they keep the health and life of the child above the surrogate. In fact they first interacted with the surrogate and met her husband and got to know them. It is only after this that, they started the procedure.

Padmini, a teacher by profession was aware of a lot of impending debates around surrogacy. She was of the opinion that at no stage did they breach the sanctity of their surrogate. She says, “We had no issue with keeping in touch with the surrogate. In fact for some months we did unless she herself said that she wanted to go back to her life and not keep meeting us again.” For Padmini, they respected her privacy and have henceforth stopped visiting her. Padmini was quick to add, “we attended all the appointments and were there at the birth. That moment when he was born and put into my arms was just an amazing feeling, finally we were parents!” As for the surrogate, they added in unison that she and her family is their friend for life and they would go to any extent to help them.

Another of my respondents added that for them having the baby was the most fulfilling experience of their lives. What was most surreal was ‘to see how another person could do so much for someone else.’ They say that the surrogate has now become a close friend and she will always be a part of their family. They refute claims of selling of wombs and buying degradation of women for money. The husband adds, “you cannot put negative logic into everything.

Something are beyond it.” The wife adds, “We see how happy our surrogate and her children are now with the money and you can see how complete we are.” They end by asking, “If it is helping both the people what is the harm in it?”

10. Opinion on the Rights of the Child:

I went on to discuss with them the question about the unborn baby, its rights, is it right to the baby to be dealing in it and yet not taking its consent. To this they had a response that I found in all of my respondents. They said, “We have faced childlessness for years, craved for it, have had sleepless nights wishing and dreaming about a baby. The baby matters the most to us. It is the fulcrum around which our entire life revolves. How can we be callous towards it?” The homemaker wife went on to add, “We feel more responsible than normal parents because we know what not having a childhood feels. The journey makes you stronger and prepares you to be a parent because you’re already making huge sacrifices and decisions that will be the best for your children.”

The myriad of voices from the field is reflective of the diversity within the intended parents. However what binds them all is the frustration caused by infertility and the desperation to have a child of their own. All of my respondents narrated a celebratory account of surrogacy, one ripe with happiness and fulfillment.

Having dealt with the standpoint of the surrogates, medical practitioners in the previous chapter, the intending couples of all kinds in this section it now becomes pertinent to explore the role of two more entities which are central to the surrogacy story: the child so born and the legal counsel who give it a coherent shape. This hence is the purpose of the next two sections.

5.5 Surrogacy from the Perspective of the Child: “It’s” Rights and Guarantees

Baby M brought to the front a critical aspect of surrogacy: the right of the baby born. While traditionally the debate had been pitted with regards to the right of the surrogate vis-a-vis the intending couple, in recent times there are growing voices that believe that this view completely obliterates the perspective of the child who has not been a signatory to the agreement. Melinda A. Roberts explicitly states that the interests of the child have been inadequately discussed and addressed in the ongoing debate.³⁹⁸ This child centric approach has been refuted by scholars like Richard A. Posner and Louis M. Seidman who argue that “because the surrogacy child owes its very existence to the commercial contract providing for surrogacy services, the contract cannot be said to harm the child.”³⁹⁹ This argument resonates with the reasoning that has been sometimes put forth by courts in delivering their judgments.

The child’s perspective became evident during the **Baby M** case wherein, “William Stern, the genetic father and Beth Whitehead, the genetic and gestational mother of Baby M, entered into a contract prior to the conception under which it was decided that Stern, not Whitehead, would have the sole custody of Baby M and that Whitehead would not make any claim to the child.”⁴⁰⁰ Based on the *intentionalist theory*, the Sterns were considered the legal parent of the child considering that he had first intended it. Therefore, “*according to the intentionalist theory, she therefore would not be considered a parent, despite the fact that from a biological point of view she is as closely related to Baby M.*”⁴⁰¹ However as the pregnancy proceeded, the intention of the two began to vary. While the Sterns still wanted the child, Ms Whitehead felt that she could not part with the child. Therefore Baby M case pointed towards a crucial factor which is, what happens when one of the parties’ intentions change over time.

³⁹⁸ Melinda Roberts, ‘Good Intentions and a Great Divide: Having babies by intending them,’ *Law and Philosophy* 3, (1993): 287-317.

³⁹⁹ Ibid

⁴⁰⁰ Melinda Roberts, ‘Good Intentions and a Great Divide: Having babies by intending them,’ *Law and Philosophy* 3, (1993): 287-317.

⁴⁰¹ Melinda Roberts, ‘Good Intentions and a Great Divide: Having babies by intending them,’ *Law and Philosophy* 3, (1993): 287-317.

In this context, John Hill, “a proponent of the intentionalist theory suggests that it is needed that the methods used by the intended parents to have a child be ‘morally permissible.’⁴⁰² Another condition that ought to be put in place is that the individuals should satisfy certain minimum standard of parental adequacy. The above proposition has however been critiqued by the opponents of the ‘intentionalist theory.’ They argue that, “*even if one assumes that the proposed intended parents have fulfilled the basic criterion of parenting, the question arises, should the exchange of parental child for money be permitted?*” Melinda Roberts considers this question from the child's epistemic position and not from the perspective of the intended parents or the biological for two reasons”.⁴⁰³

- To begin with the interests of the children have not been accorded their due significance at any academic or policy level deliberation.
- Further it will help us to outline the basic principles that enable the surrogacy child to enjoy those basic rights and liberties that are enjoyed by non-surrogacy children.

In this context, the opponents of the surrogacy arrangements consider it pertinent to outline why it is not always beneficial for the child to be born under a surrogacy arrangement. Firstly, it is argued that in lines of the New Jersey Supreme Court judgments, it was acknowledged that surrogacy prioritizes money over the interests of the child. In the words of the judge, "In surrogacy, the highest bidders will presumably become the adoptive parents regardless of suitability, so long as payment of money is permitted." The element of harm herein is evident from the possibility of an unsuitable placement.

Anita L. Allan reiterates her contention with surrogacy keeping in mind the interests of the children. She has written:

⁴⁰² Ibid

⁴⁰³ Ibid

*"Like commercial adoption, surrogacy turns human infants into a precious commodity. Whether a parent agrees before or after child- birth to terminate parental rights in exchange for money, in the end a child has been commercially disposed and acquired."*⁴⁰⁴

If we investigate this line of thought, it becomes evident that in the transaction of surrogacy the rights and privileges of the child are taken away from them and they are reduced to mere objects. Extending this argument, it has been suggested that any bid to permit and enforce exchanges of parental rights in children for money should be morally impermissible and hence be repudiated. It reduces the child to a mere object with no choice or consent. If one takes cognizance of these arguments, it could be argued that all commercial transactions involved in commercial surrogacy should be banned.

Arguing from a similar epistemic position, Margaret Radin adds that "unlike the case of a prostitute who may choose to sell her sexuality, babies are not choosing this for themselves".⁴⁰⁵ Further as has been argued by Melinda Roberts, when the surrogate and her husband decide to give away the child, they have very little information regarding the parenting ability of the intending couple. She suggests that, "if they are not up to the basic mark, it is just money for which they are handing over the baby blindly to a couple they know very little about." This puts the wellbeing of the child at risk.

Further, in yet another scenario it is pointed out that wherever the placement of the child with the intended parents who are in conflict with one another is upheld, the interest of the child is clearly disregarded. In such cases, if ever there is conflict over custody, and the court fails to uphold the "best interest" test, it will jeopardize the liberties and basic rights of the child. To avoid such a scenario, it is argued by the advocates of children's rights that what is called for is to ensure that all such decisions are taken keeping the best interest of the child in mind instead of focusing on the premises of the agreement signed.

⁴⁰⁴ Melinda Roberts, 'Good Intentions and a Great Divide: Having babies by intending them,' *Law and Philosophy* 3, (1993): 287-317.

⁴⁰⁵ Ibid

However each of the arguments put forth above from the vantage point of the child has a parallel refutation as has been put forth by the supporters of surrogacy. To begin with, they contend that these arguments do not factor in the interests of the infertile couple. Further, even if one was to assume that the interests of the child remain unpredictable and uncertain, it is outweighed by the benefits it reaps to an infertile couple.

Further it has been argued that the contention regarding the parenting ability of the intending parents cannot be justified for one is never sure of their own parenting abilities too. It has been increasingly claimed that, "*the enforcement of an agreement to which the child owes its very existence, cannot be said to be contrary to the child's interests.*"⁴⁰⁶ In this regard, Louis M. Seidman has argued that "*even from the perspective of surrogate children, it is hard to see how non enforcement of the contract would improve their lot.*"⁴⁰⁷ Richard A. Posner has gone on to argue that "*it is very likely that the baby is made better off by the contract of surrogate motherhood, and certainly not worse off for without the contract the baby probably wouldn't be born at all. With the contract, he (or she) becomes a member of a family consisting of the biological father and his wife.*" The arguments put forth by Seidman and Posner hence suggest that "*enforcing the preconception agreement of parental rights in the child for money does not hurt the child, since without the agreement and concomitant prospect of such an exchange the child would never have existed.*"⁴⁰⁸ Therefore even if the conditions provided to the child by the intending parents are less than ideal, they are at least something instead of nothing at all.

In response to these arguments, it is contended that even if one was to agree that without the surrogacy contract the child would not exist at all and that it is overwhelmingly preferable to have the child be born under such an agreement rather than not being born at all, even then it cannot be considered to be morally permissible and if it could be then a wide array of clearly unacceptable practices could also be justified. Thus for instance, in a hypothetical scenario wherein the promise of money in exchange for a newborn's kidney induces an individual to have a child that would otherwise not have existed at all. Justifying the above would also give

⁴⁰⁶ Melinda Roberts, 'Good Intentions and a Great Divide: Having babies by intending them,' *Law and Philosophy* 3, (1993): 287-317.

⁴⁰⁷ Ibid

⁴⁰⁸ Ibid

justification to selling a newborn's kidney and leaving him with one kidney and this would be considered better than not existing at all. Can this be justified, is the question that opponents of surrogacy arguing from the standpoint of the child's rights question.

Advocates of child rights within surrogacy arrangements also argue that the sound sense of judgment of the court or the surrogate who place the child with the intended parents in the child's best interests cannot be overlooked. They outline that in most cases the surrogate knows very little about her intending parents. Hence they believe that this limited set of information is highly inadequate for them to decide what is in their child's best interests or not. It is also pointed out that the lure of money could turn the biological parents blind and hence they would lose all the incentive to probe the intended parents. Under these circumstances, the quality of life for the child so born remains dubious and often obscure.

In retrospect it can be concluded that the advocates of child rights put forth very many contentions with regards to surrogacy. Therefore at the very least, the need is to be careful while such arrangements are drafted so that particular attention is paid to the rights of the child. Supporters of surrogacy on the other hand believe that the benefits brought by such an arrangement outweigh its flaws and this cannot be undermined. This posits a dilemma as to how should the two be balanced. The need perhaps is to put the two positions together so as to be able to work out a viable solution like ensuring that while undertaking surrogacy arrangements, agencies should thoroughly investigate the background of the intending couple to be sure that the child will live in a safe surrounding. Considering that even agencies and surrogates get lured by money, it is pertinent for law to lay down the basic framework within which surrogacy operates.

5.6 Surrogacy brings Law and Litigants in the Domain of Family:

Understanding the Growing Role of Lawyers

The coming in of *Assisted Reproductive Technologies* has also meant a growing role played by lawyers with regards to what was earlier considered family issues. Kim Willoughby argues that *“while traditionally across societies the role of law attorneys was limited to dealing with issues pertaining to rupture of families, in contemporary times with the widespread development in*

ART's and their subsequent use have all led to their involvement in the early stages of the family which is to say the creation of children."⁴⁰⁹ It is suggestive of the fact that assistance in reproductive technologies has brought in, "medical technology and bioethics to the domain of family law. It also forges a new nexus between family law and goes on to implicate paternity and maternity laws."⁴¹⁰ Alternatively, considering that ART's involves reproductive rights, rights of the child, the surrogate, the intending parents, it fundamentally has constitutional law inbuilt in it. While guaranteeing legal rights over the child, it has also profoundly affected the recognition of same sex couples.

As has been aforementioned, "*ART is used by many different categories of intended parents including married opposite-sex couples, unmarried opposite-sex couples, older couples, single parents, married same-sex couples, unmarried same-sex couples and widows and widowers.*"⁴¹¹ Reproduction which has traditionally been associated with heterosexual married couples has come to be reorganized thereby broadening the scope of law regarding who we recognize in parent-child relationships. Thus it has significantly altered the way in which law understands parentage. The diversity within the intending parents goes on to add various dimensions of law which further explains the growing pertinence of lawyers in the realm of family issues per se.

With reproduction becoming commercialized, laws have become all the more relevant at every step of the procedure. For instance in case of trans-national surrogacy, the baby so produced is subjected to the legal framework of many states. Considering that laws across states vary to a great extent, it is only with the help of an attorney can the process be completed. The multiple transactions involved in the ART process, there has been a growing scope of litigation and hence for attorneys in the process.

If one was to delineate, the important areas involved in surrogacy that call for legal interpretation and intervention, they could be listed as the following:

⁴⁰⁹ Kim Willoughby, 'ART - Enter the Lawyer: Surrogacy brings attorneys in at the beginning of the family, rather than at the end of the marriage, to answer probate, paternity, and constitutional questions among others,' *Family Advocate* 32, No. 4 (2010): 36-40.

⁴¹⁰ Ibid

⁴¹¹ Ibid

➤ **Conflict with Gamete Donation:**

Gamete is the fundamental unit which enables the beginning of the reproductive process. It is mature male or female germ cell that unites with that of the opposite sex so as to form a zygote. As has been argued in the work so far, infertility includes the absence of gametes. It is thus that donation of gamete emerges as an option. This role of the donors has been acknowledged by various state laws who have thus formulated laws to deal with conflicts arising out of such donation. This law however is not uniform. To substantiate, in case of some states, the third party donors are not at all acknowledged as legal parents while in other states, they are acknowledged and hence expected to sign off any parental right over the child so born.

All of these call for interpretation and explanations which is how the attorneys become a significant aspect of the process. While it is widely evident that litigation on ART's is sparse, there has been growing presence of contracts or agreements which parties to such an arrangement sign. For instance, sperm or egg donations have become areas where increasingly signing of consent forms is becoming a norm.

➤ **Divorcing Parents:**

One very pertinent concern that has been raised with regards to surrogacy is in lieu of a situation where the intending parents decide to separate before the baby is born. Another area of litigation is in case of divorcing spouses. Under such a situation, the future of the child as also that of the surrogate becomes grim. In this scenario, further two possibilities might emerge:

- In cases where the wife has used donor sperm to conceive, the husband might wish to renounce his paternity so as to evade child support.
- Another possibility is that the wife wishes to disavow the husband's paternity to invalidate his parental rights.

The contention with gamete donation arises chiefly on account of exchange for money. This transaction impinges upon law the need to see if it is at all donation of any kind. It is argued that

when monetary transactions are involved, it cannot really be considered as donation. All of these issues around gamete donation make it a crucial subject of law and therefore there is no surprise that there has been growing legal intervention in it. According to Kim Willoughby, “*Laws seek to answer crucial questions like: What are donors selling? Why are people legally allowed to sell gametes but not body parts? Are gametes purely property? Should an unregulated market control the sale price of a gamete?*”⁴¹² It is hence that legal attorneys have increasingly become party to it by drafting contracts and fighting battles.

One of my respondents was a fifty year lawyer who has been involved with surrogacy procedures and laws over the last two decades. He tells me that earlier his clients were mostly from the metro cities. However over the years due to the spread of the phenomenon and relatively few attorneys specializing in it, more and more clients are approaching from tier II and III cities to get legal assistance. He says, “*Gamete is a very crucial and yet a much hidden aspect of surrogacy. Very often the cases that come to us are after years of the pregnancy.*” However considering that there is a substantial question of law that is sought for addressing their grievances, the role of attorneys become quintessential.

➤ **Issues with Defining Surrogacy:**

Yet another issue that involves interpretation of law is how does one define surrogacy? Willoughby opines that, “*it involves a woman's gestation of a child, which she has no intention of parenting.*”⁴¹³ The line between various forms of surrogacy is very thin and delicate. In many instances, this thin lining is misused by agents and clinics against the surrogates and the intended parents. This makes it essential for the attorney to spell out the meaning and implications of surrogacy in black and white terms.

As was evident from my field investigation, in a majority of surrogacy set ups, the fertility clinics or agencies undertake the task of matching the intended parents with surrogates and hence

⁴¹² Kim Willoughby, ‘ART - Enter the Lawyer: Surrogacy brings attorneys in at the beginning of the family, rather than at the end of the marriage, to answer probate, paternity, and constitutional questions among others,’ *Family Advocate* 32, No. 4 (2010): 36-40.

⁴¹³ Ibid

they are the ones who negotiate the terms of the surrogacy agreement. Further, almost always the attorneys are their people.

➤ **Denial of Surrogate from handing over the Baby:**

The role of litigation also ushers in the extreme situations wherein the surrogate after the birth of the baby or even before it goes back on her words and decides to not give away the child. In such a situation the intending couple and the surrogacy agencies take recourse to their lawyers who help them in getting the custody of the child.

On condition of anonymity, one of my respondents practicing law in Delhi narrated to me a particular instance where in the surrogate refused to hand over the child during her last month of pregnancy. Her husband helped her to run away from the surrogacy hostel. He adds, “everyone got scared but we had their address. We also had an agreement signed by them hence we were not scared. We got the surrogate back and after she delivered the child, we paid her.” He further admits that as time has passed and as the surrogacy industry has spread farther, the role of law and lawyers has only increased manifold.

➤ **Denial of the Intending Parents Couple from taking the Baby and Making Payments:**

Kailash Nanawati, a lawyer puts forth an instance where the surrogate and the agency were in a tough spot due to denial by the intending parent couple to take home the baby and pay the remaining installments. He recalls an instance where a Hyderabad based couple started facing troubles in their marriage and soon headed for separation. This became most problematic for the surrogate sitting kilometers away who did not know what to do with the baby. She had three kids at home for whose future she had taken to surrogacy. Now she did not have the money and did not know what would happen to the child in her womb. The agency also was in a fix not knowing what to do. In this situation, Mr. Nanawati, put forth the provisions of the agreement to the couple which was binding on them. They therefore made all their payments, the child was adopted by the mother and is now being raised by her while both parents support the child's upbringing.

In all of these cases, the question of parentage becomes of crucial significance. What makes the matter more complex is that on the one hand are the economically better off intending parents and on the other is the financially weaker surrogate and her family. The entity that links them is the fertility agency. To ensure that there is no breach of rights, it is pertinent to legally establish parentage. This task is performed by the courts which issue a pre or post birth orders which establishes the intended couple as the legal parents of the child. In most instances, the surrogate relinquishes legal rights over the child following which one of the intended parents adopts the child while the other becomes the co parent. In cases where, these options are not available, the child has just one legal parent. In states that deny homosexuals or unmarried individuals, only one of the two are listed.

All of these procedures require a careful interpretation of law which is where lawyers come into the business of surrogacy. They draft these contracts, get them signed and therefore give a legal guarantee to what has been promised in surrogacy: the exchange of the child born for money paid. Ashok Rai, one of my respondents is a lawyer by profession and has specialized in surrogacy related laws over the years. He argued that just as exchanges can take within family, surrogacy makes possible exchange outside of the home. According to him, commercial surrogacy is even better considering that it improves the living conditions of numerous women and their families. He further added that there is no sexual exploitation considering that women working as surrogates only rent out their womb and not their sexual services.

Another of my respondents, Mohan Bhai who works as the coordinator of legal services at Akanksha Fertility Center tells me that it is mandatory for both the surrogate and her husband and the intending parent couple to sign the contract. The contract explicitly lays down terms of the agreement and ensures that both parties benefit out it. On asking him, what is the course of action if any of the two breach the terms, he says, “this has never happened till date. Since the party really wants the child, so they pay for it as decided. Similarly since the surrogate wants the money, she hands over the child to the party at birth. However if ever an instance arises where any of the two parties refrain from upholding the terms of the contract, the court shall help settle the dispute.”

The biggest take away from my interaction with the lawyers was the sentiment that Mohan Bhai reiterates, “We always keep the legal counsel with us.” This explains the fact that law and its practitioners who were for long considered to have a role in family only when it is on the verge of breaking through a divorce or is caught in property disputes, have now come to play a seminal role in how a child is born in surrogacy, the nature of the contract, its enforcement and remedy in situations where it is needed.

According to Willoughby, “*What is fascinating about surrogacy is the intersection of technology, rights, ethics, and law. Reproductive rights take on a whole new meaning when reproduction is subject to contracts.*”⁴¹⁴ It has been widely argued that while mostly governments do not intervene in the domain of reproductive rights, this has begun to change with coming in of reproductive technologies that are adding newer dimensions and complications. It shall not be an exaggeration to conclude that these factors succinctly explain the increased litigation in the ambit of reproductive technologies and hence there is evolving practice area for family law practitioners.

The role of legal counsel however is not as celebratory as the above account suggests. A closer introspection suggests that the role of a lawyer in assisted reproductive technologies (ART) can be embedded in conflict of interests. This becomes much more nuanced when we look at what Susan L. Crocki refers to as ‘collaborative’ or ‘third party’ ART arrangements.⁴¹⁵ These are a particular kind of arrangements wherein there are not just two intended parents instead there are very many actors involved each with its own set of interests. This is further underpinned by the presence of a multi-state and at times even an international variation of many collaborative arrangements. For instance, in some cases the egg donor, the sperm donor, the intending party and the surrogate can all be from different countries and hence subject to different jurisdictions.

⁴¹⁴ Kim Willoughby, ‘ART - Enter the Lawyer: Surrogacy brings attorneys in at the beginning of the family, rather than at the end of the marriage, to answer probate, paternity, and constitutional questions among others,’ *Family Advocate* 32, No. 4 (2010): 36-40.

⁴¹⁵ *Ibid*

In retrospect, assisted reproductive technologies have ushered in exciting new possibilities for parenthood and areas of legal practice. Having said that, it cannot be denied that there do exist various contradictions that need to be addressed.

5.7 Assessing Surrogacy in a Comparative Perspective: Pro's and Con's

Surrogacy as a phenomenon has been a subject of much deliberation and equally of contestations. While some consider it as justified, ethical and hence legitimate, other look down upon it as destroying the societal, traditional and familial set up. There have been issues of commodification of a surrogate's body, sale and purchase of children who are not consenting parties to the agreement on the one hand and the happiness of completing a family, empowering women working as surrogates and guaranteeing to newly born children a life of dignity and comfort. It is thus that it becomes quintessential to outline the benefits and harms of surrogacy. This section of the current work will hence map out the benefits and harms embedded in surrogacy arrangements.

The Pros of Surrogacy:

- **Surrogacy is the only Ray of Hope for Infertile Couples:**

While for some surrogacy is a random entity that has no bearing on their lives, for others it is perhaps the only way of starting their families. As has been outlined above, infertility no longer is a miniscule phenomenon; it has infact come to register widespread presence. Surrogacy in their case is the only way to start their family as per their aspirations of having their own child. Similarly for single parents, gay, lesbian, bisexual and transgender, surrogacy is the only method through which they can bring forth one of their own. Surrogacy hence appears as both a right and a choice made by them.

- **Surrogacy allows a Genetic Link between the Parents and Child:**

In many arguments making a case for surrogacy, it is equated with adoption with the only difference that the child so adopted is genetically their own and for which they hire a woman who willingly chooses it. This account is further celebrated taking the example of same-sex couples. It is argued that surrogacy and reproductive technologies enables them to embrace parenthood and thereby to overcome the homophobic understanding of family and parenthood.

- **Surrogacy has a High Success Rate:**

As compared to other means of having a child namely IVF, surrogacy has more chances of success. This argument found manifestation in the field where a majority of my respondents narrated stories of successful surrogacy pregnancies. This can be attributed to the fact that, very specific criterion are laid out when a surrogate is chosen.

- **Legal Counsel ensures one is Protected:**

As has been stated above, with the rapid increase in reproductive technologies and subsequently of the surrogacy industry, more and more countries steps are being taken to ensure that the process takes place smoothly. For instance, in most instances a contract is signed by the two parties spelling out the conditions in detail. If ever one of the two parties fails to abide by these conditions, legal actions can be initiated against them which make surrogacy a protected process.

- **Surrogacy creates Friendships:**

Unlike the popular belief, surrogates are not considered as vessels. They are rather treated as people of immense significance. It is with this conception in mind that there has been growing interaction between the surrogate and the intending couples thereby explaining the forging of new friendship stories.

- **Surrogacy as Economic Empowerment:**

The one thought that runs through almost all surrogacy stories is that of economic empowerment of the surrogate. Taking to surrogacy, they have managed to significantly improve their lives by building houses, educating their own children and at times also saving up. It is this that explains why so many surrogates return for second rounds of surrogacies too.

- **Surrogacy as Upward Mobility within Family:**

Surrogates narrate instances whereby economic empowerment has translated into better status within their families. Due to the monetary resources, they are treated better and are more equipped to make crucial family decisions. This has accorded to them a life of dignity and worth.

- **Surrogacy as a New Domain for Legal Counsels:**

Surrogacy has also opened up avenues for lawyers to specialize in it and make a living out of it. They play an important role in the drafting and implementation of the contract.

- **Surrogacy as a Propeller of Medical Advancement:**

As more and more families are taking to surrogacy, its demand is on a constant rise. This has also pushed medical science to innovate and bring forth newer forms of ART's.

- **Surrogacy as a Generator of National Revenue:**

With the advancement in medical terminology and the available of surrogates, countries like India have made a mark for themselves on the world map as leaders in medical tourism. A large number of foreigners came to India for a long time to take to commercial surrogacy. This leads to greater earnings for the economy.

The Cons of Surrogacy:

- **Legal Protections may Vary:**

One of the very pressing issues with surrogacy is that it does not operate under uniform universal laws. While some countries like UK, Canada, Denmark, Australia, and New Zealand allow only altruistic arrangements, others like Bulgaria, France, Germany, Italy, Portugal, and Spain ban all forms of surrogacy. With the Surrogacy (Regulation) Bill 2016, coming in the environment for surrogacy in India would undergo big changes. Due to this diversity in law, surrogate women across the world suffer from various handicaps.

- **Surrogacy can Require Significant Financial Commitment:**

What gives surrogacy a class angle is the fact that on the one hand are the intended parents who can afford renting a womb and on the other are the intending couples who chose to rent their womb due to lack of other options. Clearly then, surrogacy can only be resorted by couples with stable economic resources. Surrogacy thus is an extremely expensive process that not all can take to.

- **Commodification of a Woman's Body:**

Under surrogacy arrangements, the woman is reduced to just her reproductive labor and is hence treated as a commodity. Her uterus and other reproductive services are commodified in the market in exchange for money. This constitutes to women's exploitation and oppression over and over again.

- **Detrimental Effects on the Health of Parties Involved:**

Not only the surrogate but others like the commissioning couple too undergo painful physical changes. The large number of injections and medicines has a detrimental effect on their health.

- **Uncertain Future of the Baby Born:**

Yet another threat that lurks in the business of surrogacy is the effect it would have on the child born out of surrogacy. What happens when the couples head for divorce or have their own child? Can the child be guaranteed all the kinds of liberties that are provided to a non surrogacy child? These issues amongst many others put the lives of the babes and their future at risk.

To conclude surrogacy, like most of the phenomenon cannot be explained in absolute white or black considering that it has shades of both. As the above account suggests, surrogacy has both certain advantages and disadvantages.

5.8 Concluding Remarks

One of the advertisements on a surrogacy website reads, “Surrogacy isn’t just a means to an end; it’s an extraordinary journey. Should you decide to become an intended parent, you’ll be joined up with an ideal team, and with their help, you’ll be guided through each step of your journey. There will be moments of anxiety and of sheer elation. No two journeys are ever exactly alike, though sometimes it’s comforting and encouraging to hear the stories of people who have walked a path similar to yours. Whether you’re an intended parent with a baby (or babies) on the way or you’re simply considering the options available to you, we have answers to all your questions.”

This advertisement bears testimony to a number of things at the same time. To begin with over the years there has been a tremendous demand for surrogacy arrangements principally due to the development in assisted reproductive technologies along with the growing financial resources that enable individuals to take to surrogacy. The other half of the story is that of increasing availability of surrogates. Women taking to surrogacy have increased in number both due to the popularity of surrogacy as a fast means to earn money. Clearly then on the one hand there is an increased demand of surrogates and on the other there is a widespread supply of surrogates thereby explaining the pervasiveness of the phenomenon. To match this demand and supply there has been an unprecedented increase in the number of fertility clinics and agencies across the country.

With regards to the lawyers, what is explicit is that there has been an expansion in the role of law and legal experts in the realm of issues closely related to the families. Almost all of my respondents claimed that there was an attorney involved who drafted the contract meticulously keeping the interests of both parties in mind. For the convenience of the surrogate and her family, there would always be a translator who would make sure all the clauses of the contract were clear to them and that there was no element of coercion. After they agreed voluntarily the agreement would be signed.

However what also needs to be reiterated is that there is no standardization of protocols with regards to surrogacy arrangements. Furthermore, there are only ART guidelines and no law that can adequately represent all the parties specially the surrogates exists. To grapple with this, it is pertinent that we begin to formulate some form of registry that can hold records of surrogacy in India. In this context, National A.R.T. Registry of India by Indian Society for Assisted Reproduction is doing seminal work. Another factor that needs to be catered to in surrogacy debates is the right of the child. It is important to ensure that the qualms of opponents regarding the future of the child do not come true. For this the contract ought to have certain provisions for the well-being of the child under all circumstances.

To conclude it can be argued that surrogacy is an extremely intriguing form of feminized labor that juxtaposes various layers and dimensions within its ambit. Drawing generalizations shall render it impossible to understand the phenomenon in all its details. Only when the various strands of surrogacy are well understood and analyzed can one go on to study if it should be legalised or abolished. It is with this purpose that the current work has sought to put together the various facets of surrogacy so as to understand what could be the best line of action in looking at it.

Chapter Six

Chapter 6: Surrogacy, Law and Contract:

Legal Recourse to Surrogacy in India

6.1 Introducing the Theme

The use of modern reproductive technologies, have largely blurred the once intrinsic relation between sex and reproduction. One such reproductive technology that has in recent times increasingly become front page news is surrogacy. As has been evident from the aforementioned discussion, surrogacy is one of those phenomenon's that juxtapose on the one hand the uncertain future of a baby along with the harm caused to the surrogate and on the other hand the happy pictures of couples who for long were battling infertility and have a child due to a surrogate mother.

What is most striking is the fact that India is the most favored destination for reproductive tourism, a subset of medical tourism owing to a host of conducive conditions including standardized yet cheap medical facilities, abundance of women who offer themselves as surrogates at an extremely low price, thriving clinics that facilitate this enterprise and most importantly the fact that there exists no public debate on the implications of surrogacy in India. According to *Shila Kennan* the 'massiveness of this practice in India' can be gauged from an estimate put forth by the National Commission for Women which states that, "*there are about 3,000 clinics across the country offering surrogacy services to couples from America, Australia, Europe and the other continents.*"

The legal aspects surrounding surrogacy however have not been too forthcoming in effectively articulating the practice of surrogacy. The laws framed over the years are complex, diverse and mostly unsettled. Numerous government reports examining surrogacy have 'carved out a distinction between commercial and altruistic surrogacy.'⁴¹⁶ Sharyn Roach Anleu in this context says that "*governments have generally condemned contractual arrangements involving financial*

⁴¹⁶ S. L. Roach Anleu, 'Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,' *Acta Sociologica* 33, No. 1 (1990): 63-74.

exchange.⁴¹⁷ On the other hand, most governments across the world have been allowed regulated altruistic surrogacy arrangements.⁴¹⁸ This impinges on us the question, if at all there exists a distinction between these two kinds of surrogacy arrangements? Those who reject this distinction argue that considering that even in the most altruistic of arrangements, some amount of monetary transaction is involved it appears that this distinction is deliberately constructed to serve the patriarchal agenda.⁴¹⁹ It is argued that this *distinction upholds the stereotype that reproduction should only emerge as a labor of love*. The distinction according to them does not allow women to take control over themselves and their decision making ability.

This expansive presence of surrogacy arrangements in India becomes more conspicuous in the ‘absence of a national registry of these clinics.’ Most of these clinics are established as ordinary health centers providing IVF and ‘related’ facilities. Thus in a *society obsessed with fertility*, the emergence of reproductive treatments, presence of innumerable medical practitioners and some of which lack proper licenses furthers the concern of the feminists with the regards to the commodification of women’s bodies. This is juxtaposed by absence of a monitoring mechanism. This paradox points towards the glaring lapse in the system that exists around ART’s in India. Instances ranging from Kolkata, where a surrogate having a baby through semen donation had contracted HIV from artificial insemination to that of a young surrogate succumbing to the medical interventions have over the years amply highlighted the need for an effective law that can regulate the use of these technologies while at the same time ensuring the rights and liberties of the surrogates to their bodies, health and privacy.

In context of this, the present chapter seeks to examine the legal issues that significantly impinge any debate on surrogacy. This chapter therefore begins by putting forth the laws on *surrogacy* that exist around the world. Considering that surrogacy is not an isolated phenomenon and that its thriving presence in India has a lot to do with how it operates across the globe, it is quintessential to begin by outlining the relationship between surrogacy and law in countries

⁴¹⁷ Ibid

⁴¹⁸ S. L. Roach Anleu, ‘Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,’ *Acta Sociologica* 33, No. 1 (1990): 63–74.

⁴¹⁹ Clearly then surrogacy involves the application of gender norms wherein these become more societally applicable in case of some more than in others. Alternatively, some deviate from gender norms whereas others conform.

across the globe. The second section of this chapter will attempt to recast the debate in context of India. This discussion will be particularly relevant in context of the *Surrogacy Regulation Bill 2016* recently passed by the Cabinet and the Lok Sabha recently. The third section of my work will critically engage with surrogacy regulation bill in India, in seeking to highlight the gaps in the proposed bill that will render harm to both the surrogates, the commissioning parents as also the child so born. The fourth section would revisit the various issues with surrogacy as highlighted by the abolitionists and the advocates. The fifth section would highlight the ‘regulation v/s prohibition’ debate in a much more nuanced manner. The sixth and penultimate section will discuss why a contract is needed and will seek to tentatively chalk out what should be the shape of an ideal contract. Finally the chapter would end by outlining the potential of a law/contract for the well being of all the parties involved particularly the surrogates.

6.2 Surrogacy Laws across the World: A Study of its Various Facets

Ever since the controversial *Baby M case* in which the Court declared surrogacy illegal, countries across the globe have been grappling with the question of what should be an ideal surrogate contract.⁴²⁰ Following are the key questions with regards to surrogacy laws:

- In context of the nature of surrogacy the first question is, are they effective enough to deal with surrogacy?
- Should law distinguish between altruistic and commercial arrangements?
- What should be the manner in which the adoption of the child should take place?
- What should be the constituent of an effective legal framework that can uphold the rights of all actors involved particularly of the surrogate woman?

Though surrogacy as a practice has become of *universal prevalence*, there is a visible distinction across the countries in their methods and mechanisms of dealing with it. These differences across countries are based on whether they have specific clauses to protect the surrogate; What kinds of surrogacy arrangements do they uphold; is there a registry that keeps a check on the

⁴²⁰ Some of the states in the United States that have come up with their own frameworks are Michigan, Florida, Indiana, Kentucky, Louisiana and Nebraska.

surrogacy clinics; what is the procedure to transfer parentage from the surrogate to the intending couple; what are the eligibility conditions for one to be a surrogate and an intended parent and most importantly do contracts have a legal sanction. Revolving around these crucial themes, surrogacy laws differ across jurisdictions. On the basis of this, countries can be classified as follows⁴²¹:

1. Countries that Distinguish between Commercial and Altruistic Arrangements allowing only the latter⁴²²:

Some countries like Australia, Belgium, Canada, Iceland, Netherlands, Hungary, New Zealand distinguish between commercial and altruistic surrogacy so much so that while they allow altruistic surrogacy, they vehemently abolish commercial surrogacy and label it to be a criminal offence.

Australia for instance, distinguishes between commercial and altruistic surrogacy so much so that it outlaws commercial surrogacy as a criminal offence. They also declare entering into international surrogacy as a punishable offence. Netherlands and Belgium too allow only Altruistic form of surrogacy. Canada is governed under the Assisted Human Reproduction Act (AHRC) which categorically permits only altruistic arrangements. Here only medical expenses can be paid for.

2. Countries with no distinction between Altruistic and Commercial Arrangements and banning both:

France, Germany, Pakistan, Serbia, Switzerland, Finland, Iceland on the other hand makes no distinction between altruistic and commercial surrogacy and thereby holds it illegal in all forms.

⁴²¹ For this section various reports of the PRS Legislative research have been studied.

⁴²² See A comparative study on the regime of surrogacy in EU member states, European Parliament, 2013; India: The Surrogacy (Regulation) Bill, 2016; Netherlands: Dutch Society of Obstetrics and Gynaecology guidelines; United Kingdom: Surrogacy Arrangements Act,1985; South Africa: Chapter 19, Children's Act, 2005; Greece: Article 1458 of the Greek Civil Code; Russia: Article 51-52, Family Code,1995; Federal Law on the Fundamentals of Protection of Citizens' Health in Russian Federation 2011; PRS.

France makes no distinction between altruistic and commercial surrogacy and thereby holds it illegal in all forms. This has been upheld by the French judicial system. Similarly in Germany an all-encompassing ban on all sorts of surrogacy arrangements exists. Alternatively both commercial and altruistic are illegal in Germany. However certain fractions in Germany have been pushing to allow altruistic surrogacy arrangements in the country. This includes the German party FDP which has been pushing to allow altruistic surrogacy.

Further, both Serbia and Pakistan are amongst those countries that explicitly ban Surrogacy thereby making it illegal in all its forms. In case of Switzerland, surrogacy is illegal and anybody practicing it is liable to be awarded punishment. In its jurisdiction, the surrogate mother is to be considered the child's legal mother and hence cannot be punished. Quebec under the Quebec Civil Code bans both commercial and altruistic surrogacy arrangements thereby making it unacceptable in all of its kinds. To make rules more stringent, an intending mother cannot be designated as the legal mother by law even if she undertakes adoption.

3. Countries with no law on Surrogacy:

Columbia is amongst those countries that do not have a law on surrogacy. In the absence of laws, parenthood is governed by laws that are applicable to natural childbirth. This implies that the child is registered with the surrogate and her spouse. The only way for intending parents to get parental rights is through a paternity lawsuit.

Surrogacy laws in the United States vary across states. While there is proper written legislation in some states, there are common simple laws in the others. There is facility of surrogacy contracts in some of the states while there are such states too that completely rule out any such enforcements. Commercial surrogacy is illegal in some states of US. There are some surrogacy-friendly states like Arkansas, California and Illinois that accept both altruistic and commercial surrogacy and easily make it possible that the intended parents have legal rights over the child. However, there are some states that only permit this arrangement for married heterosexual couples. It takes the cost of surrogacy package quite high and US citizens opt for India as their surrogacy destination.

4. Countries that allow Surrogacy:

Very few countries Greece, Georgia and Iran give legal sanction to surrogacy thereby giving legal protection to intended parents. To substantiate, under law 3305/2005 of Greece titled “Enforcement of Medically Assisted Reproduction”, Surrogacy in Greece is completely legal. However, the law lays down that to be given permission to opt for surrogacy arrangements intended parents must essentially meet certain qualifications following which they can go before a family judge and begin the process of surrogacy. Similarly, all forms of surrogacy arrangements be it commercial or altruistic are legal and popular in Iran thereby explaining why many couples from Middle East have increasingly opted for surrogacy in Iran. Since the year 1992, sperm and ovum donation along with surrogacy are permitted by law. With regards to Georgia, a surrogate does not have any legal parental rights over the resulting child. Therefore all forms of surrogacy arrangements are permissible in the country.

From the above discussion, it is evident that despite the growing surrogacy industry laws across the globe have not been able to adopt a universal standard framework to deal with it. In this background, it shall be interesting to study the complexities that surrogacy has created for the law in India.

6.3 Surrogacy in the Indian Context:

The Legal Plight of Disposable Mothers in India

Should commercial surrogacy be seen as a form of motherhood that is immoral? If so, should this practice be legally prohibited or severely restricted? These questions as Amrita Pande points out suggest that, “*the law regarding commercial surrogacy is currently unsettled, and moral opinion on the issue is in a state of flux.*”⁴²³ Interestingly, feminist theorists addressing the

⁴²³ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*: (Columbia University Press, 2014).

commercial surrogacy issue have been divided in their responses too, though one can perhaps discern an emerging consensus among feminists against legal tolerance of the practice.⁴²⁴

Recently the state of surrogacy in India has been a domain of mixed information, confusion, divided opinion and dilemma. On the one hand, plenty of celebrities in India are having babies through surrogacy; on the other hand, reports of much tougher surrogacy laws make the reproductive option seem impossible. Before exploring legal framework that exists on surrogacy in India, it is relevant to understand the dilemma that the state faces in bringing forth with “pronatal technologies in an otherwise anti-natal state.”⁴²⁵

➤ ***Pro Natal Technologies in an Anti Natal State: Coming of Revised Eugenics***

While the *medicalization of reproductive processes* worldwide has become the norm, it is far from being even or uniform. In case of India, there are two differences that most starkly stand out.⁴²⁶ These are: firstly, the historically low rate of ‘medicalization’ and ‘professionalization’ of childbirth and second, the high level of ‘state surveillance of childbirth and fertility.’ In the latter part of the nineteenth century, ‘the management of childbirth’ emerged as a key issue in colonial India and the nationalist discourses. The growing interest in the maternal and infant mortality was partly the result of ‘pronatalist fears of depopulation’ and colonial anxiety about a ‘shrinking labor pool’ in the colony. The colonial state’s agenda was also to project itself as the emancipator of vulnerable subaltern women. The state thus actively engaged in promoting professionalization of obstetrics as the solution to the problem of high mortality during childbirth. Despite these early attempts by the colonial state, child birth in India continued to remain non-medicalised. This is further evident along lines of caste, religion, rural urban divide. Certain gendered ideas like the cultural restrictions against women being touched in their private parts by a male doctor during childbirth particularly is a manifestation of gendered dimensions

⁴²⁴ For a feminist argument in favor of commercial surrogacy (and more generally in favor of determination by free contract rather than by patriarchal custom) see Carmel Shalev, *Birth Power: The Case for Surrogacy*: (New Haven, Yale University Press, 1989). For a feminist case against commercial surrogacy, see Elizabeth S. Anderson, ‘Is Women’s Labor a Commodity?’ *Philosophy & Public Affairs* 9, No. 1 (1990): 71-92; see also Margaret Jane Radin, ‘Market-Inalienability,’ *Harvard Law Review* 100, (1987): 1849- 1937.

⁴²⁵ Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*: (Columbia University Press, 2014).

⁴²⁶ *ibid*

around medicalization of childbirth. This is further compounded by situations where instances where despite the availability of institutional delivery service, women particularly in rural areas rarely consult them during pregnancy. They prefer home delivery over institutional delivery thereby banking on traditional knowledge that flows down the family generations.

The other side of the medicalization of childbirth in India is related to the developmentalist agenda of population control. The genesis of the earliest debates around birth control can be traced back to the early twentieth century anti-natalist campaigns in India. Margaret Jolly and Kalpana Ram argue that their campaigns were spearheaded by the Indian elite who believed that in modern India fecundity had to be restrained and rationalized.⁴²⁷ According to Nilanjana Chatterjee and Nancy Rilet, a popular assumption is that fertility control is an essential aspect of modernization.⁴²⁸ However these fertility control measures in India were not an isolated exercise. In fact, as has been argued by Sanjam Ahluwalia, there is an ‘interconnected history of birth control in India and those in Britain and America.’⁴²⁹

While India offered a profitable market for their contraceptive technologies and a ‘site for greater publicity and acceptance for their project,’ Indian advocates found in the international community a ‘support base for their policies’. Therefore the use of contraceptives was advocated for in the endeavor to improve maternal health and child health. This continues to be the underlying philosophy of the government’s agenda, which frames its anti natalist policy as ‘family welfare planning measures’. Such framing avoids the association of contraceptive use with so-called western notions of sexual freedom and autonomy and at the same time reaffirms the states’ initiative in ‘upholding the traditional institution of family.’ Regardless of how we define it, what cannot be denied is that the underlying impact of this anti-natalist ambition has been state surveillance of fertility especially of poor and working class women.

⁴²⁷ Margaret Jolly and Kalpana Ram, *Borders of Being: Citizenship, Fertility, and Sexuality in Asia and the Pacific*: (University of Michigan Press, 2001)

⁴²⁸ Nilanjana Chatterjee and Nancy E. Riley, ‘Planning an Indian Modernity: The Gendered Politics of Fertility Control,’ *Signs* 26 (2001):811-845.

⁴²⁹ Sanjam Ahluwalia, *Reproductive Restraints: Birth Control in India, 1877-1947*: (University of Illinois Press, 2008)

Juxtaposing these two sides helps us to understand the Indian state's perspective towards the use of assisted reproductive technologies within its anti-natalist regime. Scholars across the globe have termed this paradox as 'revised eugenics script'. If eugenics is to be interpreted, the negative ones aiming at policies like voluntary sterilization target the poor whereas the positive ones like assisted fertility appear to represent the upper classes. To exemplify, while for the poor the measures adopted by the government are the likes of population control, for the rich there are newer innovations like those of ART's.

In the wake of the thriving business of surrogacy in India, it is pertinent to see how the state has looked at it. In this context following are the key bills that have been proposed on the issue of surrogacy in the country:

➤ ***Surrogacy and Indian Council for Medical Research Guidelines:***

The most fundamental document that guides the surrogacy industry in India is the guidelines laid out by the ICMR. These guidelines have played an important role in providing impetus to the surrogacy industry. While it does not have legislative backing, considering that it has been the only document dealing with surrogacy at length it has emerged as the guiding principle. In its postulations, the ICMR has laid out pro surrogacy guidelines, making clauses to protect the surrogate and the intended parents. *The central tenets of the regulation are as follows:*

- For any agreement related to the use of assisted reproductive technology, the approval of the spouse is mandatory.
- Sex Selection at any point is not allowed.
- Sperms or Eggs cannot be taken from a close relative or friend and should be outsourced from a bank only.
- Surrogacy can be opted by only those who are medically unfit to undergo reproduction themselves.
- Only through legal adoption can a child be adopted by the intended parents..

- There is also provision to store frozen embryos for five years. However this is based on the consent of all parties.
- Sale of embryos is banned
- It stresses on the need to treat infertility as another diseases.

➤ ***Baby Manji and Judicial Intervention: Supreme Court Upholds Surrogacy in India***

While ICMR laid down meticulously various provisions that regulate the surrogacy arrangement, India does not have any enforceable laws in place so as to regulate it. The necessity of having a legal protection came with the case of *Baby Manji vs Union of India*.⁴³⁰ It was a case where the intending parents separated during the surrogate's pregnancy. The intending father was not granted custody and as a result the future of the child remained uncertain. The government of Japan provided a humanitarian visa to the child and gave the custody to the grandmother. During this case, the Supreme Court acknowledged that the parent of a child born out of surrogacy could be a male. In delivering this judgment in 2008, the Supreme Court thus gave a sanction to commercial surrogacy.

➤ ***Legislative Intervention in Surrogacy Laws in India***

a. The Draft Assisted Reproductive Technology (Regulation) Bill 2008:

To take the process of formulating a law on surrogacy further, the Government of India constituted a committee that could recommend a draft bill on surrogacy in India. Though the committee came up with recommendations, it could not culminate into a bill as it failed to be put before the Parliament.

⁴³⁰ *Baby Manji Yamada v. Union of India and Another*, AIR 2009 SC 84; (2008)13SCC518.

b. The Draft ART (Assisted Reproductive Technology) Bill 2010:⁴³¹

The process to formulate a bill on surrogacy continued with the coming in of the draft bill in 2010. The highlight of the bill was that it acknowledged that there was no regulation that could put a cap on the number of surrogacies that were permissible for a person. Further, it acknowledged the desire amongst single individuals who did not wish to marry but wanted to experience parenthood. It thus enabled them to have a child through surrogacy.

The bill was also criticized on various grounds chief amongst which was that it was framed from the epistemic position of the intending parents and thus did not cater to the rights of the surrogate. Further the definition of a couple provided by it excluded the same sex couples which raised many concerns. Another drawback of the bill was that it did not lay down any standardized parameter for compensation. This remained a big loophole in the bill considering that with more and more clinics coming up the money received by surrogates is erratic. Also there was no explicit condition was a contract that ought to be signed and a copy of which should be with the surrogate.

c. Assisted Reproductive Technologies (Regulation) Bill, 2013:

The process of formulating a concrete legal framework on surrogacy continued with the Assisted Reproductive Technologies (Regulation) Bill 2013. Some of the features of the bill were as follows:

- Acknowledging the gap, this bill laid down the maximum number of surrogacies a woman could do.
- The bill also laid down the fair compensation that should be paid.
- Another important provision laid down by the bill was with regards to the minimum age of the surrogate.
- It also laid down the provisions for transnational surrogacy

⁴³¹ Mahamaya Chatterjee & Varsha Yogish, 'The Indian Handmaid's Tale: A critical analysis on the Assisted Reproductive Technology Bill, 2010 with special emphasis on the Human Rights violation in the case of Surrogacy,' *International Journal of Research and Analysis* VOL 2 ISSUE 5 (2014)

- A punitive dimension was introduced for violators of the law

d. The Draft ART (Assisted Reproductive Technology) Bill 2016:

In light of the growing presence of surrogacy in the Indian subcontinent, the Surrogacy (Regulation) Bill, 2016 after being passed by the cabinet was introduced in Lok Sabha in November 2016. The bill has been passed by the lower house, Lok Sabha on the nineteenth of December 2018. The bill is scheduled to be tabled before the Rajya Sabha. Once passed in the upper house, it would mark an end to commercial surrogacy. The coming of this bill and its codification as an act would mean big changes for the surrogacy industry in India. It is thus pertinent to understand the key features of the bill.

The most defining feature of the bill has been the proposition of the bill that seeks to completely abolish commercial surrogacy. Defining commercial surrogacy as “surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage”, this provision is aimed at banning commercial sale of reproductive labor which is believed to be exploiting women. The bill carves out a distinction between altruistic and commercial arrangements. The bill considers the former to be premised on love, and thus grants it legitimacy while seeks to abolish the latter considering that it is viewed as being exploitative.

Acknowledging that there does exist a thriving business of surrogacy which is unregulated, the bill seeks to establish a national registry of surrogacy clinics. Thus all surrogacy clinics essentially need to be registered. Further to ensure that the surrogate is not exploited, it lays down surrogacy boards at the center and state levels to ensure that the transaction is fair. The most strident provision of the law, postulated in the ART Bill, is that it denies single parents, homosexual couples, foreigners from taking to surrogacy procedures. Following are the key features of the bill:

- Under the bill only Indian couples who are married for a minimum of five years and have a proven record of infertility can take to surrogacy arrangements.
- To prove their infertility, they need a certificate from the doctor as evidence.

- Only a ‘very close relative’ can be called upon to become a surrogate. However very close does not essentially mean blood related.
- The bill puts a complete ban on commercial surrogacy. Alternatively no surrogacy arrangement that involves commercial transactions can be resorted to under any circumstances.
- The bill does not acknowledge the right of same sex couples, single parents to take to surrogacy.
- Further, NRI’s, PIO, foreigners no longer can sign up surrogacy arrangements in India
- A woman is allowed to become a surrogate only once.
- A surrogacy regulation board will be instituted both at the level of the center and in states.
- The law applies to all of India apart from Jammu and Kashmir
- It is mandatory under the new bill for all ART clinics to be registered.
- The only monetary transaction allowed is with regards to the medical procedures for which the clinics can be paid.
- The bill also is underpinned by punitive dimensions which means that any of the abolished acts like commercial surrogacy, sale and purchase of embryos are liable to be punished with minimum of ten years of imprisonment and a fine up to rupees ten lakh.
- The bill also imposes on the clinics to maintain a record of last twenty five years
- The rights of the surrogate child will be same as that of a biological child.

Of all the bills that have been proposed on surrogacy, the most discussed and deliberated has been the Draft ART (Assisted Reproductive Technology) Bill 2016. The fundamental argument forwarded by the government in bringing about the bill is stated to stop the exploitation of women working as surrogates and to stop them from being reduced to objects of sale and purchase in the market. However the bill raises pressing concerns with regards to its rudimentary nature.

Thus while the ART bill in its present incarnation recognises commercial surrogacy and provides for its regulation, thereby taking cognizance of the plausible exploitation that is a product of commercial surrogacy, critics argue that it is also outdated because it is premised on conservative ideas of family and marriage. The denial of surrogacy rights to members of the LGBT community has been widely criticized. Further, it is criticized by the surrogates themselves who consider it as the only lucrative line of work at their disposal. Their biggest contention is that their voices have not been catered to while formulating this bill. They believe that just all other bills this bill too has not been framed keeping their interests in mind. They thus refuse to accept it.

In crux, what is evident in all these laws is that they are framed from the epistemic position of the commissioning couple and not the surrogate. Clearly laws have done little to guarantee to women working as surrogates fundamental rights like fair remuneration, good medical facilities, rights over the child to name a few. It therefore becomes quintessential to briefly discuss the concerns that have been raised with regards to the bill.

6.4 Surrogacy Regulation Bill 2016: Revisiting the Balance between Regulation and Rights

The surrogacy industry in India is growing at an unprecedented rate. According to *Simran Aggarwal and Lovish Garg*, “the surrogacy industry in India has an estimated value of over 2 billion US Dollar.”⁴³² This development of the industry however will face stringent challenges if the Surrogacy Regulation Bill, 2016 becomes a reality. The most outstanding provision of the bill is that it seeks to outlaw commercial surrogacy.⁴³³ The reason behind this provision is explained as an attempt to stop the exploitation of women working as surrogates.

If one was to further break down the draft provision to its fundamentals, various crucial issues come to fore. To begin with while the bill outlaws commercial surrogacy, it calls for a regulated

⁴³² Simran Aggarwal and Lovish Garg, ‘The New Surrogacy Law in India fails to Balance Regulation and Rights,’ *London School of Economic and Political Science* 23, (2016).

⁴³³ Malavika Ravi, A Critical Analysis of the Surrogacy Regulation Bill 2016, (Plainspeak, May 15, 2017)

altruistic surrogacy arrangement. Further, even altruistic surrogacy is not a possibility for all. According to the draft provision, unmarried couples, foreigner, live in partners, same sex couples cannot choose to have altruistic surrogacy also. The only people who are allowed to have altruistic surrogacies are those Indian couples who abide by the valid form of marriage in India.⁴³⁴

This bill has been condemned as being divorced from the reality of Indian social fabric. The law is rejected by many as being regressive in nature. Following are the key contentions that have been raised with regards to the bill:

- ***The Law is antithetical to the Constitutional Provisions:***

The first premise on the basis of which the surrogacy regulation Bill 2016 can be criticized is that of the ‘Golden Triangle test’ laid down by the Supreme Court. According to this, the bill in its present incarnation is against the ethos right to equality, liberty, and freedom and thus such a law flouts the fundamental rights of an individual that have been guaranteed by the Indian Constitution. To elaborate, the law proposed is antithetical to the fundamental right to, “equality before law and equal protection of all persons guaranteed by Article 14 of the constitution.”⁴³⁵ Arguably, by distinguishing between people on basis of their nationality, marital status and sexuality, the bill restricts the right of these people to make choices.

On a related note it is argued that by abolishing commercial surrogacy, the bill abridges upon the rights of an individual to choose their livelihood as also to their control over their own reproductive process. This is a clear violation of Article 21 of the constitution. They argue that, “banning commercial surrogacy would keep the lives of so many at stake.”⁴³⁶

Another contention with the bill is that it tress passes an individual’s freedom to trade an which is enshrined in Article 19(1)(g) of the Constitution. This they argue will have an effect on the

⁴³⁴ *Ibid*

⁴³⁵ D. D. Basu, *Introduction to the Constitution of India*: (Lexis Nexis Publication, 2014).

⁴³⁶ Tung Le Xuan, *Ethical and Legal Aspects of Surrogacy – Recommendations for the Regulation of Surrogacy in Vietnam*: (Thesis for University of Southampton, June 2016).

lives of plethora of women and their families for whom surrogacy pregnancies are their only bread and butter. Thus, “a blanket ban on commercial surrogacy cannot be justified as a reasonable restriction because it jeopardizes the interests of multiple stakeholders in this multi-billion-dollar industry.”⁴³⁷

- ***The proposed Bill violates obligations of International Covenants:***

The proposed bill is also criticized on the group that it is against the principles enshrined in various international covenants of which India is a signatory. It abrogates the reproductive rights of individuals by denying to them the right to establish a family as upheld in Article 16 of the *Universal Declaration of Human Rights*. On a similar note, the bill is contrary to the principle of allowing for men and women “to decide freely and responsibly on the number and spacing of their children.” Enshrined in Article 16(1)(e) of the *Convention on the Elimination of All Forms of Discrimination against Women*.

- ***The proposed Bill leaves various concerns:***

Simran Aggarwal and Lovish Garg argues that, “*the bill has been formulated keeping two goals in mind.*”⁴³⁸ The first one is to prevent exploitation of poor women and the second is to break the linkage between surrogacy and renting of the womb. It has been argued by various critics of the bill that the state should definitely work towards eliminating all sorts of exploitation against these poor women working as surrogates. However this should not be coercive.

It is argued that banning commercial aspect of surrogacy is not the right answer. The need infact is to regulate the industry in a manner that protects the weak and vulnerable. It is believed that any bid on part of the government should adopt a rights based approach which is to say that it should ensure that the rights of all actors in this arrangement be upheld. Further there should be mechanisms to eliminate all middle men so as to ensure that the entire money reaches to the surrogate.

⁴³⁷ Simran Aggarwal and Lovish Garg, ‘The new surrogacy law in India fails to balance regulation and rights,’ *London School of Economic and Political Science* 23, (2016)

⁴³⁸ Ibid

- **The Draft Regulation Bill creates a distinction between Commercial and Altruistic Surrogacy:**

One of the central concerns with the proposed bill is that while it regulates altruistic arrangements, it outlaws commercial forms of surrogacy. The reason stated is to stop the exploitation that women are subjected to. However it has been argued that this distinction is in fact a false one considering that even in the most altruistic of arrangements, there is some amount of commercial transaction involved. It thereby denies to them the right to earn. Further, from the perspective of the woman acting as the surrogate, it eliminated a chance for her to participate in the market. Similarly, for the intending parents, it is a denial of the right to choice.

- **Pessimism with the efficacy of a blanket ban:**

The proposed bill imposes a blanket ban on commercial surrogacy. Critics argue that this would in fact go on to further exploit women. Considering the deep seated roots of the surrogacy industry, it is believed that it will come out with some mechanism to subvert the law. While this will solve their purpose, it would further leave the surrogates at the disposal of these clinics. Arguably, considering that surrogacy provides women with economic resources, there is a lesser chance that women working as surrogates will give up on it. Under the further concealed conditions, their exploitation will increase manifold times.

Additionally, egg donations are also banned, perhaps in order to curb child trafficking and illegal surrogacy racket. However, again a blanket ban will not help in this situation. Policies need to be structured and laws need to be implemented in such a way that the issue is resolved without censoring the entire industry itself.

- **Rudimentary Nature of the Proposed Bill:**

An overview of the proposed bill brings forth the fact that it is highly conservative nature. For instance, the bill does not allow homosexuals to take to surrogacy arrangements. This exclusion is premised on a homophobic understanding of the family, Indian ethos and parenting. It is

criticized for upholding the majoritarian perspective and is so doing denying to this community the right to parenting. Therefore they contend that this bill is worth being repudiated considering its majoritarian bias. Another concern is raised keeping the single people in mind. The proposed draft bill denies to them the option to take to surrogacy.

- **Waiting period of five years:**

One of the conditions laid down by the proposed bill is that only heterosexual couples who have been married for a minimum of five years can take to surrogacy. This however is criticized by those who see no reason in compelling the intended couple to wait for a period of five years for availing the surrogacy service.

- **Designer Baby:**

One of the major criticisms against surrogacy is that, it may be used to produce children of desired sex and with desired characteristics, i.e. surrogacy may be used for the creation of designer babies. However, the Bill is silent about this issue.

- **Certificate of Eligibility:**

The Bill specifies that in order to initiate a surrogacy procedure, the surrogate mother and the couple intending to commission the surrogacy are required to obtain certificates of eligibility and essentiality from the relevant appropriate authorities at the centre or state. However, the Bill does not specify a time period by which the appropriate authority will grant these certificates. Further, the Bill does not specify a review or appeal procedure in case the application for the certificates is rejected.

- **Breach of Surrogacy Contracts:**

The Bill is silent about the issue of a breach of terms and conditions of surrogacy by surrogate or intended couple during the surrogacy process or afterwards.

- **Restriction for International Surrogacy:**

One of the criticisms raised against the bill is that it is against the contemporary developments in international trade relations. Considering that India has come to become a hub of surrogacy which in turn has given impetus to medical tourism in India, denial of surrogacy to foreigners it is believed will give a severe blow to medical tourism in India. This however, this work seeks to argue is not a valid criticism considering that women and their bodies cannot and should not be means to realize the end of development.

From the above account it is explicit that the surrogacy (regulation) Bill in its current form is highly inadequate and deeply problematic. As has been argued by Simran Aggarwal *and* Lovish Garg who opine that, “The current bill does not cater to all of these concerns in fact as it only upholds the homophobic and majoritarian perspective of the state.”⁴³⁹ The Bill had earlier received the approval of the Cabinet and has very recently been passed by the Lok Sabha. Once it gets passed by the Rajya Sabha and is enacted as an act, it will be to see how far it does in realizing its agenda of putting an end to women’s exploitation.

6.5 One Occupation, Various Perceptions:

Revisiting the Various Epistemologies to Surrogacy

There has been an ongoing debate on how should surrogacy be perceived. Should it be seen as forwarding women’s rights or further curtailing them? The ideological spectrum is divided on the issue with conservatives and a strand of feminists putting forth a very pessimistic view of surrogacy as opposed to Liberal individualists standing on the opposite end of the ideological

⁴³⁹ Ibid

spectrum who feel that the “*right to enter surrogacy arrangements is a natural extension of the right to personal autonomy*”. Denying women this right would deny to them the agency to decide for themselves. It is herein that the question of women’s freedom emanates freedom to control their bodies and to decide on how to use their reproductive powers. These issues around women’s control over their own bodies, bids us to understand, can there be any argument that can justify women the autonomy to decide how to use their own reproductive capacities according to their desires.

Surrogacy is often compared to prostitution and thus it is argued that women take to it for the sake for money. Thus similar to demands for banning prostitution, are demands to outlaw surrogacy as well. In order to understand the entire debate, it is imperative to briefly outline the arguments from both the sides.

To the opponents of surrogacy, “*it is dehumanizing and alienating since surrogacy arrangements deny the legitimacy of the surrogate’s perspective on her pregnancy.*” Another set of argument is premised on the ground that surrogacy entails a coerced detachment of the surrogate from the child she carries. This reduces her work to just an avenue to make money. To elaborate, the surrogate amongst a host of other things is expected to have no feelings and emotions. This it is argued is not a part of the contract that has been signed. In simple terms “it demeans the unique mother-child bond as women can now solely be used as breeder machines.”

Prohibitionist argument further highlights the fact that even when women voluntarily become surrogates, this voluntarism is steeped into various compulsion causes most stringent of which is the large amount of money that is a part of this package. It is argued that surrogacy entails not merely physical compulsion. However there is a particular kind of methodology that is used to coerce women. This *methodology is that of money* which is essential for poor illiterate women struggling to support their family. In the schema of the abolitionists, surrogacy as a form of remunerated work is against the dignity of both the surrogate and the child so born. It is this nature of surrogacy that raises innumerable concerns.

Following are some of the keys issues with surrogacy arrangements:

- ***Signing of the Contract:***

It is widely argued that the surrogates have no or very little knowledge of the contracts that they sign. The problem with the contract emerges from the fact that the surrogate has very little role to play while it is being drafted. In most instances it is framed by the lawyers of the agency. Therefore the contract is reduced to being an instrument in the hands of the other actors, such as commissioning parents or agents. It is also pointed out that the contract is drafted in English language which makes the contract exclusionary from the very beginning considering that it is at the disadvantage of the surrogate who fails to comprehend whatever has been written in the contract.

- ***Alienation from the Process:***

In the process of surrogacy, the woman acting as the surrogate is ranked lowest in the hierarchy. She only executes whatever is directed to her. They are generally excluded from all the communication with the doctors, agents and commissioning parents. Their marginalization received further impetus due to their low economic and educational status.

- ***Information Dissemination- A One Way Process:***

Surrogacy is a typical case where information always flows from top to bottom and never the other way around. For instance while the surrogate knows very little about the party, the intending couple has complete knowledge about her family and background. This is an exemplification of the power dynamics that are at work in the surrogacy industry.

- ***Unheard Voice and its Close Relation with Poverty:***

One of the most evident aspects of surrogacy is the silencing of voices of the surrogates that has been highlighted by a host of scholars. Alison Bailey argues that, “*the voices of the surrogates*

*“are reduced to sound bites, filtered in turn by doctors, clinic staff, and intended parents in whose presence they give interviews, as well as by the international press in a language different from the one they use.”*⁴⁴⁰ These women are backward, poor, illiterate, culturally oppressed and in need of rescue.

Saravanan, in her study of gestational surrogacy terms this *“as a denial of subjectivity by which she means that these women have little or no say at all in decisions which includes decisions pertaining to their bodies as well.”*⁴⁴¹ The surrogates have no right to choose the terms and conditions in regard to the relinquishment of the baby.⁴⁴²

- ***Health: An Aspect which is Compromised***

The health of the surrogate is under constant danger. They do not have information or knowledge about the procedures they are put to or the medication they are given. Complaints of weakness, headache, fever, weight gain, and bloating are common characteristics of these procedures. Another aspect of health is the psychological damage that surrogacy entails for them.

- ***Post Delivery Care:***

One of the concerns that have always been raised with regards to surrogacy is that once the child is born, the surrogate is left completely unattended to. In most cases there is no follow up with the surrogate to ascertain her well-being. In a majority of instances, it was the surrogates herself who approached the doctors that too in extreme cases of any problems. In most cases, the surrogate was taken care of till she delivered the baby only after which, she was abandoned. This becomes more evident in the absence of post-delivery care structures.

⁴⁴⁰ Diane T. Meyers, ‘Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy,’ *Hypatia* 26, No. 4 (2011).

⁴⁴¹ Sheela Saravanan, ‘Transnational Surrogacy and Objectification of Gestational Mothers,’ *Economic and Political Weekly* 45, No. 16 (2010): 26-29.

⁴⁴² Almut Büchsel, *Informalisation of Women's Work in India*: (Heinrich Boll Stiftung, 2012).

➤ *Surrogacy and Prostitution:*

Surrogacy and prostitution are often considered synonymous. When applied to surrogacy, the feminist prostitution model constructs the argument by substituting ‘surrogacy’ for ‘prostitution’ and ‘reproduction for profit’ for ‘sex for profit.’ The substitutions, so the argument goes, do not introduce any false premises. Thus, the argument is that patriarchy creates a labor market for surrogacy only through economic practices that wrongfully restrict women's alternatives.

Another feminist model against commercial surrogacy links the wrong-ness of surrogacy with a patriarchal consumer market. Christine Overall espouses a view of this sort. According to her, the major reason a consumer market for surrogates exists is the patriarchal concern for a genetic relationship between the father and his children. The need for the labor market exists because there are (i) infertile wives and (ii) men who desire a genetic link to their children. Without an analysis of the patriarchal nature of the consumer market for surrogates, the prostitution model is incomplete, on this view. Thus, on this account, commercial surrogacy is wrong not only because it requires a labor market possible only under patriarchal economic practices.

It is also wrong because it requires a consumer market based on patriarchal preoccupation with the genetic link between fathers and children. There is some evidence that surrogates come mostly from among disadvantaged females. This suggests, but does not prove, that there would be no substantial labor market for surrogacy apart from economic conditions that significantly limit women's choices. Thus the prostitution model gains some plausibility. Yet it seems to me that even if surrogacy contracts provided profits in ways that undermined the prostitution model, there would still be serious problems with the practice. If this is true, then the prostitution model misconceives difficulties with surrogacy that survives problems of economic justice.

Having mentioned the benefits and difficulties with surrogacy, following pointers about surrogacy as the feminist contention of it being equivalent to prostitution can be discerned: To begin with, in prostitution there is sexual involvement with a third person who is the client whereas in surrogacy there is consent to rent away one's uterus for giving birth to another person's child. To add, the chances of violence and threat to health in the form of diseases is

more in prostitution. In the list of women's waged labor surrogacy stands higher above than prostitution considering the social taboo that exists around sex. The aforementioned account of the abolitionists clearly suggests that there are widespread violations of Human Rights prevalent in most cases of surrogacy, thereby pitting the question with immense urgency of whether a well drafted legislation can benefit women in this occupation.

On the other side are the liberals and the pro-surrogacy advocates, a large chunk of whom are the women engaged in the profession and the liberals who look at surrogacy as an occupational choice made by a woman. The Liberals go on to argue that the government does not have any right to intervene in the surrogacy arrangements. Liberals discount the socio-economic and educational backwardness of these women and continues to celebrate surrogacy as a women's work. However in context of India, it is believed that surrogacy is not so much a matter of choice as it is of absence of meaningful array of choices. Most women who become surrogates are poor and illiterate with no real choices and freedoms. They are internalized in such a manner that they consider it normal. If it would have in any way furthered their rights and freedom, they would not have to spend the money on essentials like food, clothing, shelter, children's education and to pay off debts of the family.

6.6 How Should Surrogacy be Dealt With:

Debating Abolition v/s Legalization/Contractualization

Having pitted the liberal v/s the abolitionist debate, it becomes evident that while surrogacy has meant the *economic empowerment of women* and has ensured to them their agency and ability to make choices, what cannot be undermined is the fact these choices are made within constrained boundaries. Further despite the economic empowerment, their occupation is one that is ripe with *violations of their human rights and their work to an extent upholds the feminist contentions of objectification and harm*. Considering this juxtaposition, it has been increasingly argued that the need is to regulate the surrogacy industry so as to do away with the detrimental effects it has on women. The most potent tool in so far as regulation is concerned, is contractualization, legalization or abolition.

With the emergence of neo liberalism, contract theory has caused much deliberation and debate in academic circles. The efficacy of contracts, their scope and limitations has all been subjected to varied interpretations. In conformity to their positions on surrogacy, on the question of law too viewpoints stand divided. On the ideological continuum on the one end are the liberals who call for state regulation and on the other hand are the neo liberals or neo conservatives who argue for complete elimination of the state from all matters that can otherwise be dealt within the framework of the contract. The liberal framework postulated by the likes of John Rawls argues that, “the very idea of contract itself cannot be seen in vacuum.”⁴⁴³ It ought to be placed within the larger conceptual framework of state laws within which contracts should operate. The call is thus for legalization by the state within which contracts can be placed. *Neo Liberalism* on the other hand suggests minimal state intervention.⁴⁴⁴ According to them, the state’s role should be limited to only maintenance of law and order while the remaining should be left outside the domain of the state where the deciding authority should be the two parties who consent to the contract. It clearly argues for removal of all third party actors and a complete elimination of any state intervention for anything that is contractual automatically becomes legitimate.

Both these stand points are critiqued and in turn rejected by feminists like Carole Pateman who argues that some professions like sex work, surrogacy, domestic work, marital alliances will continue to be demeaning irrespective of whether they are contractualised or not.⁴⁴⁵ In the words of Carol Pateman, “*the sexual contact is a repressed dimension of the contract theory, an integral part of the rational choice of the familiar, original agreement.*”⁴⁴⁶ In this context Nancy

⁴⁴³ Liberalism as a political philosophy emerged at the intersection of the Industrial Revolution, Enlightenment and political revolutions. It posits its faith in the possibilities of improvement in existing social conditions and thus it continues to retain its ameliorative ambition.

⁴⁴⁴ There are two principal meanings attached to neo liberalism. The first refers to a set of market-liberal economic policies i.e. privatization, liberalization and globalization. The second use of the term is in the domain of International Relations to demonstrate that international cooperation is possible even on realist premises.

⁴⁴⁵ Seeing contracts as being problematic in themselves, she lays out a vehement critique of the contractual framework thereby declaring contracts as being instruments of suppression and subordination of women. Her arguments are in depth laid out in her seminal work the *Sexual Contract* published in *The Sexual Contract*. Blackwell. 1988

⁴⁴⁶ Carole Pateman, *The Sexual Contract*: (Blackwell, 1988)

Hirschman writes, “*What is modern about this patriarchy is the contractual story it imposes on relations between men and women; the social contract is based on the sexual contract.*”⁴⁴⁷

In *The Sexual Contract*, Pateman argues that for the contractarians, “*the original contract has led to the coming in of a civil society that has meant two things: “the juxtaposition of ensuring rule by men as a fraternal brotherhood of equals and of subordinating women.*”⁴⁴⁸ Nancy Hirschman interjects that a reading of Pateman’s schema equivocally suggests that, “*through the establishment of the social contract, the foundation of patriarchy that women are considered naturally subject to men -was not eliminated but merely transformed into fraternal patriarchy, where the brotherhood of men as a group rules over women.*”⁴⁴⁹

Further, Mary Lyndon Shanley argues that

“*The social contract is premised on paradoxical assumptions about women’s capacity for consent. While on the one hand, women are considered lacking in the individual attributes required to consent and therefore denied any part in making the original contract. On the other hand, women are not only deemed capable of consent, they are each presumed to give it to an individual man, a husband, via the sexual contract. As a dimension of the original contract, the sexual contract does not leave women behind in the state of nature. It rather incorporates them into the world of freedom and equality per se and in so doing what it holds for women is subordination via in the marriage contract.*”⁴⁵⁰

It shall not be a false claim to suggest that according to Pateman the much celebrated and congratulated texts of liberal political philosophy in reality create a façade of consent whereby women are denied any place in the so created public political sphere. This exclusion from the public sphere is juxtaposed by a constant affirmation by women in the private sphere where it depicts, “*women as saying yes all the time in private, and in so doing agreeing to their inferior*

⁴⁴⁷ Nancy J. Hirschmann, ‘Books in Review,’ *Political Theory* 18, No. 1 (1990): 170–74.

⁴⁴⁸ Daniel I. O’Neill, Mary Lyndon Shanley, Iris Marion Young, *Illusion of Consent: Engaging with Carole Pateman*: (Penn State University Press, 2008): 264.

⁴⁴⁹ Nancy J. Hirschmann, ‘Books in Review,’ *Political Theory* 18, No. 1 (1990): 170–74.

⁴⁵⁰ Daniel I. O’Neill, Mary Lyndon Shanley, Iris Marion Young, *Illusion of Consent: Engaging with Carole Pateman*: (Penn State University Press, 2008): 264.

status in both spheres.”⁴⁵¹ The result, as Pateman articulately demonstrates, “is women’s second-class status in both public and private spheres.”⁴⁵²

Engaging with this dual casting of women, on the one hand as lacking the agency to participate in the public political sphere and on the other hand affirming always in the public sphere and in so doing agreeing to an inferior status, Pateman centrally looks at what she terms as ‘*property in the person.*’ She defines contracts based on property in the person as those “*that give one individual control over another’s use of his or her own body, and which therefore inevitably culminate in civil subordination, whether such contracts are freely consented to or not.*”⁴⁵³ In her schema, patriarchal marriage, employment contracts, prostitution, surrogate motherhood, and a host of other contracts dealing with human organs and genetic materials are personifications of this. In *The Sexual Contract*, Pateman famously concluded that “*A free social order cannot be a contractual order*”.⁴⁵⁴ It shall not be an exaggeration to state that Pateman rejects the Contract theory in its totality. To her mind, the notion of ‘consent to the contract’ at best is an illusion and hence a sham. In reality what it upholds is the will of the dominant groups at the cost of that of the subordinate groups.

In keeping with the above schema spelt out so unambiguously by Pateman, it becomes central to this research, “*to investigate if the contract is an illusion that intersects, reinforces and disguises relations of domination as voluntary partnership. Does it stress agency to a point where autonomy is not only granted to but demanded of even those who have little or no capacity for it.*”⁴⁵⁵ This is crucial for it is this illusion of the contract that significantly structures and governs the society giving some collective power and access over others. This to my mind can be best studied with special focus on feminized labour institutions, surrogacy being one of the most flourishing industries within it.

⁴⁵¹ Ibid

⁴⁵² Ibid

⁴⁵³ ‘Self Ownership and Property in the Person: Democratization and a Tale of Two Concepts,’ *Journal of Political Philosophy* 10, No 1 (2002): 20-53.

⁴⁵⁴ Daniel I. O’Neill, Mary Lyndon Shanley & Iris Marion Young, *Illusion of Consent: Engaging with Carole Pateman*: (Penn State University Press, 2008): 264.

⁴⁵⁵ Pekka Sulkunen, ‘Re-Inventing the Social Contract,’ *Acta Sociologica* 50, No. 3 (2007): 325–33.

6.7: Legally Understanding the Contract: Its Meaning and Implications

Contracts have become a part of our everyday parlance. From subscribing to a newspaper or a journal to dining in a restaurant, we enter into some contract or the other all the time. The law relating to contracts is enlisted in the *Indian Contract Act, 1872*.⁴⁵⁶ The law of contracts differs from other branches of law in a very important respect. It does not lay down so many precise rights and duties which the law will protect and enforce; it contains rather a number of limiting principles, subject to which the parties may create rights and duties for themselves and the law will uphold those rights and duties.⁴⁵⁷ Thus, we can say that the parties to a contract, in a sense make the law for themselves.⁴⁵⁸

According to the Indian Contract Act 1872, a contract can be defined as an agreement enforceable by law. Further an agreement is understood as “*every promise and every set of promises forming consideration for each other.*”⁴⁵⁹ What agreements are contracts? Only those agreements which are enforceable at law are contracts. The Contract Act is the law of those agreements which create obligations, and in case of a breach of a promise by one party to the agreement, the other has a legal remedy. Section 2(b) defines promise in these words: “*When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise.*”⁴⁶⁰ From the above definition of promise, it is obvious that an agreement is an accepted proposal. The two elements of an agreement therefore are offer or a proposal and an acceptance of that offer or proposal.⁴⁶¹

Thus, *the essential elements of a valid contract* can be summed up as follows:⁴⁶²

1. **Agreement:** An agreement is a prerequisite to a contract. An agreement is broadly composed of two elements—offer and acceptance. The party making the offer is known

⁴⁵⁶ *Teacher, Law*. Section 28 of the Indian Contract, (November 2013)

⁴⁵⁷ Shakti Ranjan Mohanty, *Nature of Contract*: (2010).

⁴⁵⁸ The Indian Contracts Act cited as Act No. 9 of 1872 and enacted by the Imperial Legislative Council, is premised on the English Common Law. While it is applicable to all the states of India, t J&K. is an exception.

⁴⁵⁹ Government of India, Indian Contracts Act 1872.

⁴⁶⁰ *Ibid*

⁴⁶¹ The Indian Contract Act, 1872

⁴⁶² Yehezkel Margalit, ‘In Defense of Surrogacy Agreements: A Modern Contract Law Perspective,’ *SSRN Electronic Journal* 10, (2013).

as the offeror, the party to whom the offer is made is known as the offeree. Thus, there are essentially to be two parties to an agreement. They both must be thinking of the same thing in the same sense. In other words, there must be *consensus-ad-idem*.⁴⁶³

2. **Intention to create Legal Relationship:** Yet another quintessential element of a contract is the intention within the two parties to undertake a contract. Crucial it is to mention herein that an agreement of a solely domestic or social undertone does not constitute as a contract unless there is intention of the parties to make it legal in nature.
3. **Free and Genuine Consent:** it is very important that the parties to the contract be autonomous beings who are freely and genuinely consenting to the agreement. Alternatively, the consent of the parties should not be obtained by misrepresentation, fraud, undue influence, coercion or mistake. Under any of these conditions, the contract becomes invalid.
4. **Parties Competent to Contract:** the law lays down certain conditions which are imperative to be fulfilled for one to be able to sign a contract. The three qualifying conditions are that one should have attained the age of maturity, should be of sound mind and not be disqualified under a court of law from signing a contract. If an individual does not fulfill any of these conditions, the contract would be null and void.
5. **Lawful Consideration:** it is mandatory for a contract to be characterized by some form of transaction or exchange. Alternatively both the parties to a contract should give and get something back in exchange. This transaction however does not need to be essentially monetary in nature. Consideration therefore is the price for which the promise of the other is sought. In the absence of this
6. **Lawful Object:** The object of the agreement must be lawful and not one which the law disapproves.

⁴⁶³ The Indian Contract Act, 1872.

7. **Agreements not Declared Void or Illegal:** Under law there are certain agreements which are considered illegal. Such agreements do not hold good even if they fulfill all the other conditions.
8. **Possibility of Performance:** The terms of the agreement should be capable of performance. An agreement to do an act impossible in itself renders it incapable of being enforced
9. **Mandatory Legal Procedures:** A contract may be oral or in writing. If, however, a particular type of contract is required by law to be in writing, it must comply with the necessary formalities as to writing, registration and attestation, if necessary. If these legal formalities are not carried out, then the contract is not enforceable at law.⁴⁶⁴

On the basis of these parameters there exist various kinds of contracts. Some are valid which abide by all the above norms while others are not for failing to qualify these conditions. Yet another is a voidable contract that is one which can be repudiated at the will of one of the two parties. Apart from these there are also illegal contracts, which are forbidden by law and unenforceable ones which are neither void nor voidable but cannot be enforced because they lack some essential component like registration or stamps.

Generally speaking, contracts that we come across on an everyday basis are of various kinds. From marriage to sex work, from employment to property renting and citizenship to surrogacy all constitute one form of contract or the other. All of these contracts per se entail the presence of *two consenting parties* who promise to adhere to the terms of the contract. Having said that, it is significant to question, can sexual relations be justly contractualised considering that these are not real contracts that seek to give entry to equal individuals. It is argued that women in these contracts are no more than entities that in reality consent to the lack of consent. In the wake of such a situation, can contracts be legitimate? If yes, then what are its possibilities of empowering women and acknowledging their rights to a better and healthier condition of work?

⁴⁶⁴ Shakti Ranjan Mohanty, *Nature of Contract*: (2010).

Hypothetically assuming the prevalence of commercial surrogacy as a practice, what can be the efficacy of contracts that govern the practice? The present work seeks to thus study the efficacy of contracts in context of women employed in surrogacy. In this context the biggest problem that we grapple with is that we do not have a conception of an enforceable contract to govern surrogacy that is consistent with the other commitments we have. At the very least, a defense of surrogacy would require a defense of a conception of an enforceable contract that applies to reproduction in these contexts. And such a defense must avoid conflict with other clear commitments we have.

One distinction among commercial contracts is between contracts for property and contracts for services. Teachers contract for services, for example, but the sale of a home involves contracting for property. Yet both are for a profit. If we are to think of commercial surrogacy as governed by commercial contracts, should we think of them as involving contracts for property or for services? And can we think of them as either without conflict with other important commitments we have? There are some serious problems with thinking of commercial surrogacy contracts as contracting for property. What is the property, and who owns it? It is very difficult to avoid saying that the property is the baby, but we are deeply committed against the sale of human beings. The reason for this is that we refuse to conceive of human beings in a way that allows that they can be owned by anyone. But if the surrogate contracts to deliver a healthy baby to the contracting couple for a profit, is she not contracting to sell her baby? Perhaps the answer depends on the description of the surrogate's relationship to the baby.

Judges in these cases often feel they must decide who the real parents are. The judiciary has often ruled that genetics determine who the parents are. Since at times the surrogate is not genetically linked to the baby, it was ruled that she was not the mother, despite the fact that she gave birth to it. And since both the contracting partners had genetic links to the baby, they could enforce the contract without endorsing the view that a baby was being sold.

Objecting to this conclusion, John Robertson says, "*It is quibbling to question whether the couple is buying a child or the mother's personal services. Quite clearly, the couple is buying the*

right to rear a child by paying the mother to beget and bear one for that very purpose."⁴⁶⁵ But the purchasers do not buy the right to treat the child or surrogate as a commodity or property. Hence such observations regarding abuse and neglect do not remove the fact that the baby was sold for a profit. This implies that the mother owned it.

Another worrisome aspect of surrogacy contracts involves escape clauses. Do we want to think of them as involving escape clauses that allow one or more of the parties out of the contract? Some kinds of contracts we do not recognize because they do not have such clauses. One cannot, for example, legally sell themselves into slavery. The reason we refuse to recognize such contracts is presumably related to our refusal to allow for the sale or purchase of human beings. Sometimes it is very difficult to distinguish the sale of a person and the sale of a person's services. This is especially true where the owner of a person's services has complete control over the person's life. We are not willing, then, to enshrine in a legally acceptable form of contract or agreement, certain forms of relinquishment of control over a person's life. How much relinquishment of control are we willing to enshrine in contract or legal agreement and over what aspects of life? How can we conceive of a contract to govern surrogacy that is consistent with our commitment to a benevolent understanding of the contracting parties? This issue therefore appears to be at the heart of the issue concerning surrogacy..

Richard Epstein suggests,

*"It is quite evident that the purchase of a child is different from the purchase of a bottle of vinegar -which is why the contracting process for surrogates, and the terms of a surrogacy contract, takes on a form that is radically different from the ordinary contract of sale for a fungible good or service. Like most transactions it is a bit of both. The important task is first to understand the motivations of the parties to these transactions, as a window into contract formation and contract terms."*⁴⁶⁶

⁴⁶⁵ Irma S. Russell, 'Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy,' 27 J. Fam. L. 585, (1989).

⁴⁶⁶ Richard A. Epstein, 'Surrogacy: The Case for Full Contractual Enforcement,' 81 Virginia Law Review 2305, (1995).

Once these elements are exposed, it is argued by proponents, that these contracts can be defended as being permissible. Richard Epstein further suggests that within this construction, there are three kinds of objections that can be raised against such contractual enforcement. According to him, the first contention related to the unequal bargaining power between two parties thus repudiating the argument of mutual gain. The second concern is with regards to the effect it might hold for a third party which has not been looked at by the consenting parties to the contract.⁴⁶⁷ Apart from these concerns, there are also questions of commodification, gender inequality and social symbolism that raise critical concerns.

From the standpoint of the feminists opposing contractualization, the *first contention* with regards to the contract is that it assumes women's incapacity to consent in the public life and transferring it to an individual man thus making women second class citizens both in public and private domains.⁴⁶⁸ Contracts thus are hegemonic. From the epistemic position of surrogates, this disputation cannot be ruled out. More often than not these women do not make these choices themselves. It is either their economic plight or unemployment that pushes them in the industry.

The *second contention* pertains to the idea of property in person that suggests that, "contracts based on property in person give an individual control over another's use of his or her body⁴⁶⁹ thereby leading to civil subordination.⁴⁷⁰ In case of surrogacy, it is the commissioning couple: more precisely the men who would gain collective access to the surrogate's (who is a woman) body and can use it as wishes or the surrogates body becomes the collective property to medical professionals involved in the process. In the exchange of money, all the violence that is perpetrated against them is argued to be bought in.

⁴⁶⁷ Ibid

⁴⁶⁸ Thelma McCormack. *Canadian Journal of Political Science* 22, No. 2 (1989): 447-448. She suggests that on account of this distinction between the public and the private, most of the women are not in a condition to make negotiations for themselves. They lack the autonomy and agency which infact is transferred to their male counterparts.

⁴⁶⁹ Daniel I. O'Neill, Mary Lyndon Shanley, Iris Marion Young, *Illusion of Consent: Engaging with Carole Pateman*: (Penn State University Press, 2008): 264.

⁴⁷⁰ 'Self Ownership and Property in the Person: Democratization and a Tale of Two Concepts,' *Journal of Political Philosophy* 10, No. 1 (2002): 20-53.

The *third* point of opposition centers on the idea of *consent*. It is argued that both the parties are not equal. It is argued that men of relative privilege and power exploit the poverty, helplessness and history of abuse of women. Radical feminists argue that the fact that women are available in the market for sale is an exemplification the injustice that is entrenched in the society. Inequality of various sorts explains the fact that socially more powerful have access to sexual objects of their choice.⁴⁷¹ As such, it is argued that the terms of the contract are determined by the haves while the have-nots are left with no option but to surrender to these unilaterally decided conditions. Contracts for them thus would not only render the oppression invisible, but would also reinforce it.

The *fourth* point of contention raised by Andrea Dworkin herself is that, ‘professions’ like surrogacy or prostitution entail the *sale of an individual’s degradation* and hence even a law cannot eliminate the detrimental effects it has on women.

The *fifth* institutional criticism forwarded is that these alternative forms of work play a key role in sustaining the social inequality of women. Women are either seen as an epitome of societal desire or as being naturally trained to perform certain forms of labor. These alternative work forms thus supports a pernicious stereotype of what women are for and reinforces our society’s tendency to view women first and foremost in sexual terms.

From the standpoint of the *advocates of contracts*,⁴⁷² to begin with commodification of women is a central argument that is forwarded by a section of the feminist school of thought. It refers to the pollution of objects and relationships that should ideally be left outside the realm of commerce. However, this claim however has lost much of its validity in the contemporary era considering that in the world around everyone makes a living by selling one faculty or the other. While the exploitation that it entails is acknowledged, one cannot undermine the fact that all work in the capitalist market tantamount to extraction of surplus value from the labor. The choice thus is between more or less meagerly paid works.

⁴⁷¹ Susanne Kappeler, ‘Liberals, Libertarianism, and the Liberal Arts Establishment,’ *Leidholdt and Raymond*: 180.

⁴⁷² These arguments are most explicitly put forth by Martha Nussbaum “Sex and Social Justice” and “Prabha Kotiswaran “Dangerous Sex and Invisible Labor.

Secondly, in the defense of contract, it is argued that employment is crucial for poverty reduction and for according to women economic security.⁴⁷³ It provides women employed in these professions an opportunity to work and improve their well-being. Surrogates are generally women who are uneducated and unskilled and do not find employment in the mainstream professions. The surrogacy industry provides to them easy entry and also gives to them financial autonomy, equality within their household and self-determination.

The *third* point raised by the advocates is with regards to agency. Seeing surrogacy as the occupational choice of women, they opine that these women should be seen as active agents. It is argued that it is quintessential to see these women as people first and surrogates later. They should not be type casted only on the basis of the work they do. Surrogate women also argue that it is imperative to make a distinction between profession and occupation. They argue that surrogacy is their occupation that they are currently involved in. It is not their profession. Therefore by using the term profession, they argue that they are being pushed into a category for a lifetime. In crux, it is essential to see these women as active agents who have some ability at the very least to negotiate their conditions of work.

Fourthly, from the standpoint of the contract, surrogacy is seen as an autonomous being with property in her person and thus having the sole rights to contract out parts of that property in the market. She does not sell herself or her body parts; she only contracts out the use of her bodily services. Dickenson believes that contractarianism emphasizes on women's property in person, thereby enhancing their political and moral agency. Thus it should be seen as just another job which should enjoy a plethora of rights like trade union rights.

The idea of choice is contested between the two viewpoints. Should women be seen as victims in quest of protection or as active agents seeking to carve out an independent niche for themselves. The feminists believe that choice cannot be seen as an adequate tool, considering that most of these choices are made within boundaries that are non-negotiable.

⁴⁷³ Scott Anderson, 'Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution,' *Ethics* 112, No. 4 (2002): 748-780. This argument is made staunchly and vociferously by Almodovar, former prostitute and former head of COYOTE (Call Off Your Old Tired Ethics).

Clearly then it shall not be an exaggeration to find some merit in the idea of contract. *Contracts according to Nivedita Menon, provides the ground for struggle, to establish just and equitable conditions of work.* Contracts at their very least assume consent and mutually negotiated conditions of work and these are at least present in theory. Susan Moller Okins opines that outright rejecting contract would tantamount to giving up on the potential use of contract for feminism. Jane S. Jaquette contends that, “*contract provides a strong commitment to individual agency and a clear negotiation of what justice in a dynamic society requires: equality, choice and negotiation.*”⁴⁷⁴

Contracts would further facilitate the regulation of conditions of work and third party actors. In the absence of a formal legal framework these work forms acquire become highly unregulated and autocratic. These continue to operate under wraps and the violence it entails becomes invisible. Contractualization carries potential of reforming the plight of these women. It includes a whole gamut of provisos ranging from unionization, welfare measures like health care, child care and social security. It would also go a long way in wiping out the stigma associated with these work forms.

Contracts could prove to go a long way in undoing the informal, unreported and illegal dimensions of the economy. For instance, surrogacy takes place in the isolated, privatized and discrete environment which itself carries with itself various vulnerabilities. However, the efficacy of contracts depends on its very nature. What should then be its nature and constituents? To begin with, it should establish a standard method of deciding the remuneration, standardize conditions so that a decent minimum standard of living is ensured to them, the leave structure as also the termination provisos should be spelled out in black and white. The vocabulary of the contract should be such that rights and entitlements of both the parties should be explicit. To supplement these, the most important step would be to provide these women a podium to unionize so that they can collectively fight for their rights and in case of a breach, muster the strength to seek for redressal of their grievances. All of these however would remain mere

⁴⁷⁴ J. Boucher, ‘Male Power and Contract Theory: Hobbes and Locke in Carole Pateman's *The Sexual Contract*,’ *Canadian Journal of Political Science* 36, No. 1 (2003): 23-38.

words, if there is not a structure in place that can ensure its execution. While formulation is a significant way forward, the implementation of these contracts is imperative.

In crux, contracts are an important instrument that can replace the present quasi-familial set up. It bears the potential of bringing sex work and domestic work within the ambit of work and thus in turn ensure it is well ordered and regulated.

6.8 Identifying the Nature of an Empowering Contract:

The Why, What and How of the Contract

Having briefly spelt out the pertinent themes around the contract, the question now arises why then do we need contracts. Contracts can be needed for a whole lot of reasons. In this particular section of this work, I attempt at sketching out the dimensions of a contract particularly with regards to surrogacy. To begin with the efficacy of contracts can be understood as follows:

- (a) Contracts can put in place a structure that can guide the formation of relation between the intended parents and the child in surrogacy.
- (b) It is an important instrument is enabling individuals to use their private reproductive faculties as they wish without risks to the parties involved.⁴⁷⁵
- (c) It facilitates informed and voluntary decision making; and
- (d) It also helps in defining and delineating the rights and responsibilities of the intended parent or parents, the providers of genetic materials, the surrogate, and her husband, if any.

The next question pertains to what of a contract. Alternatively it refers to what should be the provisions of a contract on surrogacy. These can be outlined as under:

- It should spell out the broad framework within which surrogacy should operate.
- One of the fundamental issues with surrogacy as it exists today is that there is no standard mechanism for wage remuneration. Under this uncertainty, different agencies give differential amount of money to their surrogates. This as has been widely argued increases

⁴⁷⁵ William Joseph Wagner, 'The Ethical and Legal Implications of Hired Maternity,' *The American Journal of Jurisprudence* 35, No. 1, (1990): 187–216:

the exploitation of the surrogate manifold times. To eliminate this, a law or contract ought to lay down the minimum and maximum amount of money that a surrogacy arrangement should definitely hold.⁴⁷⁶

- There should be a provision which clearly spells out the procedures that will be used during the process of surrogacy and what impact would it have on the women acting as surrogates and on their health.
- The surrogacy agreement can outline the conditions under which payment terms can be made flexible..⁴⁷⁷
- It should be categorically laid down that no minor may be a party to an agreement for surrogacy. Further no sex selective procedure should be allowed.
- The transfer of genetic materials to the surrogate shall be permitted and shall not constitute an experiment as is prohibited
- Prior to entering into any surrogacy agreement all parties must have full and informed consent. Informed consent consists of all parties being apprised of their rights and liabilities under the agreement by legal counsel; all parties being apprised of the medical risks involved by a licensed physician; all parties being apprised of psychological risks by a licensed registered mental health practitioner and that the surrogate has a previous history of childbirth.
- It should state in unequivocal terms that the surrogate and her husband would have no right or obligation towards the child born out of such an arrangement.
- State that, before the surrogacy agreement was signed, the proposed providers of genetic materials and the surrogate were examined by a licensed physician for the Rh factor compatibility and sexually transmitted diseases as required by the act.
- All medical expenditure incurred in surrogacy should be borne by the intending parents.
- Surrogacy contracts should provide for Provide for Term life insurance for the period from insemination through the sixth month after the birth of the child. Further, Adequate health insurance for the surrogate, with at least eighty percent coverage of the expenses should be provided. The health insurance may have exclusions for preexisting health

⁴⁷⁶ Ibid

⁴⁷⁷ Ibid

conditions of the surrogate. Adequate health insurance shall include coverage through a health maintenance organization.

- State the compensation, if any, to the providers of genetic materials and the surrogate if something goes wrong
- Nobody can go back on the terms of the contract. Any party failing to do so would be liable to punishment.
- The intended parents have to undertake all the responsibility of the child irrespective of the child's sex, mental stability and other conditions. .
- The surrogate and her husband, if any, have been informed of and consented to any known and anticipated medical and psycho logical risks associated with the performance of the surrogacy agreement.
- Recite that the intended parent or parents and the surrogate have previously authorized the release of their criminal and civil records including arrests and convictions for all offenses other than minor traffic offenses and consent to the examination of any sealed or impounded records, and that the intended parent or parents and the surrogate have reviewed the released information before signing the surrogacy agreement or have waived such right.
- State that the intended parent or parents shall not be liable for wages, child care, transportation, or any other expenses of the surrogate and her husband, if any, unless expressly provided in the agreement.
- State that the surrogate shall be the sole source of consent with respect to the clinical management of the pregnancy, including termination of the pregnancy.
- State that the surrogate has consulted with a lawyer of her choice and that the fees of the lawyer are to be paid either by the surrogate, or that the intended parents are to pay the surrogate's attorney's fees to a certain maximum amount.
- State the intentions of the parties with respect to their rights to know or not know the identity of the other or others and their choice to meet or not meet the other or others. Such change shall be consented to by all of the parties in a writing signed after the surrogacy agreement and does not require any consideration.
- It should state that the court shall have the authority to modify the approved agreement only as provided in the Act.

- The surrogate shall be entitled to a summary of the medical records of the providers of genetic materials as relates to sexually transmitted diseases. The surrogate shall also be entitled to ask for any criminal records of the intended parents before granting them custody of the child.

Having discussed the efficacy of the contract theoretically, it now becomes imperative to see how it exists in reality. My interaction with the surrogates, intended parents, lawyers and medical practitioners suggest that there does exist a framework contract that is signed between the two parties before the surrogacy process begins. Herein on the one side is the commissioning couple and on the other is the surrogate and her husband. The contract is framed by a legal expert or attorney who mostly is hired by the agency that is facilitating the entire process. The agreement or the contract as is often termed interchangeably begins with the declaration wherein the intending parents spell out their names, place of their residence and most importantly their inability to have a child biologically. The commissioning couple also undertakes the oath that neither of them are suffering from HIV, Hepatitis B and C or any other communicable disease. On the other hand is the surrogate who acknowledges that she willingly approached the clinic on a certain date where she was informed about the entire process of surrogacy. She further along with her husband undertakes that after knowing the entire procedure they are making an informed decision to carry a child for another couple.

The contract also outlines the provisos that may be constituent of the surrogacy procedure. Both the couples agree to all the procedures and medication that are imperative for facilitating the procedure.

Some of the essentials that these women felt should be in any contract are as under:

- The remuneration is mentioned in black and white along with the installments and time of payment. Neither the intending couple can deny paying for it, nor can the surrogate stop accepting it.
- It is categorically stated that at the end of the term, the surrogate would turn over the baby to the couple and at no point wish to keep the baby with them.

- The health of the surrogate is of principal concern and in case of a complication the life of the surrogate is prioritized over that of the child.
- It is also clearly mentioned that the child cannot be turned down by the intending couple on grounds of its sex, color, and physical and mental development. The parents have to accept the child be it a girl or a boy, a single child or twins or triplets or more. More so even if the child is especially abled, it remains the responsibility of the commissioning couple to happily raise it.
- A translator is made available so that he or she can justly spell out to them the terms of the contract.
- The intending couple also agrees to that fact that it is not imperative that these procedures will essentially lead to pregnancy.
- Both the couples lay down in written that they understand and accept that the medical and scientific staff can give no assurance that any pregnancy will result in the delivery of a normal and living child.
- The surrogate also acknowledges that she is not related to the intending couple in any way possible.
- The surrogate mother willfully consents to handing over the baby once the pregnancy comes to term.
- The contract also spells out who the custody of the child shall go to if they separate during the process. There is also a provision wherein the specific rules are made if someone passes away.
- There is an explicit clause which states that neither of the parties will force or be forced to conduct a sex determination test.
- Interestingly the intending couple also has to state if they have had an extra marital relationship since the last six months.
- Both parties also admit to not have taken drugs intravenously.
- The surrogate also signs that she shall not disclose the identity of the intending couple to anyone.
- The intending couple undertakes that it shall not target the doctor or anybody from the staff for harm of any kind that occurs during the process.

This contract is then endorsed by the ART clinic which highlights that it has specifically explained the provisions of the contract to both the parties. The law or contract is subject to the laws of the country and are hence subject to jurisdiction of the courts. Thereafter both the couples sign along with the date, place and time in the presence of a third party witness and finally this is how the surrogacy process acquires a legal binding.

6.9 Concluding Remarks

This section of the thesis, at the level of theory has sought to outline the various laws internationally and nationally on surrogacy. The attempt has been to give a balanced account of the pro and anti-contract debates. While at the level of practice, it seems evident that legalization or no legalization, the plight and psyche of surrogates, the subjection and violence to which they are put is beyond the purview of reformation by laws. However this paper in concluding, attempts at engaging with and defending what is less accepted. This paper shall hence conclude by seeing logic in the liberal argument. This will facilitate two things. While it will provide a chance to deliberate on this stance, it will also make the efficacy of the other view clearer.

Considering that the current situation for women involved is already grim, and that they do not have alternatives there seems to me some merit in the liberal conception calling for regulation and not abolition. It cannot be ignored that these women see themselves as being more empowered than most women in the patriarchal family structure. They are the breadwinners and heads of the households. Their relationships with the men of their families are more equal that the purdah of double standard is not necessary. Further economic independence from men is a reality that prostitutes enjoy with pride and dignity. For instance, surrogates clearly suggested that she looked at her job as a means to her family and to live a life of dignity.

It is thus that the demand for decriminalization starts to seem plausible. It will help those women to continue making money out of sex work without stigmatization. Decriminalization coupled with legalization on the other hand would be to challenge structures of power by using a part of our womanhood- our sexuality as a source of power and income. It needs to be reiterated that globalization and economic liberalization have begun exerting pressure of new sorts on women.

In the light of this, criminalization of the trade will force women to turn towards debt bondage, forced labor and slavery like practices making their condition worst.

To conclude then, the problem might not be so much with the institution of surrogacy as it is with the social taboos and stigmas attached to it. Legalization possibly by granting a legal status to the profession could begin the process of social acceptance. Further with regulations meticulously drafted and judiciously implemented these forms of work can be seen as just another profession that can give women a lucrative employment alternative. It can be expected that legalization of surrogacy will facilitate efficient track recording thereby doing away with its operation undercover. For instance when dance bars in Mumbai were closed most of the bar dancers migrated to Gujarat and Karnataka and other neighboring states and started their business undercover. Legalization of prostitution will hence decrease clandestine, hidden, illegal and street prostitution. Legalizing will ensure that these women, who live life on the edge, will gain access to medical facilities, which can control the spread of AIDS and the like. Also recognizing them will enable women in India to obtain working permits as "surrogates".

The chapter hence concludes by seeing a potential for betterment in the plight and psyche of surrogates with legalization of the trade thereby giving it parity with other jobs. The need is to supplement it with other provisions like making provisions for rehabilitation, promoting unions amongst them that are truly representative.

Chapter Seven

Chapter 7: Conclusion

7.1 Introducing the theme

History testifies that women have been a victim of gender hierarchies that accord men a higher status as compared to women. The segregation of the ‘public’ from the ‘private’ realm and the subsequent pushing of women into the latter has added to this. Over the years women across the globe have sought to alleviate their status. In the anticipation to reap benefits from the promises of *economic globalization*, increasing number of women have resorted to it. However not only this process has been exclusionary but has led to a *casualisation* and *flexibilisation* of women’s labour’.

This situation becomes even grimmer as we go lower down in the hierarchy of women’s labor forms. For women working as surrogates, sex workers, bar dancers it is argued that there are innumerable harms inherent in the very nature of the work that seems to be beyond repair. In context of these labor forms, there are all the more concerns with regards to whether these work forms are in any way liberating for women or do they in fact further perpetuate the violence that has forever been a reality in the lives of women. In crux, while *feminisation of labor* has meant ‘economic empowerment’ and consequent ‘upward mobility within the family’ ladder, there are ‘newer forms’ of ‘oppression’ that have come to impinge their lives. It becomes imperative therefore, “to provide social security services to workers in the informal economy and ensure higher labour standards to them.”⁴⁷⁸ It is in the study of these multiple phenomenon all tied to the lives of women that this piece of research is directed.

As has been discussed in the introductory chapter, amongst the many forms of women’s labor *surrogacy* has increasingly come to the center of immense academic and policy attention. While it has emerged as a form of work being taken by women in quest for money and empowerment, it is also considered to have significant psychological, physiological, emotional ramifications on them. Further, this debate has intensified with the ushering in of recent advancements of the science of *reproductive technologies* (ART). It has created ever-increasing options for an

⁴⁷⁸ Almut Büchsel, *Informalisation of Women's Work in India*: (Heinrich Boll Stiftung, 2012).

individual to embrace biological parenthood. However, the ART despite its significance faces its biggest *disputation at the regulatory level*, thereby creating newer challenges for women, their bodies and their lives. This development has been juxtaposed by an absolute ‘absence of a regulatory framework’ that leaves women in a much more vulnerable situation. Countries across the world are battling the crucial question of how should they look at surrogacy in terms of law.

These factors are further exacerbated by the following changes that have been a key underpinning of contemporary times, thereby making surrogacy a much more significant research area:

- To begin with, the larger context in which surrogacy has come to be in operation in current times is fundamentally propelled by *commerce within the globalized economy*. There are a wide range of reasons that go on to explain the increasingly commercial and global nature of the surrogacy industry. To begin with, traditional or genetic surrogacy arrangements involved a surrogate woman as the egg donor in addition to carrying the pregnancy. Contrary to this, advancement in medical technology has meant that today surrogacy is largely gestational wherein the woman acting as the surrogate only carries the baby. In this sense not only has surrogacy become a global phenomenon, it has also significantly delinked biology and reproduction. While this delinking of biology and reproduction has significantly redefined conventional ways of looking at reproduction it has also gone to a large extent in giving impetus to the commercialisation of surrogacy, as reproductive body parts like uteri, sperm and ova are now available in the fertility market and are hence transacted like any other commodity that comes along with a price. This therefore gives rise to ethical quandary all of which call for careful analysis.
- Secondly, *surrogacy* over the years has come to become a ‘major component of the fertility industry.’ As is evident from the aforementioned discussion, commercial surrogacy has acquired industrial proportions and thereby India has become at the center of global surrogacy arrangements. In the absence of a regulatory framework this task has become much more convenient. While there are no accurate statistics that can point towards the number of surrogacy clinics in the country currently, the evidences from

websites on the internet, the boards on the streets, the reporting in the media are all significant indicators of the scale and spread of commercial surrogacy market.

- Thirdly contrary to popular assumption, the clinics receiving the clientele for commercial surrogacy are *not confined to the metropolitan cities* or to the large cities but is as much a phenomenon of smaller cities like Jalandhar in Punjab, Indore and Bhopal in Madhya Pradesh, Pune in Maharashtra, Lucknow in Uttar Pradesh, Kochi in Kerala, Ahmedabad in Gujarat, Madurai in Tamil Nadu to name a few. A small town, Anand in the state of Gujarat has in fact come to become the surrogacy outsourcing capital in the world. With growing medical tourism the smaller cities have not only become more accessible but have in fact emerged as major centers of reproductive technologies. Considering that surrogacy has become such a widespread phenomenon, these smaller clinics have also been successful in establishing ties with clinics in the large cities thereby ensuring that a well working framework of demand and supply is in place. In crux, it shall be safe to argue that the fertility industry in India is growing both vertically and horizontally.
- Fourthly, while most of the debates on surrogacy have been sharp at pointing out the *direct correlation between the increasing demand and supply of ART's* in general and surrogacy in particular, what has been conspicuous by its absence is the fact that this rising tide cannot be comprehended without taking note of the political economy of the country that has gone a long way in the unrelenting growth of the surrogacy industry. In the particular case of India, factors such as the 'lack of regulation, comparatively lower costs than many developed countries, relatively shorter waiting span, possibility of close monitoring of the surrogates, developed infrastructure and international standard of medical expertise in India have all come together to create a conducive and feasible environment for the industry to not only strengthen its roots but also to grow at an exponential pace.'⁴⁷⁹

⁴⁷⁹ Sarojini Nadimpally, Deepa Venkatachalam, 'Marketing Reproduction: Assisted Reproductive Technologies and Commercial Surrogacy in India,' *Indian Journal of Gender Studies* 23, No. 1 (2016): 87–104.

It is in context of these pressing factors that a systematic *study of the surrogacy* industry emerged as a crucial line of research. The phenomenon of surrogacy as it exists today bids us to put together the many issues imbedded in it namely women and work, feminized labour forms and the ‘inherent violence and harm in them’; the feminist contention and the liberal advocacy of it; complications brought about by developing science and medical advancement and its effects on women and their bodies; inadequacy of laws and their biased nature and most essentially to put forth the voices of women working as surrogates. With these in mind, a careful and in depth study of surrogacy industry has been undertaken in this current research.

The crucial themes discussed in this research so far have been: *women’s relation to remunerative work, surrogacy, assisted reproductive technologies, ethical issues around surrogacy, feminist and Marxist analysis of surrogacy and legal course to surrogacy*. These themes having provided the theoretical understanding, in my research I have sought to substantiate the theoretical claims with empirical data collected through field study. The analysis of all of these very significant dimensions of surrogacy enables this research to understand if surrogacy as a remunerative work empowers women as agents making subversive choices or does it too act as a product of capitalist patriarchy seeking to suppress their psyche. Therefore, in this work my purpose has been to understand the impact of remunerative work on the lives of women through the lens of a particular form of feminized labor namely surrogacy. An overview of this terrain has been undertaken to anchor this research and offer preliminary insights as to how surrogacy arrangements in India can help in understanding new forms of (re)productive labour that women are engaging in. In the concluding chapter, I shall attempt at reflecting on these themes within the framework of my work.

7.2 Women’ Remunerative Work: Revisiting the Key Themes

In this section of the current chapter, I attempt at raising the most significant themes that run across the theoretical arguments flagged in this work. My endeavor is to reflect on these in terms of the observations that have emerged from the field research.

- **Women and Work:**

As has been outlined in the introductory chapter, any engagement with women's relation to waged employment ought to begin with the '*public-private distinction*' that has been carved out to serve the agenda of patriarchy. Under this schema, men have been traditionally associated with the 'public' (i.e. the political sphere and being 'providers' for the family by engaging in remunerative work) while women were confined to the 'private' (i.e. the domestic sphere of the household primarily because of their *biological reproductive work*). This dichotomy also implied that women's was categorized as non-remunerative work of social reproduction. Clearly then, this system has entailed privileging of men and *masculinist ideas* which translated into adverse implications for women's health, education and their access to equal opportunities in various spheres. As a spiral effect, this then explains the generally lower qualifications of women and the semiskilled nature of their 'productive' work.

This understanding however underwent a substantial shift with the coming in of capitalist industrialization. Spike Peterson highlights this in the following words, "*Public' retained its association with the state/ government/ coercion but in liberal discourse 'private' gained stature as a reference to civic activities and/or economic exchanges (productive market relations).*"⁴⁸⁰ Peterson argues that sex/ affective familial relations and the caring labour of reproductive work were cast as pre-contractual and pre-capitalist – as 'natural' and hence neither political nor economic."⁴⁸¹ Therefore with the advent of capitalism, a systematic devaluation of women's reproductive labour took place with the coming in of a 'family wage' for the man who was seen as the 'provider' for the housewife and the family by engaging in remunerative work, while women were entrusted with non-remunerative work of social reproduction within the family as an extension of their biological reproductive work.

In the shadow of this, the 'sexualised labour market' led to differential wages even when women took up remunerative work, thus cementing men's position as the primary breadwinner of the

⁴⁸⁰ V. Spike Peterson, 'Feminist Theories Within, Invisible To, and Beyond IR,' *Brown Journal of World Affairs* X No. 2 (2004): 35-46.

⁴⁸¹ V. Spike Peterson, *A Critical Rewriting of Global Political Economy: Integrating Reproductive, Productive and Virtual Economies*: (London, Routledge, 2003).

family. Thus, as Hartmann observes, 'family wage' became the norm by the end of the 19th century and early 20th century before women workers struggled for "equal pay for equal work" and managed to negotiate some gains in that respect.⁴⁸² However, even in the post Second World War phase where women's participation in the labour force has increased manifold, the fundamental characterization of women's 'proper place' in the household has not changed. Hence, according to Hartmann, *"the sexual division of labor reappears in the labor market, where women work at women's jobs, often the very jobs they used to do only at home - food preparation and service, cleaning of all kinds, caring for people, and so on. As these jobs are low-status and low-paying, patriarchal relations remain intact though their material base shifts somewhat from the family to the wage differential, from family-based to industrially-based patriarchy."*⁴⁸³

To research on feminist conceptualisations of 'women's work' should not imply that women's work should be seen as a special type of work. On the contrary, such an effort indicates that though women have always been 'working' throughout history, their work has always been accorded a different and subordinate status: be it economic devaluation of household work due to its 'natural' characteristics or the unequal assimilation of women into capitalist wage work. Feminists have probed various facets of conceptualising "women's work", particularly when it was remunerated. Jane Freedman has summarised the multitude of feminist concerns in this issue area as follows⁴⁸⁴:

" ... for some feminists [an] increase in women's employment outside of the home is seen as a positive element in increased equality between men and women, for others it is not such an important factor in reducing gender inequalities, and indeed, some feminists argue that it is an extra burden for women, resulting, in a double day's work of paid employment outside of the home and unpaid housework in it. Feminists who have focused on an analysis of women's paid employment have typically sought answers to the questions of why there is a continuing gender segregation in the labour market and why women who do take up paid employment still earn less than men. Others have focused on women's unpaid work within the family. Increasing economic globalization has meant, moreover, that these questions can no longer be treated merely in the

⁴⁸² Ibid

⁴⁸³ Ibid

⁴⁸⁴ Jane Freedman, *Feminism*: (New Delhi, Viva Books, 2002).

context of one country, and feminists have thus turned their attention to the international system of production and consumption ⁴⁸⁵

As the aforementioned account suggests, women's relation to work is multi-dimensional. It has given rise to lot of concepts that need analysis namely: equality and inequality, empowerment and subordination amongst others. While women have always worked, in contemporary times, when women have begun to perform erstwhile private functions for remuneration, it has led to many more articulations, debates and contestations which are important to grapple with from the feminist perspective. It is in this context that, in understanding women's relation to waged employment, I have chosen surrogacy as my lens of analysis.

To my mind while the feminist concerns about women's commodification and subsequent exploitation in surrogacy are acknowledged, the need is to emphasize that the problem might not be so much with the institution of surrogacy as it is about the conditions in which it operates. As has been discussed in the third chapter, "using their *wombs* and its gestational capabilities in a manner that enables them to leverage out of a difficult situation, even if only marginally, is indeed an illustration of *resourcefulness* on their part of the surrogates. Whether commercial gestational surrogates qualifies as a case of the subaltern's beating the oppressive system or does it conform to it is a project of greater research that hence is beyond the purview of this current work." ⁴⁸⁶

- **Surrogacy**

In surrogate motherhood, as has been outlined in chapter two of this research, one woman acts as *replacement* in place of another woman called the intended mother, who is unable to carry a child to birth. Surrogate mothering can be accomplished in a number of ways depending of which there can as many as 'five parents.' This entire procedure involving medical technology has been viewed differently by different schools of thoughts. While *the pro surrogacy advocates call for its legalization, the anti-surrogacy proponents by highlighting its detrimental nature call*

⁴⁸⁵ *Ibid*

⁴⁸⁶ Sneha Bannerjee, *Globalisation and Women's Remunerative Work: The Case of Commercial Surrogacy in India*: (Delhi, JNU, 2011).

for its abolition. In the third chapter of this work, an attempt has been made to gauge a proper understanding of the working of surrogacy in the larger socio-political context and in the light of legal, medical, and ethical concerns that surround commercial surrogacy.

From the epistemic position of the advocates, it has been projected as a win-win situation for all. The popular construction is that surrogacy is a mutually beneficial ‘transaction’ whereby, “the commissioning couple gets the child they so wish for and the surrogate mother receives a substantial amount of money that bears the potential of altering her life conditions for the better in a significant way.”⁴⁸⁷ Premising on the ‘labor of love’ it suggests that surrogacy has enabled everyone to have a baby, be it childless couples, infertile couples, heterosexual couples, same sex couples, older women, single men. Further, surrogacy is often considered synonymous with very pressing social revolutions that has gone to considerable length in dismantling norms that were once considered unbreakable and sacrosanct. In so doing surrogacy it is argued increasingly by scholars like Elly Teman who is convinced beyond doubt that surrogacy has “threatened dominant ideologies” in a significantly big way.

In defense of surrogacy it is often put forth that it has opened up the unpaid realm of women’s labor. By attributing motherhood the designation of work, women have come out to openly challenge and transgress the role that has been assigned to women traditionally. This aligns with one of the overarching goals of feminism: *emancipation*. It is further argued that in surrogacy women are acknowledged as rational, autonomous being capable of making meaningful choices for themselves. The fact that a woman can enter into a contract with regards to the use of their own bodies confirms a person’s status as an individual because a person is someone who owns his own body and therefore has agency.⁴⁸⁸ In challenging the ‘established ideology of motherhood’ surrogacy it is argued by the advocates threatens, challenges, breaks, revolts, and sets these active verbs against dominant ideologies, patriarchal stereotypes, long existing prejudices against women and traditional motherhood.

⁴⁸⁷ Henk ten Have, *Encyclopedia of Global Bioethics*: (Switzerland, Springer International Publishing, 2016).

⁴⁸⁸ While the term "agency" is generally used to denote something like knowing self-direction, I use it in this work to denote the ability to develop and act on conceptions of oneself that are not determined by dominant, oppressive conceptions.

Arguing from the opposite end are innumerable voices that point towards the damage that surrogacy holds, most of them for the women who work as surrogates. It not only reduces them to just their reproductive labour, it also reduces women to mere tools in the capitalist market that are bought and sold with profit motive. It is argued that considering surrogacy as a form labor is hiding its true nature for the relative benefit of the powerful. Not only is it harmful to women working as surrogates in a number of ways, it also holds damages to the intending mother. These damages, it is argued are two-fold. Along with the possible physiological harm as a direct outcome of the drugs and medical procedures, the very context and the factors “pushing” a woman into the surrogacy arrangement also constitute risks for her. At the crux of the feminist contention of surrogacy is the fact tha, “it lies at the intersection of patriarchy and capitalism.”⁴⁸⁹

In socially regressive societies like India, the innate desire to have a biological child are cashed in by the medical fraternity for profiteering questions have been raised about the ART’s to reinforcing the hetero-normative and the pressure on women to have biological children. In this sense, projection of ARTs and surrogacy as offering ‘choice’ remains debatable. More often than not this choice is contextualized rather than being devoid of systematic and structural pressures that affect the decision making process of both the intended parents and the surrogates. Further, much of the debate on commercial surrogacy has centered on its comparison with other forms of exploitative labor such as sex work. A strand of feminist scholarship believes that there exists no difference between surrogacy and prostitution and infact both of them stand at the bottom of male hierarchy. Hence they believe that surrogacy can never be emancipatory for women as also its damages are beyond repair. To their mind a contract or a law, will at the most hide the harm that is inherent in these forms of works. On these grounds they call for its abolitions, highlighting which is crucial so as to better understand the institution of surrogacy in the contemporary times.

In this research I have put forth various arguments that have been forwarded by advocates and opponents of surrogacy arrangement at length in this research so as to be able to understand its effect on women holistically. By means of conclusion, I would push the point that the need for feminist scholarship is to find a rejoinder that can join both these vying perspectives to

⁴⁸⁹ Bhadra B., *Precaarity within the Digital Age*: (Springer, 2017).

conceptualize surrogacy in a more holistic manner encompassing all its dimensions. Unless, feminist scholars find means to understand newer dimensions of women's bodies, the agenda of working for their upliftment would remain a distant dream.

- **Assisted Reproductive Technologies (ART's):**

What connects women's remunerative work with surrogacy is the emergence of the *Assisted Reproductive Technologies*. ART's as they are popularly known as are viewed as a radical transformation in the surrogacy arrangements. Assisted Reproductive Technology or ART have split the "baby making process into three fully separate components" - egg and/or sperm donation, conception in a petri-dish and gestation in a surrogate womb. This has alternatively meant the emergence of a probable market of 'infertility treatment' with avenues of making money by all actors of the industry, namely the [fertility clinics, the donors and the surrogate. However ART's have also raised a range of issues with regards to women and their bodies.

While the objective of this thesis is to understand the implications of the technologies, it has been of seminal significance to understand the debates and perspectives surrounding ART's because it is at the intersection of technology and market that women's remunerative work lays. *Reproductive Technologies fall into four groups:*⁴⁹⁰

- a) The first and the most familiar group includes those concerned with fertility control: with preventing conception, frustrating implantation of an embryo or terminating pregnancy i.e. contraceptive technologies.
- b) A second group of RTs is concerned with the 'management of labour and childbirth'.
- c) The third group includes those concerned with improving the health and genetic characteristics of foetuses and of new-born babies.
- d) The fourth group includes conceptive technologies, directed to the promotion of pregnancy through techniques for overcoming or bypassing fertility

⁴⁹⁰ Michelle Stanworth, *Reproductive Technologies: Gender, Motherhood and Medicine*: (Sage Journals, 1991).

In this work, my focus has been on the fourth category. New reproductive technologies comprise technologies associated with artificial insemination, *in vitro* fertilization and associated technologies, hormonal contraceptives amniocentesis and ultrasound, sex pre-selection and cloning amongst others. My research particularly focuses on assistance in reproduction sought through IVF, IUI and surrogacy. There are various positions which have been taken on these technologies. They are as follows:

- It is not appropriate to interfere with the natural and divine order by using these advanced technological procedures.
- ARTs are valuable and should be applied as extensively as possible.
- These technologies have to do with power relations and can be misused if they fall into the wrong hands.
- NRTs are a new form of male control where the masculinist' nature of science becomes obvious.

In the current work I have particularly focused on the last three strands of arguments. Critics of these technologies argue that these technologies are a form of 'violence against women.' The ARTs, they feel, are based on the old ideology of exploiting women as objects.⁴⁹¹ They have focused on the physical, psychological and political risks of ARTs thereby suggesting that these technologies violate the integrity of the female body, as commercializing reproduction and as control by reproductive engineers. These technologies, they say, "thus enhance patriarchal control over women, and are sexist, racist and eugenic."⁴⁹² These technologies, it is believed, put restrictions on the female body and subordinates pregnancy and childbirth. Besides sexist implications, there are and racist implications of the new reproductive technologies according to Maria Mies.⁴⁹³ The female body, according to her has been discovered as a new area of

⁴⁹¹ 6 The FINNRAGE group includes Farida Akhter, Gena Corea, Renate Klien, Maria Mies, Janice Raymond, Robyn Rowland and others.

⁴⁹² Patricia, Ed, Spallone, Steinberg, Deborah, *Made to Order: The Myth of Reproductive and Genetic Progress*: (1987).

⁴⁹³ Maria Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour*: (London, Zed Books, 1986).

investment and project making for scientists, medical engineers and entrepreneurs.⁴⁹⁴ Ann Oakley focused on relations of power between medical practitioners and their female patients which reduce them to reproductive objects.⁴⁹⁵ They thus suggest non-technological solutions like preventive measures for infertility, adoption of children of all races and sexes, and raising consciousness to reduce the social pressures for biological parenthood.

Arguing against this raise the question as to why do many women still want these technologies and submit to them? The issues surrounding pregnancy, childbirth and motherhood are so complicated that women do not identify with the demand for a ban on conceptive technologies that is advocated by some feminists. Some feminists do not see inherent dangers in these technologies but are concerned about their unregulated use. They propose a set of rational and consistent policies to manage these ARTs instead of banning them. Based on the pro technology argument that has been discussed at length in the second chapter of this research, it can be argued that technology per se is not dominating, liberating or repressive rather it is neutral. Technology becomes dominating and controlling because of patriarchal ways of thinking and behaving. Any feminist analysis of patriarchy must consider the patriarchal contexts they come up in.

These debates have been studied in this research from the perspective of the women interviewed. To begin with it is pertinent to note that reproductive technologies have to be understood and explored in their specific contexts and nuances of individual experiences. Further, taking a blanket anti-technology position tends to blur a nuanced understanding of the phenomenon. Women who are childless or women who earn remuneration about technological intervention in their bodies have their own perception of technology and have their own reasons for wanting to try various sophisticated technological procedures, however invasive or problematic they may appear to be. Having said this, a blind usage of technology, this research argues serves the purpose of capitalist patriarchy. The need thus is to understand the benefits or harms of assisted reproductive technologies in the specific contexts they are put to. Suggesting a blanket

⁴⁹⁴ Fachhochschule Köln & Fachbereich Sozialpädagogik, 'From the Individual to the Dividual: In the Supermarket of "Reproductive Alternatives",' *Reproductive and Genetic Engineering: Journal of International Feminist Analysis*.

⁴⁹⁵ Ann Oakley, *Women confined: towards a sociology of childbirth*: (Oxford, England, M. Robertson, 1980).

conclusion on its efficacy would tantamount to sweeping generalizations which this research vehemently argues against.

- **Ethical Issues around Surrogacy:**

Interestingly surrogacy is a story that connects a practice that is pregnancy as work to a multitude of contemporary social concepts. The opponents of surrogacy have pointed out that the defense of the practice that has often been forwarded has very little to do with accounting for what actually happens in surrogacy. It rather only suggests openness, progress and happiness. Birgitta Ohlsson suggests that these accounts however give no clarity in determining *what is ethical and what is not*. Why is it unethical to let a woman who is willing to do so partake of the happiness of pregnancy and birth? Further it remains unclear of why should a child who is so clearly desired, end up being worse off than a child who was not planned? In this research I have attempted to understand if there is something fundamentally unethical in surrogacy. In so doing I have focused on it from the epistemic position of the child, of the woman acting as the surrogate as also the intending mother.

From the vantage point of the child, it is argued that children under surrogacy situations are “clearly desired” and therefore their parents will love them and give them a good upbringing. Thus however is rejected by those who refute it as being a problematic argument considering that there is no certainty of the view that if one has gone to such extremes to have a child, they will also guarantee a good childhood. On the contrary they argue that if this logic was considered true, then children for whom parents pay more are to have better childhood as compared to children for whom parents pay less considering that how desired the child is can be measured in monetary terms.

From the vantage point of the *intending mother*, the first ethical concern is that in opting for surrogacy there is an essentialization on having a biological link with the child. In other words, it acts as a reiteration on the woman’s ability to procreate. Further, it is argued that almost all surrogacy arrangements are formulated and executed by the intending father which reduces the intending mother to a non-entity.

Surrogacy from the perspective of the surrogate raises ethical and practical questions arising out of experimentation on human embryos; the affect that these technologies will have on women's lives in a society where women are defined mainly in terms of their reproductive capacity and the health and gender implications of the use of female patients' bodies by a male-dominated medical profession. It has been argued that women's bodies are reduced to mere laboratories. All of these go on to suggest the many ethical issues that surrogacy holds.

In retrospect, surrogacy clearly raises very pertinent ethical concerns which constitute a subject of an independent research. However in my current research, suffice it shall be to argue that these issues call for a much more detailed analysis and therefore need to be adequately addressed if rights of all the stakeholders in the surrogacy arrangement are to be upheld.

- **Legal Recourse to Surrogacy:**

As has been discussed in my research, on the one hand there have been a growing number of women taking to surrogacy as a way of waged employment and on the other there have been explicit concerns for the degradation it holds for women. It has also been argued that in this entire transaction it is only the fuelling ART industry that is at benefit. It is hence strengthening its roots further so as to expand its scope. In this scenario, the one issue that has been most pressing is what the boundaries of this expanding phenomenon are because without it, exploitation of women is bound to take place.

It is herein that law becomes a potent tool of analysis. It has been questioned if laws eliminate the harm inbuilt in surrogacy or do they only forward the cause of the powerful parties in the arrangement. This question has been dealt with in the research work at length. By way of reiteration, I argue that that while regulations could be helpful, the ones framed so far have been far from adequate principally on account of the biased nature of laws. This makes it evident that only when laws are justly framed and equally implemented can they ameliorate the conditions of surrogates and recognize their pregnancies as a form of work. If laws or contracts are justly framed out, they do hold merit to eliminate the flaws that surrogacy holds.

7.3 Reviewing the Research Questions and Hypothesis

a. Hypothesis

In this concluding chapter of my work, my intent is to revisit the hypothesis and research questions I began this research with. My hypothesis is as follows:

In the context of economic gains surrogacy is a form of voluntary and mutually advantageous enterprise. Depending on the regulatory framework under which it operates, surrogacy as 'remunerative work' can result in empowerment for women working as surrogates.

During the process of undertaking this research both with regards to the literature review and the field survey, my understanding of the starting hypothesis has under gone a substantial shift. While it is too early to give a conclusive statement based on generalizations, I would however like to amend my starting premise: while I would like to alter the first part of the hypothesis statement, I would accept the second part with strong arguments.

To substantiate, in contemporary times there has been an ever increasing effort on part of women to participate in the labor market so as to attain economic independence. With the developments in medical technology, surrogacy has emerged as a form of work which more and more women are taking to due to easy entry and money. As has been discussed throughout this research, this economic independence has hampered women's relation with their own bodies. To understand this better, my work undertook a detailed analysis of the rich literature that has developed over the years on a particular form of labor namely Surrogacy. In depth analysis of the existing literature brought forth the opposing standpoints of the radicals, liberals, conservatives and feminists. This debate between the two is further enriched by the many voices of actors involved in this work: surrogates, intended parents, medical practitioners and legal attorneys. As has been succinctly highlighted throughout the work while radicals, conservatives and feminists reject surrogacy in all its forms due to its inherently harmful nature, the liberals call for its continued practice. Having critically engaged with these perspectives, what was evident is that

there is long ensuing dilemma on how to conceptualize surrogacy and how to meaningfully contribute to the debate without falling prey to any one standpoint. To my mind, the biggest drawback of this debate has been the continued absence of voices from the field i.e. of the surrogates and the intended parents.

In order to overcome this vacuum, in this work a rich field work was undertaken. On the basis of accounts of over seventy surrogates, twelve men who were husbands of these women working as surrogates; forty people from the medical team including doctors, counselors, nurses, ward boys, cleaners, watchmen, ambulance staff, auto drivers, nearby vendors all of which work close work with the surrogate and constantly engage with them; six agents working with the clinics and in charge of recruiting the surrogates; thirty intended parents including same sex couples, married heterosexual couples, single parents, NRI couples as also foreigners who took to surrogacy in India before 2014 as also five legal experts who closely work with framing of the contract signed by the two parties was undertaken. While all of these voices had crucial interjections to make, in reviewing my hypothesis I would like to premise by arguments from the vantage point of the women taking up the role of a surrogate because it is them who are employed in these vagrant forms of work.

If I was to draw the most striking observations from the field, while accounts of the surrogates undoubtedly suggested the physiological and psychological harm that surrogacy entails, for them the money they received and the resultant power they felt outweighed the harm that is argued to be most problematic. Most of my respondents spoke about how the money helped them to build a house and to put their lives together. It enabled them to fund their children's education and facilitated upward movement both within the family and societal hierarchy. For them the money and the resultant empowerment was such a strong force that it did away with all the harms apparent in the feminist and legal debates. To add on, surrogacy their accounts suggest is so well structured as an industry that it ensures that women are well internalized so that they never feel the loss of the child. They also expressed in explicit terms their disillusionment with the state for having failed to provide them with meaningful choices.

Therefore while this choice is made in a very restricted sense of the term ‘choice’, it cannot be completely repudiated as not being a choice at all. However considering the very limited choices available to them, the decision to opt for surrogacy cannot really be called voluntary. Further, analyzing the accounts of the intending parents, legal attorneys, medical professionals, agents it becomes evident that surrogacy is not absolutely mutually advantageous. While the surrogate woman suffers immense bodily and mental harm in return for some money, all the other parties only benefit from this transaction. It is also significant to add that all the rules are single handedly applied on the surrogate and she lacks the most basic of negotiating powers. Finally, even the agreement that governs this transaction is framed from the perspective of the intending parents like the insurance terms are decided by them, the decisions regarding when the pregnancy should be or when the C-section should be undertaken are all decided by them.

Clearly then, while one cannot overlook the harms and violence in practices like surrogacy that further oppress women, what cannot be also overlooked is that it has indeed empowered women in a number of ways. On the basis of this, I would like to amend the first part of my hypothesis which is to say that *vagrant work profiles like surrogacy are not completely a form of voluntary and mutually advantageous enterprise considering that they make this choice in the absence of any meaningful alternatives and under immense financial pressure both of which point towards the fact that it cannot be considered purely voluntary and mutually advantageous.*

Having said that, despite these very many issues in the wake of the existing situation, women working as surrogates still considered surrogacy as the most ideal form of work for it guaranteed to them easy money which they could not have otherwise earned all their lives. This brings me to the section part of my hypothesis that reads *can they be better regulated through contracts rather than prohibited to ensure an empowered existence for all.* In response to this, I would like to accept this premise considering that to my mind the problem might not entirely be with the practice of surrogacy, as it is with the manner in which it operates and the mindset that guides how we look at it. Considering that women who work as surrogates feel empowered and express a sense of amelioration in their life conditions, doing away with the very practice would be to deny agency and decision making right to these women. On the contrary, if there could be a way in which the detrimental aspects of the work could be eliminated, it could significantly contribute

to making surrogacy a not so problematic form of work. Having understood the contentions of anti-contractarians like Carol Pateman, this research would bid to explore a possible avenue of reform in contracts.

While this research does acknowledge that contracts have been unable to project themselves as the most feasible answer to eliminate women's oppression, within the existing context they definitely seem promising and capable of transforming the situations of these women for the better. Most assuredly, like my premise held contracts do hold the possibility of perpetrating domination and in the garb of liberties upholding subjugation. But this again is not a given. To my mind, the problem is not with the instrument of contract. Rather the contention should be with the components and constituents of the contract. If the contract is meticulously framed keeping in mind the rights and benefits of the parties and particularly the surrogates, contracts can most assuredly emerge as viable instruments of reforming the existing status quo. However if they are unilaterally framed by the better placed actor, they too can become dangerous.

b. Research Questions

With regards to the research questions which are as under:

- In context of surrogacy, does this 'remunerative work' enable women working as surrogates to assert their rights? If yes does this enable them to create empowering spaces for themselves and how?
- Has the coming in of Assisted Reproductive Technologies or ART's been liberating for women or has it led to their further oppression? How does an analysis of the phenomenon of surrogacy as a form of women's remunerated work contribute to the existing feminist research on ART's?
- What are the legal frameworks governing surrogacy arrangements in India? Do laws/contracts uphold the rights of women working as surrogates or does it merely represent the interests of the better placed actors in the surrogacy industry?
- Considering that surrogacy juxtaposes empowerment with oppression, what is the most viable way of dealing with it: abolition or regulation through contracts?

In context of surrogacy, it can be safely argued that yes, we can and perhaps we ought to re-conceptualize women's bodies as avenues of agency. If women wish to work from their bodies, they should have the right to exercise their agency for it enables them to create empowering spaces for themselves as has been elaborately discussed in this research. However the need is to ensure that the conditions and surroundings in which this takes place are equitable and free of biases and violence.

With regards to the second question, ART's have been a mix bout of liberation and curtailment. While it has liberated women from the patriarchal notions of essentially carrying a baby to be a mother; to have selfless motives of love and care always guiding their pregnancy; to bringing forth aspects of male reproductive avenues like sperm donation; according reproductive labor to be considered as work and giving it economic worth to name a few. It is also curtailing in a lot of ways like it has enabled patriarchy to reduce women to mere commodities in the capitalist market; it has essentialised reproduction as a feminine duty; reduced women's bodies as sites of experimentation; made the intending mother stigmatised for not being able to procreate amongst many.

Whether law/contracts uphold the rights of women or laws/contracts uphold the rights of women working as surrogates or does it merely represent the interests of the better placed actors in the surrogacy industry. Laws on surrogacy in India framed till date namely the ICMR Guidelines, the ART Draft Regulations all have been a failure because they have not been rightly framed. If a law is framed keeping the best interests of the surrogates in mind, it can go a long way in ensuring empowerment to them.

Elaborating on the last research question, indeed surrogacy puts forth an instance where empowerment stands juxtaposed with oppression. The question then is what is the ideal way of dealing with it? This research has argued in clear terms that abolition is not a sound option. Instead, regulating them through meticulously framed and judiciously executed contracts can be the most viable way of dealing with surrogacy.

To conclude then, the need thus is to move beyond the debate of whether surrogacy should be abolished or regulated and whether contracts are effective or not to what should be the most ideal structure and nature of the contract in the wake of the given conditions. Contractualization as has been variously argued in this dissertation has its merits. Doing away with these alternative professional choices is not a feasible option for it has empowered women and given them a sense of independence. What is problematic with these is the harm, violence, physical psychological and torture it entails. These can be improved via a well framed contract that will institutionalize, regularize and give legitimate recognition to the. A contract can be the instrument through which rights of these hitherto marginalized sections of the society can be secured to them. It also extends a juridical set-up that can provide to these women a podium for the redressal of their grievances when their rights are encroached upon.

7.4 Relevance of the Research

Surrogacy is a personification of a form of feminized labor that juxtaposes concepts of reproduction, body and agency. With varying voices put forth by radicals and liberals, growing technological interventions in women's bodies, shift in notions of sexuality and family, it is imperative to revisit the question of when should women be seen as empowered agents making meaningful choices and when as hapless victims in quest of protection.

These contending issues become more crucial in the wake of the limited range of economic opportunities available to women. Within this scenario, surrogacy in recent times has become at the center of debate and deliberations. It impinges upon us the question, can surrogacy be seen as voluntary in nature; if yes, should it be considered a concealed altruistic familial arrangement or should it be accepted as a commercial work women are engaged in; if so, can they be better regulated rather than prohibited; the juxtaposition of ideas of money, mother and market also call for an analysis of whether technological developments are oppressive or emancipatory? These innumerable issues have broadened the horizon of debates on surrogacy thereby transcending the conventional focus on pull and push factors.

Surrogacy raises not only critical issues in the realm of academia, the legal and policy implications around it are complex, diverse and mostly unsettled too. Numerous government reports examining surrogacy generally condemn contractual arrangements involving financial exchange.⁴⁹⁶ In contrast, “they have been reticent to recommend outlawing private, or altruistic, arrangements. Moreover, medical practitioners advocate such family arrangements as a way of treating infertility.”⁴⁹⁷

Across the globe, countries are grappling with the dilemma of should they treat surrogacy. The various options run across the gamut of regulation, contractualization, criminalization and abolition. This dilemma becomes further profound when law begins to differentiate between commercial and altruistic arrangements. India is no exception, more so considering that it has come to become the global hub of surrogacy. While Commercial surrogacy has been legal in India since 2002, in recent times there has been growing deliberation over abolishing commercial surrogacy and regulating altruistic surrogacy. It is in this context that it becomes quintessential to meticulously examine *the Surrogacy Regulation Bill 2016*.

Within these developments, my research shall enable me to engage and meaningfully contribute to the governmental and non-governmental sector in the field of policy making as also academic research with regards to surrogacy. What makes my work of particular use is my attempt to juxtapose theoretical claims with empirical research. Therefore while I have gained profound academic understanding through my reading of seminal literature in the area, my work on the field with women for whom surrogacy is a lived reality; with intended parents who have redefined conventional understanding that linked reproduction to parenting; with members of the LGBT community for whom surrogacy is the means to realize parenthood and medical professionals who have found new enclosures in women’s bodies has further accentuated my understanding of the issue.

My research engages with surrogacy, a form of feminized labor that is increasingly being termed as ‘vagrant work’ that women across the globe are employed in. These predominantly female

⁴⁹⁶ Sharyn L. Roach Anleu, ‘Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,’ *Acta Sociologica* 33, No. 1 (1990): 63–74.

⁴⁹⁷ Ibid

dominated forms of labor juxtapose a plethora of themes: gender, sexual oppressions v/s empowerment, law and contractualization, technological developments. Amidst the expanding domain of science and technology, it has become a crucial form of labor that needs meticulous research which is the purpose of the current work. . Surrogacy, in crux is a deviation from the conventional understanding of women's reproductive labor thereby raising critical issues that are central to the everyday reality of women. It is this wide engagement with the issue that makes my research relevant in current times.

7.5 Concluding Remarks

In this work, an attempt has been made to understand the existence of surrogacy in all its dimensions. There has been a constant endeavor to comprehend the practice from all the stand points. In so doing the feminist contention, the liberal proposition, voices of key actors, in depth discussion of Assisted Reproductive Technologies, Marxist analysis of surrogacy, the caste and class analysis of surrogacy, the question of ethics and the absence of well-meaning laws have all been dealt with at considerable length.

Putting together all these pieces, the most pressing conclusion is that while surrogacy has meant economic empowerment for women working as surrogates and has helped them to enjoy their rights to a better degree it is not without its flaws. Considering this juxtaposition which has not only divided feminist but also laws across the globe, the question that has been often raised is what is the most viable way of dealing with it in terms of law?

This research has sought to argue that the need is to regulate the surrogacy industry so as to do away with the detrimental effects it has on women. Banning the practice will only lead to rise of very many problems like its operation underground pushing it further towards remaining unreported and hence unregulated. It also carries the harm of further oppressing women who would be forced to take to surrogacy in the absence of meaningful alternatives. Therefore the first imperative is to create more viable and meaningful alternatives for women so that they do not have to opt for surrogacy in the first instance.

Further the need is to build a regulatory framework that can work towards eliminating the potential harm and according to it the status of a just line of work. Herein I wish to reiterate that while I do acknowledge and accept the feminist contention that harm is deeply embedded in this practice that nothing can eliminate it, I also feel it is quintessential to see that in the less than ideal scenario these are the few options women have. If these were to be eliminated too, there are probabilities of more oppression for women. This work also seeks to argue that when articulating about the lives of women, there can be no blanket yes and no. Dialogue between the two standpoints is necessary if one has to arrive at a meaningful conclusion. Therefore if feminists continue to call for abolition without taking into cognizance the voices of women on the field, their entire enterprise would remain half-hearted. By the way of this research, I wish to point out towards the need for the feminist scholarship and women's movement to re work their conceptualizations taking into record the voices of women involved in these jobs. This would help them to better theorize and hence find solutions to end women's subordination.

In this research I have also acknowledged the fact that while regulations could be helpful, the ones framed so far have been far from adequate principally on account of the biased nature of laws. This makes it evident that only when laws are justly framed and equally implemented can they ameliorate the conditions of surrogates and recognize their pregnancies as a form of work. If laws or contracts are justly framed out, they do hold merit to eliminate the flaws that surrogacy holds.

Laws according to Nivedita Menon, *provides the ground for struggle, to establish just and equitable conditions of work*. Contracts at their very least assume consent and mutually negotiated conditions of work and these are at least present in theory. Susan Moller Okins opines that out rightly rejecting the potential of law would be tantamount to giving up on its possible use for feminism. Jane S. Jaquette contends that, "law provides a strong commitment to individual agency and a clear negotiation of what justice in a dynamic society requires: equality, choice and negotiation."⁴⁹⁸

⁴⁹⁸ J. Boucher, 'Male Power and Contract Theory: Hobbes and Locke in Carole Pateman's *The Sexual Contract*,' *Canadian Journal of Political Science* 36, No. 1 (2003): 23-38.

Contracts would further facilitate the regulation of conditions of work and third party actors. In the absence of a formal legal framework these work forms acquire become highly unregulated and autocratic. These continue to operate under wraps and the violence it entails becomes invisible. Contractualization carries potential of reforming the plight of these women. It includes a whole gamut of provisos ranging from unionization, welfare measures like health care, child care and social security. It would also go a long way in wiping out the stigma associated with these work forms.

Contracts could prove to go a long way in undoing the informal, unreported and illegal dimensions of the economy. For instance, surrogacy takes place in the isolated, privatized and discrete environment which itself carries with itself various vulnerabilities. Laws could also set in motion the establishment of a national registry of surrogacy clinics. This could go a long way in standardizing the functioning of the industry. Amongst its many benefits, it could also ensure that a basic remuneration is paid to all women working as surrogates. It is also important that laws help in launching a positive campaign for surrogacy. This will be of immense help in reforming the mental attitudes of the society and hence will go a long way in eliminating the stigma around surrogacy.

However, the efficacy of contracts depends on its very nature. What should then be its nature and constituents? To begin with, it should establish a standard method of deciding the remuneration, standardize conditions so that a decent minimum standard of living is ensured to them, the leave structure as also the termination provisos should be spelled out in black and white. The vocabulary of the contract should be such that rights and entitlements of both the parties should be explicit. To supplement these, the most important step would be to provide these women a podium to unionize so that they can collectively fight for their rights and in case of a breach, muster the strength to seek for redressal of their grievances.

Further a well framed law can go a long way in regularizing various factors like who pays the insurance premiums, what are the minimum number of days that the surrogate gets medical care after the baby is born, what are the conditions under which C-section can be undertaken, what are the terms of payment and how can the number of installments be worked out to the best of

the surrogate's advantage. Generally it is seen that the major chunk of the payment is left for after the child is born thereby keeping the surrogate at the disposal of the party.

An aspect of surrogacy that often goes unnoticed is that the families of the surrogate also suffer in the entire process. To make up for this, it is important that through law provisions like providing medical insurance to the family, scholarship to the children, facilities for child to stay with the surrogate when it is too young are put in place. These could go a long way in helping the surrogates to consider their reproductive labor as a form of work. On a similar note, there ought to be provisions for providing vocational training to the women acting as surrogates so that the surrogates find avenues to work after they give birth to the child and go back to their homes.

From the standpoint of the intending couple and the intending mother more specifically, there should be a framework in place that makes the consent and choice of the woman on equal footing with that of the male counterpart. Through law, obligation should be imposed on the intending couple to ensure that they treat the surrogate as priority. Alternatively, if ever a situation arises where the health and life of the surrogate is at risk, by law it should be mandatory for the intending party to choose the surrogate over the child. Further, there should be binding provisions so that they do not go back on their promise to pay the surrogate and to also pay for her premiums. Considering that a baby is not an object which can be denied to them if the intending party goes back on its promises, it is of utmost importance that prior penal actions must be outlined so that they can be kept under check.

It is also imperative for law to lay out in black and white terms that there can be no sex determination, sex selective abortion or denial to take a child so born if it is not of their preferred gender. If ever such a situation arises, there should be strict provisions to adequately punish them. On a similar note, if ever a situation arises where the child so born is especially abled, the intending couple cannot go back on taking the child. All of these provisions are imperative to ensure the best interests of the child born out of surrogacy arrangements.

The law also needs to clearly lay down rules for the surrogacy agencies. To begin with there ought to be a cap on the number of surrogacies an individual can take. Further, there is a pressing

need to lay out basic standards of health and hygiene in these clinics and surrogacy hostels. This is very crucial considering the wide variation amongst the agencies across the country. Further, the need is for a national list of clinics working in the realm of surrogacy so as to ensure they work as per rules. The records of these clinics should be regularly updated and checked. To this end, a nodal agency should be entrusted with this task. There should also be a tight control over agents who are key actors in the entire process.

All of these however would remain mere words, if there is not a structure in place that can ensure its judicious execution. While formulation is a significant way forward, the implementation of these contracts is imperative. In crux, contracts are an important instrument that can replace the present quasi-familial set up. It bears the potential of bringing surrogacy within the ambit of work and thus in turn will ensure it is well ordered and regulated.

To conclude, I would bring forth a concept that has been forwarded by Nussbaum. She introduces the concept of '*resourcefulness*' which is immensely helpful if applied to the context of surrogacy. As has been argued by me in this work, there is paucity of empirical data on the lives of the surrogates. Thus there are no conclusive figures that can enable us to understand the factors that push women to take to surrogacy. Further, not much is known about the life conditions of these women in terms of their social and economic conditions. Nussbaum particularly urges focus on "*resourcefulness* of women in conditions of hardship" and "the complex interrelationship between agency and need, between harm and humanity."⁴⁹⁹

From the little field data that does exist, economic need is the primary reason why women take to commercial surrogacy. It emerged from my field research that women felt that the money they received significantly altered their life conditions and that no other form of work would have enabled them to earn so much money in such a short span of time. It also became evident from the field analysis that these women were from economically deprived sections and hence this money was a big amount for them. Positing these findings in Nussbaum's framework, it could be argued that the act of surrogacy involves women using the 'wombs', their 'reproductive labor' and their 'gestational capacities' in difficult situations so as to bail themselves out of it even if so

⁴⁹⁹ Ibid

marginally, it can be considered an exemplification of 'resourcefulness' on their part to some extent.

Further, it can be argued that there can be some merit in seeing commercial surrogacy as an instrument of subversion by women against the patriarchal stereotypes. Surrogacy entails the inclusion of women in the market, something that has been denied to them since time immemorial. This inclusion is on the basis of a particular form of 'paid labor' which is premised on the use of her body and more so her reproductive capacities. These capacities that were limited to the household have come into the public domain and are being remunerated for in the labor market. Women for long have performed this function of using their reproductive labor to procreate. Surrogacy has brought this to the public arena and has given it the acknowledgement of work, something that was denied to women by 'capitalist patriarchy'.

This pushes us to question if surrogacy has enabled women to reject capitalist patriarchy and in fact has repudiated all its norms. On a related note it also bids us to understand if surrogacy as a form of work has alleviated women from a position of vulnerability or has it further added to their victimization. While refuting these questions in totality would not be fair, answering them with affirmation at this stage would be immensely premature. This calls for greater research that shall follow the current work.

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APPENDIX I

Bill No. 257 of 2016: Selected Clauses from the Assisted Reproductive Technologies (Regulation) Draft Bill, 2016⁵⁰⁰

Highlights of the Bill

- 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.

Key Issues with the Bill:

- The Bill permits surrogacy only for couples who cannot conceive a child. This procedure is not allowed in case of any other medical conditions which could prevent a woman from giving birth to a child.
- The Bill specifies eligibility conditions that need to be fulfilled by the intending couple in order to commission surrogacy. Further, it allows additional conditions to be prescribed by regulations.
- The surrogate mother and the intending couple need eligibility certificates from the appropriate authority. The Bill does not specify a time limit within which such certificates will be granted. It also does not specify an appeal process in case the application is rejected.
- The surrogate mother must be a 'close relative' of the intending couple. The Bill does not define the term 'close relative'. Further, the surrogate mother (close relative) may

⁵⁰⁰ This has been taken from the PRS Legislative Research's Analysis of the Surrogacy (Regulation) Bill 2016.

donate her own egg for the pregnancy. This may lead to negative health consequences for the surrogate baby.

- For an abortion, in addition to complying with the Medical Termination of Pregnancy Act, 1971, the approval of the appropriate authority and the consent of the surrogate mother is required. The Bill does not specify a time limit for granting such an approval. Further, the intending couple has no say in the consent to abort.

Purposes for which surrogacy is permitted:

- The Bill prohibits commercial surrogacy, and allows altruistic surrogacy. Altruistic surrogacy does not involve any monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding basic medical expenses and insurance coverage.
- The Bill permits surrogacy when it is: (i) for intending couples who suffer from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any other condition or disease specified through regulations.

Eligibility criteria for the intending couple and the surrogate mother:

- The intending couple should have a ‘certificate of essentiality’ and a ‘certificate of eligibility’ issued by the appropriate authority. The surrogate mother too needs a ‘certificate of eligibility’.
- A certificate of essentiality will be issued to the intending couple upon fulfilment of the following conditions: (i) a certificate of proven infertility of either or both of them; (ii) an order of parentage and custody of the surrogate child passed by a Magistrate’s court; and (iii) insurance coverage for the surrogate mother.
- The certificate of eligibility to the intending couple is issued upon the fulfilment of the following conditions: (i) the couple being Indian citizens and married for at least five years; (ii) between 23 to 50 years old (wife) and 26 to 55 years old (husband); (iii) they do not have any surviving child (biological, adopted or surrogate), except if the child is mentally or physically challenged or suffers from a life threatening disorder; and (iv) such other conditions that may be specified through regulations.
- To obtain a certificate of eligibility from the appropriate authority, the surrogate mother has to: (i) be a close relative of the intending couple; (ii) be an ever married woman having a child of her own; (iii) be 25 to 35 years old; (iv) not have been a surrogate mother earlier; and (iv) have a certificate of medical and psychological fitness.

Parentage and abortion of surrogate child:

- A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple.
- An abortion of the surrogate child requires the written consent of the surrogate mother and the authorisation of the appropriate authority. Further, this authorisation will have to be compliant with the Medical Termination of Pregnancy Act, 1971.

Appropriate authority and registration of surrogacy clinics:

- The central and state governments will appoint one or more appropriate authorities. The functions of the appropriate authority include: (i) granting, suspending or cancelling registration of surrogacy clinics; (ii) enforcing standards for surrogacy clinics; and (iii) investigating and taking action against complaints of breach of the Act. The appropriate authority comprises the Joint Director of the state Health Department, an officer of the state Law Department, a medical practitioner, and an eminent woman.
- Surrogacy clinics cannot undertake surrogacy or its related procedures unless they are granted registration by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of the appropriate authority. This application will be accepted or rejected within 90 days. No human embryo or gamete can be stored by a surrogacy clinic for the purpose of surrogacy.

National and State Surrogacy Boards:

- The central and state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSBs), respectively. Functions of the NSB include: (i) advising the central government on surrogacy policy; (ii) laying down the code of conduct of surrogacy clinics; and (iii) supervising the functioning of SSBs.
- Functions of the SSBs include: (i) monitoring the implementation of the provisions of the Act; and (ii) reviewing the activities of the appropriate authorities functioning at the state/union territory level.

Offences and Penalties:

- The Bill creates certain offences which include: (i) undertaking or advertising commercial surrogacy; (ii) exploiting the surrogate mother; and (iii) selling or importing human embryo or gametes for surrogacy. These offences will attract a penalty of 10 years and a fine of up to 10 lakh rupees.

Analyzing the Bill:⁵⁰¹

- **Definition of ‘infertility’ restricted to failure to conceive**

Under the Bill, ‘infertility’ is a condition that has to be proven by an intending couple, in order to be eligible to commission a surrogacy procedure. The Bill defines infertility as the *inability to conceive* after five years of unprotected coitus or other medical condition preventing a couple from conception. This definition does not cover all cases in which a couple is unable to bear a child.

For example, there may be medical conditions where the woman may *conceive* but is unable to carry a child through the period of the pregnancy, i.e., the period of nine months following the conception. This includes cases where an intending mother may be able to *conceive* a child, but may have multiple miscarriages that result in her inability to *bear* a child. There are also other medical conditions like multiple fibroids in the uterus, hypertension, and diabetes that affect successful pregnancies. Such persons will not be covered under the definition of ‘infertility’ proposed in the Bill and therefore will not be eligible to undertake altruistic surrogacy.

In other countries like Netherlands, South Africa and Greece, to be eligible for altruistic surrogacy, the medical conditions that permit altruistic surrogacy are broader. These include, in addition to the inability to conceive, other medical conditions that affect the intending mother’s ability to give birth.

- **Additional eligibility criteria for surrogacy and for intending couples may be set by regulations**

The Bill specifies various eligibility conditions for couples intending to undertake surrogacy. For example, the couple is required to fulfil all of the following five conditions: (i) be Indian citizens; (ii) be married for at least five years; (iii) either member is infertile; (iv) have no surviving children (biological or adopted or surrogate), except if the child is mentally or physically challenged or suffers from a life threatening disorder; and (v) be in the age group of 23-50 years (wife) and 26-55 years (husband). The Bill allows the NSB to prescribe additional conditions that need to be fulfilled by the intending couple through regulations. The question is whether this is excessive delegation of legislative powers. It may be argued that all conditions that make persons eligible to commission a surrogacy should be specified in the parent law and not be delegated to regulations.

- **‘Any other condition or disease’ may be specified through regulations for undertaking surrogacy:**

The Bill specifies the purposes for which a surrogacy procedure may be undertaken. Surrogacy may be undertaken if: (i) it is for altruistic purposes; (ii) either member of the couple suffers from infertility; (iii) not for commercial purposes; and (iv) not for producing children for sale or prostitution. Further, the Bill allows the NSB to prescribe through regulations ‘any other

⁵⁰¹ The detail analysis can be found at: <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>

condition or disease' for which surrogacy may be allowed. It is unclear what is implied by 'any other condition' i.e., whether it relates to only a medical condition or would be of any other nature.

- **Review and appeal procedure for surrogacy applications not specified:**

In order to initiate a surrogacy procedure, the surrogate mother and the intending couple are required to obtain certificates of eligibility and essentiality upon fulfilling various conditions from the relevant appropriate authorities. However, the Bill does not specify a time limit by which the authority will grant these certificates. Further, the Bill does not specify a review or appeal procedure in case the surrogacy applications are rejected.

Note that other laws such as the Transplantation of Human Organs and Tissues Act, 1994, and adoption related provisions of the Juvenile Justice (Care and Protection) Act, 2015 prescribe a time period within which an application will be processed. They also provide the procedure for review and appeal, in case such an application is rejected.

- **Issues related to the surrogate mother being a 'close relative': 'Close relative' not defined**

The Bill specifies various conditions that need to be fulfilled by a surrogate mother in order to be eligible for a surrogacy procedure. Upon fulfilling these conditions, the surrogate mother may obtain an eligibility certificate from the appropriate authority. One of the conditions to be proved is that the surrogate mother is a 'close relative' of the intending couple who commission the surrogacy. However, the Bill does not specify who will be a 'close relative'.

Some other laws define terms such as 'relative' or 'near relative'. For example, the Transplantation of Human Organs and Tissues Act, 1994 specifies that a living donor has to be a 'near relative'. It defines a 'near relative' to include spouse, son, daughter, father, mother, brother or sister. The Companies Act, 2013 defines a 'relative' as: (i) members of a Hindu Undivided Family; (ii) husband and wife; or (iii) other relations prescribed under the Act.

- **Storage of embryo or gamete for surrogacy not allowed**

The Bill prohibits storage of embryos and gametes (unfertilised egg and sperm) for the purpose of surrogacy. This differs from the current ICMR guidelines (2005) which allow the storage of embryos for a period of five years.² The prohibition on storage of egg or sperm may have adverse health implications for the intending mother.

Typically, for a surrogacy, the eggs are extracted from the intending mother and are implanted in the surrogate mother's uterus. The success rate of one implantation is below 30%, therefore, multiple implantation attempts may be required. To ensure availability of eggs for the multiple attempts, extra eggs are extracted and stored. Note that the intending mother needs to undergo extensive hormonal treatment for this extraction. Repeated stimulation for extraction of eggs leads to the risk of Ovarian Hyperstimulation Syndrome (OHSS) for the intending mother. In some rare cases, OHSS may lead to complications like blood clots and kidney failure.

APPENDIX II

International Comparison of Surrogacy Laws: Selected Cases⁵⁰²

Country	India Surrogacy Bill, 2016	Netherlands	United Kingdom	South Africa	Greece	Russia
Type of surrogacy allowed	Altruistic (Commercial surrogacy prohibited).	Altruistic (Commercial surrogacy prohibited).	Altruistic (Commercial surrogacy prohibited).	Altruistic (Commercial surrogacy prohibited).	Altruistic (Commercial surrogacy prohibited).	Commercial surrogacy allowed.
Payment to the surrogate	Medical expenses and insurance coverage.	Reasonable expenses, insurance and legal charges.	Reasonable expenses.	Medical expenses and insurance coverage (including any loss of earnings to the surrogate).	Expenses related to pregnancy and post-partum period (including any loss of earnings to the surrogate).	No limit.
Legal guardian of the surrogate child	Intending couple.	Surrogate (transfer of guardianship through adoption).	Surrogate (transfer of guardianship through adoption or order).	Intending parent(s).	Intending parent(s).	Surrogate, if it is her egg. Intending parent(s), otherwise.
Imprisonment for engaging in commercial surrogacy	10 years.	Maximum one year.	Maximum three months.	Maximum 10 years.	Minimum two years.	No provision.
Eligibility Criteria for Commissioning Parent(s)						
Existence of a medical reason	Must prove infertility i.e., inability to conceive.	Congenital absence of a uterus or any other condition.	No requirement.	Not able to give birth to a child and such a condition is permanent.	Intending mother is unable (for medical reasons) to bear a child.	Gestation and birth of a child is impossible due to medical reasons.
Requirement of being married	Yes.	No (single male/female allowed).	No (includes civil partnerships).	No (single male/female allowed).	No (single woman allowed).	No (single woman allowed).
Eligibility Criteria for Surrogate Mother						
Relation to intending	Close relative.	No.	No.	No.	No	No.

⁵⁰² Sources: A comparative study on the regime of surrogacy in EU member states, European Parliament, 2013; **India:** The Surrogacy (Regulation) Bill, 2016; **Netherlands:** Dutch Society of Obstetrics and Gynaecology guidelines; **United Kingdom:** Surrogacy Arrangements Act, 1985; **South Africa:** Chapter 19, Children's Act, 2005; **Greece:** Article 1458 of the Greek Civil Code; **Russia:** Article 51-52, Family Code, 1995; Federal Law on the Fundamentals of Protection of Citizens' Health in Russian Federation 2011; PRS.

Country	India Surrogacy Bill, 2016	Netherlands	United Kingdom	South Africa	Greece	Russia
parent(s)						
Age	25-35 years.	<44 years.	Not specified.	Not specified.	Not specified.	20-35 years.
Requirement of being married	Yes.	No.	No.	No.	No.	No.
No. of own children	At least one.	At least one.	No requirement.	At least one.	No requirement.	At least one.
No. of times one can be a surrogate	Once.	No restriction.	No restriction.	No restriction.	No restriction.	No restriction.
Consent of the partner	No provision.	Not required.	Not required.	Required.	Required.	Required.

APPENDIX III

1. Framework of Consent Form to be signed by the Surrogates⁵⁰³

Agreement for Surrogacy I, _____ (the woman), with the consent of my husband (name), of _____ (address) have agreed to act as a host mother for the couple, _____ (wife) and _____ (husband), both of whom are unable (or do not wish to) to have a child by any other means. I had a full discussion with _____ of the clinic on _____ in regard to the matter of my acting as a surrogate mother for the child of the above couple. I understand that the methods of treatment may include: 1. Stimulation of the genetic mother for follicular recruitment 2. The recovery of one or more oocytes from the genetic mother by Guidelines for ART Clinics in India ICMR/NAMS 92 I have been assured that the genetic mother and the genetic father have been screened for HIV and hepatitis B and C before oocyte recovery and found to be seronegative for all these diseases. I have, however, been also informed that there is a small risk of the mother or/and the father becoming seropositive for HIV during the window period. I consent to the above procedures and to the administration of such drugs that may be necessary to assist in preparing my uterus for embryos transfer, and for support in the luteal phase. I understand and accept that there is no certainty that a pregnancy will result from these procedures. I understand and accept that the medical and scientific staff can give no assurance that any pregnancy will result in the delivery of a normal and living child. I am unrelated/related (relation) _____ to the couple (the would be genetic parents). I have worked out the financial terms and conditions of the surrogacy with the couple in writing and an appropriately authenticated copy of the agreement has been filed with the clinic, which the clinic will keep confidential. I agree to hand over the child to _____ and _____, the couple (to _____ in case of their separation during my pregnancy, or to the survivor in case of the death of one of them during _____

⁵⁰³ This form is the one suggested by the Indian Council of Medical Research available on <https://icmr.nic.in/sites/default/files/guidelines/c.pdf>

pregnancy) as soon as I am permitted to do so by the Hospital/Clinic/Nursing home where the child is delivered. Guidelines for ART Clinics in India ICMR/NAMS 93 I undertake to inform the ART clinic, _____, of the result of the pregnancy. I take no responsibility that the child delivered by me will be normal in all respects. I understand that the biological parents of the child have a legal obligation to accept their child that I deliver and that the child would have all the inheritance rights of a child of the biological parents as per the prevailing law. I will not be asked to go through sex determination tests for the child during the pregnancy and that I have the full right to refuse such tests. I understand that I would have the right to terminate the pregnancy at my will; I will then refund all certified and documented expenses incurred on the pregnancy by the biological parents or their representative. If, however, the pregnancy has to be terminated on expert medical advice, these expenses will not be refunded. I have been tested for HIV, hepatitis B and C and shown to be seronegative for these viruses just before embryo transfer. I certify that (a) I have not had any drug intravenously administered into me through a shared syringe; (b) I have not undergone blood transfusion; and (c) I and my husband have had no extramarital relationship in the last six months. I also declare that I will not use drugs intravenously, undergo blood transfusion excepting of blood obtained through a certified blood bank, and avoid sexual intercourse during the pregnancy. Guidelines for ART Clinics in India ICMR/NAMS 94 I undertake not to disclose the identity of the couple. In the case of the death of both the husband and wife (the couple) during my pregnancy, I will deliver the child to _____ or _____ in this order; I will be provided, before the embryo transfer into me, a written agreement of the above persons to accept the child in the case of the above-mentioned eventuality.⁵⁰⁴

⁵⁰⁴ This form is the one suggested by the Indian Council of Medical Research available on <https://icmr.nic.in/sites/default/files/guidelines/c.pdf>

2. Endorsement signed by the ART clinic with the Surrogate

I/we have personally explained to _____ and _____ the details and implications of his/her/their signing this consent/approval form, and made sure to the extent humanly possible that he/she/they understand these details and implications.⁵⁰⁵

Signed: (Surrogate Mother):

Name, Address and Signature of the Witness from the clinic:

Name and Signature of the Doctor:

Dated:

⁵⁰⁵ Ibid

APPENDIX IV

1. Consent Form for the Donor of Eggs⁵⁰⁶

I Ms. _____ consent to donate my eggs to couples who are unable to have a child by other means. I have had a full discussion with Dr. _____ (name and address of the clinician) on _____. I have been counselled by _____ (name and address of independent counsellor) on _____. I understand that there will be no direct or indirect contact between me and the recipient, and my personal identity will not be disclosed to the recipient or to the child born through the use of my gamete. I understand that I shall have no rights whatsoever on the resulting offspring and vice versa. I understand that the method of treatment may include: • Stimulating my ovaries for multifollicular development.

- The recovery of one or more of my eggs under ultrasound-guidance or by laparoscopy under sedation or general anesthesia.
- The fertilization of my oocytes with recipient's husband's or donor sperm and transferring the resulting embryo into the recipient.

Signature:

Dated:

2. Endorsement by the ART clinic/oocyte bank⁵⁰⁷

I/we have personally explained to _____ and _____ the details and implications of his/her/their signing this consent/approval form, and made sure to the extent humanly possible that he/she/they understand these details and implications.

Signed: _____

Name, Address and Signature of the Witness from the clinic Name:

Signature of the Doctor:

Dated:

⁵⁰⁶ This form is the one suggested by the Indian Council of Medical Research available on <https://icmr.nic.in/sites/default/files/guidelines/c.pdf>

⁵⁰⁷ Ibid

APPENDIX V

1. Consent Form for the Donor of Sperm⁵⁰⁸

I Mr. _____ consent to donate my sperm to couples who are unable to have a child by other means. I have had a full discussion with Dr. _____ (name and address of the clinician) on _____ .I have been counselled by _____ (name and address of independent counsellor) on _____. I understand that there will be no direct or indirect contact between the recipient, and me and my personal identity will not be disclosed to the recipient or to the child born through the use of my gamete. I understand that I shall have no rights whatsoever on the resulting offspring and vice versa.

Signature:

Dated:

2. Endorsement by the ART clinic/semen bank⁵⁰⁹

I/we have personally explained to _____ and _____ the details and implications of his/her/their signing this consent/approval form, and made sure to the extent humanly possible that he/she/they understand these details and implications.

Signed:

Name, Address and Signature of the Witness from the clinic:

Name and Signature of the Doctor:

Dated:

⁵⁰⁸ This form is the one suggested by the Indian Council of Medical Research available on <https://icmr.nic.in/sites/default/files/guidelines/c.pdf>

⁵⁰⁹ Ibid

APPENDIX VI

1. Consent Form to be signed by the Couple⁵¹⁰

We have requested the Centre (named above) to provide us with treatment services to help us bear a child. We understand and accept (as applicable) that:

a. The drugs that are used to stimulate the ovaries to raise oocytes have temporary side effects like nausea, headaches and abdominal bloating. Only in a small proportion of cases, a condition called ovarian hyperstimulation occurs, where there is an exaggerated ovarian response. Such cases can be identified ahead of time but only to a limited extent. Further, at times the ovarian response is poor or absent, in spite of using a high dose of drugs. Under these circumstances, the treatment cycle will be cancelled.

b. There is no guarantee that: a. The oocytes will be retrieved in all cases. b. The oocytes will be fertilized. c. Even if there were fertilization, the resulting embryos would be of suitable quality to be transferred. All these unforeseen situations will result in the cancellation of any treatment.

c. There is no certainty that a pregnancy will result from these procedures even in cases where good quality embryos are replaced.

d. Medical and scientific staff can give no assurance that any pregnancy will result in the delivery of a normal living child.

Name and Signature of the Husband:

Name and Signature of the Wife:

Dated:

⁵¹⁰ This form is the one suggested by the Indian Council of Medical Research available on <https://icmr.nic.in/sites/default/files/guidelines/c.pdf>

2. Endorsement by the ART Clinic⁵¹¹

I/we have personally explained to _____ and _____ the details and implications of his/her/their signing this consent/approval form, and made sure to the extent humanly possible that he/she/they understand these details and implications. This consent would hold good for all the cycles performed at the clinic.

Name, Address and Signature of the Witness from the clinic:

Name and Signature of the Doctor:

Dated:

⁵¹¹ Ibid

APPENDIX VII

Questionnaire for the Surrogates⁵¹²

- NAME(नाम):
- AGE(आयु): Village (गाँव नाम):
- CASTE (जाति): RELIGION (धर्म):
- EDUCATION (शिक्षित): Yes/(हाँ) No/नहीं: Class (कक्षा): _____
- MARRIED (विवाहित) WIDOW (विधवा) DIVORCE (तलाक़शुदा)
- HOW MANY CHILDREN OF YOUR OWN DO YOU HAVE? (कितना बच्चे हैआपके?):
One(1): Two(2) Three More than
Three(ज्यादा):
- HOW DID YOU KNOW ABOUT SURROGACY? (सरोगेसी के बारे में कैसे पता होना?)
Friend(दोस्त): Relative(संबंधी): Agent(एजेंट): Others,Specify(अन्य): _____
- WHY DID YOU CHOOSE IT? (क्यों चुनना आप?):
Money(धन) : Family(पारिवारि): Children(बच्चे): Others,Specify (अन्य): _____
- HOW MANY SURROGACY HAVE YOU HAD? (सरोगेसी कितना बार?)
Once(1): Twice(2) Thrice(More(अधि)
- HOW MUCH WERE YOU PAID?/(कितना धन मिलना आप?)
First Time(पहला वक़्त): Rs. Second Time(दूसरे वक़्त): Rs. Third Time(तीसरा वक़्त): Rs.
- WHAT DID YOU DO WITH THE MONEY?/ (क्या करी धन से?):
- DOES YOUR VILLAGE KNOW ABOUT IT? HOW DO THEY REACT? (गाँव को पता?)
- HAS YOUR FAMILY ACCEPTED IT?/ पारिवारि मंज़ूर करना ? : Yes/(हाँ) No/नहीं:
- WHO WERE THE INTENDED PARENTS? :
If Indians, From which State/ City:
If Foreigners, From which Country:
- ARE YOU IN TOUCH WITH THEM AND THE BABY: Y() ति:
- WHAT DO YOU FAVOUR ? : Paid Surrogacy (रुपया देना सरोगेसी) रुपया बिना सरोगेसी)

⁵¹² This was used to ascertain quantitative data from the field in Anand and Gurugram

APPENDIX VIII

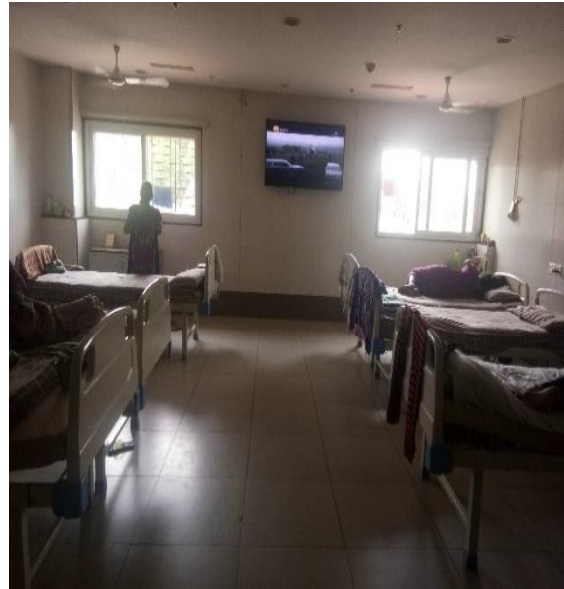
Some Images from the Field:

Campus of Akanksha Fertility Center located at Naya Padkar Road, Anand

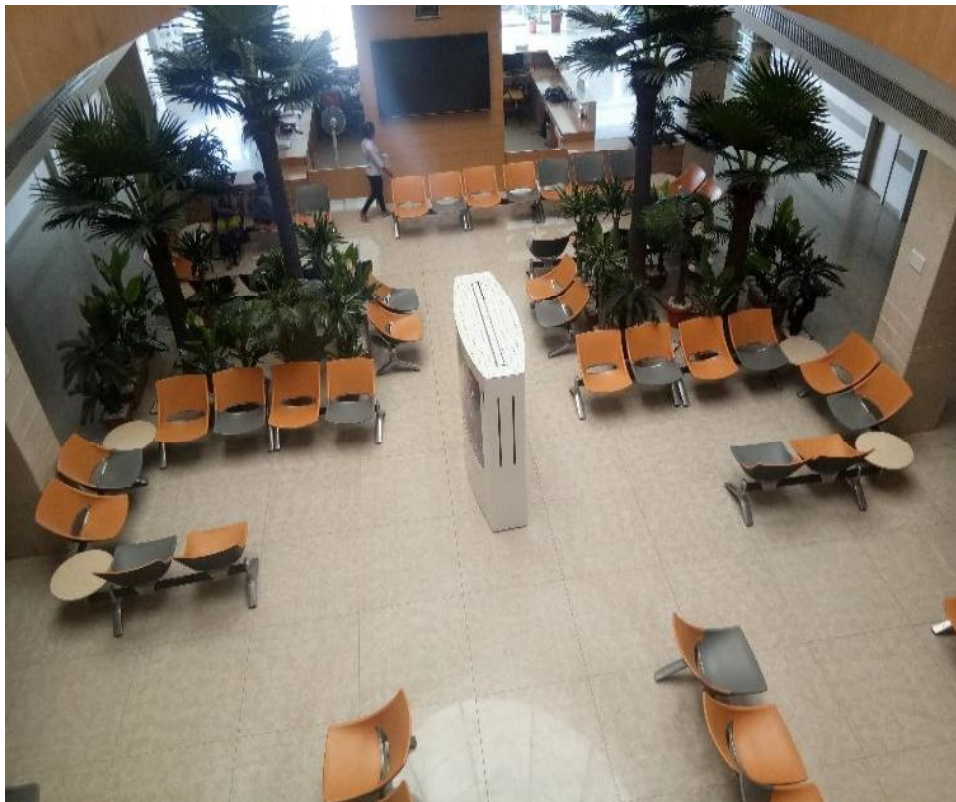


Picture of a Ward where the Surrogates live The Facilities at Akanksha Clinic





Akanksha Fertility Centre – Infrastructure



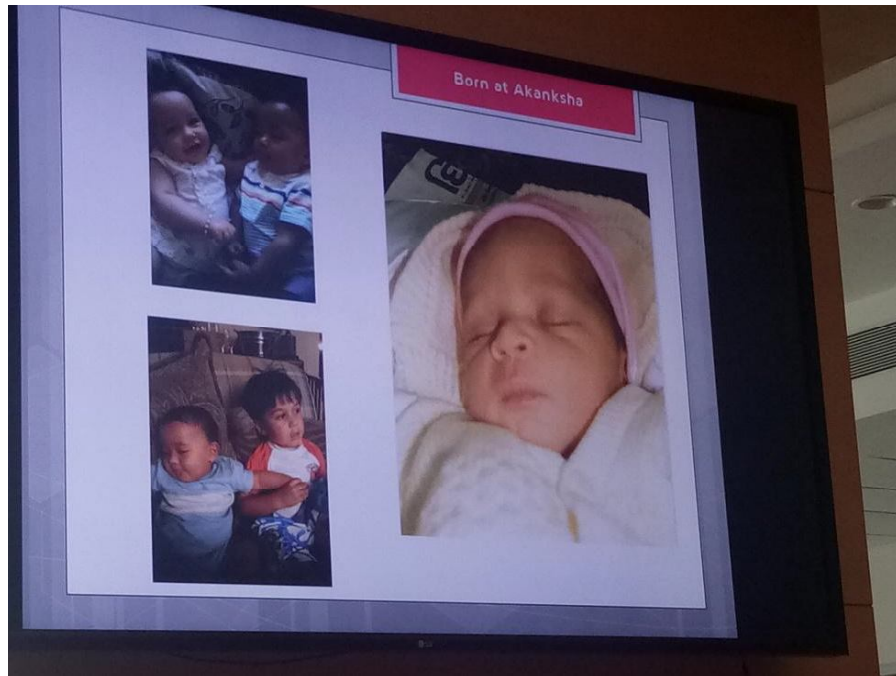
Akanksha Medical Centre – Waiting Area



Some Intended Parents waiting at the Akanksha Fertility Center



A child born out of a Surrogacy Arrangement



Documentation of every new-born baby is done at the Clinic



Laboratories at the R&D Wing of Akanksha Medical Centre



Akanksha Medical Centre – Surrogate Resting Area / Hostels

One of my respondents shared images of the time when she was a surrogate



Another Surrogate shared a memory when her 'Party' did 'God Bharai'





Intended Parents meeting Surrogates and Babies



Vocational Training Given to Surrogates



Old Campus of Akanksha Fertility Center located at Station Road



Akanksha Fertility runs under the aegis of Sat Kaival Hospital

