Understanding Gestation Work in India through Surrogacy Contracts

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Abstract: This paper engages with surrogacy contracts as crucial texts which seek to codify the role of a woman who act as a surrogate as a service provider engaged in gestation work, and not as a parent despite her central role of carrying a pregnancy and giving birth in a surrogacy arrangement. The paper analyses gestational surrogacy contracts sourced during fieldwork conducted in Delhi-Gurgaon and Mumbai, India and illustrates its salience in a surrogacy arrangement. It supplements a focus on the text of the contracts with insights drawn from interviews with lawyers who frame such contracts and 'agents' who recruit and supervise the women acting as surrogates. The paper contextualises the surrogacy contract in the evolving regulatory framework around surrogacy in India and engages in-depth with its main objectives and contents. It demonstrates how as a contract between two parties – the woman acting as the surrogate and commissioning parents – and mediated by facilitators like lawyers and agents, it renders the former to be an unequal party subjected to numerous controls and restrictions.

INTRODUCTION

Surrogacy is a *contractual* arrangement, where a woman agrees to give birth to a child for somebody else to bring up. When she receives a payment for doing so, the arrangement becomes commercial. The transaction involved in a surrogacy arrangement – especially when there is a payment for carrying a pregnancy, giving birth and relinquishing a child – has been a subject of often polarised debates on the nature of the surrogacy contract and what it entails (c.f. Richard 1990; Spar 2005). In the 1980s, validity and enforceability of sur-

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rogacy contracts became a subject of judicial scrutiny most prominently in the USA, in the wake of child custody cases when women acting as surrogates refused to relinquish the children they gave birth to. Since 1980s, many countries in the global North put in place stringent regulations on surrogacy (especially, on commercial surrogacy which came to be prohibited in many jurisdictions). Markens (2007) notes how the controversial and prominent 1985 Baby M case in the USA, in particular, was a catalyst for major regulatory steps. Further, she documents that 'most industrialized nations have rejected or greatly restricted the practice of surrogate parenting', especially through commercial surrogacy including 'Australia, Canada, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Norway, Spain, Sweden, and Switzerland' (Markens 2007: 23). In contrast to this restrictive legal scenario, since the early 2000s, the phenomenon of commercial surrogacy emerged and flourished in India for almost a decade and a half until the government announced a ban in 2016 (Bedi 2016). Surrogacy in India has been facilitated by an industry involving multiple actors and myriad modes of organising the arrangement. However, despite multiplicities in the way a surrogacy arrangement could be organised, it is always a contractual arrangement between the woman acting as the surrogate[2] and the commissioning parents. In India, even though they are primarily instruments to ensure that the woman acting as the surrogate relinquishes the child she gives birth to, in effect, such contracts are much more expansive. They include specific codes of conduct for women acting as surrogates for the duration of their pregnancy. Moreover, they have been deployed by the surrogacy industry as a critical tool to ensure a smooth completion of the process (Pande 2014; Majumdar 2017). In this context of centrality of the contract in a surrogacy arrangement, I focus on the surrogacy contract as a crucial text that frames what surrogacy entails and constructs the role of the women who act as surrogates. In this paper, I analyse the surrogacy contract – its text, the conditions it stipulates and the negotiations concerning it – as a window to understanding the role of women who acted as surrogates in India. I show how the surrogacy contract is designed to be a tool that not only regulates their lives when women act as surrogates but seeks to

[2] It is important to emphasise at the outset that in my research I use the long phrase *women who act as surrogates* and refrain from the shortcut of referring to them as just 'surrogates' in order to avoid invisibilising their personhood and to recognise them as active agents.

codify their role as that of doing, what can arguably be called *gestation work*. The surrogacy contract emphasises the role of women who act as surrogates as distinct from being mothers and only as that of *service* providers gestating a pregnancy and giving birth as part of their contractual obligation.

I draw upon field work conducted in Delhi-Gurgaon and Mumbai in India during 2014-15. The core of my fieldwork comprised of a total of 47 in-depth, semi-structured interviews with doctors who practice IVF and also facilitate surrogacy, counsellors at clinics and agencies (some of whom were clinical psychologists and others not), lawyers, commissioning parents, proprietors of agencies and their staff, individual agents and women acting as surrogates. These were held at the doctors' offices and consultation rooms at the clinics or hospitals where they practiced, with some individual agents and women acting as surrogates in the lobbies or waiting areas of the clinics or hospitals, the lawyers' chambers, offices of agencies, 'hostels' where some women acting as surrogates lived, to name the important spaces I could access. The interviews with doctors, counsellors and lawyers were mostly conducted in English, and with the all individual agents and most women acting as surrogates in Hindi (except two in Bangla). I was able to conduct these interviews without any translators since I can communicate with ease in all three languages. In this paper, I primarily draw upon discussions on surrogacy contracts from the interviews with seven lawyers (three in Delhi-Gurgaon and four in Mumbai), five individual agents (three in Delhi-Gurgaon and two in Mumbai) and two doctor-proprietors of a 'third party[3] agency' in Mumbai. Two core primary texts that I analyse in this paper are gestational surrogacy contracts that I sourced during my field research, one

[3] The procedures using Assisted Reproductive Technologies (ARTs) that necessitate involvement of a 'third party', in infertility treatment e.g. in case of egg donation, sperm donation and surrogacy, are referred to as 'third party reproduction' in medical parlance. The establishments that recruit, supervise and coordinate with these 'third parties' (i.e. egg donors, sperm donors or women acting as surrogates) are often called Third Party Agencies (TPAs). They themselves are also 'third party' in a transaction that happens primarily between the clients and the doctors who act as providers of infertility treatment to them. Even individual agents can be referred to as 'third party agents', however, in the surrogacy industry only those establishments are designated as TPAs who have a more elaborate organisational structure in place and are not run entirely by only one or two people. In the Draft ART Bills, that I refer to in the next sections, these organisations are called 'ART Banks', a term that was not commonly used in the industry as I encountered during my field research.

each from Delhi and Mumbai. All the names of people I interviewed and have quoted in this paper are pseudonyms.

In this paper, at the outset, I outline a brief overview of the phenomenon of surrogacy in India. I then contextualise the surrogacy contract in a scenario of evolving regulatory frameworks and highlight its main objectives and contents. Thereafter, using my field research, I probe how key actors from the surrogacy industry envision a surrogacy contract, its salience in a surrogacy arrangement and accordingly frame its contents. To do so, I draw upon interviews with lawyers who draft and formalise surrogacy contracts, and agents who are entrusted with the task of ensuring that the contractual obligations are upheld by women who act as surrogates. I then proceed to argue how the contract envisages women acting as surrogates as gestation workers.

THE SURROGACY INDUSTRY IN INDIA

Along with a few more countries of the global South[4], there has been a rise of the commercial surrogacy industry in India. It was often seen as a transnational 'outsourcing' industry with favourable laws (and also lower costs[5]), even though it did not cater to exclusively transnational clients. The Indian government announced a decision to prohibit commercial surrogacy and introduced the Surrogacy (Regulation) Bill[6] in Parliament in 2016, in close succession of its deposition in the Supreme Court during the hearing of a Public Interest Litigation (PIL)[7] to ban commercial surrogacy. Indian courts have also examined cases related to surrogacy, but those have involved transnational commission-

[4] Other countries were Thailand (until it was banned there in 2015), Ukraine, Nepal (until it was banned in 2016) and Cambodia (until the government announced a decision to ban it in 2016), to name a few (Nadimpally et.al. 2016).

[5] The cost in India could be less than half compared to for example, the states in the USA where commercial surrogacy is legal (Aravamudan 2014; Rudrappa 2012).

[6] The Bill was introduced in the Parliament in November 2016, but still awaits parliamentary debate and completion of the legislative process. It does not ban the practice of surrogacy but merely bans a commercial transaction between the woman acting as the surrogate and the commissioning parents. Only, Indian heterosexual couples who have been married for 5 years can enter into an altruistic surrogacy arrangement with a close relative, according to this Bill.

[7] Jayashree Wad v. Union of India; W.P. (C) 95/2015.

ing parents and citizenship issues of the children[8]. The surrogacy contract itself has not been a subject of examination by courts in India yet.

Until legal, the commissioning parents could be both foreigners and Indians, who were able to afford this process that costs up to $35,000-40,000 (Rudrappa 2012). The women who acted as surrogates in India came from marginalised sections of the society, for whom the payment which could range from $1,700 to $8,800 [i.e. INR 1,00,000 to 5,00,000[9]] was a lucrative remuneration when compared to what they were otherwise engaged in like domestic work as maids, as cooks and nannies, factory work or as housewives whose husbands work in factories, have small businesses or other low-paying jobs.

An expanding body of research on the process of commercial surrogacy in India[10] as well as incisive documentary films[11] on the subject have highlighted the proliferation of commercial surrogacy in India and analysed multiple facets of the way it was facilitated. The surrogacy industry mediates the arrangement between the clients of commercial surrogacy, i.e. the commissioning parents, and the women who act as surrogates. This industry includes a plethora of actors – doctors, lawyers, medical tourism agencies, agents who recruit women to act as surrogates, hospital administrators, counsellors, and so on. The type of commercial surrogacy that has flourished in India is *gestational*, where women who act as surrogates, do not contribute their gametes but only gestate and give birth to the embryos created using Assisted Reproductive Technologies (ARTs) like In-Vitro Fertilisation (IVF). Therefore, a primary centre where such arrangements are anchored is a hospital space which could be a 'family-owned nursing home', 'In Vitro Fertilisation (IVF) clinic' or 'maternity home/nursing home' (Deepa V. et al. 2013). Surrogacy is commissioned

[8] The first such case and perhaps the most prominent among them is the Baby Manji case. Manji Yamada v. Union of India, (2008) 13 SCC 518.

[9] This price range is a 'guesstimate' based on a survey of media reports, available research on this subject and information I gathered during my research in 2014-15 (Banerjee 2015). The prevalent conversion rate in 2014 was 1 USD = 60 INR.

[10] Like that of Pande (2014; based in Gujarat), Rudrappa (2012 & 2015; based in Bangalore), Saravanan (2010; based in Gujarat), Majumdar (2017; based in Delhi), Sama (2012: based in Delhi and Punjab), Deomampo (2016; based in Mumbai) and Deepa V. et. al. (2013; based in Punjab, Maharashtra, New Delhi and Andhra Pradesh), to name a few but prominent ones.

[11] Some important documentary films on the subject include *Made in India* (Haimowitz & Sinha 2009), *Can We See the Baby Bump Please?* (Sama 2013) and *Womb on Rent* (Dutta 2014).

by people[12] who seek it as a mode of treatment for their infertility, when they cannot reproduce on their own. Women who act as surrogates in this process are recruited by individual 'agents', who may be working for the hospitals or intermediaries like a 'third party surrogacy agency' (TPAs), or 'specialist trans-national agencies' (ibid.). These agents also supervised them during their pregnancy, and/or coordinated the logistics for the commissioning parents, including travel and visa formalities for foreigners. Thus, the surrogacy industry mediates between the commissioning parents and women who act as surrogates, bringing them together through a contractual arrangement.

EVOLVING REGULATION AND THE SURROGACY CONTRACT IN INDIA

The contracts were drafted and formalised by the surrogacy industry in an environment where some legal sanctity was accorded to them. The Indian government began its regulatory efforts since the early 2000s, and the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005) formulated by the Indian Council for Medical Research (ICMR) also included a framework for legalised commercial surrogacy (ICMR 2005). Modelled on these guidelines, various versions of Draft ART (Regulation) Bills, during 2008-2014, sought to regulate surrogacy and upheld the importance of a contractual arrangement between the women acting as surrogates and the commissioning parents (Government of India 2008, 2010 & 2014). The Draft ART Bill required the woman who acts as the surrogate to enter into a contract with the 'ART Bank' i.e. the agency which recruits her for the process as well as the 'patients' i.e. the commissioning parents, with the inclusion of a payment schedule. The other three parties – the 'patients'; the 'ART Bank' that would recruit gamete donors or women acting as surrogates; and, the 'ART Clinic' which would medically supervise the process – were also directed to enter into contracts with each other.

When I conducted my fieldwork in 2014-15, some restrictions were brought in by the Indian government with regard to foreign nationals commissioning a surrogacy. However, in general, the lawyers, doctors, individu-

[12] Gestational surrogacy can be used as a mode of reproduction by not just couples who are diagnosed to be infertile but others as well, for example single people or homosexual couples. However, the Indian government has largely excluded others (especially in case where they are foreigners) and only favours heterosexual married couples to commission a surrogacy in India.

al agents and representatives of TPAs whom I interviewed, claimed to be operating in compliance with the conditions laid down in the Draft ART Bills, particularly with regard to the contractual nature of the arrangement. In near replication of the ICMR Guidelines, the Draft ART Bill 2010 contained a consent form to be signed by the woman who acts as the surrogate, titled 'Agreement for Surrogacy'. This agreement was only an expression of consent by her to act as a surrogate and an affirmation that she understands the medical intervention that gestational surrogacy would entail. It included an endorsement by the ART Clinic that it has been 'made sure to the extent humanly possible' that she understands the 'details and implications' of the gestational surrogacy process. In her pioneering work Pande (2014), noted that the clinic in Western India where she conducted her ethnographic fieldwork, used this consent form as suggested in the ICMR guidelines, for women acting as surrogates there. However, later research on the phenomenon (Deomampo 2016; Majumdar 2017), including mine, which emerged from other locations in India shows that there was no fixed format of such agreements, even if the basic template was adopted from the ICMR Guidelines and Draft ART Bills. For example, the Draft ART Bill 2010 contained an additional proforma called the 'contract between the patient and the surrogate', which simply stated that the 'patients' are the seekers of surrogacy and the latter 'willingly agreed to be the surrogate mother for a child of the patient'. It also included the payment that the woman acting as the surrogate would receive in five instalments – at the time of embryo transfer, on confirmation of pregnancy, at the end of first and second trimesters and after the delivery. The contracts that the industry mediated took the shape of a broader document that had elements of both the 'agreement' and what was envisioned as the 'contract'.

The lawyers who specialise in the niche area of drafting surrogacy contracts have used the formats suggested in the ICMR Guidelines and Draft ART Bills as templates. Yet, they also improvised to create contracts that are not merely consent forms and are more expansive in scope. Some of the lawyers I interviewed have been involved in drafting surrogacy contracts from as early as 2004-05. They drafted some of the first contracts on their own when there were no Draft ART Bills for reference. Later, they adopted the practice of drafting contracts in consonance with the templates given in the Draft ART

Bills. During my field research, I could source two sample surrogacy contracts from lawyers, one each at Delhi and Mumbai, which I analyse in this paper[13].

OBJECTIVES AND CONTENTS OF THE SURROGACY CONTRACT

Primarily, the surrogacy contract is an agreement between the commissioning parents and the woman who acts as the surrogate. She agrees to carry a pregnancy, give birth to the child she gestates and relinquish it upon birth. The commissioning parents, in turn, agree to pay her a remuneration for doing so, to take care of all the expenses involved in the required medical treatments, and that they will take the custody of the child when it is born irrespective of its sex, health status or any disabilities. Generally, the husband of the woman acting as the surrogate was designated as a 'confirming party' for the woman acting as the surrogate. If the women acting as surrogates were separated, divorced or widowed, usually another close family member acted as a 'confirming party'[14]. This contract is supplemented by – an 'endorsement by the ART Clinic'; a separate financial agreement or payment schedule; a 'declaration of intent' by the woman who acts as the surrogate that she is gestating the pregnancy with the intention of relinquish-

[13] Interestingly, while I could source sample copies of surrogacy contracts, they refused to share the contracts where the 'ART Bank' or 'ART Clinic' are one of the parties, citing 'confidentiality'. This meant that the 'confidential' contracts that I could not access included one between the woman acting as the surrogate and the ART Bank and the agreements that the commissioning parents, the ART Bank and the ART Clinic enter into with each other, as envisaged in the Draft ART Bills. Even though only two of the lawyers agreed to share the surrogacy contract in a 'sample' form, without names and identifying details of the woman acting as surrogate, her husband or commissioning parents, similar 'blinding', or my promise of maintaining confidentiality as an academic researcher, was not deemed to be enough as far as the ART Banks and ART Clinics were concerned by any of the lawyers I interviewed. In a sense, my inability to access the auxiliary yet crucial contracts that facilitate the completion of the surrogacy process opened a window to the centrality of the facilitators of the surrogacy arrangement – the agencies and the clinics – guarding whose confidentiality was held to be of most importance by the lawyers.

[14] In my interviews with lawyers, agents, as well as doctors in Delhi and Mumbai, it emerged that the requirement of a 'confirming party' is seen as crucial. A confirmation from husband is considered as a condition that absolves the facilitators of surrogacy of any responsibility emerging in possible marital discord due to the wife 'being pregnant with someone else's child', or family members complaining of duping the woman who agreed to act as a surrogate in 'any immoral activity'. Such concern emerged from an assumption that in the marginalised sections of society from where most women who act as surrogates came, there is not much awareness about reproductive technologies like IVF and the possibility of separating sex from reproduction.

ing the child(ren) upon birth; and, an affidavit by her husband outlining his consent for his wife acting as a surrogate, that he has no paternity claims and understands that sexual abstinence is involved in the process.

The main objective of gestational surrogacy contracts is to ensure that the woman who acts as the surrogate relinquishes the child(ren) upon birth, neither she nor her husband can stake claim to gain custody, and parentage is established in favour of the commissioning parents. It also seeks to establish that the parties to the contract acknowledge that doing so would be in the 'best interest of the child'[15]. The contract that I sourced in Delhi lays this down elaborately as follows,

> the parties agree that the any Child(ren) [sic.] born pursuant to this Agreement shall be *morally, ethically, legally, contractually and otherwise* the Child of the commissioning parents for all intents and purposes, and the Commissioning Parents shall assume all legal and parental rights and responsibilities for the Child, and that Surrogate and Husband do not desire nor intend to establish a parental or any other type of relationship with the Child. *Surrogate and Husband specifically relinquish any and all rights, responsibilities, and claims with respect to a Child born pursuant to this Agreement*, and specifically agree that it is in *the best interest of the Child* that the Child be raised by the commissioning parents and be the Child of the commissioning parents for all purposes, without interference by Surrogate and/or Husband (Recital to the Contract, clause G; emphasis added).

Moreover, a supplement to the contract is an additional 'declaration of intent' by the woman acting as the surrogate. In the contract that I sourced in Mumbai, in this declaration she specifies,

> I have agreed to carry pregnancy and give birth to a child conceived by way of placement of embryos obtained by inseminating the eggs of the commissioning mother with the commissioning father's sperm into my uterus through ART process. I have no intention of having physical or legal custody or any parental rights or duties with respect to any child born of this surrogacy process […]. I further acknowledge that it is in *the best interests of the child*

[15] I refer to this aspect later in the paper.

> born of this surrogacy process for the commissioning parents to have sole custody of said child. I therefore, agree to cooperate fully in allowing the commissioning parents to bond with and take custody of said child from the moment of its birth (emphasis added).

Thus, there is an emphasis on the role of ARTs in the process of surrogacy. Later in the paper, I will show how this is sought to be linked to establishing parental rights in favour of those who seek the ARTs in the first place, i.e. the commissioning parents. Another aspect that is evident from the above clause is that the role of the woman acting as the surrogate is envisaged as ending at the moment of the birth of the child when the commissioning parents take the custody. Moreover, similar to the elaborate provision in the Delhi contract, this provision in the Mumbai contract reiterates that it is in the 'best interests of the child' that commissioning parents are entrusted with sole parental rights. Indeed, the Draft ART Bills and the Surrogacy Bill also envisage this and stipulate that even the birth certificate of the child bears the name of the commissioning parents so that they do not need to undergo any transfer of parentage or adoption formalities.

It is poignant how such elaborate clauses are put in place to circumvent the possibility of 'a parental or any other type of relationship with the Child' for the woman who acts as the surrogate, by including it as a contractual obligation for her. As Byrn and Synder (2005) note, the practice of contractually ensuring parentage prior to the birth of the child in favour of the commissioning parents is intended to facilitate recording the commissioning parents' names on the birth records and discharging the child directly from the hospital to them. However, whether a woman acting as a surrogate must, can or should agree to sign away all her claims to parenthood has been a contentious issue in debates on surrogacy contracts. Some have highlighted the undesirability of a situation where women are expected to give informed consent to relinquish the children prior to giving birth (Okin 1990; Allen 1991). Given that she carries a pregnancy and gives birth, she must be able to refuse relinquishing the child if she so desires (Qadeer & John 2009). On the contrary, others have warned against creating special conditions around gestation in surrogacy that impinge on their ability to enter into a contract, because it can set an unwarranted precedent and can be misused as a pretext to exclude women from entering into other contracts as well (Andrews 1988). While not arguing

against women's freedom or capacity to enter into a contract for surrogacy, Phillips points out how surrogacy contracts unfairly require women acting as surrogates 'to relinquish the right subsequently to change one's mind' (2013: 79). The way the practice of recording the names of the commissioning parents on birth records is upheld in draft legislations on surrogacy in India has been criticised for promoting an erasure of the woman acting as surrogate (Qadeer & John 2009; Sama Team 2009).

Moreover, even without entering a debate on the difficulty that a woman acting as a surrogate may or may not have in giving prior consent to relinquish the child she gives birth to, and acknowledging women's agency in deciding to enter into such arrangements, the erasure of the possibility of 'any other type of relationship with the Child' as is articulated in the clause from the Delhi contract above, can be criticised. The fact that she agrees to give birth to the child with the intention of relinquishing it should not mean that her status as the birth-giver should also be denied. Indeed, the erasure of her role is thought to be of such importance that she is further bound with a contractual obligation for non-disclosure and confidentiality. In the Mumbai contract there are two particularly important clauses regarding this,

> 3.1.23 She will never disclose anything about this Agreement or about her surrogate motherhood to the Child and for that purpose she agrees not to take or keep with her any copy of this Agreement or any medical papers and documents relating to her surrogate motherhood.
> 3.1.27 She will never take recourse to any legal proceedings claiming rights over and custody of the Child and declares that she is explicitly debarred from doing so and as such, any claim by herself or by anybody through her or in her name over and in respect of the Child and his/her custody shall be considered as null and void and she hereby unequivocally consents and agrees to passing of an order or direction declaring such claim as null and void by the court or authority before whom such proceedings may be initiated or filed.

These clauses seek to ensure that the woman who acts as the surrogate is deterred from staking any claim to the custody of the child(ren) she gives birth to. The substance of these clauses also demonstrates how she is not just an unequal party to the contract but is effectively signing on her own

subordination, forgoing even the right to keep documentation of the medical reports relating to her pregnancy while acting as a surrogate. Her obligations are seen to continue in perpetuity even after the process is over, however, neither the ART Clinic, agencies that recruit and supervise her, nor the commissioning parents bear any responsibility for the long-term consequences that gestational surrogacy might have on her health. The validity and enforceability of such contracts have not been challenged in Indian courts so far, unlike for example, courts in the USA that deliberated on the contract as I mentioned above. At the risk of speculation, one wonders how such contracts will stand the scrutiny of courts. Is it even possible for a citizen to waive off their right to legal remedies and provide a priori consent to a court order that nullifies their claim?

Both the sample contracts that I sourced during my fieldwork were in English. But the lawyers who shared them said that the provisions of the contract were translated for the women acting as surrogates, in Hindi or another Indian language as the case may be, before they sign it. Other studies (Pande 2010; Rudrappa 2015) have noted that most women who sign these surrogacy contracts cannot read and understand English on their own. Some lawyers I interviewed shared that contracts are also available in Hindi and in Mumbai some contracts are written in Marathi as well. However, the women who act as surrogates are highly dependent on the lawyers and agents to comprehend the technical language that is used in legal contracts even if it is in a language that they speak and/or can read and understand.

Surrogacy contracts are detailed documents, often ten to 20 pages long, but as I gathered from my interviews with agents as well as women acting as surrogates, the explanation given is not really a translation of the entire document, but just conveying a gist of what the contract signifies. Usha, an agent whom I interviewed in Mumbai, summarised what the women acting as surrogates are told,

> this document says that you will complete this work in 9 months and hand-over the child to the 'party' [i.e. the clients who have commissioned the surrogacy]. You cannot leave the work in between and if you do then legal action can be initiated against you. All this is written there, they have to sign it and complete the work given.

In this crisp summary, the main concerns that the woman acting as the surrogate relinquishes the child after giving birth and that she commits to the completion of the process in a hassle-free manner are both highlighted. Her contractual obligations are articulated as 'work' that she is entrusted with. For the entire duration of the pregnancy, it involves a wide array of instructions that she is contractually obligated to follow. For example, in the Mumbai contract, a very broadly drafted clause stipulates that,

> She will make the necessary changes to her lifestyle to minimize the risk of harm to the unborn child […]. Whenever in doubt about a particular substance or conduct, she will discuss it with the Attending Physician and will be abide (sic.) by the Attending Physician's decision and instructions.

The requirement of such 'lifestyle' changes is often also used as a justification to ask them to stay at 'surrogacy hostels' for part(s) or entire duration of the pregnancy. But even in cases that they do not stay at these hostels, the agents ensure everyday surveillance by conducting 'surprise checks' as another agent in Mumbai, Anandi, shared with me. Ethnographic work of Pande (2014) located in one such hostel, and that of Deomampo (2016) for those who continue to stay in their own homes demonstrates the myriad ways in which such surveillance is carried out by agents.

As Usha's summary above shows, the threat of punitive legal action is also deftly mobilised to disincentivise breach of contractual obligations by the woman acting as the surrogate. While the contract stands as a guarantee that she is entitled to her remuneration on completion of the process, non-completion entails penalties. In case she chooses to undergo an abortion or does not follow the medical regimen or 'fails to timely cooperate (sic.) with legal proceedings', consequences are delineated in the contract. These can lead to not just the forfeiture of her dues but also that 'she will be responsible for all monetary expenses incurred by the Commissioning parents, including, but limited to, medical expenses, psychological expenses, travel expenses, and all legal expenses', as the Delhi contract stipulates. The same contract obligates the commissioning parents to also pay what is due to her as agreed at the outset along with the costs of the procedure, in case they ask her to terminate the pregnancy or if doctors certify that there would be a risk to her life if she continues the pregnancy. However, it is striking that no equivalent

broad costs such as 'psychological expenses' are part of their obligations. Given their respective socio-economic status, such seemingly equivalent clauses are in effect designed to make the breach of contract more difficult and disincentivised for the woman who acts as the surrogate. This imbalance drafted into the contract has its roots in the way women who act as surrogates are perceived by the lawyers who draft the contracts and other agents of the surrogacy industry which I demonstrate in the next section.

The agents whom I interviewed, shared that the event of signing the contract by the woman acting as the surrogate and her husband is generally recorded on-camera. It is completed in the presence of the lawyers, sometimes also the doctor who medically supervises the process, and the venue is either the ART Clinic or the lawyer's chamber. Moreover, in many instances, the woman who acts as the surrogate and her husband do not necessarily sign simultaneously as the 'clients' who have commissioned the surrogacy. In fact, in many cases they may not even meet each other during the entire process that is mediated by the surrogacy industry. In such a context the act of signing the contract itself pans out as such that the representatives of surrogacy industry and particularly the lawyers assume a position of authority 'under' whose supervision women acting as surrogates sign on the contract.

CONSTRUCTING THE SURROGACY CONTRACTS

In Mumbai, the lawyer, Sumit Karnik, who shared the sample contract with me, had an independent practice at a firm that he was heading as the 'Managing Partner'. He worked with ART Clinics and commissioning parents who hired the services of the firm. In the case of the latter, mostly after referrals at ART Clinics, where they were 'patients'. In Delhi, I sourced the sample contract from Sundar Bharadwaj who worked as a Company Secretary and Legal Advisor at an ART Clinic, part of a multi-national chain of such clinics, responsible for operations at the Delhi branch as well as at another in a South Indian city. The clinic also commissioned two other, independent lawyers as legal consultants. While Karnik had himself drafted the contract that he shared, Bharadwaj specified that the contract is drafted by an ART Bank with which his Clinic works. He mentioned that he is responsible for vetting each contract that ART Banks draft for them, but candidly shared that it is broadly the same template that is used for all the

agreements. Even though both of them worked in very different organisational setups, they had the identical task of ensuring the formalisation of the contract when the parties signed it.

The contracts that I sourced are very detailed and include clauses that pre-empt various scenarios and put conditions accordingly. The lawyers shared that the conditions stipulated in the contracts are in the best interest of all parties, but it was apparent that their clients' interests remain a priority for them. This scenario stems from the fact that women who act as surrogates, by virtue of their poor economic conditions (as highlighted above), cannot afford to engage their own lawyers. For example, Sumit Karnik in Mumbai told me that,

> So far no surrogate has walked in to my office asking me to draft a contract, it will be the ideal situation, but that is not the case yet. So, I am obligated to keep my clients' interests in mind while drafting. But the surrogate is an equal party and I ensure that the clauses are drafted to reflect the same.

It is interesting how the interests of the woman acting as the surrogate comes as an afterthought for Karnik, where he acknowledges the principle of equality among parties to the surrogacy contract with a simultaneous emphasis on his allegiance towards his clients as a lawyer. In their own terms, the lawyers whom I interviewed, shared that the contracts are intended to be 'fool-proof' in ensuring that the custody of the child(ren) to be born remains with the 'patients' i.e. commissioning parents, and that the women acting as surrogates can be kept under surveillance to ensure the 'smooth completion' of the process. The completion and that too in a 'smooth' manner, is in the interest of the facilitators of surrogacy – the agencies and the clinics – for their reputation and commercial interests. This was deemed to be one of the crucial factors in establishing India as a favourable destination for transnational arrangements, until it was legal as well as to present an assurance to Indian commissioning parents. For example, Mumbai-based lawyer Viren Rajawat who has an independent practice along with his wife Rashmi Rajawat, shared that the clause to prohibit any claims to parenthood by women acting as surrogates or their husbands is one of the most important in the whole contract. According to him,

> If the question of relinquishing the child and all claims to parenthood is left negotiable and unsettled then that jeopardises the entire arrangement, putting the commissioning parents through much uncertainty while going through such an expensive procedure, spending so much money on the surrogate.

Thus, the key concern that the surrogacy contract seeks to address is that of commissioning parents, who must be assured that they will have sole parental rights over the child(ren) born out of this process in order that they get 'value for money' services. Further, on the question of determining parenthood in favour of commissioning parents, he said,

> This is what distinguishes surrogacy in India. In UK, surrogate can decide till 6 weeks after the birth, then a parental order is required in favour of commissioning parents, but that is not so in India. On delivery, the commissioning couple gets the child, the surrogate has no claim. In other countries this has been a problem – the issue of custody – but in India these women [i.e. those acting as surrogates] need the money not custody of children. She has her own children to take care of, which she struggles to do financially, why would she want someone else's baby, *she just needs the money* (emphasis added).

He rightly indicates that no woman acting as a surrogate in India has approached a court to claim the custody of the child she gives birth to. Implicit here is a reference to cases like the Baby M Case and Johnson v. Calvert in the USA where women who acted as surrogates refused to relinquish the children they gave birth to as a part of surrogacy arrangements and staked a claim on their own parental rights. Even though in both these cases, the women acting as surrogates did not succeed in their claim, they demonstrated the possibility of what Rajawat refers to as 'jeopardis[ing] the entire arrangement, putting the commissioning parents through much uncertainty', as highlighted above. He indicates that this major factor is addressed in India through the contract and also owing to the fact that women who act as surrogates in India, according to him, do not even want it to be any other way. The fact that she is negotiating financial struggles, is perceived as a guarantee that the woman acting as the surrogate will uphold the commitment to relinquish the child in lieu of receiving the promised payment since she is someone who 'just needs the money'. It was apparent in my inter-

views with lawyers that her financial situation and economic need is also perceived as a factor that makes her a 'potential trouble-maker', who can demand more money and possibly resort to 'blackmail'. For example, Vaishnavi Sehgal-Kapoor, who practiced as an independent lawyer in Delhi and drafted surrogacy contracts for her clients who are commissioning parents, ART Banks or ART Clinics, explained the role of lawyers and the rationale behind elaborate contracts, as follows,

> As a lawyer, my duty is to ensure no party takes advantage of others. On one hand, it is true that the rich can afford to pay and the poor are vulnerable. But on the other hand, the poor have nothing to lose; a tussle can arise when the poor make undue demands or try to take advantage. For example, we may feel sympathetic to our house help, want to do charity and help her too but many a times they do take us for granted. So, the rich and poor both should be protected in their own way.

The hierarchy between the commissioning parents and the women acting as surrogates, could not be more apparent than how Sehgal-Kapoor articulates it. Even when her point of departure is seemingly egalitarian when she emphasises that her role is to make sure that 'no party takes advantage of others', the demonstration of prejudices against the poor is unabashed in her narrative. The clarity of such articulation, in fact, is the hallmark of various actors in the surrogacy industry who rationalise and justify the excessive surveillance and control of the women acting as surrogates. An important mode of exercising control is the disbursement of the payments to women acting as surrogates. In the contracts that I sourced during my field research, it is noteworthy that in contrast to the inclusion of the payment schedule in the 'contract' itself in the Draft ART Bills, the payment schedule was drawn as a separate supplement. In my field research it also emerged that adopting the five instalment formula as the Draft ART Bill envisaged, as I highlighted above, was also not uniformly followed. The commissioning parents did not make any direct payments to the woman acting as the surrogate, but to the clinics, agents and agencies. She received her remuneration in instalments that are at the discretion of these agencies.

During the course of my field research, doctors, lawyers, and agents routinely highlighted instances of some women who deliberately cause a miscar-

riage while acting as a surrogate or abort after the pregnancy is confirmed and they receive some payment. It is argued that since they are women in need of money, they may be looking to earn only the partial payment that a pregnancy confirmation would yield, but it is then a complete loss for the commissioning parents and also a loss for facilitating agencies. In their interviews, people in the industry narrated such instances to counter the notion that women who act as surrogates are in a subordinate position. They instead sought to highlight how the women acting as surrogates are in a more powerful position with the 'power to do anything' (as one doctor put it). Therefore, for the industry, all women who act as surrogates are potential 'trouble-makers' or at least capable of 'threatening' and 'blackmailing' for greater monetary benefits. As a corollary then, for the industry it is essential to keep such 'potential trouble-makers' at bay. It is in this sense that the gestational surrogacy contract, the possibility of punitive legal action on breach of contractual obligations as well as the possibility of withholding their remuneration is sought to be instrumentalised to foreclose any possibility for the woman acting as the surrogate to renegotiate the terms of her agreement to this arrangement at a later stage.

THE CONTRACTING PARTIES: THE PATIENT AND THE GESTATION WORKER

The fact that the pregnancy of the woman acting as the surrogate would be conceived as a result of implantation of an embryo fertilised with the technique of IVF is emphasised prominently in the surrogacy contract. The contract highlights the fact that this arrangement is anchored at ART Clinics, is facilitated by doctors, and involves the use of gametes from commissioning parents (or that of an egg or sperm donor as the case may be). It is crucial that the surrogacy contract articulates it in those terms. This is because gestational surrogacy is considered to be a mode of 'infertility treatment' that the 'patients' i.e. the commissioning parents, avail. As I highlighted in the previous section, the various legal guidelines and draft legislations often use the term 'patients' to designate the commissioning parents. They are diagnosed with the disease of infertility, but they themselves do not receive a treatment for it, merely 'assistance' in reproduction (Shah 2010) which in this case is by gestational surrogacy. The woman acting as the surrogate is therefore only the medium through whom they receive the 'treatment' in the form

of a child that they otherwise cannot reproduce due to their infertility. This framing of gestational surrogacy is what is 'endorsed' by ART Clinics and hence its endorsement is an important supplement to the surrogacy contract.

The two contracts that I could source are almost similar, both contracts are sought to remain valid for up to three attempts at impregnation of the woman who acts as the surrogate and the Delhi contract even specifies that 'maximum of three embryos per attempt' can be transferred in her womb. In the case of multiple pregnancies both contracts require her to undergo 'foetal reduction' if medically advised and desired by the commissioning parents. Such critical aspects of the procedures are beyond the purview of her decision-making and instead it is the commissioning parents, i.e. the 'patients' who can decide.

Thus, the surrogacy contract is not only a contract between two parties, it is mediated by the facilitators of surrogacy, and located as part of a process where despite the body of the woman who acts as the surrogate being the site of all the technological intervention, she is not deemed to be the 'patient' but a medium for the commissioning parents. Moreover, even when she is carrying a pregnancy and giving birth, the surrogacy contract is an instrument to ensure that she is not deemed to be a mother. This is ensured in a two-pronged way. Firstly, as key to successful culmination of this process, parenthood is sought to be conclusively established in favour of the commissioning parents via the surrogacy contract, through expansive clauses like the ones I quoted above. Secondly, the contract frames the process of surrogacy in a way that she is deemed to be a worker providing the *service* of gestation. In gestational surrogacy, and as codified in terms of her contractual obligations, the woman who acts as the surrogate is envisaged as performing, what I argue can be referred to as *gestation work*[16]. It

[16] In deepening an understanding of surrogacy, various conceptual tropes have been deployed in recent ethnographic literature. For example, Pande (2014) argues that surrogacy involves 'embodied labour' that emanates from pregnancy and motherhood and yet when located in the market, women acting as surrogates perform the complex role of a 'mother-worker'. Rudrappa (2012) uses the more matter-of-fact term 'reproduction worker' for them. Others like Weis (2015) while writing about the surrogacy industry in Russia argue against deploying motherhood in such an understanding. For her, 'the temporality of identifying as a surrogacy worker renders evoking the allegory to 'mother' inappropriate'. While conceptually engaging with the experiences of women acting as surrogates and their self-identification is beyond the scope of this paper, I deploy the term 'gestation work' echoing Weis (2015). However, I emphasise 'gestation'

essentially involves: (a) following a strict regimen of drugs (administered orally as well as vaginally) and hormonal injections to prepare their body for impregnation of the clients' embryo which is created using IVF; (b) gestating the pregnancy – once the pregnancy is confirmed, there is additional injection and drug regimen which is followed at least in the first trimester; and, (c) childbirth. Agents, doctors, lawyers, counsellors ensure that the key scientific terms - uterus, eggs, sperm, embryo transfer – are internalised by the women acting as surrogates as critical components of what they are engaged in as part of their 'work', even when these terms may not be part of their everyday lexicon or their own experiences of being pregnant with and giving birth to their own children prior to acting as a surrogate. In such a context, through these articulations which are sought to be codified in the surrogacy contract, they are framed as gestation workers.

As I mentioned in the Introduction, central to the phenomenon of gestational surrogacy is the use of ARTs like IVF that have brought about the possibility to make use of women's womb for gestation of *any* embryo isolating the process of fertilisation which can be induced in a laboratory, separating reproduction from sexual intercourse. This compartmentalisation of reproduction facilitates defining the woman who acts as a surrogate merely as a 'gestational carrier', a term commonly used in medical parlance. For example, in a Glossary on ART Terminology by The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organisation (WHO), there is no entry called 'surrogate mother'. Rather it contains a definition for 'gestational carrier (surrogate)' who is 'a woman who carries a pregnancy with an agreement that she will give the offspring to the intended parent(s). Gametes can originate from the intended parent(s) and/or a third party (or parties)' (Zegers-Hochschild 2009: 2686).

Interestingly, in the Mumbai contract she is referred to as the 'Surrogate Mother' while the Delhi contract simply denotes her as a 'Surrogate'. Even when referring to her as the 'surrogate mother', the Mumbai contract sees her role as someone who 'will only lend her uterus for carrying the pregnancy and giving birth to the child' (clause 2.2). At the very outset, the Delhi

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and not just 'surrogacy' in consonance with the articulations that are codified in the surrogacy contracts I analyse here and how its provisions were sought to be conveyed by people in the surrogacy industry to women acting as surrogates.

contract specifies, 'The term Surrogate refers to the woman who will undergo an embryo transfer procedure [...] and carry the pregnancy to viability and deliver the child(ren)'. With or without the deployment of the term 'mother', the surrogacy contracts in fact seek to underscore her status as a non-mother, and merely a carrier of the pregnancy while acting as a 'surrogate', a substitute whose 'uterus' and its gestational role is central to the process. The emphasis on her uterus contributes in constructing her, I argue, as a gestation worker through the surrogacy contract.

In her pioneering ethnographic work on 'surrogate programmes' that facilitated mostly traditional surrogacy arrangements in the USA during 1980s and 1990s, Helena Ragoné observed that 'as the technological aspects of IVF are improved, there is little doubt that this method will become more and more commonplace in the surrogate industry' (1994: 73). It indeed became so in the surrogacy industry in India, where it not just became commonplace but became the only type of surrogacy provisioned by the industry in India and the practice has been sought to be codified in various regulatory instruments as well. The most recent culmination of these regulatory instruments in The Surrogacy (Regulation) Bill 2016, which defines 'surrogate mother' as 'a woman bearing a child who is genetically related to the intending couple, through surrogacy from the implantation of embryo in her womb' [Clause 2(ze)]. The notion that the woman acting as the surrogate is merely the 'gestational carrier' is sought to be codified and concretised through surrogacy contracts to the extent that even for grave situations like the possibility of sustenance on life support during the pregnancy, the commissioning parents would have an important say in deciding the course of medical care for her, the 'gestational carrier' of their child. In this regard, the following clause in the Delhi contract is striking when it states,

> The Surrogate and the Surrogate's Husband agree that in the event the Surrogate is seriously injured or suffers a life-threatening instance during her third trimester of pregnancy, if medically necessitated and advisable, and if requested by the Commissioning Parents, the Surrogate will be sustained with life support equipment to protect the foetus' viability and insure a healthy birth on the Commissioning Parents' behalf. The Surrogate's obstetrician or perinatologist is to determine when the optimal time for birth will be. The Commissioning Parents shall be

> responsible to pay the cost of any non-covered expenses for said life support, in the event the life support is provided at the Commissioning Parents' request for the sole reason of protecting the foetus' viability.

Inclusion of clauses such as this demonstrates how the woman acting as the surrogate is not just metaphorically only an incubator but is thought to be quite literally so. Thus, even in the case of grave medical danger and decisions like having to take recourse to life-support or not do not lie with her or her family but with the commissioning parents i.e. the 'patients' whose child(ren) she is gestating.

The fact that she is only gestating a pregnancy that is conceived in-vitro is deployed to assert that despite bearing a pregnancy and giving birth, she is not to be seen as a mother, but rather as someone providing the *service* of gestation for her clients who in turn offer her remuneration for it. Doing so helps distinguish surrogacy from baby-selling where the payment is made for the gestation and not for the child itself (Ohs 2002; Shapiro 2014). For example, in the proforma of the 'contract' in the Draft ART Bill 2010, with regard to the payment that she receives, there was a stipulation that, 'The surrogate agrees to accept the above amount for *bearing a child* for the patient' (emphasis added). This framing of the woman acting as a surrogate, providing a service in terms of the act of gestation had also found recognition in the way California Supreme Court in the USA decided in the Johnson v. Calvert case (1990) upholding the enforceability of the gestational surrogacy contract. Deborah Grayson notes that while dismissing the claim of Anna Johnson who acted as the gestational surrogate for the Calverts, the court emphasised that through the contract she 'was agreeing to *provide a service* to […] the intended parents, and should have had no expectation that she would be able to raise the child she carried' (emphasis added; Grayson 1998: 534). While the California Supreme Court did not recognise that the genetic claim to parenthood should necessarily trump all other criteria, it gave precedence to the enforceability of the gestational surrogacy contract. It did so by framing the woman acting as a gestational surrogate, as a 'service' provider. This is significant in terms of facilitating a distinction between women acting as gestational surrogates in contrast to those who could be seen as having a greater role than *only* the 'service' of gestation. The importance of this distinction as a rationale of upholding the

surrogacy contract is clear when contrasted to the outcome of a similar case. The New Jersey Supreme Court in the USA in the 1985 Baby M case had similarly rejected the claim to parental rights by the woman who acted as the surrogate. However, the reasoning offered was very different and the court held the surrogacy contract to be non-enforceable. Mary Beth Whitehead who acted as a surrogate in that case, conceived the pregnancy through Artificial Insemination with the sperm of the commissioning father, in an arrangement that can be called traditional surrogacy. The court decided against Whitehead because the commissioning parents were deemed to be in a better position to take care of the child whereas she gave birth for remuneration. Arguably, the court affirmed that her claim was valid but instead it ruled in favour of the principle of 'best interests of the child', which has since been entrenched after the United Nations Convention on the Rights of the Child (1989)[17]. While it is beyond the scope of this paper to engage further with this aspect, it is noteworthy that this principle with a focus on the child is meant to somewhat 'trump' the interests of the parties to the contract. However, it has greater implications for the woman acting as a surrogate. The 'best interests' of children born out of surrogacy are seen to converge with those of the commissioning parents either when it is emphasised by the courts even while declaring surrogacy contracts non-enforceable (like in the Baby M case), or in clauses regarding parentage in surrogacy contracts in India (like the example from the Delhi contract highlighted above). In a sense, the way the surrogacy contracts mobilise the principle of 'best interests of the child' the distinction between one party as the 'parents' and the other as merely a 'gestational carrier' who is providing a 'service' and hence not a 'mother' is sought to be emphasised further.

Therefore, gestational surrogacy contracts in India seek to amalgamate two important and inter-related aspects, in its quest to be 'fool-proof', to use the term that lawyers who draft these contracts often invoke. First, the role of the woman acting as the surrogate is underscored as being that of a 'gestational carrier' who provides the service of gestation. Through a supplement to the main contract this role is endorsed by the ART Clinic and

[17] According to the Article 3 clause 1 of this Convention, 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

thus emphasised further. Second, as highlighted through provisions in both the Delhi and Mumbai contracts above, the principle of the 'best interests of the child' born out of surrogacy is emphasised as coterminous with sole parental rights of the commissioning parents.

CONCLUSION: CONTRACTUAL GESTATION WORK IN INDIA POST- SURROGACY BILL 2016

In this paper, I have emphasised that it is important to underscore the fact that women acting as surrogates in India are deemed to be performing gestation work as is evident through an analysis of surrogacy contracts. This must be factored in for conceptually engaging with the labour of women acting as gestational surrogates. As has been highlighted by a growing body of research on this phenomenon, surrogacy arrangements are mediated by an industry that recruits, manages and supervises women acting as surrogates. This paper demonstrated how the industry uses the gestational surrogacy contract as a tool to foreground the role of women acting as surrogates as gestation workers. I have shown how the contract is effectively crafted to capitalise on the vulnerabilities of women acting as surrogates with threat of punitive measures and financial disincentives against any form of breach of its provisions. The provisions stipulated in surrogacy contracts are geared to instrumentalise the women who act as surrogates as mere 'gestational carriers', and indisputably establishing parental rights in favour of the commissioning parents. The contract is geared towards dislodging any claims to parenthood that she may have by virtue of being a birth-giver, seeks to bolster this with non-disclosure and confidentiality clauses and effectively frames her role as a service provider who is engaged in gestation work. I have demonstrated how as a 'gestation worker' she is in a subordinate relationship with her clients i.e. the commissioning parents and actors of the surrogacy industry who supervise her. Various clauses in surrogacy contracts render her to be an unequal party who is subjected to many controls and restrictive conditions in her work. Therefore, the surrogacy contract which seeks to regulate an arrangement involving reproduction, invisibilises a crucial actor in her capacity as a reproducer who is rather seen as a gestation worker. There is a tacit acknowledgement of the centrality of her role in a surrogacy arrangement by different actors of the in-

dustry, which drives them to construct the surrogacy contract and operationalise it in a way that she is relegated to the margins as only a 'gestation worker' who is bound by contractual obligations that ensure this.

The practice of commercial surrogacy has now been banned by the Indian government with The Surrogacy (Regulation) Bill 2016. It proposes to eliminate all intermediaries between the commissioning parents and women acting as surrogates who are now envisaged to be 'close relatives'. However, this legislation does not prohibit gestational surrogacy, only that the commissioning parents and the woman acting as surrogate have to be 'close relatives' and there cannot be a commercial transaction among them for this arrangement. While in a commercial surrogacy arrangement that was facilitated by an industry, there was an eminent socio-economic hierarchy between the commissioning parents and the women acting as surrogates, the arrangements within families may not be bereft of hierarchies. In fact, the patriarchal ordering of kinship relations within families can contribute in perpetuating a hierarchy, albeit of a different nature, where some women are perhaps pressured to, or have to negotiate an expectation to act as surrogates for others in the family. It thereby merely shifts the location of the gestation work that women are seen to be providing, from the surrogacy industry to their family. It also does not preclude the fact that gestational surrogacy arrangements would continue to be governed by private contracts, particularly to conclusively establish parentage in favour of the commissioning parents and perpetuate the invisibilisation of women who act as surrogates. In such a context, surrogacy contracts which are already in use and circulation, such as the ones that I have used in my analyses in this paper, would only require minor edits to remove the aspect of remuneration to the woman acting as surrogate. Therefore, it is crucial that gestational surrogacy contracts and what they entail for women acting as surrogates in India become a central focus for the contemporary debates on surrogacy.

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