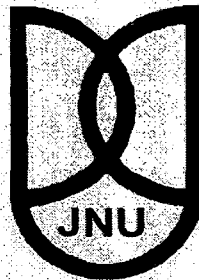


**GLOBALISATION AND WOMEN'S REMUNERATIVE WORK:  
THE CASE OF COMMERCIAL SURROGACY  
IN INDIA**

*Dissertation submitted to the Jawaharlal Nehru University  
in partial fulfilment of the requirements  
for award of the degree of*

**MASTER OF PHILOSOPHY**

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Date: 18 July 2011

### DECLARATION

I declare that the dissertation entitled "**Globalisation and Women's Remunerative Work: The Case of Commercial Surrogacy in India**" submitted by me for the award of the degree of **Master of Philosophy** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this University or any other university.

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### CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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*This dissertation is dedicated to  
my grandparents,  
my parents &  
my sister*

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# CONTENTS

LIST OF ABBREVIATIONS & FIGURES	2
CHAPTER 1: INTRODUCTION	3
CHAPTER 2: FEMINIST APPROACH TO INTERNATIONAL POLITICAL ECONOMY AND WOMEN'S REMUNERATIVE WORK	20
CHAPTER 3: WOMBS TO-LET: SUBVERSIVE 'WORK' OREXPLOITATION UNDER CAPITALIST PATRIARCHY?	40
CHAPTER 4: COMMERCIAL SURROGACY AND THE LAW	74
CHAPTER 5: CONCLUSION	94
REFERENCES	108

## **LIST OF ABBREVIATIONS & FIGURES**

ARTs	Assisted Reproductive Technologies
BPO	Business Process Outsourcing
FOGSI	Federation of Obstetrics and Gynaecological Societies of India
GDP	Gross Domestic Product
ICMR	Indian Council for Medical Research
IPE	International Political Economy
IR	International Relations
ISAR	Indian Society for Assisted Reproduction
IT	Information Technology
IVF	In-vitro Fertilisation
MNCs	Multi-national Corporations
NARI	National ART Registry of India

Figure 1	Process of Commissioning a Gestational Surrogacy in India
Figure 2	Some Narratives of Commercial Gestational Surrogates

## CHAPTER 1: INTRODUCTION

*Globalisation* as a process has been arguably recognised as the context in which all scholarship, engaged with socio-economic, politico-legal and cultural phenomena across disciplinary boundaries, is embedded since the last few decades. There exists a spectrum of arguments and opinions engaged in understanding what this process is and how (as well as the question of ‘whether’) it changes the world as it was/is. While there is a broad consensus that it is a multi-dimensional process with social, cultural, political and economic aspects, ‘economic globalisation’ is generally seen as the driver of the entire phenomenon. This research aims to engage with the process of ‘economic globalisation’ but is informed by the mutually constitutive nature of the political, economic and the cultural; the direct engagement with the ‘economic’ is only an attempt to politicise and engender its understanding (Peterson 2003). Such an exercise involves moving beyond economic determinism of all variants and exploring theoretical terrains where this process is sought to be problematised with the goal of visibilising – gender and powerful hierarchies (Peterson 2003). Primarily such a task has been undertaken by feminists across disciplines as also in International Relations (IR) and International Political Economy (IPE).

One of the basic manifestations of ‘economic’ globalisation is how we understand *work* and *value*; and that understanding can be contextualised in the way the relationship between the State and the Market is conceptualised. This research would attempt to engage with these issues broadly as well as by specifically looking at “women’s work” particularly when it earns a remuneration. Focus would be narrowed down further to analyse commercial gestational surrogacy as work, particularly in India. Such an engagement is in light of the fact that commercial gestational surrogacy, is a part of the larger Assisted Reproductive Technology (ART) ‘industry’ hailed as “a 25,000 crore rupee pot of gold” in India itself (Law Commission of India 2009: 11) and represents availability of women’s reproductive labour in the world market – a phenomenon that raises numerous questions about conceptualising women’s remunerative work in a globalised context.

Thus, this research aspires to make a two-way journey: from the general to the particular, and back. The merits of adopting such a trajectory may be debatable, however in the present research it is being undertaken with a conviction that steps towards a well-rounded understanding of any issue needs to factor-in the mutually constitutive nature of the ‘general’ and the ‘particular’. Hence moving back and forth between the two may seem chaotic but is actually critical in bringing some ‘order’ in the discourse.

This introductory chapter intends to outline the plan of the research and also include clarifications regarding terminology, apart from laying down the scope and objectives of the research. To begin with, the following few sections attempt a broad sketch of the three key elements of this research: the context (i.e. globalisation), the analytical focus (i.e. women’s remunerative work), and the case study (i.e. commercial surrogacy).

### **The Context: Globalisation**

Arguably one of the most discussed and contested concepts across various disciplines in the social sciences is ‘globalisation’ – characterised mainly by the “complex webs of interconnectedness” (Heywood 2000) that has been forged across the world, temporally, spatially and also in terms of interactions between individuals and communities.

‘Globalisation’ has often been hailed as the defining feature of post-Cold War international politics. Historians have however contended that globalisation is not as novel a phenomenon as is made out to be (Ray 1995 and Hopkins 2002) and while economies in the world were interlinked even before the latter half of the 20<sup>th</sup> century, the sheer scale of time and space compression with technological advancements that has facilitated the forging of a ‘complex web of interconnections’ throughout the world is somewhat unprecedented and marks the distinctiveness of the contemporary phase of globalisation.

The contemporary phase of globalisation (given the historical nature of the phenomenon) acquires unique dimensions due to innovations in science and



technology that have facilitated a compression of the temporal and spatial dimensions. However, it is important to note that such a compression has not necessarily meant a “flattening” of the world for all and issues of access are of critical importance. The flows of information and ideas have on the one hand facilitated the conceptions of a ‘cosmopolitan’ world but on the other hand the homogenising tendencies also have led to various forms of marginalisation. In such a context, often coping with one’s disadvantageous position and vulnerabilities becomes complex within the ‘web of interconnections’.

A useful definition of globalisation is offered by David Held and Anthony McGrew (2000). According to them, “globalization denotes the expanding scale, growing magnitude, speeding up and deepening impact of interregional flows and patterns of social interaction. It refers to a shift or transformation in the scale of human social organization that links distant communities and expands the reach of power relations across the world’s major regions and continents” (Held and McGrew 2000: 4). However, they insightfully append the caveat that this process should not be understood as universalising since in many respects it is exclusionary in nature fuelling various kinds of contestations and reactionary politics. Thus, “the unevenness of globalization ensures it is far from a universal process experienced uniformly across the entire planet” (Held and McGrew 2000: 4).

In their survey of globalisation literature, Held and McGrew (2000) note that though ideas linked to what is broadly understood as globalisation can be identified in some 19<sup>th</sup> and early 20<sup>th</sup> century scholarship, the explicit use of the term ‘globalisation’ began only in the 1960s and 1970s. To make better sense of the multitude of arguments engaged in understanding ‘globalisation’, Held and McGrew (2000) employ two ‘heuristic ideal-types’ to broadly classify the strands of analyses on globalisation as that of the ‘sceptics’ and the ‘globalists’. Thus, they “identify a clustering of arguments around an emerging fissure between those who consider that contemporary globalization is a real and significant historical development – the globalists – and those who conceive it as a primarily ideological or mythical construction which has marginal explanatory value – the sceptics” (Held and McGrew 2000: 2). Elsewhere, Held et. al. (1999) do not merely use polarised ‘heuristic ideal-

types', but instead also identify a third strand, namely the 'transformationalists' which may be seen as lying at the cusp of the two extremes that sceptics and globalists or hyper-globalists represent.

To briefly encapsulate the 'heuristic ideal-types' proposed by Held et. al. (1999), firstly, the 'hyper-globalists' characterise globalisation as a historically unprecedented revolutionary phenomenon which may be seen as facilitating a shift beyond territorial political regulation by States to supra-national phenomena that characterise a 'global economy'. Secondly, the 'sceptics' like Hirst and Thompson (1996) prefer 'internationalisation' to globalisation while analysing contemporary intensification of transnational linkages, since much of this phenomenon is some form of 'intergovernmentalism'. The 'sceptics' also take into account issues of inequities, marginalisation, unaltered hierarchical relationship between the North and the South and instances of reactionary politics and aggressive nationalism in many parts of the world. Thirdly, the 'transformationalists' acknowledge that globalisation can best be understood as a multidimensional process which entails a fundamental restructuring of politics understood in conventionally territorial and statist terms due to some degree of diffusion of authority. For them, new patterns of global stratification are discernible and there is a degree of power-sharing between the international, regional and the local.

The argument made by Keohane and Nye (2000) may be seen as an illustration of the transformationalists' view of globalisation. Globalisation, according to them,

varies by region, locality and issue area... Globalization shrinks distance, but it does not make distance irrelevant. And the filters provided by domestic politics and political institutions play a major role in determining what effects globalization really has and how well various countries adapt to it. Finally, reduced costs have enabled more actors to participate in world politics at greater distances, leading larger areas of world politics to approximate the ideal type of complex interdependence (Keohane and Nye 2000: 117-118).

In the more integrated world market today, multinational corporations (MNCs) are major players driven by the goal of increasing profits by decreasing costs and often

relocate or 'outsource' to countries in the global South with lax labour laws and often hire women and children who constitute cheap labour. However, MNCs more often than not do not cut their home-state umbilical cords in the global North. This is not to imply that there are no MNCs with their home base in the global South, but only that such enterprises are very few and often operate on similar logic of expanding or diversifying geographically with the object of exploiting material and human resources in lesser developed areas.

Analytically moving beyond MNCs, Saskia Sassen (1996) identifies the emergence of 'global assembly lines' whereby production process can be broken-up in parts with each part being carried out in different geographical locations before being assembled, and thus giving rise to some form of trans-national commodity chains. Peterson (2003) highlights the emergence of global financial markets, especially facilitated by the revolutionary technological advancements in electronics and the advent of "instantaneous worldwide communications" which in turn augments the scale and expansion of international trade.

Though it has been argued that globalisation has led to creation of a level-playing field for all (Friedman 2007), it is not unquestionably so evident from the differential impact it has had on various social groups with respect to – class, caste, race, gender, etc.

Feminists have emphasised on understanding this process as gendered and one that has a differential impact on men and women. Economists have discerned a process of 'feminisation' of labour in the export-oriented industrial enterprises. Hence the process of globalisation is far from being worth lauding because in addition to 'feminisation' there has been an increasing 'flexibilisation' and 'casualisation' of the workforce (Gimenez 2009) which indicates the structural vulnerabilities that women face and how they put up with deplorable working conditions for lack of options (Mukherjee 2004 and Mazumdar 2007). Likewise, Hensman argues, paradoxically "the only thing worse than being exploited by capital is not being exploited by capital" (2004: 1032). 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 marginalised 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.

Thus, one's analysis must be sensitive to the context in which women join the 'workforce' and the conditions they encounter once they are a part of it especially keeping in mind that though global linkages have meant free flows of capital around the world, similar unhindered flows of labour from one part of the world to another has not taken place. According to Rupa Chanda (1999) there are various barriers and impediments in movement of labour across the world which stem from immigration laws and procedures – regarding rules of entry and stay; regulatory policies for the labour market and institutionalising prior conditions or qualification mechanisms for employment of foreign labour by different states. In her assessment of the commitments related to "movement of natural persons" in the service sector across the world under the General Agreement on Trade in Services (GATS), Chanda concludes, "an overall assessment of GATS commitments on the movement of natural persons indicates that liberalisation has been marginal in this mode" (1999: 34).

Feminists from the global North have often viewed women in the global South as 'victims' with little choice trapped in multiple layers of exploitation. However post-colonial feminists and feminists from the global South in general have rejected such uniform characterisation of all women in the global South and emphasise the importance of not looking at 'women' as a homogenous category, as they too are constituted by their caste, class, race and other social positions (Mohanty 1988; Spivak 1988). Intersectionality of various determinants of women's *locus standi* has to be accounted for in order to understand how different women are affected differently even within conditions of structural inequality.

### **The Analytical Focus: Women's Remunerative Work**

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* and usage of this terminology did not even bear the pretence of being an overarching

term for 'human'. Women's labour has historically been undervalued economically (and hence socially too) than men's. Socio-political space inhabited by human kind has been historically characterised by a patriarchal public-private dichotomy with men occupying the 'public' and women relegated to the 'private' sphere, ensuing a 'sexual division of labour'. Men were occupied with "production", while women were limited to "reproduction" functions. This division has been somewhat naturalised in as much as "since the mid-nineteenth century, the economically dependent wife has been presented as the ideal for all respectable classes of society" (Pateman 1989:132).

Even though undervalued, women's labour in the 'private' sphere involved performing biological as well as social reproduction functions, which are vital for the seamless functioning of the 'public' sphere. According to Parrenas, reproductive labour is "the labour needed to sustain the productive labour force" (2000: 561). Women's reproductive labour is most critical due to its function of 'socialisation' (Peterson 2003). V. Spike Peterson elaborates this aspect as follows:

Childrearing is economically important because it involves socially necessary labor to produce human beings who are then able to "work"... Early socialization is especially consequential. To become functional human beings we must recognize and assimilate the operational codes of social life... In more conventional economic terms, [this] is key to accumulation processes and intergenerational distribution of resources through the dynamics of family property and patterns of inheritance. These dynamics especially reflect and reinforce class hierarchies, as the intergenerational transmission of private property is key to reproducing family wealth and socio-economic status (2003: 81-82).

However, the public-private dichotomy has not been a sacrosanct distinction but has been variously socially constructed at different historical junctures. 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.

According to Carole Pateman, “large numbers of working-class wives have always had to enter the public world of paid employment to ensure the survival of their families, and one of the most striking features of post-war capitalism has been the employment of married women. However, their presence serves to highlight the patriarchal continuity that exists between the sexual division of labour within the family and the sexual division of labour in the workplace” (1989: 132).

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 (Beechey 1997 cited in Freedman 2002).

As early as the nineteenth century, women had been struggling not only for citizenship rights in terms of suffrage but also for their labour rights, their “right to work and to be treated fairly and paid equally to men... the issues of paid employment, equal salaries and the provision of conditions such as childcare to enable women to work, have been long-term feminist concerns” (Freedman 2002: 45-46; citing Rowbotham 1992).

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 too. Even those women who do not hold remunerative work outside the home perform back-breaking labour within the household in terms of all the domestic chores. Feminist response to this concern has been two-pronged – to demand wages for unpaid housework (e.g. Dalla Costa and James 1972); and to struggle for bringing about a change in the household dynamics (e.g. Delphy 1984 and Walby 1990) to assert that work in the household must be shared between men and women, equally (Freedman 2002).

It is interesting to note, however, that even when women hold remunerative work, the hierarchical distinction between 'production' and 'reproduction' do not change fundamentally. Indeed, women's stepping out of the 'private' into the 'public' is subversive as far as their oppression is concerned, but we must also critically look at what is it that they are doing as remunerated work. On one hand, they might be entering 'male-bastions' to perform tasks which were traditionally 'male' (e.g. factory work, running businesses, or even driving cabs, etc.). On the other hand, they are also performing those tasks for a wage which have been socio-economically devalued for centuries when performed within the household i.e. care-giving. Thus, in the 'public' women are faced with two ironical choices: either to emulate 'masculinity' or to 'denaturalise' their social reproduction functions by performing it for non-relatives for a wage. The choice has to be made in a context where the provision of very same functions of care-giving within the household continues to be socio-economically devalued. This situation also acts as an analytical traction to contextualise the provision of commercial gestational surrogacy 'services' in the international political economy as it further problematises an understanding of remuneration for 'natural' functions performed by women when denaturalised.

Commercial gestation surrogacy represents a situation where even biological reproduction is performed for remuneration, more so in a setting where 'having babies' is not necessarily a virtue and a demographically large "population" is seen as one of the greatest developmental impediments, as in India. Thus, the illustrative case study here would be that of commercial gestational surrogacy, as elaborated below in the following section. A primary objective of this research is to undertake a conceptual analysis of such a situation in a globalised context.

### **The Case Study: Commercial Surrogacy**

Simply put, surrogacy refers to the phenomenon where a woman bears a child for an intending mother who is unable to do it herself. Without technology, the process would involve sexual intercourse between the intending father and the woman agreeing to be the 'surrogate' and hence the stigma and moral apprehensions. However, these were mitigated to a large extent with the advancements in technological innovations. A radical transformation in the arrangement came with the

technology of In-vitro Fertilisation (IVF), a form of Assisted Reproductive Technology (ART) that compartmentalised reproduction in separate and distinct components, each of which was potentially transnationally commodifiable – egg and/or sperm donation, conception in laboratory, and gestation in a surrogate womb – leading to an emerging market of ‘infertility treatment’ with avenues of making money by ART clinics, egg/sperm donors and women who agree to be surrogates – commercial gestational surrogates. According to a recent report in leading national daily, *The Hindustan Times*, the “industry of reproductive outsourcing”, referring particularly to commercial gestational surrogacy in India, is “estimated to be worth over [rupees] 2000 crores” [approximately \$500 million] (Kohli 2011).

In economics literature, an ‘industry’ has been defined as one “which consists of all businesses which operate processes of a sufficiently similar kind (which implies the possession of substantially similar technical resources) and possessing sufficiently similar backgrounds of experience and knowledge so that each of them could produce the particular commodity under consideration” (P.W.S. Andrews cited in Nightingale 1978: 32). An ‘industry’ is also understood as “any grouping of firms which operate similar processes and could produce technically identical products within a given planning horizon” (drawing from E. Brunner, Nightingale 1978: 35). In consonance with both these definitions, ARTs and commercial gestational surrogacy may be characterised 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 characterisation as “business”.

The flourishing commercial gestational surrogacy industry in India has led to an intriguing debate which compels thinking about commercialisation of women’s reproductive labour. Views in this context are sharply polarised and the phenomenon is often looked at in ‘boon or bane’ terms. However, when the issue at hand involves potential exploitation, it is imperative to consider the conditions that drive some women towards contractually ‘renting’ their womb – a choice which is often not a ‘respectable’ one in our society since it may be likened to ‘body-selling’ and/or



'baby-selling'. However, advocates of commercial surrogacy project it as a win-win situation for all – the commissioning parents get their much desired 'biological' child and the 'surrogate' mother gets her much needed money! Given such facts, the question arises as to "how is a contract among 'consenting' parties, exploitative?" Firstly, it is exploitative because the social construction of 'infertility' often drives the commissioning parents to spend an insane amount of money to have a 'biological' child, while adoption is rendered an unfortunate option of 'last resort'. Secondly, the woman who agrees to be the 'surrogate' mother is often unaware of the immense health risks involved in such a process but is consoled by the multi-billion dollars Assisted Reproductive Technologies (ARTs) industry in a rosy language that she is 'helping realise the dreams of an unfortunate childless couple'. Thirdly, while ARTs can be hailed as a boon for non-heterosexual people who can now have children through 'surrogacy', the Indian ART industry caters to demand only from foreigner homosexual couples while in India homosexuality is not legally recognised which shows discrimination in terms of who can access these technologies.

Media reports about such women indicate that they are not the poorest of the poor, nor are they rich or middle class – they belong to a transient class in urban and semi-urban areas which has aspirations of a 'good life' with educational opportunities for the children, there are aspirations of owning a house, some are on the look-out for the initial investment for an entrepreneurial aspiration, but on the whole there is a daily struggle to make ends meet. In such a situation, earning Rs 3 lakh or more in just nine months using something every woman has – a womb – is too lucrative to resist. However, a woman's so-called volunteering to act as a commercial gestational surrogate is often followed by a rigorous regime of medical tests to determine her 'fitness' to act as gestational surrogates. To clear these medical tests, women must not have any medical history of complications during previous pregnancies and must be generally 'healthy'. Even though no supporting data or statistics are available, these criteria can arguably explain why women from the poorest of the poor sections of the society may not qualify as 'fit' for gestational surrogacy owing to the high chances of their being anaemic and generally malnourished.

Nonetheless, for some feminists this phenomenon in fact represents an instance of commodification where biological reproduction itself, removed from the terrain of 'love' and 'family' assumes the form of a remunerative work. Though, gestational surrogacy does not involve 'sex', it does involve renting one's womb, the so-called sanctum sanctorum of a woman's body. This puts commercial gestational surrogacy in the realm of what feminists call 'body work', a reason it is often likened to commercial sex work.

Another important feature of this booming industry in India is the kind of 'transnational outsourcing' it embodies, where an increasing number of commissioning parents are foreigners and the women who offer to be 'surrogates' largely come from disadvantaged sections of the society, something which is not merely a curious coincidence. Front-runner in attracting business process outsourcing from the global North, India is a leader in providing outsourced commercial surrogacy services too, with its hub developing in and around India's financial capital Mumbai in the states of Maharashtra and Gujarat. In a globalised world where movement of capital is much easier than movement of labour, commissioning parents find it much easier to reach women willing to be 'surrogates' in India, many of whom might not even hold passports. While women's outward migration is an established trend, employers' painstakingly reaching women for reproductive services is a new phenomenon with deep transnational socio-economic, politico-legal implications often with ill-equipped States at the helm of affairs.

The limitations encountered by States are evident from even a cursory overview of legal cases worldwide and recently in Indian courts which deal with a range of complex issues like determining citizenship and custody of the children born out of transnational surrogacy arrangements; and the more fundamental question of the ethics of the process of commercial surrogacy itself. In India in this context, the clear fundamental dissonance between the 228th Report of the Law Commission of India (2009), which addresses commercial surrogacy and the latest Draft Assisted Reproductive Technologies (Regulation) Bill 2010 (henceforth Draft ART Bill), is particularly noteworthy. The Law Commission of India, in its 228<sup>th</sup> Report with regard to the phenomenon of commercial gestational surrogacy observes that "it

seems wombs in India are on rent which translates into babies for foreigners and dollars for Indian surrogate mothers” (2009: 11). While recognising the merits of ARTs, the Law Commission of India recommends taking a ‘pragmatic’ legal approach towards surrogacy which is “prohibition” of commercial surrogacy but legalising altruistic surrogacy, so that surrogacy can be an available recourse for infertile people and at the same time prohibiting a commercial transaction would help mitigate moral issues like commodification of motherhood and “exploitation of poor women in underdeveloped countries” (2009: 11). The Draft ART Bill takes the diametrically opposite approach and proposes to legalise commercial gestational surrogacy.

The approach of the Indian state towards this issue would be dealt with in detail in Chapter 4, but at the outset it is important to note that once technological innovation initiates something and business interests have ‘tasted blood’ in a sense, there can be no looking back. Any move towards banning or prohibition only drives it under the carpet and makes it clandestine, compounding women’s vulnerability against exploitation.

### **Contextualising the Case Study in IPE**

Most countries in the global North have stringent regulations around commercial surrogacy. Susan Markens has done a survey of policy responses to the problem of surrogacy in western industrialised states and has found that most of them “have rejected or greatly restricted the practice of surrogate parenting. Australia, Canada, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Norway, Spain, Sweden, and Switzerland all have national laws that prohibit or discourage the practice... [I]n the United States there is no national-level legislation” (2007: 23). However by 2004, 17 states and the District of Columbia in the USA enacted laws regarding this issue, of which 10 states and the District of Columbia prohibit and ban surrogacy while the rest permit surrogacy arrangements but seek to regulate them (Markens 2007: 27). Markens (2007) explains the absence of a national legislation on surrogacy in the USA with the provisions of legislative powers of individual states on some issue areas like family law under the US federal system.

As is the case with other enterprises in a trans-national scenario, stricter laws and regulations gave rise to a trend of outsourcing in the case of commercial surrogacy services under ARTs as well. India has witnessed an emerging trend of “reproductive tourism” for availing ARTs especially services of a commercial gestational surrogate. “The usual fee [of the process] is around \$25,000 to \$30,000 [approximately Rs 10-12 lakh] in India which is around 1/3<sup>rd</sup> of that in developed countries like the USA” (Law Commission of India 2009: 11). Arguably, there are at least three reasons for this – quality low-cost ART services provided by largely English-speaking doctors; cheap availability of women willing to be surrogates; and, permissive laws. However, as of now, legislation on the regulation of Assisted Reproductive Technologies is in the offing. In India, laws lack clarity and have led to legal complications where it is difficult to determine legal parentage of children which in many a transnational cases puts the children born out of such arrangements at the risk of being rendered stateless like the Japanese Baby Manji case, German twins’ case and the Israeli gay couple’s case.

This research intends to draw from feminist theorisations in IPE that strive to locate ‘gender’ in general and ‘women’ in particular at the interface of politics and economics with the help of an analysis of “power and the division of labour... [whereby] women’s different but related location within a global political economy both links and divides women of the world” (Robinson 1997: 776). Drawing from such feminist understandings of IPE, this research seeks to explore the phenomenon of commercial surrogacy and its implications for the way women’s reproductive work is conceptualised when it is remunerated. Looking at this issue also presents an opportunity to examine whether commercial surrogacy compromises or augments women’s agency. The research will extrapolate the theoretical underpinnings of a feminist understanding of the issue to the booming commercial surrogacy industry in India where an increasing number of commissioning parents are either non-resident Indians or foreigners and the women who offer to be surrogates largely come from disadvantaged sections of the society<sup>1</sup>.

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<sup>1</sup> Since no comprehensive data is available with regard to the profile of commissioning parents and surrogates, this analysis has been drawn from a survey of national and international media reports and finds support in some scholarly writings like Qadeer (2009) and research studies conducted by women’s groups like Sama Resource Group for Women and Health (Sama Team 2009).

This phenomenon also brings to the fore issues of ethics and global justice which merit analysis and research. Is renting-out one's womb a matter of choice or compulsion? It is important to probe the context in which a demand to rent wombs proliferates and what are the implications for international politics as we understand.

Having surveyed the context, the analytical focus and the case study of this research, the following sections will highlight the questions that would be explored in this research, the methodology to be employed and conclude with a summary of the subsequent substantive chapters.

### **Research Problem/Question**

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

- What are the gendered implications of 'flexibilisation' and 'casualisation' of the workforce? How should we conceptualise women's remunerative work in the context of globalisation?
- For women who are engaging in commercial gestational surrogacy, it is a form of remunerated 'work' but are these women in a position to assert their rights as 'workers'? What are the implications of engagement in this remunerated 'work' on the agency of these women?
- What are the legal frameworks governing transnational surrogacy arrangements in India?
- What is the nature of legal complications that have arisen or might arise in the future? Moreover, broadly what does an analysis of the interface between law and women's body work, yield especially in a transnational context?
- What are the ethical issues entailed in a transnational surrogacy arrangement vis-à-vis the asymmetric linkages between the poor Indian women who agree to provide commercial gestational surrogacy services and the rich commissioning parents from advanced industrialised states?
- Are such arrangements as benign as they seem where some women rent out their wombs to help the infertile and in the process earn some remuneration? Is it a coincidence that in almost all cases of commercial surrogacy

arrangements the commissioning party is well-to-do and the women renting their wombs much poorer? Are there issues of global justice implicit in such a phenomenon?

- How does an analysis of the phenomenon of commercial gestational surrogacy as a form of women's remunerated work (often with a transnational character), contribute to the existing feminist research on IPE?

### **Hypotheses:**

- Commercial gestational surrogacy as 'work' mirrors the asymmetric transnational linkages of the international political economy.
- The gendered nature of the globalised international political economy compounds the vulnerabilities of women acting as 'surrogates'.

### **Research Methods**

This research would essentially be a case study of the phenomenon of transnational surrogacy arrangements in India where the surrogates are Indian women and the commissioning parents are from rich advanced industrialised states. This research employs a feminist theoretical approach informed by the pluralities within feminisms and aiming at drawing upon relevant aspects of different variants. This case study is a qualitative one which involves genealogy of commercial surrogacy and ARTs in India, archival research and secondary research from various sources like – books, journals, news publications, the World Wide Web, government and non-government publications apart from academic publications.

Three personal interviews were also conducted – two with lawyers, G.R. Hari and Amit Karkhanis, who work on transnational gestational surrogacy arrangements in Chennai and Mumbai, respectively; and one with Deepali, who works as a surrogate recruitment agent in Mumbai. All three interviews were semi-structured and lasted for about an hour on an average. Some additional primary sources used are the texts of relevant legal instruments – laws, conventions and courts' judgements – from India and other countries. Selection of countries apart from India is based on a history of legal intervention in surrogacy arrangements – USA, UK, Australia, some other European countries, Israel and Asian countries.

### Chapter Summaries

The first chapter intended to introduce the subject of research, research methods and questions and includes clarifications regarding terminology. It is followed by three substantive chapters elaborating on the research and related theoretical arguments.

The Chapter 2 titled *Feminist Approach to International Political Economy and Women's Remunerative Work* locates this research in the terrain of feminist theoretical interventions in IPE. An overview of this terrain is undertaken to anchor this research and offer preliminary insights as to how a case study of transnational commercial gestational surrogacy arrangements in India can help in understanding new forms of (re)productive labour that women are engaging in a globalised context.

Having surveyed the theoretical terrain broadly, focus is narrowed down to understanding the case of commercial gestational surrogacy in India with particular focus on its implications for women who agree to act as gestational surrogates. Critically engaging with this issue is the primary objective of the Chapter 3, which in its title raises the analytical question: *Wombs To-Let: Subversive 'Work' or Exploitation under Capitalist Patriarchy?*

Since the State through the legal and juridical machinery produces imagery in a particularly interesting way, especially when the issue at hand involves questions related to basic human activities like biological reproduction, women's bodies, and related questions of 'morality', Chapter 4 titled *Commercial Surrogacy and the Law* would deal with some of these issues and related questions. Moreover, the interference of technology in otherwise non-complicated phenomenon like determining the fact of citizenship through birth and descent, presents unusual difficulties when attempted to resolve legally.

The research is then summarised in a concluding Chapter 5 where the research questions and the hypotheses are revisited.

## **CHAPTER 2: FEMINIST APPROACH TO INTERNATIONAL POLITICAL ECONOMY AND WOMEN'S REMUNERATIVE WORK**

The primary objective of this chapter is to explore the feminist theoretical terrain in order to arrive at a conceptualisation of international political economy (IPE) and women's remunerative work, to ground the research on commercial surrogacy. This task would be undertaken with an acknowledgement that, it is important to understand IPE critically, which essentially involves unravelling its nuances rather than seeing it as a monolith. Also given the fact that the world we live in is characterised by pluralities of all sorts, most fundamental of those pluralities being that of gender, it is important to investigate the bearings of introducing gender as a tool of analysis when we study IPE. This chapter thus seeks to present an indicative picture of the various hues of feminist theoretical engagement with the IPE. Such an exercise would then provide a theoretical and conceptual anchor to better understand the case of commercial gestational surrogacy as work in India. The two major sections in this chapter would survey the range of feminist arguments regarding IPE and women's remunerative work respectively.

### **Feminist engagement with IPE**

Though feminism roughly traces its origins to the eighteenth century, it is only as recently as the 1980s that feminists have made inroads to the discipline of International Relations. Since then, there have been "troubled engagements between feminists and IR theorists" owing to the fact that they draw on different realities and use different epistemologies (Tickner 1997). The basic objective of feminist approach to International Relations theory, as indeed to IPE theory as well, is to expose the invalidity of the claims of gender neutrality that mask entrenched masculinist suppositions about 'power', 'autonomy', 'rationality' and the 'public'. As V. Spike Peterson (2004) points out, feminist interventions have taken up broadly three overlapping issues – to unmask the androcentrism in the discipline and its consequence; to add women's experiences and 'stir'; and to 'reconstruct theory'. The second task holds appeal to non-feminists in the discipline as well as practitioners in



international relations who mostly obfuscate it with 'adding women and stirring', thus conflating 'women' as an empirical category with 'gender' as an analytical category.

International Political Economy (IPE), in a minimalist understanding is a field of enquiry that focuses on the interface between politics and economics – apparent or elusive. Different theoretical approaches to IPE have their distinct formulation of the relationship between the state and the market i.e. politics and economics (Gilpin 1987). The arguments in this chapter are based on feminist theorisations in the field of IPE. Feminist interventions in this field of enquiry (as in other fields) have strived to locate 'gender' in general and 'women' in particular with the help of an analysis of "power and the division of labour... [whereby] women's different but related location within a global political economy both links and divides women of the world" (Robinson 1997: 776).

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Feminists theorising on IPE seek to visibilise women, account for the gendered experiences of work and "rethink the international division of labour as a sexual division of labour" (Pettman 1996: 160). Moreover, such an exercise also entails "examining ideologies of femininity, marriage and motherhood, which construct and appropriate women's labour in domestic, reproductive and caring work as a labour of love, not work at all" (Pettman 1996: 165).

The various feminist theoretical interventions in the field of IPE can be thematically dealt with as in the following sub-sections delineating: the artificial public-private distinction, efforts towards engendering mainstream IPE theory, critically analysing the various manifestations of 'power' in IPE and finally looking at a few useful feminist theoretical tools to better understand the theoretical terrain of IPE.

### **Artificial Public-Private Distinction**

Feminist scholarship builds upon the 'public-private distinction' whereby men are associated with the 'public' (i.e. the political sphere and being 'providers' for the family by engaging in remunerative work) and women were confined to the 'private' (i.e. the domestic sphere of the household primarily because of their biological reproductive work which also implied that they will be entrusted with non-



remunerative work of social reproduction). The public-private dichotomy also entails privileging of men and masculinist ideas translating 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.

V. Spike Peterson draws attention to the shifts in the way 'public' and 'private' were understood with the coming in of capitalist industrialisation. According to her, "'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). 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" (Peterson 2003: 80). 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 in a 'sexualised labour market', while women were entrusted with non-remunerative work of social reproduction within the family as an extension of their biological reproductive work.

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 family (Hartmann 1981). The development of a 'family wage' for men in the era of industrialisation happened through a historically interesting process of contestation by male workers as encapsulated by Heidi Hartmann (1981). Drawing on historical evidence, Hartmann notes that during the Industrial Revolution all people were drawn into the labour force without the exception of even women and children, so much so that "in fact the first factories used child and female labor almost exclusively" (1981: 20). This led to the perception of women workers as "cheap competition" by their male counterparts, who actively organised to prevent women from entering the labour force and denied them entry into and protection from labour unions. Besides, men demanded protective labour laws for women and children which besides affording some protection from abuse to women and children also acted as a way to exclude

them from so-called “male jobs”. Male workers canvassed for higher wages for themselves to be able to ‘support their families’ rather than demanding equal wages for all, clearly to reserve women’s work in the household for their benefit which was getting compromised when they entered the ‘productive’ labour force. Hartmann summarises the secondary status of women in the sexualised labour market and the critical role of ‘family wage’ in reinforcing that in the following words:

For most men, then, the development of family wages, secured the material base of male domination in two ways. First, men have the better jobs in the labor market and earn higher wages than women. The lower pay women receive in the labor market both perpetuates men’s material advantage over women and encourages women to choose wifery as a career. Second, then, women do housework, childcare, and perform other services at home which benefit men directly. Women’s home responsibilities in turn reinforce their inferior labor market position (1981: 22).

Thus, as Hartmann (1981) and Peterson (2003) observe, ‘family wage’ became the norm by the end of the 19<sup>th</sup> century and early 20<sup>th</sup> century before women workers struggled for “equal pay for equal work” and managed to negotiate some gains in that respect. However, even in the post Second World War phase where women’s participation in the labour force has increased manifold, the fundamental characterisation 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” (1981: 25).

Furthermore, the current neo-liberal economic thinking has assumptions of the “competitive, self-interested and rational “economic man”... [as an] atomized individual... [which] is fundamentally at odds with the historical reality of (inter)dependence as the ground of all social relations, and cooperative and care-taking practices as the (socially constructed) premise of women’s lives” (Peterson

2003: 80). Thus, social, political, legal and educational institutions apart from the economic ones also reflect masculinist preferences which lead to institutional entrenchment of hierarchies. This leads to over-valourisation of elite males' identities and activities with a simultaneous devalourisation of that of women's. Extrapolating such manifestations of hierarchy where the elite are valourised in contrast to the "other" in a globalised world, migrant workers in a neo-colonial context come to be the "feminised others" who are discriminated against despite their critical role in augmenting profit for capital (Peterson 2003).

### **Engendering Mainstream IPE Theory**

J. Ann Tickner (1992) presents a formidable feminist critique of the three different undercurrents of international political economy as identified by Robert Gilpin (1987): liberalism, economic nationalism, and Marxism – each respectively focusing on the individual, the state and class. Tickner highlights the assumption of gender neutrality of all the three approaches and argues that "ignoring gender distinctions hides a set of social and economic relations characterized by inequality between men and women. In order to understand how these unequal relationships affect the workings of the world economy – and their consequences for both women and men – models of international political economy that make gender relations explicit must be constructed" (1992: 70).

Tickner (1992) explains that liberalism is based on the assumption of the instrumental rationality of an individualistic 'economic man'; however the assumption is masculinist since it obscures women's experiences and notions of interconnections and interdependence. Liberalism also wrongly characterises the 'market' as an all-pervasive institution, as much of women's work is linked to provision of basic needs in the household and in subsistence economies. Hence, liberal market-based models of 'development' lead to differential impacts mediated by gender and class exposing the gendered basis of what is conceptualised as 'economic security' and 'development'.

Encapsulating the feminist critique of economic nationalism, Tickner (1992) begins by problematising its central unit – the State, since women were not equal partners in

the 'social contract'. Moreover, as illustrated in detail in the preceding section, Tickner also notes that "the evolution of the modern state system and the capitalist world economy changed traditional gender roles in ways that were not always beneficial to women. Contemporary economic nationalist prescriptions for maximising wealth and power can have a particularly negative impact on women since women are often situated at the edge of the market or the bottom of the socioeconomic scale" (1992: 84).

The feminist critique of Marxism is mainly directed at the gender neutrality of 'class analysis' which ignores the specific ways of women's oppression due to patriarchy even under capitalism and also invisibilises the critical role of women in the family and household. With their focus on 'production', Marxists tend to ignore women's role in 'reproduction' which lies at the heart of sexual division of labour within the household and by extension in the economic sphere. Tickner summarises the feminist critique of Marxism and emphasises that "although women may suffer from particular forms of repression under capitalism, the liberation of women through class struggle cannot be assumed. It will only come about when women are equal to men in both the public and the private spheres, a condition that would not necessarily obtain in a postcapitalist world" (1992: 90).

After consolidating the feminist critique of the dominant theoretical approaches to IPE, Tickner (1992) then proceeds to formulate a feminist reconstruction of the international political economy and begins with an emphatic challenge to the liberal construct of the "rational economic man". According to her, a self-interest maximizing behaviour of the individual must be supplemented with an "ethic of care and responsibility" to include the "connected, interdependent individual whose behaviour includes activities related to reproduction as well as production" (1992: 92). She echoes other feminist voices that challenge the artificial public-private dichotomy and supports Maria Mies' (1986) contention that social reproduction functions of women must also be conceptualised as 'work' rather than relegated as 'natural' functions of women. Hence, for both Mies and Tickner, the differentiation of economically productive work and unpaid work by women in the household must not be seen in a hierarchical relationship to each other and in fact, there is a need to

develop ways in which the 'natural' activities performed by women in the household is also accounted as economically productive. Tickner thus calls for the adoption of a bottom-up approach by all "political and economic institutions... by going beyond an investigation of market relations, state behaviour, and capitalism... to understand how the global economy affects those on the fringes of the market, the state, or in households as we attempt to build a more secure world where inequalities based on gender and other forms of discrimination are eliminated" (1992: 95-96).

Jan Jindy Pettman (1996) also agrees with Tickner's critique of the liberal, economic nationalist and Marxist approaches to IPE and underscores the importance of engendering the discourse to gain a better understanding of some of the most glaring puzzles of contemporary IPE – feminisation of poverty and feminisation of labour force in the "temporary, casualised and largely unprotected work" (1996: 160). She alludes to the important fact that in contemporary international political economy poverty affects women differently than men and often in more adverse ways. Furthermore, Pettman seconds the links drawn by other feminists like Mitter (1986) and Mies (1986) between feminisation and casualisation of the workforce and the "new international division of labour" where "production is increasingly fragmented and internationalised, as different stages take place in different states, with each particular stage reduced to monotonous, repetitive, 'unskilled' work, in which workers are endlessly disposable and substitutable" (1996: 162). The most low-end of these jobs are more often than not performed by women and migrant workers who have almost no bargaining powers to negotiate rights. Pettman thus observes, "migration has become a global labour system, where borders that have been effectively dismantled for free movement of capital become ways of segmenting and exploiting labour... It demonstrates, too, that the global political economy segments the changing international division of labour along nationalised, racialised and ethnicised as well as class and gender lines" (1996: 162-163).

Pettman (1996) also undertakes a critique of the development discourse against the backdrop of globalisation. She highlights the basic dilemma for feminists as the one where the choice has to be between lobbying for a more inclusive approach towards women in the development discourse at all levels or to fundamentally challenge and

problematise 'development' itself. It is significant that she recognises the differences between women in different parts of the world based on various parameters and notes that "women's different but related location within a global political economy both links and divides women of the world" (Pettman 1996: 171).

### **Manifestations of Power in IPE**

Maria Mies (1986) uses the feminist concept of 'patriarchy' as a heuristic tool to probe various relationships that involve exploitation and oppression under capitalism which had a gender based dominance relationship at their heart. In this context, she highlights the centrality of various forms of violence against women that serve to uphold the gender-based dominance relationships and she terms this the harbinger of 'capitalist patriarchy':

The more the feminist movement developed, the more we discovered new manifestations of patriarchal structures and ideologies. In particular, the movement against violence against women, against woman-battering, rape, pornography, sexual abuse in the workplace, violence against women in the media and advertising, challenged the prevailing myth that modernity had 'civilized' the man-woman relationship, had 'tamed' the erstwhile aggressive, anti-women tendencies in men. No, these were not just 'left-overs' of a feudal past; this was the flesh and blood of modern, progressive capitalism; this was the heart of capitalism: it was *capitalist patriarchy*. (emphasis in original; Mies 1986: ix)

Mies describes violence as the open secret of the capitalist system in order to bring about subordination at two levels: firstly, defining women as mothers and housewives put their labour within the household outside the ambit of the economic sphere and thus "50 per cent of human labour was defined as a free resource" (1986: ix); secondly, European capitalists brought capitalism to Asia, Africa and South and Central America by force, by colonisation. Thus, violence is the systemic characteristic of capitalism which sought to gain control over 'nature' whose resources were available for free and hence "women and the colonies were treated as 'nature', they were 'naturalized'" (Mies 1986: x).

Interestingly, women's work in the household has been economically devalued by justifying it as 'natural' activity; however in contemporary times due to various

factors the same functions that women have been performing for free since time immemorial are also available for sale in the market. This compels one to wonder, “Why does women’s reproductive labor have to be “denaturalized” (by looking after non-relatives) in order to be socially valued, while “natural” intimate labor remains morally desirable?” (Xiang and Toyota 2010). It is here that one can see, that one of the major ways in which power manifests itself in IPE is to constantly innovate various mechanisms to sustain the artificial distinction between the ‘public’ and the ‘private’. A contemporary innovation is to give partial acknowledgement to the economic value of various ‘care-giving’ functions, but this acknowledgement is partial in the sense that the economic value comes hand in hand with ‘denaturalisation’. When performed by mothers, sisters and wives within their household, it continues to be characterised as ‘natural’ acts of caring based on ‘love’, and hence economically valueless. Feminist scholarship has highlighted how a public-private dichotomy contributes to economic devaluation of women’s work within the household and how such a devaluation is important for capitalism due to the availability of women’s critical social reproductive functions as a ‘free resource’. This particular aspect of devaluation of women’s social reproductive and care-giving functions within the household is important to develop an understanding of women’s remunerative work, and would be elaborated in subsequent sections of this chapter.

### **Some Feminist Theoretical Tools to better understand IPE**

This section would present a brief overview of some of the feminist theoretical tools that help us make better sense of international political economy. The selection of the concepts is based on a consideration of the most relevant and appropriate tools to theoretically anchor the objectives that this study intends to achieve. The few tools listed below in no way indicate that feminists have not developed any other theoretical tools in this field. Instead what this selection indicates is greater usefulness of these concepts as compared to others in exploring the international political economy of women’s remunerative work using these tools.

*Hegemonic Masculinity:* Tickner uses R.W. Connell’s (1987) concept of ‘hegemonic masculinity’ to explain the masculinist arena of international politics. According to this concept, not only is masculinity understood in opposition to inferior and devalued



femininities but also in “opposition to various subordinated and devalued masculinities, such as homosexuality” (Tickner 1992: 6). Feminist analysis demonstrates how in Western political thought, the devalued and inferior femininities find place in the ‘private’ while hegemonic masculinity dominates the ‘public’. The ‘public’ is the political sphere which is characterised as a sphere of competition and in ‘state of nature’ conceptualisation, it is a state of “war of everyman against everyman” (Tickner 1992: 45) and the subtext of such a conceptualisation is that every man fights to protect the ‘private’ household that he leads.

This understanding can be easily extrapolated to read the subtext of mainstream IPE theoretical perspectives be it liberal, economic nationalist or Marxist which further the artificial public-private distinction in two ways: firstly, by their gender-neutral pretence, they in fact bolster the masculinity of the ‘public’ which is supposedly governed by ‘rational’ factors; secondly, the household where most of women’s economically devalued social reproduction functions take place is invisibilised or inadequately accounted for in their respective conceptualisations of the international political economy.

It is important to note here that to contend that ‘the economic’ and ‘the public’ have been carried on as male enterprises, is to only highlight their masculinist nature and in no way does it suggest that men are inherently ‘rational’ and thus fit to conduct economic affairs while women are inherently non-economically oriented. Such a dichotomy is what the masculinist theoretical IPE mainstream seeks to sustain. One can see a parallel of this phenomenon in feminist reconceptualisations of ‘war’ and ‘security studies’ in traditional IR theory. For example, Jean Bethke Elshtain (1987) points out the dichotomy of what she identifies as male “Just Warriors” and female “Beautiful Souls”, which effectively acts to keep women out of the realm of the ‘political’ since war-making is considered to be the highest form of politics in many senses. However, confusion arises because of a strand often identified as maternal feminists, who argue in favour of celebrating what has been previously devalued as ‘feminine’ – i.e. women’s caregiving roles. Such ‘maternal thinking’ does not believe that there is anything ‘natural’ about women’s caregiving behaviour, it is a part of gendered socialisation and women learn those roles. Given that women are

conditioned to be 'peaceful' and 'caring', it is important to tap on that resource and mobilise women as pacifists – who can facilitate peaceful settlement of disputes, and promote the value of peace in a broader sense (Ruddick 1989). Similarly, a logical extension of maternal feminists' argument in the economic sphere would mean that women's care-giving roles equip them to understand the pitfalls of commodification of all aspects of human life and hence they can promote the value of relationships of affection even in the economic sphere.

Colonisation and Housewifisation: Maria Mies (1986) identified the close inter-relationship between colonisation and what she called 'housewifisation' to understand the workings of the modern global capitalist system, which according to her may also be described as 'capitalist patriarchy'. Anchoring her analysis in Marxism she stretches to highlight the 'predatory' nature of capitalist mode of production which had warfare, conquest and looting at its heart which gave rise to a constructed idea of 'progress' where subsistence technology like agriculture and conservation are seen as 'backward' and technologies of warfare mark 'progress'. European capitalist patriarchy was fundamentally different from somewhat 'gynocentric' patriarchies of China, India and Arabia where 'mothers' and Mother Earth/Nature fostered interdependence in those societies and hence even if slaves and women were subordinated and exploited, they were an integral part of those systems. Drawing from Wallerstein's world systems theory, Mies argues that "with the rise of capitalism as a world-system, based on large-scale conquest and colonial plunder, and the emergence of the world-market, it becomes possible to *externalize or exterritorialize* those whom the new patriarchs wanted to exploit. The colonies were no longer seen as part of the economy or society; they were lying outside 'civilized society'" (1986: 75). Moreover, there was a separation between 'man' and 'nature' using modern technology where 'nature' was no longer an organism but only a repository of 'natural resources' to be exploited by 'man'.

The historical move of European capitalists towards colonisation of foreign lands was accompanied by wiping out 'medieval' practices of various types of merchant women who were mainly unmarried, widowed or otherwise single women by persecuting these women after they were christened as 'witches' (Mies 1986). Mies thus

insightfully observes that “the progress of European Big Men is based on the subordination and exploitation of their own women, on the exploitation and killing of Nature, on the exploitation and subordination of other peoples and their lands” (1986: 76). The persecution of the ‘witches’ according to her was the precursor to domestication of all women by emphasising the primacy of the ‘nuclear’ family headed by the ‘male breadwinner’ and functionally run by ‘housewives’ who would perform all the care-giving tasks that would facilitate the ‘public’ role of the male worker. This according to her was the complementary process of ‘housewifisation’ that accompanied colonisation. Mies elaborates “that housewifization means the externalization and ex-territorialization of costs which otherwise would have to be covered by the capitalists” but are now performed for free by the housewife. The housewives not only sustained the male workforce but also emerged as the major ‘consumers’ for the goods and commodities in the capitalist market.

In the post-colonial or neo-colonial times, Mies (1986) argues that there is a ‘new’ international division of labour slightly different from the old international division of labour that was an out-and-out vertical exploitative relationship between the colonisers and their colonies. The new international division of labour is directed at disguised exploitation of the erstwhile colonies. The most labour-intensive parts of capitalist manufacturing was relocated to the ‘Third World’ to tap on to the abundant labour supply there which could be exploited by paying very low wages in the absence of labour regulations in those parts of the world. The new international division of labour forges a curious but logical relationship among women in different parts of the world. While the ‘Third World’ women formed the largest constituents of “the cheapest, most docile and most manipulable workers” who helped “lower production costs as far as possible” (Mies 1986: 114) and the women in the rich countries were targeted as the coveted ‘consumers’ which then spread to a similar targeting of urban middle-class women also in Asia, Africa and Latin America. Mies dwells on the important question that “why, all of a sudden, women, and poor Third World women at that, have been rediscovered by international capital” (1986: 116). It is because women’s primary role as ‘housewives’ enables devaluing of their status as ‘workers’, thus cheapening their labour and controlling them politically and ideologically especially in the erstwhile colonies in a neo-colonial setting. Hence,

according to Mies, there is “an increasing convergence of the sexual and the international division of labour; a division between men and women – men defined as ‘free’ wage-labourers, women as non-free housewives – and a division between producers (mainly in the colonies and mainly in the countryside) and consumers (mainly in the rich countries or the cities). Within this division, there is also the division between women mainly as producers – in the colonies – and as consumers – mainly in the West” (1986: 116).

The RPV Model: V. Spike Peterson has suggested a Reproductive-Productive-Virtual economies model (RPV model) to gain greater insights about contemporary global political economy where “the three economies are distinguishable for analytical purposes but empirically inextricable: they are overlapping, mutually constituted, and always dynamic” (2003: 39). In Peterson’s own words:

“In essence, the RPV framing brings the conceptual and material dimensions of “social reproduction”, non-wage labor, and informalization *into relation with* the familiar but increasingly global, flexibilized, information-based and service-oriented “productive economy”, as well as with the less familiar but increasingly consequential “virtual economy” of financial markets, commodified knowledge, and the exchange less of goods than of signs...

Retaining the productive economy permits continuity with conventional economic analyses, while...it is analyzed in relation to global developments and linkages among the three economies. Including the reproductive economy invites attention to otherwise marginalized agents and activities, and acknowledges especially the importance of gender-sensitive research and analysis. Including the virtual economy addresses developments in financial markets and the commodification of intangible “products”. It acknowledges the importance of interpretive approaches for analyzing how symbols and expectations mediate our construction of economic “value”” (2003: 38-39).

Thus, the RPV model also allows a methodological innovation to initiate a holistic understanding of all the complex interconnections between the various kinds of economic activities that constitute contemporary IPE. The greatest merit of this model lies in the centrality it accords to the ‘reproductive economy’ which indeed

sustains the other two economies (i.e. the productive and virtual economies) and in turn is shaped and moulded by the two. It is also noteworthy that the 'reproductive' is also accorded the status of an 'economy' in this model which is absent in conventional economic analyses where the 'reproductive' is merely a sphere of human activities in a different realm than economic activities. The RPV model also helps in illuminating how variables like power, race, gender, class and national hierarchies mediate the inter-relationship of the reproductive-productive-virtual economies (Peterson 2003).

*Global Care Chains:* Arlie Hochschild (2000) pioneered the concept of 'global care chains' to contextualise the experience of migrant women workers, particularly paid domestic workers – maids and nannies, and even sex workers (Ehrenreich and Hochschild 2003). Hochschild defined it as “a series of personal links between people across the globe based on the paid or unpaid work of caring” (2000: 131). Due to the location of 'care' outside the sphere of market production and by virtue of its being characterised primarily as women's work, it has been largely absent from literature in IPE until feminists have emphasised its importance (Yeats 2004).

According to Nicola Yeats, “Global care chains do more than demonstrate the connections between personal lives and global politics; they elucidate the structures and processes that reflect and perpetuate the unequal distribution of resources globally. Global care chains reflect a basic inequality of access to material resources arising from unequal development globally but they also reinforce global inequalities by redistributing care resources, particularly emotional care labour, from those in poorer countries for consumption by those in richer ones” (2004: 373).

The concept of global care chains, as Yeats (2004) notes is derived from the concept of 'global commodity chains'. Global commodity chains encapsulate the breakdown of the production process of commodities into distinct parts, with each part completed in geographically distinct areas. Similarly, global care chains denotes a “chain” where the providers of 'care service', primarily women, move geographically thereby indicating a movement from 'care surplus' to a location experiencing 'care drain' but in turn creating a 'drain' from where the movement has occurred to indicate a 'chain'.

However, the link between the concepts of global commodity chains and global care chains need to be more carefully explored since the former deals with goods and the latter deals with services, particularly services linked to reproductive labour which are located in both market and non-market settings (Yeats 2004).

Though a promising concept, Yeats (2004) points out its lack of robustness since it has been applied only to one type of migrant care workers, namely the paid domestic workers by Hochschild. However, care services in the global political economy are broader than individual or communities of migrant nannies, they also include a certain corporatisation of care services like ‘hospitality’ and institutionalised mechanisms of flow of migrant care workers through suppliers, recruiters and intermediaries.

Following a broad overview of feminist theoretical interventions in International Political Economy, the next section dwells on how the analytical focus of this research, i.e. women’s remunerative work is conceptualised in feminist literature.

#### **Feminist Conceptualisations of Women’s (Remunerative) Work**

“In all societies, both women and men work. But not necessarily at the same tasks or to the same 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. The term work acquires new meanings with changes in the nature of work” (Kalpagam 1994: 11).

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 follows:

“...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 context of one country, and feminists have thus turned their attention to the international system of production and consumption..." (2002: 47).

Amartya Sen's simple yet insightful way to understand women's remunerative work further presents some useful arguments. In one of the chapters of his *Development as Freedom*, Sen (2000) argues a positive correlation between "women's agency and social change". 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. 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" (2000: 189). Though, the two approaches overlap, viewing women as "agents" is 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 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-à-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.

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 Christine M. Koggel (2007). 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, specifically referring to the way MNCs operate in the global South. One then needs to analyse whether having some kind of employment when none was available before albeit in exploitative circumstances augments women's agency. Illustrative of the questions raised by Koggel (2007) is the case of acid-throwing on women in Bangladesh. Such incidences have been seen as a form of gender violence as a reaction to women's increasing socio-economic roles in the 'public' (Buerk 2006), women have to face such horrific forms of violence when they tend to exercise some choice regarding choosing partners for marriage from jilted suitors, and so on.

Koggel emphasises that the positive correlation that Sen makes, needs to be problematised by considering that there are possibilities of home-based remunerative work and in that case how important is working outside the home important for Sen's correlation to hold. 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; whether women are working in the formal or informal sector with favourable working conditions; do they have control over their income in terms of decisions in household budgets and general expenditures, and so on. Koggel (2007) thus concludes that having remunerative employment is necessary but not sufficient for an enhancement in women's agency.

An approach that views women's having remunerative work as a necessary but not sufficient condition for enhancing their agency is closer to the structural conditions that patriarchy creates. In a capitalist society that values and valorises production for the market and "scorn[s] or demean[s] those values and social relationships that do not adhere to market norms of self-interest and profit maximization" (Beneria, et. al.



2000: xiii) like the social reproduction roles of women, joining the 'productive' work force in the market does not eliminate all the discriminatory conditions in which women's lives are embedded. However, even Lim (1990) and Hensman (2004) do have a point when they make an argument which is closer to that of Sen's above, that having an income does allow women some power to negotiate and bargain within the household and outside, whether in the form of being a breadwinner or in the form of having an option to 'walk out' in the case of violence within the family.

Moreover, Hensman also highlights the importance of "right to a safe and healthy workplace and freedom from sexual harassment" (2004: 1032) as enabling factors for women to be engaged in remunerative employment outside the home, and for her globalisation and deepening transnational civil society linkages can be utilised to initiate international campaigns for securing those rights. A further important argument that Hensman makes is the importance of availability of social welfare services that would facilitate women's coming out of the home to work and also increase the value of the work of those who are involved in care-giving, health services and education sectors. Economically valuing care services has very important implications. Hensman argues, "As working women, we make a substantial contribution to the creation of wealth; indeed, if the unwaged component is taken into account, women still contribute more than men do, although things are slowly changing, with men taking a greater part in household work" (2004: 1034).

Primary responsibility of unpaid household work has also meant that the majority of the "part-time" workforce is constituted of women because of the potential of part-time work to "help workers reconcile employment with family, social and civic responsibilities" (Bolle 2002: 215). However, Patrick Bolle also makes an important distinction between voluntary and involuntary part-time work. Being able to balance remunerative employment and family responsibilities is not the only reason why most part-time workers are women, other important reasons for a disproportionately high number of women part-time workers are: "inequalities in qualifications and pay, which means that in a married couple, the less well paid of the two is the one likely to work part time, or the fact that part-time employment is particularly widespread in the

services sector, where women are relatively more numerous compared to manufacturing” (2002: 226).

In this regard, it is important to note that the transnational linkages that globalisation has helped forge is responsible for both enhancing and shrinking opportunities for workers, particularly women (Mukherjee 2004). The situation in India makes clear the precarious position of women workers in the globalised era. While there is an overall decline in women’s employment, there are an increasing number of women in the traditional agriculture sector (Mukherjee 2004, drawing from NSS 55<sup>th</sup> Round 2000). However, the other traditional sectors that employed women are getting increasingly mechanised and as a result “women are displaced from their customary sources of livelihood in the traditional sectors, lack of requisite resources and capabilities prevent them from seeking compensatory employment in the newly-emerging areas in modern industry and their only refuge, inevitably, is the informal sector” (Mukherjee 2004: 279). Thus Mukherjee argues that “before women can take advantage of these opportunities, they have to overcome the constraints they face in accessing information, credit, skill training and other necessary resources as well as markets. The issue of access... is intertwined with the broader and more fundamental question of women’s agency and their ability to gain control over the circumstances of their lives” (2004: 288).

To summarise this discussion on feminist conceptions of the international political economy and women’s remunerative work, one can conclude that essentially what is envisioned is moving away from all tendencies of creating artificial boundaries/dichotomies and challenging all other kinds of hierarchies. This is because politics in general, including international politics, is defined and conditioned by ‘hegemonic masculinity’ where though all women may not be disprivileged, but ‘some women’ always come to be dominated by ‘some men’ and ‘some men’ dominate all others in the system. Such a system inevitably invisibilises and marginalises ‘women’ and feminist projects seek to recover those marginalisations and render visibility to the previously devalued. Thus, IPE cannot be understood in abstract terms where the most vulnerable in the system are unaccounted for.

However, as Fiona Robinson points out it is not enough to merely expose the invisibility of gender in IR, including IPE, or to only highlight their gender-blindness, she emphasises that feminist interventions must also address more difficult normative questions to demonstrate “how a feminist methodology or theoretical approach to the study of IR, including IPE, might be able to help us to think of new solutions to old, and some hitherto hidden, problems” (1997: 774). Moreover, she urges that feminists must work towards answering the ‘hard questions’ even if in a partial manner: “how the world could be different, and how we might get there from here... how do we end the oppression and exclusion of women, and indeed, of all subjugated groups?” (1997: 778). Robinson (1997) supports Alison Jaggar’s (1995) argument in this regard and echoes that “improving the lives of the world’s women certainly requires empathy, imagination and responsiveness; but it also requires a kind of moral thinking that focuses not only on immediate needs but on problematizing the structures that create those needs or keep them unfulfilled” (Robinson 1997: 780).

It is indeed imperative that feminist theoretical interventions in IPE have the scope for logical corollaries in terms of strategising for ‘real’ tangible changes in the lives of the most marginalised, of whom women constitute the most vulnerable section. The foregoing survey of feminist theoretical interventions in the field of IPE broadly and towards understanding women’s remunerative work particularly would form the framework of this study’s analytical focus on commercial surrogacy as work in India.

As highlighted in the introductory Chapter 1, the broader issues of globalisation and women’s remunerative work would provide traction for understanding the case of commercial gestational surrogacy as work in India. The case study would also hopefully bring about newer insights for broadening the way we understand globalisation and women’s remunerative work from a feminist perspective. To develop a conceptualisation of commercial gestational surrogacy as remunerative work, the production-reproduction dichotomy would be elaborated in a later chapter. This researcher also has nascent ideas about feminist strategies for improving the lives of women working as commercial gestational surrogates and these would be delineated in the subsequent chapters.

### CHAPTER 3: WOMBS TO-LET: SUBVERSIVE ‘WORK’ OR EXPLOITATION UNDER CAPITALIST PATRIARCHY?

At the outset, to explore the theoretical plausibility of conceptualising commercial gestational surrogacy in India as ‘work’ or ‘labour’ in the ‘globalised’ international political economy, it is important to have a sense of the plural ways in which feminists and participants in the Indian women’s movement understand ‘globalisation’.

Mary E. John has critically analysed the diverse positions within the women’s movement on ‘globalisation’ and according to her the central characteristic of such a multilayered engagement indicates not only “conflicting political positions, but points to deep differences in conceptualising the term itself – globalisation, then, is a far from settled question” (2009: 46).

It emerges from John’s analysis that the most vociferous feminist critique in India is of an ‘anti-globalisation’ hue, where globalisation is viewed as essentially an economic process that irreversibly entrenches hierarchies and insecurities to the disadvantage of the most marginalised of whom women are the most vulnerable section. In this view, the retreat of the State from its social welfare functions indicates its assimilation in the global capitalist nexus under international pressure. However, as John rightly points out this analysis tends to ignore how under even the so-called insulated socialist regime in the immediate post-independence period did the condition of women become a matter of concern as highlighted in the path-breaking 1975 report of the Committee on the Status of Women in India titled *Towards Equality*. Thus, John raises the question as to “[h]ow can we be confident that a resurrected version of this [socialistically oriented] state – in the adverse market-dominated conditions of today – will be more accountable to its women?” (2009: 47). Diametrically opposite to the approach of the leftist ‘anti-globalisation’ feminists is what John calls the “people’s capitalism” approach adopted by many grassroots women’s organisations, most notably among them being the Self Employed Women’s Association (SEWA) which focuses on “providing economic and financial security to

poor women workers in the informal sector” (2009: 47) as a pragmatic response to a market-oriented globalised world economy. SEWA aspires to “full employment” of women workers i.e. “work security, income security, food security and social security (at least health care, child care and shelter)” (SEWA n.d.). The organisation is basically a trade union of women workers in the unorganised sector, whom it mobilises to form cooperatives, savings and credit groups, and self-help groups to achieve self-reliance for the women workers. Concluding from her focussed study on SEWA, Kalima Rose (1992) has observed:

Under SEWA, women have forged a new model of what a trade union can be – a Third World model, which defies conventional conceptions about who unions organize and what they do for their members. Most unions in the world organize workers in one kind of industry, who share one fixed workplace and concern themselves only with problems which revolve around the work issues of their members... SEWA organizes women who work in their homes, in the streets of cities, in the fields and villages of rural India, with no fixed employer, carving their small niches in the economy, day by day, with only their wits to guide them against incredible odds of vulnerability, invisibility and poverty (cited in Visvanathan et. al. 1997: 382)

However, to move on, two more positions highlighted by John, in my understanding better equip a nuanced analysis of position of women workers engaging in the most marginalised forms of work, particularly ‘bodily services’ that are relevant to the present study. First, Marxist-feminist Rohini Hensman locates the contemporary ‘globalisation’ process on the continuum of development of capitalism in the world. According to John, “[t]he anti-globalisation agenda, in [Hensman’s] view, does not make sense for third world women workers, with its defence of national boundaries which foster nationalisms that, in turn, promote imperialism, fascism and war” (2009: 47; citing Hensman 2004). However, John cautions about the lack of “signs, however nascent, of such an international working class? Indeed, has it not become that much easier – in the era of global outsourcing – to pit workers against each other?” (2009: 47). For example, contrary to Marxist proposition that it is possible for the workers of the world to unite, workers in the rich countries like United States resent workers in the Business Process Outsourcing (BPO) industry in India due to notions that their jobs are being hijacked.

Secondly, John (2009) points out how Gail Omvedt (2005) raises questions for the anti-globalisation proponents as to what is wrong with the creation of newer avenues where the historically marginalised are getting employed even if only as 'cheap labour'. Omvedt succinctly argues that "[t]o ask dalits, women and others to simply 'fight globalisation' at the cost of taking up real democratic demands, without carrying out a real analysis and understanding of how to deal with the situations they find themselves in, is a recipe for disaster" (2005: 4881). Again, the case of the BPO industry and the Information Technology (IT) and IT-enabled services industry is illustrative in this context. Highly-skilled and semi-skilled professionals in India find employment in this sector at wage-rates which are better than other avenues open for them. However, the very emergence of this sector in India is linked to the possibility of exploiting the abundant human resource in absence of stringent labour laws and wage standardisations contrary to the case in the so-called First World. Despite having to work in taxing conditions like odd work-shifts to overcome the difference in time-zones between North America or Europe and India, workers in this industry are comparatively better-off with these jobs than without them.

The two arguments delineated above by Hensman and Omvedt are somewhat complementary to each other. They provide the ground on which to base any attempt of making feminist theoretical sense of commercial gestational surrogacy as a temporary livelihood generation option that many women mostly from disadvantaged sections in urban/semi-urban areas of India are choosing. The framework of evolution of capitalism on a global scale that Hensman elaborates is helpful in contextualising different kinds of outsourcing industries that are emerging in various parts of the global South and the commercial surrogacy industry in India is one of the instances of such a phenomena. Such a framework links well with the expansion of opportunities for the marginalised sections in the global South that Omvedt discusses. Thus, women from marginalised and disadvantaged sections of society in India who agree to be commercial gestational surrogates are 'choosing' to do so even if in a highly asymmetric and constrained position owing to the emergence of an outsourced commercial surrogacy industry. In such a context, it is not enough to simply argue either for or against their decision to act as commercial gestational surrogates or

question the element of 'choice' without contextualising the structures in which that 'choice' is made.

In an effort to analyse the transnational linkages facilitated by globalisation, some feminist scholars have tried to locate the boom in trans-national commercial gestational surrogacy arrangements in India on the web of interconnections in the international political economy. Catherine Waldby views commercial surrogacy in India as "fundamentally exploitative" and as a process that can be understood as "a neo-colonial phenomenon" (interviewed by Vembu 2010) on the lines of the "call-centre model" of the BPO industry where the low-end functions are 'outsourced' to labour-abundant countries like India at a fraction of the costs. Waldby explains it further that "in the history of colonial relations, the natural wealth of a colonised country was exported to the colonising country. This could be raw materials, food, spices, textiles and indigenous wealth and labour capacity. The system operated in the interests of the colonising country, not the colonised country. There's something similar going on with commercial surrogacy" (interviewed by Vembu 2010). The outsourcing analogy has also been invoked by sociologist Ravinder Kaur (2009):

Outsourcing of pregnancy may mean a new division of 'labour' between rich and poor countries – richer country women may have neither the time nor the desire to spend nine months bearing their own babies when they can easily be borne by third world women at a fraction of what it would cost in their own countries. Global spatial hierarchies in such divisions of labour first emerged with the outsourcing of domestic work with Asian women migrating in droves to rich countries as maids; then as 'mail-order brides' for rich country men to fulfil reproductive and domestic roles; and now the outsourcing of the labour of bearing babies. The colonial 'wet-nurse' only fed (and even emotionally mothered) the child; surrogacy outsources the entire process (and perhaps the joy) of bearing babies from rich to poor women.

A formidable argument in the debate surrounding commercial surrogacy is that it 'commodifies' women's reproductive labour and children born out of such arrangements. The next section would explore 'commodification' by contextualising it in the contemporary world economy which many feminists describe as an embodiment of 'capitalist-patriarchy'.

### *Conceptualising Commodification under Capitalist Patriarchy*

'Patriarchy' derived from Latin words literally means the "rule of the father" but rather than referring to real situations where the father is ruler in the literal sense, it is a heuristic tool in feminist scholarship to understand oppression of women. Gerda Lerner defines patriarchy as "the manifestation and institutionalisation of male dominance over women and children in the family and the extension of male dominance over women in society in general" (1986: 239), where women are 'naturally' associated with the domestic sphere while men are identified with the 'public interest'. In fact, 'patriarchy' is not a monolithic concept and increasingly feminists have been using 'patriarchies' to incorporate the diversity of the manifestations of women's oppression across cultures and societies. For example, Deniz Kandiyoti highlights two different forms of patriarchy, "ranging from less corporate forms of householding, involving the relative autonomy of mother-child units evidenced in sub-Saharan polygyny, to the more corporate male-headed entities prevalent in regions [like North Africa, Muslim Middle East and South and East Asia]" which exemplify "classic patriarchy" (1988: 275, 278).

In the preceding chapter, the way Mies (1986) has used the characterisation of 'capitalist patriarchy' has been discussed. She highlights the way patriarchy manifests itself in a capitalist economic system to naturalise women's work in order to economically devalue their social reproductive labour thereby rendering this critical form of labour a 'free resource'. Moreover, it has also been emphasised that in the contemporary globalised world economy avenues have been created for even reproductive labour (biological as well as social) to get economic value provided it is 'denaturalised' i.e. performed beyond the household and outside kinship relations.

It is believed that with 'globalisation' leading to heightened marketisation, previously 'non-economic' activities have become 'commodified' and thus now "infants, human organs, sexualized bodies, intimate caring, sensual pleasures and spiritual salvation are all for sale" (Peterson 2003: 78). It is in this context that commercial surrogacy can be seen as an issue of political economy where even the act of reproduction itself, removed from the terrain of 'love' and 'family' assumes the form of a remunerative



work. It thus raises critical questions about what it means for an understanding of motherhood and also women's remunerative work. Moreover, it also compels thinking about the ethics of commercialisation and commodification of women's reproductive labour.

Thus, traditional labour performed by 'housewives' for free across cultures like: sex, reproduction/ gestation and care-giving, are all individually available in the market provided by commercial sex workers (though it is not distinctive of contemporary times), women who act as surrogates: traditional or gestational, and nannies and paid domestic workers, respectively<sup>2</sup>.

However, it is noteworthy that all these social reproduction functions (or *services*, if they can be called that in keeping with contemporary market lexicon<sup>3</sup>) are not available in the market in similar ways as other services in as much as these are mostly part of the informal unorganised sector of the economy. Those who provide such 'services' for a remuneration are often stigmatised since these services are 'bodily' services in a special sense beyond the fact that all forms of labour do involve use of the 'body' in some way or the other, i.e. they involve use of the genitalia, reproductive organs, or for care-givers sustained proximity and intimate body contact to the receiver of care service.

In an interesting formulation, H. Malm compares financially 'compensating' a woman acting as a surrogate to paying a surgeon, a taxi-driver and even a model. For her, the payment received by the surrogate is "for the efforts and risks of bearing a child, e.g.,

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<sup>2</sup> I am grateful to Ara Wilson (Duke University, USA) for bringing up this fact during discussions around a paper I presented on commercial surrogacy in India at the workshop "Reproduction Mobility in Asia" of the *Inter-Asian Connections II*, organized by SSRC, NUS and HKISS at Singapore in December 2010.

<sup>3</sup> There are express disagreements with calling the transaction involved in surrogacy as provision of a 'service'. For example, Merrick argues:

Arguments that surrogacy allows a man to "rent" a womb or permits a woman to provide a "service" have obvious flaws. Commercial surrogacy provides payment of a fee to a mother in exchange for the termination of her parental rights to her child. It is difficult to characterize this transaction as anything other than a sale. The commercialization of surrogacy turns the child into a product and devalues that child as a human being... We restrict the surrogate's freedom of choice regarding her health care during pregnancy, and we allow her to become a tool for others to achieve a goal of becoming parents. (1990: 171)

not drinking coffee or alcohol for nine months, not engaging in enjoyable but potentially dangerous activities, for the risks involved in giving birth, and for the effort it may take to return her body to the condition it was in prior to pregnancy” (1989: 129). She also identifies the important “difference between (a) my paying you for me to use your body in a way that benefits me, and (b) my paying you for you to use your body in a way that benefits me” (Malm 1989: 130). Thus, implicitly indicating that sex work which involves payment by a client to use the sex worker’s body and her sexual services is different from commercial surrogacy whereby the payment is for extraction of some bodily service without the clients’ interference or personal use of the surrogate’s body. The need to distinguish between the two is also instructive for the way the question of morality of ‘selling sex’ and ‘helping reproduce the biological child of infertile people’ is addressed where the former is implicitly immoral and the latter not quite so.

This particular aspect of ‘taking money for bodily services’ and its related stigma is dealt with very insightfully by Martha Nussbaum (1998) when she compares ‘prostitution’ with other forms of work like singing, painting, teaching, factory work and so on. She also refers to ‘surrogate mothers’ in the similar manner but explores the case of ‘prostitutes’ in more detail. Hinting at the opportunity of extending her arguments to understand the case of commercial surrogacy in a similar way, she observes:

In general... there appears to be nothing baneful or value-debasing about taking money for a service, even when that service expresses something intimate about the self. Professors take a salary, artists work on commission under contract—frequently producing works of high intellectual and spiritual value. To take money for a production does not turn either the activity or the product (for example, the article, the painting) into a commodity in the baneful sense in which that implies fungibility. (1998: 716)

Nussbaum indicates that it is important to problematise what feminists mean when they argue that contractually providing sexual or reproductive services for a remuneration is ‘demeaning’ to not only women providing those services but in fact women in general “involving a damaging commodification and market alienation of

women's sexual and reproductive capacities" (1998: 695); it is important to explore whether that claim is based on 'reason or prejudice'. On these lines, she argues in support of a two-pronged analysis:

a broader analysis of our beliefs and practices with regard to taking pay for the use of the body and... a broader awareness of the options and choices available to poor working women... many of women's employment choices are so heavily constrained by poor options that they are hardly choices at all. I think that this should bother us and that the fact that a woman with plenty of choices becomes a prostitute should not bother us, provided that there are sufficient safeguards against abuse and disease, safeguards of a type that legalization would make possible. (1998: 696)

Two particular, arguably progressive, arguments from the set of arguments that Nussbaum identifies against 'prostitution' are also relevant to feminist concerns against women engaging in commercial surrogacy: firstly, that such work gives no autonomy to the women involved and they are controlled by others; and secondly, nobody engages in such work by 'choice' and hence bargains made within such trades do not indicate agency. An important illustration of the second argument can be found in Sara Ann Ketchum's formulation:

A market in women's bodies-whether sexual prostitution or reproductive prostitution-reveals a social ontology in which women are among the things in the world that can be appropriately commodified -bought and sold and, by extension, stolen. The purported freedom that such institutions would give women to enter into the market by selling their bodies is paradoxical. Sexual or reproductive prostitutes enter the market not so much as agents or subjects, but as commodities or objects. This is evidenced by the fact that the pimps and their counterparts, the arrangers of baby contracts, make the bulk of the profits. Moreover, once there is a market for women's bodies, all women's bodies will have a price, and the woman who does not sell her body becomes a hoarder of something that is useful to other people and is financially valuable. (1989: 122-23)

Nussbaum shows how these arguments are insufficient in arguing a case against bodily services like prostitution, and here by extension, against commercial

surrogacy. Firstly, lack of autonomy and control are not distinctive features of labouring in provision of bodily services but in fact is a “problem of labor in the modern world, not a problem peculiar to prostitution as such” (1998: 712). Secondly, she is uncomfortable with the atomistic conceptualisation of ‘choice’ delinked from its context. Hence she points out that though it is not an option ‘chosen with alacrity’ among many other available ones but a choice made in a constricted environment and debunking it altogether results in further marginalisation. This is illustrated by Batliwala, while dealing with Indian women’s livelihood options on the margins which are often stigmatised like commercial sex work. She argues in favour of:

recast[ing] choice not as just ‘real’ or ‘false’, but as occurring within a spectrum that is defined by context. Consent would be looked at as not only a manifestation of ‘agency’ within socially recognised institutions (marriage, family, state, market) or for socially acceptable alternatives, but as the right to choose a social situation outside of these structures (2010).

Thus both Nussbaum and Batliwala attempt an expansion of understanding subordination of women and their labour in the context of a globalised economy involving issues of choice, consent, control and autonomy. Hence, the correct approach according to Nussbaum should be “to work to enhance the economic autonomy and the personal dignity of members of that class, not to rule off limits an option that may be the only livelihood for many poor women and to further stigmatize women who already make their living this way... nothing per se wrong with taking money for the use of one’s body” (1998: 723). Ketchum rightly recognises that “[a]ll commercial transactions are at least potentially coercive in that the parties to them are likely to come from unequal bargaining positions and in that, whatever we have a market in, there will be some people who will be in a position such that they have to sell it in order to survive” (1989: 120). Further, citing Radin (1987) Ketchum identifies that the “problem is not in the possibility of commercial transactions, but in the situation that makes these arrangements attractive by comparison... Given the coerciveness of the situation, we cannot assume that the presumed or formal voluntariness of the contract makes it non-exploitative” (1989: 121).

However, having highlighted the need to contextualise 'choice' and also debating how 'real' a choice is, when made in a constraining environment and pushed to the wall, it is also important to acknowledge that "[f]eminist understandings of women's autonomy always tread that uncertain ground where we must recognise that oppressive conditions produce a 'free' will constrained by harshly limited choices, but where we must also ensure that women are seen to act as agents nevertheless" (Menon 2004: 95).

Before, proceeding further it would be pertinent to attempt a conceptualisation of 'commodification' to theoretically equip oneself for engaging with what is actually at stake when 'bodily services' like commercial gestational surrogacy are said to be commodifying women and their reproductive labour; and enrich further the above-mentioned problematisation exercise that Nussbaum (1998) has undertaken.

In the *Dictionary of Marxist Thought*, T. Bottomore defines a "commodity" as follows:

All human societies must produce their own material conditions of existence. The commodity is the form products take when this production is organized through exchange... The commodity... has two powers: first it can satisfy some human want, that is, it has what Adam Smith calls *use value*; second, it has the power to command other commodities in exchange, a power of exchangeability that Marx calls *value*... The commodity, analytically is the dialectical union of use value and value (1983: 86).

Bottomore further explains:

The concept of the commodity is used by Marx to analyse forms which arise on the basis of a well-developed commodity production and exchange, but which are not themselves in the primitive sense commodities, that is, products produced for a system of exchange. For example, labour power is sold for a price, the wage, and hence appears on the market as a commodity, though labour is not produced as a commodity, nor does its value arise directly from the labour expended in producing it (1983: 86).

According to Anderson, “A practice treats something as a commodity if its production, distribution, or enjoyment is governed by one or more norms distinctive to the market (2000: 19). For Sharp, “commodification insists upon objectification in some form, transforming persons and their bodies from a human category into objects of economic desire” (2000: 293).

What emerges from the above definitions and conceptualisations is that commodities and commodification of otherwise ‘non-commodities’ is a feature of capitalist system of production which continues to be a feature of the contemporary phase of ‘global’ capitalism. In this context, market relations are entrenched in such a manner that commodification per se is a concept that has a negative undertone indicative of ‘objectification’ of otherwise ‘non-commodities’ like people and their labour.

However, it is important to not lose sight of the fact that certain kinds and variants of ‘commodification’ seem to be more problematic than others and hence for example, while on one hand, “athletes and their teams are frequently bought and sold by elite clients” (Sharp 2000: 293) and cricketers are purportedly “auctioned” in the Indian Premier League, it does not invoke abhorrence of the same kind as a woman ‘renting’ her womb sometimes does, and concerns of exploitation also do not arise in the former case. On the other hand “[s]urrogate motherhood emerges as the quintessential example of the commodification of female bodies and their reproductive capabilities” (Sharp 2000: 302) likened to even ‘enslavement’ by some. Further, as a corollary “[p]roducing a child to order for money is a paradigm case of commodifying children... we are not, as a society, investing the time and money needed to place the hard [i.e. the infrastructure] to adopt children” (Ketchum 1989: 119).

Arguing for a rethinking of commodification and commercialisation, Seshu (2010) writes, “commodification needs to be redefined in a world dictated by commerce, where the vast majority of exchanges are marked by some material gain, be it purely monetary or otherwise... commodification and commercialisation need to be understood from the point of view of ‘control’. Thus... sex should be defined as commodification only if the body (be it male, female or transgender) is used as an

instrument for financial gain without consent.” This argument can be extended to gestation and reproduction as well.

While some argue that there is nothing wrong with treating reproductive services provided by a woman acting as a commercial surrogate as a ‘commodity’ because it is consensual and also does/should not come in the way of respecting the personhood of such women (van Niekerk and van Zyl 1995; McLachlan and Swales 2000). There are objections to such a contention on the grounds “that there are some ways of treating people that are morally objectionable, even if they consent to being treated in those ways” (Anderson 2000: 23). The existence of (a somewhat fuzzy) category of things that are “morally objectionable” leads to stigmatisation of some forms of work due to their perceived ‘dirtiness’.

Before proceeding to the next section where an analysis of forms of labour, that involve the intimate use of ‘the body’ by women and are thus, christened ‘dirty’ is undertaken, it will be relevant to at least cursorily tease out what constitutes that ‘dirtiness’.

Social anthropologist Mary Douglas (1966) defines ‘dirt’ as “matter out of place” and explains:

It implies two conditions: a set of ordered relations and a contravention of that order. Dirt, then is never a unique, isolated event. Where there is dirt there is system. Dirt is the by-product of a systematic ordering and classification of matter in so far as ordering involves rejecting inappropriate elements. This idea of dirt takes us straight into the field of symbolism and promises a link-up with more obviously symbolic systems of purity (cited in Alexander and Seidman 1990: 155).

Her analysis of the relationship between ‘dirtiness’ and disturbing set patterns of being can be extrapolated to understand that the perceived ‘dirtiness’ of commercial gestational surrogacy stems from its existence beyond ‘motherhood’ in a hetero-normative family setting. It even compartmentalises and thus disturbs the understanding of motherhood by separating genes from gestation and gestation from

social mothering. It has the potential to challenge hetero-normative families in the sense that commercial gestational surrogacy can potentially allow non-heterosexual people an opportunity to have their *own* biological offspring within a homosexual partnership. Just as the 'dirtiness' of commercial sex workers is related to how "[t]hey have taken sex out of the domain not only of morality but of the relationship paradigm entirely" (Batliwala 2010).

As pointed out in Chapter 1, commercial gestational surrogacy does not involve the act of 'sex' but only having a fertilised embryo implanted in one's uterus and hence only the gestational part of pregnancy. The fact that it does involve renting one's *womb*, the so-called *sanctum sanctorum* of a woman's body makes it somewhat 'dirty' and a stigmatised form of 'body work'.

### **Sex Work – Gestation Work: Conceptual Continuities and Disjunctures**

It is illuminating to draw parallels with the sharp polarisation of opinions (feminist and otherwise) regarding commercial sex work while engaging with the debates around commercial surrogacy. However, it is important to keep in mind that in this research we are looking at only commercial gestational surrogacy arrangements while most of the feminist (or otherwise) writings from the 1980s and 1990s referred to here, deal with commercial surrogacy resulting from artificial insemination where the so-called 'surrogate' is actually the genetic as well as gestational birth mother. In this context, Hilde and James Lindemann Nelson have rightly observed:

on the face of it, "surrogate mother" is an odd designation for the woman hired to gestate the child. The O.E.D. [Oxford English Dictionary] defines "surrogate" as "a person appointed by authority to act in the place of another;" "mother" as "a woman who has given birth to a child." It would seem, then, that the surrogate mother would actually be someone to whom the child is surrendered, and who will then act in place of the mother. The person who does the surrendering, it seems clear, is a real mother, not a surrogate anything. (1989: 86)

Andrea Dworkin (1983) argues that women's selling of their reproductive capacities can be likened to sex-workers selling their sexual capacities, however without the stigma because of the absence of sexual intercourse where not the vagina but the



womb is what is sold (or more appropriately, 'rented'). Moreover, commercial sex work has been looked at as both – 'sin' as well as a 'health hazard'. Policy debates around commercial sex work have been framed around – abolitionism (banning; criminalising intermediaries but not holding the sex worker liable), prohibitionism (criminalising the entire institution and holding all parties liable), and regulation (state intervention in the institution) (Outshoorn 2004). Interestingly, policy debates around commercial gestational surrogacy have also been roughly around these lines which will be elaborated upon in the next chapter.

Commercial sex work while arguably degrading and exploitative of women's sexuality is also seen as a legitimate means of earning one's livelihood once the women enter the field.<sup>4</sup> Drawing from Margaret Radin (1987), Deborah Spar feels that issues involving intimate relationships are "in a state of 'incomplete commodification'... [involving] attributes which we might not want to commodify, yet which nevertheless exist in a market economy" (Spar 2005: 305). Hence, in 'services' that allude to intimate relationships, there is a perpetual invocation of the '(im)morality' of commercialising them, however that does not preclude a thriving market for them be it sex work, paid domestic work or commercial surrogacy.

Writing about commercial sex work in the Indian context, Srilatha Batliwala (2010) and Meena Saraswati Seshu (2010) highlight some very pertinent arguments that emerge from an analysis of how Indian feminists and the autonomous women's movement have engaged with commercial sex work. From the survey of positions taken by feminists in India vis-à-vis commercial sex work undertaken by Seshu (2010) and Batliwala (2010), the following strands are discernible: a) viewing commercial sex work as a 'modern form of slavery' b) viewing commercial sex workers as colluding with patriarchal forces in perpetuating women's oppression by engaging in the work that they do, and c) accessing the issue with a 'right to work' and livelihood approach, which has its roots in the links that the Indian autonomous women's movement has with leftist politics. However, according to Seshu (2010) the

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<sup>4</sup>Entering this field, however is more often than not, coercive and a form of trafficking but there is evidence, especially in India that subsequently many women choose to continue to remain engaged in this livelihood option for various reasons, most formidable among them being the ability to earn much more than what they would in other forms of similarly 'unskilled and unorganised' labour (Batliwala 2010).

two approaches juxtaposing victimhood on one hand and choice on the other, often cannot be decoupled from individual commercial sex workers' lived experiences. Both Seshu and Batliwala observe the tendency to put sex work in a different league from all other forms of remunerated work and labour that women engage in, not only by non-feminists but even by progressive and feminist voices because of a pervasive social-conditioning that abhors any non-normative/reproductive manifestation of women's sexuality (Seshu 2010) which has its roots in constructions of women's genitalia as channels of both purity and pollution (Batliwala 2010).

This particular construction of women's sexuality as a signifier of both purity and pollution is what throws up important issues when one sets out to make feminist theoretical sense of even commercial gestational surrogacy, for reproductive capacities are a logical patriarchal extension of sexuality. This enables one to understand that while commercial sex work is stigmatised because it embodies what is considered 'illicit' in society i.e. sex outside the institution of marriage, it is precisely on this ground that commercial gestational surrogacy somewhat circumvents societal stigma as it does not involve sex. Stigmatisation of commercial sex work is rooted in 'selling sex' while that of commercial gestational surrogacy is rooted in 'commercialising motherhood' which is sometimes thought to result in 'baby-selling'. The stigma attached to a commercial surrogate's 'work' is linked to her 'selling' a child she carries in her womb, thus earning remuneration for her reproductive capacities as a 'mother', which is considered morally abhorrible. Moreover, those who seek to have their *own* children through ARTs and surrogacy are seen as 'buying' 'designer babies' or children with desired characteristics.

In the only existing scholarly study of women engaging in commercial gestational surrogacy in India, Amrita Pande (2009, 2010) has unravelled the various ways in which these women mitigate the stigma attached to surrogacy (its mere gestational character notwithstanding) and how often the comparison with sex work arises in that discourse. Pande (2009) concludes that a gestational surrogate is neither an 'angel' and nor is she a 'whore'. Not really an 'angel' as there is more to the story than her being a god(dess)send in the life of a 'miserably unfortunate infertile couple' and she is obviously not a 'whore' – a pejorative term used for commercial sex workers – as

gestational surrogacy does not require the act of 'sex' for getting pregnant. It emerges from their narratives that they emphasise how what they are doing is different from prostitution as well as 'selling' one's *own* baby.

Deborah Spar points out the polarisation of feminist positions on the issue of commercial surrogacy in the West, where on the one hand some feminists believe that "women's rights [do] not include the right to sell one's procreative services... and all [such] arrangements [are] essentially exploitative", while on the other hand some "insist[ed] that freedom for women included the freedom to contract for labor" (2005: 295) including reproductive labour.

Catherine McKinnon (2008) has also surveyed the range of feminist arguments in support of and opposition to commercial surrogacy. According to her, the arguments in support of commercial surrogacy are made on broadly two grounds – first, procreative freedom (i.e. right to decide "whether and under what circumstances" one chooses to reproduce "including whether they will do so for financial remuneration" (Robertson 1990)) and second, occupational freedom (i.e. "the choice to become a surrogate mother is sufficiently like any other job to be accorded the same legal protection" (Fabre 2006)). The support for commercial surrogacy on the ground of occupational freedom points out that though reproductive labour entails potential health risks, women participate in many kinds of work which may also have an adverse impact on their health, e.g. coal mining. McKinnon then outlines the feminist arguments against commercial surrogacy which point out the exploitative nature of such private contracts. The opponents believe that being a surrogate is not a matter of independent choice but necessarily is based on the vulnerability of women from disadvantaged sections who can be induced due to their need for money. Moreover, according to this view, reproductive labour should not and cannot be commodified. McKinnon also points out that the supporters of commercial surrogacy negate this argument by emphasising the need to demystify reproduction which need not always be a labour of love. Just because reproduction assumes the form of a remunerative service does not mean that it loses its intrinsic value or it comes to be any less respected. There are many other occupations which provide an invaluable service and

command a lot of respect but at the same time are remunerated, e.g. teachers and doctors.

With regard to the ethical aspects of commercial surrogacy, E. S. Anderson (1990) has argued against commercial surrogacy because not only does it commodify women's reproductive labour but also leads to 'alienation' since a surrogate mother is denied the legitimacy of evolving a perspective and attaching significance and meaning to her own pregnancy. Remunerative reproductive labour has moreover been opposed on the ground not that it involves alienation of labour (something which is true of all forms of labour in a capitalist society) but more importantly that there is something 'special and intrinsic' to reproductive labour and that it *should not* be equated with other forms of physical labour (Satz 1992).

Support for this argument can be found from at least three different perspectives – firstly, an essentialist argument that women's reproductive labour is fundamentally different from other forms of labour which are less invasive in a worker's life, that reproduction is a long-drawn process and involves various emotions absent in other forms of labour. However, this perspective finds limited support because different women experience the reproductive process, differently (Satz 1992). Secondly, Carole Pateman (1988) makes the case against commodifying reproductive and sexual labour as they are central to a woman's identity when compared to other forms of productive labour. Thirdly, van Niekerk and van Zyl argue that the distinguishing feature of women's reproductive labour is that the product is "not *something* but *someone*" (emphasis in original; 1995: 347) making the relationship between the worker and the 'product' radically different as the product is a child and the worker a *mother*. Here, the fact that for a worker the product is a means to an end, namely wage/remuneration, comes in conflict with the fact that for a mother the product of her reproductive labour, her child is an end in itself. By denying the surrogate mother the right to consider the product of her reproductive labour as her *own* child, she is being dehumanised by being reduced to "a mere 'environment' or 'human incubator' for someone else's child" (van Niekerk and van Zyl 1995: 347). They however, object to surrogacy when it is commercial because altruistic surrogacy within the family or even otherwise does not deny the surrogate mother the right to attach

meanings to her experience of pregnancy and in the future may also play the role of a 'second mother' to the child and hence retain her relationship with the child.

It is also important to contextualise the issue of commercial surrogacy with notions of reproduction within a heterosexual marriage and notions of chastity and morality. For this, it will be useful to take a brief look at how commercial surrogacy in spite of the ethical and/or moral questions that it raises, has still come to acquire certain legitimacy and comparatively is not as clandestine an affair as for example sex work is.

### **Historicising Commercial Surrogacy and its Legitimacy (if any)**

In the simplest terms, surrogacy refers to the phenomenon where a woman bears a child for an intending mother who is unable to do it herself. If technology is kept out of the picture, it involves that the surrogate also engages in sexual intercourse with the intending father. Instances of such surrogacy can be found in various mythological traditions – e.g. Jewish and Biblical accounts of the story of Hagar the maid bearing Abraham's son Ishmael when his wife Sarah commissions her. In Hindu mythology, Devaki and Vasudev's seventh child is transferred by divine intervention to the womb of Rohini who gives birth to their son Balaram. This story has a curious reference to some form of divine 'embryo transfer' from Devaki to Rohini where Rohini and Vasudev do not actually have sex. In sum, in traditional surrogacy, at least one of the intending parents was also a genetic parent of the child born out of a surrogate arrangement. Spar observes that "[a]t its core, surrogacy is a low-tech operation. All it entails... is a woman willing (or coerced) to have sex with another woman's husband and then willing (or coerced) to let this other woman raise her child" (2005: 292).

Hence, surrogacy necessarily involved some kind of transgression of marital chastity and morality which meant that being a surrogate had some form of societal distaste and stigma attached to it and if paid for, it could potentially be equated with sex work<sup>5</sup>.

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<sup>5</sup> Based on this notion, for example, in a Bollywood movie *Chori Chori Chupke Chupke* (2001) the story revolves around the lead couple who are unable to find a woman willing to be a surrogate for the

The moral apprehensions surrounding surrogacy were mitigated to a large extent with the advancements in technological innovations, mostly in the developed world.<sup>6</sup> The technique of artificial insemination enabled insertion of sperms into the surrogate without having to engage in sex. This also made way for a possibility where none of the intending parents are genetic parents of a child born to a surrogate mother by sperms from a donor. However, as in the traditional surrogacy arrangements, here too the woman who is giving birth is the genetic mother of the child.

A radical transformation in the arrangement came with the technology of In-vitro Fertilisation (IVF), a form of Assisted Reproductive Technology (ART) that split the “baby making process into three fully separate components” – egg and/or sperm donation (techniques of “egg harvesting” involve administering hormone treatments to the donor woman and retrieving the eggs while sperm collection is easily done in a laboratory setting), conception in a petri-dish (not actually a test-tube, as the term ‘test-tube baby’ suggests), and gestation in a surrogate womb. This presented an immense potential of an emerging market of “infertility treatment” with avenues of making money by ART clinics, egg/sperm donors and women who agree to be surrogates.

Notwithstanding the somewhat unstable resolution of morality question on account of technological innovations, the commercial surrogacy issue has raised a range of legal and regulatory issues. The foremost legal question that the issue raises is linked to potential complications regarding custody of children born through such arrangements and the question of validity of such commercial surrogacy contracts.

The 1985 Baby M case in the New Jersey Supreme Court in the USA highlighted some of the complexities that can arise through commercial surrogacy arrangements. The woman who entered into a surrogacy contract with a couple refused to part with

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infertile intending mother. Ultimately, a sex worker agrees to do the job when induced by the intending father with an offer of a lucrative remuneration.

<sup>6</sup> However, an Indian doctor holds the distinction of giving the world’s second test tube baby, just 67 days after Louise Brown, world’s first test tube baby was born in the UK in 1978. Thus, technological know-how of this technique can also be considered as an indigenous technological development (Ghosh 2005).

the child after her birth. The court however, granted custody to the commissioning parents mainly on the ground that they intended to have the child and were in a better position to take care of the child whereas the surrogate mother gave birth for remuneration. Moreover, surrogate contracts were declared illegal by the court (Spar 2005, Jacquith 1998 and McKinnon 2008). Around the same time, following the Warnock Report<sup>7</sup> (1985) in the UK, the Surrogacy (Arrangements) Act 1985 was passed by the British Parliament. This legislation “outlaw[ed] commercial surrogacy but allow[ed] altruistic surrogacy for which no payment occurs... [It sought] to prevent third parties from deriving monetary payment from the arrangement” (Anleu 1992: 35). Susan Markens has done a survey of policy responses to the problem of surrogacy in western industrialised states and has found that most of them “have rejected or greatly restricted the practice of surrogate parenting. Australia, Canada, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Norway, Spain, Sweden, and Switzerland all have national laws that prohibit or discourage the practice... [I]n the United States there is no national-level legislation” (2007: 23). However by 2004, 17 states and the District of Columbia in the USA enacted laws regarding this issue, of which 10 states and the District of Columbia prohibit and ban surrogacy while the rest permit surrogacy arrangements but seek to regulate them by specifying the modalities of how such arrangements may be carried out: regulating surrogacy contracts, payments that surrogates receive, payments that intermediaries and third parties like lawyers receive, and determining legal parentage of children born out of surrogacy in favour of intended parents or surrogates (Markens 2007: 27).

As is the case with other multi-national enterprises, stricter laws and regulations gave rise to a trend of outsourcing in the case of commercial surrogacy services under ARTs as well. Soon, India became a preferred destination, along with some other countries in the global South like Thailand, for availing ARTs especially when it came to commercial gestational surrogacy arrangements. However, in this research the focus would be on India and its emergence as a destination for seekers of ARTs,

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<sup>7</sup> In 1978, a committee chaired by Mary Warnock was appointed in the UK in the wake of rapid developments in the field of IVF. The committee came out with a report titled *A Question of Life: The Warnock Report on human fertilisation and embryology* in 1985, popularly known as the Warnock Report.

especially surrogacy. Arguably, there are at least three reasons for this – first, quality low-cost ART services provided by largely English-speaking doctors; second, cheap availability of women willing to be surrogates; third, permissive laws and regulations.

### **The Booming Commercial Surrogacy Industry in India**

In an insightful study by Ushma Upadhyay (2000) on the impact of the liberalisation policies introduced by the Indian state in 1991 including structural adjustments, devaluation of the currency and reduced public expenditure in the social sector. She notes that such policies have encouraged urbanisation leading to inducing forced migration and lack of opportunities for women in the formal sector which have worked together to increase poverty among women. According to her, there might be a connection between these factors and an increase in the number of women in sex work, given the lack of other employment opportunities. One can even follow this line of argument to understand the proliferation of commercial surrogacy in India – which is also a form of ‘body work’, though comparatively less stigmatised than sex work.

As estimated in 2008, commercial surrogacy in India is a booming industry worth around \$445 million per year (IANS 2008) and the Law Commission of India describes the ART industry as a “25,000 crore rupee pot of gold” (2009: 11). As per a latest estimation in *The Hindustan Times*, commercial surrogacy alone is said to be worth “over 2000 crore” rupees (Kohli 2011). Availing commercial surrogacy services in India can be as less as one-third of what it costs in the USA or UK. According to one estimate this service at a Mumbai based ART clinic costs around \$25,000 [approximately Rs. 10 lakh] of which roughly \$5,000-\$7,000 [approximately Rs 2-3 lakh] is paid to the surrogate (Taneja 2008). According to another estimate, the surrogates get around \$6,250 to \$15,000 [approximately Rs. 2.5-6 lakh] (Thakur 2008). In 2008, an Israeli homosexual couple “paid about \$30,000 [approximately Rs. 12 lakh] of which the surrogate [was to get] about \$7,500 [approximately Rs. 3 lakh]” (Gentleman 2008). The woman who acts as the surrogate receives only a fraction of the total money involved in the whole process with greater share for the medical tourism companies, doctors and lawyers. According to a special story on commercial surrogacy in India in *The Hindustan Times*, Kohli (2011) claims that the



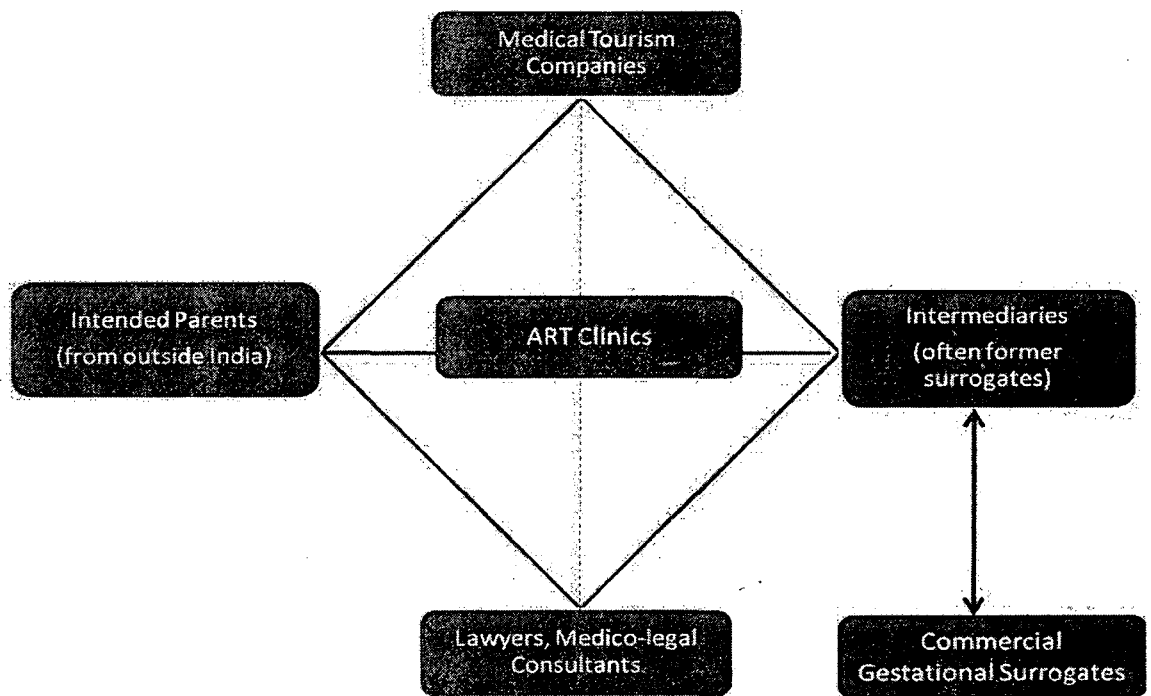
remuneration a woman acting as a gestational surrogate gets across various cities in India ranges between Rs. 1 lakh – 3.5 lakh and additional monthly expenses for food of Rs 2,000 – 3,000. Apart from the remuneration of the women who act as surrogates, the total costs include medical and legal fees as well as travel and lodging charges (Haimowitz and Sinha 2009).

While there is no law governing ARTs in India, the transactions happen in a fairly institutionalised manner especially when the arrangements for commercial gestational surrogacy are trans-national with the commissioning parents from other countries (Figure 1, below). The transnational commercial surrogacy ‘industry’ in India has many actors/stakeholders. There is no existing academic research which presents an overview of the way this industry functions, apart from periodic journalistic accounts (print and electronic media) of specific cases of such transnational surrogacy arrangements and a few documentaries. The analysis of this ‘industry’ below, focusing on each actor/stakeholder, is extremely brief, arguably superficial since it is only indicative of impressions gathered from media reports, some publications by women’s groups and women’s rights activists and three personal interviews<sup>8</sup>.

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<sup>8</sup> The three personal interviews were semi-structured and lasted about an hour on an average, with the following:

- a) G.R. Hari, Partner, Indian Surrogacy Law Centre, Chennai – at his chamber in Chennai on 10 June 2011
- b) Amit Karkhanis, Head, Kay Legal: Advocates, Corporate Advisors & Medico-legal Consultants – at his chamber in Mumbai on 14 June 2011
- c) Deepali, Surrogate Recruitment Agent works for Kay Legal – at Kay Legal office in Mumbai on 14 June 2011



**Figure 1:** Process of Commissioning a Gestational Surrogacy in India

*Intended Parents:*

These are the people who wish to have a child of their *own* through gestational surrogacy in India to overcome their inability to biologically reproduce due to infertility. The focus in this research is on such people who come to India from other countries – non-resident Indians (NRIs) or people of different nationalities. It is difficult to get a profile of these people, due to lack of any comprehensive statistics. However, in a personal interview with me, Amit Karkhanis (2011), a medico-legal consultant based in Mumbai who specialises in drafting surrogacy contracts and has been involved in about 200 gestational surrogacy arrangements for Intended Parents, claimed that 90% of his clients are foreigners and of the remaining 10% Indians only 2% are based in India, i.e. 8% are NRIs. G.R. Hari (2011), an advocate who runs the Indian Surrogacy Law Centre based in Chennai, in a personal interview said that all of his clients are based outside India. This is a clear reference to the enhanced mobility some people enjoy in a globalised world to move transnationally seeking services, in this case services of ART clinics and women willing to act as commercial gestational surrogates.

The Intended Parents who come to India include both heterosexual and homosexual couples as well as single parents (both men and women). The decision to come to India to commission a gestational surrogacy for them is largely driven by the fact that it helps overcome legal barriers against surrogacy and/or costs only a fraction of what it would in their countries when they are based in the global North, and for those coming in from countries in the global South it is the availability of better infrastructure and medical facilities in India.

Most of their research, about the facilities available and how the whole system works, is mostly carried out virtually over the Internet. They typically approach a medical tourism company which takes care of the whole process on their behalf and generally offers “packages” which include costs of medical procedures, legal fees, travel and lodging and occasional sight-seeing in India.

In terms of the medical condition of ‘infertility’ in heterosexual couples, either of them may be infertile: men with medical problems related to their sperm; and, women with either problems related to their eggs, ovulation and/or problems related to carrying a pregnancy. Gestational surrogacy is resorted to generally only for those infertile women who are unable to carry a pregnancy to term, in heterosexual couples. In this process, either/both of the partners are genetic parents of the child being commissioned through surrogacy.

*Medical Tourism Companies:*

Typically the whole arrangement is overseen by a medical tourism company (based either in the home country of the commissioning parents or in India) which has tie-ups with ART clinic(s) in India. These medical tourism companies<sup>9</sup> do not necessarily specialise in surrogacy arrangements, but claim to provide assistance in IVF treatments and surrogacy just like any other medical treatment. Medical tourism may also be seen as an instance of transnational movement of people in a globalised world,

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<sup>9</sup> Medical tourism refers to movement of people (generally in a transnational context) to seek medical services. India is emerging as a preferred destination for various facilities like dental treatment, cardiological treatments, orthopaedic treatments, etc. ARTs like IVF treatments and commercial gestational surrogacy are a part of the larger medical tourism industry (Reddy and Qadeer 2010).

and the market providing opportunities to business interests for capitalising on emerging demands. Medical tourism from the global North on one hand is indicative of the crumbling provision of health care services by the states in the global North. On the other hand, it also shows how the private health care sector in the global South is developing for a transnational and local elite clientele, while the masses in the global South continue to be dependent on a weak or almost non-existent basic government health care infrastructure.

For example, California based Planet Hospital, an American medical tourism company claims to have “pioneered the concept of going abroad for surrogacy” (More details available at: <http://www.planethospital.net/fertility.html>; Accessed on 24 June 2011). There are many such establishments based in India as well like:

- Wyzax Medical Tourism<sup>10</sup> which has its head office in New Delhi apart from other offices in the UK, Afghanistan and Iran.
- We Care India<sup>11</sup> based in Mumbai.

#### ART Clinics:

There is no comprehensive statistics regarding the number of ART Clinics in India and the kinds of procedures they do for their patients, their infrastructure and other such details. However, a collective of gynaecologists and obstetrics in India namely the Federation of Obstetric and Gynaecological Societies of India (FOGSI) and the Indian Society for Assisted Reproduction (ISAR), also a collective of medical practitioners and scientists in the field of ARTs, have initiated the establishment of a “National ART Registry of India” (NARI). It aims at documenting information from various ART clinics throughout the country, by collecting data from clinics willing to be included in its surveys. The latest survey it carried out was in 2006, published in 2008, with data from 116 ART clinics throughout the country. In her foreword, Dr. Sadhana Desai, president of ISAR claimed “there are approximately 400 IVF centres” (NARI 2006) in the country, while Dr. Manish Banker, co-ordinator of the survey

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<sup>10</sup> More details available at: <http://www.wyzaxmedicaltourism.com/surrogacy-india.html>; Accessed on 24 June 2011

<sup>11</sup> More details available at: <http://www.wecareindia.com/ivf/surrogacy/surrogacy.html>; Accessed on 24 June 2011

“felt” that the 116 ART Clinics included in the survey covered “60-70% of all ART clinics in India”. The two claims on the numbers of ART clinics in India are clearly inconsistent as 116 is only 29% of 400. Nonetheless, despite the inconsistency in the basic data on total number of ART clinics in India, NARI 2006 remains the only compilation of data regarding ART clinics which gives us a broad overview of their numbers, location and infrastructure.

Though ART clinics exist throughout the length and breadth of the country, there is a high concentration of ART Clinics in Maharashtra and Gujarat, two states in Western India. Of the 116 ART clinics included in NARI 2006, 12 are located in Gujarat and 27 in Maharashtra, together comprising approximately one-third of the total. In terms of region-wise location of ART clinics surveyed in NARI 2006, South India is second with the four states of Kerala, Karnataka, Andhra Pradesh and Tamil Nadu totalling 30 clinics, with the majority of 10 in Tamil Nadu, itself. It is noteworthy that in terms of wealth and prosperity, Western and Southern States are considered the most prosperous in India with 23.58% and 27.08% contribution to India’s Gross Domestic Product (GDP) respectively, together the two regions have an approximately 50% contribution to the country’s GDP (VMW Analytics 2011).

Thus, some of the most successful ART clinics, widely covered in the media are located in the Western region of India, particularly Mumbai and Pune in Maharashtra and Anand in Gujarat, geographically close to India’s financial hub Mumbai, not really a curious coincidence. While it is difficult to identify the exact reason for the high concentration of clinics in this region, but from the socio-economic profile of the region it can be inferred that Mumbai and the area surrounding it in Maharashtra has been historically a site of entrepreneurship and business which is also the reason why this area is touted as India’s financial hub, and Gujarati diaspora and related linkages may be a catalyst of the emergence of this industry in Gujarat. The advent of commercial surrogacy in India is often traced back to the early 2000s in the Akanksha Infertility Clinic in Anand, Gujarat run by Dr. Nayna Patel. Apart from what may be characterised as the doctor’s innovation and entrepreneurship, the fact that Gujaratis account for the majority of Indians settled abroad is also linked to the flourishing of medical tourism or even reproductive tourism in the region, since they choose to come

back to the region for personal medical visits as well (Pande 2009). Besides a client base among non-resident Indians, the medical/reproductive tourism industry in India has expanded its clientele to people of other nationalities as well.

Akanksha Infertility Clinic in Anand touted as “the epicenter of the commercial surrogacy industry in India” (Points n.d.: 3), run by Dr. Nayna Patel who says she gets an average of 10 requests per day by e-mail from foreign couples.

*Lawyers & Medico-legal Consultants:*

In the commercial gestational surrogacy arrangements that involve a transnational element, services of lawyers become immensely important in taking care of matters of private international law like nationality and citizenship of the child(ren) born out of such arrangements, in addition to formulating the contracts between the Intended Parents, ART Clinics and the women who act as gestational surrogates.

This has emerged as a niche area in legal practice and there are many firms throughout the country foraying in this area like Kay Legal<sup>12</sup> in Mumbai, Indian Surrogacy Law Centre<sup>13</sup> in Chennai, and Surrogacy Laws India<sup>14</sup> in New Delhi.

Such lawyers and firms are involved in extending legal advice to the Intended Parents and/or ART clinics. Much of this part of their work happens virtually over the Internet with Intended Parents based abroad. Thus, technological innovations are a key driver of this industry whose foundations lie on the possibility that technology provides of “renting a womb” as a means of biological reproduction, the quest to do so is also facilitated by technology like the Internet which facilitates the transnational commercial surrogacy industry in multiple ways.

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<sup>12</sup> More details available at: <http://www.kaylegalsurrogacy.com/> Accessed on 27 December 2010

<sup>13</sup> More details available at: <http://indiansurrogacylaw.com/> Accessed on 27 December 2010

<sup>14</sup> More details available at: [http://surrogacylawsindia.com/index\\_inner.php?id=12&menu\\_id=1](http://surrogacylawsindia.com/index_inner.php?id=12&menu_id=1) Accessed on 27 December 2010

In case of legal complications at later stages of the arrangement or after the birth of the child(ren), they also represent their clients in arbitration, negotiation and litigation.

Amit Karkhanis (2011) of Kay Legal in Mumbai, drafts the surrogacy contracts for Intended Parents, advises ART clinics on specific queries from them regarding the legal aspect of such arrangements for particular countries, and legally represents his clients when the need arises such as complications regarding the citizenship issues of children born out of surrogacy.

G.R. Hari (2011) of the Indian Surrogacy Law Centre in Chennai, does most of his work online and focus on the advisory aspect. His clients are mainly Intended Parents based abroad. He offers “legal risk assessment” services to his clients from other countries regarding the extent of compatibility or lack thereof vis-à-vis the Indian laws and laws in their country related to commercial surrogacy.

Intermediaries:

The medical tourism company and the clinic have their own network of intermediaries who help source women willing to act as gestational surrogates across the country. In a personal interview with Deepali (2011), who acts a surrogate recruitment agent with Kay Legal in Mumbai, she interestingly claimed that there are very few surrogate recruitment agencies like the one she works for. However, women who ‘volunteer’ to be gestational surrogates approach these agencies or sometimes the ART clinics directly as a result of ‘word-of-mouth’ knowledge about the procedure. They do not generally ‘volunteer’ for specific Intended Parents, but rather enrol themselves in a database that the agencies or clinics maintain of women willing to lend gestational surrogacy services.

A limited role in hiring surrogates is played by advertisements in the print/electronic media. G. R. Hari (2011) also maintains a database of women willing to be surrogates and he sources them through advertisements in local Tamil newspapers seeking “*vaadagai thai*”, the Tamil term for surrogate mothers. Sama (2008), an NGO working on women’s health issues undertook an analysis of advertisements on ARTs in India and found that women’s magazines like *Sarita* (in Hindi) and *Women’s Era*

(in English) as well as some advertisements on websites of ART clinics highlighting the non-sexual nature of the process of gestational surrogacy and its commercial aspect along with promises of confidentiality.

Kohli (2011) from the interviews she conducted quotes “Jagatjeet Singh, owner of Wyzax Medical Tourism, Janakpuri [in New Delhi who] says he has an established ‘professional network’ of surrogate agents across North India: some of whom boast ‘300 potentials’ ready for surrogacy”. The women who act as surrogates mostly go on to become brokers/intermediaries who bring in other women from their communities who are also willing to be surrogates, earning Rs 50,000 [approximately \$1250] for each such woman they bring (Datta 2010, Jaisinghani 2010).

#### *Gestational Surrogates:*

The women who act as commercial gestational surrogates are the most vital actors in the whole process, since they are the ones who actually “rent-out” their wombs and act as birth mothers for children biologically unrelated to them. The ‘boom’ in the commercial gestational surrogacy industry in India is not only because of the low-cost services that Indian clinics offer, but also because Indian women who act as surrogates are considered to be women “free of vices like alcohol, smoking and drugs” (Gentleman 2008). Another ART specialist, Delhi-based Dr. Shivani Gour also echoes this view about the ‘suitability’ of Indian women as according to her “women here are less exposed to a lifestyle with drugs, alcohol and smoking, which has a positive impact on the health of the baby as well as the mother” (IANS 2011). Thus, some women are seen as closer to a ‘ideal-type’ of women who are considered more ‘fit’ to be commercial gestational surrogates.

Gestational surrogates are the ones who despite playing the most vital role, receive only a fraction of the monetary transaction that the whole process entails since they are mere ‘labourers’ and the maximum monetary advantage goes to the ‘managers’ – the medical tourism companies, doctors and lawyers. These women are often reduced to being mere ‘incubators’ for the ‘embryo’ fertilised in a laboratory petri-dish, in medical parlance. It is imperative for this research to critically analyse their position in this ‘industry’.



### **Can the ‘Incubator’ Speak?**

Women’s groups in India have raised apprehensions about the risks of exploitation that poor Indian women who offer to be surrogates face. For those women, the money on offer as remuneration for acting as surrogates is a huge amount since some of them engaged in low paying jobs – like factory work, agriculture, paid domestic work or as housewives in low-income families – would not be able to earn that amount even in 5 years or more. The motivations for women behind agreeing to such an arrangement are varied – e.g. repaying debts, meeting medical expenses, buying a house, starting a small business to financing a better and higher education for their children (Sharma 2007).

Since these women and their families understood that it was only ‘gestational’ surrogacy through artificial insemination techniques which did not involve issues of chastity within marriage vis-à-vis extramarital sex, the moral dilemmas against commercial surrogacy were somewhat mitigated. Moreover, in a society that attaches a lot of value to fertility and motherhood, women who agree to be surrogates are overwhelmed with the feeling that they are “helping” couples who cannot have children of their own.

Amrita Pande (2009) undertook an in-depth ethnographic study of more than 40 women at an ART clinic in the city of Anand in Gujarat who have taken up surrogacy. She finds that the surrogates and their families though aware of the stigma attached to what she calls ‘sexualised care work’ as it involves their bodies and also due to its analogous nature with sex work, employ various mechanisms to nullify the stigma for themselves. Mostly, they are not comfortable with publicly proclaiming having chosen to act as surrogates and thus they do not look at it as ‘work’ that one chooses to do but rather a ‘calling’ that they follow as a survival strategy in desperate situations for the sake of some ‘higher loyalties’ – like, medical costs for the family, education of children, etc. The women she interviewed generally tended to distinguish themselves from both ‘body sellers’ (because they ‘did not sleep with anyone’) and from ‘baby sellers’ (because they are not selling their *own/real* child(ren) but rather are merely acting as ‘foster mothers’ by keeping the babies in

their wombs for other women who are unable to do so, and hence ‘helping’ infertile couples).

Pande herself sees commercial surrogacy as a type of care work which lies “somewhere on the cusp of care work and dirty work” (2009: 169). However, she points out that it is important to note that the surrogates and their families shy away from viewing commercial surrogacy as ‘work’ but something that they have taken up for the sake of ‘familial obligations’ and hence not a real ‘choice’. The narratives of these women, according to Pande indicate that they go out of their way to defend their husband’s moral worth because of the women’s own role as breadwinners, albeit temporary.

**Figure 2: Some Narratives of Commercial Gestational Surrogates**

(Source:- Pande 2009: 159-161)

*“Who would choose to do this? I have had a lifetime’s worth of injections pumped into me. Some big ones in my hips hurt so much...In the beginning I had about 20-25 pills almost every day. I feel bloated all the time. But I know I have to do it for my children’s future. This is not work, this is majboori [a compulsion]... But I say, if your family is starving what will you do with respect? Prestige won’t fill an empty stomach”...*

*“I am doing this basically for my daughters... I want them to be educated, maybe become teachers or air-hostesses? I don’t want them to grow up and be like me – illiterate and desperate”...*

*“My husband is unemployed but he is a very good person. He takes care of the children. He stays at home mostly so he knows what to feed them. Most husbands would not agree to let their wives do this – but he agreed. I am very lucky. We had no issues (with getting the surrogacy contract) because his history is so clean. He doesn’t smoke or drink”...*

Pande notes that “the narratives that increase their feeling of self-worth are also instrumental in eroding recognition of the significant role they play as workers, breadwinners and wage earners for their families” (2009: 169). Pande characterises commercial surrogacy “as a new kind of labor – gendered, exploitative, and stigmatized labor, but labor nonetheless... where labor becomes the capacity to produce and reproduce in order to earn income” (2010: 971-2).

Amrita Pande (2010) highlights how commercial surrogacy in India thrives on the construction of a “perfect mother-worker”, who is simultaneously a good mother and a good contract worker, who is “nurturing toward the baby and yet detached from it” (2010: 978). She underscores the need to understand “nature and structures of power (the disciplinary project) as well as to highlight the power of resistances by the workers themselves... [at the] gendered spaces for networking and collective action in the case of surrogacy hostels in India” (2010: 972). A degree of ‘professionalism’ is expected out of the women acting as surrogates in as much as they should not develop too much attachment to the child they gestate. However, they should at the same time not be too detached from the child they gestate as that is not how good ‘mothers’ behave and it would make them comparable to ‘prostitutes’ who are considered extremely professional in intimate matters, not seen as a virtue in society at large. This is what Pande refers to when she talks about the construction of a ‘perfect mother worker’, and according to her research what emerges as the site of such a construction is the ‘surrogacy hostels’ run by ART clinics where these women stay for some parts or throughout their pregnancy.

Many leading ART clinics run hostels for the surrogate women who stay there during the course of the pregnancy under the supervision of the doctors and technicians (Taneja 2008). While the express reason behind this is the fact that this way, the clinics and the commissioning parents can ensure good care and a healthy diet for the surrogate woman, the implicit reason is also to keep a track of these ‘poor’ women so as to put apprehensions of any kind of breach of contract, at bay and one wonders the degree of coercion that can possibly be involved in such arrangements of physically confining the surrogates.

Pande (2010) illustrates how women living in one of the surrogacy hostels in Anand, Gujarat collectively convinced the matron to communicate to the clinic management their demand to have an additional clause in the contract where payment to the brokers would be a responsibility of the commissioning couple. Pande insightfully observes that “[t]he surrogates in Anand are desirable not just because they are cheap but because they are fully under the control of the doctor and the buyer. To ensure that the women remain perfect surrogates and that the clients get the best deal, the [ART clinic] management has devised ways to have complete control over the surrogates during the nine months of pregnancy: surrogacy hostels” (2010: 980).

An argument that has been made by feminists regarding women’s securing rights as workers is about the importance of collectives and organising (Rowbotham and Linkogle 2001; Mohanty 1997; and Griffen 2004). Though on the rise, commercial gestational surrogacy is a relatively newer form of remunerative work that women are engaging in. Extrapolating Mohanty’s argument about women living and working together in Free Trade Zones gradually evolve a community feeling “share resources and dreams, provide mutual support and aid... and develop individual and collective habits of resistance” (1997: 25). It might be argued that given the high geographical concentration of commercial surrogacy in Western India and that many clinics arrange for surrogates to stay in ‘hostels’, conditions can be in favour of these women organising themselves and campaigning for their rights collectively especially with regard to the silences about their rights in the Draft Assisted Reproductive Technologies (Regulation) Bill 2010. Commercial sex workers, for example, have been able to organise themselves in many instances and put up a collective front against the spread of sexually transmitted diseases by insisting on the use of condoms by clients. For example, in the “red-light” area of Sonagachi in Kolkata, India, sex-workers have organised to initiate a community-led initiative called the Sonagachi HIV/AIDS Intervention Programme (SHIP). They have been successful in insisting condom use by clients and thus effectively inducing a sense of community empowerment (Ghose et. al. 2011). Similarly, there are other active collectives of women in sex work like the Veshya AIDS Mukabla Parishad (VAMP) in Maharashtra and the Durbar Mahila Samanvaya Committee in West Bengal, India.

However, commercial sex workers are more amenable to organising because their work is more like a 'profession' whereas commercial surrogacy is not something that the surrogates are constantly engaging in, at the most they might do so for a couple of times in their lives. The larger women's movement has to support their cause and continue to raise questions about the risks involved in the process, spread awareness among the surrogates about their rights and entitlements, and be vigilant against exploitation by multinational enterprises.

## CHAPTER 4: COMMERCIAL SURROGACY AND THE LAW

This chapter would first focus on the legal response and approach towards ‘dirty’ body work in general and would seek to locate commercial gestational surrogacy on that continuum. An attempt would be made to chart the international terrain of legal response to surrogacy particularly contrasting the situation in the ‘West’ and other parts of the world. This exercise would provide a background for the critique of legal response to surrogacy in India.

### *The Law and ‘Dirty’ Body Work: Locating Commercial Gestational Surrogacy*

As outlined in the previous chapter, some forms of work involving the intimate use of the ‘body’ by women are often categorised as ‘dirty’ and hence get stigmatised as well as relegated to the margins. However, though such forms of ‘work’ exist on the fringes of societal imagination of the labour market they in fact constitute thriving economies in their own right generating huge albeit *unaccounted* ‘revenue’. The State and its machinery do not relegate such forms of body work to the margins in terms of legal engagement. If one analyses the legal approach to commercial sex work and commercial surrogacy, the sex work-gestation work continuum referred to in the preceding chapter is discernible.

### *Sex Work-Gestation Work in Policy Debates*

Policy debates around commercial sex work in the West have been framed around – abolitionism (banning; criminalising intermediaries but not holding the sex worker liable), prohibitionism (criminalising the entire institution and holding all parties liable), and regulation (state intervention in the institution) (Outshoorn 2004). In the Indian context, Menon (2007) characterises the debates around legal intervention in sex work as arguing in terms of – ‘criminalisation’, ‘decriminalisation’, ‘legalisation’ and ‘legalisation for empowerment’ (distinct from the ‘legalisation’ approach by its human rights focus in contrast to legalisation in terms of state controls, licensing, etc.).

In Joyce Outshoorn’s (2004), volume on *The Politics of Prostitution* with essays on the prostitution question in mostly European countries plus Israel and Australia and

hence broadly 'Western' countries and observed, "Governments, at all levels, have always attempted to control prostitution and, depending on the dominant definition of the issue, have done so in different ways. The definition determined the goal of the state intervention: to maintain law and order, preserve morals, prevent the spread of STDs or protect women from exploitation."

Governments have been guided by similar concerns regarding commercial surrogacy as well in the West and subsequently elsewhere. Firstly, a primary concern for courts while dealing with contractual commercial surrogacy has been safeguarding the sanctity of 'contracts'. In the famous Baby M case of the mid-1980s in the US, courts found it imperative to deliberate on the legality of paid surrogacy contracts when adjudicating a case of child-custody dispute between the rich commissioning (biological) father and the poor surrogate mother (the biological mother as well since Baby M was conceived through artificial insemination). In India, legal determination of the nationality and citizenship of children born at Indian ART clinics through transnational commercial gestational surrogacy arrangements, has been a major concern for legislating on this issue since there is a real threat for some of these children to end up 'stateless' as evident in the Japanese Baby Manji case and the German twins' case in India, as discussed in detail in the last section of this chapter.

Secondly, the preoccupation of the State with both 'preserving morals' and 'protection of women from exploitation' are closely interlinked. On one hand, the (im)morality of women bearing children for a remuneration figures prominently in legal discourses, it is curiously linked to the State's admitted responsibility of protecting women from exploitation. However, on a closer look it is clear that protecting women from exploitation is only a rhetorical proclamation intended to garb the moralistic leanings of the discourse.

As an illustration of this argument, Justices G.S. Singhvi and A.K. Ganguly of the Supreme Court of India during the course of the German twins' case observed, "Do we treat children born out of surrogacy as commodity? What do the Indian mothers receive for carrying the baby? Now in society we calculate everything by money" (Rajagopal 2009). In the same hearing they also objected to identifying surrogacy as

an “industry” in the country by the Law Commission of India in its 228<sup>th</sup> Report, and noted “with all due respect to the Law Commission, how can they call something with regard to children as an industry?” (Rajagopal 2009). Evidently, the judges here are grappling with the moral aspects of commodification of children born through surrogacy and when they wonder ‘what the *Indian* women receive for carrying the baby’, they are clearly not referring to whether the women receive their due remuneration and are exploited or not, but in fact are more concerned whether some women of *our* country are complicit in the ‘morally abhorrible’ commodification of babies. This is seen as a matter of grave concern since ‘outsiders’ or ‘foreign nationals’ are involved as one party to the arrangement thereby complicating the matter which would otherwise have been different if it were only *our* people involved. This point is clear from the arguments made by the Solicitor-General of India Gopal Subramaniam in the same case who submitted, “there is no difficulty if the persons are Indian, but when it comes to foreign nationals, we have to consider many social dimensions, like that of exploitation of these children. In the end, we have to ask if this is a country where people are going to buy or sell children” (Rajagopal 2009).

The Law Commission of India in its 228<sup>th</sup> Report took up the issue *suo moto* and recommended banning commercial surrogacy and legalisation of altruistic surrogacy. This was informed by recognition that surrogacy is a ‘saviour’ technology for the infertile, but when commercialised, it “involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family.” (Law Commission of India 2009: 24).

Interestingly, policy debates around commercial gestational surrogacy in India have also been roughly around the same lines as the approaches towards sex work as delineated above. Parallel to the ‘abolitionism’ approach to sex work has been the approach to conceive commercial surrogacy in “boon or bane terms” by various actors. The queer community generally hails it as a ‘boon’ for they too can now have ‘biological’ children. However, some vociferous groups and collectives view surrogacy as a ‘bane’ in the society. For example, the Catholic Church in India vehemently opposes the proposed legislation on ARTs. In a public statement, a spokesperson of the Syro-Malabar Church exhorted:



We shall not play God just because technology is available... If passed, the bill will make a mockery of the institution of marriage and our value system. We have decided to try out all possible steps to stop the bill and will be writing to all MPs listing the moral and social consequences of the bill. There will be a session with the Christian MPs [asking them to canvass against the Bill across party lines] (Paul 2010).

Regressive caste-collectives in North India, especially Haryana called the *Khap panchayats* infamous for their role in honour killings also consider surrogacy a 'bane'. At a *Sarva Jatia Sarv Khap Mahapanchayat*, they warned the government against enacting laws legalising embryo transplant and surrogate motherhood. In the same meeting they also demanded a 'ban' on homosexuality (Deswal 2010).

The State in India favours the 'regulation' and 'legalisation' approach evident from the Draft Assisted Reproductive Technologies (Regulation) Bill 2010 (a modified version of its 2008 predecessor). Currently, in the absence of any legislation, the ARTs are regulated by the Indian Council of Medical Research's (ICMR) National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005) (henceforth 'the Guidelines').

Most women's groups in India also favour the 'regulation' approach and have engaged with subsequent Drafts of the ART Bill to ensure that the women who agree to be 'surrogates' get a fair deal. Such an engagement is informed by the fact that once technological innovation initiates something and business interests have 'tasted blood' in a sense, there can be no looking back. Any move towards banning or prohibition only drives it under the carpet and makes it clandestine, compounding women's vulnerability against exploitation.

### *Commercial Surrogacy on the Legal Terrain Internationally*

The 1985 Baby M case in the New Jersey Supreme Court in the USA highlighted some of the complexities that can arise through commercial surrogacy arrangements. Mary Beth Whitehead, who entered into a surrogacy contract with the Sterns, an infertile couple in New Jersey, refused to part with the child after its birth. Mary Beth Whitehead underwent artificial insemination with the sperm of the commissioning father to conceive Baby M, and hence as the biological as well as birth mother of the child, she refused to part with the child, contrary to the contract she earlier signed with the commissioning father. The court however granted custody of the child to the commissioning parents mainly on the ground that they intended to have the child and were in a better position to take care of the child whereas the surrogate mother gave birth for remuneration. Moreover, paid surrogate motherhood contracts were declared illegal by the court (Spar 2005, Jacquith 1998 and McKinnon 2008). The Chief Justice of the New Jersey Supreme Court observed:

If the Legislature decides to address surrogacy, consideration of this case will highlight many of its potential harms. We do not underestimate the difficulties of legislating on this subject. In addition to the inevitable confrontation with the ethical and moral issues involved, there is the question of the wisdom and effectiveness of regulating a matter so private, yet of such public interest. Legislative consideration of surrogacy may also provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology – in vitro fertilization, preservation of sperm and eggs, embryo implantation and the like. The problem is how to enjoy the benefits of the technology – especially for infertile couples – while minimizing the risk of abuse. The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising, area (*In the Matter of Baby M*, 1988).

This observation by the Chief Justice of the New Jersey Supreme Court highlights the dilemmas that legislators and the judiciary has to grapple with when dealing with technology and its interference in intimate human relationships like biological reproduction and families.

Around the same time as the Baby M case in the US, British and Australian governments commissioned reports on this issue which resulted in the Warnock Report (1985) [*A Question Of Life: The Warnock Report on Human Fertilisation and Embryology*] in the UK and Family Law Council's report (1985) [*Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia*] in Australia. Both of them "condemned commercial surrogacy and advised legislation to make surrogacy contracts void and unenforceable... recommend[ing] that it should be illegal to advertise to recruit surrogate mothers, to publicize that specific women are interested and willing to participate in a surrogacy arrangement, and to exchange money as the result of a surrogacy arrangement or contract" (Anleu 1992: 34). However, the most noteworthy feature of the logic of such recommendations as Anleu has observed is that, "these recommendations, while not advocating complete bans on surrogacy, seek to prevent contract law and the courts from being used as a resource to resolve among participants in a surrogacy arrangement. This position regards questions of family and social control within families as not the business of the state; they are private matters to be resolved by individuals rather than an adjudicator" (1992: 34).

Following the Warnock Report (1985) in the UK, the Surrogacy (Arrangements) Act 1985 was passed by the British Parliament. This legislation "outlaw[ed] commercial surrogacy but allow[ed] altruistic surrogacy for which no payment occurs... [It sought] to prevent third parties from deriving monetary payment from the arrangement" (Anleu 1992: 35). However, the Human Fertilisation and Embryology Act, 2008 does allow scope for payment of "expenses" to the surrogates. Some changes were introduced to this law in 2010 which "aimed at helping same-sex and unmarried couples who seek to have surrogate children and allow[ed] them to secure legal parenthood in a new, simplified manner. [While originally] only married, heterosexual couples [could] use this route" (McKie 2010). However, according to a fertility lawyer quoted by McKie, "there are particular pitfalls for single parents and those going abroad. In the latter case, a couple returning to England with a surrogate child finds that the law does not recognise their right to parenthood" (2010).

In Australia, the states of Victoria and South Australia prohibit commercial surrogacy contracts and in the state of Queensland all kinds of surrogacy arrangements were banned (Anleu 1992). In some recent developments, on 26 February 2008, the Queensland Parliament appointed the “Investigation into Altruistic Surrogacy Committee” (IASC) to primarily report on the question, “should altruistic surrogacy be decriminalised in Queensland?” and related modalities for the responsibility of the government if such a measure was implemented (Queensland Parliament n.d.). The committee in its report in October 2008 recommended that “the Queensland Government decriminalises altruistic surrogacy supported with an appropriate legislative and regulatory framework” (IASC 2008: i) and provided some directions as to how such a framework should be formulated. It also recommended that the term ‘birth mother’ be used instead of a ‘surrogate mother’ and altruistic surrogacy be referred to in terms of ‘arrangement’ rather than an agreement, moreover rather than the term ‘commissioning parents’, the term ‘intending parents’ be used. Such a modification in terminologies is envisaged to make it more humane and do away with commercial terms like ‘commissioning’.

In its recommendations, IASC also allowed the provision of “reasonable expenses for altruistic surrogacy as long as there is no material gain for the birth mother... [however] payment of reasonable expenses is not enforceable as part of altruistic surrogacy arrangements” (IASC 2008: ii). It is noteworthy that in its recommendations IASC preferred a “gestational surrogacy” arrangement where the birth mother is not genetically linked to the child she gestates, but clarified that the government should not be prescriptive in its approach regarding the genetic contribution of the birth mother in such an arrangement. Subsequently, in the state of Queensland according to changes in the law in February 2010, non-commercial or altruistic surrogacy was no longer illegal (O’Brien 2010).

As highlighted earlier in Chapter 1, Susan Markens has done a survey of policy responses to the problem of surrogacy in western industrialised states and has found that most of them “have rejected or greatly restricted the practice of surrogate parenting. Australia, Canada, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Norway, Spain, Sweden, and Switzerland all have national laws that

prohibit or discourage the practice... [I]n the United States there is no national-level legislation” (2007: 23). However by 2004, 17 states and the District of Columbia in the USA enacted laws regarding this issue, of which 10 states and the District of Columbia prohibit and ban surrogacy while the rest permit surrogacy arrangements but seek to regulate them (Markens 2007: 27). Markens (2007) attributes the absence of federal/national legislation on surrogacy in the USA to the constitutional reality that the states have control over family law in the US federal system.

With the spread of the technology across the world many countries have begun legislating on the issue – Brazil forbids payments other than ‘expenses’ to the surrogate; the situation in South Africa is somewhat similar to the Indian context in as much as surrogacy is not illegal, there is no law governing the practice but only some guidelines (Khanna n.d.). According to the South African guidelines, “only married couples can opt for surrogacy, the surrogate mother must have at least one child of her own and the gametes of the surrogate mother and her husband cannot be used. The courts also require an examination of the commissioning parents to confirm that they have appropriate intentions and require a signed agreement between the surrogate mother and the commissioners in order to be able to nationalize the child” (Khanna n.d.).

In the wake of growing instances of surrogacy both in the country as well as internationally commissioned cases, Thailand is also deliberating legislation on the issue since there are no laws currently governing surrogacy arrangements. The Draft law has been approved by the Thai Cabinet and “provides that the Juvenile and Family Court will be given authority for judging paternity and a committee will be established with the authority to protect the children born as a result of surrogacy... [aiming at] redressing the legal issues surrounding the parental rights of the commissioning parents as well as defending the children which lie at the heart of surrogacy disputes... [Moreover it] gives the Medical Council the right to set out the requirements and financial conditions for the care of the surrogate mother before and during all stages of the pregnancy” (Adams 2010).

In the western industrialised countries where commercial surrogacy is permitted, the rights of the surrogate mother are well protected. For example, in those states of the USA where commercial surrogacy is permitted, Imrana Qadeer notes that there are protections for the surrogate's rights and "[i]n addition to medical expenses related to the pregnancy, the surrogate is given health insurance for the period of involvement, medical insurance for her family as she is the caretaker for them and expenses including for maternity care and clothing. In addition expenses for the independent lawyer that she would employ are paid by the commissioning parents" (2009: 29). By contrast, in India no such protections or standards exist, vis-à-vis the surrogate. The Draft Assisted Reproductive Technology (Regulation) Bill & Rules, 2008 (and arguably even its modified 2010 version referred to as Draft ART Bill henceforth) also does not satisfactorily address the concerns that there should be comprehensive regulations to guard against the exploitation of women who offer to be surrogates and mostly belong to economically weaker sections of the society (Qadeer 2009 and Sama 2008).

It is important to note here that in all societies, women who agree to be surrogates for remuneration often belong to disadvantaged sections of society, but when analysing the contemporary situation in the global South particularly in India, one has to account for poverty and marginalisation which is historically linked to colonialism and some forms of historical discriminations (e.g. based on caste or religion) that the most marginalised sections face.

### **Commercial Gestational Surrogacy and the Law in India**

In this section a broad overview of the law in India regarding commercial gestational surrogacy (a part of ARTs) would be attempted. It is worth reiterating here that the kind of surrogacy that has received great attention from the legal establishment in India is commercial gestational surrogacy – where the surrogate is only a gestational 'carrier' of the fertilised egg till the delivery of the child(ren) without contributing any of her *own* genetic material to it. The Guidelines, in clause 1.2.33 define 'surrogacy' as "an arrangement in which a 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 is acting as a surrogate". With only an

added mention of “pregnancy achieved through assisted reproductive technology” in its clause 2.aa, the Draft ART Bill similarly defines surrogacy. In the same draft legislation in clause 2.bb ““surrogate mother”, means a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple/ individual that had asked for surrogacy”.

This kind of surrogacy is sought to be regulated in the way that the Indian State plans, mainly in the wake of legal complications that have arisen in transnational arrangements where infertile foreigners commission a child at Indian ART clinics where surrogates are mostly women from disadvantaged sections of the society. Demands from some women’s groups to safeguard the rights of women accessing ART services generally and also that of women acting as commercial gestational surrogates, have also been instrumental in the process of the State’s legal engagement with the issue.

Legal engagement with this issue is merely a decade old and all the legal documents that deal with this issue are very limited in numbers. Indeed what is more difficult is to make sense of the complexity (or its lack thereof) when constantly evolving ‘new’ *reproductive* technologies are sought to be regulated by state machinery (thereby attempting ‘fixity’ or standardisation). The Indian State’s attempt to regulate ARTs is particularly noteworthy since it is not in tandem with its general approach to engage with biological reproduction by its population. Since independence, the State has viewed the *fertility* of the Indian population as a ‘problem’, how then does it come to legally engage with technologies that seek to ‘assist’ in reproduction, in a way that defies logic when that legal engagement is not to ‘ban’ these technologies but in fact to facilitate their proliferation. It is not surprising in this regard that in the Draft ART Bill though not stated explicitly, the recognition by the State of the fact that ARTs in India are being used in a transnational context with rising medical/ reproductive tourism, is implicit. One of the main reasons is that in spite of infertility and ARTs not being a high priority health issue for much of the Indian population, the Draft Bill

seeks to regulate it in the wake of a mushrooming of ART clinics with a substantive transnational clientele.

In keeping with the research focus of the present study, a closer analysis would be undertaken of the regulation of commercial gestational surrogacy, which often happens in the form of transnational arrangements. Before proceeding to critically analyse the position of commercial surrogacy vis-à-vis the law in India, it would be pertinent to focus on how the issue has come up in the Indian courts.

### **Citizenship Issues in the Courts**

Very crudely put, the law in India is ambiguous about various aspects of commercial surrogacy. However, commercial surrogacy has legal recognition in various instruments even when there is no legislation presently on the issue. Courts in India have had to mainly deal with complications in determining citizenship of transnationally commissioned children born to women acting as gestational surrogates in Indian ART clinics. Thus, various Indian courts, on many occasions have directed the government to legislate on this matter to avoid such situations for infants. Unlike the legal cases in the West which often involved custody battles with women who acted as surrogates also staking a claim on custody rights of the children they bore, in India there have been no such cases. This is because: one, the emphasis on absence of any genetic connection between the women acting as surrogates and the child(ren) they gestate, often works to make these women understand that the child(ren) they are gestating is *not their own*; and two, because mostly these women are heavily burdened with financial compulsions in their families and are in an extremely asymmetric relationship with the mostly foreigner commissioning parents with the ART clinics as formidably powerful intermediaries. Another important reason can be the paucity of monetary and other resources required for court cases in India, compounded by the possibility of stigmatisation of acting as a surrogate during the legal process. Thus, the 'rights of the surrogate' have not really been an issue that the courts have had to deal with.

Some potential complications that can arise in case of international surrogacy arrangements were highlighted by two major court cases in India – the Japanese Baby



Manji case in the Supreme Court in 2008 and the November 2009 citizenship case involving surrogate twin babies commissioned by German parents in the Gujarat High Court.

A surrogate mother in Gujarat gave birth to Baby Manji in July 2008 commissioned by a Japanese couple. However, before her birth the commission couple divorced and the intending mother refused to have anything to do with the baby. After her birth, the baby was moved to Jaipur, Rajasthan with some Indian friends of the Japanese father.

Kari Points observed:

“Suddenly, Baby Manji had three mothers—the intended mother who had contracted for the surrogacy, the egg donor, and the gestational surrogate—yet legally she had none. The surrogacy contract did not cover a situation such as this. Nor did any existing laws help to clarify the matter. Both the parentage and the nationality of Baby Manji were impossible to determine under existing definitions of family and citizenship under Indian and Japanese law. The situation soon grew into a legal and diplomatic crisis” (n.d.: 1).

The case first went to the Rajasthan High Court on a *habeas corpus* petition filed by a Jaipur based NGO – SATYA and it issued notices to both the Central and State Governments to produce Manji in court. However, the Supreme Court restrained the police from forcibly taking away the baby and granted the custody of the child to her grandmother. The Court issued notice to the Union of India and also sought the response from the Indian Council for Medical Research (ICMR) as the baby’s counsel contended that in keeping with the National Guidelines for Accreditation, Supervision and Regulation of ART (Assisted Reproductive Technologies) Clinics, the baby can be considered a legitimate child of the biological father. Following a direction from the Supreme Court, the Regional Passport Office in Jaipur issued an ‘identity certificate’ to Baby Manji Yamada, to enable her to get a Japanese visa and fly with her grandmother to join her father in Japan (Venkatesan 2008 and Press Trust of India 2008).

In the case regarding the twin babies commissioned by a German couple and born to a surrogate mother in Gujarat, complications again arose regarding their citizenship and nationality. Since German laws prohibit surrogacy they could not possibly get German citizenship and in view of this fact the German couple moved base to the UK and applied for British visas for the twins after getting Indian passports for them. But these passports were later withdrawn by the Indian government when it learnt that the commissioning parents were not Indian nationals. On the appeal of the intending German father, the Gujarat High Court “took a middle path in the absence of any law, and ordered the Centre to issue identity certificates, just like the Japanese baby Manji’s case, and on basis of this the couple was allowed to take their babies to UK” (Times News Network 2009). The court ultimately concluded that even in the face of a lack of clarity in the citizenship laws on this issue, “even if the children are described as illegitimate children, they are born in this country to an Indian national and hence, they are entitled to get citizenship by birth, as one of their parents is an Indian” (Times News Network 2009). The judges also noted that “[a] comprehensive legislation dealing with all these issues is very imminent to meet the present situation created by the reproductive science and technology which have no clear answers in the existing legal system in this country... Legislature has to address lot of issues like rights of the children born out of the surrogate mother, legal, moral, ethical, rights, duties and obligations of the donor, gestational surrogate and a host of other issues” (Daily News and Analysis 2009). The Solicitor General of India told a Supreme Court bench in 2010 that in the view of the German twins case, “The government is examining the legal, moral, constitutional implications of surrogacy as well as commercial and exploitative implications of it” (Negi 2010) especially in the wake of the 228<sup>th</sup> Law Commission Report that advises the government to legislate on the issue with adequate safeguards for the rights of the children born to surrogate mothers and the “parties to a surrogacy contract”.

Both these cases highlight the difficulties that can arise legally in case of international arrangements of commercial surrogacy thus, underscoring the importance of having clarity in national legislation regarding this issue with foremost attention to the rights of the child and the surrogate mother.

Besides these two, there have been other similar disputed cases involving commissioning parents of other nationalities. For example, recently the Delhi Commission for Protection of Child Rights took notice of the adoption of twin girls born through surrogacy by a Spanish gay couple in Delhi (HT Correspondent 2011). Twin boys born to an Indian surrogate in Mumbai commissioned by a Norwegian single woman ran the risk of 'statelessness' since they could not get Norwegian citizenship since they were not biologically related to the commissioning mother and they were refused Indian citizenship since according to Indian rules, the commissioning parent(s) and not the surrogate mother is recognised as legal parent (Deb Roy 2011). In 2010, an Israeli gay man, Dan Goldberg, was prevented from taking back his twins born to a surrogate in Mumbai to Jerusalem (Datta 2010). For Israeli citizenship it is essential to establish parentage of the children; however a judge in Jerusalem declared that passing orders for a paternity test was not in his jurisdiction. The incidence was prominently covered by the media and finally on the directions of Israeli Prime Minister, Benjamin Netanyahu, the Interior Ministry relaxed the law to let Goldberg return to Israel with his children (Lis 2010).

### **Legal Position of Commercial Surrogacy in India and its Critique**

#### *ICMR Ethical Guidelines:*

Legal engagement with ARTs and specifically surrogacy began with their inclusion in one of the chapters of ICMR's *Ethical Guidelines for the Biomedical Research on Human Subjects* (2000). However, women's groups like the Delhi-based Saheli argued that:

The ethical guidelines should go beyond technicalities and build effective safeguards so that unequal power relationship between the providers of new technology and its users [mostly women] is minimised... [they] should not accept social stigma attached to infertility as a norm... It is still too early to visualise all the knotty and complex situations that could emerge. However, ethical guidelines for ART need to be broad and flexible in order to accommodate these future scenarios, but stringent enough to prevent violation of individual rights... For this, well-formulated guidelines drafted with foresight and long-term visions are a must (Saheli 2002: 21).

The latest 2006 version of *Ethical Guidelines for the Biomedical Research on Human Subjects* also has a chapter titled “Statement of Specific Principles for Assisted Reproductive Technologies” which contains a subsection on “IVF-ET (*in-vitro* fertilisation and embryo-transfer) and Surrogate Motherhood”. Here too, there is an implicit acceptance of infertility as a ‘problem’ and ARTs as a form of saviour technology for infertile couples. However, apart from the generally celebratory approach towards ARTs as immense scientific advancement, there is an acknowledgement that “many of these technologies require enormous technical expertise and infrastructure, carry a success rate below 30% even in the best of hands, are expensive, and tax the couple’s endurance physically, emotionally and economically” (ICMR 2006: 97).

In the sub-section on “informed consent”, there is no mention of the women acting as surrogates; this section is only with respect to “the [infertile] couple / oocyte/ semen donor” (ICMR 2006: 98). There is a need to specifically include women acting as surrogates in the section on informed consent, especially because women likely to be providing these services are generally from disadvantaged sections of the society and it is incumbent on the ART specialists to give full information of the procedures and solicit their informed consent.

The sub-section on surrogate motherhood contains some technicalities of the medical procedure to be undertaken as well as legal procedure for the ‘adoption’ of the child by the infertile couple which commissions it. It proclaims, “the contract for surrogacy is legally enforceable. It shall provide for all expenses related to medical management during pregnancy, delivery, and immediate postpartum period till adoption and should be borne by the intending couple. Monetary compensation for agreeing to be the surrogate may also be specified in the agreement” (ICMR 2006: 102). The right to abortion on medical grounds has been upheld for the surrogate and in such a case, the commissioning couple cannot reclaim the amount already paid to her.

It is also stated that “ART clinics shall not provide surrogate mothers or information on potential surrogate mothers to couples or individuals” (ICMR 2006: 103), an ethical guideline which is most notable due to its violation as far as the ground scenario of

the way such clinics operate in India is concerned. For example, the “epicentre” of commercial surrogacy in India, the Akanksha Infertility Clinic in Anand, Gujarat functions contrary to this particular guideline. Dr. Nayna Patel who runs the clinic has her own network to scout for women willing to act as commercial gestational surrogates. According to an *Associated Press* (2007) report, “Patel’s center is believed to be unique in offering one-stop service. Other clinics may request that the couple bring in their own surrogate, often a family member or friend, and some place classified ads. But in Anand the couple just provides the egg and sperm and the clinic does the rest, drawing from a waiting list of tested and ready surrogates”.

*ICMR Guidelines for ART Clinics, 2005:*

As referred to in the previous sections, the present regulations governing ARTs in India (National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India issued by the ICMR in 2005) are not mandatory or binding on clinics as they are merely ‘guidelines’.

Moreover, the Guidelines do not adequately safeguard the rights of the surrogate on the one hand while on the other many provisions ensure that the experience of overseas commissioning parents is ‘hassle-free’ particularly because the birth certificate of the child does not contain the name of the surrogate mother as according to the clause 3.5.4 of the Guidelines, “The birth certificate shall be in the name of the genetic parents”. The gestational surrogate is neither the genetic mother of the child nor does she have any legal standing for its being – something that the ART clinics use to woo women to be surrogates so that there are no ‘strings attached’ and they can earn a decent remuneration. However, some feminists in India feel that this can be a potential site for exploitation of these women and they rather prefer that “[their] name should be on the baby’s birth certificate and parentage legally transferred to the new parents later” (John and Qadeer 2009; and Sama Team 2009). A technical ambiguity that this provision overlooks is that of the case where donor sperm/egg is used by the commissioning couple, would the birth certificate of the child then bear the name of one of the commissioning parent who has also contributed sperm/egg and the donor? However, if that be the case then it would contradict the provision contained in clause 3.12.3 of the Guidelines, “children born through the use of donor gametes shall not

have any right whatsoever to know the identity (such as name, address, parentage, etc.) of their genetic parent(s). A child thus born will, however, be provided all other information (including that mentioned in Section 3.4.8) about the donor as and when desired by the child, when the child becomes an adult”.

Mary John and Imrana Qadeer emphasise that “[t]o understand surrogacy in the Indian context, one must begin with the fact that while the Transplantation of Human Organ Act, 1994 banned sale of human organs, organ loaning – equally difficult and risky – is being promoted through paid surrogacy. This is due to a medical industry that welcomes all profitable ventures like ‘reproductive tourism’, even when infertility constitutes a small segment of local priorities” (John and Qadeer 2009). They are also wary of the way the government approves of this phenomenon especially in the light of the fact that infertility is not a major public health concern in India, while maternal mortality and antenatal care for women, are (John and Qadeer 2009).

*Draft ART Bill, 2010:*

Inconsistent with the ‘small family norm’ in India’s population policies, whereby women are advised to have only two children, citing reproductive health and well-being of women, the Draft ART Bill permits three surrogate pregnancies per woman irrespective of the number of her own children. Moreover, under the IVF technology, the number of cycles of embryo implantation might be much more than the actual number of conceptions, because there are high chances of embryo rejection by a surrogate’s body and the Draft ART Bill also fails to factor this in (Sama Team 2009).

Apart from Mary John and Imrana Qadeer, the Delhi based women’s groups Saheli (2009) and Sama Resource Group for Women and Health (2008) have undertaken detailed critiques of the 2008 predecessor of the Draft ART Bill and Sama has also submitted their comments and suggestions to the Ministry of Health and Family Welfare urging greater public debate on the bill and not hurrying it up. Some of the issues highlighted in the critique of the 2008 version have not been dealt with and some concerns are valid for the latest draft too.

While the 2008 version lacked an introductory prelude, the Draft ART Bill does have a preamble which hails ARTs as a form of tremendous scientific advancement to deal with infertility which is a “highly prevalent medical problem” as “15 per cent of couples around the world are infertile”. There is a simultaneous unquestioning assumption of a normative societal stigma around infertility. ARTs however only assist in reproduction evident from their nomenclature; they do not treat infertility (Shah 2010) and can only “take care of” some cases. Infertility is defined as “the inability to conceive after at least one year of unprotected coitus; or an anatomical / physiological condition that would prevent an individual from having a child”(clause 2.u); however infertility is a ‘problem’ of ‘couples’ i.e. “two persons living together and having a sexual relationship that is legal in India” (clause 2.h). Clearly, while mentioning a physiological condition as reason for inability to have children, there is a scope of including non-heterosexual people’s reproductive capacities; but this scope is foreclosed with the way “couples” are sought to be defined since clearly homosexuality is not legal in India, albeit stands decriminalised<sup>15</sup>.

The woman acting as the surrogate is assumed to be ‘married’ and the consent of her husband is needed on the contract (Draft ART Rules 2010; Form J). This clearly impinges on the right of the woman who agrees to act as a surrogate, an adult, to act of her own accord. This requirement of the ‘husband’s consent’ is important in view of the State to ward-off matrimonial discords on account of husband’s disapproval or lack of knowledge regarding the use of his wife’s reproductive capabilities beyond the hetero-normative family. Moreover, the importance attached to the consent of the husband of the woman who agrees to act as a surrogate compounds the vulnerability of these women since there is no way to guard against the use of women as commercial surrogates at husband’s insistence/coercion even when they are unwilling.

“ART banks” are to be set up to “supply” surrogates according to the Draft ART Bill (clause 2.a). The Bill however is silent on how the monetary aspect of the contractual

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<sup>15</sup> According to the 19<sup>th</sup> century colonial Indian Penal Code, the section 377 criminalises “sex against the order of nature” implying sodomy, paedophilia and homosexuality. After a long legal battle against this provision, queer rights groups succeeded in convincing the Delhi High Court in 2009 to decriminalise homosexuality and limiting the interpretation of this clause to sodomy and paedophilia.

arrangement will be governed. The contract that the surrogate is supposed to sign ambiguously mentions “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” (Draft ART Rules 2010; Form J). There is no guarantee or safeguard against economic exploitation of the woman acting as surrogate and clearly ART banks/clinics would effectively be in a position of power while controlling the negotiations between the commissioning couple and her.

A formidable argument with respect to the provision of surrogacy contracts under the Draft ART Bill is put forward by Chayanika Shah. She has argued:

A surrogacy contract, much like a marriage contract, is definitely needed to protect the woman's rights. The question is: does this need to be put under the ART Bill? Inclusion here simply underlines the notion that women are baby-producing machines, if not in their avatars as wives then definitely in their avatars as surrogate mothers. A Bill that is meant to safeguard the provider and the commissioning couple (because they are seeking to produce children through methods that are not normally used by ‘non-normative’ means) will not protect the rights of the surrogate. She is the most marginalised and vulnerable in this triad. Her rights need to be protected, but not under a Bill that regulates technology. We need to oppose the inclusion of surrogates’ rights within this Bill and also oppose this definition of surrogacy (Shah 2010).

All progressive voices, from the civil society concerned about the rights of the women acting as surrogates, in India unequivocally demand that the booming commercial surrogacy industry should be strictly regulated – especially that vulnerable women do not get exploited by the clinics, and also that their rights are protected legally.

A fundamental theme that emerges from the discourse of legal regulation on the issue is the undisputed assumption of a *fact* that “every couple has the right to have a child” (as in the Preamble of the Draft ART Bill), it is implicit in this assumption that child has to be biologically/genetically one’s *own*. Foremost is the need for progressive feminist voices to continue problematising this issue. As Jaquith (1988) has argued this is a fallacious way to approach the issue and emphasised:



The government has an obligation to guarantee that every *child* has protection and nurture – health care, education, and decent living conditions. This obligation extends to other dependent human beings as well, such as the aged and people who are incapacitated by physical or mental illness. But the government has *no* obligation to guarantee every adult the “right” to “their own” child (1988: 7).

Infertility is and ought to be seen as a social problem and there are social ways to deal with it like adoption and foster-parenthood (Saheli 2002), regulation of ARTs should not be isolated from such social mechanisms and alternatives must be encouraged, which clearly has not currently figured in the imagination of the law-makers. It is even more ironic that the 11-member committee which formulated the Draft ART Bill has 4 ART practitioners, 3 bureaucrats, 3 lawyers from the same firm and 1 person closely linked with a biotechnology business. The drafting committee predominantly consists of people with clear business interests in ARTs since five members are linked to the industry itself.

In tandem with progressive voices concerned about the rights of women acting as surrogates it is important that the Draft ART Bill effectively regulates the technology and should not subsume the rights of women acting as surrogates and as Shah argues, “Until the voices of these women are heard and concrete demands emerge from their experiences, let the Bill do just what its name indicates it should do – regulate technology, not human beings” (2010).

## CHAPTER 5: CONCLUSION

This research aimed to undertake a survey of feminist theorisations of IPE and women's remunerative work, and the case study of commercial gestational surrogacy in India. The case study was approached from an international political economy perspective with some focus on the theoretical plausibility of conceptualising commercial gestational surrogacy as 'work' in the context of what some feminists understand as 'capitalist patriarchy' as well as its location on the legal terrain internationally and particularly in India.

Rather than offering concrete 'conclusions' as the nomenclature of this chapter may suggest, what is attempted here is identifying theoretical routes that can be traversed to make conceptual sense of the case study in a broader milieu of feminist theoretical engagements with globalisation, IPE and women's remunerative work.

Feminist engagement with the discipline of IR and IPE as its sub-field, has been broadly guided by an effort to extend the feminist slogan 'the personal is political' to also that 'the personal is international' (Sjoberg 2011). Cynthia Enloe has noted insightfully:

Read forward, 'the personal is international' insofar as ideas about what it means to be a 'respectable' woman or an 'honorable' man have been shaped by colonizing policies, trading strategies, and military doctrines ... the implications of a feminist understanding of international politics are thrown into sharper relief when one reads 'the personal is international' the other way round: the international is personal. This calls for a radical new imagining of what it takes for governments to ally with each other, compete with, and wage war with each other. (Enloe 1990 quoted in Sjoberg 2011: 114)

Taking a cue from Enloe, in this concluding chapter, it would be fruitful to examine how a case study of the commercial gestational surrogacy industry helps feminist theorisations of IPE, globalisation and women's remunerative work to make the round-trip journey from 'the personal is international' to 'the international is personal'.

### *The Personal is International*

As a point of departure, it will be insightful to dwell on what Bedford and Rai (2010) in their analysis of existing feminist theorisations of IPE in a recent special issue of *Signs* have argued. They contended:

Issues of work – paid and unpaid, formal and informal – remain central to feminist IPE debates, and the promise of labor as a route to women’s empowerment continues to be critically interrogated. These concerns echo those...regarding the relationships between feminism and capitalism and the increasing calls for women to be incorporated into markets, whether through paid labor, microcredit schemes, or migrant remittances (2010: 8).

Issues related to women’s work have been critically examined from a feminist perspective in Chapter 2, but Bedford and Rai’s (2010) contention about labour paving a way for women’s *empowerment* merits some engagement, especially in the light of the case study of commercial surrogacy in India, which is also an instance of women’s ‘incorporation into markets’ with the commercialisation of their reproductive capabilities. To that end, it is first important to reasonably clarify what “empowerment” might be.

The most salient feature of the term empowerment is that it contains the word ‘power’. Evelin Hust (2004) has analysed what the term means in the Indian context. Though the focus of Hust’s analysis is the representation and participation of women in Indian local government system of *panchayats*, it is nonetheless useful to extrapolate on the theoretical framework she identifies, for the purpose of this research as well. Hust (2004) cites Naila Kabeer’s emphasis on distinguishing between different understandings of power that are important to the concept of empowerment. According to her, Kabeer makes a contrast between possessing the ‘power to’, ‘power over’, and ‘power within’. Hust (2004) also cites Jo Rowlands who argues that the dominant perspective of empowerment held by Western development-experts is to give women ‘the chance to occupy positions of “power”, in terms of political and economic decision-making’. According to Rowlands, the difficulty with this view of “empowerment” is that if it can be bestowed, it can easily be withdrawn too as it does not involve a structural change in the power relations.

Noted Indian feminist and women's rights activist Kamla Bhasin (1995) holds a similar view and believes that empowerment has to be seen as an essentially political process because it aims at changing existing power relations.

Bhasin provides a well-rounded definition of empowerment and according to her, "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. It is a process which enables women to get self-respect and dignity and which improves their self-image and social-image" (1995: 234).

When it comes to understanding empowerment in a gendered sense, the process of empowerment has to be seen in the context of patriarchy, where women are 'naturally' associated with the domestic sphere while men are identified with the 'public interest'. In India, as elsewhere, it is extremely important to examine the social realities in the light of the intricate connections among class, caste and gender, and also being cautious so as not to assume 'women' as a homogenous group.

Ernesto Laclau and Chantal Mouffe in their 'post-Marxist' writings talk of empowerment as a journey towards a horizon that one only aims to reach. This view is also echoed by Nivedita Menon who idealises "political practice as the perpetual *attempt* to eliminate oppression rather than the *achievement* of this elimination" (emphasis in original; 2004: 20).

In the light of the above understanding of empowerment, it would be pertinent to ask whether the practice of commercial gestational surrogacy, as it has evolved in India, recently, is empowering for women. As discussed at length in Chapter 3, a survey of feminist voices from the global North and those from India does not lead us to a categorical answer to the above question either in the negative or otherwise. Perhaps complex situations women find themselves in due to various structural reasons merit conceptualisation in all their complexities without looking for simplistic answers. Martha Nussbaum (1999) rightly cautions against oversimplification of understanding

women's position in various situations as either that of 'victims' or of 'agents'. According to her, the interconnections between women's victimhood and agency have to be carefully explored in order to meaningfully make sense of the particularities of various situations they find themselves in. Nussbaum particularly urges focus on "*resourcefulness* of women in conditions of hardship" (emphasis added; 1999: 18) and "the complex interrelationship between agency and need, between harm and humanity" (1999: 20).

Nussbaum's "resourcefulness" argument is an interesting one if applied to the case of women who agree to be commercial gestational surrogates. Though there is not much existing research on the motivations for women to agree to be gestational surrogates for a remuneration, nor is there adequate empirical data to get a picture of the socio-economic position of such women, it will not be far-fetched to argue that largely they do so to earn a sum of money that would be virtually impossible to earn or take them a much longer time to earn otherwise if not through the means of acting as commercial gestational surrogates. However, when the sum of money at stake is more or less in the range of Rs. 1-3 lakh [approximately \$2500-7500], the women in question here are largely from economically disadvantaged sections of the society. 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, in some senses. One might even provocatively argue that acting as commercial gestational surrogates is also potentially subversive. It involves the 'incorporation' of women in the market through another albeit new form of 'paid' labour. It involves the use of women's reproductive capabilities to earn remuneration in the labour market, which is precisely the capability which has arguably been the fundamental reason of their exclusion from the 'economic sphere', notwithstanding the fact that this exclusion historically served an end for 'capitalist patriarchy'. So, does acting as commercial gestational surrogates qualify as a case of the subaltern's beating the oppressive system at its own game? While negating that question without a considered engagement would not be fair, answering it in the affirmative at this stage would be immensely premature.

A closely linked issue, however, which would be more appropriate to engage with at this stage, is whether this resourcefulness/subversiveness on the part of the women agreeing to act as commercial gestational surrogates, alleviates these women from a position where they are vulnerable and can be potentially victimised. Foremost is the question of risks to their health – physical, mental as well as emotional. For the pregnancies they gestate, their body has to be first prepared to receive the embryo that has been fertilised in a laboratory petri-dish and thus a pregnancy which is arguably ‘natural’ for any woman’s body to bear has to be mediated and overseen by ‘unnatural’ scientific technologies and skills of medical practitioners. It is highly probable that women are not completely aware of all the potential risks and side-effects and hence not in a position to give informed consent. In a country like India, which is distinguished for its high Maternal Mortality Rates where a pregnancy and child-birth often lead to death of the pregnant women, one can only imagine the extent to which these women might be vulnerable. Even if these women are aware of all the risks involved in the process and still agree to act as commercial gestational surrogates, consenting to all the hormonal treatments and risks of highly probable multiple pregnancies, the question that feminists and pro-women’s rights groups/individuals have to engage with is the structural condition that compels these women.

It is here that a robust feminist understanding of IPE and globalisation is useful for conceptualising their case and reflecting on its implications. In order to synthesise the arguments and debates in this literature which have been already surveyed in Chapter 2, a few aspects must be highlighted here.

In the contemporary context of neoliberal globalisation, feminist economists have observed a trend of ‘feminisation’, ‘flexibilisation’ and ‘casualisation’ of the labour force which characterises the ‘new international division of labour’ (Mies 1986). The new international division of labour represents a shift from colonial division of labour where manufactured goods were produced in the ‘core’ while the colonies were the source of raw materials and much of subsistence activities took place there. The new international division of labour is characterised by ‘global assembly lines’ (Sassen 1996) and a concentration of the most monotonous and labour-intensive aspects of

capitalist manufacturing in the erstwhile colonies (Mies 1986). Imperatives of cost-cutting and profit maximisation generate more demand for 'cheap' labour; and, a sexualised labour market thus facilitates extensive female employment in such jobs. In such a scenario, as Afshar and Barrientos observe, "women's work [especially in the global South] is often insecure, temporary or part time, with little protection and few fringe benefits" (1999:4). The fragmentation in the production process on a 'global assembly lines' model is so far-reaching that increasingly, women in the unorganised informal sector are 'home-based', inhabiting the lowest ranks in vertical chains of production in fashion garments, non-traditional agro-exports, electronics, and so on (Carr et.al. 2000, Custers 1997). In India specifically, some illustrations of such work include, doing all or some activities like embroidery, hemming, stitching buttons, ironing, washing in the garments sector; low-end manual packaging in different industries like *bindi* sticking, stitching labels and so on (Shakeel 2011). Based on a study of home-based workers in Delhi conducted by the All India Democratic Women's Association (AIDWA), Albeena Shakeel has reflected that many of these women did not even recognise themselves as 'workers', "they rather considered themselves as wives or mothers trying to make their little contribution to the family income. Many talked about being motivated to work because they could give better food to their children or give some money to them when they asked" (2011: 128). It would have been interesting to probe this aspect of 'giving some money when the children asked', there is an inkling of the critical IPE recognition of even the poor being pulled into 'consumerism' in a neoliberal globalised world economy. Afshar and Barrientos have noted that under the influence of globalisation:

Traditional subsistence production has been undermined, entitlements and capabilities depend more and more on money income, and even the poorest in many developing countries are drawn into a fantasy world of global consumerism. Poverty is now often associated with those in insecure, flexible, waged employment: the 'working poor'. But many of the poor are sucked into a consumer-led debt spiral. When poor households are in debt, it is often women who make the bigger sacrifices, searching for work on any terms to keep the debt collector from the door... (1999: 8).

The self-perception of women working in a home-based situation (Shakeel 2011) resonates well with the self-perceptions of women 'working' as commercial gestational surrogates (Pande 2009). The most distinguishable factor about their 'work' lies in their non-characterisation of themselves as 'workers' in a highly unorganised and informal setting. Though both kinds of work may be characterised as part of 'unorganised' sector as they are performed often in isolation, but the production system in which their respective labour feeds in functions in a fairly institutionalised manner – be it the garments or electronic items industry or the ART/commercial gestational surrogacy industry.

Commercial gestational surrogacy, however, poses a puzzle for feminists theorising globalisation and IPE. Feminists have argued, as Beneria et. al. indicate that “globalisation also tends to devalue nonmarket goods and services, including reproductive work. As feminist economists have pointed out, it tends to scorn or demean those values and social relationships that do not adhere to market norms of self-interest and profit maximisation” (2000: xiii). Even though it can be argued that in principle, activities related to biological reproduction ‘do not adhere to market norms of self-interest and profit maximisation’, in a neoliberal globalised context with the trajectory of technological innovation that it promotes, it would be simplistic to argue that activities that defy market-norms are merely ‘scorned’ upon, ‘devalued’ or ‘demeaned’. On the contrary, the impetus from the market is such that even reproductive work – both biological and social – is increasingly emerging as remunerative work for women. Thus, there is a shift from categorical devaluation of women’s reproductive work to a selective devaluation of such work when performed within the ‘family’, indicating the Janus-faced manifestations of women’s oppression in ‘capitalist patriarchy’.

Leaving aside the complex ethical argument whether reproductive work, especially biological reproduction should be available as a purchasable commodity, it is pertinent to draw attention to yet another aspect of devaluation or women’s labour in commercial gestational surrogacy. This aspect is linked to the fact that the woman who acts as the gestational surrogate is the most indispensable component of the whole process who bears the maximum risk to her health and well-being, and yet she



is not the one who stakes claim to the 'maximum' profit in the commercial transaction and what she receives is only a fraction of what the entire process costs. In this sense, like other workers in the unorganised sector, she is also an inhabitant of the lowest rung in the vertical value chain of the ART/commercial gestational surrogacy industry.

### **The International is Personal**

An examination of how 'the international is personal' conceptually involves an abstraction from the 'general' to the 'particular'. Contemplating how the case study of commercial gestational surrogacy in India might help in feminist analyses of IR/IPE, the following axes might allow us some footing.

**Citizenship:** To move from the general to the particular in the case study of commercial gestational surrogacy industry, a convenient departure point is concentrating on the bearing that technology has on the way individuals relate to politics. A primary way of linking individuals is through defining their role in 'the political' by way of citizenship. An interesting question worth exploring in this regard is how technology problematises conventional citizenship in contemporary times.

The Industrial Revolution, arguably opened avenues for technology to intermesh with politics, subsequently in ways perhaps inconceivable before. It is particularly interesting to explore how technology re-constitutes experiences of citizenship. Technology acts as a facilitator of the multi-layered "transnational experience" with its layers ranging from what Roudometof characterises as "the construction of transnational social spaces to the formation of transnational communities" (2005: 113). While technology facilitates a 'beyond borders' experience of citizenship, technology itself has also been an instrument for the state to keep enhanced surveillance on both citizens and non-citizens – be it the Indian government's recent efforts to give every citizen a Unique Identification number or the controversial radio-tagging of immigrants in the United States. The internet and 'information revolution' have made it possible for one to be a 'citizen of the world' though not exactly in the way Diogenes may have thought in ancient Greece. It is possible for a person

anywhere in the world to proclaim on Facebook “*Ana aydan Masri!* - I too am an Egyptian today” in solidarity with protesters at the Tahrir Square, though notwithstanding the uncertainty over what does ‘electronic solidarity’ mean. In this sense, nonetheless, such an experience of emergence of new identities may be conceptualised as embedded in what Klaus Eder (2009) calls “a narrative network” mediated by technology. However, this emancipatory potential of the experience of citizenship is often dependent on State power. Hence for example Chinese government has banned Google and Facebook, thus foreclosing the possibility of people in the Chinese territory to ‘experience’ being ‘citizens of the world’ in the sense that was referred to here.

Technology in contemporary times has the potential of not only transforming the ‘experience’ of citizenship but also opens avenues to problematise even the ‘fact’ of conventional citizenship which is determined by descent, place of birth or residence. An illustrative example is the widespread transnational usage of Assisted Reproductive Technologies (ARTs), particularly that of using women as commercial gestational surrogates. As highlighted in Chapter 1, ARTs have facilitated compartmentalisation of reproduction in distinct components, each of which is potentially transnationally commodifiable – egg and/or sperm donation, conception in laboratory, and gestation in a surrogate womb. This is somewhat akin to the examples of breaking up of the production process and advent of ‘global assembly lines’ vis-à-vis computer parts separately made and then assembled and the Mexican *maquiladoras* invoked by Saskia Sassen (1996).

Elaborated in detail in Chapter 4, most countries in the global North have stringent regulations around commercial surrogacy, mainly in the nature of not recognising the practice legally. As is the case with other multi-national enterprises, stricter laws and regulations gave rise to a trend of outsourcing. It was shown in Chapter 3 that there is a booming market of transnational gestational surrogacy arrangements in the global South with India emerging as a hub, where commissioning parents are mostly foreigners. However, in arrangements when the commissioning parents are from a country that either bans or not recognises surrogacy, children born through surrogacy in India often run the risk of being ‘stateless’ – effectively jeopardising their

membership in a political community in the globalised world. There was a recent case in the Indian Supreme court, much talked about in the media as the Jan Balaz case that involved a German couple's inability to take back their twins to Germany born to a surrogate mother in India. This was so because Germany doesn't recognise commercial surrogacy hence the children were not 'German' in spite of German genes, according to Indian laws the biological parents are recognised on the birth certificate despite a surrogacy, so the children were refused Indian passports – ultimately the German couple was directed to 'adopt' their own biological children in keeping with international adoption guidelines. Such a suggestion, ought to have been 'bizarre' to say the least, for people who travel the length of the globe and spend a considerable amount of their hard-earned money to avail of ARTs that helped them have children, biologically their *own*, with a choice not to 'adopt' children to build a family in the first place.

The complications in legal determination of citizenship of children born through commercial gestational surrogacy, represents the inability of rigid legal statutes to constantly evolve with times. In international relations, it also represents the resilience of 'borders' even when the use of technology alters the way the globalised political economy is constituted and makes it 'transnational' in many senses.

**Hierarchies:** The evolution of India as a destination for commercial gestational surrogacy is also linked to an intersection of various hierarchies: global, regional and local.

In a personal interview Amit Karkhanis (2011), a Mumbai based medico-legal consultant who runs the firm Kay Legal specialising in transnational gestational surrogacy arrangements, admitted when asked why he ventured into this area, that transnational gestational surrogacy and ART industry can be characterised as a "luxury industry" which presents numerous opportunities for enterprising people in India. He, in fact poignantly characterised infertility as an 'elite disease', a disease which is not life-threatening, people from all classes might be affected by it but it is only the elite who can afford to do something about it. When there are people who are willing to go to such great lengths and India is distinguished world-over for the

skills of its doctors, it is easy to find women who are willing to be surrogates, the situation is conducive, according to him, to put India as a 'hub' on the world map for yet another service that can be outsourced here, just like the IT industry.

A critical reading of the brief yet comprehensive assessment of why the ART/commercial gestational surrogacy industry has evolved in India that Karkhanis (2011) has attempted above raises several issues that illustrate how this industry has emerged at the intersection of various hierarchies.

Firstly, it is about those who can 'afford' seeking to reproduce their own biologically children through commercial gestational surrogacy, and about those women who find an option of remunerated work in acting as commercial gestational surrogates. Clearly, there is a hierarchical relationship between the seekers and primary providers of the service of commercial gestational surrogacy who are at an advantaged and disadvantaged position respectively. If the women 'renting-out' their wombs are primary providers of the service, the medical practitioners in ART clinics are secondary providers and the medical tourism companies and lawyers, etc. are tertiary providers. The primary providers in this case then, are not only in a hierarchical relationship with the service seekers, but also vulnerable in a hierarchical relationship with the secondary and tertiary providers: they are at the mercy of the secondary providers for their health and well-being as well as determining their remuneration, while the tertiary providers also often influence their remuneration and related negotiations.

Secondly, the industry has evolved in a hierarchical international political economy where the seekers of the services that the ART/commercial gestational surrogacy industry can also be classified as follows:

a) Some seekers of these services come to India in order to get 'affordable' services as against their home countries in the global North. When the seekers are from the global North their choice of India as the destination reflects their desire to overcome legal barriers and/or inability to afford the service there, whereby the journey facilitates a shift in their position from disadvantaged to advantaged seekers.

b) There is another category of seekers of these services, the ones who come to India from other countries in the global South, and they do so to overcome their disadvantaged position in terms of non-availability of such technology and services in their home country. Their position illustrates the fact that access to technological innovation is not evenly distributed and there are 'epicentres' where innovations are concentrated. However, there exists a hierarchy between those who can afford to pay for overcoming the issues of access and those who cannot.

c) Yet another category of the seekers of these services is the Indian diaspora communities. Non-resident Indians often make a journey back to seek these services due to the affordability issue as well as the precarious legal situation in their country of residence. Their migration in the first place, (except the case of distress or forced migrants) is most generally governed by the availability of better educational and/or economic opportunities, however their journey back to India to seek commercial gestational surrogacy indicates the barriers they face in accessing services in their country of residence. Moreover, it also indicates one of various ways in which diasporic communities seek to maintain their ties with the place they emigrated from, in this case act of gestating their biological child in the body of a racially similar woman.

While analysing the citizenship complications arising out of surrogacy in Chapter 4, the research alluded to the resilience of border politics in the era of globalisation where in spite of greater movement of people and capital across borders in a transnational context facilitated by technology, some areas of 'high politics' like citizenship prove to be untouched by forces of globalisation. However, such a resilience of border politics does not preclude the opportunities that borders present to people. Hence, when commercial surrogacy is outlawed in particular territories it does not make it impossible for people to seek the services of a commercial surrogate even if that involves travelling beyond borders of those territories to such states where the laws are friendlier to such practices. Thus, in a globalised context with comparatively easier ways of international travel, outlawing commercial surrogacy in most countries of the global North does not translate into eradication of the practice; it has only led to emergence of new avenues where such practices have started flourishing.

Thirdly, the availability of highly skilled 'world-class' medical practitioners is a major reason why India has developed as a 'hub' for ARTs/commercial gestational surrogacy. However, the emergence of highly skilled practitioners in this particular specialisation when infertility is not really an epidemiological concern in India, is also in a context where the anticipated clientele is transnational, facilitated by a liberalised economic scenario and ambiguous yet permissive legal situation regarding commercial gestational surrogacy in India.

Fourthly, the rise of this industry is premised on the availability of women who would be willing to act as commercial gestational surrogates in India. While it may be legitimate to ponder upon what distinguishes India in this respect since there are many other parts of the world where women might be willing to act as surrogates, and hence arrive at an understanding that the permissive economic and legal environment, and the availability of skilled medical practitioners along with the availability of women willing to act as gestational surrogates, in combination make India a conducive place for the industry. It is nonetheless important to note that on the one hand, India makes a major contribution to the world's highly-skilled labour force, on the other hand a large part of its labour force remains in the unorganised sector, living under such constraining circumstances that for women various kinds of body-work and sexualised labour – sex work and now, gestation 'work' – emerge as 'better' options (Upadhyay 2000). For the medical practitioners, medical tourism agents and lawyers, venturing into the commercial gestational surrogacy is driven by a zeal to carve out a niche for themselves in their respective 'businesses' and continue this pursuit as a 'profession'. However, for the women who act as commercial gestational surrogates, gestating an implanted embryo in their wombs and earning remuneration for it can never be a sustainable livelihood option. They might do it for a couple of times in their lifetimes, putting themselves at health risks, but still there is a limit to a number of times a woman can carry a pregnancy in her reproductive life. A constrained environment in terms of livelihood options and survival needs pushes them to commercial gestational surrogacy, but can they earn enough so as to escape the possibility of getting pushed back into the same economically constrained environment, ever again? One does not need to be an accomplished economist to

figure out that it is highly likely that commercial gestational surrogacy cannot emerge as a panacea for such women as far as livelihood and remunerated work is concerned.

Thus, this research surveyed the broad area of feminist theorisations of IPE, globalisation and women's work, and explored how the case study of commercial gestational surrogacy in India might be insightful in illustrating some arguments that feminist make and also problematise them to a certain extent. The case study is also illustrative of how one can make feminist sense of IR/IPE by embarking on an exploratory journey of how 'the personal is international' and 'the international is personal'. The phenomenon of commercial gestational surrogacy represents the transnational movement of people in a globalised context to seek an avenue of biological reproduction with the help of technology. It also represents the constrained choices that women from disadvantaged and marginalised sections of the society in the global South are making in the hierarchical globalised international political economy.

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