The Law Commission & Surrogacy: A Critical Look at the 228th Report

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*The Law Commission of India, in its 228*th *Report, deliberated upon the issue of surrogacy in the year 2009 and included criticism of the Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2008 (hereinafter referred to as 'ART Bill'). This paper emphasises that an uncritical acceptance of the patriarchal stigmatisation of 'infertility' is a major driver of legal engagement with Assisted Reproductive Technologies (hereinafter referred to as 'ARTs') and surrogacy in India which are hailed as laudatory advancements in ameliorating the plight of the 'infertile'. Both the Draft ART Bill as well as the 228*th *Report echo this. However, there is a dissonance between the two as the former envisaged a legalisation approach whereas the latter recommended prohibition of commercial surrogacy and only legalising altruistic arrangements – a recommendation that the Government neglected in the updated Draft ART Bill, 2010. The paper also explores the resonances of the Law Commission's engagement with surrogacy through its examination of other issues such as inter-country adoption and the commercial availability of women's bodily work. The paper demonstrates how in the Law Commission's engagement with the issue of reproduction, whether through surrogacy or adoption, the authenticity of claiming affinities emanates from a privileging of perceived 'biological' connections. Moreover, in its engagement with the issue of women's bodily work being available in a market context, whether as 'prostitutes' or surrogates (both 'deviants' in a patriarchal context), the Law Commission constructs women as legal subjects in a way that shows the centrality of the 'heteronormative family' as an ideal.*

The issue of surrogacy has received legal attention in India since the 2000s coinciding with the increasing use of this practice as yet another mode

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of 'infertility treatment'. The Indian Council of Medical Research (hereinafter referred to as 'ICMR') began formulating guidelines on the use of ARTs, including guidelines on surrogacy in 2002, which were published in 2005[1] titled *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* (hereinafter referred to as 'ICMR Guidelines'). The ICMR also took note of surrogacy and laid down some guiding principles in its *Ethical Guidelines for the Biomedical Research on Human Subjects* in 2000 that was updated in 2006. In fact, the ICMR, under the aegis of Ministry of Health and Family Welfare (hereinafter referred to as 'MoHFW') is the institution primarily involved in the task of formulating a law to regulate ARTs in India prepared a Draft ART (Regulation) Bill first in 2008, which was subsequently updated in 2010 and 2013. The 2013 draft is not available in the public domain and is deemed a 'top secret' document as part of Cabinet notes.[2]

The 228th Report of the Law Commission of India on the *Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy* (hereinafter referred to as 'the 228th Report') was released in 2009 and thus came as a critique of and included recommendations on the Draft ART Bill, 2008. However, the subsequent Draft ART Bill, 2010 was a minor modification of its predecessor and hence, there remained a fundamental dissonance between the approach that the Government had and that which the Law Commission proposed. Recognising the merits of ARTs, the Law Commission of India recommended taking a 'pragmatic' legal approach – that of "prohibition" of commercial surrogacy but legalising altruistic surrogacy – so that surrogacy can be an available recourse for 'infertile' people while 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"[3]. The Draft ART Bills have taken the diametrically opposite approach and propose to legalise commercial gestational surrogacy.

It is important here to highlight at the outset that the 228th Report as well as the Draft ART Bills deal with a specific kind of surrogacy i.e. *gestational* surrogacy which has been made possible by innovations in ARTs, particularly the technology of In-Vitro Fertilization (hereinafter referred to as 'IVF'). With this technology, it is possible to fertilise the male and female gametes, i.e., the egg and the sperm, in a laboratory petridish and implant

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1 Aloke Tikku, *ICMR Has Not Delayed Surrogacy Law: R.S. Sharma*, Hindustan Times (March 25, 2013), http://www.hindustantimes.com/comment/interviewsnews/icmr-has-not-delayed-surrogacy-law-rs-sharma/article1-1031633.aspx, (last visited on Oct. 23, 2014). Full Text of the ICMR Guidelines is available at http://icmr.nic.in/art/art_clinics.htm (last visited on Oct. 28, 2014).

2 Anil Malhotra, *Ending Discrimination in Surrogacy Laws*, The Hindu, (May 3, 2014), http://www.thehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece, (last visited on Oct. 29, 2014).

3 228th Law Commission of India Report, ¶ 1.8 (2009).

the resulting embryo in the womb for gestation and birth. It thus facilitates the separation of three key elements involved in the human reproduction process – the egg, the sperm and the womb, making it also possible to substitute one or more 'bad'/ 'diseased'/'non-functional' element(s) in the case of a heterosexual couple with that of a gamete donor or surrogate womb. It is in such a context that the role of egg and/or sperm donors as well as women who act as surrogates comes into play. Moreover, in the contemporary milieu of an inter-connected global political economy, the donors and surrogates can even be sought out in a transnational context and far from donation and 'gift', their services are available for a fee in the market, often the reproductive tourism market. The women who act as surrogates are thus engaged in *commercial gestational surrogacy*, a practice distinct from what is known as traditional surrogacy – where a woman gives birth to a child as a surrogate or substitute for the woman in a heterosexual couple (i.e. the commissioning or intended parents) either by begetting a pregnancy through sexual intercourse with the man or through artificial insemination of his sperm – where she remains the genetic mother of the child. However, in gestational surrogacy she is said to have made no genetic contribution to the child and is arguably only a gestational carrier. Depending on whether the woman who acts as a surrogate does so for a fee or not, the practice is termed altruistic or commercial.

Commercial surrogacy presents an important avenue for feminist politics as it lies at the cusp of the reproduction-production dichotomy, whereby with the interference of technology, women's wombs are arguably performing productive functions in a market scenario through the act of 'giving birth' itself. The woman who acts as the surrogate makes the difficult choice of agreeing to an 'alien' pregnancy, through the implantation of a laboratory fertilised embryo in her womb with technological intervention. She often does not grasp fully what the technology entails, but agrees to a surrogacy or 'chooses' to be a surrogate in the face of economic distress. The surrogate is thus in a hierarchical relationship with the surrogacy 'industry' (which facilitates a surrogacy arrangement comprising a range of actors including doctors, lawyers, agencies and agents who recruit surrogates, etc.) and also with the clients, i.e., the 'commissioning parents', where she is in the least privileged position. How then, does the law intervene in surrogacy and how is the woman who acts as the surrogate framed in legal discourses? In the engagement between feminism and the law, analysing surrogacy opens an avenue to deepen the critique of how the law views reproduction, the meaning of 'having a family', women's work and an 'industry' that fundamentally alters an understanding of these issues. Using the 228th Report of the Law Commission as traction, this paper seeks to indicate the possible trajectories of exploring these questions and issues.

This paper is divided into three sections – the first concentrates on delineating the underlying assumptions and bases that have driven legal engagement

with ARTs and surrogacy in India. The second section examines the dissonance between the Draft ART Bills and the approach recommended by the Law Commission – that of prohibiting commercial surrogacy and legalising altruistic one – which is closely related to the way the Law Commission articulates discomfort with India's emergence as a favourable 'reproductive tourism destination'. The third section moves beyond the 228th Report to also analyse the broader approach of the Law Commission towards two central issues that surrogacy embodies – the question of reproduction and having a family, and, that of the availability of women's bodily work commercially. While the former is sought to be done through a comparative analysis of the 228th Report with the 153rd Report on Inter-Country Adoption (hereinafter referred to as 'the 153rd Report'), for the latter a comparative analysis is undertaken with the 64th Report on *The Suppression of Immoral Traffic in Woman and Girls Act, 1956* (hereinafter referred to as 'the 64th Report').

I. The Drivers of Legal Engagement with ARTs & Surrogacy

Legal engagement with ARTs and surrogacy in India – through the various instruments like the ICMR Guidelines, the Draft ART Bills, the Law Commission Report or even the cases that have reached the courts – has at its foundation at least two main drivers, notwithstanding the somewhat divergent trajectories that these texts may traverse. The first is the uncritical acceptance of 'infertility' as a disease that needs medical intervention in contrast to understanding it as a social condition of 'childlessness'. Continuous innovations in ARTs, including IVF, have also facilitated the possibility of gestational surrogacy which is sought to be viewed as one of the treatment modalities for some 'infertility patients'. Even though, such surrogacy arrangements are sought to be governed contractually, the way the law engages with them and the way medical practitioners execute them embeds the practice in the milieu of 'infertility treatment' where the woman who acts as the surrogate is reduced to a 'mere incubator'. The second driver is a concern or acknowledgement that the mushrooming of ART clinics in India is also a part of India's emergence as a favourable 'reproductive tourism destination' and when surrogacy arrangements are transnational in nature, some knotty issues around the citizenship of the child born out of such arrangements may arise and what should be India's approach in that regard. The two sub-sections below delve deeper into an examination of these two drivers.

A. Infertility as a 'Disease' and Surrogacy as 'Treatment'

The 228th Report of the Law Commission of India firmly recognises 'infertility' as a disease, which "as a medical condition is a huge impediment to the overall well-being of couples and cannot be overlooked especially in a

patriarchal society like India."[4] In such a context, surrogacy is considered "as a supreme saviour"[5] which is one of the possibilities brought forth by ARTs. The 228th Report hails the advent of ARTs as a boon accessible since the birth of the first IVF baby in 1978, who it wrongly described as the "world's first IVF boy"[6], when in fact Louise Joy Brown, the first IVF baby was a girl and the first IVF boy, Alastair MacDonald was born in 1979.

Explaining the rationale of engaging with the issue of surrogacy, the 228th Report lays down the following:

> *"Non-intervention of law in this knotty issue will not be proper at a time when law is to act as an ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto."*[7]

The take-off point for the 228th Report is the undisputed assumption of begetting a child with one's *own* genes as a 'positive entitlement' that the law needs to safeguard and ensure the distribution of. Such an understanding is closely linked to the emergence of a discourse around a 'right to procreate' or a 'right to found a family', often traced back to the Universal Declaration of Human Rights (1948)[8] as even the 228th Report does, or as the Draft ART Bill does in its Preamble, by an unqualified claim that it is a "fact that every couple has the right to have a child". Such a discourse is at the foundation of the multi-billion-dollar ART industry, of which commercial surrogacy is a part, which by espousing such a 'right' in effect *produces* its own clients. When understood as a social condition of childlessness, there have been many ways of dealing with 'infertility', like foster parenthood, and adoption (within or outside the 'family'). The rise of the ART industry has coincided with the growing understanding of 'infertility' as a *disease*, a medical condition that needs 'treatment' and has arguably led to a decrease in preference for social ways of dealing with childlessness in the form of practices like adoption as mentioned above. The ART industry cashes upon the patriarchal stigmatisation of childlessness and promises the 'pleasure of having one's *own* child', more in sync with the patriarchal premium on purity of bloodlines. The fact that the law effectively gives or *should* give an impetus to this industry is implicit when the 228th Report envisages the role of law "as an ardent defender of human liberty

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4 *Id*. at 6.
5 *Id*.
6 *Id*.
7 *Id*.
8 *See*, Article 16.1, Universal Declaration of Human Rights (1948).

and an instrument of distribution of positive entitlements"[9] and "if reproductive right gets constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection"[10].

The 228th Report reiterates, drawing from the ICMR Guidelines that, "surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the genetic parents."[11] It is noteworthy that the ICMR Guidelines as well as the above reference in the 228th Report mentions "genetic parents". In ¶ 3.10.1, the ICMR Guidelines say, "A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs". Hence, ARTs and gestational surrogacy provide an avenue to achieve the patriarchal 'ideal' of having a child which shares one's genetic makeup and is thus even legally and automatically one's 'own'. The law, while upholding this notion, concretises it further by giving credence to documenting the results of techniques like DNA fingerprinting to eliminate 'doubt', if any. Those who are unable to establish a 'genetic' claim are thus directed towards adoption, the 'other' option.

Therefore, parentage is sought to be clearly linked to shared genetic makeup rather than a bond of affinities and nurturance, in the law. This premium on a shared genetic makeup is an integral part of the patriarchal notion of family and kinship based on blood ties and children born within the heteronormative "wedlock". Thus, a child who has a genetic link but the fact of whose birth is through a surrogate womb needs to have legitimacy established in law. Therefore, the ICMR Guidelines in ¶ 3.12.1 state,

> *"A child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to a couple through sexual intercourse."*

This is further affirmed in the Draft ART Bill 2010 in § 34 ¶ 10 which states, "The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of individual/individuals who commissioned the surrogacy, as parents." This is in view of the fact that describing the legal parents as the commissioning or intended parents is more appropriate since in many cases an egg or a sperm donor is also or may be used in a pregnancy that the surrogate gestates. This update to defining parentage in terms of those who "commission" the child(ren) is a poignant indication – first, to the commercial and market aspect of this transaction, where a 'choice' is made in favour of

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[9] *Supra* note 3, at 7.
[10] *Id*., ¶ 1.10.
[11] *Id*. ¶ 1.14.

the expensive procedure of IVF and gestational surrogacy to ensure a genetic link to the child(ren), a choice which is made bypassing adoption. Second, it points to the fact that "notions of 'natural' and 'biological' are being put in place by Science, the sole discourse with the monopoly on defining the 'natural'"[12] as Nivedita Menon argues, and the law is a faithful ally in entrenching this monopoly.

B. Reproductive Tourism and Citizenship Issues

Given that commercial surrogacy in India often happens through transnational arrangements, whereby the commissioning parents are 'reproductive tourists' to India trying to escape stringent laws in their home countries and to cut costs, often determination of the citizenship of child(ren) born out of transnational commercial surrogacy arrangements becomes knotty. Various Indian courts, on many occasions, have directed the government to legislate on this matter to avoid such situations for infants. In ¶ 1.15 to ¶ 1.17, the 228th Report cursorily mentions two such cases the "Indian Baby M Case" and the "Israeli Gay Couple's Case".

The "Indian Baby M Case"[13] of 2008 was nothing like its American namesake of 1985. A surrogate mother in Gujarat gave birth to Baby Manji in July 2008 commissioned by a Japanese couple. However, before Baby Manji's birth the commissioning parents divorced and the commissioning mother refused to have anything to do with her since donor eggs had been used in her conception and she arguably shared no genetic links. The commissioning as well as genetic father who thus became a 'single man' was refused custody of the girl-child who then ran the risk of being rendered 'stateless'. In this context, 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.*[14]

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[12] Nivedita Menon, *The Disappearing Body and Feminist Thought*, Critical Encounters, http://criticalencounters.net/2011/02/19/the-disappearing-body-and-feminist-thought/ (last visited on Oct. 30, 2014).

[13] Manji Yamada v. Union of India, (2008) 13 SCC 518.

[14] Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, The Kenan Institute for Ethics at Duke University, http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf (last visited on Oct. 21, 2014).

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 child 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 ICMR as the child's counsel contended that in keeping with the ICMR Guidelines, the child 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.[15]

The Israeli gay couple's case that the 228th Report mentions relates to the requirement of the Israeli government for establishing parentage through DNA testing before issuing a passport and granting citizenship. Israel is not the only country with such a requirement, many others have the same requirement. For instance, in 2011 twin boys born to an Indian surrogate in Mumbai commissioned by a Norwegian single woman also ran the risk of 'statelessness' since they could not get Norwegian citizenship as 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 are recognised as the legal parents.[16] In 2010, an Israeli gay man, Dan Goldberg, was prevented from taking back his twins born to a surrogate in Mumbai, to Jerusalem.[17] As mentioned above, 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 incident 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.[18]

All these cases highlight the difficulties that can arise in the legal determination of citizenship in case of transnational arrangements of commercial surrogacy, underscoring the importance of having clarity in national legislation

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[15] *See* Press Trust of India, *Baby Manji to Unite with Dad in Japan*, India Today, (Oct. 31, 2008) http://indiatoday.intoday.in/story/Baby+Manji+to+unite+with+dad+in+Japan/1/19050.html, (last visited on Oct. 25, 2014); Venkatesan Vembu, *Rent-A-Womb Trend Is a Form of Neo-Colonialism*, DNA India, (July 24, 2010), http://www.dnaindia.com/india/interview_rent-a-womb-trend-is-a-form-of-neo-colonialism_1413754 (last visited on Sept. 14, 2014).

[16] Sumitra Deb Roy, *Divergent Laws Leave Twins Stateless*, The Times of India, (Feb. 2, 2011), http://timesofindia.indiatimes.com/india/Divergent-laws-leave-twins-stateless/articleshow/7407699.cms

[17] Pronoti Datta, *Surrogacy Goes into Labour*, Times of India Crest, (May 15, 2010), http://articles.timesofindia.indiatimes.com/2010-05-15/india/28282187_1_manji-yamada-gay-couples-law-commission-report, (last visited on Nov. 1, 2014).

[18] Jonathan Lis, *Netanyahu: Gay Father and Twins Must Be Allowed to Return to Israel*, Haaretz.com, (May 17, 2010), http://www.haaretz.com/news/national/netanyahu-gay-father-and-twins-must-be-allowed-to-return-to-israel-1.290847, (last visited on Sept. 29, 2014).

regarding this issue with foremost attention to the rights of the child as well as the surrogate mother since under no circumstance should she be forced to take care of an abandoned child. As mentioned above, since the legal approach towards parentage is strongly linked to 'genetic links' and the woman who acts as the surrogate is not recognised as a legal parent, the children born out of transnational commercial surrogacy arrangements in India do not have a claim to Indian citizenship. In this regard, the Ministry of Home Affairs has issued a series of notifications since July 2012 linking commissioning of a surrogacy in India by foreigners to the requirement of a 'medical visa' which is to be issued only when a letter is produced from an appropriate authority from the home country certifying that the children born out of surrogacy would be taken back as 'biological' children of those who commission them[19].

II. The Dissonance Between Law Commission Recommendations and The Draft ART Bills (2008 & 2010) Regarding Surrogacy

In as much as the approach towards ARTs in general and surrogacy in particular is celebratory and lauding the technological advancements in 'infertility treatment', there is no dissonance between the 228th Report and Draft ART Bills. The dissonance lies in what the 228th Report considers as the "correct use" of surrogacy and how in its opinion, the Draft ART Bill 2008 should "relinquish the cocooned approach to legalization of surrogacy adopted hitherto"[20].

In contrast to the approach taken in the Draft ART Bill 2008, the 228th Report recommends that only altruistic surrogacy be legalized while commercial surrogacy be prohibited or banned. This recommendation was not accepted and the Draft ART Bill 2010 also retained the thrust towards legalization of commercial surrogacy. The overarching argument regarding surrogacy in the 228th Report seems to be that surrogacy, per se, is not a problematic practice but in fact a boon for the 'infertile', the problem is its commercialization, it is acceptable when done altruistically with "reimbursement of all reasonable expenses for carrying the child to full term"[21] to the surrogate.

In ¶ 1.8, the 228th Report highlights the possible "moral issues" vis-à-vis surrogacy as "commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money. Sometimes, psychological considerations may come in the way of a successful

[19] *Instructions Relating to Foreign Nationals Intending to Visit India for Commissioning Surrogacy*, Ministry of Home Affairs, (July 9, 2012) http://mha1.nic.in/pdfs/Surrogacy-111013.pdf (last visited on March 9, 2015).

[20] *Supra* note 3, at 7.

[21] *Id*. at 25.

surrogacy arrangement." Commercial or not, the problems highlighted here can arise out of all kinds of surrogacy arrangements. The contract on which a surrogacy arrangement is based can also be debated upon for its enforceability. However, the 228th Report does not go into those aspects but recommends in ¶ 4.2 [1] that,

> *"Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes."*

Here, the 228th Report affirms the way the Draft ART Bill 2008 upholds the enforceability of surrogacy contracts in accordance with the Indian Contract Act, 1872. However, it laments the fact that the Draft ART Bill 2008 does not adequately lay down a redressal mechanism for grievances that may arise which would need specialised attention. This issue was brought to the notice of the Law Commission through a seminar on "Surrogacy – Bane or Boon" where the merits of the Draft ART Bill 2008 were debated, and the 228th Report cited the major discussion points from this seminar in its § III and seems to attest to the possibility that "if a specialized court called 'Surrogacy Court' is created, it could comprehensively look at all the above problems for adjudicating disputes" in ¶ 3.3. No such provision for a specialized court was included in the Draft ART Bill 2010. It is evident then, that by recognising the validity of a surrogacy contract, the Law Commission intends to set aside the moral issues it enlisted as mentioned above and views a surrogacy contract as any other entered into by two consenting parties. It is puzzling therefore why it opines that somehow a commercial arrangement is more problematic and the absence of a commercial transaction ensures the 'purity' of a surrogacy arrangement, and this issue merits discussion at some length.

An aspect of the altruistic versus commercial surrogacy debate is the assumption that commercial surrogacy is in some senses 'baby-selling' and also exploitative towards the woman who acts as the surrogate. It is possible to critique this argument in a two-pronged way. One, that commercial surrogacy is no more or no less exploitative than any other 'work'[22] and more so when a surrogate, like the sex-worker is located in the larger context of the conditions that unorganised labour faces in the contemporary economic scenario. Two, that altruism in the context of surrogacy reaffirms women's reproductive labour as a 'free' resource available for consumption within the family. Feminists have foregrounded how historically women within the family or the household have

[22] *See* Martha Nussbaum, Sex and Social Justice, (1999).

been coerced in multiple ways to be traditional surrogates as 'second' wives or 'maids', and questioned why should it then be assumed that women in the family will not be coerced into gestational surrogacy as well. Janice Raymond argues,

> *"Reproductive gift relationships must be seen in a political as well as a familial context. Egg donation, the giving of fetal tissue, and non-commercial surrogacy cannot be treated as pure acts of altruism; moral meaning and public policy should not be governed by the mere absence of market values. But moral meaning and public policy should be guided by the specificity of gender. What does this mean? For one thing, it means that any ethical or legal assessment of reproductive gifts* begins *with the realization that women are both gift and gift giver. The validation of altruistic surrogacy, on the level of public policy, leaves intact the image and reality of a woman as a* reproductive conduit […]"[23] (emphasis in original).

In this sense, merely arguing for a prohibition on commercial surrogacy while celebrating surrogacy when altruistic, shrouds the patriarchal "essentializ[ation] [of] the role of women as *mothers for others*"[24] (emphasis in original).

However, it would not be correct to discern that the Government's rejection of this recommendation of prohibiting in favour of legalisation of commercial surrogacy is a reflection of an understanding of the issues highlighted above. This dissonance between the Government's approach and the recommendations of the Law Commission is better located in an understanding of how these arrangements are facilitated by the 'industry'. The twelve-member committee that has prepared the Draft ART Bill 2010 consists of four private-sector ART practitioners, who have arguably informed the drafting process with the ways in which the commercial surrogacy industry functions. The practice of altruistic surrogacy is possible when undertaken within a family or with the involvement of friends; it is then a 'gift' from the surrogate 'out of love' for her 'infertile' relatives/friends and such arrangements also take place. In interviews that I have conducted with doctors, lawyers, agents and surrogates themselves in Mumbai and Delhi it often emerges that in most cases it is very difficult for a commissioning parent to find a 'known' surrogate who will do it altruistically for them. It is argued that it is only women who are in dire need of money agree to a gestational surrogacy – which entails massive medical intervention in the surrogate's body in terms of hormonal injections, various medicines and tremendous counselling in order to physically and mentally prepare the surrogate for an induced pregnancy using ARTs. Apart from non-willingness of women who are known to the commissioning parents to

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[23] Janice G. Raymond, Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom 56-57 (1993).

[24] *Id*. at 58.

be a surrogate for them, there is also the issue of non-willingness on the part of the commissioning parents to involve someone in the family which might result in emotional complications arising due to the proximity that the child born out of surrogacy will have with the woman who acted as the surrogate while growing up and in many cases, the commissioning parents do not wish to share the fact that the child is born out of surrogacy among their family. Moreover, a major part of surrogacy arrangements in India are transnational in nature, the foreigner commissioning parents come to India for various reasons like the permissive legal environment and lower costs but also for the anonymity that a distant country provides – which is not to say it is always the case, but it remains a factor.

Therefore, the law on surrogacy in India, by and large, as it evolves alongside the growth of the 'industry', mirrors the assumptions, requirements and practices that are already prevalent. The only justification otherwise that one could discern as to why the Law Commission recommends a prohibition on commercial arrangements but does not see any problems with the practice of surrogacy as such, is that in outlining moral issues regarding commercial surrogacy, it sees the practice as an instance of "poor women in underdeveloped countries who sell their bodies for money" as it mentions in ¶ 1.8 with an implicit parallel to sex-work. A critique of the engagement that the Law Commission has had with respect to women 'sell their bodies for money' allows for an interesting analysis of such women as legal subjects, an exercise undertaken in the next section.

Another possible explanation of the problem that the 228th Report finds with commercial surrogacy lies in the fact that the Law Commission took up the matter *suo motu* for examination due to the growing popularity of India as a "reproductive tourism destination" which it explains in ¶ 1.7. It notes that for a commercial surrogacy arrangement,

> *"The usual fee is around $25,000 to $30,000 in India which is around 1/3rd of that in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice. ART industry is now a 25,000 crore rupee pot of gold. Anand, a small town in Gujarat, has acquired a distinct reputation as a place for outsourcing commercial surrogacy. It seems that wombs in India are on rent which translates into babies for foreigners and dollars for Indian surrogate mothers."*

The way reproductive tourism is explained here, clarifies that in the 228th Report, the Law Commission is uncomfortable with the arrangement that leads to foreigners getting children through commercial surrogacy

arrangements with Indian women which resonates with the possibility of "exploitation of poor women in underdeveloped countries who sell their bodies for money" as outlined in ¶ 1.8. The (im)morality of women bearing children for a remuneration figures prominently in legal discourses worldwide (which the 228th Report seems to draw upon[25]), and 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 one of the surrogacy cases that also involved complication around determination of citizenship 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"[26] (emphasis added). In the same hearing they also objected to identifying surrogacy as an "industry" in the country by the Law Commission of India in its 228th Report, and noted "with all due respect to the Law Commission, how can they call something with regard to children as an industry?"[27] 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 or what their working conditions are, but in fact are expressing concern whether some women of '*our*' country are complicit in the 'morally abhorrent' 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 possibly could have been different if it were only '*our*' people involved. This point is clear from the arguments made by the then Solicitor-General of India Gopal Subramanium in the same case, who submitted,[28]

> *"[…] 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."*

That an issue acquires a different dimension altogether, when it is foreign nationals and Indian children in question, is evident if one explores the debate on inter-country adoptions which was the subject addressed in the Law Commission's 153rd Report which will be examined in the next section.

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[25] *Supra* note 3, at 11-14, ¶ ¶ 1.8 - 1.14.

[26] Krishnadas Rajagopal, *SC Enters Surrogacy Debate, Asks If An Indian Baby Is A 'Commodity'*, The Indian Express, (Dec. 16, 2009), http://archive.indianexpress.com/news/sc-enters-surrogacy-debate-asks-if-an-indian-baby-is-a--commodity-/554760/.

[27] *Id*.

[28] *Id*.

However, it is important to emphasise that the Draft ART Bill 2010 does not seem to be as bothered with the involvement of foreign nationals as the Law Commission, and in fact is geared towards promoting India as a medical tourism destination in general and reproductive tourism destination in particular. That it does not only refer to Indian citizens availing of the facilities at ART Clinics and in fact is drafted with the implicit understanding that surrogacy services are being availed by foreign nationals in India, is clear from the way it defines a "married couple" as "two persons whose marriage is legal in the country/countries of which they are citizens"[29]. In §35 ¶ 8 it declares that, "if a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen." In §34 ¶ 19, the Draft ART Bill 2010 seeks to further establish certain safeguards with regard to foreigners accessing surrogacy in India. It lays down that they need to "appoint a local guardian" "legally responsible for taking care of the surrogate" in terms of ensuring that her expenses are covered and she receives the agreed monetary compensation and also in case "[i]f the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party". The Draft ART Bill 2010 in §34 ¶ 19 further lays down that foreigners must also produce documentation from the authorities of their residence assuring that surrogacy is permitted and the children born through surrogacy will be recognised and permitted entry as the foreigners' "biological" children even if donor gamete was used.

III. Locating The Resonances of Engagement with Surrogacy vis-à-vis Other Law Commission Reports

With the objective of moving towards a holistic understanding of the Law Commission's engagement with surrogacy, this section aims to examine at some length, the 228th Report in comparison to other reports by the Commission on related issues. The phenomenon of surrogacy embodies at least two broad issues. Firstly, that it is a non-conventional mode of 'having a family', in as much as it entails begetting a child that has not been 'given birth to' by the person/couple with which it grows up, notwithstanding the 'genetic link' aspect and in that sense, there exists a parallel between surrogacy and adoption. In India, surrogacy arrangements often involve transnational reproductive tourists, a cause of some discomfort for the Law Commission as highlighted above. It is thus, interesting to undertake a comparative analysis between the 228th Report on surrogacy and the 153rd Report on inter-country adoption which has been done in the first sub-section below.

Secondly, commercial surrogacy involves the availability of women's biological reproductive labour or gestational capacities in a market context. That

[29] Draft ART (Regulation) Bill, 2010, §2 ¶ v.

the Law Commission finds women having to "sell their bodies" particularly abhorrent arguably mainly for moralistic reasons has been highlighted above and moreover, the Commission has also engaged with issue in another context, that of 'immoral traffic in women and girls' in its 64th Report. This Report is analysed in comparison with the 228th Report on surrogacy, in the second sub-section, with the broader objective of exploring the Law Commission's engagement with the commercial availability of women's bodily work.

A. Inter-Country Adoption & Transnational Surrogacy

Like in the case of surrogacy that was the subject matter of the 228th Report, the issue of inter-country adoption in the 153rd Report was also taken up for study, *suo motu* by the Law Commission. Both the Reports were placed before the Ministry of Law in a context of the absence of any law governing the subject matter. While the 228th Report included a critique of the Draft ART Bill 2008, the 153rd Report commented on the Adoption of Children Bill 1980 that had since lapsed after its introduction in the Lok Sabha and included the draft of a legislation titled "The Inter-Country Adoption Bill" which the Law Commission formulated as a recommendation for enactment on this issue. No such Act has been legislated upon by the Government and till date, there is no concrete legislation governing this area. Both the reports recommend that the birth certificate of the child bears the name with whom the child grows up i.e. adoptive parents in the case of the 153rd Report[30] and commissioning parents in the case of 228th Report[31].

Compared to the 228th Report, the 153rd Report is much more rigorous in terms of methodology. As is the general trend with Law Commission Reports, a questionnaire method[32] is adopted to generate empirical data on the given issue by circulating it among relevant agencies and organisations; the 153rd Report too has been prepared following the same method. The 228th Report, apart from summarising some deliberations at a seminar on surrogacy, as mentioned earlier, does not contain any insights that are inferred from wide ranging consultations or opinions of other relevant agencies/organisations and contains no such note of the methodology adopted to arrive at the empirical data it cites.

While the 228th Report begins with noting the plight caused to those who suffer from 'infertility' and how surrogacy is a "saviour", the focus of the 153rd Report is the children who are given for adoption, the plight that they face and how "adoption of Indian children by foreigners has given rise to

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[30] 153rd Law Commission of India Report, (1994) ¶ 7.6.

[31] *Supra* note 3 at ¶ 4.2.

[32] Lotika Sarkar, National Specialised Agencies and Women's Equality: Law Commission of India, (1988).

malpractices"[33] such as trade in children for domestic servitude, forcing them into prostitution or beggary, etc. The 153rd Report notes that,

> *"In India, adoption is not popular and the adopter generally chooses a healthy and fair male child. Girls are not usually taken in adoption. Foreigners on the other hand, do not have any reservation about sex, colour of the skin or state of the child's health."*[34]

In spite of taking a positive view towards the supposedly somewhat egalitarian attitude of foreigners in general, the 153rd Report does not have a generally approving tone towards proactive encouragement of inter-country adoption of Indian children. The overall view in the 153rd Report is that there is no harm in foreigners adopting Indian children "if it is not possible to provide to them in India decent family life where they can grow up under the loving care and attention of parents and enjoy the basic necessities of life."[35] It further emphasises that the top priority should be to "find adoptive parents for the child within the country"[36] citing better scope of assimilation. The second priority is to non-resident Indians, "failing which to foreign parents"[37] as the conditions in orphanages due to the overall socio-economic conditions in the country often result in "a life of a destitute, half-clad, half-hungry and suffering"[38] for children in such orphanages and a life with adoptive parents will be for their "welfare"[39]. The 153rd Report emphasises on the need for regulation "with a view to eliminating profiteering and trafficking in children and preventing abuse and exploitation of children by foreign parents and above all ensuring the welfare of the child proposed to be given in adoption."[40] As a primary safeguard, ¶ 7.10 of the 153rd Report recommends that "if the law of the foreigner's country does not provide for adoption, then he should not be entitled to adopt an Indian child." Moreover, in ¶ 7.12 it recommended that an Indian citizen be appointed as the representative of the "sponsoring foreign child welfare agency" to understandably coordinate the procedures in India.

It is interesting to note that in the 153rd Report, the Law Commission notes that "...biological parents provide the best family environment for the full growth and development of a child. [...] adoption ... is the best substitute for the biological family."[41] Further, in the 228th Report it specifies, "One of the intended parents should be a donor as well, because the bond of love and

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[33] *Supra* note 30 at ¶ 1.8.
[34] *Id*. at ¶ 1.7.
[35] *Id*. at ¶ 1.5.
[36] *Id*. at ¶ 1.6.
[37] *Id*. at ¶ 1.6 (the first choice as Indian, second as NRI and last foreigners as adoptive parents is reiterated in ¶ 7.2).
[38] *Id*. at ¶ 1.6.
[39] Not, "best interest of the child", but indeed "welfare".
[40] *Id*. at ¶ 7.1.
[41] *Id*. at ¶ 7.2.

affection with a child primarily emanates from biological relationship."[42] The use of the term 'donor' here implies the contribution (donation) of gametes (either egg or sperm) by either of the intended parents and in this paragraph, the Law Commission has also emphasised that in case of the intended parent being single, he/she must have contributed gametes to have the surrogate child. Thus, the "right to found a family", that is one of the core principles on which ARTs and surrogacy are hailed as a boon in the 228th Report, is not just any 'family' but the assumption that an ideal 'family' is one that is 'biological'[43] is masked behind the unqualified way in which a 'family' finds mention in the Law Commission Reports. In the fifteen intervening years between 1994 and 2009 when the Law Commission presented the 153rd and 228th Reports, respectively, there has been a mushrooming of ART Clinics in India along with the increasing prominence of commercial gestational surrogacy as also an option for the 'infertile'. It is not far-fetched to argue that even though the 153rd Report hails adoption as second-best to a "biological family", the 228th Report reflects the dislodging of adoption as a means to create families and the concretisation of 'infertility' treatment industry that bears the promise of helping achieve the ideal – a 'biological' family, even if it involves availing of the womb of an unrelated woman for gestating a genetically 'own' child.

B. Commercial Availability of Women's Bodily Work

A survey of the titles of all the reports of the Law Commission shows that apart from the 228th Report on surrogacy, in at least one of its other reports it has engaged with the issue of the availability of women's bodily work in a market context - in its 64th Report on *The Suppression of Immoral Traffic in Women and Girls Act, 1956*. It is important to emphasise here that the Law Commission is not necessarily analysing a form of paid bodily labour of women in clear terms but rather the availability of women in the market 'for sale' or 'for hire' in particular contexts. However, when viewed from a feminist perspective, the Reports shed light on the way women are framed and constructed as subjects of the law by the Commission.

In its 64th Report, the Law Commission deliberates upon "prostitution" as "a social evil"[44] and puts forth recommendations for amendments in The Suppression of Immoral Traffic in Woman and Girls Act, 1956. It historically looks at legislative engagement with prostitution and also undertakes a comparative study of the legal approach in various countries worldwide and notes

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[42] *Supra* note 3, ¶ 4.2.

[43] However, specifically what is implied by the Law Commission is 'genetic' since the act of gestation is also 'biological' but not accorded equal credence as genetic ties through contribution of egg or sperm.

[44] 64th Law Commission of India Report, (1975) ¶ 1.3.

that all legal efforts at stopping prostitution have "always proved abortive"[45] and hence prostitution continues to be "tolerated as a necessary evil"[46].

It is important to note, here, that in legal texts the use of the term 'prostitute'/ 'prostitution' in contrast to sex-work implicitly contains the understanding that all women in prostitution are forced into it or 'trafficked', for sexual exploitation and thus are victims. However, in contrast, the use of the term sex-work and sex-worker for the women who participate in it reflects an understanding where the women are viewed as rights-bearing agents who can then talk about their conditions of work and make a move towards negotiating the stigma attached to their work by affirming themselves as such. While the 'prostitute' continues to exist within the discursive space of exploitation, victimhood and denigration, the use of the term 'sex-worker' puts her in the discursive space of livelihood strategies in the face of economic vulnerability, and as an agent who may or may not be beyond exploitation just as any other person in any other job.[47] Sex-workers in India have collectivised and unionised[48] and though their voices remain at the margins, they continue to emphatically argue against the conflation of 'trafficking' and sex-work. They condemn trafficking as a form of violation of human rights, but also argue that all sex-workers are not necessarily trafficked, or even if their entry into sex-work was forced, they may not necessarily wish to get out of it. This relates to the policy of rescue and rehabilitation which has been critiqued by sex-workers' collectives for the coercion, dismal state of the 'homes' they are rescued into and the economic non-viability for the women to leave sex-work that this rescue-rehabilitation discourse masks. Some feminist scholarship also focuses on understanding sex-work within the larger context of poverty, distress migration as well as an issue located in the broader context of unorganised labour[49]. However, this debate is much nuanced, not just among feminists and non-feminists but there are multiple views on the 'prostitute versus sex-worker' debate even among feminists[50] and it is beyond the scope of this paper to explore it in depth.

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[45] *Id*. at ¶ 1.7.

[46] *Id*.

[47] *See* Martha Nussbaum, Sex and Social Justice (1999).

[48] For example, Durbar Mahila Samanwaya Committee based in Kolkata, West Bengal (See http://durbar.org/) and Veshya Anyay Mukti Parishad based in Sangli, Maharashtra (See http://www.sangram.org/)

[49] *See* Prabha Kotiswaran, Dangerous Sex, Invisible Labor: Sex Work and the Law in India, (2011); Svati P. Shah, Street Corner Secrets: Sex, Work, and Migration in the City of Mumbai, (2014); and, Srilatha Batliwala, *The Feminist and the Sex Worker: Lessons from the Indian Experience*, Himal Southasian, (Aug. 2010), http://himalmag.com/component/content/article/241-the-feminist-and-the-sex-worker-lessons-from-the-indian-experience.html, (last visited on Nov. 13, 2014).

[50] *See* Gloria Steinem, *Body-invasion is Dehumanising*, The Hindu, (Apr. 6, 2012), http://www.thehindu.com/news/national/body-invasion-is-dehumanising/article3287212.ece, (last visited on Nov. 12, 2014); Kumkum Roy, *Need for a Nuanced Debate*, The Hindu, (Apr. 6, 2012), http://www.thehindu.com/news/national/need-for-a-nuanced-debate/article3287164.ece, (last visited on Nov. 12, 2014); and Shohini Ghosh, *Moralistic Assumptions*, The Hindu, (Apr. 6, 2012),

Lotika Sarkar, in her 1988 study on the Law Commission, analysed the 64th Report as the first "women-specific" report which was undertaken to mark the International Women's Year in 1975. She notes that the recommendations of the 64th Report were "completely ignored by the Government"[51] and the new legislation, renamed as the Immoral Traffic (Prevention) Act, 1956 rejects the "suppression" approach to address 'prevention'. The 64th Report recommended that the term 'prostitution' be defined as "the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind, and whether offered immediately or otherwise, and the expression 'prostitute' shall be construed accordingly."[52] The penal provisions contained in the legislation apply on those who keep or manage a brothel or assist in doing so[53] as well as all "person[s] over 18 years who knowingly live on the earnings of prostitution"[54]

It is noteworthy that in this recommended definition, the woman is viewed as an individual engaging in an act out of her own free will which is clearly not in consonance with the "social evil" understanding that the 64th Report emphasises when it says "being a threat to the family as an institution, and a means of exploitation of females, prostitution is a social evil which leads to social injustice"[55]. On one hand, the Commission's is of the view that "the institution of prostitution is the external manifestation of the failure of man to control his animal will within the limits set by the institution of marriage."[56] On the other hand, the recommended definition of 'prostitution' squarely puts the woman acting as the 'prostitute' as the deviant subject who engages in 'promiscuous' sex 'for hire'. On a similar note, Lotika Sarkar pointed out the Commission's "reluctance to deal with the 'indulgence of the male' in prostitution" and its declaration that "the question goes much beyond the present scope of the Act, and it would mean making a radical departure. Their recommendation is that 'if desirable' it could be dealt with separately."[57] The contradictions in the understanding on which the Commissions' recommendations are premised upon, and the recommendations themselves, is apparent.

In a conventional patriarchal understanding, both the sex-worker and the woman who acts as the surrogate are *substituting* the 'wife' and can thus be viewed as deviants and outliers to the moral boundaries of marriage and family. It is interesting how the 64th Report bases its understanding of 'prostitutes' somewhat contradictorily as women who are victims entrapped in a social evil

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http://www.thehindu.com/news/national/moralistic-assumptions/article3287109.ece, (last visited on Nov. 12, 2014).

51 *Supra* note 32 at 46.

52 *Supra* note 44, ¶ 4.26.

53 *Id*., ¶ 5.1.

54 *Id*., ¶ 5.4.

55 *Id*., ¶ 1.3.

56 *Id*., ¶ 1.5.

57 *Supra* note 32 at 49.

where sex is bought and sold outside the permitted social limits of marriage, but also as promiscuous agents selling sex. The 228th Report similarly privileges marriage and kinship based on 'blood-ties', thus views 'infertility' as a problem but the woman who acts as the surrogate is benevolent in furthering the patriarchal project of begetting an heir. The woman who acts as the *gestational* surrogate is further exonerated from the disgust that a 'prostitute' possibly evokes since she is a 'mere incubator' in the scheme of ARTs and her "embodied labour" is not 'recreational' but for procreation – which is privileged in the modern understanding that the law is embedded in. Thus, while the 'prostitute' woman figures prominently in the deliberations of the 64th Report variously as a victim, a promiscuous agent and one in need of rescue and rehabilitation, the discussions in the 228th Report effectively invisibilises the agency of the woman who acts as the surrogate whose consent needs to be supplemented by her family to maintain the 'purity' of the arrangement. However, the victim trope is evoked even for her while viewed as a "poor woman in an underdeveloped country" that is emerging as a reproductive tourism destination and thus potentially vulnerable to exploitation by foreigners. Even though the provision for a life insurance cover for her is recommended, the potential vulnerability emerging from excessive medical intervention in her body to induce an alien pregnancy is not sought to be emphasised. Such an approach is in sync with the uncritical acceptance of technological innovations like ARTs which purportedly provide a solution to 'infertility' which is a problem and thus understood as a 'disease' in a modern patriarchal context that privileges a 'genetic link' for parentage over other means towards parenthood like adoption. In such a context, the body of the woman who acts as a surrogate is providing a benign service in the milieu of ARTs and hence, despite 'substituting' the 'wife', is not regarded as an outlier to be rescued and rehabilitated.

IV. Conclusion

In conclusion, while legal engagement with surrogacy in India may be a 'new' phenomenon, the attempt in this paper was to demonstrate how a feminist engagement with the issue can draw upon the parallels that exist with the issues that have been of concern in other areas. Despite a 'new' area, the law in general, and the 228th Report of the Law Commission in particular, employs similar patriarchal tropes to construct the woman who acts as a surrogate as a subject of law. The voice and agency of the woman who acts as a surrogate is effectively rendered invisible in a discourse that is overshadowed by an understanding of 'infertility' as a disease in a patriarchal context that stigmatises and disincentivises childlessness variously. Such a discourse privileges exploring ways of begetting one's *own* child with a shared 'genetic link' over other social ways of having a child like adoption. As one of the very few countries in the world where commercial surrogacy arrangements are not illegal, the law in India is evidently evolving in tandem with a booming industry which is able to influence the process of law-making in a way that the thrust is

towards codification of various practices within the industry that have already informally evolved e.g. move towards providing legal sanctity to 'agencies' that "supply" women who act as surrogates in the Draft ART Bills and even though the overall thrust of the Law Commission's recommendations is to prohibit commercial arrangements, the 228th Report does not specifically critique this aspect of the emergence of such 'agencies'. It is imperative that a feminist engagement in this area be geared towards a multi-pronged critique of patriarchal underpinnings of the Science-Market nexus which propels the surrogacy industry.