

Global justice, capabilities approach and commercial surrogacy in India

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Abstract Inequalities, ineffective governance, unclear surrogacy regulations and unethical practices make India an ideal environment for global injustice in the process of commercial surrogacy. This article aims to apply the ‘capabilities approach’ to find possibilities of global justice through human fellowship in the context of commercial surrogacy. I draw primarily on my research findings supplemented by other relevant empirical research and documentary films on surrogacy. The paper reveals inequalities and inadequate basic entitlements among surrogate mothers as a consequence of which they are engaged in unjust contracts. Their limited entitlements also limit their opportunities to engage in enriching goals. It is the role of the state to provide all its citizens with basic entitlements and protect their basic human rights. Individuals in India evading their basic duty also contribute to the existing inequalities. Individual responsibilities of the medical practitioners and the intended parents are in question here as they are more inclined towards self-interest rather than commitment towards human fellowship. At the global level, the injustice in transnational

commercial surrogacy practices in developing countries calls for an international declaration of women and child rights in third party reproduction with a normative vision of mutual fellowship and human dignity.

Keywords Commercial surrogacy · Inequalities · Global justice · Capabilities approach · Responsibility · Human dignity

Global and state inequalities

Inequalities in human development and gender indicators are evident in India as well as at a global level. The Human Development Report (HDR) places India at a 135th rank, among the ‘medium development’ countries (UNDP 2014). Although malnutrition is slowly declining, nearly half of India’s children under 3 years of age are malnourished (NFHS 2007). In 2005–2006, more than half of the women in India aged 15–49 years suffered from anaemia (55.3 %), an increase of three percentage points over 1998–1999 (NFHS 2007). In the backdrop of this, commercial surrogacy in India is steadily growing also reinforcing some of the existing inequalities. The growing demand for surrogacy in the circumstances of ineffective governance and existing inequalities makes India an ideal environment for global injustice in the process of commercial surrogacy. This paper draws on the ‘capabilities approach’, to examine possibilities of equality and mutual fellowship in the context of commercial surrogacy in India.

Although overall inequalities in India are reducing over a period of time, great differences continue to remain. Poverty in India has reduced over time due to an increasing public spending and poverty eradication programs. India has also recently started a welfare program of cash payout

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for the poor. However, according to official figures 267 Million (22 %) of the total population in India presently live below the poverty line (NSSO 2013). The McKinsey Global Institute (MGI) developed a revised analytic index, the 'Empowerment line' which estimated that 680 million (56 %) of the population lacks the means to meet their essential needs (Gupta et al. 2014). The same report also estimated that only half of the total public money spent on basic services actually reached the beneficiaries with much of it lost to inefficiency or corruption (Gupta et al. 2014). Without reforms in political will, ineffectiveness of governance would constrain future impact of public spending resulting in a very slow decline of poverty in India. While India has shown considerable improvement in literacy levels (65–74 % between 2001 and 2011) and school enrollment due to the Sarva Shiksha Abhiyan (SSA 2015) and the Mid-day Meal programme in the last 10 years; the Census 2011 household data shows one in ten households still doesn't have even a single literate member (Census of India 2010). Only 57 % of India's population participated in the labour force (Gupta et al. 2014). Gender inequalities in India is evident in the low female labour force participation rate (32 %) which according to records is stagnating (NSSO 2013), high female school dropout rates at primary (27 %), elementary (40.6 %) and secondary (49.3 %) levels (Census of India 2010), and decreasing sex ratio (0–6 age group) from 962 in 1981 to 914 girls every 1000 boys in 2011 (Census of India 2010).

Ineffective governance in India is also reflected in the commercial surrogacy practices. The official registration of IVF clinics in India is inconsistent as records reveals that many clinics remain unregistered. According to a recent ICMR report only 140 IVF clinics in India have been registered (ICMR 2015). However some years ago according to the National Commission for Women, there were about 3,000 clinics across India offering surrogacy services (Kannan 2009). Almost a decade ago it was estimated that approximately 30,000 infertility clinics in India had the potential to offer surrogacy services (Krishnakumar 2003). Hence the record of the number of clinics, surrogate mothers or the number of children born through this process in India is inadequate. Record from one of the most popular clinics in Western India boasts of the birth of more than 500 babies through surrogacy until 2014. According to a recent estimation the surrogacy business in India accounts for a 2.3bn Dollar yearly return (Perappadan 2014). Inequalities are reinforced in Assisted Reproductive Technology (ART) Bill, which is inclined towards the medical private sector's interests. While many other countries have clearer and stringent laws imposing stricter surrogacy circumstances, the ART Bill in India is unclear in its clauses and ineffective in implementation. Surrogacy is cheaper in India and the

surrogate mothers¹ have comparatively lesser rights over the child, over their body, lesser legal and psychological support, receive a lesser share of the total surrogacy costs and are not safeguarded with medical/life insurance. All these factors and differential regulations on surrogacy abroad have led to a steadily increasing demand for surrogacy in India creating an ideal situation for global injustice (Fig. 1).

This paper draws on the 'capabilities approach' from Sen's (2009a) 'Idea of Justice' and Martha Nussbaum's (2004) input to this approach with an aim to examine possibilities of equality and mutual fellowship in the context of transnational commercial surrogacy in India. For this purpose, the paper draws on my research conducted between 2009 and 2010 supplemented by the empirical research of Amrita Pande, Kalindi Vora, SAMA Group and CSR because these studies are some of the main social science empirical research that has been conducted on transnational commercial surrogacy in India (Saravanan 2009–2010, 2013; Saravanan and Ranadive 2010²; Vora 2009; Pande 2010, 2011; SAMA 2012; CSR 2012). Amrita Pande has focused on how surrogate mothers explain their work as labour in the context of social stigma from a sociological perspective, while Kalinda Vora examines surrogacy as a vital energy and disaggregation of motherhood from an Anthropological perspective. Both the CSR report and that of the SAMA group use descriptive research methods to develop a comprehensive legal framework for regulating the ART industry in India. Additionally material from the documentary films produced in my research and SAMA Group titled 'Anonymous Mother' and 'Can we see the Baby Bump' respectively has also been used (Saravanan and Ranadive 2010; SAMA and Surabhi 2010).

Researchers have described commercial surrogacy from a sociological, anthropological, psychological and feminist perspective but very few have discussed about what it 'ought to be'. Many have argued that surrogacy is justifiable ethically and legally if the law can prevent exploitation and control abuses (Spitz 2001). A few have suggested policy implications to the argument that the activity should be totally banned (Nelson and Nelson 1989; Merrick 1990) or in favour of autonomy of the surrogate mothers to enter into such contracts (Wilkinson 2003). Recently a few authors have suggested measures to reduce the exploitation

¹ Surrogate mother may not be an ideal terminology to define the woman who carries a baby to term. The ART Bill uses the word 'surrogate' without the word 'mother', however I find this terminology insufficient. The discussion on an adequate terminology is a whole new subject and hence I have adopted the terminology they use for themselves 'surrogate mother'.

² This study was conducted by Dr. Sheela Saravanan as a Post Doctoral Researcher at the Karl Jaspers Centre; Cluster of Excellence, Asia and Europe in a Global Context, University of Heidelberg between July 2009 and June 2010.

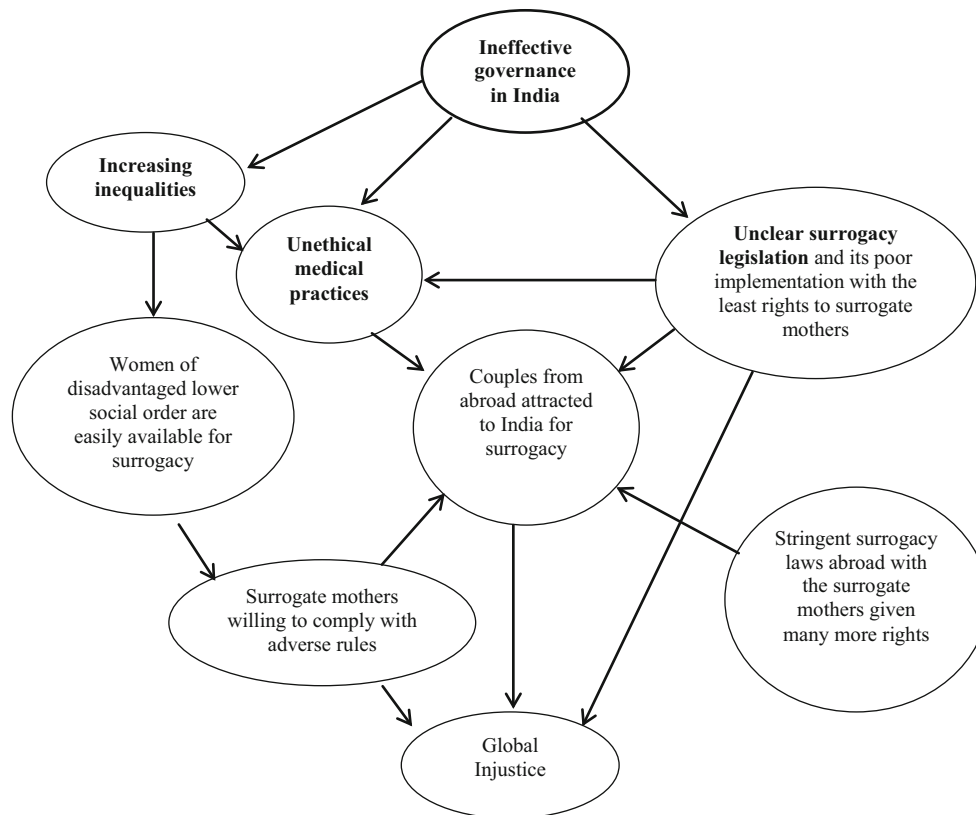


Fig. 1 Linkage between governance with structural inequalities, surrogacy regulations, medical practices and exploitation in India

(Panitch 2013) and the required changes to the ART Bill in India (Qadeer 2009; Sarojini and Sharma 2009) and to reduce health inequalities in the source countries (Pennings et al. 2008). The medical practitioners in India have justified the exploitative condition by the positive end result ‘a win–win situation’ (Saravanan 2013; SAMA 2012), falling in line with utilitarian views that ‘all is well that ends well’ no matter what consequences the process may have had. In my previous article I have discussed the power and exploitative situation of commercial surrogacy in India and have attempted at explaining the phenomenon using theories of trust and exploitation in the context of human fellowship (Saravanan 2013). Several other writers too have observed the power dynamics in favour of the medical practitioners and intended parents in the process of commercial surrogacy in India (Vora 2009; Pande 2011). This is not to say that the surrogate mothers are ‘powerless victims’. The surrogate mothers gain power in certain ways but are also exploited in many other ways (Saravanan 2013). It is important to locate the rights and capabilities of the surrogate mothers in India in comparison to their counterparts in more developed countries and their lower functionalities/entitlements in comparison to other participants in the process that significantly affect their negotiation powers and to examine the responsibilities of

individuals, the state and international agencies in reducing this injustice. I aim to identify the possibilities of bringing about more equity and human dignity to the situation of commercial surrogacy in India using Amartya Sen’s ‘Capabilities Approach’ (2009a) for enhancing ‘global justice’ further elaborated by Martha Nussbaum (2004). Several theorists have thought about the importance of a state sovereign, justification of the political obligation of citizens, significance of democracy, liberty, the problem of distributive justice and human rights. All of this has been reviewed briefly as these theories are relevant to the discourse leading to global inequalities and justice.

Theories of global justice and the capabilities approach

With increasing globalization, there is growing interest and need on a discourse on international justice. Global justice is a relatively new concept that has emerged from this need of a globalizing world and moral duties that need to extend beyond state borders. Sociological, Anthropological and Psychological theorists have engaged in examining ‘what is’ a society and in explaining ‘why is it so’ by applying theories. Political philosophers have engaged in developing

theories on what 'ought to be' an appropriate government system, and collective or individual behavior towards political obligation with a broader aim of justice. They are also interested in 'what is' a society and 'why it is so' but more as an empirical input to the theories. Philosophers have offered approaches that define rights for all human beings in the world and also those that are confined to political boundaries. Hence all these disciplines have informed the 'Global Justice' theories.

Social Contract theories talk about the relationship between the citizens and the State and their responsibilities towards each other in forming contract or mutual agreement (Hobbes 1968; Locke 1988; Rousseau 1973; Mill 1989). Thomas Hobbes (1968) notes that people are primarily self-interested individuals and will be motivated to act morally and consent to governmental authority (Hobbes 1968). While Rousseau (1973) supposed that natural pity and compassion would prevent people from indulging in war even in a 'state of nature'. Both Locke (1988) and Rousseau (1973) however agreed that the state of war could be avoided only temporarily in the absence of a state. All major social contract theorists rely on the argument that individuals give tacit consent in the form of voting for enjoying protection, benefits and rights in return from the sovereign (Hobbes 1968; Locke 1988; Rousseau 1973). Rousseau (1973) places a high value on educating all citizens with the appropriate skills to play a collectively effective role in democracy and that laws are made at public assemblies based on 'general will' or 'popular morality' and not in the parliament. The criticism is that, the popular morality could go completely wrong and against certain minority groups or unequal sections of a society (Wolff 1996). His assumptions for this to function are that large inequalities should be absent, the state needs to pass fewer laws, there should be no political parties and public assemblies should be representing many social groups. This assumption has been criticized firstly because it is unlikely that a society with the above assumptions actually exist, and secondly apart from economic there may be several other forms of differences such as religious, cultural, ethnic and of moral beliefs making it difficult to draw a 'general will' that would be in the interest of all (Wolff 1996). Criticism of Rousseau's ideas led to the theory of 'democratic participation' claiming that only active democratic involvement in matters that effect people can lead to freedom and equality for all.

Also important to mention here are the views of the Classical Utilitarians, Jeremy Bentham (1982) and John Stuart Mill (1989), who identified 'justified actions' with 'pleasure'. Utilitarians focus on actions that lead to general happiness (or less unhappiness). Although utilitarians expressed a desire for freedom, they were more interested in the consequences (general happiness) than the means to

that happiness. The primary criticism of this reasoning is that utilitarianism would permit grave injustice in pursuit of general happiness. According to Mill (1989), liberty is valuable to progress and signifies 'impartial rules' applied to all citizens regardless of their status and wealth. However he excludes children and 'barbarians' from liberty and limits it only to 'civilized' people. Mill suggests a mix of freedom and authority in his 'Harm Philosophy' that gives rights to the State to interfere in prohibiting people from acting as they wish if they threaten to 'harm' another person.

A contemporary Social Contract theorist John Rawls (1971) put forth liberty and equality among citizens and fairness in opportunities as an important component of justice. His idea of political liberalism makes legitimate use of political power in democracy that aims to demonstrate how unity may be achieved despite the diversity of views held by free institutions worldwide. In his idealized theory, citizens are willing and able to abide by rules and not driven by hunger, thereby retaining their reasoning capacity. In this idea of political liberalism, it is the role of the state to provide justice, freedom, rights, and means to people so that they make effective use of their freedom and that 'stability' can be achieved with trust among citizens. According to him reasonable citizens will cooperate with their fellow citizens on universally acceptable terms, they will be willing to propose, abide and honour mutually acceptable rules even if it means they have to sacrifice some of their self-interest. Sen's position is that 'mutually acceptable rules' depends on a likewise reciprocation from others. Hence behavioural adaptation is necessary for people to live amicably with what justice requires. Rawls (1971) assumed people behind a 'veil of ignorance' that shielded them from knowledge about themselves (sex, class, race, age and many such facts) would be constrained to reason in unbiased general terms. Rawls (1971) in his 'burden of judgment' describes people who will make judgments based on their life experiences which they will not impose on others. Sen is skeptical that people could be induced to agree on a theory of justice about serious injustices in this way.

Feminists have criticized the social contract theories as being inadequate in considering the point of view of women (Pateman 1988; Held 1993). According to Pateman (1988) patriarchal control of women can be found in three kinds of contracts: the marriage contract, the prostitution contract, and the contract for surrogate motherhood. Marriage contract restricts women's access to legal protection in marital rape; prostitution allows access to women's bodies and surrogate motherhood to women's reproductive capacity. Hence they argue that the social contract theories do not lead to freedom and equality but is a means by which patriarchy is upheld. Virginia Held (1993) and

Annette Baier (1994) argue that the social contract theories is based on an idealized person who can be best described as an ‘economic man’ who enters into a contract as a means to achieve his needs and fails to adequately represent children and women.

Amartya Sen criticizes the Social Contract theories as being unrealistic which do not include real possibilities and positions of citizens. According to him for a theory of justice to guide reasoned choice of policies, an “identification of fully just arrangements is neither necessary nor sufficient” (Sen 2009a, p. 15). According to him, an approach to justice can be acceptable theoretically as well as applied practically without subscribing to an ideally just situation. There are however, similarities in the ideologies of these approaches. Both Rawls (1971) and Sen suggest that helping the disadvantaged is necessary regardless of the costs. Bird-Pollan (2009) notes that Sen’s ‘public deliberation’ and Rawls (1971) ‘reflective equilibrium’ are comparable.

Sen (2009a) is more interested in the realization of justice rather than the determination of its definitions which are based on the idealized images of the world. Sen prefers a practical approach which can be applied universally and can deal with the questions of inequality and basic rights that plague the present global system. ‘Justice’ as Sen describes cannot ideally be completely ‘just’ or incompletely ‘unjust’ and there are shades of grey in real life that need to be taken into consideration in all theorization. In other words a theory of justice should be able to respond to the needs of justice as well the real world problems. Hence he starts with the real world with an aim to identify injustice and reduce it. He relates to the ‘social choice model’ that relies on practical conditions and only somewhat on rational conceptions and hence makes room for incompleteness. According to Sen (2009a) it is more important to identify ways of attaining redressable justice than aiming to arrive at a situation that is perfectly just. Redressable justice involves a process of diagnosing injustice and identifying what would reduce or eliminate it. He observes several previous theorists who differ in their thought about ways of identifying perfectly just arrangements. The social contract theories he observes, is limited as it aims at setting up just institutions and people’s behaviors that perfectly comply with its demands. He categorizes these theories (Hobbes 1968; Locke 1988; Rousseau 1973) as ‘transcendental intuitionism’ although according to him, John Rawls (1971) has offered ‘arrangement-focused approaches’ that provide far reaching analyses of the requirements of human behavior and institutional arrangements. Theories of Smith (1975), Wollstonecraft (1992), Bentham (1982) and Mill (1989) make comparisons between different ways in which people lead their lives influenced not only by institutions but also by behavior, social interactions and other determinants. Sen describes this line of

thoughts as a ‘realization-focused comparison’. Although he is inclined towards the later, he has referred to the ideas of both arrangement-based and realization-based approaches. To understand the difference between the ‘arrangement-focused’ and ‘realization-focused approach’ to justice he introduces the terms ‘Niti’ and ‘Nyaya’ from the Indian literature.³ ‘Niti’ refers to organizational propriety and appropriate behavior while ‘Nyaya’ relates to the comprehensive concept of realized justice. He observes that the arrangement-focused approach is inclined towards ‘Niti’ while the realization-focused approach towards ‘Nyaya’. Sen’s comparative approach draws on the social choice theory for effective democracy giving consideration to the plurality of reasons and public reasoning, according to which every question of justice need not be settled to resolve any particular issue of justice.

According to Sen, institutions are important and so are their rules, but the realized actuality of human lives includes not only what people succeed in doing but also the freedoms that determine their choices. Freedom to him includes; political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security. To him freedom is a principle factor contributing to individual initiative and social effectiveness. ‘Capabilities’, according to Sen is ‘freedom’ that provides opportunities and choices to pursue one’s ends. Capabilities, “a person’s actual ability to do the different things that she values doing”, is the power to do something and ‘duty’ is the accountability that emanates from that power (Sen 2009a, p. 253). John Rawl’s list of ‘primary goods’ includes income, wealth, health care, social respect and other such attributes (Rawls 1971). Sen rather defines ‘functionings’ as different features of one’s lives and concerns, ‘a state of being’. He resists from listing functioning and would focus on people’s lives rather than the resources they may own/possess. ‘Capabilities’ is one’s ability to achieve various combinations of functioning that can be compared and judged against each other. Pogge (2002) criticizes this approach for being judgmental of people based on their functioning and that given human diversity basic needs may also be diverse. He rather focuses on ‘distributive justice’ which encompasses distribution of wealth from the rich to the poor and rich countries to poor countries. According to Pogge (2002), the capabilities approach is inadequate in providing specificity required for arriving at a workable public criterion of social justice. The

³ Giving an example of the Epic Mahabharata, especially in the context of Bhagawat Gita, he notes Krishna (a deontologist) was following the idea of ‘Niti’ while Arjuna (a consequentialist) was presenting ‘Nyaya’, a comprehensive form of a process inclusive broad account. He observes limitations in Krishna’s perspective and puts forward the importance of faring ‘well’ rather than merely ‘forward’.

distributive justice has proved to be dissatisfactory in more than one ways. For instance; international institutions funding Africa has helped in sustaining the poverty in the continent and its continued dependence on this funding, eventually slowing down the process of development.

'Capitalist Free Market' is believed to be one way in which people are motivated by markets to acquire property with free competition and goods produced for profits. Free market has been able to achieve higher efficiency and well-being through competition and incentives. However free market tends to oversupply goods and gives rise to middlemen. Another criticism of free market which is relevant also in the context of surrogacy in India is that it gives rise to 'exploitation'. 'Planned economy' on the other hand suggests that the State controls all property to reduce inequalities. This is in the lines of the Marxian theory where production should be towards needs of the citizens and not for profit and the State should control 'who' may produce 'what' and 'how much' (Marx 1975). According to Sen, people seek trade for self-interest which also needs other values and commitments such as mutual trust and confidence to work efficiently. Referring to Adam Smith's work, Sen does not advocate for the role of the State in doing what the markets failed to do, or for anchoring institutions to some fixed ideas that leave things completely to the market. He rather argued for institutional choices that resolve the problems that arise. Sen argues for a better understanding of, the variety of organizations ranging from the market to the State and how these different institutions work that can "contribute to producing a more decent economic world" (Sen 2009b). Justice according to Sen is about providing opportunities for people to develop and fulfill their own capabilities. The task of the theory of justice for Sen, is to identify hurdles in realizing these opportunities and refer to ways of the removal of such obstacles. Sen suggests that the most compelling injustices should be addressed first. However he has been criticized for not clarifying what makes a claim 'compelling'.

Martha Nussbaum amended the 'capabilities approach' with a core idea that includes; 'entitlements' and 'capabilities'. The former 'the beings' includes being well-nourished, being housed, being educated, being part of a supportive network and also efficiency, agency and procedural fairness. While, 'the doings' include; travelling, voting, participating, donating and activities including a responsible contribution to the society by following the taxation, welfare, economic and criminal system. She defines human entitlements, similar to human rights "as a minimum of what justice requires for all". The basis of Nussbaum's approach is that citizens need to be provided with basic entitlements and capabilities required for living a dignified life (Nussbaum 2004). According to Nussbaum, every citizen needs these entitlements to live a life worthy of

human dignity, to live cooperatively with others and to fulfill their human needs. According to this approach, the State has the primary responsibility to provide citizens with basic entitlements and individual support as a part of the state institutional structure. At the global level, Nussbaum suggests international institutions need to be decentralized and promote human capabilities in the nations they do business with.

Nussbaum's (2004) list of the basic entitlements required for being at a reasonable threshold level mainly include; adequate nutrition, education, protection of bodily integrity and freedom of speech. This is unlike Sen who resists from making such a list. Nussbaum instead suggest these entitlements have to be provided to citizens of a society if it is to be considered minimally just. Basic entitlements are necessary for people to avoid poverty and entanglements in oppressive social relationships (Anderson 1999; Sen 1992). Nussbaum argues, it is within the capacity of the State to provide basic human entitlement up to a reasonable threshold level and it should use its capacity to its fullest extent to fulfil this purpose. The responsibility of the State includes enhancing capabilities through effective institutions such as; legislature, courts and other administrations and delegating ethical responsibility to individuals within institutions. The legal guidelines include; allocating privileges to family as an institution, defining system of taxation, welfare, economic and criminal system. Citizens are morally responsible to follow these systems aimed at an overall enhancement of human dignity. All institutions and individuals according to this approach should focus on the problems of the disadvantaged. Nussbaum has been critiqued for her focus on entitlement which is the minimum threshold level of what justice requires and for not clarifying what follows on attaining this level. According to her, Global institutions such as World Bank and IMF would provide global economic policy and agreements and UN, ILO and World Courts for international agreements on human rights, labour and environment and she also suggests involving NGOs in attaining these goals (Nussbaum 2004).

It can be criticized that similar institutions are already in place and what would be the purpose of reiterating the same as a novel approach. Especially global institutions such as World Bank and IMF have been widely criticized for imposing conditions that cripples, slows development and maintains poverty in parts of the world. Nussbaum explains that these structures have assumed as a result of history rather than a deliberate normative reflection. Her normative vision of such international institutions is a world "held together by mutual fellowship, as well as a pursuit of mutual advantage, by compassion as well as self-interest, by a love of human dignity in all people", even when there is nothing to gain in the cooperation (Nussbaum

2004: 18). Drawing on Adam Smith, Sen also says that along with self-interest, motivations such as “humanity, justice, generosity and public spirit may even be more productive for society” (Sen 2009b, p. 191).

There have been recent attempts to identify ways of putting the ‘capabilities approach’ into practice (Robeyns 2005, 2006). Robeyns (2006) identifies several theoretical specifications to use the capabilities approach as a framework to analyse development, poverty, justice and social policies. This paper identifies one of these specifications that focuses on the differences of functionalities between actors that determine their capabilities. In the context of commercial surrogacy in India, differing functionalities of participants determine their capabilities. By focusing on functionalities, this paper brings forth the structural inequalities between participants in the surrogacy process. There is enough evidence that there are significant inequalities between the participants in the surrogacy process in India resulting in the reinforcement of class, race and gender issues (Saravanan 2010, Pande 2010). Given the comparatively different functionalities, certain participants cannot choose the same set of capabilities. Drawing on the capabilities approach, the paper aims to find justified ways to reduce these inequalities at the national, international and contract level of commercial surrogacy. Although the paper draws more on Nussbaum’s approach as her work has more potential to understand actions, meanings and motivations by engaging in narratives about people’s hopes, desires, aspirations, and decisions; the paper also significantly applies Sen’s original version. While Sen’s work is that of real opportunity as in the social choice theory, Nussbaum pays attention to people’s skills and personality traits (Robeyns 2005). Although Sen and Nussbaum use different categories and terminologies of capabilities both agree on the importance of combined capabilities which is the external provisions that enable individuals to effectively exercise the capabilities. Nussbaum believes in a ‘benevolent government’ while Sen does not focus on claims on the government. While according to Sen’s approach, social institutions have limited role as individual responsibility cannot be replaced by social regulation (Sen 1999). According to Sen’s approach the role the government is in understanding how the different institutions work and making effective choices to attain redressable justice.

This paper tries to bring out the significance of a ‘benevolent government’ so that citizens take more responsibility over and are accountable for their actions because many citizens lack the very basic threshold level required to live a life of dignity. According to the process identified by Sen, the paper first identifies the real world problem; the functionalities and resulting negotiation power that manifest into unjust contracts. The paper then identifies the

ways in which the injustice can be reduced or eliminated and the role of individuals, government and international agencies in attaining this redressable justice.

Global inequalities and commercial surrogacy in India

There are concerns about global injustice due to the inequalities between the participants of the surrogacy process in India (Saravanan 2013; Sarojini and Sharma 2009). These inequalities are reflected in the inadequate rights for the surrogate mothers in the Assisted Reproductive Technology (ART) Bill, their share in the surrogacy costs, lack of social support, inadequate legal and medical support, violation of their basic human rights and their willingness to comply with inconvenient rules within the process of surrogacy in India. The intended parents (IPs) too have to depend on the clinics for attaining their goals and hence undesired rules are imposed on them too and many are also over-charged. The first national guidelines aiming to regulate surrogacy and other ARTs was published in 2005, followed by the unpublished draft guidelines issued 3 years later in 2008 and then again a draft version was publicly shared in 2010 (MoHFW 2010). As the ART Bill remains a guideline, surrogacy is neither fully legalised nor is it illegal in India. There is criticism that the ART Bill caters largely to the medical private sector’s interests and reinforces social inequalities (Sarojini and Sharma 2009). In contrast other countries have stricter and regularized laws on surrogacy. Some countries have banned any form of surrogacy and the countries permitting altruistic surrogacy have imposed strict operational rules. Austria, Bulgaria, France, Germany, Italy, Norway, Portugal, Switzerland, Spain and Sweden prohibit all surrogacy agreements. In Belgium, Denmark, Ireland and the UK altruistic surrogacy is allowed. Even countries within the European Union, where surrogacy is not fully banned, commercial surrogacy, surrogacy agencies and advertisements are prohibited and such agreements are not enforceable (Iona Institute 2012). Canada and Thailand is becoming more restrictive with their surrogacy laws, while in some states of the USA and Australia and in Russia and Ukraine commercial surrogacy is legal.

I begin by comparing the rights of surrogate mothers in the USA with those in India. In the USA, surrogate mothers are provided with social support group, insurance for multiple pregnancies, maternity benefits, life insurance, psychological support, compensation for all expenses and loss of employment and representation by an attorney among many other rights and benefits. Both surrogate mothers (SMs) and intended parents (IPs) were allowed to choose each other and the kind of contract they sign (open’

or 'closed) (Blyth 1994). SMs in the USA also enjoyed many benefits including a grace period post-birth to relinquish the baby, a clause with options to withdraw pre-birth and the options for choosing an ongoing relationship with the child and the IPs (Busby and Vun 2010).

In India women receive a minimal psychological and no legal support. Some of the clinics do not give them a copy of their contract hence the possibility of their fighting legal cases is far fetched (Saravanan 2013; Puricelli 2014). The medical support too ended soon after birth. They have to sign off all rights over the child when entering into the contract. They are not covered by medical or life insurance and are not compensated for loss of employment. They are not given any compensation if they experience an abortion even if it is because of medically induced selective abortion in utero (Saravanan 2013). Neither the SMs nor the IPs in India have the rights to choose the kind of contract, relinquishment or their preferred mutual relationship. While in America, women were screened out by the surrogacy clinics if their motive was primarily financial, in India the primary criterion for selecting SMs was poverty (Saravanan 2013). Mandatory rules of the clinics in India include that the surrogate mothers be confined to hostel like accommodation for the entire period of the surrogacy, they are expected to take care of the babies for days-weeks in case the intended parents arrived late, comply with any medical procedures and maintain distance with the intended parents, all this without appropriate psychological counseling (Saravanan 2013). Many of these surrogacy procedures in India are a violation of basic human rights, dignity and freedom as stated in Articles 1,⁴ 2,⁵ 9⁶ and 14⁷ of the Universal Declaration of Human Rights and The Universal Declaration on Bioethics and Human Rights 2005⁸ (UNESCO 2006; UN 1948).

⁴ The Universal Declaration of Human Rights, Article 1 states, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (UNESCO 2006).

⁵ The Universal Declaration of Human Rights, Article 2, states, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (UNESCO 2006).

⁶ The Universal Declaration of Human Rights, Article 9 states, "No one shall be subjected to arbitrary arrest, detention or exile" (UNESCO 2006).

⁷ The Universal Declaration of Human Rights, Article 14 states, "Everyone has the right to freedom of movement and residence within the borders of each state".

⁸ The Universal Declaration on Bioethics and Human Rights 2005 recognizes that technological advancements in medical science should be ethically sound, giving "due respect to the dignity of the human person and universal respect for, and observance of, human rights and fundamental freedoms" (UNESCO 2006: 3).

Surrogacy is more expensive in the USA, UK, Canada and Australia than in India. In the USA, the costs of commissioning a surrogacy through an agency accounts to a minimum of 200,000 USD, whereas for those coming to India it would cost approximately 50,000 USD including travelling and living expenditure (SSA). The surrogacy cost itself only for the clinic in India accounts to about 27,000 USD. In Canada an altruistic surrogacy costs almost as much (80,000 CND) as the total cost of surrogacy in India (Fertility Consultants Canada 2014). Surrogate mothers (SMs) in other countries benefit from a comparatively larger share in the total surrogacy costs than the SMs in India. In the USA surrogacy costs approximately 200,000 USD of which 73,000 USD (about 35 %) is paid to the SM (SSA). Whereas in India, SMs are paid only 15–25 % of the total costs (Saravanan 2013). Even the highest paying clinic that imposes mandatory rules on women to stay in 'surrogate homes' pays only up to <30 % of the total cost (Daily Mail 2013). The IPs too are exploited of finances, as they are not provided with complete information about possible extra costs they would incur on caesarean, post-delivery intensive care and in making official documents. These additional expenses are thrust on them post birth and some clinics also request for extra payments to be made to the SMs. From the SMs point of view it is justified as she is underpaid for her labour but for the intended parents this may be an extra burden of costs. The IPs have comparatively more rights and choices in choosing the clinic and the surrogate mothers and in making changes in the surrogacy procedure as per their convenience (Saravanan 2013). Intended parents who prefer that the surrogate mothers are monitored throughout the pregnancy choose the clinics with surrogate homes (Saravanan 2013). The inequality between the surrogate mothers, intended parents and the medical practitioners is profound (Saravanan 2013; Sarojini and Sharma 2009). There are also inequalities of payment and conditions of surrogacy between clinics in India. Those women willing to stay in surrogate homes are paid more. Some clinics in India also recruit on the basis of physical appearance (good looks are preferred) caste, class and religion (Saravanan 2013; SAMA 2012; Pande 2010). This is not to say that surrogacy arrangements in other countries are free from exploitation. In the U.K., the Barking, Havering and Redbridge University Hospital NHS Trust has called for additional legislation and guidelines to prevent women and babies from exploitation. In the USA, a surrogate mother fled across the country to save her child after the intended parents wanted to have the child aborted because disabilities had been found (Donnelly 2013). However as also argued by Panitch (2013), the justice condition of the Indian commercial surrogacy arrangements in globally comparative terms remains significantly unfulfilled. Socio-

cultural and economic inequalities between individuals and between two countries participating in surrogacy make the overall contractual situation unjust.

Differing functionalities and negotiating power of participants

The basic ‘functionalities’ significantly differ between the surrogate mothers, the intended parents and medical practitioners. Surrogate mothers have the least ‘functionalities’ in terms of education, knowledge, contacts and financial capacity (Saravanan 2013; Vora 2009). Most surrogate mothers are illiterate or on an average have completed only up to middle school. Pande (2010) has observed that the surrogate mothers with higher education attainment had an enhanced negotiating power in the surrogacy process. Hence better entitlements reflect in enhanced capabilities. By participating in surrogacy the SMs earned approximately Rs. 250,000 to 500,000 (USD 4000 to 8000), an amount they would take at least 15 years to earn with their present earnings. First time surrogate mothers also have limited knowledge about the medical procedure or the law on surrogacy. The contract was usually drafted in English, a foreign language, which the surrogate mothers do not understand. They were not explained the details of the contract and in one clinic they were also not given a copy of the contract (Saravanan 2013; Pande 2010). Moreover the surrogate mothers expressed their financial inability to approach lawyers (SAMA 2012). Their need for money reflected in their motivation makes them gullible to accept unjustified conditions in the surrogacy process. SMs participated in surrogacy to provide their family with basic needs, adequate income, food, education for their children and to avoid slipping further into poverty. These are some of the basic ‘entitlements’ that according to Nussbaum (2004) is required to live a life of dignity. Their financial needs were to repay debts, to buy a house, to add to their savings to avoid falling into debts in future, to save the house rent and in the long run to save money for the education of their children (Saravanan 2013; SAMA 2012; Pande 2010). According to one surrogate mother, her motivation to enter into surrogacy contract was;

not a choice, this is majboori (helplessness). When we heard of surrogacy, we didn’t have any clothes to wear after the rains – just one pair that used to get wet and our roof had fallen. What were we to do? If your family is starving what will you do with respect? Prestige won’t fill an empty stomach (Pande, 2010).

Some surrogate mothers had serious health problems in their households which needed immediate medical treatment; either an ailing family member or a child with severe

disabilities (Saravanan 2013). Some clinics in India make it mandatory that women stay in ‘surrogate homes’⁹ during the entire surrogacy process that can last for almost a year. The medical practitioners justify the surrogate homes as a preference by the surrogate mothers due to the social stigma about surrogacy in India. However recent accounts of surrogate mothers and doctors indicate a growing social acceptance for surrogacy. This is especially so in the areas surrounding clinics where many women tend to participate in the surrogacy process.

They used to be hesitant to act as surrogates earlier, and were scared of the social stigma, but not any longer (Raha, 2013).

However some doctors insist on justifying compulsory stay at surrogate homes due to demand for it from SMs and social stigma against surrogacy. Women face more problems with regard to stigma when they have to make excuses to stay away from their families for 1 year. Most are unhappy leaving their family for such a long period. Being confined to surrogate homes means women are denied participation in public life and they cannot meet their non-reproductive aspirations such as; educational, occupational and social, and that they are treated as means to an end (Saravanan 2013). The Article 9 of the Universal Declaration of Human Rights states, “No one shall be subjected to arbitrary arrest, detention or exile” and hence this is a violation of human rights.

Within the surrogate homes, beds are lined up in hostel like environment, they were not allowed to use the staircase, even the elevator cannot be used without assistance from the nurses or other hospital personnel (Pande 2011). Their own children were allowed to visit their mothers only on Sundays, under restrictive conditions. At the 10th World Conference of Bioethics, Medical Ethics and Health Law, January 2015 in Jerusalem, Dr Shalev commented;

Even prisons have courtyards, but these surrogate homes don’t have enough space to walk even within the rooms (Shalev, 2015).

The SMs also complained of water shortage, cramped conditions, substandard food quality, and poor sanitation and hygiene at the surrogate homes. They were unhappy to be over-monitored, over-fed and restricted from any house work.

I feel bloated; all I’m doing is eating and sitting around all day. One gets sleep only when one is tired. I don’t get sleep also because my food is not digested. I don’t like these biscuits but I still have to eat. I have no choice because I have to gain weight. They pay

⁹ Surrogate homes are dormitories where the women are expected to live away from their families during the surrogacy process.

more money if the baby's weight is more than 3100 gms (SAMA and Surabhi 2010).

In one of the clinic, intended parents could demand that the surrogate mothers change their place of residence if they were not satisfied with her household hygiene or living condition (Saravanan 2009–2010). SAMA team questions these excessive rights of the intended parents to control the lifestyle of the surrogate mothers (SAMA 2012). Compared to the surrogate mothers, the intended parents had significantly advanced functionalities to start with giving them better negotiating powers within the surrogacy process. They had higher educational qualifications with work profiles such as; heading an IT firm in America, information technology (IT) professional in America and Human Resources Director in a mobile application firm in Canada. Their motivation in choosing India as a destination was inclined towards self-interest rather than human fellowship. They were interested in India because of the liberal laws, low cost, easy availability of women willing to become SMs, and their lesser rights and a payment pattern that withheld any lump sum payment until after the baby was relinquished (Saravanan 2013; SAMA 2012). The comparatively higher negotiating power of the intended parents was evident in the conditions they imposed on surrogate mothers as mentioned above, in the choice of surrogate mothers (based on caste/religion/class), preference for surrogate homes (when they prefer full monitoring of the SMs) and their insistence on a certain lifestyle of the surrogate mother (food, diet, sexual behavior, mobility, work and suggesting the kind of music they should listen to) (SAMA and Surabhi 2010). All deliveries are invariably cesareans as they (the MPs and IPs) do not want to take any chances with anything happening to the baby during a normal delivery (Saravanan 2013). According to the SMs the wellbeing of the fetus was given precedence over the surrogate mother and the care of the surrogate mother ended soon after the birth. As mentioned above the intended parents may also face a situation of additional expenses. They too lack in social support system regarding issues related with the law, official documentation and the medical procedure. Their opinion regarding their desired level of interaction with the surrogate mother is not taken into consideration. Some intended parents from countries that prohibit surrogacy came with hopes to be able to evade the law in India, on the reassurance given by the clinics.

The medical practitioners comparatively have the highest level of functionalities and hence also the highest bargaining power in the surrogacy process. With the profits earned in the surrogacy process a clinic in Western India is constructing the world's largest all inclusive surrogacy building complex which is expected to house hundreds of

surrogate mothers, the clinic, guesthouses for intended parents, surrogate homes and shopping area (Daily Mail 2013). The profits made by the medical practitioners are so profound that they are able to launch such a massive project. Within this complex the surrogate mothers will become more and more isolated. The MPs have taken up a gatekeeper's role for both the IPs and SMs but more so for the surrogate mothers.

Although the ART Bill specifies that the clinics should not be involved in selection of surrogate mothers or with financial dealings, the medical practitioners are involved in recruiting potential surrogate mothers, handling legal paperwork, monitoring them throughout the pregnancy in surrogate homes, requesting them to take care of the babies on birth on request of the intended parents and even handling cash transfers between the intended parents and the surrogate mothers (Saravanan 2013; Pande 2010). The medical practitioners interfere if the intended parents want to pay the surrogate mother more than the amount prescribed in the contract (Saravanan 2013). As a participant observer in a conversation between the intended parents and a medical practitioner, the doctor was advising the intended parent;

I would suggest you not to pay her (the SM) any more money, I hope you understand me. Then the other surrogate mothers will start demanding more money and it will become a problem for us. What you have paid her is enough (Saravanan, 2009–2010).

There is also evidence of medical practitioners being involved in illegal activities only to satisfy the needs of the intended parents. With the initiation of the clinic a German citizen Mr. Jan Balaz's twins were given an illegal birth certificate with his name as the father and the surrogate mother as the legal mother resulting in an extended legal struggle in India (Saravanan 2009–2010). There are fears that sex selection already a grave issue in India is rampantly being used in selecting embryos within the surrogacy process in India (CSR 2012). There is evidence that some intended parents know the sex of the child prior to birth which is illegal in India (Journeyman Pictures 2014). Eagerly waiting outside the cesarean ward nervous and excited, an intended mother says;

I am waiting for my baby to come out, just want him to come out. What's 'he' up to, what's 'he' doing (Journeyman Pictures, 2014).

Their new born son was delivered to them minutes after a cesarean birth and according to the above quote; the intended mother apparently knew it was a boy child (Journeyman Pictures 2014).

Role of the state, individuals and international agencies

Most of the idealized theories; Rousseau's 'absence of injustice', 'popular morality', Mill's 'civilized person' Rawl's 'idealized man' who would take unbiased judgments, willing to sacrifice some of their self-interests, do not fit into the real life situation of commercial surrogacy in India. People motivated into this contract are all here for self-interest, the medical practitioners are in for 'business' motive, the intended parents for their 'quest' to complete their family, and the surrogate mothers to fulfil their basic human needs. Surrogate mothers in India however are vulnerable and involved in unjust contracts due to their comparatively disadvantageous socio-economic position and needs such as health, nutrition, employment, education and other such basic necessities. The 'State' holds the primary responsibility and moral duty to provide basic human needs (such as; nutrition, health care, education) to all citizens so that they can live a life of dignity. Along with the goal of providing a minimum threshold level for all citizens (as suggested by Nussbaum 2004), the State needs to simultaneously provide more opportunities to people for developing and fulfilling their own 'capabilities'. With enhanced functionalities and improved entitlements they will be able to pursue better opportunities (not contracts such as surrogacy) with an increased bargaining power. Citizens also need to be accountable in performing their duties to bring about more equality in the society; by adhering to the taxation system, property rights and justice with an aim to maximize welfare.

The ART regulation process in India is presently dominated by the medical sector with some involvement of the NGOs, which is similar to Plato's concept of 'guardians' or 'experts'. The consequence of this expert involvement is that the ART Bill is largely inclined towards the needs of the medical sector. A more democratic process is needed in the drafting and implementation of the surrogacy laws. Hence other participants directly involved in the surrogacy process should also be included in drafting the ART Bill. Presently, the representation of intended parents, surrogate mothers or surrogate agents is not visible in any workshops, discussions or law formulation activities on surrogacy and the ART Bill.

What is glaringly evident in the ART Bill and from existing empirical evidence is a lack of legal provision protecting all participants (especially the surrogate mothers) in the surrogacy process, ineffective governance of the ongoing unethical practices, exploitation of participants (financially, physically, emotionally and legally), lack of protection of children born and intended parents who are also vulnerable to exploitation in the process. The

surrogacy practices in India represents a free-market system where anything can be sold and purchased, with surplus of surrogate mothers willing to comply to the exploitative contracts due to their desperate need for money and an overall violation of human rights.

According to Sen's approach, people have the freedom to determine their choices and hence surrogate mothers cannot be prevented from pursuing their choices, however their bargaining power in the surrogacy process needs to be enhanced with effective legal and institutional changes and their situation more aligned to globally comparable terms. A few recommendations suggested by intended parents and surrogate mothers towards this has been referred to in certain reports and empirical studies and these have been listed below. Surrogate mothers ask for higher decision making in remuneration, medical procedures, relinquishment process, post-natal care, compensation for loss of work (herself and her husband) and standardization of remuneration between surrogate mothers and between clinics (Saravanan 2009–2010). They demand that staying in the surrogate homes should not be made mandatory by the clinics and that those wanting a shift in residence due to social stigma should be given an option to shift into another residence along with their family.

The CSR report also asks for mandatory provision of post-natal care for the surrogate mother, appropriate counseling for medical, financial, legal, cultural and social aspects of the surrogacy contract, creation of a nodal agency to act as depository of all documents and as a grievance redress cell and a central database or registration to maintain the permanent address and the details of children born, surrogate mothers and intended parents. In terms of the contract, the Bill should ensure no 'gatekeeper' role of the doctors (CSR 2012). The contract should be drafted in a local language, should contain the real names and not pseudonyms, and should be signed by all participants including the surrogate agents, a copy of which should be given to all participants. The CSR reports also demands for several other regulations such as restriction on sex-selection, provision of dual citizenship for the children of surrogacy contracts, punishment for surrogacy related trafficking, tightening of the law to enhance responsibility of the doctors, agents and intended parents against criminal offences, protection for disabled children and inclusion of the lesbian, gay, bisexual and transgender (LGBT), single parents and unmarried couples for surrogacy (CSR 2012). SAMA report calls for strengthening linkages between academia and activists to build a perspective of how markets and technology should work in the existing patriarchy and hetero-normativity in the society.

The intended parents ask for more counselling for them and the surrogate mothers towards relinquishment and

more freedom to be able to choose between ‘open’ or ‘closed’ contracts (Saravanan 2013). From the perspective of care ethics, the intended parents however need to reconsider their role in the surrogacy process as it involves participation of women of lower socio-economic status from developing countries who provide reproductive services under poorly paid conditions, unprotected by law. Both the medical practitioners and the intended parents need to give more consideration to the exploitative dynamic that they are party to in the surrogacy process rather than merely from an economic or contractual perspective.

At the global level, the injustice in transnational commercial surrogacy calls for an international declaration of women and child rights in third party reproduction. I participated in a panel session on ‘Ethics and Regulation of Inter-Country Medically Assisted Reproduction’ initiated by Dr. Carmel Shalev, at the 10th World Conference of Bioethics, Medical Ethics and Health Law, January 2015 in Jerusalem organized by the UNESCO Chair of Bioethics, where initial steps towards such a draft was taken. A follow-up of this initial meeting has been planned in Innsbruck in May 2015 along with UNESCO Chair of Bioethics with an aim to develop a human rights convention for International Medical Assisted Reproduction (IMAR) to reduce global injustices in practices involving medical assisted reproduction. As suggested by Nussbaum, the normative vision in drafting such a convention should aim at a world “held together by mutual fellowship, as well as a pursuit of mutual advantage, by compassion as well as self-interest, by a love of human dignity in all people”, even when there is nothing to gain in the cooperation (Nussbaum 2004, p. 18).

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