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Commercial surrogacy in India: The presumption of adaptive preference formation, the possibility of autonomy and the persistence of exploitation

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## Introduction

India's proposed new 2016 Bill<sup>1</sup> on the regulation of surrogacy is the fourth attempt to respond to national and international criticism from women's groups<sup>2</sup> and social and legal theorists<sup>3</sup> that suggest that insufficient protection is given to all parties of a commercial surrogacy arrangement. Ostensibly drafted to protect the surrogate mother and the resulting child, the series of Bills have lacked clarity and, most importantly, have failed to safeguard the rights of women and children. The proposed legislation provides a valuable opportunity to analyse not only the legislation, but also to consider developments in the theoretical critique of conditions of exploitation that threaten the autonomy of women. Central to these developments has been the work of Martha Nussbaum and Susan Okin who have introduced the notion of 'adaptive preference'<sup>4</sup>

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<sup>1</sup> The Surrogacy (Regulation) Bill 2016 <http://www.prssindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/>

<sup>2</sup> Sarojini Nadimpally, Sneha Banerjee, and Deepa Venkatachalam, Sama Resource Group for Women and Health, 'Commercial Surrogacy: A Contested Terrain in the Realm of Rights and Justice', Kuala Lumpur: Asian-Pacific Resource and Research Centre for Women (ARROW), 2016

<sup>3</sup> See, for example, Margaret Ryznar, 'International Commercial Surrogacy and its Parties', *John Marshall Law Review*, 43:4 (2010) pp 1009-1040, Ruby L Lee, 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation', *Hastings Women's Law Journal*, Volume 20, Issue 2, (2009) pp 275 – 299, Anindita Majumdar, 'The Rhetoric of Choice: The Feminist Debates on Reproductive Choice in the Commercial Surrogacy Arrangement in India', *Gender, Technology and Development*, 18(2), (2014), 275-301

<sup>4</sup> The principal theorists of adaptive preference formation are Martha Nussbaum, 'Human capabilities: female human beings' in *Women, Culture, and Development* (Oxford: Clarendon, 1995) at p. 91, Susan Okin, 'Feminism and multiculturalism: some tensions', *Ethics* 108, 4 (1998), p. 661 in S J Khader, 'Must theorising about adaptive preferences deny women's

This refers to a decision or choice, made by a woman living in a patriarchal and oppressive environment, which is held to be inconsistent with that woman's well-being. Crucial to the account is the presumption that the adaptive preference signifies a deficit in autonomy. These two presumptions thus imply that the 'adaptive preference' in question signifies exploitation. There is no doubt that patriarchal oppression does influence the decision-making of women living under such conditions, and there is no doubt that patriarchy seeks to exploit women by the influence exerted upon them. But are *all* preferences expressed under oppressive conditions rightly to be regarded as 'adaptive preferences' in the sense that they imply an absence of autonomy on the part of the choice maker? In following Serene Khader's valuable work in this area this article seeks to question this assumption.<sup>5</sup>

*Some* decisions might reasonably be hypothesised as 'adaptive preferences' as defined by Nussbaum and Okin, but the application of a more imaginative understanding of the complexity of the relationship between autonomy and exploitation – and of the environments in which it strives to express itself – can render different conclusions about its presence or absence. This is because explanatory theory in general must

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agency?', *Journal of Applied Philosophy: Journal of the Society for Applied Philosophy* Vol. 29 Issue 4 (2012) p. 302 and A. Sen, *Rationality and Freedom*, (Belknap, Cambridge 2002), in Serene J Khader, 'Adaptive Preferences and Procedural Autonomy', *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People-Centered Development* 10:2 (2009), p.169

<sup>5</sup> Serene Khader, *Adaptive Preferences and Women's Empowerment*, (Oxford University Press 2011), 54

acknowledge, and attempt to account for, complex contextual motivations behind decisions, in circumstances where social, cultural and economic influences are overwhelmingly varied and uncertain. What Khader's account of autonomy seeks to demonstrate, however, is that a particular decision under scrutiny (e.g, the choice to act as a commercial surrogate) may be deemed to be an autonomous choice of action *even if it is also simultaneously the case* that the decision-maker is a victim of exploitation in respect of the decision made.

In pursuing this theoretical point, the first section of this article considers the various issues related to regulation and, supposedly, the protection, of surrogates that have emerged in the four draft Bills, (2008, 2010, 2014, and especially the latest and most restrictive legislation of 2016), that have been proposed since India has attracted global interest as a centre for commercial surrogacy. In light of this, the second section explains what is meant by autonomy and why it holds such an important place in medical decision-making in particular. The possibility of 'adaptive preference' formation is examined and the epistemological difficulties surrounding the in-principle identification of instances of adaptive preference are discussed: identifying an individual's choice of action as an 'adaptive preference' denies the autonomy of that individual. But whilst the notion of instances of 'adaptive preference' is logically coherent, and empirically and historically plausible and likely, so too are choices of

action which are better understood as trade-offs or ways of flourishing which are not immediately familiar to different cultures operating with less flexible criteria and convictions about freedom and choice. Rather than assuming that certain preferences have been ‘adapted’ and thus forfeit autonomy, theory should look to characterize choice phenomena more imaginatively. This might be achieved by asking which theoretical perspective offers the best critical account of the ways in which the notion of autonomy survives in circumstances that, empirically, suggest the complete internalisation of oppression.

The concluding section acknowledges that despite the problems inherent in applying autonomy theory to practical-empirical situations, its value lies in demonstrating that autonomy can survive and be coherently imputed to empirical choice makers, even in circumstances where individuals must make decisions within an environment of constrained choice. Where there is an imbalance of bargaining-power, insufficient provision of information, and a lack of protection provided by the state for the surrogate mother, then these conditions promote and encourage exploitation, and erode autonomy in equal measure. But exploitative conditions do not annihilate autonomy. A critique of legislation informed by this understanding of the complex relationship between autonomy and oppression can accept that surrogacy might, in some circumstances, be an autonomous choice. Nevertheless, explaining the theoretical survival of autonomy in

the face of oppression and exploitation does not alter the fact that the *promotion and flourishing* of the autonomy of women demands the eradication of exploitation. It is submitted that the 2016 Surrogacy Bill is a missed opportunity to introduce safeguards that genuinely protect those who are fundamental to the practice and help to promote and nurture autonomy.

### India's legislation on commercial surrogacy

The Indian Government's Union Cabinet has recently given its approval for the introduction of the draft Surrogacy (Regulation) Bill 2016.<sup>6</sup> The government has outlined its intentions to establish a central level National Surrogacy Board, State Surrogacy Boards and Appropriate Authorities in the State and Union Territories.<sup>7</sup> The principal aims of the legislation will be to regulate surrogacy, to protect the rights of the surrogate mother and the children born as a result of a surrogacy arrangement, to

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<sup>6</sup> The Surrogacy (Regulation) Bill 2016 <http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/> The Parliamentary Standing Committee submitted its report on the Bill in August 2017 outlining its observations and recommendations. The Bill's status is still listed as Pending and there is no indication as yet when or whether it will be passed. Standing Committee Report Summary, August 25, 2017. [www.prsindia.org](http://www.prsindia.org)

<sup>7</sup> This is in response to the Law Commission of India's 228<sup>th</sup> Report 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy' (Report No. 228), August 2009 <http://lawcommissionofindia.nic.in/reports/report228.pdf>

prohibit commercial surrogacy and to allow altruistic surrogacy for Indian married couples who are infertile.<sup>8</sup>

Although this would be welcomed by those who believe that the lack of regulation has resulted in exploitation of Indian women and uncertainty as to the status of the children born from surrogacy arrangements, criticisms of the proposals remain. There is also scepticism as to whether this Bill will reach enactment given that similar attempts at legislation proposed in 2008<sup>9</sup>, 2010<sup>10</sup> and 2014<sup>11</sup>, still remain tabled as Drafts. The four Bills have displayed differences in focus and aims and all have met obstacles when exposed to the scrutiny of various ministries.<sup>12</sup> A brief summary of the debate from 2008 will thus be useful here.

The 2008 Bill proposed to make Assisted Reproduction Techniques (ARTs) available to single persons, married couples and unmarried couples. ‘Couples’ were defined in gender neutral fashion as ‘persons’ who lived together and were in a sexual relationship that was legal in their country of residence or citizenship. Although this would have

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<sup>8</sup> The States of Jammu and Kashmir are to be excluded from the Bill.

<sup>9</sup> The Assisted Reproductive Technology (Regulation) Bill and Rules 2008. This was presented by the Indian Council of Medical Research.

<sup>10</sup> The Assisted Reproductive Technology (Regulation) Bill 2010

<sup>11</sup> The Assisted Reproductive Technology (Regulation) Bill 2014

<sup>12</sup> Priyattama Bhanj, ‘The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities?’, JILS Blog, 17 July, 2014. Available at <https://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/> Accessed 27 February, 2017.

excluded non-heterosexual couples in India, the fact that the 2008 Bill allowed foreigners to access ART services meant that non-heterosexual couples, from countries where such a relationship *was* legally recognised, could have accessed ART services in India.<sup>13</sup> This is the first indication of discrimination against same sex couples in India. As well as attracting criticism for lack of clarity and ambiguity, the resource group SAMA, considered the Bill to be retrograde in that it reinforced patriarchal values and promoted the interests of those who were providing ARTs rather than the rights of women and children.<sup>14</sup> SAMA expressed concerns relating to the lack of clarity in the 2008 draft ART Bill and the use of ambiguous language. Most importantly, risks to the woman were downplayed: ‘It is appalling how the MOHFW/ICMR have described life-threatening risks as ‘*small risks*’.’<sup>15</sup> In its recommendations SAMA states:

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<sup>13</sup> <http://phrh.law.ox.ac.uk/regulating-assisted-reproductive-technologies-in-india/> Nehaa Chaudhari, ‘Regulating Assisted Reproductive Technologies in India’, Oxford Human Rights Hub, 12 November 2015

<sup>14</sup> SAMA Team, Welcome Kit for Parliamentarians: Assisted Reproductive Technologies (ARTs), Centre for Legislative Research and Advocacy, July 2009. Available at [www.clraindia.org](http://www.clraindia.org) Accessed 27 February, 2017. SAMA Resource Group for Women and Health is an organisation based in Delhi which focuses on issues of women’s rights and health. Also see [www.samawomenshealth.in](http://www.samawomenshealth.in) for several articles on surrogacy and reproductive rights.

<sup>15</sup> Serious risks to the surrogate mother were not reflected in the Bill, where the risks were described as ‘small risks’ and risks to the potential offspring were not mentioned at all. Rules 6.13.

The Draft Bill in its present form is completely unacceptable, and there is an urgent need for regulation of present practices of ARTs, NOT regularization and promotion, which seem to be its main thrust in the current form.<sup>16</sup>

The document goes on:

The Draft Bill must ensure that the commissioning parents understand and agree to the fact that the surrogate has a right to physical integrity and bodily autonomy, i.e. she cannot be forced to abort the foetus, go through foetal reduction or made to follow a certain diet.<sup>17</sup>

In endorsing these criticisms Alison Bailey said,

The draft bill does not have much to say about surrogacy work beyond recommending a basic set of guidelines for selecting surrogates. .... No evidence exists that the health and well-being of surrogates is taken into consideration, except in relation to the pregnancy.<sup>18</sup>

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<sup>16</sup> SAMA, 'Welcome Kit' p. 4

<sup>17</sup> SAMA, 'Welcome Kit' p.4

<sup>18</sup> Alison Bailey, 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy', *Hypatia* Volume 26, Issue 4, (Fall 2011), pp 715-741. Available at

The 2010 Bill similarly allowed for parents, couples or individuals to be able to use ART services. However, although ‘couple’ was again defined in a gender neutral way as ‘two persons in a sexual relationship and living together’<sup>19</sup> this Bill required the sexual relationship to be legal in India which meant that *all* homosexual couples, Indian or otherwise, would be refused access to services.<sup>20</sup> Thus discrimination against homosexual couples increased and, although the Bill claimed to protect the interests of the surrogate mother, no further measures were considered.<sup>21</sup>

The 2014 Bill was more wide-ranging. Its intention was to establish a National Board for Assisted Reproductive Technology, with a view to developing new policies in the area of ART, and to assist State Boards in accrediting and regulating services of ART Clinics and Banks. This included provisions on rights and duties in relation to surrogacy, and in particular the prohibition of commercial surrogacy.<sup>22</sup> Surrogacy for foreigners was not to be permitted but would be allowed for Overseas Citizens of India,

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<http://onlinelibrary.wiley.com.libaccess.hud.ac.uk/doi/10.1111/j.1527-2001.2011.01168.x/full>  
Accessed 27 February.

<sup>19</sup> The Assisted Reproductive Technologies (Regulation) Bill 2010 s 2(h)

<sup>20</sup> The Assisted Reproductive Technologies (Regulation) Bill 2010 s 2(h)

<sup>21</sup> Priyattama Bhanj, ‘The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities?’, JILS Blog, 17 July, 2014. Available at <https://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/> Accessed 27 February, 2017.

<sup>22</sup> ‘India: Draft Legislation Regulating Assisted Reproductive Technology Published’ Law Library, Library of Congress, 2 November 2015. Available at: <http://www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating-assisted-reproductive-technology-published/>

People of Indian Origin, Non-Resident Indians and Foreign Nationals married to Indian citizens.<sup>23</sup> A qualifying right included the requirement of a subsisting marriage of at least two years.<sup>24</sup> In addition a certificate confirming that the woman was unable to conceive her own child would have to be submitted.<sup>25</sup> A surrogacy agreement would be binding on the parties such that a commissioning couple<sup>26</sup> would have to accept the custody of the child<sup>27</sup> and the surrogate would relinquish all parental rights over the child.<sup>28</sup> One departure from previous versions of the Bill was that services would only be available to infertile married couples, excluding single persons and unmarried couples.<sup>29</sup>

In 2015 the government issued a strong statement to the Supreme Court and made reference to its 2014 Bill which set out its intentions to limit the scope of surrogacy to altruistic surrogacy to Indian married infertile couples and to prohibit commercial

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<sup>23</sup> Draft Bill 2014, Clause 60(11)(a)

<sup>24</sup> Clause 60(21)(a)(i)

<sup>25</sup> Clause 60(21)(a)(ii)

<sup>26</sup> The term ‘commissioning couple’ fits with the contractual nature of the practice of surrogacy in India but is also sometimes used in the U.K. The term ‘intended parents’ is preferred by surrogates in the U.K.

<sup>27</sup> Clause 60(11)(b)

<sup>28</sup> Clause 60(4)

<sup>29</sup> <http://phrh.law.ox.ac.uk/regulating-assisted-reproductive-technologies-in-india/> Nehaa Chaudhari, ‘Regulating Assisted Reproductive Technologies in India’, Oxford Human Rights Hub, 12 November 2015

surrogacy services.<sup>30</sup> This was in response to several high profile cases which had demonstrated that there were serious problems inherent in the provision of surrogacy services. One such case was the *Baby Manji* case. Here, a Japanese couple who had entered into a surrogacy contract with an Indian woman, divorced prior to the child's birth. The wife did not wish to raise the child, leaving doubts as to the child's nationality and identity. The dearth of surrogacy regulations provided no legal clarification and these deficiencies provoked intense media debate.<sup>31</sup> Not only did this have ramifications for international relations, it also led to the suspension of commercial surrogacy for foreign couples<sup>32</sup> and restrictions for Indian couples. In light of this, the latest Bill goes further.

The 2016 Bill is the most restrictive proposed Indian legislation on surrogacy to date: The commissioning couple must be between 23-50 years for a female and 26-55 years for a male.<sup>33</sup> The couple must have been legally married for at least five years and

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<sup>30</sup> <http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples/> ‘No commercial surrogacy, only for needy Indian couples, Govt tells SC’, *Indian Express*, 25 December 2015

<sup>31</sup> *Baby Manji Yamada vs Union of India & Anr.* (2008) INSC 1656 (29 September 2008). Judgment in the Supreme Court of India Civil Original Jurisdiction Writ Petition (C) No. 369 of 2008. <http://www.commonlii.org/in/cases/INSC/2008/1656.html> The definitions of family and citizenship under Indian and Japanese law could not provide a decisive answer as to the parentage and nationality of the baby in this case. Kari Points, ‘Commercial Surrogacy and Fertility Tourism in India’, The Kenan Institute for Ethics at Duke University,

<https://web.duke.edu/kenanethics/casestudies/babymanji.pdf> accessed 20 September 2016  
<sup>32</sup> The Union Home Ministry instructed Indian Missions and Foreigner Regional Registration Offices (FRRO) not to grant visas to couples intending to visit India for surrogacy.

<sup>33</sup> Bill No. 257 of 2016, Clause 4 (iii)(c)(I).

should be Indian citizens.<sup>34</sup> They must not have a surviving biological child, an adopted child or a child from a previous surrogacy, unless the child in question is mentally or physically challenged or suffers from a life threatening disorder with no permanent cure.<sup>35</sup> At least one of the couple must have proven infertility.<sup>36</sup> There will be a provision which ensures that the commissioning couple would not be able to abandon the child born through surrogacy.<sup>37</sup> The surrogate (who will be an altruistic surrogate) must be a close relative of the commissioning couple and can only act as a surrogate once.<sup>38</sup> The Bill again prohibits commercial surrogacy and does not allow homosexual couples, single parents, or couples who are merely living together, to have access to surrogacy.

This protects the surrogate only to the extent that it takes the option for surrogacy away from her. Customers from overseas pay significant fees for the service, albeit less than they would have to pay elsewhere.<sup>39</sup> The ban on commercial surrogacy would thus deprive women of potential economic benefits.<sup>40</sup> Article 21 of the Constitution of India

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<sup>34</sup> Clause 4(iii)(c)(II)

<sup>35</sup> Clause 4(iii)(c)(III)

<sup>36</sup> Clause 4(iii)(a)(I)

<sup>37</sup> Clause 7

<sup>38</sup> Clause 4(iii)(b)(II)

<sup>39</sup> <http://www.businessinsider.com/india-surrogate-mother-industry-2013-9> Nita Bhalla and Mansi Thapliyal, 'Foreigners are Flocking to India to Rent Wombs and Grow Surrogate Babies', *Business Insider* (2013)

<sup>40</sup> Izabela Jargilo, 'Regulating the trade of commercial surrogacy in India', *Journal of International Business and Law* 15 (2015-2016), p. 354

lists the fundamental right to protection of life and personal liberty and this could be interpreted to include a right to choose to earn a livelihood through surrogacy.<sup>41</sup>

The demand for surrogacy will always be high in India itself, a country which expects a woman to produce an heir and where there is stigma attached to adoption.<sup>42</sup> Some will only respect a wife if she is the mother of a child, which not only proves her husband's virility but also enables the family line to be continued.<sup>43</sup> Many women who are infertile are ostracized and some even at risk of domestic violence and abandonment.<sup>44</sup> Given this societal focus on producing a child, the insistence that the surrogate can only be a close relative of the commissioning parents has led to concerns that young women will then be coerced by family members to assist sisters-in-law who are unable to conceive or carry a child.<sup>45</sup> In addition, given that the commissioning couple and the surrogate will be living in close proximity to each other, there is the potential for the

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<sup>41</sup> The Constitution of India (1950) Art. 21. <https://india.gov.in/my-government/constitution-india/constitution-india-full-text> See also <http://thewire.in/64656/why-the-government-needs-to-rethink-the-surrogacy-bill/> Chithra P. George, 'The Government Must Rethink the Surrogacy Bill', The Wire, 8<sup>th</sup> September, 2016

<sup>42</sup> <http://www.feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/#.V9un8fkrKUk> Malavika Ravi, 'A Critical Analysis of The Surrogacy Regulation Bill 2016'.

<sup>43</sup> <http://dx.doi.org/10.2139/ssrn.1762401> Smith Chandra, 'Surrogacy and India', *Social Science Research Network*, 16 February 2011

<sup>44</sup> Anne Donchin, 'Reproductive Tourism and the Quest for Global Gender Justice', *Bioethics* Volume 24 Number 7 (2010), pp 323-332

<sup>45</sup> <http://thewire.in/64656/why-the-government-needs-to-rethink-the-surrogacy-bill/> Chithra P. George, 'The Government Must Rethink the Surrogacy Bill', The Wire, 8<sup>th</sup> September, 2016. The Standing Committee's Report, published in August, also refers to potential psychological effects on the surrogate child, should a close relative be compelled to act as a surrogate. Standing Committee Report Summary, August 25, 2017. [www.prssindia.org](http://www.prssindia.org)

surrogate and the baby to bond and as a consequence it is likely that the surrogate will be deprived of her privacy in order to avoid this.<sup>46</sup> This would violate the surrogate's right to health and bodily integrity as a facet of 'personal liberty' under Article 21 of the Constitution of India.<sup>47</sup>

Enactment and implementation of the 2016 Bill is not certain.<sup>48</sup> There are many with a vested interest in the continuation of commercial surrogacy. The current commercialisation of surrogacy in India is thought to be worth between US \$450-500 million.<sup>49</sup> It is, therefore, lucrative, not only for the medical profession but also for those women who would not otherwise be able to access the level of income that acting as a surrogate provides. India legalized commercial surrogacy in 2002 and this led to the country becoming one of the most popular destinations for reproductive tourism, providing a much cheaper and less bureaucratic access to surrogacy for couples from

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<sup>46</sup> <http://thewire.in/64656/why-the-government-needs-to-rethink-the-surrogacy-bill/> Chithra P. George, 'The Government Must Rethink the Surrogacy Bill', The Wire, 8<sup>th</sup> September, 2016

<sup>47</sup> Article 21 Constitution of India (1950). Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

<sup>48</sup> The Parliamentary Standing Committee submitted its report in August 2017 and recommended a compensation model of surrogacy rather than an altruistic one, also expressing concerns as to the requirement that the surrogate should be a close relative, the five year waiting period and the lack of clarity regarding egg or sperm donation. It also recommended that the criteria for eligibility be widened to include live-in couples, divorced women and widows. [www.prssindia.org](http://www.prssindia.org)

<sup>49</sup> Prabha Raghavan & Divya Rajagopal, 'Double Whammy: What the surrogacy bill brings for India', *The Economic Times* 3 September 2016.

<http://economictimes.indiatimes.com/news/economy/policy/double-whammy-what-the-surracy-bill-brings-for-ndia/articleshow/53987298.cms?prtpage=1>

many different countries.<sup>50</sup> India has been particularly attractive for surrogacy as there is no risk of the surrogate mother being regarded as the legal parent, the contract making it clear that the commissioning couple are the legal parents of the resulting child.<sup>51</sup> The practice is unregulated, with little evidence of whether many infertility clinics adhere to the voluntary guidelines published by the Indian Medical Council, which have not been implemented into law.<sup>52</sup> There are reports of malpractice at some of the clinics.<sup>53</sup> There is little information available on how many ART clinics are in existence, and no information available on the babies which have been produced using ART.

As noted, there are doubts as to whether the legislation would be enforced. Similarly strong feelings were evidenced about sex-selective abortion and there is clear legislation banning sex determination for non-medical reasons<sup>54</sup> leading to sex-selective abortion<sup>55</sup> but data indicates that the practice is still common.<sup>56</sup> As with surrogacy, many benefit

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<sup>50</sup> Possibly the main destination. ‘India: Draft Legislation Regulating Assisted Reproductive Technology Published’ Law Library, Library of Congress, 2 November 2015, <http://www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating-assisted-reproductive-technology-published/>

<sup>51</sup> Jargilo, ‘Commercial Surrogacy in India’, p. 343

<sup>52</sup> [http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm) Indian Council of Medical Research and National Academy of Medical Sciences, India, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005)

<sup>53</sup> Jargilo, ‘Commercial Surrogacy in India’, p.343

<sup>54</sup> Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act 2002.

<sup>55</sup> In India abortion was legalised in 1971 by the Medical Termination of Pregnancy Act, legislation which was very similar to the U.K.’s 1967 Act. Sex selection is not included in the grounds permitted for abortion.

<sup>56</sup> Prof Prabhat Jha, Maya A Kesler, Prof Rajesh Kumar, Prof Faujdar Ram, Usha Ram, Lukasz Aleksandrowicz, Diego G Bassani, Shailaja Changra, Jayant K Banthia, ‘Trends in selective

financially from the practice of sex-selective abortion and this seems to take priority over observance of a clear prohibition. It seems that there has to be a belief in India that the legislation will benefit the individual in order for it to be adhered to.

If the Bill proceeds to legislation there is fear that commercial surrogacy will be driven underground and that women may be trafficked to other jurisdictions where surrogacy is permitted.<sup>57</sup> There is also the possibility that agreements with commissioning couples from overseas will continue despite the ban, the couples willing to take the risk of entering into a contract. Clinics and doctors who have also become used to the high levels of income will be unwilling to forfeit such opportunities. It may be that the demand and supply will remain unchanged; it will merely be the access to such services which will vary. As a consequence, women who act as surrogates will be even less protected and more exposed to potential harm. Desperation on both sides will override any prohibition. The proposed Bill does not protect the commercial surrogate and in fact creates a more exploitative environment.

As the proposed ban on commercial surrogacy appears to be a reaction to concerns about exploitation, based upon fears that women are not making the choice

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abortions of girls in India: analysis of nationally representative birth histories from 1990 to 2005 and census data from 1991 to 2011', *The Lancet*, Volume 377 Issue 9781, (2011) p. 1921

<sup>57</sup> <http://thewire.in/64656/why-the-government-needs-to-rethink-the-surrogacy-bill/> Chithra P. George, 'The Government Must Rethink the Surrogacy Bill', The Wire, 8 September 2016

autonomously but may be making what Nussbaum and Okin refer to as ‘adaptive preferences’, the following section examines in more detail the concept of ‘adaptive preference’ formation and how we might develop the critique of autonomy.

### Adaptive preference formation and the presumption of autonomy deficit

To act autonomously is to be the author of one’s own decisions and choices.<sup>58</sup> Autonomous decisions and choices are assumed to be the products of beliefs and values arrived at, and held, freely – not imposed on us from without. Autonomy plays a central role in the sphere of bioethics and is usually evidenced by the provision of a valid consent to medical treatment which lends moral legitimacy and legality to treatment. Thus a person’s autonomy will be respected if the individual has capacity, has been provided with, and has understood, sufficient information about the treatment, and if the decision is made voluntarily. But a valid consent (or refusal) is only *evidence* of autonomy and if an irrational or ill-advised decision is made then further scrutiny of a decision will be triggered to better determine the presence or otherwise of autonomy. In the context of a person living under gender and social oppression, where a decision is perceived to be inconsistent with the woman’s well-being and is made under conditions which are inconsistent with her flourishing, then there may be a reasonable intuition that

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<sup>58</sup> Beauchamp and McCullough describe the concept as having sovereignty over one’s life. T L Beauchamp and L B McCullough, *Medical Ethics*, (Englewood Cliffs: Prentice Hall 1984)

the woman has internalised her oppression. The presumption will be that this has caused her to adapt her preference, negating her autonomy.

In the case of an Indian woman choosing to act as a commercial surrogate her decision could be considered to be against her wellbeing because it results in separation from her family, risks her health and means that she is treated as a means to an end, a cheap source of labour.<sup>59</sup> If cross-cultural judgments are made about her flourishing the assumption will be that she cannot be in control of her own decision-making.

However, it is difficult to understand the surrogate's desires from her behaviour and ways in which she may flourish will be unfamiliar. There could be other reasons for her choice other than an internalisation of oppression and it may be possible that the woman choosing to act as a surrogate *does* possess agency and autonomy. Although this alternative intuition may challenge the popular view of the Indian surrogate as an exploited victim it does recognise that the woman may have her own reasons for making the decision which are not solely built upon her society's views of her sex. Certainly choice environment is limited by culture, and the woman will optimise her position within those choice constraints, but she may yet be acting autonomously. This

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<sup>59</sup> Donchin, 'Reproductive Tourism', p. 326

recognition then empowers her as it does not label her as a defective agent and serves to promote her autonomy.

The danger of one intuition is that too much is assumed from the environment of oppression, but the other intuition may not acknowledge the extent of the internalisation of oppression. Both approaches aim to improve the lives of women yet both could be detrimental to their wellbeing.<sup>60</sup> The key is to achieve the correct balance between the two: to recognise that a decision which may appear to be representative of the woman's own values could in fact be a product of her internalising social oppression and so not her own, yet not making that assumption automatically because of the content of her decision. Further scrutiny of the decision, and her reasons for acting, is required. Western women's feminist presumptions will not serve Indian surrogate mothers' best interests and claims as to the presence or otherwise of autonomy must be based on more rigorous examination of why this choice is being made and the extent of external and internal influences. As Deomampo reasons, to regard Third World women merely as

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<sup>60</sup> See Diana Tietjens Meyers, 'The Feminist Debate over Values in Autonomy Theory', in Andrea Veltman and and Mark Piper, eds., *Autonomy, Oppression, and Gender* ((Oxford University Press, 2014), p. 114-140 for a discussion of the conflict between the two feminist intutions.

the helpless and oppressed who need to be rescued labels them as victims but does not acknowledge that these are individuals with their own perspective and reasoning.<sup>61</sup>

The first intuition is a possibility if there is a total internalisation of her society's views of her sex and those are the sole reason for her preference. This has been described as a paradigmatic adaptive preference<sup>62</sup> and would mean that the woman is not choosing autonomously. Socialisation can have a subtle effect on the ability of women to act autonomously<sup>63</sup> and could be so internalised that a woman may genuinely believe that her reasons for acting are her own.<sup>64</sup> The socialisation may be deemed oppressive because what the woman is made to think and believe is not true. She may have been led to internalise false ideas and so does not understand her reasons for making certain decisions. The woman in India is regarded by some as an economic liability and a burden to her family as a dowry has to be paid on her marriage and sometimes continuing payments made to the groom's family to ensure her wellbeing and respectability. Marriages are often arranged to produce alliances between groups or the

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<sup>61</sup> Daisy Deomampo, 'Transnational Surrogacy in India', *Frontiers* Vol. 34 No. 3 (2013), pp 167-188

<sup>62</sup> Hanna Papanek, 'To Each Less Than She Needs, From Each More Than She Can Do: Allocations, Entitlement and Value', in I Tinker, ed., *Persistent Inequalities: Women and World Development*, (Oxford University Press, 1990), referenced in Serene Khader, Identifying adaptive preferences in practice: lessons from postcolonial feminisms', *Journal of Global Ethics*, 9:3 (2013), 311

<sup>63</sup> Paul Benson, 'Autonomy and Oppressive Socialization', *Social Theory and Practice* 17 (1991) p 385

<sup>64</sup> Benson, 'Oppressive Socialization', p. 389

woman may be sold as a bride to produce male heirs. She is therefore accustomed to being considered as a means to an end, something to be used to further others' purposes. She may consequently possess a low status and this will influence how she regards herself and her own worth. If she is pressurised by her family to act as a surrogate to provide an income for her family then she is unlikely to refuse or even to question that path.

However, if there is no total internalisation of oppression, the decision is still intuitively problematic because it appears to be causally related to unjust conditions. Further scrutiny of the decision is thus required to determine the option set the woman is working within and how she perceives her choices. There are different types of adaptive preferences and it may be that the woman is finding her own way of negotiating her environment. There are also external conditions which will affect her decision-making. Traditionally many women in India have limited earning power, they have little education but will need to add to the sparse income of their husbands so that their children may have the chance of an education or perhaps improved living conditions.<sup>65</sup> There are thus structures of inequality and social subordination which affect many women and these influences will feed into her decision-making.<sup>66</sup>

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<sup>65</sup> Donchin, 'Reproductive Tourism', p. 326

<sup>66</sup> Donchin, 'Reproductive Tourism', p. 323

Serene Khader uses her Deliberative Perfectionist Conception of Adaptive Preference to identify those preferences of concern, where there is a suspicion of an absence of autonomy. Her definition of an adaptive preference requires a choice to be inconsistent with basic flourishing, formed under conditions which are not conducive to basic flourishing, and which it is believed could be changed following normative scrutiny and exposure to conditions which are more conducive to flourishing.<sup>67</sup>

The preference to act as a commercial surrogate can be considered to be contrary to the woman's welfare, certainly, as she is in effect selling the use of her body and is being used as a means to an end. The preference is also causally related to the conditions of oppression which have formed it as she is then regarded as the baby maker which can produce the all-important child, essential to the Indian family. In addition she is a source of income for the family and the medical profession who provide surrogacy services. The preference may have been developed in response to unjust social arrangements and it is incompatible with her basic wellbeing. However, this will merely trigger suspicion as to whether she is making her own choice but would not necessarily deny the agency of the decision-maker.

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<sup>67</sup> Khader, *Adaptive Preferences*, p. 51

The woman could have a degree of normative distortion but not total. She may have a critical perspective of her situation and the decision she is making within a limited choice environment.<sup>68</sup> Ramya, a surrogate mother interviewed in Amrita Pande's study of Indian surrogates, recognises that the practice of surrogacy is regarded by some as wrong, but attempts to justify her involvement, describing it as a good opportunity for her and others.

Women in our country will continue to do this, whether the government likes it or not, whether you like it or not! This is the best option available for many of us. If the government declares this to be a bad thing, we will do this in hiding, like prisoners, ashamed and weeping over our misfortune.<sup>69</sup>

Another surrogate, Salma, also recognises the dubious ethics of the practice, but states that for many there is no choice.

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<sup>68</sup> Uma Narayan, Minds of Their Own: Choices, Autonomy, Cultural Practices, and Other Women', in Louise M Antony and Charlotte E Witt eds., *A Mind of One's Own: Feminist Essays on Reason and Objectivity*, (Boulder, CO: Westview Press 2002) in Serene J Khader, 'Identifying adaptive preferences in practice: lessons from postcolonial feminisms', *Journal of Global Ethics*, 9:3, (2013), p 311

<sup>69</sup> Amrita Pande, *Wombs in Labor*, (New York, Columbia University Press, 2014), pp 180-181

This work is not ethical – it's just something we *have* to do to survive. .... society disapproves. But I say, if your family is starving what will you do with respect? Prestige won't fill an empty stomach.<sup>70</sup>

Her words also indicate that she has been forced to execute a trade-off, with the awareness that she will only be able to achieve a certain level of welfare. She strives to maximise her security and increase her life choices. This is again illustrated in Yashoda's account where she explains that acting as a surrogate takes her away from the harsh treatment from her mother-in-law and grants her some independence.

This is the first time that I am not giving up all my income to my mother-in-law. Whatever I earned as a maid I had to surrender to her and she would decide how much spending money my children and I would get every month. This is the first time I get to keep all of it with me. I get to decide what I want to do with it. I know this money is not enough for everything, I know I will go back to being a maid. But as long as it gets me out of that house – I think all this will be worth it.<sup>71</sup>

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<sup>70</sup> Amrita Pande, 'Not an 'Angel', not a 'Whore': Surrogates as 'Dirty' Workers in India', *Indian Journal of Gender Studies* 16:2 (2009) pp 141-173

<sup>71</sup> Pande, *Wombs*, p. 48

Alternatively the Indian surrogate may be lacking non-normative information. She may not be aware of other choices or any benefits she may gain in refusing to make the choice. She may not be informed of the risks involved to her own health.<sup>72</sup> In the case of commercial surrogacy it is doubted that the surrogate will fully understand the terms of the contract she is signing and any rights she may have. In some cases it is the husband's signature which is used to finalise the contract. Again, this is demonstrated in the individual narratives in Pande's study. These are the words of Panna, a 27 year old housewife, who was persuaded to act as a surrogate by her husband and sister-in law.

I don't know if the egg is mine or not. I wasn't involved in the paperwork either. When the nurse was explaining everything to us, my husband was there. He understands more about all this and he is the one who is handling the money.<sup>73</sup>

It may be that if she was made aware of the terms of the contract she would not have made the same decision. So it is an adaptive preference based on limited information. But there is a significant difference between being non-autonomous on the one hand, and on the other not being fully informed. A consent to treatment may be invalid if

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<sup>72</sup> As evidenced in the case studies carried out by Jargilo in Izabela Jargilo, 'Regulating the trade of commercial surrogacy in India' *Journal of International Business & Law* 15 (2015-2016), at p 349

<sup>73</sup> Pande, *Wombs*, p. 54

insufficient information regarding the nature of the procedure is provided, but the individual may yet be autonomous.

These would all, *prima facie*, appear to be adaptive preferences which some would then claim results in autonomy deficit. However, if Khader's perfectionist conception of adaptive preference is applied, then there is a suspicion of an adaptive preference but autonomy or its absence of autonomy remains to be determined. We can attempt to settle this by applying different theories of autonomy. Traditional procedural and substantive theories are applied here but also the re-conceptualised versions of these: relational autonomy theories. The latter acknowledges that individuals are socially embedded and that social relations and conditions will influence the capacities of an agent. They may better take into account the possible internalisation of oppression but at the same time these theories aim to grant autonomy to women where internalisation is less than total.

#### The application of different theories of autonomy to the decision to act as a commercial surrogate in India

Traditional procedural theories of autonomy are content-neutral in that the actual content of a person's desires and values is viewed as irrelevant. What is required is that

the individual has the capacity to reflect on her motivational structure and is then able to change it in response to the reflection. The structural approach is advocated by the models of Gerald Dworkin<sup>74</sup> and Harry Frankfurt.<sup>75</sup> Dworkin would describe a person as autonomous where there is “authenticity”, which is where the individual identifies at a higher level with her lower level desires, and where there is procedural independence of this identification.<sup>76</sup> Frankfurt’s description is similar, although he emphasises the requirement that ‘first’ and ‘second order’ desires or volitions be in agreement. To be considered autonomous the individual must exercise control over her will, and also identify with her will at the level of her second order desires. There will be identification following reflection, where the person distinguishes between desires she regards as her own and those she has but to which she is indifferent. The problem then is how to ensure that the higher order identifications are autonomous given that there is a clear problem of a possible ‘constant regress’.<sup>77</sup> There would always be the doubt as to whether the higher order desire (which endorses the lower order desire), is in itself autonomous, or whether endorsement by yet another level of desire is required.<sup>78</sup> This would be particularly of concern in hard cases where the decision-maker is exposed to

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<sup>74</sup> Gerald Dworkin, ‘The Concept of Autonomy’ in John Christman (ed), *The Inner Citadel, Essays on Individual Autonomy* (Oxford University Press 1989), pp 54-62

<sup>75</sup> Harry G Frankfurt, ‘Freedom of the Will and the Concept of a Person’ in John Christman (ed), *The Inner Citadel, Essays on Individual Autonomy* (Oxford University Press 1989)

<sup>76</sup> Dworkin, ‘Concept of Autonomy’, p. 61

<sup>77</sup> Gary Watson, ‘Free Agency’, *Journal of Philosophy* 72 (1975) p 205

<sup>78</sup> James Stacey Taylor (ed) *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy* (Cambridge University Press 2005)

gender or cultural oppression. Frankfurt suggests that there would be no need for a further higher endorsement if the endorsement is made decisively and without reservation<sup>79</sup>, or if the person is satisfied with the higher order desire<sup>80</sup>, but this decisive identification, or satisfaction, could just as easily be the result of oppression.<sup>81</sup> In addition, there is little guidance as to when or how a particular desire becomes one's own and what properties it must have.<sup>82</sup> There would be doubt as to whether the woman in India choosing to act as a commercial surrogate would have sufficient capacity to reflect as the majority of the surrogates are uneducated and are rarely independent. There may also be uncertainty as to whether she would be able to distinguish between the different levels of desire.

In response to these criticisms the relational version of this approach attempts to provide a better account of the problem of socialisation, recognising that oppressive socialisation could result in the first order desires being a more accurate indicator of what the individual wants and values, the higher level values being a product of the

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<sup>79</sup> Harry Frankfurt, 'Identification and Wholeheartedness' in F. Schoeman (ed), *Responsibility, Character and the Emotions* (Cambridge University Press 1987)

<sup>80</sup> Harry Frankfurt, 'The Faintest Passion. Proceedings and Addresses of the American Philosophical Association' (1992) Vol. 66 Newark, Del.: American Philosophical Association 5, referenced in John Martin Fischer, 'Recent Work on Moral Responsibility' *Ethics* Vol. 110 No. 1 (1999) p 93

<sup>81</sup> John Christman (ed), *The Inner Citadel: Essays on Individual Autonomy*, (Oxford University Press 1989)

<sup>82</sup> Watson, 'Free Agency', p. 205

socialisation.<sup>83</sup> Marilyn Friedman proposes a model which is non-hierarchical: a two-way process which aims to integrate intermediate standards and motivations and the individual's highest principles.<sup>84</sup> However, a threat to autonomy is perceived only when total internalisation of socialisation which acts to inhibit autonomy is either not entirely successful or has started to fail. This alternative approach is therefore subject to the same criticisms as the more traditional models of Frankfurt and Dworkin as a lack of disparity between the two standards will not necessarily signify autonomy.<sup>85</sup>

Another criticism of the traditional procedural approach has been its ‘time-slice’ nature, where no account is taken of how a person’s wishes and values have evolved. John Christman’s historical approach recognises the potential danger of manipulation and the internalisation of oppression, and requires that upon reflection the individual does not resist how the desire has developed.<sup>86</sup> In addition, a lack of resistance should not be because of factors which inhibit self-reflection and should not involve self-deception. Christman explicitly demands that the process of reflection not be influenced by manipulation, indoctrination or oppressive socialisation as these would interfere with

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<sup>83</sup> Marilyn Friedman, ‘Autonomy and the Split-Level Self’, *Southern Journal of Philosophy* 24 (1986) p 19

<sup>84</sup> Friedman, ‘Split-Level Self’, p. 19

<sup>85</sup> Benson, ‘Oppressive Socialization’, p.395

<sup>86</sup> Taylor, ‘Personal Autonomy’, p.10

normal cognitive reflective processes.<sup>87</sup> But we might ask whether it is plausible or likely to assume that a person who has known only one way of thinking would be capable of identifying external influences, or disposed to challenge them as illegitimate. The individual would have to be self-transparent and be aware of how desires and preferences have been acquired. It seems that the ability to consider changing one's identifications presupposes autonomy from the outset.<sup>88</sup> Even if this is too harsh an observation, the bar is set in terms of the depth of awareness of one's psychological history and of the ability to analyse in depth the motivations for each desire.<sup>89</sup>

Diana Meyers' competency theory, also relational, analyses the skills and capacities required for autonomy and the type of socialisation that is required to develop - rather than undermine - those skills. It is based on the concept that autonomy is a competency which consists of the skills of self-discovery, self-direction and self-definition, enabling reflection.<sup>90</sup> Meyers contends that this self-realisation approach can be developed only in the context of social relationships, thus the social environment is central to the extent

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<sup>87</sup> John Christman, 'Autonomy: A Defense of the Split-level Self', *Southern Journal of Philosophy* 25 (1987) p 281

<sup>88</sup> Benson, 'Oppressive Socialization', p. 397

<sup>89</sup> Andrea Westlund, 'Selflessness and Responsibility for Self: Is Deference Compatible with Autonomy?' *The Philosophical Review* Vol. 112 No. 4, (2003) 483

<sup>90</sup> Diana Meyers, 'Personal Autonomy and the Paradox of Feminine Socialization', *Journal of Philosophy* 84 (1987) pp 619-628

of the capacities achieved.<sup>91</sup> Meyers believes that a woman who has been subjected to oppressive socialisation may be particularly compromised in relation to programmatic autonomy, that is, the capacity to decide important life issues critically and reflectively.<sup>92</sup> This demonstrates one of the criticisms of the relational autonomy approach as the existence of social oppression in a society may then lead to a conclusion that a woman living within that society cannot be autonomous. On this point Paul Benson prefers to argue that despite the existence of social oppression, *some* women will still have sufficient self-awareness and information to prevent them from being entirely manipulated. These women will have regard for their own competence and worth and so will be able to defend their decisions and answer for them.<sup>93</sup> This would not automatically lead to the conclusion that a woman in an oppressive society has no autonomy. Meyers agrees, proposing that not all preferences of an individual should be granted equal weight. If the preference reflects uncritical acceptance of social norms and expectations then such a preference will warrant less recognition than decisions arising from the exercise of skills of self-discovery, self-definition and self-direction. We can note here that theoretically the focus is not on the *content* of the decision, but on how the woman has acquired the desire in question. In practice, however, it will be the

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<sup>91</sup> Meyers, 'Personal Autonomy', p. 619

<sup>92</sup> Meyers, 'Personal Autonomy', p. 624

<sup>93</sup> Paul Benson, 'Feminist Intuitions and the Normative Substance of Autonomy' in James Stacey Taylor (ed), *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy* (Cambridge University Press 2005)

content of the decision which prompts the concern and further scrutiny, as it is in the case of commercial surrogacy.

In the light of these objections to procedural approaches, and particularly in relation to the problem identified with socialisation, some theorists hold the view that the procedural account should be supplemented by a non-neutral condition. A strong substantive account requires an individual's preference to contain specific content in order for it to be considered autonomous. There must be the capacity to identify the difference between right and wrong. Oppressive socialisation may interfere with that capacity and those subjected to such may not be regarded as autonomous. Susan Wolf is an advocate of the strong substantive account, requiring the individual to have the capacity for rational self-legislation.<sup>94</sup> She describes this as a 'special sort of sanity'.<sup>95</sup> The agent would have to have the ability to know what she is doing and also to know that what she is doing is right or wrong. This clearly goes beyond the requirements for the procedural account, and requires 'the ability to cognitively and normatively appreciate the world for what it is'.<sup>96</sup> Wolf describes this as meaning 'widespread inter-subjective agreement'<sup>97</sup> but this requires further analysis and also results in other concerns. If this signifies that the individual's preference will be measured by the

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<sup>94</sup> Susan Wolf, 'Sanity and the Metaphysics of Responsibility' in John Christman ed., *The Inner Citadel: Essays on Individual Autonomy*, (Oxford University Press, 1989) pp 137-151

<sup>95</sup> Wolf, 'Sanity', p. 145

<sup>96</sup> Wolf, 'Sanity', p. 145

<sup>97</sup> Wolf, 'Sanity', p. 149

majority view (if indeed there is a majority view of commercial surrogacy), that other views about the world are incorrect and therefore that person does not possess this ‘special sort of sanity’, then this hands the majority the power to decide on the sanity of others. It also allows them to judge whether or not the decision-makers are autonomous. The approach certainly responds to situations where oppressive socialisation may have resulted in preferences which are normatively questionable, but it may also then discount autonomy for all erroneous decisions and those which are the result of human weakness, as well as those made within an environment of subordination or oppression.<sup>98</sup> This will unavoidably result in implied criticism of other cultures with little regard for the problems that attend the justification of substantive ethical claims thrown up by cultural pluralism or relativism. The more prescription that attends the content of a decision, the more we move away from the traditional concept of autonomy that values the ability to decide for oneself.

A weak substantive account requires the decision-maker to hold certain attitudes in relation to herself - such as self-trust, self-confidence and self-esteem - and this is more in line with the emphasis on the societal orientation of relational theories given that these attributes often depend on social conditions and relations. This may be too burdensome, however, for those who are socially oppressed, given that such character

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<sup>98</sup> Paul Benson, ‘Freedom and value’ *Journal of Philosophy* 84 (1987) p 465

traits do not flourish in environments which erode self-worth and self-esteem. This becomes apparent in Robin Dillon's support for the weak substantive account which maintains that a feminist conception of self-respect would be more favourable to liberalisation.<sup>99</sup> Dillon focuses on Stephen Darwall's 'recognition self-respect'<sup>100</sup> and it being required for a person to be able to develop and make choices. This means recognising that persons have intrinsic moral worth and status and that as a member of the moral community the individual possesses basic moral rights.<sup>101</sup> However, any institutionalised denial of the equality of women would make 'recognition self-respect' difficult to achieve, leading to a presumption that women living within such an environment will be non-autonomous. This idea of self-respect is relational as it recognises that connections to others are part of what makes us an individual, but it may then act against those women who have had a low status imposed on them by society. Similarly, Trudy Govier emphasises the value of self-trust, requiring the individual to be secure in the sense of her own values, motives and capacities to facilitate reflection and effective action.<sup>102</sup> Andrea Westlund's dialogical conception also asks the agent to take responsibility for herself, and to subject herself to independent self-criticism, to

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<sup>99</sup> Robin Dillon, 'Toward a Feminist Conception of Self-Respect' *Hypatia* Vol. 7 no. 1 (1992) p. 52

<sup>100</sup> This follows Stephen Darwall's distinction made between appraisal self-respect and recognition self-respect. Stephen Darwall, 'Two kinds of respect', *Ethics* 88 (1977) p. 36

<sup>101</sup> Dillon, 'Self Respect', p. 55

<sup>102</sup> Trudy Govier, 'Self-Trust, Autonomy and Self-Esteem', *Hypatia* 8 1 (1993) p 99

hold herself answerable.<sup>103</sup> All of these approaches attempt to address directly the effect of social oppression but the requirement of such attributes as a criterion of autonomy appears onerous. Although intended to provide a supportive critique of women living within an oppressive environment, the very account of the oppressive circumstances might preclude a finding of autonomy.

Natalie Stoljar's relational version of a strong substantive approach to autonomy relies on the intuition that if a preference is directly produced by the internalisation of oppressive norms then even when those attitudes have been reflectively endorsed by the decision-maker she will be unable to produce autonomous action.<sup>104</sup> It is not then the content of the preference which goes to the heart of this approach but the motivation behind the preference and whether this motivation is the woman's own. But feminist intuitions should not endorse a presumption of non-autonomy, rather they should trigger further inquiry. Stoljar's approach satisfies one intuition, namely, that the woman's choice cannot be her own if it is based on norms promulgated by others, but it will rarely lead to an acknowledgement of autonomy for women who appear to be acting in accordance with those norms.

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<sup>103</sup> Westlund, 'Selflessness', p 495

<sup>104</sup> Natalie Stoljar, 'Autonomy and the Feminist Intuition' in C Mackenzie and N Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*, (New York: Oxford University Press 2000)

These competing theories have similar aims, but not one alone adequately addresses the concerns related to the internalisation of oppression. A more holistic approach has been taken by Catriona Mackenzie who identifies distinct dimensions of autonomy and how they are causally interdependent.<sup>105</sup> The three dimensions are self-determination, self-governance and self-authorisation. Her novel approach aims to give the necessary weight to the social and political preconditions for autonomy and may also satisfy both intuitions. It addresses the possible effect of internalisation of oppression and also recognises that a person could, nevertheless, be self-governing and self-authorising even when living under oppression. Further, a person could have the freedom she requires for self-determination but may not be self-governing or self-authorising.

The relational self-determination dimension requires the agent to have the freedom and opportunity to make choices which are referred to as ‘opportunity conditions’. External constraints may take away the ability to control one’s life and this will inevitably undermine autonomy. Mackenzie believes that the opportunity conditions for self-determination are best described in the ‘capability’ account of Martha Nussbaum. These capabilities include being able to live a life of normal length, being able to have good health, including reproductive health, being able to move freely and have a choice in

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<sup>105</sup> Catriona Mackenzie, ‘Three Dimensions of Autonomy: A Relational Analysis’ in Andrea Veltman and Mark Piper (eds), *Autonomy, Oppression and Gender* (Oxford University Press 2014), pp 15-41

matters of reproduction, being able to use the senses, imagination and thought, being able to have attachment to things and people, being able to form a conception of the good, affiliation, being able to live with other species, being able to laugh and play and having control over one's environment, both politically and materially.<sup>106</sup> If the internalisation of oppression leads to a choice not to have one of the capabilities on the list, evidenced by a suspected adaptive preference, then the external constraints may have affected the conditions required for self-governance (authenticity and competency) and for self-authorisation.

Relational self-governance focuses on the internal conditions of competence and authenticity, but recognises at the same time that external conditions will influence the development of skills and competencies needed to govern the self. Here Mackenzie uses John Christman's approach to authenticity which accepts that a person's identity develops over time and is historically sensitive.<sup>107</sup> Competence conditions refer to the skills a person needs to be self-governing and the importance of social influence is recognised again, as well as the need to promote relationships which will assist with self-knowledge.

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<sup>106</sup> Martha Nussbaum in 'Symposium on Artya Sen's philosophy: 5 Adaptive preferences and women's options', *Economic and Philosophy*, (2001) p. 67 doi: 10.1017/S0266267101000153

<sup>107</sup> Christman, *Inner Citadel*, p. 9

For relational self-authorisation a person must regard herself as having the normative authority to be self-determining and self-governing. This dimension clearly draws on the work of those who have promoted the weak substantive relational theories of autonomy such as Dillon, Govier and Westlund who require the individual to have self-respect, self-trust and self-esteem. These self-evaluative stances will depend on inter-subjective social relations, creating a vulnerability on the part of the person who is not granted recognition by others when there is an inequality of power.<sup>108</sup> Because of the emphasis on how others regard the individual, this account grants too much influence to external factors in determining the presence or absence of autonomy. Mackenzie attempts to soften this externalism by rejecting the ‘all or nothing’ approach and stipulating only that a person has *appropriate* self-evaluative attitudes which will depend on the context of the decision to be made. This three dimensional approach may be more comprehensive and attempts to address the criticisms of each single relational theory of autonomy but with that comes complexity and an uncertainty as to how these different dimensions may be applied as well as the weight to be given to each one. It may yet be asking too much of an oppressed woman to be able to satisfy each dimension and so achieve autonomy. Much depends on Mackenzie’s interpretation of ‘appropriate’ self-evaluative attitudes and how each dimension is applied to the decision to act as a commercial surrogate.

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<sup>108</sup> Mackenzie, ‘Three Dimensions’, p.37

It is submitted that no theory of autonomy can lead us to definite conclusions as to the presence or absence of autonomy. What theory can do is show us that there is the *possibility* of the presence of autonomy, even in a patriarchal, oppressive, environment. But how are we to theorise the overwhelming issue of exploitation, the existence of which cannot plausibly be denied? We have argued that oppression does not eradicate autonomy, but does finding a place for autonomy in oppression mean that we must concede that autonomy precludes exploitation?

#### The existence of exploitation in the context of an autonomous decision

If we conclude that the Indian woman choosing to act as a commercial surrogate may be autonomous then this empowers her as we recognise her as an autonomous being rather than dismiss her as non-autonomous because of her oppressive environment. This avoids any charge of paternalism, one of the main concerns of Western feminists in particular. However, there is a danger, identified by Heather Widdows, that if we merely focus on respect for autonomy then we underplay the possibility of exploitation.<sup>109</sup> Certainly it is important to determine whether or not a decision is supportable on the basis of autonomy but that is not the golden key which transforms an

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<sup>109</sup> Heather Widdows, 'Border disputes across bodies: Exploitation in trafficking for prostitution and egg sale for stem cell research' *International Journal of Feminist Approaches to Bioethics* Vol. 2, No. 1, (2009), pp 5-24

act or a service into one which is not exploitative, so absolving those benefiting from an act or service from charges of exploitation. If we argue that there *can* be autonomy but still exploitation then we need to explore further what we understand as exploitation.

Exploitation is treating a person as a means to an end. The Indian surrogate is used as a commodity to benefit others: her family, the medical profession and the commissioning couples. Even the state benefits from the income generated by this form of medical tourism.

Exploitation is treating another unfairly and taking advantage of the other's situation. There are such signs in reports of 'baby farms' in certain States, surrogates not understanding the contracts they are signing, and not being paid a sufficient share of the amount the commissioning couple are charged.<sup>110</sup> The family of the surrogate use the gender subordination within the patriarchal system to persuade the women to trade their bodies, their labour and even body parts in exchange for much needed income. They are often desperate, illiterate and unaware of the associated risks. They may still be autonomous, even if their agreement to the procedure is solely because they desperately need the money to survive, or to feed their families. Surrogacy may be a way to escape

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<sup>110</sup> <http://www.feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/#.V9un8fkrKUk> Malavika Ravi, 'A Critical Analysis of The Surrogacy Regulation Bill 2016'.

from abusive husbands or may be a way to survive following divorce.<sup>111</sup> It could then be argued that the practice of surrogacy will, for these women in particular, increase their chance of an autonomous life. But even if she is autonomous and will benefit from her decision she may be exploited nevertheless. She is still being treated unfairly.

Anne Donchin's view of exploitation is concerned about an individual's surrounding social conditions and how these affect choices.<sup>112</sup> She cites Onora O'Neill:

This is not to say that (the) impoverished are irrational or wholly dependent or cannot consent. However, their effective capacities and their opportunities for action ... constrain their possibilities for refusal and negotiation.<sup>113</sup>

Donchin accepts that impecunious women in poor economies choose to sell their bodily resources rather than remain in poverty but believes that the consent of those women cannot turn a morally unacceptable offer into a morally fair purchase.<sup>114</sup> Again, the consent is accepted as evidence of autonomy but the criticism is of the exploitation of the vulnerabilities of those who have to make such choices in order to survive. It is then

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<sup>111</sup> Deomampo, 'Transnational Surrogacy', p. 167

<sup>112</sup> Donchin, 'Reproductive Tourism', p. 325

<sup>113</sup> O. O'Neill, *Bounds of Justice*, (Cambridge University Press 2000) pp 166-167

<sup>114</sup> Donchin, 'Reproductive Tourism', p. 325

the imbalance of power between the buyer and seller which leads to a conclusion of exploitation.

This will occur in many areas of life, but it may be that there are certain arenas where the exploitation is considered more heinous than others. A comparison could be made with the sale of organs where there are also claims of exploitation of the poor by those who are wealthier and in a position to purchase organs. James Stacey Taylor examines the arguments of Paul Hughes and T.Z. Zutlevics who claim that the option to sell an organ is an autonomy-undermining ‘constraining option’.<sup>115</sup> They submit that such an option in a person’s choice set is likely to undermine that person’s autonomy rather than enhance it. Taylor disagrees and states that to allow a market in human organs would enhance vendor autonomy rather than diminish it. This again links exploitation to the quality of autonomy, however, and does not address the possibility of exploitation even when autonomy is present. Taylor points out that there are many areas of work which are regarded as exploitative but they are regulated to protect those working in those areas, rather than banned. There are clearly different forms of exploitation, one of which would be to take advantage of others’ limited life choices, but another would be to not provide protection which may be costly but which would improve the quality of

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<sup>115</sup> James Stacey Taylor, ‘Autonomy, Constraining Options, and Organ Sales’, *Journal of Applied Philosophy*, Vol. 19, No. 3, (2002) pp 273-285

the option set available to certain workers.<sup>116</sup> This last point is persuasive when applied to the practice of commercial surrogacy and is developed further in the last section of this paper.

Heather Widdows questions whether it is merely the inequality of bargaining power and unjust remuneration which constitutes exploitation or, in the case of any form of sale relating to bodies and body parts it is more the affront to human dignity that is inherent in such a service, and the consequent harm to a person's self-worth.<sup>117</sup> Although Widdows' article concerns trafficking for prostitution, and the sale of eggs for stem cell research, her arguments could be relevant to commercial surrogacy. Yet a distinction may be made between prostitution which seems to be intrinsically exploitative and degrading and commercial surrogacy which may not be exploitative if certain conditions and protections are in place to respect the woman's dignity and to recognise the essence of her role in producing the much-wanted child. It is submitted that prostitution would remain exploitative even if sufficient protection was given to the woman and she was paid a fair remuneration.

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<sup>116</sup> Taylor, 'Organ Sales', p. 275

<sup>117</sup> Widdows, 'Border disputes', p.6

Certainly there may be an undermining of autonomy when there is a narrow choice base and an inequality in bargaining power, but if sufficient safeguards are put in place then the exploitative conditions will be reduced and autonomy can be helped to flourish.

The final section of the paper examines what could convert an exploitative practice to one which better respects those who choose to embark upon it, whatever their reasons for doing so.

#### Alternatives to the current proposed Bill

A ban on commercial surrogacy could be an inappropriate solution in that it could eliminate one form of exploitation, merely to replace it with others: women could be coerced into helping family members to produce an heir or even be trafficked as surrogates. Paradoxically, it could even be seen to curtail the woman's autonomy by doing so as it limits her choices.<sup>118</sup> An alternative solution would allow women to be able to make the decision to act as a surrogate but would protect them, as well as the commissioning couple, and the child which is the product of the surrogacy.

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<sup>118</sup> Jennifer Damelio and Kelly Sorensen, 'Enhancing Autonomy in Paid Surrogacy', *Bioethics* Volume 22 Number 5, (2008), pp 269-277

Many have proposed an international agreement to provide consistency in surrogacy laws across different countries but the differences in approaches to the practice of surrogacy mean that there is unlikely to be a consensus as to the standards to be set.<sup>119</sup> Work on achieving private international law rules relating to the status of children and other issues which arise from international surrogacy arrangements is on-going but the most recent report from the Meeting of the Experts' Groups on Parentage/Surrogacy indicated that no conclusions had been reached to date, due to the complexity of the subject and the different approaches by the States.<sup>120</sup> If such an agreement is unlikely to materialise for some time, then vulnerable commercial surrogates only have their own government to protect them. In this respect the Indian government have failed the surrogate. The lack of regulation is exploitative.

Damelio and Sorensen argue that the right sort of surrogacy contracts could enhance and extend freedom.<sup>121</sup> Tighter regulation, including contracts which are more beneficial to the surrogate, would allow the practice of commercial surrogacy to continue, but would also go some way to alleviating the fears of exploitation of these women. The surrogate should be entitled to care during the pregnancy but also

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<sup>119</sup> See for example Izabela Jargilo, 'Regulating the Trade of Commercial Surrogacy in India', *Journal of International Business & Law*, 15 (2015-2016), pp 337-360 who argues for international safeguards to protect those who are currently being exploited.

<sup>120</sup> Report of the February 2016 meeting of the experts' group on parentage/surrogacy, Prel. Doc. No 3, Hague Conference on Private International Law, General Affairs and Policy

<sup>121</sup> Damelio and Sorensen, 'Enhancing Autonomy', p. 274

afterwards, and could also be given a fairer percentage of the fees the commissioning couple pay to clinics or agents and brokers. Financial payments should be paid securely to the surrogate to avoid others taking advantage of her earnings.

Although the woman may be acting autonomously there is no indication that there is a respect for her autonomy at each stage of the surrogacy arrangement or related treatment. The requirement of a valid consent would respect the woman as an autonomous being and should therefore be central to the provision of treatment. The woman should have the capacity to make the particular decision, should have received sufficient information to make an informed decision and should make the decision voluntarily. At present there is considerable variation in the amount of information given to patients, still signs of paternalism in the doctor-patient relationship and often it is family members or the wider community who are making the decision on behalf of the woman.<sup>122</sup>

Damelio and Sorensen hold that women are wronged by a prohibition because that interferes with the woman's personal decision regarding what she wishes to do with her body. However, to legalise commercial surrogacy without more protection for those

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<sup>122</sup> A DeCosta, N D'Souza, S Krishnan, M S Chhabra, I Shihaam, K Goswami, 'Community based trials and informed consent in rural north India', *Journal of Medical Ethics*, 30 (2004) pp 318-323. Doi: 10.1136/jme.2002.001065

involved also wrongs women because of their unique vulnerability. This proposed third way of allowing commercial surrogacy but with adequate safeguards in place is a ‘legal tool that honours and expands autonomy’.<sup>123</sup>

### Conclusion

This article demonstrates that an assumption of adaptive preference formation and a consequent absence of autonomy when an Indian woman is choosing to act as a commercial surrogate, may be incorrect. She may have her own reasons for her preference, even if for others it is an unfamiliar form of flourishing. She may be autonomous even if the influences are related to her constrained opportunities. To legislate based on those presumptions would therefore be ill advised. Yet the accusations of exploitation have substance.

Certainly, in an ideal world there would be alternatives to surrogacy for these women to earn a living but the reality is that the service of surrogacy provides them with an income which can help them to improve not only their own lives but also those of their family. To deprive them of that opportunity may relieve international consciences but does not help them practically unless other conditions also change.

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<sup>123</sup> Damelio and Sorensen, ‘Enhancing Autonomy’, p. 277

Although regulation of surrogacy in India is to be welcomed, given the uncertainty which prevails regarding the rights of all those involved in a surrogacy arrangement, this blanket ban on commercial surrogacy in the 2016 Bill is an inadequate reaction to criticism from the international community. It may lead to an underground market being created and would place the surrogate in more danger.<sup>124</sup> The monitoring of surrogacy and regulation of the practice which prioritises the mother as well as the child could be a better way to protect the surrogate from exploitation.

The proposed legislation may, as it stands, do more harm than good.<sup>125</sup> The current exploitation should be addressed, certainly, but not at the expense of personal choice.

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<sup>124</sup> Jargilo, 'Commercial Surrogacy in India', p. 354

<sup>125</sup> <http://thewire.in/64656/why-the-government-needs-to-rethink-the-surrogacy-bill/> Chithra P. George, 'The Government Must Rethink the Surrogacy Bill', The Wire, 8 September 2016