

REGULATING COMMERCIAL SURROGACY THROUGH RELATIONAL AUTONOMY IN INDIA

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ABSTRACT

Surrogacy Regulation Act, 2021 prohibits commercial surrogacy and allows only altruistic surrogacy. The notions on the basis of which Commercial Surrogacy is being banned by GOI are based on ethical grounds. Surrogacy faces challenges as it diminishes the autonomy of surrogates to make their own choices. A surrogate-centered regulatory framework could have addressed concerns surrounding the protection of surrogates and other ethical issues. Regulations in accordance with theory of relational autonomy can provide protection to the surrogates. Regulations which take into context the feminist concept of relational autonomy are suitable for Indian surrogates. Such regulations will protect the Indian surrogates while keeping in context their vulnerabilities in life.

Keywords: *Surrogacy, Relational Autonomy, Feminism*

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I. Introduction

SURROGACY REGULATION Act, 2021 was enacted on December 25, 2021 (*hereinafter* referred as “the Act”). The Act prohibits commercial surrogacy and allows only altruistic surrogacy.¹ The notions on the basis of which Commercial Surrogacy is being banned by Government of India (*hereinafter* referred as ‘GOI’) are based on ethical grounds. This prohibition comes at a time when Commercial Surrogacy has been socially and legally acceptable by various countries. Banning commercial surrogacy faces challenges as it diminishes the autonomy of surrogates to make their own choices. A surrogate-centered regulatory framework could have

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¹ The Surrogacy Regulation Act, 2021 (Act No. 47 of 2021) s. 38.

addressed concerns surrounding the protection of surrogates and other ethical issues. There should have been careful and serious regulation of the surrogacy markets.

However, this does not mean surrogacy should be the subject of free-market exchange. Rather such regulations should be in accordance with the theory of relational autonomy while empowering and protecting the surrogates. Regulations which take into context the feminist concept of relational autonomy are suitable for Indian surrogates. Such regulations will provide protection to the Indian surrogates while keeping in context their vulnerabilities in life. Good regulations will also raise the status of the work that surrogates do and promote their autonomy. The theoretical approach of relational autonomy does not guarantee the perfect conditions for surrogates protection but tries to maximize such conditions. A regulatory approach should be used to optimize the autonomy of the surrogates by recognizing circumstances, conditions, and surrounding relationships.

This paper gives suggestions for changes in the Act that reflects the relational autonomy framework for regulating surrogacy. Regulations in accordance with feminist concept of relational autonomy will not leave women alone to choose and be at their own fate without any regulations or not to choose at all by prohibiting it. In fact, regulations will provide legal framework for women through which they can make their own choice in accordance with their own best interests. The main goal of the regulations will be to prevent exploitation of surrogates through illicit transactions. Regulations will provide specific legal parameters for surrogacy agreements which will ensure that surrogates give informed consent.

The first part will deal with theories of autonomy but with the contention in the second part that it is not suitable in the Indian context while theories of relational autonomy should be used to create a legal and regulatory framework to best deal with surrogacy in India. The third part will deal with the regulatory framework for surrogates reflecting the relational autonomy framework.

II. Surrogate Autonomy

The first feminist instinct should be to support the compensation for the labor of surrogates because very often the labor of the women has been uncompensated or undercompensated. Regulations

will improve the conditions of surrogacy and make it more favorable for women.² For years there have been legal principles that were oppressive for women and the basis of these principles has been women's incapability of making decisions. Laws for not allowing women to hold property is one of the illustrations of such a legal principle.³ Such principles should not be applied to the law of surrogacy by prohibiting it. Surrogate autonomy and her freedom of choice should be preserved. It should be conferred upon the legal protection. Prohibition on moral grounds will deny her autonomous rights.

However, in the context of surrogacy in India, one has to be more cautious when arguments like autonomy and the right to choose are provided. In India, Surrogates need protection through regulations. In other words, focus should be on surrogates autonomy effectuated by government regulations, through which the domain of autonomous choices of surrogates can be expanded. But concept of traditional autonomy is inappropriate in context of India. Regulations for the protection of the surrogates should be adopted by applying the feminist concept of relational autonomy to maximize surrogates autonomy.

To begin with, the concept of autonomy as perceived by liberal feminists will be explained. After that how liberal feminists apply concept of autonomy to surrogacy and why it is problematic in the context of India will be analyzed. Then the model of relational autonomy will be discussed, which will eventually lead us to the answer of how relational autonomy is more appropriate in the Indian context and how the concept of relational autonomy can be useful for Indian surrogates in preserving their autonomy without compromising on their choices.

A. Autonomy

Earlier scholars like Mill and contemporary scholars like Hayek, Friedman, and Fried considered individual autonomy as most important social value and as a central prerequisite for freedom of individual. These liberal political theorists assign substantial weight to individual autonomy and are of view that autonomous choices should be respected. Individual autonomy is a legitimate

² Julie Shapiro, For A Feminist Considering Surrogacy, Is Compensation Really The Key Question? 89 *Washington Law Review* (2014).

³ Lori B. Andrews, Surrogate Motherhood: The Challenge for Feminists, 16 *Journal of Law, Medicine & Ethics* 72 (1988).

exercise of the right of self-determination without regard to what outside viewers feel about the individual or social virtues of those choices. Individuals have a right to pursue their conception of the good without interference from others. Others should not impose alternative conceptions of the good at least in cases where their interests are not harmed or jeopardized by the actions or choices of the individual concerned. Classical liberal theories of individual rights or autonomy have thus tended to stress negative liberty: freedom from external intrusions on the domain of self-determination.⁴

The idea behind personal autonomy is that people should be free in their own lives. The ideal of personal autonomy is that people have control over their destiny to some extent and this is possible because they take their successive decisions throughout their lives.⁵ This is liberal understanding of autonomy in which individual's right to choose is most essential component. An assumption is made that individuals have the capability of formulating a specific intention to act for exercising their free choice or consent and behave as a reasonable person.

B. Feminism and Autonomy

Women's liberal rights advocates made similar assumptions when they argued that women should have greater personal autonomy, more freedom to make their own choices, and sufficient power to control their own lives.⁶ Liberal feminists have been the strongest proponents of personal autonomy and have strongly rejected the claim that women are incapable of making decisions. They promoted women's choices in all contexts as they assumed that women are radically individualized autonomous agents.⁷ The individualistic conception of autonomy is also related to other values like self-sufficiency, self-sovereignty, moral independence, and liberty.⁸

However, this individualistic characteristic of liberalism has also been criticized by some feminists because it is not in consonance with feminist theory and over-emphasizing choice ignores the

⁴ Michael J. Trebilcock, *The Limits of Freedom of Contract*, 9 (Harvard University Press, 1997).

⁵ Joseph Raz, *The morality of freedom* 369 (Oxford University Press, 1986).

⁶ Katharine T. Bartlett and Deborah L. Rhode, *Gender and Law: Theory, Doctrine, Commentary* 765 (Wolters Kluwer Law & Business, 4th ed., 2006).

⁷ Joan C. Callahan and Dorothy E. Roberts, "A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory", 84 *Kentucky Law Journal* 1197 (1995).

⁸ Martha Fineman, *The Autonomy Myth* (The New Press 2004).

importance of social context and the difference that gender makes. Therefore, they argue that the value of autonomy should be retained but liberal incarnation should be rejected.⁹ Postliberal feminists departed from this liberal view and liberal feminists commitment to this individualistic view of persons. They insisted that persons "arrive" in the world already inextricably embedded in webs of relationships and social contexts in great part determine who they are and what they will become as individuals, as well as where their responsibilities will lie. They rejected "abstract individualism," which treats persons as individuals abstracted out of all social contexts.¹⁰ Feminist philosophers attempted to rehabilitate autonomy in the social context and named it relational autonomy after reconceptualization.

C. Surrogates Autonomy

As feminists have been generally divided over the issue of autonomy itself, they have also been divided over the issue of autonomy of surrogates. Liberal feminists accept surrogacy as a means to empower women and women's autonomy in which they can exercise their right to contract with anyone and for anything. It was mainly during 1960's and 1970's that feminists started demanding procreation rights and the concept of autonomy developed mostly in the area of abortion where feminists demanded freedom to choose and control over their bodies. Similarly, many liberal feminists defended surrogacy as a woman's right to choose, a woman's right to control her own body and do with it what she wants, and as an economic option for women. Therefore, the autonomy of surrogates can be viewed as a natural extension of the woman's right to choose.

Lori B. Andrews, a liberal feminist, in her classic article criticized those feminists who see surrogacy as turning women into reproductive vessels. She argues that government oversight for women's decisions will potentially turn *all* women into reproductive vessels and that too without their consent."¹¹ *Carmel Shalev* is also of the view that surrogates must be seen as autonomous parties because otherwise it would amount to a denial of the women's self-determination and also

⁹ Catriona Mackenzie and Natalie Stoljar, "Introduction: Autonomy Reconfigured", in Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy : Feminist Perspectives On Autonomy, Agency And The Social Self* 3 (Hypatia 2000); Jannifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 Yale Journal of Law & Feminism 7 (1989).

¹⁰ *Supra* note 7.

¹¹ *Supra* note 3.

ignore how women can mold and take responsibility for their own lives. It would reinforce a paternalistic system that governs reproductive law.¹²

However, in the context of choices available to Indian surrogates under the conception of liberal autonomy *April L. Cherry* raises the question of whether the choices available to them are sufficient. She states the reality is that for a woman involved in gestational surrogacy it is one of the few ways to attain only basic social goods.¹³ While referring to *Andrea Dworkin*¹⁴ she makes an argument that “choice and autonomy rhetoric hides the reality that women who choose to be a gestational surrogate have inadequate choices.” In fact they may be simply making the best of a double-bind choice.¹⁵ Although Commercial Surrogacy may be better paying and less stigmatized than selling drugs, prostitution, or crushing glass, it is not a meaningful choice that women are making. Further, the autonomy of the women is questionable as they are exercising autonomy in the context of the feminization of survival with their limited choices.

The concerns raised regarding Indian surrogates that they have restricted choices and autonomy are unpretentious. Surrogates don't even have proper information which is required to promote their autonomy. So what is the solution? An analysis of relational autonomy from feminist perspective and regulations in the context of relational autonomy for the protection of the surrogates will give us the answer. GOI, instead of not regulating at all and leaving Indian surrogates alone to make choices or prohibiting in order to completely restrict their choices, should rather support surrogates by a broader regulatory framework through which their autonomy can be well-established. GOI should make and implement regulations that aim to optimize autonomy of the surrogates from a relational autonomy perspective with focus on facilitating women's choice within regulatory limits.

¹² Carmel Shalev, *Birth Power: The Case for Surrogacy* 160 (Yale University Press 1989).

¹³ April L. Cherry, The rise of the reproductive brothel in the global economy: Some thoughts on reproductive tourism, autonomy, and justice, 17 *University Of Pennsylvania Journal of law & Social Change* 257 (2014).

¹⁴ Andrea Dworkin, *Right-Wing Women* 176 (Tarcher Perigee, 1983).

¹⁵ April L. Cherry defines double-bind choices are “situations in which options are reduced to a very few and all of them expose one to penalty, censure, or deprivation” and are emblematic of oppression.

III. Regulating Surrogacy with Relational Autonomy

A. Concept of Relational Autonomy

Relational Autonomy is a response and reconceptualization of the individualized autonomy of liberals. Catriona Mackenzie and Natalie Stoljar have defined the term “relational autonomy” as “It does not refer to a single unified conception of autonomy but is rather an umbrella term, designating a range of related perspectives. These perspectives are premised on a shared conviction that persons are socially embedded and that agent identities are formed within the context of social relationships and shaped by a complex of intersection social determinants, such as race, class, gender, and ethnicity.

Thus, the focus of relational approaches is to analyze the implications of the intersubjective and social dimensions of selfhood and identity for conceptions of individual autonomy and moral and political agency.”¹⁶ Therefore, it can be said that relational autonomy is based on principle that relational life of individuals is inevitable. In reality individuals are not free to live their life as they choose because choices are not made in accordance with a liberal model of individual rights but are influenced by responsibilities, context and societal and familial pressure. The individuals are not capable of choosing independently of external influences.

Feminist theorists and activists also had critical perspectives on the liberal concept of individual autonomy. The values relating to patriarchy such as power, control, autonomy, independence, toughness, invulnerability, strength, aggressiveness, rationality, detachment (being non-emotional), and other traditionally masculine attributes have been rejected by relational approaches.¹⁷ They have been able to accept that choice is a relative concept and not always what it seems and therefore they expanded traditional understanding of autonomy, both those relating to freedom from interference by others, and those concerned with the ability to flourish in a more positive sense.¹⁸ *Martha Fineman* says that the fact that individuals exist in family or relational

¹⁶ Catriona Mackenzie and Natalie Stoljar, *Introduction: Autonomy Reconfigured*, in Catriona Mackenzie and Natalie Stoljar eds *Relational Autonomy: Feminist Perspectives On Autonomy, Agency And The Social Self* 4 (Hypatia, 2000).

¹⁷ Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 *University of Chicago Legal Forum* 21 (1999).

¹⁸ *Supra* note 6.

contexts has been largely ignored and therefore little attention has been paid to how assumptions about the family affect the theories expounded in regard to market and state or the nature of the individual.¹⁹ In her words:

Justice requires constant mediation between articulated historic values and current realities. It is not found in abstract pronouncements. Our understanding of independence, autonomy, and self-sufficiency, therefore, should be evolving as societal knowledge, realizations, aspirations and circumstances change. Unfortunately, the political and governmental institutions that should be facilitating and encouraging debate and reconsideration are currently partisan and polarizing in the methods they use, and thus, are actually impeding understanding and exploration.

Although feminist critiques of autonomy identified theoretical problems with historical and contemporary conceptions of autonomy, still the notion of autonomy is vital to feminist attempts to understand oppression, subjection, and agency. Therefore, feminist scholars urged reconceptualization of the liberal concept of autonomy from feminist perspective as individual autonomy fails to recognize inherent social nature of the human beings.²⁰ Jennifer Nedelsky urged that feminism requires a shift from conventional understanding of separate individuals but retaining the value of autonomy. She writes:²¹

The autonomy I am talking about does remain an individual value, a value that takes its meaning from the recognition of (and respect for) the inherent individuality of each person. But it takes its meaning no less from the recognition that individuality cannot be conceived of in isolation from the social context in which that individuality comes into being. The value of autonomy will at some level be inseparable from the relations that make it possible; there will thus be a social component built into the meaning of autonomy. That is the difference.

¹⁹ Martha Albertson Fineman, Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency, 8 *American University Journal of Gender, Social Policy & Law* 13 (2000).

²⁰ *Supra* note 16.

²¹ Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 *Yale Journal of Law & Feminism* 7 (1989).

Accordingly it can be said that relational autonomy takes into perspective and is sensitive towards the approach that individuals and institutional relationships are integral part of person's decision-making process. Therefore, if an attempt is made to ascertain that whether some individual has capacity and what their autonomous wish is, it can only properly be made if it is assessed within the context of their relationships. The capacity test should consider whether an individual is able to make decisions with the support of family and friends.²² Relational Autonomy recognizes social and contextual constraints that are placed on choices along with recognition of value in self-determination. It takes into consideration the gray area which falls between full individualistic autonomy and complete coercion as it account for the circumstances and conditions under which decisions are made. The aim of Relational Autonomy is to maximize autonomy and ensure it by putting conditions that optimize non-coercive and deliberate decision making.²³

B. Surrogacy Regulations and Relational Autonomy

Liberal notion of autonomy does not take into consideration the context under which surrogates make their choices and ignores the female difference in order to contest the notions of patriarchy and paternalism. Whereas feminist perspective of Relational Autonomy emphasizes on the context in which the individual choices are made and when applied in context of surrogacy in India it will not only emphasize on autonomy of surrogates but will also keep into consideration the context and socio-economic conditions under which Indian surrogates make their choices.

Accordingly, relational autonomy of surrogates does not aim in prohibiting women to make their choices or give them complete freedom to make their choice, but rather will ensure that the autonomy of the surrogates is preserved fully by keeping in context the conditions under which surrogates make choices. Regulations as per relational autonomy will ensure that women who choose to be surrogates are in optimal conditions when they make such choices. Regulations should be created for enhancing and optimizing autonomous decision making through explicit recognition of social and contextual pressures involved in choice.²⁴ Regulations should support surrogates decision making and therefore, in accordance with relational autonomy, should seek to

²² Jonathan Herring, *Relational Autonomy and Family Law* 21 (Springer, 2014).

²³ Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption*, 8 *Indiana Law Journal* 1223 (2013).

²⁴ *Ibid.*

ensure that women who choose to become surrogate are free from familial pressure, not in economic distress and as informed as possible about the process. Regulations can promote autonomy by helping surrogates to make well-informed and meaningful choice. Regulations should be directed towards ensuring the autonomy of the surrogates and effectively protecting the surrogates.

In other words focus of regulations should be on relational autonomy which will expand the domain of autonomous choices for surrogates. This will make sure that women are in best condition to make such a choice of becoming surrogates. The proposed regulation will not deny women their choices or give them complete freedom. Rather it will ensure ideal conditions for autonomous decision making.

IV. Regulations For Protection of Surrogates

Regulations should primarily aim at protecting the surrogates by ensuring that women can make an informed choice to become a surrogate mothers. She should not be under any pressure to participate in surrogacy arrangements or be controlled by others during the surrogacy procedure. Accordingly, the changes that are required to be made to the Act to avoid exploitation of the surrogates are as follows:

A. Appointment of Regulatory Authority

The Act provides for the appointment of an Authority²⁵ whose function is to consider an application for commissioning surrogacy and grant certificates for the same after all the conditions, as specified in the Act, have been fulfilled. However, under the Act, this Appropriate Authority only considers applications for altruistic surrogacy as Commercial Surrogacy is banned under the Act. It is recommended that this same Authority or any other Regulatory Authority, as appointed under the Act should perform regulatory functions in context of Commercial Surrogacy also.

The model on which this Authority works should start at the initial stage itself when any intended parents have decided, after being recommended by the medical professional, that they want to

²⁵ *Supra* note 1, s. 35.

commission surrogacy in India. Intended Parents should make an application to this Authority before commissioning of Commercial Surrogacy. After verification of the application, Authority should screen the intended parents for their eligibility for commissioning surrogacy and after being satisfied should grant a certificate to the intended parents that they fulfill the eligibility of having child through surrogacy. Only after this certificate has been granted, intended parents should be allowed to approach ART Clinics/Surrogate Agency for shortlisting the surrogates. After surrogate has been shortlisted by the intended parents, they should again approach the Authority. The Authority after being fully satisfied that the surrogates fulfill the eligibility criteria (as listed below) and has been provided with all the protections (listed below) shall grant a certificate that the surrogacy can be commissioned between the particular intended couple and a particular surrogate. Authority should also make sure that the intending couple is not commissioning surrogacy with two or more surrogates at the same time.

B. Eligibility for Surrogate

Under the Act, the surrogate mother has to be a married woman and should have a child of her own. Her age should be between 25 to 35 years and she should be medically and psychologically fit for surrogacy and surrogacy procedures. Further, she can only be a surrogate once in her lifetime.²⁶ The Act correctly states the eligibility for surrogates. However, it is suggested that some amendments are required to be made to the same.

Firstly, only those women should be allowed to become surrogates who had their own child, preferably 2 children and have completed their own family. This is important as it has been contended that a women as a mother cannot make an informed decision to give up a child before she knows the strength of her bond with that child and when they have to give up the baby under surrogacy agreements they may suffer emotionally.²⁷ This will be helpful in preserving the choice of the women as who have already experienced motherhood can better understand and appreciate the surrogacy arrangements.

²⁶ *Supra* note 1, s. 4(iii)(b).

²⁷ Andrew Kimbrell, *The Case against the Commercialization of Childbearing*, 24 *Willamette Law Review* 1035 (1988).

Also the medical and psychological fitness of the surrogates is very important and such an assessment should be done by a certified medical and psychologist only. The medical assessment is important because surrogate has to bear the child for 9 months and this will ensure that she is safely able to withstand the physical demands of bearing a child. Whereas Psychologist can assess surrogates willingness and motivation to do surrogacy as she should not be doing surrogacy only under pressure of finances. Psychologist can also evaluate the personality of the surrogate and that she is not under any depression or any other pressure.

Psychologists will also be able to assess the autonomy of the surrogate and any element of exploitation involved which shows that woman's choice to become surrogate is not free. The importance of the mental assessment of the surrogates by the psychologist is also very essential to know if she is acting under some pressure and to prevent the element of exploitation. This will help in understanding the influences and social pressures involved. Although, it is not doubtful that women in India become surrogates for financial reasons but still to preserve her autonomy it is significant that she has made the choice voluntarily. Psychologist can assess her accordingly and can recommend that surrogate should not be allowed to undergo surrogacy procedure if they feel her choice is not voluntary in real sense.

Surrogacy Clinics should mandatorily attach a certified psychologist. There should be comprehensive screening of potential surrogates by professionals in the clinic for initial medical and psychological assessment. When the parties approach the Authority, it should be the obligation of the Authority to ensure that surrogates have been medically and psychologically assessed. A fitness certificate for the same should be submitted by the intending parents and surrogate together to the Authority before any surrogacy procedure is initiated.

Secondly, Act should also make it clear that surrogates should not be shortlisted based on their skin color, religion etc. to avoid any exploitation.

C. Protection of Surrogates under the Regulation

Although the Act seeks to safeguard the rights and interests of surrogate mothers, following are the additional protections required to safeguard surrogates against exploitation:

i. Safeguards for Contract execution

Complete private agreement arrangements between the surrogates and intended parents should not be allowed because of the chance that the rights of the surrogates can be violated under the agreement. Every surrogacy agreement must be reviewed and approved by the Authority before its execution. The Authority should ensure that under the surrogacy arrangements, fair terms are provided and there are no additional terms and conditions in the agreement that may impact the autonomy and well-being of the surrogates. Only after the surrogacy agreement has been approved by the Authority and it has been executed between the parties, any medical procedure of commissioning surrogacy should be initiated on surrogate.

Authority should also ensure fairness and protection to surrogates under the agreement by providing guidance to surrogates regarding it and ensuring that surrogates are not taken advantage of by intending parents or agents or fertility clinic. In order to evade the various pitfalls of contractual problems that might lead to the exploitation of the surrogates, the Authority should act to strictly adhere to ensure that the surrogates are receiving independent, sufficient, and reasonable legal counselling and a legal representative. Authority should also ensure that the cost of this legal representative and legal counselling is being bear by intending parents. Legal representative should not only explain their obligations under the agreement to the surrogates but also independently represent them. Agencies should not be relied upon to furnish legal counselling as it increases the probability that the surrogacy contract will contain terms that are disproportionately unfavorable to the surrogate.

An alternative model for contract execution can be that this Authority publishes a comprehensive form of standard surrogacy contract that includes mandatory stipulations. This standard contract should be made mandatorily to be used by all who enters into surrogacy arrangements. This will help in the preservation of fairness and avoidance of the exploitation of surrogates. Authority should ensure that this is the agreement that is used by the parties and only upon its satisfaction should provide a certificate for commission surrogacy. This standard surrogacy contract should clearly have clauses for the protection of surrogates and should be able to address various anticipatable concerns. Clauses can include but are not limited to the timely payment of compensation to the surrogate, no obligation of the surrogate in case intended parents change their

mind or in case of death of the intended parents, obligation of the intended parents if the surrogate dies during the surrogacy procedure or any other health complication of the surrogate. This standard contract should be explained to surrogates clause by clause orally as well as through explanatory video.

There are also certain acts like delay in signing of agreement by the surrogates which seem exploitative. It is recommended that under the Act, GOI should make uniform provisions that the surrogacy agreement should be signed before any medical procedure is performed on surrogates and some compensation should be paid to surrogates even for any first medical procedure i.e. while preparing the lining of the uterus. Authority should also ensure that surrogates are given a copy of the contract.

ii. Compensated Surrogacy Model

The term Commercial Surrogacy should be replaced with compensated surrogacy under which reasonable compensation should be legally permitted to the surrogates. Compensation for the surrogate should include her fees for loss of time and suffering, medical expenses, legal consultation, and other reasonable compensation including monthly allowances for certain expenses like food/nutrition/maternity clothing, post-partum care charges including free health supplements and free diagnosis, child care support for surrogate mother's own children.

As per the Parliamentary Standing Committee recommendation, the amount of compensation should also be fixed by the Authorities. However, it is recommended that the amount of compensation fixed by the Authority should be the minimum compensation. This minimum compensation should only be the base pay for the surrogates. Compensation above the minimum compensation should be subject to negotiation between parties. More importantly, over and above adequate compensation, Indian surrogates should be given similar protections and privileges that surrogates have in developed nations which may include the provision of life insurance and medical insurance for surrogate mothers. These provisions are discussed further.

Authority should also assist in administrative mechanisms at the contract negotiation period and should ensure minimum compensation for the surrogates but without interfering with the

negotiation itself. This will help avoid the financial exploitation of the surrogates and ensure that the surrogate is not the most vulnerable party to the transaction.

There are also certain acts like delay in compensation to surrogates which seem exploitative. The Parliamentary Standing Committee has recommended that surrogates should be given compensation from the very moment there is any use of medication on the surrogate in connection with the surrogacy procedure. The Parliamentary Standing Committee has also recommended that the money should be deposited directly in the bank accounts of the surrogates by the intending parents. It is suggested that this recommendation should be made mandatory by GOI. Further to prevent any exploitation by agents/clinics, compensation to surrogates by intending parents should be through an escrow account with no intermediaries involved in the transaction.

One more important suggestion is that full compensation should also be made to surrogates in certain incidents like miscarriage, termination of pregnancy, harm to any of her reproductive organs, ectopic pregnancy or any other unexpected incident.

iii. Medical Counselling

The women who suffer from economic hardships are more likely to enter into surrogacy agreements. Because of these hardships, they do not fully realize or simply disregard the risks of physical harm that may result from carrying out the arrangement. Therefore, the problem in surrogacy arrangements is that the surrogates don't have a full understanding of the adverse physical and emotional consequences of surrogacy. This can have a disproportionate impact on economically disenfranchised women. With regard to physical harm, the Parliamentary Standing Committee also made an observation that surrogate mothers are not informed of the effects of fertility medications and treatment protocols and as a result thereof, they are left completely unprotected and vulnerable in the matter.

It is recommended that medical counseling should be made mandatory by regulations in India. It should be provided in matter of course before any type of procedure of surrogacy arrangements actually commences. Surrogates should be made to understand the complete surrogacy medical

procedure. This will help in promoting autonomy, help surrogates in giving informed consent and diminish the possibility of exploitation as surrogates will be able to make a deliberate choice.

Moreover, it is unknown what all is explained to the surrogates during the medical counselling. Therefore, Regulations should also specify the contents which have to be mandatorily explained by the Clinics to the surrogates. It is suggested that medical counselling should be done by medical professionals themselves and surrogates should be explained about the entire medical procedure of surrogacy which starts from preparing the uterus till delivery of the child. They should also be completely informed about the risks associated with surrogacy which may include bleeding, abortion, cesarean delivery, premature birth etc. and also about the after-delivery risks. It should not be the case that surrogates know about the risks only after these complications have occurred during pregnancy. Authority should ensure that surrogates give full informed consent after comprehensive medical counselling and the risks associated with ART procedures, fertility medications and surrogate pregnancy have been completely explained to surrogate.

iv. Psychological Counselling

Regulations should provide for mandatorily psychological counselling of the surrogates before the surrogacy procedure starts, during the period of pregnancy and 1 year after the delivery of the child. Before the surrogacy is commissioned, the psychological counseling sessions should inform surrogates about all the emotional risks of the surrogacy. Counselling Sessions should not only be as much as informative but also conversational in which all the concerns of the surrogates can be addressed.

Psychological counselling is important as surrogates have to carry the child for 9 months. She can be under psychological stress as she has to deliver a baby and baby has to be given to intending parents. In many cases she also has to stay separate from the family in the surrogate homes where only her own children are permitted but the husband is not permitted. Therefore, psychological counselling during the delivery is must and plays very important role. Psychological Counselling after the delivery is also important because surrogacy is a unique procedure in which intimacy is involved for the surrogates and they may develop bond with the child. Therefore, to prevent any type of mental stress/depression to surrogates after the delivery, psychologist should counsel them

accordingly atleast for 1 year to avoid the postnatal depression. Authority should ensure that surrogates are provided comprehensive psychological counselling at all the stages.

v. Meeting with intended parents

It is suggested that regulations should make it mandatory the meeting of surrogate with the intended parents before any procedure is started and women should also be able to make choice that whether she wants to be a surrogate for a particular intending couple or not. It is the general practice in India that intended parents shortlist the surrogate for them. But it should not only be the option of the intending parent that they can shortlist the women who can become surrogate for them. Rather surrogates should also have the same option. Fertility Clinics/Agents should arrange a comprehensive meeting of the parties before any procedure is started and then they should make a choice after meeting each other that whether they want to be in a surrogacy arrangement with each other or not. Authority should also ensure from the surrogate that whether she wants to be surrogate for particular intending couple or not.

vi. Cooling-off Period

The Act gives the option to the surrogate that she can withdraw her consent for surrogacy before the implantation of embryo in her womb.²⁸ This option should be extended in case of Commercial Surrogacy also as it will be helpful in maintaining the autonomy of the surrogate. She will have a choice to change her mind to undergo the surrogacy procedure. Surrogate should inform the Authority and Authority should accordingly cancel the granted surrogacy certificate.

In addition, it is suggested that there should be a provision of “cooling-off period” if surrogates have extreme changed circumstances. During this cooling-off period for example 3 months from the date of pregnancy, surrogates should have the right to withdraw from the agreement and abort if she has a reasonable justification of encountering extreme changed circumstances. It is emphasized that this unique option of withdrawal should only be made available in very rare circumstances which should be explained by the surrogates to the Authority. Authority after being satisfied with the reason should approve of this withdrawal. Only after Authority is completely

²⁸ *Supra* note 1, s. 6(2).

satisfied with extreme change in circumstances of the surrogate, it should cancel the surrogacy certificate.

vii. Optional stay at surrogate homes

It is suggested that surrogates should not be forced to stay in the surrogate homes for the duration of their pregnancies. Regulations should clearly state that it should be the option available to surrogates whether they want to stay in surrogate homes or not. Surrogates should be given monthly allowances for medicines, food etc. if they choose to stay at their own homes. In case surrogates choose to stay in surrogate homes, they should be free to go to their own homes whenever they want to. The Authority must also lay down conditions for proper maintenance of surrogate homes. They should also have right to inspect surrogate homes at all times so that surrogates can be provided proper and good living conditions in the surrogate homes.

viii. Full compensation even if child born with deformity

The Bill provides that the intending couple cannot abandon the child for any reason including physical or medical defects.²⁹ However, the Bill for protection of surrogates should clearly state that surrogates will be given their full and complete compensation as per their surrogacy agreement even if child is born with any physical or medical defects. Surrogates should not be held liable for any such defect whatsoever. It is unfair to blame surrogate in such cases and therefore it is recommended that in all the cases the compensation should be placed in escrow with an independent escrow agent prior to the commencement of any medical procedures on the surrogate. It might also be the case that the fetus is diagnosed with a defect before birth and intending couple disclaims responsibility for a child with abnormalities and wants the surrogate to abort. Regulations must clearly state that even in such scenarios surrogate will be given her full and complete compensation which will not be dependent upon her aborting or not. If abortion is not possible legally, intended parents will also assume responsibility of the child and cannot abandon the child regardless of the child's mental or physical condition.

²⁹ *Supra* note 1, s. 7

ix. Health-Care, Insurance and other provisions

The Parliamentary Standing Committee has made a suggestion that surrogate should be provided “medical” and comprehensive insurance coverage along with other reasonable expenses. However, it is suggested that the intending parents must make provision of life insurance also and should also provide insurance coverage during the entire pregnancy procedure for the surrogates. The regulations must also provide for adequate and comprehensive health-care provisions for the surrogates for three years after the delivery at the expense of the intending parents.

x. Medical-decision making

The surrogate should not be forced to undergo unnecessary medical procedures for e.g. undergoing cesarean section when a vaginal birth of the child is possible or any other invasive treatments. Regulation should ensure that the surrogate retains her medical decision-making and it is not controlled or restricted by intended parents or surrogacy agents. Surrogates also often have minimal control over the number of embryos implanted as the implantation of more embryos increases the probability of a pregnancy. However, multiple embryo transfer poses health risks to the woman and regulations should address this issue.

xi. Grievance Resolution

It may be the case that during the surrogacy procedure or arrangements, any surrogate may have some grievance or disagreements with the intending couple or ART clinics or surrogacy agency. But she may be forced to fulfill all the obligations without disputing the same because she has signed the surrogacy agreement and there is already inequality of power between the parties. Also, she might not be willing to go to Court to resolve the dispute. Therefore, under the regulations, the Authority should establish a committee of its members who can resolve the grievances of the surrogates during the surrogacy procedure. Establishment of such a committee under the Authority will be helpful in resolving the grievances of the surrogates through mediation. It is further suggested that the surrogates should be allowed to put her grievance without any representative. However, if surrogates want, then Authority should provide her with legal representation. The cost of such legal representative should be borne by the intending parents.

xii. Registration of Surrogate Agencies

The Act only provides for the registration of Surrogacy Clinics.³⁰ However, it is suggested that the Act while allowing Commercial Surrogacy should provide for a regulatory model to be followed by surrogacy agencies as well. Surrogacy agencies play a very major role in commissioning Commercial Surrogacy in India but they are profit-driven. For their profits, they might deceive women into surrogate arrangements or might ill-care or defraud them. Some surrogate agencies also charge very high fees from the intending parents which can be more disadvantageous for surrogates as these agencies work only to satisfy the demands of the intending parents without caring to protect the interests of the surrogates. Agencies may also practice procedures that are unsafe or unethical and raise concerns about safety issues for surrogates. However, they do serve some purpose of providing information and assistance throughout the surrogacy commissioning procedure and therefore should not be eliminated. The solution to these concerns is a registration and strict regulation of surrogacy agencies so that the interests of the surrogates are protected in the transaction. A certificate of registration should be granted to the Surrogacy agencies by the Authority after satisfying that they comply with certain requirements.

Further, there is no regulatory body which keeps an oversight over the surrogacy agency. It is suggested that the Authority should act as an oversight body that is responsible for ensuring that surrogate agency complies with certain minimum standards. Regulatory oversight of the surrogate agency would protect the surrogates from the misconduct of fraudulent agencies.

V. Conclusion

GOI is simply waiving-off its duties of protecting surrogates by prohibiting commercial surrogacy. It should change its policy and law of prohibition. Regulations in accordance with relational autonomy can provide protection to the surrogates along with raising their status and that of the work they do. In fact, regulations will provide legal framework for women through which they can make their own choice in accordance with their own best interests and hence promote their autonomy. Regulations would promote surrogates autonomy through counseling, psychological evaluations, and clear provisions of information provided to surrogates. On the whole, formulating

³⁰ *Supra* note 1, s. 11.

regulations in accordance with relational autonomy conceptual framework can allow surrogacy to be practiced in a best possible way.