

Review Paper

A Critical Discussion of The International Bioethics Committee Ethical Directive on Surrogacy in the Light of The Universal Declaration of Bioethics and Human Rights

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ABSTRACT

In September 2017, the International Bioethics committee of UNESCO (hereafter IBC) established a working committee with the aim of focusing on the issue of reproductive technology and parenthood. In 2019, the IBC published a study paper entitled 'Report of the IBC on Assisted Reproductive Technologies and Parenthood' (hereafter RIAPT&P). Although the report pays attention to several matters, this article will focus on RIAPT&P's analysis, judgment, and advice regarding surrogacy. The purpose of this article is to determine the extent to which the advice of the RIAPT&P on surrogate motherhood aligns with the principles of the Universal Declaration of Bioethics and Human Rights (hereafter UDBHR). Additionally, the article will examine whether there are any challenges or issues associated with the RIAPT&P's guidance on surrogacy.

The RIAPT&P of the IBC rejects commercial surrogacy and indirectly accepts and recommends altruistic surrogacy based on three global principles as found in the UDBHR, namely autonomy, sharing of benefits and solidarity. In my opinion, it can be asserted with certainty that, when it is tested against the UDBHR, the IBC does ground their arguments in favour of altruistic surrogacy (indirectly) in the UDBHR. The recommendation of altruistic surrogacy by the RIAPT&P does pose problems, however, because it raises and unfortunately leaves unanswered critical foundational questions regarding the family, the best interests of the child and the status of the embryo, as demonstrated.

Keywords: Surrogacy, Universal Declaration of Bioethics and Human Rights, The International Bioethics Committee.

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The International Bioethics Committee (hereafter IBC) of the United Nations Educational, Scientific and Cultural Organization (hereafter UNESCO) was established in 1993. The IBC provides the only global forum for reflection on bioethics [1]. The committee played a major role in the development of UNESCO's Universal Declaration on Bioethics and Human Rights (hereafter UDBHR) [2-3].

This committee was appointed by the Director-General of UNESCO and consists of experts who aim at serving him or her with advice in their capacity as independent scientists. This advice reflects the best possible practice in the context of bioethics in response to pertinent global ethical questions. The Director-General subsequently offers this global bioethical advice to member states in the form of reports that can guide them around determining regulations and legislation. The

committee consists of 36 experts from a diversity of disciplines, namely genetics, medicine, law, philosophy, ethics, history, and the social sciences. This body does not represent member states, nor does it receive any instructions from them. The committee periodically creates smaller working groups that conduct research and prepare reports, each of which can be accepted or rejected by the IBC [1-2].

In September 2017, the IBC established a working committee with the aim of focusing on the issue of reproductive technology and parenthood. The committee worked on the report by means of email communication and physical meetings. The IBC approved the final report by email on 20 December 2019. In 2019, the IBC published a study paper entitled 'Report of the IBC on Assisted Reproductive Technologies (ART) and Parenthood' (hereafter RIAPT&P).

The RIAPT&P deals with a variety of assisted reproductive technologies (hereafter ART), namely gamete and embryo donation, the storage of gametes and embryos, mitochondrial donation, transplantation of the uterus, the use of artificial uteruses, gametes and after-death reproduction, surrogate motherhood, and genetic diagnosis [4]. Although the report pays attention to several matters, this article will focus on the RIAPT&P's analysis, judgment, and advice regarding surrogacy.

The report explicitly states that the UDBHR is very relevant to the discussion in the document and that it in fact forms the basis of the report. According to paragraphs 10 and 94 (of the RIAPT&P), the UDBHR offers a general framework with the purpose to provide an ethical answer to surrogate motherhood. Although the report acknowledges that the UDBHR serves as the ethical basis for its advice, the document only explicitly refers to the UDBHR once around its discussion of surrogate motherhood [4].

The purpose of the present article is to establish the extent to which the advice of the RIAPT&P on surrogate motherhood reflects the principles of the UDBHR. Given that there is only one direct reference to the UDBHR in the RIAPT&P, the advice presented in the latter will be examined to determine if there is compliance with the principles of the UDBHR.

Subsequently, the article determines whether the UDBHR *per se* truly serves as a framework for addressing and can give ethical guidance regarding global bioethical challenges: as centred, in this instance, on surrogate motherhood (art. 1.1, 2a-b) [3,5]. The secondary reason for the analysis is that, should its findings affirm that it does indeed serve as such a framework, the advice given to member states will be reinforced [2]. This would entail that the advice is based on human rights and global bioethical principles [6]. Simultaneously, the article will assess whether there are any challenges or issues within the RIAPT&P regarding their guidance on surrogacy. It should be noted that seven members of the IBC maintained a dissenting position regarding surrogacy, which was spelled out at the end of the report.

Description

In the paragraphs to follow, two matters will be discussed in brief, namely the RIAPT&P's understanding of that which surrogate motherhood embodies and the report's summary of arguments for or against the phenomenon. It is important to examine this information, because it provides the background against which the ethical analysis and advice of the report will be understood and discussed.

Surrogacy Explained

Under the sub-heading 'Technological And Scientific Developments (II,II.10)' of the RIAPT&P, the dynamics of surrogate motherhood is discussed comprising six paragraphs (48-52). According to the report, surrogacy is on the rise worldwide (par. 52). The *Oxford Dictionary*, used as reference in the report, defines surrogacy as a condition in which a woman has been impregnated by means of donor gametes or an embryo and gives birth to a baby on behalf of another couple or partners, while the baby is therefore relinquished to the commissioning parents (pars. 48, 50). The report distinguishes between 'traditional surrogacy', 'gestational surrogacy' and 'non-traditional surrogacy', albeit that it does not use the latter terminology.[4]

Traditional surrogacy takes place when the surrogate's ovum is fertilized with a male gamete from the commissioning couple by means of self-insemination or sexual intercourse. This was practised

until approximately 1978. After this, 'gestational surrogacy' was increasingly used. Surrogate motherhood is described in this way because there is no genetic link between the commissioning parents and the surrogate mother, while this is made possible by advanced medical technology such as the stimulation of ovulation and in vitro fertilization or other technologies (pars. 11-23, 48). According to the RIAPT&P, gestational surrogacy gives rise to various forms of parenting. The first possibility is the use of gametes that come from the commissioning parents. This entails a genetic link between the instructing legal/ social parents and the child (Par. 51a). A second possibility is where the female gamete comes from a donor and is fertilized with the gamete of the commissioning father (par. 51b). The third is where the gamete comes from the commissioning mother and is fertilized with the male gamete of a donor (par. 51c). Finally, there is the possibility where both the male and female gametes come from donors (par. 51d), which means that the child can have up to five different 'parents', namely the surrogate mother, the commissioning parents and the donor parents. 'Non-traditional surrogacy' takes place outside the context of traditional and gestational surrogacy where the parents are male and female (par. 48). This may involve homosexual couples or a single male/ female parent who wants to make use of surrogate motherhood (par. 20) [4].

Surrogacy Arguments

In paragraph VI.3 of the RIAPT&P, the arguments against and for motherhood are discussed. The first argument against surrogacy is that most surrogate mothers make the decision under duress. Most women, especially in developing countries, are poor and illiterate and are (mis)used by commissioning parents and commercial intermediaries (par. 155). The second argument is the possibility that vulnerable women (as well as other women, however) do not function in a context of real informed consent. Women who enter the surrogate process cannot anticipate possible risks, such as the fact that they may form a strong bond with the child, experience resistance to giving up the child or the psychological struggle that this kind of pregnancy may well entail. (par. 156). The third argument is that surrogate motherhood is a form of commodification of the woman and the child, which degrades both to a means of trade, and therefore affects their dignity (par. 156) [4]. The fourth argument concerns the best interest of the child. Although there is a contract between the surrogate mother and the commissioning parents, there is no absolute control over the lifestyle choices of the surrogate mother, which may have a direct and potentially negative impact on the (health of the) child. Concomitantly, requirements set by the instructing parents can encroach on the time that is available for the surrogate: for instance, she may have to attend a clinic for long periods or may experience health problems centred on the pregnancy, and these may lead to physical and/ or psychological neglect of her own children. There is always the risk that the contracted child will not meet the expectations of the commissioning parents or surrogate mother and may be rejected at birth or later. Practices such as embryo selection on the basis of prenatal diagnosis or the selection of a donor can create the expectation among the commissioning parents that a 'perfect' baby will result, which can later lead to great disappointment and possible rejection (pars. 157-158) [4].

In the fifth place, this practice is an intrusion into the private life of the surrogate, because she is subject to the commissioning parents' preferences for her way of life (par. 157). The sixth argument centres on the health risks associated with surrogacy. Ovulation stimulation increases the risk of breast cancer and deep vein thrombosis, while multiple pregnancies may cause greater maternal morbidity and mortality (pars. 16, 21, 49). There are also dangers for the children in multiple pregnancies, including greater risk for prenatal and neural problems (par. 16). Babies born by means of in vitro technology have a greater risk of harm such as low birth weight, premature birth and birth pathology (par. 18) [4].

A final argument against surrogacy is that it affects the institution of the family (par. 159). Based on the Universal Declaration of Human Rights (UDHR, art. 16.3) [7] and International Covenant on Economic, Social and Cultural Rights (ICESC, art. 10.1) [8], the family is seen as a natural and fundamental unit of society that is changed by surrogacy. The institution of the family is harmed by the change of family roles when an aunt, a grandmother or sister acts as birth mother, while this adjustment can harm the interests of the child because, as stated in the judgment of the

European Court of Human Rights (case *Frette v. France*, 2002), 'it is not about giving a child to a family, but a family to a child' (par. 159). According to par. 5 of the dissenting opinion (RIAPT&P, p. 39), the latter proposition means that the best interests of the child must be given priority, which is understood that a child has the right to a natural or biological family. As a natural and fundamental unit between a man and a woman, the family centres on persons who must perform the basic family roles, and this is undermined by surrogate motherhood. The basic natural and fundamental parents are not the aunt, grandmother, sister, single parent, or lesbian couple, but the biological father and mother. In other words, a natural and fundamental family must be given to the child.[4]

The first argument in favour of surrogacy is of a medical nature. If a woman was born without a uterus or lost it due for medical reasons, or in a case where spontaneous pregnancy or pregnancy by means of IVF is repeatedly unsuccessful (pars. 52, 160), surrogacy offers a solution. The second, held by some utilitarian philosophers, is that the economy is market-driven, and that motherhood is a social construct that can be separated from pregnancy. Surrogacy is an autonomous and private matter (par. 161). The third is that new forms of parenting are made possible by genetically own children for homosexual couples or single men (par. 52).[4]

In conclusion, report states around these arguments that surrogacy 'raises a number of ethical challenges, which we will consider in Section VI.3' (par. 52).[4] This brings into focus the ethical advice of the RIAPT&P regarding surrogacy.

Analysis

Three positions

In Paragraphs VI.3.3., entitled 'Analysis', ethical aspects of surrogate motherhood are argued, and guidelines presented [4]. There are three sets of positions regarding surrogacy within the IBC as reflected in the RIAPT&P (par. 168). The first set of positions rejects altruistic and commercial surrogacy in its entirety on the basis of the arguments discussed above (pars. 157-159, 168) [4]. Along with this, two arguments are indirectly presented from the UDBHR against altruistic and commercial surrogacy (par. 168).

The first argument is grounded in human dignity (par. 163). Surrogacy affects the human dignity of the surrogate and the child. Although there is no direct reference to the UDBHR, it can be assumed that the IBC has in mind article 3.1 of the UDBHR, which is formulated as follows: "Human dignity, human rights and fundamental freedoms are to be fully respected".[3] The IBC interprets human dignity as a principle that is incompatible with the concept of all forms of surrogate motherhood, because a woman is used as a means to an end (par. 163, 168) [4]. However, the document does not explain why the employment of people to an end is automatically an infringement on human dignity.

The second argument against commercial surrogacy is based on the principle of vulnerability (par. 165). Article 8 of the UDBHR articulates this as follows: 'In applying and advancing scientific knowledge, medical practice and associated technologies, human vulnerability should be considered. Individuals and groups of special vulnerability should be protected, and the personal integrity of such individuals respected' [9]. Note that is the only article that directly refers to the UDBHR within the context of surrogate motherhood [3]. According to the RIAPT&P, women can be classified as persons with special vulnerabilities under certain circumstances. The report states that most women who consider acting as a surrogate are in dire financial need and are therefore economically defenceless. They can easily be exploited. Special vulnerability is defined in the report as the fact that, for some women, a greater risk of being harmed physically and psychologically exists. Such women have a greater chance of being deceived or forced into choices and disrespected (pars. 165-166) [4].

The second set of positions around the matter as found within the RIAPT&P rejects commercial surrogacy but accepts altruistic surrogacy as a method of creating a family. Here, reference can be made to the first and third arguments in favour of surrogate motherhood, as unpacked above in terms of infertility and alternative forms of parenting.

Altruistic surrogate motherhood, as discussed in the RIAPT&P, is based to my mind indirectly on three principles of the UDBHR, namely autonomy, sharing of benefits and solidarity (par. 164)

[4]. Once again, the report does not refer directly to the UDBHR, but simply offers a disappointingly vague and unreasoned reference to autonomy. It is not clear how the report understands autonomy within the context of surrogate motherhood, but a hesitant conclusion would be that the report links it to the concept of responsible liberty. In pars. 101 and 121 (which do not deal directly with surrogate motherhood) reproductive autonomy is explained as the right to make meaningful decisions regarding your life and health. The reference to autonomy in the report reflects article 5 of the UDBHR, which defines it as follows: 'The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected' [3]. Article 5 gives the instructing parents, couple, single parents, and the surrogate mother the right to an autonomous decision centred on participating in the technological reproduction process.

Article 26 of the UDBHR states that this declaration is to be understood as a whole and the principles are to be understood as of a complementary and interrelated nature. Each principle is to be considered in the context of the other principles, as appropriate and relevant in given circumstances [3]. In the light of the principle just mentioned (which is not mentioned in the report), in my judgment, the RIAPT&P determines that freedom of choice (autonomy) must be considered in the context of two other appropriate and relevant principles, each of which will subsequently be briefly discussed.

It can be assumed that altruistic surrogacy is also based on the principle of 'sharing of benefits' (par. 164). The report does not refer directly to the UDBHR but, instead, to the 'Report of the IBC on the Principle of Benefit Sharing,' which provides an interpretation of Article 15 of the UDBHR." [10]. In that sense, an indirect reference to article 15 does occur, which is formulated as follows: 'Benefits resulting from any scientific research and its applications should be shared with society as a whole and within the international community, in particular with developing countries. [...] (g) other forms of benefit consistent with the principles set out in this Declaration.' (UDBHR, Art. 15g) [3]. Unfortunately, the RIAPT&P does not offer an extensive interpretation of the concept of 'sharing of benefits. A short sentence does state that the sharing of benefits can be carefully defined as the free provision of technological procreation services. This means that the surrogate mother must be freely willing to be part of a technological process without payment, in which she will be pregnant with the baby on behalf of the commissioning parents. Payment may be made, but only to cover the basic expenses of the surrogate mother (par. 164) [4].

The last principle on which altruistic surrogacy is founded is the concept of solidarity (par. 164) [4]. The RIAPT&P does not give a comprehensive description of the meaning of solidarity, though, but merely offers the following statement: 'Free provision of this kind strengthens the idea of solidarity among human beings, promotes the altruistic motivation'. The report therefore views solidarity as an act where people help each other free of charge and, in such a case, altruism is promoted. The report does not refer to the UDBHR, but the idea of solidarity does appear in article 13 and is formulated as follows: 'Solidarity among human beings and international cooperation towards that end are to be encouraged' (art. 13) [3].

The members of IBC who accept altruistic surrogacy believe that the technological practice may only take place under the following conditions (par. 169) [4].

- a) The best interest and the rights of the child must be protected. This idea forms a nexus with article 7a of the UDBHR, which is however not mentioned in the report. According to article 7a, the best interests of persons without capacity (such as children) must be protected within the context of medical and technological practices. [3,11]
- b) The autonomy and well-being of the surrogate mother and her family must be protected.
- c) The successful involvement of all parties must be ensured, which entails that the surrogate mother and commissioning parents will undergo counselling and psychological assessment. The surrogate must also undergo regular medical tests. This condition dovetails with article 4 of the UDBHR, namely that, during the application of medical practices, the best interests of all parties must be promoted, and any harm must be prevented [3,12]. Also, as far as this principle is concerned, no direct reference is found in the RIAPT&P.

- d) The report sets the condition that a family bond (or a close relationship) between the surrogate and the commissioning parents must exist or be formed, because this will cause the least problems. The reason on which this condition is based is not made clear. The only possible inference is that the condition is based on article 13 (which centres on solidarity and cooperation), especially article 24 (centred on international cooperation), which states in point 3 that states 'should respect and promote solidarity between and among States, as well as individuals, families, groups and communities...'.^[3] This condition can be understood to promote solidarity among family members.
- e) Surrogacy must be a financially neutral act. This is based on the principle of human dignity, as indicated.
- f) Surrogate motherhood is only permitted where technological intervention is the only option for a couple to have their own child. It is unacceptable in situations where parents can conceive their own children. The principal basis of this condition is not made clear but make logical sense.

The RIAPT&P does not directly indicate that it supports and recommends altruistic surrogacy. But it is fair to assume that it does recommend altruistic surrogacy for consideration by States, based on inference, as indicated above. This inference is reinforced by the fact that, in its final recommendations (paragraphs VII), a request is made that commercial surrogacy should be prohibited, while governments should 'observe neutrality on different forms of family and parenthood chosen and not discriminate any of their citizens on the basis of their choice under the scope of each national legislation' (pars. 202c, f) ^[4]. This indirect recommendation in favour of altruistic surrogacy can clearly be related to the principles of the UDBHR, and therefore it can be stated the IBC report does comply with their statement that the UDBHR forms the framework of their thinking and advice.

The third set of positions adopted by the IBC also recognizes that altruistic surrogacy is acceptable in some cases, while there is doubt about whether the risks associated with altruistic surrogacy can in fact be avoided (see pars. 165-166, 168) ^[4].

Critical questions

In view of these considerations, the following critical questions arise. The first is that the report views family and parenthood as neutral phenomena and thus moves away from the belief that family is a natural unit. According to the UDHR (art. 16.3) ^[7] and ICESCR (art. 10.1) ^[8] as well as the IBC dissident group, the family is the natural unit for and is in the best interest of the child. On the one hand, one could claim that the concept of the natural family does not appear in the UDBHR but, on the other, the preface of the UDBHR states that the UDHR and ICESCR must be taken into account when applying the UDBHR. However, the ethical grounds on which the RIAPT&P bases its statement that the family is a neutral concept are not made clear.

The second critical comment to be made around the acceptance of altruistic surrogacy is that the IBC report considers the interests of the commissioning parents (autonomy) and the best interest of the child to be equivalent. Paragraph 200b states that 'the protection of rights of individuals involved in these new forms of parenthood must be balanced with the best interests of the child'. This thought conflicts with the UN Convention on the Rights of the Child, which clearly states that the best interest of the child will prevail over any other interest (art. 3) ^[13]. According to the preface of the UDBHR, this UN document must also be considered when it comes to the implementation of the principles of the UDBHR ^[3]. However, the ethical foundation on which the report bases its statement that the interests of the commissioning parents and the best interests of the child can be considered equal, is again not given.

The third critical comment around the acceptance of altruistic surrogacy is the fact that the report does not enter any debate about the status of the human embryo. RIAPT&P admits that 'the moral status of embryo is a fiercely debated philosophical problem' (par. 9) ^[4]. It is known that, in the surrogate process, several healthy and normal embryos are destroyed (par. 55, 58) ^[4]. The question arises whether Article 8 of the UDBHR, which centres on vulnerable human life, should not be held to be important around the debate about altruistic surrogate motherhood ^[14]. The global ethical idea of responsibility is an important part of the UDBHR, and the question arises whether

the responsibility to give guidance on important ethical issues is not being evaded (UDBHR, articles 2a-b, 5, 14) [3].

Summary

Indeed, one can agree with the minority group in the IBC report when they notice that the RIAPT&P ‘is commendable in many respects: for its clear language; extreme precision and considerable rigor in argumentation; absolute correctness in the exposition of the different and controversial theses on the subject’.

The RIAPT&P of the IBC rejects commercial surrogacy and accepts and recommends altruistic surrogacy based on three global principles as found in the UDBHR, namely autonomy, sharing of benefits and solidarity. In my opinion, it can be asserted with certainty that, when it is tested against the UDBHR, the IBC does ground their arguments in favour of altruistic surrogacy (indirectly) in the UDBHR.

The recommendation of altruistic surrogacy by the RIAPT&P does pose problems, however, because it raises and unfortunately leaves unanswered critical foundational questions regarding the family, the best interests of the child and the status of the embryo, as demonstrated. Clearly the moral disengagement that goes along with this is problematic.

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