



# SURROGACY AND CHILDREN WITH DISABILITIES: A CONFLICT OF RIGHTS

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## Abstract

*Reproductive rights are integral component of right to life with dignity. It is a part of constitutional morality to protect and safeguard same, while acknowledging the autonomy and choices of person in concern. Moreover, it is philosophically proven fact human agent is rational agent (Kant) and therefore has autonomy to decide and consent in a free manner. The idea of surrogacy is based on this very principle, whereby rights are provided to individual to make her choices independently. The ongoing debates about legalizing commercial surrogacy in India are surrounded with the different moral and ethical questions? It is opening of the Pandora box that has various complex questions to address. One such question is related to rights of the newly born disabled child. There are many instances throughout the world, where commissioning parents have refused to take the disabled baby. One such example is from Ukraine, where after knowing the mental and physical disability of their three-month surrogate child, American parents have abandoned her. The main reason of these instances is the lack of understanding about disability as diversity. This is primary because of the labeling and stereotypes of society and state. There is to have inclusive dialogue while discussing about laws and policies related to surrogacy. Moreover, at international level, UNCRPD provide a platform for centrally deliberating about the issues related to disability.*

**Key words:** Surrogacy, Individual Dignity, Diversity, Disability, and Informed-choices.

## INTRODUCTION

People with disabilities are integral to human diversity. According to one of the view, people with disabilities constitute the largest minority group of the world, where they enjoy equal rights with others. UNCRPD (Convention on Rights of Persons with Disabilities) guarantees them the equitable right to life with dignity. It also guarantees them the right to have their self-identity and self-determination. The same rights are extended to children with disabilities in womb and otherwise. Further, at the same time disabled people also enjoy the equitable access to their sexual and reproductive rights.<sup>1</sup> The expressions draw its significance from the proposition every individual is a rational being and therefore worthy of dignity and respect.<sup>2</sup> Thus they have right to decide and choose freely and autonomously. In this way one has the right to decide about family planning, sexual interactions, contraception and surrogate parenthood etc. related issues. Almost for more than a decade people are discussing the issue of surrogacy and its

<sup>1</sup> The expressions underline the complex two-folded rights (right of disabled child (right to life) and right of disabled adult (reproductive choices).

<sup>2</sup> Immanuel Kant, Critique of Pure Reason, George Bell and Sons, York Street, 1890.

related aspects. Especially in countries like USA, India, Ukraine it has become the means of business. Though large number of countries is not practicing surrogacy but at the same time there is no law that prohibits the same. It is the reason that the legality of surrogacy is often considered as the gray area. It also provides the way of illegal and inhuman practices pertaining to surrogacy- including trafficking etc. Thus practice of surrogacy is always having a moral dilemma. This is surrounded by few important questions, for example: is it morally correct to commercialize the human life? Does surrogate-contract is not more than a simple transaction of goods and services? Shall one apply the common scale of consumerism while dealing with the surrogacy contract? In other words, does it have capitalist oriented understanding of surrogacy- a matter of cost and benefit? In such a contract there is physical transfer of the child along with alteration in her affiliation. Hence child becomes the object of the contract and that poses in itself a major ethical problem. One may try answering these questions with the theories of liberalism, where liberal philosopher argued that individual is free to contract and do anything as long as it doesn't harm others.<sup>3</sup> It further argues that state should not interfere between personal lives of individuals.<sup>4</sup> According to this school of thought there shall not be any denial of human agency in surrogate contracts. If parties to the said contract are dealing with informed and free consent, it is considered as the morally fair contract. While substantiating the proposition from Rawlsian concept of justice, the equal opportunities among parties is only possible if there is no unequal bargain power.<sup>5</sup> Further, we know generally surrogacy contracts are international in nature, e.g. clients from one country seek services of surrogate mother from the other country. Therefore, in order to ensure the autonomy and free consent of parties it is advisable to develop an international legal framework around the issue.<sup>6</sup> This will be similar to convention on Inter-country Adoption, 1993- as it doesn't compel states to authorize international adoption but frames guidelines once it allows inter-county adoption.<sup>7</sup>

### **MORAL DILEMMA & SURROGACY: INJUSTICE WITH BABIES WITH DISABILITIES**

A Surrogate can bring great joy to a couple that themselves cannot have children. In United Kingdom, the surrogate mother has greater right over the baby as she used to be mentioned on the birth certificate of the baby. In this sense, in UK it is said *tummy-mummy* has priority over commissioned parent(s). Therefore, if surrogate mother later decided to keep baby with herself, she has the right to do the same. On the contrary in United States of America, commercial surrogacy gave upper hand to the commissioning couple. It is vastly based on the consumer rights that generally protect the buyers over sellers.

As we know in surrogacy contract women accept to bear a baby for someone else. Where she abandons the child at the birth and handover the same to the contractual couple. She acts as an incubator. According to Dr. Lee Salk, in surrogate contract couple turned to surrogate uterus and not to a surrogate

<sup>3</sup> Norris Turner, 'Harm' and Mill's Harm Principle, Ethics, Vol. 124, Issue 2, pp. 29-329, 2014.

<sup>4</sup> Robert Nozick, ANARCHY, STATE AND UTOPIA, Basic Books, New York, 2013.

<sup>5</sup> John Rawls, THEORY OF JUSTICE, Oxford Publication, 2<sup>nd</sup> Ed., 2005.

<sup>6</sup> It will be helpful to deal with the issues related to surrogacy if there would be common guidelines that concern countries will keep in mind.

<sup>7</sup> Miranda Davis (Ed.), Babies for Sale?, Transnational Surrogacy, Human Rights and The Politics of Reproduction, Zed Books London, 2017.

mother.<sup>8</sup> It is also argued that in surrogacy contract women are merely treated as the means to achieve the desired end i.e. delivering “healthy” babies. This is one of the reasons that it is stated altruistic and generous appearing action of surrogacy actually opens the door for discrimination and violation of human dignity. Though this is not the question for discussion in this paper. Here author is delving with one another major moral question about the status of the children with disabilities in a surrogate contract. It is often noticed in various cases worldwide where couples to the surrogate contract refused to accept the baby after knowing about her disability. They consider disabled baby as a “faulty product”. This clearly indicates that the surrogacy is operationalized within the binaries of eugenic model, which is influenced from modernization.<sup>9</sup>

In a case from Britain, the commissioning mother who accepted the baby boy but refused to accept the twin sister because of her severe muscular condition, Congenital Myotonic Dystrophy. In an interview to the Telegraph, surrogate mother said that the agreement was fixed at 12000 pounds. After her delivery to the twin babies, the mother took the boy and refused to take girl and said “*she is a dribbling cabbage! Who would want to adopt her?*” The similar case happened in case of baby Gammy who was left with his Thai surrogate mother by an Australian couple because of his down’s syndrome. In addition to the child welfare concern there are also issues related to the exploitation of the poor women. Exploitation concern has led to the many countries to shut down their earlier booming surrogacy industries. United Nations has also warned against the commercial surrogacy as it is amounting to the sale of the sale of the children.<sup>10</sup>

The legislation around surrogacy varies hugely from country to country. It has effect of social values, culture and history of the particular country. In places like, France, Germany surrogacy is seen as the violating the dignity of the women. As according to them it is the means to use to achieve someone’s end. Whereas in countries like UK, surrogacy is consider as the gift by the one women to another and allow it on altruistic’ expenses-only basis. The countries like California, Ukraine and Russia permit commercial surrogacy, considering it as an expression of a women’s autonomy to engage in surrogacy of their own free will. In recent years commissioning couple looking towards countries like India, Thailand and Nepal, here the surrogate contract is signed in a easily in a very less price.

In addition to the ethical dilemmas there are equal number of legal concern in the surrogacy related contracts. While some countries recognize the surrogate as the legal parent, other allocates parenthood to the commissioning parents from the moment of the birth. The clash of laws results in leaving children stateless, with neither country providing the citizenry rights.<sup>11</sup>

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<sup>8</sup> Dr. Salk is a famous child psychologist. Also see: *Towards a common Language for functioning, disability and health*, Geneva: World health Organization, 2002, available at: <http://www.who.int/classifications/icf/en/>.

<sup>9</sup> David e. Apter, *THE POLITICS OF MODERNIZATION*, The University of Chicago Press, 1965.

<sup>10</sup> G. Thomas Couser, *VULNERABLE SUBJECTS: ETHICS AND LIFE WRITINGS*, Cornell University Press, 2003.

<sup>11</sup> This can be illustrated from the case of Baby Manji in 2008, where a child born to the Indian surrogate and was left in limbo after the Japanese commissioning parents got divorced before the birth. Neither surrogate mother nor the commissioned mother wants to take the child. The commissioned father, being a single parent was disqualified under the Indian law of adoption.

## CAPITALIST-EUGENIC MODEL AND CHILDREN WITH DISABILITIES

It is argued, as discussed that surrogacy is the process of gifting by one woman to the other. It is also said that the process should be based on free consent and human agency of the individuals. But above mentioned cases and examples are indicators to test the nature of society and its thinking. There is no hesitation in stating that the state and society is still operating within the eugenic model of thinking. It is the narrow perception and lack of value education among common masses that results in such stigmatized attitude of the society. It is burgesses' mind-setup that has controlled the democracy and policymaking. It is the economic value of the human being, who is always used as source of Labour in the market. This is the primary reason that it always promoted so called abled bodies, so that it can contribute to the market. Therefore there is denial of the disabled child in a surrogacy contract. It is the modernist understating of the self that has structured within the boundaries of binaries. The people of the society are normalized in such a manner that they don't accept any diversity around them.<sup>12</sup> In the words of Michel Foucault this is the normalization of society where people are not in capacity to rationalize and decide freely and independently. 'Modernity' has defined and structured everything in our society. It has its own problem and very own solution for the same.

The diminishing human values have resulted into materializing the humanity. In other words it is only the profit –loss relation that plays a crucial role in deciding human relations. This is the reason that commissioning couples are denying taking baby once they discover the disability. In yet another example from Ukraine, which is has the large surrogacy industry, an American couple denied taking the baby who was prematurely born in 2016 as twenty-five weeks and weighed just about eight hundred grams. The tragedy of the situation is that baby is ultimately sent to the Sonechko Children's Home. The couple said that we would not take her to America because this baby is incurable. But child survived against the doctor's opinion. When she was almost to years old a letter was sent to giving the consent for her adoption. But technically the child Bridget was essentially a stateless as she wasn't considered a Ukrainian citizen and no application had been made for her to become an American citizen. In this case it was Biotexcom Company that undertakes the commissioning process. The Bridget's birth is result of its commercial surrogacy "arrangements". The owner of the company, Mr. Tochilovsky was later briefly placed under house arrest on allegation for child trafficking, document forgery etc.

### IMMORAL BUSINESS & DIMINISHING VALUES

From above discussion it is almost clear that the surrogacy contracts are under the scanner of morality. The related moral questions become serious in cases of "disabled" births. Though in countries like Ukraine commercial surrogacy is legal, but the their laws and policies doesn't talk about the these contract in an elucidate manner. Apart from these factors corruption also facilitates in child trafficking and forceful surrogate agreements. It is the process where one tried treating other as the means. There are

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<sup>12</sup> This remind me one old case in united states, where a deaf couple advertised in a newspaper for sperm donor with history in deafness, on seeing the said advertisement people objected and criticized the couple by saying that they are imposing disability on future child. Whereas in another advertisement, a couple wants an abled bodied sperm donor with height of six feet and good IQ, there was no reaction from the society. According to them the later advertisement is "normal" and permissible within the society. See: Michel Sandal, CASE AGAINST PERFECTION, Oxford Publication, 2003.

several cases where foreign couple has abandoned the babies because of disabilities etc. There is large number of such cases that are not even reported. Hence it is appropriate to argue that surrogacy contract and related laws are lacking the constitutional morality. Constitution of any democratic country talks about equality, liberty, freedom and above all the right to life with the dignity. It is very strange to note that commissioning couple from the countries like USA, UK and Australia have refuse to accept the babies after discovering certain disabilities. Their constitutions and philosophies are used as role model for all other developing counties. For example we refer to American constitution while discussing about right to life, freedom of choices etc. This reflects that there is lack of human values. It is the business mindedness that has overpowered the human sentiments and emotions. In other words now there is commercial value of individual's emotions. The existing state of affair is simply remind me the Hobbesian state of nature, which depicts human being as brutal and selfish. But the current so-called social contract setup seems worse then that state of nature. We have lost the idea of Judicious Spectator<sup>13</sup> there is need to revive and again inculcate these values so that humanity can survive and lead by an example. Though the existing situation seems depressing where all human beings are structured within the notion of fictional identities, where everyone is trying to control the other. The human ego is endless that it has started contorting and domesticating the earth and its vastness within in the confinements of boundaries.

I, *per se* does not have the issue with legalizing the commercial surrogacy as long as it is practiced in boundaries of human agency, freedom of choice, equitable bargaining power and unbiased selection and decision-making. The commissioning parties including the facilitative agency and surrogate mother should accept the children with all diversities. This will be possible with assistance of state in providing the value education to all its citizens. Further, researcher is of the opinion that there is need to develop a common guidelines related to surrogacy and related international & national agreements. It has to be specifically mentioned in the agreement that if concerned parties decided to have babies, then they should accept the baby in all circumstances.<sup>14</sup> There is need to respect the reproductive rights of surrogate mother, where she should have the right to revoke the contract at any time within the permissible time limit for termination of pregnancy. At the same time there is need to aware the masses about the disability as diversity, so that if there is birth of a disabled child, she can be accepted and welcomed by the couple with same enthusiasm as it is done for 'other'. This argument is holds good for the countries, which doesn't allow surrogacy for commercial purposes but only for altruistic purposes, within or outside family.

## CONCLUSION: GOVERNMENTAL INITIATIVES AND CONCERNS

In order to address and regulate the issues related to surrogacy agreement government of India has taken certain steps including introducing the national guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART). But at the same time there are no such laws to deal the

<sup>13</sup> The word 'judicious spectator' is used by Adam Smith in his famous work, 'Wealth of Nations'. It means that state of mind where human being can see through the other's problem without even one narrates it.

<sup>14</sup> Ideally speaking state should provide the assistance of taking care of health of newly born baby.

concerns and rights of surrogate mother. The recent law ban commercial surrogacy and Surrogacy (regulation) Rules, 2022 provide for the form and manner for registration, fee etc. for a surrogacy clinic. It also includes qualification for persons employed at registered clinics. The law also fixes the rights and duties in relation to surrogacy. For instance, both the couple or individual seeking surrogacy and surrogate mother shall enter into a agreement which shall be legally enforceable. Accordingly, all expenses, including medical assistance, insurance, assistance in furtherance to assistive technology etc. during pregnancy till handing over the baby shall be borne by the couple or individual seeking surrogacy. Law further states, surrogate mother is also entitled to receive monetary compensation from said couple or individual. Further, surrogate mother shall relinquish all parental rights over the child. The law tired to facilitate the smooth contractual obligation between concerned parties, so that in case of any dispute between couple and surrogate mother, the issue can be resolved as per the law. But at the same time law including regulation, nowhere expressly discusses the issues related to children with disabilities and therefore ignored their concerns and rights who born out of such surrogate contract. Thus, issues related to protection of the rights of disabled children still remain in dark and therefore it is violative national and international laws related to disabilities.

