

SURROGACY AGREEMENTS AND THE RIGHTS OF CHILDREN IN NIGERIA AND SOUTH AFRICA

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SUMMARY

Surrogacy agreements help to provide children for persons who cannot achieve conception or carry a child to term themselves. This practice has improved several lives over the years but can also be exploitative for some parties involved, if not adequately regulated.

Using the doctrinal research method, this study discusses the rights of children in surrogacy agreements and examines the regulation of the practice in Nigeria and South Africa. This study found that a comprehensive framework regulating surrogacy agreements is lacking in Nigeria, while the practice is regulated in South Africa under Chapter 19 of the Children's Act 38 of 2005 (Children's Act). The lack of a legal framework in Nigeria implies that the rights of children born through surrogacy agreements may be violated. Two Bills are however awaiting passage into law in Nigeria.

This study thus recommends the enactment of these Bills into one comprehensive law so as to regulate surrogacy agreements effectively in Nigeria and safeguard the well-being of children. Legislation regulating surrogacy agreements in Nigeria should include provisions similar to those found in the Children's Act of South Africa. Policies that promote the best interests of the child should be adhered to and their rights to know their biological heritage, identity and nationality, and to prevention from harm, should be protected and promoted.

1 INTRODUCTION

Surrogacy gives hope to couples who have been unsuccessful in their efforts to have children, whether through miscarriages, inability to conceive or health issues. The practice was recorded in the Holy Bible¹ when Abraham

¹ The Holy Bible: Genesis 16: 1–16.

and Sarah had difficulties bearing children and used their Egyptian slave girl, Hagar, to bear a child for them. Nevertheless, while Abram had sexual contact with Hagar, the modern reproduction technique of surrogacy can be done without the need for sexual contact.² Surrogacy has been defined as “an arrangement whereby a woman agrees to become pregnant and deliver a child for a contracted party”.³ The surrogacy agreement will state that after the birth the surrogate mother breaks her parental link with the child and hands him or her over to the commissioning parents who legally become his or her parents.⁴ The woman delivering the child is known as the surrogate mother while the couple to whom she is handing over the child are known as the commissioning or intending parents.

Surrogacy has become a more viable option than it was a few decades ago. This is largely due to the increasing awareness of Assisted Reproductive Techniques (ART),⁵ an increase in ART knowledge, and demand in several countries as well as the complex requirements and processes involved in adoption processes.⁶ Abortion of children has also reduced the availability of babies who could be adopted by interested persons.⁷ While surrogacy agreements assist people to have the children they desire, children are at risk of being subjected to human rights violations owing to their vulnerability.⁸ Children have rights that have been recognised in several international human rights documents, including the United Nations Convention on the Rights of the Child⁹ (UNCRC) and the African Charter on the Rights and Welfare of the Child¹⁰ (ACRWC).¹¹ According to Gerber and O’Byrne,¹² “whatever their parentage or the means of their conception and birth, children are not properties, but human beings and rights-holders in law.” However, these rights are usually in conflict with the rights of other parties involved in surrogacy agreements.

² Emiri *Medical Law and Ethics in Nigeria* (2012) 79.

³ US Legal “Surrogacy Law and Legal Definition” <https://definitions.uslegal.com/s/surrogacy/> (accessed 2020-12-01).

⁴ Danna *Contract Children: Questioning Surrogacy* (2015) 19.

⁵ These are techniques used to achieve conception when it is difficult for a person to achieve pregnancy the natural way. These include surrogacy, artificial insemination and in-vitro fertilisation (IVF).

⁶ Caamano “International, Commercial, Gestational Surrogacy Through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Attention” 2016 96(2) *Boston University Law Review* 571 575 576.

⁷ Marianne and Zavodny “Did Abortion Legalization Reduce the Number of Unwanted Children? Evidence from Adoptions” 2002 34(1) *Perspectives on Sexual and Reproductive Health* 25 25.

⁸ United Nations Human Rights “Children Risk Being ‘Commodities’ as Surrogacy Spreads, UN Rights Expert Warns” <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22763&LangID=E> (accessed 2020-12-01).

⁹ United Nations General Assembly *Convention on the Rights of the Child* (20 November 1989) 1577 UNTS 3 <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

¹⁰ Organisation of African Unity *African Charter on the Rights and Welfare of the Child* (11 July 1990) CAB/LEG/24.9/49 (1990).

¹¹ Olusegun and Idowu “Child Abuse in Nigeria: Dimension, Causes and Reasons for Its Persistence” 2016 4(1) *Child and Family Law Journal* 1 2 3.

¹² Gerber and O’Byrne “Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy” in Gerber and O’Byrne (eds) *Surrogacy, Law and Human Rights* (2015) 82.

This article aims to discuss the rights of children in surrogacy agreements, with the aim of ensuring that they are not abused through people's desire to have children. Furthermore, the types of surrogacy agreement as well as the legal frameworks in Nigeria and South Africa respectively are discussed to determine how these countries regulate the practice of surrogacy to protect the rights of children. South Africa is compared with Nigeria because they are both developing African countries and South Africa's comprehensive legislation on surrogacy agreements may be of benefit to Nigeria. A child, according to the UNCRC, is defined as a person below the age of 18 years.¹³ However, references to "children" in this article are to those who were born through surrogacy as well as to the unborn foetus.

2 TYPES OF SURROGACY AGREEMENT

The practice of surrogacy comprises two types – namely, partial or traditional surrogacy, and full or gestational surrogacy; each works in its distinct way.

2.1 Traditional or partial surrogacy

In traditional or partial surrogacy, the surrogate donates her eggs for fertilisation with the commissioning man's sperm either through artificial insemination or sexual relations.¹⁴ Partial surrogacy is less expensive and might not need medical assistance.¹⁵ The disadvantage, however, is that the surrogate mother is genetically linked to the child and she might be able to lay claim to the child upon his or her delivery.¹⁶ In South Africa, for example, a surrogate who is genetically connected with a child has the right to terminate an agreement within a period of 60 days after the birth of the child.¹⁷

2.2 Gestational or full surrogacy

Zaidi¹⁸ describes gestational or full surrogacy as the procedure carried out when a commissioning couple donates their gametes to be carried to term by a third party, and the child is handed over as soon as he or she is born. The child is related to the commissioning couple genetically; while the womb of the surrogate mother is used, she will have no genetic relationship with the child.¹⁹ Full surrogacy has been called a form of womb leasing and it

¹³ Art 1 of the UNCRC.

¹⁴ Blauwhoff and Frohn "International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law" in Paulussen (eds) *Fundamental Rights in International and European Law: Public and Private Law in Perspective* (2016) 215.

¹⁵ Rispel *The Scope and Content of the Child's Right to Identity in the Context of Surrogacy* (unpublished LLM dissertation, University of the Western Cape, South Africa) 2017 29.

¹⁶ *Ibid.*

¹⁷ S 298 of the Children's Act.

¹⁸ Zaidi *Ethics in Medicine* (2014) 192.

¹⁹ Dada *Legal Aspects of Medical Practice in Nigeria* (2013) 263.

necessarily involves the technique known as in-vitro fertilisation (IVF).²⁰ In gestational surrogacy, the surrogate could be implanted with donor eggs, donor sperm or donor embryo, in cases where both commissioning parents do not have viable gametes.

3 RIGHTS OF CHILDREN BORN VIA SURROGACY AGREEMENTS

Surrogacy has various implications for the rights of children. Without adequate regulation and monitoring, abuse and exploitation can occur, which affects the well-being of children born of surrogacy.²¹ In a survey conducted by the World Health Organisation (WHO) in 2015, it was reported that only 46 per cent of the 68 participating countries had ART legislation that included children in its provisions.²² The rights of children, which must be protected in surrogacy agreements, are discussed below.

3.1 The rights to non-discrimination

Children may be deprived of certain rights based on their gender, race, colour, disability, language, sexual orientation, religion and/or the circumstances of their birth. Discrimination against children is usually due to their dependence on adults for basic needs, their immaturity and their inadequate access to justice.²³ Article 2 of the UNCRC provides that the rights of children should be respected without any form of discrimination based on their birth or parents' status. The United Nations (UN) Committee on the Rights of the Child, which monitors the enforcement of the UNCRC,²⁴ affirmed this position by stating in General Comment 7 that States Parties must monitor and combat discrimination against children based on circumstances of their birth that deviate from the traditional process.²⁵ Therefore, children born through surrogate mothers must enjoy the same rights as children born through natural methods.²⁶ Their status, role and

²⁰ IVF is a medical procedure where gametes are fertilised in a laboratory dish and thereafter injected into a woman's body for possible implantation (De Cruz *Medical Law in a Nutshell* (2005) 164).

²¹ University of Chicago Law School: Global Human Rights Clinic "Human Rights Implications of Global Surrogacy" (2019) Global Human Rights Clinic 10 <https://chicagounbound.uchicago.edu/ihrcl/10> (accessed 2020-11-11).

²² Global Reproductive Health: International Federation of Fertility Societies "IFFS Surveillance 2016" (September 2016 1(e1)) https://journals.lww.com/grh/Fulltext/2016/09000/IFFS_Surveillance_2016.1.aspx (accessed 2020-11-12) 1–143; Lind "The Rights of Intended Children: The Best Interests of the Child Argument in Assisted Reproduction Policy" <https://journals.sagepub.com/doi/10.1177/0907568219853331> (accessed 2020-12-15).

²³ CRIN "Discrimination and the CRC" <https://archive.crin.org/en/guides/introduction/discrimination-and-crc.html> (accessed 2020-12-02).

²⁴ Art 43(1) of the UNCRC.

²⁵ United Nations Committee on the Rights of the Child *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood* (20 September 2006) CRC/C/GC/7/Rev.1 <http://www.refworld.org/docid/460bc5a62.html> (accessed 2018-04-16); Gerber and O'Byrne in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* 87.

²⁶ University of Chicago Law School: Global Human Rights Clinic <https://chicagounbound.uchicago.edu/ihrcl/10> 23.

position in the home and society should not be different from those of children born through natural methods.²⁷ In schools and communities, children born through surrogacy agreements should not be stigmatised. All privileges obtained by other children should be available to them.

3 2 The right to know one's biological origins

Article 7 of the UNCRC provides that “a child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents”. The right to know one's parents in article 7 has been interpreted to mean providing children with information concerning their biological origins and the circumstances surrounding their birth.²⁸ In the case of *Rose v Secretary of the State for Health*,²⁹ the European Convention on Human Rights (ECHR) held that the applicant had a right to be given details about her father. Failure to avail children of this information affects their ability to develop a sense of identity. Identity is a person's unique profile of which genetic origin is a key feature.³⁰ Article 8(1) of the UNCRC recognises a child's right to preserve his or her identity, including nationality, name and family relations. Article 8(2) further states, “where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity”. Therefore, States Parties are to assist children in achieving their right to identity and this right cannot be achieved if children are not aware of their biological origins, as this is one of the determining factors that make them understand who they are.³¹

Donor gametes, particularly sperm, have been used to conceive children since ancient times, and this practice has “traditionally been shrouded in secrecy” so as to protect men who have challenges with fertility.³² Sperm donors were also granted anonymity out of concern that a lack of anonymity would reduce the willingness to donate and cause a shortage in the availability of gametes to cure infertility.³³ However, the secrecy involved in this practice is declining as medical science advances.³⁴

In surrogacy agreements, donor gametes are sometimes used when either of the intending parents cannot use their own. However, lack of information about biological origin deprives children born through surrogacy

²⁷ Wade “The Regulation of Surrogacy: A Children's Rights Perspective” 2017 29(2) *Child Family Law Quarterly* 113 131.

²⁸ South African Law Reform Commission “The Right to Know One's Own Biological Origins” Issue Paper 32 <http://pmg-assets.s3-website-eu-west1.amazonaws.com/170720righttoknowonesownbiologicalorigins.pdf> (accessed 2019-12-24).

²⁹ (2002) E.W.J NO 3823 (H.C.J).

³⁰ McCombs and Gonzalez “Right to Identity” 2007 *International Human Rights Law Clinic* 1.

³¹ Rispel *The Scope and Content of the Child's Right to Identity in the Context of Surrogacy* 32.

³² Clark “A Balancing Act? The Rights of Donor-Conceived Children To Know Their Biological Origins” 2012 40(3) *Georgia Journal of International and Comparative Law* 619 621.

³³ Mason and Ekman *Babies of Technology: Assisted Reproduction and the Rights of the Child* (2017) 189.

³⁴ Clark 2012 *Georgia Journal of International and Comparative Law* 619 621.

agreements of the freedom to define their genetic relationships and connect with their heritage.³⁵ It can also pose medical risks as uninformed decisions can be made in the absence of a person's family medical history.³⁶ This is contrary to article 24 of the UNCRC, which protects the rights of the child to the highest attainable standard of health.³⁷ Jancic³⁸ is of the opinion that sharing information concerning the biological parents of children does not mean that a relationship will be established between them, but it can fulfil a usual human desire (on the part of the child) to discover from whom they originated. Many countries have ruled against the child's right to know his or her parents owing to privacy protection established by law for donors in these countries.³⁹ Parents also prefer the non-disclosure rule because of the connection they have with the child and the fear that the attitude of the child might change when he or she learns of his or her biological origin. They also do not want to destabilise the child and disclose the fertility status of the parent(s).⁴⁰

However, some countries have placed the rights of children to know their origins ahead of the rights of donors to privacy, with Sweden leading the way in 1984, followed by other jurisdictions.⁴¹ Factors that have increased the support for children learning about their biological origins include the realisation that keeping such secrets could be harmful to families, as well as the support received from government-appointed committees including the UK's Warnock Committee, and laws like the Human Fertilisation and Embryology Act, 1990 in the UK, which absolves a donor from the responsibility of caring for a child resulting from a donated gamete.⁴² The UN Committee on the Rights of the Child also states that article 7 of the UNCRC should take preference where there is a conflict between a child's right to information about his or her biological parents and the rights of others to privacy.⁴³ The issue remains a contentious one and has not been regulated in several countries, including the Solomon Islands, Iran, Japan and Uzbekistan, which means parents can choose either to notify the child or conceal the circumstances behind a child's birth. In other countries like the Netherlands, a child conceived by sperm or egg donation has the right to non-identifying information about the donor upon reaching 12 years, and at

³⁵ Shalev, Moreno, Eyal, Leibel, Schuz and Eldar-Geva "Ethics and Regulation of Inter-Country Medically Assisted Reproduction: A Call for Action" 2016 5 *Israel Journal of Health Policy Research* 59 66.

³⁶ Ravitsky "The Right to Know One's Genetic Origins and Cross-Border Medically Assisted Reproduction" 2017 6(3) *Israel Journal of Health Policy Research* 1 3.

³⁷ Child Rights International Network "A Children's Rights Approach to Assisted Reproduction" https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf (accessed 2020-10-13).

³⁸ Jancic "Introduction" in Jancic (ed) *Rights of the Child in a Changing World: The UN Convention on the Rights of the Child: 25 Years After* (2015) 15 16.

³⁹ See for e.g., the Canadian case of *Pratten v British Columbia (Attorney General)* 2012 BCCA 40, where this right was denied to a woman.

⁴⁰ Clark 2012 *Georgia Journal of International and Comparative Law* 619 621.

⁴¹ Child Rights International Network https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf.

⁴² Blyth and Farrand "Anonymity in Donor-Assisted Conception and the UN Convention on the Rights of the Child" 2004 12 *The International Journal of Children's Rights* 89 90.

⁴³ Art 7 of the UNCRC provides that a child shall have the right "to know and be cared for by his or her parents".

the age of 16 years, may apply to have access to identifying information. In Denmark, in cases of gestational surrogacy with donor sperm, a child's right to such information is dependent on the agreement between the legal parents and the sperm bank.⁴⁴

Disclosing information about the biological origin of a child is the duty of the intended parents, although this duty might be carried out indirectly by the State through the issuing of a birth certificate. However, there have been reports of low levels of disclosure of this information, even in countries where parents are mandated to make such disclosure. It is nevertheless difficult to enforce such complicated family matters.⁴⁵ The rights of a child to a name and nationality are essential to preserving his or her identity and the registration of a child's birth enables enjoyment of such rights.⁴⁶ For children born through surrogacy agreements, birth registration is an essential right, as it is the first step to the process of determining their legal parentage and nationality.⁴⁷

3 3 Protection from harm

Children conceived through surrogacy agreements can experience various forms of harm and exploitation if their rights are not considered. In the event of parents losing a legal claim, a child could experience psychological trauma if taken from the parents who had cared for him or her and given to the surrogate.⁴⁸ The child's right to be protected from harm would mean parties not making decisions that negatively affect his or her well-being and health. Medical screening for genetic diseases and counselling before implantation in the surrogate will protect the child from harm. There should also be a limit to the number of agreements in which surrogates can participate, as the higher the number of pregnancies and births achieved, the higher the risk to the children produced. Another form of preventable harm is the risk of sexual, physical or emotional abuse by the partner of a single parent who has a child through a surrogate mother when that partner is not the biological parent of the child.⁴⁹

3 4 Best interests of the child

The consideration of the best interests of the child is a fundamental legal principle borne out of the realisation that most decisions concerning children are made by adults. These decisions must not be detrimental to children, since they are too immature to make their own choices.⁵⁰ Article 3(1) of the

⁴⁴ Jancic in Jancic (ed) *Rights of the Child in a Changing World: The UN Convention on the Rights of the Child: 25 Years After* 16 17.

⁴⁵ Clark 2012 *Georgia Journal of International and Comparative Law* 619 623.

⁴⁶ UNICEF "Birth Registration and Armed Conflict" [https://www.unicef.org/protection/birth_registrationandarmedconflict\(1\).pdf](https://www.unicef.org/protection/birth_registrationandarmedconflict(1).pdf) (accessed 2018-02-08).

⁴⁷ Gerber and O'Byrne in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* 91.

⁴⁸ Shanley *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same Sex and Unwed Parents* (2001) 46.

⁴⁹ University of Chicago Law School: Global Human Rights Clinic https://chicagounbound.uchicago.edu/ihrcl/10_23.

⁵⁰ Van Bueren *Child Rights in Europe* (2007) 30.

UNCRC provides that the best interests of children shall be a primary consideration in all issues concerning them. According to the UN Committee on the Rights of the Child, the above provision means that the effects of laws and policies on children must be considered in all issues concerning them before they are enacted or adopted.⁵¹

Identifying the best interests of the child is especially difficult in surrogacy agreements because it involves several ethical and moral issues⁵² and deals with choices in respect of unborn children.⁵³ Cohen⁵⁴ has, for example, argued that the best interests principle cannot be extended to unborn children since they do not yet have an identity. Mutcherson,⁵⁵ however, contends that children who have been born cannot be the sole focus, as those unborn are equally important. Mutcherson's opinion is agreeable, as protecting unborn children helps to prevent further harm when they are eventually born. It also brings a certain consciousness to all parties who, at an early stage, come to understand the implications of the best interests principle. In this context, all decisions that have consequences for children must be well considered to ensure that decisions made do not adversely affect the child's health and well-being.⁵⁶

Parents play a great role in ensuring that the best interests of their children born through surrogacy are protected.⁵⁷ It is thus important that intending parents are appropriately examined so that their willingness and commitment to safeguarding their children's rights are confirmed.⁵⁸ Failure to make investigations concerning the background of intending parents, as is done in adoption processes, undermines the best interests principle.⁵⁹ It is

⁵¹ University of Chicago Law School: Global Human Rights Clinic https://chicagounbound.uchicago.edu/ihrcl/10_23.

⁵² Daniels, Blyth, Hall and Hanson "The Best Interests of the Child in Assisted Human Reproduction: The Interplay Between the State, Professionals, and Parents" 2000 *Politics and the Life Sciences* 33 34.

⁵³ Gerber and O'Byrne in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* 89.

⁵⁴ Cohen "Regulating Reproduction: The Problem with Best Interest" 2011 96 *Minnesota Law Review* 423 426.

⁵⁵ Mutcherson "In Defence of Future Children: A Response to Cohen's Beyond Best Interests" 2012 96 *Minnesota Law Review* 49.

⁵⁶ Wade 2017 *Child Family Law Quarterly* 113 116.

⁵⁷ United Nations Committee on the Rights of the Child *General Comment No 7 (2005): Implementing Child Rights in Early Childhood* (20 September 2006) CRC/C/GC/7/Rev 1) par 13; United Nations Committee on the Rights of the Child *General Comment No 5 (2003): General Measures of Implementation of the CRC (arts 4, 42 and 44, para 6)* CRC/GC/2003/5 par 54 56 66.

⁵⁸ University of Chicago Law School: Global Human Rights Clinic https://chicagounbound.uchicago.edu/ihrcl/10_23.

⁵⁹ Owing to inadequate background checks, surrogates had babies for a cancer patient who later died, and in another instance, for an Australian man, David Farnell, who had previously been convicted of 22 child sex offences. See Murdoch "Australian Couples Caught in Thailand's Surrogacy Crackdown" (2014-09-14) *Sydney Morning Herald* <https://www.smh.com.au/business/australian-couples-caught-in-thailands-surrogacy-crackdown-20140913-10gess.html>; Mail Online "You Have Robbed Them of the Opportunity to Have a Normal Life: What Judge Told Paedophile Father Convicted of TWENTY-TWO Child Sex Offences – as Welfare Officers Step Up Hunt for Couple in Baby Gammy Case" <https://www.dailymail.co.uk/news/article-2717364/Australian-parents-Gammy-met-Chinese-mail-order-bride-agency.html>; Caamano 2016 *Boston University Law Review* 571 586.

against the best interests of a child to be separated from his or her parents after birth. Article 9 of the UNCRC prohibits separation without the consent of the parents except when abuse or maltreatment has been judicially determined. This principle also applies to commissioning parents who have no genetic link with the child as it has been reported that “strong and positive ties” also exist between them and their children born through surrogacy.⁶⁰ Thus, when children are taken away from intending parents owing to restrictions on surrogacy, this might deprive children of the benefits of living with a caring family and violate their rights. For example, owing to the ban on commercial surrogacy in Cambodia, some surrogate mothers were mandated to bring up the children they gave birth to until they were 18 years old or risk being imprisoned for 20 years.⁶¹ This is contrary to the best interests of the child as the surrogates might not be mentally and financially capable of caring for those children, which could lead to neglect and abuse.⁶²

The National Board of Health and Welfare (NBHW) in Sweden, in collaboration with the Swedish Society for Obstetrics and Gynaecology and the Swedish Paediatric Society, claimed in their reports that the transfer of multiple embryos is contrary to the best interests of the child, because they tend to increase the risk of pre-term births, low birth weight and disabilities like cerebral palsy. They thus recommended instead that single embryos be transferred to prevent multiple pregnancies. However, they added that the above conditions stated to be common in multiple embryo transfers also happen to single embryos. The single embryo transfer recommendation has been criticised on the basis that the transfer of single embryos reduces the chances of conception in ART.⁶³

To protect the best interests of the child, more attention should be placed on avoiding lengthy custody battles and reducing the rate at which children move from one family to another.⁶⁴ The risk of disputes increases when more than two persons can claim to be parents of a child, when the surrogacy agreement involves people residing in more than one jurisdiction and when laws governing surrogacy agreements are not clear and comprehensive.⁶⁵ Determining the best interests of the child requires careful scrutiny of each case and rules must be subject to review and changes as new developments arise.⁶⁶

⁶⁰ Golombok, Murray, Jadva, Lycett, MacCallum and Rust “Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3” 2006 21 *Human Reproduction* 1918 1922.

⁶¹ Chong and Whewell “Paid to Carry a Stranger’s Baby: Then Forced to Raise it” (2019-02) *BBC* <https://www.bbc.co.uk/news/resources/idt-sh/surrogates> (accessed 2020-11-10).

⁶² University of Chicago Law School: Global Human Rights Clinic https://chicagounbound.uchicago.edu/ihrcl/10_23.

⁶³ Lind <https://journals.sagepub.com/doi/10.1177/0907568219853331>.

⁶⁴ Caamano 2016 *Boston University Law Review* 571 586.

⁶⁵ Child Rights International Network https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf.

⁶⁶ Daniels *et al* 2000 *Politics and the Life Sciences* 33 38.

3 5 Citizenship and nationality of the child in cross-border surrogacy agreements

In accordance with article 7 of the UNCRC, it is important that States Parties assign a nationality to children when they are born, thus providing the jurisdiction where their rights can be enforced and protected.⁶⁷ When a child is born in a country different to that of the commissioning parents, he or she could sometimes be denied their nationality upon birth.⁶⁸ The country whence the intending parents come could have banned surrogacy while some countries require a genetic link with the intending parents before a child could be accepted as a citizen of their country. Denial of citizenship results in a child being rendered stateless, which affects his or her ability to obtain passports for travelling, receive medical care, get quality education and other public service benefits.⁶⁹ Storrow⁷⁰ suggests that the best solution is the doctrine of comity, which is the recognition given by a state to the legislative, executive or judicial acts of another jurisdiction, bearing in mind its own public policies.⁷¹ Under this principle, agreements concluded in other jurisdictions where surrogacy is legal will be declared valid by the court.⁷² Shalev *et al* on the other hand opine that those children should be offered nationality in the country in which they were born as well as the country where the intended parents are citizens.⁷³

3 6 Commercial surrogacy

Commercial surrogacy refers to a situation where a woman is compensated for giving birth to a child whom she hands over to the commissioning parents in return for payment. When no payment is made, the situation is referred to as altruistic surrogacy.⁷⁴ Over the years, there have been ethical, legal and policy considerations to determine whether commercial surrogacy presents children as commodities and violates their rights.⁷⁵ Countries that prohibit commercial surrogacy give ethical reasons to defend their position. Some regard the payment of surrogate mothers as renting or buying the human

⁶⁷ Child Rights International Network https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf.

⁶⁸ Saxena, Mishra and Malik "Surrogacy: Ethical and Legal Issues" 2012 37(4) *Indian Journal of Community Medicine* 211 213.

⁶⁹ France, for e.g., bans surrogacy and before 2015, children born through surrogate mothers, were not recognised legally and were denied a legal tie to their parents. This led to various challenges for these children due to their "incomplete identities". See Mason and Ekman *Babies of Technology: Assisted Reproduction and the Rights of the Child* 199 200; Lin "Born Lost: Stateless Children in International Surrogacy Arrangements" 2013 21 *Cardozo Journal of International and Comparative Law* 546 559.

⁷⁰ Storrow "The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy" 2012 12 *Journal of Gender, Social Policy & the Law* 602.

⁷¹ *Hilton v Guyot* 159 U.S. 113, 164 (1895); Childress "Comity as Conflict: Resituating International Comity as Conflict of Laws" 2010 44 *University of California, Davis* 11 14.

⁷² Gerber and O'Byrne in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* 89.

⁷³ Shalev *et al* 2016 *Israel Journal of Health Policy Research* 59 67.

⁷⁴ Wilkinson "The Exploitation Argument Against Commercial Surrogacy" 2003 17(2) *Bioethics* 169.

⁷⁵ Allan "The Surrogate in Commercial Surrogacy: Ethical and Legal Considerations" in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* 116.

body or human life. They claim that mothers should always want to give birth, not for financial gain, but out of their obligation to such children, who cannot be sold.⁷⁶ Furthermore, in consideration of the well-being of the child, it is believed that a child's knowledge that his or her mother was paid to give birth might affect the child psychologically, which could also ruin the relationship with his or her parents.⁷⁷ In contrast, those in favour of commercialisation cite the free choice individuals should have to enter into contracts and the right to autonomy – that is, to do whatever they like with their own bodies.⁷⁸

Commercial surrogacy, especially one involving parties who live in different countries, thereby effecting a transfer of the resulting child from one country to another, has been likened to human trafficking.⁷⁹ Through deceit and promises for a better life, some women are introduced into prostitution and slavery, for the purpose of selling their babies.⁸⁰ Article 35 of the UNCRC prohibits the “abduction of, the sale of or traffic in children for any purpose or in any form”. In some countries, when surrogates deliver more babies than the planned or desired number, the “extra ones” are not accepted by the intending parents and are then sold. Some intending parents also do not accept the children they initially wanted because of a birth defect, among other reasons.⁸¹ In 2012, an attorney specialising in reproductive law in the United States was convicted for her involvement in a baby-selling scheme where childless couples were deceived into believing that children sold to them were the results of legal surrogacy agreements from which the original intended parents had withdrawn.⁸² To eliminate the possibility of child trafficking in surrogacy agreements, the Supreme Court in Israel ruled that there must be a genetic connection between one of the intending parents and the child.⁸³ It has also been recommended that children are better protected when surrogate mothers are relatives or friends of intending parents, with the caveat of ensuring that they have not been coerced into participating and have been informed of all risks.⁸⁴ The UN Special Rapporteur (SR) on the Sale and Sexual Exploitation of Children also recommends that payment to a surrogate mother that is only for

⁷⁶ Reilly “Surrogate Pregnancy: A Guide for Canadian Prenatal Health Care Providers” 2007 176(4) *Canadian Medical Association* 483.

⁷⁷ Casparsson “Surrogacy and the Best Interest of the Child” (LLM dissertation, Centre for Applied Ethics, Linköping University) 2014 11.

⁷⁸ Vidlicka, Hrstic and Kirin “Bioethical and Legal Challenges of Surrogate Motherhood in the Republic of Croatia” 2012 3(5) *JHR* 37 43.

⁷⁹ Child Rights International Network “A Children's Rights Approach to Assisted Reproduction” https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf (accessed 2020-10-13).

⁸⁰ Reilly 2007 *Canadian Medical Association* 483.

⁸¹ Shalev *et al* 2016 *Israel Journal of Health Policy Research* 59 65.

⁸² The Federal Bureau of Investigation “Prominent Surrogacy Attorney Sentenced to Prison for Her Role in Baby-Selling Case” <https://archives.fbi.gov/archives/sandiego/press-releases/2012/prominent-surrogacy-attorney-sentenced-to-prison-for-her-role-in-baby-selling-case> (accessed 2020-10-10).

⁸³ Ba'am (Administrative Appeal Motion) 1118/14 *Anonymous v Ministry of Welfare and Social Services* (1 April 2015); Shalev *et al* 2016 *Israel Journal of Health Policy Research* 59 65.

⁸⁴ Shalev *et al* 2016 *Israel Journal of Health Policy Research* 59 65.

gestational services rendered, and not for the transfer of the child, would not amount to the sale of a child.⁸⁵

4 LEGAL FRAMEWORK REGULATING SURROGACY AGREEMENTS IN SOUTH AFRICA

In South Africa, the rights of children are regulated in the Children's Act⁸⁶ and by the Constitution of the Republic of South Africa.⁸⁷ The relevant subsections of the South African Constitution are section 28(1), which spells out the rights of children, and section 28(2), which provides that "the best interests of the child are of paramount importance in all matters concerning such a child".

The first known case of surrogacy in South Africa took place in 1987, when a 48-year-old mother, Karen Ferreira-Jorge, agreed to carry her daughter's baby and gave birth to triplets.⁸⁸ Subsequently, the publicity generated by the birth of the Ferreira-Jorge triplets, and the consciousness of the existence of surrogacy in the country, led the South African Law Commission (SALC) to advocate for legislation that would specify the rights and duties of all parties to a surrogacy agreement.⁸⁹ Surrogacy agreements are regulated by Chapter 19 of the Children's Act. Before enactment of the Children's Act, surrogacy agreements were regulated by the law of contract as well as by rules pertaining to artificial insemination, such as the Human Tissue Act 65 of 1983.⁹⁰

Section 292 of the Children's Act provides for the criteria that must be complied with before surrogacy agreements can be declared valid. They must be in writing, signed by all parties and entered into in South Africa.⁹¹ One of the commissioning parents, as well as the surrogate mother and her husband or partner, must be domiciled in South Africa at the time the agreement is entered into.⁹² However, the court will be willing to overlook this requirement for a good reason – for example, in the event that a foreign relative of the commissioning parents who is not living in South Africa is willing to act as an altruistic surrogate mother.⁹³ Furthermore, a high court judge who has jurisdiction in the area where the commissioning parents are domiciled must confirm a surrogacy agreement before the surrogate mother

⁸⁵ *Ibid.*

⁸⁶ Children's Act 38 of 2005.

⁸⁷ Constitution of the Republic of South Africa, 1996.

⁸⁸ Lewis *The Constitutional and Contractual Implications of the Application of Chapter 19 of the Children's Act 38 of 2005* (LLM dissertation, University of the Western Cape, South Africa) 2011 13.

⁸⁹ Filander *The Enforceability of International Surrogacy in South Africa: How Would a South African Court Proceed in Determining an International Surrogacy Case?* (LLM dissertation, University of Western Cape, South Africa) 2016 25.

⁹⁰ The Human Tissue Act 65 of 1983 was repealed and replaced by the National Health Act (NHA) 61 of 2003; Slabbert "Legal Issues Relating to the Use of Surrogate Mothers in the Practice of Assisted Conception" 2012 5(1) *The South African Journal of Bioethics and Law* 1.

⁹¹ S 292(1)(a) and (b) of the Children's Act.

⁹² S 292(1)(c) and (d) of the Children's Act.

⁹³ Slabbert 2012 *The South African Journal of Bioethics and Law* 2.

is artificially inseminated.⁹⁴ According to section 293(1) and (2), where a commissioning parent as well as a surrogate mother are married or involved in a permanent relationship, the spouses or partners must give their consent in writing to the agreement and therefore become parties to the agreement. However, in the event of the unreasonable refusal of consent by the husband or partner of a surrogate who is not genetically related to the child, the court may confirm the agreement.⁹⁵

A surrogacy agreement will not be sanctioned by a court unless it is certain that the commissioning parents are permanently unable to have a child.⁹⁶ Furthermore, the surrogate mother must be fit and capable of performing all her relevant roles as a surrogate, must not be paid for her services, and must comprehend the legal implications of the agreement. She must have been pregnant before and given birth to her own child, who must still be alive.⁹⁷ Although the condition and situation of all parties will be considered, the court will not approve the surrogacy agreement if its terms are against the interests of the children and has the potential of harming them.⁹⁸ In the case of *Ex Parte Applications for the Confirmation of Three Surrogate Motherhood Agreements*,⁹⁹ it was emphasised that the confirmation of agreements by courts is not automatic, as courts are under an obligation to ensure that the interests of children are prioritised, and cases are considered on their merits, in accordance with their duty.¹⁰⁰

Adequate arrangements must be made to ensure that children are born in a secure environment and they must be cared for and well brought up. The agreement must consider the child's status on the occasion that one or both of the commissioning parents dies, divorces or separates before the birth of the child.¹⁰¹ In full surrogacy agreements, the child belongs to the commissioning parents upon birth. Therefore, the surrogate mother or her husband lacks the right to get in touch with the child, except where provision is made to this effect in the agreement.¹⁰² However, in partial surrogacy agreements, the rights of the commissioning parents to the child are suspended until the surrogate mother makes a decision either to renege or abide by the terms of the agreement. Thus, she has the right to terminate the agreement within the period of 60 days after the child's birth through notice to the court, on condition that she pays back the money spent on her care by the commissioning parents.¹⁰³ It has been argued that the distinction between full and partial surrogacy is made because the surrogate mother's rights to dignity, privacy and autonomy are violated by being compelled to give up the baby contrary to her wishes.¹⁰⁴ Commercial surrogacy is

⁹⁴ S 292(1)(e) of the Children's Act.

⁹⁵ S 293(3) of the Children's Act.

⁹⁶ S 295(a) of the Children's Act.

⁹⁷ S 295 9(c)(i)–(vii) of the Children's Act.

⁹⁸ S 295(e) of the Children's Act.

⁹⁹ 2011 (6) SA 22 (GSJ).

¹⁰⁰ Louw "Surrogacy in South Africa: Should We Reconsider the Current Approach?" 2013 76 *THRHR* 564 567.

¹⁰¹ S 295(d) of the Children's Act.

¹⁰² S 297(1)(a)–(d) of the Children's Act.

¹⁰³ S 298(1) and (3) of the Children's Act.

¹⁰⁴ Slabbert 2012 *The South African Journal of Bioethics and Law* 4.

prohibited and the only financial payment allowed is with respect to expenses in fertilising the surrogate, birthing the child, confirming the agreement in the court, loss of earnings owing to absence of the surrogate from work and insurance for the surrogate in the event of death or disability.¹⁰⁵ Legal and medical professionals who helped to further the objectives of the surrogate agreement are also to be compensated.¹⁰⁶ The identity of a person born through a surrogacy agreement, as well as other parties involved, must not be revealed through any publication.¹⁰⁷

According to section 294 of the Children's Act, the gamete of at least one of the commissioning parents must be used for a valid surrogate agreement. In other words, at least one of the parents must be biologically related to the child. This is based on the SALC's rationale that where both parents cannot have children, adoption will be an adequate substitute.¹⁰⁸ The committee reasoned that being related genetically to at least one parent would protect children emotionally as their connection to the commissioning parents will be stronger than when they use donor gametes. It will also restrict the undesirable practice of searching for gametes to create children with specific characteristics.¹⁰⁹

The genetic link prerequisite has, however, been criticised by several authors. For example, Metz¹¹⁰ argues that the rationale given for the provision is not sufficient and should be repealed so as to respect the privacy of commissioning couples and allow them to "create loving and intimate relationships".¹¹¹ Furthermore, in the case of *AB v Minister of Social Development*,¹¹² the respondents contended that not being related to at least one parent would mean the child might not know his or her parents, which would violate the child's right to dignity. There is also the risk of the child being abandoned in the event he or she is born disabled.¹¹³ The court disagreed and declared section 294 of the Children's Act to be discriminatory and a violation of the constitutional rights to non-discrimination, dignity, privacy, healthcare, and bodily and psychological integrity of people who are incapable of using their own gametes. Unfortunately, the invalidity of section 294 of the Children's Act posited by the High Court was not confirmed by the Constitutional Court on the basis that the High Court placed more emphasis on the interests of the commissioning parent(s) than on the best interests of children.¹¹⁴

Section 41(1) of the Children's Act makes it mandatory for a child to have access to information, including medical information, concerning his genetic

¹⁰⁵ S 301 of the Children's Act.

¹⁰⁶ S 301(3) of the Children's Act.

¹⁰⁷ S 302(2) of the Children's Act.

¹⁰⁸ Louw 2013 *THRHR* 564.

¹⁰⁹ Filander *The Enforceability of International Surrogacy in South Africa: How Would a South African Court Proceed in Determining an International Surrogacy Case?* 25.

¹¹⁰ Metz "Questioning South Africa's 'Genetic Link' Requirement for Surrogacy" 2014 7(1) *SAJBL* 34.

¹¹¹ *Ibid.*

¹¹² [2016] 4 All SA 24 (GP) par 115; 2016 (2) SA 27 (GP).

¹¹³ Boniface "Surrogacy in South Africa" (2016) <http://www.kansai-u.ac.jp/ILS/publication/asset/nomos/43/nomos43-07.pdf> (accessed 2019-12-29).

¹¹⁴ *Ibid.*

parents, as soon as he or she is 18 years old. However, according to section 41(2), such revealed information must not extend to the identity of the donor and surrogate mother. This is contrary to section 7 of the UNCRC, which gives a child the right to know his or her origins. The SALC has condemned countries that prohibit the availability of such information to the child as well as those who allow anonymous birth and have suggested the reformation of their laws.¹¹⁵ This is so that children will enjoy their right to identity as stipulated in the UNCRC.¹¹⁶ Authors have suggested that information concerning the biological origin of a child can be divulged before a child is 10 years of age because, at that age, children can process vital information in a simpler manner before they start forming their identity. They are also old enough to distinguish between biological and non-biological parents.¹¹⁷

5 LEGAL FRAMEWORK REGULATING SURROGACY AGREEMENTS IN NIGERIA

Nigeria has yet to provide specific comprehensive legislation to regulate surrogacy; there are also no judicial decisions made in that respect. The implication is that the rights of children in surrogacy agreements are not protected and parties could choose to make any decision concerning them, whether harmful or not. There are, however, certain provisions in Rule 23 of the Code of Medical Ethics, 2004¹¹⁸ that regulate assisted conception and related practices. Rule 23 recognises gestational surrogacy and permits the donation of gametes for that purpose. It states that necessary statutes to govern assisted reproduction have not yet been established; nevertheless, medical practitioners must resolve all ethical issues that may arise with respect to the counselling and consent of the donor. The Code states that gamete and embryo donation should not be commercialised. With respect to children, the Code notes that in the absence of a legal framework protecting them in these agreements, the basic principles applied in child adoption cases should be considered as best practice.

However, in 2016, a Bill was introduced in the Nigerian National Assembly to amend the National Health Act and includes the regulation of ART.¹¹⁹ The Bill mandates the Federal Ministry of Health to regulate the practice of ART and establish a National Registry of Assisted Reproductive Technology

¹¹⁵ South African Law Reform Commission <http://pmg-assets.s3-website-eu-west1.amazonaws.com/170720righttoknowonesownbiologicalorigins.pdf> (accessed 2019-12-24).

¹¹⁶ Rispel *The Scope and Content of the Child's Right to Identity in the Context of Surrogacy* 29.

¹¹⁷ See Van Bueren *The International Law on the Rights of the Child* (2006) 36; Midford *Disclosure: How, Why and When to Tell Your Child About Their Origins?* Australian Conference (26-27 May 2012) perthpsychology.com.au/wp-content/uploads/DisclosureSurrogacy.Midford.pdf (accessed 2017-08-17).

¹¹⁸ The Code of Medical Ethics is a guideline for medical practitioners in Nigeria and any form of misconduct against this Code will amount to professional misconduct by the medical practitioner.

¹¹⁹ An Act to Amend the National Health Act to provide for the Regulation of Assisted Birth Technology, for Safe and Ethical Practice of Assisted Reproductive Technology Services and for Related Matters <http://placbillstrack.org/upload/HB610.pdf> (accessed 2019-12-29) – referred to hereafter as the National Health Act (Amendment) Bill 2016.

Clinics and Banks, which will have the function of creating and maintaining a central database of ART data in Nigeria. Medical tests and screening are required for surrogates and donors to ensure that children are not harmed in any way. Clinics are also to counsel the commissioning parents on the options available to them and the consequences and risks involved.

Before surrogacy will be supported, a medical report must confirm the inability of the commissioning mother to carry a child to term.¹²⁰ Written consents must also be obtained by all parties to the agreement for every stage of the assisted reproduction process.¹²¹ They may, however, withdraw such consent any time before the surrogate is implanted with the required gametes.¹²² Children are protected through the prohibition of implantation of gametes from more than one man and woman,¹²³ sex pre-determination or selection¹²⁴ and freezing of embryos without consent from all parties.¹²⁵ Clinics must also inform the commissioning couple of the rights of children born through ART.¹²⁶ The Bill allows ARTs, except surrogacy, for married infertile couples.¹²⁷ This provision is not drafted clearly as that would mean surrogacy is declared illegal by the Act, when it has already been deemed lawful in previous provisions in the same Act.¹²⁸

In 2017, a Bill for the regulation of reproductive technology¹²⁹ was also introduced in the National Assembly. This Bill has yet to be passed but has scaled the second reading.¹³⁰ The ART Bill spells out more clearly the rights and duties of all parties in assisted reproduction. The status and welfare of children born through ARTs are included. For example, it is a crime for commissioning parents to refuse to accept a child, regardless of any disability that he or she may have.¹³¹ The child must be registered at birth in the name of the commissioning parents.¹³² Only one surrogate may be employed at a particular point in time¹³³ and a woman cannot be a surrogate more than three times in her lifetime, in order to prevent harm to the resulting children.¹³⁴ As in the case of the South African Children's Act, a child has the right to apply for information concerning his or her biological parents, with the exception of information concerning their identity. However,

¹²⁰ Clause 68(10) of the National Health Act (Amendment) Bill 2016.

¹²¹ Clause 69 of the National Health Act (Amendment) Bill 2016.

¹²² Clause 69(4) of the National Health Act (Amendment) Bill 2016.

¹²³ Clause 71(3) of the National Health Act (Amendment) Bill 2016.

¹²⁴ Clause 72(1) and (2) of the National Health Act (Amendment) Bill 2016.

¹²⁵ Clause 69(2) of the National Health Act (Amendment) Bill 2016.

¹²⁶ Clause 68(7) of the National Health Act (Amendment) Bill 2016.

¹²⁷ Clause 75(1) of the National Health Act (Amendment) Bill 2016.

¹²⁸ See Clause 68(5) and (10) of the National Health Act (Amendment) Bill 2016.

¹²⁹ An Act to Provide for a National Framework for the Regulation and Supervision of Reproductive Technology and Other Matters Connected Therewith <http://placbillstrack.org/upload/SB325.pdf> (accessed 2019-12-29) – referred to hereafter as the ART Bill.

¹³⁰ Umoru "Senate Moves to Approve Birth via In-Vitro Fertilization" <https://www.vanguardngr.com/2017/10/senate-moves-approve-birth-via-vitro-fertilization/> (accessed 2019-12-27).

¹³¹ Clause 34(11) of the ART Bill.

¹³² Clause 34(10) and (11) of the ART Bill.

¹³³ Clause 34(20) of the ART Bill.

¹³⁴ Clause 34(5) of the ART Bill.

a child could apply to know the biological parents' identity if there were a medical emergency that required the physical testing of the biological parents. The consent of the biological parents is, however, required before the release of such information.¹³⁵ The Bill also allows the payment of compensation to surrogate mothers, unlike the South African Children's Act and the Nigerian National Health Act (Amendment) Bill, which prohibit the practice.

6 COMPARISON OF CHILD RIGHTS PROTECTION IN SURROGACY AGREEMENTS IN NIGERIA AND SOUTH AFRICA

In South Africa, there are still some criticisms inherent in the regulation of surrogacy. For example, surrogacy agreements can only be undertaken by persons domiciled in South Africa, and it has been argued that this regulation is restrictive to citizens from other countries. Also, the prohibition of commercial surrogacy, the genetic link requirement and knowledge of biological origin by the child are also issues that have been subject to debates. However, despite these criticisms, the fact that the practice of surrogacy has been regulated in the Children's Act has helped to protect the rights of children born through surrogacy agreements in South Africa.

Chapter 19 of the Children's Act aims to promote the best interests of children through the confirmation of surrogacy agreements in South African courts. This ensures that clauses harmful to children are not included in these agreements. Thus, the capacity of surrogate mothers to carry the child and the ability of the commissioning parents to care for him or her will be considered by the courts so that the child's welfare will not be put at risk. It is a laudable requirement that spouses of the surrogate and commissioning parent give their written consent as it prevents subsequent conflicts and neglect of the child after his or her birth. The best interests principle is also to be made a priority in surrogacy agreements. Parties are also screened to ensure they are capable of handling their duties without causing harm to the child. The fact that surrogates are required to have at least one child who is alive reduces the risk of a refusal to hand over the babies, thus leading to legal disputes that affect such children psychologically. The court is also interested in what would happen to the child upon divorce or separation of the commissioning parents. The Children's Act aims for surrogacy to be the last option for commissioning couples, which is why it is preferred that they have a medical condition that has affected their ability to conceive naturally. Thus, a surrogacy agreement can only be termed as valid when other ARTs have been unsuccessful and this ensures that the practice is not taken lightly and abused.

On the other hand, in Nigeria, the rights of children have not been sufficiently protected in surrogacy agreements. The lack of specific comprehensive legislation to regulate the practice has the implication of increasing the risk of abuse of children. It has, for example, led to the illegal sale of gametes without screening or counselling, while some people

¹³⁵ Clause 36(1)–(3) of the ART Bill.

encounter health risks from quack doctors. In addition to this, the lack of regulation has increased the prevalence of “baby factories”, where girls are impregnated and their babies sold to people in need of children. Baby factories cause a lot of harm to children in several ways. The mothers housed in these factories are not screened and there is a risk of diseases being passed on to the children as well as the possibility of deformity through inadequate care of the mothers. The surrogates are also at risk of contracting sexual infections through multiple sexual partners who try to impregnate them, in addition to physical abuse that could affect the health and safety of the babies.¹³⁶

7 A WAY FORWARD FOR NIGERIA

A step in the right direction in Nigeria is the tabling of the National Health Act (Amendment) Bill and the ART Regulation Bill. These Bills, with some adjustments, are adequate to serve as a foundation for regulating ART, including surrogacy agreements in Nigeria. The Bills include important provisions similar to the South African Children’s Act, such as requiring consent of parties as well as spouses and partners, medical screening, proof of inability of the commissioning parents to give birth to a baby, legal status of children, among others. The two Bills, which to a large extent have similar provisions, should, however, be merged together into a single piece of comprehensive legislation so as to prevent inconsistencies and to provide a simple process for all parties. The Bills, for example, have different standards concerning commercial surrogacy. Also, the laudable provisions in the South African Children’s Act, which are absent in the Bills, should be considered in Nigeria. For example, the confirmation of surrogacy agreements by courts will help in protecting children. The requirement that a surrogate mother must have given birth to her own child who is alive should also be incorporated into Nigeria’s legislation as it reduces the risk of surrogates refusing to give up the child. To avoid children having several parents as a result of different donors and to establish a good child-parent relationship, the genetic link requirement should also be incorporated in Nigeria. However, there should be an exception, whereby those who have been unsuccessful with adoption for a specific period of years, could be given an opportunity to use a surrogate.

Concerning disclosure of biological origins to a child, the South African Children’s Act and the ART Bill both prohibit the identity of the genetic parents being divulged to the child. The right of children to know their biological origin may compete with the right of the donor to be anonymous and the right of parents to have a private life and keep their reproductive choices private.¹³⁷ The best interests of the child should, however, be primarily considered as stated by the UNCRC. It is thus recommended that this provision be modified and the right to identity of children be protected. Specific conditions like the age of the child, persons who should disclose

¹³⁶ Makinde, Olaleye, Makinde, Huntley and Brown “Baby Factories in Nigeria: Starting the Discussion Toward a National Prevention Policy” 2017 18(1) *Trauma, Violence & Abuse* 98–105.

¹³⁷ Rispel *The Scope and Content of the Child’s Right to Identity in the Context of Surrogacy* 18.

such information, and other conditions that would make the information easier for the child to process, should be included. The identity of the parties should however not be made public knowledge.

Clause 75(1) of the National Health (Amendment Bill), which prohibits surrogacy for married couples who cannot have children, should be amended and spelt out more clearly.

8 CONCLUSION

The practice of surrogacy is becoming more common in Nigeria. Adequate regulation is therefore important so as to create standards for the practice and to prevent the abuse of parties, especially children who are the most vulnerable and are brought innocently into the world. It is important for Nigeria to join the rank of countries, such as South Africa, that have established and legally enforceable ART laws. All parties must consider the best interests of children when drafting agreements and clauses. Medical practitioners must conduct medical and psychological evaluations to assess the fitness of surrogate mothers and such reports must be attached with the surrogacy agreements for confirmation. All medical processes should be performed in registered hospitals and by qualified doctors to prevent harm to the child. Commissioning parents must also be seen to have the capacity to care for the child in a safe environment and should be informed about their rights. Children should be registered at birth so that their right to identity and nationality is ensured. It is also important for parents to inform their children of their biological heritage when they are old enough to understand.