

Evaluation of the Consequences of the Absence of Legal Framework on Genetic Commercial Surrogacy in Nigeria

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Abstract

The concept of commercial surrogacy spikes a human right discourse in diverse ways, especially when the surrogates are minors and are deceived or coerced into such arrangements, as is seen in Nigeria. The human rights perspective of commercial surrogacy as it affects adult surrogates is a phenomenon that has received more research attention, unlike from the perspective of children as surrogates. Due to the unregularized nature of commercial surrogacy in Nigeria, it is possible for unqualified persons to open and run fertility clinics and provide surrogacy aid and consultancy, and such unqualified clinics is what operates as what the media has termed “baby factories”. Reports and research have shown that most of the victims rescued from baby factories are teenage girls. In other words, they are also children. Thus, the principal objective of this study is to highlight and discuss from the child rights perspective the consequences of the absence of legislation on genetic surrogacy. The study adopted a qualitative methodology, and a phenomenological research design which aims at studying the lived experiences of a group of people, and the researcher conducted structured interviews with representatives of three child rights-based NGOs in Lagos State, Nigeria, which were selected using the purposive sampling technique. The study found that genetic commercial surrogacy is practiced without any standard regulation and legislation in Nigeria, and the absence of this legal framework created a loophole for the violation of the rights of children who have been coerced into such unethical arrangements and these rights are enshrined in the Child Rights Act (2004). The study concluded that to curb the violations of child rights, the practice of genetic commercial surrogacy requires legislation and monitoring agency which would ensure that proper guidelines are implemented.

Keywords: Surrogacy, Child Rights, Infertility, Nigeria

Introduction

The concept of commercial surrogacy spikes a human right discourse in diverse ways, especially when the surrogates are minors and are deceived or coerced into such arrangements, like is seen in Nigeria. Research has shown that majority of females that have been rescued from illegal commercial surrogacy institutions are girls, minors, especially those who have unwanted pregnancies and have been rejected by their families or are too timid to face the societal stigma that accompanies such conditions. The human rights perspective of commercial surrogacy as it affects adult surrogates is a grossly researched phenomenon, unlike from the perspective of children as surrogates.

Due to the nature of commercial surrogacy in Nigeria, it is possible for unqualified persons to supposedly open and run fertility clinics and provide surrogacy aid and consultancy, and such unqualified clinics is what operates as what the media has termed “baby factories”. Reports and research has shown that most of the victims rescued from baby factories are teenage girls, in other words, they are also children.

Nwaka & Odoemene in 2019 wrote that the use of children as surrogates and the sale of the children born from such arrangements raise a human rights concern which this study attempts to address. Thus, the principal focus of this study is the highlight and discussion of various human rights on the part of the child, that can be violated through the unlegislated practice of genetic commercial surrogacy in Nigeria, based on existing human and child

rights documents, specifically the UN Convention on the Rights of the Child (CRC), and the Child Rights Act (2003) of Nigeria.

The study adopted a qualitative methodology, and a phenomenological research design which aims at studying the lived experiences of a group of people, and the researcher conducted structured interviews with representatives of three child rights-based NGOs in Lagos State, Nigeria, which were selected using the purposive sampling technique.

The instrument of data collection was the interview guide. The researcher also reviewed literature as well as other secondary data which included Newspapers, Government reports, textbooks and encyclopedias.

The primary objective of this study is to identify the effects of the absence of a legal framework on commercial surrogacy in Nigeria. The secondary objective is to highlight the rights of the child that are prone to violation following the absence of a legal framework.

LITERATURE REVIEW

The term 'surrogacy' is applied to the act or process whereby a woman carries and delivers a child on behalf of another couple. It comes from the Latin root word "Subrogare," which means 'to substitute,' which further promotes the ideology that the surrogate acts as a substitute for another woman who cannot go through the natural procedure of pregnancy and childbearing according to Lasker (2016). Surrogacy is a fast-growing concept and practice that millions of people have patronized in various continents of the World, it is a means for infertile women to create a family of their own without going through the rigorous and limited process of adoption, as well as the stigma that accompanies infertility by providing a more liberal solution.

However, for surrogacy to occur, a surrogacy agreement must be present because there are variations of the concept. Generally, there are two ways through which surrogacy occurs; gestational and genetic. Gestational surrogacy is one where the pregnancy is achieved through Assisted Reproductive Technology (ART) in vitro fertilization (IVF), where the fertilized egg of the commissioning parents is inserted into the surrogate mother. Thus, she is not genetically related to the child she is carrying. This arrangement can also be referred to as IVF surrogacy.

On the other hand, genetic surrogacy is when the egg of the intended surrogate is used in the conception process, along with the sperm of the intended father or donor (as the case may be), which means that the surrogate mother is genetically related to the child being conceived, and this was asserted by Bromfield & Rotabi, (2014). The origin of traditional surrogacy can thus be traced to the bible, specifically the story of Jacob, Rachel, Leah and their handmaidens.

Genetic and gestational surrogacy can occur in two forms; either altruistic or commercial. Altruistic surrogacy is the type of surrogacy done without monetary or financial reward after the service has been rendered. It is regarded as a gift from one woman to another and is usually practiced by close relatives and friends. However, the medical bills and other necessary care are settled by the commissioning parents. Commercial surrogacy is the opposite of altruistic surrogacy, as it is done with monetary compensation besides the medical bills and other fundamental expenses. The surrogate is paid for her services after the successfully carrying the child to term as may have been specified within the contract.

Caamano (2016) opined that the increased demand for alternative reproduction methods is as a result of the increase in the rate of infertility in the world and in Nigeria as well. Due to the African status quo, infertility and adoption is highly stigmatized, as importance is placed on biological children conceived in wedlock, who are expected to continue the family name and heritage.

The crux of this study therefore, is the absence of the necessary legal framework on Surrogacy in Nigeria (Umeora et al., 2014), which has led to the criminalization of the genetic commercial surrogacy procedure, where children have become commodified and even the surrogates are sometimes forced into getting pregnant, some of them being under aged girls, thus making them children under the law as opined by Okoli & Eze (2021).

Based on existing legal framework on the rights of the child, such as the Child Rights Act in Nigeria and the internationally recognized United Nations Convention on the Rights of the Child (UNCRC) the following rights have been identified and discussed as rights prone to possible violations from the unregulated practice of genetic commercial surrogacy in Nigeria.

Genetic Commercial Surrogacy and Child Rights Violations in Nigeria

As earlier mentioned, surrogacy can either be gestational or genetic, with commercial or altruistic characteristics as determined as the parties in the arrangement. This section however, focuses on a genetic commercial surrogacy agreement, as it is practiced in Nigeria. Genetic surrogacy implies a surrogacy arrangement where a surrogate is inseminated with the sperm of an infertile couple's male partner or a male willing to be a sperm donor or father of the child confidentially. The surrogate and the man are genetically linked to the kid, but not to the commissioning female partner. It is done through either artificial insemination but most times through sexual intercourse as researched by Blauwhoff and Frohn. (2015)

It is also termed incomplete surrogacy, and is more affordable and does not always require clinical assistance, meaning that it can be a private matter without any written contracts or consultation in a proper fertility clinic or hospital. The inconvenience, notwithstanding, is that the substitute mother is hereditarily connected to the kid and she could possibly make a case for the child in the future according to Rispel (2017). This method of surrogacy and its practice in Nigeria is the focus of this study.

While gestational surrogacy has to be carried out in a proper hospital or fertility clinic because of the processes and steps involved, genetic surrogacy can be done like a normal impregnation process, and reference can be made to the origin story of the arrangement between Jacob, Rachel, Leah and their handmaidens who did not need any fertility clinic tools and assistance but still carried out successful genetic surrogacy which occurred through normal sexual intercourse.

There is a common misconception that surrogacy is practiced and done by professionals, however, due to the lack of proper legislation in Nigeria and the flexible requirements, it is easy for individuals to open quack fertility clinics to practiced supposed commercial surrogacy, especially the genetic type, as this does not require expertise. Okonta, Ajayi, Bamgbopa, Ogbeche, Okeke & Onwuzurigbo (2018) highlighted that the research undertaken by the Association for Fertility and Reproductive Health (AFRH) of Nigeria, a non-governmental association of assisted reproductive technology (ART) providers assert that the lack of a legislation regulating ART in Nigeria has greatly contributed to the growth of unethical practices, one of such practices being the creation of baby factories, whose surrogates are mostly girls under the age of 18.

Put more simply, while gestational commercial surrogacy is practiced in Nigeria through fertility clinics and hospitals with assisted reproductive technologies, the absence of defined laws and legislations create loopholes that enables genetic commercial surrogacy to be practiced outside of recognized fertility clinics. These unrecognized organizations are different from fertility clinics because they mostly coerce young ladies and women into participating as surrogates, and some ladies willingly cooperate with them in order to make money. Huntley (2013) opined that in their bid to get more ladies to be used as surrogates, kidnapping is sometimes introduced and these victims are raped in order for them to get pregnant and their babies sold off for diverse

purposes. Organizations that practice this form of commercial surrogacy has been termed “baby factory” by the media.

This practice is unethical and constitutes a violation of specific child rights provisions as stipulated in the Child Rights Act (2003), the African Charter on the Rights and Welfare of the Child (1999) and the Convention on the Rights of the child (1989). Some of the rights violated by the unethical and coerced practice of genetic commercial surrogacy is discussed below.

1. The Right to Knowledge of Biological Origins

According to Article 7 of the UNCRC, "a child should be registered promptly upon birth and shall have the right to a name, the right to acquire nationality, and, to the extent practicable, the right to know and be cared for by his or her parents." Article 7's right to know one's parents has been interpreted to entail that children should be informed about their biological origins and the circumstances of their birth. The inability to provide this knowledge to youngsters has a detrimental effect on their capacity to establish a sense of self. The term "identity" refers to a person's distinctive profile, of which genetic origin is a critical component. The UNCRC's Article 8(1) recognizes a child's right to keep his or her identity, which includes nationality, name, and familial ties. Additionally, Article 8(2) specifies that "when a child is wrongfully deprived of part or all of the components of his or her identity, States Parties should offer adequate support and protection in order to expeditiously restore that child's identity." As a result, States Parties are tasked with assisting children in obtaining their right to identity, which cannot be realized if children are unaware of their biological origins, as this is one of the aspects that contribute to their understanding of who they are. (Oluwaseyi & Oladimeji, 2021)

When either of the intended parents cannot utilize their own gametes, donor gametes are frequently used in surrogacy arrangements. Children born through surrogacy arrangements, on the other hand, lack the flexibility to identify their genetic links and connect with their history due to a lack of information about biological origin. It can also offer medical hazards since, in the lack of a person's family medical history, incorrect judgments might be made, which contravenes the child's rights to attain the highest attainable standard of health as provided in article 24 of the UNCRC. A child's right to a name and nationality are crucial for preserving his or her identity, and the registration of a child's birth allows for the enjoyment of these rights. Birth registration is a crucial entitlement for children born via surrogacy arrangements, since it is the first step in confirming their legal parentage and nationality.

2. Sale of the Child

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, (to which Nigeria is a signatory) define the sale of children as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.” Considering the definition of commercial surrogacy, which is the process of a third party bearing a child on behalf of the commissioning parents or parent, and hands over the child at birth, relinquishes all rights to the child and is then compensated monetarily. (Johnson, 2019)

Referring to the activities of baby factories, a group of persons are involved in the process of transferring a child or children (as the case may be) to another person in exchange for monetary compensations. In addition, Section 30 of the Child Rights Act of Nigeria (2003) explicitly prohibits the buying and selling of children, an offence punishable by law with a sentence of 10 years imprisonment. Article 9 of the UN Convention on the Rights of the Child also provides that a “child shall not be separated from his or her parents against their will... except such separation is in the best interests of the child”. The presence of commercialization in the process of handing over the child, and the monetary gains attached to it, qualifies the process as “sale of children”, and it is an outright violation of the rights of the child as asserted by Bromfield & Rotabi, (2014).

3. Trafficking of Children

According to Etor (2014), operators of baby factories disguise as orphanages and maternity homes, and when the girls who have been held hostage and forcefully impregnated put to bed, the children are sold as “products” to those who might sincerely need babies, or to those who would use them for ritual purposes. Makinde, Olaleye, Makinde, Huntley & Brown (2017) also opined that some of these babies are given to those who are expecting “miracle babies” from their spiritual leaders. These acts are classified as Human trafficking, which is defined by the United Nations Office on Drugs and Crime (UNODC) as the act of recruiting, transferring, transporting, harboring or receiving a person by use of coercion, force or other measures for the purpose of exploiting them.

The definition when compared with the activities of baby factory operators is a violation of the rights of the child and is a crime both by municipal and international law. The Child Rights Act, in section 30, prohibits the buying and selling of children, and places a punishment of 10 years imprisonment on the crime. Also, when coercion is absent, deceit and fraud is utilized in luring victims. According to BBC news report (2018) titled “Nigeria Baby Factory raided in Lagos”, over 160 babies were rescued and the mothers said they were promised healthcare as some of these factories present a false front as private maternity homes or orphanages and after delivery, the babies are taken away and sold. This also translates to be a denial of the right to personal liberty and freedom of movement.

4. Sexual Exploitations

According to Makinde et al (2017), it is a usual practice for women and young girls to be forcefully impregnated in order for sales to be on the increase. In addition, Makinde et al (2017) also noted that while some of the young victims of these baby factory operators might have been lured because of their situation (unwanted pregnancy), some others have been kidnapped, raped and forcefully impregnated. BBC news (2018) reported that some of the babies and children rescued from a baby factory in Lagos had been sexually abused, and some of the girls have been sold into prostitution as well.

Section 31 of the Child Rights Act refers to such acts as “unlawful sexual intercourse with a child” and the corresponding punishment is life imprisonment. Section 27 also addresses unlawful abduction or kidnapping of children, and proposed 7 – 20 years imprisonment. In addition, articles 34 and 35 of the United Nation’s Convention on the Rights of the Child provides that children should be protected by the State from all forms of sexual exploitations and to ensure that they are not abducted or trafficked, as it constitutes a violation of their fundamental human rights.

5. Exploitative Labour

Sections 28 and 33 of the Child Rights Act (2003) address exploitative labor and the corresponding fine and punishment. Exploitative labor is an unjust social relationship, where children are employed and ultimately deprived of their childhood, and their mental, physical and emotional health is subjected to danger, damage or harm. Morgan Rennie (2018) opined that it is the undue working of children at the expense of their well-being, security and proper development.

Some of these young girls who are coerced into being the tree that bears multiple children, who are eventually sold, even after delivery of the child, they are not released, rather they are primed to be impregnated again. For those who are not forced into bearing children, they are sold into modern day slavery. (Makinde et al, 2017) The International Labor Organization (ILO) in a report titled “Forced Labor, modern slavery and human trafficking” asserted that 1 in 4 victims of modern slavery are children, and girls account for 99% of victims of forced labor in the commercial sex industry. (ILO, 2017). In addition, article 32 and 36 of the UN Convention on the Rights of the Child gives State parties the responsibility to protect the child from economic exploitation and from

performing any work that can interfere with the social, moral, mental, spiritual and physical development and welfare of the child.

Legal Framework for Surrogacy in Selected Countries

There is no particular global framework to direct surrogacy, accordingly nations take on reasonable laws to control substitute practice in their different wards. Differences in the guideline of surrogacy make struggle in instances of transnational surrogacy, however in such cases contentions have been agreeable to the wellbeing of the child (UNICEF, 2022). The best interest child is a basic principle that supports the act of inter-country reception. The legitimate status of surrogacy arrangements contrasts considerably from one country to another. For instance, surrogacy is totally prohibited in certain nations yet permitted in others. In the nations that take into consideration surrogacy there is a further division between the ones who permit surrogacy completely, which means taking into consideration business surrogacy, and the people who simply take into consideration surrogacy with no monetary profit (unselfish) for the proxy mother. Every one of these nations has their own legal arrangements managing the surrogacy interaction.

1. South Africa

The South African Children's Act, drafted in 2005, but fully enforced in 2010, addresses surrogacy related concerns, particularly in chapter 19 of the Act. The aforementioned Act legalizes surrogacy agreements subject to specific conditions stated in the Act, one of which is the requirement that a surrogacy agreement must be confirmed, approved and finalized by a High Court before the fertilization of the surrogate mother can occur. Following that, the Act also states that the commissioning couple or parent, and the surrogate mother and spouse must be domiciled in South Africa at the time of entering into the agreement. These provisions prevent South African from becoming a surrogacy tourism destination according to Sloth- Nielsen, (2013). The South African surrogacy legislation explicitly bans commercial surrogacy and ensures that the surrogate is not using surrogacy as a source of income, this is to be confirmed by the same High court approving the procedure. Akpambang & Amujo-Akomolafe (2020) penned that prior to the approval of the High Court, the commissioning parents are laden with the responsibility to prove that they are permanently and irreversibly unable to conceive or birth to their own child through natural conditions. It is also stipulated in the Act that the gametes of at least one of the commissioning parents must be used in the procedure. The court must also ascertain that the commissioning parents are suitable and responsible enough to accept the duties of parenthood, and to provide a safe environment for the child as well as financial and emotional care.

The surrogate mother must also have a documented history of at least one pregnancy and a living child of her own before she can be approved by the court. These requirements and obligations enforced by the South African government ensures that due process is taken before surrogacy is approved, and such due process also helps in the exclusion of children and unqualified women from taking part in surrogacy. It also disagrees with every form of monetary compensation, and thus expunges such controversial issues such as sale of children in the form of surrogacy, it also prevents trafficking and potential abandonment of the child. According to the research titled "Baby Factories": Exploitation of Women in Southern Nigeria, by Nwaka & Odoemene (2019), the South African Children's Right Act protects the best interests of the child to the best of its ability and frowns against illegal commercial surrogacy activities such as baby factories.

2. United Kingdom

The United Kingdom enacted the Human Fertilization and Embryology Act of 1990, which created the legal foundation for infertility therapy, medical services related to infertility treatment, such as embryo preservation, and all human embryological research in the United Kingdom. The law also establishes a legal definition of a parent of a baby created using assisted reproductive technology. The Human Fertilization and Embryology Authority, the first of its type in the world, according to LaTourelle (2018) is established in Section 5 of the Act

to enforce and regulate the duties that scientists, clinicians, and prospective parents have towards embryos and each other.

The HFE Act includes an introduction, 49 sections, and four schedules. The Human Fertilisation and Embryology Authority, based in London, was formed as the UK's regulating agency for these concerns. The Authority can give or cancel permits to medical practitioners, storage centers, and research scientists who investigate human gametes and embryos according on the requirements listed in Sections 9 through 22 of the HFE Act. Schedule 2 outlines the HFE Authority's rules for granting licenses to professionals and institutions who use or store human embryos.

According to the UK department of health (2010), the HFE Act also prohibited sex selection of children for social purposes and broadened the roles that same-sex spouses are permitted to play under the law.

Findings

The study found that genetic commercial surrogacy is practiced without any standard regulation and legislation in Nigeria, as opposed to the norm in countries that also practice commercial surrogacy such as South Africa and the United Kingdom, where the procedures are strictly regulated and legislated, and the absence of the necessary legal framework has created a loophole for the violation of the rights of children who have been coerced into such unethical arrangements. It was also found that although there have been attempts at legislating surrogacy in Nigeria, none of these draft legislations have ever made it to the final stage of being passed into law.

The study identified a pool of child rights being violated by the unethical practice of genetic commercial surrogacy in Nigeria. These rights were identified as violated after the unethical practice of genetic commercial surrogacy was juxtaposed with the existing child rights instruments in Nigeria, and the generally recognized international instrument which is the UN Convention on the Rights of the Child. Some of the identified violated rights include the rights to know one's biological origin, sexual exploitations, child labor, sale of the child and child trafficking. These are fundamental rights of every child which needs to be protected from all forms of violations.

Conclusion

The absence of proper legislation of surrogacy in Nigeria, has led to the unethical practice of genetic commercial surrogacy (which doesn't necessarily require clinical technologies and expertise) by unprofessional individuals and has led to the violation of the rights of the child, rights such as exploitative labor, sexual exploitations, trafficking of the child etc., as stipulated in the Child Rights Act of 2003 and other related regional and international instruments. The study concluded that to curb the violations of child rights, the practice of genetic commercial surrogacy requires legislation and monitoring agency which would ensure that proper guidelines are implemented.

Recommendations

The crux of the study is hinged on the effect of missing legislations of the practice of surrogacy in Nigeria, with a focus on genetic commercial surrogacy, especially the child rights implication. The study makes the following recommendations;

1. The National Assembly and the National Human Rights Commission should collaborate in in-depth research on the legislation of surrogacy utilized in other countries, such as South Africa and use their legal framework as a precedence in drafting Nigeria's own regulations.

2. Human rights non-governmental organizations in Nigeria should make it an agenda to sensitize and educate the National law-making body, as well as parents and young people on the correct processes and procedures of surrogacy and what indicates a human rights violation.
3. The National Assembly in conjunction with the National Medical Association can create certification procedures for professional surrogacy practitioners. They could also create a monitoring, ethics and implementation agency for surrogacy practitioners in Nigeria to prevent the unethical and unlicensed practice of the procedure in the country.

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