

The Unseen Stakeholder: Protecting the Child's Rights in Surrogacy Arrangements

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Abstract:

Surrogacy, an increasingly utilized assisted reproductive technology, facilitates parenthood for many. However, the existing legal and ethical frameworks often focus predominantly on the rights and interests of intended parents and surrogate mothers, inadvertently sidelining the central figure: the child born through these arrangements. This article argues that the child in surrogacy is an "unseen stakeholder" whose unique rights, particularly the right to identity, origins, and long-term well-being, require explicit recognition and robust protection. Drawing upon the principles of the UN Convention on the Rights of the Child (CRC) and examining the Indian Surrogacy (Regulation) Act, 2021, this paper critically analyses the current safeguards, highlights their limitations, and proposes a child-centric approach. Through case studies, it illustrates the potential for rights violations and advocates for proactive measures, including access to information, comprehensive psychosocial support, and legal mechanisms to ensure the child's best interests remain paramount throughout their life.

Keywords: Surrogacy, Child Rights, Right to Identity, Best Interests of the Child, UN Convention on the Rights of the Child (CRC), India, Surrogacy (Regulation) Act, 2021

Introduction

The advent of assisted reproductive technologies (ARTs) has revolutionized family building, offering hope to individuals and couples facing infertility. Among these, surrogacy has emerged as a significant option, allowing a woman to carry a pregnancy for intended parents. While the ethical and legal debates surrounding surrogacy often revolve around the autonomy of the surrogate mother and the reproductive rights of intended parents, a crucial, yet often "unseen," stakeholder remains at the periphery: the child born of the arrangement. This child, whose very existence is a consequence of these adult decisions, possesses fundamental rights that demand explicit protection and proactive consideration, not merely as an outcome but as an individual with inherent dignity and evolving capacity.

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This article posits that current surrogacy frameworks, despite their stated intentions, often fall short in adequately safeguarding the long-term rights and well-being of the child. We will delve into the concept of the "child's voice" – not in the literal sense of verbal expression at birth, but in the broader context of ensuring their future rights are enshrined and upheld. Specifically, we will examine the right to identity, access to information about their genetic and gestational origins, and the overarching principle of the child's best interests as articulated in international instruments like the UN Convention on the Rights of the Child (CRC). By analysing the Indian Surrogacy (Regulation) Act, 2021, and drawing upon illustrative case studies, this paper aims to highlight existing gaps and advocate for a more child-centric paradigm in surrogacy legislation and practice.

The Child as a Rights-Bearer: A CRC Perspective

The United Nations Convention on the Rights of the Child (CRC) is the most widely ratified human rights treaty in history, providing a comprehensive framework for the protection of children's rights. Key articles of the CRC are particularly pertinent to children born through surrogacy:

- **Article 3 (Best Interests of the Child):** This foundational principle mandates that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration. In the context of surrogacy, this means every decision, from the initial agreement to post-birth care, must prioritize the child's welfare above all else (UNICEF, n.d.).
- **Article 7 (Right to Name, Nationality, and to Know and Be Cared for by Parents):** This article establishes the child's right to be registered immediately after birth, to acquire a nationality, and, "as far as possible, the right to know and be cared for by his or her parents." The complexities of multi-parentage (genetic, gestational, intended) in surrogacy can challenge this right, especially regarding the recognition of legal parentage and access to information about origins (OHCHR, n.d.).
- **Article 8 (Right to Identity):** This article asserts the child's right to preserve their identity, including nationality, name, and family relations. The ability to understand one's origins is a crucial component of identity formation. For children born through surrogacy, this encompasses knowing about their genetic donors (if any) and the gestational surrogate (UNICEF, n.d.).
- **Article 9 (Right not to be Separated from Parents):** While surrogacy inherently involves a planned separation from the gestational mother, this article underscores the importance of minimizing disruption to the child's family environment and ensuring stable care (OHCHR, n.d.).



These CRC principles serve as a crucial lens to evaluate domestic surrogacy laws and practices. While surrogacy offers the joy of parenthood, it must do so without compromising the fundamental rights and long-term well-being of the child.

India's Surrogacy (Regulation) Act, 2021: A Critical Review through a Child Rights Lens

India's journey with surrogacy has been marked by significant shifts, moving from a global hub for commercial surrogacy to a strict altruistic model. The Surrogacy (Regulation) Act, 2021 (hereinafter "the Act"), aims to regulate surrogacy practices, prohibit commercial surrogacy, and ensure ethical conduct. While the Act explicitly states its intention to protect the rights of the surrogate mother and the child, a closer examination reveals areas where the "child's voice" might still be muted or unheard in the long term.

The Act allows only altruistic surrogacy for Indian married couples (and OCI card holders, with some specific conditions recently clarified by the Supreme Court). Key provisions aimed at child protection include:

- **Prohibition of Commercial Surrogacy:** This is a significant step towards preventing the commodification of children and exploitation, which historically led to concerns about "baby farms" and instances of children being "ordered" with specific traits (RostrumLegal, 2023).
- **Legal Parentage:** The Act clarifies that the child born through surrogacy is deemed the biological child of the intending couple, establishing their legal parentage from birth (Surrogacy (Regulation) Act, 2021). This aims to prevent scenarios of abandonment or disputed parentage.
- **No Abandonment Clause:** The Act strictly prohibits the abandonment of the child by the intending parents for any reason, including congenital defects or sex of the child. This is a vital safeguard against discrimination (Surrogacy (Regulation) Act, 2021).
- **Medical and Psychological Fitness:** The Act mandates medical and psychological evaluations for both intended parents and the surrogate, ostensibly to ensure the well-being of all parties involved, including the child (Ayushman Infertility Centre, n.d.).

Despite these commendable provisions, certain aspects warrant further consideration from a child rights perspective:

- **Access to Origins:** While the Act establishes legal parentage with the intending parents, it is less explicit about the child's right to know their gestational or genetic origins (if a donor is involved). The right to identity (CRC Article 8) suggests that information about biological and



gestational connections is fundamental to a child's sense of self. The Act's focus is primarily on legal parentage for the intending couple, with limited provisions for the child's access to information about the surrogate mother or donors later in life. This could potentially lead to psychological challenges for the child as they mature and seek to understand their full lineage.

- **The "Best Interests" in Practice:** While the "best interests of the child" is a guiding principle, how this is *assessed and enforced* throughout the child's life remains a challenge. Pre-birth agreements, though legally binding, cannot fully anticipate the child's evolving needs and potential future questions about their unique conception story.
- **Limited Scope for Single Individuals/Couples:** The Act's strict eligibility criteria (married Indian couples, specific age limits) mean that many individuals or couples who could provide a loving and stable home are excluded from accessing surrogacy. While intended to prevent misuse, this indirectly impacts the "right to family" for some children who might otherwise be born into such families. Recent Supreme Court interventions have started to address some of these rigidities, particularly for single women, but the broader scope remains narrow (Ayushman Infertility Centre, n.d.).

The Unheard Questions: Case Studies and Their Implications

While direct public case studies of children expressing their "voice" in surrogacy arrangements are rare (given their age and the sensitive nature), historical and comparative examples illuminate the potential issues:

Case Study 1: The "Baby Manji" Case (India, 2008) (Pre-Act):

This landmark case, though predating the 2021 Act, starkly highlighted the vulnerabilities of children born through international commercial surrogacy. A Japanese couple contracted an Indian surrogate. During the pregnancy, the intended parents divorced, leading to legal limbo for Baby Manji, born in India. Her legal parentage and nationality were disputed under Indian and Japanese law. The Supreme Court ultimately granted custody to the biological father's mother.

- **Child's Voice Implication:** Baby Manji's case demonstrated the severe consequences for a child when adult arrangements fail to account for unexpected circumstances. Her right to nationality (CRC Article 7) and a stable family environment were severely jeopardized, illustrating the urgent need for clear legal frameworks that prioritize the child's well-being above contractual disputes between adults



(Jus Corpus, n.d.). While the current Act addresses abandonment and clarifies parentage for Indian citizens, cross-border issues could still arise if not internationally harmonized.

Case Study 2: The Right to Origins in Donor Conception (Applicable by Analogy):

Numerous studies on children born through donor conception (e.g., sperm or egg donation) demonstrate a growing desire among these individuals, as they mature, to know about their biological origins. Many report feeling a "gap" in their identity or a curiosity about their genetic heritage (Golombok et al., 2004; Golombok et al., 2006).

- **Child's Voice Implication:** For children born through surrogacy, especially those involving donor gametes, the questions about origins can be even more complex. They may have a genetic connection to one or both intended parents, but a gestational connection to the surrogate. Denying or making it difficult to access information about the surrogate mother, or genetic donors, can undermine the child's right to identity (CRC Article 8). While early research suggests positive psychological outcomes for children born via surrogacy from the parents' perspective, there is limited long-term data from the children themselves, and concerns about potential psychological impact as they age and learn of their origins remain (The Heritage Foundation, 2024).

These cases underscore that decisions made pre-birth, without explicit consideration for the child's long-term informational and psychological needs, can create future challenges for them.

Safeguarding the Unseen Stakeholder: Recommendations

To truly protect the "child's voice" in surrogacy arrangements, a multi-faceted approach encompassing legal reform, ethical guidelines, and psychosocial support is imperative:

1. Ensuring the Right to Identity and Access to Origins:

- **Mandatory Information Disclosure:** While respecting privacy, laws should facilitate the child's access to non-identifying and, where appropriate and agreed upon, identifying information about the surrogate mother and any genetic donors upon reaching a mature age. This could involve regulated registries accessible to the child.
- **Counselling and Preparation:** Intended parents should receive mandatory counselling on the importance of discussing the child's origins with them in an age-appropriate manner, fostering an open and honest family environment. Clinics should provide resources and guidance on how to navigate these conversations.



2. Robust "Best Interests" Determinations:

- **Pre-Surrogacy Assessments:** Beyond basic medical and psychological checks, a more comprehensive assessment of the intending parents' capacity to provide a stable, loving, and supportive environment for a child born through surrogacy should be undertaken, with a specific focus on their understanding of the child's unique needs.
- **Post-Birth Follow-up:** While intrusive, mechanisms for post-birth check-ins (e.g., through child welfare services, perhaps for a limited period) could ensure the child's well-being, particularly in cases where concerns arise about the stability of the intended family.

3. Comprehensive Psychosocial Support:

- **For Children:** As they grow, children born through surrogacy should have access to specialized counselling and support groups to help them understand their origins and navigate any emotional or identity-related questions that may arise.
- **For Intended Parents:** Continuous access to support groups and counseling can help intended parents address potential anxieties or societal pressures related to surrogacy, ensuring they are emotionally well-equipped to raise their child.
- **For Surrogate Mothers and Their Families:** While the focus is on the child born of surrogacy, the surrogate's own children and family also experience the surrogacy journey. Providing support for them can indirectly contribute to a more stable environment for all children involved.

4. Harmonized International Legal Frameworks:

- Given the global nature of reproductive travel (even if restricted in India), international cooperation is vital to prevent statelessness and legal ambiguities for children born through surrogacy (The Regulatory Review, 2024). This requires consensus on issues of parentage, nationality, and information sharing across borders.

5. Research and Data Collection:

- More robust, long-term research focusing specifically on the psychological and social development of children born through surrogacy is crucial. Current data is limited and often relies on parental reports, which may present a biased view (The Heritage Foundation, 2024). Understanding the child's perspective as they mature is paramount.



Conclusion

The child born through surrogacy is not merely a product of a contract but a unique individual with inherent rights. While India's Surrogacy (Regulation) Act, 2021, represents a commendable effort to regulate the practice and prevent exploitation, it must evolve to more fully embrace a child-centric approach. Protecting the "unseen stakeholder's voice" means moving beyond merely ensuring legal parentage at birth. It necessitates a proactive commitment to their right to identity, access to information about their origins, and comprehensive psychosocial support throughout their lives. By prioritizing the child's best interests as the paramount consideration, legislative bodies and societal norms can ensure that the gift of parenthood through surrogacy is truly a blessing for all involved, especially for the newest member of the family.

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