

CHALLENGES OF SURROGACY IN THE DEVELOPMENT OF REPRODUCTIVE HEALTH IN NIGERIA

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Abstract

Infertility among married couples is a major problem affecting not only their marital life but also their social life. Fertility and family are considered the most basic foundations of life, and infertility is one of the greatest problems of the human lives. The Assisted Reproductive Technologies have come to the help of such infertile couples. Until recently, they had only two options either to adopt a child or to remain childless. However, with the advent of the new reproductive technologies, infertile couples now have the advantage of selecting from a number of options, including artificial insemination, in-vitro fertilization, and surrogacy. Thus, human procreation can be accomplished through a variety of reproductive technologies that do not involve sexual intercourse. Of these new technologies, surrogacy is arguably the most controversial. Surrogacy is one of the assisted reproductive

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techniques which involve using the third party. The subject of surrogacy is a unique one and most countries do not have a uniform legal stand on the concept. It may be argued that the sensitive nature of this procedure has affected the way it is viewed and accepted in different societies. This no doubt is an emerging area in some jurisdictions which the law is yet to address sufficiently. This paper examines the challenges e of surrogacy in the development of reproductive health law in Nigeria. It adopts a comparative method and compares the legal frameworks governing surrogacy in Nigeria and other jurisdictions. It concludes that surrogacy is a new trend in the development of health law, but this law is lacking in Nigeria. The paper recommends among other things, that legislative framework should be put in place to enact a law on surrogacy so that the problem of infertility in marriages can be drastically reduced.

Keywords: assisted reproductive technologies artificial insemination, fertilization, surrogacy, infertility, surrogate agreement

1. Introduction

The introduction of IVF and other reproductive technologies has revolutionized the law on childbearing and redrawn the boundaries of reproduction. According to Pattinson,¹ some reproductive medicine simply treats involuntary childlessness, to others it

¹ Shaun D. Pattinson, *Medical Law and Ethics* (3rded) London, Sweet & Maxwell 011 P.274.

threatens the very essence of the family and society. Medicine is now involved more fully in reproduction through a range of assisted reproductive technologies². Surrogacy is considered one of the many assisted reproductive technologies option. The concept of Surrogacy has openly and obviously challenged the hetero-normative family structure.

Surrogacy is the practice where a woman (a surrogate) carries a child for another (the commissioning parent) with the intention that the child would be handed over after birth.³ There is nothing new about surrogacy.⁴ However, it gained popularity since The American College of Obstetricians and Gynecologists (ACOG) published its first statement on this topic in 1983⁵. In the African society, having a child in marriage is regarded as a sign of stability and is commonly celebrated as the pride of womanhood and a symbol of fertility.⁶ Generally, People tend to seek surrogacy arrangements when conceiving, naturally becomes medically impossible, when the risk associated with carrying such pregnancy is likely to cause physical injury for the prospective mother, or when a single man or a male couple wish to start a family of their own.

² Ibid.

³ The Warnock Report, Report of the Committee of Inquiry into Human Fertilisation and Embryology (Cmnd. 9314, London, HMSO 1984) at para 8. 1, accessed 20 February, 2022.

⁴ N. Gamble, L. Ghevaert, 'Surrogacy, parenthood, and disputes: are there any lessons to be learned?' http://etheses.dur.ac.uk/3192/1/MJur_-_Chantell_Burrows.pdf?DDD19, accessed 20 February, 2022.

⁵ Ibid

⁶ OJ Umeora, UN Nzerem& JN Eze 'What Drives Grand Multiparous Women In Rural Nigeria To Seek Treatment For Infertility' *African Journal of Medical and Health Sciences* (2013) P.15

In surrogacy, a woman is artificially inseminated with a man's sperm⁷. The woman carries his child in her womb and immediately after the child's birth hands it over to the man and his wife to be raised as their own.⁸ Surrogacy, as a form of assisted reproduction, is a scientific extension of a woman's natural ability to reproduce⁹. It has become a viable alternative for couples finding it difficult to conceive naturally to overcome the challenges of infertility and of adoption.¹⁰ This practice has gained wide spread recognition throughout the world particularly in India¹¹ over the past fifteen years as a viable reproductive option for infertile couples wanting to have a baby that is biologically related to them¹². Surrogacy, like any other technological breakthrough, has its own pros and cons.¹³

Surrogacy as an alternative reproductive method is swamped with various challenges ranging from parental rights, reproductive rights, the fundamental human rights of the child, and the

⁷ https://wikiimilli.com/en/Baby_M; Accessed 18th February, 2022.

⁸ O.S Adelakun 'The concept of surrogacy in Nigeria: Issues, prospects and challenges' *African Human Rights Law Journal* PP.605-624

⁹ K Horsey & S. Sheldon 'Still hazy after all these years: The law regulating surrogacy' *Medical Law Review* (2012) 20 PP.67-68. <<https://en.wikipedia.org/wiki/surrogacy>>. Accessed 18th February, 2022.

¹⁰ Judith Lynn, Bick Rice, "The Need for Statutes Regulating Artificial Insemination by Donors" *Ohio State Law Journal* , (1985) P. 1055

¹¹ Gestational surrogacy is legal in India. India is one of the few countries where commercial surrogacy is still allowed.

¹² Helen Ragone, "Surrogate Motherhood: Conception in the Heart" (1994) U.S.A, West View Press, P. 13

¹³ Lisa L. Belman, "Legal, Moral & International Perspectives on Surrogate Motherhood: The Call from a Uniform Regulatory Scheme in the United States". <https://www.mondaq.com/nigeria/family-law/840674/legal-approach-to-surrogacy-in-nigeria>, accessed 20 February, 2022.

commercialization of the process of surrogacy; particularly the exploitation and abuse of surrogate mothers. The widely publicized case of *Re Baby M*¹⁴ was the first American court ruling on the legality of surrogacy¹⁵. In this case, The Infertility Center of New York arranged for William Stern to enter into a surrogacy agreement with Mary Beth Whitehead. According to the terms of the agreement, Mary Beth Whitehead would be inseminated with William Stern's sperm, carry the pregnancy to term, and relinquish her parental rights in favor of William's wife, Elizabeth¹⁶. Mary Beth initially handed over the child to the Sterns per the contract, but she returned the next day, threatening to harm herself if she didn't get to see the baby. Not wanting to risk Mary Beth's safety, the Stern's agreed to let her see the baby for another day or two¹⁷.

Instead of returning the baby to the Sterns, Mary Beth and her husband Richard kidnapped Baby M for 87 days. The Sterns took the matter to court. The trial court awarded to the father permanent custody of Baby M thereby enforcing the contract agreed upon by both parties before the child was conceived and terminated the birth mother's parental rights. On appeal, the Supreme Court¹⁸ upheld the award of custody to Mr. Stern as it is in the child's best interest, but however declared the contract to be unenforceable and reinstated Whitehead's parental rights, leaving her visitation rights

¹⁴ New Jersey. Supreme Court (1988-02-03) P.109

¹⁵ <https://en.wikipedia.org/wiki/surrogacy>, accessed 11 March, 2022.

¹⁶ Ibid.

¹⁷ https://wikimilli.com/en/Baby_M. Accessed March 18, 2022.

¹⁸ New Jersey. Superior Court, Chancery Division, Family Part, Bergen County (1987-03-31). "In Re Baby M". Atlantic Reporter. PP. 1128–1176. <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/03/family-building-through-gestational-surrogacy>, Accessed 20 March, 2022.

as noncustodial parent in place. This case raised novel legal and societal issues about third party reproduction, the meaning of parenthood and the possibility of contracting pertaining to the issues of pregnancy and childbirth¹⁹.

The subject of surrogacy is a complex one and most countries are yet to adopt a unified legal position on the concept. It is even more complicated in a developing country like Nigeria where there is no clear-cut legislation on surrogacy. The sensitive and complex nature of this procedure has influenced how it is viewed and accepted in many jurisdictions. There is no doubt that in some jurisdiction it is a developing reproductive area which the law needs to address. There exists a nagging question of whether a woman's ability to make decisions about her own body should include the right to relinquish her parental responsibilities to a child born by her on the basis of a contractual agreement²⁰. This issue raises a number of legal concerns including; human rights, reproductive rights, morality, public policies, infant rights, rights of children, parental responsibilities & rights.²¹

The provision of the law on Assisted Reproductive Technology procedures is clear. Section 30 of the Child's Right Act²² provides that: "No person shall buy, sell, hire, let on hire, dispose of, or obtain possession of, or otherwise deal in a child". In the same vein, Section 30 (3) of the Child Right Act goes further to state that

¹⁹ Ibid.

²⁰ https://www.academia.edu/40171530/Legal_Approach_to_Surrogacy_in_Nigeria. Accessed 18th March,2022

²¹ <https://www.mondaq.com/nigeria/family-law/840674/legal-approach-to-surrogacy-in-nigeria>. Accessed February 20 , 2022

²² Child Rights Act 2003

“A person who contravenes the provision of subsection (1) of this section commits an offence and is liable on conviction to imprisonment for a term of ten years.

It is clear that the act of surrogacy involves obtaining possession of and dealing in a child. By virtue of the above provisions, it can be stated that anyone who involves in surrogate motherhood practices or enters into a surrogate contract agreement in Nigeria has committed a crime and is susceptible to a term of 10 years imprisonment.

The National Health Act which is the legal framework for the regulation, development and management of Nigeria’s Health System²³ prohibits in Section 50 of the Act all forms of assisted reproductive technology procedures by providing thus:

(1) A person shall not: (a) manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; (b) engage in any activity including nuclear transfer or embryo splitting for the purpose of the cloning of human being; (c) import or export human zygotes or embryos. (2) A person who contravenes or fails to comply with the provision of this section commits an offence and is liable on conviction to imprisonment for a minimum of five years with no option of a fine.²⁴

²³ Osahon Enabulele and Joan Emien Enabulele, “Nigeria's National Health Act: An assessment of health professionals' knowledge and perception” <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5036296/>> Accessed 30 May 2022.

²⁴ Section 50, National Health Act, 2014

From the above provisions of Section 30 of the Child's Right Act and the provisions of the National Health Act, it is evident that assisted reproductive technology (ART) procedures are prohibited in Nigeria. There's therefore need for the adoption of regulations in Nigeria that recognize, promote, and regulate ART; this will also help to discourage unethical practices, enhance surrogacy standards, supervise ART agencies, and guarantee that all participants follow the laid down procedure of the law. The paper therefore analyze the role of surrogacy in the development of reproductive health law in Nigeria and suggest a way forward.

2. The Nature of Surrogacy

Surrogacy was defined in the Warnock Report²⁵as “the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth”. In practice, the child is usually handed over within a day of the birth.²⁶Surrogacy is an alternative method of assisted human procreation for those who are unable or choose not to bear children on their own in the traditional manner. This procedure is undoubtedly one of the most controversial of the assisted reproductive technologies; it is a contractual arrangement whereby a woman agrees to be impregnated through assisted conception, carries the pregnancy to term, and relinquishes all parental rights of the child at birth²⁷.

²⁵ Warnock Mary, Chairman ‘*Report of the Committee of Inquiry into Human Fertilization and Embryology*’. London 1984https://www.hfea.gov.uk/docs/Warnock_report_of_the_committe_of_inquiry_into_human_fertilization_and_embryology_1984. Accessed March 19, 2022.

²⁶ <https://www.vinsfertility.com/surrogacy-in-cyprus/> Accessed March 19, 2022.

²⁷ Katherine B. Lieber, ‘Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?’ *Indiana Law Journal*, (1992) P.52

They are medical conditions in which a woman often times may be unable to carry her own genetic offspring. For example, a woman may be unable to ovulate or carry a pregnancy if her womb and ovaries have been removed due to cancer or if she was not born with them. Similarly, due to a high blood pressure or a life-threatening skin disorders, a woman may be able to ovulate but unable to carry a pregnancy. Such women could still raise a child that is their partner's biological child by contracting the services of a surrogate²⁸. Furthermore, a woman who is unable to keep the conceived foetus due to a history of spontaneous abortion may demand her partner participate in this arrangement in order to realize their dream of having their own child.

Women with life threatening conditions such as renal disease or multiple sclerosis may also benefit from this procedure. In *Paul Montover & Chantele Montover v T.B and D.B*²⁹ The Montovers agreed to pay the sum of \$13,000 to a Muscatine woman, but after the child's birth she wanted to keep the child³⁰. The supreme court of Iowa held as follows:

A contrary holding invalidating surrogacy contracts would deprive infertile couples of the opportunity to raise their own biological children and would limit the personal autonomy of women willing to serve as surrogates to carry and deliver a baby to be raised by other loving parents³¹.

²⁸ Ibid.

²⁹ Supreme Court No. 17 – 0376

³⁰ Ibid.

³¹ <https://www.iowacourts.gov/courtcases/357/briefs/272/embedBrief>. Accessed 20th March, 2022.

Similarly, in today's materialistic and commercial world, it's unsurprising that incidents have been documented in which figure-conscious women have chosen this approach in order to preserve their attractiveness and thus have allowed another woman to bear their child. Career advancement could also be a factor in the husband's decision to use a surrogate

Surrogacy is traditionally characterized as a procedure in which a couple hires a woman (known as the surrogate) to conceive their child, bring it to term and then renounce all parental rights to the couple. The word 'surrogate' comes from the Latin word '*surrogatus*', which means a substitute, or someone designated to act in the place of someone else. Hence, a surrogate mother is a person who carries a child for another woman, either from her own ovum or from the fertilized egg of another woman implanted in her womb.

A woman who is unable bear a child by herself may commission another woman to carry her child. The woman who asks for another to carry her pregnancy is known as the 'Commissioning Mother', while the woman who agrees to carry the child in her womb is called the 'Carrying Mother'. Because the commissioning mother may provide the egg, she is often referred to as the 'Genetic Mother'. The genetic father is either the commissioning mother's husband or an anonymous donor in some situations.³²

3. Types of Surrogacy Agreement

Surrogacy is divided into two types: Partial or Traditional Surrogacy, and Full or Gestational Surrogacy; each has its own set of rules.

³² Ibid.

- (i) **Traditional or partial surrogacy:** In partial or traditional surrogacy, the surrogate donates her eggs for fertilization with the commissioning man's sperm, either through artificial insemination or through sexual intercourse³³. Partial surrogacy is less expensive than full surrogacy and may not require medical intervention.³⁴ The disadvantage is that the surrogate mother is genetically related to the child and may be able to seek custody of him or her after the child is born³⁵. In South Africa, for example, a surrogate who is genetically related to a child has the right to terminate the agreement within 60 days after the birth of the child.³⁶
- (ii) **Gestational or Full Surrogacy:** The procedure whereby the commissioning couple donates their gametes to be carried to term by a third party, and the child upon delivery is handed over as soon as he or she is born is known as Full or Gestational Surrogacy. The child is genetically related to the commissioning couple; even though the surrogate mother's womb is used to carry the pregnancy to term, she has no genetic relationship with the child.³⁷ Full surrogacy has been referred to as a form

³³ Blauwhoff and Frohn "International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law", *Public and Private Law in Perspective* (2016) P. 215, accessed 25February, 2022.

³⁴ Blauwhoff and Frohn "International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law", *Public and Private Law in Perspective* (2016) P. 219

³⁵ <https://journals.co.za>. Accessed December 15,2022.

³⁶ Section 298 of the Children's Act, South Africa.

³⁷ Dada *Legal Aspects of Medical Practice in Nigeria* (2013), <Http://www.surrogacy./and/thelaw.>fyz> accessed 25February, 2022.

of womb leasing because it necessitates the use of In-Vitro Fertilization (IVF).³⁸ In circumstances where the commissioning parents do not have viable gametes, the surrogate may be implanted with donor eggs, donor sperm or donor embryo for fertilization.

4. Ethical Issues in Surrogacy

Surrogacy is not expressly prohibited in Nigeria, but it is also not legally recognized. As such, it cannot be stated that a person who engages in surrogate motherhood practices or enters into a surrogate contract in Nigeria has committed a crime. However, the fundamental issue is one of legally establishing the child's legal paternity as well as the contractual agreement entered into by the parties.

Surrogacy procedures is still being practiced within our shores, despite the fact that it is not yet legal under the Nigerian law. In fact, The African Journal for Infertility and Assisted Conception in 2017 recorded a successful gestational surrogacy procedure of a "35-year-old married trader"³⁹ with primary infertility of 7 years due to Mulleriandysgenesis" in south-eastern Nigeria was reported in the African Journal for Infertility and Assisted Conception.⁴⁰ There are also several privately owned agencies in the country that are

³⁸ IVF is a medical procedure where gametes are fertilised in a laboratory dish and thereafter injected into a woman's body for possible implantation.

³⁹ Dada Legal Aspects of Medical Practice in Nigeria (2013), <http://www.surrogacy./and/thelaw.>fyz> accessed 25February, 2022.

⁴⁰ J. Ikechebelu, K. Ibadin, N. Joe-Ikechebelu, L.A. Nwajiaku, K. Nwaefulu, & S.I., Okwelogu. "A successful gestational surrogacy in Southeast Nigeria", *African Journal for Infertility and Assisted Conception*, (2017), <http://www.afrijiac.org/text.asp?2017/2/1/19/241009>, accessed 22 February, 2022.

involved in consensually arranged surrogacy, acting as a middle ground between the surrogate mother and the commissioning parent. They provide the services of bringing parties together through a signed contractual agreement. These organizations are financed by fees paid by the parties involved. "Meet Surrogate Mothers Agency Limited" is an example of such an agency. This agency is registered and is based in Lagos, Nigeria. It deals in all forms of surrogacy agreements. Similar operations can also be found in Abuja and other parts of Nigeria. There is currently no judicial pronouncement in Nigeria on this type of contract, but if a dispute arises from a surrogate agreement and is brought before a Nigerian court, determining such a case could be difficult. There are chances that a biased judgment based on cultural differences will be made. The bias is most likely due to socio-cultural pressures that consider artificial conception to be unethical⁴¹.

With no statutory regulations in Nigeria to control surrogacy procedures, most artificial reproductive technology clinics in Nigeria base their operations on the UK's Human Fertilization and Embryology Authorities Guidelines. The Nigerian Law Reform Commission on the other hand, has recommended that any child born to a woman via artificial insemination or implantation of an embryo in her body while she is married should be considered as a child of the husband.⁴² The Commission further recommends that if a child is born as a result of a surrogacy agreement, the commissioning parents should formally adopt the child, even if the

⁴¹ A.S Jegede & A.S Fayemiwo 'Cultural and Ethical Challenges of Assisted Reproductive Technologies in the management of infertility among the Yoruba of South-Western Nigeria' (2010), *African Journal of Reproductive Health* PP. 115 -121.

⁴² Law Reform Commission 'Reform of Nigerian family law' 2018.

child is the commissioning parents biological child⁴³. The reasoning behind this is to prevent the surrogate mother from returning back to claim the child⁴⁴. In May 2012, the National Assembly was presented with a Bill to establish a Nigerian Assisted Reproduction Authority to set a standard and checkmate activities of this branch of science for the second time⁴⁵. This Bill however, did not become law as it lacked the support of a majority of the legislatures.

Subsequently, The National Health Act⁴⁶ was signed into law on October 31, 2014. It provides a legal framework for the regulation, development and management of Nigeria's Health System⁴⁷. Section 50 of the Act prohibits assisted reproductive technology by providing the following:

(1) A person shall not: (a) manipulate any genetic material, including” genetic material of human gametes, zygotes or embryos; (b) engage in any activity including nuclear transfer or embryo splitting for the purpose of the cloning of human being; (c) import or export human zygotes or embryos. (2) A person who contravenes or fails to comply with the provision of this section commits an offence and is liable on conviction to

⁴³ Ibid.

⁴⁴ M. Attah “Family welfare law in Nigeria” (2016) P. 215.

⁴⁵ <http://www.scielo.org.za>. Accessed March 13, 2022.

⁴⁶ National Health Act of 2014 (There's a 2016 National Health (Amendment) Bill being championed by the Health Reforms Foundation of Nigeria (HERFON) and Legislative Network for Universal Health Coverage(LNU).

⁴⁷ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5036296/>. Accessed March 20,2022.

imprisonment for a minimum of five years with no option of a fine⁴⁸.

From the above provision, it may be deduced that assisted reproductive technology (ART) procedures is prohibited in Nigeria. One cannot help but wonder why several assisted reproductive technology procedures, such as zygote intra-fallopian transfer (in vitro fertilization) and gamete intra-fallopian transfers, are still widely performed in Nigeria's major hospitals, including the National hospital Abuja, with no recorded incident of a medical practitioner being penalized so far. However, it is worth of note that The House of Representative are making plans towards the amendment of the National Health Act of 2014 towards restructuring it to meet emerging health challenges of assisted reproductive technology services⁴⁹.

5. Rights of Children Born via Surrogacy Agreements

By virtue of the provision of the United Nations Conventions on the Rights of the Child (CRC),⁵⁰ Children born through surrogacy have the same rights as all other children. The UN went further to provide that regardless of individual states' position on surrogacy, all states have a responsibility to protect the human rights of all children born through surrogacy without discrimination, including

⁴⁸ Section 50, National Health Act, 2014

⁴⁹ A Bill for 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 other Related Matters (2016) HB 16.05.610 C 3203 <http://www.placbillstrack.org/> (Accessed 22 February, 2022).

⁵⁰ The UN released a statement during the 37th session of the Human Rights Council in March 2018 on Surrogacy and Sale of Children. <https://www.unicef.org>. (Accessed 22 February, 2022).

ensuring that appropriate legal and regulatory frameworks exist at the national level. Thus, without adequate regulation and monitoring, abuse and exploitation are likely to occur, which can affect the well-being of children born of surrogacy.⁵¹ The rights of children, which must be protected in surrogacy agreements, are discussed below.

5.1 The rights to non-discrimination

Children are often discriminated against due to their dependence on adults for basic necessities, or due to their ethnicity or immaturity.⁵² Article 2 of the UNCRC⁵³ provides as follows:

The rights of all children are to be respected, without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, political or other opinion, national, social origin, property, disability or other status⁵⁴.

The UN Committee on the Rights of the Child which oversees the implementation of the UNCRC, reaffirmed this position stating that States Parties must monitor and combat discrimination against children based on circumstances that differ from the norm.

⁵¹ University of Chicago Law School: Global Human Rights Clinic "Human Rights Implications of Global Surrogacy" (2019) Global Human Rights Clinic <https://chicagounbound.uchicago.edu/ihr/10> ,accessed 11 February, 2022).

⁵² Art 43(1) of The United Nations Convention on the Rights of the Child, (UNCRC).

⁵³ United Nations Convention on the Rights of the Child

⁵⁴ <https://childfriendlycities.org/child-rights>. Accessed 15 March, 2022.

Therefore, children born via surrogate procedures must enjoy same rights as the children born through naturally⁵⁵.

5.2 The Right to know one's Biological Origin

The question as to whether a child has a right to know her biological or genetic origins is one of the hardest issues to have arisen over the past years⁵⁶.

Article 7 of the UNCRC provides that “A child shall be registered immediately after birth and shall have the right 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”. Article 7 has been interpreted to entail that children should be informed about their biological origins and the circumstances of their birth.⁵⁷

5.3 Best Interests of the child

The ‘Best interests of the child’ is a child rights principle derived from Article 3 of the UN Convention on the Rights of the Child, as well as the Nigerian Child Rights Act⁵⁸, which states that ‘the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social

⁵⁵ Ibid.

⁵⁶ International Journal of Law, Policy and Family “Enforcing the Child’s Right to know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights” (2007), pp. 137 – 159.

⁵⁷ South African Law Reform Commission “The Right to Know One’s Own Biological Origins” Issue Paper 32 http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170720_right_to_know_one’s_own_biological_orign.pdf (accessed 18 February, 2022).

⁵⁸ 2003

welfare institutions, courts of law, administrative authorities or legislative bodies.

The consideration of the best interests of the child is a fundamental legal principle borne out of the realization 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 choices⁵⁹.

5.4 Protection from Harm

Article 19 of the UN Convention on the Rights of the Child, provides that children have the right to be protected from physical and mental violence, neglect, sexual abuse and exploitation, while they are in the care of parents or any other person. Children conceived through surrogacy arrangements are likely to suffer 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. 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.

6. Challenges of Surrogacy in Nigeria

There are several ethical, legal, cultural and social issues surrounding surrogacy in Nigeria. Due to the cultural and social perceptions of infertility in Nigeria, surrogacy is not a topic that is openly discussed.⁶⁰ Legal concern surrounding surrogacy agreements is centered on the surrogacy agreement itself and the

⁵⁹ Van Bueren Child Rights in Europe (2007) 30

⁶⁰ www.surrogatefinder.com (accessed 26 February, 2022).

legal parentage of the child. While several countries have taken a stand on surrogacy, by either outrightly prohibiting it or fully allowing it with or without commercial value, Nigeria is yet to take a legal standpoint on the issue.⁶¹ As a result of the lack of recognition in Nigeria, the practice is unregulated, leaving surrogate mothers vulnerable to exploitation and commissioning parents subject to blackmail⁶².

Concerns have been raised in Nigeria over surrogacy-related abuse. One Motunrayo Joel, a health journalist⁶³ shared her experience on how she posed as a young woman interested in selling her ova; she recounted how several fertility clinics were in the business of harvesting ova from young women for a fee.⁶⁴ She reported the high rate at which Nigerian ladies sell their eggs at various fertility clinics. Her report showed that many of these women were not properly counseled on the health risks associated with egg donation, especially in cases of recurrent donation. They have been reported cases of quack doctors carrying out surrogacy and other in vitro fertilization procedures.⁶⁵ Surrogacy practices has been linked to the rise in the number of ‘baby factories’ in Nigeria, this has

⁶¹ Umeora et al (n 5) 106

⁶² https://www.academia.edu/38108792/The_concept_of_surrogacy_in_nigeria. (accessed 27 February, 2022).

⁶³ Motunrayo Joel is an editor/health researcher at Pearson Institute of Higher Education.

⁶⁴ M Joel ‘Ovum trading: Inside Nigeria’s multi-million naira human egg business’ Punch Newspaper, August 2015, <https://punchng.com/ovum-trading-inside-nigerias-multi-million-naira-human-egg-business/> (accessed 27 February, 2022).

⁶⁵ C Obinna ‘Without regulation, IVF treatment is unsustainable’ Vanguard 6 October, 2014 <https://www.vanguardngr.com/2014/10/without-regulation-ivf-treatment-unsustainable/> (accessed 10 February 2022)

heightened the level of stigma surrounding surrogacy as an alternative of becoming a parent.⁶⁶ The prevalence of the presence of baby factories in Nigeria fulfils two needs: firstly, a situation where teenage girls give up their unwanted babies for financial gain and to avoid social stigma; and, secondly, the desire for infertile couples to fulfil social obligations by having a child of their own.⁶⁷ Some of the children from these baby factories are trafficked outside the country for international adoption⁶⁸.

The increased patronage of baby factories by infertile couples could be attributed to the social stigma publicly associated with adoption and surrogacy in Nigeria.⁶⁹ According to a report by BBC, a common strategy for some infertile woman is to pretend to be pregnant or be fooled into believing she is pregnant, and then buying a baby from one of these baby factories.⁷⁰ It has been contended, that the increase in baby factory operations in Nigeria poses a threat to the social acceptance of surrogacy in the country as many might be confused as to the difference between baby factories and surrogacy.⁷¹ While some ladies give their consent,

⁶⁶ OBA van den Akker 'Surrogate motherhood families' (2017) P.218

⁶⁷ .A. Makinde '*Baby factories taint surrogacy in Nigeria*' Reproductive Bio-medicine, (2015). <http://www.assisted,doi: 10.1016/j.rbmo.2015.10.001> (accessed 18 February, 2022).

⁶⁸ <http://www.scielo.org.za>. (accessed 18 February, 2022).

⁶⁹ O.A Ojelabi, P. Osamor & B.E. Owumi 'Policies and practices of child adoption in Nigeria: A review paper' *Mediterranean Journal of Social Sciences*, (2015), PP. 75-77

⁷⁰ 'Judge raises Nigeria baby selling scam concerns' BBC News 25 October 2012<http://www.bbc.com/news/uk-england-london-20082389> (accessed 20 February, 2022)

⁷¹ R Omokri 'Reno Omokri breaks silence, wants "baby factories" allowed' Premium Times, 9 August 2015 <http://www.premiumtimesng.com/news/>

others particularly teenage girls, are persuaded or coerced to be surrogate mothers against their wishes.⁷² Omokri, however, cautioned that the criticism of surrogate mothers as being ‘baby factories’ by the media in Nigeria is not acceptable and should be seen as an unwelcome development. Omokri fails to differentiate between surrogacy-like baby factories presenting themselves as surrogate motherhood clinics.⁷³ These threats to the development of surrogacy is a cause for concern and has thus led practitioners to call on government to regulate ART in Nigeria.⁷⁴

These practices of baby selling, as reported across Nigeria, contravene the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and pornography⁷⁵ which Nigeria signed in 2000 and ratified in 2010. The Optional Protocol expressly prohibits the sale of children for consideration and enjoins state parties to criminalize the sale of children for sexual exploitation, the transfer of the child’s organs or

headlines/188066-reno-omokri-breaks-silence-wants-baby-factories-allowed.html (accessed 22 February, 2022).

⁷² Makinde et al (n 118) 4

⁷³ O.A. Makinde ‘Infant trafficking and baby factories: A new tale of child abuse in Nigeria’ 2016 (25) Child Abuse Review P. 433.

⁷⁴ O. A. Makinde, H. Umoru ‘Senate moves to approve birth via in-vitro fertilisation’ Vanguard 25 October 2017 <https://www.vanguardngr.com/2017/10/senate-moves-approve-birth-via-vitro-fertilization/> (accessed 22 February, 2022); A. Onyenucheya ‘Fresh concerns over IVF babies’ The Guardian 4 October 2018 <https://guardian.ng/features/health/fresh-concerns-over-ivf-babies/> (accessed 10 February, 2022).

⁷⁵ United Nations ‘Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Pornography’ (2000) A/RES/54/26325 May 2000 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx> (accessed 22 February, 2022.)

engagement in forced labour.⁷⁶ While Nigeria has laws⁷⁷ in place to comply with the Protocol, one cannot but support the enforcement mechanisms to ensure that the act of baby selling is curbed in Nigeria.

With the shift of surrogate motherhood to developing countries where surrogacy is poorly or hardly regulated,⁷⁸ poverty may make women vulnerable to exploitation by entering into surrogate agreements. The incentive of earning with one agreement what a woman in a developing country may never earn in years appears too tempting to many poor women in developing countries to resist. In Nigeria surrogacy is not regulated, and there have been reports of young ladies either submitting themselves to or being coerced into an arrangement similar to surrogate motherhood. In view of this, it is pertinent to have laws and policies that will protect the rights of parties to surrogate agreements as well as prescribing standards for the practice. Before a surrogacy agreement is concluded, there should be a counselling session with all the parties involved where they would all be educated on their rights and responsibilities. A surrogate mother has the right to be fully aware of the restrictive conditions that may accompany the pregnancy, by having to refrain from certain habits such as drinking and smoking. She has the right to be informed about any physical, emotional and hormonal changes that may occur throughout her pregnancy.⁷⁹The

⁷⁶ Article 3 Optional Protocol to CRC on the Sale of Children.

⁷⁷ Such as the Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004; the Child's Rights Act 26 of 2003; the Violence Against Persons Act 2015; and so forth.

⁷⁸ M. Goodwin 'Reproducing hierarchy in commercial intimacy' *Indiana Law Journal* (2013) PP. 1290 1293

⁷⁹ http://www.scielo.org.za/scielo.php?script=sci_arttext&pid= (accessed 16 February, 2022).

child born of a surrogate agreement is in a peculiar situation which makes his or her existence centered on a contractual formation, be it oral or written, entered into before his or her conception, although it has been argued that marriage and family are within the purview of public institutions and part of a contractual agreement with the state.⁸⁰ The child may or may not have a genetic tie to the surrogate mother, depending on the kind of surrogacy. Such a child may become faced later in life with identity, custody or legal parentage disputes⁸¹ that he or she isn't aware of.

Also in Nigeria, where only two parents are acknowledged or recognized as parents to a child,⁸² a child born through full surrogacy is likely to experience difficulties determining the status of his or her parents, especially if all three parents decide to claim parentage of the child. As such, the child's best interests should be paramount.⁸³ Since a child could be gestationally or genetically related to the surrogate parent(s), it follows that such a child has the right to lay claim to the identity of the commissioning parents, the genetic parents as well as the surrogate parent on the strength of articles 7(1) and 8 of the CRC⁸⁴.

⁸⁰ K.M. Swift 'Parenting agreements, the potential power of contract, and the limits of family law' (2007) 34 *Florida State University Review* 913 919-920.135 (accessed 18 February, 2022).

⁸¹ *Ibid.*

⁸² Section 69 of the Matrimonial Causes Act of 2004, on maintenance and custody of a child, it refers to either the father or mother of a child. There is no law in Nigeria that recognizes the possibility of a third parent in the concept of surrogacy, except adoptive or foster parents.

⁸³ www.academia.edu

⁸⁴ United Nations Conventions on the Rights of the Child, 2002.

As stated earlier, the provision of the law on Assisted Reproductive Technology procedures is clear. Section 30 of the Child's Right Act⁸⁵ provides that: "No person shall buy, sell, hire, let on hire, dispose of, or obtain possession of, or otherwise deal in a child". In the same vein, Section 30 (3) of the Child Right Act goes further to state that "A person who contravenes the provision of subsection (1) of this section commits an offence and is liable on conviction to imprisonment for a term of ten years.

It is clear that the act of surrogacy involves obtaining possession of and dealing in a child. By virtue of the above provisions, it can be stated that anyone who involves in surrogate motherhood practices or enters into a surrogate contract agreement in Nigeria has committed a crime and is susceptible to a term of 10 years imprisonment.

7. Legislative Interventions on Surrogacy Arrangements in some Selected Jurisdictions

The World Health Organization⁸⁶ estimates that between 48 million couples and 186 million individuals live with infertility globally. 17% couples are suffering from infertility globally.⁸⁷ This accounts

⁸⁵ Child Rights Act 2003

⁸⁶ World Health Organization (WHO) International Classification of Diseases, 11th Revision (ICD -11) Geneva: WHO 2018.

⁸⁷ Vaishnau, G. and Takkar put the rate at 15%, while Okonufua suggests 5-8% globally. See Vaishnau, G. and Takkar, N., "*Surrogacy Medicolegal Issues (New Delhi)*", 1st Edition; Jaypee Brothers Medical Publishers Ltd, (2015), ; Okonufua, F. E., "*Infertility in sub-Saharan Africa,*" In: Okonufua, F. E. and Odunsi, O. A. (eds.) *Contemporary Obstetrics and Gynecology for Developing Countries* (Benin-City: Women's Health Action Research Center, 2003), pp. 128-156.

for why couples seek gynecologic consultations⁸⁸ and accept assisted reproductive technology (ART) method like surrogacy to raise up children for themselves. This paper would focus on the practice of surrogacy arrangements in the United Kingdom and India.

7.1 Regulatory Framework on Surrogacy in United Kingdom

The bedrock of surrogacy regulation in the United Kingdom (UK) is laid in the Surrogacy Arrangements Act (SAA) 1985.⁸⁹ Under the law, while surrogacy is legal in the UK, commercial surrogacy is unenforceable. The only payments allowed to be made to a surrogate are reasonable expenses, i.e. compensation for any expenses that may arise as a direct result of her pregnancy. The SAA was a quick legislative response following the public condemnation of the Kim Cotton's "baby-for-cash-deal" incident,⁹⁰ where a married mother of two received £6500 for acting as a surrogate for a childless couple. The child was conceived using her egg and the sperm of the man whose wife was infertile. Though the court made reference to the "difficult problems of ethics, morality and social desirability raised by surrogacy," it nonetheless went ahead to give custody of the child to the commissioning parents.⁹¹ Prior to the enactment of the statute, there was no law permitting or

⁸⁸ Larsen U., "*Primary and Secondary Infertility in sub-Saharan Africa*," (2000), *International Journal of Epidemiology*, pp. 285-291; Omoaregba, J. O. et. al. "*Psychosocial Characteristics of Female Infertility in a Tertiary Health Institution in Nigeria*," (2011), *Annals of African Medicine*, pp. 19-24.

⁸⁹ Cap. 49 of 1985.

⁹⁰ BBC on this day, "1985: Inquiry over baby-for-cash" deal." Available at http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm. Accessed on 19 February, 2022.

⁹¹ In Re- C (A minor a.k.a. the Baby Cotton Case) (1985) FLR 846

barring surrogacy arrangements in the United Kingdom.⁹² In an earlier decided case of *A v. C*,⁹³ the commissioning parents, Mr. A and Mrs. B, offered a prostitute £3500 to have a child for Mr. A but she turned down the offer and found a 19 year old lady, Miss C, who accepted to bear the child for Mr. A for a monetary reward of £3000 and that at birth will relinquish the child to the couple. Miss C was thereafter artificially inseminated with Mr. A's sperm and in due time gave birth to a male child. However, Miss C reneged on the agreement with the commissioning couple and decided to keep the child. Mr. A was granted permission to keep the child initially, but it was revoked on an appeal as the court deemed the surrogacy arrangement as a "totally inhuman proceedings"⁹⁴ and a "sordid commercial bargain." It was against this backdrop, that the SAA 1985 was enacted based on recommendations of the Committee of Inquiry into Human Fertilisation and Embryology in 1984⁹⁵. The statute permits altruistic surrogacy but prohibits commercial surrogacy⁹⁶ and renders surrogacy arrangements unenforceable.⁹⁷ By the wordings of section 2(2) of the Act, it appears that commissioning parents and/or the surrogate mother are not guilty of an offence if payment is not made beyond reasonable expenses as required under the statute. However, it becomes a crime for a

⁹² Brahams D., "*The Hasty British Ban on Commercial Surrogacy*" (1987) 17(1)*The Hastings Center Report*, pp. 16-19

⁹³ (1985) FLR 445

⁹⁴ *Ibid.*

⁹⁵ Alghrani, A. and Griffiths, D., "*Regulation of Surrogacy in the United Kingdom: The Case for Reform*," (2017) 29(2) *Child and Family Law Quarterly*, p. 5. Available at <http://sro.sussex.ac.uk/id/eprint/68402/>. Accessed on 20 February, 2022.

⁹⁶ SAA 1985, section 2(1).

⁹⁷ *Ibid*, section 1A, inserted by section 36 of the Human Fertilisation and Embryology Act, 1990.

person to advertise that they are looking for surrogate mother or offer to act as a surrogate mother as well as for third parties to advertise their readiness to facilitate or broker a surrogacy arrangement and for newspapers, periodicals or telecommunication system to carry such advertisements⁹⁸ or for a person to distribute or cause to be distributed such advertisement to which the section applies⁹⁹.

7.2 Regulatory Frameworks on Surrogacy in India

India first gained the world's recognition in the area of assisted reproductive technology following the birth of the world's second and India's first in vitro fertilisation (IVF) baby, *Durga (aka Kanupriya Agarwal)*, in October 1978 and another scientifically documented IVF baby, Harsha, in August 1986. Ever since then, the field of India's ART has grown rapidly and the country has remained the major and the most preferred medical tourism venues for foreign commissioning couples or intending parents, who for one medical condition or the other, have chosen the assisted reproductive technologies or techniques, such as surrogacy, as a form of process to have their own children.

A number of reasons may have contributed to India becoming a favorable destination for such couples. One, there is no law or monitoring mechanism regulating surrogacy arrangements, which have encouraged many mushroom ART clinics to spring up in the country. According to a 2012 report by the National Commission for Women (NCW), there were about 3000 clinics across India

⁹⁸ SAA 1985, *ibid*, sections 3(1)(a) and (2)

⁹⁹ *Ibid*, section 3(5)

rendering surrogacy services to foreign couples¹⁰⁰ with a generated income of about \$2billion annually.¹⁰¹ Secondly, the cost of undergoing the procedure is relatively cheaper in India when compared with the position in other developed countries like Canada, United States of America, United Kingdom, etc.¹⁰² Thirdly, due to the prevalence of poverty in the Asian country, a large number of women are ready to offer themselves as surrogates and get paid to enable them meet up with their financial needs “to either buy a house, get their kids good education, fix the money in a bank for future use and in some cases, attend to a medical emergency in the family.”¹⁰³ The shorter period which parties need to wait as well as advancement in infrastructure and medical expertise in India, which is comparable to global standards, also

¹⁰⁰ Sama-Resource Group for Women and Health, “*Birthing a Market: A Study on Commercial Surrogacy*,” (New Delhi: Sama-Resource Group for Women and Health, 2012), p. 7. Available at http://www.communityhealth.in/~commun26/wiki/images/e/e8/Sama_Birthing. See also Kannan, S., “*Regulators Eye India’s Surrogacy Sector*,” (18 March 2009) BBC World News; Accessed 22 February, 2022.

¹⁰¹ See Kohli, N., “*Commercial Surrogacy: The Half Mothers of Anand*,” (8 November 2015) The Hindustan Times. Available at <https://www.hindustantimes.com/health-andfitness/the-half-mothers-of-anand/story-OsncxL9TycKZ38QusrKNGI.html>. Accessed on 19 February, 2022.

¹⁰² For instance, while surrogacy arrangement (including in vitro fertilisation-IVF) cost about \$11,000 in India, it is estimated that the cost is approximately \$15,000 (excluding ART charges) in the United States of America and £10,000 in the United Kingdom. See Sama Resource Group for Women and Health, “*Birthing a Market: A Study on Commercial Surrogacy*,” op. cit

¹⁰³ See Kohli, N., “*Commercial Surrogacy: The Half Mothers of Anand*,” (8 November 2015) The Hindustan Times. Available at <https://www.hindustantimes.com/health-andfitness/the-half-mothers-of-anand/story-OsncxL9TycKZ38QusrKNGI.html>. Accessed on 19 February, 2020.

contribute significantly in making the country a desired destination for surrogacy.¹⁰⁴ The ART Bill 2008 was revised in 2010, 2014, 2016 and 2018 and was passed in 2021.

The guidelines also authorizes either a relative, an unknown person or a known person to the intending couple to a surrogate mother for the couple. With respect to a relative of a surrogate mother, she must belong to the same generation “as the intending surrogate mother.”¹⁰⁵ A woman cannot be a surrogate mother beyond three times in her life time.¹⁰⁶ The surrogate child is seen by law as the legal child of the commissioning parents and accordingly enjoys all rights and due entitlements as available to a natural child.¹⁰⁷ While the guidelines empower the commissioning parents to have access to all medical and genetic information of the biological parents which may be material for the health of the child¹⁰⁸, it correspondingly authorize the surrogate child to have the right to information regarding his biological parents upon attainment of a majority age. The commissioning parents “payment to a surrogate mother of all relevant expenses associated with the pregnancy is recognized and documented as financial commitments for the surrogacy arrangement¹⁰⁹. The determination of the sex of the unborn child is prohibited unless there is a likelihood of possible risk of transfer of genetic abnormality determined during genetic testing of the biological parents or as a result of pre-implantation genetic diagnosis.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid, para. 3,10

¹⁰⁶ Ibid, para. 3

¹⁰⁷ Ibid, Clause 25

¹⁰⁸ ART (Regulation) Bill 2010, Preamble

¹⁰⁹ <https://www.surrogacyasia.com/blog/2018/02/01/main-training-health-surrogate-mother>

8. Conclusion

Considering the multi-cultural diversity of Nigeria as a country, it is important to ensure that any surrogacy law or policy takes into cognizance the country's unique characteristics¹¹⁰. Traditional culture in Nigeria places a great importance on natural conception and child birth, and rejects the Western notion of surrogacy as a viable option. This African culture views the notion of surrogacy as a risk to destabilizing family lineages which are highly valued in the Nigerian society.¹¹¹ While surrogacy as an alternative is a way of bringing solace to infertile couples who desires to have a biological child of their own; like every aspect of life, the practice is accompanied with challenges. But if properly regulated to protect the best interests of the child, the surrogate mother and the commissioning parents, surrogacy could put an end to several illegal practices in Nigeria, such as the menace of baby factories and illegal adoption practices.

In Nigeria today, there is no enabling law on surrogacy. However, with the National Health (Amendment) Bill 2016 and the Assistive Reproductive Technology Bill 2016 before the National Assembly, Nigeria is already on the right path. To avoid duplicity and a conflict in the laws, it is recommended that the two Bills be harmonized. In the said bill, comprehensive provisions are made to accommodate surrogacy, but until the bill is passed, it cannot serve as a law. A regulation of this nature is what is needed and not a total ban on assisted reproductive technology procedures. The ART Bill, if passed into law, will be a model for many African countries.

¹¹⁰ https://www.academia.edu/38109792/The_concept_of_surrogacy_in_nigeria.

¹¹¹ FT Christiana 'Surrogate motherhood: A philosophical discourse' *Journal of Emerging Trends in Educational Research and Policy Studies* (2013) 4 P. 575.

There's need for a proper framework for surrogacy which works in a global context. Surrogacy is not going away. To manage it properly and to make it safe and more easily accessible, this paper recommends that the National Assembly should hasten the passing of the Assisted Reproductive Technology Bill to ensure that the cry of infertility in Nigeria will become a thing of the past as it is practiced in most developed Nations and also calls for a law, which reflects modern reality that is workable for all families involved.