SURROGACY IN NIGERIA: AN EMERGING TREND ON AN UNCHARTED LEGAL TERRAIN

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Abstract

Through assisted conception, technology has made it possible for couples who otherwise cannot bear children to become happy parents. One way through which this has happened is surrogacy. Though a fast-emerging trend in Nigeria, there is neither statutory nor case law for the regulation of its practice. As more and more Nigerians embrace surrogacy, disputes are bound to arise between the parties to the surrogacy arrangement. In such situation, the courts will be put in a difficult position in the absence of applicable laws. This paper examines the nature of surrogacy and situates it in extant Nigerian family law. It argues that without a regime of surrogacy laws in Nigeria, the emerging trend is a legal minefield. With a view to making appropriate recommendations for surrogacy legislation in Nigeria, the paper studies the surrogacy laws of the United Kingdom, Israel and South Africa. It argues that due to poverty and illiteracy, unregulated surrogacy in Nigeria would be deleterious to surrogates, intending parents and society at large. The paper makes recommendations for a legal regime for state-regulated surrogacy in Nigeria.

Keywords: *Surrogacy, law, Nigeria, emerging trend, uncharted* terrain

Introduction

The inability of some couples to conceive naturally is as much a fact today as it was in Bible times. From Sara in the Old Testament to Hannah in the New Testament of the Holy Bible and their spouses to present-day couples, infertility or the inability to naturally conceive has posed challenges that have tried conjugal unions to their breaking points. While the Biblical Sara and Hannah and their spouses achieved conception by divine intervention,

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the infertile couples of today have achieved parenthood in their numbers through the use of technology. The facility afforded otherwise infertile couples to bear children would appear to be one of the most remarkable contributions of scientific and technological the modern world. Assistive Reproductive Technology (ART) has, in no little way, increased the possibilities for procreation without sexual relation. In Vitro Fertilisation (IVF) processes in which a woman is artificially inseminated with the aid of technology to achieve conception dates back, in fact, to the late eighteenth century.[1]

Until ART intervened, the only option open to couples who could not achieve conception naturally to achieve their dream of parenthood was adoption. Today, technology has afforded other options. One remarkable way in which ART has made procreation possible for infertile couples is surrogacy. Surrogacy refers to the arrangement whereby a couple who could not achieve pregnancy the natural way, or, who due to some medical conditions cannot carry a pregnancy to term, enter into an agreement with another woman to carry a pregnancy for them to term, give birth and surrender the baby born to them. The origins of surrogacy could be traced to as far back as Bible times. When Abraham's wife Sara could not bear children, she had given her maid servant, Hagar to Abraham for the purpose of bearing a child for the childless union. She had said to her husband: 'the Lord has kept me from bearing children. Have intercourse, then, with my maid; perhaps I shall have sons through her.'[2] The Bible records that a child, Ismael, was born from this arrangement.

In some more advanced jurisdictions, surrogacy has been practised for a considerably long period of time. In fact, there have been more than 35,000 births attributed to surrogacy since the 1970s.[3] In the last decade, the public, the legal and medical professions have witnessed a boom worldwide in the practice.[4] In some of these advanced jurisdictions, legal frameworks have been set up for its regulation to ensure sanity and prevent abuses. In Nigeria, surrogacy is of recent development but is fast emerging. Couples and single persons alike are taking advantage of this procreative arrangement to have children where natural conception and gestation to term was impossible.

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1 SF Appleton and DK Weisberg, *Adoption and Assisted Reproduction: Families under Construction* (Wolters, Kluwer 2009) 239.

2 Genesis 16:13.

3 EK Osagie, 'Surrogacy: Whose Child is It?' (2010) 11 *Journal of Medicine and Medical Sciences*, 2.

4 *Ibid*.

While this trend is fast emerging in Nigeria, there is no clear legal framework for its regulation. This means that disputes emerging from surrogacy (as they do usually emerge in jurisdictions where it has been long practised) would pose serious legal challenges to Nigerian courts. This state of affairs could portend danger and constitute legal landmines for the courts. It could give rise to legal uncertainties in family relation and raise questions regarding parental rights and responsibilities. It could also lead to abuses and cause damage to the family institution held in very high regard in the Nigerian society.

This paper will examine the nature of surrogacy and its legal status under extant Nigerian law. It will critically examine the compatibility of the practice, which is fast emerging in Nigeria with extant Nigerian family law. The paper will argue with the growing practice of surrogacy in Nigeria, there is an urgent need for legislative intervention. In order to suggest appropriate measures for the regulating the practice in Nigeria, the surrogacy laws of three more advanced jurisdictions will be studied.

Nature and Types of Surrogacy

Surrogacy is an arrangement by which persons who wish to have babies, but either cannot conceive and carry a pregnancy to term, or can but do not wish to do so, can contract with a surrogate to do so for them. It is a practice whereby a woman called the surrogate mother carries a child for another person and (usually) that other person's partner, as the result of an agreement prior to conception that the child should be handed over to the couple after the birth. Ordinarily, upon the surrogate being delivered of the baby, she drops off while the couple become the legal parents of the baby. In a surrogacy arrangement in which a married couple conceive a child by using the wife's egg fertilised in vitro with the husband's sperm, but the baby is carried to term by a gestational surrogate, two mothers are recognised – the genetic mother and the gestational mother. But where the surrogate's own egg is used, she is both the genetic and gestational mother of the baby, the commissioning couple having no genetic connection whatsoever to the baby. The use of ART in surrogacy has, therefore, introduced a third person into the hitherto two-party parenthood, and thus introduced a distinction between social and biological parenthood.[5]

Surrogacy arrangements could be broadly classified into two – gestational surrogacy and traditional surrogacy. Gestational surrogacy arrangements are made where, due to medical reasons, a married woman cannot carry a foetus

[5] M Strathern, *Reproducing the Future: Essay on Anthropology, Kinship and the New Reproductive Technologies* (Manchester University Press, 1992).

to term but can produce healthy eggs. In such situation, a couple may decide to have the woman's healthy eggs fertilised with the husband's sperm outside the womb and implanted in the genetically unrelated surrogate for gestation purposes, and she carries the resulting pregnancy to term.[6] In the traditional surrogacy, a married woman is infertile and cannot produce healthy eggs that could be fertilised. In that case, the husband's sperm is used to fertilise the egg of a surrogate who carries the pregnancy to term for the couple.

Recently, surrogacy has also caught the fancy of unmarried couples, including same-sex couples. Same-sex couples wishing to have children have been known to enter into surrogacy agreements for the purpose with a surrogate who would bear children for them. Single parents, both male and female could also contract a surrogate to conceive, naturally or by assisted means, and bear them children. In these cases, the surrogate is, under a surrogate agreement, agreed to be paid a fee for carrying the pregnancy, resulting in what is now regarded as commercial or for-profit surrogacy. In some jurisdictions, commercial surrogacy is allowed under the law, while in some others, it is not.

Surrogacy and Extant Nigerian Law

As adverted to earlier in this paper, while the practice of surrogacy is fast becoming a trend in Nigeria, there is yet no legal framework for its regulation. This, as already pointed out, would certainly pose considerable adjudicatory difficulties for the courts when disputes begin to arise from surrogacy arrangements. In this part of the paper, effort will be made to examine surrogacy in the context of the overall architecture of Nigerian family law. Aside from the law, effort will also be made to situate the surrogacy practice in Nigerian public policy, a major consideration in the application of legal rules by Nigerian courts.

At the heart of the family is the marriage institution. Marriage is a universal institution the sacredness of which is recognised everywhere in the world. As a social institution, it is founded on, and governed by social and religious norms of society. Nigerian law recognises three types of marriages – statutory marriage, customary law marriage and Islamic law marriage.[7] Under statutory law, marriage is the voluntary union for life of one man and

[6] See AL Campbell, 'Annotation, Determination of Status as Legal or Natural Parents in Contested Surrogacy Births' (2000) 5 *Administrative Law Review*, 574.

[7] A Rahmatian, 'Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience' (1996) 10(3) *International Journal of Law, Policy and the Family*, 281.

one woman to the exclusion of all others until divorce or death.[8] Customary and Islamic law marriages allow a man to marry more than one wife at the same time. Whatever the type of marriage, the institution of marriage is regarded sacred in Nigeria. Its sanctity is not only recognised by society, but also enforced by law. Recognising the sanctity of marriage, Nigerian law contains a number of legal rules aimed at promoting the marriage institution and rendering unlawful, acts which interfere with the sanctity of that institution. These include rules on adultery, conjugal rights of spouses, presumption of valid marriage between persons living as husband and wife, custody of children of a marriage, etc.

The definition of marriage given by Lord Penzance in *Hyde v. Hyde*[9] as the voluntary union for life of one man and one woman to the exclusion of all others suggests that procreation, a cardinal essence of marriage, shall be between the spouses and not otherwise. Contrary to the policy behind sexual relation and procreation outside wedlock, surrogacy is essentially hinged on extra-marital procreation. The facility it affords couples who cannot naturally have their own children to have children rests on the introduction of a third party (the surrogate), in procreation. Surrogacy, therefore, interferes with the legal order of child-bearing between married spouses implicit in the legal tenets of marriage under Nigerian law. It enables parenthood to be distributed among three, rather than two parties as contemplated under the law.[10] Though the corpus of Nigerian law is at present bereft of legal principles on surrogacy, laws governing in other jurisdictions, as will be seen presently, recognise and give certain parental rights to the surrogate mother, making her a parent in some way.

Beside termination by death, marriages, whether contracted under the statute or under customary or Islamic laws, are also terminable by divorce. By virtue of section 15(1) of the Matrimonial Causes Act,[11] a marriage contracted under the Marriage Act is dissoluble on the ground that the marriage has broken down irretrievably. One fact upon which a spouse may urge a court to conclude that the marriage has broken down irretrievable is the other spouse's adultery. Though surrogacy does not involve sexual relation between the male partner in the commissioning couple and the surrogate, the fertilisation of the surrogate's egg with the male partner's

8 Hyde v. Hyde (1866) L.R.I.P. & D. 130.

9 *Ibid*.

10 See B Benshushan and JG Schenker, 'Legitimizing Surrogacy in Israel' (1997) 12(8) *Human Reproduction*, 1834.

11 Cap M7 Laws of the Federation, 2004.

sperm has been equated to adultery.[12] This view is premised on the fact that the two major religions of the world, Christianity and Islam forbid surrogacy. The Catholic Church, for example, forbids all forms of surrogacy, especially because the process may involve the discarding of embryos.[13] Surrogacy, inevitably involves IVF, not of the female partner of the commissioning parents, but a stranger to the union. Islam, for its part, supports IVF but only if it is performed with the egg and sperm of the husband and wife because it views any other arrangement as adulterous.[14] It could, therefore, be argued from the foregoing that, for married couples, the traditional surrogacy is somewhat adulterous since adultery is rooted in religious precepts.

Surrogacy also raises the question of whose child the child born through the surrogacy arrangement is. This question is cardinal in family law because on the answer depends, not only the legal right of the commissioning couple in relation to the child, but also the legal status of the child born. It determines the legitimacy of the child. A child is legitimate if born in lawful wedlock.[15] Under Nigerian law 'lawful wedlock' means marriage under statutory law and customary law (including Islamic law). These are marriages recognised under Nigerian law, and children born of them are legitimate.[16] A child born out of a surrogacy arrangement is obviously born outside wedlock and, as such, illegitimate.

Aside from the status of illegitimacy which may be foisted on a child by virtue of a surrogacy birth, there is also the question as to, between the natural father and the surrogate, whose child the baby is when born. A surrogate agreement may well provide the answer to the question since it always vests all parental rights over the baby on the intending parents and robs the surrogate of all such rights. But there is yet no Nigerian law or judicial decision avowing or disavowing the validity of surrogacy agreements in Nigeria. It is, therefore, uncertain whether when such agreement comes before a Nigerian court for enforcement it will receive judicial approbation. One aspect in which the question regarding whose child it is has weighty consequence is that of custody. It determines, as between the natural father and the surrogate who is entitled to the custody of the child.

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12 SC Mondal and others, 'Genetic and Gestational Surrogacy: An Overview' *Walailak Journal of Science and Technology*, 191.

13 *Ibid*.

14 *Ibid*.

15 EI Nwogugu, *Family Law in Nigeria* (HEB Publishers, 2014) 303.

16 *Lawal v. Yuonan* (1961) 1 All NLR 245.

Under the Marriage Act, marriage is prohibited between persons within certain degrees of consanguinity and affinity.[17] The implication is that child bearing is outlawed for persons within those degrees of consanguinity and affinity since, to lawfully bear children, they have to be legally married. Though there is nothing in extant law prohibiting it, it is submitted that surrogacy arrangements between persons within the prohibited degrees of consanguinity and affinity may not receive judicial support. This is because, despite the absence of sexual relation in assistive reproduction, public policy in Nigeria does not lend support to reproduction between persons related by common ancestry or marriage. This is, again, an issue that could arise from surrogacy which the Nigerian court will have to address when the opportunity arises.

In jurisdictions where same-sex relations are allowed, couples could become parents through surrogacy. In the United States, the United Kingdom, Canada, Mexico, Colombia, Denmark, Belgium, the Netherlands and some states in Australia, for example, gay couples are permitted under very strict regulations to have children through surrogacy.[18] In Nigeria, the Same Sex Marriage (Prohibition) Act recognises as valid only a marriage contracted between a man and a woman.[19] It prohibits a marriage contract or civil union between persons of the same sex.[20] Any such marriage or union 'shall not be recognised as entitled to the benefits of a valid marriage.'[21] Such marriage or union validly entered into in a foreign country is void in Nigeria, and any benefit accruing from the union shall not be enforced by any court in Nigeria.[22] The purport of these provisions is that same-sex couples are denied all benefits available to legally married couples in Nigeria.

One of the most important benefits of marriage is procreation. It follows that by virtue of the Same Sex Marriage (Prohibition) Act, gay couples do not enjoy the benefit of lawful procreation in Nigeria. Procreation by gay couples through surrogacy arrangements is, therefore, prohibited under Nigerian law. It also follows that children born to gay couples in foreign

17 Sections 24 and 27 of the Marriage Act.

18 W Houghton, 'Surrogacy for Gay Couples Worldwide' <http://www.sensible surrogacy.com/gay-surrogacy/> accessed 19 February 2023.

19 See section 3 Same Sex Marriage (Prohibition) Act.

20 *Ibid*. section 1.

21 *Ibid*.

jurisdictions will not be recognised in Nigeria as lawful, even if lawful under the laws of those jurisdictions. Thus, children born to Nigerians who entered into gay unions through surrogacy under the permissible laws of other countries will not be recognised as such in Nigeria.

This brings us to surrogacy by single but intending parents. Aside from married couples who are unable to have children naturally, it has become fashionable for single persons to attain parenthood through surrogacy. Only recently, the news media in Nigeria was awash with news of the birth of a baby girl for a popular Nigerian actress, Ini Edo, by a surrogate.[23] Though single, the actress attained parenthood through genetic surrogacy after a number of miscarriages she suffered while trying to carry her pregnancies to term.[24] In Nigeria, both law and public policy approve procreation in lawful wedlock and not otherwise. Again, it is a matter of conjecture what would be the judicial attitude to surrogacy by single but intending parents.

Surrogacy in Selected Foreign Jurisdictions

Although it is still in its infancy in Nigeria, surrogacy is well developed in certain other jurisdictions where they are not banned.[25] In such jurisdictions there are established legal and regulatory frameworks for commissioning surrogates, caring for them the whole period of gestation, and vesting custodial rights after birth on the commissioning or intended parents. In this section, we review the legal and regulatory frameworks for surrogacy in the United Kingdom (U.K.), Israel and South Africa. The tested surrogacy rules and practices of these jurisdiction are hoped to provide guidance for making recommendations for the legal regulation of surrogacy in Nigeria.

United Kingdom (U.K.)

The need for the legal regulation of the use of technology in conception became a matter of national concern in England after the first ever test tube

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23 Oreoritse Tariemi, 'Ini Edo Speaks on Motherhood' <http://www.guardian.ng/life/ini-edo-speaks-on-motherhood/> accessed 19 February 2023; Victoria E deme, 'Ini Edo Confirms Surrogacy Rumours, open up about Past Miscarriages' <http://www.punchng.com/ini-edo-confirms-surrogacy-rumours-opens-up-about-past-miscarriages/%famp> accessed 19 February 2023.

24 A Adigun, 'I opted for Surrogacy because I had Couple of Miscarriages – Ini Edo' <http://www.tribuneonline.com/i-opted-for-surrogacy-because-i-had-couple-of-miscarriages> accessed 12 February 2024.

25 Commercial surrogacy is banned in such countries as Switzerland, Germany, France, Greece and Norway. See S Mohapatra, 'States of Confusion: Regulation of Surrogacy in the United States' in JD Rainhorn and S El Boudamoussi (eds.), *Commodification of the Human Body: A Cannibal Market* (Edition de la Fondation Maison de Sciences de l'Homme, 2015) 1.

baby Louise Brown was born in England in 1978.[26] Though the birth was widely celebrated as a major scientific breakthrough, it raised issues as to the adverse consequences of unregulated advances in science.[27] This need for regulation prompted Government to set up a Committee of Inquiry into Human Fertilization and Embryology (popularly known as the Warnock Committee, after its Chairperson Dame Mary Warnock) in July 1982.[28] The work of the Committee was to study emerging reproductive technologies and make policy recommendations to government regarding these technologies.

In its Report issued in 1984, the Committee recommended the continued use of IVF and artificial insemination for the treatment of infertility subject to regulation by a statutory licencing authority to be established by Government.[29] Such authority was proposed to regulate these treatment methods, especially the ethical implications of their use.[30] The Committee recommended the criminalisation of the activities of both profit and non-profit organisations that recruit women to act as surrogates.[31] It was also recommended that legislation be enacted that would expressly declare surrogacy agreements illegal contracts and therefore unenforceable.[32]

The Warnock Committee reasoned that surrogacy could easily give rise to circumstances in which the surrogate could be exploited by intermediaries or the infertile couple. It held the view that the dangers posed by surrogacy outweigh the benefits, 'even in compelling medical circumstances.'[33] The Committee concluded that surrogacy arrangements were morally objectionable, especially where they involved financial interests. It considered surrogacy as the use of an individual (the surrogate) as a means to an end.[34]

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26 New York Times, 'Woman Gives Birth to Baby Conceived Outside the Body', *N.Y. Times*, 26 July, 1978, at A1.

27 See Report of the Committee of Inquiry into Human Fertilization and Embryology, 1984. CMND, 9314, at 1. Hereinafter ['Warnock Report']. See also TA. Eaton, 'Comparative Responses to Surrogate Motherhood' (1986) 65 *NEB L. Review*, 686; MA Baggish, 'Surrogate Parenting: What We Can Learn from Our British Counterparts' (1988-1989) 39 *Case W. Res. L. Rev*., 217.

28 A Serratelli, 'Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum? (1993) *GW J. Int'l L & Econ.*, 633 at 637.

29 Warnock Report, (n 27) 1.2.

30 *Ibid*. at 13.3.

31 *Ibid*. at 8.18.

32 *Ibid*. at 8.19.

33 *Ibid*. at 8.17.

34 *Ibid*.

While agreeing that commercial surrogacy agreements were immoral, two dissenting members of the Committee proposed that surrogacy be allowed in the U.K. only as a last resort subject to regulation by the statutory authority recommended by the Committee in order to prevent abuses.[35] For the dissenters, surrogacy should only be allowed for the purpose of alleviating 'childlessness'.[36] This means that surrogacy should not be allowed for purposes other than realising the desires of infertile couples to have children. They are not to be resorted to for convenience, or for avoiding career disruption, or for facilitating a preferred lifestyle.

On 4 January, 1985 (barely six months after the Warnock Report was issued), Baby Cotton, a baby born out of a surrogacy arrangement, arrived. Baby Cotton was the product of a surrogacy arrangement involving Kim Cotton, a British and an American couple Mr and Mrs A. After birth, Kim Cotton abandoned the baby in the hospital before the Americans arrived to retrieve the baby for their custody. Mr. A then instituted proceedings in court praying that custody of Baby Cotton be given to him and Mrs A. In deciding the question of custody, the court overlooked the morality of the surrogacy agreement and ruled that because the genetic surrogate mother of the baby had voluntarily relinquished her rights over the baby, and because the Americans really wanted the baby and were found to be caring people adequately equipped to meet the needs of the child, custody of Baby Cotton be awarded to them. The court therefore placed the interest of the baby above all other considerations in determining custody. The court further granted the couple leave to take the child out of England.

The *Baby Cotton* case was regarded by many to be controversial and did outrage the morality of many in Britain. Pressure was, expectedly, mounted on Parliament to intervene and outlaw commercial surrogacy considered by many to be evil. In tandem with public opinion, Parliament reacted by passing the Surrogacy Arrangements Act, 1985 to stop the activities of agencies who engaged in the business of matching intending parents with 'rent-a-womb' women.

The Surrogacy Arrangements Act expressly prohibits and criminalises the arrangement of commercial surrogacies in the U.K. by organisations which do so for profit.[37] Section 1 of the Act defines 'surrogate mother' to include women who conceive through artificial insemination or through embryonic

35 *Ibid*. at 1, 5.
36 *Ibid*. at 88, para. 5.
37 See E Jackson, 'UK Law and International Commercial Surrogacy: 'the very antithesis of sensible'' (2016) 4(3) *Journal of Medical Law and Ethics*, 197-214.

insertion.[38] By this definition, surrogate mothers encompass women whose eggs are inseminated with the male gamete using reproductive technology, and those who conceive without having any genetic connection to the pregnancy. The Surrogacy Arrangements Act does not contain express provisions regarding the legality of non-commercial surrogacy. It rather provides that the Act 'applies to arrangements whether or not they are lawful and whether or not they are enforceable by or against any of the persons making them.'[39] Since commercial surrogacy is outlawed under the Act, this provision tends to suggest that some surrogacy arrangements (which must be non-commercial surrogacy), would be lawful in the U.K.

The closest the Act goes in providing for the legality of surrogacy arrangements in the U.K. is in section 2(1) of the Act. The section provides that no person shall, on a 'commercial basis' initiate, negotiate, offer or agree to negotiate or compile any information with a view to its use in making, or negotiating the making of surrogacy arrangements.' Any person who contraventions the provisions of section 2(1) of the Act is guilty of an offence.[40] It is, however, not a contravention of the Act in the case of a woman, who wishes to be a surrogate mother, to do any of those acts.[41] It is also not a contravention of the section for any person, with a view to a surrogate mother carrying a child for him, to engage in those acts.[42] In the same vein, a non-profit organisation does not contravene the section by doing any of those acts.

Under the Act, a person does an act on a commercial basis if any payment is received by himself or another in respect of that act, or he does it with a view to any payment being received by himself or another in respect of making or negotiating a surrogacy arrangement.[43] 'Payment' here does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother.[44] It would appear, therefore, that the Act is intended to render illegal, commercial surrogacy arranged by matching agencies that bring together and negotiate surrogacy arrangements between intending parents and surrogates for a fee, and not commercial surrogacy arranged by surrogates and intending parents themselves, or by non-profit organisations.

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38 Section 1(6) Surrogacy Arrangements Act.
39 *Ibid* section 1(9).
40 *Ibid* section 2(1).
41 *Ibid*. section 2(2)(a).
42 *Ibid* section 2(2)(b).
43 *Ibid* section 3(1).
44 *Ibid*.

This view is reinforced by section 3(1) of the Act which prohibits advertisements containing an indication (however expressed) that any person is willing to enter into a surrogacy arrangement or to negotiate or facilitate the making of a surrogacy arrangement. Or that any person is looking for a woman willing to become a surrogate mother or for persons wanting a woman to carry a child as a surrogate mother. Where a newspaper or periodical publishes such an advert in the United Kingdom, the editor or proprietor thereof is guilty of an offence.[45] The same applies to a person who distributes or causes to be distributed in the United Kingdom any newspaper or periodical, or electronic communication in which such advertisement is contained.[46]

Altruistic surrogacy is therefore permissible in the U.K. while commercial surrogacy is regulated. With regard to commercial surrogacy, while intending parents and surrogates may directly enter into surrogacy arrangements, surrogacy agencies and other intermediaries are prohibited from doing so. It could, therefore, be safely inferred that in the U.K. the law is concerned with the commercialisation of surrogacy for profit by persons and agencies that are neither intending parents nor surrogates. It is concerned with the public policy dimension of profit-making by intermediaries from the misfortune of infertile couples and women willing to rent their wombs for financial rewards.

Israel

It is estimated that fifteen percent of the population of Israel is infertile.[47] The implication is that quite a reasonable number of Israelis seek surrogates every year. Surrogacy in Israel is governed by the Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child) Law, 1996.[48] By that law, Israel became the first country to legalise surrogacy arrangements and to implement a state-controlled surrogacy in which every surrogacy arrangement must have state approval.[49] Israel's legalisation of surrogacy has been attributed to the country's pronatalist ideology and the reproductive aspirations of its citizens.[50] This pro-natalist ideology has itself been attributed to the Jewish religion's reproductive

45 *Ibid* section 3(2).
46 *Ibid* section 5(5).
47 J Hand, 'Surrogacy in Israel: A Model of Comprehensive Regulation of New Technologies' (2006) 4(2) *Santa Clara Journal of International Law*, 111.
48 The Law was passed by the Israeli Knesset on 7 March 1996.
49 See E Teman, 'Surrogacy in Israel' in ES Sills (eds), *Handbook of Gestational Surrogacy* (Cambridge University Press 2016) 165.
50 *Ibid*.

imperative, and the 'emotional needs of a of a people in a permanent war society.'[51]

Under that law, surrogacy is stringently regulated by an Approval Committee which comprises experts in law, ethics, medicine and religion.[52] All arrangements for surrogacy parenting in Israel must receive the imprimatur of the Approval Committee. Under the Law, only heterogeneous couples are permitted to commission a surrogate to gestate a pregnancy for them. Even among heterogeneous couples, the Approval Committee reserves the right to withhold approval on grounds of age or the number of children a couple already has.[53] The surrogate must be an unmarried woman who must already have her own children. In addition, she must share the religion as the intended mother but she must not be her relative. In 2008, the Knesset amended the law to include single mothers to the list of intended parents.[54] As a result, only man-and-woman couples and single women may get a surrogate to have a baby for them. These conditions imposed under Israeli law limit the availability of surrogates in Israel, compelling many intending parents to seek surrogates internationally.[55]

Uniquely, the Law also regulates the compensation surrogates are to receive which ranges between US$45,000 to US$65,000. In fact, one of the main objects of the Approving Committee is to prevent commercialisation of the procedure. Money paid is strictly intended to cover expenses incurred by the surrogate and compensation for suffering and loss of earnings.[56] After the child is born, the intended parents must apply for and obtain a paternity order in respect of the child. The order recognises the intended parents as the sole parents of the child. By so doing, it also severs every legal connection between the child and the surrogate mother, making it impossible for the surrogate to hold unto the child after it is born.

Though Israel has a considerable population of same-sex couples, Israeli law does not recognise them as 'couples' within the meaning given to the word under Israeli law.[57] As a result, surrogacy arrangements by such

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51 *Ibid*.

52 S Carmel. 'Halakha and Patriarchal Motherhood: An Anatomy of the New Israeli Surrogacy Law' (1998) 32 (1) *Israel Law Review*, 51-80.

53 R Zafran and D Hacker, 'Who Will Safeguard Transnational Surrogates' Interests? Lessons from the Israeli Case Study' (2019) 44 *Law & Soc. Inquiry*, 1145.

54 Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child) Law, 5778-2018, SH No. 2748 p. 941 (as amended).

55 Zafran and Hacker (n 95) 1145.

56 *Ibid*. at 1143.

57 Y Cohen, The Development of the Issues of Same-Sex Couples Under Israeli Law (2016) 30 *BUY J. Pub. L.*, 177-178.

couples are legally frowned at. In recent time, there has been strong advocacy for the legal recognition of same-sex partners as 'couples'. It has been contended that the exclusivity enjoyed by heterogeneous couples with respect to surrogacy made Israeli surrogacy law discriminatory against LGBTQ couples.[58] In 2015, a gay couple supported by LGBTQ advocacy groups brought a petition before an Israeli court praying the court to declare Israeli surrogacy law discriminatory. On 27 February, 2020 the Israeli Supreme Court delivered judgement in the petition ruling that the definition of the word in a gendered language under Israeli surrogacy law which recognises intended parents as 'a man and a woman who are a couple' was discriminatory.[59] The court ordered that 'intended parents', for the purpose of surrogacy, should include two men or two women also. The court further ruled that, by excluding single men and gay couples from persons who could enter into surrogacy agreements, Israel's surrogacy law violated the constitutional right to equality. It then ordered the Knesset to amend the surrogacy law within one year to include gay men as potential intended parents.[60]

South Africa

South Africa is one of the few African countries that have a legal framework for surrogacy parenting. Chapter 19 of the South African Children's Law, 2005[61] recognises and regulates surrogacy in the Republic of South Africa. Parties to a surrogacy arrangement are required under the Act to enter into a surrogacy agreement. Section 1 of the Act defines a surrogacy agreement as:

> an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a

[58] Y Ilany and N Ilany, 'The LGBT Community in Israel Access to the Surrogacy Procedure and Legal Right to Equality, Family Life and Parenthood' (2021) 1 *RPEiS*, 86-87; R Amichai, 'Israel's LGBTQ Community Protests for Fathers' Surrogacy Rights' <http://www.reuters.com/article/idUSKBN1KC0BL/> accessed 13 February 2024.

[59] HCJ 781/15 *Arad-Pinkas v. Committee for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements* (Agreement Approval & Status of the Newborn Child Law) 5756-1996 (Feb. 27, 2020).

[60] *Ibid*.

[61] Act 38 of 2005.

> reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

As a legal requirement, the surrogacy agreement must be in writing and signed by the commissioning parent(s) and the surrogate mother. Also, one of the commissioning parents must be domiciled in South Africa at the when the agreement is entered into. Upon execution of the surrogacy agreement, it must be confirmed by the High Court for to be valid.[62] Where the commissioning parent or the surrogate mother is married or is in a permanent relationship, the court may require the consent of the spouse to the arrangement.[63] This is to ensure that the spouse is aware of the arrangement by the other spouse to gestate a child outside the marriage or permanent relationship and gives his approval.

In South Africa commercial surrogacy is expressly prohibited.[64] To this extent, the only compensation the surrogate mother is allowed to receive is compensation as regards direct expenses of artificial insemination, pregnancy, birth of the child, loss of earnings and insurance taken out in respect of the pregnancy.[65] Gestational surrogacy is, therefore, the legally recognised type of surrogacy in South Africa. Though this is not expressly provided under the Children's Act, it is deducible from section 294 of the Act which provides that the gamete of at least one of the commissioning parents must be used in the assisted conception.

Because the south African law prohibits commercial surrogacy, section 301 prohibits anyone to give, agree to give or receive any remuneration with respect to a surrogate arrangement otherwise than as allowed under the Children's Act. Contravention of this provision is an offence punishable with a fine or imprisonment of not less than ten years, or both fine and imprisonment.[66] The prohibition on remuneration was affirmed by the South African High Court in *Ex Parte* HP.[67] Here, HP and JP (couple) had entered into a surrogacy agreement which was confirmed by the court on 19 November 2013 from which a boy had been born to them. They later wanted to have another child through surrogacy but the first surrogate mother was not available. They approached a Ms Lee-Ann Strydom who describes herself as a surrogacy consultant for assistance. Ms Strydom

62 Section 292 Children's Act.
63 *Ibid* section 293.
64 Section 301 Children's Act.
65 *Ibid* section 301(2).
66 *Ibid* section 305(6) & (7).
67 (2017) 2 All SA 171 (GP).

connected the couple to SW, a surrogate mother, and invoiced them in the sum of R 5000 which she stated did not include introduction fee that might be paid to the surrogate mother. It was held that the surrogacy facilitation agreement signed between the couple and Ms Strydom was unlawful and unenforceable.

Importantly, South African surrogacy law provides for measures that protect the surrogate mother from exploitation. A surrogate mother has the right to terminate the surrogate motherhood agreement within six months of giving birth to the child by filing a notice in court to that effect.[68] She can also terminate the agreement before delivery provided that she informed the commissioning parents. Upon such termination, the surrogate mother incurs no liability to the commissioning parents.[69] Where the surrogate mother has no spouse, the responsibility of caring for the child will be shared between the surrogate mother and the commissioning father.[70]

Under section 297(1) of the Children's Act, after birth, the child born from the surrogacy arrangement becomes a child of the commissioning parents. Unless the surrogate mother terminates the surrogacy agreement, she is under a duty to hand over the child to the commissioning parents within a reasonable time after birth.[71] This helps to protect the right of the commissioning parents to have the child born and acquire the status of its parents.[72] This means that after the child is born, the commissioning parents have full parental responsibility.

The Issues in Nigeria

As earlier noted, there is yet no legal regime for governing ART, including surrogacy, in Nigeria. Efforts made in the past to enact laws at the federal level for regulating the use of ART in the country did not succeed.[73] In the absence of a legal regime, doctors and hospitals involved in the use of ART to assist conception are said to do so under the U.K. Human Fertilisation

68 Section 298(1) Children's Act.

69 *Ibid* section 300.

70 *Ibid* section 292; A Louw, 'Chapter 19 Surrogate Motherhood (ss 292-303)' in CJ Davel and A Skelton (eds), *Commentary on Children's Act* (Juta & Co., 2007) 8.

71 Section 297(1) Children's Act.

72 OS Adelakun, 'The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges' (2018) 18 *African Human Rights Law Journal*, 613.

73 In 2012 a bill was introduced in the National Assembly for an Act to establish the Nigerian Assisted Reproductive Authority. The Authority sought to be established under the bill was intended to regulate assisted reproduction in Nigeria. The bill failed, however, to pass.

and Embryology Authority Guidelines.[74] Adelakun has justified reliance on this U.K. Guideline in the practice of assisted reproduction on the ground that Nigerian law is grounded in English law and as such where there is a lacuna in Nigerian law resort could be made to English law.[75] It is submitted that fertility clinics in Nigeria cannot validly rely on the U.K. Guideline as basis for assisted reproduction because it has no applicability in Nigeria.

With the growing resort to surrogacy in Nigeria by infertile couples and single persons who wish to attain parenthood through surrogacy, the existence of a legal and regulatory framework becomes imperative. This is more so when regard is had to certain challenges that are likely to arise if the practice of surrogacy becomes rampant in the country without any form of legal and regulatory control. Firstly, being a developing country where poverty rate is high, unregulated surrogacy could result in abuses and exploitation. Many a poor, young Nigerian women are very likely to become professional rent-a-womb ladies offering their services to whoever could pay for it. Without regulation, there could be no limit to the number of times a woman could decide to be a surrogate. Such situation could make the baby factory[76] problem in the country child's play. These women many of whom could become surrogate mothers just for so much as for survival could easily be exploited by commissioning individuals who may pay them peanuts for their trouble. Due to poverty, too, women willing to be surrogates may act as such for as many times as there are commissioning parents willing to pay, imperilling their health.

Secondly, with the high level of illiteracy in Nigeria, many women who would become willing surrogates may not know the health implications of conceiving and gestating a pregnancy to term. As a result, they may not seek and receive appropriate pre-natal and post-natal care, thus endangering their lives. Aside from endangering their lives, they could also imperil their reproductive health in the process and become incapable of further procreation. Many such women would even proceed to act as surrogates without a surrogacy agreement.

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74 See, generally, JO Fadare and AA Adeniyi, 'Ethical Issues in Newer Assisted Reproductive Technologies: A View from Nigeria' (2015) 18 *Nigerian Journal of Clinical Practice*.

75 Adelakun (n 72) 613.

76 'Baby factory' is a term used to describe a wide range of criminal activities carried out for the purpose of providing babies for people who want them, including forced impregnation of young women, sale of babies and illegal adoptions. See S *Huntley, Phenomenon of 'baby factories' in Nigeria as a new Trend in Human Trafficking* (International Crime Database, 2013) 3.

Thirdly, in the absence of a legal and regulatory framework for surrogacy arrangements in Nigeria, surrogacy may upset prevailing social, cultural and religious conditions. Persons within prohibited degrees of consanguinity and affinity could become parties to a surrogacy agreement. Married women could accept to become surrogate mothers with or without spousal consent. Many single persons could become parents outside the sacred institution of marriage. Spouses of relationships that are not heterogenous could also have children of the opposite sex through surrogates.

Fourthly, in the absence of laws governing surrogacy in Nigeria, commissioning parents could easily become the victims of blackmail.[77] Apart from a few cases, surrogacy arrangements in Nigeria are usually made and concluded in secrecy because of its ethical, social, cultural and religious trappings.[78] Due to this, many people do not even discuss surrogacy openly.[79] This is because due to inadequate understanding of the nature of surrogacy, many associate it with and regard it as part of the illegal 'baby factory' business.[80] Without legal regulation, irresponsible surrogate mothers aware of the secrecy that surrounded the transaction could turn the surrogacy transaction into an to opportunity to blackmail commissioning parents.

Conclusion/Recommendations

This study has examined the emerging practice of surrogacy in Nigeria. It has shown that there is no legal framework for regulating the practice in Nigeria in some more advanced jurisdictions. In the absence of a legal framework for the regulation of surrogacy in Nigeria several problems could arise as the practice grows as more and more infertile couples and unmarried people seek to achieve parenthood through surrogacy. Due to poverty and illiteracy, unregulated surrogacy could create socio-cultural challenges for the Nigerian society. It could also portend danger to the health and well-being of poor women who may try to escape poverty through commercial surrogacy.

Due to these challenges which the emerging practice of surrogacy could give rise to in Nigeria, possibilities, the following recommendations are made for the safe and beneficial practise of this assisted reproductive

77 Adelakun (n 72) 619.

78 OJ Umeora, UN Nzerem and JN Eje, 'What Drives Grand Multiparous Women in Rural Nigeria to Seek Treatment for Infertility' (2013) 12 *African Journal of Medical and Health Sciences*, 15.

79 *Ibid*.

80 OBA van den Akker, *Surrogate Motherhood Families* (Palgrave McMillan 2017) 218.

process in Nigeria:

With the rising number of Nigerians resorting to surrogacy, there is an urgent need for a national legislation on surrogacy that would regulate its practice by all stakeholders. Such national legislation should be domesticated in all states of the federation to ensure uniformity. A uniform legislation on surrogacy will obviate the current challenge in the United States where the fifty states of the federation have their variegated laws on surrogacy.[81] This rainbow of legislations means that a surrogate mother must be careful not to have her baby delivered in a state the law of which does not permit surrogacy after conceiving in a surrogacy-friendly state.

Like in Israel, surrogacy in Nigeria should be state-regulated. An approving authority as in Israel should be created under every state's surrogacy law with responsibility for approving, on a case-by-case basis, applications by married couples for surrogacy commissioning. Applicants should be married couples with evidence of inability or difficulty in conceiving naturally or in carrying pregnancy to term. The proposed law should outlaw surrogacy by unmarried couples, single men and persons in LGBTQ unions. With same-sex marriage prohibited under Nigerian law, LGBTQ partners cannot be permitted to participate in surrogacy.

Such legislation should forbid commercial surrogacy in Nigeria because given the high poverty and illiteracy levels in the country, there are not few women who would jump on surrogacy as a way out of poverty. Fees payable to surrogates under such law should be such that adequately cater for antenatal and post-natal care, inconveniences and loss of earning as under the Israeli surrogacy law. Parties to a surrogate arrangement should not be at large to agree to compensation payable to the surrogate mother to avoid indirect commercialisation. The Approving Authority should have the final say on the compensation payable in each case not exceeding a statutorily stipulated maximum.

To avoid an indirect approval of the baby factory business, all forms of consultancy other for the purpose of matching intending parents with surrogates for a fee are to be prohibited under any surrogacy law in Nigeria. Since this has given rise to problems in the U.K., a developed society (where, as seen above, it has been prohibited), it is certain to become a guise for operating the obnoxious baby factories in the country. Intending

[81] See K Drabiak and others, 'Ethics, Law and Commercial Surrogacy: A Call for Uniformity (2007) 35 *J. L. Med & Ethics*, 300, 301; M Yehezkel, 'In Defense of Surrogacy Agreements: A Modern Contract Law Perspective (2014) 20 *William and Mary Journal of Women and the Law*, 423.

parents and women willing to act as surrogates should register with the approving authority to be created under every state's surrogacy legislation. The approving authority shall be the only agency with power to match intending parents willing surrogates.

The law should also require mandatorily the execution of a surrogacy agreement for every surrogacy arrangement which must be approved by the authority before execution. The authority is to ensure that the terms of such agreement are neither exploitative nor oppressive against the surrogate. Artificial insemination of the surrogate would only proceed after the Authority has approved the surrogacy agreement and not before. Unlike under the South African Children's Law where the surrogate could walk away from the surrogacy agreement and become the legal parent of the child conceived or born out of the surrogacy arrangement, a surrogate under Nigerian surrogacy law should not be able to walk away from the agreement where the commissioning parents have, to the satisfaction of the Authority, performed their obligations under the surrogacy agreement.

The proposed surrogacy law should ensure that, due to poverty, willing surrogates do not compromise their health through surrogacy. In order to make as much money as possible, willing surrogates whose ages may not be medically suitable for child-bearing may want to participate, while some might want to participate multiple times. This could be prevented by providing under the law, an age bracket outside of which a woman must not be approved by the Authority to act as a surrogate and the number of times a woman is permitted to so act. This is without prejudice to the power of the Authority to deny approval where, despite the age submitted by a willing surrogate, the Authority is of the opinion that the she is not suitable for surrogacy.

Finally, the possibility of surrogates becoming attached to the baby after birth and refusing to hand it over to the commissioning parents cannot be ruled out. As seen above, this has happened in the United States in *Re Baby M*.[82] Here, husband and wife, Mr. and Mrs. Stern could not have their own children and decided to have them through a traditional surrogacy arrangement. For a fee of $10,000 a Mrs. Whitehead agreed to be artificially inseminated with Mr. Stern's semen. She was to carry the resulting pregnancy to term, and after birth surrender it to the Sterns. After the baby was born, Whitehead became emotionally attached the unborn baby and had a change of heart as the pregnancy progressed. After birth, she went into hiding with baby M and a legal battle ensued regarding custodial rights over

[82] 2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

baby M. A New Jersey court decided that the Sterns would have custody of baby M, while Whitehead was entitled to visitation. There is no doubt that this outcome is a recipe for trouble.

To prevent this from happening in Nigeria, the future surrogacy law suggested in this paper should require the commissioning parents to apply to court after the child is born for an order affirming that they, and no other, are the legal parents of the child. This is the case under the California Family Code, the surrogacy legislation of that state of the United States.[83] In line with the Code, in the Californian case of *Johnson v. Calvert*,[84] it was held that a woman who enters into a surrogacy agreement to gestate a pregnancy for intending parents has no intention of procreating for herself and as such cannot be the legal parent of the child born.

[83] Section 7960 (e).
[84] 5 Cal. 4th 84 (1993).