

## FRAMEWORK ON SURROGACY PRACTICE IN PARTIAL AID TO CHALLENGES OF INFERTILITY IN NIGERIA

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### Abstract

*Surrogacy is the situation whereby a person known as surrogate mother agrees to carry pregnancy for another woman who is generally believed to be infertile. The term surrogacy is the practice where a woman carries pregnancy and gives birth to a child for another woman or couple. While Surrogacy has been legalized in many countries as a panacea to infertility, the use of surrogacy in Nigeria remains unregulated. This paper examined the historical development of surrogacy. It further examined the existing legal frameworks that supported the practice of surrogacy and compared the practice of surrogacy in other jurisdiction with Nigeria where the practice is largely unregulated. The paper adopted doctrinal approach. It thus recommended establish legal frameworks that chart a course for practice of surrogacy where rights of the surrogate mothers is protected. It further advocated for establishment of an agency saddled with the responsibility of monitoring compliance with the provisions of the legal framework. Although the mere existence of laws regulating surrogacy does not guarantee widespread compliance, these laws can serve as a reference point for the protection of women's rights.*

**Keywords: Assisted Reproductive System, Childless Couples, Feminism, Infertility, Surrogacy.**

### 1. Introduction

Marriage as an institution is regarded as important for a man and woman in a typical African society. One of the essences of a marriage is to procreate and it is generally believed that this procreation must be done within the ambit of marriage which is the acceptable norms. Surrogacy is one of the means of procreation employed by some couples for several reasons and one of which is infertility. Nigeria has no legal framework on surrogacy. The semblance Nigeria has in regulating surrogacy practice is the Assisted Reproductive Technology<sup>1</sup>

Simply put, surrogacy is the practice whereby a woman (regarded as a surrogate mother) agrees to carry a baby for another couple because of the inability of the wife to procreate. The term "surrogate" simply means to "appointed to act in replacement of."<sup>2</sup> Surrogacy has attracted global attention with an effort to formulate international model law that ensures best practices in surrogacy.<sup>3</sup> In some nations, altruistic surrogacy is permitted while commercial surrogacy is

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<sup>1</sup> Assisted Reproductive Technology (Regulation) Bill 2016.

<sup>2</sup> Narender Kumar & Jyotsana Choudhary. The Concept of Surrogacy: Historical Origins and Contemporary Developments. (2024) 4(2) *International Journal of Civil Law and Legal Research*; 244.

<sup>3</sup> O.S. Adelokun. "The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges" (2018) 18 *African Human Rights Law Journal*; 605.

strongly frowned at.<sup>4</sup> Such countries include Germany, France, Spain, United Kingdom, New Zealand etc. Some countries are known as surrogate-friendly as they allow the practice of surrogacy, while other nations such as Saudi Arabia, Portugal, Turkey, Nigeria, have no legal framework on surrogacy.

Nigeria as a multi-ethnicity society places emphasis on marriage and procreation. This is evident in the aspersion cast on girl child that have child out of wedlock. Children are seen as security in matrimony and they are widely celebrated as the pride of womanhood and a sign of fertility. The article analyses surrogacy under family law in Nigeria and examines the existing legal framework on surrogacy. It further identifies several ways in which surrogate is being practiced in Nigeria,

## 2. The History, Nature and Scope of Surrogacy.

Surrogate parenthood is traceable to the biblical account of the relationship between Rachael and her slave named Zipah where Rachael sought the consent of her slave to give birth to children for her because of her bareness at that time.<sup>5</sup> The first recorded case<sup>6</sup> of assisted reproduction through surrogacy was contested in the English courts in 1970 and this development has generated several debates on surrogacy as a means of reproduction<sup>7</sup>.

Surrogacy is in two forms namely: genetic (partial) or gestational (full)<sup>8</sup>. Genetic surrogacy is a situation whereby the male parent impregnates the surrogate mother through artificial insemination or sexual intercourse<sup>9</sup>, while gestational surrogacy is a situation whereby the male parent fertilizes an egg from the female parent and the fertilized egg is placed in the womb of the surrogate mother who will deliver the baby. This process is known as In Vitro Fertilization (IVF)<sup>10</sup>. Surrogacy can also be classified as altruistic and commercial. It is altruistic where it is done out of good will without any form of financial compensation and it is commercial where the sole aim of the surrogate mother is to make profit from the transaction.

The acceptability of surrogacy in many communities is predicated on the exploitation of women who serve as surrogate mothers and the commercialization of babies<sup>11</sup>. This led to regulation of surrogate transaction. While some countries expressly prohibit surrogacy,<sup>12</sup> some countries allow all forms of surrogacy, while other countries leave surrogacy completely

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<sup>4</sup>Hannah Rahim. Regulating International Commercial Surrogacy. (2024) *Health Law Policy, Biotechnology and Bioethics*.

<sup>5</sup> Genesis 16: 1-16 and Genesis 30: 1-13.11

<sup>6</sup> A v C (1978) 8 Fam Law 170 [1985] FLR 445.

<sup>7</sup> K Horsey & S Sheldon 'Still hazy after all these years: The law regulating surrogacy' (2012) 20 *Medical Law Review*, 67- 68.

<sup>8</sup> HV MacLachlan 'Surrogate Motherhood: Beyond the Warnock and the Brazier reports' (2005) 11 *Human Reproduction and Genetic Ethics*, 3.

<sup>9</sup>Blauwhoff & Frohn. P.215

<sup>10</sup>H. V. MacLachlan. Surrogate Motherhood: Beyond the Warnock and the Brazier Reports. (2005) 11 *Human Reproduction and Genetic Ethics*; 3.

<sup>11</sup> DR Bromham 'Surrogacy: Ethical, legal and social aspects' (1995) 12 *Journal of Assisted Reproduction and Genetics* 509 510

<sup>12</sup>Such countries as France and Switzerland.

unregulated.<sup>13</sup> In societies where surrogacy is allowed the consent of the surrogate mother is a parameter to determine the legal and ethical compliance.<sup>14</sup>

In Nigeria, surrogacy is unregulated due to lack of adequate legal framework. It is worthy of note that Nigeria is yet to make any policy statement on surrogacy.

While Murray and Roscoe refuted long standing claims that homosexuality in Africa is nonexistent, incidental, or the result of western influences,<sup>15</sup> the practice of traditional Surrogate which involves woman to woman marriages in some part of the country such as Igbo land, Ishan,<sup>16</sup> and some other customs did not involve any sexual intercourse between the women. The essence is just for procreation.

Therefore, women to women marriages were not in the real sense contracted due to sexual emotions, attractions or amorous satisfaction between the couple, but with the sole motive of preserving one's lineage, traditions, inheritance, and chieftaincy from extinction.

### 2.1. Framework on Surrogacy in Nigeria

While people continue to engage in act of surrogacy, it is worthy of note that surrogacy does not enjoy any legal framework. It is not clear if surrogacy will be regarded as a concurrent list as it is not contemplated in the Constitution. Be that it is may, it is important that a national stance and policy be made uniform considering the effect of surrogacy on national life particularly as it affects the life and right of a child.

The practice of surrogacy is not criminalized in any of our laws. It is largely based on the principle of contract that parties are bound by the terms of agreement they freely entered into. The lack of regulations may pose serious problems in the area of intestacy, estate and matrimonial issues. Also, medical professional ethics may be breached and abuse at the detriment of an innocent party where surrogacy is allowed without any regulations.

Several legal issues will be raised where surrogacy is unregulated. One of the legal issues is how to legally define the parentage of a child as well as the contractual rights and duties of parties to surrogate agreement. Presently, no court in Nigeria has been afforded the opportunity to make reported judicial pronouncement on the nature of surrogacy agreement as at the time of conducting this research.

Since there are no regulations on the practice of surrogacy in Nigeria, most clinics that engages in surrogacy in Nigeria predicate their practice on the Human Fertilization and Embryology Authority Guidelines of the United Kingdom.<sup>17</sup> However, the Nigerian Law Reform Commission has recommended that any child born to a woman as a result of artificial insemination or implantation of an embryo in the body of a woman while she is in a marriage must be regarded as a child of the husband<sup>18</sup>. The Commission further recommends that where a child is born under a surrogacy agreement, the commissioning parents should formally adopt

<sup>13</sup>A Finkelstein et al 'Surrogacy law and policy in the USL A national conversation informed by global law making' (2016) *Report of the Columbia Law School Sexuality and Gender Law Clinic*; 11

<sup>14</sup>Finkelstein page 25

<sup>15</sup> O. S. Murray and Roscoe W., (eds.) *Boy-wives and Female Husbands: Studies of African Homosexuality*

<sup>16</sup> Helena Odigie v Iyare Aika, Vol. 85 *Nig. Law Bulletin*; 5

<sup>17</sup>J. O. Fadare & A. A. Adeniyi 'Ethical Issues in Newer Assisted Reproductive Technologies: A View from Nigeria' (2015) 18 *Nigerian Journal of Clinical Practice*, S57 S59.

<sup>18</sup> Law Reform Commission 'Reform of Nigerian family law' III, 15.

the child under the relevant laws (i.e Child's Right Act), even if the child is the biological child (gene) of the commissioning parents<sup>19</sup>. Since adoption is provided for under the Child's Right Act, the rationale behind this is to prevent the surrogate mother from returning to claim the child<sup>20</sup> having been adopted under the relevant laws.

In 2014, the National Health Act<sup>21</sup> was enacted. Section 10 prohibits assisted reproductive technology by providing that:

- (1) A person shall not:
  - (a) manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; or
  - (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.

It appears that section 10(1)(a) of the Act prohibited Assisted Reproductive Technology (ART). However, several assisted reproductive technology practices, such as zygote intra-fallopian transfer (*in vitro* fertilisation) and gamete intra-fallopian transfers, are widely practised in major hospitals in Nigeria, including the National Hospital, without any penalty.

### 2.3 Protocols and Guidelines for Managing Surrogate

Infertility clinics that offer surrogacy have protocols and guidelines that regulate surrogacy. Ideally, persons who want to engage in surrogacy should have the following essential characteristics:

- a. Be married or in a suitable relationship and relatively young.
- b. Should be less than 38 years old to minimize the obstetric risk to the host and her family.
- c. Should at least have one previous live birth without complications.
- d. The surrogate should not have habits of smoking, alcohol, illicit drugs or medical history of diabetes, Rhesus antibodies that could jeopardize health of the fetus.
- e. The surrogate womb is evaluated with ultrasound scan or Hysteroscopy. A psychological evaluation of the surrogate is also essential.

The genetic woman, genetic couple, female host and host couple must be screened before surrogate treatment. The genetic woman may have blood tests and ultrasound scan to assess her ovaries and ovarian function. Also, Rhesus, HIV, Hepatitis screening should be carried out before treatment.

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<sup>19</sup>Law Reform Commission

<sup>20</sup> M Attah Family Welfare Law in Nigeria (2016) 215

<sup>21</sup> National Health Act 8 of 2014.

It is the responsibility of the genetic couples to find their own host. The surrogate can be known or anonymous. Known surrogates can be relatives such as sisters or friends. Anonymous surrogates can be arranged privately by fertility clinic or agencies known to the fertility clinics.

### 3. Challenges of surrogacy in Nigeria

There are several ethical, cultural, social and legal issues surrounding surrogacy in Nigeria. Surrogacy is not an issue that is usually discussed publicly in Nigeria due to the cultural and social perceptions surrounding infertility<sup>22</sup>. However, according to *PM News*, young ladies across Nigeria advertise their availability as surrogate mothers by registering on the internet<sup>23</sup>.

The legal issue on surrogacy agreement in Nigeria bothers on the legal parent of the child, status of parties concerned and the validity of the surrogacy agreement itself since there is no legal framework supporting it. While several countries have taken positions on surrogacy, by prohibiting, allowing without commercial value or fully allowing it with commercial value, Nigeria is yet to take a legal standpoint on the issue.<sup>24</sup> Thus, the lack of acknowledgment of the practice of surrogacy in Nigeria has led to a lack of regulation of the practice which leaves surrogate mothers vulnerable to exploitation and commissioning parents vulnerable to blackmail.

There are several abuses relating to the practice of unregulated surrogacy in Nigeria. One Motunrayo Joel was reported to have posed as a young woman interested in selling her ova, and she recounted how several fertility clinics in Nigeria harvested ova and paid the donors.<sup>25</sup> She reported the high rate at which Nigerian ladies sell their eggs at various fertility clinics. The report revealed that these women were not properly counselled on the health risks involved in donating eggs, especially in cases of recurrent donation.

Increase in 'baby factories' is linked to surrogacy and this has heightened the level of stigma attached to surrogacy as an alternative of becoming a parent. It has been noted that the prevalence of baby factories in Nigeria is for two reasons namely: the conviction of teenage girls to give up their unwanted babies for pecuniary gain in order to avoid social stigma; and the need for infertile couples to fulfill social obligations by having a baby<sup>26</sup>. Some of the babies from these baby factories are trafficked for the purpose of international adoption or used for rituals<sup>27</sup>.

The increased patronage of baby factories by infertile couples could be attributed to the social stigma associated with legal adoption and surrogacy in Nigeria<sup>28</sup>. Makinde & Ors<sup>29</sup> contend that the rapid increase in baby factory operations in Nigeria is a threat to the social acceptance of surrogacy in the country as many might be confused as to the difference between baby

<sup>22</sup>Umeora, Surrogacy in Nigeria. *African Journal of Medical and Health sciences*/july-december/vol 13 106.

<sup>23</sup> www.surrogatefinder.com (accessed 26 June 2017).

<sup>24</sup>Umeora et al page107

<sup>25</sup> ibid.

<sup>26</sup> O. A Makinde et al 'Baby factories taint surrogacy in Nigeria' (2015) *Reproductive Bio-Medicine Online* 1 doi: 10.1016/j.rbmo.2015.10.001

<sup>27</sup>Makinde et al P. 2

<sup>28</sup> O. A Ojelabi, P Osamor & B. E Owumi 'Policies and practices of child adoption in Nigeria: A review paper' (2015) 6 *Mediterranean Journal of Social Sciences*; 757

<sup>29</sup>Makinde et al 3

factories and surrogacy<sup>30</sup>. It appears that in the case of Nigerian baby factories, while some females give their free consent, others, especially teenage girls, are coerced or forced against their wishes to be surrogate mothers<sup>31</sup>.

With the shift of surrogate motherhood to developing countries where surrogacy is poorly or hardly regulated,<sup>32</sup> 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. This necessitates the need to have laws and policies that will protect the rights of parties to surrogate agreements as well as sound regulations. Before a surrogacy agreement is executed, there should be a sensitization and enlightenment for both the surrogate mother and the commissioning parents where all parties are informed of their rights and responsibilities.

In Nigeria, where only two parents are recognized as parents to a child<sup>33</sup>, a child born of full surrogacy is likely to face the challenge of determining the status of his or her parents, especially where all three parents involved decide to claim parentage of the child. As such, the best interest of such a child is paramount. Since a child could be genetically or gestational 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 CRC<sup>34</sup>.

### **3.2 The Legal spectrum of surrogacy and Parental Rights**

Although contracts and agreements of surrogacy are not binding in law, most infertility clinics always assist in obtaining written consent from both parties before administering their treatment. One of the challenges of surrogacy is that both parties may renege from the agreement with little or no consequences. Despite this, the surrogate mother cannot be compelled to hand over the baby against her wish. Similarly, if the commissioning couple decides to reject the child, it remains the responsibility of the surrogate.

Couples who intended to engage in surrogacy must be fully abreast of the possibly relationship of the child and the surrogate mother. Another legal issue in surrogacy is the possible outcome of the pregnancy which remains unpredictable. In medical ethics, it is only the pregnant woman (surrogate mother) that can give her consent for termination of the pregnancy in the event an abnormality is discovered in the fetus and this may affect the genetic couple's interest adversely.

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<sup>30</sup> R Omokri 'Reno Omokri breaks silence, wants "baby factories" allowed' Premium Times 9 August 2015 <http://www.premiumtimesng.com/news/headlines/188066-reno-omokri-breaks-silence-wants-baby-factories-allowed.html> (accessed 29 June 2017)

<sup>31</sup>Makinde et al. P. 4

<sup>32</sup> M Goodwin 'Reproducing hierarchy in commercial intimacy' (2013) 88 *Indiana Law Journal*; 1290- 1293

<sup>33</sup> The Matrimonial Causes Act, 1970 on custody and maintenance of a child refers to either the father or mother of a child. There is no law in Nigeria that recognises the possibility of a third parent in the concept of surrogacy, except adoptive or foster parents

<sup>34</sup>Art 7(1) gives a child the right to know and be cared for by his or her parents, while art 8 enjoins state parties to respect the right of a child to preserve his or her identity, including family relations, without interference.

### 3.2.1 The Irony of the Perks of an Unregulated Artificial Reproductive Technology System in Nigeria

Pressure from society on childbearing pushes many persons to seek assisted reproduction alternatives. Yet, reports of substandard services to couples seeking ART are being given, with some not only disappointed by failed outcomes but that they end up having serious health concerns relating to the procedures. Other unscrupulous persons pay huge amounts to get young, and in many cases; underage girls, to carry their unborn babies. Some simply buy these babies from the girls under the arrangement of fraudulent ART centres. In the absence of any regulatory law, institution, or ART body to check unwholesome practices, these clinics and persons manipulate regulatory and ethical loopholes and take advantage of the current system to avoid liability or punishments. Furthermore, the uncontrolled system shows poor management of the number of times a man or woman donates gamete. This uncontrolled environment increases chances of unsuspecting incestuous marriages and spread of diseases<sup>35</sup>.

Many ART clinics benefitting from the unregulated environment, conspire with middlemen and agents to defraud vulnerable donors and recipients. Donors are under-compensated, and recipients are over-charged. Some connive with medical professionals to manipulate surrogates and donors for commercial babies. The Nigerian Supreme Court in *Akalazu v The State*,<sup>36</sup> stated that the offence of conspiracy is the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. It is a unique offence in the sense that it is usually started and completed behind closed doors and is hardly ever capable of being proved by direct evidence. Jauro JSC stated that the element of the offence of conspiracy lie in the meeting of the minds of the conspirators to do an unlawful act or to do a lawful act by unlawful means<sup>37</sup>. Unscrupulous health personnel conspire to feed off the vulnerable infertile man, woman or couple who are often desperate and do not possess all the necessary information concerning the endeavour.

In light of modern medical practice and professional medical negligence, while there are regulations and ART laws in the United Kingdom, South Africa, and Australia, quacks, unregistered assisted reproduction clinics, criminals and those profiting from an unregulated ART system continue to support a disregard for legislation to regulate MAR and ART use in Nigeria<sup>38</sup>. Wide abuse of powers offices, knowledge, and practice go unnoticed and unchecked even where the facts speak for themselves. Taking undue advantage of the current system is unprofessional for medical practitioners, but this ethical issue also comes from donors, recipients, and society. Children are raised in a communal manner in Nigeria, and it is not uncommon for grandparents to raise children as they often bring economic stability, parental responsibility, and maturity to the family unit. With the absence of legal regulation, elderly women and people with illnesses engage in ART use in other to raise their own children. The is seen across many states in Nigeria, with testimonies of women in their 50s, 60s, 70s still bearing children for their family because they can afford the services. It is reasoned that the family that surrounds the woman will help her raise the child as she would have confirmed her womanhood.

<sup>35</sup>Malami E, *The Law of Tort* (2nd edn, Princeton Publishing Co, 2013) 363; This Day Editorial (36); 45.

<sup>36</sup> [2022] 13 NWLR (Pt 1848) 453 at 481.

<sup>37</sup> *ibid*, 481; *Sani v State* [2021] 5 NWLR (Pt 1770) 502 at 528

<sup>38</sup>*Ojo v Gharoro* [2006] 10 NWLR (Pt 987) 175 SC; Denning MR, *The Discipline of Law* (Butterworth and Co Publishers, 1979) 88; Human Fertilization and Embryology Authority (HFEA) United Kingdom Regulation in 1992; American Society of Reproductive Medicine (ASRM); Omokanye and Others; 3.

Any regulation that prevents the continuous enjoyment of this right by woman and men of all ages, would not be welcomed. Sadly, it may even be considered discriminatory to prevent older women from having children if it is considered acceptable for men to procreate at similar ages. When the system is to one's advantage such women and men do not consider postmenopausal pregnancy as challenging, or that parenting at an elderly age poses significant emotional and physical demands that they may not be able to handle, in addition to a high likelihood that the children may experience the loss of one or both parents before reaching adulthood, which may lead to depression, drug abuse, social oppressions, and financial burdens. Such persons ignore the possible harm to a child as being outweighed by the harm to parents of not being able to use assisted reproduction.

### 3.3 Comparison with other Jurisdiction

A comparative analysis of surrogacy arrangements and parental rights in Nigeria, the United States, the United Kingdom, and Canada reveals distinct legal philosophies, shaped by cultural values, legal traditions, and bioethical considerations. While each country recognises the growing role of assisted reproduction in family formation, their responses vary significantly in terms of regulation, parental recognition, and enforceability of surrogacy arrangements.<sup>39</sup>

In Nigeria, surrogacy exists in a legal vacuum. There is no specific statutory provision regulating either gestational or traditional surrogacy. Consequently, parental rights are often established based on informal contracts between parties or through judicial discretion, which can lead to uncertainty and inconsistent outcomes. Without legislative backing, surrogates and intended parents in Nigeria remain vulnerable to exploitation, breach of contract, and disputes over child custody. Furthermore, cultural and religious opposition in some quarters has hampered legal progress, despite growing reliance on assisted reproductive technologies.<sup>40</sup>

In contrast, the United States presents a complex but more evolved framework. The absence of federal legislation means surrogacy is regulated at the state level, resulting in a fragmented legal landscape. States like California have embraced both altruistic and commercial surrogacy, with clear statutory provisions that allow intended parents to obtain pre-birth orders recognising them as legal parents. Courts in such jurisdictions apply an intent-based doctrine — where the individual or couple who initiates and funds the reproductive process, with the intention to parent, is recognised as the lawful parent. However, other states, such as Michigan, prohibit commercial surrogacy outright and treat such agreements as void and unenforceable. This diversity reflects broader tensions in U.S. law between reproductive autonomy and public policy concerns over commodification and exploitation.<sup>41</sup>

The United Kingdom adopts a more uniform and cautious approach. Surrogacy is permitted under the Human Fertilisation and Embryology Act 2008, but only on an altruistic basis. Commercial surrogacy is expressly prohibited, and surrogacy agreements are not legally binding. Legal parentage does not automatically vest in the intended parents at birth. Instead, they must apply for a Parental Order, which transfers parenthood from the surrogate to the

<sup>39</sup> P. Frati, Bioethical issues and legal frameworks of surrogacy: A global perspective about the right to health and dignity <[https://www.researchgate.net/publication/347665826\\_Bioethical\\_issues\\_and\\_legal\\_frameworks\\_of\\_surrogacy\\_A\\_global\\_perspective\\_about\\_the\\_right\\_to\\_health\\_and\\_dignity](https://www.researchgate.net/publication/347665826_Bioethical_issues_and_legal_frameworks_of_surrogacy_A_global_perspective_about_the_right_to_health_and_dignity)> accessed 24th June, 2025

<sup>40</sup> O. S. Sanni, Legal Approach to surrogacy in Nigeria <<https://www.mondaq.com/nigeria/family-law/840674/legal-approach-to-surrogacy-in-nigeria>> accessed 24th June, 2025.

<sup>41</sup> M. Beiner, Signed, Sealed, Delivered--Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy, 71(2018), *Vanderbilt Law Review* 285 <<https://scholarship.law.vanderbilt.edu/vlr/vol71/iss1/4>> accessed 24th June, 2025

commissioning parents, provided that specific statutory criteria are met — including the surrogate’s full and informed consent, a genetic link to at least one intended parent, and compliance with the time limits. This process, while protective of the surrogate’s autonomy and child welfare, has been criticised for being cumbersome and outdated in the face of modern family structures.<sup>42</sup>

Canada offers a hybrid of the British and American models. Surrogacy is regulated federally under the Assisted Human Reproduction Act (AHRA) 2004, which prohibits commercial surrogacy and the payment of consideration beyond approved expenses. Provincial law, however, governs the recognition of parental rights. For instance, in Ontario, the All Families Are Equal Act (2016) allows for the pre-birth recognition of intended parents if there is a valid surrogacy agreement entered into before conception and if all parties provide informed consent. This progressive model supports intent-based parentage while preserving strong ethical safeguards. In other provinces, court declarations or adoption orders may still be required to establish parentage, reflecting some inconsistency across jurisdictions.<sup>43</sup>

The four jurisdictions differ most significantly in their treatment of commercial surrogacy. The United States, in states like California, allows and enforces compensated surrogacy contracts. In contrast, the United Kingdom, Canada, and Nigeria (though unregulated) either prohibit commercial arrangements or do not explicitly permit them. These differences are rooted in divergent legal and moral outlooks: while the U.S. model often prioritises individual autonomy and reproductive freedom, Canada and the UK favour state intervention to uphold ethical standards and prevent exploitation. Nigeria, for its part, remains undecided at the legislative level, but the risk of unregulated commercial practices looms large due to the absence of a coherent policy.

A further point of divergence lies in the legal recognition of parentage. The U.S. and Canada (in some provinces) have embraced the concept of intent-based parentage, where the intended parents’ pre-conception intent, rather than genetic or gestational ties, determines legal status. In the UK, by contrast, the surrogate remains the legal mother until a court transfers parenthood, regardless of genetics or intent. Nigeria lacks formal mechanisms for establishing legal parentage in surrogacy, leaving courts to rely on general principles of contract or custody law, which may not adequately address the nuances of reproductive arrangements.<sup>44</sup>

Judicial oversight is another key variable. Canada and the UK require court or administrative approval before legal parentage can be transferred, thereby ensuring that the surrogate’s consent is freely given and that the arrangement is in the child’s best interest. The United States allows for pre-birth or post-birth orders depending on the state, while Nigeria offers little or no judicial guidance beyond individual custody disputes.<sup>45</sup>

Ethical and cultural considerations further influence each country’s approach. Nigeria’s legal inaction is partly attributable to conservative religious and cultural norms that view surrogacy with suspicion. In Canada and the UK, ethical concerns over commodification and exploitation inform restrictive legislative policies. Meanwhile, the commercial surrogacy industry in parts

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<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> J. Stoll, *Surrogacy Arrangements and Legal Parenthood* <<https://www.diva-portal.org/smash/get/diva2:649875/FULLTEXT01.pdf>> accessed 24 June, 2025

<sup>45</sup> *ibid.*

of the United States has flourished under a rights-based framework that prioritises individual choice and contractual freedom.<sup>46</sup>

While the United States provides the most flexible and market-driven approach to surrogacy, it also exposes participants to a greater degree of legal disparity between states. The United Kingdom and Canada adopt more cautious, protective models that foreground consent and the child's best interests, although their restrictions on compensation may limit accessibility. Nigeria's legal vacuum poses serious risks to all parties involved, underlining the urgent need for a comprehensive legal framework that incorporates both ethical safeguards and clear procedures for establishing parental rights.

### 3.4 Lessons for Nigeria from Other Jurisdictions

In light of the varying approaches to surrogacy and parental rights in the United States, the United Kingdom, and Canada, Nigeria can draw several lessons to guide the formulation of a robust, clear, and ethically sound legal framework for surrogacy. These lessons, while context-specific, offer pathways to protect the interests of all parties involved — intended parents, surrogates, and children born through assisted reproduction — while ensuring compliance with fundamental principles of child welfare, family integrity, and ethical medical practices.

#### 3.4.1 Promulgating Laws, Regulations and Policies on Surrogacy

There is the need for concise legal framework on the practice of surrogacy in Nigeria. Surrogacy is largely unregulated and reliant on general contract law and informal arrangements in Nigeria unlike other countries that have enacted specific statutes that provide clarity and structure for surrogacy agreements and the determination of parental rights.<sup>47</sup>

There is the need for Nigeria to maintain her stance of the type of surrogacy to be legalized and which type to be criminalized in a distinct legal framework wherein the right of the surrogate mother will be well safe guided and the interest of the child duly protected.

#### 3.4.2 Regulating and Prohibiting Commercial Surrogacy

Another key lesson for Nigeria is drawn from the U.K. and Canada's prohibition of commercial surrogacy. While commercial surrogacy is allowed in the U.S., with states like California leading the way, there are significant ethical and exploitation concerns tied to the practice, especially when it involves financially vulnerable women.<sup>48</sup>

- a) The U.K. and Canada have taken a strong ethical stance by allowing only altruistic surrogacy and ensuring that surrogates are compensated only for reasonable expenses (such as medical bills and lost wages) and not for their services. This helps to protect women from being exploited, while also curbing the potential for surrogacy to be commodified.
- b) In contrast, Nigeria faces the risk of creating a market for commercial surrogacy due to its lack of regulation, which could lead to unethically motivated arrangements and

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<sup>46</sup> C. Chukwuma-Agbodike, Surrogacy Practice in Nigeria: Navigating the Current Legal Landscape, Vol 8 (6), *I. Int. J. L. Pol. Sci. Admin.*; 20 – 40 <<https://aspjournals.org/Journals/index.php/ijlpsa/article/download/849/915/1122>> accessed 24th June, 2025

<sup>47</sup> M. Eme, Legal Framework For Surrogacy In Nigeria, Mondaq ( 3 August 2022) <<https://www.mondaq.com/nigeria/family-law/1217952/legal-framework-for-surrogacy-in-nigeria>> accessed 06 April, 2025

<sup>48</sup> P. Brandão, Commercial Surrogacy: An Overview <<https://pmc.ncbi.nlm.nih.gov/articles/PMC9800153/>> accessed 24<sup>th</sup> June, 2025

exploitation of women. To avoid this, Nigeria could adopt a hybrid model, where altruistic surrogacy is allowed with clear regulations on reimbursement for medical and other reasonable expenses, mirroring the systems in Canada and the U.K.

Regulating surrogacy in this way would provide protection for vulnerable surrogates and limit the financial incentives that might otherwise distort the surrogacy process.

#### 4. Ethical challenge of Surrogacy in Nigeria: The way forward and contract

One other beneficial learning point for Nigeria is the necessity to legally establish surrogacy agreements. While in the U.K. Surrogacy arrangements are not legally binding, the parental order provides a simple method through which intended parents are able to assert their rights to parenthood, following the fulfilment of some legal criteria. This system protects surrogates from exploitation because the law ensures that their agreement is given voluntarily in all the step.<sup>49</sup>

Considering the multi-cultural diversity of Nigeria as a country, it is important to ensure that any law or government policy and directives on surrogacy takes cognisance of the nature of the country's ethical, religious, social and cultural values. For instances, Catholics see surrogacy as an immoral act which violates the child's dignity, while the Protestants display a liberal attitude towards surrogacy<sup>50</sup>. On the cumulative strength of Quran 23: 5-7,<sup>51</sup>70: 29-31<sup>52</sup> and 16: 72<sup>53</sup> on the preservation of chastity, the prohibition of inseminating one's semen into the womb of a woman who is not one's wife, gestational surrogacy, is prohibited in Islam<sup>54</sup>. Traditional culture in Nigeria places a high value on natural conception, and rejects Western notions of surrogacy. This situation recognises the Western notion of surrogacy as a risk to destabilising family lineages which are regarded highly in Nigerian society<sup>55</sup>. In traditional Nigerian society, the husband of an infertile wife has a choice to marry another wife and the wife of an infertile husband may choose to divorce the husband or stay with him and have children by a close relative<sup>56</sup>. The situation is similar to that which obtains in the Zulu culture of South Africa, where the husband of an infertile wife has the right to approach the wife's family to demand a substitute who could be a sister or relative of the wife<sup>57</sup>. A refusal to give a substitute has been described as a breach of the marriage contract in Zulu culture, and entitles the husband to a refund of the part of the bride price paid<sup>58</sup>. A lesson could be learnt

<sup>49</sup> A. Oyinalade, surrogacy in Nigeria: Can surrogacy contracts And Agreements Be Enforced? <<https://www.legal1500.com/developments/thought-leadership/surrogacy-in-nigeria-can-surrogacy-contracts-and-agreements-be-enforced/>> accessed 09 April 2025.

<sup>50</sup>Umeora et al page 105

<sup>51</sup> 'And they who guard their private parts except from their wives or those their right hand possess, for indeed they will not be blamed, but whoever seeks beyond that then those are the transgressors

<sup>52</sup> And those who preserve their chastity, save with their wives and those whom their right hand possess, for thus they are not blameworthy but those who seeketh more than that, those are they who are transgressors.

<sup>53</sup> 'And Allah hath given you wives of your own kind, and hath given you from your wives, sons and grandsons, and hath made provision of good things for you.

<sup>54</sup> T Al-Mubarak 'Surrogacy and Islam: Between permissibility and prohibition'(2014) *Islam and Civilisational Renewal*; 277- 279

<sup>55</sup> FT Christiana 'Surrogate motherhood: A philosophical discourse' (2013) 4 *Journal of Emerging Trends in Educational Research and Policy Studies*; 575

<sup>56</sup>C. S. Sanders 'Surrogate motherhood and reproductive technologies: An African-American perspective' (1992) 25 *Creighton Law Review* 1708

<sup>57</sup>FM Mahlobogwane 'Surrogate motherhood arrangements in South Africa: Changing societal norms?' (2013) 2 *Speculum Juris*; 45

<sup>58</sup>TW Bennett. *Customary Law in South Africa* (2008); 355

from the provisions of the Children's Act in South Africa to enact an appropriate law to regulate surrogacy in Nigeria. Nigeria already is on the right path with the National Health (Amendment) Bill 2016 and the Assistive Reproductive Technology Bill 2016. However, to avoid duplicity and a conflict in the laws, the two Bills should be harmonised with the National Health Act. ART should be recognised and efforts should be made by medical practitioners to ensure that the Bills are adopted. The ART Bill, if passed into law, will be a model for African countries. The Bill should be commended in that it goes a step further than South African law by comprehensively recognising the rights of donors, surrogate mothers, commissioning parents and the child.

## **5. Conclusion**

Nigeria is a multi-cultural and multi-religious society with a vast population. In times of increased infertility among married couples, desperate legal and illegal measures have been taken to parent a child, including the buying and selling of babies. Surrogacy is practised but left unregulated in Nigeria, making room for a series of child crimes and abuses. An analysis of the gap in the legal framework of surrogacy and artificial reproductive technology in Nigeria calls for attention and an urgent solution. While there is a dire need to regulate surrogacy in Nigeria, cognizance must be taken of the ethnic, religious and cultural values of the country. The rights of commissioning parents, surrogate mothers and unborn children must be protected by prospective laws, with priority given to the best interests of the child. Regulatory and enforcement institutions must be put in place to ensure that acceptable minimum standards adhered to in the practice of surrogacy.

## **6. Recommendations**

The following recommendations are made to enhance and maximize the practice of woman to woman marriage and surrogacy.

1. The National Assembly should cooperate with reproductive Health Practitioners to draft a potent ART legal framework. The National Assembly should thereafter pass the legal framework as law in Nigeria.
2. The legal framework should establish an agency for the regulation of surrogacy and other forms of ART in Nigeria.
3. The Nigeria Government must recognize infertility as a public health issue requiring government attention.
4. It is further recommended that commercial surrogacy should be outlawed and the practice of surrogacy should be prohibited for commissioning parents that are fertile so as to avoid abuse.
5. Lastly, baby factories should be criminalized so as to discourage the various abuses associated with such inimical ventures.