

## Legal Position on Surrogacy Arrangements in Nigeria and Some Selected Jurisdictions

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### ABSTRACT

Many couples look forward to having their own children; however some are faced with medical difficulties which prevent them from achieving this desire naturally. Advancements in medical and biomedical sciences through assisted reproductive technologies or techniques (ARTs) have offered infertile couples opportunities to procreate. Surrogacy arrangement is one of such ART procedures. Surrogacy is an agreement by which a woman agrees to carry and deliver a child for another individual or couple. The practice is not without its own ethical, socio-cultural and legal issues. The article seeks to examine the legal position of surrogacy arrangements in Nigeria and some selected countries, namely, United Kingdom, India and South Africa, which are all Commonwealth countries. One of the aims of the study is to understand the underlying issues and concerns associated with surrogacy arrangements. It was discovered in the study that while a number of countries have regulated the practice, Nigeria and India have no legislation regulating the practice thereby encouraging unethical practices. The study recommended that appropriate laws should be put in place both in Nigeria and India to protect the respective parties to the surrogacy arrangements.

**Keywords:** Altruistic Surrogacy, Assisted Reproductive Technology, Commercial Surrogacy, Couples, In Vitro Fertilisation, Infertility, Nigeria, Pregnancy

### INTRODUCTION

At creation, after creating human beings, God instructed the man and the woman to be “fruitful, and multiply, and replenish the earth.”<sup>1</sup> One of the purposes of marriage is for procreation. This fact was noted by the court in *Skinner v. Oklahoma ex rel. Williamson*,<sup>2</sup> where the United States Supreme Court maintained *inter alia*, that procreation was one of the recognised basic civil rights of man and that “marriage and procreation are fundamental to the very existence and survival of the (human) race.”<sup>3</sup> Consequently, the court invalidated a State law which required the forced sterilisation of habitual criminal offenders as an unconstitutional violation on that right as recognised under the Equal Protection Clause of the Fourteenth Amendment.<sup>4</sup>

However, it sometimes happens that some years after marriage, some couples still experience delays in childbearing as a result of infertility. The hope of procreation in such instances becomes dwindled and abandons the couples in

a state of worries, stigmatisation and constant pressures from their family members and the larger society in general. Infertility is a global phenomenon as all countries deal with it in varying degrees. According to modern medicine, infertility is a disease which requires medical treatment.<sup>5</sup> Medically, infertility is a disease of the reproductive system defined by the inability to attain a clinical pregnancy or impregnate a woman after a year or more of regular unprotected coitus<sup>6</sup> and without using contraceptives. Dickens also posits that,

*Infertility includes infecundity, meaning inability to conceive or to impregnate, and pregnancy wastage, meaning failure to carry a pregnancy to term through spontaneous abortion and stillbirth. Infertility includes primary infertility, where couple has never achieved conception, and secondary infertility, where at least one conception has occurred but the couple is currently unable to achieve pregnancy.*<sup>7</sup>

Available statistics reveal that the global prevalence rate of infertility is estimated at around 17%, with 1 in every 6 women within the reproductive ages experiencing delays in conception.<sup>8</sup> In the United Kingdom, 1 in every 8 women and 1 in every 10 men are reported to suffer from infertility.<sup>9</sup> Research has also shown that up to 20% of South African couples struggle with infertility problems which affect both men and women almost equally.<sup>10</sup> According to the Indian Society of Assisted Reproduction, about 10-14% of Indian population is impacted by infertility with greater rates in urban areas where 1 out of 6 couples are affected.<sup>11</sup> Prevalence of infertility in sub-Saharan Africa is reported to be higher, with 10-30 % of couples affected in Nigeria according to another study.<sup>12</sup> A further study indicates that about 1 in every 4 women of reproductive ages encounter delays in conception.<sup>13</sup> Given Nigeria's population as at April 2020 estimated at over 205 million people,<sup>14</sup> out of which the population of women within the reproductive age bracket is well over 49%, it is obvious that Nigeria has a high incidence rate of infertility. Though the stated statistics were in relation to women within specific locations, the truth remains that infertility rates in Nigeria is neither limited to a geographical location nor is it restricted to women alone. Infertility associated problem is shared by both male and female gender.

Although the African socio-cultural settings seem to concentrate more on female infertility, a study has shown that male factor accounts for around 40-50% of all infertility in Nigeria.<sup>15</sup> For instance, studies conducted in some communities in the southwestern part of Nigeria indicated that around 42.4%<sup>16</sup> and 46%<sup>17</sup> respectively of infertility incidences were attributed to male factor while in Enugu, a community in the southeastern part of the country, the prevalence of male infertility was stated as being approximately 55-93%.<sup>18</sup> A more recent statistics noted that about 30% of infertility was due to female problems, 30% was attributed to male problems and another 30% was due to combined male/female challenges while the remaining 10% was attributable to other factors.<sup>19</sup>

A number of factors may account for infertility among couples such as immunological factors, genetically associated problems, erectile dysfunction in male, use of illicit or harmful drugs, cigarette smoking, high consumption of alcohol, sexually transmitted infections (STIs),

environmental and occupational hazards, such as nutritional and exposure to toxic elements, ovulatory disorders or tubal damage uterine or cervical abnormalities, endometriosis, early menopause, pelvic adhesions and certain medical treatment like radiation and chemotherapy, among many others.<sup>20</sup> Thus, women alone should not be blamed for childlessness in marriages as the various studies have indicated significant contribution of male factors to infertility incidences in Nigeria.<sup>21</sup>

The right to have children correspondingly includes the right to use the advancement in medicine and technology to address the problems of infertility posed to couples; especially those with irreversible cases, in order to enable them have their own children. The quest to have a baby leads them to seek for a substitute means and surrogacy arrangement presents itself as a feasible option.<sup>22</sup> Surrogacy is a medical process whereby, based on a prior arrangement, a woman or surrogate mother becomes pregnant and gives birth to the child/children and surrenders the child/children including her parental rights and entitlements over the child/children in favour of the commissioning couple. Surrogacy has been categorised into traditional or gestational and for altruistic or commercial purpose. While some countries like the United Kingdom and South Africa have laws regulating the practice of surrogacy, others like Nigeria and India, do not. This article carries out a critical examination of the legal status of the practice of surrogacy in the United Kingdom, India, South Africa and Nigeria. Providing a regulatory framework to control the practice in Nigeria will help in preventing unethical practices, undue exploitation of desperate infertile couples and surrogate mothers as well as protect the rights of children born through surrogacy arrangements.

### CONCEPT AND CATEGORISATION OF SURROGACY

The noun, "surrogate," originated from the early 15<sup>th</sup> century Latin word, *surrogatus*, a past participle of *surrogare* or *subrogare*, meaning, a substitute or person appointed to act in the place of another.<sup>23</sup> Surrogacy has also been defined as "an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, with the intention to carry it to term and hand over the child to the person or persons for whom she is acting as a surrogate."<sup>24</sup> Thus, in medical terms,

surrogacy implies the use of a substitute mother to carry a pregnancy for another woman and thereafter relinquishes the child/children and any parental entitlement to the child/children to the commissioning parents or commissioning mother, usually an infertile couple.

It is widely believed that surrogate motherhood is traceable to the biblical cases where infertile wives encouraged their husbands to engage in sexual relationships with family housemaids so that they may have children through them.<sup>25</sup> Such informal surrogacy arrangements were more often entered into by private pact between family members or people known to each other without recourse to entering into a more formal agreement. In some Nigerian communities, it is also customary to find an infertile wife marry a younger wife for her husband purely for the purpose of bearing children for the husband. Such younger wife is accountable to the elder wife who “married” her for her husband. Often, the children given birth to by such younger wife recognise the elder wife as their “mother.”<sup>26</sup>

As earlier pointed out, there are basically two types of surrogacy, namely, traditional surrogacy and gestational surrogacy.<sup>27</sup> Traditional surrogacy requires an artificial insemination of the sperm of the intended father or sperm donor into the surrogate.<sup>28</sup> It could mean a process whereby the egg of the surrogate is used; as a result, the surrogate mother is genetically related to the resulting child.<sup>29</sup> It involves an *in vitro* fertilisation, because the eggs from the surrogate or donor are fertilised with that of the intending father or donor sperm to create an embryo implanted into the surrogate mother. Gestational surrogacy on the other hand is an arrangement where the embryo is fertilised with the egg of the intending mother and the sperm of the intending father (though donor eggs, donor embryos, or donor sperm are sometimes used) and implanted into the surrogate mother. In this instance, the baby is not genetically related to the surrogate mother.<sup>30</sup> Thus, while gestational surrogacy entails medical interference of a more intricate process of *in vitro* fertilisation (IVF) and the embryo transfer (ET) to the womb of the surrogate mother, traditional surrogacy on the other is performed in a natural way through sexual contact or by means of assisted insemination using the sperm of the commissioning father.<sup>31</sup>

Surrogacy arrangement can be either for altruistic or commercial consideration. Altruistic surrogacy relates to an arrangement whereby the

commissioning or intending couple does not pay the surrogate mother any compensation except reasonable expenses like, legal charges, loss of earnings, medical expenses and insurance coverage related to the pregnancy and post-partum period.<sup>32</sup> Altruistic surrogacy is recognised in such countries like the Netherlands, South Africa, United Kingdom and Greece. On the other hand, commercial surrogacy relates to a surrogacy arrangement which is undertaken by the surrogate mother for “payment, reward, benefit, fees, remuneration or monetary incentives in cash or kind” aside from the payment of medical expenses and insurance coverage associated with the pregnancy.<sup>33</sup> Commercial surrogacy is permitted in India and Russia.

### LEGISLATIVE INTERVENTIONS ON SURROGACY ARRANGEMENTS IN NIGERIA AND SOME SELECTED JURISDICTIONS

As earlier pointed out, approximately 17% couples are suffering from infertility globally.<sup>34</sup> This accounts for why couples seek gynecologic consultations<sup>35</sup> and accept assisted reproductive technology (ART) method like surrogacy to raise up children for themselves. In this section of the work, attention would be focused on the practice of surrogacy arrangements in the United Kingdom, India, South Africa and Nigeria, which are basically Commonwealth countries.

#### Regulatory Framework on Surrogacy in United Kingdom

The bedrock of surrogacy regulation in the United Kingdom (UK) was laid in the Surrogacy Arrangements Act (SAA) 1985,<sup>36</sup> which was a quick legislative response following the public condemnation of the Kim Cotton’s “baby-for-cash-deal” incident,<sup>37</sup> where a married mother of two received £6500 for acting as a surrogate for a childless couple. The child was conceived by using her own egg and the sperm of the man whose wife was infertile. Though the court made reference to the “difficult problems of ethics, morality and social desirability raised by surrogacy,” it nonetheless went ahead to give custody of the child to the commissioning parents.<sup>38</sup> Prior to the enactment of the statute, there was no law permitting or barring surrogacy arrangements in the United Kingdom.<sup>39</sup>

In an earlier case of *A v. C*,<sup>40</sup> the commissioning parents, Mr. A and Mrs. B, offered a prostitute £3500 to have a child for Mr. A but she turned

down the offer and found a 19 year old lady, Miss C, who accepted to bear the child for Mr. A for a monetary reward of £3000 and that at birth relinquish the child to the couple. Miss C was artificially inseminated with Mr. A's sperm at a clinic and in due course gave birth to a male child. However, Miss C reneged on the agreement made with the commissioning couple and decided to keep the child. Though Mr. A was initially granted access to the child, this was withdrawn on an appeal as the court deemed the surrogacy arrangement as a "totally inhuman proceedings"<sup>41</sup> and a "sordid commercial bargain."<sup>42</sup>

It was therefore, against this background that the SAA 1985 was enacted based on recommendations of the Committee of Inquiry into Human Fertilisation and Embryology in 1984.<sup>43</sup> The statute permits altruistic surrogacy but prohibits commercial surrogacy<sup>44</sup> and renders surrogacy arrangements unenforceable.<sup>45</sup> By the wordings of section 2(2) of the Act, it appears that commissioning parents and/or the surrogate mother are not guilty of an offence if payment is made beyond reasonable expenses as required under the statute. However, it is a criminal offence for a person to advertise that they are looking for surrogate mother or offer to act as a surrogate mother as well as for third parties to advertise their readiness to facilitate or broker a surrogacy arrangement and for newspapers, periodicals or telecommunication system to carry such advertisements<sup>46</sup> or for a person to distribute or cause to be distributed such advertisement to which the section applies.<sup>47</sup> The provision of section 2 which prohibits any third party from negotiating surrogacy arrangements on a commercial basis covers both individuals and professional bodies/members. For instance, in *JP v. LP*,<sup>48</sup> the court brought this provision to the attention of a firm of Solicitors who had charged a fee for preparing a surrogacy arrangement. The violation of any of these provisions attracts a fine or an imprisonment term not exceeding three months or both.<sup>49</sup>

Five years after the passing of SAA, the parliament enacted the Human Fertilisation and Embryology Act 1990, which eighteen years thereafter was amended and restyled, the Human Fertilisation and Embryology Act (HFEA) 2008.<sup>50</sup> Under the HFEA 2008, the legal mother of a surrogate child is the woman who carries the child irrespective of whether she has any genetic link to the child.<sup>51</sup> This position applies whether the woman was in the UK or elsewhere

at the time of the insemination of the embryo or sperm and eggs.<sup>52</sup> In a situation where the surrogate mother is married at the time of her treatment, the legal father of the surrogate child is the husband of the surrogate mother at the time of treatment except he had objected to or refused consent to the woman's artificial insemination.<sup>53</sup> If the surrogate mother is in a civil partnership at the material time of her treatment, her civil partner becomes the legal second parent of the child, unless she did not consent to the treatment.<sup>54</sup> On the other hand, if the surrogate mother is unmarried and not in a civil partnership, the statute requires that the legal father can be decided in two ways, namely, if no one decides otherwise, then the commissioning father will be considered as the legal father of the child provided that he is also the child's biological father; or, if the treatment occurs at a recognised fertility clinic, the surrogate mother can appoint the commissioning mother or a non-biological father as the child's second parent.<sup>55</sup> But a sperm donor is not regarded as a legal father.<sup>56</sup>

The HFEA 2008 also provides for the transfer of parental responsibility and legal parenthood.<sup>57</sup> In order to do this in respect of a surrogate child and to extinguish the status of the surrogate mother, the commissioning parents must apply for a parental order.<sup>58</sup> The following criteria are to be satisfied before one could be eligible to apply for parental order: the applicants must be married (or in a civil partnership or two persons living as partners in an enduring family relationship); must have attained the age of 18;<sup>59</sup> domiciled in the UK;<sup>60</sup> at least one of them must have a genetic connection with the child;<sup>61</sup> the application must have been made within 6 months of the child's birth;<sup>62</sup> the existing legal parents must have consented to the parental order; the child's home must be with the commissioning parents;<sup>63</sup> and only a reasonable expenses must have been paid to the surrogate mother.<sup>64</sup> The applicants must provide the court with a full certified copy of an entry in the register of live-births.<sup>65</sup>

The essence of a parental order is that it makes the commissioning parents the legal parents of the child and terminates the surrogate mother's position as the child's legal mother along with her husband or any other legal parents. Without such an order, the commissioning parents will not be recognised as the legal parents of the surrogate child. Thus, parental order "goes to the most fundamental aspects of status and to the very identity of the child, who s/he is and

who his/her parents are.”<sup>66</sup> Although the absence of this “transformative order” may not necessarily disturb the ability of the commissioning parents in providing the child with everyday care, it may nonetheless have lasting implications. The court stressed this fact in *Re A and B (No. 2 Parental Order)*<sup>67</sup> thus:

*I am not concerned about the children who are the subject of parental order application, but am more concerned about those who are not. There is a real risk that those who care for children born as a result of these arrangements may be inadvertently sleepwalking into an uncertain legal future for their much wanted child. That uncertainty is very likely to be detrimental to that child's long term welfare. I sincerely hope publication of this judgment will assist people who may be in that situation.*<sup>68</sup>

Under the Human Fertilisation and Embryology (Parental Orders) Regulations 2010, an attendant regulation of the HFEA 2008, the welfare of the surrogate child is to be taken into paramount consideration when determining an application for parental order.<sup>69</sup> The UK courts have also placed reliance on the provisions of the Family Procedure Rules 2010<sup>70</sup> when entertaining applications for parental orders. For the purpose of international surrogacy arrangements, notice of the proceedings must also be served on any person with parental obligation for the child who resides outside of the UK.<sup>71</sup> A parental order takes effect from the day it has been made.<sup>72</sup>

It could be inferred that current realities in the UK have shown that the initial conservative judicial attitudes towards surrogacy arrangements is now flexible as the practice have become a more acceptable method of putting smiles on the faces of infertile couples and affording them the hope of becoming parents.<sup>73</sup> Also public and media perceptions have shifted from the initial hostility that greeted the Kim Cotton's case to a friendly reception of the Nicole Kidman,<sup>74</sup> Elton John's<sup>75</sup> and Claire Kelly's<sup>76</sup> surrogacy arrangements' reports, among many others. As a matter of fact, in the UK, the number of parental orders made as a result of surrogate birth has reportedly increased from 121 in 2011 to 368 in 2018.<sup>77</sup> However, the actual number of surrogacy arrangements may even be higher as it is not mandatory to apply for a parental order. This is aside from cases of UK citizens who

embark on international surrogacy arrangements, usual commercial surrogacy, in other countries.<sup>78</sup>

### Regulatory Frameworks on Surrogacy in India

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

A number of reasons may have contributed to India becoming a favourable destination for such couples. One, there is no law or monitoring mechanism regulating surrogacy arrangements, which have encouraged many mushroom ART clinics to spring up in the country. According to a 2012 report by the National Commission for Women (NCW), there were about 3000 clinics across India rendering surrogacy services to foreign couples<sup>79</sup> with a generated income of about \$2billion annually.<sup>80</sup> Second, the cost of undergoing the procedure is relatively cheaper in India when compared with the position in other developed countries like Canada, United States of America, United Kingdom, etc.<sup>81</sup> Third, due to prevalence of poverty in the Asian country, a large number of women are ready to offer themselves as surrogates and get paid to enable them meet up with their financial needs “to either buy a house, get their kids good education, ‘fix’ the money in a bank for future use and in some cases, attend to a medical emergency in the family.”<sup>82</sup> The shorter period which parties need to wait as well as advancement in infrastructure and medical expertise in India, which is comparable to global standards, also contribute significantly in making the country a desired destination for surrogacy.<sup>83</sup>

Attempts to regulate the procedure for ARTs began in India about the 1990s, several years after the birth of the first Indian test tube baby, *Durga* (aka Kanupriya Agarwal) in 1978. Such regulatory efforts led to the introduction and implementation of the National Guidelines for

Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics in 2005 by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare.<sup>84</sup> Subsequently in September 2008, a two day national consultation programme on “Assisted Reproductive Technologies (ARTs): Emerging Concerns and Future Strategies” was organised by the Sama-Resource Group for Women and Health in New Delhi in collaboration with the Indian Council of Medical Research (ICMR). This resulted in the presentation of the draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2008.<sup>85</sup> The ART Bill 2008 has been revised in 2010, 2014, 2016 and 2018, though it has not yet been passed into law. These proposed regulatory bills are discussed in fuller details below:

### *The Indian Council of Medical Research (ICMR) Guidelines 2005*

This was the maiden step taken towards the regulation of ARTs in India. It was initiated by the ICMR. The intendment of the ICMR Guidelines were to guarantee that the practice of ARTs by clinics and banks were accredited, regulated and supervised to ensure that medical experts, patients, commissioning parents, surrogates and surrogate child/children, etc were protected as well as reassure the public that the country’s ART clinics provided services that met global standards. The guidelines defined surrogacy as “an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate.”<sup>86</sup> The implication of this definition is that the guidelines seemed to promote gestational surrogacy as the surrogate mother and her husband are biologically unrelated to the surrogate child. A surrogate child is required to be adopted by the biological or genetic parents unless they can establish through a DNA test that the child is theirs.<sup>87</sup>

The guidelines make surrogacy arrangements only available to couples who are medically or physically unable to carry their own babies to full term.<sup>88</sup> It goes further to saddle the intending parents or the semen bank with the duty of finding a surrogate mother either by means of advertisement or otherwise. Accordingly, the ART clinics are precluded from making such advertisements.<sup>89</sup> There is no stipulated age limit for male donors but the

guidelines require that the surrogate mother must be below 45 years of age; carry out all required medical examinations to go through a successful term of pregnancy;<sup>90</sup> and tested seronegative to HIV before transfer of embryo. She must also certify that she has not been administered with an intravenous drug through a shared syringe; not undergone a blood transfusion and that neither she nor her husband had been engaged in any extramarital affairs in the last 6 months. She must also declare that she will neither administer intravenous drugs nor undergo blood transfusion apart from blood obtained through a licensed blood bank.<sup>91</sup>

The guidelines also authorise a relative, a known person or unknown person to the intending couple to act as a surrogate mother for the couple. With respect to a relative of a surrogate mother, she must belong to the generation “as the women desiring the surrogate.”<sup>92</sup> A woman cannot act as a surrogate mother beyond three times in her life time.<sup>93</sup> The surrogate child is regarded as the lawful child of the commissioning parents and accordingly enjoys all rights and due entitlements as available to a natural child.<sup>94</sup> While the guidelines empower the commissioning parents to have access to all medical and genetic information of the biological parents which may be material for the health of the child,<sup>95</sup> it correspondingly authorise the surrogate child to have the right to information regarding his biological parents upon attainment of a majority age.<sup>96</sup> The commissioning parents’ payment to a surrogate mother of all relevant expenses associated with the pregnancy is recognised and documentary financial commitments for the surrogacy arrangement must be made available.<sup>97</sup> Sex determination is prohibited unless where there is a possible risk of transfer of genetic abnormality determined during genetic testing of the biological parents or as a result of pre-implantation genetic diagnosis.

### *The ART (Regulation) Bill 2008*

The bill made an attempt at regulating surrogacy arrangement in India. It mandates all ART clinics to be registered with the Registration Authority<sup>98</sup> and prohibits the practice of any form of ART by semen banks, clinics or research institutions without a prior registration.<sup>99</sup> The bill imposes a general obligation on the clinics and semen banks to ensure that patients, donors of gametes and surrogate mothers have been medically examined for such diseases like sexually

transmitted diseases and other communicable diseases which may endanger the health of the parents, surrogate mother or the child.<sup>100</sup> The clinics are further required to provide professional counselling to the parties regarding the ART procedures<sup>101</sup> as well as ensure that information about clients, donors and surrogate mothers are kept confidential and may only be revealed in the circumstances as permitted under the bill.<sup>102</sup>

Under the bill, surrogacy commissioning is permitted to all persons including singles, married or unmarried couples<sup>103</sup> who also must enter into a binding surrogacy agreement.<sup>104</sup> The surrogate mother and the gamete donor are duty bound to renounce all parental rights or claims over the surrogate child<sup>105</sup> while the commissioning couples are bound to settle all expenses incurred at the time of pregnancy and after delivery till the child is relinquished. There is also a requirement for the payment of monetary compensation to the surrogate mother.<sup>106</sup> The names of the commissioning parents are allowed on the birth certificate of the surrogate baby as lawful parents of the child.<sup>107</sup> No ART clinic is allowed to offer to the commissioning parents a child of pre-determined sex or administer drugs or anything that can assist in the delivery of a pre-selected sex of the child.<sup>108</sup> A married surrogate mother is required to secure the consent of her spouse before acting as a surrogate mother. A surrogate mother is equally mandated to obtain a certificate from the commissioning parents indicating clearly that she is acting as a surrogate on their behalf.<sup>109</sup> Semen banks can only obtain sperms from males aged between 21-45 years and eggs from females between the ages of 21 and 35 years<sup>110</sup> along with a written consent from the donor's spouse.<sup>111</sup> The surrogate mother must be between 21 and 45 years of age and is permitted a maximum of three successful live births in her lifetime.<sup>112</sup>

To further protect the interest and welfare of the child, the commissioning parents are under a legal duty to take custody of the surrogate child despite any abnormality or any deformity in the child.<sup>113</sup> A local guardian is required to be appointed by a foreign commissioning parent to take care of the surrogate mother during the gestation period and the surrogate child after he has been born till the time it is surrendered to the foreign commissioning couple.<sup>114</sup> Though as earlier noted, the identities and information regarding the surrogate and donors are to be kept confidentially; yet such information could

be revealed in circumstances permitted under the bill and in the face of life threatening medical conditions which may warrant medical examinations and samples from such parties.<sup>115</sup>

A number of criticisms have trailed the bill as it encourages and legalises commercial surrogacy. Since the surrogate mother is debarred from donating her eggs, this implies that she would be required to undergo a form of complicated, expensive and risky IVF procedure rather than a simpler intrauterine insemination (IUI). This also becomes an additional financial burden on the commissioning couple who has to search for both surrogate and egg donor. The bill is also silent regarding the qualification of a local guardian. Besides, what happens where the foreign commissioning couple refuses to accept the child in the event of abnormality? What arrangements have been made to protect the interest of the local guardian who may legally be held accountable in such situation? Moreover, there are some discrepancies in the bill. For instance, while confidentiality of the surrogate mother is encouraged, yet the bill requires that the surrogate mother should provide her name while registering for medical treatment for acting as a surrogate mother. If she is enjoined to divulge her identity, then the provision regarding her privacy or anonymity is defeated by such revelation.<sup>116</sup>

In addition, a study has shown that surrogacy agreements in India are often signed after the pregnancy has been confirmed by the end of the first trimester till the middle of the fourth to fifth months of pregnancy. More than 85% of such agreements were shown to have been signed and executed around the second trimester of the pregnancy.<sup>117</sup> The question is, "what happens in the event that the pregnancy has to be aborted as a result of abnormality in the foetus prior to the signing or execution of the surrogacy agreement by the parties"? Thus, a delay in the signing of the contract may possibly put the surrogate mother at a disadvantage and at the mercy of the ART clinic and the commissioning couple.

Also, it appears that once the parties have entered into the surrogacy agreement there is no room for the surrogate mother to change her mind about it unlike what obtains in other countries like South Africa, the Netherlands, France, United States of America, Australia,<sup>118</sup> the United Kingdom and Israel.<sup>119</sup> In the South African case for instance, aside from the law requiring that the contractual parties must be domiciled in South Africa at the time of signing

the contract as well as the requirement for having the contract confirmed by the court of competent jurisdiction before it could be valid, a surrogate mother can change her mind before the expiration of 60 days after the birth of the surrogate child.<sup>120</sup> Similarly, under Israeli legislation, a surrogate mother can apply to the District Court during the first 7 days after delivery to terminate the contract and keep the baby. But where she fails to do so, then the responsibility for taking care of the child is saddled on the commissioning couple.<sup>121</sup>

### *The ART (Regulation) Bill 2010*

Due to lacunary problems noticed in the ART (Regulation) Bill 2008, the latter was subsequently revised and restyled as Assisted Reproductive Technology (Regulation) Bill 2010. The bill was intended to be a national framework to regulate and supervise ART clinics in such a manner as to safeguard that the services rendered by them were ethical and that medical, social and legal rights of all relevant parties to surrogacy arrangements were protected.<sup>122</sup> Under the bill, a surrogate mother must be resident in India and only a gestational surrogacy through IVF and embryo transfer (ET) is permitted while traditional surrogacy (i.e. through intra uterine insemination-‘IUI’) is prohibited. This may not be unconnected with the need to promote the inviolability of the surrogacy agreement and to forestall a situation whereby the surrogate mother may want to lay claims to the surrogate child.

The bill increased the number of successful live births of a surrogate mother to five, which is inclusive of her own children<sup>123</sup> and limited the entire number of embryo transfers a surrogate mother can undertake to three. Access to assisted reproductive techniques is open to married and unmarried couples. However, to avoid a cross-border disagreement regarding the citizenship right of a surrogate child as were obvious in *Baby Manji*,<sup>124</sup> and *Jan Balaz*,<sup>125</sup> cases, the bill requires a foreign couple who desires to access a surrogacy arrangement in India to produce a certificate from their country stating that their country permits surrogacy and will give legal recognition to a child born through such an arrangement by providing citizenship in their country.

One of the lacunae in the bill is the fact that requiring three surrogate births from a woman and three cycles of ova transfer for one couple is rather insensitive and tends to overlook the health and safety complications and rights of the

surrogate mother at the expense of ensuring that a commissioning couple has a child. The bill appears to have sympathy more for the commissioning parents than it does to surrogate mothers.

### *Ministry of Home Affairs 2012 Guidelines and the ART (Regulation) Bill 2014*

It may be recalled that prior to proposing the ART (Regulation) Bill 2014, the Indian Ministry of Home Affairs in July 2012 issued guidelines in which it prevented overseas nationals from accessing surrogacy arrangements in India on tourist’s visa. It limited surrogacy to only those overseas nationals who were married for at least two years and the marriage was still subsisting. Only heterosexual couples are recognised beneficiaries as gay or homosexual marriages are prohibited under section 377 of Indian Penal Code.<sup>126</sup> To avail surrogacy in the country, such foreign nationals were required to obtain a medical visa. In addition to the visa application, such foreign couples must provide a letter from their country’s Foreign Ministry or their Embassy in India certifying that surrogacy was recognised in their home country and that the surrogate child would have a right to enter into the home country as a biological child. There must also be an undertaking by the commissioning couple that they will take care of the child. A duly notarised surrogacy agreement between the commissioning couple and the Indian surrogate mother must also be produced. The guidelines also made it mandatory for the overseas nationals to carry out the treatment from a registered ART clinic recognised by ICMR.<sup>127</sup>

The 2014 ART bill also retained the guidelines’ position that only heterosexual couples and not gay couples or those engaged in “live-in relationships” can have access to surrogacy in India. As a matter of fact, the bill defines a “couple” as “a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage which is legal in India.”<sup>128</sup> The bill prohibits surrogacy for foreign nationals but permits surrogacy to people of Indian origin (PIOs), overseas citizen of India (OCIs), non-resident Indians (NRIs) and foreigners who are married to Indian citizens.<sup>129</sup> In addition, a foreign commissioning couple is required to submit a certificate stating that the woman is unable to conceive their own child. Such certificate must be authenticated by appropriate government authority of the



couple's home country.<sup>130</sup> When a foreign national is married to an Indian citizen and a surrogate child is born to them, such a child will not be conferred with an Indian citizenship right but would be regarded as an overseas citizen of India even though he/she was born in India.<sup>131</sup>

A surrogate mother must be a married Indian aged between 23-35 years and she must be a mother of at least one live child of her own with a minimum age of 3 years. She cannot act as a surrogate for more than one successful live birth in her life and with not less than 2 years interval between the two deliveries. She could also be subjected to a maximum 3 cycles of medications while acting as a surrogate mother.<sup>132</sup> A foreigner married to an Indian citizen, PIOs, and OCIs are required to produce a duly notarised agreement between the commissioning couple and the prospective Indian surrogate mother as required under the 2012 Ministry of Home Affairs guidelines.<sup>133</sup> They are also required to produce an undertaking that they will take care of the surrogate child.<sup>134</sup> At the time of signing the surrogacy agreement, the commissioning couple is required to insure the surrogate child till the age of 21 years or till the period when custody of the child is taken through appropriate insurance policy, whichever comes first. This is intended to take care of the welfare of the child.<sup>135</sup>

The bill also mandates the commissioning couple to submit a certificate showing that there is a genetic connection between them and the surrogate child and that the child shall not be used by them to promote any form of pornography. Moreover, regardless that the surrogate child is suffering from any abnormality or abnormalities, the commissioning couple is mandated to accept the child born out of the surrogacy arrangement. Where the abnormality or abnormalities were discovered during the gestation period, then the commissioning couple must provide appropriate insurance cover and compensation to take care of the developmental growth of the deformed or disabled child by his family in the event that the commissioning couple dies accidentally.<sup>136</sup> While the bill mandates the donors of gametes and the surrogate mother to relinquish all parental rights over the surrogate child,<sup>137</sup> it goes further to require that in the event of the death of the surrogate mother after the confirmation of conception, the commissioning couple shall pay an appropriate compensation to the surrogate mother's family in addition to the amount fixed at the time of the agreement for the deceased's

services as a surrogate.<sup>138</sup>

Finally, like the position under the 2005 ICMR guidelines which prevents a surrogate mother from donating her egg for commissioning couple who has a surrogacy arrangement with her, the 2014 ART bill also provides that an egg donated by a relative of the couple seeking surrogacy must not be accepted by the ART clinics.

### *The Surrogacy (Regulation) Bill 2016*

The main purpose for introducing the bill in *Lok Sabha* (the lower house of Parliament of India) in November 2016 was ably captured in the bill's "Statement of Objects and Reasons" as follows:

*Indian has emerged as surrogacy hub for couples from different countries for past few years. There have been reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes. Widespread condemnation of commercial surrogacy in India has been regularly reflected in different print and electronic media....The Law Commission of India has, in its 228<sup>th</sup> Report, also recommended for prohibition of commercial surrogacy by enacting a suitable legislation....*<sup>139</sup>

In the light of the above and to address the challenges posed by lack of legal framework on surrogacy arrangements in India, the bill makes provision for the constitution of Surrogacy Boards both at the national<sup>140</sup> and State level<sup>141</sup> as well as the appointment of appropriate authorities for each of the Union's territories.<sup>142</sup> The scope of the bill covers the entire of India except the State of Jammu and Kashmir.<sup>143</sup>

The bill permits surrogacy when it is for intended couples who suffer from proven infertility; altruistic and not for commercial reason; not for producing children for sale, prostitution or other forms of exploitation; and for any other condition specified through appropriate regulations.<sup>144</sup> The intending couple is also required to have a certificate of essentiality and a certificate of eligibility issued by the appropriate authority. To qualify for a certificate of essentiality, the intending or commissioning couple must satisfy certain stipulated conditions, namely, production of a certificate of proven infertility in favour of either or both of them;<sup>145</sup> an order concerning

parentage and custody of the surrogate child passed by the Magistrate of the first class or above; and an insurance coverage in favour of the surrogate mother.<sup>146</sup>

On the other hand, in order to obtain the certificate of eligibility, the intending couple must also fulfill the following requirements, namely, the age of the intending couple is between 23-50 years in the case of female and between 26-55 years in the case of male as at the date of certification; the intending couple are Indian citizens and have been married for at least 5 years; they do not have any surviving child biologically or through adoption or through earlier surrogacy (except if the child is mentally or physically challenged or suffers from life threatening disorder or fatal illness with no permanent cure); and such other conditions that may be specified by regulations.<sup>147</sup> The surrogate mother is similarly obligated to obtain a certificate of eligibility from the appropriate authority upon meeting the stipulated conditions, viz, she must be an ever married woman having a child of her own and within the age range of 25-35 years on the day of implantation; must be a close relative of the intending couple; must not have acted as a surrogate mother previously; produces a certificate of medical and psychological fitness from a registered medical practitioner.<sup>148</sup>

A child born out of a surrogacy arrangement will be deemed to be the biological child of the intending couple and shall enjoy all rights and privileges accorded to a natural child. The abandonment of a surrogate child regardless of any form of genetic defect, birth defect or other medical condition or abnormality is prohibited under the bill.<sup>149</sup> It goes further to abolish abortion of the foetus and disallows any person to coerce the surrogate mother to abort the pregnancy at any stage except as recognised under the law. In such situation, the written consent of the surrogate mother and the authorisation of the appropriate authority are mandatory. The authorisation must also meet the requirement under the Medical Termination of Pregnancy Act 1971.<sup>150</sup> The intending couple does not have a say in the termination of the pregnancy. The bill penalises certain offences created therein like, undertaking or advertising commercial surrogacy; exploiting the surrogate mother and children born through surrogacy; as well as selling or importing human embryo or gametes for surrogacy. It prescribes a penalty of 10 years imprisonment and a fine of 10 lakh rupees for offenders.<sup>151</sup> Also medical experts

who contravene the provisions of the bill<sup>152</sup> and intending couples or any other person who initiates commercial surrogacy<sup>153</sup> are similarly sanctioned.

Like its predecessors, the bill has a number of lacunae. For instance, the failure of the bill to define “close relative,” as the surrogate is required to be genetically related to the intending couple, has given room to a number of speculations. Is the phrase synonymous with “near relative,” which was defined under the Transplantation of Human Organs and Tissues Act 1994 to cover “spouse, son, daughter, father, mother, brother or sister”?<sup>154</sup> Also where the surrogate mother is a “close relative” of the intending father (for instance, a sister) and she is permitted to donate her egg, such may negatively impact on the surrogate child’s health as a result of possible congenital anomalies which the World Health Organisation has seriously warned against.<sup>155</sup> In addition, the definition of “infertility” is lopsided as it appears to concentrate more on inability to “conceive” or condition debarring a couple from “conception.” It is a known fact, for instance, that some women may conceive but are unable to carry the pregnancy to full term as a result of medical conditions like, multiple miscarriages, multiple fibroids in the uterus, hypertension, cancer, etc. Are such cases covered under the bill’s definition of “infertility”?<sup>156</sup> It is worthy of note that even the 2016 bill was again subjected to further amendments and revisions in 2018. Thus, at the moment there is no legislation regulating surrogacy in India. Apparently the ICMR guidelines appear to regulate the practice of surrogacy in India, though its’ legal status is doubtful, being mere guidelines.<sup>157</sup>

It is therefore, suggested that the Indian government should expeditiously enact a statute to control the practice of surrogacy in the country. Fortunately, a number of revised or amended ART bills have overtime been introduced in the parliament. If enacted into law, such legislation have the capability of preventing unethical practices by medical doctors operating the ART clinics and the semen banks as well as protects the interests of the commissioning couples, the surrogate mothers and the surrogate child.

### Regulatory Framework on Surrogacy in South Africa

Surrogacy in South Africa is legally recognised and regulated by the Children’s Act 2005.<sup>158</sup> Unlike the Indian situation, the likelihood of

South Africa becoming a target for surrogacy tourism is seriously minimal and restricted going by the requirements under section 292(1)(c) and (d) of the Children's Act 2005 which mandates that at the time of executing the surrogacy agreement, the commissioning parents or commissioning single parent, the surrogate mother and her husband or partner must have their residence in South Africa. The Act requires that the surrogacy agreement must be in writing, signed by the relevant parties in South Africa and confirmed by a South African High Court before fertilisation of the surrogate mother occurs. The confirming High Court must be the one in whose jurisdictional area the commissioning parent or parents are domiciled or habitually resident.<sup>159</sup> Commercial surrogacy is proscribed as the court in the process of entertaining the application for confirmation of the agreement must ensure that the surrogate mother is not employing surrogacy as a source of income generation and is entering into the agreement purely for altruistic purposes.<sup>160</sup>

Before the surrogacy agreement could be confirmed by the court, the statute imposes some obligations on the part of both the commissioning parents and the surrogate mother. For instance, the commissioning parents must establish that they are unable to give birth to a child and that such situation has remained permanent or irreversible.<sup>161</sup> It is also a statutory obligation that the gametes of both commissioning parents must be used or in the event that for any medical, biological or other valid explanation that is not possible, then the gametes of at least a commissioning parent must be used in the procedure.<sup>162</sup> The court must also be satisfied that the commissioning parents are in all respect suitable persons to accept the parenthood of the child that is to be born.<sup>163</sup> In *Ex Parte WH*,<sup>164</sup> while confirming the surrogate motherhood agreement application filed by a gay couple, the South African High Court expressed the view that in determining the suitability of a parent as a suitable person, an objective test should be applied and that such test should *inter alia*, include an enquiry into the ability of the parents to care for the child both emotionally and financially and to provide an environment appropriate for the harmonious growth and development of the child.<sup>165</sup> The court also noted that "the personal and character details of a commissioning parent" regarding "details of previous criminal convictions, particularly those relating to violent crimes or crimes of sexual nature"<sup>166</sup> should also be taken

into consideration in determining the suitability of the parenthood of the child.

On the part of the surrogate mother, the statute similarly requires her to be domiciled in South Africa;<sup>167</sup> be in all respect a suitable person to act as a surrogate mother;<sup>168</sup> and supply a written approval of her husband or partner in addition to such partner becoming a party to the agreement.<sup>169</sup> The surrogate mother must also have a documented history of at least a pregnancy and a possible delivery as well as has a living child of her own.<sup>170</sup> Section 298(2) of the Act requires the court to terminate the confirmation of the surrogate motherhood agreement upon discovery, after notice to the parties and a hearing, that the surrogate mother has freely terminated the agreement. It is worthy of note that a surrogate mother who is also a genetic parent of the child may make such an application to the court at any time before the expiration of 60 days after the birth of the child. The court is required to ensure that the best interests of the child are protected on the termination of the agreement.<sup>171</sup> The surrogate mother has the right to also terminate the pregnancy but such must be subject to prior information to and consultation with the commissioning parents.<sup>172</sup>

The surrogate mother does not incur any liability to the commissioning parents for the termination of the agreement except as it relates to the payment of compensation for any payment made by the commissioning parents such as expenses directly connected to the artificial fertilisation and pregnancy of the surrogate mother, loss of earnings made to the surrogate mother, insurance to cover the surrogate mother, etc.<sup>173</sup> Furthermore, once the agreement has been terminated, the parental right that would have been vested in the commissioning parents are terminated and reassigned to the surrogate mother, her husband or partner and if none, then it would be conferred on the commissioning father.<sup>174</sup> Once the court has confirmed a surrogacy agreement, its implication on the status of the surrogate child is that the child belongs to the commissioning parents as from the time of birth and the surrogate mother is required to surrender the child over to the commissioning parents as soon as reasonably possible and neither she nor her partner or relatives have any right of parenthood or care.<sup>175</sup>

The position prior to the enactment of the Children's Act 2005 was that the surrogate

mother who gave birth to the child and her husband, if married, were regarded as the child's parents.<sup>176</sup> The commissioning parents who were desirous of becoming the legal parents were required to apply for an adoption. However, where the surrogate mother changes her mind and did not want to consent to the adoption of the baby, she could do so regardless of the genetic origin of the surrogate baby. Such action may have negative impact on the best interest of the child. The provision of section 297 of the extant Children's Act 2005 was possibly intended to address the lapses and protect both the interests of the commissioning parents as well as the surrogate baby.

### Regulatory Framework on Surrogacy in Nigeria

Surrogacy arrangement is neither banned nor legalised in Nigeria and parties who engage in it may not be liable to a criminal prosecution or conviction as the offence is not defined and the penalty therefore prescribed in any written law.<sup>177</sup> In spite of the dearth of laws to regulate or protect parties to ART procedures and the children who are products of such arrangements, Nigerian couples faced with reproductive challenges continue to patronise specialists in this area of medicine.<sup>178</sup> However, one of the possible challenges the absence of a regulatory framework in this area may constitute to parties in a surrogacy arrangement, who may wish to approach the court to resolve any dispute arising therefrom,<sup>179</sup> is the problem of which law the court would place reliance upon in determining the case. Adelakun has argued that "[t]here is a likelihood of a biased judgment based on cultural sentiments. The bias is likely to arise from socio-cultural influences which view conception through artificial means unacceptable."<sup>180</sup> Dolgin<sup>181</sup> has also admitted that the law is ambivalent and that:

*The rulings that establish the context for surrogacy law, including rulings about the right to procreate, the right to raise children, and the right to enter into contracts, carry conflicting implications for the legality of surrogacy. These rulings reflect society's uncertainty about the comparative significance of status and contract, and of nature and culture.*<sup>182</sup>

Another challenge posed by lack of surrogacy regulation in Nigeria is that it has resulted in the sudden increase of "baby factories" (also referred to as "baby farm" or "baby harvesting") where ill-equipped clinics and unhygienic orphanages homes, prayer homes, social welfare

homes or maternity homes have been turned into centers where poor young and vulnerable girls or women are lured into and encouraged or forced to become pregnant and deliver babies who are taken away from their mothers and sold on the "black markets" to desperate childless couples.<sup>183</sup>

As a matter of fact, negative media reports on baby factories<sup>184</sup> have further endangered the recognition of surrogacy arrangements in Nigeria as a result of the likely stigmatisation of any couple known to have engaged the services of a surrogate mother because of the erroneous public perception and equation of surrogacy arrangements to baby factories.<sup>185</sup> In most cases, unsuspecting desperate childless couples who went seeking for "bogus" fertility treatments have been caught up in baby-selling scams in Nigeria. BBC News gave an account of a United Kingdom based Nigerian woman who was "tricked by a doctor into believing (that) she had given birth at a clinic in Port Harcourt, Nigeria, in January 2011, while sedated, after she went...for fertility treatment."<sup>186</sup> After regaining "consciousness she was handed a baby and told she had given birth."<sup>187</sup> Reports have it that most times the pregnancies and deliveries are framed by the fraudulent clinic operators who administer some substances to such unsuspecting childless mothers.<sup>188</sup>

But the truth is that "baby factories" and surrogacy arrangements are not the same. In countries where the practice of surrogacy is regulated, it is carried out in ART licensed clinics operated by experts; the parties enter into proper or formal surrogacy agreements and they are provided with counselling and psychological sessions to prepare them for psychological issues that may arise by reason of surrogacy procedures. This may not often be the case in baby factories where the whole issue is shrouded in secrecy and criminality. Given the nonexistence of surrogacy regulatory framework in Nigeria, ART specialists conduct the procedure as they consider proper "under self-crafted" or adopted laws and standards,<sup>189</sup> such as operating based on the United Kingdom's Human Fertilisation and Embryology Authority Guidelines.<sup>190</sup>

Nonetheless, there have been some legislative attempts at providing framework for regulating assisted reproductive technology in Nigeria. The initial effort was made in May 2012 following a presentation of a bill at the House of Representatives for the creation of a Nigerian

Assisted Reproduction Authority (Establishment) Bill 2012,<sup>191</sup> but it did not scale through as it did not enjoy the majority support of members of the parliament. Besides, both the Nigerian Medical Association (NMA) and the Society for Obstetrics and Gynecology of Nigeria (SOGON) admitted that they neither knew the source of the bill nor contributed to its contents.<sup>192</sup> About two years later, the National Health Act, 2014<sup>193</sup> was passed into law. The Act bans the practice of ARTs and punishes any person who *inter alia*, manipulates “any genetic material, including genetic material of human gametes, zygotes or embryos” or is involved in the importation or exportation of “human zygotes or embryos” with a minimum imprisonment term of 5 years with no option of fine.<sup>194</sup> Another bill seeking to amend the principal Act No. 8 of 2014 was presented to the National Assembly, the National Health Act (Amendment) Bill 2016. The bill called for the creation of a regulatory body, National Registry of Assisted Reproductive Technology Clinics and Banks, which could act as a national database of ART data in the country.<sup>195</sup>

The bill makes surrogacy arrangement available to only commissioning couple who can show that the commissioning woman suffers from inability to carry her pregnancy to full term and in which case, she is mandated to provide an attested medical evidence which makes such disclosure.<sup>196</sup> The importation, exportation or sale of gametes or zygotes and embryos are banned in Nigeria unless where a party elects to transfer his/her gametes overseas.<sup>197</sup> Moreover, a married donor must secure the consent of the spouse before donating his/her gametes and he/she can decide the scope of his/her information that should be released and to whom same could be released to unless as otherwise directed by the court. The donor must also be ready to relinquish his claim over the surrogate child.<sup>198</sup> In fact, the Nigerian Law Commission has also recommended that any child born through a surrogacy arrangement should be formally adopted by the commissioning parents even when they are genetically linked to the child.<sup>199</sup> The ART clinics are further mandated to perform medical tests on the patients, surrogates and donors to determine any medical state which may jeopardise any of the parties to the surrogacy arrangement as well as offer counselling sessions to the parties on the ART options they could have access to and the probable consequences.<sup>200</sup>

In addition to this proposed bill, two other bills were later introduced in the National Assembly, namely, “A Bill for an Act for the regulations of in-vitro fertilisation, to prohibit certain practices in connection with in-vitro fertilisation, to establish an in-vitro fertilisation authority to make provision in respect of children born of in-vitro fertilisation process and for connected purposes,” sponsored by Senator Barau Jibrin which was first read in April 2016<sup>201</sup> and “A Bill for an Act to provide for the regulation and supervision of Assisted Reproductive Technology and for matters connected therewith” sponsored by Senator Lanre Tejuoso.<sup>202</sup> Both bills, which respectively scaled through a second reading at the Senate in October 2017,<sup>203</sup> were later consolidated<sup>204</sup> into the Assisted Reproductive Technology (Regulation) Bill.

According to this bill, ART procedure is accessible to every person including single persons, married and unmarried couples. Consent is a requirement where the procedure is needed by couples and a parent of a minor in search of the procedure will be entitled to have access to information relating to the donor, the surrogate mother and the child’s welfare to the limit allowed by law.<sup>205</sup> Surrogate mothers and commissioning couples are required to enter into a legally binding surrogacy agreement,<sup>206</sup> while the commissioning parents are to be responsible for all the expenses relating to the pregnancy, insurance coverage and post-natal expenses linked to the pregnancy and incurred by the surrogate mother.<sup>207</sup> The surrogate mother is also entitled to compensation from the commissioning parents/couple for acting as a surrogate on their behalf.<sup>208</sup> The donor of the gametes<sup>209</sup> and the surrogate mother are required to surrender all parental rights over the child in favour of the commissioning couple who are recognised as the legitimate parents of the child.<sup>210</sup> The birth certificate and register must have the name of the commissioning couple as parents of the child.<sup>211</sup>

On their part, the commissioning parents are obligated to accept the surrogate child regardless of any abnormality/abnormalities.<sup>212</sup> The commissioning couple must also issue a certificate declaring that the surrogate mother acted on their behalf.<sup>213</sup> The bill penalises any commissioning parents who refuse to accept or take custody of the surrogate child.<sup>214</sup> The bill goes further to set the eligibility standard that must be met by intending surrogate mothers. She must be between the ages of 21-45 years and cannot act as a surrogate or undergo embryo

transfer beyond three times in her life.<sup>215</sup> It is notable that the bill makes provisions regarding cross-border surrogacy arrangements. In such situation, the overseas commissioning couple must engage the services of a local guardian who should take care of the surrogate mother during and after the period of pregnancy and the child to be born. The foreign commissioning couple will also undertake to accept the custody of the surrogate child. On attainment of 18 years, a surrogate child is entitled to apply for information regarding his origin except as it relates to the identity of his/her genetic parents or surrogate mother.<sup>216</sup>

### CONCLUSION AND RECOMMENDATIONS

Surrogacy arrangement through assisted reproductive technology process is a fast growing area in medical and biomedical sciences across the globe. Due to huge pressure, mostly from family members and friends, on couples to have children after marriages, infertile couples have resorted to having their own children through ART in order to avoid social stigmatisation. Similarly, commercial surrogacy has made it feasible for women who have no genetic links to the fetuses they gestate to enjoy monetary benefits and rewards for acting as gestational surrogate mothers to the intended parents or commissioning couples. Surrogacy practice as a form of artificial reproduction has not been without its socio-cultural, ethical, and legal controversies. Some have reasoned that surrogacy arrangement undermines the self-esteem of both the child who is deemed as an object of a “settlement commodity” and the surrogate mother as a “womb for rent” whilst the medium of procreation becomes a “commercial enterprise.”<sup>217</sup> It may be recalled that in the famous New Jersey case of *Baby M*, the judge while pronouncing the surrogacy contract unenforceable noted,

*[w]e invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of yearning of infertile couples to have their own children, we find payment of money to a “surrogate” mother illegal, perhaps criminal, and potentially degrading to women.*<sup>218</sup>

Established family perception is said to be violated as a result of the “procedural relationship” between the surrogate mother and the commissioning father as the child, in some

instances, may be genetically linked to the surrogate mother and the commissioning father without any biological nexus with the commissioning mother. African culture generally has a vertical notion of family lineage involving the ancestors, the present generation and the generations yet unborn, all hereditarily related in an unbroken chain. Commercial surrogacy, for instance, tends to compromise the inviolability of this genealogy<sup>219</sup> and portrays the surrogate child as a “property”<sup>220</sup> or a “commodity of purchase” brought into the family system through the instrumentality of “commodification of motherhood”<sup>221</sup> rather than being seen as a “gift of nature.”<sup>222</sup>

Besides, surrogacy arrangement also throws up the legal questions regarding the applicable law in a surrogacy arrangement and the parenthood of the surrogate child, which at times may transcend beyond national boundaries. There are also a number of associated bioethical dilemmas, as raised in the *Baby M* case, regarding surrogacy, contract law and parental rights. Would it be ethically right for a gestational surrogate who has a genetic tie with the surrogate child to be contractually forced to surrender her maternal status and maternal rights over a child she has carried in her womb for several months and subsequently breastfed? Like the Bible rightly questions, “Can a mother forget her nursing child? Can she feel no love for the child she has borne?”<sup>223</sup>

While a number of countries like the United Kingdom, South Africa, Canada, United States of America, the Netherlands, Israel, Saudi Arabia, Kenya, Russia, Ukraine, Japan, China, Australia, among others, have adopted a position on surrogacy arrangements within their respective domains by expressly permitting, banning or limiting the scope of the acceptable practice to either commercial or altruistic surrogacy, Nigeria has not taken a defined legal position on this sensitive subject. The unregulated surrogacy practice in Nigeria has invariably opened the floodgates to a number of unethical practices by medical experts to exploit susceptible donors and surrogate mothers who may be engaged by fertility clinics to either “harvest their eggs” (sell their eggs) or “hire their wombs” for insignificant payments<sup>224</sup> as well as subject intending commissioning couples to undue societal stigmatisation and uncertainty regarding their parenthood status of the surrogate children. To remedy this unfortunate position, the Nigerian government must take appropriate steps to ensure that the

ART bills pending at the National Assembly are expeditiously harmonised, passed and enacted into law, taking into account the peculiarities of our political, religious, socio-cultural, ethical and multi-ethnic diversities.

Moreover, it is suggested that the age limit for an intending surrogate mother in Nigeria should be pegged between 21 and 35 years, which is the age range under the Indian Surrogacy (Regulation) Bill 2016. This will help in addressing possible health complications associated with late child bearing in older women. Moreover to avoid the likely risk of ovarian failure, ovarian hyper-stimulation syndrome (OHSS) and development of cancer, liver, kidney and other life threatening diseases which are commonly associated with fertility treatment drugs, it is advisable that a woman should not act as a surrogate or undergo embryo transfer beyond two times in her life time. Furthermore, there is need to adopt the South African position under the Nigerian law in making it mandatory for a High Court of a State where the procedure is to be performed to confirm every executed surrogacy agreement before fertilisation of the surrogate mother occurs. For this purpose, there should be statutory provisions stipulating the preconditions or obligations that must be fulfilled by the parties to the surrogacy agreement before such confirmation by the court. Subjecting the procedure to the scrutiny of the court would further provide checks and balances capable of preventing unethical practices by fertility clinics, semen banks, surrogacy agencies and unnecessary exploitation of both the surrogate mothers and/or the desperate commissioning parents as well as protects the surrogate child.

To further protect the interest of the local guardian appointed by a foreign commissioning parents under the Nigerian ART (Regulation) Bill, it is not enough for the foreign couple to make undertaking to accept the surrogate child, there must in addition be an insurance coverage for the appointed local guardian in the event that the overseas commissioning parents fail to show up to adopt the child or honour their undertaking. Moreover, disparities in the regulations of surrogacy arrangements by countries create difficulties for the enforcement of a foreign surrogacy in another jurisdiction, although generally, legal considerations have always been in favour of the best interests of the child. Considering the fact that intending couples travel outside their countries in search

of surrogates, it is imperative for the international community or bodies to come together and put in place an international surrogacy instrument in order to minimise complications that could arise from international surrogate contracts.

Generally speaking, regardless of the various controversies surrounding surrogacy arrangements, the authors strongly recommend altruistic surrogacy for Nigeria as it helps yearning infertile couples to become parents without leaving undue moral burdens and guilt in the minds of surrogate mothers.

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- [19] Owolabi, A. T. *et al.*, "Semen Quality of Male Partners of Infertile Couples in Ile-Ife, Nigeria," (2013) 16(1) *Nigerian Journal of Clinical Practice*, p. 37.
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- [21] Ikechebelu, J. I. *et al.*, "High Prevalence of Male Infertility in Southeastern Nigeria," (2003) 23 *J. Obstet. Gynaecol*, pp. 657-659.
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- [26] Princewill, C. W. and Jegede, A. S., "Women's Reproductive Autonomy and the Ethics of Baby Making: The Nigerian Case Study," (2019) 7 *Journal of Health Science*, pp. 328, 332.
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- [31] Vidlicka, S. R. *et al.*, "Bioethical and legal challenges of surrogate motherhood in the Republic of Croatia," (2012) 3(5) *JAHHR (Proceedings of the 12<sup>th</sup> Bioethics Roundtable of Rijeka: Bioethics Education-Challenges and Perspectives*, held on 13<sup>th</sup> & 14<sup>th</sup> May 2011), p. 42.
- [32] Surrogacy (Regulation) Bill 2016 (India), Clause 2(b).
- [33] *Ibid*, Clause 2(f).
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- [36] Cap. 49 of 1985.
- [37] BBC ON THIS DAY, "1985: Inquiry over 'baby-for-cash' deal." Available at [http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid\\_2495000/2495857.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm). Accessed on 16 May 2020.
- [38] *In Re- C (A Minor)(Wardship: Surrogacy) (a.k.a. the Baby Cotton Case)* (1985) FLR 846.
- [39] Brahams, D., "The Hasty British Ban on Commercial Surrogacy" (1987) 17(1) *The Hastings Center Report*, pp. 16-19.
- [40] (1985) FLR 445.
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- [42] *Ibid*, 457.
- [43] Alghrani, A. and Griffiths, D., "Regulation of Surrogacy in the United Kingdom: The Case for Reform," (2017) 29(2) *Child and Family Law Quarterly*, p. 5. Available at <http://sro.sussex.ac.uk/id/eprint/68402/>. Accessed on 16 May 2020.
- [44] SAA 1985, section 2(1).
- [45] *Ibid*, section 1A, inserted by section 36 of the Human Fertilisation and Embryology Act, 1990.
- [46] SAA 1985, *ibid*, sections 3(1)(a) and (2).
- [47] *Ibid*, section 3(5)
- [48] (2014) EWHC 595.
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- [50] HFEA, Cap. 22 of 2008. For a detailed discussion on the 2008 statute, see Fox, M., "The Human Fertilisation and Embryology Act 2008: Tinkering at the Margins," (2009) 17 *Feminist Legal Studies*, 333; McCandles, J. and Sheldon, S., "The Human Fertilisation and Embryology Act (2008) and the Tenacity of Sexual Family Form," (2010) 73 *Modern Law Review*, 175.
- [51] HFEA 2008, section 33(1).
- [52] *Ibid*, section 33(3).
- [53] *Ibid*, section 35.
- [54] *Ibid*, section 42.
- [55] *Ibid*, sections 36 and 43.
- [56] *Ibid*, section 41. See generally sections 35-41 thereof regarding who can be regarded as a father of a surrogate child.
- [57] Parental responsibility is defined as "all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and administration of his/her property"- see Children Act 1985, section 3.
- [58] HFEA 2008, section 54(1).
- [59] *Ibid*, section 54(2) (5).
- [60] *Ibid*, section 54(4).
- [61] *Ibid*, section 54(1)(b).
- [62] *Ibid*, section 54(3). See also the case of *In Re X (A Child) (Surrogacy: Time Limit)* (2014) EWHC 3135 (Fam), where the court considered an application for a parental order in respect of a child born through surrogacy procedures in an Indian clinic two years and two months outside the time limits imposed by HFEA 2008. The rule was relaxed as the commissioning parents claimed that they were ignorant that they needed to apply for the order. See also *In Re X and Y (Foreign Surrogacy)* (2008) EWHC 3030 (Fam), (2009) 2 WLR 1274, (2009) 1 FLR 733. Available at <https://swarb.co.uk/in-re-x-a-child-surrogacy-time-limit-fd-3-oct-2014/>. Accessed on 16 May 2020.
- [63] HFEA 2008, *Ibid*, section 54(4).
- [64] *Ibid*, section 54(8).
- [65] Family Procedure Rules 2010, Order 13 Rule 15(2)(a).
- [66] Alghrani, A. and Griffiths, D., "Regulation of Surrogacy in the United Kingdom: The Case for Reform," (2017) 29(2) *Child and Family Law Quarterly*, p. 11.
- [67] (2015) EWHC 2080. The court granted the parental order even though it was made 17 months after the expiration of the statutory time limit.
- [68] *Ibid*. See also *Re J (Adoption: Non-Patril)* (1998) NILR 424, (1998) 1 FLR 225, where the court considered an adoption of the child as "the creation of the psychological relationship of parent and child with all its far-reaching manifestations and consequences," and "to achieve for the child the emotional, psychological, social and legal benefits." per Thorpe LJ. Available at <https://swarb.co.uk/re-j-adoption-non-patril-ca-1998/>. Also available at <https://www.4pd.com/case-detail-re-j-adoption-non-patril/>. Both accessed on 16 May 2020.
- [69] The Regulation applies the requirement under section 1 of the Children and Adoption Act 2002 to parental order applications. See also *Re W* [2013] EWHC 3570 (Fam).
- [70] For instance, the applicants for parental orders are required to comply with the procedure stipulated in Part 13 of the Family Procedure Rules (FPR) 2010.
- [71] *Ibid*, Order 13 Rule 4.
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- [73] See for instance, the case of *In Re T (A Child) (Surrogacy: Residence Order)* (2011) EWHC 33.

- [74] See BBC, “Nicole Kidman announces baby born through surrogate” (18 January 2011) *BBC NEWS*. Available at <https://www.bbc.com/news/entertainment-arts-12213615>. Accessed on 16 May 2020.
- [75] See Pidd, H., “You can tell everybody, this is our son: Elton John becomes a father at 63,” (28 December 2010) *The Guardian*. Available at <https://www.theguardian.com/music/2010/dec/28/elton-john-david-furnish-son>. Accessed on 16 May 2020.
- [76] Cowie, L., “Surrogacy: I wanted to help someone” (5 June 2019) *BBC NEWS*. Available at <https://www.bbc.com/news/uk-scotland-48526098>. Accessed on 16 May 2020, where it was reported that the 39-year-old woman who has two boys of her own has carried surrogate babies three times for two couples.
- [77] *Ibid*.
- [78] Jackson, E., “UK law and international commercial surrogacy: 'the very antithesis of Sensible'” (2016)4(3) *Journal of Medical Law and Ethics*, 197-214. See also, ““BBC Today Programme on stranded surrogacy babies.” Available at <https://www.ngalaw.co.uk/blog/2020/04/04/bbc-today-programme-on-stranded-surrogacy-babies..> Accessed on 16 May 2020, where it was reported that as at April 2020, about 14 British families with babies born or imminently due through international surrogacy in the USA, Canada, Ukraine, Georgia were seeking emergency travel documents during the current coronavirus crisis to help them bring their children home to the UK.
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- [80] See Kohli, N., “Commercial Surrogacy: The Half Mothers of Anand,” (8 November 2015) *The Hindustan Times*. Available at <https://www.hindustantimes.com/health-and-fitness/the-half-mothers-of-anand/story-OsnxcL9TycKZ38QusrKNGI.html>. Accessed on 12 May 2020.
- [81] For instance, while surrogacy arrangement (including in vitro fertilisation-IVF) cost about \$11,000 in India, it is estimated that the cost is approximately \$15,000 (excluding ART charges) in the United States of America and £10,000 in the United Kingdom. See Sama-Resource Group for Women and Health, “Birthing a Market: A Study on Commercial Surrogacy,” *op. cit*.
- [82] See Kohli, N., “Commercial Surrogacy: The Half Mothers of Anand,” (8 November 2015) *The Hindustan Times*. Available at <https://www.hindustantimes.com/health-and-fitness/the-half-mothers-of-anand/story-OsnxcL9TycKZ38QusrKNGI.html>. Accessed on 12 May 2020.
- [83] See Sama-Resource Group for Women and Health, “Birthing a Market: A Study on Commercial Surrogacy,” *op. cit*.
- [84] Centre for Social Research, *Final Report, Surrogate Motherhood-Ethical or Commercial* (Centre for Social Research, 2010), p. 5. Available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>. Accessed on 12 May 2020.
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- [86] ICMR Guidelines, 2005, para. 1.2.33.
- [87] *Ibid*, para. 3.10.1.
- [88] *Ibid*, para. 3.10.2.
- [89] *Ibid*, para. 3.10.4.
- [90] *Ibid*, para. 3.10.5.
- [91] *Ibid*, para. 3.10.7.
- [92] *Ibid*, para. 3.10.6.
- [93] *Ibid*, para. 3.10.8.
- [94] *Ibid*, para. 3.12.1.
- [95] *Ibid*, para. 3.12.2.
- [96] *Ibid*, para. 3.12.3. The Indian Majority Act, 1875 recognises the majority age as eighteen years.
- [97] *Ibid*, para. 3.10.3.
- [98] ART (Regulation) Bill 2008, Clause 13.
- [99] *Ibid*, Clause 14(2).
- [100] *Ibid*, Clauses 20(1) & (5) and 34(6).
- [101] *Ibid*, Clause 20(6).
- [102] *Ibid*, Clauses 20(9) and 33-34.
- [103] *Ibid*, Clause 32(1).
- [104] *Ibid*, Clause 34(1).
- [105] *Ibid*, Clauses 33(3) and 34(4).
- [106] *Ibid*, Clause 34(2) and (3).
- [107] *Ibid*, Clauses 34(10), 35(1) & 35(7).
- [108] *Ibid*, Clause 25.
- [109] *Ibid*, Clause 34(16) and (17).
- [110] *Ibid*, Clause 26(3).
- [111] *Ibid*, Clause 34(4).
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- [120] Children’s Act No. 38, Cap. 19 of 2005, Republic of South Africa Government Gazette No. 28944, Vol. 492 of 19 June 2006, section 298
- [121] Schenker, J. G., “Assisted Reproduction Practice in Europe: Legal and Ethical Aspects,” (1997) 3(2) *Human Reproduction Update*, p. 180.
- [122] ART (Regulation) Bill 2010, Preamble.
- [123] *Ibid*, Clause 34(5).
- [124] *Yamada v. Union of India* AIR 2008 SC 1554; (2008) SCC 518.
- [125] *Union of India v. Jan Balaz*, Indian Supreme Court Civil Appeal No. 8714/2010.
- [126] See Kohli, N., “Commercial Surrogacy: The Half Mothers of Anand,” (8 November 2015) *The Hindustan Times*. Available at <https://www.hindustantimes.com/health-and-fitness/the-half-mothers-of-anand/story-OsnxcL9TycKZ38QusrKNGI.html>. Accessed on 12 May 2020.
- [127] Jagran, J., “Union Home Ministry Issued Strict Guidelines for Regulating Surrogacy in India.” Available at <https://www.jagranjosh.com/current-affairs/union-home-ministry-issued-strict-guidelines-for-regulating-surrogacy-in-india-1358573456-null>. Accessed on 14 May 2020.
- [128] ART (Regulation) Bill 2014, Clause 2(i).
- [129] *Ibid*, Clause 60(11)(a).
- [130] *Ibid*, Clause 60(21)(ii).
- [131] *Ibid*, Clause 61(7). See also Citizenship Act 1955, section 7A.
- [132] *Ibid*, Clause 60(5).
- [133] *Ibid*, Clause 60(1) provides that “the couple commissioning surrogacy through the use of assisted reproductive technology and the surrogate shall enter into a surrogacy agreement which shall be binding on the parties.”
- [134] *Ibid*, Clause 60(13).
- [135] *Ibid*, Clause 60(21)(iv).
- [136] *Ibid*, Clause 60(11)(b) and (c).
- [137] *Ibid*, Clauses 59(3) and 60(4).
- [138] *Ibid*, Clause 60(29).
- [139] Surrogacy (Regulation) Bill 2016 (SRB 2016), p.19. Available at <http://164.100.47.4/Bills/Texts/LSBillTexts/Asintroduced/257LS2016Eng.pdf>.
- [140] *Ibid*, Clauses 14-22.
- [141] *Ibid*, Clauses 23-31.
- [142] *Ibid*, Clauses 32-34.
- [143] *Ibid*, Clause 1(2).
- [144] *Ibid*, Clause 4(ii) (a)-(e).
- [145] The bill defines “infertility” as the “inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception,” *Ibid*, Clause 2(p).
- [146] *Ibid*, Clause 4(iii)(a)(I)-(III).
- [147] *Ibid*, Clause 4(c)(I)-(IV).
- [148] *Ibid*, Clause 4(b)(I)(IV).
- [149] *Ibid*, Clause 7.
- [150] *Ibid*, Clauses 9 and 3(vi).
- [151] *Ibid*, Clause 35.
- [152] *Ibid*, Clause 36.
- [153] *Ibid*, Clause 37.
- [154] See Ministry of Health, “The Surrogacy (Regulation) Bill, 2016.” Available at <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>. Accessed on 12 May 2020.
- [155] See Fact Sheet: Congenital Anomalies, World Health Organisation, September, 2016. Available at <http://www.who.int/mediacentre/factsheets/fs370/en/>. See also Ministry of Health, “The Surrogacy (Regulation) Bill, 2016.” Available at <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>. Accessed on 12 May 2020.
- [156] See also Ministry of Health, “The Surrogacy (Regulation) Bill, 2016.” Available at <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>. Accessed on 12 May 2020.
- [157] *Tanvi Trading and Credit Pvt. Ltd. v. New Delhi Municipal Council* 112 (2004) DLT 1.

- Available at <https://indiankanoon.org/doc/995427/>. Accessed on 16 May 2020.
- [158]Cap. 19, Act No. 38 of 2005, Republic of South Africa Government Gazette No. 28944, Vol. 492 of 19 June 2006.
- [159]*Ibid*, section 292(1)(a)(b) and (e).
- [160]*Ibid*, section 295(c)(iv) and (v).
- [161]*Ibid*, section 295(a). It is submitted that in South Africa, the law recognises the rights of both heterosexual couples and same sex couples to adopt the procedure of surrogacy motherhood agreement to have their own children, provided they meet the requirements of the Children's Act 2005. See *Minister of Home Affairs v. Fourie* 2006 (1) SA 546; *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2002 (6) SA 1; *Gory v. Glover* 2007 (4) SA 97.
- [162]The Children's Act 2005, *ibid*, section 294.
- [163]*Ibid*, section 295(b)(ii).
- [164](2011) ZAGPPHC 185; 2011 (6) SA 514 (GNP); (2011) 4 All SA 630. Available at <http://www.saflii.info/zo/za/cases/ZAGPPHC/2011/185.html>. Accessed on 16 May 2020.
- [165]*Ibid*, para. 70.
- [166]*Ibid*, para. 69.
- [167]Children's Act 2005, section 292(1)(d).
- [168]*Ibid*, section 295(c)(ii).
- [169]*Ibid*, section 293(2).
- [170]*Ibid*, section 295(c) (vi) and (vii).
- [171]*Ibid*, section 7 sets out the factors that must be taken into consideration in applying the best interest principle or standard. See also section 28(2) of the South African Constitution which stipulates that a child's best interests are of primary importance in every matter relating to the child.
- [172]Children's Act 2005, *ibid*, section 300.
- [173]*Ibid*, sections 298 and 301.
- [174]*Ibid*, section 299.
- [175]*Ibid*, section 297(b) and (c). It must be pointed out that where sufficient evidence is not placed before the court, it is doubtful if the surrogate motherhood agreement would be confirmed. See *Ex Parte Applications for the Confirmation of Three Surrogate Motherhood Agreements* 2011 (6) SA 22, where the confirmation was denied because of lack of sufficient evidence. See also *In Ex Parte WH, op. cit.*, where the court, in confirming the agreement, stated some vital information that must be provided in the affidavit or affidavits in support of the application, namely: (a) all factors stipulated in the Children's Act 2005 with documentary proof, where applicable; (b) whether there have been any previous applications for surrogacy, the division in which the application was brought, whether such application was granted or refused and if it was refused, the reasons for the refusal must be stated; (c) a report by a clinical psychologist in respect of the commissioning parents and a separate report in respect of the surrogate mother and her partner; (d) a medical report regarding the surrogate mother; (e) details and proof of payment of any compensation for services rendered, either to the surrogate mother herself or to the intermediary, the donor, the clinic or any third party involved in the process; (f) all agreements between the surrogate any intermediary or any other person who is involved in the process; (g) full particulars, if any agency was involved, any payment to such agency, as well as affidavit by that agency; and (h) whether any of the commissioning parents have been charged with or convicted of violent crime or a crime of a sexual nature.
- [176]See the repealed Children Status Act No. 82 of 1978, section 5.
- [177]Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 36(12).
- [178]France-Presse, A., "Nigerian Couples Cautiously Turn to Surrogacy to Ease Fertility Woes" (27 December 2018) *VOA News*. Available at <https://www.voanews.com/africa/nigeria-couples-cautiously-turn-surrogacy-ease-fertility-woes>. Accessed on 16 May 2020. See also Koyonda, S. O., "ASSISTED REPRODUCTIVE TECHNOLOGIES IN NIGERIA: PLACING THE LAW ABOVE MEDICAL TECHNOLOGY," (2001) 43(1) *The Indian Law Institute*, p. 66-67.
- [179]Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 6(6)(b).
- [180]Adelakun, O. S., "The concept of surrogacy in Nigeria: Issues, prospects and challenges," (2018) 18 *African Human Rights Law Journal*, pp. 613-614. See also, Jegede, A. S. and Fayemiwo, A. S., "Cultural and ethical challenges of assisted reproductive technologies in the management of infertility among Yoruba of South-Western Nigeria," (2010) 14 *African Journal of Reproductive Health*, pp. 115-121.
- [181]Dolgin, J. L., "Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate," (1990) 38(2) *Buffalo Law Review*, pp. 515-550. Available at <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol38/iss2/5>. Accessed on 16 May 2020.
- [182]*Ibid*, p. 526.
- [183]Makinde, O. A. *et. al.*, "Baby factories taint surrogacy in Nigeria," (2016) 32 *Reproductive BioMedicine Online*, pp. 6-8. See also, Ayitogo, N., "Reps call for end to "baby factories" in Nigeria," (10 March 2020) *Premium Times*. Available at <https://www.premiumtimesng.com>

- /news/top-news/381180-reps-call-for-end-to-baby-factories-in-nigeria.html. Accessed on 16 May 2020.
- [184] See for instance, Agency Report, “Police rescue 19 pregnant girls, four children from Lagos ‘baby factories,’” (30 September 2019) *Premium Times*. Available at <https://www.premiumtimesng.com/news/headlines/355124-police-rescue-19-pregnant-girls-four-children-from-lagos-baby-factories.html>. Accessed on 16 May 2020, where it was alleged that those operating “baby factories” usually sell those babies to potential buyers for between ₦300,000–₦500,000 depending on their sexes. See also Balogun, I., “Baby factories: How pregnancies, deliveries are framed,” (2 September 2011) *Vanguard*. Available at <https://www.vanguardngr.com/2011/09/baby-factories-how-pregnancies-deliveries-are-framed/>. Accessed on 16 May 2020, where it was also alleged that the amount could even be as high as between ₦750,000 to ₦1 Million depending on the sex of the baby or ₦1.5 million or more for twins.
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**Citation:** Enobong Mbang Akpambang, “Legal Position on Surrogacy Arrangements in Nigeria and Some Selected Jurisdictions” *International Journal of Research in Humanities and Social Studies*, 7(3), 2020, pp. 18-39.

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