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## RESEARCH ARTICLE

# NEED FOR LEGAL FRAMEWORK FOR SURROGACY PRACTICE IN NIGERIA

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### ABSTRACT

Surrogacy is an arrangement where a person carries and gives birth to a baby for another person, for example, a couple who can't be pregnant themselves. The issue of child birth has been a challenge to many couples in Nigeria which has resulted in acrimony among couples leading to gross misunderstanding, separations and divorce. Reports have shown that the number of persons who cannot give birth to babies by themselves is on the increase. Couples who desire the surrogacy option are on the increase. There is no legal framework for surrogacy practice in Nigeria. The aim of this paper therefore is to examine the concept of surrogacy. The paper also advocates the need for legal framework to regulate surrogacy practice in Nigeria.

## INTRODUCTION

The family institution is a very vital and important aspect of human existence in both classical and contemporary study of human society. Undoubtedly elements of modernization and globalization is fast changing traditionally obtainable practices within Africa but the importance of the family remains a sacrosanct nexus to the social life of Africans. Ekane<sup>1</sup> posited that African societies are highly collectivist with emphatic stress of customary relations such as respect for ancestors and elder; dominance of patriarchy; prevalence of polygamous unions; important kinship networks; and, attachment of substantial importance to lineage continuation. Hence, according to Umeora<sup>2</sup>, the pronatalistic nature of traditional African society emphasizes the importance of procreation as an invaluable family rite and infertility is perceived as a disability and a loss of something, though invisible but so tangible with attendant social, psychological and emotional consequences. The family institution within Africa is a territory that is highly policed by various cultural, traditional and religious tenets across different communities and ethnicity. Despite the dynamics in the social narratives surrounding the perception of procreation across cultural boundaries, it is eminent that there is great similarity in the ways various African cultures value children and

attach an immense importance to the ability of a man and woman to procreate. There are expectations for the man to be biologically capable to father a child by getting a woman pregnant and the expectations for the woman to have the physiological and biological ability to carry a pregnancy to term. These painted scenarios of the gender role of a man and woman represent an ideal social expectation of what is regarded as a complete human. This study examines how surrogacy - an assisted reproductive technique, operates within a society (Nigeria) that is highly patriarchal and socially police reproduction within the lens of cultural, traditional and religious canons. Considering the presence of a thick socio-cultural and religious dictates in Nigeria and most African countries, Armour<sup>3</sup> opined that, "Although the birth of a child is typically considered a very happy time for parents, SURROGACY - whether traditional or gestational- is often an uncharted territory that can become very stressful for all parties involved." The intersection of culture, traditional beliefs, religious doctrines and social practices became a focal point of investigation for this study by collating the informed opinions of gynecologists, traditional birth attendants and legal professionals. Surrogacy is a practice where a woman agrees to conceive on behalf of a third party either by using her own eggs which is referred to as traditional surrogacy or by the in-vitro fertilization (IVF) where the surrogate does not contribute genetically to the conception of the child more accurately referred to as gestational surrogacy<sup>4</sup>.

<sup>1</sup> D, Ekane, 'Contemporary Family patterns in Sub Saharan Africa', *Digitala Vetenskapliga Arkivet*, 2012, <http://www.divaportal.org/smash/record.jsf?pid=diva2%3A602444&dswid>

<sup>2</sup> Umeora, O, J et al 'Surrogacy in Nigeria: Legal, ethical, social, cultural, psychological and religious musings' (2014) 13 *African Journal of Medical and Health Sciences* 105 106.

<sup>3</sup> Armour, K.L., 2012. An overview of surrogacy around the world: trends, questions and ethical issues. *Nursing for women's health*, 16(3).

<sup>4</sup> Rebecca Taylor "using a surrogate mother, WebMD" Last

However, within the broad definition there are many different ways surrogacy is defined in the world, surrogacy can be defined based on the way the embryo is created, whether or not the surrogate is compensated or not, and even by which professional you work with during the surrogacy. The origin of surrogacy dates as far back, as the medieval times where traditional surrogacy agreements were a common practice all around the world. A good example is the biblical story of Abraham and Sarah, where Sarah instructed her servant to lay with Abraham in order to conceive a child<sup>5</sup>. This form of surrogacy was also noted in Africa more specifically, in some tribes in Nigeria were rich women who could not conceive would marry other women to conceive on their behalf. In the case of gestational surrogacy there are several claims successfully gestational surrogacy surgeries before the year 1978, but there are no records or way to confirm that support this claim. The first officially recorded successful gestational surrogacy using (IVF) was in 1978. The technique was pioneered by a Consultant Gynecologist, Patrick Steptoe and Cambridge research physiologist Robert Edwards<sup>6</sup>. Surrogacy has become a cause of international debates and strife because of the technicalities surrounding it and also what it represents from the legal point, while some countries like Russia see it as 'a gift from one woman to another' others countries like the France see it as against public policy and have prohibited it within their borders. Nigeria is yet to produce any laws on the subject, although documents are drafted by the Nigerian lawyers according to the recommendations of the human fertilization and embryology Authority and the surrogacy arrangement act of England, Nigeria is yet to give a stance on the subject of surrogacy. This means that the rights of children are not protected and parties could choose to do whatever they want concerning them, regardless of if it is harmful to the child, surrogate or the biological parents or parent. Surrogacy agreements help to provide children for persons who cannot achieve conception or carry a child to full term themselves. This practice has improved several lives over the years but can also be exploitative for some parties if not properly regulated. Surrogacy has risen in demand in the past few years due to the changes in the societal perception of the surrogacy concept and the reduction of the stigmatization of women who cannot conceive naturally due to health or other reasons and has thus produced ripple effect that has raised questions in many countries and communities, this has led to either the restrictions or a total ban of surrogacy contracts in many countries. surrogacy has been classified into two types which are commercial surrogacy and altruistic surrogacy, commercial surrogacy can be defined as a surrogacy contract were consideration or a price is payed for the conception and birth of the child to the surrogate mother by the biological parents or parents, although some will argue that the money isn't paid for the conception of the child but for the surrogate to relinquish all rights to the child produced through surrogacy, while altruistic surrogacy is where the birth mother of the child does not collect monetary compensation for the child but does the act due to a close relationship with the biological parent or parents. The ban on surrogacy differs from place to place depending on what types of surrogacy is to be practiced, in countries such as the France, Germany and some other countries all types of surrogacy are prohibited while in countries like Greece, Australia, altruistic surrogacy is legal. The high demand for surrogacy in recent years has given rise to a global phenomenon known as surrogacy tourism, this has resulted in a lot of countries closing their borders to foreigners who want to make surrogacy contracts in their countries due to the level of damage that has been done previously as a result of the their previously relaxed laws .

## CONCEPTUAL CLARIFICATIONS AND THEORETICAL FRAMEWORK

Surrogacy is a process where a third party (woman) of childbearing age carries pregnancy for a commissioning parent with the intention of relinquishing the baby after birth. Surrogate pregnancies may be

both <sup>7</sup>gestational and <sup>8</sup>traditional. Surrogacy gained global attention with the 1986 case of *baby M* in the United States of America. Surrogate mother, Mary Beth Whitehead repudiated giving up the baby; she acted as surrogate for Elizabeth and William Stern (Tieu, 2009). Mary (the surrogate) in less than 24 hours of relinquishing the baby had demanded and collected back the baby, hence, the commissioning parent approached the court to seek legal custody of the child. The Supreme Court in New Jersey therefore formalized the surrogate arrangement between the parties and awarded custody of the child to the commissioning parent. The court rationalized the decision reached based on a critical consideration of the best interest of the child. The case sparked deliberations on the definition of motherhood, a woman's role in surrogacy as well as the changing nature of the formation of family. Surrogacy is advocated to childless couples as an alternative means of procreation. It is a procedure made possible as a result of progress with <sup>9</sup>Assisted Reproductive Technique (ART), which addresses the challenges of infertility. Surrogacy has been discussed as the most intense separation between sexual intercourse and procreation. Hence, it is now imaginable for a woman to bear a child to which she or her partner has no genetic relationship.

**Definition of Terms:** Gugucheva (2010) identified some crucial terms in the discussion of surrogacy and provides conceptualizations as deemed appropriate by the American Society of Reproductive Medicine (2006), American College of Obstetricians and Gynecologists (2008) and Council for Reproductive Genetics. The terms will be presented and defined below; they form a core part of the essential conceptualizations required to making meaning in this study.

- Biological mother/ genetic donor: a woman who contributes her egg to produce the fetus that results as a child.
- Biological father/ genetic donor: a man who contributes his sperm to produce the fetus that results as a child.
- Intended/ commissioning parent: the individual (s) who intend to be the parent (s) of the child born through surrogate arrangement. They may or may not have any biological link to the expected child.
- Traditional surrogacy: this arrangement is obtainable when a surrogate donates her egg and it is fertilized with the sperm from the intended father or from a donor. Most often, it is a process possible through <sup>9</sup>artificial insemination to avoid the greater cost of in-vitro fertilization. This woman is considered the biological, genetic and gestational mother and will carry the pregnancy until delivery after which she relinquishes all rights and claim to the child.
- Traditional surrogate mother: the woman who donates her <sup>10</sup>deoxyribonucleic acid (DNA) and gestates the pregnancy for someone else.
- Gestational surrogate mother/ carrier: this is the woman who gestates until delivery. She does not have any genetic or biological connection to the child.

**Conceptual Clarification:** Surrogate parenthood has its roots in biblical times with the relationship between Jacob, Rachael, Leah, Bilhah and Ziphah and the four sons born among them.<sup>11</sup>

<sup>7</sup> Gestational surrogacy is a process whereby eggs from one woman are used to create an embryo implanted in another. The surrogate therefore becomes the rented womb.

<sup>8</sup> Traditional surrogacy is a process whereby a woman's eggs are fertilized with the sperm of the intended father. <sup>3</sup> New Reproductive Technology (NRT)

<sup>9</sup>Artificial insemination (AI) is the deliberate introduction of sperm into a female's uterus or cervix for achieving a pregnancy through in vivo fertilization by means other than sexual intercourse.

<sup>10</sup>DNA-deoxyribonucleic acid, a self-replicating material which is present in nearly all living organisms as the main constituent of chromosomes. It is the carrier of genetic information.

<sup>11</sup> Genesis 16: 1-16 and Genesis 30: 1-13.

In the late 1970s the first recorded case<sup>12</sup> of assisted reproduction through surrogacy was contested in the English courts and this development has led to several debates on surrogacy as a means of reproduction.<sup>13</sup> Umeora defines surrogacy as a situation where a woman (third party) carries a pregnancy for the commissioning parents and hands the child over to the commissioning parents after its delivery.<sup>14</sup> A surrogate mother is a woman who, based on an agreement before pregnancy, carries a child and relinquishes all rights to and over the child to another person after giving birth to the child.<sup>15</sup> Surrogacy could be either genetic<sup>16</sup> (partial) or gestational (full).<sup>17</sup> It is genetic where the male parent impregnates the surrogate mother through artificial insemination or sexual intercourse,<sup>18</sup> while surrogacy is gestational where the male parent fertilizes an egg from the female parent and the fertilized egg is placed in the womb of the surrogate mother to grow and be delivered (*in vitro* fertilization).<sup>17</sup> Surrogacy agreements can be either commercial or non-commercial (altruistic), and it could be agreed within a jurisdiction or internationally (across borders).<sup>19</sup>

The debate around the acceptability of surrogacy in many communities' centers on the exploitation of those women who serve as surrogate mothers and the commercialization of babies.<sup>20</sup> Different countries adopted different approaches to the regulation of surrogacy. Some countries expressly prohibited surrogacy;<sup>21</sup> some permit and regulate only non-commercial surrogacy; some countries allow all forms of surrogacy; while other countries leave surrogacy completely unregulated.<sup>22</sup> In societies where surrogacy is allowed the consent of the surrogate mother is a yardstick to determine ethical compliance.<sup>23</sup> The argument is that surrogacy should be considered in the same way as any other form of labor and regulation should be in form of protection against exploitation.<sup>24</sup> However, it has been noted that a woman has a right to privacy and reproductive autonomy under international human rights law and, as such, attempts to limit these rights must be reasonably justified.<sup>25</sup> Nigeria is among the last category of countries where surrogacy is left unregulated.

**Nature of surrogacy:** Surrogacy is a form of Assisted Reproductive Technology (ART) which is used to treat infertility. It includes fertility treatments that handle both a woman's egg and a man's sperm. It works by removing eggs from a woman's body. The eggs are then mixed with sperm to make embryos. The embryos are then put back in the woman's body. In Vitro Fertilization (IVF)<sup>26</sup> is the most

common and effective type of ART. ART procedures sometimes use donor eggs, donor sperm, or previously frozen embryos. It may also involve a surrogate<sup>27</sup> or gestational carrier<sup>28</sup>. Surrogacy is increasingly becoming popular amongst people in the world as a good alternative for infertile couples or people with reproductive issues due to one reason or the other and even people in same sex marriages, and with more people using surrogacy as an alternative way for the conception and reproduction of children, surrogacy has become increasingly more socially accepted in the world. Surrogacy helps in the production of children for persons who cannot conceive children or carry a child to full term themselves naturally. This practice has improved several lives over the years but can also be exploitative for some parties involved if not adequately regulated. Surrogacy has helped a lot of people get children as they desire and has also helped many marriages without children and even individuals, but it has also become very detrimental to the children being born through surrogacy as these children are now prone and suffering human right violations, because of their vulnerability as children gotten through surrogacy several cases have been sat and more reported of the unfavorable circumstances children gotten through surrogacy have to suffer because of the means through which they were reproduced.

**Types of Surrogacy:** There are two types of surrogacy as it relates to the conception of the child and the involvement of the surrogate genetically. These are Natural surrogacy and Gestational surrogacy. When choosing a traditional surrogacy, the surrogate is genetically related to the child. This is because her eggs were artificially fertilized with the sponsor's sperm, also known as the intended father, the spouse of the intended father is also referred to as the intended mother. When choosing Gestational surrogacy, the surrogate is not related to the child and instead the commissioning or intentional parents are both genetically related to the child. This is done when the sperm is used to fertilize the egg outside the womb and then the embryo is implanted into the uterus of the surrogate mother, This method is often used when the intentional mother is unable to carry the child in her own womb for any reason which may be detrimental to the fetus. Gestational surrogacy does not only involve the egg or sperm of this is done when sperm is used to fertilize an egg outside the uterus and the embryo is then implanted in the pregnant mother's uterus. This method is usually used when the intended mother is unable to carry a baby in her womb for any reason that could harm the fetus. Gestational surrogacy does not only involve the egg or sperm of the intentional father, it may also involve the egg or sperm of an anonymous donor and an intentional father or mother, it can also be done with an egg and sperm of an anonymous donor.

**Legal Perspectives:** Surrogacy can be regarded as a contract. This is because the intentional mother and the intentional father make an offer to the surrogate mother who accepts the offer based on terms and conditions regarding the terms of her pregnancy, consideration is accepted in exchange of the relinquishment of parental rights towards the child to the intentional father and mother. There are also terms which can be breached by the surrogate or the intentional father or mother that can repudiate the contract thus leading to the conclusion that a surrogacy agreement is a contract. There is a distinction between the types of surrogacy contract that can be made. In both cases a couple (or individual) contracts with a surrogate who will carry a child to term and subsequently relinquish parental rights of the child. The same rule will be applied to contract regardless of the genetic relation the child has to the contracting parties<sup>29</sup>. Surrogacy can be further broken down into commercial and non-commercial surrogacy. Commercial surrogacy generally involves payment to the surrogate above and beyond reasonable expenses<sup>30</sup>. The surrogate is paid to conceive, maintain, bear and relinquish her parental rights to

<sup>12</sup> *A v C* (1978) 8 Fam Law 170 [1985] FLR 445.

<sup>13</sup> K Horsey and S Sheldon 'Still hazy after all these years: The law regulating surrogacy' (2012) 20 *Medical Law Review* 67 68.

<sup>14</sup> Umeora et al (n 8) 106.

<sup>15</sup> R. Blauwhoff and L. Frohn 'International commercial surrogacy arrangements: The interest of the child as a concern of both human rights and private international

<sup>16</sup> law' in C Paulussen et al (eds) *Fundamental rights in international and European law* (2016) 215.

<sup>17</sup> HV MacLachlan 'Surrogate motherhood: Beyond the Warnock and the Brazier reports' (2005) 11 *Human Reproduction and Genetic Ethics* 3.

<sup>18</sup> Blauwhoff & Frohn (n 14) 215. 17

MacLachlan (n 15) 3.

<sup>19</sup> Blauwhoff & Frohn (n 14) 216.

<sup>20</sup> DR Bromham 'Surrogacy: Ethical, legal and social aspects' (1995) 12 *Journal of Assisted Reproduction and Genetics* 509 510.

<sup>21</sup> Such as France and Switzerland (n 2).

<sup>22</sup> A Finkelstein et al 'Surrogacy law and policy in the US: A national conversation informed by global law making' (2016) *Report of the Columbia Law School Sexuality and Gender Law Clinic* 11.

<sup>23</sup> Finkelstein (n 21) 25.

<sup>24</sup> *ibid*.

<sup>25</sup> J Tobin 'To prohibit or permit: What is the (human) rights response to the practice of international commercial surrogacy?' (2014) 63 *International and Comparative Law Quarterly* 317 344.

<sup>26</sup> IVF stands for in vitro fertilization. It's one of the more widely known types of assisted reproductive technology (ART). IVF works by using a combination of medicines and surgical procedures to help sperm fertilize an egg, and help the fertilized egg implant in the uterus.

<sup>27</sup> A surrogate is a woman who becomes pregnant with sperm from the male partner of the couple

<sup>28</sup> A gestational carrier becomes pregnant with an egg from the female partner and the sperm from the male partner. The most common complication of ART is a multiple pregnancy. It can be prevented or minimized by limiting the number of embryos that are put into the woman's body.

<sup>29</sup> *ibid*

<sup>30</sup> *ibid*

the child after birth. Commercial surrogacy is largely frowned upon and prohibited in several first world countries including the United States, UK, and others. Non-commercial surrogacy occurs when the surrogate mother is compensated for the reasonable expenses associated with bearing a child but is not paid a fee for her services or for transferring her parental rights over the child. This type of surrogacy is more generally accepted in the international society as it is believed to be altruistic and with the aim of advancing human life.

**Basic Issues With Surrogacy:** Critiques of surrogacy charge that many risks are involved in the surrogacy process, such as risks to the women, the risk to the children, harm to other children of surrogates, psychological or emotional damage to all parties involved in the surrogate agreement.<sup>31</sup> In many jurisdictions of the United States, commercial surrogacy is either prohibited or criminalized, likewise in Britain, commercial surrogacy is prohibited.<sup>32</sup> Many argue that the payment in commercial surrogacy is not the selling off a child but a reimbursement of the surrogate mother for the expenses incurred during the gestational period of the pregnancy. While others are of the opinion that the payment is given to the surrogate mother in order for her to relinquish her parental rights over the child thus making the child a commodity seeing as the rights over the child are transferred on payment. Commercial surrogacy is also seen to be potentially degrading to women. In a widely publicized New Jersey case of, *Re Baby M*, the New Jersey Supreme Court ruled that the surrogate motherhood contract was invalid and the surrogate cannot be paid for her services because this contract for surrogate motherhood conflicted with the law and the public policy of the state. The court recognized the 'depth of yearning of infertile couples to have their own children, but found that "the payment of money to a surrogate mother was illegal, perhaps criminal and potentially degrading to women." The court went on to say that it is clear that a contractual agreement to abandon ones parental rights, or not to contest a termination action, it will not be enforced in our court.<sup>33</sup> Many states are yet to take a stand on surrogacy laws in their countries because of the varying reactions that have come as a result. While the United States has basically prohibited commercial surrogacy and see it as against public policy, countries like Russia encourage it and see it as a woman's gift to another woman. Another critic of the surrogacy agreement is that although it does give infertile couples the chance to have their own children the inadequate regulations of surrogacy agreements implications such as abuse and exploitation can affect the wellbeing of the child. The children may be denied of some rights based on their color, gender, race and even disabilities, this is because children are depended on adults for basic needs and their dependency and immaturity makes them vulnerable. Children born through surrogacy may be discriminated against and stigmatized.

**CONCEPTUAL FRAMEWORK:** Olusegun and Oladimeji in their papertitled, "Surrogacy agreement and rights of children in Nigeria and South Africa," stated that proper rules are necessary to establish practice standards and to avoid abuse of parties, particularly children, who are the most vulnerable and are brought into the world innocently. It is critical for Nigeria to join the ranks of countries like South Africa that have passed ART legislation that is legally enforceable. When crafting agreements and terms, all parties must have the best interests of children in mind. Medical practitioners must undertake medical and psychological examinations on the surrogate mother to determine her fitness, and a report must be attached to the surrogacy agreement for confirmation. To protect the infant, all medical procedures should be performed in a licensed hospital by qualified professionals. Parents who commission children must be seen to be capable of caring for them in a safe environment and should be informed about their rights. Children's rights to identify and nationality should be protected by registering them at birth.

<sup>31</sup>Lori B. Andrews, beyond doctrinal boundaries: a legal framework for surrogate motherhood, 81 V.a. L. Rev.2343-57, (1995)

<sup>32</sup> Surrogacy agreement act, 1985 (Eng); human fertilization and embryology acts 1990(Eng).

<sup>33</sup>Amy Garrity, A comparative analysis of surrogacy law in the United States of America and Great Britain – A proposed model statute for louisiana,60La, L, Rev. (2000) <https://digitalcommons.law.lsu.edu/lalrev/vol60/iss3/6>

When their children are old enough, parents should also inform them about their biological heritage<sup>34</sup>. Burrows, Chantelle, Louise in their work<sup>35</sup>Given that surrogacy is fraught with significant ethical difficulties, it is the job of the law to respond to them and make it easier for those who choose surrogacy as their method of conception to make informed decisions in the best interests of the child and their own reproductive autonomy. According to Horsey:

Because methods of creating children by non-natural means or by those requiring medical intervention has greatly increased, and perhaps also because of increase in popular exposure to assisted reproductive techniques, it has become necessary for us to rethink how parenthood is defined in such situations.<sup>36</sup> As many writers have argued, the definition of parenthood is critical in determining how the law responds to assisted reproduction. In particular, a legislative reassessment of how motherhood is defined is absolutely needed. At the moment, the law and society are at odds over motherhood; a good example of non-normative motherhood is surrogacy, which can take numerous forms. Conflicts between societal and legal conceptions of motherhood have a negative impact on women's autonomy and their lives as mothers. Since the implementation of the SAA in 1985, there has been relatively little legislative change or debate, particularly in relation to the legal framework that governs all surrogacy partnerships. It's past time to reconsider surrogacy agreements. It is past time to reconsider surrogacy laws in order to improve women's autonomy and legal experience as moms.<sup>37</sup> Pikes, Archana, and Sonia, in their article, "Surrogacy: Ethical and Legal Issues" are of the opinion that, to avoid unfairness to the child, the surrogacy agreement should include financial assistance for the child born in the event that the commissioning couple dies before the child is delivered, or if the intended parents get divorced and no one wants to take custody of the child. In order to avoid legal issues, a surrogate mother should not have any parental rights over the child, and the baby's birth certificate should identify the intended parents as parents. The child born through ART is deemed to be the legitimate child of the married/unmarried couple/single parent, with all the accompanying rights of parenting, support, and inheritance, according to the guidelines. The ART clinics should not be allowed to advertise for surrogacy for its clients, and couples should directly seek facilities of ART Bank. The intended parents should be legally bound to accept the custody of the child/children irrespective of any abnormality in the child/children. Confidentiality should always be preserved, and the donor's and surrogate mother's right to privacy should be protected. If a foreigner or NRI wants to use a surrogate, they should sign a contract with their government that includes a written guarantee of citizenship for the child, as well as appoint a local guardian who will be legally responsible for the surrogate during and after the pregnancy, until the child is delivered to the foreigner couple or arrives in their country. Surrogacy that is based only on a woman's gender should be illegal, and abortions should be governed by the Medical Termination of Pregnancy Act.<sup>38</sup>

Amy Garrity in her article titled, "A proposed model statute of Louisiana,"argued that it is the Legislature's responsibility to adopt laws protecting Louisiana people and ensuring that all of the benefits of reproductive technology are available to all members of society in Louisiana. She went on to argue that the government is not acting in the best interests of Louisiana citizens or assuring the protection of children by disregarding surrogacy and the difficulties surrounding it. She believes that by regulating surrogacy, all parties involved in a surrogacy contract can be protected. Precautions can be made to

<sup>34</sup> Ibid, 36

<sup>35</sup>Burrows Chantell and Louise "deconstructing motherhood: a critique of legal regulations of surrogacy, durham E theses", 2011, last accessed 19th of January 2022 Durham theses, Durham University.<http://etheses.dur.ac.uk/3192>.

<sup>36</sup>ibid.

<sup>37</sup> ibid

<sup>38</sup>Pikee Saxena, Archana Mishra, and Sonia Malik, Surrogacy:" Ethical and Legal Issues" Indian Journal of Community Medicine, Official Publication of Indian Association of Preventive & Social Medicine are provided here courtesy of Wolters Kluwer -- Medknow Publications last accessed December 12,2021 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/>

secure long-term agreements because all parties involved are aware of the contract and the child's best interests are protected. Declaring surrogacy contracts illegal or against public policy is ineffective and will result in illegal arrangements with no way of validly enforcing them through the legal system. She asked the Louisiana task force to concentrate on her model legislation when choosing how to tackle the increasingly technical world of reproduction and the implementation of the aforementioned provision to regulate surrogacy agreements.<sup>39</sup>

Surrogacy arrangements through the ART process, according to Dr. Enobong and Monica, are a rapidly growing area in medical and biomedical sciences around the world due to enormous pressure from family and friends on couples to have children. Infertile couples have resorted to having children through ART to avoid stigmatization<sup>40</sup>. Similarly, commercial surrogacy has allowed women who have no biological ties to the fetus they carry to earn financially from acting as surrogate mothers for the intended parents or commissioning couples. Surrogacy has been fraught with social, ethical, and legal issues since its inception as a method of artificial reproduction. Surrogacy agreements, according to some, erode the self-esteem of both the child, who is viewed as a "settlement commodity," and the surrogate mother, who is viewed as a "womb for hire," as the medium of conception becomes a commercial operation. It may be recalled that in the famous New Jersey case of Baby M<sup>41</sup>, the judge while pronouncing the surrogacy contract unenforceable noted:

"We invalidate the surrogate contract because it conflicts with the law and public policy of the 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". Because of the "procedural" relationship between the surrogate mother and the commissioning father, established family perception is said to be violated, as the child may be genetically linked to the commissioning mother and the surrogate father without any biological nexus with the commissioning mother in some cases. In most African cultures, family lineage is viewed vertically, with the ancestors, current generations, and future generations all hereditarily related in an uninterrupted chain. Commercial surrogacy, for example, tends to weaken the genealogy's inviolability by portraying the surrogate child as a "thing" or a "buy" brought into the family system through the instrumentality of "commodification of motherhood," rather than a "gift of nature" Furthermore, surrogacy arrangements raise legal issues such as the applicable law in surrogacy arrangements and the parenthood of the surrogate kid, which can often cross national borders. Surrogacy, contact law, and parental rights are among the bioethical issues presented in the Baby M case. Would it be ethical to contractually force a gestational surrogate with a genetic tie to the surrogate kid to relinquish her maternal status and maternal rights over a child she has carried in her womb for several months and breastfed?. While several countries, including the United Kingdom, South Africa, Canada, the United States of America, the Netherlands, Israel, South Arabia, Kenya, Russia, Ukraine, Japan, China, and Australia, have taken positions 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 issue. Surrogacy in Nigeria is uncontrolled, which has resulted in a slew of unethical medical procedures aimed at exploiting vulnerable donors and surrogate mothers who may be hired by reproductive clinics to either harness their eggs (sell their eggs) or "rent their wombs" "for insignificant payments as well as subject intending commissioning couples to undue social stigmatizations or uncertainty regarding their parenthood status of the surrogate children. To address this unfortunate acts, the government must take the necessary steps to ensure that the ART bills currently pending in the national assembly

are quickly harmonized, passed, and enacted into law, while taking into account the unique characteristics of our political, religious, sociocultural, ethical, and multiethnic diversity. Furthermore, it is proposed that the age limit for a surrogate mother in Nigeria be set between 21 and 35 years<sup>42</sup>, What is the age range for surrogacy in India? (Regulation bill 2016). This will aid in resolving any health issues that may arise as a result of older women having children later in life. Furthermore, a woman should not act as a surrogate or undergo embryo transfer more than twice in her lifetime to avoid the risk of ovarian failure, Ovarian Hyper-Stimulation Syndrome (OHSS), and the development of cancer, liver, kidney, and other life-threatening diseases that are commonly associated with fertility treatment drugs. Furthermore, under Nigerian law, it is necessary to adopt the South African approach, which requires a high court of state where the process is to be performed to validate every executed surrogacy deal before the surrogate mother is fertilized. For this aim, statutory provisions should be included, beginning with the preconditions or requirements that the parties to the surrogacy agreement must meet before the court can confirm the arrangement. Subjecting the procedure to judicial scrutiny would provide additional checks and balances, preventing unethical practices by fertility clinics, sperm banks, and surrogacy agencies, as well as unnecessary exploitation of surrogate mothers and or desperate commissioning parents, and protecting the surrogate child. Under the Nigerian ART (Regulation) Bill, it is not enough for the foreign couple to make an undertaking to accept the surrogate child; there must also be insurance coverage for the appointed local guardian in the event that the overseas commissioning parent fails to show up to adopt the child or honor their undertaking. Furthermore, differences in surrogacy regulation between nations make it difficult to enforce a foreign surrogacy in another jurisdiction. Although, in general, legal factors have always favored the child's best interests. Given the fact that intended couples go outside of their nations in search of surrogates, it is critical for international communities or groups to band together and create an international surrogacy instrument to reduce the risks associated with international surrogacy contracts. Regardless of the different debates surrounding surrogacy arrangements, the authors strongly suggest altruistic surrogacy for Nigeria since it allows desiring infertile couples to become parents without burdening surrogate moms with moral obligations and guilt.<sup>43</sup>

According to Kriti Bhatia, ShubhPareek, and Salonibahl in their article titled "comparative study on surrogacy laws around the world" They believe that the rising demand for surrogacy in India has produced a number of difficulties, including surrogate mother rights, infantile parent rights, and the enforcement of surrogacy contracts, among others. They believe that surrogacy is a complicated process that requires patience and endurance. They believe that the relationship can be difficult, overwhelming, and emotional, and that patience and perseverance are required. With advances in technology and medical research, it is more important than ever to avoid the complicated complications that can arise for surrogate mothers. They went on to suggest that the validity of a child is another crucial factor to consider. Before passing law, these issues must be thoroughly investigated. Furthermore, the lack of a complete law in the area may lead to a slew of unethical acts, legal complexity, and other issues. India's 228th Law Commission Report<sup>44</sup>. They also advocate for legislation in India to regulate ART clinics and the rights and responsibilities of the parties involved in surrogacy agreements. The surrogate arrangement involves a lot of emotional and psychological difficulties. For those who want equality in women's social conditions, failing to recognise labor is a fool's errand. Finally, we can state that the Union Home Ministry took a good move in 2014 to regulate surrogacy in India, which will undoubtedly improve people's attitudes toward surrogacy.<sup>45</sup>

<sup>42</sup> *ibid*

<sup>43</sup> Enobong Akpambang and Monica Akomolaf "Legal position on surrogacy arrangement in Nigeria and some selected jurisdiction" international journal of research in Humanities and social studies volume 7, Issue 3, 2020, pp 18-39, issn 2394-6288 .

<sup>44</sup> Law commission of India (Report NO. 228). last accessed 2/02/2022, <https://lawcommissionofindia.nic.in/reports/report228.pdf>

<sup>45</sup> Kritibhatia, Shubhpareek, and Salonibahl in their article "comparative study

<sup>39</sup> Amy Garrity, A comparative analysis of surrogacy law in the united states and Great Britain – A proposed model statute for lousisiana, 60La, L, Rev. (2000) <https://digitalcommons.law.lsu.edu/lalrev/vol60/iss3/6>

<sup>40</sup> *ibid*

<sup>41</sup> The 1985 case of Baby M was a contentious one that made surrogacy the center of many issues; this included the legality of surrogate contracts, feminism, father's rights, and reproductive rights.

Maternal uncertainty is perhaps the most significant source of uncertainty following surrogacy arrangements. This has resulted from developments in reproductive technologies that have allowed for the separation of gestation and genetics. As a result, the historical certainty associated with maternity, which focuses on gestation as the primary criterion for motherhood, is no longer in place. Surrogacy questions the underlying idea that birth and motherhood are inextricably linked in this regard. Despite the fact that egg donation has allowed genetics and gestational motherhood to be separated for decades, the goal of egg donation is to keep birth and motherhood together: the birth mother maintains the kid she bears despite having no genetic relationship to the child. Our laws have been written to particularly preserve the legal motherhood of the birth mother after egg donation. Surrogacy, on the other hand, is founded on the separation of birth and motherhood, whether with or without egg donation. Even though this is a very different starting place than egg donation, our current legal structure is incapable of distinguishing between the two circumstances when it comes to the legal status of the "mother," even after gestational surrogacy. This has ramifications for the surrogate-born child's legal standing<sup>46</sup>.

The dilemma for law and policy makers is that a priority must be made between the respective contributions of genetics and gestation in situations where a decision must be made about maternity. Egg donation has in the last decade become less controversial in Sweden, no doubt contributed to by the fact that the gestational mother is, after all, the mother who will raise the child. With surrogacy, however, the dilemma of separating the genetic and gestational contributions is amplified because the gestational mother does not intend to raise the child. Instead, she intends to give the child to another woman who may or may not be the child's genetic mother. Irrespective of the dilemma, a decision about what makes a "statutory" mother must be made if the State is to meet its obligations to the child. The child needs parents. One of the alternatives considered in this thesis that could promote greater certainty, even in the absence of regulation, is to codify the *Mater-Est* rule<sup>47</sup> and make it into a statutory rule of law in favor of the gestational mother. This assumes a policy that favors the gestational mother as the child's legal mother at the time of the child's birth and reinforces the existing unwritten presumption of maternity. Applied to surrogacy, it would – at least at the time of the surrogate-born child's birth – provide complete certainty as to the legal status of the various "mothers". This, in turn, would guarantee that the surrogate-born child has at least one legal parent at that time. The creation of alternative presumptions of maternity, paternity and parenthood could also be considered but it appears that the main problem today is connected to the uncertainty attached to maternal status. To this end there would be little benefit in changing the rules connected to paternity and same-sex parenthood in the absence of a clear regulatory direction since these rules already function well (and probably better than the alternatives considered). One effect of applying the existing Swedish parenthood rules to surrogacy is that it appears impossible for female commissioning parents to become legal parents at time of the surrogate-born child's birth, irrespective of whether they have a genetic connection to the child or not. Male commissioning genetic parents on the other hand, are able to confirm their paternity in relation to the surrogate-born child. In situations where the commissioning parent is not the legal parent at birth, the issue of how parenthood can be transferred must also be determined<sup>48</sup>. Another consideration that must be made concerns the nature and degree of monitoring by the State. Would it be suitable to have a similar situation as that practiced in England, where there is a high administrative load on the authorities after the surrogate-born child

has been born but before parentage can be transferred because all of the requirements must be carefully checked prior to the approval of the parental order? Alternatively, would it be better to adopt an Israeli-style approach, where the administrative burden is heavier before the surrogate-conception, resulting in a significantly more streamlined process for the transfer of parentage after the surrogate-born child is born? Clearly, both models take time and resources. A disadvantage of the England and Wales model, however, is that the administrative load takes place after baby is born. This results in delays in confirming parenthood for the commissioning parents – who are already caring for the baby assuming all goes well. Thus, it might be more effective to use the time before the agreement is approved, to do the groundwork, as in Israel. The role of the State in determining what issues will be regulated and in the on-going administration and enforcement of the model it establishes could vary considerably depending on the model chosen. Will the form of regulation be loose with minimal intervention (England and Wales) or will the State play a more active role in controlling and monitoring the process, as it does in Israel where contracts are approved by an approvals committee? The consideration of these issues would clearly be a necessary part of the preparatory work required before surrogacy regulation could be implemented.<sup>49</sup> Kriti Bhatia, Shubhpareek, and Salonibahl remarked that it is impossible to deny the fact that surrogacy is an option for those seeking to meet their desired needs. On the one hand, an impoverished surrogate mother receives the necessary funds, while an infertile couple receives their biologically desired child. Surrogacy as a whole so contributes to the country's ability to generate foreign revenue. However, the truth is rather different. Both intended parents and surrogate mothers are exploited in the country due to a lack of effective legislation and rules. The profit is funneled into the clutches of middlemen and commercial agencies who profit from our law's flaws. Poor illiterate women from rural areas are exploited for such agreements by their husbands or brokers looking to make money. It is impossible to resist the conclusion that if women use such bargains, they have no right to make decisions about their own bodies and lives<sup>50</sup>.

**HISTORY OF SURROGACY:** The history of surrogacy dates as far back to the biblical period of Abraham about 18000BC where Sarah had been reported to have given her maid servant (Hagar) to Abraham to bear a child on her behalf<sup>51</sup>. There is also record of surrogacy agreements being made in Africa before the colonization of Africa, where rich women would marry other women as their wives in order to have children for their husbands through them. The surrogates were majorly widows, there is also record of these practices in early Asia. Surrogacy has now evolved and has been categorized based on the advent of both technology and the legal procedures required in order to maintain the rights of all the parties involved. In 1976, a lawyer named Noel Keane negotiated and drafted the first legal surrogacy contract<sup>52</sup>. This arrangement was designed for traditional surrogacy, and the surrogate mother was not financially compensated for her service. Keane remained a strong supporter of surrogacy throughout his life. He is believed to have helped the birth of about 600 children through surrogacy throughout his career. Although there are reports of successful in vitro fertilization (IVF) embryo transfer prior to 1978, the first baby born using IVF was Louise Brown on July 25, 1978. The procedure was led by a consultant gynecologist Patrick Steptoe and a research psychologist at Cambridge named Robert Edwards. In 1980, surrogacy contracts were generally legal, but could not be enforced because the state's surrogacy law was largely ambiguous. Then came Elizabeth Cain, the first legally indemnified agent in the United States. Both parties have agreed to traditional surrogacy. The agreement stated that the agent would be paid a total of \$ 11,500.

on surrogacy laws around the world" vol7,2019 issn 2581-5504

<sup>46</sup>Jane Stoll, "Surrogacy Arrangements and Legal Parenthood Swedish Law in a Comparative Context" 2013, *Juridiska institutional*. 373 pp. Uppsala ISBN 978-91-506-2369-7.pg323

<sup>47</sup>*Mater-Est* rule means ("The mother is always certain") it is a Roman-law principle which has the power of *praesumptio iuris et de iure*, meaning that no counter-evidence can be made against this principle (literally: presumption of law and by law). It provides that the mother of the child is conclusively established, from the moment of birth, by the mother's role in the birth.

<sup>48</sup>*Ibid.*,324

<sup>49</sup>*Ibid.*, 330

<sup>50</sup>kritibhatia, shubhpareek, and salonibahl "comparative study on surrogacy laws around the world" vol7,2019

<sup>51</sup>Genesis 16 vs 2 Revised Standard bible edition

<sup>52</sup>The History of Surrogacy: A Legal Timeline, last accessed 19/01.2022, <https://www.worldwidesurrogacy.org/blog/the-history-of-surrogacy-a-legal-timeline#:~:text=Technically%2C%20surrogacy%20dates%20back%20to,wive%20could%20not%20become%20pregnant>.

The first successful surrogacy occurred in 1985, in which a surrogate mother acted on behalf of the intended parents<sup>53</sup>. The fallopian tubes of the expectant mother were damaged by a childhood illness. This has created a whole new field of possibilities for parents-to-be and future surrogates. Eliminating the biological link between the surrogate mother and the child reduces the likelihood that the surrogate mother will change her mind after the child is born. The well-known case of "Baby M." A female agreed to be a conventional surrogate to someone who couldn't conceive on their own. A surrogacy settlement turned into signed, the Intended Father's sperm turned into used, and the surrogate turned into to be paid \$10,000 as compensation. Once the kid turned into born, the surrogate determined she couldn't deliver the child up. She attempted to preserve the kid and went to courtroom docket with the Intended Parents in a prolonged custody battle. Eventually, the courtroom docket granted custody to the Intended Father, who turned into additionally the kid's organic father. The case enhanced momentum for legally contracted surrogacies. Because of this case, many in the surrogacy field developed a greater interest and support for a newer option: gestational surrogacy. The case has created more impetus for legal contract surrogacy. Due to this case, many people in the field of surrogacy became more interested and advocated for a new option on surrogacy. An important legal turning point for surrogacy. A surrogate, who has signed a surrogacy agreement with commissioning parents, decides to keep the baby. The carrier and the child are not related by blood and in the custody battle, the court sided with the intended parents. The judicial decision in *Johnson v. Calvert* demonstrated that the surrogacy agreement was a legally binding agreement that would be backed by a court, guaranteeing the provenance of the intended parents.<sup>54</sup>

From the records of surrogacy in Nigeria there aren't any legal guidelines on surrogacy and despite the fact that we cannot situate when surrogacy started in Nigeria legal guidelines and regulations that have been made to mitigate troubles growing as an end result of surrogacy agreements started to rise up in Nigeria. Acknowledging the exercise of surrogacy within the Nigerian society, provisions such as, Rule 23 of the Code of Medical Ethics, 2004, 118<sup>55</sup> that modify assisted thought and associated practices. Rule 23 acknowledges gestational surrogacy and allows the donation of gametes for that purpose. It states that vital statutes to control assisted replica have been established; nevertheless, clinical practitioners should remedy all moral troubles which can rise up with respect to the counselling and consent of the donor. The Code states that gamete and embryo donation can no longer be commercialized. With respect to children, the Code notes that the absence of a felony framework protecting them in those agreements, the simple concepts carried out in infant adoption instances need to be taken into consideration as nice exercise<sup>56</sup>. In 2016, a Bill was introduced in the Nigerian National Assembly to amend the National Health Act and includes the regulation of ART119. The Bill mandates the Federal Ministry of Health to regulate the practice of ART and establish a National Registry of Assisted Reproductive Technology Clinics and Banks, which will have the function of creating and maintaining a central database of ART data in Nigeria. Medical tests and screening are required for surrogates and donors to ensure that children are not harmed in any way. Clinics are also to counsel the commissioning parents on the options available to them and the consequences and risks involved.<sup>57</sup> In 2017, a bill regulating Reproductive Technology was also introduced. This bill is yet to be passed by the National Assaembly. The ART Bill more clearly establishes the rights and

obligations of all parties involved in assisted reproduction. The status and well-being of children born through the arts are included. For example, it is a crime for a fiduciary parent to refuse to accept a child, a woman cannot be a surrogate mother more than three times in her life, in order to avoid harm to the children later on<sup>58</sup>. Surrogacy has become a double edged sword and to which the edge that faces the owner might just be sharper no less, and although some may argue that surrogacy has brought along its pros the cons out way the pros with the advent of trafficking, baby markets and the blatant discrimination against children gotten through surrogacy based on their nationality of even origins and the fact that there are no uniform laws has worsened the situation therefore creating a place for bad things to be fostered under the guise of surrogacy. In a place like Nigeria where the development is slow and corruption is vast a lot of issues can arise from such a policy, surrogacy is a concept that even first world countries are grappling with, how can a third world country grasp such a policy that will come with several categories of issues to analyses and create policies over, it may result in very chaotic scene.

#### JUSTIFICATION FOR LEGAL FRAMEWORK IN NIGERIA:

There are many controversial views and opinions surrounding the topic of surrogacy in the international community. In some country's surrogacy is legal, while in some it is illegal or unenforceable. There are articles which promote the ban of surrogacy contracts internationally, there are also articles which give a different opinion. Other articles even promote a type of surrogacy while condemning the other. According to Natalie Gamble in her article "Crossing the line: the legal and ethical problems of foreign surrogacy," submitted that UK legislation has adopted a cautious approach to surrogacy for many years, neither prohibiting it nor allowing it to flourish unrestrictedly. Surrogacy is legal in the UK, as long as it is consensual and only involves the payment of reasonable expenses. However, in an increasingly globalized world, patients are crossing borders for treatment, often to countries where commerciality and enforceability of surrogacy agreements are not a concern. The resulting conflicts of law can be a minefield, and this makes the maintenance of the UK's careful legal balance increasingly untenable<sup>59</sup>. She shares the sentiments of many individuals on the subject of surrogacy, but she overlooks the fact that there are alternative possibilities for surrogacy, and that surrogacy is not the only option available to couples who are unable to have children. She also avoided discussing the debate among states over whether surrogacy is against public policy because it can be viewed as the commercialization of human beings, involving both the surrogate and the kid, in which money is sometimes transferred for the child, which is unlawful. In Nigeria there are no laws regulating surrogacy, Surrogacy contracts are being made in Nigeria by legal practitioners. These contracts are modeled after the recommendations of the human fertilization and embryology Authority and the Surrogacy Agreement Acts of the United Kingdom due to the fact that Nigerian laws are modeled after British laws, Nigeria being a former British colony.<sup>60</sup> Surrogacy is a controversial topic and has such a fine line between being contrary to public policy and several charters against monetizing human organs. Some would argue that the sale of human parts and surrogacy are not the same but the commercialization of the female's ability to reproduce is in a way selling an organ, so neither banning nor enforcing surrogacy is sitting on the fence and will definitely cause issues for the careful legal balance because no actual action has been taken and thus there is no stance on the matter. If Nigeria should follow the lead of Britain and also sit on the fence it will eventually lead to issues that Nigeria as a third world country still struggling with its development will be able to control, this of course will lead to a lot of casualties mostly comprising of women and

<sup>53</sup> Ibid.

<sup>54</sup> Ibid

<sup>55</sup> The Australian medical association code of medical ethics, 2004, editorially revised 2006, revised 2016,

<sup>56</sup> Olusegun Olaitan and Olatawura Oladimeji, "Surrogacy agreements and the rights of children in Nigeria and South Africa, scielo", last accessed 31<sup>st</sup> January 2022, [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532021000100002](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532021000100002).

<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Natalie Gamble "Crossing the line: the legal and ethical problems of foreign surrogacy, pubmed.gov," last accessed 17/11/2021 <https://pubmed.ncbi.nlm.nih.gov/19712546/>.

<sup>60</sup> Abayomi Ajayi and Victor Ajayi "Gestational surrogacy in Nigeria, research gate" last accessed 17/11/2021, [https://www.researchgate.net/publication/323907314\\_Gestational\\_Surrogacy\\_in\\_Nigeria](https://www.researchgate.net/publication/323907314_Gestational_Surrogacy_in_Nigeria)

children. M.E Ekberg's article "Ethical, legal and social issues to consider when designing a surrogacy law" considers both commercial and altruistic surrogacy and highlights some of the similarities and differences between the two. Starting with the original question of whether surrogacy should be legal, the contentious issues concern the time leading up to conception, during pregnancy, and after the kid is born. Surrogacy arrangements are ethical and should be permitted, according to the paper, because they allow the physically and socially infertile, including singles and same-sex couples, to become parents and enjoy the lifelong joys of motherhood. For many, this will be the most compelling argument in favor of surrogacy legislation, as well as the largest gain from surrogacy arrangements<sup>61</sup>. This work also raised valid points but failed to talk about the most important aspect of the legalization of surrogacy which is the regulation and enforcement of such contracts, surrogacy has raised the hackles of so many countries not only because of its controversialist but also because of matters concerning nationality and possible breaches of public policy, human rights and rights of children, also it did not produce possible ways to mitigate against discrimination and abuse of this children by adults as children are immature and heavily dependent on adults.

Pikee, Archana, and Sonia, in their article, "Surrogacy, Ethical and Legal Issues," opined that financial support should also be provided for the surrogate child in case the commissioning couple die before the delivery of the child, or get divorced between the intended parents and subsequent willingness of none to take delivery of the child to avoid injustice to the child. parental rights should not be given to the surrogate mother, and the birth certificate of the child should bear the names of intended parents as the legal parents in order to avoid any legal complications. Rules dealing with legitimacy of the child born through ART state that the child shall be presumed to be the legitimate child of the married/unmarried couple/single parent with all the attendant rights of parentage, support, and inheritance, the ART<sup>62</sup> clinics should not be allowed to advertise for surrogacy for its clients, and couples should directly seek facilities of ART Bank. The intended parents should be legally bound to accept the custody of the child/children irrespective of any abnormality in the child/children. Confidentiality should always be maintained, and the right to privacy of the donor as well as surrogate mother should be protected. If a foreigner is seeking surrogacy, they should enter an agreement with written guarantee of citizenship for the child from their government, and they should also appoint a local guardian who would be legally responsible for taking care of the surrogate during and after the pregnancy till the child is delivered to the foreigner couple or reaches their country. Sex-selective surrogacy should be prohibited, and abortions should be governed by the Medical Termination of Pregnancy<sup>63</sup>. Their discussions touched more on the implications of surrogacy and some majors that needed to be taken in order to safe guard the rights of the children, it talks less on the importance of surrogacy for infertile couples. It is true that emphasis is not places on the rights of the child and that rules and regulations regarding surrogacy should focus more on the safety of the child and measures to safe guard their rights as citizens, children and to also aid them in to avoid being discriminated against them based on the circumstance of their birth.

## FINDINGS

- There is no legal framework for surrogacy in Nigeria

<sup>61</sup>M.E Ekberg" Ethical, legal and social issues to consider when designing a surrogacy law" <https://europepmc.org/article/med/24804538>

<sup>62</sup> "ART" means Assisted Reproductive Technology. (ART) is used to treat infertility. It includes fertility treatments that handle both a woman's egg and a man's sperm. It works by removing eggs from a woman's body. The eggs are then mixed with sperm to make embryos. The embryos are then put back in the woman's body. In vitro fertilization (IVF) is the most common and effective type of ART.

<sup>63</sup>Pikee Saxena, Archana Mishra, and Sonia Malik, Surrogacy:" Ethical and Legal Issues, Indian Journal of Community Medicine, Official Publication of Indian Association of Preventive & Social" last accessed December 12,2021 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/>.

- There is need for legal protection for the children born through surrogacy

## RECOMMENDATION

- This study advocates for the enactment of a legal framework for surrogacy in Nigeria. There must be a formal contract for all surrogacy arrangements. Such arrangements must be sanctioned by a High Court. The South African model is recommended.
- The Bill on Reproductive Technology should be re-introduced and passed into law by the National Assembly.

## CONCLUSION

Surrogacy can either be traditional or gestational, it is traditional when the mother of the child is still biologically related to the child, it has been in use for centuries in and out of Africa, gestational surrogacy is fairly new and was first recorded by using IVF was Louise Brown on July 25, 1978. In this type of surrogacy, the surrogate mother is not related to the child and carries the child for the commissioning parents. surrogacy has been largely criticized by several people on issues such as the commercialization of the bodies of women and also the ill regulation of states over surrogacy as it has become part of the private industry and has reeked havoc on the life of women and the children involved in surrogacy contract from their exploitation to the violation of their basic human rights. Surrogacy has opened the doors of controversy everywhere regarding its concept and some of its methods which has resulted in the ban of surrogacy fully or partially in certain countries, and even led to the issue wildly known as fertility tourism. Therefore, surrogacy is very helpful and has advanced mankind in its effort to continue to procreate and foster life but with its good a lot of bad has also come out of it. In Nigeria, there is no legal framework for the regulation of surrogacy and reproduction technology. Couples who want to take advantage of surrogacy practice is on the increase. There is need to regulate ART and reproductive related technology in Nigeria as is the case in developed countries of the world This will provide legal protection to the offspring of the process, their parents and the surrogates. This will in the long-term help restore love and understanding to many marriages in Nigeria and reduce cases of divorce pending in our various courts.

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