

AN APPRAISAL OF CHALLENGES AFFECTING THE PRACTICE OF SURROGACY IN NIGERIA

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Abstract

In Nigeria, the value placed on children cannot be over emphasized as this is viewed as a sign of fertility and security in marriage. Infertility or childlessness is therefore viewed as an anomaly and the couples could go to any length just to have children. Surrogacy as a variant of ART has offered such couples hope. This study analysed the concept of surrogacy in Nigeria by examining the nature of surrogacy, the ethical and legal challenges affecting it, as well as the legal regime for the regulation in Nigeria. This was with the view to establishing that Nigeria currently has no sufficient legal regime for the practice of surrogacy and that the absence of any regulatory policy already poses danger to the society. The study revealed that Nigeria has no specific statute in place to regulate surrogacy in as much as surrogacy is being practiced widely. The practitioners rely on the guidelines of the British Human and Fertilisation Embryology Act, 1990 and there is usually a contractual agreement between the parties to the surrogate arrangement. The study revealed that a lot of couples afflicted by infertility resort to it as it affords them the opportunity to have children genetically related to them; it is regarded as the best option for single parents, those with medical conditions and for others who for the sake of convenience would rather not go through the rigors of pregnancy and its attendant challenges though the practice is still not widely accepted. There is a proposed ART Bill that has been pending at the Senate since 2016 which if passed into law would bring a lot of relief to all parties involved as well as the society at large. This study therefore concluded that surrogacy needs to be regulated in Nigeria as the frontiers of reproductive technology seems to be advancing as is seen in other jurisdictions. It therefore recommended that the proposed Art Bill be promulgated to effectively regulate the practice of surrogacy in Nigeria and establish institutional framework to accredit and license practitioners and facilities.

1.0 Introduction

Individuals and couples have the right to decide the number, timing and spacing of their children whereas infertility can negate the realisation of these essential human rights. Addressing infertility is therefore an important part of realizing the right of individuals and

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couples to found a family.³ Womanhood within most African society is defined by a female's ability to conceive, deliver and nurture a child and this is also considered as an authentication of a woman's place within her matrimonial home. When a couple is not forthcoming in producing children years after marriage, generally it is often assumed that the fault is from the woman which may not be the case.⁴ Many modern reproductive techniques which allow conception to occur without resorting to normal sexual intercourse now exist. These have helped many couples experiencing difficulty in conceiving naturally to have children. Surrogacy happens to be one of such methods available to them.

The emergence of surrogacy via ART has uncovered core issues contiguous to the definitions of motherhood, parenthood and paternity within the family,⁵ specifically the biological detachment of pregnancy from genetic relations.⁶ Several studies have examined surrogacy in relation to legal and ethical considerations; socio-cultural, psychological and religious acuity.⁷ Suffice it to say that there is a gap in the explanations of surrogacy in various texts, as the operational basis of this practice is yet to be properly examined within the Nigerian context. While surrogacy has become a booming industry in countries like India,⁸ it is still a grey area struggling for acceptance in Nigeria, though attitudes and perceptions about it in most African countries differ from what is obtainable in most western countries, the body of scholarship available globally about surrogacy represent a mixture of western ideological thought and practices,⁹ hence the ethical issues related to surrogacy are influenced by the cultural and social norm of the community or population involved. This study in order to ascertain the challenges affecting the practice of surrogacy will be examining infertility and its causes, the meaning and nature of surrogacy, why couples resort to surrogacy and the challenges affecting the practice in Nigeria, an examination of surrogacy in selected jurisdictions to enable us arrive at a conclusion.

2.0 Nature of Infertility

Infertility is a problem common to both sexes.¹⁰ 40% of cases of infertility are attributed to female factors another 40% attributed to male factors while 20 percent is a combination of

³ F. Zegers-Hochschild and Others, 'Human Rights to In Vitro Fertilization' [2013] (123) (1) *International Journal of Gynecology & Obstetrics* 86-89.

⁴ A.A. Adewunmi, The Need for Assisted Reproductive Technology Law in Nigeria [2012] (2) (1) *University of Ibadan Law Journal* 19

⁵ O.J. Umeora and Others, 'Surrogacy in Nigeria: Legal, Ethical, Socio-Cultural, Psychological and Religious Musings' [2014](13)(2) *Journal of Medical and Health Sciences* 105-106

⁶ K. Horsey and S. Sheldon, Still Hazy After All These Years: The Law Regulating Surrogacy [2012](20) (1) *Medical Law Review* 67-89

⁷ Umeora and others (n 3); E. Teman, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' [2008](67)(7) *Social Science and Medicine* 1104-1112; Banerjee and Basu (n1); N.F. Bromfield and K.S. Rotabi, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendation' [2014](1)(3) *Global Social Welfare* 123-135.

⁸ E. Teman, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' [2008](67)(7) *Social Science and Medicine* 1104-1112

⁹ K.L. Armour, 'An Overview of Surrogacy around the World: Trends, Questions and Ethical Issues' [2012](6)(3) *Nursing for Women's Health* 231-236.

¹⁰ 'Infertility in Men & Women', <<http://sexeducationnow.com/infertility-men-women-causes-treatment.html>> accessed 7 October 2022; PM News, "Causes of Infertility" (14 Jan 2011) <<http://pmnewsnigeria.com/2011/01/14/causes-of-infertility>> accessed 7 October 2022.

males and females.¹¹ Furthermore, it is estimated that the prevalence of infertility across the globe is 17% (1 in 6) of women experience delayed conception but specifically infertility among women in Nigeria has been projected to affect 25% (1 in 4) of women in their reproductive age.¹² In a country that boasts of over 160 million people, of which 22% are women in their reproductive age group, infertility therefore becomes a prevalent issue.¹³ Assisted Reproductive Technologies are generally considered to be a treatment for infertility.

Infertility, however, can be seen as either a medical problem or a social condition of childlessness. From the social perspective, the common assumption is that the need and desire to have children is a normal part of our lives. According to most medical definitions, infertility is a disease of the male or female reproductive system defined by the inability to produce a child despite regular unprotected sexual intercourse over a period of twelve months or more during a woman's fertile period¹⁴. The World Health Organization (WHO), however, stipulates a period of two years¹⁵. Infertility can be primary or secondary. Primary infertility is when a pregnancy has never been achieved by a person, and secondary infertility is when at least one prior pregnancy has been achieved.¹⁶

2.1 Causes of Infertility

Infertility is caused by or at least associated with several medical or (biological) environmental and social factors.¹⁷ The more common physiological causes are sexually transmitted diseases, smoking and age.¹⁸ Age affects the fertility of females more than males. Other possible causes of biological infertility include environmental and lifestyle factors such as smoking, excessive alcohol intake, caffeine, illicit drugs, disease, and medical procedures with unintended effects, sterilization, contraception and obesity can affect fertility. In addition, exposure to environmental pollutants and toxins can be directly toxic to gametes (eggs and sperm), resulting in their decreased numbers and poor quality, and leading to infertility.¹⁹ Infertility is an international public health problem. A general estimate is that between 8 to 12 percent of couples experience some form of involuntary infertility during their reproductive lives.²⁰ When

¹¹N. Oyeboode, 'How to Tackle infertility in men and women' (6 Jan 2011)

<<http://www.punchng.com/Articl.aspx?theartic=Art201001060483468>> accessed 25 October 2022.

¹²R.A. Ajayi and O.J. Dibosa-Osador, 'Stakeholders' Views on Ethical Issues in the Practice of In vitro Fertilization and Embryo Transfer in Nigeria' [2011] (15) (3) *African Journal of Reproductive Health* 73-80

¹³Ajayi and Dibosa-Osador (n 11)

¹⁴World Health Organization (WHO), 'International Classification of Diseases' 11th Revision (ICD-11) Geneva: WHO 2018.

¹⁵ Ibid

¹⁶ The Royal Commission on New Reproductive Technologies, (Canada 1993); G. Pence, *Classic Cases in Medical Ethics* (4th edn McGraw Hill, 2004) 153.

¹⁷ 'Infertility', <<http://www.medicinenet.com/infertility/article.html>> accessed 9 October 2022.

¹⁸ Canadian Health Law and Policy (2nd ed Canada, Ontario: Butterworth, 2002) 373.

¹⁹ A.C. Gore and Others, 'EDC-2: The Endocrine Society's Second Scientific Statement on Endocrine-Disrupting Chemicals [2015] (36) (6) *Endocrine Reviews* E1-E150<doi:10.1210/er.2015-1010> accessed on 6 October 2022; T.R. Segal and L.C. Giudice, 'Before the Beginning: Environmental Exposures and Reproductive and Obstetrical Outcomes [2019] (112) (4) *Fertility and Sterility* 613-21; O.A. Makinde and Others, 'Baby Factories in Nigeria: Starting the Discussion Towards a National Prevention Policy' [2017] (18) *Trauma, Violence And Abuse* 98

²⁰ J. Sciarra, 'Infertility: An International Health Problem' [1994] (46) *International Journal of Gynecology & Obstetrics* 155

extrapolated, to the global population, this means that 50 to 80 million people may be suffering from some infertility problem.²¹

2.2 Consequences of Infertility

In addition to the personal grief and suffering it causes, the inability to have children especially in poor communities can create greater problems, particularly for the woman, in terms of social stigma, economic hardship, social isolation and even violence.²² While many people therefore would not consider infertility a disease in itself, it can certainly be said to be a social and public health issue as well as an individual problem.²³

Most of the infertility in developing countries in Africa like Nigeria is attributable to damage caused by infections of the reproductive tract, notably Gonorrhoea and Chlamydial infection.²⁴ Delayed diagnosis of Sexually Transmitted Infections (STIs), lack of diagnosis, incomplete therapy, no therapy or inappropriate therapy compounds the problems of STIs in Africa. After STIs, infections during or after abortion, and during and after childbirth represent the next major causes of female infertility in Africa.²⁵ The latter explains the prevalence of secondary infertility over primary infertility in Africa.²⁶

In comparison, the developed countries of Europe and North America have more endocrine causes of infertility and have better facilities for the diagnosis and appropriate therapy of STIs and can therefore be expected to have better prognosis in infertility management. In Africa, there are more tubal factors, more irreversible oligospermia (condition of insufficient spermatozoa in the semen) and fewer resources for the management of infertility due to economic, political, capacity building factors and the severity of disease.²⁷ All over the world, the crisis of diagnosis and stress of fertility treatments are inadequately documented and we are not always aware of the wear and tear effect on a couple's sexual and emotional life of finding themselves unable to be fruitful together without external intervention. Loss of control, frustration, deep shame and ferocious envy may spill over into other areas of their lives, inducing couples to restrict social contacts, avoiding child bearing couples and family or

²¹ G. Pence, *Classic Cases in Medical Ethics* (4th edn USA: McGraw Hill, 2004) 154.

²² F. Okonofua and Others, 'The Social meaning of Infertility in South-West Nigeria' [1997] (7) *Health Transition Review* 205-220.

²³ M. Inhorn and F. Van Balen, *Infertility Around the Globe: New Thinking on Childlessness, Gender and Reproductive Technologies* (eds) (University of California Press 2002) <<http://www.ucpress.edu/ebook.php?isbn=9780520927810>> accessed 9 October 2022; Christina de Kok.B, 'Infertility in Malawi: Exploring its impact and social consequences' Centre for Research on Families and Relationships, Briefing 41, December, 2008 <<http://www.cfr.ac.uk/reports/rb41.pdf>> accessed 9 October 2022

²⁴ M. Araoye, 'Epidemiology of Infertility: Social Problems of the infertile couples' [2003] (22) (2) *West African Journal of Medicine* 190 – 196; O. Giwa-Osagie, 'ART in Developing Countries with Particular reference to Sub-Saharan Africa: Report of World Health Organisation Meeting on Medical, Ethical and Social Aspects of Assisted Reproduction' (Geneva: W.H.O 2002) 22.

²⁵ Thread, 'Infertility in Africa' <<http://nigeriavillagesquare.com/forum/healthwise/21125-infertilityafrica.html>> accessed 9 October 2022 .

²⁶ O. Giwa-Osagie and Others, 'Aetiological Classification and Socio-medical Characteristics of Infertility in 250 couples' [1984](29) *International Journal of Infertility* 104 – 108; W. Cates and Others, 'Worldwide Patterns of Infertility: Is Africa different?' [1985] (2) *Lancet*, 596–598.

²⁷ R. Cook and Others, *Reproductive Health and Human Rights, Integrating Medicine, Ethics and Law* (Oxford: Clarendon Press 2003) 30.

friends oblivious to their predicament. Depression, panic attacks and agitation, paranoid anxieties and loss of personal identity may prevail intermittently.²⁸

3.0 The Nature of Surrogacy

Surrogacy is defined as one of the several assisted reproductive technology methods where a woman (third party) carries a pregnancy for the commissioning parents and hands the child over to the commissioning parents after its delivery.²⁹ A surrogate mother is a woman who, based on an agreement before pregnancy, carries a child and relinquishes all rights over the child to another person after giving birth to the child.³⁰ There are crucial terms in the discussion of surrogacy which forms a core part of this study which needs to be examined as explained by the American Society of Reproductive medicine.

Biological mother or Genetic donor means a woman who contributes her egg to produce the foetus that results as a child or a man who contributes his sperm to produce the foetus that results as a child while Intended or Commissioning parent means the individual(s) who intend to be parent(s) of the child born through the surrogate arrangement. They may or may not have any biological link to the expected child. Traditional surrogacy means an arrangement where a surrogate donates her egg and it is fertilized with the sperm from the intended father or from a donor. Often times, it is a process possible through Artificial Insemination (AI) 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 her rights and claim to the child. Traditional surrogate mother is the woman who donates her deoxyribonucleic acid (DNA) and carries the pregnancy for someone else. Gestational surrogate mother or Carrier is the woman who carries the baby until delivery. She does not have any genetic or biological connection to the child while Gestational surrogacy means an arrangement where a woman undergoes in vitro fertilization to carry a fetus that has no biological or genetic link to her; she provides “a womb to rent.” She relinquishes all parental right upon the birth of the child. However, the foetus could be genetically linked to one, both or neither of the intended or commissioning parents if donor DNA was utilized.³¹ It therefore follows that a woman can now become pregnant as a result of nine different combinations of possible use of eggs and sperm as follows: the egg and sperm of a commissioning heterosexual couple, the egg of a commissioning woman and donor sperm, the egg of a donor and the sperm of a commissioning male (be part of a couple or a single person), both donor egg and sperm (unrelated to the commissioning person(s)), the egg of a donor and sperm from the surrogate’s partner, her own egg and the sperm of a commissioning male, her own egg and the sperm of a

²⁸ S. Franklin, ‘Deconstructing Desperateness: The Social Construction of Infertility in Popular Representations on New Reproductive Technologies’ in M. McNeil and Others (eds.) *The New Reproductive Technologies* (New York: St. Martins Press, 1990) 200

²⁹ O.J. Umeora and Others I (n 4)105-106

³⁰ R. Blauwhoff & L. Frohn, ‘ International Commercial Surrogacy Arrangements: The Interests of the Child As A Concern of Both Human Rights and Private International Law’ in C. Paulessen and Others (eds) ‘Fundamental rights in International and European Law’ (2016) 215

³¹ M. Gugucheva, ‘Surrogacy in America’ [2010] *Cambridge Medical Association: Council for Responsible Genetics* 1-4

donor, her own egg and the sperm of her partner.³² The first five involve gestational surrogacy, while the remaining parts involve ‘traditional’ surrogacy where the woman is genetically related to the child.³³

3.1 Types of Surrogacy

There are two types of surrogacy namely traditional and gestational surrogacy. The gestational surrogacy is more common than the traditional surrogacy.³⁴ Gestational surrogacy is a method of surrogacy where an embryo created by IVF is implanted in a woman (surrogate mother) or gestational carrier for the purpose of carrying the child to term. Here, the child is not biologically related to the surrogate mother. The eggs and sperm of the intended couple are used to form an embryo which is then transferred to the gestational carrier. The gestational carrier is only the birth mother and not the biological mother. The biological mother is the intended mother whose egg was used in fertilization.³⁵ A traditional surrogate on the other hand donates her egg and carries the pregnancy at the same time. In other words, the surrogate mother is also the birth mother and the biological mother. The sperm for fertilization may be from the intended father or a donor sperm. The sperm from the intended father or donor is artificially inseminated into the uterus of the birth mother. In traditional surrogacy, the surrogate is genetically related to the child but she must relinquish all parental rights to the intended couple after the birth of the child.³⁶ Traditional surrogacy is also known as “genetic surrogacy” and it is less popular these days. People are more likely to consider gestational surrogacy than the traditional surrogacy. The only option for gay couples, single men and intended mothers who are unable to produce eggs is the traditional surrogacy.³⁷

Surrogacy arrangement can either be altruistic or commercial arrangement. Altruistic surrogacy is an arrangement whereby the surrogate mother does not receive any compensation for her services except legal charges, medical expenses, insurance and pregnancy-related expenses.³⁸ Altruistic surrogacy is less expensive as the surrogate in most cases is a relative or friend of the intending couple willing to assist them to fulfill their dream of being parents and it is legally recognized in countries like the United States of America, South Africa, United Kingdom and the Netherlands.³⁹ Commercial surrogacy on the other hand is an arrangement where the surrogate mother is compensated for her services beyond reimbursement of medical expenses and pregnancy-related expenses. Commercial surrogacy is prohibited in several countries that

³² Y. Olomojobi *Human Rights on Gender, Sex and the Law in Nigeria* (2nd edn Princeton Publishing Co. 2021)517

³³ S. Allan, ‘The Surrogate in Commercial Surrogacy: Legal and Ethical Consideration’ in Paula Gerber (ed) and Katie O’Byrne, *Surrogacy, Law and Human Rights* (Routledge Taylor & Francis Group 2015) Chapter 7

³⁴ Olomojobi (n 35) 517

³⁵ Y. Olomojobi *Human Rights on Gender, Sex and the Law in Nigeria* (2nd edn Princeton Publishing Co. 2021)518

³⁶ Ibid 518

³⁷ Ibid 519

³⁸ B.M. Adeniyi and T.J. Owolabi, ‘Surrogacy, Marriage and Commodification of the Womb: A Religio-Ethical Perspective’ [2022] (2) (5) *International Journal of Research in Education and Sustainable Development* 58

³⁹ B.M. Adeniyi and T.J. Owolabi, ‘Surrogacy, Marriage and Commodification of the Womb: A Religio-Ethical Perspective’ [2022] (2) (5) *International Journal of Research in Education and Sustainable Development* 58

allow altruistic surrogacy. For instance, United States, United Kingdom, Australia, South Africa and others prohibit commercial surrogacy but allow altruistic surrogacy. Commercial surrogacy arrangement is permitted in India and Russia.

4.0 Historical Background

Surrogate practice is not novel as it may appear. Ancient Israelites practiced it. When Abraham and Sarah had difficulties having children, Sarah suggested that her Egyptian slave-girl, Hagar, should be used as surrogate mother to help them have a child.⁴⁰ The only material difference between the Abraham-Sarah surrogate motherhood and the modern reproduction technique of surrogate motherhood is that while the former involved physical sexual contact, the latter need not involve physical contact.⁴¹ In fact it is usually completed by artificial insemination (AI). Not only did the Jews practice surrogacy, they also had a version called brother-in-law marriage.⁴² The Jewish canon law permitted a brother-in-law to marry the wife of his deceased brother for purposes of bearing children for him to preserve his name.⁴³ Similar custom and practices were not uncommon to most African societies prior to modernity. The Igbo in Eastern part of Nigeria practice marriage and children rites akin to the Jewish customs.⁴⁴ Same practice still exists in some parts of the riverine areas of the south-south geo-political zone of Nigeria as well.

The first legal surrogacy agreement was drafted in 1976 by Noel Keane, a lawyer. The agreement was for a traditional surrogacy as the surrogate mother was not compensated monetarily for her services. The first surrogate who was compensated for her services was Elizabeth Kane who was paid \$11,500 though the surrogacy arrangement was the traditional surrogacy.⁴⁵

In 1986, in the popular case of *Baby M*⁴⁶ the court was asked to determine the validity of a surrogate contract for which consideration was placed at \$10,000. For the fee, a woman named Mary Beth Whitehead (the surrogate) entered into contract with William Stern whose wife, Elizabeth, had a medical condition which prevented her from being pregnant. Mrs. Whitehead agreed to be inseminated with semen extracted from William Stern, after which she will carry the pregnancy to term and then yield all parental rights to the Sterns. When the baby M was born, Mrs. Whitehead changed her mind. She decided to forego the \$10,000 and keep the baby instead. The Sterns sued and prevailed at the lower court. The *ratio decidendi* as stated in the relevant part of the judgement was, "... the biological father pays the surrogate for her willingness to be impregnated and carry his child to term. At birth, the father does not purchase

⁴⁰ The Holy Bible KJV, Genesis 16: 1-15

⁴¹ F.O. Emiri, *Medical Law and Ethics in Nigeria* (Malthouse Press Ltd 2012) 79

⁴² Holy Bible (n 38), Deuteronomy 25:5-6

⁴³ Holy Bible (n 38) Genesis 38:8-9 ; Genesis chapter 39; Ruth Chapter 4

⁴⁴ Emiri (n 39) 79

⁴⁵ F.O. Emiri, *Medical Law and Ethics in Nigeria* (Malthouse Press Ltd 2012) 79

⁴⁶ *Re Baby M*, 109 NJ 537

the child. It is his own biological genetically related child. He cannot purchase what is already his.” Mrs. Whitehead was dissatisfied with this decision hence appealed to the Supreme Court of New Jersey. The Supreme Court reversed that decision by invalidating the surrogacy contract as an affront to public policy. In the words of the Supreme Court, “... it is a bare contract for the sale of a child, or at its very best, a sale of a mother’s right to her child, the only mitigating factor being that one of the purchasers is the father.” It is of note that the Supreme Court however did not find objectionable a voluntary non-commercial surrogacy agreement provided it does not compel the surrogate mother to hand over the child. As though by a reverse twist, however, the court awarded custody to the commissioning couple on the basis of the interest of the child. It can be gleaned from the case that the courts show some sympathy for surrogacy so long as it is not used for purposes of exploitation. The debate around the acceptability of surrogacy in many societies centers on the exploitation of those women who serve as surrogate mothers and the commercialization of babies.⁴⁷

Different countries have adopted different approaches to the regulation of surrogacy. Some countries expressly prohibited surrogacy, such as France and Switzerland. England and South Africa permits and regulates only non-commercial surrogacy while other countries like Nigeria and India leave surrogacy completely unregulated.⁴⁸ In societies where surrogacy is allowed, the consent of the surrogate mother is a yardstick to determine ethical compliance.⁴⁹ The argument is that surrogacy should be considered in the same way as any other form of labour and regulation should be in form of protection against exploitation.⁵⁰ However, it has been noted that a woman has a right to privacy and reproductive rights under international human rights law and as such, attempts to limit these rights must be reasonably justified.⁵¹

5.0 The Practice of Surrogacy in Nigeria

The value placed on having a child of your own in Nigeria cannot be overemphasized, indeed in most parts of the world. Procreation is deemed as a necessity in the African family system.⁵² Having a child in marriage in the African society is regarded as a sign of fertility and security in the marriage,⁵³ while infertility is perceived as a stigma. Factors that influence this position are the multicultural background of the society,⁵⁴ the influence and multiplicity of religion, economic standard and questions about morality.⁵⁵ It is religiously believed that at creation, God instructed the man and the woman to be “fruitful, and multiply, and replenish the earth.”

⁴⁷ D.R. Bromham, ‘Surrogacy: Ethical, Legal and Social Aspects’ [1995] (12) *Journal of Assisted Reproduction and Genetics* 509-510

⁴⁸ A. Finkelstein and others, ‘Surrogacy Law and Policy in the US Legislature: A National Conversation Informed By Global law Making’ [2016] *Report of the Columbia Law School Sexuality and Gender Law Clinic* 11

⁴⁹ *Ibid* 25

⁵⁰ *Ibid* 27

⁵¹ 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

⁵² O.S. Adelakun, ‘The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges’ [2018] (18) *African Human Rights Law Journal* 605

⁵³ *Umeora and Others II* (n 55) 15

⁵⁴ *Ibid*

⁵⁵ *Olomjobi* (n 33) 521

⁵⁶ This notion was affirmed by the Supreme Court in *Skinner v Oklahoma ex rel Williamson*,⁵⁷ where the US Supreme Court maintained *inter alia*, that procreation was one of the recognized basic civil rights of man and that “marriage and procreation are fundamental to the very existence and survival of the human race.”

While surrogacy is not expressly prohibited in Nigeria, it is also not legally acknowledged. As such, if a person engages in surrogate motherhood or enters into a surrogate contract in Nigeria, such a person cannot be said to have committed a crime.⁵⁸ The underlying problem however is in terms of legally defining the legal parentage of the child as well as the contractual rights and duties of parties to the surrogate agreement. Presently, there is no judicial pronouncement on this form of contract in Nigeria, but if a dispute arises out of a surrogate agreement and such a dispute is presented before a Nigerian court, deciding such a case could prove problematic. There is likelihood of a biased judgment based on cultural sentiments. The bias is likely to arise from socio-cultural influences which views conception through artificial means unacceptable.⁵⁹

With no legislative measures to regulate surrogacy in Nigeria, most artificial reproductive technology clinics in Nigeria base their operations on the Human Fertilisation and Embryology Authority Guidelines of the United Kingdom.⁶⁰ However, the Nigerian Law Reform Commission has recommended that any child born to a woman as a result of artificial insemination or implantation of an embryo in the body of a woman while she is in a marriage must be regarded as a child of the husband,⁶¹ and further recommends same for a child born under a surrogate agreement even if the child is the biological child of the commissioning parents. The rationale behind this is to prevent the surrogate mother from returning to claim the child.⁶²

A Bill for the establishment of a Nigerian Assisted Reproduction Authority was presented before the National Assembly in 2012,⁶³ which was not passed into law as it did not enjoy the support of the majority of the legislature. Later in 2014, the National Health Act⁶⁴ was enacted which did not satisfy the quest to improve surrogacy or any other form of ART at best, although it recognized other evolving health technologies such as cloning, bioethical research amongst others.

⁵⁶ The Holy Bible KJV Gen 1:28

⁵⁷ 316 U.S. 535 (1942)

⁵⁸ O.S. Adedokun, ‘The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges’ [2018](18) *African Human Rights Law Journal* 613

⁵⁹ A.S. Jegede and A.S. Fayemiwo, ‘Cultural and Ethical Challenges of Assisted Reproductive Technologies in the Management of Infertility Among the Yoruba of South-Western Nigeria’ [2014] (14) *African Journal of Reproductive Health* 115-121

⁶⁰ J.O. Fadare and A.A. Adeniyi, ‘Ethical Issues in Newer Assisted Reproductive Technologies: A View from Nigeria’ [2015] (18) *Nigerian Journal of Clinical Practice* 557-559

⁶¹ Law Reform Commission, Reform of Nigerian Family Law III in O.S. Adedokun, The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges’ [2018] (18) *African Human Rights Law Journal* 15

⁶² M. Attah, ‘Family Law in Nigeria’ (Malthouse Press Ltd 2016) 215

⁶³ House of Representatives, ‘Votes and Proceedings’(2 May 2012) 97 <<http://nass.gov.ng/document/download/5555>> accessed 20 July 2022

⁶⁴ National Health Act 2014

The need for progress was recognized with a bill which is pending before the National Assembly intending to amend the National Health Act and to provide regulation for ART.⁶⁵ If passed into law, the Federal Ministry of Health will have the duty of developing policies for ART and will accredit and regulate the practice of ART.⁶⁶ This pending Bill to amend the National Health Act even though it is comprehensive in terms of procedure to regulate and ensure minimum standards in ART in Nigeria, little effort was made in it to enumerate and guarantee the rights of the parties involved.

In this regard, a member of the Nigerian Parliament sponsored another Bill for an Act to provide for a National Framework for the Regulation and Supervision of Reproductive Technology and Matters Connected therewith.⁶⁷ This Bill was presented to the Senate for first reading⁶⁸ on 3 November 2016 and scaled through the second reading in October 2017. The Assisted Reproductive Technology (Regulation) Bill (ART Bill) seeks to regulate ART in Nigeria. The ART Bill seems much more comprehensive and if passed into law, it will be a significant achievement in the history of assisted reproduction in Nigeria. The ART Bill has gone a step further to supplement the provisions of the proposed National Health (Amendment) Bill by providing detailed rights and obligations of the parties to the procedure.

In the absence of any legal and regulatory framework for surrogacy in Nigeria, the Human Fertilization and Embryology Act of the United Kingdom⁶⁹ is the basis of regulation of ART procedures in most ART Clinics in Nigeria. The use of this law is predicated on the fact that Nigeria is a commonwealth country and has the roots of her common law in the United Kingdom. Section 45 of the Nigerian Interpretation Act⁷⁰ allows statutes of general application that were in force in England on or before 1 January 1900 to be directly in force in Nigeria so that where there is a lacuna in Nigerian law, English law may be applied. However, since there is no existing law in England before 1900 which could be applied directly to resolve disputes related to surrogacy in Nigeria, the refusal by a fertility clinic to follow the guidelines of the Human Fertilisation and Embryology Act cannot be said to be in contravention of any law. Such a law will only serve as a persuasive authority and will not be binding in Nigeria.⁷¹

6.0 Challenges affecting the practice of Surrogacy in Nigeria

There are several ethical, religious, cultural, social and legal issues surrounding the concept of surrogacy in Nigeria especially with regards to the child, the surrogate and even the

⁶⁵ A Bill for an Act to Amend the National Health Act to provide for the Regulation of Assisted Birth Technology: For Safe and Ethical Practice of Assisted Reproductive Technology Services and For Other Related Matters (2016) HB 610C 3203 <<http://www.placbillstrack.org/view.php?getid=2075>> accessed 28 July 2022

⁶⁶ National Health Act (Amendment) Bill 2016 Clause 50(1)

⁶⁷ Assisted Reproductive Technology (Regulation) Bill 2016 (ART Bill)

⁶⁸ Senate of the Federal Republic of Nigeria 'Order Paper' (3 November 2016) 49 <<http://nass.gov.ng/document/download/8229>> accessed 28 July 2022

⁶⁹ Human Fertilisation and Embryology Act 2008 S59

⁷⁰ Interpretation Act Cap 123 Laws of Federation of Nigeria 2014

⁷¹ A.S. Jegede and A.S. Fayemiwo, 'Cultural and Ethical Challenges of Assisted Reproductive Technologies in the Management of Infertility Among the Yoruba of Southern-Western Nigeria [2020] (14) *African Journal of Reproductive Health* 115-121

commissioning parents. These challenges have direct and remote consequences on all the parties involved.

6.1 Exploitation of the Surrogate Mother

Concerns have been expressed on whether a practice which exploits poor, vulnerable young women in the society is ethically right and should be encouraged as an answer to infertility challenges in the same society especially when these young women are going into such contracts due to frustration and poverty which makes them vulnerable.⁷² Some scholars have posited that surrogacy aids a man to procreate by buying with money a woman's womb.⁷³ While others⁷⁴ have opined that rather than regaling the surrogate mother's ability to assert power over her body or her ability to enter into the contract; the negative, physical and psychological impact on the surrogate mother should be emphasized such as postpartum depression which is heightened by giving up of the baby.⁷⁵ Concerns have also been expressed over the abuse by fertility Clinics in Nigeria with regards to harvesting of ova and payment of the donors.⁷⁶ There are reports of Nigerian ladies selling their eggs at various fertility Clinics without proper counseling on the health risks involved in donating their eggs especially in cases of recurrent donation.⁷⁷ There are also cases of quack doctors carrying out surrogacy and other in vitro fertilization procedures which is of grave concern to the genuine fertility practitioners.⁷⁸

6.2 Sale of Babies

The practice of baby selling as reported across Nigeria contravenes the Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Pornography which Nigeria signed in 2000 and ratified ten years later.⁷⁹ The Optional Protocol expressly prohibits the sale of children for consideration and enjoins State parties to criminalise the sale of children for sexual exploitation, the transfer of the child's organs or engagement in forced labour.⁸⁰ While Nigeria has laws⁸¹ in place to comply with the protocol, there need to be the will on the part of the government and the society to support the enforcement mechanism to ensure that the act of baby selling is curbed in Nigeria.

⁷² O. Ogunwande and G. Ozuru, 'Socio-Legal Issues of Surrogacy in Nigeria: A Quagmire' [2020] (4) (1) *African Journal of Law and Human Rights*. 41

⁷³ Emiri (n 44) 88

⁷⁴ J. M. Caamano, 'International, Commercial, Gestational Surrogacy through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Affection' [2018] (96) *Boston University Law Review* 571

⁷⁵ Ibid

⁷⁶ M. Joel, 'Ovum Trading: Inside Nigeria's Multi-Million Naira Human Egg Business' Punch 9 August 2015 <<https://punchng.com/ovum-trading-inside-nigerias-multi-million-naira-human-eggs-business>> accessed 29 July 2022

⁷⁷ M. Joel, 'Ovum Trading: Inside Nigeria's Multi-Million Naira Human Egg Business' Punch 9 August 2015 <<https://punchng.com/ovum-trading-inside-nigerias-multi-million-naira-human-eggs-business>> accessed 29 July 2022

⁷⁸ C. Obinna, 'Without Regulation: IVF Treatment is Unsustainable' Vanguard 6 October 2014 <<https://vanguardngr.com/2014/10/without-regulation-ivf-treatment-unsustainable>> accessed 29 July 2022

⁷⁹ United Nations 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Pornography.

⁸⁰ Optional Protocol to the Child Right Convention on the Sale of Children.

⁸¹ Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004; The Child's Rights Act 2003; The Violence Against Persons Act 2015 among others.

6.3 Well-being and Health of the Child

Another area of concern in surrogacy is that of who breast feeds the child since the biological mother hands over the baby to its commissioning parents immediately after delivery. This is coming in an era when breast feeding a baby exclusively for the first six months of life has been so aggressively the centre for campaign and awareness. The benefits of exclusive breast feeding cannot be over-emphasized as it increases the survival, growth and development of the baby, it also increases and strengthens the baby's immunity, enabling it to withstand life-threatening diseases like diarrhea and pneumonia infections.⁸² This places the baby at an advantage from birth. This is not the case for a surrogate baby who may be deprived of these benefits. Modern Surrogacy threatens the sanctity of family relationship as projected by the people's cultural belief and values.⁸³

7.0 Consequences of surrogacy on the sanctity of the African Family

Modern Surrogacy threatens the sanctity of family relationship as projected by the people's cultural belief and values.⁸⁴ Any form of artificial birth arrangement does not go down well the people's social and cultural beliefs. It is cultural for every Nigerian to trace his roots back to his ancestry.⁸⁵ The blood ties inform the value placed on the child and the love and acceptability of that child not only within the nuclear family but even as far as the extended family. Children who are products of surrogacy are not quite accepted in the family. They may not be allowed the privileges due to a blood related child of the family, such as headship of the family or clan and inheritance from the extended family.⁸⁶ This will also be an embarrassment to the child when he becomes an adult. No child will be happy to be told he is an object of profit-making.⁸⁷ This is another reason the surrogacy arrangement is shrouded in secrecy and it is a topic not usually discussed in public.⁸⁸

7.1 Commodification of the Surrogate's body

The African culture does not see children as mere commercial commodity but as a continuation of the existing blood lineage of the family.⁸⁹ Commercial surrogacy is treated as an abomination in African culture and any girl who does that may find it difficult to get married afterwards because she will be regarded as evil and heartless to sell off her own biological child to

⁸² M.A. Jeewon. 'Importance of Exclusive Breastfeeding and Complementary Feeding Among Infants' [2014] (2) *Curr Res Nutr Food Science* <<http://dx.doi.org/10.12944/CRNFSJ.2.2.0.2>> accessed 29 July 2022

⁸³ E. Babatunde, *Culture, Religion and the Self: A Critic Study of Benin and Yoruba Value Systems in Charge* (Edwin Mellon Press 1992)

⁸⁴ E. Babatunde, *Culture, Religion and the Self: A Critic Study of Benin and Yoruba Value Systems in Charge* (Edwin Mellon Press 1992)

⁸⁵ Umeora and Others I (n 4) 105-106

⁸⁶ Ibid 105-109

⁸⁷ Ibid 104

⁸⁸ Ibid 106

⁸⁹ E. Babatunde, *Culture, Religion and the Self: A Critic Study of Benin and Yoruba Value Systems in Charge* (Edwin Mellon Press 1992)

strangers. She may be rejected by her family as having brought shame to her family and the stigma would trail her for the rest of her life.⁹⁰

Some scholars are of the view that the practice of surrogacy encourages the exploitation of the rural woman by the urban. Their argument is that the underlying reason for surrogacy is not to assist the infertile couple but that some people see it as a lucrative business, as seen from the fact that such an opportunity may not be available for a poor infertile woman.⁹¹

7.2 Intermediaries and advertisement

Employment of intermediaries, usually commercial surrogacy agencies and the possible harm that can be caused by mass media advertisement for surrogate parents and commissioning couple can raise ethical and moral questions. Some advertisements may be in bad taste to such an extent that they offend public sense of decency.⁹² In Nigeria, it is public knowledge that one can source for surrogates online as young ladies across Nigeria advertise their availability as surrogate mothers by registering on the internet⁹³ and providing their full details and states of residence.⁹⁴ Also, agencies in Nigeria advertise on the internet to match surrogate mothers with commissioning parents.⁹⁵

7.3 Increase in Baby factories

The increase in baby factories has been linked to surrogacy and this has heightened the level of stigma attached to surrogacy as an option for infertile couples.⁹⁶ It has been established that the prevalence of baby factories in Nigeria fulfils two needs, the first is to lure teenage girls to give up their unwanted babies for financial gain and to avoid social stigma and the next is the need for infertile couples to fulfil social obligations by having a baby.⁹⁷ Some of the babies from these baby factories are trafficked for the purpose of international adoption or used for sacrifice at shrines.⁹⁸ The increased patronage of baby factories by infertile couples could be attributed to the social stigma publicly associated with adoption and surrogacy in Nigeria.⁹⁹ The BBC reported that a common strategy for an infertile woman is to pretend to be pregnant or to be fooled into believing she is pregnant, and then buying a baby from one of these baby

⁹⁰ K.P. Anu and Others, 'Surrogacy and Women's Right to Health in India: Issues and Perspective' [2013] (57) (2) *Indian Journal of Public Health* 65-70

⁹¹ V. Jadvia and Others, 'Surrogacy: The Experience of Surrogate Mothers' [2003] (18) (2) *Human Reproduction* 196-204

⁹² Emiri (n 39) 93

⁹³ PM News <www.surrogatefinder.com> accessed 30 July 2022

⁹⁴ E. Ebhomele, 'Nigerian Ladies Paid To Get Pregnant For Childless Couples' PM New 28 March 2013 <<https://www.premiumtimesng.com/2013/03/nigerian-ladies-paid-to-get-pregnant-for-childless-couples/>> accessed 30 July 2022

⁹⁵ PM News (n 111)

⁹⁶ O.B.A. Van den Akker, *Surrogate Motherhood Families* (2017) 218

⁹⁷ O.A. Makinde and Others, 'Baby Factories Taint Surrogacy in Nigeria' [2016] (32) *Reproductive Biomedicine Online* 6-8

⁹⁸ N. Ayitogo, 'Reps Call for an End to "Baby Factories" in Nigeria' Premium Times 10 March 2020 <<https://www.premiumtimesng.com/news/top-news/381180-reps-call-for-end-to-baby-factories-in-nigeria.html>> accessed 30 July 2022

⁹⁹ O.A. Ojelabi and others, 'Policies and Practices of Child Adoption in Nigeria: A Review Paper' [2015] (6) *Mediterranean Journal of Social Sciences* 75-77

factories.¹⁰⁰ Some scholars contend that the rapid increase in baby factory operations in Nigeria is a threat to the social acceptance of surrogacy in the country as many might be confused as to the difference between baby factories and surrogacy.¹⁰¹ It appears that in the case of the baby factories in Nigeria, while some females give their free consent, others especially teenage girls are coerced against their wishes to be surrogate mothers.¹⁰² These threats to the development of surrogacy are a cause for concern which has led practitioners to call on government to regulate ART in Nigeria.¹⁰³

7.4 Surrogacy for Convenience

The essence of surrogacy is to help childless couples. On this basis, surrogacy for mere convenience seems to be expanding the unethical frontiers of ART. Where for instance a woman capable of bearing children does not wish to undergo a period of pregnancy for some reasons ranging from career, to avoiding distortions to the body due to pregnancy and others but rather desires to use another woman to carry the pregnancy for her calls for serious ethical objections. Such an arrangement can be likened to exploitation of others, using them as means to achieve others selfish end.¹⁰⁴

7.5 Religious Concerns

Nigerians are a highly religious people and belong to different religious groups with Islam and Christianity dominating. There are also a minority who believe in traditional worship. Islam has different views regarding surrogacy. Some Islamic scholars see surrogacy strictly from the *Sharia* point of view that prohibits surrogacy,¹⁰⁵ others see it as another form of prostitution where a woman carries pregnancy which is not fathered by her legitimate husband. The implication of it being that the baby is not a legitimate child. Yet, some feels it affords infertile couples the ability to fulfill a natural role of procreation and preserving the human race.¹⁰⁶ Christians differ in opinion. For example, the Catholic Church believes that children are gifts from God, not a right and that procreation can only result from the conjugal love shared by married couples. It is therefore a great 'sin' to use other techniques that is contrary to divine arrangement, by bringing in the services of a third party. The Catholic Church also believes that surrogacy is an abuse of the dignity of a child and commodification of the womb a sin.¹⁰⁷

¹⁰⁰ BBC News, 'Judges Raises Nigeria Baby Selling Scam Concerns' BBC News 25 October 2012 <http://www.bbc.com/news/uk_england-london-20082389> accessed 30 July 2022

¹⁰¹ A.O. Makinde and Others, *Baby Factories in Nigeria: Starting the Discussion towards a National Prevention Policy* [2017] (18) *Trauma, Violence and Abuse* 3

¹⁰² Adewunmi (n 4)

¹⁰³ O.A. Makinde, 'Infant Trafficking and Baby Factories: A New Tale of Child Abuse in Nigeria' [2016] (25) *Child Abuse Review* 433

¹⁰⁴ F.O. Emiri, *Medical Law and Ethics in Nigeria* (Malthouse Press Ltd 2012) 92

¹⁰⁵ G.I. Serour, 'Reproductive Choice: A Muslim Perspective' in J. Harris and S. Holm, (eds) *The Future of Human Reproduction: Ethics, Choice and Regulation* (Clarendon Press and Oxford University Press 1998)

¹⁰⁶ E. Mackenzie, 'Religious Views on Surrogacy : Opposing Views' <<http://www.people.opposingviews.com/religious-views-surrogacy-9339.html>> accessed 30 July 2022

¹⁰⁷ E. Mackenzie, 'Religious Views on Surrogacy : Opposing Views' <<http://www.people.opposingviews.com/religious-views-surrogacy-9339.html>> accessed 30 July 2022

The Pentecostals however, have a more liberal view on surrogacy as a cure for infertility. Some may have their reservations about the possible challenges associated with the concept like the question of ownership of the baby, objectification of the baby, procreation outside properly constituted family and other unforeseen problems that may arise in future regarding the child.¹⁰⁸ The fact still remains that neither of these religions expressly supports modern surrogacy practices.

7.8 Medical Concerns

Assisted Reproductive Technology and all its variants especially surrogacy are not without its medical risks to both the surrogate and the baby. Cases of human error, where fertility clinics may make mistake in the mixing of sperm and embryos cannot be ruled out. Conceivably, a conception of a baby that is of a different race to the parents can be embarrassing to the intended couple; Multiple births occur as a result of multiple embryos implanted with attendant risk of premature birth, low birth weight, still birth and sometimes long-term disability; Chances of birth defects occurring is high as it has been suggested that IVF increases the chance of a risk of birth defects, such as heart or kidney problems for the child; Surrogate's health may be affected due to complications from hormonal treatment or a multiple-foetus pregnancy may have damaging effect on her¹⁰⁹ such as risk of stroke, pre-eclampsia, placental abruption, post-partum depression and so on.¹¹⁰

All these risks enumerated are consequences of surrogacy that raises critical ethical concerns in a place like Nigeria where surrogacy is unregulated. What redress are available to the parties concerned? However, while still waiting for the ART Bill to be passed, where there are problems like these, all the parties must be enlightened as to their rights even before they commence the process. The surrogacy agreement may include a dispute resolution clause stating how to commence such disputes and where to go. For instance, the Medical and Dental Practitioners Council of Nigeria has a disciplinary committee that sanctions erring practitioners. Parties may write to the MDCN stating their grievances with the aim of ultimately getting a relief before pursuing other legal avenues.

8. Legal Implications of Surrogacy on all the parties

The surrogacy contract involves majorly the commissioning parents, the surrogate mother and then the child who is the product of the arrangement. These persons are affected directly or remotely by the surrogacy arrangement, hence the need to ascertain what their rights are in Nigeria.

¹⁰⁸ B.M. Adeniyi and T. J. Owolabi, 'Surrogacy, Marriage and Commodification of the Womb: A Religio-Ethical Perspective [2022] (2) (5) *International Journal of Research in Education and Sustainable Development* 2782-7666

¹⁰⁹ Emiri (n 39) 75-76

¹¹⁰ T. Kelvin, 'The Ethics of surrogacy contracts and Nebraska's Surrogacy Law [2008](41) *Creighton Law Review* 185-206

8.1 Legality of the Contract

Surrogacy may pose contractual, paternal and maternal problems.¹¹¹ An example is the *Baby M. case*.¹¹² The Supreme Court of New Jersey in *Re Baby M's case* invalidated the practice of surrogacy on grounds of public policy. It upheld the surrogate's rights over the child but however granted custody to the commissioning father who also happened to be the biological father of the baby "in the best interest of the child" not because of the contractual rights of the commissioning couple. The major hurdle parties may encounter in Nigeria is whether the courts will enforce the contract between the parties and there is no way one would know until parties take their disputes to a court of competent jurisdiction.

8.2 Cases where the surrogate refuses to hand over the baby

In Africa, there is always a strong attachment of women to their unborn babies. This is psychological as well as cultural for mothers to share intimacy and love with the baby in their womb. This may be lacking in a surrogate arrangement where the mother is a mere means to an end and the baby is treated like a commodity.¹¹³ There may be instances where the surrogate mother may change her mind and insist on keeping the baby. It may also happen that the child may not be wanted either by the surrogate mother or the commissioning parents because of disability or due to the fact that the commissioning parents got divorced or separated before the birth of the child and for some other reasons.¹¹⁴ In situations like this, who does the law hold responsible for the defect of the child especially if there exist evidence, say to the effect that the life style of the surrogate mother could have caused the injuries or that the commissioning parents aggravated the situation by not making available money for proper medical treatment? Who should exercise parental responsibility to the child when both the surrogate mother and the commissioning parents do not want the child?

The surrogate mother may wish to abort the pregnancy or alternatively live a lifestyle that could cause serious damage to the foetus and in such instance; can the commissioning parents prevent her?¹¹⁵ These and many more are the complicated legal questions that the law would have resolved if there is a specific law regulating surrogacy in Nigeria. However, to reduce the vagaries of the surrogacy arrangement, it is suggested that the terms of the agreement should be properly worded. That is, the surrogacy contract may contain provisions such as those preventing anti-social behaviour by the surrogate, insist commissioning parents must accept the child with birth defects, address questions of paternity of the child, especially for purposes of subsequent adoption proceedings, time frame for nursing (if need be) and return of the baby

¹¹¹ K.P. Anu and Others, ' Surrogacy and Women's Right to Health in India: Issues and Perspective' [2013] (57) (2) *Indian Journal of Public Health* 66

¹¹² *Re Baby M* 109 NJ 537

¹¹³ O.J. Umeora and Others, 'Surrogacy in Nigeria: Legal, Ethical, Socio-Cultural, Psychological and Religious Musings' [2014](13)(2) *Journal of Medical and Health Sciences* 108

¹¹⁴ *Emiri* (n 39) 93

¹¹⁵ *Ibid*

to the intended couple and so on. Also, it should include an insurance cover for the surrogate should the commissioning parents refuse to show up due to reasons best known to them.

8.3 Lack of proper counseling of parties especially the surrogate

For a baby to be detached from its mother is inhumane and torturous to some women. This is even worse where the delivery turns out to be an operative one.¹¹⁶ All the sufferings and risks are only for the baby to be handed over to a couple. This calls for proper counseling to make the surrogate mother know the attendant risk in what she is going in for as well as her legal rights under the contractual agreement. Unfortunately, such is lacking in Nigeria.

8.4 Paternity of the child

In Nigeria, there is no law to properly tackle issues of parentage of the child and no legally recognized contractual backing to that effect where the rights and duties of all parties in the agreement are clearly spelt out.¹¹⁷ Since there is no legal framework upon which the court can interpret if there is a dispute involving the parties, it becomes a challenge to delve into such contracts in Nigeria. The likelihood that cultural and social sentiments will come into play is inevitable.¹¹⁸ This is because Nigerians still view such an artificial means of procreation as unacceptable and the courts may not be willing to delve into the validity of such contracts as it may be against morality and public policy. Any contract found to be inconsistent with public policy is viewed as unlawful and illegal, thus is unenforceable in Nigeria.¹¹⁹

8.5 Incompatibility with Human Rights and International law

According to the 1926 Convention against Slavery, ‘Slavery is the status or condition of an individual over whom any or all powers attributing ownership rights are exercised’.¹²⁰ The Convention of the Right of the Child¹²¹ ‘forbids the sale or trafficking of children for any purpose or in any form.’ Also, the Hague Convention established safeguards to ensure that international adoptions are carried out for the best interest of the child to prevent abduction, trafficking or sale of children.¹²² In addition, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires state members to take all adequate measures including making appropriate laws to ‘suppress all forms of trafficking of women and exploitations of women for prostitution’.¹²³ It added that state members ‘must ensure the

¹¹⁶ K.P. Anu and Others, ‘Surrogacy and Women’s Right to Health in India: Issues and Perspective’ [2013] (57) (2) *Indian Journal of Public Health* 68

¹¹⁷ Adedokun (n 63) 620

¹¹⁸ O.S. Adedokun, ‘The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges’ [2018] (18) *African Human Rights Law Journal* 605

¹¹⁹ M.A. Field, *The Case Against Enforcement of Surrogacy Contracts, Law School Harvard University, Policy and Life Science* (Cambridge University Press 1990)

¹²⁰ The Convention Against Slavery 1926

¹²¹ The United Nations Convention of the Right of the Child 1989 Art 35

¹²² Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 Art 1

¹²³ Convention on the Elimination of all Forms of Discrimination Against Women 1979 Art 6

right to health, protection and safety... including safeguarding the functions of reproduction'.¹²⁴ This particularly could be applied to the exploitation and commercialization of the reproductive functions of surrogate mothers and teenage girls. No wonder, the European Parliament in December 2015 and in line with its Rules of Procedure,¹²⁵ by majority vote strongly voted against the practice as being exploitative and undermines human rights.¹²⁶ Only countries like Ireland, France, Italy, Sweden, Germany and UK are in strong support of the practice.¹²⁷

9.0 Conclusion and Recommendation

It is evident that surrogacy now occupies a prominent place in the reproductive health of Nigerians and the legislature cannot ignore this fact. There is an urgent need for government to make assisted reproduction especially surrogacy an important public health issue in the National Health plan and policy. It is also expedient for the Nigerian legislature to pass the pending ART Bill to regulate the practice of surrogacy in Nigeria. This is to ensure certainty as to the legal effect of the practice and to help decide the rights of parties who have chosen surrogacy as an alternative to natural reproduction. However in passing the law, care should be taken to harmonise the religious and cultural sentiments of Nigerians in respect of sanctity of life and the fundamental value of family life. While waiting for the ART Bill to be passed, parties are advised to ensure that the surrogacy contract between the parties should be properly worded to include terms that will reflect the interest of all the parties and also include the fact that they can resort to alternate dispute resolution where they have disputes or disagreements. Furthermore, institutional framework that will uphold the legal status of surrogacy should be established. Professional organizations like the NMA, Non-governmental organizations and other stakeholders should embark on an effective awareness campaign on surrogacy and the legal implication of the practice for the purpose of enlightening the public. This will forestall the uncertainty surrounding the practice of surrogacy in Nigeria, strengthen the confidence of parties involved and reduce the incidence of unethical practices and commercialization of reproduction in Nigeria.

¹²⁴ Ibid Art 11(f)

¹²⁵ Resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter Rule 133 para 115

¹²⁶ Ibid

¹²⁷ Ibid