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Legal and Ethical Issues in Nigerian Surrogacy Practice: A Comparison with South Africa and United Kingdom

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Abstract

Technology surrounding surrogacy in Nigeria is nascent and uncertain and a web of complexity is injected into its law and ethics. There are currently no laws prescribing or proscribing the practice and there is a great lacuna in legislative deliberations of the Hansard of various Houses of Assembly. This void is open to abuse and exploitation by illegal commercial operators. In addressing this paper explore how the enactment of legal provisions to cover the practice of surrogacy might address the void. It is suggested that any such legislation must provide for the legality of the different types of surrogacy, reflecting the social, cultural, ethical and psychological issues abounding within it. The provisions will regulate the procedures and processes of commercial surrogacy and address the exploitation of vulnerable populations by surrogacy agents allowing the interests of all those with fertility difficulties to assume paramountcy. The methodology adopted is doctrinal, using a qualitative approach which is library and e library focused research. It draws from primary sources, the 1999 Constitution (as amended), Acts of the National Assembly, Law of the States and case laws and secondary authorities including relevant information from leading authorities, edited literature, textbooks on the subject matter of the research, journals, articles, newspapers, opinion of experts and practitioners on relevant aspects of law. Also, primary data is generated through the use of in-depth interviews with key stakeholders with respect to the available laws governing the practice of surrogacy. There is also some element of comparison with South African and UK jurisdictions.

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Introduction

The World Health Organisation (WHO) study, indicates infertility affects up to 10.5% of couples of reproductive age in global terms (Mascarenhas: 2012) and 20% of Nigerian couples (Snow: 1995). The total fertility rate in 2015 was 5.5 births per woman or 5,500 births per 1000 women. Women in Nigeria have on the average 5.5 children each during their childbearing years. Fertility understood in terms of child bearing, refers to the number of children ever born. It depends on many factors and social circumstances, such as culture, tradition, education and the overall level of development of a particular society or community. The two key proximate determinants of fertility are the age of entry into a union and the availability of contraception (Akinayo: 2014). This will indicate Nigeria suffers a high rate of infertility, and in vitro fertilization and embryo transfer clinics is the immediate response. But surrogacy also plays a role and it is defined as the act of performing some function in the place of someone else, the process of carrying a child of another person (Black's Law Dictionary), with the intention of handing over once it is born (Lumbasyo: 2015).

Surrogacy comes from the Latin word "subrogare" which means substitute. One of the earliest forms can be traced to ancient times (Umeora: 2014). The biblical story of Abraham and Sarah and their maidservant, Hagar is a point in illustration (Genesis 16:1-4). It is referred to as traditional surrogacy. One of the earliest law codes dating back to 1860 BC, the Lipit-Ishtar Code of Mesopotamia regulated the practice of surrogacy by allowing the man whose wife was infertile the use of the services of a harlot for child bearing and in return she was rewarded with "grain, oil and clothing", which later paved way for commercial surrogacy (Sckenker: 2003). The Babylonian Code of Hammurabi evolved surrogacy in a way by compelling the surrogate mother to transfer all parental rights to the other mother who needed her service after giving birth to the child (Sckenker: 2003).

There has always been a close linkage between adoption and surrogacy, adoption is mostly considered to be the next logical step following afterwards,

with the surrogate mother transferring her maternal rights in favour of the social, or with the advent of gestational surrogacy, the genetic and social mother. Unlike adoption, surrogacy deals with more provocative ethical and legal issues, such as priority boundaries, purchasing and selling oocytes, renting of reproductive functions and organs, and the act of donation. Also unlike adoption, surrogacy is neither recognised nor regulated in many countries. Nigeria is indeed one of those many and this opens up a space for debate and lacuna.

The existence of ART's like IVF and the rest of the technologies and their uses around the world, whilst this relatively new technology exists in Nigeria many couples who find it difficult to bear children are not exposed to them. Surrogacy is one of them and it raises a number of complex legal and ethical issues that an appropriate framework is required to regulate its practice. Nigeria is yet to acknowledge legally and provide policy guidelines and legislation to formalise and regulate its practice. There are therefore no laws prescribing or proscribing the practice in this country and it has not formed part of the deliberations in any of the State Houses of Assembly or National Assembly (Umeora: 2014). This void has been exploited by illegal commercial operators as evidenced with news of baby factories, baby sale, human trafficking, and baby swipe dominating the headlines. (Amadi: 2014) The prevailing situation opens up the need for legal provisions for the practice of surrogacy in order to put an end to the illegal practices mentioned above. These laws of course should provide for the legality of the different types of surrogacy in order to address any form of exploitation of a vulnerable population by surrogacy agents, while serving the interests of all those with fertility difficulties.

It is indicative from prevailing discourse in this area that surrogacy raises a lot of ethical questions and that no legal framework currently exists to address them. This means that parental rights are not guaranteed after a surrogate pregnancy. The closest to the protection of rights are those covered under reproductive law. Usually under these lawyers can draft a surrogacy agreement that clearly spells out what everyone needs to do. This may help if legal issues come up after birth. It can also outline agreements about a variety

of possible scenarios with the pregnancy, such as what happens if there are twins or triplets.

African Society, Family and Children

In Nigeria, one of the most culturally traditional African communities, people are interdependent and commune together as a society despite the various ethnicities. A person's worth is determined through the eyes of his peers and community at large (Tangwa: 2000). This interdependence is such that one's well-being is attached with the well-being of others, which therefore means that hence people are expected to cooperate and seek situations that not only make one happy but also makes the society happy as a whole. (Wirendu: 2008) However, this movement is connected with the idea of a family; which is one of the most important units of the society, and as such what constitutes a family is defined by a society. (Behrens: 2014) Most African societies define a family as that which constitutes both adults and children, which literally means that a family is incomplete if there is absence of children. For instance, in a typical African society, an individual who is of age is expected to get a suitor and thereafter it is expected that children should follow from such a union. Children therefore are and still are considered to be of importance, not just for the continuity of the lineage of the parents but also for the society in general (Ankeny 2006), (Kimani: 2001).

The idea that a woman who cannot bear her own child is considered "incomplete" has not changed much over the years. However, it is silent since globalisation and civilisation came into being in this modern society, compared to the early years. It should be noted that even though this issue is silent as a result of the reasons stated earlier, the stigma remains. The will to bear one's own child is as strong as it was in the days of old and it is not only affected by personal situations, but also by social inference. (Chadwick: 1987) The situations and our various cultural practices and beliefs have conditioned and even pressured the woman into feeling that without a child of her own, her value diminishes before the eyes of the community. This same pressure applies to men as well but not as much as to the woman. In the African traditional set up for instance, a man and woman are considered a complete family once they have children of their own. For instance, according to the Christian faith,

'reproduction represents the culmination of one's fulfillment of marriage vows, (Ankeny: 2006) as captured in the bible "be fruitful and multiply."

As referred to above, in most indigenous African communities including Nigeria, children remain a most important aspect. It could extend to childless women being stigmatised in holding positions in the society. It is suggested the more children one had, the higher her status in the society. It is with this background that a woman proceeds to great lengths and in the process, does everything and anything in her power to get children of her own. The issue of infertility has really cost the woman her place in her house and the society at large. Most cases when the woman is unable to have her own child, it leads to divorce, or she is sent back to her parents' house. Other times, the woman goes out of her marriage in search of a child or her husband marries another wife. It is generally assumed that the existence of a home without children is as a result of the woman's fault and as such it is acceptable if the man gets the children out of his matrimonial home. Cases have been heard of where the woman herself gets another woman to bear children with her husband on her behalf. (Genesis 16:2-4) This is referred to as traditional surrogacy and the children borne out of such union are usually considered to be the children of the woman who sought the services of the surrogate as it is being practiced in the olden days, in other not to allow the current lineage go into extinction.

The Right to Procreate

In Nigeria, the right to have a family is a fundamental human right (1999 Constitution as amended). However, there are arguments on whether human beings have the right to procreate. Hence, if the right to procreate is a fundamental right, then an equal protection argument suggests that it cannot be denied to men whose wives are infertile and for whom surrogacy offers one of the few viable alternatives to childlessness. Some scholars from the natural school of thought are of the opinion that since giving birth is a God given natural process then it follows that there is a natural right to procreate (Ankeny: 2006). Therefore, the decisions on whether to procreate or not are linked to our self-being and identity as human beings and as such are bound to arouse personal opinions. Some consider such decisions to be so personal and inherent such that they do not require legislating upon and/or regulating.

Besides, as Immanuel Kant's observed, human beings have an intrinsic worth and dignity hence they have the capacity to make decisions and choices on matters that determine their well-being (Kant: 1996). However, international and national bodies have not stopped recognising, providing for and regulating the right (or not) to procreate. For instance, the United Nations Declaration on Human Rights (UDHR 1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966) and International Covenant on Civil and Political Rights (ICESCR 1966) all support the arguments that everyone has the right to marry and found a family. Regionally, this notion is echoed by article 18 of the African Charter on Human Rights (1981) and supported by article 6 of the African Charter on the Rights and Welfare of the Child (1990).

Current Practices of Surrogacy in Nigeria

Surrogacy being a relatively 'new' technology in Nigeria has no laid down regulations of practice. The few fertility centers that offer the surrogacy option of treatment by IVF are forced to rely on their own personal interpretation of how the process is to be administered (ICESCR 1966).

Societal Alternatives to Surrogacy

Adoption: Adoption is the process which "creates a parent-child relationship between the adopted child and the adoptive parents with all the rights, privileges and responsibilities that attach to that relationship..." (Black's Law Dictionary) It may be added that adoption severs the legal relationship between the natural child and the natural parents or guardians. However, adoption was unknown to common law and it is entirely a creature of statute. (Nwogugu: 2004)

Statutory Adoption: There are two types of persons that can be adopted. (Nwogugu: 2014). A person who is below eighteen years whose parents or where there is no surviving parent, the guardian has consented to the adoption (Child's Right Act 2003). The other is a child below eighteen years who is abandoned, neglected or persistently abused or ill-treated, and there are compelling reasons in the interest of the child why he should be adopted (Child's Right Act 2003). Furthermore, there are three categories of persons

who may adopt a child. A married couple may jointly adopt with the authorization of the court if one of them has attained the age of twenty-five years (Child's Right Act 2003). Also, a married person who has obtained the consent of his/her spouse may adopt (Child's Right Act 2003). A single person may also adopt if he/she has attained the age of thirty-five years, provided that the child to be adopted is of the same sex as the adopter (Child's Right Act 2003). However, in all the following cases, the adopters must be persons suitable, by the appropriate investigation officer, to adopt the child (Nwogugu: 2014)Section 131 (Child's Right Act 2003) imposes several restrictions on the making of adoption orders but we will not go into further detail in this paper. We will briefly examine it under Customary Law.

Adoption under Customary Law

Customary law in several parts of Nigeria recognises and enforces the adoption of children. However, adoption is rare because parents are generally unwilling to relinquish their rights over their children. On the other hand, there is reluctance in making a child a member of a family other than through natural process by birth. Unlike the situation under statutory law, customary law has not developed sufficient criteria to make the institution readily identifiable. Consequently, adoption is sometimes confused with guardianship or foster parentage. (Nwogugu: 2014) Any adult person, either male or female may adopt a child under customary law. Also, a child below the age of puberty may be adopted, and in most cases, children who are adopted are related by blood to the person who desires to adopt them. There are two ways in which adoption may be affected under customary law; the formal and informal adoption.

Illegal Practices of Surrogacy in Nigeria

The Existence of Baby Factories in Nigeria

According to Onuoha (2014), trafficking in persons in Nigeria has largely targeted adults and children, particularly women and girls, and of growing concern, however, is the recent emergence and growth of sophisticated and syndicated groups involved in baby 'factories' and trafficking in Nigeria. It should be understood that trafficking in human beings is not a new evolution, and historically it has taken many forms, across different periods and different

places, but in the context of globalization it has acquired shocking new dimensions (United Nations Educational, Scientific and Cultural Organization (UNESCO)). What is more concerning is the recent dimension of baby trafficking. In January 2014, for instance, a Chinese obstetrician, Zhang Shuxia, was given a suspended death sentence for abducting newborn babies in Fuping, Shaanxi province, and selling them to child traffickers. Zhang sold seven babies to child traffickers between November 2011 and July 2013, including a pair of twins (BBC News: 2014).

However, Nigeria has a reputation for being one of the leading African countries in terms of origin, transit and destination for human trafficking (Okoli: 2014). Recently, baby trafficking in Nigeria has underpinned the evolution of highly organized and sophisticated 'farming' in babies to sustain a growing demand in the underground market.

The term 'baby factory' has been used interchangeably with 'baby farming' and 'baby harvesting'. Since it was first described in a United Nations Educational, Scientific and Cultural Organization report in Nigeria in 2006 (Makinde: 2015), several more baby factories have been discovered over the years. However, there is no legal definition for these terms; they are used by journalists to describe criminal activities in Nigeria involving restriction of a person's movement against such person's will, forced impregnations, sale of babies and illegal adoptions (Huntley: 2013). According to Mba baby factories are defined as locations where young ladies or girls, some teenagers or little above that, are harbored and deliberately encouraged or forced to become pregnant and subsequently give up their babies for sale. (Omonobi; 2013) In other words, a baby farm or factory is any accommodation where mostly teenage pregnant girls are kept with or without their consent, or are encouraged or forced to become pregnant, for the purpose of giving birth to babies that are sold for monetary gains to diverse clients. Accordingly, baby trafficking refers to all acts involved in the abduction, (Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria 1990), transport, harboring, and transfer, sale of a baby, within national or across international borders, through stealing, false adoption, fraud or deception, to be used for satisfying social, material, and ritual purposes, among others.

Baby Factories and Trafficking in Nigeria: Dimensions and Modus Operandi

The occurrence of baby factories, as well as baby trafficking, is growing into one of the most lucrative forms of organized crimes in Nigeria, consisting of powerful suppliers and clients. Several dimensions are noticeable in the practice of baby trafficking in Nigeria. The first is the highly sophisticated and organized 'farming' of babies. These operations are usually carried out by registered organizations that are disguised as hospitals, maternity homes, rehabilitation centres, and orphanages. Most operators are, however, unregistered. Not only are the facilities illegal, but they have been mentioned in cases of abduction, stealing of babies, and child trafficking (*The Vanguard Newspaper*, 31 March 2014).

In 2011, Nigeria's NAPTIP raised the alarm over booming baby sales in Nigeria. The agency disclosed that in the lucrative but inhumane business, babies are sold for between three hundred and fifty thousand naira (₦350,000) and four hundred and fifty thousand naira (₦450,000), depending on their gender. Although the occurrence of baby factories and trafficking cuts across the various zones in Nigeria, it is more prevalent in the south-east zone. One analyst provides an interesting chronicle of this scourge: in 2011, the police raided two hospitals, and dismantled two baby factories in Enugu State; in June 2011, thirty-two (32) pregnant girls were rescued in Aba, Abia from a hospital of the Cross Foundation; between January and March 2010, seventy-seven (77) girls were rescued in other parts of Abia State; and in 2007, nineteen (19) girls were rescued from a cartel that operated between Aba and Port Harcourt in Rivers State (Madike: 2013). Several factories have been raided across the country in the past by security and law enforcement officials, but the inhumane trade continues to thrive. A typical organized association involved in baby factories and trafficking may involve all or some of the diverse actors with each performing 'specialized' roles in the maintenance of the business. The baby factories are mostly managed by 'quacks' (fake doctors) who claim to have medical qualifications, or nurses who have abandoned formal practice to provide antenatal care for the pregnant girls due to its profitability (Sun Newspaper; 2011). Some of the baby factory operators are known to keep teenage girls and allow their sons or male syndicate employees to impregnate them. Once a girl is pregnant, she is separated from those yet to be

impregnated. After delivery, the girls are offered a meager amount of money, and their babies are taken from them and sold to clients for an agreed amount. The girls can then be re-engaged for another nine-month deal. There is no fixed price for the sale of the babies. It all depends on who is buying and who is selling, as well as the location where the transaction takes place. However, in all instances, baby boys are costlier than baby girls, and twins are known to fetch the highest prices.

The second dimension is not as sophisticated as the first. It relates to the activities of some maternity homes and private hospitals that do not engage in deliberate 'baby farming' but through their network of laboratory technicians, nurses, doctors and facilitators spread across the country – encouraging girls with unwanted pregnancies to deliver babies in their facilities. In most cases, they provide teenage and single mothers who do not want to keep their babies with shelter and care while they are pregnant, and then sell their babies for a premium to couples that want them. They are made to sign papers renouncing their rights to the babies, as well as swearing oaths of secrecy not to disclose what has transpired. (Odigie: 2008)

A third dimension of the business relates to sham adoptions. The operation involves layers of fraudulent activities. It usually starts with a pregnant teenager delivering a baby at a hospital. Afterwards, the baby is deposited in an orphanage. Some clients (people seeking to adopt a baby) connive with assessors without following the due process stipulated for child adoption. These assessors, who are supposed to be attached to Magistrate's Courts, procure fake or forged court orders with which they sell the babies, in most cases to childless couples. The sale of babies is a booming trade with international dimensions, which encompasses the locations from which the babies are sourced to the countries where the end-users receive them. Such babies can be sold to a range of clients, including desperate childless couples and ritualists, among others. Few years ago, in March 2014, a Cameroonian woman (Mrs. Ngala Norgu Julia) was arrested by Nigerian security officials at the Calabar Port while trying to smuggle a one-week-old baby girl to Cameroon, which she claims was delivered to her by a herbalist at Okitipupa, Ondo State (Una: 2014).

Factors behind the Upsurge in Baby Factories

Several factors have been accounted for the upsurge of baby farming and trafficking in Nigeria, these factors shall be considered in the following;

The high rate of poverty in the country lends itself to most parents finding it difficult to feed their family on a three times daily basis. The stigmatization of young girls with unwanted pregnancies forces some young girls to slip into baby factories to deliver their babies, in order to escape being noticed by their parents or the community. With 46% of the Nigerian population noted to be living under the poverty line, the most important factor promoting baby factories in Nigeria is poverty (Francis: 2014). In the context of intergenerational poverty, young females are vulnerable to the efforts of traffickers who encourage them to breed babies as an easy means of making money. Teenage girls who may have to support their families through hawking are exposed to rape and pregnancy with the possibility of ending up as victims of baby factories.

Secondly, a premium is placed on having biological children in Nigeria, which compels some childless couples to indulge in sham adoptions out of desperation, thereby contributing to baby farming. This means that there is high demand for babies by infertile couples with a desire to complete their family and thereby fulfill a crucial social obligation. Thus, the high burden and stigmatization of infertility in Nigeria, and the unwillingness of infertile couples to associate publicly with adoption or surrogacy, contributes to the increased patronage of baby factories (Ombelet: 2006).

Thirdly, the inability of government agencies to effectively monitor the activities of orphanages and maternity homes, among others, allows for baby farming and baby sales under a cloak of legality. Also, weak law enforcement owing to the complicity of state actors has for a long time meant that apprehending traffickers is unlikely, prosecuting those arrested less so, and securing conviction even more difficult.

Ethical Issues Inherent in Surrogacy

According to Khan (2017), surrogacy practice at the outset may seem very amicable as it solves the purpose of both the parties, but there are many ethical

issues that the parties often overlook while entering into such arrangements and oblivious of the repercussions of the failure of these agreements they are unaware of the legal implications as well. The Warnock committee report was aimed at basically a more prohibitive approach to surrogacy though it was not aimed at the complete prohibition and it essentially discouraged this practice. In fact the Warnock committee report recommended that “legislation be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for the individual or couples who wish to use the services of a carrying mother.”(Para 8.11)

The Margret Brazier committee was later commissioned which was less hostile towards the approach to surrogacy as compared to the Warnock committee report, nevertheless it provided that the regulation should not appear to either endorse or encourage the practice of surrogacy. In the case of *Briody v. St Helens and Knowsley AHA* ((2001) 2 FLR 1094, at p. 1098–1100.), Justice Hale concluded that surrogacy as such is not contrary to public policy but the issue is a difficult one, upon which the opinions are divided, so that it would be wise to tread with caution. To deliberately become pregnant with the intention of giving up the child distorts the relationship between the mother and the child.

Regulating Surrogacy

Initially, the paper discusses instances both in support and against surrogacy before I can adequately arrive at an opinion on whether surrogacy should be regulated or not, and the instances are as follows;

Issues in Support of Surrogacy

Surrogacy practice is a process of ensuring that infertile couple, who finds it difficult to bear children of their own, with their genetic material is able to do so. The role of the surrogate mother/host is important as it fulfills the inherent desire of the commissioning parents of passing their genetic material to their offspring and hence ensuring the continuity of their bloodline, that is, not allowing their lineage go into extinction.

Secondly, by giving the infertile couple a chance to have children that they call their own, surrogacy uplifts the pain and pressure that comes with being judged by the society as being inferior and barren due to childlessness. Accepted, some scholars as mentioned before have argued that infertility is not a disease and thus, it should not be treated as if it is a disease. However, in an African set up where children are the expected outcome of any union of spouses and without which one is ridiculed to an extent of developing stress related ailments, childlessness could easily lead to mental illness and other related disorders and should not be treated as a disease. Surrogacy is therefore one way of 'curing' this so-called 'infertility disease'. Thirdly, the practice of surrogacy may provide material gain (including monetary gain in some instances) for the surrogates. As noted earlier, most women who choose to become surrogate hosts are usually from income challenged backgrounds and the belief that there shall be some material and /or monetary gain may motivate them into becoming surrogate mothers. However, there are cases where some women become surrogates from the goodness of their hearts with the singular aim of helping infertile couples realize their dream of having children. This kind of surrogacy is referred to as altruistic surrogacy, notwithstanding, many women become surrogates because of the intended financial gain (Runzheimer: 2011). Altruistic surrogacy is where the surrogate does not receive any compensation, in monetary or any other material gain, and it is mostly common among family members and very close friends, while commercial surrogacy is the most popular type among strangers. Some countries have banned commercial surrogacy, although some form of compensation is encouraged. These countries include Germany, France, Italy and Latvia. The paper proposes the practice of surrogacy in Nigeria to be regulated by a legal and ethical framework, and by doing so; the paper proceeds to undertake a comparative study between the laws regulating surrogacy practice in the United Kingdom and South Africa to the current practices in Nigeria.

Surrogacy under the United Kingdom and South African Legislations

In relating this to the previous position of surrogacy in Nigeria that has been discussed, it is trite to note that Nigeria is a member of various international

statutes, and one such statute is the Universal Declaration on Bioethics and Human Rights ((UDHR) Human Fertilization and Embryology Act 2008 (as amended)), which, though it provides a general view on bioethics, the ethics on the practice of surrogacy can be inferred from it. The paper therefore finds it expedient to compare the Nigerian situation with what is obtainable under the United Kingdom and South Africa laws, since both are equally members of the UDHR.

Regulatory Framework on Surrogacy in the United Kingdom

The Human Fertilization and Embryology Act 2008 (as amended)

The Human Fertilization and Embryology Act (HFEA) 2008 (c 22) is an Act of the Parliament of the United Kingdom. The Act constitutes a major review and update of the Human Fertilization and Embryology Act 1990 and to also amend the Surrogacy Arrangements Act 1985, whose purpose among others is to make provision about the persons who in certain circumstances are to be treated in law as the parents of a child; and for connected purposes (Human Fertilization and Embryology Act 2008 (as amended)).

It should, however, be noted that the HFEA is the main regulatory framework for cases of assisted reproduction and its components in the United Kingdom, and the relevant section with respect to ART's shall be discussed below.

The Surrogacy Act 1985

This Act was enacted in the United Kingdom in order to regulate the practice of surrogacy. Section 1(2) (Surrogacy Arrangement Act 1985) defines key terms such as surrogate mother, surrogacy arrangement and payment. A surrogate mother means a woman who carries a child in pursuance of an arrangement made before she began to carry the child, and made with the view to any child carried in pursuance of it being handled over to, and the parental rights being exercised (so far as practicable) by, another person or other persons.

Section 2 (Surrogacy Arrangement Act 1985) deals with negotiating surrogacy arrangements on a commercial basis. This provision criminalizes commercial surrogacy and forbids payment to third parties aiding in negotiating any

surrogacy arrangements. However, Section 59(4) HFEA 2008 allows for nonprofit making bodies to make a not for profit charge, but for facilitating surrogacy arrangements.

Section 3 (Surrogacy Arrangement Act 1985) deals with advertisements about surrogacy. The Act criminalizes any form of advertisement and/or posting of such adverts in any public place, social media like newspapers, internet and television. This was, however amended by Section 59(2) HFEA 2008 which allows for adverts to be made and distributed with the exception that it is only by or on behalf of a nonprofit making body, and as long as it shall not be an advert calling for commercial surrogacy.

Section 4 (Surrogacy Arrangement Act 1985) deals with the offences and provides for the sentences and/or fines that are to be awarded to a person who acts contrary to the provisions of the Act.

The British Nationality Act 1981

The British Nationality Act Chapter 61 of 1981 of the United Kingdom was enacted 'to make provision about citizenship and nationality...as regards the right of abode in the United Kingdom'. Surrogacy arrangements, especially those conducted outside the United Kingdom may raise issues about the nationality of the child. Section 2 of the Act recognizes that a child born outside the UK shall automatically acquire British nationality if either of the parents is a British citizen. There has to be solid proof however of the parentage before nationality is conferred.

Section 50 of the Act read in conjunction with the British Nationality (Proof of Paternity) Regulations 2006) covers the definition of a parent for children born after 1st July 2006.

Regulatory Framework of Surrogacy in South Africa

The Children's Act 2005

This Act was enacted to make provisions for surrogate motherhood and other situations with respect to it. Section 1 (The Children's Act 2005) provides for

the definition of certain key terms related to the practice of surrogacy, which include artificial fertilization, commissioning parent, gamete, parental responsibilities, surrogate mother and surrogate motherhood agreement.

By virtue of Section 296 (The Children's Act 2005), surrogacy motherhood agreement is provided for and the conditions for its validity, confirmation by court, termination and its effect on the status of the child is laid down. It states that no artificial fertilization on the surrogate mother can take place before a surrogacy motherhood agreement has been confirmed by the court. The fertilization has to take place within 18 months of the court's confirmation.

The conditions that must be fulfilled before entering into a surrogacy motherhood agreement as provided by the law is contained in the Act: Furthermore, Section 295(c) (iv-v) (The Children's Act 2005) prohibits commercial surrogacy and forbids the surrogate mother from using the surrogacy as a source of income.

Section 297(1) provides for the effect of surrogacy arrangement. And the effect of a valid agreement is that, please see below:

- a. Any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned;
- b. The surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;
- c. The surrogate mother or her husband, partner or relatives has no rights of parenthood or care of the child;
- d. The surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties;

Section 297(2) (The Children's Act 2005) provides that any surrogate motherhood agreement that does not comply with the provisions of the Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child.

As provided by the Act in Sections 298 and 299, the ways in which a surrogacy agreement can be terminated are as follows:

(a) By the genetic mother of the child concerned as long as it is within sixty (60) days after the birth of the child as long as;

- i. The termination has to be in writing and notice filed with the court,
- ii. A court must be satisfied that the termination has been done voluntarily and that the genetic mother understands the effects of the termination of the agreement,
- iii. The termination is done in the best interest of the child and
- iv. Surrogate mother shall not incur liability to the commissioning parents for the termination of the agreement.

(b) Termination of a surrogate motherhood agreement has the effect of terminating any parental rights that may have already been invested in the commissioning parents and vests them in the surrogate parents. It also terminates any and all claims that the child may have to the commissioning parents or their relatives.

National Health Act 61 of 2003

The National Health (2003) (National Health Act 2003 61) provides for rules and processes for artificial fertilization of persons under the regulations relating to artificial fertilization of persons. Although the regulations do not touch on surrogacy directly, the fact that surrogacy is mainly achieved through artificial fertilization and more specifically IVF, makes the regulations relevant. The regulations provide definitions of key relevant terms like artificial fertilization, embryo transfer, gamete donor, *in vitro* fertilization, oocyte and surrogate.

Under the regulations, artificial fertilization includes *in vitro* fertilization and embryo intrafallopian transfer, procedures that are used when undertaking gestational surrogacy. Provisions that touch on artificial fertilization and in extension surrogacy under the regulations are included below:

(a) The full informed consent from parties involved before any procedure of artificial fertilization is undertaken (National Health Act 2003. 61).

- (b) Establishment of a central data bank where all information on gamete and embryo donation is stored. Information should be properly kept and updated and should be protected from the public (National Health Act 2003 61).
- (c) Only competent and licensed persons may carry out artificial insemination including embryo transfer and that may only be carried out at an authorized institution (National Health Act 2003 61).
- (d) Ownership of a zygote or embryo after fertilization is vested in the recipient. The regulations define a recipient to include 'a female person in whose uterus/womb a zygote or embryo is to be placed for the purpose of human reproduction' and a surrogate as 'a voluntary recipient of an embryo who will carry such embryo to birth for contractual parents' (National Health Act 2003 61).
- (e) All births delivered as a result of artificial fertilization should be recorded by the person in-charge of the facility and thereafter into the central data bank within 3 months of such birth (National Health Act 2003 61).
- (f) Disclosing of facts resulting from artificial fertilization is prohibited except where law provides otherwise or where court orders (National Health Act 2003 61).
- (g) Persons going against any provision in the regulations are liable to a fine or imprisonment not exceeding 10 years or both (National Health Act 2003 61).

However, the Health Professions Council of South Africa (HPCSA) (National Health Act 2003 61) is the main regulatory authority, which deals with general matters concerning medical practitioners in South Africa. It has a list of guidelines that relate to different health related areas, which include ethical guidelines for reproductive health among health care practitioners in South Africa. These guidelines provide that surrogacy should only be applied in very limited cases and under strict medical supervision (National Health Act 2003 61). The autonomy of the surrogate mother has to be respected (National Health Act 2003 61) and she should at all costs be protected from exploitation, considering she is most likely from a lower socio-economic background from that of the commissioning parents (National Health Act 2003 61). The

guidelines prohibit the practice of commercial surrogacy (National Health Act 2003 61) and all cases of artificial fertilization should only be carried out by competent, qualified and licensed practitioners.

Comparative Analysis of the United Kingdom and South Africa Laws and the Current Situation in Nigeria

With the laws essentially analyzed earlier, it can be deduced that the United Kingdom laws allow for surrogacy as long as one of the commissioning parents is genetically/biologically related to the resulting child, all parties are adults of sound mind and have entered into the arrangement with their full informed consent, the practice is not for commercial purposes and the intending parties should either be husband and wife or legal partners at the time of the arrangement. The intending parties have to obtain a parental order within three months of the birth of the child to transfer any or all parental rights from the surrogate mother to themselves. The United Kingdom laws also recognize that surrogacy should not be of commercial purpose.

So also, it is apparent that South Africa does allow for the practice of surrogacy as long as the arrangement is entered into by adults of sound mind under a valid surrogate motherhood agreement, the agreement is registered and confirmed by the court before artificial fertilization is done, it is not for commercial purposes, surrogate mother/host meets certain laid out conditions, the commissioning parents suffer from permanent and irreversible infertility and the resultant child is genetically/biologically related to at least one of the commissioning parents. The resultant child is considered for all intent and purposes as the child of the commissioning parents.

Both the United Kingdom and South Africa laws accept the practice of surrogacy with open hands by providing for the regulations of the practice and also by stating the conditions that must be fulfilled before the parties can enter into the surrogate motherhood agreement. Even though the practice is fully accepted, the exception is that the practice must not be used for commercial purposes. As it is, Nigeria has no laws, policies, regulations and professional guidelines to regulate the practice of surrogacy.

Summary, Conclusion and Recommendations

In this research the paper views the Nigerian society and its perception on children and reaches a conclusion that children are an integral part of the society, and also the end result of being married, and as such there is pressure and strong expectations for married couples to procreate. It should be understood that in our society, a family, which forms a part of society is incomplete without children and the woman who cannot give birth to a child is viewed as a lesser member of the society leading to being stigmatized as barren. The societal alternatives to having children is adoption, however, in adoption of a child, it still does not satisfy the strong will in humans to pass on their genetic material to their children. With adoption, there is no blood bond with the child adopted, and this makes women who are having difficulties to bear their own children yearn for their own genetically related children. Also, the right to reproduce for all was explained as it is a fundamental human right to life, right to health, which includes reproductive health. Besides the fact that every couple has the right to have a child, as ordained by the Almighty God, in Nigeria infertility widely carries with it a social stigma. In the African culture, which Nigeria is not an exception, children are not just a blessing to the entire family but also a kind of old age insurance and pride. Hence, where a couple is unable to bear a child, the woman in particular is declared barren, cursed and treated as nobody by her husband's family. However, the practice of surrogacy is playing an increasingly large role in how some Nigerians have achieved the age-long dream of creating families.

The ethical/moral theories and their arguments on surrogacy practice was considered and it could be argued that even though the practice is taunted and Nigerian is deeply rooted in the African culture, these theories seem to support the surrogacy arrangements albeit for different reasons and to varying degrees. For instance, Utilitarianism views the argues that the arrangement is acceptable as long as it results in greater happiness for more people, to Principlism and the four principles under it, it requires one to weigh the benefits and effect of the practice and it is acceptable as long as it does not violate the principles of respect for autonomy, beneficence, non-maleficence and justice, but rather conforms to all.

As there are no laws, principles and professional guidelines for the practice of surrogacy in Nigeria, The paper has looked at some legal

frameworks from two countries, which are the United Kingdom and South Africa, in order to have more insight on how surrogacy practice is regulated. It should be noted that the reasons for choosing these countries is that Nigeria was colonized by Britain, and by virtue of her being our colonial masters, Nigerian common laws were derived from the United Kingdom. On the other hand, South Africa as a sister country brings about the prospect of having laws that compliment the African culture and practices and are as such much more practical to the Nigerian context.

Conclusion and Recommendations

It is true that surrogacy practice is a highly controversial form of infertility treatment, with views varying widely between faith and personal beliefs. The fundamental fact that many couples in Nigeria who are faced with the difficulties of bearing their own children have embraced the idea and it is now creating hope for those couples who otherwise thought there was no other option for them, hence, resulting to the unfair, unethical and criminal practice of human trafficking and baby factories.

Even though it appears that many Nigerians are not aware of it, while few frown at it, a reasonable number of Nigerians are very much aware of it and are open to the idea of surrogacy in Nigeria. Recently, a popular and well-known celebrity, Chief Nike Oshinowo, welcomed a set of twins through a gestational surrogate, and most recently is that of Mrs. Omolara, a woman of 60 years old, who has been married for over 30 years without a single baby, in the month of September 2014 gave birth to a beautiful and bouncing baby girl through IVF here in Nigeria (Olanrewaju: 2015).

The paper concludes that the practice of surrogacy is a noble and essential service that allows couples suffering from infertility to have children of their own. However, surrogacy should only be practiced in a regulated environment. In as much as the practice can run without any regulations in a sort of “free for all and everyone for himself” kind of way, regulating the practice would not only put an end or rather curb any potential exploitation but would also ensure the provision of standardized services. One may argue that regulating the practice of surrogacy would be taking away the autonomy of people and denying them their right to make decisions on matters affecting

their reproductive capabilities that regulating matters on reproduction is akin to inviting the state 'to bed' with couples and thereby infringing on privacy that is associated with the act of reproduction. These sorts of arguments, it argued, are based or brought up by the fear of the 'unknown', effective regulation would not only provide parties more options in their decision making process but would also ensure that their decisions are protected by law.

The paper therefore suggests surrogacy is a worthwhile technology that has helped and continues to help alleviate infertility especially with women who cannot bear children. It however, needs to be regulated to avoid abuse and other exploitative practices. The paper recommends drawing from the regulatory framework of the United Kingdom and Republic of South Africa, taking into account the norms and practices of the people of Nigeria, the legal system and its technological advancement. The following:

Commercial surrogacy should be strictly forbidden and payment for surrogacy arrangements should be criminalized except payments for the following, see footnote (As adopted from the regulatory frameworks of United Kingdom & South Africa.):

For a woman to be considered as a surrogate, the following conditions must be satisfied;

1. A surrogate mother/host should be 21 years and above at the time of the surrogacy arrangement. The surrogate mother/host should be mentally competent at the time of entering the surrogacy agreement. A psychological analysis should be undertaken by a qualified practitioner to determine the mental and psychological capacity of the surrogate mother/host before a surrogacy arrangement can be entered into.
2. The surrogate mother/host should have at least given birth to a child of her own. This in addition to medical records is evidence enough that she is capable of carrying a pregnancy to term. The surrogate mother/host should have a living child of her own at the time of the surrogacy arrangement agreement. This is because there is psychological attachment to bearing a child and the surrogate mother should have gone through that to understand what she is getting herself into.

3. The surrogate/host mother should not enter into the surrogacy arrangement under undue influence; the arrangement must be entered into by her freewill. The consent given should be informed, that is it is given voluntarily, with full understanding of material facts which include risks, explained in a language that the surrogate understands (Overy: 2016). If the surrogate mother/host has a husband or partner, their consent should be sought as well.
4. A surrogate mother should not enter into a surrogacy arrangement for commercial purposes. Her intention to enter into such an arrangement should not be for monetary purposes. However, reasonable compensation for loss of earnings while she is pregnant should be allowed and given. Funds for direct expenses towards the artificial fertilization, birth of the baby, medical cover and immediate care for the child after birth should be provided for.

Before the artificial fertilization and transfer of embryos into the surrogate mother's uterus, the parties must enter into a surrogacy arrangement and sign a surrogacy agreement beforehand. The surrogacy agreement should have the following provisions;

1. The surrogacy agreement should be in writing and should be signed by both parties. Oral arrangements should not be allowed. The writing should be in the national language of Nigeria, which is English.
2. The agreement should be entered into in the Federal Republic of Nigeria under the relevant laws with respect to Law of Contract, and the said agreement should be acknowledged by a commissioner of oaths as the case may be.
3. There should be a commencement clause in the agreement which will be effective only after it has been approved by the court. No artificial fertilization of the surrogate woman may happen before the agreement is in effect. Such fertilization will be considered a breach of law.
4. The agreement should provide for the contact, care, upbringing and general welfare of the child to be born. It should also provide for the child's position in the event of the death of one or both of the commissioning parents before the birth of the child. A guardian to the

child should be named in the agreement in writing before artificial fertilization takes place. This is to ensure that the surrogate mother is not left with the parental responsibilities should the death of both commissioning parents occur.

The surrogacy agreement and arrangement should have the following effect:

1. A child born of surrogacy shall be considered for all intent and purposes as the child of the commissioning parents and shall be registered as such under the births and deaths registration in the department of registration of persons. This is only applicable if there was a valid surrogacy agreement entered and filed before artificial fertilization of the surrogate occurred.
2. All parental responsibilities are and should be vested in the commissioning parents. A child born of surrogacy shall have no claims for succession, maintenance or related child responsibilities claims towards the surrogate mother and her husband and/or their relatives.

These recommendations if accepted and implemented will go a long way in ensuring that the practice of surrogacy in Nigeria is safeguarded from corruption and exploitation. A regulatory framework would also ensure that services are standardized and made not only easy but also accessible.

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