



An examination of the legal framework for surrogacy in Nigeria

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Abstract

Generally, one of the primary reasons for the celebration of a marriage is the bearing of children in such a marriage. This is because children are very important and desirable both in the family and in the society because without them couples never attain fulfilment and love throughout their lifetime especially those in the African and Su-Saharan countries. Marriage is thus seen as a culturally defined special relationship between a man and a woman from different families, which regulates sexual intercourse and provides for procreation. However, in some certain circumstances, the childlessness of the couple, more often than not, leads them to engage in certain acts to ensure their aim including surrogacy and baby factories. The major aim of this article is to examine the legal framework for surrogacy in Nigeria and the attendant consequences of surrogacy. This article adopts a doctrinal method of research, and concludes that there is a big lacuna regarding surrogacy in the laws of Nigeria which allows for abuse and impunity during the surrogacy proceedings. The article finally makes some policy recommendations to provide the legal structure to protect stakeholders and participants in surrogate agreements in Nigeria.

Keywords: Surrogacy, baby factories, infertility, legal framework, laws, Nigeria

Introduction

Generally, children are very important and desirable in the society because without them couples never attain fulfilment and love throughout their lifetime. They are considered as the most precious endowment which God has bestowed upon man. Nigeria and indeed the rest of the African continent are pro-natalist societies. Much emphasis is laid on child-bearing and child-rearing. In this context, bearing a child is seen as a complete definition of womanhood and a confirmation of manhood. In effect, having a child is not merely one of the ends of marriage; it is, in fact, the very essence of it^[1].

Peoples and Bailey^[2] agree that marriage ordinarily involves the following:

a culturally defined special relationship between a man and a woman from different families, which regulates sexual intercourse and provides for procreation, (ii.) a set of rights the couple and the families obtain over each other, including rights over the couple's children...

Thus, marriage seems to be the major institution for procreation and nursing of children. Wanjobi observes that: the African believes that each individual, male or female is a channel for the transmission of life and that it is wrong to interrupt that transmission. Among Africans, not only must one get married, but one must have children and as many of them as possible. From this, two important implications follow: for an African, a childless marriage is ruled out as no marriage. In order to get as many children as possible, Africans are forced to become polygamous, (in this context, it can be observed that childlessness is only one cause for being polygamous among Africans; that is, it is a necessary but not sufficient condition for polygamy in Africa)^[3].

From ancient times, if a couple wanted children, the two major methods were through normal conception and adoption. Historically, surrogacy was practised in the biblical times. For instance, Sarah was unable to give birth after several years of waiting for the promised child. She

decided to give her maid, Hagar, to her husband to produce a child on her behalf^[4]. Rachael permitted her maid, Bilhah to bear a child for her husband, Jacob^[5]. Likewise, Ishmael was conceived for Abraham by Hagar, Sarah's maid. However, in modern times, advancement in reproductive technology has expanded those options to comprise artificial insemination, *in vitro* fertilisation, surrogacy, womb transplantation and a host of other assisted reproductive technologies as feasible options in situations of fertility challenges^[6].

In the past, couples unable to conceive were expected to turn to adoption to achieve their parenthood dreams. Nowadays, there are many options for infertile couples, as well as singles and homosexuals who want children. The urge for parenthood leads them to seek alternative solutions including Artificial Reproductive Technology (ART), In-Vitro Fertilisation (IVF) and Intra-Uterine Injections (IUI).

One of these ARTs is the use of Surrogacy. It is now possible for a woman, now called a surrogate to decide to 'rent or loan' out her womb to carry a child that will eventually be transferred to a third party / couple after birth. Between the 20th to the 21st centuries, conception became possible without sex through the use of artificial insemination technique and that was the beginning of the concept of "womb commodification". With the spate of advancement in modern technology, prospective parent(s) can now enter into a commercial agreement with a woman called the surrogate who would agree to gestate a child either with the egg of the prospective mother or that of a surrogate, on the understanding that upon the child's birth, he/she shall be released to the prospective parents^[7].

The techniques of medically assisted conception has been the root of public debate in recent times as many ponder on what attitude to adopt concerning this new power over human reproduction. Worldwide research on assisted reproductive methods has shown multiple opportunities to couples for reproduction through artificial insemination and

in vitro fertilization or embryo transfer. Many women are not able to take advantage of these methods due to health challenges, financial incapacity and other reservations. This has encouraged increasing role of surrogacy, which acts as the surer bet for childless women. It must be stated that surrogacy is gradually becoming a lucrative business in an age when government is taking steps to put an end to human trafficking, child abuse and human trading of all sort. Surrogacy may not be illegal in Nigeria, but the laws are either non-existent or ambiguous, creating room for exploitation and illegal practices to thrive. It has also been shown that the absence of a legal framework has led to the prevalence of sharp practices in some fertility clinics and some surrogacy agencies running baby factories. For instance, Section 30 of the Child Rights Act (2003) prohibits the buying, selling, hiring or dealing in children. Also, the Trafficking in Persons (Prohibition) Enforcement and Administration Act also condemns all forms of human trafficking. Surrogacy is, however, fraught with ethical, legal, moral, emotional and psychological dilemmas and difficulties. These include conflict of interests that may occur if pregnancy complications arise, the legal and emotional difficulties that may surround the relinquishment of the infant to the intending parents, and problems with the acceptance of a congenitally abnormal infant^[8]. This article undertakes an analysis of family law in Nigeria with the aim of identifying legislative deficiencies pertaining to the practise of surrogacy.

There is a significant amount of activity taking place globally with regards to the formulation and implementation of legislation and policies in response to the needs and expectations of the general population. In contrast, there appears to be a lack of emphasis on the imperative to enhance the Nigerian family law in order to address the evolving needs of contemporary families, including those arising from intricate family structures, surrogacy arrangements, and artificial insemination techniques. The article delineates various modalities via which surrogacy are implemented in Nigeria, encompassing an examination of the resultant ramifications and the associated burdens borne by the relevant stakeholders. The aforementioned issues encompass instances of blackmail, instances where a surrogate refuses to relinquish custody of a child despite receiving payment, and the legal rights of the individuals engaged in surrogacy arrangements.

The concept of surrogacy

As far back as the late 1970s the first recorded case^[9] of assisted reproduction through surrogacy was contested in the English courts and this development has led to several debates on surrogacy as a means of reproduction.

According to the Artificial Reproductive Technique (ART) Guidelines, surrogacy is an:

arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a 'surrogate mother' is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)^[10].

Surrogacy is an arrangement or contract where a woman (the surrogate mother) agrees to act as a substitute to carry and bear a child for another woman (the commissioning mother) who cannot conceive due to health challenges, age or natural causes. Surrogacy is derived from the latin word *subrogare* meaning to substitute. It is a situation where a third party female elects or is commissioned to carry pregnancy on behalf of another couple, delivers and hands the baby over to the commissioning parents^[11]. Surrogacy is a process whereby a third party (woman) of childbearing age carries a pregnancy for a commissioning parent with the intention of relinquishing the baby after birth, usually enforced by a contractual agreement between the parties involved. The United Nations Special Rapporteur defined surrogacy as "a form of third-party reproductive practice in which intending parents(s) contracts a surrogate mother to give birth to a child"^[12].

A surrogate mother is a woman who, based on an agreement before pregnancy, carries a child and relinquishes all rights to and over the child to another person after giving birth to the child. Surrogacy could be either genetic (partial) or gestational (full)^[13]. It is genetic where the male parent impregnates the surrogate mother through artificial insemination or sexual intercourse^[14]. In traditional or partial surrogacy, the surrogate donates her eggs for fertilisation with the commissioning man's sperm either through artificial insemination or sexual relations. Partial surrogacy is less expensive and might not need medical assistance. The disadvantage, however, is that the surrogate mother is genetically linked to the child and she might be able to lay claim to the child upon his or her delivery. In South Africa, for example, a surrogate who is genetically connected with a child has the right to terminate an agreement within a period of 60 days after the birth of the child (Section 298 of the Children's Act 38 of 2005 (South Africa)).

On the other hand, surrogacy is gestational where the male parent fertilises an egg from the female parent and the fertilised egg is placed in the womb of the surrogate mother to grow and be delivered (*in vitro* fertilisation)^[15]. Gestational or full surrogacy has been seen as the procedure carried out when a commissioning couple donates their gametes to be carried to term by a third party, and the child is handed over as soon as he or she is born. The child is related to the commissioning couple genetically; while the womb of the surrogate mother is used, she will have no genetic relationship with the child.

Surrogacy agreements can be either commercial (Commercial surrogacy refers to a situation where a woman is compensated for giving birth to a child whom she hands over to the commissioning parents in return for payment. When no payment is made, the situation is referred to as altruistic surrogacy) or non-commercial (altruistic), and this could be agreed upon within a jurisdiction or internationally (that is, across borders). The discourse surrounding the ethical permissibility of surrogacy within various societal contexts revolves around concerns regarding the potential exploitation of surrogate mothers and the commodification of infants^[16].

Nineteen distinct nations have implemented varying strategies in the governance of surrogacy. Certain countries have explicitly banned the practise of surrogacy, whereas others permit and regulate non-commercial surrogacy exclusively. Additionally, there are countries that allow all

types of surrogacy, and some nations that have chosen not to regulate surrogacy at all. In societies where the practise of surrogacy is permissible, the ethical adherence is often evaluated based on the surrogate mother's permission. The contention posits that surrogacy ought to be regarded on par with other types of employment, and its regulation should be designed to safeguard against exploitation ^[17]. Nevertheless, it has been observed that women possess the entitlement to privacy and reproductive autonomy in accordance with international human rights law. Consequently, any endeavours to restrict these rights necessitate a reasonable justification. Nigeria is situated within the group of nations that have yet to establish comprehensive regulations pertaining to the practise of surrogacy.

Various reasons abound for the practice of Surrogacy around the world. These are not limited to the following:

1. Infertility

Of course, the major reason for the practice of surrogacy is Infertility. Infertile couples face family pressure especially from the husband's family; they are stigmatized and ridiculed by society. This no sooner may lead to a breakup of the union ^[18]. Most women who go for surrogacy insist on anonymity for fear of social stigma. Infertility affects up to 10.5% of couples of reproductive age globally, according to a WHO study ^[19], and 20% of couples in Nigeria ^[20]. Many couples opt for alternative solutions to their childlessness. Worldwide research on assisted reproductive methods has multiple opportunities to couples for reproduction through artificial insemination and *in vitro* fertilization or embryo transfer. Many women are not able to take advantage of these methods due to health challenges and other reservations. This has encouraged increasing role of surrogacy, which acts as the surer bet for childless women ^[21].

2. Poverty

Women, who undertake these assignments usually come from lower class to lower middle class backgrounds, are of lower educational achievements, are more often than not married, and are often in need of money. Their need for money is so acute that more than often, childless couples can negotiate a better price as a result of competition. The amount of money given to a surrogate mother may appear very miniscule from any reasonable perspective, however, the amount may serve as the economic lifeblood for the families, and will be spent on the needs of the family (a house, education of the children, medical treatment).

3. Health and sicknesses

Other reasons for gestational surrogacy or even traditional surrogacy in Nigeria include medical conditions such as severe hypertension or heart diseases, advanced maternal age, and desire for a certain gender child after having completed childbearing. Reasons for which women need surrogacy in Nigeria include being born without a uterus or having an atrophic, poorly developed uterus as in Turner syndrome; loss of the uterus at childbirth, for example, following hysterectomy for severe postpartum haemorrhage from poorly managed labour and delivery; and badly damaged uterus following open myomectomy for large, multiple fibroids, which is relatively common in these parts ^[22].

4. Same-sex marriages

As the name implies, it is marriage between people of the same sex, i.e. marriage between a man and a man (commonly referred to as homosexual marriage) and marriage between a woman and another woman (lesbian marriage). Same-sex couples are unable to conceive a child naturally and often turn to surrogates for help in their journey to parenthood. It gives intended parents the opportunity to have genetic links to their child or children.

The legal framework

Different surrogacy regimes exist in various jurisdictions of the contemporary world. While countries like Cyprus, India, South Africa, Ukraine, Belarus, Georgia, Armenia, and the United States of America (in the States of Arkansas, California, Florida, Illinois, Texas, Massachusetts and Vermont) allow both commercial and altruistic surrogacy, others such as Australia, Canada (except Quebec), the United Kingdom, the Netherlands, Denmark, Hungary, Israel and some States of the United States (New York, New Jersey, New Mexico, Nebraska, Virginia, Oregon and Washington) allow altruistic surrogacy only.

Nigeria is yet to acknowledge surrogacy legally, and thus, has failed to provide policy guidelines and legislation to formalize and regulate surrogacy in the country. It means there are no laws prescribing or proscribing surrogacy in the country.

To the best of our knowledge and belief, the topic has not come up for detailed discussion in any legislative chambers in Nigeria. This has created a vacuum, which is being and can be exploited further by illegal commercial operators with news of baby factories, baby sale, and baby swap rife in the country ^[23]. Nigeria is yet to provide specific comprehensive legislation to regulate surrogacy; there are also no judicial decisions made in that respect. The implication is that the rights of children in surrogacy agreements are not protected and parties could choose to make any decision concerning them, whether harmful or not ^[24]. 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. In such contexts, much emphasis is laid on having children as much as having material wealth. Those who have material wealth but lack children are inclined to explore all means possible to make up for their social inadequacy, including patronizing 'baby factories' ^[25].

However, certain provisions recognising surrogacy exist. For instance, Rule 23 of the Code of Medical Ethics ^[26], that regulates assisted conception and related practices. Rule 23 recognises gestational surrogacy and permits the donation of gametes for that purpose. It states that necessary statutes to govern assisted reproduction have not yet been established; nevertheless, medical practitioners must resolve all ethical issues that may arise with respect to the counselling and consent of the donor. The Code states that gamete and embryo donation should not be commercialised. With respect to children, the Code notes that in the absence of a legal framework protecting them in these agreements, the basic principles applied in child adoption cases should be considered as best practice.

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 [27].

We also have the Child Rights Act (2003). This represents an adapted rendition of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Act serves to enhance and broaden the scope of human rights. Additional privileges are granted to Nigerian children, in addition to the rights currently given upon all Nigerian citizens. The Nigerian Constitution provides protection and rights for individuals, including children. With regards to the topic of surrogacy, Section 30(1) of the aforementioned legislation stipulates that: No one is permitted to engage in the actions of purchasing, selling, hiring, leasing, disposing of, or acquiring ownership of or any other related activities; engage in the exploitation of a minor. Subsequently, Subsection (3) of the aforementioned provision delves deeper into the matter by stipulating that: individual who violates the stipulations outlined in paragraph (1) of this section is engaging in an act of contravention. The act of committing an offence carries the potential consequence of imprisonment for a duration of ten years upon being found guilty. An integrated analysis of the aforementioned parts of the Child Rights Act elucidates the fact that the act of purchasing, engaging in the act of selling, hiring, disposing, getting possession, or engaging in any other form of transaction involving a kid is considered a criminal offence. Therefore, a contract pertaining to any of these subjects would be rendered void due to its illegality. The consequence is that such a contract lacks enforceability, and it is the responsibility of each party to absorb any losses incurred during its execution.

Furthermore, there is the National Health Act. The Act was promulgated by the National Assembly in the year 2014. The document establishes a legal structure to facilitate the growth and administration of the healthcare system in Nigeria. The legislation is applicable across the entire territory of Nigeria. Given its pertinence to surrogacy agreements, it may be pertinent to take into account several of its stipulations. Accordingly, Sec 50 of the Act provides that:

1. A person shall not:
 - a. manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; or
 - b. engage in any activity including nuclear transfer or embryo splitting for the purpose of the cloning of human being;
 - c. Import or export human zygotes or embryos.

2. A person who contravenes or fails to comply with the provision of this section commits an offence and is liable on conviction to imprisonment for a minimum of five years with no option of fine. According to the aforementioned clause, several scholars have contended that surrogacy, along with other types of assisted reproductive technology, is forbidden in Nigeria in accordance with Section 50(1) of the Nigerian Health Act. Accordingly, scholars of this field have reached the conclusion that surrogacy contracts are illegal, rendering them unenforceable [28].

The federal law on trafficking of persons; “Trafficking in Persons (Prohibition) Enforcement and Administration Act” seems to also greatly affect surrogacy. Section 13 of the Trafficking in Persons [Prohibition] Enforcement and

Administration Act (TIPPEA Act) condemns all forms of human trafficking. It also defined trafficking in persons in its section 82, to include; ... the giving or receiving of payments or benefits to achieve the consent of a person having control over another person or debt bondage for the purpose of placing or holding the person whether for or not in involuntary servitude (domestic, sexual or reproductive) in forced or bonded labour, or in slavery-like conditions, the removal of organs or generally for exploitative purposes. This definition clearly captures surrogacy, parties to surrogacy and all other agents/persons (doctors, lawyers and all others) involved in the business of surrogacy, where there is exploitation. This is seen where there is “...the giving or receiving of payments or benefits...” to surrogate mothers for reproductive services and exploitative purposes under a surrogacy.

For clarity, TIPPEA Act defines “exploitation” to include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, deprivation of the offspring of any person, forced labour or services or practices similar to slavery, servitude or the removal of organs. With this, any surrogacy that takes advantage of a surrogate mother, whether by force or deception, is trafficking in human and as such criminal. This is part of the reasons that surrogacy and its practices in baby factories (centers where girls and women are forced or deceived to get pregnant and bear children for other persons in return for money) are criminal.

Also, section 21 of the TIPPEA Act, states that; Any person who buys, sells, hires, lets or otherwise obtains the possession or disposal of any person with intent, knowing it to be likely or having reasons to know that such a person will be subjected to exploitation, commits an offence and is liable on conviction to imprisonment for a term of not less than 5 years and a fine of not less than N2,000,000.00. This statement explicitly denounces and penalises all forms of surrogacy contracts that exploit surrogate mothers, while also addressing all individuals and entities engaged in such exploitative surrogacy arrangements. The legislation prohibits all types of surrogacy arrangements that exploit surrogate mothers, imposing a minimum prison sentence of 5 years or a minimum fine of N2 Million Naira, or both, as a form of punishment.

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 (Law Reform Commission ‘Reform of Nigerian Family Law’ III, 15). The Commission further recommends that where a child is born under a surrogacy agreement, the commissioning parents should formally adopt the child, 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 [29]. A Bill for the establishment of a Nigerian Assisted Reproduction Authority was presented before the National Assembly in 2012 and was read for the second time on 2 May 2012 [30]. This Bill, however, was not passed into law as it did not enjoy the support of the majority of the Legislature.

It is worth noting that there was a pending Bill before the Nigerian Parliament to amend the National Health Act in order to regulate assisted birth technology, to encourage the safe and ethical practice of assisted reproductive technology

services^[31]. The Bill aimed at effecting this amendment was introduced to Parliament on 8 June, 2016. If passed into law, the Federal Ministry of Health will have the duty of developing policies for Assisted Reproductive Technology (ART) and will accredit and regulate the practice of ART^[32]. The training of medical personnel as well as research on assisted reproduction is stressed in the Bill.

Also, reference is made to the potential vulnerabilities and health risks of potential surrogate mothers. Clause 60 of the Bill purports to establish a regulatory body to be known as the National Registry of Assisted Reproductive Technology Clinics and Banks in Nigeria. The national registry is to be the central database of assisted reproductive technology data in Nigeria. The patients, surrogates and donors are required to undergo medical tests that may endanger any party to the Assisted Reproductive Technology Procedure or the child. ART clinics are under an obligation to provide counselling to the commissioning couple on the choices available to them and the likely consequences of the procedure, and here the international procedure such as *in vitro* fertilisation is recognised.

Surrogacy is not to be considered for any commissioning mother who is able to carry a pregnancy to term, thus a commissioning mother must provide a medical report to attest to her inability to carry a pregnancy to term. The written consent of all parties involved in ART must be obtained by the clinic for every stage of the assisted reproduction process. Such consent may be withdrawn by any of the parties at any time before the human embryo or gametes are transferred to the uterus of the woman who is to carry the pregnancy^[33].

All clinics registered for ART will maintain records at all times of the parties and the procedure. The sale of gametes outside Nigeria is expressly prohibited except where a party chooses to transfer his or her gamete outside the country, and the sale of zygotes and embryos in Nigeria is expressly prohibited. The option of all forms of assisted reproductive technology, except surrogacy, is available to married infertile couples. Inasmuch as the Bill to amend the National Health Act is comprehensive in terms of procedure to regulate and ensure minimum standards in ART in Nigeria, little effort was made in the Bill to enumerate and guarantee the rights of the parties involved. There is a need to take greater effort from the human rights perspective to secure the rights of the parties to assisted reproduction as well as the child born of the procedure^[34].

In December 2021, the Senate amended the National Health Insurance Act (Repeal and Re-enactment Bill) 2021. The amendment of the law followed the consideration of a motion for re-committal of some clauses by the Committee of the House. Some critical issues were raised in Clauses 20, 24(2) and 25 (2) (c) which necessitated the re-committal. Section 20 which provided for Third Party Administrator was deleted while the provisions of clause 24 (2) on the implementation of the Basic Health Care Fund was amended. However, it is sad to note that till date, the National Health Act is still awaiting the required amendments. The Speaker of the House of Representatives said the House was working on plans to amend the National Health Act as its attempts at amending the ill earlier failed due to some challenges^[35].

In 2017, a Bill for the regulation of reproductive technology^[36] was also introduced in the National Assembly. This Bill is yet to be passed but has scaled the second reading^[37]. The

ART Bill spells out more clearly the rights and duties of all parties in assisted reproduction. The status and welfare of children born through ARTs are included. For example, it is a crime for commissioning parents to refuse to accept a child, regardless of any disability that he or she may have. The child must be registered at birth in the name of the commissioning parents^[38]. Only one surrogate may be employed at a particular point in time and a woman cannot be a surrogate more than three times in her lifetime, in order to prevent harm to the resulting children. As in the case of the South African Children's Act, a child has the right to apply for information concerning his or her biological parents, with the exception of information concerning their identity.

However, a child could apply to know the biological parents' identity if there were a medical emergency that required the physical testing of the biological parents. The consent of the biological parents is, however, required before the release of such information. The Bill also allows the payment of compensation to surrogate mothers, unlike the South African Children's Act and the Nigerian National Health Act (Amendment) Bill, which prohibit the practice^[39]. The Bill further provides that a surrogate mother must relinquish all parental rights over the child (ART Bill clause 34(4)). This is different from the South African situation where commercial surrogacy is prohibited.

The proposal for commercial surrogacy in Nigeria may be based on the fact that there is clear evidence of commercial surrogacy^[40], and a bid to enact a law to prohibit this may hinder the successful support to enact the ART Bill. To be eligible to be a surrogate mother, a woman must be between 21 and 45 years of age and no woman may act as surrogate for more than three times in her life-time^[41]. Likewise, no surrogate shall more than three times undergo embryo transplant for the same couple. If the embryo transplant fails, the surrogate may agree on a fresh financial agreement to undergo another transplant provided it is not in excess of the limit of three.

Adelakun^[42] is of the opinion that in the absence of any legal and regulatory framework for surrogacy in Nigeria, the Human Fertilisation and Embryology Act (Section 59 of the Human Fertilisation and Embryology Act 2008) of the United Kingdom is the basis of regulation of ART procedures in most ART clinics in Nigeria. The use of this law is premised on the fact that Nigeria, as a commonwealth country, has the roots of her common law in the United Kingdom. Section 45 of the Nigerian Interpretation Act (Cap I23 Laws of Federation of Nigeria 2014) 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 persuasive authority and will not be binding in Nigeria.

The indifference of the Nigerian government, no doubt, puts the surrogate mothers and their babies to greater disadvantage and the commissioning parents to public ridicule. These girls are exposed to health risks and threat to life by selling their ova to the fertility clinics^[42]. These donors are not properly counselled as to all the risks

involved, especially, for the recurrent donors. There are no laws to regulate how this is done and by whom. There is therefore a need in Nigeria, for legal provisions for or against surrogacy. Such laws must provide for the legality or otherwise of the different types and forms of surrogacy taking into consideration the social, cultural, ethical, and psychological climate in the country. It should be able to regulate the procedure and processes of commercial surrogacy to avoid exploitation of a vulnerable population by surrogacy agents, while serving the interest of all concerned.

Nexus between surrogacy and baby factories

Due to the almost totally non-existent legislations regarding surrogacy in Nigeria, there has emerged a trend popularly called “Baby Factories” in local parlance. “Baby factories” are outlets where pregnant girls/young women are harboured for the purpose of producing babies, mostly for sale^[43]. It has also been described as buying of children, underscoring the commercial activity that goes on while realizing children through this means. It is an illegal business involving having or forcing pregnant women and girls to give up their babies in exchange for money; many of these mothers never have contact with the buyer and never see their children again.

The baby factory meets the need of infertile child seekers while resolving the challenges inherent in government or agency adoption such as bureaucratic bottle necks, prolonged waiting, and ignorance of adoption procedures and stigmatization that is dreaded by infertile couples. The general belief (mind-set) that the ultimate purpose of marriage is childbearing in addition to the social stigmatization of infertility and/ or childlessness in Nigeria provides an abiding socio-cultural impetus for the desperation to have a child via third-party reproductive paths. The situation is complicated by the deep-seated cultural antipathies against legal adoption and surrogacy as modes of alternative parenting. In effect, most Nigerian child-seeking couples would rather seek to have a child through clandestine and illicit avenues such as ‘baby factories’^[44].

Nigeria’s national health law does not have any explicit provision on surrogacy^[45]. It neither prescribes nor proscribes it. “Baby factories” have capitalized on this legal lacuna to proliferate as both surrogacy agencies and sources of legal adoption. Besides, ‘baby factories’ in Nigeria have festered within the context of extreme pro-natalist and pro-materialist cultures. In such contexts, much emphasis is laid on having children as much as having material wealth. Those who have material wealth but lack children are inclined to explore all means possible to make up for their social inadequacy, including patronizing ‘baby factories’.

The increase in “baby factories” has been linked to surrogacy, and this increase has particularly heightened the level of stigma attached to surrogacy as an option for becoming a parent. It has been established that the prevalence of baby factories persisting in Nigeria fulfils two needs: first, the conviction of teenage girls to give up their unwanted babies for financial gain and to avoid social stigma; and, second, and the need for infertile couples to fulfil social obligations by having a baby^[46]. Some of the babies from these baby factories are trafficked for the purpose of international adoption or used for sacrifice at shrines. The increased patronage of baby factories by

infertile couples could be attributed to the social stigma publicly associated with adoption and surrogacy in Nigeria^[47]. Also, because baby factories are illegal institutions operating in secrecy, it is unlikely that the women in them or the children being born in these baby factories are provided with adequate healthcare services, exposing them to undue hazards and risk of death.

Makinde *et al* 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^[48]. The sale of babies contravenes the provisions of the Optional Protocol to the Convention on the Rights of the Child (CRC) which also deals with the sale of children, child prostitution and child pornography^[49]. Nigeria, being a state party to the Convention, ought to take steps to prevent any violations to the Convention by intervening on the activities of both the baby factories and surrogate practices in the country. The Convention criminalizes the sale of children for sexual exploitations, engaging children to forced labour, transfer of the child's organs *etc* (Article 3 Optional Protocol to the CRC on the Sale of Children).

Nigeria's compliance was seen through its domestication. These include the criminal Code Act cap C38 Laws of the Federation of Nigeria 2004; the Child's Rights Act 26 of 2003; the Violence Against Persons Act 2015; *etc*. Therefore steps must be taken to ensure that all forms of baby selling is checked in the country.

Notwithstanding, surrogacy, if practised responsibly, is respected by many as a wonderful advance in medical science for helping women with infertility. However, the proliferation of baby factories in Nigeria *is* neo-slavery and a cause for alarm. This practice, under the guise of providing a social service, emphasizes the need for all facilities and professionals providing surrogacy and adoption services in the country to be licensed and to operate under guidelines and codes of practice. Such a procedure will help to ensure that any facility that falls short of standard practice can be held accountable for its actions. There is no better time for surrogacy and other assisted reproductive techniques in Nigeria (and other African countries) to acquire regulation than now.

Conclusion and recommendations

This paper has attempted to examine legal framework for the regulation of Surrogacy in Nigeria. In times of increased infertility among married couples, desperate legal and illegal measures have been taken to parent a child, including the buying and selling of babies. Surrogacy is almost widely practised but left unregulated in Nigeria, making room for a series of child crimes and abuses. In spite of the widespread religious and customary antipathies against the practice, it has prevailed. Extant laws are ambivalent on commercial surrogacy. They neither explicitly condemn nor uphold it; hence, it has subsisted without much statutory regulation and moderation, and incidentally, with collateral abuses, including the gale of ‘baby factories’. In the absence of any strong regulatory framework guiding it, commercial surrogacy has been practiced with criminal opportunism and impunity. An analysis of the gap in the legal framework of surrogacy and artificial reproductive technology in Nigeria calls for attention and an urgent solution.

It is imperative that an all-inclusive health law be passed to regulate the medical sphere of the country. The law makers and the executive have to make laws and execute these laws which will prevent impunity in that sector. The National Health law needs to be passed and enforced totally with strict compliance to avoid the increase in human trafficking. The legislators have to keep up with the modern trends and advancements on going in the world especially as it affects our country. Many of our laws in Nigeria are still archaic, out-dated and cannot suit the emerging developments in the daily life.

Nigeria is characterised by its diverse cultural and religious composition, encompassing a significant population. In the context of heightened rates of infertility among married couples, there has been a notable prevalence of individuals resorting to both lawful and unlawful methods in their pursuit of parenthood, which includes engaging in the practise of purchasing and selling infants. The practise of surrogacy in Nigeria is currently without regulation, hence creating an environment conducive to a range of child-related crimes and abuses. The present study highlights the existing deficiency in the legal framework pertaining to surrogacy and artificial reproductive technologies in Nigeria, emphasising the need for immediate attention and a prompt resolution. The regulation of surrogacy in Nigeria is of utmost importance; however, it is crucial to consider the ethical, religious, and cultural values that are prevalent in the country. It is imperative to establish legal measures that safeguard the rights of commissioning parents, surrogate mothers, and unborn children, ensuring that the paramount consideration is given to the child's best interests. It is imperative to establish regulatory and enforcement entities in order to ensure compliance with the prescribed minimum standards in the field of surrogacy.

Surrogacy serves as a means of providing relief to couples experiencing infertility who aspire to conceive a child biologically. However, akin to several facets of existence, the practise of surrogacy is not exempt from encountering difficulties. If surrogacy is appropriately controlled to safeguard the welfare of the child and uphold the rights of both the surrogate mother and the commissioning parents, it has the potential to eliminate certain illicit activities in Nigeria, including the proliferation of baby factories and unlawful adoption practises.

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