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ADDRESSING THE LEGAL VACUUM IN SURROGACY PRACTICES IN NIGERIA: A NEED
FOR A COMPREHENSIVE LEGISLATIVE FRAMEWORK.**

BY

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ADDRESSING THE LEGAL VACUUM IN SURROGACY PRACTICES IN NIGERIA: A NEED FOR A COMPREHENSIVE LEGISLATIVE FRAMEWORK.

ABSTRACT:

This paper examines the gap left by Nigeria's lack of a comprehensive legal framework to regulate and oversee the surrogacy industry. The popular Latin maxim "ubi societa ubi jus", which translates to "where there is society, there is law" in English, highlights the value and significance of laws that govern the community. It goes beyond simply enacting regulations for community members; it also includes enacting laws to control the types of interactions and relationships that occur within it. Despite being unpopular, surrogacy is becoming more and more common due to several circumstances, which makes the establishment of a legal framework to regulate the practice necessary. This study examines the extent of the gap caused by the absence of a legal framework. It issues a call to action for the National Assembly and other pertinent parties regarding the significance of such legislation.

BACKGROUND OF THE RESEARCH

A woman known as a "surrogate mother" becomes pregnant on behalf of another woman known as the "commissioning mother" to birth a child or children for the commissioning mother. This procedure is known as surrogacy, and it is a type of Assisted Reproductive Technology (ART). This may be due to gestation or genetics. Because a child is an indirect party to this agreement and interaction, it is terrible that there is no law governing this approach, which entails a contract between the surrogate mother and the commissioning mother or the family. Unanswered and so uncontrolled are issues like who can be a surrogate mother, the rights and responsibilities of the commissioning mother, and who can be a commissioning mother. This study examines existing legislation, medical papers, legal publications, and bills on surrogacy in Nigeria. Every source cited acknowledges the harm caused by surrogacy and the gap created by its lack of a legal structure. Thus, the content of a comprehensive legal framework about surrogacy is a matter of debate among legal scholars.

STATEMENT OF THE PROBLEM

The absence of a legal framework for this crucial facet of contemporary human interaction has generated apprehensions about surrogacy in Nigeria. Pregnancy and childbirth are very vital and delicate processes, and so it is pertinent to have laws that ensure the welfare and health of both mothers and the child. To prevent any party from abandoning their obligation or abusing the situation, surrogate agreements must have legal safeguards and protections.

The lack of specific laws creates challenges in determining legal parentage and establishing the rights and responsibilities of all parties involved in surrogacy agreements. Currently, surrogacy is not considered a criminal act in Nigeria, but the absence of clear legal guidelines raises concerns about potential exploitation and abuse in surrogacy arrangements.

The sanctity of such agreements may be compromised, the commissioning mother's and surrogate's health and welfare may be in danger, and finally, the child's protection may not be assured if necessary clauses and safeguards are not provided and made legally obligatory. Additionally, the laws cannot remain silent when custody and support conflicts arise.

OBJECTIVES OF THE RESEARCH

The objectives of this study are:

1. To research Nigerian surrogacy.
2. To conduct a critical analysis of all parties involved in the surrogacy process, including the child, commissioning mothers, doctors, surrogate mothers, and family members.
3. To assess the dangers connected to the surrogacy industry.
4. To consider and evaluate extant laws that touch on surrogacy in Nigeria.
5. To examine the significance and effect of having a comprehensive legislative framework.
6. To examine the effect that the lack of a comprehensive legislative framework has on Nigeria.

RESEARCH QUESTIONS

1. What is the prevailing practice of surrogacy in Nigeria, and to what extent did the lack of a legal framework impact its practice and perception?
2. What is the legal standing of the parties in a surrogacy arrangement, their vulnerable stance, and what role do they occupy in Nigeria's present vacuum?
3. What are the legal, ethical and social risks of non-regulated surrogacy in Nigeria?
4. What lessons can be learned from other countries to help formulate a robust surrogacy law in Nigeria?
- 5.

RESEARCH METHODOLOGY

In this paper, the doctrinal research method was used due to privacy and sensitivity issues associated with surrogacy. This means researching current laws, theories, and arguments from different scholars and legal experts on the topic at hand.

SIGNIFICANCE OF THE RESEARCH

This work's ability to act as a fulcrum for thinking about the significance of Nigeria's comprehensive surrogacy legislation is one of its essential features. It examines the void and the problems that result from its absence. It also seeks to clarify crucial points that need to be taken into account as Nigeria's legal framework for surrogacy is being developed and curated. By considering surrogacy contracts, the rights and responsibilities of commissioning moms, surrogate mothers, doctors, and the child, it aids in raising awareness of the nature and workings of surrogacy in Nigeria.

CONCEPTUAL AND THEORETICAL FRAMEWORK

A foundational understanding of surrogacy and related legal concepts is crucial for navigating the complexities associated with its practice in jurisdictions like Nigeria, where formal regulatory frameworks are lacking. This section aims to clarify the key terms, typologies, and legal concepts that will be referenced throughout the research. These clarifications help illustrate why the absence of clear legal definitions and Standards create significant uncertainty and legal risk for all parties involved.

DEFINITION OF SURROGACY

Surrogacy is a form of third-party reproduction in which a woman consents to carrying a pregnancy for intended parents who cannot conceive for medical reasons.

It can also be defined as a form of Assisted Reproductive Technology (ART) in which a woman (the surrogate) agrees to carry and give birth to a child for another individual or couple, referred to as the intended or commissioning parents. Upon birth, the surrogate relinquishes the child to the intended parents, who assume parental rights and responsibilities, either through contractual arrangements, legal proceedings, or informal agreements.

Surrogacy serves as a solution for individuals or couples facing infertility, same-sex couples desiring biological parenthood, or individuals who cannot safely carry a pregnancy due to medical conditions. However, surrogacy is not simply a medical or biological procedure. It is

inherently legal, social, and ethical, involving issues of parenthood, bodily autonomy, contract enforceability, and child welfare.

WHO IS A SURROGATE MOTHER?

A surrogate mother is a woman who, for financial or other reasons, agrees to bear a child for another woman who is unable to conceive. She gestates and delivers a child on behalf of another woman, who is then considered the child's birth mother (socially and legally).

WHAT IS A SURROGACY AGREEMENT?

A surrogacy agreement, also referred to as a surrogate contract, is a legal document that outlines the rights, obligations, and expectations of all parties involved in a surrogacy arrangement. Some surrogacy contracts must carefully protect the interests of all parties involved, particularly the intended mother and surrogate. In a traditional surrogacy agreement, it is critical to include clauses that protect the intended mother and parents against disputes over parental rights. Contracts for all kinds of surrogacy should clearly stipulate that any unauthorised keeping of the child by the surrogate is considered abduction, stressing the gravity of such actions and ensuring legal protections for the intended parents.

NATURE OF SURROGACY

Surrogacy is a form of Assisted Reproductive Technology (ART), which is used to treat infertility. It includes fertility treatments that handle both a woman's egg and a man's sperm. It works by removing eggs from a woman's body. The eggs are then mixed with sperm to make embryos. The embryos are then returned to the woman's body. In Vitro Fertilisation (IVF) is the most common and effective type of ART. ART procedures sometimes use donor eggs, donor sperm, or previously frozen embryos. It may also involve a surrogate or gestational carrier. Surrogacy is increasingly becoming popular amongst people in the world as a good alternative for infertile couples or people with reproductive issues due to one reason or another, and even people in same sex marriages. With more people using surrogacy as an alternative way for the conception and reproduction of children, surrogacy has become increasingly more socially accepted in the world. Surrogacy helps in the production of children for persons who cannot conceive children or carry a child to full term naturally. This practice has improved the lives of many over the years, but can also be exploitative for some parties involved if not adequately regulated. Surrogacy has helped a lot of people get children as they desire and has also helped many marriages without children, and even individuals. Still, it has also become very detrimental to the children being born through surrogacy, as these children are now prone to suffering human rights violations, because of their vulnerability as children born through surrogacy. Several cases have been sat and more reported of the unfavourable circumstances children have to endure because of the means by which they were conceived.

TYPES OF SURROGACY

Surrogacy can be classified in various ways depending on the biological and financial arrangements between the parties involved. For clarity, the two major dimensions of classification are:

Based on Genetic Connection:

- a. Traditional Surrogacy
- b. Gestational Surrogacy

Based on Financial Compensation:

- c. Altruistic Surrogacy
- d. Commercial Surrogacy

These classifications are not merely academic; they have profound legal, ethical, and social implications. Each type poses different challenges, particularly in legal systems like Nigeria's, where no comprehensive framework exists to guide or regulate surrogacy practices.

1. TRADITIONAL SURROGACY

In traditional surrogacy, the surrogate mother is inseminated with the sperm of the intended father (or a donor). She uses her own egg, making her both the genetic and gestational mother of the child. This form is simpler in medical terms but raises more complicated legal and emotional questions, particularly around parentage, consent withdrawal, and custody. Because the surrogate has a biological link to the child, courts in some jurisdictions have been reluctant to sever her parental rights without extensive legal scrutiny.

While not widely practised in Nigeria due to the growing preference for IVF-based solutions, traditional surrogacy may still occur in informal or rural contexts, often without medical supervision or legal protection.

1. GESTATIONAL SURROGACY

Gestational surrogacy is the more prevalent form in medically advanced settings and increasingly in Nigerian fertility clinics. Here, an embryo created via in vitro Fertilization (IVF), using the gametes of the intended parents or donors, is implanted into the surrogate. The surrogate mother has no genetic relationship with the child. This reduces the risk of legal disputes over parentage but does not eliminate legal ambiguities, especially in the absence of a statutory framework that recognizes intended parents from the outset. This model is often considered ethically and legally preferable due to the more precise distinction between the surrogate's role as a gestational carrier rather than a biological mother.

1. ALTRUISTIC SURROGACY

Altruistic surrogacy occurs where the surrogate receives no financial reward beyond reasonable medical expenses. Motivations are typically personal or emotional, such as helping a relative or close friend. Policymakers and religious groups cite this model as more ethical and less exploitative, as it limits the risk of commodifying reproduction.

However, in practice, the boundary between altruism and indirect compensation can be blurry. Even in altruistic arrangements, questions may arise about reimbursement, consent, and the surrogate's ability to withdraw from the agreement freely.

1. COMMERCIAL SURROGACY

Commercial surrogacy involves the payment of financial compensation to the surrogate for her role in carrying the pregnancy. While this may create a stronger incentive and supply of surrogates, it also raises profound ethical and legal concerns, particularly in low-regulation environments. Issues include:

- i. Potential exploitation of economically disadvantaged women
- ii. Power imbalances between intended parents and surrogates
- iii. Risk of coercion, commodification of children, and human trafficking

Nigeria currently has no laws prohibiting or regulating commercial surrogacy, leading to an unregulated industry often driven by private clinics and informal intermediaries. This legal ambiguity increases the likelihood of rights violations, fraud, and breach of agreement.

KEY LEGAL CONCEPTS IN SURROGACY

1. PARENTAGE

Parentage refers to the legally recognized relationship between a parent and a child. In surrogacy, especially where there is no genetic link (as in cases using donor gametes), determining who qualifies as the legal parent can be contentious. In gestational surrogacy, intended parents usually seek to be recognized as legal parents from birth. While in traditional surrogacy, the surrogate may assert her parental rights due to her genetic link to the child.

1. CUSTODY

Custody involves the legal right to care for a child and make decisions about their Welfare. Custody disputes may arise if:

- i. The surrogate refuses to relinquish the child
- ii. The intended parents abandon the arrangement
- iii. The contract is found to be unenforceable

1. CONSENT

Consent is a critical legal and ethical element in any surrogacy agreement. For consent to be valid, it must be freely given, informed, and ongoing. Surrogates must understand the medical, psychological, and legal implications of the agreement, and retain the right to withdraw under some ethical frameworks.

In Nigeria, consent in surrogacy agreements often lacks proper documentation, legal advice, or medical counseling, undermining its validity. Moreover, in commercial arrangements, financial need may compromise the voluntariness of consent.

1. REPRODUCTIVE RIGHTS

Reproductive rights are a subset of human rights encompassing the right to make decisions about reproduction free from coercion, discrimination, and violence.

Surrogacy intersects with these rights in several ways:

- i. The surrogate's right to bodily autonomy
- ii. The intended parents' right to found a family
- iii. The child's right to identity, care, and protection

In the Nigerian context, where ART and surrogacy remain legally undefined, these rights are often unprotected or inadequately balanced, resulting in potential violations, especially for vulnerable parties

THEORETICAL FRAMEWORK

The theoretical foundation of this study is anchored on several legal theories that collectively explain the necessity for a well-defined and enforceable legislative framework to regulate surrogacy practices in Nigeria. These theories provide the conceptual basis for understanding the relationship between law, morality, human rights, gender, and societal values in addressing the legal vacuum surrounding surrogacy.

1. LEGAL POSITIVISM

Legal positivism provides the foundation for understanding the importance of codified laws in regulating social conduct. This theory, advanced by thinkers such as Jeremy Bentham, John Austin, and H.L.A. Hart, emphasizes that the validity of law depends on its enactment by a recognized authority rather than on its moral or ethical content. In the context of surrogacy in Nigeria, where there is currently no statutory regulation, legal positivism underscores the need for legislative action to establish clear and binding rules. It highlights that without express legal provisions, surrogacy arrangements remain uncertain and unenforceable. Therefore, this theory supports the argument for a comprehensive legislative framework that defines the rights, duties, and responsibilities of all parties involved in surrogacy.

1. NATURAL LAW THEORY

Natural law theory posits that laws should reflect universal moral principles derived from human nature and reason. Philosophers such as Thomas Aquinas and Lon Fuller argue that for laws to be just, they must be consistent with moral values. Surrogacy involves profound moral, ethical, and cultural considerations surrounding human reproduction, parenthood, and the sanctity of life. In the Nigerian context, where religion and traditional values play a significant role, natural law theory provides a moral compass for crafting legislation that respects human dignity, protects children's welfare, and prevents exploitation. It ensures that legal frameworks on surrogacy are not only valid but also morally acceptable within the nation's cultural and religious fabric.

1. FEMINIST LEGAL THEORY

Feminist legal theory examines how laws impact women and seeks to eliminate gender inequality within the legal system. It is particularly relevant in the surrogacy discourse because it centres on the autonomy, rights, and potential vulnerability of women who act as surrogate mothers. In Nigeria, economic disparity and patriarchal structures could expose women to exploitation if surrogacy remains unregulated. Through this theoretical lens, the research emphasizes the need for gender-sensitive legislation that protects surrogate mothers from coercion, ensures informed consent, and guarantees fair treatment. Feminist legal theory thus advocates for laws that uphold reproductive justice, protect women's bodily autonomy, and balance power relations in surrogacy arrangements.

1. HUMAN RIGHTS THEORY

Human rights theory provides a normative framework for analyzing surrogacy in relation to fundamental rights, such as reproductive autonomy, the right to family life, equality, and the rights of the child. Drawing on international instruments such as the Universal Declaration of Human Rights (1948) and the Convention on the Rights of the Child (1989), this theory underscores Nigeria's obligation to protect individuals from human rights violations arising from unregulated reproductive practices. The absence of legislation exposes both intended parents and surrogate children to legal uncertainties concerning parentage, citizenship, and inheritance. Human rights theory, therefore, supports the formulation of laws that ensure surrogacy practices are consistent with international human rights standards, protect the best interests of the child, and guarantee the dignity and equality of all parties involved.

1. SOCIO-LEGAL THEORY

Socio-legal theory bridges the gap between law and society, emphasizing that effective laws must reflect and respond to social realities. In Nigeria, cultural, religious, and traditional beliefs shape public attitudes toward reproductive technologies such as surrogacy. The socio-legal perspective recognizes that for any legislative framework to be successful, it must align with societal values while addressing evolving social needs. This theory advocates for participatory law-making that involves medical practitioners, religious bodies, legal experts, and civil society organizations in developing comprehensive surrogacy laws. It ensures that the resulting legal framework is both enforceable and socially acceptable.

1. LEGAL REALISM

Legal realism focuses on how law operates in practice rather than in theory. It emphasizes that the effectiveness of any legal framework depends on its implementation, judicial interpretation, and administrative capacity. In relation to surrogacy, legal realism highlights the importance of developing practical laws that Nigerian courts and medical institutions can effectively apply. It also highlights the need for regulatory bodies, judicial training, and ethical oversight mechanisms to ensure that the law serves its intended purpose. This approach ensures that surrogacy legislation is dynamic, adaptable, and able to address future developments in reproductive technology.

SURROGACY IN NIGERIA: LEGAL STATUS, CHALLENGES AND IMPLICATIONS.

There is currently no legal framework regulating surrogacy in Nigeria; however, a system of arranged third-party reproduction is prevalent. The Pro-Natalist nature of the traditional African society, where procreation is termed invaluable, has no doubt contributed to the slow acceptance rate in the conduct of surrogacy, as well as the possible build-up of a regulatory framework. Nigerian society remains conservative in this area, as reflected in the laws governing related issues.

The concept of surrogacy, although yet to be legally provided for under the Nigerian laws, remains practiced within our shores. In fact, a successful gestational surrogacy was reported in the African Journal for Infertility and Assisted Conception of a "35-year-old married graduate trader with primary infertility of 7-year duration due to Mullerian dysgenesis" in south-eastern Nigeria.

As generally observed, surrogacy agreements in Nigeria are based on simple contract terms; the concern, therefore, is whether such contracts, born out of surrogacy, can be enforced in our national courts. Amid other requirements, most contracts require two key elements to be valid and enforceable. All parties must agree (through an offer and acceptance), and something of value must be exchanged as consideration.

Nigerian society remains conservative in this area, as reflected in the laws governing related issues. Nigeria has been known to have drawn some of its legal cues from the United Kingdom. Given the United Kingdom's existing surrogacy law, surrogacy agreements may be enforceable in our national courts when tested. From another perspective, the concept of void contracts under Nigerian law, which holds that a contract is void if it is illegal or contrary to public policy, may also impact the enforceability of surrogacy contracts.

In Nigeria, as in most jurisdictions, a contract becomes enforceable once it satisfies the required elements of a valid contract. Although there is no law or statute regulating surrogacy in Nigeria, the contracts and agreements related to it remain enforceable.

The underlying problem, however, concerns the legal definition of the child's parentage and the contractual rights and duties of the parties to the surrogate agreement. Presently, there is no judicial pronouncement on this form of contract in Nigeria. If a dispute arising from a surrogate agreement is presented before a Nigerian court, deciding the case could prove problematic. There is a risk of biased judgment driven by cultural sentiments. The bias is likely to arise from socio-cultural influences that view conception through artificial means as unacceptable.

With no legislative measures to regulate surrogacy in Nigeria, most artificial reproductive technology clinics in Nigeria base their operations on the Human Fertilization and Embryology Authority Guidelines of the United Kingdom.

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. 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. A Bill to establish a Nigerian Assisted Reproduction Authority was presented to the National Assembly in 2012 and read for the second time on 2 May 2012. This Bill, however, was not passed into law as it did not enjoy the support of the majority of the legislature.

Subsequently, in 2014, the National Health Act 72 was enacted. Section 10 prohibits assisted reproductive technology by providing:

(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 cloning of a 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 a fine.

It may be deduced from section 10(1)(a) that assisted reproductive technology (ART) is prohibited. One cannot help but wonder why several assisted reproductive technology practices, such as zygote intra-fallopian transfer (in vitro fertilisation) and gamete intra-fallopian transfer, are widely practiced in major hospitals in Nigeria, including the national hospital, without any medical practitioner having been penalised so far. However, it is worth noting that there is a pending Bill before the Nigerian Parliament to amend the National Health Act to regulate assisted birth technology, to encourage the safe and ethical practice of assisted reproductive technology services. The Bill intended to effect this amendment was introduced to Parliament on 8 June 2016. If passed into law, the Federal Ministry of Health will be responsible for developing policies for ART and accrediting and regulating its practice.

There are several ethical, cultural, social, and legal issues surrounding surrogacy in Nigeria. Surrogacy is not a topic discussed publicly in Nigeria due to the cultural and social perceptions surrounding infertility. However, according to PM News, young ladies across Nigeria advertise their availability as surrogate mothers by registering on the internet and providing their full details and states of residence in Nigeria. Similarly, agencies in Nigeria advertise on the internet to match surrogate mothers with commissioning parents.

The legal question surrounding the surrogacy agreement in Nigeria centres on the legal parentage of the child and the surrogacy agreement itself. While several countries have taken positions on surrogacy, by prohibiting, allowing without commercial value, or fully allowing it with commercial value, Nigeria has yet to take a legal standpoint on the issue. Thus, the lack of acknowledgement of the practice of surrogacy in Nigeria has led to a lack of regulation of the practice, which leaves surrogate mothers vulnerable to exploitation and commissioning parents susceptible to blackmail.

Concerns have been expressed over abuse related to surrogacy in Nigeria. One Motunrayo Joel was reported to have posed as a young woman interested in selling her ova, and she recounted how several fertility clinics in Nigeria harvested ova and paid the donors. She reported the high rate at which Nigerian ladies sell their eggs at various fertility clinics. Her report revealed that these women were not properly counseled on the health risks involved in donating eggs, especially in cases of recurrent donation. Cases of quack doctors carrying out surrogacy and other in vitro fertilization procedures have also been reported and are a cause for concern for genuine fertility practitioners.

The increase in 'baby factories' has been linked to surrogacy, and this has heightened the level of stigma attached to surrogacy as an option for becoming a parent. It has been established

that the prevalence of baby factories persisting in Nigeria fulfills 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 fulfill social obligations by having a baby. Some of the babies from these baby factories are trafficked for 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. The BBC reported that a common strategy for an infertile woman is to pretend to be pregnant or be fooled into believing she is pregnant, and then buy a baby from one of these baby factories. It is contended 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. It appears that in the case of Nigerian baby factories. At the same time, some females give their free consent, while others, especially teenage girls, are coerced or forced against their wishes to be surrogate mothers.

COMPARATIVE ANALYSIS: REGULATORY APPROACHES TO SURROGACY IN SELECTED JURISDICTIONS

Surrogacy regulation worldwide reveals a range of legal approaches, from permissive, market-friendly models to strict bans on commercial arrangements. A comparative study of these models is beneficial for Nigeria, a country currently lacking a coherent statutory regime, as it provides real-world evidence on how different regulatory designs influence outcomes for children, intended parents, and surrogate women. This chapter compares the regulatory approaches of five jurisdictions namely, the United Kingdom, India, South Africa, Australia, and the United States and extracts practical lessons for a Nigerian legislative framework. The jurisdictions were chosen because they represent a range of policy options (parental-order regimes, outright commercial bans, statutory children's frameworks, state-based variation), and because each has recent reforms or established practice that illuminate trade-offs relevant to Nigeria.

UNITED KINGDOM:

The United Kingdom has long favored a cautious, child-centred model. Surrogacy arrangements are governed by the Surrogacy Arrangements Act 1985, together with the parentage and fertility provisions in the Human Fertilization and Embryology Act 2008. In practice, legal parenthood is created by post-birth parental orders; judicial instruments that transfer legal parentage from the birth mother (and, if applicable, her spouse) to the intended parent(s). The Human Fertilization and Embryology Authority (HFEA) regulate fertility clinics and the clinical components of assisted reproduction. These combined features provide a dual layer of oversight, encompassing both clinical regulation of reproductive technology and judicial oversight of parentage and child welfare.

Strengths of the UK model include a clear emphasis on the child's welfare, formal court scrutiny of parentage orders, and clinical regulation through the HFEA, all of which reduce the risk of unregulated market practices. Critics point to the uncertainty produced by post-birth orders: intended parents must wait until after delivery to secure full legal recognition, which can create temporary legal limbo for the child and emotional strain for parties. For policymakers, the UK

model demonstrates the benefits of coupling clinical oversight with judicial parentage mechanisms, while also underscoring the need to streamline court processes to avoid protracted uncertainty.

INDIA:

Prohibiting commercial surrogacy with restrictive eligibility for altruistic arrangements

India's Surrogacy (Regulation) Act, 2021, represents a sharp regulatory response to a prior era when commercial surrogacy in India was widely available to domestic and foreign intended parents. The 2021 Act bans commercial surrogacy, allowing only altruistic surrogacy under tightly controlled conditions (for example, limited to specific categories of intending parents and close-relative surrogate models in practice), and establishes licensing and oversight for clinics and agencies. The Act was justified as necessary to prevent exploitation and "rent-a-womb" markets.

While the Indian approach aims to protect women from commercial exploitation, critics argue that an absolute ban on compensation may have perverse effects: it risks driving the practice underground, depriving surrogate women of regulated income opportunities, and pushing desperate parties toward unregulated clinics or cross-border arrangements. Media and scholarly commentary have highlighted cases in which overly restrictive rules have incentivized illicit markets and produced harms contrary to legislative intent. For Nigeria, India's experience is an instructive caution: while curbing commodification is a legitimate policy goal, an outright ban on regulated compensation can produce unintended harms unless accompanied by robust enforcement, social protections, and realistic alternatives for women who rely on surrogacy-related income.

SOUTH AFRICA:

South Africa embeds surrogacy regulation within its children's law, specifically Chapter 19 of the Children's Act (as reflected in statutory provisions and regulations). The Children's Act provides a statutory route to parental orders and outlines procedural safeguards, emphasizing the importance of consent, counseling, and the best interests of the child. This placement within the children's statute foregrounds child protection as the primary legislative objective and gives family courts a clear statutory mandate to adjudicate parentage disputes arising from surrogacy agreements.

The South African model's principal advantage is the explicit prioritization of the child as the legislative touchstone; moreover, the statutory framework clarifies consent and procedural requirements that courts must evaluate. Practical challenges include ensuring genuine informed consent (in the face of socio-economic pressures) and reducing delay in judicial processes. For Nigeria, embedding surrogacy provisions within a children or family law statute would provide a solid legal framework that prioritizes welfare considerations. Still, the design must also ensure accessibility and the speed of parentage determinations.

AUSTRALIA:

Australia represents a broadly shared national stance: commercial surrogacy is illegal across Australian jurisdictions, and the practice permitted domestically is altruistic in nature (with the surrogate's reasonable expenses reimbursed). Operational rules, particularly those related to

parentage orders and eligibility, are established at the state and territory levels, resulting in procedural variations across the federation. The Australian federal government and state inquiries have reemphasized that prohibiting commercial payments aims to protect surrogates from exploitation; however, this consensus has generated cross-jurisdictional complexity and an increase in Australians pursuing cross-border commercial surrogacy, thereby creating legal and welfare dilemmas for children born abroad.

The Australian experience signals two lessons for Nigeria. First, a national principle (for example, forbidding commercialization) can reflect important ethical commitments. Second, where subnational variation is allowed, coordination is essential; otherwise, intended parents may encounter inconsistent rules, and cross-border surrogacy will create complex recognition problems. Nigeria may prefer a single national statute to avoid a fragmented legal landscape.

UNITED STATES:

In the United States, surrogacy regulation is a state matter, resulting in a patchwork of approaches. Some states expressly permit and facilitate compensated surrogacy with detailed protections, while others criminalize paid agreements (though modernizing their laws). Recent state-level reforms (for instance, New York's Child-Parent Security Act legalized compensated gestational surrogacy in 2021, and other states' recent legislative changes) illustrate a significant trend: legislatures are recognizing and regulating surrogacy rather than relying on the instability of outdated prohibitions. The American experience offers rich examples of statute drafting (including required independent legal advice for surrogates, mandatory counseling, insurance, and contractual safeguards). Still, it also demonstrates how legal fragmentation complicates interstate recognition and access to justice.

For Nigeria, the U.S. example warns against devolving surrogacy law in ways that create uneven protection and legal uncertainty; if Nigeria decentralizes regulatory roles, it must design strong harmonization mechanisms.

COMPARATIVE LESSONS:

Four consistent themes emerge across the jurisdictions examined:

Parentage mechanism matters. Post-birth parental orders (as in the UK and South Africa) priorities judicial scrutiny and child welfare, but can postpone legal certainty. Pre-birth recognition (available in some U.S. statutes) increases certainty for intended parents but demands careful safeguards to protect surrogate autonomy. A Nigerian framework should weigh the trade-off between certainty and protective oversight and consider hybrid options (e.g., limited pre-birth recognition with stringent safeguards).

Compensation policy involves trade-offs. Absolute bans (e.g., India; many Australian jurisdictions) aim to prevent the commodification of sex work but risk driving practices underground. Regulated compensation (U.S. state models) professionalize the field but require robust surrogate protections, transparency, and strict oversight. Nigeria should avoid simple prohibition without enforcement capacity and social safety nets. Surrogate protections are non-negotiable. Best practices include mandatory independent legal advice, psychological counseling, informed-consent protocols, medical screening, insurance (health/life), and cooling-off periods. These measures reduce coercion and ensure surrogates make informed, voluntary choices.

Clinic and practitioner regulation reduces malpractice. Licensing of ART clinics, record-keeping requirements, and enforcement powers (as exercised by the HFEA in the UK or analogous regulators) help ensure clinical standards and accountability, especially where surrogacy is practiced domestically. Nigeria will need regulatory institutions for clinics and ART professionals if it intends to accommodate surrogacy at scale.

THE LEGISLATIVE FRAMEWORK FOR SURROGACY PRACTICE IN NIGERIA.

PROPOSED LEGISLATION

Surrogacy is not explicitly prohibited in Nigeria; however, it is not comprehensively regulated. The Nigerian Constitution does not directly address surrogacy, resulting in legal ambiguity. The Nigerian Child Rights Act emphasizes children's rights but lacks specific provisions for surrogacy arrangements. While some states, such as Lagos, have established guidelines for Assisted Reproductive Technology (ART), there are no specific laws governing surrogacy practices nationwide.

The implication is that surrogacy in Nigeria is neither allowed nor prohibited. Notwithstanding these legal lapses, some authors have, over the years, argued in the negative that the practice of surrogacy is outlawed in the country. The proponent of this argument relied on sections 30 of the Child's Rights Act and section 50 of the National Health Act to support their contention. On the other hand, other authors argued against this proposition. They contended that the absence of a legal framework expressly prohibiting surrogacy in Nigeria invariably permits its practice, as it is not forbidden. While arguments for and against the legal framework for surrogacy in Nigeria remain debatable, we will examine the provisions of the Child's Rights Act and the National Health Act to determine whether, as argued, surrogacy is permitted or prohibited in the country.

The Child's Rights Act, National Health Act, and the Practice of Surrogacy in Nigeria. The Child's Rights Act, as its name suggests, is a legal framework designed to protect the rights of children. The law provides the legal framework that defines the rights of children, the obligations of parents, the state, and agencies towards children, and the legal basis for adoption, fostering, and family court proceedings. The law guards against child trafficking and seeks to provide adequate protection to abandoned, destitute, and molested children. It is on this basis that section 30 of the law prohibits trade in human beings, where it is provided that no person shall buy, sell, hire, let on hire, dispose of, or obtain possession of or otherwise deal in a child. They went further to restrict the use of children for other illegal activities, i.e. Section 30 of the CRA, which, to our mind, prohibits trafficking in children and other illicit dealings with children, which indeed offered a complete protection package to Children and their well-being. The law went to penalize trading in children with ten (10) years imprisonment upon conviction, with no option of fine. The question, therefore, is whether the prohibition in section 30 of the law relates to surrogacy? Ekwousi contended that section 30 of the CRA prohibits surrogacy and equated the practice of surrogacy to "womb hiring" while the child, the outcome of the process, is an "object"; thus, argued that the practice of surrogacy is against natural law and a gross violation of the right of the woman or the prospective mother.

In 2016, the Assisted Reproductive Technology (Regulation) Bill was presented to the Nigerian government, aiming to provide a legal framework for surrogacy and other reproductive technologies. However, this Bill has yet to be passed into law, leaving a significant gap in legal protections for intended parents, surrogates, and children born through surrogacy.

Notably, Sonnie's assertion, which was aired on a widely broadcast TV program, and Umah's position, which was also reported in a widely circulated national daily, may have far-reaching implications, creating legal confusion in the minds of many prospective individuals or couples who intend to venture into this landscape. Therefore, to ascertain the correctness of the statement, the Cable news went on a voyage of legal discovery to determine the validity of Sonnie's assertion. Questions were asked and responses elicited from a select group of legal minds. Some of the renowned lawyers interviewed include Henry Akanwa, Olu Daramola (A Senior Advocate of Nigeria, SAN), Olutumbi Babayomi (a family lawyer), and Awa Kalu (also a SAN). The responses were unanimous in disputing Sonnie's assertion regarding the import of sections 30 and 50 of the CRA and NHA with respect to the practice of surrogacy in Nigeria.

These legal minds contended that since there is no legal framework for surrogacy in Nigeria, it cannot therefore be correct to say that the practice of surrogacy is outlawed in the country. This case pritrte criminalises our crionly when it does so; that it is only when a criminal commits an act that the same can be construed as a crime; otherwise, criminal culpability cannot be inferred. He contended that section 50 of the NHA targets activities such as genetic engineering rather than the legitimate practice of surrogacy. On the whole, the Cable News delivered its verdict on the legality of surrogacy in Nigeria. The News outlet found that, indeed, surrogacy is neither legislated nor prohibited in Nigeria. This verdict was reached having regard to the responses elicited from renowned legal icons in the profession, who considered the issue dispassionately and made a finding based on the law as it stands. We aligned with Cable News's conclusions and the lawyers' position. Our position is anchored on the premise that CRA did not mention the word 'Surrogacy' anywhere in its entire provisions and this cannot be construed or imported to have been incorporated therein.

Furthermore, the definitions section of both the CRA and the NHA does not mention the word "surrogacy." This is a testament to the fact that the respective legislations were not contemplated to regulate surrogacy in the country. For instance, the CRA mentioned adoption and fostering, but omitted the word 'surrogacy.' It is also important to emphasize that the CRA's mandate is not to regulate family affairs, but rather to address children's issues. Family matters are regulated by the Matrimonial Causes Act (MCA).

The law, as rightly observed above, is set out to ensure adequate protection of the right of the child. The criminalizing of the selling or hiring of a child for whatever reason cannot be construed as prohibiting surrogacy, as the gamut of surrogacy pertains to an altruistic act of birthing a child through a third party that willingly consented to the process. This has nothing to do with the activities of criminal elements that translate the practice into baby factories where children are manufactured for commercial purposes. Such activities, to our mind, which raise ethical issues, fall within the gamut of child trafficking and not surrogacy, as surrogacy deals with a contractual arrangement that is strictly regulated by a legal agreement wherein the respective rights and obligations of parties to the same are defined and monitored. The mother agreed to the transaction legally without coercion and is only used as a conduit to actualise the

parenthood dream of parents who are, by reason of infertility or medical condition, incapable of conceiving naturally.

Currently, there is no existing legal framework for the practice of surrogacy in Nigeria. Both legal and nonlegal scholars have repeatedly corroborated this assertion. Aguwa, for instance, while agreeing that there is no legal framework for surrogacy in the country, observed that the absence of such a legal structure poses challenges and risks for all parties involved in the process. He further contended that these lapses would expose the parties' vulnerability to exploitation, abuse, and legal dispute, particularly as the Founder of Headfort Foundation, a pro-poor legal firm, Oluyemi Orija. General Perception on the Practice of Surrogacy in Nigeria. It is essential to underscore the fact that, despite the absence of a legal structure for the regulation of surrogacy in Nigeria, the practice of surrogacy in the country is thriving with an 85 to 90 per cent success rate. A study by IVF Select found that success rates vary depending on the type of IVF used. For instance, in surrogacy using the commissioning parents' eggs and their own sperm (gestational surrogacy), the success rate is 75 to 95%. In comparison, surrogacy by donor eggs and their own sperm (traditional surrogacy) is 85 to 95%. The study also revealed that in surrogacy using donor sperm and own eggs, the success rate is 80 to 90% whereas IVF and Embryo Transfer have the success rate of 85 to 90%.

Several medical clinics, both private and government, are actively involved in this practice. Some of the renowned hospitals actively engaged in this revolutionary practice include: Select IVF, Nordica Fertility Centre, Care Women's Clinic, Androcare Fertility Centre, We Care IVF Surrogacy, Bless World Eggs Donor and Surrogacy Agency, Prime Care Fertility Clinic, World Fertility Service, Continental Fertility Clinic, Medison Specialist Women's Hospital Fertility, and many more. These fertility centres have, over the years, performed thousands of IVF procedures in the country and restored hope and joy to many couples.

One of the discouraging factors in the surrogacy process is the fact that the process is costly, and only a few wealthy individuals can afford the service. The cost of a single IVF cycle in Nigeria is estimated at \$1,000 to \$2,200. A further breakdown showed that factors such as medication, location, infertility cause, additional procedure, and pre-existing health conditions play a significant role in determining the price of the procedure. It was further revealed that surrogacy using one's own eggs and own sperm costs \$1800 to \$22000, while surrogacy by donor eggs and one's own sperm costs \$19000 to \$23000. In the same vein, IVF and embryo transfer costs up to \$ 5,000.

In contrast, surrogate mother selection, blood test, and surrogate mother preparation cost up to \$2500, while Normal Vaginal Delivery costs range within \$1000. Cesarean section (C-section) Delivery costs \$1200 to \$2500, and Housing for the Surrogate mother, including food, could cost up to \$4000. No doubt, having regard to the above figures, only the wealthy in society can afford to explore the option of surrogacy to start a family. This will indeed affect the chances of many infertile couples from experiencing this opportunity to start a family, most especially in areas where the rate of infertility is estimated at 32 per cent of the entire population.

ENFORCEABILITY OF SURROGACY AGREEMENT IN NIGERIA

We have noted that there is no legal framework that regulates the practice of surrogacy in Nigeria. With this in mind, what then will be the legal basis for the enforceability of a surrogacy

contract in the country? In South Africa for instance, the legal framework in the country set requirements regarding the validity and enforceability of surrogacy agreement in the country; thus, for the agreement to be legally binding, a surrogate motherhood agreement must meet specific criteria, i.e., the agreement must be in writing and signed by all parties involved, It must be concluded in South Africa and confirmed by the High Court, at least one of the commissioning parents, or the sole commissioning parent, must be domiciled in South Africa at the time of entering the agreement and failure to comply with these formal requirements renders the agreement invalid and unenforceable in the country.

In jurisdictions like the UK, surrogacy agreements are unenforceable; hence, everyone relies on each other to honor the arrangement, both in respect of the handover of the child and the payment of expenses and other issues. It is also against the law for a third party (including a solicitor) to negotiate a surrogacy contract for payment. In contrast, in India, for a surrogacy Agreement to be enforceable, the contract must be drafted in compliance with the guidelines laid down by the National Surrogacy Board. The contract must address issues that relate to Informed Consent, which entails that the surrogate mother must give her informed consent to carry the child of the intended parents. He should be aware of the medical risks and emotional challenges involved in the surrogacy process, Eligibility Criteria, wherein the surrogate mother must fulfill the eligibility criteria laid down by the National Surrogacy Board; thus, she must be a willing candidate for surrogacy and should have given birth to at least one child. The agreement must also address Medical Tests, wherein both the surrogate mother and the intended parents must go through a series of medical tests to make sure they are healthy enough to go through the surrogacy process. It must also contain Financial Terms. In this regard, the surrogacy contract should clearly outline the financial terms of the surrogacy arrangement. The intended parents must compensate all medical expenses of the surrogate mother, and, lastly, the parental rights, which the surrogacy contract should also specify. It is also expected that the agreement include a Dispute Resolution provision. Thus, the above discussion demonstrates that different countries have varying requirements for the enforceability of surrogacy agreements. The question, therefore, is whether, in the absence of a legal framework defining the parameters of surrogacy agreements, a surrogacy contract entered into between the parties can be binding or enforceable.

The absence of a legal framework in the country (Nigeria) regarding surrogacy contracts will not invalidate a surrogacy contract since the practice is not expressly outlawed. It is a different ball game if the practice had been banned, which would have rendered the agreement unenforceable. Under the general principle of the common law, which applies in Nigeria, a contract legally entered into between parties is enforceable. This principle is validated in the case of *Baliol (NIG) LTD v Navcon (NIG) LTD*, where the Apex Court held to the effect that "A valid contract thus existed, and once that is in place, i.e. the natural question therefore is what a valid contract is?

The Court in the case of *Amana Suits Hotels LTD v. PDP* held that a valid contract thus:

The traditional view is that a valid contract requires the identification of a valid offer and a valid acceptance of that offer. An acceptance is a final and unqualified assent to all the terms of the offer, and the offeree must communicate it to the offeror. In this case, the offeror is the appellant. He offered the offeree, the respondent, rooms in his hotel from January 2nd to 6th,

2003, at a cost of N1,831,500. This is a valid offer. There is nothing in the Record of appeal to show a valid acceptance. In the absence of a valid acceptance, no contract exists. The requirements of a valid offer and a valid acceptance can be dispensed with only if the parties have agreed on all material points.

In the same vein, in the case of *Best (Nig) Ltd v Blackwood Hodge Nig Ltd & Anor*, the Supreme Court outlined the basic elements of a valid contract thus: "It is basic that to constitute a binding contract, there must be an agreement in which the parties are ad idem on essential terms and conditions thereof. The promise of each party must be supported by consideration." It then suffices that for a contract to be valid in the country, it must contain the elements outlined by the Court in the authorities referenced above. With this understanding in mind, it is essential to emphasize that a surrogacy agreement is often entered into by three or more parties to the arrangement, namely the commissioning parents, the surrogate mother, and, in some cases, the surrogate agency or the hospital. Frequently, there is usually an offer and acceptance, but without consideration, as the agreement is expected to be without consideration, given that it is illegal to transact in a human being in line with section 30 of the CRA. Given that there is no legal framework prohibiting commercial surrogacy in the country, it is doubtful that surrogacy agreements backed by consideration will be unenforceable.

It is therefore our candid opinion that, irrespective of the legal framework for surrogacy in Nigeria, a surrogacy agreement that contains all the elements of a valid contract under the country's law is admissible. However, it would have been simpler if there were a legal framework in place defining the requirements for a valid and enforceable surrogacy agreement, as is the case in South Africa, because there are instances where an agreement can be valid but unenforceable. Therefore, a legally defined framework outlining the requirements for an enforceable agreement would have been preferable.

As rightly seen, surrogacy has gained traction worldwide. Today, many developed and developing countries have established a legal and regulatory framework necessary to regulate this practice, and Nigeria should be no exception. The legal framework in South Africa, Britain, and India is worth emulating. This will give the practice, which is widely practiced in most hospitals in the country, including government and private hospitals, legitimacy and restore sanity and confidence in it. This revolutionary method that affords infertile couple alternative route to parenthood is a welcome development that Nigeria as a country must take very seriously as this will go a long way in bringing peace and succor to families that desire to experience joy of parenthood but due to one medical complication or the other had robbed them of this opportunity.

RECOMMENDATIONS

Based on the Nigeria Surrogacy Regulatory Commission Bill 2024, here are some wider recommendations for Nigeria¹:

1. Enact comprehensive legislation that outlines the rights and responsibilities of all parties involved in surrogacy, including intended parents, surrogates, and children born through surrogacy.
2. Establish a regulatory framework that ensures transparency, accountability, and protection of vulnerable populations, particularly surrogates and children.
3. It is recommended that the Child's Rights Act be amended to incorporate a provision for surrogacy in the country, which is indeed long overdue.
4. It is recommended that Chapter 19 of the Children Act in South Africa be replicated in Nigeria's Child Rights Act to allow for the practice of surrogacy in the country, with the exact requirements.
5. It is also recommended that the legal position, as obtainable in India, on the registration of surrogacy centres, be codified in Nigeria to monitor the process.
6. It is further recommended that the legal framework in Nigeria recognise both gestational and traditional surrogacy to accommodate all situations.

Surrogacy is not explicitly prohibited in Nigeria; however, it is not comprehensively regulated. The Nigerian Constitution does not directly address surrogacy, resulting in legal ambiguity. The Nigerian Child Rights Act emphasizes children's rights but lacks specific provisions for surrogacy arrangements. While some states, such as Lagos, have established guidelines for Assisted Reproductive Technology (ART), there are no specific laws governing surrogacy practices nationwide.

CONCLUSION

The current state of surrogacy laws in Nigeria highlights the urgent need for comprehensive legislation to protect the rights of all parties involved. As discussions continue regarding the regulation of surrogacy, it is essential for intended parents. It is advisable to seek legal advice and understand the implications of entering into surrogacy agreements in the absence of clear legal guidelines.

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