

**Protection of Surrogate Mothers Against Exploitation of Their
Reproductive Organs in Kenya**

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DECLARATION

I, **OWUOR GEORGINA AGOLA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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ABSTRACT

Surrogacy motherhood, an arrangement involving one woman gestating a baby to be raised by another, is still a relatively 'new' technology in Kenya seeing as the first surrogate birth in Kenya happened in August 2007. Indeed, it is still a new technology in Kenya and this leaves a lot of legal and ethical issues that have not been addressed.

The fact that there is no legal and ethical framework to regulate surrogacy arrangements in Kenya, exposes the practice to corruption and other exploitative activities. Lacunas in the legal framework makes it hard to standardize the practice of surrogacy in Kenya, leaving the consumers of the service, especially surrogate mothers, at the mercy of the medical doctors as well as the biological parents that have commissioned them.

This research seeks to address the lacunas found in the law, how they adversely affect the surrogate mothers and finally, what strides Kenya can take to ensure that there is no exploitation of surrogate mothers that may lead to commodification of their body parts as well as child trafficking among other atrocities.

LIST OF ABBREVIATIONS

AFRH	Association of Fertility and Reproductive Health
ART	Assisted Reproductive Techniques
CA	Children's Act
ICCPR	International Covenant on Civil and Political Rights
IVF	In Vitro Fertilization
PESA	Percutaneous Epididymal Sperm Aspiration
TESA	Testicular Sperm Aspiration
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
US	United States

CHAPTER ONE **INTRODUCTION**

1.1 Background of the Study

Surrogacy is defined as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.¹ This being a relatively new emergence in Kenya although it has been widely used in other parts of the world. The first surrogacy case ruled was in the Matter of Baby M, the New Jersey Supreme Court ruled that surrogacy contracts are not enforceable.²

Lack of laws has also opened up uncontrolled medical tourism, as in the article by Arthur Okwemba in 2012,³ especially from countries with stringent surrogacy laws hence international standards are evidently not being met. The current practice of adoption⁴ which requires commissioning parents to legally adopt the child borne out of a surrogacy arrangement is lengthy and open to abuse. Since there are no codes of practice for the practitioners there is likelihood that one may exploit it to their advantage and in the process violate the rights of the 'service users. In the end the rights of the patients remain unprotected.

Surrogacy Contracts

A surrogacy contract can be described as the agreement made between commissioning parents and the surrogate mother in a bid to facilitate a surrogacy procedure to commence. The surrogacy contract is the root and genesis of all the rights and responsibilities. The rights and responsibilities, both express and implied, are what give a legitimate claim to any aggrieved party in the contract.

¹ Stephen M., *Principles of Family Law* Sweet & Maxwell (2003) p16.

² *In Re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988)

³ <http://www.africareview.com/special-reports/Surrogacy-in-Kenya-gains-pace/979182-1322482-rvpsjyz/index.html> on 10 March 2017

⁴ An adoption process in Kenya usually takes between 3 to 6 years as per the practice on the ground

Surrogacy contracts in Kenya are also the basis of all the surrogacy procedures that are performed here in Kenya. Established institutions in Kenya are the ones responsible for performing the surrogacy procedures. These institutions include the Nairobi IVF Center which is one of the biggest and first growing centres in Kenya. They offer a wide range of Assisted Reproductive Technologies including IVF and ICSI (Intracytoplasmic Sperm Injection), Egg and Sperm donation, Embryo and Sperm Cryopreservation, Intrauterine inseminations (IUI), Ovulation induction and others.⁵ These institutions are not regulated and thus they come up with their own rules of procedure. Whereas in practice, surrogacy contracts are being used and are the legal basis of all the surrogacy procedures, the law is yet to catch up.

1.2 Statement of the Problem

Despite the prevalence of surrogacy in Kenya, the Reproductive Health Act is silent on the machinations of the contract. Therefore, the statement of the problem is that the Kenyan legal system lacks laws for the regulation of modern human reproduction technologies. The stark reality is that Kenyans continue to enter into arrangements involving modern reproductive technologies in spite of the absence of a legal regime for their regulation.⁶ This absence of laws leads to exploitation of surrogate women.

1.3 Objectives of the Study

The general objective of this study is to analyse the legal framework in Kenya concerning surrogacy and in particular, surrogacy agreements and the protection a surrogate mother has.

⁵ <http://nairobiivf.com/#> on 1 December 2017.

⁶ Memorandum of Objects and Reasons, *In-Vitro Fertilization Bill*, 2014.

The specific objectives of this research are to:

- Review Analyse laws of other jurisdictions on surrogacy and how they deal with protection of the surrogate mothers rights.
- Make legal recommendations that Kenya could adapt in an attempt create our own national legislation on surrogacy.

1.4 Research Questions

The main research questions of this research is: 'To what extent are the current laws concerning surrogacy in Kenya doing protect surrogate mother?'

From this, the following questions may be found:

- What laws have other jurisdictions put in place in order to curb the exploitation of the reproductive organs of surrogate women?
- What are the ideologies Kenya can borrow and take up and make up national legislation to that effect?

1.5 Hypothesis

This study tests the following hypotheses:

That Kenya laws are inadequate and do not contemplate the protection of surrogate mothers.

Furthermore, there is no legal framework or legislation that deals with surrogate mothers

That if Kenya in fact comes up with legislation on surrogacy and surrogate agreements, surrogate mothers will not be exploited.

1.6 Literature Review

One of the materials that this research will rely on is a Kenyan article by Muthomi Thiankolu.⁷ In this article the author analyses the legal framework on the Assisted Human Reproduction in Kenya. He looks at surrogacy as one form of Assisted Human Reproduction. He concurs with the hypothesis of this research that there are no laws regulating surrogacy agreements in Kenya. He also states that there is no Kenyan law prohibiting surrogacy laws either. He recognizes the need for the drafters of a legal framework in Kenya of Assisted human reproduction in Kenya to address several issues in regard to surrogacy. He is also of the view that Kenyan legal drafters must address their minds to the question of enforceability of surrogacy agreements. This will go a long way in giving protection to the surrogate mother.

In Elizabeth S. Anderson's publication, "Is Women's Labour a Commodity?" the author argues that commercial surrogacy raises new ethical issues and it represents an invasion of the market into a new sphere of conduct (women's labour). Women's labour is treated as a commodity and their dignity is being degraded. In addressing a possible way in which surrogacy is used as Elizabeth points out is that shortage of children for adoption and difficulty of qualifying as adoptive parents points to surrogacy as the only other way in which some people can raise a family. She also points out that commercial surrogacy at the very least should be unenforceable. A stronger conclusion, she argues that surrogate contracts should be illegal and be criminally punishable. She argues that commercial surrogacy constitutes degrading and harmful trafficking of children as well as violating the dignity of women. These factors subject the children as well as the mothers to a serious risk of exploitation. She discusses most of the problems are emotional and one does not know who will have them and regulation will not

⁷Muthomi Thiankolu, Towards a legal framework on the Assisted Human Reproduction in Kenya; Some thoughts on the law, technology and social change (2007) Nairobi Kenya.

check on the exploitation of the surrogate mothers. This will be a great foundation and backing for my research paper as it backs up and echoes my research question.

Similarly, in the thesis written by Jane Stoll: "Surrogacy Arrangements and Legal Parenthood Swedish Law in a Comparative Context" is a great literary work that provides a clear understanding of commodification. In her thesis, she points out that commodification arguments are connected to commercial surrogacy. Indeed, one of the strongest and most emotive arguments against permitting commercial surrogacy arrangements is that they create a market in children (result in child selling).⁸ She also points out that way or ways the surrogate mother can be seen as a commodity is that, because the surrogate, in effect, sells her womb and hands over control of her body, surrogacy is a subtle form of prostitution.⁹

Surrogate Motherhood: A Violation of Human Rights Report Presented at the Council of Europe, Strasbourg, on 26 April 2012, was a paper aimed at it is posited that surrogacy laws were allegedly enacted to protect both unborn babies and parents seeking children. The examples of surrogacy exploitation, however, reveal a different backdrop of the abuses caused to both children and woman. Unfortunately, given the ethical dilemmas and newness of surrogacy issues, many human rights groups are either ignorant or remain neutral to the dangers of surrogacy. For example, Asia director for Human Rights Watch, Phil Robertson, stated,

⁸ Stoll J, 'Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context', Uppsala University, 2013.

⁹ Damelio and Sorensen (n 94) p 270. On similarities between surrogacy and prostitution see also Anton van Niekerk and Liezl van Zyl, 'The ethics of surrogacy: women's reproductive labour' (1995) 21 J Med Ethics 345-349. Van Niekerk and van Zyl consider whether surrogacy arrangements are intrinsically immoral from the perspective of the surrogate. In particular, they explore whether surrogacy is like prostitution in that it reduces a woman's reproductive labour into what they call alienated or dehumanised labour. Regarding alienated labour, see Elizabeth S Anderson (n 110). In this article, written at a time when surrogacy arrangements were just beginning to receive public attention, Anderson discusses the objection that surrogacy is wrong because it involves the commodification of women's reproductive labour. See also Ekis Ekman (n 95) p 124. Ekis Ekman, who describes surrogacy as the pregnancy market and a child market, above, also refers to surrogacy as 'reproductive prostitution, where women are inseminated and made pregnant on order.'

“[G]overnments are confronting something that’s totally new. . . . [Human Rights Watch I]like many others, [are] caught by the newness of this issue.”¹⁰

1.7 Theoretical Framework

This study is premised on the following theories: Natural Law Theory propounded by John Locke, Kant’s Deontological Moral Theory and Radin’s Theory of Property and Personhood.

From a naturalist point of view, everyone has inherent rights afforded to them, thus surrogate mothers being treated as mere objects or nests for budding children is a violation of the right to their Human Dignity. This is propounded by the philosopher, John Locke stated this in *The Second Treatise on Civil Government*.¹¹ He argues that there are some rights that inalienable and cannot be derogated from. In the same light, using Locke’s point of view that there are some right that cannot be derogated from, this research will propose that Human Dignity is one of those rights. Whether you are a surrogate mother or not, you have and possess Human Dignity by the mere fact that you are a surrogate being.

In a daring attempt to set universal human dignity on a strictly rational foundation Immanuel Kant states that the primary purpose was to show how moral freedom and responsibility could still be possible in a world governed by the laws of mathematical physics. For Kant, in agreement with the Stoics, dignity is the intrinsic worth that belongs to all human beings and to no other beings in the natural world. All men possess dignity because of their rational autonomy.¹² Using Kant’s doctrine of human dignity, the research bases its argument on this

¹⁰ Patrick Winn, Underworld: Upending an Asian Baby Farm, GLOBALPOST <http://mobile.globalpost.com/dispatch/news/regions/asia-pacific/thailand/110310/thailand-surrogacyhumantrafficking> on 4th February 2017

¹¹ <http://people.uwplatt.edu/~hood/inalienable.html> on 28th January 2017

¹² Susan Meld Shell (2008). Kant’s Concept of Human Dignity as a Resource for Bioethics. In Adam Schulman (ed.), *Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics* page 10

that all men and women possess dignity, and this dignity should be upheld and not disregarded to the extent that one's body and organs are used and exploited.

Moreover Margaret Radin propounds that proprietary rights in the body will damage an individual's personhood.¹³ She also recognises that the notion of property in one's body presents "some interesting paradoxes",¹⁴ highlighting that blood can be withdrawn and used in a transfusion, hair can be cut off and given to a wigmaker and organs can be transplanted, yet one cannot sell one's organ even if it is for the greater good. The reasoning for this is not entirely clear, but Radin illustrates that some things will simply be too "personal" ever to be property.¹⁵ To justify this, she dichotomises property into two categories: fungible and personal. The former is a thing of an external nature whilst the latter is things that are of such a personal, and sentimental, nature that they form part of an individual's identity.¹⁶

By separating property into fungible and personal, Radin creates the argument that personal property warrants more legal protection than fungible property.¹⁷ Accordingly, if organs were to be placed on the market then, according to such reasoning, they would be degraded and their true value diminished. However, as illustrated by Wertheimer, one can acquire "priceless" art without claiming its value is reduced,¹⁸ which demonstrates how the market can acclimatise according to societal needs and how "priceless" objects can in fact be bought. Nevertheless, many staunchly support that organs, if sold, will be valued in a way that cannot capture their true worth,¹⁹ and the source for this position can be unearthed in Radin's personal and fungible dichotomy.

¹³ Margaret J Radin, "Market Inalienability" (1987) *Harvard Law Review*, 100(8): 1849-1937.

¹⁴ Margaret J Radin, "Property for Personhood: an intuitive view", (1982) 34 *Stanford Law Review* 957.

¹⁵ Margaret J Radin, "Property for Personhood: an intuitive view", (1982) 34 *Stanford Law Review* 957.

¹⁶ Margaret J Radin, "Persons and Property" (1982) *Stanford Law Review*, 34: 959.

¹⁷ Margaret J Radin, "Persons and Property" (1982) *Stanford Law Review*, 34: 959

¹⁸ Alan Wertheimer, "Two Questions About Surrogacy and Exploitation" (1992) *Philosophy & Public Affairs*, 21(3): 211-239 at 218.

¹⁹ Fourcade and Kieran Healy, "Moral Views of Market Society" (2007) *Annual Review of Sociology* 33: 14.1-14.27 at 14.8

These theories inspired the work in that every human being has the inherent right to dignity. Their bodies are not to be treated as property. Thus in using a surrogate mother as a commodity, as a mere object to house a growing foetus, would be a gross violation of that right.

1.8 Research Methodology

Secondary methods of data collection will be used to carry out this research. For instance: desktop research and library sources will be employed.

Internet websites will also be employed in this research as well as journal and surrogacy legislation in Kenya, South Africa and England.

1.9 Chapter Breakdown

Chapter one will focus on the introduction and background of research and why the research is necessary. The various methodology that is going to be employed to undertake the research as well as the theories that inspired the work.

Chapter two will deal with the place of surrogate mothers in the law. It will capture the concept of surrogacy, the parties involved and how the surrogate mother should be treated in law in a bid to conceptualize surrogacy.

Chapter three will look into the current situation in Kenya. It will discuss the law, or lack of, with regards to surrogacy and the steps and measures Kenya has taken to protect the surrogate mother from being exploited.

Chapter four will offer a comparative study in an effort to derive the best practices for Kenya. The jurisdictions that will be discussed are Britain and South Africa as they seem to have legislation that touches on Surrogacy.

Chapter five will be the concluding chapter where recommendations and suggestions will be put forth for Kenya to adopt in a bid to make its own legislation regarding the surrogacy and most importantly, protection of surrogate mothers against exploitation.

CHAPTER TWO
PROBLEMATIZING 'SURROGACY': DEFINITION, CHALLENGES
AND OPPORTUNITIES

2.1. Introduction

As stated in the introductory chapter, surrogacy is an emerging area in law that has been neglected. Due to this, many legal loop holes may be found which may lead to abuse and manipulation of the same in favour of some stakeholders in the surrogacy agreement and sadly, to the disadvantage of others.

In this chapter, we shall attempt to problematize surrogacy. Different scholars argue that surrogacy is an area of law that needs to be dealt with in contract law²⁰ while others argue that it should be regulated by family law as contract law cannot make enforceable agreements concerning children's custody.²¹ This, I believe is the genesis of why there has not been advancement in this area of law. It is shocking to note that although the law has not developed, technology has greatly developed. With the advancement of technology, there should be an advancement of the law to accommodate for new and innovative areas that were previously not contemplated.

To better understand this,²² we need to look at the development of surrogacy, how surrogacy works and the parties involved in a surrogacy agreement. In so doing, we may get an indication of how the law can be involved in this process and transaction.

²⁰ Epstein R, "Surrogacy: The Case for Full Contractual Enforcement," *Virginia Law Review* (1995) 2305

²¹ Andrews L, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood.' *Virginia Law Review* (1995) 2343

²² To better understand why there have not been great advancements towards creation of a legal framework for surrogacy.

2.2 What is Surrogacy?

Surrogacy is defined as Surrogacy is defined as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.²³

The surrogacy process occurs over a series of several steps. There are the legal steps as well as the actual retrieval embryo transfer process. The parties that are involved in the process are several and each of them play a critical role. The parties include: The Commissioning parents, the Surrogate mother (and father), the counsel for each side as regards the signing of the contract and in some countries, the adoption office for the legal transfer of the child from the surrogate mother to the biological parents. There are three main legal processes in surrogacy: the surrogacy contract, the pre-birth order, and, in some cases, adoption or other post-birth legal procedures.²⁴

Looking at the retrieval and insemination process, the first step in the process is creating and retrieving the egg. This typically involves the stimulation of the ovaries of the future child's mother (not the surrogate mother) using some type of fertility drug. In this way, the woman's ovaries produce a number of eggs, which a physician will then retrieve during a surgical procedure known as transvaginal ultrasound aspiration. The procedure is simple: the doctor removes the eggs from the ovary using a needle-like suction device. The eggs are then placed carefully into an incubator.²⁵

In the second step, the commissioning father is then supposed to produce a sperm sample himself, by ejaculating into a cup on the same day as the eggs are collected. If there is no sperm in his semen, or he's unable to ejaculate, it may be possible for your doctor to extract sperm from him. For that procedure, the doctor will use a fine needle to take the sperm either from

²³ Stephen M., *Principles of Family Law* Sweet & Maxwell (2003) 29

²⁴ <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/the-legal-process-in-surrogacy/> on 18 December 2017.

²⁵ <https://www.livestrong.com/article/34039-surrogate-mother-become-pregnant/> on 11 December 2017.

his epididymis, in a procedure known as percutaneous epididymal sperm aspiration (PESA), or testicle, in a procedure known as testicular sperm aspiration (TESA). This will usually be done under a local anaesthetic, so your partner won't feel any pain.²⁶

After these processes are completed and the sperms are successfully extracted, the extracted egg and sperms are fertilized in conditions favourable as though it occurs in the womb. The fertilized embryo is then artificially inseminated into the surrogate's womb.

2.3. Historical Development of the Surrogacy Agreement:

Infertility is the absence of pregnancy after one year of intercourse without contraceptive methods.²⁷ Medical scientists came up with a way in which willing and able mothers would be able to have children of their own even though they were unable to bear children.

Tracing back to the Biblical days, an ancient instance of traditional surrogacy is illustrated. Sarah, who was infertile, requested that her handmaiden, Hagar, carry her husband, Abraham's, child.²⁸ This was a traditional type of surrogacy.

In 1976, however, gestational surrogacy developed. The first in vitro fertilization (IVF) baby was born. Just five years later, the first baby from an egg donation was born.²⁹ Over the years, gestational surrogacy has developed around the world. The US saw over 859 gestational surrogacy cases during 2010, which was a 28 percent rise from the number of gestational cycles that were carried out in 2007. The total number of surrogacy cases in the US, during 2011, stood at 35,000. As of 2014, it was seen that gestational surrogacy number grew by 89 percent

²⁶<https://www.babycentre.co.uk/a4097/fertility-treatment-intracytoplasmic-sperm-injection-icsi#ixzz51DrtICE2> on 11 December 2017.

²⁷ Berek J, *Berek and Novak's Gynecology*. 14th ed. Philadelphia: Lippincott Williams and Wilkins, 2011, 946

²⁸ Genesis: 11:30 NIV

²⁹ <http://www.circlesurrogacy.com/blog/circle-surrogacy/history-surrogacy-surrogacy-evolved/> on 21 November 2017.

over a four-year period in the US. The general estimate is that 9 children are born through surrogacy each year, in every US state.³⁰

Britain alone saw its surrogate baby numbers rise by a whopping 255 percent in the 2008-2014 period. In fact, statistics from about 12 of the leading surrogacy clinics overseas showed that there was a 180 percent growth in the inflow of UK parents who were seeking surrogacy, between 2011 and 2014.³¹

The success rates of surrogacy have also grown. This is now evident as the number of surrogate children have widely grown. With more and more advancements in technology, this technique has been seen to be safer and thus more people are willing to take the risk.³²

The expansion of this market demands further study, oversight and regulation. Unfortunately, most of the necessary data is still unavailable.³³ Justice Ryan recently commented in the case of *Mason & Mason*³⁴, that this unregulated market creates a 'troubling' environment for vulnerable women who have little bargaining power.

2.3 Forms of Surrogacy

Surrogacy may take two different forms: traditional surrogacy and altruistic surrogacy. Traditional surrogacy involves a woman (surrogate) who provides her own ova or egg. This egg is then fertilized with the sperm of the intended father or by using a sperm donor.³⁵

³⁰ <http://www.mymedholiday.com/article-info/50/639/surrogacy-statistics-numbers-success-rates-worldwide> on 1st December 2017.

³¹ <http://www.mymedholiday.com/article-info/50/639/surrogacy-statistics-numbers-success-rates-worldwide> on 1st December 2017.

³² Thiankolu M, 'Towards a Legal Framework on Assisted Human Reproduction in Kenya; Some Thoughts on the Law, Technology and Social Change' *UON Law Journal* (2007) 21

³³ Magdalena Gugucheva, 'Surrogacy in America' *Council for Responsible Genetics* (2010)

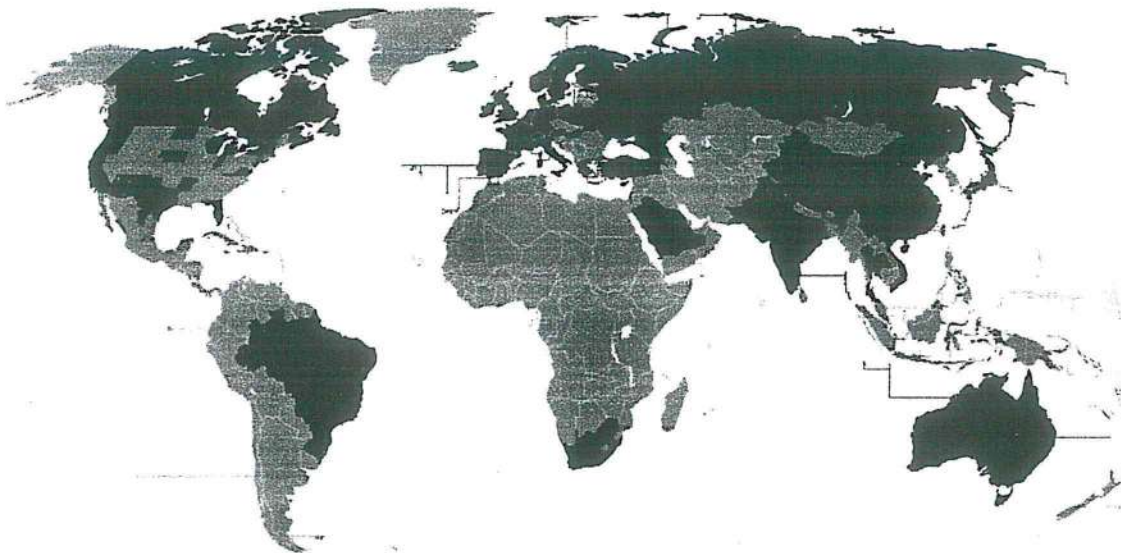
³⁴ *Mason & Mason And Anor* [2013] FamCA 424

³⁵ <https://www.indianaadoptionlawyer.com/Assisted-Reproductive-Technology/Traditional-Vs-Gestational-Surrogacy.shtml> on 1st December 2017.

Altruistic surrogacy on the other hand is where the surrogate mother is not the commissioning mother and carries a baby for her. Moreover, the surrogate mother in this case is not compensated. This is an important in the context of surrogacy in Australia, and invariably most countries, because it is the bedrock upon which our surrogacy laws are based on.³⁶

Commercial surrogacy in contrast is surrogate receives financial reward for her pregnancy.³⁷ This mode of surrogacy is prohibited in many jurisdictions. This is because commercial surrogacy can lead to commodification of human life leading to human trafficking.³⁸

2.4 Surrogacy Practices in Different Parts of the World:



³⁶ <https://www.surrogacynsw.com.au/20162428/altruistic-surrogacy-labour-of-love/> on 1st December 2017

³⁷ Teuta Vodo 'Altruistic Surrogacy Why to oppose empathetic gestures?' *European Christian Political Movement* (2016) 2

³⁸ Yanchuan Liu, 'The Commodification of Human Life: Human Trafficking in the Age of Globalization' *Macalester College* (2010) 3

KEY:

Legal regulation of surrogacy in the world:

- Both gainful and altruistic forms are legal
- No legal regulation
- Only altruistic is legal
- Allowed between relatives up to second degree of consanguinity
- Banned
- Unregulated/uncertain situation

Source: Comparative Gender History Study Group. Available on http://ch-gender.jp/wp/?page_id=9137

In Britain, surrogacy is legal only if it is done for altruistic reasons – for example, as a favour to a friend or relative – and the only acceptable payment is “reasonable expenses”. This means most prospective parents turn to foreign markets to pay for someone who will carry out the pregnancy.³⁹

In Australia, altruistic surrogacy is the only type of surrogacy that may be carried out legally. Advertising for surrogates not legal.⁴⁰ All donors must be identified. Ethics committee approval often required before a surrogacy procedure is carried out.⁴¹ Foreigners cannot access surrogacy in Australia.

In India, surrogacy agreements are only available for Indian residents. This is however what is practiced. Majority of the surrogacy agreement in India are not from Indians as stipulated in the Act. According to Maya,⁴² assisted procreation services and IVF centres have developed

³⁹ <http://www.independent.co.uk/news/uk/home-news/revealed-surrogate-births-hit-record-high-as-couples-flock-abroad-9162834.html> on 12th December 2017.

⁴⁰ Section 10, *Surrogacy Act*, 2010 (Australia).

⁴¹ Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements House of Representatives Standing Committee on Social Policy and Legal Affairs

⁴² <http://www.sussex.ac.uk/profiles/2755> on 12 December 2017.

rapidly in the private sector to provide services at high costs and are frequented by the Indian upper middle class and affluent foreigners, the bulk of whom are Non-Resident Indians.⁴³

Looking at African countries as seen on the map above most of them are uncertain or have no regulation in place to specifically deal with surrogacy. In a country such as Nigeria, Gestational surrogacy is currently practiced in Nigeria by a few IVF clinics. The guidelines are as approved by the practice guidelines of the Association of Fertility and Reproductive Health (AFRH) of Nigeria. The ART regulation that is currently being considered by the Senate permits surrogacy and allows some inducement to be paid for transport and other expenses.⁴⁴

In South Africa, The South African Children's Act⁴⁵ has made surrogacy agreements legal, provided that the conditions set out in the Act are met. The provisions are found in Chapter 19 of the Act. An in depth of this analysis is provided in the next chapter.

2.4 Conclusion

Indeed, surrogacy is not a new phenomenon. It has been around for quite a long time but the law has been quite silent in putting forward legislation to address and regulate the matter. As a consequence of this, different countries have come up with different measures and rules leading to un-uniform regulation around the globe. This can present a big challenge as in the event international standards are to be set, countries may find it difficult to abolish their old laws and comply with the new international standards and regulations.

⁴³ Maya Unnithan, 'Thinking through Surrogacy Legislation in India: Reflections on Relational Consent and the Rights of Infertile Women', *Journal of Legal Anthropology* (2013) 5

⁴⁴ Abiola Adewusi, Chizara Okeke, Kemi Ailoje and Oladapo A. Ashiru, The 6th Conference of GIERAF Cote D'ivoire, February 7-10, 2017.

⁴⁵ Act 38 of 2005 fully in force from 1 April 2010

CHAPTER THREE
SURROGACY IN THE LAW: THE CASE OF KENYA

3.0 Introduction

As earlier stated, Kenya lacks legislation aimed to protect surrogate mothers. Nevertheless, there are some attempts to formulate laws that seek to fill in the lacuna in the current law.

This chapter will critically analyse the relevant laws in Kenya in respect of surrogacy. These include: the Constitution of Kenya 2010, the Bills and proposed legislation in Kenya and lastly, traditional practices in Kenya as they form part of the laws in Kenya to the extent that they are not inconsistent with the Constitution of Kenya.⁴⁶ The legislations that will be dealt with include the Reproductive Health Care Bill of 2014, The In-Vitro Fertilization Bill of 2014 and will conclude by finally taking a look into some of the cases that have been decided with regards to surrogacy and in particular, surrogate mothers and their rights.

3.1 The Constitution of Kenya, 2010

In the preamble, it states that the Constitution is committed to nurturing and protecting the well-being of the individual, the family, communities and the nation.⁴⁷ This means that the rights and freedom of each Kenyan which are inherent in nature are safeguarded and secured by the constitution.

Chapter Four of the Constitution comprises of the Bill of Rights, and as one of the General Provisions of the Bill, it states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote

⁴⁶ Article 2, *Constitution of Kenya, 2010*

⁴⁷ Preamble, *Constitution of Kenya, 2010*

social justice and the realisation of the potential of all human beings.⁴⁸ This is the main basis of protecting and safeguarding human rights; the preservation of one's dignity.

Article 20 (2) (a) and (b) of the 2010 Constitution provide that in applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. To this extent the law has failed to provide further legislation for the protection of the exploitation of surrogate mothers in Kenya.

Furthermore, article 27 discusses equality and freedom from discrimination and states that: every person is equal before the law and has the right to equal protection and equal benefit of the law and that equality includes full enjoyment of all rights and fundamental freedoms.⁴⁹ This should mean that no person should be exploited or treated in a manner that they are not benefitting equally from the law.

One of the economic and social rights recognized in the Bill of Rights is that every person has the right to the highest attainable standard of health., which includes the right to healthcare services, including reproductive health care.⁵⁰ Reproductive healthcare is essential to both the mother and child for their proper health and wellbeing and thus should be protected by every means possible.

3.2 Reproductive Health Care Bill, 2014:

This Bill was proposed by Judith Atieno Sijeny, a Nominated Senator in Senate back in 2014.

It was received by The National Council of Reporting on the 20th of May 2014.

⁴⁸ Article 19, *Constitution of Kenya, 2010*

⁴⁹ Article 27, *Constitution of Kenya, 2010*

⁵⁰ Article 43, *Constitution of Kenya, 2010*

The aim of this Bill was to: provide for the recognition of reproductive rights; to set the standards of reproductive health; provide for the right to make decisions regarding reproduction free from discrimination, coercion and violence; and for connected purposes.⁵¹

Section 2, as in most Kenyan Acts, is the interpretation of the Act. It gives definitions of key words and terminologies that will be used throughout the Bill. Of paramount importance to this paper include: "informed consent" which means consent obtained freely, without threats or improper inducement, after appropriate disclosure to the patient of adequate and understandable information in a form and language understood by the patient, "informed choice" which means a voluntary decision by a patient to use or not to use a contraceptive method or to accept a sexual and reproductive health service, after receiving adequate information regarding the options, risks, advantages and disadvantages of all the available methods, "reproductive health" which means a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes; "reproductive rights" which includes the right of all individuals to attain the highest standard of sexual and reproductive health and to make informed decisions regarding their reproductive lives free from discrimination, coercion or violence; and finally "right to safe motherhood" which means the right to access information and quality service by women throughout pregnancy and childbirth with the desired outcome of a live and healthy mother and baby.

The manner in which the above phrases have been interpreted will go a long way in answering whether or not the proposed legislation looks into the plight of the surrogate mothers in Kenya. For instance, according to the interpretation, in order for a patient to make an informed choice,⁵² they must have received adequate information regarding the options, risks, advantages and

⁵¹ Objective, *Reproductive Health Care Bill*, 2014

⁵² Section 5, *Reproductive Health Care Bill*, 2014

disadvantages of all the available methods,⁵³ give their consent⁵⁴ as well as obtain consent from their respective partner.⁵⁵ This simply means that in order for a woman to be eligible to become a surrogate, prior steps should have been taken to ensure that she is fully aware of what she is about to do and the implications of such an activity not only on her as a person but the legal implications as well. It is with such detail as provided in the example above that one can ascertain whether or not rights of the surrogate mother have been duly catered for.

Furthermore, Part III of this Bill is solely dedicated to Gestational Surrogacy. In this section, the term partner is defined,⁵⁶ and their consent is needed prior to the signing of the surrogacy agreement.⁵⁷ This surrogacy agreement for it to be valid, as per the Bill, it has to be written and is signed by all the parties thereto,⁵⁸ should be entered into in Kenya⁵⁹ and the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in Kenya.⁶⁰ The requirements of a surrogacy agreement as contemplated in Section 11 verbatim are as follows:

A party may enter into a surrogate parenthood agreement only if-

(a) The commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible;

(b) The commissioning parent, or parents-

(i) Are in terms of this Act competent to enter into the agreement;

⁵³ Section 2, *Reproductive Health Care Bill, 2014*

⁵⁴ Section 5, *Reproductive Health Care Bill, 2014*

⁵⁵ Section 9, *Reproductive Health Care Bill, 2014*

⁵⁶ Section 6, *Reproductive Health Care Bill, 2014*

⁵⁷ Section 9, *Reproductive Health Care Bill, 2014*

⁵⁸ Section 8 (a), *Reproductive Health Care Bill, 2014*

⁵⁹ Section 8 (b), *Reproductive Health Care Bill, 2014*

⁶⁰ Section 8 (c), *Reproductive Health Care Bill, 2014*

(ii) Are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and

(iii) Understand and accept the legal consequences of the agreement and this Act and their rights and obligations thereof:

(c) The surrogate mother-

(i) Is in terms of this Act competent to enter into the agreement;

(ii) Is in all respects a suitable person to act as a surrogate mother;

(iii) Understands and accepts the legal consequences of the agreement and this Act and her rights and obligations thereof;

(iv) Is not using gestational surrogacy as a source of income;

(v) Has a documented history of at least one pregnancy and viable delivery; and

(vi) has a living child of her own;

d) The agreement includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child's position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child; and

(e) In general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed⁶¹

The above provision is very important as it first and foremost starts with expressly stating that a surrogate parenthood agreement can be entered into only if the commissioning parents are

⁶¹ Section 11, *Reproductive Health Care Bill*, 2014

not able to give birth due to a condition that is permanent or irreversible. This means in other words that if the commissioning parents are able to give birth to their own children but enter into a surrogacy agreement, that agreement would be rendered void. This goes a long way in protecting the surrogate mother in that she does not have to necessarily “bear the burden” of pregnancy and child birth.

The provision goes on to state that the commissioning parents as well as the surrogate should be competent parties as per the Bill and understand the implications of entering into such an agreement. Their consent and right to information as seen previously are very crucial in determining the legitimacy of the agreement.

Section 14 of the Bill contemplates that that payments in respect of surrogacy are prohibited. Compensation expenses, loss of earnings as well as insurance cover⁶² are the only expenses that should be allowed. Other expenses or money given would render the agreement not enforceable.⁶³

3.3 In-Vitro Fertilization Bill, 2014:

The In-Vitro Fertilization Bill (IVF Bill) is also another attempt by Kenyan legislators. The aim of this proposed act of Parliament was to for the regulate In-vitro fertilization, to prohibit certain practices in connection with in-vitro fertilization, to establish an in-vitro fertilization Authority; to make provision in relation to children born of in-vitro fertilization process and for connected purposes.⁶⁴

⁶² Section 14, *Reproductive Health Care Bill*, 2014

⁶³ Section 11, *Reproductive Health Care Bill*, 2014

⁶⁴ Aim, *In-Vitro Fertilization Bill*, 2014

Section 2 of the IVF Bill gives an interpretation for the Bill. In this section a surrogate mother has been defined as a woman who has agreed to carry a pregnancy to term another woman under a surrogacy agreement and lays no legal claim to the born child.⁶⁵ Section 28 of the Bill however expressly states that the term “mother” as used in the Bill shall not include a woman carrying a child under a surrogate motherhood agreement. This provision tries to give a clear differentiation between a mother as in seen in the eyes of the law and a surrogate mother. This may be interpreted in two different ways; first, it may seem that surrogate mothers are not regarded as mothers but a mere womb for hire, thus should not be afforded the rights that a mother would have otherwise gotten. On the other hand, the definition of mother as contemplated in the Bill and the surrogate mother have different rights and as such should be treated as two distinct persons. The former is seen as to be unconstitutional as it degrades surrogate women as being mere objects. The latter however, would be more appropriate in protecting the rights of the surrogate mother, and thus would be more inclined to take that approach.

The IVF Bill also touches on the aspect of consent,⁶⁶ which was highlighted above. Section 32 states that a surrogate mother shall relinquish all her parental rights over the child unless the contrary intention is proven. The Bill later goes on to highlight that this should be done by granting of a court order to prove that the child is for the Commissioning Parents.⁶⁷ This section further elaborates that the surrogacy agreement should be signed before insemination. The commissioning parents should apply within one year of the birth of the child as well as be domiciled in Kenya. They should also be 18 years and above to be valid Commissioning Parents.

⁶⁵ Section 2, *In-Vitro Fertilization Bill, 2014*

⁶⁶ Section 19, *In-Vitro Fertilization Bill, 2014*

⁶⁷ Section 33, *In-Vitro Fertilization Bill, 2014*

In conclusion to this Bill, its main focus was on the authority as well as the board and their function. It mainly dealt with procedural matters and not the substantive matters that deal with surrogacy.

3.4 Traditional African Practices in Kenya

The above are not part of the Kenyan law as they are merely Bills and have not yet been passed as legislation in the Kenyan legal system. The constitution⁶⁸ vests power on the legislation arm of the government to make laws and is done so following specific procedures.⁶⁹

Kenya however recognizes African customary law as a source of law.⁷⁰ It views and allows the application of African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far it is applicable and is not repugnant to justice and morality or inconsistent with any written law. Surrogacy has been used by some Kenyan communities over the ages and have formed part of their traditions as well. Below are some of the examples:

In the Kamba community,⁷¹ it was a great taboo if a married woman could not bear children, especially sons. The Kamba culture required the woman to marry young women as their wives, with the sole aim of getting children on their behalf. The child bears the surname of the 'woman-husband'.⁷² This may be seen as a form of surrogacy as a barren woman would marry another wife so as to bear a child on her behalf. These customary practices were not written or promulgated in any way. They were just used within the Kamba community. This could be one of the reasons why the practice did not spread to other communities in Kenya.

⁶⁸ Article 30, *Constitution of Kenya*, 2010

⁶⁹ Part XIX, *12th Parliament Standing Orders*, 2013

⁷⁰ Section 3(2), *Judicature Act*, 1967

⁷¹ An Ethnic Group in Kenya forming part of the 43 Tribes of Kenya

⁷² <http://impacthubmedia.com/11343/infertility-pushes-ukambani-women-marry-fellow-women/> on 17th September 2017

3.5 Kenyan Case Law

Kenya has adjudicated on a few surrogacy matters despite the fact that the law concerning surrogacy in Kenya is still not well developed. The Kenyan landmark case for surrogacy in Kenya is the *JLN Case*⁷³ where Justice Majanja pointed out that there is no law in Kenya regulating surrogacy arrangements. It is because of lack of a legal regime that the parties found themselves in such a situation and bringing the case for determination.

In the case of *A.M.N & 2 others v Attorney General & 5 others*,⁷⁴ it was argued that there is need to harmonise the legal position regarding surrogacy arrangements between Kenya and the United Kingdom because while the latter has an elaborate legal framework to govern surrogacy arrangements, Kenya has none. Reference was thus made in that regard to the UK's Surrogacy Arrangements Act, 1985 and the Human Fertilisation and Embryology Act, 1990.

In Re the Matter of Baby T D L,⁷⁵ T was born out of a surrogacy arrangement between the applicants and the birth mother and her husband, Pastor R T. The child is biologically that of the applicants and the birth mother only carried the pregnancy, as the female applicant supplied the egg while the male applicant supplied the sperm. The child was handed over to the applicants immediately upon delivery. The birth notification was given in the name of the birth mother, and the adoption application was properly tailored. The issue was that the child was freed for adoption by the Kenya Children's Homes adoption society by their certificate of 24th April 2012. As such it meant that for two years the biological parents were not Baby T's legal parents as he was born on 25th November 2010 and free for adoption on 24th April 2012.

Kenya still has a very few decided cases on surrogacy. This may be due to a number of reasons some of which include that surrogate women do not know their rights and that they are

⁷³ *J L N & 2 others v Director of Children Services & 4 others* [2014] eKLR

⁷⁴ *A.M.N & 2 others v Attorney General & 5 others* [2015] eKLR

⁷⁵ *In Re the Matter of Baby T D L* [2014] eKLR

protected by law. As such, they do not know the proper channels to seek redress and protection. Another cause of dismal jurisprudence of surrogacy in Kenya may be due to the fact that it is still a relatively new concept that is said to be from "The West" and does not reflect positively on African traditions and beliefs.

3.5 Conclusion

Kenya still has a long way to go with regards to having a legal framework on surrogacy especially protection of surrogate mothers from being exploited. As seen above, the provisions in the Bill are quite vague and do not touch on surrogate mothers in particular. This leaves a vacuum whereby the rights and dignity of the surrogate mothers are not catered for.

CHAPTER FOUR

A COMPARATIVE STUDY OF SURROGACY LAW

4.1 Introduction

The previous chapter discussed the legal framework surrounding surrogacy in Kenya. This included the legislations well as bills that have been tabled in parliament with the intention of becoming law.

In this chapter, we shall compare surrogacy law in Kenya with the existing laws in South Africa and the United Kingdom. Specifically, we will compare the following: namely: role of the surrogate mother in the whole surrogacy process and in particular parties to the contract and enforceability of the contract in the event that there are violations of the rights of the surrogate mother.

4.2. Selection of South Africa and the United Kingdom as Points of Comparison

The countries that will be focused on in this analysis are: The United Kingdom and South Africa. The reason as to why we are analysing the United Kingdom is firstly, Kenya is a Commonwealth country as such derive its common laws from the United Kingdom.⁷⁶ This can be evidenced by some of our Kenyan laws are more or less carbon copies of the corresponding English laws with very little modification to fit the Kenyan context. For instance, The Climate Change Act⁷⁷ of Kenya is very similar to the United Kingdom's act that deals with the same issues with the Climate Change Act of 2008 in the United Kingdom.⁷⁸ In the same breath, a

⁷⁶ *Towards A Kenyan Legal and Ethical Framework On Surrogacy* Robai Ayieta Lumbasyo p52

⁷⁷ *Climate Change Act*, 2016 Laws of Kenya

⁷⁸ *Climate Change Act 2008* UK. Available at <https://www.legislation.gov.uk/ukpga/2008/27> on 10th January 2018

comparative study with the United Kingdom would be ideal so as to analyze in Kenya can borrow from a well-established nation.

South Africa also has an elaborate legal framework that specifically touches on surrogacy. This would be an ideal comparative study as being an African country in which we share African beliefs and cultures, analyzing their laws would be beneficial in a bid to help Kenya device its own rules as well.

4.3 Governing Legislation

As noted in the previous chapter, Kenya has the following legislation to govern surrogacy: The Constitution of Kenya, 2010, and Traditional African practices. The In Vitro Fertilization Bill and the Reproductive Health Care Act are yet to come into force as law in Kenya.

In the United Kingdom there are two pieces of legislation on Surrogacy, The Surrogacy Agreements Act of 1985, which makes it clear that surrogacy contracts are not enforceable and criminalizes certain activities that relate to commercial surrogacy. The Parental Order provisions in the Human Fertilization and Embryology Act of 2008 allows for the transfer of legal parenthood from the surrogate mother to the intended parents. Home office has also published guidelines on immigration and cross-border surrogacy.⁷⁹

Similarly, South Africa has a legislation that solely deals with surrogacy. This can be found in Chapter 19 of the Children's Act. South Africa has also instigated a court approval procedure for surrogacy agreements. As such it will act as a useful comparator to the current regime.⁸⁰ The High Court has also issued guidance on when surrogacy agreements will be validated.⁸¹ In

⁷⁹ Surrogacy: Addendum to the Replies to questionnaire on access to medically assisted procreation (MAP), on right to know about their origin for children born after MAP, Council of Europe.

⁸⁰ http://www.bionews.org.uk/page_111585.asp on 10th January 2018

⁸¹ <http://www.dejure.up.ac.za/index.php/volumes/47-volume-1-2014/recent-case-law/louw-a> on 10th January 2018

this guidance, the court was particularly concerned with the socio-economic context in which surrogacy operates. It will therefore be useful for the study to analyse the legal framework and court guidance in order to better assess how certain social justice issues may be countenanced by law.⁸²

4.4 Parties to the Surrogacy Contract

The parties to a surrogacy contract consists of those involved in the surrogacy process. Surrogacy in Kenya is still unregulated, but widely tolerated as a fertility treatment.⁸³ This leaves parties to the contract as well as the contract itself to the determination of those with a higher bargaining power. In practice, those with the upper hand in bargaining power are the commissioning parents leaving the surrogate mother at their mercy.

In South Africa, a surrogacy agreement is defined in the Children's Act (CA) as: An agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilized for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.⁸⁴

All surrogacy arrangements in South Africa must be the subject of a valid, written surrogate motherhood agreement, the provisions of which, together with the CA, regulate the surrogacy arrangement.⁸⁵ According to section 292 of the Southern African CA, the parties to a surrogacy agreement are implied and not stated expressly. The parties to a surrogacy agreement include:

⁸² Surrogacy: Addendum to the Replies to questionnaire on access to medically assisted procreation (MAP), on right to know about their origin for children born after MAP, Council of Europe.

⁸³ <http://www.sensible-surrogacy.com/surrogacy-in-kenya/> on 12 February 2018

⁸⁴ Section 1, *Children's Act* No. 38 of 2005 (South Africa)

⁸⁵ Section 292, *Children's Act* No. 38 of 2005 (South Africa)

the commissioning parents, or parent if they are single, the surrogate mother and the husband if any. The Act however does not limit the parties to the above but states that in order for there to be a valid agreement, it should be signed by all parties.⁸⁶

On the other hand, in, Section 1 of the Surrogacy Arrangements Act 1985, U.K. attempts to give a description of what the surrogacy agreement is and what it should contain. It states that:

(3) An arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.

(4) In determining whether an arrangement is made, regard may be had to the circumstances as a whole (and, in particular, where there is a promise or understanding that any payment will or may be made to the woman or for her benefit, in respect of the carrying of any child in pursuance of the arrangement, to that promise or understanding).

(5) An arrangement may be regarded as made with such a view though subject to conditions relating to the handing over of any child.

(9) This Act applies to arrangements whether or not they are lawful and whether or not they are enforceable by or against any of the persons making them.

In the above section, the parties to the contract may be construed as follows: the surrogate woman and intended commissioning parents.

⁸⁶ Section 292 (1) (a), *Children's Act* No. 38 of 2005 (South Africa)

4.5 Enforceability of the Contract

Since surrogacy in Kenya is highly unregulated, enforceability of the contract may be difficult. However, since a surrogacy contract is still a contract on its own, it may be argued that the law of contract as well as Tort Law would apply.

In South Africa, if there is breach of the said contract, the aggrieved party may proceed to the Law Commission. The Law Commission and the legislature endorse the application of the *pacta servanda sunt* principle.⁸⁷ Due to the nature of surrogacy, the only performance that will truly satisfy the aggrieved party in the case of breach is specific performance. No court will order damages, beyond actual expenses incurred, be paid to the commissioning parents by the surrogate mother, the result being that where a dispute arises there will never be justice for both parties.⁸⁸

Anne Louw,⁸⁹ a Senior Lecturer, Department of Private Law in the University of Pretoria is of the opinion that compelling specific performance could possibly be unconstitutional as such an order might unduly impact the surrogate mother's rights to dignity, privacy and reproductive autonomy.⁹⁰ The extremely personal nature of the surrogate motherhood agreement has also been identified as a reason why specific performance would not be an appropriate order in the instance of breach.⁹¹

As stated in the beginning of the chapter, surrogacy contracts in the UK are not enforceable. This means that in the event of a dispute between the parties, they cannot seek redress in a court of law as the court will not recognize the said contract.

⁸⁷ Clark 1993 *SALJ* 773

⁸⁸ Meyerson, D 1994, '*Surrogacy agreements*' *Acta juridica*, vol 1994, p. 121-145.

⁸⁹ Surrogacy in South Africa: Should we reconsider the current approach? Anne Louw BA BJur LLB LLD Senior Lecturer, Department of Private Law, University of Pretoria

⁹⁰ Article 10, 14, 12(2), *Constitution of South Africa* (1994).

⁹¹ Lupton 1986 *J Juridical Science* 155, Clark 1993 *SALJ* 778, 214 1991 *TSAR* 229.

4.6 Conclusion

Having looked at the laws that govern other jurisdictions, namely UK and South Africa, it is quite evident that Kenya still has a lot to do in order to catch up with the law surrounding surrogacy. That notwithstanding, the laws do not fully address the issue of protection of the surrogate mother against her exploitation.

Firstly, the UK law does not contemplate enforcement of surrogacy contracts. The contract is the bedrock of all rights and obligations of any given agreement. The contract is document that gives the parties to an agreement the power to act and perform the terms of a contract. In the case of a breach of the said contract, parties can reach out to the courts for legal redress. In the case of surrogacy contracts in the UK, one cannot seek the courts indulgence even though a right has been violated in the surrogacy agreement. South Africa on the other hand has put in place measures in the event that there is a breach, discussed above. This breach however is only limited to specific performance and not to the rights of the surrogate mother. Thus, enforceability of the contract in South Africa does not guarantee that the rights of the surrogate mother are well catered for.

CHAPTER FIVE CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The research findings of this study have led to an overarching conclusion that surrogate mothers are not being protected by law from being exploited of their reproductive organs, in Kenya, the UK and South Africa.

At the onset, this research sought to analyse the current law in Kenya and to what extent the law is doing to protect the surrogate mother. Having looked at the laws in Kenya, it was clear that Kenya did not have a proper legal framework on surrogacy in general and ultimately no protection of the surrogate mother specifically in the law. It is key to note that the Kenyan Constitution, which is the supreme law of the land, provides for the highest attainable standard of health, which includes the right to healthcare services, including reproductive health care.⁹² Furthermore, the rights of every individual, including right to dignity, is catered for in the Bill of Rights and as such should be upheld.

5.2 Conclusion

This research paper is premised on three research questions namely: To what extent are the current laws concerning surrogacy in Kenya doing protect surrogate mother? Secondly, what laws have other jurisdictions put in place in order to curb the exploitation of the reproductive organs of surrogate women? And lastly, what are the ideologies Kenya can borrow and take up and make up national legislation to that effect?

⁹² Article 43, *Constitution of Kenya*, 2010

Chapter Two of this study is focused on problematizing surrogacy. It dealt with the technicalities of the surrogacy process. This include: how surrogacy works, its development, parties to a surrogacy agreement and how different countries deal with surrogacy matters.

Chapter Three focused on the legal framework of surrogacy in Kenya. It looked at the current law governing surrogacy in Kenya and the proposed bills that have been put forth in the hopes of becoming legislation on Kenya. From this chapter, we can conclude that Kenya's law on surrogacy is still wanting and has a long way to go to actualize proper surrogacy rules as well as rules on the protection of the exploitation of surrogate mothers.

Chapter Four is a comparative study that seeks to address one of the research questions, specifically, what laws have other jurisdictions put in place in order to curb the exploitation of the reproductive organs of surrogate women. Two jurisdictions were chosen for this study and they were: the k and South Africa. Having looked at these two countries that boast to have well-developed surrogacy laws, it is shocking to find out that their surrogacy laws do not adequately cater for the protection of the surrogate mother from exploitation.

5.3 Recommendations

From the findings of the research, it is clear that more needs to be done in order to ensure that surrogate mothers in Kenya are not exploited merely because of their reproductive organs.

This paper proposes the following recommendations so as to ensure protection of surrogate mothers:

- Enactment of the proposed bills namely, The In Vitro Fertilization Bill and The Reproductive Healthcare Bill.

- In accordance to Article 20 of the constitution of Kenya, Parliament should endeavour to develop the law to the extent that it does not give effect to a right or fundamental freedom; in this case, the right to human dignity, and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
- Create an office, specifically in the Ministry of Health that would look into the drafting, regulation and enforcement of surrogacy agreement so as to ensure that the contract is fair for all those that are party to it.

BIBLIOGRAPHY

Statutes

United Kingdom

Human Fertilization and Embryology Act, 2008

Surrogacy Agreements Act, 1895

South Africa

Children Act, 38 of 2005

Constitution of South Africa, 1994

Australia

Surrogacy Act, 2010

Kenya

Constitution of Kenya, 2010

In Vitro Fertilization Bill, 2014

Judicature Act, 1967

Reproductive Health Care Bill, 2014

List of Cases

A.M.N & 2 others v Attorney General & 5 others [2015] eKLR

In Re Baby M, 537 A.2d 1227, 109 N.J. 396 (1988)

In Re the Matter of Baby T D L [2014] eKLR

J L N & 2 others v Director of Children Services & 4 others [2014] eKLR

Mason & Mason And Anor [2013] FamCA 424

Text-books

Berek J, *Berek and Novak's Gynecology*. 14th ed. Philadelphia: Lippincott Williams and Wilkins, 2011

Stephen M., *Principles of Family Law* Sweet & Maxwell, 2003

Journal Articles

Alan Wertheimer, "Two Questions About Surrogacy and Exploitation" *Philosophy & Public Affairs*, 1992

Andrews L, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood.' *Virginia Law Review*, 1995

Epstein R, "Surrogacy: The Case for Full Contractual Enforcement," *Virginia Law Review*, 1995

Fourcade and Kieran Healy, "Moral Views of Market Society" *Annual Review of Sociology*, 2007.

Magdalena Gugucheva, 'Surrogacy in America' *Council for Responsible Genetics*, 2010

Margaret J Radin, "Market Inalienability" *Harvard Law Review*, 1987

Margaret J Radin, "Persons and Property" *Stanford Law Review*, 1982

Margaret J Radin, "Property for Personhood: an intuitive view", *Stanford Law Review*, 1982

Maya Unnithan, 'Thinking through Surrogacy Legislation in India: Reflections on Relational Consent and the Rights of Infertile Women', *Journal of Legal Anthropology*, 2013.

Meyerson, D , 'Surrogacy agreements' *Acta juridica*, 1994

Patrick Winn, Underworld: Upending an Asian Baby Farm, GLOBALPOST
<http://mobile.globalpost.com/dispatch/news/regions/asia-pacific/thailand/110310/thailand-surrogacyhumantrafficking> on 4th February 2017

Stoll J, 'Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context', *Uppsala University*, 2013

Susan Meld Shell Kant's Concept of Human Dignity as a Resource for Bioethics. In Adam Schulman (ed.), *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics*, 2008.

Teuta Vodo 'Altruistic Surrogacy Why to oppose empathetic gestures?' *European Christian Political Movement*, 2016

Thiankolu M, 'Towards a Legal Framework on Assisted Human Reproduction in Kenya; Some Thoughts on the Law, Technology and Social Change' *UON Law Journal*, 2007

Yanchuan Liu, 'The Commodification of Human Life: Human Trafficking in the Age of Globalization' *Macalester College*, 2010

Bible Verse

Genesis: 11:30 NIV

Unpublished Theses

Anne S Louw, Surrogate motherhood agreements, condonation of non-compliance with confirmation requirements and the best interests of the child. *University of Pretoria*
<http://www.dejure.up.ac.za/index.php/volumes/47-volume-1-2014/recent-case-law/louw-a> on
10th January 2018.

Robai Ayieta Lumbasyo *Towards A Kenyan Legal and Ethical Framework On Surrogacy*

Conference Papers

Abiola Adewusi, Chizara Okeke, Kemi Ailoje and Oladapo A. Ashiru, The 6th Conference of GIERAF Cote Dé Ivoire, February 7-10, 2017.

Newspaper Articles

Arthur Okemba, A Kenyan surrogate mother speaks: I rented out my womb for \$8,000
<http://www.africareview.com/special-reports/Surrogacy-in-Kenya-gains-pace/979182-1322482-rvpsjyz/index.html> on 10th March 2017

Emily Dugan, Revealed: Surrogate births hit record high as couples flock abroad.
<http://www.independent.co.uk/news/uk/home-news/revealed-surrogate-births-hit-record-high-as-couples-flock-abroad-9162834.html> on 12th December 2017.

Websites

Antony Blackburn-Starza, South African court sets out guidelines for surrogacy arrangements.

http://www.bionews.org.uk/page_111585.asp on 10th January 2018.

Fertility treatment intracytoplasmic sperm injection (ICSI)

<https://www.babycentre.co.uk/a4097/fertility-treatment-intracytoplasmic-sperm-injection-icsi#ixzz51DrtICE2> on 11th December 2017.

<http://nairobiivf.com/#> on 1st December 2017.

<http://people.uwplatt.edu/~hood/inalienable.html> on 28th January 2017

<http://www.sussex.ac.uk/profiles/2755> on 12 December 2017.

<https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/the-legal-process-in-surrogacy/> on 18th December 2017.

Kristin Marsoli, The History of Surrogacy: How Surrogacy Has Evolved

<http://www.circlesurrogacy.com/blog/circle-surrogacy/history-surrogacy-surrogacy-evolved/> on 21st November 2017.

Lilian Kaivilu, Meet a community where traditional surrogacy is celebrated.

<http://impacthubmedia.com/11343/infertility-pushes-ukambani-women-marry-fellow-women/> on 17th September 2017.

Sarah Jackson, How Does a Surrogate Mother Become Pregnant?

<https://www.livestrong.com/article/34039-surrogate-mother-become-pregnant/> on 11th December 2017.

Surrogacy in Kenya Following the Footsteps of European Parliaments.
<http://www.sensible-surrogacy.com/surrogacy-in-kenya/> on 12th February 2018.

Surrogacy Statistics: Numbers and Success Rates Worldwide,
<http://www.mymedholiday.com/article-info/50/639/surrogacy-statistics-numbers-success-rates-worldwide> on 1st December 2017.

The Law And Surrogacy, <https://www.indianaadoptionlawyer.com/Assisted-Reproductive-Technology/Traditional-Vs-Gestational-Surrogacy.shtml> on 1st December 2017.

The Meaning Of Altruistic Surrogacy, <https://www.surrogacynsw.com.au/20162428/altruistic-surrogacy-labour-of-love/> on 1st December 2017