

**THE DETERMINATION OF LEGAL PARENTHOOD
FOLLOWING SURROGACY ARRANGEMENTS IN KENYA.**

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DECLARATION.

I, LINDA WANJIKU WATHIKA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been 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.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

[Supervisor's Name]

LIST OF ABBREVIATIONS.

ART	Artificial Reproductive Technology
HFEA	Human Fertilization and Embryology Act
IVF	In Vitro Fertilization

LIST OF CASES.

JLN and 2 others v Director of Children's Services and MP Shah Hospital

In the Matter of Baby M

Johnson v Calvert

CHAPTER 1: INTRODUCTION.

BACKGROUND.

Surrogacy can be defined as the practice where a woman carries a child for another person and the person's partner and is usually as a result of an agreement drafted prior to the conception of the child who should be handed over to them after birth. There are two types of surrogacy, traditional surrogacy and gestational surrogacy that are outlined. For traditional surrogacy, the surrogate mother is the biological mother to the child she intends to carry for the intending parents whereas for gestational surrogacy the surrogate mother had no genetic relationship to the child she will carry for the intended parents.¹ This paper will focus its research on gestational surrogacy with a few references to traditional surrogacy need it be.

Surrogacy first entered the public eye in the mid-1980s through the *Baby M* case in the United Kingdom. In this case, a Mrs Mary Beth Whitehead, the surrogate mother had been inseminated with Mr. Stern's sperm. The surrogate mother upon birth was unwilling to give the baby to Mr Stern and his wife. Upon seeking the court's guidance, the court of New Jersey made void the surrogacy agreement as being contrary to public policy and Mr Stern and Mrs Whitehead were awarded equal claim to the child. The courts however, further had to determine which home was better suited for the child to which custody was awarded to Mr Stern.²

The treatment of surrogacy, however, differs from one state jurisdiction to the other. Seeing how the courts responded to the Baby M case in the United Kingdom basing it on claims related to the biological parenthood, a Californian court in the United States of America in the case of *Johnson v Calvert*, based its judgement on intentional parenthood. In this case, Mrs Johnson had the Calverts' embryo implanted in her who after gestation bore the child. The courts established that when determining parenthood and legal motherhood to be specific, the process of birth as well as genetic consanguinity where factors to be considered. Custody was therefore awarded to the commissioning parents, the Calverts.³

¹ <https://www.gov.uk/government/.../surrogacy> on 16th February 2016.

² Trimmings K, International Surrogacy Arrangement: An Urgent Need for Legal Regulation at the International Level, Volume 7, *Journal of Private International Law* (2011).

³ Gillers L S, 'A Labour Theory of Legal Parenthood', Volume 110, *the Yale Law Journal* (2001).

In the case *JLN and 2 others v Director of Children's Services and MP Shah Hospital*, where the petitioners were seeking orders to have the children under a surrogacy agreement between them released as well as have orders stopping the respondents from interfering with their legal arrangements. The children's court granted unlimited access of the surrogate mother but declared that the birth of the twins should be entered under the names of the genetic parents. Upon appeal the court held the director was right to insist that the children be registered under the surrogate mother but later held that the director did indeed violate the rights of the petitioners. This case is of paramount importance as Justice Majanja not only stated that he did not think that the director acted in the interest of the children as there was no dispute between the surrogate mother and the genetic parents but went further to urge the state to protect the children born into surrogacy arrangement as there lacks a legal framework.⁴

Article 45 (1) provides that the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.⁵ With the establishment of a family, the rights of children then come into play. Many a couples that cannot bear children are seen to opt for alternatives such as surrogacy. The Children's Act further provides that a mother is one who gives birth to a child and a question of what happens to the legal parents of a surrogate baby then arises. In article 53 (2) it is provided that the child's interests are of paramount importance in any matter concerning children.⁶ The Children's Act provides that a parent means the mother or father of a child including any person liable by the law to maintain a child and is entitled to his custody.⁷ The Act further provides that a child shall have the right to live with and be cared for by his parents.⁸

The definitions provided for by the Children's Act are seen to be vague as they do not clarify whether a surrogate mother is accommodated in the definition of a parent.

According to Jane Stoll, a surrogate born child has the right to have responsible parents at birth. She argues that the purpose of enacting legislation for the practice of surrogacy is to secure

⁴ Sunday Nation, *A Tale of Two Mothers, a Father and Surrogate Twins*, Benson Wambugu, July 6 2014.

⁵ Article 45(1), Constitution of Kenya (2010).

⁶ Article 53(2), Constitution of Kenya (2010).

⁷ Section 2, Children's Act (2007).

⁸ Section 2, Children's Act (2007).

parents for the child rather than to make provisions for a commissioning couple to acquire a child of their own through surrogacy.⁹

Freeman adds that even in the event that a child is able to trace their origin, they may experience confusion as to their identity. They may grow up wondering who their 'real' mother is. Surrogacy that is regulated domestically can however overcome this by ensuring the recording of information of all parties involved.¹⁰

While there are jurisdictions that are seen to regulate the practice of surrogacy, this is not the norm. There are certain jurisdictions that have no legislation that permits or prohibits this practice. Other jurisdictions on the other hand go ahead and even ban aspects of the practice or surrogacy in totality.¹¹

There are arguments for and against the practice of surrogacy that extend widely. There is the Harm to Children Argument. This argument is against the permitting of surrogacy on grounds that it can cause harm to the children. According to Donchin, the process infringes on one's right to trace their genetic origin especially where the arrangements are made in secrecy.¹²

Legal arguments are characterised by the problems that arise in connection with the legal parenthood of the child as well as the rights and responsibilities of the parents. This argument follows an assumption that the surrogate mother would want to keep the baby. Elly Teman however points out that there are studies that disclose that many surrogate mothers are satisfied with the surrogacy arrangement and its relinquishment rarely causes psychological problems.¹³

According to the United Kingdom jurisdiction, the surrogate mother is to be treated as the mother of the child born out of a surrogacy arrangement. This means that the commissioning couple involved should apply for parental order to the court and such order is only granted upon the satisfaction of certain conditions.¹⁴

⁹ Stoll J, 'Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context' Uppsala University, 1 November 2013.

¹⁰ Freeman M, *'Is surrogacy exploitative? Legal Issues in Human Reproduction,'* (1989) 164.

¹¹ Stoll J, 'Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context' Uppsala University, 1 November 2013.

¹² Donchin A, 'Reproductive tourism and the quest for global gender justice,' (2010).

¹³ Teman E, *Birthing a mother: the surrogate body and the pregnant self*, University of California Press, (2010).

¹⁴ <https://www.gov.uk/government/.../surrogacy> on 4th March 2016.

In the regulation of surrogacy arrangements, Bernard Dickens has outlined 3 models applicable to surrogate motherhood. He outlines them as the Static Model, the Private Ordering Model and the State Regulation Model. With the Static Model there's an understanding of the biological and social life that is hostile to surrogacy. This model is seen to respond with legal mechanisms that prohibit and frustrate surrogacy contracts. The private Ordering Model recognizes surrogacy contracts as well as accommodates the concept of commercialism. This however does not suggest that surrogacy contracts shall be unregulated, it simply provides that supervision shall be by other means or institutions other than through the law. In the State Regulation Model one of two forms may be taken. The punitive approach which proposes that aspects of surrogacy are seen to be prohibited and there might be the prescription of criminal penalties or civil sanctions. The Inducement approach on the other hand lays claim that the prohibition of surrogacy would only lead to the private arrangements that would be dysfunctional.¹⁵

Currently, the whispered debate on the legal issues that surround surrogacy are seen to be limited to aspects such as the protection of involved parties from exploitation, the need for national regulation and the issue of the enforceability of surrogacy agreements.¹⁶

STATEMENT OF THE PROBLEM.

Surrogacy being an issue of a sensitive nature that is a fast growing interest has not spared the rise of further legal issues related to the recognition of the rights of the people undertaking surrogacy.¹⁷ Despite the increasing cases of surrogacy as well as arguments for and against the practice, there is a gap in Kenya's laws. There is lack of a well-defined legal framework governing surrogacy in Kenya. This means that there is no legislation either prohibiting or permitting surrogacy arrangements.

JUSTIFICATION OF THE STUDY.

Echoing article 53(2) of the constitution that the interests of children are ones of paramount importance and taking into consideration that surrogacy is an emerging area of interest and there is a continued rising trend in families opting for surrogacy, it is important to address this

¹⁵ Morgan D, who to Be or Not to Be: The Surrogacy Story, Volume 49 *The Modern Law Review* (1986).

¹⁶ Isterevych T, 'International Surrogacy Arrangements: The Problem with Legal Parenthood' Unpublished LLM Thesis, Central European University, 20th November 2013.

¹⁷<http://humanrights.ie/international-law/international-human-rights/amram-on-maternity-leave-surrogacy-the-impact-of-eu-law/#more-18706> on 16th February 2016.

topic as the courts need principles to help them in adjudication of such matters to ensure that there is no delay in the protection of the rights of the children. It is also important to address it so as to ensure that the interests as well as the rights of both the surrogate mother and the genetic parents are not only outlined but also safeguarded.¹⁸

PURPOSE AND OBJECTIVES OF THE STUDY.

Research Purpose.

This paper therefore seeks to contextualize the current surrogacy practices in Kenya despite the lack of a legal framework governing surrogacy. The paper will also attempt to make recommendations based on an analysis of other jurisdictions' approach to the practice to help guide the formulation and development of a legal framework in Kenya. The focus will be on how parenthood following surrogacy is or can be determined and protected under the Kenyan law.

Research Objectives.

The following are the study objectives:

- i. To evaluate the current practices, guidelines and proposed laws on surrogacy in Kenya.
- ii. To evaluate existing country specific laws on surrogacy with a keen look at the jurisdiction of the United Kingdom and that of South Africa.
- iii. To formulate and propose recommendations aimed at contributing to the development of laws, regulations and professional guidelines with respect to surrogacy in Kenya.

RESEARCH QUESTION.

The following are the research questions looking to be answered:

- Are the current family laws in Kenya sufficient in governing both the surrogate-child as well as the parties to a surrogacy arrangement?
- How can parenthood, following surrogacy be determined?

DEFINITION OF KEY TERMS.

According to the Children's Act of South Africa, the following terms are defined hereafter:

Surrogate mother: A woman who enters into a surrogate agreement with a commissioning couple with a view of carrying and bearing a child who will then be handed over to the commissioning parents after birth for upbringing.

¹⁸ Article 53(2), Constitution of Kenya, (2010).

Commissioning parents: These are the people who enter into a surrogate agreement with a host or surrogate mother with the intention of bringing up the child upon the birth by the surrogate mother.

Surrogacy agreement: This is an agreement drawn between two parties, the commissioning parents and s surrogate mother where the surrogate mother consents to be artificially fertilized and bears a child for the commissioning parents.¹⁹

¹⁹ Section 1, Children's Act of South Africa, (2005).

CHAPTER 2: THEORETICAL FRAMEWORK AND METHODOLOGY.

This part of the paper will layout the theories that have been utilized in explaining the determination of parenthood with regards to surrogacy arrangements.

A theory addressing the issue of what constitutes legal parenthood must put consideration and be applicable to the different cases that would be presented by the practice of surrogacy. Parenthood must be awarded so as to respect all the parties to a surrogacy arrangement.

Initially, at common law, marriage was a key determining factor when it came to the discussion of legal parenthood. It is seen that previously a man was the legal owner of both the product of his wife as a person and her labour, her biological children. In the instance of an unmarried woman, she owned her labour thus had claim to her children. Since then, the theory of legal parenthood determination has moved away from a marital property theory and has been replaced with a not so clear theory that is mainly based on functional parenthood, biology and marital status.²⁰

There are however, various theories that shall be highlighted below that are seen to give guidance in the determination of parenthood in instances of surrogacy arrangements.

PRAGMATIC FEMINISM THEORY.

The Pragmatic Feminism Theory Approach proposed by Margaret Radin that suggests that it is important to realise that in approaching legal questions there will be advantages and disadvantages in each solution and thus a resolution to an issue should be pragmatic.²¹

Surrogacy is an issue that will have both advantages and disadvantages regardless of whatever will be done. There will be advantages and disadvantages of both the non-enforcement and specific performance of a contract drawn for a surrogacy arrangement. The pragmatic approach therefore suggests that all that can be done is carry out experimentations that will be best for women in such situations and watch how things work out as there are no ideal solutions that would cater for all women in all circumstances in all of time.²²

With regards to the enforcement of the surrogacy arrangements, if an agreement is enforced, it would assume an increase in the concept of commodification of a woman's body. Aspects of

²⁰ Gillers L S, 'A Labour Theory of Legal Parenthood', Volume 110, *the Yale Law Journal* (2001).

²¹ Radin M J, 'The Pragmatist and the Feminist', Volume 63, *Southern California Law Review* (1990).

²² Becker M, 'Four Feminist Theoretical Approaches and the Double Bind of Surrogacy', Volume 69, *Chicago-Kent Law Review* (1993).

birthing a child such her relationship with the child are thus deemed as fungible and capable of being traded. Women who fall under the lower-earning income bracket opt to sign such agreements without being aware of the emotional and psychological impact it would have on them.²³

²³ Becker M, 'Four Feminist Theoretical Approaches and the Double Bind of Surrogacy', Volume 69, *Chicago-Kent Law Review* (1993).

LABOUR THEORIES.

In filling the gap in literature there are also various theories of legal parenthood that have been proposed. These theories are seen to be sub-theories of the Labour Theory.

It has been argued that theories of legal parenthood should accommodate all instances; a surrogate mother, a married couple or in the instance of an unwed father and further ensure that parenthood is awarded so as to respect all the parties' interests.

Genetic Model Theory.

The Genetic Model Theory suggests that individuals have parental rights to their genetic offspring. Custodial rights to marital children should be granted to husbands and wives as they are presumed to be their genetic offspring. This theory has two versions namely the property version and the "best interests of a child" version. The property version is rooted on one's property interest they would have in their genes. The best interests of a child version suggest that children are better off with their genetic parents. A proponent of the property version, Kermit Roosevelt argues that men and women have rights in their eggs and sperm hence property rights in the children that develop from their eggs and sperm. These rights are considered alienable and legal parenthood is therefore awarded to whomever held the property rights before gestation. This theory is however seen to be flawed as it overlooks the steps that occur between the production of the reproductive material and the childbirth. The version of the best interests of a child rests on empirical assumptions that the child is better off with their biological parents and thus not a well-reasoned theory in determining the parenthood of a surrogate-child.²⁴

Intent Model Theory.

The Intent Model Theory goes to award legal parenthood of a child to those who had intended to bring the child into the world. In surrogacy arrangements this award would be to the contracting parents. The core of this theory is the need to honour contractual agreements thus limiting it as a theory of legal parenthood. This theory is further limited as it does not govern all cases. Shultz, a proponent of the intent model theory states that this theory only applies to collaborative reproductive agreements with Hill, another proponent stating that the theory is only relevant in cases of intentional reproduction.²⁵

²⁴ Gillers L S, 'A Labour Theory of Legal Parenthood', Volume 110 *the Yale Law Journal* (2001).

²⁵ Gillers L S, 'A Labour Theory of Legal Parenthood', Volume 110 *the Yale Law Journal* (2001).

Baker's Property Model of Custody Allocation.

The current system of custody allocation awards custodial rights based on the “best interest” standard which frequently if not all times awards custody to he who is considered the primary caretaker. Under the Property Model Theory, Katherine Baker proposes a system of custody allocation that is based on one’s emotional investments in children. This theory however, has a primary focus on matters of custody. According to Baker, custody is reward for one’s investment in child bearing thus the custody of a new born child in a surrogate arrangement would be awarded to the gestating mother. This is because due to her physical connection to the child, she would hold a greater emotional connection. Decisions made with regards to the child would be awarded to the gestational mother as well. The commissioning parties according to Baker would have a reversionary interest in the child. This theory in its consideration provides that other parties would be allowed to invest in the child and in turn hold custodial interests in the child. The investment must however be made with the permission of the gestational mother.²⁶

There is the Property Model Theory that comes to complete the intent model theory. It not only presupposes the entitlement of legal parenthood but also posits a method of acquisition. Under this theory, parenthood is achieved through the acquisition of property like rights in the surrogate born child. This theory also respects contractual intentions in all the cases of legal parenthood. It is therefore said that the Property model Theory fills in the lacuna left by the intent based theory and a contract based theory of parenthood.²⁷

The Labour Theories approaches to legal parenthood have impacted the determination of parenthood following surrogacy arrangements all round hence their use is this paper. In as much as other theoretical frameworks may prove useful in this work, the Labour Theory approach is important as it provides the basis for parenthood determination across various jurisdictions.

²⁶ http://works.bepress.com/katharine_baker/14/ on 16th February 2016.

²⁷ Baker K, ‘Property Rules meet Feminist Needs; Respecting Autonomy by Valuing Connection’, Volume 59 *Ohio State Law Journal* (1998).

MORAL THEORIES.

Utilitarian Theory.

This theory that was proposed by one Jeremy Bentham suggests that an act of a person is termed good or bad based on the result or outcome of such action. In relation to the practice of surrogacy, a utilitarian would reason that surrogacy would yield a lot of happiness through various ways. The commissioning couple for example would have children with their own genetic material granting them fulfilment and psychological satisfaction. The surrogate mother would have a monetary gain due to the compensation paid to her. Lastly, the fertility centre where the process would be carried out would not only benefit monetarily but also through the experience they would have gained. The experience in this case would be beneficial as it would be a starting point in drawing up policies.²⁸

This theory is however very limited as it overlooks many aspects of the process of surrogacy. It further goes to imply that in instances of surrogacy, only material benefits amount to that which would be considered happiness. It overlooks the emotional, the psychological and physical outcomes that would come out of the process and thus making it a weak theory to form basis for the regulatory framework governing the practice of surrogacy.

Kantian Deontology.

The Kantian Deontology being a duty based theory suggests that people ought to do certain actions not because it brings them happiness but because they have an obligation or is their natural duty to perform such action. Immanuel Kant a proponent of this theory suggests that ‘a good will is good not because of what it accomplishes nor because of fitness to attain some proposed end, it is good only through its willing, meaning that it is good in itself.’²⁹ It goes further to propose that one should not be weary of the outcome of their actions but act in ways that are right in themselves irrespective of their consequences. It is the motive of one’s action that is the focus of this theory.³⁰ Human beings, though rational beings able of making rational decisions would still require some principles highlighted to enable them make such decisions. Kant categorized them in form of imperatives.

²⁸ Mill J S & Bentham, *Utilitarianism and other essays*, Alan Ryan London Penguin books, 1987.

²⁹ <http://wiredspace.wits.ac.za/bitstream/handle/10539/18501/TOWARDS%20A%20KENYAN%20LEGAL%20AND%20ETHICAL%20FRAMEWORK%20ON%20SURROGACY%20-%20778951.pdf?sequence=1> on 5th January 2017.

³⁰ Kant I and Sullivan, *The metaphysics of morals*, Cambridge University Press, 1996.

With regards to surrogacy, the categorical imperative “Act in a manner such that one’s action were to become a universal law of nature,” for example, would imply that laws and practices of surrogacy need to be set up in such a manner that benefits both the commissioning couple as well as the surrogate mother and that such practices be acceptable to all.³¹

Conclusion.

Having assessed the above theories, it is evident that each of the theories are relatively inadequate when it comes to answering the question of parenthood determination. This paper has shown that in each of the above, an aspect of the process of surrogacy; be it a physical, emotional, economic or even psychological aspect is seen to be disregarded. This makes the theories incapable of providing clear guidance in the determination of legal parenthood following surrogacy arrangements. This research paper however, leans towards the labour theories as it will illustrate a bias for awarding parenthood to the commissioning parents. Such an award is subject to certain conditions or requirements that vary from one jurisdiction to the other.

³¹ Robai A, ‘Towards A Kenyan Legal and Ethical Framework on Surrogacy’ Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

METHODOLOGY.

This study is a non-empirical legal research with no new data collected or analysed. It will therefore be dependent on secondary sources derived from literary works by various scholars. It will mainly be desk based through internet searches and library material. The study will also rely on tertiary sources such as written theses addressing the concept of surrogacy.

In an attempt to come to a conclusion, the study will also take a comparative analysis of two distinct jurisdictions that have established laws on the determination of legal parenthood through surrogacy arrangements. It will analyse how they have dealt with the issue of surrogacy regulation in relation to parenthood. This is in hope that such comparison could provide inspiration for Kenya.

CHAPTER 3: A COMPARATIVE STUDY.

INTRODUCTION.

In Kenya, there is currently a lack of guidelines, policies and laws that would regulate the practice of surrogacy. There has however been a bill that was drafted and presented to parliament but the bill suffers limitations as it fails to give an outline on the regulation of surrogacy. The practice of surrogacy in Kenya seeks guidance from the United Kingdom's Human Fertilization and Embryo Act of 1990 with supplementary material from the Surrogacy Arrangement Act of 1985 and the British Nationality Regulations of 2006. These statutes however, merely act as reference points and guidelines as they are not legally enforceable in the Kenyan courts.³²

This Chapter will therefore take a closer look and analyse the laws and policies that guide the United Kingdom in their regulation of surrogacy. The chapter will also entail an analysis of a second jurisdiction, the laws and policies on surrogacy in South Africa. South Africa was a viable pick due to the fact that Kenya's Bill of Rights is heavily borrowed from that of South Africa. The purpose of having a comparative analysis is to provide motivation and insight on developing a legal framework of surrogacy in Kenya.

REGULATORY FRAMEWORK ON SURROGACY IN THE UNITED KINGDOM.

The laws that govern and regulate the practice of surrogacy have many at times been described as "restrictive" due to the fact that the practice of surrogacy is permitted only to the extent that it is befitting to the model of law prescribed. The framework in the United Kingdom consists of the following instruments that define the model of regulation for surrogacy. There is the Human Fertilization and Embryology Act, Surrogacy Arrangement Act, the Adoption and Children Act and the British Nationality Act.³³

The Surrogacy Arrangement Act.

This statute was enacted in 1985 to deal with the regulation of surrogacy. It is short as it only comprises of five sections.

³² Isterevych T, 'International Surrogacy Arrangements: The Problem with Legal Parenthood' Unpublished LLM Thesis, Central European University, 20th November 2013.

³³ Trimmings K, International Surrogacy Arrangement: An Urgent Need for Legal Regulation at the International Level, Volume 7, *Journal of Private International Law* (2011).

Section 1 of the Act provides for the key definitions of terms. A surrogate mother for example has been defined as a woman who enters into an arrangement to carry such a child with the intention of handing the child over to another person(s) who shall then exercise parental rights over the child. The agreement to do so must be made before the woman begins to carry the child.

Section 2 makes provision for the criminalization of commercial surrogacy. Payment to third parties who have aided in the negotiations of any surrogacy arrangements is also prohibited.³⁴

Section 3 of the Act criminalizes advertisement and distribution of surrogacy arrangements adverts either in the media, on the internet or in the newspapers. The Human Fertilization and Embryology Act however, provides that adverts may be made and distributed only in the case of a non-profit making institution so long as it does not call for commercial surrogacy.³⁵

Section 4 looks at the penalties that would be prescribed upon contravention of the provisions of the Act.

Human Fertilization and Embryology Act.

The Human Fertilization and Embryology Act (HFEA) enacted in 1990 but thereafter amended in 2008, is the Key regulatory framework for assisted reproduction instances in the United Kingdom. It prohibited commercial surrogacy as well as makes provisions on who is to be treated as the parents of a child. It also provides for the registration of children born out a surrogacy arrangement.

Section 5 of the Act provides that a Human Fertilization and Embryology Authority be established. Such authority will be a body corporate in nature with the capacity to sue or be sued. The membership of such authority would comprise of a chairman, deputy chairman and other members who are deemed qualified at the discretion of applicable provisions and policies. The authority is mandated to carry out the following functions:

- a. The authority may issue licenses to fertility clinics across the United Kingdom. Licenses to carry out research work on related topics are also issued by the authority. It has the mandate to suspend or revoke any of the issued licenses. They set up licensing committees that award punishment to aggrieved parties.³⁶

³⁴ Section 2, Surrogacy Arrangement Act, (1985).

³⁵ Section 3, Surrogacy Arrangement Act, (1985).

³⁶ Section 5, Human Fertilization and Embryology Act, (2008).

- b. The authority also deals with the preparation of annual reports of undertaken activities, keeping accounts of the corporate and the formulation of a code of conduct for its members.³⁷
- c. It also reviews information that is stipulated by the Act and provides the public with information if the need arises.³⁸

Section 54 (1) provides that the court may order a child to be treated by law as the child of the commissioning couple upon application. This is in so far as;

- The child has been borne by the surrogate after an artificial insemination,
- There is a genetic link of one of the commissioning party to the child and that
- The conditions provided under subsection 2 to subsection 8 are met.

For the courts to grant parenthood to the commissioning couple of a surrogate arrangement born child, there are certain conditions that have been outlined under section 54 of the HFEA. These conditions read as follows:

- i. That the applicants to be commissioning parents should be wife and husband or at the least civil partners to each other.
- ii. Both the applicants must have attained the age of 18.
- iii. The surrogate and her partner must consent to the making of a parental order and this must be free of any coercion or undue influence.
- iv. The application is to be made within six weeks after the birth of the child.
- v. One of the applicants must be genetically related to the child.
- vi. That no money with regards to the surrogacy arrangement has been paid. This is not unless the courts have directed otherwise.³⁹

Once a parental order is granted by the courts, all parental rights, duties and obligations are transferred to the commissioning couple with the surrogate mother officially relinquishing of all claim of custody to the child.

³⁷ Section 6, Human Fertilization and Embryology Act, (2008).

³⁸ Section 8, Human Fertilization and Embryology Act, (2008).

³⁹ Section 54, Human Fertilization and Embryology Act, (2008).

The British Nationality Act.

This Act was enacted in 1981 and it looked at the issues of nationality that would arise from surrogacy arrangements conducted out of the United Kingdom.

Section 2 provides that any child, with parents of British citizenry may acquire British nationality irrespective of whether they were born out of the United Kingdom.⁴⁰

REGULATORY FRAMEWORK ON SURROGACY IN SOUTH AFRICA.

The law governing surrogacy in South Africa comprises of the Children's Act and the National Health Act.

Children's Act.

This act was assented in 2006 but came into force in the year 2010. For the purposes of surrogacy, the Act addresses issues motherhood and matters related that would arise. Definition of terms related to the practice are provided under section 1 of the Act.

Section 296 of the Act provides for surrogacy agreements. It outlines the issues regarding the validity of the agreement, its termination and the effect that such an agreement would have on the child. A confirmation by the court is also required. Fertilization should then take place within one and a half years after a confirmation by the courts.⁴¹

For parties to enter into a surrogacy agreement, there are certain conditions that have to be met:

- i. One of the commissioning couples must be genetically related to the child.⁴²
- ii. Consent by the partner to a commissioning party has to be acquired.⁴³
- iii. Before fertilization takes place, the agreement entered into must be confirmed by the court.
- iv. Parties involved must be of sound mind and have the capacity to enter into legal contracts.

For there to exist a valid agreement, section 292 provides for the requirements that need be fulfilled;

- a. The agreement must be in writing and signed by all involved parties.

⁴⁰ Section 2, British Nationality Act, (1981).

⁴¹ Section 296, Children's Act of South Africa, (2005).

⁴² Section 294, Children's Act of South Africa, (2005).

⁴³ Section 293, Children's Act of South Africa, (2005).

- b. The agreement must be entered within the jurisdiction of South Africa.
- c. One of the commissioning parties must be a resident in South Africa.
- d. The agreement must be confirmed by the relevant authority of the residential area of the commissioning parents.⁴⁴

Commercial surrogacy is prohibited under section 295 of the Act. A surrogate mother may not use the practice of surrogacy as a means of income.

Under section 297, a child born to a surrogate mother is for all purposes deemed to be the child of the commissioning couple from time of birth.⁴⁵ If a surrogacy agreement contravenes the provisions of the Act after the birth of a child born out of it, the custody of the child would belong to the surrogate mother.⁴⁶

The Act further makes provisions for the termination of the agreement. It highlights that a surrogacy agreement may only be terminated;

- a) By the genetic mother of the child and this should be done within sixty days after the birth of the child.

Such termination should be in writing with a notice filed at the court. The courts have to be satisfied that the termination was voluntary and the applicant understands the meaning of terminating the agreement. Such termination should not result to the surrogate mother incurring any liability.

- b) Termination of the agreement terminates the parental rights of the commissioning parents and are transferred to the surrogate mother and her partner. The child will have no claim to the commissioning parents.⁴⁷
- c) In the event of a termination of pregnancy, the surrogacy agreement would automatically be terminated. However, a termination in the agreement does not amount to termination of pregnancy by the surrogate mother.

As earlier stated, the law of South Africa prohibits commercial surrogacy and reward or compensation in form of material payment. The Act, nevertheless provides for payments that

⁴⁴ Section 292, Children's Act of South Africa, (2005).

⁴⁵ Section 297(1), Children's Act of South Africa, (2005).

⁴⁶ Section 297(2), Children's Act of South Africa, (2005).

⁴⁷ Section 299, Children's Act of South Africa, (2005).

are permitted with relation to the agreement. These are payments that relate to; artificial fertilization, payments related to the delivery of the child and pregnancy expenses. There may also be insurance payments.

National Health Act.

The National Health Act was enacted in 2003 and it provides for the guidelines of artificial fertilization. The regulations though not specific to surrogacy may be relevant due to the fact that the process of surrogacy is one involving a means of artificial fertilization. Schedule 1 of the regulations provide for the definitions of key terms.

Applicable provisions to surrogacy include schedule 7 that states that before any artificial fertilization has taken place, the parties need to have fully consented.

Schedule 5 on the other hand provides that there is need for a central data bank where all relevant information is stored and should be updated and protected from the public's reach.

Schedule 16 provides for the registration of all births out of artificial fertilization processes and this is to be done by whoever is in charge of the facility.

Persons who contravene the provisions of the regulations is liable to imprisonment or a fine or both.⁴⁸

South Africa, has established a Health Professions Council of South Africa which acts as the main authority for medical practitioners. Through guidelines that have been put in place, the authority tackled different health related matters. With a focus on surrogacy, the guidelines provide that surrogacy is only to be applied in limited circumstances and is to be done under restrictive supervision. The guidelines further echo the Children's Act and prohibit commercial surrogacy.⁴⁹

⁴⁸ Schedule 21, National Health Act of South Africa, (2003).

⁴⁹ Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

Conclusion.

It is evident that both South Africa and the United Kingdom allow for the practice of surrogacy to varying degrees. This is however, subject to certain restrictions as seen the case of UK. There are similarities in the requirements and obligations of the parties involved. Both jurisdiction have an expectation that the parties shall be of sound mind, shall have the capacity to enter such an agreement among other requirements. Further, with both jurisdictions having legal links to Kenya or rather Kenya is seen as to borrow from both, this will aid to shed some light as Kenya goes forth to lay foundation for the regulation of this process.

CHAPTER 4: CONTEXTUALIZING THE CURRENT KENYAN SITUATION ON SURROGACY AND RECOMMENDATIONS.

Having looked at the theories related to the practice of surrogacy together with the comparative study of the two jurisdiction on their regulatory framework of the practice, this research study will now look at the current Kenyan practices on surrogacy and make recommendations that will be heavily influenced by findings from the comparative analysis.

The Children's Act provides that in every situation that involves children, the interest of the child is to be the primary factor affecting any decisions made.⁵⁰ In Kenya the Director of Children's Service is responsible for guaranteeing the welfare of the child. Further, the director should assist in establishing, promoting, co-ordinating and supervising of all childcare services and related facilities.⁵¹

Although Kenya is said to lack a regulatory framework for the practice of surrogacy, clear steps such as the drafting of the Assisted Reproductive Technology Bill, 2016, (formerly known as the Reproductive HealthCare Bill 2014) that makes provisions for surrogacy as an alternative option to birthing have been seen to be taken. The bill is thus far only used not as an authority but a persuasive reference when the topic of surrogacy is being addressed as it outlines the path the Kenyan jurisdiction is swaying towards with regards to the practice.

Section 2 of the Bill highlights that a mother means a woman carrying a child as a result of placing in her an embryo or sperm or her being artificially inseminated and this shall not include a woman carrying a child under a surrogacy motherhood agreement.⁵² A surrogate mother on the other hand is established as a woman who has agreed to carry a child for another woman under a surrogacy agreement and can lay no claim to the born child.⁵³ This two provisions of the bill already lean to answer the question of motherhood and extendedly, that of legal parenthood in general with regards to a surrogacy arrangement.

⁵⁰ Section 4(2), Children's Act, (2010).

⁵¹ Section 28(1), Children's Act, (2010).

⁵² Section 2, Assisted Reproductive Technology Bill, (2016).

⁵³ Section 2, Assisted Reproductive Technology Bill, (2016).

For one to legally be a surrogate mother at the request of a couple, they need to have attained the age of twenty-five and must have consented to the process. Upon birth, such party shall relinquish all her parental rights unless a contrary intention can be proved.⁵⁴

There are some requirements highlighted with regards to the surrogacy agreement that include the following: parties shall sign an agreement in the prescribed form before the process is undertaken, the form shall indicate parents' names of the child to be born and the entry form shall be conclusive proof of parentage of the child and shall be used for the purposes of birth registration and any other legal processes. In the event of a dispute, the aggrieved party may appeal to the courts within sixty days of the child's birth for the determination of the parentage of the child. Monetary benefits shall not be awarded to the surrogate mother unless for expenses incurred during the undertaking of the process.⁵⁵

The following bill vaguely addresses the practice of surrogacy based on the provisions it gives. It ignores several aspects of the practice such as the type of surrogacy that is permitted. It also lays no consequences specific to surrogacy holding no one accountable if the process does not go accordingly. Further, it is still under parliamentary discussions and as thus cannot yet be used as an authority, leaving Kenya still finding its balancing ground on how to conduct the process of surrogacy.

Kenya's Current Situation On Surrogacy.

Assisted Reproductive Technologies, though practices that have been around for a substantial amount of time are quite new in Kenya. The first case of assisted reproduction in Kenya is as recent as 2006 with the birth of twins through in Vitro Fertilization (IVF). In 2007, as per the IVF centre, the first surrogacy babies were born. Currently there are five fertility centres across the country. There is however, only one of the centres that practices surrogacy.

Practices of Surrogacy in Kenya.

The practice of surrogacy in Kenya, though lacking a legal framework continues to be on the rise. The fertility centres that offer surrogacy as a method of assisted reproduction have no guidelines or policies and are therefore seen to rely on their personal interpretation of what is required during the administration of such a process.

⁵⁴ Section 31, Assisted Reproductive Technology Bill, (2016).

⁵⁵ Section 32, Assisted Reproductive Technology Bill, (2016).

The process of carrying out surrogacy in the Nairobi IVF centre can be outlined as follows:

The commissioning couple is established as a candidate for a surrogate by the fertility centre, upon which they are taken through an in-house counselling process. The process entails information on the benefits of the process, the procedure itself, the risks and potential problems that may arise either immediately or in the years to come following the undertaking of the process. A data base of potential surrogates is then revealed to the commissioning couple through which based on the information provided, they have to select a suitable candidate to be their surrogate mother. The surrogate mother is afterwards contacted and is requested to avail herself at the fertility centre where she too undergoes in house counselling on the process. A formal introduction between the two parties is done in preparation of a group counselling session.⁵⁶

The parties, after a discussion on various expectations are then taken through a legal counselling that is more often than not carried out by the in house lawyer. Legal rights and obligations are highlighted to the parties and a surrogacy arrangement is thereafter drafted. The parties are afforded time to go through the arrangement clauses and sign it. At this point, the reproduction process may commence.

The fertility centre lays out certain requirements that one must meet to be a surrogate.

- She must be of a least 21 years old.
- She must be of sound mind.
- She must be a bearer of a certificate of good conduct issued by the Kenya police. This must be with an indication of no criminal records.
- She must have one living child.
- She must be physically healthy and free of any specified diseases.

The registration of children born out of a surrogacy arrangement in Kenya follows the norm with regards to birth registrations. Before the official registration is carried out, a notice of birth is issued by the medical practitioner present indicating; name of the mother, place of birth, sex of child and the date of birth. This would imply that the surrogate mother would be listed as the mother to the child. In this instance, the commissioning parents would therefore be required

⁵⁶ Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

to legally “adopt” the child from the surrogate. Currently, this is the only recognised process in Kenya for the registration of children born out of surrogacy.⁵⁷

Recommendations.

Surrogacy being a fast growing practice, is a sensitive practice and the lack of legal framework would imply an unbalance between parties involved. Practically speaking, women of the lower class are more often than not the ones who become surrogate mothers with persons of the middle and upper class being the commissioning parties. Regulation is thus an urgent need to ensure all persons’ interests are considered.

The following are the recommendations:

Professional Guidelines.

Practitioners in the field, such as the fertility centres that already provide services of surrogacy need to be given leeway to formulate their own rules and standards with regards to the practice. There is also need for a regulatory body to deal with the registration of the fertility centres and serve as an oversight body for such centres.

Institutions providing artificial fertilization should be licensed with its practitioners being qualified in their field.⁵⁸

Provisions of the Surrogacy Agreement.

Before fertilization of a surrogate occurs, the parties must get into an agreement. The agreement should provide for;

1. The form of the agreement. The agreement should be in writing in either of Kenya’s two national languages, Kiswahili and English.
2. A commencement clause that would outline when the agreement is to take effect. This would be after the approval by the courts.

⁵⁷<http://wiredspace.wits.ac.za/bitstream/handle/10539/18501/TOWARDS%20A%20KENYAN%20LEGAL%20AND%20ETHICAL%20FRAMEWORK%20ON%20SURROGACY%20-%20778951.pdf?sequence=1> on 5th January 2017.

⁵⁸ Robai A, ‘Towards A Kenyan Legal and Ethical Framework on Surrogacy’ Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

3. The general welfare of the child. The agreement should give a guardian to the child. The guardian should be notified and have consented to the appointment.⁵⁹
4. Termination of the agreement but only under specific circumstances. These circumstances are under the discretion of the parties or the courts. Terms of termination should be as follows;
 - i. An agreement cannot be terminated once fertilization has occurred. In instances of traditional surrogacy, where the surrogate is also the genetic mother of the child then she may opt to terminate the agreement though subject to a time constraint.
 - ii. Upon termination, all parental responsibilities cease to apply.
5. With regards to payment, commercial surrogacy should be prohibited. Only certain payments should be allowed. These payments include those related to insurance covers, expenses throughout the pregnancy, payments to practitioners and expenses in relation to the agreement.⁶⁰

Requirements of parties.

a. Commissioning Parties.

With regards to the commissioning parties, certain conditions need to be met. Both the commissioning mother and father should have capacity at the time of the agreement. According to the children's Act, the age of majority is 18 years old which is proof of capacity.

At least one of the parties need be domiciled in Kenya when getting into a surrogacy agreement.

One of the parties should have a genetic link to the child born out of the agreement.

b. Surrogate Host.

For one to be a surrogate/host, they need to have attained the age of 21 years with mental competence.

There is need for proof of fertility with a living child at the time of the agreement.

⁵⁹ Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

⁶⁰ Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

The surrogate host should have domicile in Kenya when the agreement is being entered into.⁶¹

The following recommendations, though they may give guidance to the formulation of a regulatory framework are not comprehensive enough. The state should take initiative to provide policies and standards for surrogacy as they prepare a well-documented framework.

The study has also achieved its research objectives. These objectives were;

1. To evaluate the current practices, guidelines and proposed laws on surrogacy in Kenya.
2. To evaluate existing country specific laws on surrogacy with a keen look at the jurisdiction of the United Kingdom and that of South Africa.
3. To formulate and propose recommendations aimed at contributing to the development of laws, regulations and professional guidelines with respect to surrogacy in Kenya.

Objective 1.

The study outlines the current structure of the practice of surrogacy in Kenya. In chapter two of the study, it is evident that though there is a bill that has been presented to parliament to address the issues arising from the practice, persons are seen to depend on the personal interpretation of fertility centres when undertaking the process. Though not previously highlighted, there are instances when parties interested in using surrogacy as a means of acquiring an offspring bend the system to favour them. An example would be an instance where the surrogate mother uses the commissioning mother's information all through her pregnancy up until the birth of the child. The result of this is that the commissioning mother will now be officially recorded as the birth mother. Such actions are deemed illegal and one is liable to a severe penalty.

Objective 2.

Chapter three, through the analysis of the laws on surrogacy in two different jurisdictions, highlights various features of a functional regulatory framework. Due to time constraints, the

⁶¹<http://wiredspace.wits.ac.za/bitstream/handle/10539/18501/TOWARDS%20A%20KENYAN%20LEGAL%20AND%20ETHICAL%20FRAMEWORK%20ON%20SURROGACY%20-%20778951.pdf?sequence=1> on 5th January 2017.

study was however not able to get into the historical background that brought about the formulation of a framework for the practice.

Objective 3.

The research study has also made some recommendations that are based on the practices of South Africa and the United Kingdom. These recommendations if undertaken, may safeguard the interests of the involved parties.

CHAPTER 5: CONCLUSION.

This research paper kicked off with an introduction to what surrogacy is and what its practice entails. It went forth to highlight the practice of surrogacy in Kenya and show how there is lack of regulatory framework to govern a new yet fast rising reproductive technology such as surrogacy in Kenya and provided a justification for the dire need of such a framework.

An analysis of the theories surrounding the legal determination of parenthood following surrogacy arrangements was provided to help provide insight on the various interpretations of surrogacy arrangements and what their focal point should be. The theories discussed in this paper, in their own different way support the practice but to varying extents. As seen also, there is no one theory that incorporates all aspects related to surrogacy thus all are limited in that sense.

Having echoed severally the lack of a framework to regulate the practice in Kenya, this paper took the direction of a comparative analysis of the laws of two jurisdictions that seemingly have legal ties or influence to laws in Kenya. This comparative analysis was to provide guidance to Kenya as we try to formulate our own framework that would hopefully permit the practice and make necessary provisions regarding the arrangements.

This paper then looked at the current situation of surrogacy in Kenya highlighting how the practice is currently conducted in the fertility centres that happen to offer it as an Alternative Reproductive Technology (ART). It went ahead to make certain recommendations influenced by the practices of the jurisdiction of the United Kingdom and that of South Africa that would aid in the formulation of Kenya's own laws.

In conclusion, the practice of surrogacy is seen to be a plausible alternative to adoption for couples who cannot bear their own children. Advocates for the practice argue that surrogacy ensures that such couples fulfil their desire to have children with their genetic formulation. This desire is satisfied by the role the surrogate mother plays in the whole process.⁶² On the regulation of the practice, it may be argued that formulating a framework would be denying parties to have autonomy to make decisions on matters that would affect their reproductive

⁶² Ankeny R, 'Individual responsibility and reproduction' In Rhodes, Rosamond *et al* (eds.) *The Blackwell Guide to Medical Ethics*, Blackwell Publishing, 2006.

capabilities.⁶³ In Kenya, its practice has been seen to promote foreign interaction as parties from different jurisdictions find Kenya a cheaper and easier option due to its non-regulation.

This research study was focussed on the determination of legal parenthood following this practice as this is one of its major problems surrounding it. The importance of parentage status in a surrogacy agreement is to ensure the welfare of the child. Such status is awarded differently based on the different schools of thoughts as illustrated by the theories earlier on. The theories were however, not comprehensive enough to be the foundation of legal parenthood determination as they all are lacking or have not put into consideration several societal and life aspects and such is their greatest limitation.

An instrument for regulation of surrogacy in Kenya is long overdue and though it may take time to tackle all issues that arise in the event that the practice is permitted, the lacuna in law need be filled immediately as to safeguard wholly the interests of involved parties.

⁶³ Chadwick F R, 'Having children: introduction' in R.F Chadwick (ed.) *Ethics, reproduction and genetics control*, London Croom Helm, 1987.

BIBLIOGRAPHY.

Journals.

Baker K, 'Property Rules meet Feminist Needs; Respecting Autonomy by Valuing Connection', Volume 59 *Ohio State Law Journal* (1998).

Becker M, 'Four Feminist Theoretical Approaches and the Double Bind of Surrogacy', Volume 69, *Chicago-Kent Law Review* (1993).

Gillers L S, 'A Labour Theory of Legal Parenthood', Volume 110 *the Yale Law Journal* (2001).

Morgan D, 'Who to Be or Not to Be: The Surrogacy Story', Volume 49 *The Modern Law Review* (1986).

Radin M J, 'The Pragmatist and the Feminist', Volume 63, *Southern California Law Review* (1990).

Trimmings K, 'International Surrogacy Arrangement: An Urgent Need for Legal Regulation at the International Level', Volume 7, *Journal of Private International Law* (2011).

Kenyan Legislation.

The Children's Act Cap 141 (2007).

The Constitution of Kenya (2010).

Assisted Reproductive Technology Bill (2016).

Legislation.

British Nationality Act (1985).

Children's Act of South Africa (2005).

Human Fertilization and Embryology Act (2008).

National Health Act of South Africa (2003).

Internet Sources.

http://works.bepress.com/katharine_baker/14/ on 16th February 2016.

<https://www.gov.uk/government/.../surrogacy> on 4th March 2016.

<http://humanrights.ie/international-lawinternational-human-rights/amram-on-maternity-leave-surrogacy-the-impact-of-eu-law/#more-18706> on 16th February 2016.

<https://www.gov.uk/government/.../surrogacy> on 16th February 2016.

<http://wiredspace.wits.ac.za/bitstream/handle/10539/18501/TOWARDS%20A%20KENYAN%20LEGAL%20AND%20ETHICAL%20FRAMEWORK%20ON%20SURROGACY%20-%20778951.pdf?sequence=1> on 5th January 2017.

Books.

Ankeny R, 'Individual responsibility and reproduction' In Rhodes, Rosamond *et al* (eds.) *The Blackwell Guide to Medical Ethics*, Blackwell Publishing, 2006.

Chadwick F R, 'Having children: introduction' in R.F Chadwick (ed.) *Ethics, reproduction and genetics control*, London Croom Helm, 1987.

Freeman M, *Is surrogacy exploitative? Legal Issues in Human Reproduction*, (1989).

Kant I and Sullivan, *The metaphysics of morals*, Cambridge University Press, 1996.

Mill J S & Bentham, *Utilitarianism and other essays*, Alan Ryan London Penguin books, 1987.

Teman E, *Birthing a mother: the surrogate body and the pregnant self*, University of California Press, 2010.

Theses.

Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

Isterevych T, 'International Surrogacy Arrangements: The Problem with Legal Parenthood' Unpublished LLM Thesis, Central European University, 20th November 2013.

Newspaper Article.

Sunday Nation, *A Tale of Two Mothers, a Father and Surrogate Twins*, Benson Wambugu, July 6 2014.