

# **SAFEGUARDING THE BEST INTERESTS OF THE CHILD IN SURROGACY ARRANGEMENTS IN KENYA**

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**By**

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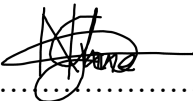
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## Declaration

I, CHRISTINE WAMERE NJANE, do hereby declare that this dissertation 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 referenced in this paper have been duly acknowledged.

Signed: .....

Date: 16 June 2021

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

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## **Abstract**

*The practice of surrogacy is a living reality for a lot of people world over. It has been an appealing option for a lot of desperate couples and individuals who wish to have their own children despite not being able to naturally. In Kenya, a lot of women who enter into surrogacy arrangements do so out of economic desperation; and therefore, risk objectifying their wombs and the resulting children. Children, however, are the most vulnerable in such arrangements because they do not have a voice; their welfare often left to play second fiddle to that of the contracting parties; the inadequacy of legislation governing the practice of surrogacy only exacerbates the situation. The status of the law exposes children to 'limping parentage', statelessness, abandonment by the contracting parties, identity crisis, and psychological problems, with limited opportunities for legal recourse.*

*Kenya has recently made laudable attempts to legislate the practice through four Bills, although none of them have been legislated into law. They are the In-Vitro Fertilization Bill of 2014, the Children's Bill of 2017, The Assisted Reproductive Technology Bill of 2019, and the Reproductive Healthcare Bill of 2019. The paper seeks to assess the current practice of surrogacy in Kenya against other jurisdictions; analyse the aforementioned and investigate how different courts have applied the principle of the best interests of the child(BIC) in surrogacy arrangements, in a bid to provide perspectives for Kenya, as the push for legislation continues.*

*The methodology applied in this paper is a review of literature on the BIC principle and a comparative study of the practices of advanced jurisdictions in the field like the United Kingdom (UK) and South Africa. As will be revealed by this research, the Bills contain certain inconsistencies and challenges that ought to be addressed as regards promoting the best interests of the child in surrogacy. Although caselaw reveals that the courts have been instrumental in promoting the welfare of the resulting child, there are glaring gaps that can only be defined by legislation.*

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### **List of Abbreviations**

<b>Arrangements</b>	Surrogacy arrangements
<b>ACHR</b>	American Convention on Human Rights
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>ART</b>	Artificial Reproductive Technologies
<b>ART Bill</b>	Assisted Reproductive Technology Bill
<b>BIC</b>	Best interests of the child
<b>CRC</b>	United Nations Convention on the Rights of the Child
<b>Constitution</b>	Constitution of Kenya
<b>ECtHR</b>	European Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IVF</b>	In-vitro fertilisation
<b>IVF Bill</b>	In-Vitro Fertilization Bill
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations

## **List of Legal Instruments**

### **List of International Instruments**

*African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49.

*American Convention on Human Rights* (1969).

*Convention on the Rights of Persons with Disabilities* (2006).

*European Convention on Human Rights, ECHR* (1950).

*French Civil Code* (2004).

*Human Fertilisation and Embryology Act*, (1990) United Kingdom.

*International Covenant on Civil and Political Rights, ICCPR* 16 December 1966, 999 UNTS 171.

*International Covenant on Economic, Social and Cultural Rights, ICESCR* 16 December 1966, 993 UNTS, 3.

*Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

*Universal Declaration on the Rights of the Child*, 20 November 1959, A/4354.

*United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

### **List of National Instruments**

*Births and Deaths Registration Act* (1928), Kenya.

*The Constitution of Kenya* (2010).

*The Constitution of Italy* (1948).

*The Children Act* (Act No. 8 of 2001).

*The Health Act* (Act No. 21 of 2017).

*The Surrogacy Arrangements Act* (1985), United Kingdom.

## **List of Cases**

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

*Baby Manji Yamada v Union of India & Another* (2008) Supreme Court of India,

*Eisenstadt v Baird*, Supreme Court of the USA (1972).

*Evans v The United Kingdom*, ECtHR Judgement of 10 April 2007.

*Ex Parte MS and Others* [2013], High Court of South Africa.

*J V C* (1970) United Kingdom House of Lords

*JLN and 2 Others v The Director of Children Services and 4 Others [2014] eKLR.*

*Johansen v Norway* (1970), European Court of Human Rights.

*Johnson v Calvert* (1993), The Supreme Court of California.

*In re RW aka RWB* [2018] eKLR.

*M v HFEA [2015]*, The United Kingdom High Court of Justice.

*Mennesson v France*, ECtHR judgement on 30 September 2004.

*Minister for Welfare Population Development v Fitzpatrick and Others* (2000), Constitutional Court of South Africa.

*Re G (Children)* [2012], England and Wales Court of Appeal.

*Re Baby M* (1988), The Supreme Court of New Jersey.

*Republic v Attorney General & 11 Others Ex-Parte Child In Family Focus [2014] eKLR.*

*S v M* (2008), Constitutional Court of South Africa.

*S v Makwanyane*, (1995) Constitutional Court of South Africa.

*Yousef v The Netherlands*, ECtHR judgement on 5 February 2003.

## **Dedication**

This work is dedicated to all those who advocate for the rights of children in the world over. A better future for the generations to come will only be guaranteed through the relentless struggle of those who speak up for the voiceless.



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## CHAPTER ONE

### 1.0 Background

Families are considered to be the basic unit of every society.<sup>1</sup> In sub-Saharan Africa, children remain the symbol of pride for couples and families in general. They are seen as a sign of couples' completeness and future investments.<sup>2</sup> It is therefore not surprising to see couples who are unable to conceive doing everything possible, including the use of conventional and unconventional means to bear children.<sup>3</sup> This innate desire to bear children is instinctive, cognitive, and constitutes a wish to perpetuate oneself and to pass heirloom to a genetic offspring.<sup>4</sup>

The development of Assisted Reproductive Technologies (*ARTs hereinafter*) is an attempted response to ensure that the desire of such couples to have children, is fulfilled.<sup>5</sup> One form of ART is surrogacy arrangements, which, allow couples to have children that are genetically related to them.<sup>6</sup> In surrogacy, a woman agrees to become pregnant, gestate and give birth to a child that will be raised by commissioning or intending parents.<sup>7</sup> Surrogacy consists of traditional and gestational surrogacy.<sup>8</sup> Traditional surrogacy (also called partial or straight surrogacy), consists of a woman providing both the genetic material and carrying the pregnancy. The sperm of the commissioning father is inserted into the surrogate mother's reproductive tract through artificial insemination. Gestational surrogacy (also called full, host, or IVF surrogacy) occurs when the sperm and ovum of the intended parents are fertilised outside the body, then introduced into the uterus of a surrogate mother.<sup>9</sup> The surrogate mother's engagement is limited to the gestation period and childbirth.<sup>10</sup> Surrogacy could also be of an

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<sup>1</sup> Ebrahim G J, 'The family as a child-rearing unit of society' in Ebrahim G J, *Child health in a changing environment*, 1<sup>st</sup> ed, Palgrave Macmillan, London, 1983, 68.

<sup>2</sup> Kwena Z, 'Reproductive Health Ethics' 5(4) *KEMRI Bioethics Review*, 2015, 5.

<sup>3</sup> Kwena Z, 'Reproductive Health Ethics' 5.

<sup>4</sup> Benshushan A and G. Schenker J, 'The right to an heir in the era of assisted reproduction' 13(5) *European Society for Human Reproduction and Embryology*, 1998, 1407.

<sup>5</sup> Lenaola I and Mutugi M, *Bioethics of medical advances and genetic manipulation*, Longhorn Publishers and Worldreader, 2018, 136.

<sup>6</sup> Anu, Kumar P, Inder D and Sharma N, Surrogacy, and women's right to health in India: Issues and perspective, 57(2) *Indian Journal of Public Health*, 2013, 65 – 70.

<sup>7</sup> Pawan K, Inder D and Sharma N, Surrogacy, and women's right to health in India: Issues and perspective, 57(2) *Indian Journal of Public Health*, 2013, 1.

<sup>8</sup> Lenaola I and Mutugi M, *Bioethics of medical advances and genetic manipulation*, Longhorn Publishers and Woerldreader, Nairobi, 2018, 144.

<sup>9</sup> Ladomato D, 'Protecting traditional surrogacy contracting through fee payment regulation' 23(2) *Hastings Women's Law Journal*, 2012, 247.

<sup>10</sup> Ladomato D, 'Protecting traditional surrogacy contracting through fee payment regulation' 23(2) *Hastings Women's Law Journal*, 2012, 247.

altruistic or a commercial nature. Altruistic surrogacy occurs where a surrogate gestates a child for intended parents without receiving any monetary compensation. In commercial surrogacy, on the other hand, the intending parents offer a financial incentive to secure a willing surrogate.<sup>11</sup> Studies indicate that couples opt for surrogacy due to barrenness or infertility, repeated miscarriages, failure of fertility treatment, dysfunctional reproductive organs, complications in previous pregnancies, and to avoid social stigma from the society due to the inability to have children.<sup>12</sup>

Although the widespread use of ART has helped desirous individuals get their own children, the legal, social, ethical, religious, and medical concerns resulting from the practice cannot be downplayed.<sup>13</sup> The ethical issues surrounding surrogacy arrangements got international attention in 2014 after the *Baby Gammy Case*.<sup>14</sup> Gammy and Pipah were twins born to a Thai surrogate, who was remunerated by a commissioning couple from Australia. Gammy was born with down syndrome and a congenital heart condition that required extensive medical attention. As a result, the Australian couple refused to take Gammy, and went away with his healthy sister.<sup>15</sup> This case created awareness not only about the lack of an international framework governing surrogacy, but also brought to light legitimate concerns for the wellbeing of the child in surrogacy arrangements.<sup>16</sup>

Surrogacy involves various parties, specifically the child, the surrogate mother, commissioning parents, and the donor/s of gametes.<sup>17</sup> At the heart of a surrogacy arrangement is the resulting child, who is arguably the most vulnerable and lacks decision-making power in the arrangements.<sup>18</sup> The inadequacy of a legal framework to govern the conduct of the contracting parties further puts the child's welfare at risk. Some of the legal issues that are directly linked

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<sup>11</sup> Anu, Kumar P, Inder D and Sharma N, Surrogacy, and women's right to health in India: Issues and perspective.

<sup>12</sup> Dash M S, Surrogacy: The socio-legal issues 5(4) *Indian Journal of Applied Research* 2015, 336.

<sup>13</sup> Kwen Z, 'Reproductive health ethics' 6.

<sup>14</sup> BBC News, 'Baby Gammy granted Australian citizenship' 20 January 2015, -<  
<https://www.bbc.com/news/world-australia-30892258#:~:text=Baby%20Gammy%2C%20who%20was%20born,Australian%20citizenship%2C%20local%20media%20report.&text=The%20case%20sparked%20intense%20debate,citizenship%20to%20safeguard%20Gammy's%20future.>> on 16 September 2020.

<sup>15</sup> Newson A and Callaghan S, 'Surrogacy, motherhood and Baby Gammy' BioNews, 11 August 2014, -<  
<https://ses.library.usyd.edu.au/bitstream/handle/2123/12239/Surrogacy-motherhood-and-baby-Gammy-2014.pdf?sequence=2&isAllowed=y>> on 14 September 2020.

<sup>16</sup> Macdonald T and Dale M, 'Regulating surrogacy in Australia' Human Rights Law Centre, 17 April 2015 -<  
<https://www.hrlc.org.au/bulletin-content/regulating-surrogacy-in-australia>> on 15 September 2015.

<sup>17</sup> Sifris A, 'The family courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach' *Thomson Reuters*, 2015, 396.

<sup>18</sup> Sifris A, The family courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach *Thompson Reuters*, 2015, 396.

to the child include the fate of the surrogate baby when he or she is rejected due to a medical condition, dislike of their sex, divorce of the commissioning parents, or instances of death of the commissioning couple.<sup>19</sup>

Other issues involve the threat to the right to a name, nationality, and the right to know and be cared for by their own parents. For instance, where both gametes are obtained from donors, none of the commissioning parents contributes genetically to the make-up of the child.<sup>20</sup> This creates a lot of dilemmas as to the right identity of the child. In some cases, the industry is considered exploitative and comparable to baby selling and therefore degrading to the child.<sup>21</sup> These concerns could adversely affect the welfare of the child.

The principle of the *best interests of the child* (herein referred to as BIC)<sup>22</sup> is widely recognized in child right protection matters.<sup>23</sup> Its basis is the notion that ‘mankind owes to the child the best it has to give.’<sup>24</sup> The principle is reiterated in both national and international frameworks.<sup>25</sup> Article 53 of the Constitution of Kenya guarantees the right of every child to have their best interests promoted in all matters involving them.<sup>26</sup> The UN Convention on the Rights of the Child (CRC hereinafter) further states that all institutions concerning children, including social welfare institutions, courts of law, administrative authorities or legislative bodies, shall consider the BIC as a *primary consideration*.<sup>27</sup>

Kenya has also taken strides to acknowledge the various technological developments in the world over.<sup>28</sup> Although Kenya has embraced some scientific advances, particularly to promote technology and innovation in reproductive health care,<sup>29</sup> it has nevertheless failed to enact laws

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<sup>19</sup> Sifris A, The family courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach, 396.

<sup>20</sup> These were words said by Mutugi M during a conference titled, ‘IVF & Surrogacy: What you need to know’ held by the Strathmore Institute for Family Studies and Ethics (IFS) in Strathmore University on 27 November 2019.

<sup>21</sup> Nicholson C, ‘When moral outrage determines a legal response: Surrogacy as labour’ 29(3) *South African Journal on Human Rights*, 2013, 499.

<sup>22</sup> <[https://ec.europa.eu/home-affairs/content/best-interests-child-bic\\_en](https://ec.europa.eu/home-affairs/content/best-interests-child-bic_en)> on 25 January 2021.

<sup>23</sup> Degol A and Dinku S, ‘Notes on the principle ‘Best Interest of the Child’: Meaning, History and its Place under Ethiopian law, 5(2) *Mizan Law Review*, 2011, 320.

<sup>24</sup> Degol A and Dinku S, ‘Notes on the principle ‘Best Interest of the Child’: Meaning, History and its Place under Ethiopian law’ 322.

<sup>25</sup> Article 2, *Declaration on the Rights of the Child* (1924) allows for a wide application of the rights, enabling the child to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner.

<sup>26</sup> Article 53, *Constitution of Kenya* (2010). The same is reiterated under section 4 (2) of the *Children Act* (Act No. 8 of 2001).

<sup>27</sup> Article 3, *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

<sup>28</sup> Article 11 (2) (b), *Constitution of Kenya* (2010) provides that the state shall recognise the role of science and indigenous technologies in the development of the nation.

<sup>29</sup> Section 4, *Health Act* (Act 21 of 2017).

that regulate surrogacy. It, however, leaves individuals who opt for surrogacy vulnerable to abuse and devoid of sufficient legal recourse. It also leaves the children at the mercy of the individuals involved, which threatens their wellbeing.

This study will look into the practice of surrogacy across the world, closely examining countries that authorise, those that prohibit, and those that lack a particular stand. It will also analyse the proposed surrogacy Bills in Kenya, namely, *The In-Vitro Fertilization Bill* of 2014, the *Children's Bill* of 2017, *The Assisted Reproductive Technology Bill* of 2019, and *The Reproductive Healthcare Bill* of 2019 to assess whether they would promote the welfare of children if passed into law.<sup>30</sup> Both the UK and South Africa have made notable strides in the regulation of surrogacy.<sup>31</sup> It will therefore explore jurisprudence emanating from courts in South Africa and the United Kingdom (UK) and comparing it with Kenyan jurisprudence.

### **1.1 Statement of the problem**

Kenya has no legislation regulating the practice of surrogacy. Despite the practice of surrogacy having developed over time and even caused many legal contentions; Kenya lacks a legislation that regulates it. The legal vacuum means that the involved parties, and especially the child, are vulnerable and likely to have their rights violated without access to avenues of legal redress. A suitable legislation on surrogacy would foster the appropriate consideration of the best interests of the vulnerable child.

### **1.2 Statement of aims and objectives**

The aim of the study is to determine how the best interests of the child can be safeguarded in the practice of surrogacy in Kenya.

1. To investigate the current status of practice of surrogacy both locally and internationally.
2. To understand the meaning of the BIC in surrogacy arrangements.
3. To analyse the proposed surrogacy Bills in Kenya in light of the BIC principle.
4. To conduct a comparative assessment of how foreign courts have interpreted the BIC principle in relation to surrogacy arrangements.

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<sup>30</sup> *The Assisted Reproductive Technology Bill* (2019).

<sup>31</sup> *Ex Parte MS and Others* (2013), para. 8. Also, Wade K, 'The regulation of surrogacy: a children's rights perspective' *Child Fam Law* 2017, 4.

### **1.3 Hypothesis**

As children are the most vulnerable parties in surrogacy arrangements, they are more likely to be exploited and their interests disregarded. The lack of a law to regulate the practice leaves the children at a more disadvantaged position as they risk having their welfare trampled on. The proposed bills could potentially come to the rescue of children.

### **1.4 Research questions**

The study will be guided by the following questions:

1. What is the current practice in the area of surrogacy in the global and local context?
2. Do the proposed Bills meet the requirements under the BIC principle?
3. How do Kenyan courts compare with courts in other jurisdictions in terms of ensuring the BIC in cases involving surrogacy?
4. What is the way forward for Kenya with regard to the legal status of surrogacy?

### **1.5 Significance of the study**

The study is significant to people who have an interest in surrogacy and children matters both locally and internationally. It would help policy makers by providing perspectives on how to ensure the interests of the child are considered in any future laws on surrogacy. It is also important for the wider public to understand the legal and ethical issues surrounding the practice.

### **1.6 Literature review**

A lot of writings in this field have focused on balancing the interests of all the parties involved in surrogacy contracts. Some of the issues associated with children's interests under surrogacy include the determination of the nationality of the child under international law, and of legal parentage and the right to know of one's identity.. The literature review first analyses the status of surrogacy and its regulation in different jurisdictions, and then discusses children's welfare in this field.

Cretney, in the book, *Principles of Family Law* gives an extensive reasoning behind the regulation of surrogacy.<sup>32</sup> He argues that the practice of surrogacy requires a careful balancing

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<sup>32</sup> Cretney SM, Masson J, Bailey-Harris R and Probert R, *The Principles of family law* 7<sup>th</sup> ed, Sweet & Maxwell Publishers, London, 1996, 858.



of rights of donors, legal parents and the children.<sup>33</sup> Sebatello concurs with Cretney, maintaining that a child's rights should not be violated simply because they were born under a particular set of circumstances.<sup>34</sup> He holds that it is not the technology that dehumanises the act and violates the child's right, but rather societal beliefs that tend to lead to discrimination.<sup>35</sup> The use of IVF for instance does not give the child any lower status compared to those born through natural means, and hence they should enjoy equal treatment before the law. Negative cultural attitudes towards the practice could adversely affect the wellbeing of the resultant child. Cretney gave a general overview about family law, but this research focuses on Kenya.

Alvare argues that the *best interest* concept makes sense if considered as a way to encourage the parents before conception to rise to the level of fit parents by allowing the child's best interest to come first, and their own rights follow.<sup>36</sup> Kennard J addresses the problems of gestational surrogacy in the absence of legislation.<sup>37</sup> He argues that in determining the parentage of the child, the courts should look into family law as opposed to property or contract law as the governing paradigm. This is because granting parental rights and duties directly impacts the welfare of the child. According to him, the best standard of determining the parentage of a child is applying the BIC, rather than the intent of the genetic mother.<sup>38</sup>

He posits that the mere fact that a genetic mother and her spouse may be more affluent than the gestational mother is not an assurance of good parenting. Therefore, relying on the intention of the genetic mother does not always benefit the child. His arguments present a shift in the sense that, as much as legislation potentially cures the problems for which it was intended, it may not always work. His work supports this study by showing that the BIC principle should act as the applied lens in determining the welfare of the child in surrogacy arrangements.

Sifris advocates for a child-centred approach to the vexed issue of overseas commercial surrogacy arrangements in Australia.<sup>39</sup> He posits that children have a moral right to demand the recognition of their family structure.<sup>40</sup> Although he recognises the importance of biological

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<sup>33</sup> Cretney SM, Masson J, Bailey-Harris R and Probert R, *The Principles of Family Law* 864.

<sup>34</sup> Sebatello M, 'Are the kids alright? A child centred approach to assisted reproductive technologies' 31 *Netherlands Quarterly of Human Rights*, 2013, 90.

<sup>35</sup> Sebatello M, 'Are the kids alright? A child centred approach to assisted reproductive technologies' 92.

<sup>36</sup> Alvare H M, 'A response to professor I Glenn Cohen's "Regulating reproduction: The problem with best interests' 96(11) *Minnesota Law Review Headnotes*, 2012.

<sup>37</sup> *Johnson v Calvert* (1993), The Supreme Court of California.

<sup>38</sup> *Johnson v Calvert* (1993), The Supreme Court of California.

<sup>39</sup> Sifris A, 'The family courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach' 2015.

<sup>40</sup> Sifris A, 'The family courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach' 406.

connections between parents and their children, he suggests that in an environment where science is far ahead of legislation, it represents a single facet of the parenting matrix. Functional parenting, he asserts, is central to advancing the interests of the child.<sup>41</sup> Sifris alludes to the idea that although it is important to know one's parentage, it is not enough to ensure the wellbeing of the resultant child. Interactions with the child are important and ought to be considered in considering the welfare of the child in the long-term. Sifris' argument is important to this study since the author applies the right to knowledge of one's parents as a basis of determining the welfare of the child.

Sifris further argues that since commercial surrogacy is illegal in Australia, children born out of overseas commercial surrogacy arrangements are largely disadvantaged due to the discrimination propagated by the state.<sup>42</sup> Whereas a biological parent may be recognised as a parent, the non-biological parent in the case of traditional surrogacy may not be recognised as such. Moreover, numerous courts have denied both parents the legal recognition, leaving many children without any secure legal relationship with the parents raising them.<sup>43</sup> Sifris' article is significant to this study as it sheds light onto the disadvantaged status of children in commercial surrogacy arrangements. At the heart of his arguments is the fact that children are not to blame for the environment in which they find themselves, and therefore the courts should make determinations that are aligned to the BIC principle.

Golombok argues that parents of children born from gamete donation may act less positively toward a non-genetic child. She argues that the lack of a genetic link to either or both parents may undermine the child's sense of identity. She, however, posits that children conceived through gamete donation report better relationships with their parents than children who have been conceived through natural means.<sup>44</sup> This suggests that surrogacy that occurs by way of gamete donation may not have an adverse effect on the socio-emotional development of the child. The study, limited to children under the age of 6 years,<sup>45</sup> does not provide data on the impact on children in the long-term. Golombok's work is significant to this study as it shows

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<sup>41</sup> Sifris A, 'The family courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach' 405.

<sup>42</sup> Sifris A, 'The family courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach' 406.

<sup>43</sup> Family Law Council, *Report on parentage and the Family Law*, 2013, 99.

<sup>44</sup> Golombok S, 'New families, old values: Considerations regarding the welfare of the child' *Family and Child Psychology Research Centre, City University, London*, 1998, 2344.

<sup>45</sup> Golombok S, 'New families, old values: Considerations regarding the welfare of the child' 2344.

that being genetically linked to the parents does not seem to be crucial to the realisation of a child's wellbeing.<sup>46</sup>

Bearing all this in mind, it is evident that children born out of surrogacy arrangements are likely to experience issues that a normal child would probably not experience. The literature review gives different approaches and understanding to the vexed issue of surrogacy and how children matters should be handled in this practice.

### **1.7 Delimitations of the study**

This study only focuses on the rights appertaining to children, particularly focusing on their best interests as it is, an area that requires attention. The issues pertaining to the other parties involved do not form part of the scope of the study as it would be too wide.

### **1.8 Limitations of the study**

The study is of a doctrinal nature. The duration of the study is limited, hence actual sampling and surveys to ascertain the reality on the ground is impossible. There is also a lack of recent data on the long-term status of children born of surrogacy. Consequently, the study may not be comprehensive.

### **1.9 Chapter breakdown**

The first chapter gives an overview of the study. It introduces the reader to the subject under study, providing the background, the statement of the problem, hypothesis, research objectives, and the corresponding research questions, justification of the study, and a literature review.

The second chapter serves as the theoretical and conceptual framework, exploring the human rights theory and the BIC and the special case principles.

The third chapter looks into the practice of surrogacy in the global and local context, highlighting the unique concerns relating to children's welfare. It also analyses the Kenyan proposed bills on surrogacy in order to find out if they advance the BIC.

The fourth chapter examines Kenyan case law to determine how the courts have dealt with children matters in surrogacy arrangements. It also examines the case law from the ECtHR and South African Courts to analyse their approaches towards promoting the welfare of children

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<sup>46</sup> Wade K, 'The regulation of surrogacy: A children's rights perspective' *Child Fam Law Q*, 2017, 8.

in surrogacy. This will be done in a bid to compare approaches and provide insights on alternatives for Kenya if need be; and the findings would potentially inform future law.

The fifth chapter focuses on the findings of the study, recommendations, and a conclusion.

## CHAPTER TWO

### 2.0 Theoretical and Conceptual Framework

#### 2.1 Introduction

In order to understand the special place, the child has in surrogacy matters; it is essential to examine some theories that give this study a foundational basis. This chapter applies the *human rights theory* and discusses two concepts, the *special case* and that of the *best interests of the child* that expose the social understanding of the primacy of children matters and welfare.

#### 2.2 Theories

##### 2.2.1 Human Rights Theory

The natural rights theory of human rights posits that every human being has inherent rights by virtue of being human beings. These rights derive from human nature, and they are held universally and equally by all people without discrimination. The theory expounds that these rights are crucial for the maintenance of a worthy life of a human being, that ensures the realization of human nature and dignity of every person.<sup>47</sup> This theory relies heavily on the writings of classical Greek philosophers such as Aristotle. Beitz considers natural rights as ‘exceptionless’ and as representing claims which ‘no one may permissibly infringe.’<sup>48</sup> The central case that a human rights theorist holds, is that human rights represent the strongest moral claims available as regards rights.<sup>49</sup> The natural rights theory of human rights identifies human nature as the source of human rights.<sup>50</sup>

Human rights are generally seen as minimal standards to secure the basic interests and needs of human beings.<sup>51</sup> The human nature that underlies natural rights is a moral nature, that is commonly referred to as dignity.<sup>52</sup> The dignity of life and equality of rights are also affirmed in the preamble of the Universal Declaration of Human Rights (UDHR).<sup>53</sup> The Constitution is also alive to the dignity of persons and equality of rights and expressly states that everyone, including children is equal before the law and enjoys the right to equal protection of the law.<sup>54</sup>

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<sup>47</sup> Donnelly J, ‘Human Rights as Natural Rights’ 4 *The Johns Hopkins University Press* 3, 1982, 397.

<sup>48</sup> Donnelly J, ‘Human Rights as Natural Rights’ 395.

<sup>49</sup> Donnelly J, ‘Human Rights as Natural Rights’ 396.

<sup>50</sup> Donnelly J, ‘Human Rights as Natural Rights’ 395.

<sup>51</sup> Donnelly J, ‘Human Rights as Natural Rights’ 398.

<sup>52</sup> Donnelly J, ‘Human Rights as Natural Rights’ 399.

<sup>53</sup> *Universal Declaration of Human Rights* (1948).

<sup>54</sup> Article 27 (1), *Constitution of Kenya* (2010).

Thus, all parties to a surrogacy arrangement are entitled to protection under the law. Their rights ought to be respected by virtue of their being human. The study makes the argument that legislation on surrogacy would also be more effective if it promoted the best interests and welfare of the child as recognized under international law.

This study pays special attention to the dignity and rights of the child born out of surrogacy arrangements. Children are neither the possessions of parents, nor the state, they have equal status as members of the human family.<sup>55</sup> Due to their vulnerability, children ought to be protected specially by the law. The relevant rights owed to children in this case include the right to life, the right to have one's dignity respected, knowledge of one's parents, and nationality. Jurisprudence has held that the right to life and the right to human dignity are the genesis of all rights and are indivisible.<sup>56</sup> International law, however, considers respect of dignity of the human being to be the basis of all rights. The UDHR has also given special significance to the right to have one's dignity respected as it appears in the first paragraph of the preamble.<sup>57</sup>

The human rights theory is critical for a study that seeks to safeguard the BIC in surrogacy arrangements. Knowledge of the foundational basis of human rights is necessary in order to understand why children should also be treated as a special case as elaborated below. Through the theory of human rights this study makes a case for the promotion of children's rights and interests in surrogacy arrangements in Kenya.

## **2.3 Concepts**

### **2.3.1 Best interests of the child (BIC)**

This principle was first recognized in 1924 with the adoption by the League of Nations of the Geneva Declaration of the Rights of the Child.<sup>58</sup> In the UN General Comment of 2013, the Committee of the Rights of the Child explains that the child's best interests are a threefold concept: a *substantive right*; a *fundamental, interpretative legal principle*, and a *rule of procedure*. Firstly, a substantive right means that the child should have his or her best interests assessed and taken as a primary consideration when different interests are being considered in reaching a decision to an issue at stake. It also guarantees that the right will be implemented

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<sup>55</sup> UNICEF, 'Child rights and why they matter' -<<https://www.unicef.org/child-rights-convention/child-rights-why-they-matter>> on 16 August 2020.

<sup>56</sup> *S v Makwanyane*, 1995, Constitutional Court of South Africa, para.308.

<sup>57</sup> Preamble, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III).

<sup>58</sup> *Geneva Declaration of the Rights of the Child* (1924).

whenever a decision is to be made concerning a child, a group of identified or unidentified children, or children in general.<sup>59</sup>

Secondly, a fundamental, interpretative legal principle is one in which a legal provision with more than one interpretation is considered to be most effective when it serves the BIC.<sup>60</sup> Finally, in a rule of procedure, In case a decision is to be made that will affect a specific child, the decision-making process should evaluate the possible impact, both positive and negative, of the decision on the child.<sup>61</sup> The obligation to ensure that the child's best interests are considered belongs to public and private social welfare institutions, courts of law, administrative authorities, legislative bodies, civil societies, parents, and care givers.<sup>62</sup> The study focuses on the role of the courts and the legislative bodies.

The principle is considered flexible and adaptable.<sup>63</sup> It should be defined on an individual basis, according to the specific situation of the child concerned.<sup>64</sup> The courts have attached unique importance to the BIC, which, depending on their nature and seriousness, may override those of the parent.<sup>65</sup>

The analysis of this principle on a case-by-case basis implies that there is no one set standard of interpretation of the concept in surrogacy arrangements. Different issues arising from surrogacy arrangements should be handled uniquely. Issues such as determination of legal parenthood between the gestational and commissioning parents, the right of the child to acquire a nationality, the right of the child to know and be cared for by their parents, the right of the child to acquire a nationality, and the right from birth to a name should be evaluated in light of this principle.

### **2.3.2 Special Case principle**

To see children as a special case means to prioritize their interests over those of others due to their unique position in society. Ferguson, a major proponent of this concept, explains that prioritization takes two forms, that is, providing children with additional legal protection

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<sup>59</sup>UN General Comment No. 14, *The right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, para. 6 (a).

<sup>60</sup> United Nations, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, para. 6 (b).

<sup>61</sup>United Nations, *General Comment 14*, para. 6 (c).

<sup>62</sup> United Nations, General Comment 14 para. 6(c). It is also reflected under section 4 (3) of the *Children's Act*, (Act No. 8 of 2001).

<sup>63</sup> Article 3(1), *Convention on the Rights of the Child* (1989).

<sup>64</sup> UN General Comment 14, para. 32.

<sup>65</sup> *Johansen v Norway* (1970), European Court of Human Rights.

compared to that available to others and, when there is a conflict between children's interests and other parties' interests, prioritising children's interests to resolve the dispute.<sup>66</sup> Lord McDermott, while dealing with the issue of paramountcy of the child's interest being an overriding factor, averred that all the circumstances are weighed, and the outcome is that which best favours the child.<sup>67</sup>

The case for special case treatment is highly debated upon. Reece, a scholar in the field, argues against the treatment of children as a *special case*. She notes that the idea that children need more protection compared to adults is self-evident. She contends that the need for protection has confused academics into making assumptions that children's interests receive unequal consideration from adults. In essence, overriding the rights of the parents could ultimately be detrimental to the child and therefore caution should be exercised.<sup>68</sup>

In so far as this study is concerned, the two principles consider the welfare of the resulting child as the primary consideration in surrogacy matters. This study argues that the BIC should override the interests of the other parties. It also appreciates that the welfare of the child is closely linked to that of the birth mother, and hence the best interests should not always override those of the birth mother, rather, the circumstances should be evaluated from a holistic approach.

## **2.4 Research methodology**

This study is largely doctrinal research, comprising of critical analysis of the legal materials. It applies both primary and secondary sources. The primary sources include, *inter alia*, statutes, international conventions and instruments, and case law. Most important among the primary sources are the Constitution of Kenya, the Children's Act, and the CRC. These provide the legal framework governing the rights of the child, forming a basis of the study.

The secondary sources apply works by various writers and scholars in surrogacy as a field of study, and particularly those making a central case for children's rights and welfare. These works comprise mostly of journal articles, conference papers, books, judicial decisions, discussion papers, dissertations, and credible mainstream media reports. Also, secondary sources analysing the human rights theory, the *BIC and the special case concepts* are also

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<sup>66</sup> Ferguson L, 'The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' in Diduck A, Peleg N and Reece H, *Law in Society: Reflections on Children, Family, Culture and Philosophy* 2015, 143.

<sup>67</sup> *J V C* (1970) United Kingdom House of Lords.

<sup>68</sup> Ferguson L, 'The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' 2015, 11.



particularly valuable in enriching the arguments propounded in the paper. To this end, both physical and online libraries are used in accessing the secondary sources. Online sources such as HeinOnline, Jstor, Academia, and SpringerLink are used to access journal articles.

Among the primary sources, are the four proposed parliamentary Bills that seek to regulate surrogacy in Kenya. They are analysed to assess whether they are suitable in advancing the child's welfare. The study also compares the approaches taken by other states in regulating surrogacy. The main jurisdictions referenced in the paper include India, Italy, and the UK. The choice of the UK is informed by the restrictive approach they have taken in regulating surrogacy. India, on the other hand, represents the countries that do not have a regulation on surrogacy whereas Italy, represents the approaches by countries that prohibit the practice all together. The unique approaches taken by these jurisdictions in handling matters of surrogacy gives certain insights on approaches that could be used by Kenya.

Besides this, at a comparative level, an analysis of courts' attitude towards the BIC in surrogacy arrangements is conducted. The study applies the decisions of the European Court of Human Rights (ECtHR), South African courts, and the Kenyan Courts. The ECtHR is chosen because it demonstrates how children matters should be addressed in states that prohibit surrogacy. South Africa is selected as it is one of the progressive countries on the African Continent in relation to child-centred approaches in surrogacy matters. The jurisprudence is evaluated against that of the Kenyan courts to determine how the courts treat the BIC principle.

## CHAPTER THREE

### 3.0 Regulatory Frameworks Governing the Practice of Surrogacy

#### 3.1 Introduction

This chapter examines the regulatory framework of surrogacy in the global context. It discusses the various international and regional human rights instruments that govern the practice of surrogacy. It also examines the various ideologies of states that regulate surrogacy, states that criminalise it, and those that do not have any regulatory framework whatsoever. The chapter then discusses the attempts at regulating surrogacy in Kenya. This chapter will discuss the various attempts at legislation over the last six years, that is, the *In-Vitro Fertilization Bill* (2014), the *Children's Bill* (2017), the *Assisted Reproductive Technology Bill* (2019) and the *Reproductive Healthcare Bill* (2019).

#### 3.2 Surrogacy in the International and Regional Human Rights Instruments

To some extent, international and regional human rights instruments have influenced the discourse on surrogacy.<sup>69</sup> They do not make any specific references to surrogacy; however, the right can be founded on the broad interpretation of the wording of the instruments. The indirect recognition of surrogacy can be surmised through three rights, namely, the right to form a family, the right to privacy, and the right to benefit from scientific advancement.

##### 3.2.1 The right to form a family

This right is provided for in international human rights instruments. Article 16 of the UDHR provides that men and women of full age have the right to found a family.<sup>70</sup> The ICCPR and the ECHR also recognize the right of couples of age to marry and found a family.<sup>71</sup> Although this right is not an absolute one, it is still a human right, which deserves protection, safeguarding the right holders from unnecessary interference from the state. In the case of infertile couples and other individuals who wish to form families, this right would suggest that they should have access to technological advancements in the reproductive health sector. An attempt to unduly restrict the use of such technological advancements, which are applied in surrogacy, could potentially result in a negation of the right to found a family as provided in

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<sup>69</sup> *The United Nations Universal Declaration of Human Rights* (1948).

<sup>70</sup> Article 16, *Universal Declaration of Human Rights* (1948).

<sup>71</sup> Article 23(2), *The International Covenant on Civil and Political Rights* (1966). See also Article 12, *European Convention on Human Rights* (1950).

these instruments.<sup>72</sup> It is, however, acknowledged that since the right is not absolute, reasonable limitations could be justified.

### 3.2.2 The right to privacy

The right to privacy has been recognised in several international human rights instruments.<sup>73</sup> The ICCPR protects against unlawful interference with one's privacy, family, home, or correspondence, and unlawful attacks on one's honour or reputation.<sup>74</sup> The CRC specifically prohibits unlawful interference of a child's privacy, family, home, or correspondence, and reputation.<sup>75</sup> The *African Charter on the Rights and Welfare of the Child* goes further to provide that parents, or legal guardians have the right to supervise the conduct of their children to a reasonable degree.<sup>76</sup> The ECHR also guarantees the right to respect for everyone's privacy except where, there is need to protect national security, public order and safety, economic wellbeing of the country, health, morals, or to safeguard the rights and freedoms of others. The ACHR also provides for the protection of this right in similar terms as the ICCPR.<sup>77</sup>

Privacy is considered an integral part of family life, including the rights of parents to contact their children, adoption, remarriage, and the right to make reproductive choices.<sup>78</sup> For example, in the case of *Eisenstadt v Baird*, the court observed that the right to privacy means that every individual should be free from government interference, in matters that fundamentally affect the person, such as bearing a child.<sup>79</sup> In *Evans v The United Kingdom*, the court noted that the concept of 'private life' involves the right to respect a person's decision to become a parent.<sup>80</sup> This implies that individuals are free to choose the timing, spacing, and the number of children, rather than the means of getting the children. It is worth noting that this right is not absolute, and therefore reasonable restrictions can be imposed.<sup>81</sup> Thus, restrictions on surrogacy arrangements could be imposed on this basis.

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<sup>72</sup> Aneesh P, Surrogacy under Indian legal system, and human rights concerns, PHD Thesis at Cohin University of Science and Technology, 2013, 144.

<sup>73</sup> Article 8 of the European Convention on Human Rights, 1950; and Article 22 of the *Convention on the Rights of Persons with Disabilities*, 2006.

<sup>74</sup> Article 17, the *International Covenant on Civil and Political Rights*, 1966.

<sup>75</sup> Article 16 of the *Convention on the Rights of the Child*, 1989.

<sup>76</sup> Article 10, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49.

<sup>77</sup> Article 11, *American Convention on Human Rights*, 22 November 1969, 17955.

<sup>78</sup> Icelandic Human Rights Centre, 'The right to privacy and family life' -<  
<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-privacy-and-family-life>> on 18 January 2021.

<sup>79</sup> *Eisenstadt v Baird*, Supreme Court of the USA (1972).

<sup>80</sup> *Evans v The United Kingdom*, ECtHR Judgement of 10 April 2007.

<sup>81</sup> Aneesh P, 'Surrogacy under Indian legal system and human rights concerns', 147.

### 3.2.3 The right to benefit from scientific advancement

This right is recognised as a human right under the UDHR and the ICESCR.<sup>82</sup> Scientific advancements include medical technologies that help infertile people and others to beget children. Surrogacy, which is a product of such technologies, is also used by people to beget children. Thus, the right to use the benefits of surrogacy may be argued on the grounds of the right to enjoy the benefits of scientific and technological progress.<sup>83</sup> The pursuit of the benefits of scientific progress in reproductive health requires caution as there are strong sentiments among researchers, concerning the sanctity and risk of abuse of human life.<sup>84</sup> This may be the case where for instance the fertilisation of gametes in an IVF procedure, results in multiple embryos yet the commissioning couple is interested in having one child.

### 3.3 National approaches to the practice of surrogacy

Domestic legal responses to surrogacy differ widely from one jurisdiction to another. As earlier mentioned, surrogacy could be altruistic or commercial. Countries that have legalised altruistic surrogacy include The UK, Canada (except for Quebec), the Netherlands, Australia, Denmark, and Hungary.<sup>85</sup> In the UK, surrogacy is governed by *The Surrogacy Arrangements Act 1985*<sup>86</sup> (SAA herein) and some provisions of the *Human Fertilisation and Embryology Act 2008*.<sup>87</sup> The SAA was enacted amidst controversies and public outcry when a married mother of two, received £6500 for acting as a surrogate.<sup>88</sup> The practice was strongly condemned because it was seen as baby selling. The courts, nonetheless, granted wardship to the commissioning couple, on the basis of the best interests of the child, ignoring the commercial nature of the arrangement.<sup>89</sup> Although the UK led the way in regulating ARTs, the law has struggled to keep abreast of social attitudes and the unending demand.<sup>90</sup>

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<sup>82</sup> Article 27, *UDHR* (1948) and Article 15, *ICESCR* (1966).

<sup>83</sup> Aneesh P, 'Surrogacy under Indian legal system and human rights concerns' 148.

<sup>84</sup> Cook R, 'Human rights and reproductive self-determination' 44 *The American University Law Review* 1995, 1003.

<sup>85</sup> Goyal S, 'Surrogacy in India: History, impact on poor and facts' *Jagran Josh* 17 August 2020 -< <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1>> on 12 September 2020.

<sup>86</sup> *The Surrogacy Arrangements Act* (1985), United Kingdom.

<sup>87</sup> *The Human and Fertilisation Act* (2008), United Kingdom.

<sup>88</sup> *Re C (A Minor) (Wardship: Surrogacy)*, 1985, Family Law Reports 846.

<sup>89</sup> BBC, "1985: Inquiry over 'baby-for-cash- deal' " - [http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid\\_2495000/2495857.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm) on 19 September 2020.

<sup>90</sup> Amel A and Griffiths D, *The regulation of surrogacy in the United Kingdom: The case for reform*, Child and Family Law Quarterly, 2017, 2.

Countries that have legalised commercialised surrogacy include Russia, Ukraine, Thailand, and India. India has been “the hub of surrogacy” for decades.<sup>91</sup> Commercial surrogacy was legalised in India in 2002 in a bid to promote medical tourism in the country.<sup>92</sup> However, the use of surrogacy was prevalently by the foreigners, which led to its ban with respect to foreign nationals in 2015.<sup>93</sup> The Confederation of Indian Industry (CII) report of 2012 revealed that India’s surrogacy industry generated \$2 billion a year.<sup>94</sup> It also had an estimated 3,000 active fertility clinics across the country.

This boom was facilitated by the cheap cost of medication, preference for biological parenting over adoptive parenting, comparatively low cost of surrogacy compared to the developed countries due to readily available poor surrogates, and the lax rules applied to foreigners compared to their countries of origin.<sup>95</sup> However, the industry, which was only governed by mere guidelines, was, full of unethical practices such as exploitation of surrogate mothers, abandonment of children born out of surrogacy, organ trade and importation gametes and human embryos.<sup>96</sup> This eventually led to the proposed Surrogacy (Regulation) Bill of 2019 that seeks to ban commercial surrogacy.<sup>97</sup>

Other countries prohibit the practice of surrogacy altogether. In Italy, surrogate motherhood is prohibited under the *Rules on Medically Assisted Procreation*.<sup>98</sup> The state has tabled certain justifications for it. It has a stake in protecting children from being turned into commodities; second, surrogacy causes maternal uncertainty, because of the separation of the involved mother figures, which adversely affects both the social and psychological development of the child; and third, surrogacy treats the surrogate mother as a means to an end, diminishing her from a person worthy of respect to a mere object.<sup>99</sup> The Italian laws underpinning the

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<sup>91</sup> BBC News, ‘India unveils plans to ban surrogacy’ 25 August 2016, <<https://www.bbc.com/news/world-asia-india-37182197>> on 21 September 2020.

<sup>92</sup> Newson A and Callaghan S, ‘Surrogacy, motherhood and baby Gammy’ BioNews, 11 August 2014, <[https://www.bionews.org.uk/page\\_94709](https://www.bionews.org.uk/page_94709)> on 20 September 2020.

<sup>93</sup> Goyal S, ‘Surrogacy in India: History, impact on poor and facts’ *Jagran Josh* 17 August 2020 <<https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1>> on 17 September 2020.

<sup>94</sup> Kohli N, ‘Commercial surrogacy: The half mothers of Anand’ Hindustan Times, 8 November 2015 <<https://www.hindustantimes.com/health-and-fitness/the-half-mothers-of-anand/story-0snxcL9TycKZ38QusrKNGI.html>> on 20 September 2020.

<sup>95</sup> Newson A and Callaghan S, ‘Surrogacy, motherhood and baby Gammy’ BioNews, 11 August 2014, <[https://www.bionews.org.uk/page\\_94709](https://www.bionews.org.uk/page_94709)> on 20 September 2020.

<sup>96</sup> Chaturvedi R, Garg P S, Mishra A, Garg V and Chaturvedi P, ‘Surrogacy policy in India and need of Acts to regulate commercial surrogacy’ 3(20) *Journal of Evolution of Medical and Dental Sciences*, 2014, 5386.

<sup>97</sup> The Surrogacy (Regulation) Bill, 2019 of India.

<sup>98</sup> Article 12, para. 6, *Rules on Medically Assisted Procreation*, (Act Feb. 19, No. 40 of 2004).

<sup>99</sup> Kriai I and Valongo A, ‘International issues regarding surrogacy’ 2 *The Italian Law Journal* 2, 2016, 333.

prohibition are based on the respect for human dignity.<sup>100</sup> The risk of exploitation is not certain, rather, a potential as seen from the widespread practice of altruistic surrogacy.<sup>101</sup>

Other countries such as Russia, Georgia, Ukraine, including Kenya and Nigeria in Africa, are silent about the practice of surrogacy.<sup>102</sup> Lack of a clear stand on the legal status of surrogacy in Kenya, for instance, has made it a bait for commercial transnational surrogacy since it is considered ‘surrogacy-friendly’.<sup>103</sup> The different approaches taken by different countries are problematic since people are caught up between contrasting approaches of states, especially in international surrogacy arrangements, which could easily lead to exploitation.<sup>104</sup>

### **3.4 The Legal framework on surrogacy practice in Kenya: A child-centred approach**

#### **3.4.1 Introduction**

Although Kenya lacks a regulatory framework, it has been offering surrogacy to many clients for a long time. Kenya’s fertility hub came into existence due to unfavourable regulatory frameworks in most Asian countries and the cheap cost of treatment in Kenya.<sup>105</sup> The first case of IVF in Kenya was reported in 2006, which resulted in the birth of twins in 2007. By 2017, there were seventeen surrogate births and twenty-eight children.<sup>106</sup> The existent legislations as discussed below do not make any mention of surrogacy, however, their provisions could be inferred for purposes of this discourse.

#### **3.4.2 The Births and Deaths Registration Act**

The Act stipulates that a birth notification requires the particulars of the woman who physically bore the child.<sup>107</sup> The rationale behind this legislation was to accord every child the right to an identity, including a name upon birth, which is the first step in securing their recognition before the law and ensuring that any violations of these rights are dealt with.<sup>108</sup> However, this Act

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<sup>100</sup> Article 3, *Constitution of Italy* (1948).

<sup>101</sup> Kriai I and Valongo A, ‘International issues regarding surrogacy’ 333.

<sup>102</sup> Goyal S, ‘Surrogacy in India: History, impact on poor and facts’ *Jagran Josh* 17 August 2020 -< <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1>> on 12 September 2020.

<sup>103</sup> Trimmings K and Beaumont P, ‘International surrogacy arrangements: An urgent need for legal regulation at the international level’ 7(3) *Journal of Private International Law*, 2011, 629.

<sup>104</sup> Bromfield N and Rotabi K S, Global surrogacy, exploitation, human rights, and international private law: A pragmatic stance and policy recommendations, *Springer International Publishing*, 2014, 124.

<sup>105</sup> Growing families, ‘Surrogacy in Kenya’ -< <https://www.growingfamilies.org/surrogacy-in-kenya/#:~:text=Surrogacy%20in%20Kenya%20has%20no,by%20successful%20Indian%20IVF%20professionals,>> on 26 September 2020.

<sup>106</sup> Rashid F, ‘The legal and regulatory framework of surrogacy in Kenya: Theory and practice’ 48.

<sup>107</sup> Form 1, Schedule, *Births and Deaths Registration Rules* (1966).

<sup>108</sup> United Nations Children’s Fund, ‘Every child’s birth right; Inequalities and trends in birth registration, New York, 2013, 6.

does not recognise situations involving surrogacy. It is worth noting that this Act and the *Children Act* were in fact enacted at a time when surrogacy had not gained roots in Kenya and was a remote concept in the minds of the legislators.<sup>109</sup>

### 3.4.3 The Children Act

*The Children Act*, despite being the principal statute on legal matters pertaining children, also does not make any provisions on surrogacy.<sup>110</sup> The Act also limits the definition of the term ‘parent’ to ‘the mother or the father of the child, and includes any person responsible for the maintenance and custody of the child.’<sup>111</sup> It further stipulates that parental responsibility attaches to the mother at the time of the child’s birth.<sup>112</sup> Nowadays, the words “mother or father of a child” can provoke serious disputes in cases where the child has been born through ART. This is because the natural interpretation of “mother or father of a child” means the genetic father or mother.<sup>113</sup> Thus, a married couple who bear a child through gamete donation may not be the child’s parents, in the legal sense.

The unregulated practice of surrogacy can no longer survive the criticism within the surrogacy discourses.<sup>114</sup> A lot of legal and ethical concerns regarding the practice have led to the development of several bills in an attempt to create order in the field and secure the interests of the parties involved. The first of the attempts at legislation was the *Kenya Reproductive Healthcare Bill* 2014 and 2019; *The In-Vitro Fertilization Bill* (2014), the *Children’s Bill* (2017), and the *Assisted Reproductive Technology Bill* (2019). The next section will give an analysis of the proposed Bills in light of the BIC principle in surrogacy arrangements.

### 3.4.4 Kenya Reproductive Health Care Bill (2014)

This Bill sought to recognise reproductive rights; set the standards of reproductive health; and allow for the right of individuals to make decisions regarding reproduction free from coercion, discrimination, and violence.<sup>115</sup> Pertinent to this study is part 3 of the Bill, which provides for gestational surrogacy. Section 7 of the Bill recognizes gestational surrogacy as a right and

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<sup>109</sup> Rashid F, ‘The legal and regulatory framework of surrogacy in Kenya: Theory and practice’ Unpublished LLM Thesis, University of Nairobi, 2017, 48.

<sup>110</sup> The *Children Act* (Act No. 8 of 2001) provides for parental responsibility, child adoption, child custody, child maintenance, childcare, and child protection.

<sup>111</sup> Section 2, *Children Act* (Act No. 8 of 2001).

<sup>112</sup> Section 24 (1), *Children Act* (Act No. 8 of 2001).

<sup>113</sup> Thiankolu M, ‘Towards a legal framework on assisted human reproduction in Kenya: Some thoughts on the law, technology and social change’ 2007, 5.

<sup>114</sup> Rashid F, ‘The legal and regulatory framework of surrogacy in Kenya: Theory and practice’ 47.

<sup>115</sup> *The Reproductive Health Bill*, (2014).

directs the Cabinet Secretary to make regulations regarding gestational surrogacy.<sup>116</sup> Pursuant to section 14 of the Bill, commercial surrogacy is prohibited.

Under the Bill, surrogate parenthood is deemed valid if the contract is written and signed by all concerned parties; is entered into Kenya; and lastly, if the surrogate mother and her partner, are domiciled in Kenya at the time of entering into the agreement.<sup>117</sup> The only payments allowed are those compensating for expenses relating directly to artificial fertilisation and pregnancy of the surrogate mother, birth of the child, and the confirmation of the surrogate parenthood agreement. Other payments include the loss of earning due to the agreement and insurance costs for the surrogate mother for unforeseen situations leading to death or disability caused by the pregnancy.<sup>118</sup> The Bill borrowed heavily from the practice of surrogacy in the UK.<sup>119</sup>

In a bid to safeguard the child, the Bill also made provisions ensuring that the surrogate mother has a documented history of at least one viable pregnancy. Additionally, the surrogacy arrangement agreement should include adequate provisions for the care and general welfare of the child that is to be born in a stable home environment. The agreement should also cater for the child's wellbeing upon divorce or separation of the commissioning parents before the birth of the child, and in the event of death of the commissioning parents.<sup>120</sup>

### **3.4.5 The In-Vitro Fertilization Bill of 2014 (IVF Bill)**

This Bill was sponsored by Millie Odhiambo, the Member of Parliament of Mbita in 2014.<sup>121</sup> The Bill formed the basis of the *ART Bill* of 2019 since the provisions have many similarities. The terms 'in-vitro fertilisation' as used in the IVF Bill, were replaced with 'assisted reproductive technology' in the ART Bill. The IVF Bill seeks to regulate the practices related to IVF, including to protect the rights of test-tube babies. It also addresses societal concerns such as consent required before undergoing the process, regulating the handling of embryos, protecting the welfare of children born through IVF, and establishing an IVF Authority to regulate the industry.<sup>122</sup> The Bill justifies state intervention in private matters by asserting that

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<sup>116</sup> Section 7, *The Reproductive Health Bill* (2014).

<sup>117</sup> Section 8, *The Reproductive Health Bill* (2014).

<sup>118</sup> Section 14, *The Reproductive Health Bill* (2014).

<sup>119</sup> Houghton W B, 'Is surrogacy in Kenya legal?' The sensible Surrogacy Guide, - <<https://www.sensible-surrogacy.com/surrogacy-in-kenya/>> on 27 September 2020.

<sup>120</sup> Section 11 (d), *The Reproductive Health Care Bill* (2014).

<sup>121</sup> National Assembly Hansard Report, 15 April 2015, 13.

<sup>122</sup> *The In-Vitro Fertilization Bill* (2014).



it has legitimate interest in regulating matters that may adversely affect the society and protect individuals from negative impacts resulting from the application of new technology.<sup>123</sup>

#### **3.4.6 The Assisted Reproductive Technology Bill of 2019 (ART Bill)**

Also sponsored by Millie Odhiambo, the ART Bill is an advancement of the IVF Bill. The IVF Bill had not specified the period within which the child should be handed over to the intended parents after delivery. This Bill, however, makes it a requirement for the surrogate mother to hand over the child to the intended parents “at the time of birth”, leaving no room for the birth mother to keep the baby.<sup>124</sup>

The Bill is alive to the key position that family holds in society and therefore limits the number of parties eligible to this arrangement. It provides that in order to be eligible to undertake ART, a certified medical doctor, has to authorise it on medical and health grounds.<sup>125</sup> It also limits the surrogacy arrangements to married couples, under the laws of Kenya, which only permit heterosexual relationships.<sup>126</sup> This necessarily locks out individuals who would choose it to avoid the difficulties associated with pregnancy, single people, and people in same-sex relationships. The rationale behind this is that intentionally depriving the child of a mother or father is considered fundamentally unfair to the child.<sup>127</sup>

The Bill expanded the definition of the term ‘mother’ that is provided in the *Children Act* to include surrogate mothers.<sup>128</sup> It also makes a clear distinction between the rights of the surrogate mother and the rights of the intended mother, in that the intended mother has absolute legal parenthood.<sup>129</sup> If the Bill passes into law, it might reduce the legal dilemmas involved when determining legal parenthood in the surrogacy arrangements.<sup>130</sup>

The Bill establishes the *Assisted Reproductive Technology Authority* whose mandate is to develop standards on ART, undertake research, regulate licenses, advise, and establish a confidential national database on persons receiving this treatment.<sup>131</sup> It has been argued that the lack of understanding of these new medical technologies may have contributed to the

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<sup>123</sup> Memorandum of Objects and Reasons, *In Vitro Fertilization Bill* (2014).

<sup>124</sup> Section 31 (2), *The Reproductive Technology Bill* (2019).

<sup>125</sup> Section 22, *The Assisted Reproductive Technology Bill*, (2019).

<sup>126</sup> Section 29, *The Assisted Reproductive Technology Bill*, (2019)

<sup>127</sup> Mostowik P, ‘Fundamental legal problems of surrogate motherhood: Global perspective’ Instytut Wymiaru Sprawiedliwosci, Warszawa 2019, 154.

<sup>128</sup> Section 2, *The Assisted Reproductive Technology Bill*, (2019).

<sup>129</sup> Section 2, *The Assisted Reproductive Technology Bill*, (2019).

<sup>130</sup> Rashid F, ‘The legal and regulatory framework of surrogacy in Kenya: Theory and practice’ 58.

<sup>131</sup> Section 5, *The Assisted Reproductive Technology Bill*, (2019).

delayed legislation and therefore the dissemination of information about the ARTs would go a long way in creating awareness among Kenyans.<sup>132</sup> Furthermore, it would help to fulfil the constitutionally guaranteed right of access to information.<sup>133</sup>

The proposed legislation also heeds the constitutionally guaranteed right to have one's dignity respected<sup>134</sup> and privacy.<sup>135</sup> The hallmark of the right to privacy is consent, as highlighted throughout the Bill. Donors can only donate the gametes after having given written consent.<sup>136</sup> Similarly, the surrogate mother can only undertake the process through express consent.<sup>137</sup> It also provides for safe storage of any information on surrogacy arrangements, by providing only a few exceptional instances when such information may be disclosed to the child born through such an arrangement, and to any government agency.<sup>138</sup> The Bill also expressly prohibits the employees of the Authority from disclosing such information.<sup>139</sup>

In relation to preservation of human dignity, the Bill provides for strict regulations on issuance of licenses to qualified medical institutions, prohibition on seeking reproductive services for speculative reasons, or other purposes other than human procreation and for experimental purposes aimed at modifying the human race.<sup>140</sup> The Bill, which has been under public scrutiny for some time now, is currently at the senate level.<sup>141</sup>

### **3.4.7 The Children Bill of 2017**

The Children Bill of 2017 addresses surrogacy arrangements in Kenya.<sup>142</sup> Like the other bills, it only allows for altruistic surrogacy.<sup>143</sup> The provisions on surrogacy in this Bill are strikingly similar to those in the *Reproductive Health Care Bill* of 2014. However, the *Children Bill* goes a step further to define the legal status of the child in surrogacy arrangements and that of the surrogate and commissioning mother.<sup>144</sup> According to the Bill, the resulting child is legally

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<sup>132</sup> Ajayi A and Mwoka M, 'Kenya having another go at passing a Reproductive Rights Bill' 15 July 2020, -<<https://www.indepthnews.net/index.php/sustainability/gender-equality/3694-kenya-having-another-go-at-passing-a-reproductive-rights-bill>> on 28 September 2020.

<sup>133</sup> Article 35, *Constitution of Kenya* (2010).

<sup>134</sup> Article 28, *Constitution of Kenya* (2010).

<sup>135</sup> Article 31, *Constitution of Kenya* (2010).

<sup>136</sup> Section 19, *The Assisted Reproductive Technology Bill*, (2019).

<sup>137</sup> Section 31, *The Assisted Reproductive Technology Bill*, (2019).

<sup>138</sup> Section 34 and 36, *The Assisted Reproductive Technology Bill*, (2019).

<sup>139</sup> Section 37, *The Assisted Reproductive Technology Bill*, (2019).

<sup>140</sup> Section 23, *The Assisted Reproductive Technology Bill*, (2019).

<sup>141</sup> Jerving S, 'Q&A: Kenya's second go at a reproductive health bill' Devex, 22 September 2020, -<<https://www.devex.com/news/q-a-kenya-s-second-go-at-a-reproductive-health-bill-98134>> on 28 September 2020.

<sup>142</sup> Part XIII, *Children's Bill* (2017).

<sup>143</sup> Section 214 (c) (v), *Children's Bill* (2017).

<sup>144</sup> Section 216, *Children's Bill* (2017).

recognised as the child of the commissioning parents. The surrogate mother is legally bound to surrender the child to the commissioning parent or parents upon the birth of the child, absolving the surrogate mother and her relatives from any responsibilities in respect of the child.<sup>145</sup> Consequently, the child is not entitled to maintenance or succession by the surrogate mother and her family.<sup>146</sup>

The Bill also contains strict provisions regarding the registration of surrogacy agreements. The registration is done by the Director, who must be satisfied that all the requirements have been duly met by the parties.<sup>147</sup> It also seeks to provide more circumstances that warrant a termination of surrogacy contracts. In addition to reason of termination of pregnancy, the Bill allows for parties to rescind the surrogate motherhood agreement either before or after the delivery of the child in special cases.<sup>148</sup> Essentially, this allows for the autonomy of the parties. Under the Bill, a surrogate mother who is a genetic mother is allowed to rescind the agreement before the lapse of sixty days upon delivery of the child upon submitting a written notice to the Director containing grounds upon which the agreement should be revoked. The Director decides based on principles of fair administrative action prescribed in the Constitution.<sup>149</sup>

In case the agreement is rescinded before the delivery of the child, the child is deemed to belong to the surrogate mother or her husband, if any. However, the commissioning parents may acquire the parental rights through an adoption process. Where the surrogate mother dies, leaving no spouse, the agreement revives, and the commissioning parents take custody of the child.<sup>150</sup> The only instance where the surrogate mother compensates the commissioning parents, is in relation to the surrogate motherhood agreement.<sup>151</sup>

#### **3.4.8 The Reproductive Healthcare Bill of 2019**

The Bill was tabled in parliament by Susan Kihika, the Senator of Nakuru County.<sup>152</sup> It imposes obligations on both the national and county governments to ensure availability and adequate funding of reproductive health care services. It imposes conditions required for a surrogate parenthood agreement, highlights the obligations of the parties to the agreement and provides grounds for termination. To protect the welfare of the resulting child, the Bill makes provisions

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<sup>145</sup> Section 216 (1) (b) and (c), *Children's Bill* (2017).

<sup>146</sup> Section 216 91) (f), *Children's Bill* (2017).

<sup>147</sup> Section 214, *Children's Bill* (2017).

<sup>148</sup> Section 217 (1), *Children's Bill* (2017).

<sup>149</sup> Section 217 (4), *Children's Bill* (2017).

<sup>150</sup> Section 218, *Children's Bill* (2017).

<sup>151</sup> Section 217 (6), *Children's Bill* (2017).

<sup>152</sup> Memorandum of objects and reasons, *The Reproductive Healthcare Bill* (2019).

for the contact, care, upbringing, and the child's position in case of death divorce or separation of the commissioning parents.<sup>153</sup> It also expressly provides that the child shall bear the citizenship of the commissioning parents and they shall be names as the parents of the child pursuant to section 10 of the Births and Deaths Registration Act. This effectively puts an end to legal concerns of stateless and identity.

The Bills are extensive and ensure that the interests of the child are considered, and their legal identity is also protected as discussed. It is, however, questionable whether they promote the BIC in totality, as will be discussed below.

### **3.5 Challenges of the Proposed Bills**

The proposed Bills have made notable attempts to protect the rights of the parties to a surrogacy arrangement. However, they present certain inconsistencies and challenges that do not necessarily promote the BIC. These problems are outlined below.

#### **3.5.1 Inherent problem of altruistic surrogacy**

Altruistic surrogacy is preferred to commercial surrogacy in all the Bills because the latter is said to be degrading to both the surrogate mother and the child. However, altruistic surrogacy similarly fails to uphold the dignity and the welfare of the child. It ignores the fact that early foetal development is crucial in determining the welfare of the child, whereby the biological and psychological bond between the surrogate and the child are of utmost significance to the child's development. It requires that the welfare of the surrogate and her child be subordinated in favour of the commissioning parents who are desiring to have the child.<sup>154</sup> Subordinating the interests of the child goes against the principle requiring that children matters ought to be given the paramountcy they deserve.

#### **3.5.2 Threat to the right to life**

The ART Bill faces a major constitutional concern as its conformity to Article 26 of the Constitution on the right to life is questionable. Although it is silent on the issue of disposal of embryos, it provides for a statutory period beyond which embryos should not be stored.<sup>155</sup> This could be interpreted as permitting for the disposal of the embryos. This would be in direct contravention of the constitutionally guaranteed right to life.

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<sup>153</sup> Section 15 (1) (d) *The Reproductive Healthcare Bill* (2019).

<sup>154</sup> Tieu M, 'Altruistic surrogacy: The necessary objectification of surrogate mothers' 3(35) *Journal of Medical Ethics*, 2009, 175.

<sup>155</sup> Section 43 (1) (d), *The Reproductive Technology Bill* (2019).

### 3.5.3 The right to a nationality

The ART Bill provides for an adoption process for the commissioning parents as a way of safeguarding the legal identity of the child. The Children's Bill also allows children to take on the citizenship of the commissioning parents, who could be foreigners. However, there has been an indefinite moratorium on intercountry adoption of Kenyan children to foreigners as a measure to curb human trafficking.<sup>156</sup> This means that the children who are Kenyan citizens cannot be adopted by foreign nationals, despite the favourable surrogacy arrangements. Thus, in an agreement involving foreign commissioning parents, a child could be left in the hands of a surrogate mother who, is unwilling to take care of the child, and may neglect him/her.

### 3.5.4 Societal attitudes

The *Reproductive Healthcare Bill* of 2019 has been stalled due to concerted opposition, mainly by civil society and religious groups.<sup>157</sup> Besides surrogacy, the Bill provides a framework for other reproductive services for women such as family planning, termination of pregnancy, and adolescent reproductive health. It has stirred up a strong debate with its critics arguing that if passed into law, it will promote promiscuity among the youth, and abortion.<sup>158</sup> Others argue that surrogacy and 'test-tube babies' are unnatural and would allow for same sex couples to have children.<sup>159</sup> For a country that is very homophobic,<sup>160</sup> such debates could further stall the Bill, leaving parties to surrogacy arrangements vulnerable in the face of exploitation.

### 3.5.5 The right of every child to know and be cared for by their parents

The Bills do not guarantee this right as provided by the Constitution of Kenya.<sup>161</sup> Parentage has always meant the biological parents.<sup>162</sup> Majority of the surrogacy arrangements use donor gametes from at least one donor. The Bills also eliminate all obligations from the donors. For

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<sup>156</sup> *In re RW aka RWB (Minor)* [2018] eKLR, para. 11.

<sup>157</sup> Lepapa N, 'Hard labour: The surrogacy industry in Kenya' *The Elephant*, 28 May 2021, <<https://www.theelephant.info/long-reads/2021/05/28/hard-labour-the-surrogacy-industry-in-kenya-part-i/>> on 13 June 2021.

<sup>158</sup> Jerving S, 'Q&A: Kenya's second go at a reproductive health bill' *Devex*, 22 September 2020, <<https://www.devex.com/news/q-a-kenya-s-second-go-at-a-reproductive-health-bill-98134>> on 13 June 2021.

<sup>159</sup> Lepapa N, 'Hard labour: The surrogacy industry in Kenya' *The Elephant*, 28 May 2021, <<https://www.theelephant.info/long-reads/2021/05/28/hard-labour-the-surrogacy-industry-in-kenya-part-i/>> on 14 June 2021.

<sup>160</sup> Kushner J, 'The British Empire's homophobia lives on in former colonies' *The Atlantic*, 24 May 2019, <<https://www.theatlantic.com/international/archive/2019/05/kenya-supreme-court-lgbtq/590014/>> on 14 June 2021.

<sup>161</sup> Article 53 (1) (e), *Constitution of Kenya* (2010) and Article 7(1), *United Nations Convention on the Rights of the Child* (1989).

<sup>162</sup> World Youth Alliance, 'Brief on Reproductive Healthcare Bill' 2019, 4.

instance, the *Children Bill* provides that the surrogate mother, the spouse, and relatives possess no parental rights or obligations over the child.<sup>163</sup> Surrogate motherhood in the ART Bill is also to the effect that all parental rights are relinquished from the surrogate mother upon the birth of the child.<sup>164</sup> It is not disputed that the child will still receive care from the commissioning parents. However, the fact that the birth parents are robbed off this opportunity is unfair for the resulting child since they are entitled to this right.

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<sup>163</sup> Section 216 (1) (c), *The Children Bill*, (2017).

<sup>164</sup> Section 31(2), *The Assisted Reproductive Technology Bill*, (2019).

## CHAPTER FOUR

### 4.0 Application and interpretation of the BIC doctrine by the courts

#### 4.1 Introduction

The previous chapter proves that the ethical and legal issues bedevilling the practice of surrogacy have not yet been adequately addressed in the proposed legislations. This chapter will proceed to investigate the direction taken by the courts in handling surrogacy matters and an assessment of their findings as seen against the proposed Bills. It discusses one of the most recent decisions of the ECtHR in *Mennesson v France*, in order to analyse how national authorities, address birth registration of surrogate children in states that prohibit the practice altogether. It also looks into the South African case of *Ex Parte MS and Others*, to analyse how the courts interpret the principle in states that have regulated the practice. This case is particularly important for the discussion due to the many scholarly criticisms it has gotten as it is said to have contradicted the BIC principle. Lastly, the chapter will discuss the *AMN* and the *JLN* cases in Kenyan courts to show how local courts have dealt with the matter. The other jurisdictions will serve as a benchmark for Kenyan approaches, to assess how far Kenya is in relation to protecting the welfare of children in surrogacy arrangements and thus obtain relevant insights.

#### 4.2 The European Court of Human Rights

The ECtHR has pronounced several judgements on surrogacy. The case of *Mennesson v France* is particularly relevant to this study because of the special importance the court gave to the rights and welfare of the children born through surrogacy. The case primarily dealt with the right to a legal identity for children born through surrogacy. The main issue at the ECtHR, was whether the failure of the French authorities to register the twins' birth because of the father's inability to prove that the mother had given birth to them, constituted an interference with the family's right to respect for family and private life, pursuant to Article 8 of the *ECHR*.<sup>165</sup>

The court held that France had indeed violated the children's right to respect for their private life. In its reasoning, it stated that respect for private life demanded the right to establish details of one's identity, which includes the legal parent-child relationship.<sup>166</sup> To establish the interference, the court had to examine whether it was legal; proportional; and whether it pursued a legitimate aim. The court noted that French Law expressly prohibits surrogacy on

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<sup>165</sup> *Mennesson v France*, European Court of Human Rights, 2014. The Mennessons were a French couple who entered into a surrogate motherhood agreement with a Californian surrogate, who gave birth to a set of twins.

<sup>166</sup> *Mennesson v France*, European Court of Human Rights, 2014, para. 96.

grounds of public policy.<sup>167</sup> The interference was legitimate since it was meant to protect the health and other rights of the children and surrogate mothers.<sup>168</sup>

As regards *proportionality*, the Court discussed the rights of the parents and the children separately, noting that the parents' rights had not been violated, since they could live with the children and enjoy family life with them.<sup>169</sup> It was, however, disproportionate to the children who were uncertain as to whether they would get a French citizenship. The court also recognised that the nationality of the children and their right to inheritance are relevant elements of identity and noted that the children's inheritance rights were at stake.<sup>170</sup>

Later in 2019, the Court gave an advisory opinion on the right to respect for private life of a child born abroad through a gestational surrogacy arrangement in a bid to respect their best interests. It noted that legislation should provide a possibility of recognition of a legal parent-child relationship with the intended mother in the birth certificate. It was after this decision that the French law changed, allowing children born through a foreign surrogate mother to obtain a birth certificate indicating the name of the commissioning father, if he was the biological father. However, it is still impossible for the commissioning mother to be included in the birth certificate, although she could adopt the child.<sup>171</sup>

Despite the opinion being a step towards ensuring the intended mother can adopt the child, it does not guarantee that a stateless child can acquire a nationality. This is mainly in cases where the commissioning mother cannot pass on her nationality to her adopted child or children.<sup>172</sup> It is, however, clear that states are required to guarantee that the birth of any child connected to a state is registered by that state, including children born abroad to intended parents who are citizens of that state. This necessitates that states show flexibility and legislate laws that ensure that children do not suffer because of the circumstances surrounding their birth.<sup>173</sup>

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<sup>167</sup> Article 16-7 and 16-9, *French Civil Code*, (2004).

<sup>168</sup> *Mennesson v France*, European Court of Human Rights, 2014, Para. 62.

<sup>169</sup> *Mennesson v France*, European Court of Human Rights, 2014, Para. 94.

<sup>170</sup> *Mennesson v France*, European Court of Human Rights, 2014, para. 98.

<sup>171</sup> Weiss A, 'Mennesson v France and 2019 ECtHR advisory opinion concerning the recognition in domestic law of a legal parent' *European Network on Statelessness*, 2020 -<<https://www.statelessness.eu/updates/blog/mennesson-v-france-and-2019-ecthr-advisory-opinion-concerning-recognition-domestic-law>> on 2 December 2020.

<sup>172</sup> Weiss A, 'Mennesson v France and 2019 ECtHR advisory opinion concerning the recognition in domestic law of a legal parent' *European Network on Statelessness*, 2020 -<<https://www.statelessness.eu/updates/blog/mennesson-v-france-and-2019-ecthr-advisory-opinion-concerning-recognition-domestic-law>> on 2 December 2020.

<sup>173</sup> Weiss A, 'Mennesson v France and Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother' 2019, 349.



### 4.3 South African Courts

In *Ex Parte MS and Others*, the issues before the court were first, whether judges should consider the BIC when ratifying inadequate surrogacy arrangements; and secondly, in what manner the court could implement the BIC when validating unlawful surrogacy arrangements.<sup>174</sup> The court noted that legislation should be interpreted in a manner that would promote the object, spirit and purport of the Bill of Rights.<sup>175</sup> This requires the court to read legislation in a more generous statutory interpretation in some instances.<sup>176</sup> It noted that although the law prohibits the artificial fertilisation of the surrogate mother before the confirmation of the surrogate motherhood agreement, it does not impinge on the validity of such agreements.<sup>177</sup>

The High Court noted that failure to confirm the agreement would be detrimental to the resultant child since she or he would be deprived of the family life organised for him or her. Additionally, the child would have to rely on the parental care of the surrogate mother, who expressly stated her decision not to fulfil this future role.<sup>178</sup> The court, however, provided some guidelines for future confirmation of post-fertilisation surrogate motherhood agreement applications, stating that such applications are to be regarded as an exception to the rule.<sup>179</sup>

The decision reached by the court raises certain concerns. The use of the BIC principle as a means to justify its ruling has received criticism by Louw, who asks the question, “When would it not be in the best interest of the child to confirm a surrogacy arrangement once the child has been conceived?” Owing to the negative implications of granting legal parenthood to the surrogate mother as indicated by the court, it is difficult to conceive of circumstances that would lead the court to deny confirmation in such situations. However, the wording of the legislation is to the effect that an intended child can only be protected by investigating the fitness of the intended parents and surrogate mother before the child is conceived.

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<sup>174</sup> *Ex Parte:MS and Others*, High Court of South Africa (2014). The applicants made an application to confirm a surrogacy agreement as required under Section 292 as read with section 295 of the Children’s Act. The Act envisages entering into a valid agreement before implementing its requirements, but the applicants entered into a verbal surrogacy agreement and proceeded to implement artificial fertilisation before the agreement was confirmed by the High Court. In considering the best interest of the resultant child, the High Court agreed to ratify the inadequate surrogacy agreement. Inadequate in the sense that implementation preceded the surrogate motherhood agreement.

<sup>175</sup> The court was persuaded by Section 39 (2) of *The Constitution of the Republic of South Africa* (1996).

<sup>176</sup> *Ex Parte MS and Others*, High Court of South Africa (2014), para. 36.

<sup>177</sup> *Ex Parte MS and Others*, High Court of South Africa (2014), para. 48.

<sup>178</sup> *Ex Parte MS and Others*, High Court of South Africa (2014), para. 54.

<sup>179</sup> *Ex Parte MS and Others*, High Court of South Africa (2014), para. 61.

This decision also means that the provisions of the law requiring the criminal prosecution of health professionals who fertilise a surrogate mother in the absence of an agreement authorising the procedure will not be enforced. Health professionals can also easily deny being aware of the surrogacy arrangement at the time the procedure is performed, thereby escaping prosecution. The court should have dealt with the matter better, by acknowledging that the Act does not reprimand confirmation after fertilisation. That way, the judgement could have been vindicated on the basis that the circumstances in the case were exceptional, as opposed to claiming that the requirement was unconstitutional as a whole.<sup>180</sup>

#### **4.4 Kenyan Courts**

##### **4.4.1 JLN v Director of Children Services (JLN Case)**

In this case, the petitioners entered into a surrogacy arrangement, and upon the birth of the child, disputes arose as to whose particulars would go into the birth notifications. As a result, the Hospital notified the Director of Children Services of the arrangement, who in turn took the new-borns to a Children's home. Later, the commissioning parents and the surrogate mother obtained court orders to prevent the new borns from being adopted. The issue was whether the decision by the Director of Children Services had violated any of the parties' rights when he took the new-borns away.<sup>181</sup> It was held that the conduct of the Director contravened the parties' rights to respect for human dignity and fundamental freedoms, since the actions were not justified in law. The actions had caused the commissioning parents a lot of distress and humiliation, and the new-borns did not require any special care as it had been alleged by the Director. Additionally, the Director had not acted in the BIC as there had been no dispute between the parties to begin with.<sup>182</sup>

The court in *JLN* gave a landmark decision on the constitutional rights of a child through a surrogacy arrangement. The court interpreted the rights of the surrogate child with respect to constitutional principles on fundamental rights and freedoms. It was held that a child born out of a surrogacy arrangement is not different from any other child and is thus entitled to the constitutional protection provided for under Article 53 of the Constitution of Kenya and section 11 of the Children Act. Additionally, the child has the right to certainty of their parentage, a

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<sup>180</sup>Louw A, 'Ex Parte MS 2014 JDR 0102 Case No 48856/2010 (GNP): Surrogate motherhood agreements, condonation of non-compliance with confirmation requirements and the best interests of the child' 116.

<sup>181</sup> *JLN & 2 Others v Director of Children Services & 4 others* [2014] eKLR.

<sup>182</sup> *JLN & 2 Others v Director of Children Services & 4 others* [2014] eKLR.

family, a name, access to health services, and a right not to be discriminated against on the basis of birth.<sup>183</sup>

#### **4.4.2 A.M.N & 2 Others v Attorney General & 5 others**

In this case, the petitioners were foreigners who entered into a surrogacy agreement with a Kenyan surrogate mother. A birth notification and certificate had been issued showing the commissioning couple as the parents of the child. The main issue was whether the issuance of the birth certificates to the surrogate twins was proper under the Kenyan legal system.<sup>184</sup> The court held that the surrogate mother is presumed in law to be the mother of the resultant child until legal motherhood is transferred through an adoption process.<sup>185</sup> Also, the court cautioned the government, noting that due to evolution in medical health and processes, surrogacy arrangements are bound to increase in the coming years, hence the need for regulation.<sup>186</sup>

#### **4.4.3 A critique of the two cases: JLN and AMN cases**

The Kenyan courts have been quite authoritative in cases involving surrogacy arrangements, considering that there is no law to regulate the practice. This is evident from the way they have adjudicated on matters related to the birth registration process. The usurping of powers has been demonstrated by how the courts have made orders to have the names of the commissioning parents entered into the birth notifications and certificates. In the *JLN Case*, the court implicitly affirmed the Children Court's decision to have the names of the commissioning parents entered into the birth certificates and notification.<sup>187</sup> The position still applies today, since it has not been overruled. Similarly, in the *AMN Case*, a commissioning mother can be granted legal parenthood once they have followed the requisite legal procedures.

Both cases have reiterated the need for consideration of the BIC in adjudicating surrogacy cases. The courts are keen to secure the rights of children in the absence of legislation. In fact, in both cases, the court's interpretation of the Constitution illuminated on the rights of a surrogate child with respect to the constitutional provisions on protection of fundamental rights and freedoms. In both cases, however, they insist that the surrogate mother is the legal mother of the child, whereas the genetic father is the legal father until the parties follow a legal process to transfer legal parenthood to the mother. The court in *JLN* stated that this would remain the

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<sup>183</sup> *JLN & 2 Others v Director of Children Services & 4 others* [2014] eKLR.

<sup>184</sup> *A.M.N & 2 Others v Attorney General & 5 others*, [2015] eKLR.

<sup>185</sup> *A.M.N & 2 Others v Attorney General & 5 others*, [2015], para. 44.

<sup>186</sup> *A.M.N & 2 Others v Attorney General & 5 others*, [2015], para. 47.

<sup>187</sup> *JLN & 2 Others v Director of Children Services & 4 others* [2014] eKLR, para. 7.

case until a statutory framework is created.<sup>188</sup> It is not clear how the courts would deal with a case where the commissioning father is not the genetic father of the child but wants to obtain legal parenthood since there are still no directives on the same.

The uncertainty of the approach taken by the courts is also strenuous for the people who are interested in the practice. In these cases, the court made a bold move, allowing the commissioning parents to have their names registered, and although the decisions have not been overturned, there is no certainty that this precedent will continue for long. Owing to the present realities of Kenyan surrogate mothers, who enter into these arrangements out of economic desperation, the practice in Kenya could be considered commercial in nature. It has been argued that commercial surrogacy as currently practised usually constitutes sale of children under human rights law and therefore parties could be liable to criminal prosecution.<sup>189</sup>

#### **4.5 Conclusion**

This chapter sought to analyse and prove that the BIC principle is of paramount consideration in determining the wellbeing of children in surrogacy arrangements. It focused on what different courts are doing to safeguard the interests of the child, with the aim of ultimately assessing the viability of their approaches in Kenya's legal system. Similar to the other courts discussed in this chapter, Kenya has made positive strides towards protecting children through a broad interpretation of the human rights instruments, and therefore there is hope for posterity conceived through surrogacy. It is also clear that the jurisprudence is not sufficient to safeguard the children's welfare since there are unresolved concerns that only the legislature can address.

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<sup>188</sup> *A.M.N & 2 Others v Attorney General & 5 others*, [2015], para. 46.

<sup>189</sup> United Nations Human Rights Office of the High Commissioner, 'Surrogacy and the sale of children: Side event, 37<sup>th</sup> session of the Human Rights Council, 6 March 2018, -< <https://www.ohchr.org/EN/Issues/Children/Pages/SurrogacySummary.aspx>> on 15 December 2020. See also Mburu S, 'Kenya: Why surrogacy in Kenya is shrouded in secrecy' Daily Nation, 31 October 2020, -< <https://allafrica.com/stories/202010310097.html>> on 14 December 2020.

## **CHAPTER FIVE**

### **5.0 Findings of the Study, Recommendations and Conclusion**

This chapter will detail the overall findings of the study and propose recommendations based on the different approaches outlined in the preceding chapters.

#### **5.1 Research Findings**

The overall objective of the study was to investigate whether the current practice of surrogacy in Kenya promotes the BIC. In order to determine this, the author established four objectives and a hypothesis, which will be used to establish the research findings.

As for the first objective, this study shows that the practice of surrogacy is a common phenomenon in many jurisdictions across the world. This practice occurs in various forms, that is, traditional surrogacy and gestational surrogacy, which could either be altruistic, as regulated in the UK or of a commercial nature like in India. Majority of the countries prohibit commercial surrogacy because it is considered exploitative to the parties involved. Other countries like Italy expressly prohibit it through legislation as a way of protecting human dignity. In most developing countries, like Kenya, international surrogacy arrangements are on the rise due to cheaper and less complicated procedures, compared to the developed countries.<sup>190</sup>

There is no international instrument that expressly regulates the practice of surrogacy at a global level. However, various UN treaties such as the UDHR, ICESCR, ICCPR, and regional instruments such as the ACRWC, ECHR and ACHR indirectly provide for it through the right to form a family, the right to privacy and the right to benefit from scientific advancements. Different countries have developed legislative frameworks and guidelines to govern the practice, unique to their own countries. The lack of a uniform international instrument on surrogacy poses challenges for children born through international surrogacy arrangements.

In line with the second objective, legislative instruments, scholars, and courts have continuously shown that there is no one fixed definition of the BIC. Generally, issues regarding children should be given the primary consideration where different interests are in question. The primary consideration is evaluated on a case-by-case basis. Children matters should be treated as a special case, by affording children more legal mechanisms compared to others due to their vulnerable state. The case studies applied in answering the fourth objective have attempted to show this.<sup>191</sup>

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<sup>190</sup> See Chapter 3.

<sup>191</sup> See Chapter 2.

Results of the third objective show that in Kenya, although there is a vast regulatory framework safeguarding the interests of children, there is no regulatory mechanism to govern surrogacy. There have been attempts to legislate the practice over the last six years through proposed bills. The Bills have gone through various phases, with the *Children Bill*, the *ART* of 2019, and *The Reproductive Healthcare Bill* (2019) making substantive provisions to safeguard the rights of the parties involved in the arrangement, and more so the resultant child.

For instance, the Bills guarantee the rights of the parties through regulation; the practice can only be altruistic; the child's welfare is safeguarded through parental orders; registration of the name is guaranteed; and the process ensures that the privacy of the child is promoted through strict guidelines for the practitioners in the practice. However, some issues that affect the welfare of the child, for instance questions on determination of nationality in international surrogacy arrangements are beyond the scope of the Bills, and therefore, the Bills are not self-sufficient. Also, the Bills, if enacted into law, would not solve the inherent problem of altruistic surrogacy and the right of every child to know and be cared for by their parents.

Lastly, the study finds that combining surrogacy provisions with other contentious matters in the same Bill, for instance, as is the case with the *Reproductive Healthcare Bill* (2019) delays the legislative process.

As for the fourth objective, the study focused on the decisions by the ECtHR, the South African Courts, and the Kenyan Courts because, respectively, they represent the different countries that criminalise it, legalise it, and those that do not have any regulation. One common feature of the three courts was the interpretation of surrogacy cases using the Bill of Rights as the central tenet. In the case of ECtHR, the prohibition of the practice of surrogacy in France did not prevent it from deciding on a surrogacy case that promoted the best interests of the resultant child. If Kenya chose to prohibit the practice, it would have to be flexible enough to accommodate the innocent children, who are not to blame for being born under these arrangements.

South Africa has regulated the practice of surrogacy through the *Children Act*. The Act does not set any fixed parameters for determining BIC. The courts have been flexible in applying the principle in cases of surrogacy. Although the case evaluated in the study created inconsistencies in jurisprudence, the court did not shy away from deciding what best suited the resulting child.

The study reveals that Kenyan courts are alive to the existence of the practice and the issues surrogacy presents. There has been emphasis on treating children born through surrogacy on an equal basis with those born normally. It borrows from the UK, which requires commissioning parents to seek parental orders in order to obtain legal parenthood. Unlike the UK, however, Kenya does not have a criterion for determining the suitability of the parents and therefore it is upon the courts to determine. The courts have also emphasised the need for regulation because medical advancements in the field are bound to encourage the practice. They are keen to ensure that the decisions of the cases promote the best interests of children, more so the right to a name and identity, the right to a family, and freedom from discrimination. They are, however, limited to the extent that they cannot award damages to the offended parties or give criminal penalties, all of which are established under a regulatory framework, that can only be done by the Legislature.<sup>192</sup>

The findings affirm the hypothesis that the lack of a good regulatory framework governing surrogacy arrangements in Kenya makes it easy for parties to disregard the BIC in the process. The fact that most Kenyan surrogate mothers enter into such agreements as a means of earning money means that the child can be used as a manipulation ‘tool’ which in no way, aligns with their wellbeing. A good regulatory framework would ensure that such instances are avoided. This study also finds that if the loopholes in the proposed Bills are corrected, they could potentially safeguard the interests and wellbeing of the children and other parties to surrogacy arrangements.

## **5.2 Recommendations**

The last objective of the study was to make recommendations and propose a way forward for Kenya. These recommendations are drawn from the findings of the study and the practices of the jurisdictions in this study. They also address the salient concerns in the proposed bills.

### **5.2.1 The Role of the International Community**

There is a need for a uniform international public policy framework that harmonizes the surrogacy policies. These policies should heed to public health and BIC principles, while also acknowledging the various values and culture of different regions to protect all the parties in a surrogacy arrangement. Unresolved issues such as how many eggs should be fertilised in the case of IVF, ethical amounts of monetary compensation, and which state is mandated to give

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<sup>192</sup> See Chapter 4.

citizenship to the new-born in cases of inter-country agreements, are questions that need attention in such a framework.<sup>193</sup>

### **5.2.2 The role of Parliament**

There is a need for parliament to legislate a national policy governing surrogacy in order to safeguard the rights of the parties.<sup>194</sup> Kenya could imitate the UK and South Africa by legislating surrogacy arrangements, ensuring that the provisions promote the welfare of children. It could also follow the path used by France, by prohibiting the practice altogether, but affording mechanisms to promote the BIC who is born through the illegal practice of surrogacy. The study, however, acknowledges that a blanket prohibition is burying our heads in the sand, in the wake of fast-developing advancements in medical technology. The practice of surrogacy should be legalised, but only allowed in exceptional circumstances and under very strict regulations to ensure that the child is safeguarded. Thus, the study recommends the establishment of a task force to resolve the unaddressed concerns in the proposed Bills.

### **5.2.3 Recommendations on the Bills**

#### **5.2.3.1 Full disclosure of the origin of the child**

The Bills could be enhanced by ensuring that information about the origin of the children born through surrogacy is disclosed to them, to safeguard their right to know their parents. Additionally, the provision in the *Children's Bill* requiring that surrogate mothers can only rescind such an arrangement if the intended parents do not meet the set requirements should be changed.<sup>195</sup> A surrogate mother who wishes to keep the baby after birth due to emotional attachments should be allowed to do so as a right, and not because of faults of the intended parents. This way, the autonomy of the surrogate would be guaranteed, to avoid any cases of exploitation and this would safeguard the child's right to be taken care of by their birth parent.

#### **5.2.3.2 Provisions for inter-country surrogacy arrangements**

The right of every child to a nationality would be guaranteed by ensuring that the proposed legislation makes specific provisions for inter-country surrogacy arrangements. This way, the resultant child is assured that they will not have limping parentage and legal status. This would require that the countries of the involved parties have a regulatory framework for it. Kenya should also exercise some flexibility with regard to the moratorium prohibiting inter-country

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<sup>193</sup> Torres G, Shapiro A and Mackey T, 'A review of surrogate motherhood regulation in south American countries: Pointing to a need for an international legal framework' *BMC Pregnancy and Childbirth* 2019, 10.

<sup>194</sup> *JLN & 2 Others v Director of Children Services & 4 Others* [2014] eKLR, para. 40.

<sup>195</sup> Section 217, *Children Bill* (2017).



adoptions for couples who can prove that they have infertility issues, as long as it is clear that their intentions are to form a family, as opposed to child trafficking.

#### **5.2.3.3 Stand-alone surrogacy legislation**

A legislation governing surrogacy arrangements should be a stand-alone document instead of having its provisions as a section in another legislation.<sup>196</sup> The ART Bill of 2019 had its main focus on ART in general, and therefore, concerns on surrogacy did not get the attention they deserve. Provisions in a stand-alone document should address concerns relating to legal parentage, nationality, and identity while respecting the dignity of the child. The surrogacy Bills should be consolidated into one document, which, if addressed well, could ensure the child's welfare is guaranteed. Also, a legislation would put an end to the dilemma that our courts often face as regards surrogacy as they strive to dispense justice, while also trying not to overstep the role of the legislature.

#### **5.2.4 Other solutions for infertility**

Individuals struggling with infertility could find other means of care and support other than surrogacy, since the practice may not always respect the human dignity of the child. Solutions for infertility ought to respect the natural and good desire for couples to become parents and the rights of children not to be objectified. This could take the form of further medical research into causes and other ethical modes of treatment for infertility. For those struggling with permanent infertility, adoption would be a suitable solution for both the children and the prospective parents. Laws and policies should foster positive attitudes towards adoption and support individuals who choose this path.<sup>197</sup>

#### **5.2.5 Role of the courts**

The Kenyan courts could borrow from South African courts by being more actively involved in the approval of surrogacy arrangements. The case law discussed in Chapter four shows that the South African regime is keen on ensuring approval is obtained before the surrogate mother conceives the child, in order to safeguard the welfare of all the parties in such arrangements. A lot of disputes and ethical concerns would thus be minimised or avoided all together, since all parties who enter into the arrangements for commercial purposes and other potential threats

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<sup>196</sup> Provisions on surrogacy appear in sections in all the proposed Bills.

<sup>197</sup> Mengual A and Wolfe N, 'Surrogacy White Paper' *World Youth Alliance* 2015, 21.

would be curtailed. The study proposes that the proposed bills give these special powers to the courts.<sup>198</sup>

### 5.3 Conclusion

*Evaluating a child's best interests involves a welfare appraisal in the widest sense, considering, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations.*<sup>199</sup>

This quote aptly captures the spirit of this study. Innocent children across the world are the most vulnerable of all the parties to a surrogacy arrangement. It is unfortunate that their interests are often subordinated to benefit the other parties. The BIC principle as internationally recognised, forms a basis upon which the wellbeing of the child should be assessed, and the study shows that the current unregulated practice of surrogacy in Kenya does not promote this principle. Kenya should aspire to live up to the spirit of this principle in all respects as regards surrogacy arrangements through suitable legislation.

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<sup>198</sup> Rashid F, 'The legal and regulatory framework of surrogacy in Kenya: Theory and practice' Unpublished LLM Thesis, *University of Nairobi*, 2018, 98.

<sup>199</sup> *Re G (Children)* [2012], England and Wales Court of Appeal.

## Bibliography

### i. Books

Cretney SM, Masson J, Bailey-Harris R and Probert R, *The Principles of family law* 7<sup>th</sup> ed, Sweet & Maxwell Publishers, London, 1996.

Ebrahim G J, 'The family as a child-rearing unit of society' in Ebrahim G J, *Child health in a changing environment*, 1<sup>st</sup> ed, Palgrave Macmillan, London, 1983.

Ferguson L, 'The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' in Diduck A, Peleg N and Reece H, *Law in Society: Reflections on Children, Family, Culture and Philosophy* 2015.

Lenaola I and Mutugi M, *Bioethics of medical advances and genetic manipulation*, Longhorn Publishers and World reader, Nairobi, 2018.

Patel T, Schicktanz S and Mitra S, *Cross-cultural comparisons on surrogacy and egg donation: Interdisciplinary perspectives from India, Germany, and Israel* 1<sup>st</sup> ed, Palgrave Macmillan, 2018.

The New African Bible, *Paulines Publications Africa*, 2011.

### ii. Journal Articles

Alvare H M, 'A response to professor I Glenn Cohen's "Regulating reproduction: The problem with best interests' 96(11) *Minnesota Law Review Headnotes*, 2012.

Amel A and Griffiths D, The regulation of surrogacy in the United Kingdom: The case for reform, *Child and Family Law Quarterly*, 2017.

Anu, Kumar P, Inder D and Sharma N, 'Surrogacy and women's right to health in India: Issues and perspective' 57(2) *Indian Journal of Public Health*, 2013.

Banerjee S, Gestational surrogacy contracts: Altruistic or commercial? A contract theoretic approach 81(1) *Blackwell Publishing Ltd*, 2013.

Benshushan A and G. Schenker J, 'The right to an heir in the era of assisted reproduction' 13(5) *European Society for Human Reproduction and Embryology*, 1998.

Bromfield N and Rotabi K S, Global surrogacy, exploitation, human rights, and international private law: A pragmatic stance and policy recommendations, *Springer International Publishing*, 2014.

Chaturvedi R, Garg P S, Mishra A, Garg V and Chaturvedi P, 'Surrogacy policy in India and need of Acts to regulate commercial surrogacy' 3(20) *Journal of Evolution of Medical and Dental Sciences*, 2014.

Chilton A S, 'Book Review of Charles R Beitz, The Idea of Human Rights 1(25) *Harvard Human Rights Journal* 2012.

Cook R, 'Human rights and reproductive self-determination' 44(1) *The American University Law Review* 1995, 1003.

Degol A and Dinku S, 'Notes on the principle 'Best Interest of the Child': Meaning, History and its Place under Ethiopian law, 5(2) *Mizan Law Review*, 2011.

Kriai I and Valongo A, 'International issues regarding surrogacy' 2(2) *The Italian Law Journal*, 2016.

Kwena Z, 'Reproductive health Ethics' 5(4) *Kemri Bioethics Review*, 2015.

Ladomato D, 'Protecting traditional surrogacy contracting through fee payment regulation' 23(2) *Hastings Women's Law Journal*, 2012.

Louw A, 'Ex Parte MS 2014 JDR 0102 Case No 48856/2010 (GNP): Surrogate motherhood agreements, condonation of non-compliance with confirmation requirements and the best interests of the child' 47(1) *De Jure Law Journal*, 2014.

Nicholson C, 'When moral outrage determines a legal response: Surrogacy as labour' 29(3) *South African Journal on Human Rights*, 2013.

Poole A, Pearman H, Pook E, Cokthi G and Rushworth J, 'The Surrogacy Arrangements Act 1985: To what extent does the current law on surrogacy infringe on parental rights?' 1(1) *Student Journal of Professional Practice and Academic Research*, 2020.

Sebatello M, 'Are the kids alright? A child centred approach to assisted reproductive technologies' 31(1) *Netherlands Quarterly of Human Rights*, 2013.

Sifris A, 'The family courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach' *Thomson Reuters*, 2015.

Thiankolu M, 'Towards a legal framework on assisted human reproduction in Kenya: Some thoughts on the law, technology and social change' University of Nairobi, 2007.

Tieu M, 'Altruistic surrogacy: The necessary objectification of surrogate mothers' 3(35) *Journal of Medical Ethics*, 2009.

Trimming K and Beaumont P, 'International surrogacy arrangements: An urgent need for legal regulation at the international level' 7(3) *Journal of Private International Law*, 2011.

William-Jones B, 'Commercial surrogacy and the Redefinition of Motherhood' 2 *The Journal of Philosophy, Science and Law*, 2002.

### **iii. Reports**

Family Law Council, *Report on parentage and the Family Law*, 2013.

Grhari, 'Indian Surrogacy Law Centre review of 228<sup>th</sup> report of law commission of India on surrogacy' Web-Blog of Indian Surrogacy Law Centre -< <http://blog.indiansurrogacylaw.com/indian-surrogacy-law-centre-review-228th-report-law-commission-india/#:~:text=On%205th%20of%20August,Law%20and%20Justice%2C%20Government%20of%20on%20September%202020>> on 20 September 2020.

Mostowik P, 'Fundamental legal problems of surrogate motherhood: Global perspective' Instytut Wymiaru Sprawiedliwosci, Warszawa 2019,

Weiss A, 'Mennesson v France and 2019 ECtHR advisory opinion concerning the recognition in domestic law of a legal parent' *European Network on Statelessness*, 2020 -< <https://www.statelessness.eu/updates/blog/mennesson-v-france-and-2019-ecthr-advisory-opinion-concerning-recognition-domestic-law>> on 2 December 2020.

### **iv. Institutional Authors**

Growing families, 'Surrogacy in Kenya' -< <https://www.growingfamilies.org/surrogacy-in-kenya/#:~:text=Surrogacy%20in%20Kenya%20has%20no,by%20successful%20Indian%20IVF%20professionals.>> on 26 September 2020.

Health Ethics, Population Health, Global & Public Health, cost centre 10800, 'The surrogacy pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales' 2019.

UNICEF, 'Child rights and why they matter' -<<https://www.unicef.org/child-rights-convention/child-rig> United Nations Human Rights Office of the High Commissioner, 'Surrogacy and the sale of children: Side event, 37<sup>th</sup> session of the Human Rights Council, 6 March 2018, -< <https://www.ohchr.org/EN/Issues/Children/Pages/SurrogacySummary.aspx>> on 15 December 2020. <https://www.ohchr.org/EN/Issues/Children/Pages/SurrogacySummary.aspx>> on 16 August 2020.

## **v. Dissertations and Theses**

Aneesh P, Surrogacy under Indian legal system, and human rights concerns, PHD Thesis at Cohin University of Science and Technology, 2013.

Rashid F, 'The legal and regulatory framework of surrogacy in Kenya: Theory and practice' Unpublished LLM Thesis, University of Nairobi, 2017.

## **vi. Working papers, Discussion Papers and Research Papers**

Golombok S, 'New families, old values: Considerations regarding the welfare of the child' *Family and Child Psychology Research Centre, City University, London*, 1998.

Kushner J, 'The British Empire's homophobia lives on in former colonies' *The Atlantic*, 24 May 2019, -< <https://www.theatlantic.com/international/archive/2019/05/kenya-supreme-court-lgbtq/590014/>> on 14 June 2021.

Lepapa N, 'Hard labour: The surrogacy industry in Kenya' *The Elephant*, 28 May 2021, -< <https://www.theelephant.info/long-reads/2021/05/28/hard-labour-the-surrogacy-industry-in-kenya-part-i/>. on 14 June 2021.

Macdonald T and Dale M, 'Regulating surrogacy in Australia' Human Rights Law Centre, 17 April 2015 -< <https://www.hrlc.org.au/bulletin-content/regulating-surrogacy-in-australia>> on 15 September 2015.

Mengual A and Wolfe N, *Surrogacy White Paper*, World Youth Alliance, 2015.

## **vii. Self-published Articles**

Goyal S, 'Surrogacy in India: History, impact on poor and facts' *Jagran Josh* 17 August 2020 -< <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1>> on 12 September 2020.

Houghton W B, 'Is surrogacy in Kenya legal?' The sensible Surrogacy Guide, -<<https://www.sensible-surrogacy.com/surrogacy-in-kenya/>> on 27 September 2020.

Jerving S, 'Q&A: Kenya's second go at a reproductive health bill' Devex, 22 September 2020, -< <https://www.devex.com/news/q-a-kenya-s-second-go-at-a-reproductive-health-bill-98134>> on 28 September 2020.

## **viii. Newspapers**

BBC News, 'Baby Gammy granted Australian citizenship' -<<https://www.bbc.com/news/world-australia-30892258#:~:text=Baby%20Gammy%2C%20who%20was%20born,Australian%20citizenship%2C%20local%20media%20report.&text=The%20case%20sparked%20intense%20debate,citizenship%20to%20safeguard%20Gammy's%20future.>>

BBC, "1985: Inquiry over 'baby-for-cash- deal' " -<[http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid\\_2495000/2495857.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm)> on 19 September 2020.

Kohli N, 'Commercial surrogacy: The half mothers of Anand' Hindustan Times, 8 November 2015 -< <https://www.hindustantimes.com/health-and-fitness/the-half-mothers-of-anand/story-0snxcL9TycKZ38QusrKNGL.html>> on 20 September 2020.

Mburu S, 'Kenya: Why surrogacy in Kenya is shrouded in secrecy' Daily Nation, 31 October 2020, -< <https://allafrica.com/stories/202010310097.html>> on 14 December 2020.

Newson A and Callaghan S, 'Surrogacy, motherhood and baby Gammy' BioNews, 11 August 2014, -< [https://www.bionews.org.uk/page\\_94709](https://www.bionews.org.uk/page_94709)> on 20 September 2020.

Yadav B, 'The new surrogacy bill protects the interests of all' *Hindustan Times* 6 February 2020 -< <https://www.hindustantimes.com/analysis/the-new-surrogacy-bill-protects-the-interests-of-all/story-F4DJy6L5QsfYk57npKVB3H.html>> on 17 September 2020.

#### **ix. Web Resources**

<https://www.britannica.com/science/infertility>

<https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/infertility>

<https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>

Ajayi A and Mwoka M, 'Kenya having another go at passing a Reproductive Rights Bill' 15 July 2020, -< <https://www.indepthnews.net/index.php/sustainability/gender-equality/3694-kenya-having-another-go-at-passing-a-reproductive-rights-bill>> on 28 September 2020.