

THE RISE OF SURROGACY IN NIGERIA: CHALLENGES AND OPPORTUNITIES OF FAMILY BUILDING*

Abstract

Surrogacy in Nigeria is a rapidly evolving practice that offers hope to infertile individuals and couples seeking to build families. However, the lack of a comprehensive legal framework governing surrogacy in Nigeria poses significant challenges. Some of the challenges are: Legal Ambiguity which leaves intended parents, surrogates, and children vulnerable to potential legal disputes and exploitation, Exploitation of Surrogate Mothers and without a robust legal protection, surrogates may face unfair contracts, inadequate compensation and pressure to proceed with pregnancy despite complications, Cultural and Social Stigma most persons view surrogacy as unnatural or morally questionable, preventing open discussions and leaving many to seek surrogacy services discreetly and health risk. The opportunities available are: Family Building that provides infertile individual and couples to build families and experience parenthood; Growing Awareness will increase awareness and discussions about surrogacy are pushing for legislative action to regulate the practice; The Lagos State Guidelines on the implementation of assisted reproductive technology represents a step towards legal recognition and regulation of surrogacy. The way forward is for the pressing need for unified legislation that addresses the complexities of surrogacy, protects the rights of all parties involved, and ensures the well-being of children born through surrogacy; there should be Public Education and Awareness that will promote understanding and acceptance within Nigerian society; also the laws should be put in place to protect surrogate mothers from exploitation and ensure their rights are respected throughout the surrogacy process.

Keywords: Surrogacy, Nigeria, Legal Frame Works, Infertility, Challenges, Opportunities, Family building.

1. Introduction

The increasing practice of surrogacy in Nigeria has generated widespread debate, highlighting changing perspectives on family creation and reproductive technologies. As a diverse, multi-cultural society, Nigeria places strong emphasis on marriage and childbearing. Consequently, the birth of a child within marriage is often regarded as a form of marital security and is celebrated as a symbol of womanhood and fertility. As infertility rates continue to climb and social norms evolve, Surrogacy has emerged as a viable option for individuals and couples seeking to build their families. However, this trend also raises complex challenges, including socio-cultural implications. This article explores the opportunities and challenges presented by growing prevalence of Surrogacy in Nigeria, examining its impact on family building and the broader societal landscape. Across the globe, countries are advancing laws and policies to address the needs of their citizens. In contrast, limited effort has been made to reform Nigerian family law to reflect the realities of contemporary family structures, including issues such as surrogacy, artificial insemination, and complex family arrangements. This paper explores different ways surrogacy is practiced in Nigeria, the challenges it poses, the burdens faced by those involved, and the opportunities it presents. Such challenges include blackmail, refusal to release a child after payment, and disputes over the rights of the parties engaged in surrogacy. The discussion also examines Nigeria's legal framework. The focus on Nigeria is justified by its position as a developing nation within Africa and by the absence of a clear legislative structure to regulate surrogacy. The paper argues for the creation of regulatory policies to safeguard the rights of parties entering into surrogacy agreements in the country.

2. The Concept and Nature of Surrogacy

Children are regarded as vital members of society and are often seen as symbols of accomplishment, particularly within the Nigerian context, which retains strong traditional values. Their significance is deeply rooted in cultural practices, as seen in the naming conventions across African communities, where names often reflect the circumstances of a child's birth. Religious texts, especially the Holy Scriptures, also emphasize the prominent role of children. These texts outline the mutual responsibilities between parents and their offspring, stressing both the children's duty to obey and the parents' obligation to raise them according to divine principles.¹ The Qur'an highlights the obligations of parents towards their children, including the duty to provide just and fair treatment, ensure proper upbringing and education, and meet their maintenance needs. It also emphasizes the children's responsibility to show obedience and respect to their parents.² Beyond their role in procreation, children play a vital part in societal development by serving as a bridge between the present generation and the future. As they grow, children undergo various stages of social development before transitioning into adulthood. Childhood is typically regarded as a natural and biological phase of human life, and the distinction between the roles of children and adults holds significant meaning within social, political, religious, and legal frameworks. Historically, it was widely assumed that adults—especially parents—naturally acted in the best interest of their children. Consequently, there were no specific legal provisions or international conventions that acknowledged children as individuals with distinct rights. Instead, they were merely seen as dependents of their parents or guardians, and their welfare was considered to be entirely within the control and responsibility of those adults. As a result, the idea of children's rights was not seriously contemplated.

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¹ Qur'an 17:23-24, Qur'an 52:21, Qur'an 66:6

² King James Version, *The Holy Bible* (2014)

However, with the reform movement of the nineteenth century,³ concern for the protection of the dignity, equality and basic human rights of children came to the forefront of public consciousness. Children are often considered a vulnerable segment of the population, primarily because they are frequently subordinated to the authority and dominance of adults.⁴ As a result, there is a critical need to safeguard their rights. This protection is facilitated through a range of international legal frameworks aimed at promoting the well-being of children.⁵ These instruments emphasize the recognition of children's rights to self-determination and advocate for their ability to exercise certain rights independently and with an appropriate level of autonomy.⁶ Today, children's rights are being advocated globally. The adoption of the United Nations Convention on the Rights of the Child⁷ sought to see to the protection of the child's life, the promotion of health and educational opportunities and the prevention of exploitation, physical and sexual abuse. They emphasized that every child is entitled to opportunities and facilities which guarantee healthy and normal development. The African charter on the Rights and Welfare of the Child which was adopted by the Summit of the Heads of State of the Organization of African Unity in 1990, stresses the need for the strengthening and preservation of African values in the child and also to discourage those practices that are harmful to the health and status of the child.

It is important to explore the fundamental rights of the child, particularly in determining whether the widely accepted definition of a child also encompasses those conceived through surrogacy. Key questions arise concerning from whom such a child can claim parental responsibilities, and who holds the authority to exercise the rights on behalf of the child under the concept of parental rights. In scenarios involving a legally married couple where the husband's sperm is used to inseminate the wife, these questions may be straightforward. However, complexities often emerge in cases involving donor sperm or eggs, or arrangements such as surrogacy.

Surrogacy

Surrogacy in literal terminology represents *substitute*. The procedure is motivated by the desire for the conception and subsequent delivery of a child, genetically connected to the parents, but an alteration of the basic process of conception and birth of a child. It is distinct from adoption. Hence, it is an arrangement between a couple or the original mother of a baby to carry out the conception to the delivery process of a baby.⁸ Popular terminologies used in describing the concept include: The process of surrogacy is a new and developing technology in combating the process and deliver the baby on behalf of the couple or the original parent. The Commissioning Parent: these are the persons who originally own the baby conceived from the surrogate arrangement and benefit of the delivery⁹ Surrogacy has been employed as an alternative to adoption and has solved the difficulty of many women to conceive babies. It has also been referred to as mothering by proxy. A standard definition is provided by the *American Law Reports* which defines it as;

...a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth.¹⁰

Surrogacy motherhood hence is the procedure where one woman, who is the surrogate, takes the role of another woman, (the intended mother) who usually cannot produce fertile eggs or cannot carry pregnancy to term (or birth). The procedure is carried out by two basic methods which are the Traditional and the Gestational methods. The basic difference is the original of the genes, the former (also referred to as partial, natural or straight surrogacy) in which the eggs from the mother is used for fertilization with the sperm of the father through a process known as insemination (which could be natural or artificial); the latter on the other hand (also known as host or full surrogacy) is carried out by implanting an embryo created through *in vitro fertilization* into the surrogate.¹¹

Surrogacy as an Evolving Concept in Nigeria

Surrogacy in Africa is influenced by several factors. In Nigeria particularly, the approach to the inability to conceive and deliver a baby is not positive, hence, procreation is deemed as a necessity in the African family system.¹² Factors that influence this position are the multi-cultural background,¹³ the influence and multiplicity of religion, economic standard,

³The first ever documented law on the rights of the child is the Geneva Declaration of the Rights of the Child 1924, which was adopted by the League of Nation.

⁴Lansdown G, 'Children's Welfare and Children's Rights' in Hendrick H *Child Welfare and Social Policy: An Essential Reader* (The Policy Press 2005) 117.

⁵United Nations Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, Convention against Torture and other Cruel or Degrading Treatment or Punishment.

⁶ Ayua A.I and Okagbue I.E (eds), *The Rights of the child in Nigeria* (2005) Lagos, Nigerian Institute of Advanced Legal Studies 3.

⁷The convention was adopted by the forty-fourth UN General Assembly on 20 November 1989. 174 countries adopted the convention and 172 have ratified it, South Sudan and USA are yet to ratify the convention now known as African Union

⁸Rajinder Kaur, 'Surrogate Motherhood: Social and Legal Aspect' (Punjabi University, 2014) http://shodhganga.inflibnet.ac.in/bitstream/10603/54478/8/08_chapter%202.pdf accessed 23rd December, 2023.

⁹ British Medical Association, *Changing Conceptions of Motherhood: the practice of Surrogacy in Britain* (BMA Publications 1996).

¹⁰ American Law Reports, *Validity and Construction of Surrogate Parenting Agreement* (1989) 77 A.L.R 4th 70.

¹¹ Susan Imrie, Vasanti Jadva, 'The Long-Term Experience of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements' (2014) 29(4) *Reproductive Biomedicine Online* 424 [https://www.rbmojournal.com/article/S1472-6483\(14\)00353-8/pdf](https://www.rbmojournal.com/article/S1472-6483(14)00353-8/pdf) accessed 27th December 2023.

¹² Adelakun, O.S., 'The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges' (2018)

¹³ Umeora, O.J., Nzerem U.N., Eze, J.N., 'What Drives Grand Multiparous Women in Rural Nigeria to seek Treatment for Infertility?' (2013) 12 *African Journal of Medical and Health Sciences* 15.

and questions pertaining to morality. Therefore, it is necessary to note that the procedure is not expressly prohibited under the Nigerian laws, neither is it also expressly permitted. Hence, any person carrying out the procedure would not be guilty of committing a crime.¹⁴ Also, there is no judicial pronouncement on surrogacy contracts in Nigeria and as such if a judicial dispute arises on surrogacy contracts before a court in Nigeria, deciding on the matter would be a landmark decision.¹⁵ There is however, the likelihood of a bias, noting the influence of culture, religion and social factors in place in the Nigerian Legal and Health system.¹⁶ However, the law in Nigeria recommends that any child born as a result of artificial insemination, or the implantation of an embryo, while the woman is married, is regarded as the child to the husband.¹⁷ The Law Reform Commission further recommends that “where a child is born under a surrogacy agreement, the commissioning parents should formerly adopt the child, even if the child is the biological child of the commissioning parents.”¹⁸ Clearly this is intended to protect the intending/commissioning parents.¹⁹

In linking surrogacy with religion, Christians view the procedure in varied ways. The Catholics recognize the procedure as an immoral act, violating the dignity of the child, while Protestants display a liberal approach to the procedure.²⁰ The Quran on the procedure notes in Quran 23: 5- 7,²¹ 70: 29-31²² and 16: 72²³ the essence of preserving chastity, and the prohibition of insemination, particularly on a woman who is not the wife to another man.²⁴

3. Factors that necessitate the employ of Surrogacy practice in Nigeria

The need for surrogacy arises from a variety of circumstances, reflecting the complex landscape of modern reproductive challenges and societal changes. Several reasons contribute to the increasing demand for surrogacy which are:

Infertility: one of the primary drivers for turning to surrogacy is infertility. Individuals or couples who are unable to conceive or carry a pregnancy to term may seek the assistance of a surrogate to fulfill their desire for parenthood. The desire to have biological children is widely valued, and the inability to conceive is often negatively portrayed, socially stigmatized, and may even lead to divorce, causing adverse psychological and health effects for the individuals involved²⁵

Medical Conditions: Some individuals may face medical conditions that make it unsafe or impossible for them to carry a pregnancy. Surrogacy provides a viable alternative for those who want to have biological children despite medical constraints.

Single Parenthood: Individuals who wish to become parents but do not have a partner, or whose partner is unable or unwilling to have children, may turn to surrogacy as a means of realizing their parenthood goals. In fact more and more matured singles with no partners in Nigeria are leveraging on the opportunity surrogacy provides to become parents.

Recurrent Pregnancy Loss: individuals or couples who have experienced recurrent pregnancy loss may opt for surrogacy to mitigate the risks associated with carrying a pregnancy and increase the chances of a successful and healthy birth.

Uterine Issues: women facing medical issues such as a missing or non-functional uterus may choose surrogacy as a way to overcome these physical challenges and still experience biological parenthood.

Social Changes: Evolving social norms and changing attitudes toward family structures contribute to the growing acceptance and utilization of surrogacy as a means of expanding families in diverse ways

4. Legal Framework Associated with the Practice of Surrogacy in Nigeria

In contemporary society, accepting childlessness or resigning oneself to infertility is no longer widely embraced. Surrogacy has become a widely acknowledged method, offering hope to individuals and couples who, for various reasons, are unable to conceive naturally. Although surrogacy may not yet have formal legal recognition in Nigeria, it has gradually gained social acceptance. Nonetheless, there remains a degree of secrecy surrounding its practice, as many couples still feel uneasy openly acknowledging their use of this reproductive method. In contrast, numerous other countries have established legal frameworks to regulate surrogacy, defining the rights and obligations of all parties involved, outlining the benefits they are entitled to, and imposing specific responsibilities. Despite ongoing debates influenced by religious, cultural, and social

¹⁴ Adelakun, O.S., ‘The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges’, n 58.

¹⁵ Ibid.

¹⁶ Jegede, A. S., Fayemiwo, A. S., ‘Cultural and Ethical Challenges of Assisted Reproductive Technologies in the Management of Infertility among the Yoruba of South-Western Nigeria’ (2010) 14 *African Journal of Reproductive Health* 115.

¹⁷ Law Reform Commission ‘Reform of Nigerian Family Law’ III, 15.

¹⁸ Ibid.

¹⁹ M. Attah, *Family Welfare Law in Nigeria* (2016) 215.

²⁰ Umeora et al (n59), 105.

²¹ ‘and they who guard their private parts except from their wives or those their right hand possess, for indeed they will not be blamed, but whoever seeks beyond that then those are the transgressors.’

²² And those who preserve their chastity, save with their wives and those whom their right hand possess, for thus they are not blameworthy but those who seeketh more than that, those are they who are transgressors.’

²³ ‘And Allah hath given you wives of your own kind, and hath given you from your wives, Sons and grandsons, and hath made provision of good things for you.’

²⁴ T. Al-Mubarak, ‘Surrogacy and Islam: Between Permissibility and Prohibition’ (2014) *Islam and Civilisation Renewal* 277.

²⁵ Alibi oj: Socioeconomic Dynamism and the Growth of Baby Factories in Nigeria. SAGE. 2018; 8(2): 21582440108779115

beliefs, it is foreseeable that the Nigerian legislature may, in the near future, be compelled to develop statutory regulations governing artificial insemination.

5. Legal Challenges Relating to the Practice of Surrogacy in Nigeria

The challenges and emerging trends: the absence of specific Surrogacy laws in Nigeria poses challenges, including issues related to the definition of parentage, citizenship, maintenance, right of visitation, rights of the child, custody and succession. As surrogacy gain popularity, there is a growing recognition of the need for legal clarity and ethical standards. Ongoing legal discourse and scholarly research contribute to the evolving understanding of Surrogacy within Nigeria landscape but surrogacy is not discussed publicly in Nigeria as a result of ethical, legal issues, cultural and social perceptions surrounding infertility.

Lack of specific Legislation: one of the primary challenges is the absence of specific legislation addressing Surrogacy in many jurisdictions, especially Nigerian. The lack of clear legal frameworks can result in uncertainty regarding the rights and responsibilities of commissioning parents.

International Surrogacy and Citizenship Issues: Cross-border Artificial insemination or surrogacy arrangements can exacerbate challenges in establishing parental rights, particularly when there are discrepancies in citizenship laws. There are complexities surrounding citizenship and the potential for legal disputes over the child's nationality.

Parentage: Before the increased popularity of surrogacy and other assisted reproductive techniques parenthood was relatively simple to define.²⁶ The definition originates from the biological link between the male and female gamete donors and the child born from the union. In adoption, individuals rely on legal processes to obtain parental status. In modern times, surrogacy has introduced scenarios where a child may have more than one maternal figure: the genetic mother, who contributes the fertilized egg, and the gestational mother, who carries the pregnancy to term.²⁷ The concept of fatherhood has also become more complex. A sperm donor whose semen is used to fertilize another man's wife's egg may be recognized as the genetic father. However, whether he assumes the legal or social role of the father depends on factors such as his anonymity or whether he has a personal relationship with the intended mother. Additionally, if a married woman is artificially inseminated with sperm from another man, the law generally presumes her husband to be the child's legal father, regardless of any biological link. In Nigeria, this area remains undefined due to the absence of legislation regulating the relationships among parties involved in surrogacy. Nonetheless, under Section 125 of the Evidence Act, 2011, there is a presumption of legitimacy that considers the husband to be the child's father unless proven otherwise. This legal ambiguity not only obscures the definition of parenthood but also creates uncertainty regarding the parental rights and responsibilities of all parties, including the child.

Child Custody: Legally, custody refers to the authority to care for and make decisions on behalf of a child. Once the law recognizes someone as a child's mother or father, that individual is generally entitled to custody. However, custody disputes can arise in situations involving domestic violence, desertion, non-marital relationships, or during separation or divorce. A significant legal challenge may surface when a man, though not the biological father, is recognized as the legal parent—raising the question of whether he should be granted custody in the event of a divorce or separation.

Succession: The uncertainty surrounding the legality of artificial insemination extends to the legal status of children born through such means. It remains unclear whether these children are entitled to recognition as legitimate heirs of their social or nurturing parents. If deemed illegitimate, their rights to inherit—especially when the nurturing parent dies without a will—may be significantly restricted.²⁸ It is not without a legitimate concern in a country like Nigeria where the society lends credence to superstitions and obnoxious customs as to the claim to inheritance of a child who is not biologically related to the parent. The law should make clear provisions on the rights of such children in order to protect their succession rights and settle their legal status.

6. Surrogacy in Nigeria: The Way Forward

Given Nigeria's cultural and religious diversity, it is crucial that any law or policy on surrogacy reflects the unique character of the nation. Within this context, the Catholic Church regards surrogacy as morally unacceptable and a violation of the child's dignity, whereas Protestant groups tend to adopt a more permissive stance toward the practice.²⁹ On the cumulative strength of Quran 23: 5-7,³⁰ 70: 29-31³¹ and 16: 72³² In Islam, the preservation of chastity and the prohibition against placing a man's semen in the womb of a woman who is not his lawful wife form the basis for rejecting gestational surrogacy, making the practice impermissible under Islamic teachings.³³ In Nigerian traditional culture, natural conception is highly esteemed, while Western concepts such as surrogacy are generally rejected. Surrogacy is often viewed as a potential threat

²⁶ Robert H, 'Blank Regulating reproduction' (1990) (discussing modern changes in reproductive technologies and attitudes) 9

²⁷ Andre P Rose 'Reproductive misconception: why cloning is not just another assisted reproductive technology' (1999) 48 *Duke LJ* 1148

²⁸ Whether the provisions of section 42 of the 1999 constitution on Right to freedom from Discrimination can be invoked to protect the right of the child born through AI. It is, however, not clear whether the lack of genetic nexus between an Intestate parent and the child will make the latter's inheritance right more precarious.

²⁹ Umeora et al (n 8) 105.

³⁰ And they who guard their private parts except from their wives or those their right hands possess, for indeed they will not be blamed, but whoever seeks beyond that then those are the transgressors.'

³¹ And those who preserve their chastity, save with their wives and those whom their right hands possess, for thus they are not blameworthy but those who seeketh more than that, those are they who are transgressors.'

³² And Allah hath given you wives of your own kind, and hath given you from your wives, sons and grandsons, and hath made provision of good things for you.'

³³ T Al-Mubarak 'Surrogacy and Islam: Between permissibility and prohibition' (2014) *Islam and Civilisational Renewal* 277 279.

to the preservation of family lineage, which holds significant importance in the country's cultural heritage.³⁴ Within traditional Nigerian society, a man whose wife is unable to conceive often has the option of marrying an additional wife. Conversely, a woman married to an infertile husband may decide either to remain in the marriage and bear children through one of his close relatives or to seek a divorce.³⁵ A comparable practice exists in Zulu culture in South Africa, where a man whose wife is infertile may appeal to her family for a substitute, often a sister or close relative, to bear children on her behalf.³⁶ In Zulu tradition, denying a husband a substitute for an infertile wife is considered a violation of the marriage agreement and may entitle him to reclaim part of the bride price he had paid.³⁷

Nigeria can draw valuable lessons from South Africa's Children's Act in developing a suitable legal framework to regulate surrogacy. The country has already taken steps in this direction through the National Health (Amendment) Bill of 2016 and the Assistive Reproductive Technology (ART) Bill of 2016. To prevent overlaps and legal conflicts, these Bills should be aligned with the National Health Act. Furthermore, ART needs to be formally recognized, and medical professionals should advocate for the passage of these Bills. Once enacted, the ART Bill has the potential to serve as a model for other African nations. It is particularly commendable because it goes beyond South African law by explicitly safeguarding the rights of donors, surrogate mothers, commissioning parents, and the child.

7. Opportunities Available in Surrogacy for Family Building in Nigeria

Surrogacy avail opportunities to women and men who desire to have a baby or children even if the hopeful mother cannot carry the baby or the hopeful man cannot impregnate his wife. A surrogate carries the baby to term and the eggs may be from the hopeful mother, another woman and from the surrogate and for a man, the donor of sperm is from another man or combination of that of the husband and a third-party donor.

- (1) Women who have no uterus because either they were born without a uterus or it has been removed surgically.
- (2) Women who have the disease of cervical scarring and endometrioses
- (3) Women who are medically unfit to carry pregnancy especially women with severe heart condition, systemic lupus erythematosus, or end-stage renal disease (bad kidney)
- (4) Women who have many unsuccessful IVF treatments
- (5) Women who have abnormally formed uterus either in size or shape such that they cannot get pregnant or they have been having recurrent miscarriages
- (6) Where a man or men is with low sperm count
- (7) Where the man or men who are sterile
- (8) Where the man or men with decreased sperm motility
- (9) Where the man or men with low sperm erectile dysfunction.³⁸

Therefore, both Men and Women who are faced with the above challenges now have the opportunity available in surrogacy to build up their family/families.

8. Conclusion

Nigeria, with its large population and cultural as well as religious diversity, faces growing challenges linked to rising infertility among married couples. In response, many individuals resort to both legal and illegal means of becoming parents, including the buying and selling of infants. Although surrogacy is practiced in the country, the absence of regulation has created space for child-related crimes and abuses. This highlights the urgent need to address gaps in the legal framework surrounding surrogacy and assisted reproductive technology in Nigeria. Any regulatory approach must, however, respect the nation's cultural, religious, and ethical values. Prospective laws should prioritize the protection of commissioning parents, surrogate mothers, and, most importantly, the unborn child, while ensuring that the child's best interests remain paramount. To achieve this, effective regulatory and enforcement mechanisms must be established to guarantee compliance with acceptable minimum standards in surrogacy practice. Although surrogacy provides hope to infertile couples who long for a biological child, it is not without challenges. Nevertheless, if appropriately regulated with strong safeguards for the rights of the child, the surrogate mother, and commissioning parents, surrogacy could help eliminate several illegal practices currently prevalent in Nigeria, such as baby factories and unlawful adoptions.

³⁴ FT Christiana 'Surrogate motherhood: A philosophical discourse' (2013) 4 *Journal of Emerging Trends in Educational Research and Policy Studies* 575.

³⁵ CS Sanders 'Surrogate motherhood and reproductive technologies: An African-American perspective' (1992) 25 *Creighton Law Review* 1708.

³⁶ FM Mahlobogwane 'Surrogate motherhood arrangements in South Africa: Changing societal norms?' (2013) 2 *Speculum Juris* 45.

³⁷ TW Bennett Customary Law in South Africa (2008) 355.

³⁸ <https://www.origenefertility.com/services-details?ref=65833b86fa39a0d7c08db5bc&&fertilityservice=Surrogacy>