

**BETWEEN REPRODUCTIVE AUTONOMY AND LEGAL
UNCERTAINTY: THE ENFORCEMENT OF SURROGACY
AGREEMENTS IN NIGERIA**

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Abstract

Surrogacy has emerged as a significant alternative reproductive arrangement for individuals and couples facing infertility challenges. In Nigeria, the increasing resort to surrogacy agreements has outpaced the development of a clear and comprehensive legal framework regulating their formation and enforcement. While surrogacy practices are privately conducted and increasingly commercialised, Nigerian law remains largely silent, leaving parties vulnerable to legal uncertainty and

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exploitation. This paper examines the enforceability of surrogacy agreements in Nigeria. The study finds that there is an absence of specific legislation governing surrogacy and the consequent ambiguity regarding the validity and enforceability of surrogacy agreements under Nigerian contract, family, and child laws. The paper adopts a doctrinal legal research methodology by analysing Nigerian statutes, case law, constitutional provisions, and international instruments, alongside comparative perspectives from jurisdictions such as the United Kingdom and South Africa. It recommends the enactment of comprehensive assisted reproductive technology legislation, among others.

Keywords: Assisted Reproductive Technology, Enforcement, Medical science, Matrimonial law, Surrogacy

1. INTRODUCTION

Advances in medical science, particularly in Assisted Reproductive Technologies (ARTs), have transformed traditional notions of conception, parenthood, and family formation. One of such development is surrogacy, an arrangement whereby a woman agrees to carry and give birth to a child on behalf of another person or couple, commonly referred to as the intended parents.¹ Surrogacy may be altruistic or commercial, and may involve genetic or gestational arrangements.

Globally, surrogacy has generated intense legal, ethical, and moral debates, particularly concerning the commodification of reproduction,

¹ M Brazier, *Medicine, Patients and the Law* (5th edn, Manchester University Press 2016) 394.

exploitation of women, parental status, and the welfare of the child.² In many jurisdictions, these concerns have been addressed through detailed statutory frameworks regulating surrogacy agreements. However, Nigeria presents a contrasting picture.

In Nigeria, surrogacy arrangements are increasingly common, driven by high infertility rates, cultural pressure to procreate, and social stigma associated with childlessness.³ Despite this growing practice, Nigerian law contains no comprehensive legislation governing surrogacy. Existing laws, including the Constitution, Matrimonial Causes Act, Child's Rights Act, and general principles of contract law, provide no clear guidance on the legality or enforceability of surrogacy agreements.⁴

As a result, surrogacy agreements are often privately drafted and executed without regulatory oversight. This legal vacuum creates uncertainty regarding the enforceability of such agreements, particularly when disputes arise over parental rights, custody, payment, or refusal to relinquish the child.⁵ The absence of a clear legal framework exposes surrogate mothers, intended parents, and children to significant legal and human rights risks. It is against this backdrop that this study critically examines the enforceability of surrogacy agreements in Nigeria.

² E Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 805.

³ A A Adewunmi, 'Infertility and Assisted Reproductive Technology in Nigeria' (2019) 27 *African Journal of Reproductive Health* 17.

⁴ Constitution of the Federal Republic of Nigeria 1999 (as amended); Child's Rights Act 2003.

⁵ AI Ogbale, 'Legal Implications of Surrogacy in Nigeria' (2020) 5 *Nigerian Journal of Family Law* 62.

The major problem confronting surrogacy agreements in Nigeria is the absence of a specific statutory framework governing their validity and enforcement. Unlike jurisdictions that have clearly defined the legal status of surrogacy agreements, Nigerian law remains silent, creating ambiguity as to whether such agreements are legally binding or void.

This uncertainty raises several legal questions. First, it is unclear whether surrogacy agreements satisfy the requirements of valid contracts under Nigerian law, particularly with respect to legality, consideration, and public policy.⁶ Second, disputes over parental rights challenge existing family law principles, especially the presumption that the woman who gives birth is the legal mother.⁷ Third, the commercialisation of surrogacy raises concerns about exploitation, human dignity, and potential conflict with constitutional and child protection norms.⁸

The lack of judicial precedent further compounds the problem, leaving courts without clear guidance when disputes arise. Consequently, parties to surrogacy agreements face unpredictable outcomes, undermining confidence in the legal system and exposing vulnerable participants to abuse. The study focuses on the enforceability of surrogacy agreements within Nigeria and comparative references are made to other jurisdictions solely for analytical and reform purposes.

⁶ *Sodipo v Lemminkainen Oy* [1986] 1 NWLR (Pt 15) 220.

⁷ *R v Prince* (1875) LR 2 CCR 154.

⁸ Constitution of the Federal Republic of Nigeria 1999 (as amended), s 34.

2. CONCEPTUAL AND THEORETICAL FRAMEWORK OF SURROGACY

A proper analysis of the enforcement of surrogacy agreements in Nigeria requires a clear understanding of the concept of surrogacy, its various forms, and the theoretical frameworks that inform legal regulation. Surrogacy challenges traditional legal assumptions about motherhood, parenthood, bodily autonomy, and contractual freedom. This section examines the meaning, types, and characteristics of surrogacy, distinguishes it from related reproductive arrangements, and situates the study within relevant theoretical and ethical frameworks. These conceptual foundations are essential for evaluating the enforceability of surrogacy agreements under Nigerian law.

2.1 Meaning and Concept of Surrogacy

Surrogacy is generally defined as an arrangement in which a woman (the surrogate mother) agrees to carry a pregnancy and give birth to a child for another person or couple (the intended parents), with the understanding that parental rights will be transferred after birth.⁹ The defining feature of surrogacy is the intention to relinquish parental status, which distinguishes it from ordinary pregnancy or adoption. Okonkoh and Odunaike explained surrogacy thus:

Surrogacy ‘is the process by which a woman makes a choice to become pregnant and then carry to full term and deliver a baby who, she intends, will be raised by someone else’. The surrogate is the woman who carries the child, whereas the intended or commissioning parent refers to the person ‘who manifests the intent to be legally bound as the parent of a child resulting from assisted or collaborative

⁹ E Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 801.

reproduction'. There are generally two forms of surrogacy arrangements: gestational surrogacy and traditional surrogacy. A surrogacy arrangement may be altruistic or commercial/compensated.¹⁰

From a medical perspective, surrogacy is a form of assisted reproductive technology (ART) employed where pregnancy is medically or socially impossible or undesirable for the intended mother.¹¹ Legally, surrogacy presents complex questions regarding consent, enforceability, parentage, and the welfare of the child.

Assisted Reproductive Technology (ART) has been defined as:

All interventions that include the in vitro handling of both human oocytes and sperm or embryos for reproduction. This includes, but is not limited to, IVF and embryo transfer (ET), intracytoplasmic sperm injection (ICSI), embryo biopsy, preimplantation genetic testing (PGT), assisted hatching, gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer, gamete and embryo cryopreservation, semen, oocyte and embryo donation, and gestational carrier cycles.¹²

¹⁰ AC Okonkoh and D Odunaike, 'Contract for Gestational Services: Examining the Legal Status and Enforceability of Surrogacy Arrangements in Nigeria'. In *Reproductive Health and Assisted Reproductive Technologies In Sub-Saharan Africa: Issues and Challenges* (Springer Nature Singapore, 2023) 260.

¹¹ M Brazier, *Medicine, Patients and the Law* (5th edn, MUP 2016) 390.

¹² A C Okonkoh, & D Odunaike, Contract for Gestational Services: Examining the Legal Status and Enforceability of Surrogacy Arrangements in Nigeria. In *Reproductive Health and Assisted Reproductive Technologies In Sub-Saharan Africa: Issues and Challenges* (Singapore: Springer Nature Singapore, 2023) 257-258; Fernando Zegers-Hochschild and others, 'The International Glossary on Infertility and Fertility Care, 2017' (2017) 32(9) Human Reproduction 1786, 1790.

2.2 Types of Surrogacies

There are two types of surrogacies: that is traditional Surrogacy and Gestational surrogacy. Traditional surrogacy involves the surrogate mother using her own egg, making her the genetic and gestational mother of the child. Fertilisation is typically achieved through artificial insemination using the sperm of the intended father or a donor.¹³ This form of surrogacy poses significant legal challenges because the surrogate has a genetic connection to the child, strengthening claims to maternity under traditional legal principles. In jurisdictions without clear statutory regulation, courts are often reluctant to enforce agreements requiring a genetic mother to surrender a child.¹⁴

Gestational surrogacy involves the implantation of an embryo created through in Vitro Fertilisation (IVF), using the gametes of the intended parents or donors. The surrogate mother has no genetic link to the child.¹⁵ Gestational surrogacy is generally preferred in jurisdictions that permit surrogacy because it reduces disputes over parentage. However, in Nigeria, the absence of legislation means that even gestational surrogacy does not automatically confer parental rights on intended parents.¹⁶

2.3 Altruistic and Commercial Surrogacy

Surrogacy may also be classified based on compensation. Altruistic surrogacy involves no financial reward beyond reimbursement of reasonable expenses. Commercial surrogacy involves payment to the

¹³ M Brazier, *Medicine, Patients and the Law* (5th edn, MUP 2016) 392.

¹⁴ *Re TT (A Minor)* [2011] EWHC 33 (Fam).

¹⁵ Emily Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 804.

¹⁶ AI Ogbale, 'Legal Implications of Surrogacy in Nigeria' (2020) 5 *Nigerian Journal of Family Law* 65.

surrogate beyond expenses.¹⁷ Commercial surrogacy is particularly controversial, raising concerns about commodification of reproduction and exploitation of economically vulnerable women.¹⁸ These concerns are central to debates about enforceability under Nigerian public policy.

2.4 Differences between Surrogacy and Related Concepts

Surrogacy differs fundamentally from adoption. Adoption involves the transfer of parental rights after birth, whereas surrogacy is premised on an intention before conception to vest parentage in the intended parents.¹⁹ Nigerian adoption laws do not adequately address surrogacy arrangements, leaving a regulatory gap. Surrogacy is part of a broader category of assisted reproductive technologies, including IVF, gamete donation, and embryo transfer.²⁰ However, unlike other ARTs, surrogacy involves third-party gestation, making it legally and ethically distinct.

2.5 Ethical and Moral Debates Surrounding Surrogacy

Surrogacy has generated intense ethical debates. Critics argue that surrogacy: Commodifies women's bodies; Exploits poverty and inequality; Undermines human dignity.²¹ Supporters contend that: Surrogacy promotes reproductive autonomy; It enables the right to family life; With regulation, exploitation can be prevented.²² These ethical

¹⁷ Margaret Brazier, *Medicine, Patients and the Law* (5th edn, MUP 2016) 398.

¹⁸ Sonia Allan, 'Surrogacy and the Commodification of Reproduction' (2012) 20 *Medical Law Review* 18.

¹⁹ Child's Rights Act 2003 ss 125-141.

²⁰ Emily Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 780.

²¹ Margaret Radin, 'Market-Inalienability' (1987) 100 *Harvard Law Review* 1849.

²² John Harris, 'Rights and Reproductive Choice' (2005) 31 *Journal of Medical Ethics* 71.

tensions directly influence judicial and legislative attitudes toward enforceability.

2.6 Theoretical Framework

This paper is anchored on three key theories namely: Contract Theory, Feminist Legal Theory and Child-Centred (Best Interests) Theory. Contract theory emphasises freedom of contract and the enforceability of agreements freely entered into by competent parties.²³ From this perspective, surrogacy agreements should be enforceable if they satisfy contractual requirements. However, Nigerian law limits contractual freedom where agreements conflict with public policy or morality, a significant constraint on surrogacy enforcement. Feminist legal theory critiques surrogacy as potentially exploitative, particularly in unequal socio-economic contexts.²⁴ This theory is relevant in Nigeria, where poverty may compromise genuine consent. The best interests of the child principle, entrenched in Nigerian law and international instruments, prioritises child welfare over contractual intentions.²⁵ Courts may invalidate surrogacy agreements if enforcement is deemed contrary to the child's best interests.

2.6.1 The Nigerian Legal Framework and The Enforceability of Surrogacy Agreements

The enforceability of surrogacy agreements in Nigeria must be assessed within the context of existing legal regimes, notwithstanding the absence of a specific statute regulating assisted reproductive technologies. This section examines relevant provisions of Nigerian constitutional law,

²³ *Sodipo v Lemminkainen Oy* [1986] 1 NWLR (Pt 15) 220.

²⁴ Andrea Dworkin, *Right-Wing Women* (Perigee 1983) 192.

²⁵ Child's Rights Act 2003 s 1; Convention on the Rights of the Child 1989 art 3.

contract law, family and matrimonial law, and child protection law to determine whether surrogacy agreements can be recognised or enforced by Nigerian courts. It argues that while certain aspects of Nigerian law may accommodate surrogacy arrangements indirectly, significant doctrinal obstacles remain, particularly in relation to public policy, parentage, and the best interests of the child.

2.6.2 Constitutional Framework and Surrogacy in Nigeria

The Constitution of the Federal Republic of Nigeria 1999 (as amended) provides the foundational legal context within which surrogacy agreements must operate. Section 34 guarantees the right to dignity of the human person and expressly prohibits slavery, servitude, and forced labour.²⁶ Critics of commercial surrogacy argue that paid gestation may amount to commodification of the female body and violate human dignity.²⁷

However, Nigerian courts have generally adopted a purposive interpretation of section 34, focusing on coercion and inhuman treatment rather than consensual arrangements.²⁸ From this perspective, surrogacy entered into freely may not automatically violate constitutional dignity, though exploitative arrangements could be constitutionally suspect. The Constitution also protects the right to private and family life, which may support reproductive autonomy.²⁹ Nevertheless, these rights are not

²⁶ 1999 Constitution of the Federal Republic of Nigeria (as amended) s 34.

²⁷ S Allan, 'Surrogacy and the Politics of Commodification' (2013) 21 Medical Law Review 111.

²⁸ *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt 200) 708.

²⁹ Constitution of the Federal Republic of Nigeria 1999 (as amended) s 37.

absolute and may be restricted in the interest of morality and public policy, a limitation highly relevant to surrogacy agreements.

4.0 SURROGACY AGREEMENTS UNDER NIGERIAN CONTRACT LAW

Under Nigerian law, a valid contract requires offer, acceptance, consideration, intention to create legal relations, and legality.³⁰ On the surface, surrogacy agreements may satisfy these requirements. However, the principal obstacle lies in the requirement of legality.

Contracts are unenforceable where they are illegal or contrary to public policy.³¹ Nigerian courts have consistently refused to enforce agreements that offend morality or public interest.³² Given Nigeria's conservative social values, courts may regard commercial surrogacy as contrary to public policy, particularly where payment is involved. The doctrine that courts will not enforce contracts involving personal status or custody of children presents an additional barrier.³³ Surrogacy agreements purport to predetermine parentage and custody before birth, a matter traditionally reserved for judicial determination.

4.1 Family and Matrimonial Law Implications

The Matrimonial Causes Act governs marital relationships but does not guide surrogacy.³⁴ Nigerian family law generally presumes that the

³⁰ *Sodipo v Lemminkainen Oy* [1986] 1 NWLR (Pt 15) 220.

³¹ *Pan Bisbilder (Nig) Ltd v First Bank of Nigeria Ltd* (2000) 1 NWLR (Pt 642) 684.

³² *Okonkwo v Okagbue* (1994) 9 NWLR (Pt 368) 301.

³³ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

³⁴ Matrimonial Causes Act, Cap M7 LFN 2004.

woman who gives birth to a child is the legal mother.³⁵ This presumption conflicts directly with surrogacy arrangements, especially gestational surrogacy where the surrogate has no genetic link. In the absence of statutory displacement of this presumption, intended parents may lack legal recognition, regardless of genetic connection. This creates uncertainty in enforcing agreements that require the surrogate to relinquish the child.

4.2 Child's Rights Act and the Best Interests of the Child

The Child's Rights Act 2003 incorporates the best interests of the child principle as the paramount consideration in all matters concerning children.³⁶ Courts are empowered to override private agreements where enforcement would not serve the child's welfare. Surrogacy agreements that prioritise contractual obligations over child welfare are therefore vulnerable to judicial invalidation. While intended parents may offer superior socio-economic conditions, courts may still prioritise stability, birth circumstances, and psychological welfare over contractual intentions.³⁷

4.3 Parentage, Custody, and Legitimacy Issues

Nigerian law lacks a clear framework for determining parentage in surrogacy cases. Unlike jurisdictions that allow pre-birth or post-birth parental orders, Nigeria relies on traditional principles linking maternity to childbirth.³⁸ Custody disputes arising from surrogacy would likely be resolved under general child custody principles, not contract law. This

³⁵ E Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 809.

³⁶ Child's Rights Act 2003 s 1.

³⁷ *Williams v Williams* (1987) 2 NWLR (Pt 54) 66.

³⁸ E Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 810.

significantly weakens the enforceability of surrogacy agreements, as courts may disregard contractual clauses on custody and parentage.

4.4 Absence of Judicial Precedent on Surrogacy

To date, there is no reported Nigerian appellate decision directly addressing the enforceability of surrogacy agreements.³⁹ This judicial silence compounds uncertainty and leaves lower courts without authoritative guidance. In contrast, courts in jurisdictions such as the UK and South Africa have developed detailed jurisprudence on surrogacy enforcement.

4.5 Public Policy and Moral Considerations

Public policy remains the most significant obstacle to enforcement. Nigerian courts have wide discretion in determining public policy, often reflecting prevailing moral and social values.⁴⁰ Commercial surrogacy may be viewed as baby-selling or exploitation, particularly in the absence of regulation. Until legislative clarity is provided, public policy considerations are likely to override contractual autonomy in surrogacy disputes.

5.0 ENFORCEMENT CHALLENGES AND PRACTICAL ISSUES IN SURROGACY AGREEMENTS IN NIGERIA

While a section of this paper above has established that surrogacy agreements face doctrinal uncertainty under Nigerian law, this section moves from theory to practice by examining the practical enforcement challenges that arise when surrogacy arrangements break down. Even

³⁹ AI Ogbale, 'Legal Implications of Surrogacy in Nigeria' (2020) 5 Nigerian Journal of Family Law 68.

⁴⁰ *Sodipo v Lemminkainen Oy* [1986] 1 NWLR (Pt 15) 220.

where parties intend surrogacy agreements to be legally binding, enforcement is hindered by regulatory gaps, evidential difficulties, ethical tensions, and institutional weaknesses. These challenges demonstrate why reliance on private contracts alone is inadequate in regulating surrogacy in Nigeria.

i. Absence of Regulatory Oversight and Standardisation

One of the most fundamental enforcement challenges is the absence of a regulatory authority overseeing surrogacy arrangements in Nigeria. Unlike jurisdictions with licensing systems for fertility clinics and surrogacy agencies, Nigerian surrogacy practices are largely unregulated and privately organised.⁴¹ As a result: Surrogacy agreements vary widely in content and quality; There are no standard safeguards for surrogate mothers; and Medical practitioners operate without uniform legal guidelines.⁴² This lack of standardisation undermines enforceability, as courts are reluctant to enforce agreements formed in legally ambiguous and poorly regulated contexts.

ii. Disputes Over Parental Rights and Custody

The most common enforcement disputes in surrogacy arrangements relate to parental rights and custody. Situations frequently arise where: A surrogate mother refuses to relinquish the child; Intended parents reject the child due to disability or marital breakdown; and Genetic parentage is contested.⁴³ In Nigeria, courts resolving such disputes are likely to

⁴¹ AI Ogbole, 'Legal Implications of Surrogacy in Nigeria' (2020) 5 Nigerian Journal of Family Law 70.

⁴² AA Adewunmi, 'Assisted Reproductive Technology and the Law in Nigeria' (2019) 27 African Journal of Reproductive Health 19.

⁴³ E Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 812.

prioritise child welfare principles over and above contractual obligations.⁴⁴ Consequently, even well-drafted surrogacy agreements may be disregarded if enforcement is deemed contrary to the best interests of the child.

iii. Non-Enforcement of Financial Obligations

Another major challenge involves disputes over payment and compensation. Intended parents may refuse to pay agreed sums, or surrogate mothers may demand additional compensation beyond contractual terms.⁴⁵ Nigerian courts are generally reluctant to enforce contracts that appear to commercialise childbirth, particularly where payment is tied to the surrender of a child.⁴⁶ This reluctance severely undermines the enforceability of commercial surrogacy agreements and leaves surrogate mothers economically vulnerable.

iv. Evidential and Proof Challenges

Surrogacy disputes raise complex evidential issues, including: Proof of genetic parentage; Proof of consent; Medical records confidentiality; and Identity of donors.⁴⁷ In Nigeria, weak medical record-keeping and lack of statutory disclosure obligations complicate litigation. Courts may lack the technical expertise to evaluate DNA evidence and assisted reproduction procedures, further discouraging enforcement.⁴⁸

⁴⁴ Child's Rights Act 2003, s 1.

⁴⁵ S Allan, 'Commercial Surrogacy and Contractual Enforcement' (2014) 22 *Medical Law Review* 45.

⁴⁶ *Okonkwo v Okagbue* (1994) 9 NWLR (Pt 368) 301.

⁴⁷ E Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 815.

⁴⁸ AO Obadina, 'DNA Evidence and Family Law in Nigeria' (2018) 6 *Nigerian Law Journal* 92.

v. Exploitation and Power Imbalances

A critical enforcement concern is the power imbalance between intended parents and surrogate mothers. Many surrogate mothers come from economically disadvantaged backgrounds, raising questions about genuine consent.⁴⁹ Courts are likely to invalidate agreements where consent appears compromised by poverty, misinformation, or unequal bargaining power.⁵⁰ This judicial sensitivity, while protective, further weakens predictability in enforcement.

vi. Role of Medical Practitioners and Fertility Clinics

Fertility clinics play a central role in surrogacy arrangements but operate without a comprehensive legal framework. There is no Nigerian statute clearly defining: The duties of clinics; liability for failed procedures; and obligations to ensure informed consent.⁵¹ Where clinics facilitate surrogacy without adequate safeguards, enforcement disputes may expand into medical negligence claims, further complicating resolution.

vii. Social Stigma and Cultural Resistance

Cultural and religious attitudes in Nigeria often view surrogacy as morally objectionable or unnatural.⁵² This societal resistance influences judicial attitudes and may subtly shape public policy considerations against enforcement. Judges, as members of society, may be reluctant to

⁴⁹ M Radin, 'Market-Inalienability' (1987) 100 Harvard Law Review 1849.

⁵⁰ *Williams v Williams* (1987) 2 NWLR (Pt 54) 66.

⁵¹ AA Adewunmi, 'Assisted Reproductive Technology and the Law in Nigeria' (2019) 27 African Journal of Reproductive Health 21.

⁵² OA Olatunji, 'Religion, Culture and Assisted Reproduction in Nigeria' (2020) 8 Journal of African Law 133.

legitimise surrogacy through enforcement in the absence of legislative endorsement.⁵³

viii. Lack of Alternative Dispute Resolution Mechanisms

Surrogacy disputes are emotionally sensitive and poorly suited to adversarial litigation. However, Nigeria lacks specialised alternative dispute resolution (ADR) mechanisms for family and reproductive disputes.⁵⁴ Litigation often exacerbates conflict and delays resolution, harming all parties, particularly the child.

6.0 COMPARATIVE INSIGHT: WHY ENFORCEMENT FAILS WITHOUT LEGISLATION

Comparative experience demonstrates that jurisdictions without statutory regulation experience similar enforcement failures.⁵⁵ Courts consistently prefer legislative guidance over private ordering in matters affecting status, parentage, and child welfare. Nigeria's experience aligns with this global pattern, reinforcing the argument that enforcement challenges are systemic rather than incidental.

6.1 Comparative Analysis of Surrogacy Regulation and Enforcement

Comparative analysis is particularly valuable in areas of law marked by domestic uncertainty, such as surrogacy. Jurisdictions that have confronted similar ethical, social, and legal dilemmas provide tested regulatory models for balancing reproductive autonomy, prevention of exploitation, and protection of children's welfare. This section examines the regulatory

⁵³ *Sodipo v Lemminkainen Oy* [1986] 1 NWLR (Pt 15) 220.

⁵⁴ OC Okafor, 'ADR and Family Law Disputes in Nigeria' (2017) 4 *African Journal of Law and Society* 88.

⁵⁵ E Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 820.

frameworks of the United Kingdom, South Africa, and India, focusing on the legal status and enforceability of surrogacy agreements, institutional safeguards, and dispute-resolution mechanisms. The chapter concludes by extracting lessons relevant to Nigeria.

6.1.1 United Kingdom

Surrogacy in the UK is primarily regulated by the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008 (HFEA 2008).⁵⁶ While surrogacy agreements are lawful, section 1A of the 1985 Act renders them unenforceable, reflecting legislative caution against contractual coercion in matters of parentage.⁵⁷ Despite unenforceability, the UK provides a clear post-birth legal mechanism which is the parental order through which intended parents can obtain legal parentage, provided statutory conditions are satisfied.⁵⁸ This approach separates contractual intentions from the final determination of parentage, which is grounded in child welfare.

The UK prohibits commercial surrogacy and restricts payments to ‘reasonable expenses.’⁵⁹ Courts scrutinise payments and prioritise the best interests of the child when granting parental orders.⁶⁰ This welfare-centric model mitigates exploitation while offering legal certainty post-birth.

⁵⁶ Surrogacy Arrangements Act 1985 (UK); Human Fertilisation and Embryology Act 2008 (UK).

⁵⁷ Surrogacy Arrangements Act 1985, s 1A.

⁵⁸ Human Fertilisation and Embryology Act 2008, ss 54-55.

⁵⁹ *ibid* s 54(8).

⁶⁰ *Re X (A Child) (Surrogacy: Time Limits)* [2014] EWHC 3135 (Fam).

6.1.2 South Africa

South Africa adopts one of the most comprehensive statutory regimes through the Children's Act 2005.⁶¹ Unlike the UK, surrogacy agreements in South Africa are enforceable, but only if pre-approved by a High Court before conception.⁶² Court approval requires proof of informed consent, medical necessity, non-commerciality, and arrangements consistent with the best interests of the child.⁶³ This ex ante judicial control significantly reduces disputes. Once approved, the intended parents are deemed the legal parents at birth, and the surrogate has no parental rights.⁶⁴ This clarity enhances enforceability and legal certainty.

6.1.3 India

India's experience illustrates the risks of regulatory absence. Initially, India permitted commercial surrogacy, becoming a global hub with widespread reports of exploitation.⁶⁵ In response, India enacted the Surrogacy (Regulation) Act 2021, which prohibits commercial surrogacy and permits only altruistic surrogacy under strict conditions.⁶⁶ The 2021 Act establishes national and state surrogacy boards, mandatory registration of clinics, and stringent eligibility criteria.⁶⁷ Agreements operate within a tightly controlled administrative framework, with criminal sanctions for violations.

⁶¹ Children's Act 38 of 2005 (South Africa).

⁶² *ibid* s 292.

⁶³ *ibid* ss 295-301.

⁶⁴ *ibid* s 297.

⁶⁵ Amrita Pande, *Wombs in Labor* (Columbia University Press 2014) 67.

⁶⁶ Surrogacy (Regulation) Act 2021 (India).

⁶⁷ *ibid* ss 35-42.

6.2 Comparative Assessment

Across the three jurisdictions, common themes emerge and they include: Child welfare supremacy over contractual autonomy; State oversight (judicial or administrative) as a precondition for legitimacy; clear parentage rules to prevent post-birth disputes; and restrictions on commercialisation to reduce exploitation.

While the UK prioritises post-birth welfare review, South Africa emphasises pre-birth judicial approval, and India relies on administrative regulation and prohibition. Each model reflects different balances between autonomy and protection.

7.0 CONCLUSION

The paper finds that Nigeria lacks a specific statutory framework regulating surrogacy or assisted reproductive technologies. Existing laws such as constitutional provisions, contract law, family law, and the Child's Rights Act, were not designed to address surrogacy and are therefore ill-suited to resolve disputes arising from surrogacy arrangements.⁶⁸ This legislative silence creates uncertainty as to the validity and enforceability of surrogacy agreements. Although surrogacy agreements may satisfy the formal elements of contract formation, their enforceability is severely constrained by the doctrines of illegality and public policy. Nigerian courts traditionally decline to enforce agreements affecting personal status, custody, or child welfare.⁶⁹ Consequently, surrogacy agreements are vulnerable to being declared void or unenforceable, particularly where commercial consideration is involved.

⁶⁸ AI Ogbale, 'Legal Implications of Surrogacy in Nigeria' (2020) 5 Nigerian Journal of Family Law 62.

⁶⁹ *Okonkwo v Okagbue* (1994) 9 NWLR (Pt 368) 301.

The paper also finds that Nigerian family law continues to presume that the woman who gives birth is the legal mother.⁷⁰ In the absence of statutory displacement of this presumption, intended parents lack automatic legal recognition, regardless of genetic connection or contractual intention. This doctrinal conflict significantly undermines enforcement. The best interests of the child principle operates as a dominant constraint on enforcement.⁷¹ Courts are empowered to override private agreements where enforcement is perceived to undermine child welfare. While protective, this discretion introduces unpredictability into surrogacy disputes.

The paper further finds that enforcement is impeded by lack of regulatory oversight, power imbalances between parties, evidential difficulties, cultural resistance, and absence of specialised dispute-resolution mechanisms.⁷² These factors render private ordering through contracts inadequate. Comparative analysis reveals that jurisdictions with statutory regulation, notably South Africa and the UK, achieve greater certainty through judicial pre-approval, parental orders, and regulatory oversight.⁷³ Nigeria's challenges are therefore systemic and not unique.

A surrogacy arrangement is by its very nature full of ethical and legal questions. It becomes even more complicated in traditional surrogacy

⁷⁰ Emily Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 809.

⁷¹ Child's Rights Act 2003 s 1.

⁷² AA Adewunmi, 'Assisted Reproductive Technology and the Law in Nigeria' (2019) 27 *African Journal of Reproductive Health* 21.

⁷³ Human Fertilisation and Embryology Act 2008 (UK); Children's Act 38 of 2005 (South Africa).

arrangements. A gestational surrogacy is a safer option in Nigeria where there are no ART/ Surrogacy Laws. It must be stated that the absence of this law creates uncertainty in the rights and obligations of parties to surrogacy arrangement. This however, does not obviate the fact that surrogacy agreements are enforceable, especially gestational surrogacy can be enforced depending on the circumstances of each case. It is the only form of surrogacy that is recognized and appropriately classified as a form of reproductive technology by the ICMART. Gestational surrogacy therefore refers to a form of surrogacy arrangement where the surrogate contributes no genetic material to the creation of the child, she only offers gestational services.

A surrogacy arrangement is either legal or illegal. If it is legal, it is valid if all the ingredients of a valid contract are present in it and therefore enforceable. If it is illegal and against public policy, it is unenforceable even if all the elements of a valid contract are present in it. In *Bellow v A.G Oyo State*,⁷⁴ the word illegal was defined to mean an act which the law forbids and which is declared to be unlawful. In *Onyiuke III v Okeke*,⁷⁵ where the Supreme court stated that a contract is illegal if the consideration or promise involves doing something illegal or contrary to public policy. An illegal contract is therefore one which requires the doing of an act expressly prohibited by law. Despite that Surrogacy/ART Laws have not been enacted in Nigeria, the only thing certain is that there is no law in Nigeria which prohibits Surrogacy. The only law which has provisions relevant to surrogacy is National Health Act, 2014. See section 50 of the Act. However, this Act did not expressly mention surrogacy and

⁷⁴ (1986) LPELR-764(SC).

⁷⁵ (1976) LPELR-8039(SC).

this is important to note. Aside this, the only two regulations that provide insights on the clinical practice of ART in Nigeria are namely: Code of Medical Ethics and the ART Practice in Lagos State Regulation and Guidelines applicable in Lagos.

Having said this, the absence of surrogacy laws in Nigeria does not make surrogacy contracts unenforceable in Nigeria as the contracts can be enforced relying on contract law, family law, international law, human right law etc. In the case of *JF v DB*,⁷⁶ the Ohio Supreme Court held that gestational surrogacy contract does not violate public policy. In Nigeria, there is only one surrogacy case decided by the High Court, where it held a surrogacy arrangement to be valid and enforced the same.

In *Meribe v Egwu*,⁷⁷ the issue raised in the case was an incidental question on the validity of a customary surrogacy which permitted a childless woman to procure another woman for her husband in order to procreate. A surrogacy arrangement is a contract because it has some resemblance of a contract.

Being a contract, the following legal principles can be invoked in the enforcement of gestational surrogacy contracts namely: Offer, Acceptance, agreement between two parties, in commercial surrogacy, where there is consideration-monetary reward in exchange to carry and bear a child for the intending parents and even in altruistic surrogacy where the surrogate is paid no fee for her services, promises are still exchanged. All these undeniably bring a surrogacy contract/agreement

⁷⁶ *JF v DB*, 116 Ohio St. 3d 363, 2007-Ohio-6750.

⁷⁷ (1976) LPELR-1861 (SC).

within the province of contract law even though surrogacy agreement does not fit into contract law alone but extends to family law, human rights law. In *JF v JB*,⁷⁸ The Ohio Supreme Court emphasized the contractual nature of surrogacy agreements and its enforceability stating that a written contract defining the rights and obligations of parties are right and just to be enforced. To this end, it is appropriate to say that surrogacy agreement/contract can be governed by amalgam of laws including international law and Child Rights Laws. In *Re Olatunde*,⁷⁹ the intending parents entered into a gestational surrogacy arrangement with a surrogate, the arrangement was brokered by a Surrogacy Agency, so the intending parents never met the surrogate. After the child was born, the intending parents filed a suit praying the court to declare that they are the legal parents, since there is no law in Nigeria prohibiting surrogacy, the court ordered the intending parents to do DNA testing which strengthened the right claimed by the intending parent and the court held that surrogacy is a means of having a child and consequently declared that the intending parents are the legal parents of the child. Section 14 of the Child Rights Act provides that the child has a right to parental care and protection.

Estoppel: A surrogacy contract can be enforced by invoking principles like estoppel, intent and conduct within the realm of contract law. Comparatively, Surrogacy in the UK is primarily regulated by the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008. While surrogacy agreements are lawful there and even in South Africa through the Children's Act 2005. Surrogacy agreements in South Africa are enforceable, but only if pre-approved by a

⁷⁸ 879 NE 2d 740, 740 (Ohio 2007), 741

⁷⁹ *Re Olatunde* DHC/50/CS/2021 (Unreported).

High Court before conception. Above all, the National Assembly of Nigeria should as a matter of necessity and urgency enact ART/Surrogacy law for the Country.

This paper examined the enforcement of surrogacy agreements in Nigeria against the backdrop of increasing reliance on assisted reproductive technologies and the absence of a comprehensive legal framework regulating surrogacy. The research was prompted by the growing disconnect between social practice and legal regulation, which has left surrogate mothers, intended parents, children, and medical practitioners operating within a space of legal uncertainty. Using a doctrinal and comparative methodology, the study analysed Nigerian constitutional law, contract law, family and child law, enforcement challenges, and comparative regulatory models from selected jurisdictions.

The central conclusion of this paper is that surrogacy agreements are presently not reliably enforceable under Nigerian law. Although such agreements may satisfy the formal requirements of contract formation, their enforcement is significantly constrained by doctrines of public policy, illegality, and the courts' overriding obligation to protect the best interests of the child. Nigerian family law principles, particularly the presumption that the woman who gives birth is the legal mother, remain dominant and unmodified by statute, thereby undermining contractual attempts to predetermine parentage.

The paper further concludes that the absence of judicial precedent and statutory guidance leaves Nigerian courts ill-equipped to resolve surrogacy disputes consistently. Where disputes arise, courts are likely to

prioritise child welfare and constitutional values over private agreements, resulting in unpredictable outcomes and weakened contractual certainty. From a human rights perspective, the current legal vacuum exposes all parties to risk. Surrogate mothers are vulnerable to exploitation and non-payment, intended parents face uncertainty regarding parental status, and children born through surrogacy risk legal limbo. The lack of regulation also undermines constitutional values of dignity, private and family life, and protection of children.

The paper confirms that unregulated commercial surrogacy, rather than surrogacy per se, poses the greatest threat to dignity and welfare. Comparative experience demonstrates that prohibition alone is ineffective, while carefully regulated frameworks better protect vulnerable parties.

Comparative analysis reveals that jurisdictions that have achieved relative success in regulating surrogacy such as South Africa and the United Kingdom, have done so through legislative intervention, not judicial improvisation. Pre-conception judicial approval, statutory parentage orders, clinic regulation, and child-centred safeguards are critical to enforceability and legitimacy. Nigeria's continued reliance on general legal principles is therefore untenable.

In conclusion, the enforceability crisis surrounding surrogacy agreements in Nigeria is not a failure of contract law but a failure of legislative foresight. Surrogacy raises issues of status, identity, and human dignity that cannot be adequately addressed through private ordering alone. Until Nigeria enacts a comprehensive assisted reproductive technology framework, surrogacy agreements will remain legally fragile, inconsistently enforced, and socially contested. This paper contributes to

Nigerian legal scholarship by clarifying the limits of existing law and proposing a principled pathway for reform. It underscores the urgency of legislative action to align Nigeria's legal system with contemporary reproductive realities while safeguarding dignity, preventing exploitation, and promoting the best interests of the child.

8.0 RECOMMENDATIONS

The paper found, among other things; that Nigeria lacks a specific statutory framework regulating surrogacy or assisted reproductive technologies. It also concluded that the enforceability crisis surrounding surrogacy agreements in Nigeria is not a failure of contract law but a failure of legislative foresight. based on the findings and conclusion, this paper recommends as follows:

i. Enactment of Assisted Reproductive Technology Legislation

Nigeria should enact a comprehensive Assisted Reproductive Technology and Surrogacy Act to provide legal recognition, regulation, and enforcement mechanisms for surrogacy arrangements. Such legislation should clearly define permissible forms of surrogacy and prohibit exploitative practices. Statutory safeguards should ensure independent legal advice for surrogate mothers; health insurance and post-partum care; and protection against coercion and exploitation.

ii. Judicial Pre-Approval of Surrogacy Agreements

Drawing from the South African model, surrogacy agreements should be subject to mandatory pre-conception judicial approval. This would ensure informed consent, protect dignity, and enhance enforceability.

iii. Statutory Parentage Orders

Legislation should provide for parentage orders vesting legal parenthood in intended parents, subject to child-welfare safeguards. This would resolve parentage uncertainty and reduce post-birth disputes.

iv. Regulation of Fertility Clinics and Intermediaries

Fertility clinics and surrogacy facilitators should be licensed and regulated, with clear duties relating to consent, record-keeping, and counselling. Regulatory oversight would improve accountability and evidence quality.

v. Development of Specialised Dispute Resolution Mechanisms

Nigeria should establish specialised family or medical law divisions or ADR frameworks to handle surrogacy disputes efficiently and sensitively.