

## Surrogacy in Africa

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### 1. Introduction

A cursory examination of some of the world's databases<sup>2</sup> of women offering their services for surrogacy reveals numerous African entries, from Tanzania to Nigeria, from Uganda to Botswana. In fact the number of surrogate mothers from Africa registered on one site since April 2021 seem to total about half or more of all women registered (from all four corners of the world!). This may be explained by any number of factors, such as increased internet access in Africa, the poverty of desperate African women, and declining interest in surrogacy in other parts of the world. The drop in the numbers of intercountry adoptions worldwide must also be cited as a backdrop. The question to be posed is whether, as was the case with intercountry adoption a decade ago, Africa is poised to be the 'new frontier for surrogacy'?<sup>3</sup>

This chapter is divided into 3 parts. This first provides an overall introduction, exploring themes such as surrogacy and cultural values, the rise of fertility clinics, and the importation of fertility and IVF skills (not to mention agencies) into Africa. The second part consists of country briefs of identified "hotspots". The choice of countries was dictated by language (the author found French and Arab speaking countries impossible to get information on), as well as by detected incidences of surrogacy occurring in these countries. The third part identifies some conclusions.

#### *Cultural and social values*

Children play a central role in kinship family formation in Africa,<sup>4</sup> and across various countries in Africa, scholars have long since emphasised the cultural importance of childbearing. Most African societies define a family as that which constitutes both adults and children. A family is thus incomplete if there is absence of children. A person who came of age was required to get a suitor and thereafter it was expected that children should follow from such a union. Children therefore were and still are considered to be of importance, not just for the continuity of the lineage of the parents but also of the society in general.<sup>5</sup> As Thandabantu Nhlapo says "Children are at the centre of the African concept of marriages as an arrangement serving interests wider than the immediate needs of the spouses. A man needed many sons to ensure the survival of the lineage and to increase his power within the clan, and daughters who by their marriages would swell his herds and create beneficial alliances with other clans. As members of the family children were also important participants in the household economy. The whole clan thus had an interest in the children of its members, their upbringing, socialization and eventually, marriage."<sup>6</sup>

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<sup>2</sup> <https://surrogatefinder.com/findsurrogates/> (accessed 12 March 2022); countries represented include Tunisia, Zambia, Zimbabwe, many in Uganda, Cote D'ivoire, Mozambique, Namibia, Morocco,

<sup>3</sup> "Africa: The New Frontier for Intercountry adoption. Addis Ababa: The African Child Policy Forum" (2012).

<sup>4</sup> This appreciation of the importance of the kinship group was an important driver in motivating for a regional treaty on children's rights, the African Charter on the Rights and Welfare of the Child (1990), now ratified by 48 African state parties.

<sup>5</sup> Robai Ayieta Lumbasyo TOWARDS A KENYAN LEGAL AND ETHICAL FRAMEWORK ON SURROGACY (Unpublished Master of Science in Medicine Bioethics and Health Law, University of Johannesburg, 2015).

<sup>6</sup> The African Family and Women's Rights: Friends or Foe's?' 1991 *Acta Juridica* 135 at 143, quoted in JC Bekker and M Buchner Eveleigh "The legal character of ancillary customary marriages" vol 50:1 {2017} De Jure p 80-96.

Lack of children, and infertility lead to social stigma. “Couples need to have children to give meaning and worth to marriage and in order to be socially accepted and respected as complete human beings.”<sup>7</sup> Demonstrating fertility is necessary to be considered a full adult, a real man or woman, and to leave a legacy after death. The cultural environment is paternalistic and as such, children are highly desired, and parenthood is culturally mandatory.<sup>8</sup>

In Botswana, for instance, surrogacy is not alien to local culture. Since time immemorial, Batswana women have nominated relatives to give birth on their behalf.<sup>9</sup> The procedure can bring with it great advantages, especially for those who can't have children naturally, by allowing individuals and couples to have their “own” child, without going through a long and restrictive adoption process.<sup>10</sup> In Nigeria too, a high value is placed on marriage and procreation.<sup>11</sup> Surrogate motherhood has been an acceptable means of child acquisition in Igbo culture, for instance. This is basically a practice in which a woman who could not have children of her own gets another woman to carry a pregnancy and bear children for her.<sup>12</sup> This surrogate is either impregnated by the husband of the woman or by another man and the children she bears belongs to the intending mother.

Amongst South African clans such as the Pedi, Xhosa and Tswana, according to African customary law, if a married woman is infertile or dies young or without having borne children, the husband's family has a right to approach the woman's family and ask that he be given a substitute (or seed raiser). The substitute could be an unmarried sister or another female relative of the infertile or deceased woman who has to bear children for the house of the infertile or deceased wife. This practice is referred to as a sororate union.<sup>13</sup>

It is likely that similar cultural practice exist elsewhere in African customs to address infertility and ensure the perpetuation of the lineage. However, information is rather scant.

### *Rise of fertility clinics*

The rise of fertility clinics on the continent has been a catalyst for the growth of surrogacy. Various websites indicate, for instance, that there are at least 6 such clinics in Ghana, although none

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<sup>7</sup> T Gerrits (2018) “Reproductive Travel to Ghana: Testimonies, Transnational Relationships, and Stratified Reproduction”, *Medical Anthropology*, 37:2, 131-144.

<sup>8</sup> Oluwatobi Joseph Alabi “Perceptions of Surrogacy Within the Yoruba Socio-Cultural Context of Ado-Ekiti, Nigeria” *F1000Research* 2021, 9:103. In a patriarchal vein, the memorandum accompanying the recent Ugandan Bill, discussed below, even refers to a risk of rejection from husband and family where women are unable to conceive, as well as to increased likelihood of socio-economic deprivation and domestic violence (terming this as a “social drama”). Some men (“a high proportion”, according to the memorandum) then engage in extramarital relationships, leading to divorce and stigma for the infertile wife.

<sup>9</sup> <https://www.sundaystandard.info/legislators-caught-flatfooted-as-batswana-women-rent-out-their-wombs/> (accessed 14 July 2022).

<sup>10</sup> Legislators caught flatfooted as Batswana women rent out their womb <https://www.sundaystandard.info/legislators-caught-flatfooted-as-batswana-women-rent-out-their-wombs/#:~:text=Surrogacy%20is%20not%20alien%20to,give%20birth%20on%20their%20behalf> (accessed 14 March 2022).

<sup>11</sup> O Adelakun “The concept of surrogacy in Nigeria: Issues prospects and challenges” (2018) *18 African Human Rights Law Journal* 605-624.

<sup>12</sup> Okwuosa Ikechukwu Kenneth “An ethical evaluation of traditional surrogacy in Igbo culture, south east Nigeria” *Sapientia Journal of Arts, Humanities and Development Studies (SGOJAHDS)*, Vol.3 No.2 June, 2020; p.g. 13 – 24.

<sup>13</sup> JC Bekker note 6 above.

explicitly lists surrogacy as a service offering.<sup>14</sup> That they accommodate an international clientele is evident though. In Uganda, with a population of 47 million people, 14 IVF clinics have been mentioned, in the statement of the member of Parliament who introduced a private members bill to regulate surrogacy in November 2021.<sup>15</sup> He said that some, at least, offer surrogacy services, which was confirmed by a basic internet search. In Kenya, at least 8 clinics provide surrogacy services. Some appear to be part of international companies.<sup>16</sup>

Some of these clinics have been a destination for medical personnel from other regions, eg Thailand, India<sup>17</sup> and Cambodia, where surrogacy regulation has tightened or shut down. That commercial interests are at stake is obvious. Indeed, one agency website in Kenya identifies tourism related destinations for intended parents to enjoy.<sup>18</sup>

High costs elsewhere in the world, and the mushrooming of relatively first world facilities can also be cited as a factor driving the growth of surrogacy in Africa. And lower costs in African surrogacy destinations<sup>19</sup> are dictated by the cheaper costs of hiring a surrogate mother.<sup>20</sup> For instance one agency reported that the surrogate's take home pay would be 8000 USD, rising by 1000 USD if she had twins.<sup>21</sup> This is around one quarter of what the cost in the USA would be. Furthermore, the success rate of surrogacy in delivering a 'take home' baby is high at 70-80% which is comparable to first world figures.<sup>22</sup>

#### *Lack of legal regulation*

With the exception of South Africa, discussed next, comprehensive regulation is largely absent.<sup>23</sup> Thus, a fertile environment is set for those who cannot (eg same sex couples), or do not want to access highly regulated markets (eg as they would not meet counselling criteria) to explore African

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<sup>14</sup> Gerrits (note 7 above) however records the existence of 14 clinics offering fertility services in Ghana, 16-20 in Nigeria, and 12-15 in South Africa.

<sup>15</sup> <https://www.independent.co.uk/news/world/africa/parliament-grants-leave-to-ope-to-introduce-bill-on-surrogacy/> (accessed 22 March 2022.)

<sup>16</sup> See for instance <https://www.vinsfertility.com/surrogacy-fees/> (accessed 22 March 2022).

<sup>17</sup> <https://www.fertilitypoint.co.ke/our-team> indicates that the doctors previously worked in India, as an example.

<sup>18</sup> <https://www.surrogacyagencykenya.com/accommodation/> (accessed 22 March 2022).

<sup>19</sup> Total costs of surrogacy are estimated to be between 25000 USD and 37000 USD.

[https://www.google.com/search?q=surrogacy+agencies+in+kenya&rlz=1C1GCEU\\_enZA821ZA821&oq=surrogacy+agencies+in&aqs=chrome.0.69i59j0i512j69i57j0i512l7.6903j0j15&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=surrogacy+agencies+in+kenya&rlz=1C1GCEU_enZA821ZA821&oq=surrogacy+agencies+in&aqs=chrome.0.69i59j0i512j69i57j0i512l7.6903j0j15&sourceid=chrome&ie=UTF-8)

<sup>20</sup> Gerrits (note 4 above) p 139 referring to a Ghanaian US resident who travelled back to get surrogate born twins, who said she had done so because costs in the US were too high.

<sup>21</sup> <https://www.theelephant.info/long-reads/2021/05/28/hard-labour-the-surrogacy-industry-in-kenya-part-i/> (accessed 14 July 2022). A typical monthly wage of a domestic house help would be 55 USD per month.

However, the investigation carried out by the Elephant also tells the following stories: "Magdalene lived overseas for the duration of her pregnancy. After she delivered, she flew back to Kenya where she said she was paid Sh400,000 (\$3,668) — a welcome sum for a single mother, but still Sh200,000 (\$1,834) short of the agreed Sh600,000 (\$5,502) delivery fee." The same surrogate also revealed when she and the parent sat together on the flight, the parent discovered from me that a "lot of what he had paid for seemed excessive. For example, I was just staying at the surrogate hostel but they said that I was costing over Sh100,000 a month for rental, food, upkeep and a personal maid." Monica also learned, through her commissioning parent, that the surrogacy contract between the agency and the parent, which she was never given sight of, stated she would be paid Sh1.5 million. In fact, Monica claims she had been offered Sh630,000 (see <https://www.theelephant.info/long-reads/2021/05/29/hard-labour-the-surrogacy-industry-in-kenya-part-ii/> (accessed 14 July 2022).

<sup>22</sup> See for instance <https://www.vinsfertility.com/surrogacy-fees/> (accessed 22 March 2022).

<sup>23</sup> The unusual changes in the law in Ghana is discussed in that section.

alternatives. The lack of regulation has also led to the transfer to these markets from other countries where surrogacy is largely banned or excluded for foreign commissioning parents.

Ghana recently introduced legislation, but by a rather back door method, as discussed below. Although bills have been introduced in at least three countries discussed here – Kenya, Nigeria and most recently Uganda, but have yet to be finalised. However, Parliaments do not seem to have much appetite for the issue, as some of these have not yet been passed, some years after their introduction.

## 2. Country specific briefs

### 2.1 Countries regulating surrogacy in terms of legislation

#### *South Africa*

South Africa's surrogacy provisions have been discussed in many extant academic contributions.<sup>24</sup> Therefore only a brief synopsis of the salient features is provided here. Surrogacy is regulated by chapter 19 of the Children's Act 38 of 2005. Since discrimination on the basis of sexual orientation is constitutionally prohibited, same sex couples are eligible as commissioning parents.

The Act sets various eligibility requirements for confirmation of a surrogate motherhood agreement, which must be sought pre-implantation, and must be in writing and signed by all the parties. Confirmation is effected by a High Court only. Only persons domiciled in South Africa are eligible to be commissioning parents or surrogate mothers - although it appears that this requirement has from time to time been breached.<sup>25</sup>

There are various decisions laying out what material needs to be placed before the court to assist the court to determine whether the surrogate mother is suitable, and whether the commissioning parent(s) are so too.<sup>26</sup> Infertility of the commissioning parents or incapacity to carry a child of their own to term must be confirmed by medical reports. There must be a genetic link between one of the commissioning parents and the child that is to be born. This requirement which was challenged in the Constitutional court, was upheld as being in the best interests of the child in *AB v Minister for Social Development and Others*.<sup>27</sup>

No artificial fertilisation of the surrogate may take place before the confirmation of the agreement by a court, or after the lapse of 18 months from the date of confirmation. In *Ex parte M and others*<sup>28</sup> the court was confronted with just such a *fait accompli* as this section tried to prevent. The application for confirmation was made when the surrogate was already 33 weeks pregnant. The

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<sup>24</sup> J Heaton "The pitfalls of international surrogacy: a South African Family Law perspective" (2015) THRHR 29; T Boezaart (ed) *Child Law in South Africa* (2019) Juta and Co Cape Town; J Sloth-Nielsen "Surrogacy in South Africa" in C Fenton Glynne, J Scherpe and T Kaan (eds) "Eastern and Western Perspectives on Surrogacy" Intersentia, Cambridge 2019, Louw A "Chapter 19: Surrogate Motherhood" in CJ Davel and A Skelton (eds) *Commentary on the Children's Act* Juta and co 2018; Adelsun (note 11 above) also discusses the South African position.

<sup>25</sup> Heaton note 23 above and see also Namibia in this chapter.

<sup>26</sup> *Ex Parte WH and others* 2011 (6) SA 514.

<sup>27</sup> CCT 155/15, discussed in S. Florescu and J. Sloth-Nielsen 'Visions on Surrogacy: From North to South: the approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin' [2017] *International Survey of Family Law*, Jordan Publishers, 239 – 58. The finding of the Constitutional Court has, however, led to a South African Law Reform Commission investigation into the rights of children to know their biological origins 16 more generally and an Issue paper was released on the topic in 2017.

<sup>28</sup> 2014 (3) SA 415 (GP). Pre-confirmation conception is actually an offence in terms of s. 301.

fertilisation had taken place on the basis of a verbal agreement between the parties, who had used the father's sperm and a donor egg. At common law, an arrangement of this kind would be an unlawful agreement, and therefore unenforceable. Courts would normally be slow to interpret a statute in such a way as to condone illegality. But, the court noted, a surrogacy contract is a contract of a special kind, raising issues such as the best interests of the child to be born, the right to dignity, and the surrogate's right to security in and control over her body. Hence, the judge interpreted her mandate to include a discretionary power to condone the late submission of the agreement, for the most part inspired by the best interests of the child whose birth was imminent. It is widely thought, though, that the judgment involved considerable stretching of legal principle to arrive at the desired result.

The effect of a valid surrogacy agreement is that any child born is for all purposes the child of the commissioning parent or parents from the moment of birth.<sup>29</sup> The surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth.<sup>30</sup> She and her husband, partner or relatives have no rights of parenthood over the child.<sup>31</sup> Equally, the child has no maintenance claim against the surrogate or her family.<sup>32</sup>

Payments authorised by the Act are limited to expenses incurred in artificial insemination; costs incurred with regards to pregnancy and birth; loss of earnings; and insurance associated with the pregnancy. Commercial surrogacy is outlawed and permissible payments are limited to those expressly mentioned in s301 of the Act; payments to an intermediary who provided emotional support to surrogate mothers were disallowed in *Ex Parte HP and others*.<sup>33</sup> In *Ex Parte WH*,<sup>34</sup> the court wanted considerable additional details to be filed on the role of the agency that was involved, such as all agreements concluded between the commissioning parents, the agency and the surrogate, and details of any sums paid by the commissioning parents to the agency. Full details of payments made by the agency to the surrogate were also required to be produced. The court adversely commented on the provision for payment of "lump sums" or general amounts under the various categories (health insurance, life insurance, surrogate's various expenditure (maternity clothes, transport)) as these could disguise the payment of compensation.<sup>35</sup>

The Act contains detailed provisions on termination of surrogacy agreements. The surrogate may terminate the agreement before giving birth but must first inform the commissioning parents. However, where the surrogate mother is genetically related to the child (ie her own gametes were used), she may within 60 days after birth terminate the surrogate motherhood agreement by filing notice in court.<sup>36</sup> She incurs no liability towards the commissioning parents for exercising her rights of termination, except for any payments made by the commissioning parent, which must be

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<sup>29</sup> Section 297 (1)(a). In respect of legally invalid surrogacy agreement, the consequences would be that the child is for all purposes the child of the surrogate (and her partner, if any) even if there is no genetic link to either of them, Conversely, the commissioning parents would have not status as legal parents (even in one of them is genetically related to the child): s. 297(2).

<sup>30</sup> Section 297(1)(b).

<sup>31</sup> Section 297(1)(c) and (d).

<sup>32</sup> Section 297(1)(f).

<sup>33</sup> Unreported case no. 45037/16.

<sup>34</sup> 2011 (6) SA 514 (GNP) par 39.

<sup>35</sup> Sloth-Nielsen note 23 above.

<sup>36</sup> 298 (1)-(3).

compensated.<sup>37</sup> Then, too, any parental rights established are terminated and vest in the surrogate mother. Where the surrogate does not carry a genetic link to the child, she may not terminate a valid surrogate motherhood agreement once artificial fertilisation has taken place.<sup>38</sup> She may, however, at any time elect to undergo a termination of pregnancy, although she must inform the commissioning parents of her intention to terminate the pregnancy.<sup>39</sup>

Courts have from time to time probed surrogate motherhood agreements quite closely - confirmation is not a routine exercise. A recent case illustrates the willingness of the court to delve quite closely into the suitability of would-be surrogate. In *Ex Parte K*<sup>40</sup> the court raised as a matter of concern (inter alia) that the prospective surrogate was only 20 years old, that she had met her husband (the fourth applicant) when she was only 13 years old, had had her first child at 16, whereupon she dropped out of school prematurely. She had another child two years later. The court was concerned that, as regards her psycho-social status, she did not appear to have made good decisions in her best interests as a teenager, and that there was nothing in the papers to indicate that she had gained the maturity to understand the implications of her decisions. The court did not find her suitable to serve as a surrogate mother, also raising concerns that it seemed that she was being paid to carry the baby. She came seemingly from poor socio-economic circumstances, and had no other income.

Further, in *Ex Parte CJD and others (Centre for Child Law intervening as amicus curiae)*,<sup>41</sup> two men seeking confirmation of a surrogacy agreement were unsuccessful. It came to the attention of the judge before whom the matter served that the second applicant, HN, did not want his sexual orientation made public and that he and partner CJD did not co-habit. The court noted that his need to be discreet about his sexual orientation was occasioned by his career as a medical specialist, as rumours about his sexual orientation had in the past impacted negatively on his practice. However, the court raised this as a flag with potential consequences for the child's best interests. The court found it difficult to conceptualise of a "family unit" when it is clear from the start that the commissioning parents would not be living together and sharing a household. The court was careful to stress that the judgment did not preclude an application by one partner as prospective commissioning parent, or a joint application if the second applicant were to be more open about his sexual orientation and status in the relationship in future.

A Gauteng High Court (Pretoria) judgment recently has set new guidelines for courts to take into consideration before granting surrogacy agreements.<sup>42</sup> The new directives require that a medical clinical assessment of the surrogate mother be made if she has had any medical history posing a risk to surrogacy. The court also required a clinical interview with the surrogate mother's children to prepare them for the surrogacy journey and also take care of the minor children's emotional needs. The case involved a couple who could not have children and sought to enter into a second surrogacy agreement with a woman who carried their first child that was born in May 2021. The surrogate mother and her partner are married and have two children of their own, aged 10 and seven. She has had three surrogate pregnancies since 2019, leading to a miscarriage in one, the birth of twins in the

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<sup>37</sup> The author is not aware of this provision ever having been used thusfar: at a seminar on surrogacy in September 2017 attended by fertility specialists, it was widely said that they prefer to use donor gametes to avoid this possibility of this situation arising.

<sup>38</sup> Section 297(1)(e).

<sup>39</sup> Section 300.

<sup>40</sup> [2018] ZAGPJHC 529.

<sup>41</sup> Case no. 53131/2017, North Gauteng High Court

<sup>42</sup> *Ex Parte JCR and others* 2022 ZAGPPHC 209 (judgment of 16 March 2022).

second and the birth of the present commissioning parent's first child last year. Though the law provides that a court may confirm a surrogate motherhood agreement if the surrogate mother has a living child of her own, the court in this case had questions about the interests of the children of the surrogate mother. 'How does a surrogate pregnancy affect the surrogate mother's own child/children – bearing in mind that they watch her pregnancy for nine months, they know she is carrying a child, they see her going to a hospital to deliver the baby (and she may be away from them for a period after giving birth) and then she comes back home without a baby in her arms? Is it important that the interests of these children be protected and, if so, how does a court do that?' Judge Brenda Neukircher asked.

The court also had questions about the children the commissioning parents may already have. The judge noted in many cases, these children may suddenly be confronted with this 'stranger' that now takes up their parents' time and attention. It was also worthy of note that when the judge first heard the application in November 2021, the surrogate mother had delivered the commissioning parents' first child a mere six months earlier. What was of concern to the judge was the effect of three births in three years on her body. Neukircher ordered that a psychologist conduct an assessment regarding the surrogate mother's suitability to act as a surrogate for the fourth time. The judge also ordered that a further report by an obstetrician or gynaecologist be prepared regarding her physical suitability (and any risks) to carry a child. It was also ordered that a clinical psychologist conduct an assessment of the surrogate parent's two minor children with specific attention to be paid to the effect on them, if any, of their mother's pregnancies.

The reports showed that the surrogate mother was physically and mentally suitable to carry a child as a surrogate mother. An assessment of the surrogate mother's children showed that both children were well informed about surrogacies and were proud of the fact that their mother assists other couples in becoming families. After receiving this information, the Judge confirmed the surrogate motherhood agreement, saying that the information she obtained should in future cases be placed before a court to safeguard the interests of the surrogate as well as any existing children of the commissioning parents and the surrogate.<sup>43</sup>

In a case subsequently decided,<sup>44</sup> the Court was seized with the legal question as to whether, as a rule, it should be required that a clinical psychologist assess the existing child(ren) of commissioning and surrogate parents to determine whether they are prepared for the surrogacy and its outcome, arising from the *JCR* decision above. The Court held that Section 295(c)(ii) of the Children's Act provides that a Court must be satisfied that a surrogate is emotionally available to her children before the Court confirms the surrogacy agreement.<sup>45</sup> If the particular circumstances of a child necessitate the need for evaluation, then it remains open to the Court to consider the need for such an evaluation, based on the particular facts of the case, but there is no need for a blanket rule requiring such evaluation; the best interest of the child are not served by a requirement subjecting them to psychological evaluation. The emotional evaluation of the surrogate mother required by section 295©(ii) includes assessing whether she is emotionally available for her own child or children, including her readiness to discuss the surrogate pregnancy with her child or children, depending on their ages and levels of comprehension.<sup>46</sup> The expert evidence before the Court

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<sup>43</sup> As above..

<sup>44</sup> *Ex parte matters of three surrogacy applications* (cases no 8749/22; 9353/22; and 34190/22, as yet unreported), judgment of 24 October 2022.

<sup>45</sup> See too *Ex parte K* (note 40 above).

<sup>46</sup> Par 32, citing *Ex parte K* (note 40 above).

indicates that the child's best interests are provided for appropriately through establishing the emotional availability of the parents.<sup>47</sup>

### *Ghana*

Ghana does not, at the time of writing, have a comprehensive law to address surrogacy, there have now been partial attempts at regulation, as discussed below. There appears to be some public awareness of the issue, particular after news reports of a Ghanaian woman giving birth to quadruplets for commission parents she had never met in 2015 and then not being paid as promised.<sup>48</sup> There is a recent partial attempt to address aspects of surrogacy, as will be explained below.

Addressing Parliament in 2019, one MP called on the urgent need for legislation to regulate surrogacy.<sup>49</sup> Noting the IVF facilities and surrogacy were now common medical interventions in Ghana, he stated that cycle treatment cost between 15000 and 40 000 USD.<sup>50</sup>

On 6th October 2020, Ghana's President assented to the Registration of Births and Deaths Act, 2020 (Act 1027) effectively bringing the law into force. The law aims to, amongst others, provide for the registration of births, foetal deaths, and other deaths in the country. What is not obvious from the long title of the Act is the law's incursion into the area of surrogacy, and other assisted reproductive birth issues.<sup>51</sup> The law now recognises the right of an intended parent (i.e., a person who desires to be a parent through surrogacy or any other assisted reproductive arrangement) to engage the services of a surrogate for that purpose.<sup>52</sup> A pre-birth parental order must be obtained at the High Court.<sup>53</sup> The application by the intended parent for the pre-birth parental order must be made within 12 weeks after the introduction of an embryo or gamete into the surrogate mother.<sup>54</sup> Once the court is satisfied with the existence of the surrogacy and the issue of parentage, the order is issued. The order, when granted, would allow the intended parent or the surrogate mother (or both of them) to be named as the parent of a child. It is important that the birth must occur within twenty-eight weeks of the order of the High Court.<sup>55</sup>

If the parties fail to obtain a pre-birth parental order, the new law provides that the parties with another opportunity to regularise the nature of the intended relationship. They may apply to the High Court for a post-birth parental order or a substitute parental order naming the intended parent or the surrogate mother as the legal parent of the child.<sup>56</sup> The post-birth parental order is in

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<sup>47</sup> Par 35.

<sup>48</sup> Daisie MA, "Surrogate Mother Carrying Quadruplets Cheated of Incentives" myjoyonline.com (January 12, 2015) <<https://www.myjoyonline.com/news/2015/January-12th/surrogate-mother-carrying-quadruplets-cheated-of-incentives.php>>

<sup>49</sup>

[http://ir.parliament.gh/bitstream/handle/123456789/1380/2019\\_07\\_29\\_14\\_55\\_51.pdf?sequence=1&isAllowed=y](http://ir.parliament.gh/bitstream/handle/123456789/1380/2019_07_29_14_55_51.pdf?sequence=1&isAllowed=y) (accessed 15 March 2022).

<sup>50</sup> Surrogacy costs as such are not mentioned. However, the speech alludes to "unethical practices and blatant abuse of surrogacy", requiring legislative intervention. He mentions rife reports in the media of exploitation and abuse of "rent a womb" mothers by middle men and women, arrangers, agencies and individuals who engage or employ their services.

<sup>51</sup> <https://audreygrey.co/notes/2021/07/11/surrogacy-under-ghanaian-law/> (accessed 15 March 2022).

AudreyGrey is a law and professional services firm based in Accra.

<sup>52</sup>Section 22(1).

<sup>53</sup> Section 22(2).

<sup>54</sup> Section 22(2).

<sup>55</sup> Section 28(2)(b).

<sup>56</sup> Section 22(8).



substance an application seeking to adopt the child.<sup>57</sup> The application must be lodged at the High Court at least twenty-eight days after the birth of the child but not later than six months after the birth of the child. When the District Registrar of Births receives a sealed substitute parentage order from the High Court, he shall strike out or cause to be struck out the original birth record, and open or cause to be opened a new birth record with the intended parent or the surrogate mother named as the parent of the child, in accordance with the order of the High Court.<sup>58</sup> The original birth record that has been struck out must be retained and may be made available to the surrogate born child only when that child attains the age of 21 years.

In her study of two fertility clinics in Ghana in 2018, Gerrits found that while both clinics provide assisted reproductive services (ARTs) to Ghanaians and ex-pats living in Ghana, they also attract clients from neighbouring West African countries such as Gabon, Nigeria, the Ivory Coast and Burkina Faso, and Ghanaians living in the diaspora in the US and Europe who return home to use ARTs.<sup>59</sup> No evidence was found of use of their service by European or American people unconnected to Ghana. Although she focusses on reproductive travel more broadly, she does refer to surrogacy being offered in both clinics that participated in the study.

The new legal provisions identified above do not address any of the minutiae of the relationship between the surrogate, the intended parent(s),<sup>60</sup> the contractual details between them, nor indeed the role of any clinics or agencies. Nor does not provide for licensing of facilities that offer surrogacy services. It regulates only the affiliation details to be recorded on the birth certificate, and introduces the pre-birth and post-birth High Court application process. It would appear therefore that commercial surrogacy remains legal. Malpractice in surrogacy as identified previously, such as exploitation of surrogates, and heir non- or underpayment, might continue to characterise the industry.

Furthermore, it is not self evident that Ghanaian High Courts will scrutinise the arrangements between intended parents and surrogates to the same degree as South African courts have done, for instance to ensure that contractual arrangements include provision of counselling for the surrogate, payment of medical expenses, and so forth. The fact that a High Court application is only to be brought after introduction of the embryo or gamete into the surrogate mother means that it is then too late to ensure that the surrogate is fit and suitable (medically and psychologically) to carry the baby for the intended parents. It is also too late to ensure that suitability of the intended parents (eg their age).

## 2.2 Countries where surrogacy is not yet regulated, but Bills are pending before parliament

### *Nigeria*

Nigeria is most populous of the countries in Africa, at 206 million people. Geographically it comprises 36 states, with devolved jurisdiction over issues such as family and child law. The northern states are Islamic, which explain differing approaches to some matters which are regarded as being religiously suspect. This explain why the Child Rights Act of 2003, enacted federally, has only been adopted by

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<sup>57</sup> Section 28(10). This post birth parental order or substitute parental order shall be lodged with the High Court at least 28 days after the birth of the child but not later than six months after the birth of the child.

<sup>58</sup> Section 22 (11).

<sup>59</sup> Gerrits (note 4 above).

<sup>60</sup> Such as any eligibility requirements.

15 of the remaining states. The mainstream view is that currently surrogacy is legal, and regulated by private contract law.<sup>61</sup>

Infertility and the lack of legal regulation, coupled with clear indications of profiteering and trafficking,<sup>62</sup> has led to the thriving business of “baby factories”<sup>63</sup> where women choose to buy babies and present them as their own.<sup>64</sup> Akpambang *et al* point to the fact that there has been a sudden increase of “baby factories” (also referred to as “baby farm” or “baby harvesting”) where ill-equipped clinics and unhygienic orphanages, prayer homes, social welfare homes or maternity homes “have been turned into centers where poor young and vulnerable girls or women are lured into and encouraged or forced to become pregnant and deliver babies who are taken away from their mothers and sold on the “black markets” to desperate childless couples.”<sup>65</sup> They cite a BBC News report that gave an account of a United Kingdom-based Nigerian woman who was “tricked by a doctor into believing (that) she had given birth at a clinic in Port Harcourt, Nigeria, in January 2011, while sedated, after she went...for fertility treatment.” After regaining consciousness she was handed a baby and told she had given birth.<sup>66</sup> In 2021, the US Department of State urged the government of Nigeria “National Agency for the Prohibition of Trafficking in Persons (NAPTIP) and Nigeria Police Force (NPF) to enhance coordination on law enforcement efforts – including investigating illicit centers exploiting women in forced surrogacy – and prosecute suspects while respecting the rights of the accused.”<sup>67</sup>

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<sup>61</sup> An acknowledged minority view is expressed by Onyekachi Umah: “Section 30 of the Child Rights Act is against surrogacy in Nigeria. The section reads; “No person shall buy, sell, hire, let on hire, dispose of or obtain possession of or otherwise deal in a child”. This provision clearly frowns at the processes and procedures of surrogacy, even without mentioning the term, “Surrogacy”. At this point, it is important to list the elements present in every surrogacy and then compare them with the verbs listed in section 30 of the Child Rights Act, to truly decipher the impact of the Child Rights Act on surrogacy in Nigeria. It is also important to read and understand section 30 of the Child Rights Act, without focusing on its side notes/marginal notes (since side notes do not form part of statutes). Also, it must be emphasized that the Child Rights Act, protects born and an unborn child.” (see <https://thenigerialawyer.com/why-surrogacy-is-unlawful-in-parts-of-nigeria/> accessed 4 July 2022).

<sup>62</sup> O Oluwaseyi and O Oladimeji refer to certain provisions in the Code of Medical Ethics of 2004 which regulate assisted conception and related practice, including gestational surrogacy, permitting gamete donation for that purpose (“Surrogacy Agreements and the Right of Children in Nigeria and South Africa” *Obiter* 2021 p 20). The Code states further that gamete and embryo donation should not be commercialised.

<sup>63</sup> O Makinde, O Olaleye, Olufunmbi *et al* “Baby Factories in Nigeria: Starting the Discussion Toward a National Prevention Policy” (2017) 18(1) *Trauma, Violence and Abuse* 98-105.

<sup>64</sup> OA Makinde *et al* (note 58 above) note as follows: Baby factories are usually buildings or institutions such as hospitals or orphanages that have been converted to shelters for young pregnant girls and women for the purpose of delivery and selling off their offspring. Heinous crimes are noted to occur in these baby factories that include baby breeding, forced impregnations, sale of babies, illegal adoptions, and even human trafficking. It is not uncommon in baby factories for women to be forcefully impregnated by one of their kidnappers or an associate for the sake of birthing another offspring to be trafficked after a completed cycle.

<sup>65</sup> Dr. E Akpambang and M Amujo-Akomolafe “Legal Position on Surrogacy Arrangements in Nigeria and Some Selected Jurisdictions” *International Journal of Research in Humanities and Social Studies* Volume 7, Issue 3, 2020, pp 18-39.

<sup>66</sup> See too <https://www.africanews.com/2018/12/27/nigeria-surge-in-surrogacy-despite-lack-of-legislation/> (accessed 21 March 2022).

<sup>67</sup> Trafficking in Persons Report 2021 p 424. At 428, the following is provided: “Primarily in Cross River and other southern states, as well as from IDP populations in the north, illicit actors – including some church leaders – operate “baby factories,” which the government and NGOs describe as a widespread criminal industry in the country; experts state the phenomenon is driven by poverty and a lack of opportunity for young girls, as well as the demands of the illegal adoption market and cultural pressure for large families in Nigeria. Recruiters – or “mamas” – operating out of unregulated clinics work with enforcers to control

In one study sampling medical personnel, the respondents noted that surrogacy is becoming a thriving venture in major urban settlements like Abuja, Lagos, and Port-Harcourt, even though the legal terrain in which it operates remains unregulated.<sup>68</sup> There is currently a complete absence of regulation of surrogacy in Nigeria. According to Adedun, this means that it is not a crime to engage in surrogate motherhood, nor so to enter into a surrogate contract.<sup>69</sup> Accordingly, most artificial reproductive technology clinics base their practice on the Human Fertilisation and Embryology Authority Guidelines of the United Kingdom.<sup>70</sup> A Bill for the establishment of a Nigerian Assisted Reproduction Authority was presented to Parliament in 2012, but did not pass as it did not enjoy support. Again in 2016 a Bill was introduced which, amongst others, would regulate artificial reproduction, and which would have regulated surrogacy.<sup>71</sup> A further Bill for the regulation of reproductive technology was also introduced, and has passed the second reading.<sup>72</sup> Again according to Adedun, the ART Bill has gone a step further to supplement the provisions of the proposed National Health Amendment Bill by providing detailed rights and obligations of the parties to the procedure.

The Bill provides that surrogacy arrangements would be available to only commissioning couples who can show that the commissioning woman suffers from inability to carry her pregnancy to full term and in which case, she is mandated to provide an attested medical evidence which supports this. The importation, exportation or sale of gametes or zygotes and embryos are banned in Nigeria unless a party elects to transfer his/her gametes overseas. Moreover, a married donor must secure the consent of the spouse before donating his/her gametes and he/she can decide the scope of his/her information that should be released and to whom this information could be released unless as otherwise directed by the court. The donor must also be ready to relinquish his claim over the surrogate child.

The ART clinics are further mandated to perform medical tests on the patients, surrogates and donors to determine any medical state which may jeopardise any of the parties to the surrogacy arrangement as well as offer counselling sessions to the parties on the ART options they could have access to and the probable consequences. According to the Bill, ART procedure is accessible to every person including single persons, married and unmarried couples. Consent is a requirement where the procedure is needed by couples.<sup>73</sup>

Surrogate mothers and commissioning couples are required to enter into a legally binding surrogacy agreement, while the commissioning parents are to be responsible for all the expenses relating to the pregnancy, insurance coverage and post-natal expenses linked to the pregnancy and incurred by the surrogate mother. The surrogate mother is also entitled to compensation from the commissioning parents/couple for acting as a surrogate on their behalf. This would render commercial surrogacy thus legal. The donor of the gametes and the surrogate mother are required to surrender all parental rights over the child in favour of the commissioning couple who are

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the women through childbirth. The traffickers then sell the children, sometimes with the intent to exploit them in forced labor and sex trafficking.”

<sup>68</sup>O Alabi “Perceptions of Surrogacy Within the Yoruba Socio-Cultural Context of Ado-Ekiti, Nigeria” F1000Res (2021).

<sup>69</sup> Adedun (note 11 above) at 613.

<sup>70</sup> As above p 614.

<sup>71</sup> National Health Act Amendment Bill, 2016,

<sup>72</sup> An Act to Provide for a National Framework for the Regulation and Supervision of Reproductive Technology and other matters connected therewith. See Oluwaseyi *et al* (note 58 above).

<sup>73</sup> Akpambang note 62 above at p30.

recognised as the legitimate parents of the child. The birth certificate and register must have the name of the commissioning couple as parents of the child.<sup>74</sup>

On their part, the commissioning parents are obligated to accept the surrogate child regardless of any abnormality or disability. The commissioning couple must also issue a certificate declaring that the surrogate mother acted on their behalf. The Bill penalises any commissioning parents who refuse to accept or take custody of the surrogate child. Only one surrogate may be employed at any one time, and a woman cannot be a surrogate more than three times in her lifetime.<sup>75</sup> Intending surrogate mothers must be between the ages of 21-45 years. It is notable that the Bill makes provisions regarding cross-border surrogacy arrangements. In such situations, the overseas commissioning couple must engage the services of a local guardian who should take care of the surrogate mother during and after the period of pregnancy. The foreign commissioning couple have to also undertake to accept the custody of the surrogate child.

As mentioned, the Bill allows surrogates to be paid.<sup>76</sup> Adedokun opines that the proposal for commercial surrogacy may be based on the fact that there is currently clear evidence of commercial surrogacy anyway, and that a bid to enact a law to prohibit it may hinder the successful passage of the Bill through Parliament.<sup>77</sup> No evidence could be traced of any further progress made towards legislative conclusion of this Bill.

### *Uganda*

Due to a rise in the number of fertility clinics in the country, a high infertility rate standing at 10-15% of couples, and the absence of legal provisions dealing with *inter alia*, attribution of parentage between surrogate mother and intending parents, medical risks, and ethical concerns,<sup>78</sup> a private members Bill was introduced here in November 2021.<sup>79</sup> According to the memorandum, the Bill is intended to regulate the following: couples who are unable to have children; women who want to be a single (sic) mother a child; couple in search of a specific sex of their next child; and couple with issues related to genetic make up to enable them to have children.

The Bill as tabled comprises 57 sections, too much for detailed analysis here. It aims to set up a Committee on Assisted Reproductive Technology to function under the Uganda Medical and Dental Practitioners Council. The primary functions of this body will be to review information about embryos; to license health units involved in reproductive technology; and to impose license conditions. Licenses are required for the creation, storage and implantation of embryos.<sup>80</sup> Fully half the Bill deals with the license procedures.

Regarding surrogacy, the salient provisions include the following: the possibility of payment (over and above medical expenses and costs) for gamete donation;<sup>81</sup> permission for advertisements to solicit gamete donors;<sup>82</sup> provision for gamete donor contracts, which must specify that the donor

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<sup>74</sup> As above.

<sup>75</sup> Oluwaseyi note 58 above.

<sup>76</sup> Oluwaseyi as above.

<sup>77</sup> Adedokun (note 11 above) at 617.

<sup>78</sup> Taken from the motion to introduce the Bill tabled by the Hon. Sarah Opendi, MP.

<sup>79</sup> The Surrogacy and Assisted Reproductive Technology Bill 2021.

<sup>80</sup> Clause 7 and 8.

<sup>81</sup> Clause 30(2)(e).

<sup>82</sup> Clause 31.

relinquishes any parental responsibilities and rights, and rights to name any child born as a result of the donation.<sup>83</sup>

Surrogacy is defined in section 33. It refers to a contract made before the surrogate carries the child, and with the intention of handing over the child, once born, to the intended parents with the view to them exercising sole parental responsibility and rights for the child. The surrogacy contract must comply with the Law of Contract Act of 2010 (offer, acceptance, consideration, legal purposes, enforceability etc). Persons negotiating a surrogacy agreement may charge fees for this.<sup>84</sup> Advertising for a surrogate is permitted, in Uganda or elsewhere.<sup>85</sup> To be eligible, a surrogate must be over 18 years of age, and may be single, married or in partnership.<sup>86</sup> Surrogates do not become the mother of the child – that is reserved for the intended parent where a surrogacy contract has been concluded.<sup>87</sup>

Prior to giving consent, the surrogate mother must be informed of the nature of the treatment, its consequences and risks, any analytical tests if they are to be performed, the recording and protection of personal data and confidentiality, the right to withdraw or vary their consent, and the availability of counselling.<sup>88</sup> It is not clear if transnational surrogacy is permitted – the Bill refers to non-nationals but in the context of the woman who is to be the embryo recipient.<sup>89</sup> Commercial surrogacy does not appear to be prohibited.<sup>90</sup> There does not appear to be any procedure, prior to or after, a surrogacy agreement is concluded for the terms, conditions and suitability of either the surrogate or the intending parents to be reviewed, as in South Africa.

The progress of this Bill after November 2021 could not be verified.

#### *Kenya*<sup>91</sup>

Surrogacy has been widely practiced in Kenya since 2006. Kenya has become a popular surrogacy location for foreign IPs and practitioners predominantly due to low costs and completely unregulated practices, however this is as a part of a transnational enterprise which attracts foreign medical practitioners to work hand in hand with domiciled Kenyan practitioners. In turn this increases the number of foreign intending parents coming to Kenya.<sup>92</sup>

In Kenya, where surrogate motherhood agreements are not regulated by law, the Courts have been seized with surrogacy. In *JLN and 2 Others v. Director of Children's Services and 4 Others* [2014] the Court held that the commissioning parents should be recognised as the parents of the children

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<sup>83</sup> Clause 32. The gamete recipient has the sole right to sex selection (clause 32(3)(d)).

<sup>84</sup> Clause 34.

<sup>85</sup> Clause 35(2).

<sup>86</sup> Clause 36(12).

<sup>87</sup> Clause 36(7). It must be conceded that the Bill as drafted is quite confusing on this point, as declarations of parentage application to a Family and Child Court (akin to an adoption) are also provided for, generally in the context of IVF but surrogacy is expressly mentioned – see clause 39 (2) and (3). Overall, the Bill is quite confusing – for instance it refers to the application of s 7(1)(a) – (g) of Schedule 7 in the context of surrogacy, but neither this Schedule nor any other is attached.

<sup>88</sup> Clause 45(3).

<sup>89</sup> Clause 36(10) and (11).

<sup>90</sup> See Clause 34(1).

<sup>91</sup> See, in general, VC Cordeiro “The Right of the Child Born Through a Surrogacy Agreement in Kenya” (unpublished LLM Thesis, University of Leiden, 2019). Cordeiro notes that due to the secrecy and controversy surrounding surrogacy in Kenya, potential interviewees declined to be interviewed for her study. For a two part investigative study by a journalist in 2021, see The Elephant (note 21 above).

<sup>92</sup> Cordeiro as above p 7.

as this was in the best interests of the children and protected the right to dignity of the commissioning parents. In a recent high profile case in Mombasa Kenya, brought before the Tononoka Children’s Court in July 2018, whereby Dr. Chudasama, Neo Kian Fu (intending father) and Josephine Kariuki (surrogate mother) were charged with attempted child trafficking with the intent to illegally take the 12 day old boy to Singapore and unlawful adoption.<sup>93</sup> It was alleged that the surrogate mother entered into a contract where she would receive 30,000 KSH for each month of the pregnancy and 500,000 KSH once the child was born. Utilising a traditional surrogacy agreement (whereby Fu’s sperm was used to fertilize Ms. Kariuki’s eggs), Ms. Kariuki claimed that after Fu donated his sperm he left Kenya and returned upon the birth of his son. Ms. Kariuku raised that the baby was handed over to Fu by Dr. Chudasama without her consent or knowledge. However, despite signing a surrogacy agreement, and agreeing that she would act purely as a surrogate mother to host and carry the child and upon birth she would hand over the baby to Fu, Ms. Kariuki protested and refused to hand over the baby to Fu. During this dispute, and whilst the case was still pending in court, the baby was ruled to be in need of care and protection and was taken to the Baby Life Rescue Centre. Allegedly, after the birth of the child, Dr. Chudasama and Ms. Kariuki agreed to give full guardianship of the child to Fu in order for him to take the child from Kenya to Singapore. It was stated that Dr. Chudasama initiated this process by backdating and falsifying a letter from November 2016 from the Medical Practitioners Board. The three accused suspects were later released on a 1 million KSH bond and 100,000 KSH bail bond.<sup>94</sup> It is unknown what the final fate of the case was.

A Reproductive Health Bill which also regulates surrogacy has been in the offing in Kenya since 2019. The Bill passed its third reading on 25 November 2021, and was forwarded to Senate on 21/12/2021.<sup>95</sup> It does not, at the time of writing, appear to have been considered by Senate yet. Nor is it evident whether the National Assembly brought about any amendment to the tabled Bill. Hence this discussion that follows revolves around the text of the 2019 Bill as it appears on the Parliamentary website.<sup>96</sup>

In the definitions section of the Bill, “commissioning parents” are defined as a couple of opposite gender who seek the help of a surrogate mother to bear them a child through artificial insemination; “commissioning parent” means a woman or a man who seeks the help of a surrogate mother to bear him or her a child through artificial insemination. From this it is clear that single or hetero-sexual couple are eligible for surrogacy but not same sex couples.<sup>97</sup> A party may enter into a surrogate

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<sup>93</sup> Cited in Cordeiro (note 87 above): J. Bwana, DPP seeks more time to try 3 Mombasa child trafficking suspects, *The Standard Media* (2018) available at: <<https://www.standardmedia.co.ke/article/2001297127/dpp-seeks-time-to-try-chinese-doctor-in-child-trafficking-case> (Cordeiro at p13).

<sup>94</sup> Cordeiro p 14.

<sup>95</sup> <http://www.parliament.go.ke/sites/default/files/2021-12/BILLS%20TRACKER%20AS%20AT%2022%20DEC%202021.pdf> (accessed 25 March 2022.)

<sup>96</sup> The objects of the Bill are to—

(a) provide a framework for the protection and advancement of reproductive health rights for every person;

(b) create an enabling environment for the reduction in maternal morbidity, child morbidity and child mortality; and to

(c) ensure access to quality and comprehensive health care services to every person (clause 3). Family planning services are also provided for (clause 6), as well as the right of every person to assisted reproductive services (clause 9). Termination of pregnancy is also provided for, as is adolescent reproductive health.

<sup>97</sup> Current websites of Kenya fertility clinics advise that although same sex commissioning parents are not allowed, services are provide to same sex couples provided they are discreet – eg when visiting the hospital post birth. See <https://www.growingfamilies.org/surrogacy-in-kenya/#:~:text=Kenya%20has%20no%20law%20governing,by%20successful%20Indian%20VF%20professional>

parenthood agreement only if the commissioning parent or commissioning parents are not able to give birth to a child and that condition is irreversible.<sup>98</sup> The commissioning parent or commissioning parents, as the case may be, must be at least twenty-five years of age and not more than fifty-five years of age; they must be competent to enter into the agreement; and be in all respects suitable to accept the parenthood of the child that is to be conceived.<sup>99</sup>

The proposed surrogate mother must be at least twenty-one years of age; she must meet the prescribed conditions for acting as a surrogate mother; and understand and accept the legal consequences of entering into the agreement and this Act and her rights and obligations.<sup>100</sup> Clause 15 provides that a surrogate motherhood agreement will be valid if it is in writing, it is entered into in Kenya in the prescribed form, it includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born, and what is to happen in the event of the death, separation or divorce of the commissioning parents. Clause 15(1)(e) requires that the commissioning parent or commissioning parents, agree to meet the expenses of the surrogate mother with regard to the pre-natal care regimen necessary for the care of the surrogate mother and child during the course of the pregnancy. Parties entering into an agreement must be (separately) represented by an advocate.<sup>101</sup> Any legal fees payable by a surrogate mother must be paid by the commissioning parent or commissioning parents as the case may be.<sup>102</sup> Artificial insemination with respect to a surrogate mother may not be effected unless the surrogate parenthood agreement is duly signed and deposited in the assisted reproduction facility.

The Bill contains fairly detailed provisions regarding termination of a surrogate motherhood agreement, eg upon termination of the pregnancy or before artificial fertilisation has occurred. It also makes provision for DNA testing where the commissioning parent or commissioning parents have reason to believe that the child born is not the child contemplated under the surrogate parenthood agreement.<sup>103</sup>

The Bill provides that a child born of a valid surrogacy agreement shall be the legal parent or parents of a child conceived by a surrogate mother in accordance with this Act,<sup>104</sup> and the commissioning parents may not reject or discriminate against the child. The surrogate mother shall hand the child over to the commissioning parent or commissioning parents as soon as is reasonably possible after the birth.<sup>105</sup> Neither she nor her spouse, partner or relative shall have a right of parenthood or care of the child, and neither she nor her spouse, partner or relative shall have a right of contact with the child unless provided for in the surrogate parenthood agreement. She shall not have an obligation to maintain the child.<sup>106</sup>

The commissioning parent or commissioning parents shall be named as the parents of the child on the child's birth notification, and the child shall also acquire their citizenship.<sup>107</sup>

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s. (accessed 29 March 2022). See too <https://www.sensiblesurrogacy.com/surrogacy-in-kenya/> for similar cautionary advice to same sex intending couples.

<sup>98</sup> Clause 14(1)(a).

<sup>99</sup> Clause 14(1)(b)-(d).

<sup>100</sup> Clause 14(1)(c).

<sup>101</sup> Clause 15(2)(c) read with clause 17..

<sup>102</sup> Clause 17(2).

<sup>103</sup> Clause 18(2).

<sup>104</sup> This is also so for multiple pregnancies: clause 20.

<sup>105</sup> Clause 19(1)(b).

<sup>106</sup> Clause 19(1)(b)(iii), (iv) and (v).

<sup>107</sup> Clause 21.

Section 22 appears to outlaw commercial surrogacy: it provides that “a person shall not, in connection with a surrogate parenthood agreement, give or promise to give to any person or receive from any person a reward or compensation in cash or in kind”. Exempt are compensation for expenses that relate directly to the process of in vitro insemination and pregnancy of the surrogate mother, the birth of the child, post-natal care and post-delivery complications; loss of earnings suffered by the surrogate mother as a result of the surrogacy; and insurance to cover the surrogate mother for any acts that may lead to death or disability brought about by the pregnancy.<sup>108</sup>

The above provisions do not outlaw transnational surrogacy. However, the challenge might be to find surrogates who are willing to perform largely altruistic services, albeit that they can receive compensation for loss of income. In a country where unemployment rates are high, and many women are employed in the informal sector (and might be unable to provide actual proof of loss of income), it is not clear how this will play out.

2.3 Countries where surrogacy is not regulated, nor are there attempts to regulate it.

### *Botswana*

Botswana is a conservative and traditional country with a small population situated to the north of South Africa. Since there is a sophisticated, state-of-the-art fertility clinic in Gaborone which opened in 2017,<sup>109</sup> it is likely that surrogacy is offered. News reports indicate that some surrogacy is indeed taking place in Botswana, although affordability is a problem for most Botswana.<sup>110</sup>

Surrogacy has, in fact, come before the Court of Appeal in an unusual fashion. It did not occur in the fertility clinic in Gaborone, which had yet to open its doors. According to facts of the case, GS and LB married on March 11, 2005 in community of property. According to papers before the courts, at the time of the marriage, LB knew his wife had no womb as it had been removed on account of a complication with a previous child. As the marriage progressed, the couple felt the need to have children, and after exploring a number of options and consulting a renowned gynaecologist in South Africa, decided to go the surrogacy route. An arrangement was made with a surrogate, where the woman would be paid P1,000 during the period of the pregnancy and a once-off sum of P50,000.<sup>111</sup> A doctor was engaged who harvested sperm from LB and eggs from GS. Five embryos were created and ultimately, one embryo was frozen in a laboratory in South Africa waiting to be implanted in the surrogate mother's womb. However, the marriage between the parties broke down irretrievably, resulting in a divorce. The agreement between the parties (at divorce) did not take the fate of the frozen embryo into account in the event the parties divorced. There was therefore a contest between the parties as to what was to be done with the frozen embryo. GS wanted the embryo implanted leading to a birth, while LB wanted the embryo destroyed.

At the High Court, GS won the right to proceed with implantation of the embryo, leading to pregnancy. However, LB appealed the case to the Court of Appeal. The Court of Appeal bench noted that it did not have any jurisdiction over the frozen embryo and any other agreements made between the couple, and advised that the matter should be taken to South Africa, where the embryo

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<sup>108</sup> Clause 22 (2)(a) –(c).

<sup>109</sup> <https://www.botswanaguardian.co.bw/news/item/2895-dr-molelekwa-trailblazing-indigenous-scientist.html>

<sup>110</sup> <https://www.sundaystandard.info/legislators-caught-flatfooted-as-batswana-women-rent-out-their-wombs/#:~:text=Surrogacy%20is%20not%20alien%20to,give%20birth%20on%20their%20behalf> (accessed 28 March 2022).

<sup>111</sup> Botswana Pula. The dollar value of 50 000 pula is 4360.



is. The Court of Appeal judges noted that the case was complex as there was no law in Botswana specifically dealing with surrogacy.

However, the couple still faced a challenge, as LB's lawyers argued (correctly) that the original surrogacy agreement violated the law in South Africa.<sup>112</sup> It could not be established whether the matter was, indeed, taken any further. The case is relevant to this charter as it illustrates the ongoing transnational character of surrogacy in Africa, as also sometimes its intra-continental character (as in Ghana), even where this is expressly forbidden (as in South Africa).

### *Mauritius*

Attempts to find information on surrogacy in Mauritius were not especially successful. However, a well known website for finding surrogate mothers lists at least 10 Mauritian prospective surrogates. Moreover, there are Mauritian IVF clinics which advertise on the internet,<sup>113</sup> so it seems likely that surrogacy is offered. There is no mention of surrogacy in the 2021 report of Mauritius to the Committee on the Rights of the Child, nor to the CEDAW Committee in the same year.

### *Namibia*

There is no legal framework for surrogacy in Namibia, nor does it enjoy any legal protection.<sup>114</sup> Possibly, post *Leuhl*, discussed below, one could conclude that there is now limited judicial recognition of surrogacy, via the granting of citizenship to the surrogate born child of a Namibian national.

A landmark case handed down by the Namibian High court in October 2021 saw Namibian citizenship being finally ordered after a surrogate born child had been persistently denied this. In *Luehl v Minister of Home Affairs and Immigration*,<sup>115</sup> the applicant was a Namibian male involved in a same sex marriage solemnized in South Africa. Together with his partner, they obtained an order from the Western Cape High Court endorsing a surrogacy arrangement with a South African woman.<sup>116</sup> Evidently, conscious of the fact that there was no regulation of surrogacy in Namibia, the couple had sought prior acquiescence from the relevant government Ministry dealing with child protection.<sup>117</sup> After birth, the child was issued with a South African birth certificate, in which the applicant and his partner were endorsed as the child's parents.

The applicant brought the child to Namibia, and in due course applied for Namibian citizenship by descent, but the respondent Ministry dealing with citizenship required of him to first provide proof that he indeed is the biological father of the child. This was premised on the respondents' position that a possibility exists that the gamete that fertilised the egg of the surrogate mother, may be that of the applicant's spouse, who is not a Namibian citizen. This position was informed by the fact that the applicant is in a same sex marriage.

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<sup>112</sup> <https://www.mmegi.bw/ampArticle/195386> (accessed 28 March 2022).

<sup>113</sup> <https://www.ivfdelhi.in/mauritius/ivf-centre.html> lists a clinic called Neues Leben IVF Planer Centre in Mauritius. The telephone number given is, however, one in India. <https://ovu.com/mauritius/moka/fertility-clinic/wellkin-hospital> provides another site based in Moka Mauritius.

<sup>114</sup> [https://www.lac.org.na/news/probono/Probono\\_24-SURROGACY.pdf](https://www.lac.org.na/news/probono/Probono_24-SURROGACY.pdf) (accessed 29 March 2022).

<sup>115</sup> [2021] NAHCMD 481.

<sup>116</sup> Note that this is expressly outlawed by section 292(1)(c) of the South Africa Children's Act 38 of 2005 which requires as a founding criterion that an applicant for confirmation of a surrogate motherhood agreement must be domiciled in the Republic of South Africa.

<sup>117</sup> This I was made aware of in a personal communication from a person who knew the couple.

In a counter application to the quest to grant the child Namibian citizenship, the Minister countered that the applicant and child must undergo a DNA test. The court of first instance held on this point that there is no reference in the Namibian Constitution<sup>118</sup> to biology or genetics in matters pertaining to citizenship by descent. If the respondent's stance was accepted, children adopted outside Namibia by Namibian citizens would not be entitled to citizenship by descent, which would be anomalous. This court also held that the authenticity of the court order by the South African court has not been challenged, and in the circumstances, it should be given effect to as it does not appear to violate Namibia's public policy or Namibian laws.<sup>119</sup> The Constitution of Namibia was the main source of law relied on (as regards Namibian citizenship by descent) as well as the UN Convention on the Rights of the Child (1989) and the Africa Charter on the Rights and Welfare of the Child (1990).

Referring to previously decided South African and Namibian cases on disputed paternity, the learned judge held that in those cases it may have been necessary and in the children's best interests to know who their father was, but this case is on a different footing as parentage is not in dispute (by virtue of the clear determination of parentage in the court order confirming the surrogate motherhood agreement).<sup>120</sup> The Court said, further, that Namibian courts recognise judgments and orders issued by foreign courts and more particularly South African, because of historical ties. The authenticity of the court order by the South African court has not been challenged, and in the circumstances, it should be given effect to as it does not appear to violate Namibia's public policy or Namibian laws.

Noting that the relevant legislation at stake was the Citizenship Act, and not the Child Care and Protection Act of 2015, the Court found that the respondent Ministry's stance was motivated by a discriminatory attitude towards persons in same sex relationships.<sup>121</sup> Moreover, the actions of the respondent were in breach of article 6(3) of the African Charter on the Right and Welfare of the Child,<sup>122</sup> to which Namibia was bound.

The Court concluded that the applicant qualifies to apply for Namibian citizenship for his child, in the child's best interests, and ordered the Minister for Home Affairs to issue a certificate of Namibian citizenship for the child.<sup>123</sup> The counter application attempting to order the applicants and the child to undergo paternity tests was dismissed.

### *Rwanda*

With a population of 14 million people. Rwanda is a landlocked country in central Africa. Known as broadly speaking conservative, it is famous for the 1994 genocide, and for gorillas. One experience with surrogacy was detected.

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<sup>118</sup> Section 4(2) which governs citizenship by descent is quoted in full at par 24 of the judgment. The provisions of the Citizenship Act 4 of 1990 are also relied upon.

<sup>119</sup> The further point was made that had the surrogate born child been acquired by a hetero-sexual couple, the respondent would have not required DNA tests. This was alleged to be discriminatory. The requirement of a DNA test was also alleged to violate the dignity of the father and of the child.

<sup>120</sup> Par 52 and par 60.

<sup>121</sup> Par 69.

<sup>122</sup> Article 6(3) provides that: "Every child shall have the right to acquire a nationality." Also, the Minister's stance violated article 10 of the African Children's Charter, which provides for the child's right not to be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, amongst others: par 82. Several rights contained in the UNCRC are also cited: article 2, article 3, article 7, article 8, article 9 and article 16: par 83.

<sup>123</sup> Par 89.

The Nyarugenge Intermediate Court ruled in September 2020 in favour of a couple that had for months pursued legal approval to have a child by surrogacy. The case had ignited debate among legal practitioners and human rights activists for the past three months. A primary Court in Kigali had earlier denied the couple the right to have children through surrogacy. The couple had gone to court after other legal means in Rwanda to have children (naturally or by artificial insemination) failed.

Surrogacy was the remaining option. The judge at the court of first instance ruled to block this procedure saying that the law provides that “procreation occurs between a man and a woman or with assistance” while the petitioners were seeking reproduction between two families which is out of the law. The couple appealed the decision.

The verdict dictates that the surrogate couple will bear and deliver the child. At birth, the child will be registered to the biological family but stay with the surrogate couple for a period of six months after birth.<sup>124</sup>

There remains no legislation on surrogacy in Rwanda. Calling for legal clarity, it has been “recommended that Parliament enact a law to regulate assisted reproductive technology, as well as the rights and obligations of the parties to surrogacy. A complete ban of the surrogacy may be irrational, but the commercialization of surrogacy is a social obstacle, a legal challenge, and a disgrace in a society like Rwanda.”<sup>125</sup>

### 3. Conclusions

A common thread underlying development in surrogacy in Africa has been the identified decline in intercountry adoption around the globe. Indeed, some of the (sending) countries surveyed here have imposed moratoria on intercountry adoption, including Kenya and Ghana, from whom intercountry adoptions took place previously. Coupled with the mushrooming of fertility clinics in Africa, the scene is set for an ongoing growth in cross-border surrogacy arrangements using African surrogates. This is probably also likely due to the (current) war in Ukraine, which will take that country out of the equation as a commercial surrogacy destination. The relatively lower costs of surrogacy in Africa compared to other destinations such as California will also drive this development. Commercial surrogacy is clearly here to stay (Ghana, Nigeria, Uganda, for instance) and transnational surrogacy appears inevitable.

It is not possible to discern an African common thread in surrogacy related discussions. Each country appears to respond individually, whether legislatively or by judicial intervention. Such would be the case elsewhere, eg Europe. Thus in some countries, such as South Africa, only altruistic surrogacy is provided for, whilst in others, commercial forms of surrogacy seem to be tolerated (as in Nigeria and Ghana). At present, legally, surrogacy tourism is outlawed in South Africa, whilst evidently occurring in destinations such as Kenya. Same sex couples are able to be party to surrogacy agreements in South Africa based on the expansive constitutional guarantee of non-discrimination (including based on sexual orientation), but this does not reflect the general sentiments towards LGBTI persons on the continent.

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<sup>124</sup> <https://www.newtimes.co.rw/news/rwandan-court-backs-surrogacy-landmark-ruling#:~:text=Nyarugenge%20Intermediate%20Court%20on%20Friday,for%20the%20past%20three%20months> (accessed 22 February 2022).

<sup>125</sup> T Murangira “Medically assisted procreation technologies in Rwanda: surrogacy as new method of motherhood” 2020(1) *Rwanda Law Journal* 49- 72.

Nevertheless, it appears imperative for African nations to adopt legislation to protect surrogate mothers, the children to be born of surrogacy, and to regulate the ethical (and medical) practices of all other parties involved. Although how this is effected will inevitably differ from country to country, it is proposed that more, rather than less, detail is needed to ensure the optimum protection of all parties, as is evident in the Kenya Bill (which was introduced as a private member's Bill). Hence, the Ghanaian approach which merely regulates registration of births is not ideal. Further, the requirement of social work assessments or screening, as with adoptions, is recommended as a good practice.<sup>126</sup> It would serve hopefully as an important bar to trafficking and to undesirables wishing to become intending parents, such as convicted child abusers, as well as unsuitable surrogates (such as the young surrogate in *Ex Parte K* in South Africa, discussed above). The South African position of close judicial scrutiny of contracts and supporting documentation provides a model for other African jurisdictions to emulate.

Child rights friendly and child rights unfriendly features can be identified from the country studies. An example of the former is the recent South African case in which the rights of the siblings of both the surrogate and the intending parents played a prominent role. Examples of the latter include the lack of any screening of the surrogate or the intended parents if the Ugandan Bill were to become law.

Possibly a way forward would be the development of a model law for the African context. Such a model law could serve as a blueprint for drafters in future, and focus more closely on children's rights, as well as surrogates' rights. It would no doubt have to provide for altruistic and commercial surrogacy as two possible alternatives, given the evident appetite for commercial surrogacy that already exists in Africa. It would nevertheless serve as a benchmark for legislators, to enable them to move beyond the issue of birth registration and the attribution of parentage, to deal more comprehensively with the position of all parties to the agreement. It would also provide a framework for more intensive scrutiny (licensing) of facilities offering surrogacy services. An example of the model law concept is to be found in the SADC Model Law on Eradicating Child Marriage and Protecting Child already in Marriage, adopted in 2016.<sup>127</sup> Emulating this initiative, a model law on surrogacy could serve as a source for the Africa Committee of Experts on the Rights and Welfare of the Child when it completes its reviews of State party reports pertinent to those countries where surrogacy is happening.

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<sup>126</sup> This requirement is one of the Verona Principles, formulated under the aegis of the ISS in Geneva to protect children's rights in surrogacy ([https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples\\_25February2021.pdf](https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25February2021.pdf)). See Principle 5.

<sup>127</sup> <https://www.girlsnotbrides.org/learning-resources/resource-centre/sadc-model-law-child-marriage/> (accessed 14 July 2022).

