

# MEDICALLY ASSISTED PROCREATION TECHNOLOGIES IN RWANDA: SURROGACY AS NEW METHOD OF MOTHERHOOD

By Thierry Murangira<sup>1</sup>

## ABSTRACT

*The evolution of science and technology has attained achievements in countless areas including health and family procreation. Medically assisted reproduction methods which are possible nowadays have wiped away the tears of infertile couples who could not have the chance to have children due to various health problems. The need was felt in Rwandan society and the law regulating Persons and Family was amended to give a chance to those who have been unable to procreate through natural methods to use artificial methods for reproduction. Article 254 of said law states that reproduction occurs naturally between a man and a woman or it is medically assisted. This directs the couple to resort to various medical reproductive methods including In Vitro Fertilization (IVF) and surrogacy.*

*However, much these technological methods of reproduction are of paramount importance, because their introduction into Rwandan Family Law is likely to open Pandora's Box. It is likely to raise various issues, not only for the persons directly concerned, but also for society in general. There are a series of issues such as human rights, social, ethical, and criminal offence connected with this medically assisted reproduction which need to be examined when relying on Article 254 of the above-stated law. In this regard, this article intends to elucidate on whether surrogacy as an artificial method of reproduction is accepted within the meaning of Article 254 of law N°32/2016 of 28/08/2016 Governing Persons and Family.*

*It also intends to clarify whether the maternal filiation be established based on proof of genetic kinship or on the act of giving birth. The article also examines if Article 254 is sufficient to regulate all issues and challenges arising from authorizing infertile couples to resort to medical assistance when the natural way of reproduction does not succeed.*

*It suggests that there should be specific legislation and adequate legal mechanisms of controls and regulations of medically assisted technology to deter likely misuse of Artificial Reproductive Technologies.*

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<sup>1</sup> **Murangira B. Thierry** is a Forensic and Human Rights Law Expert, Researcher and Senior Lecturer at Kigali Independent University (ULK) and Professional Trainer at ILPD.

## 1. GENERAL INTRODUCTION

With the evolution of science and technology, infertility is no longer a barrier to couples who want to become parents. Technological and scientific development, particularly in medical science and genetic engineering, have developed and reached a satisfactory level. The quick development of science and technology in the medical and health sectors has led to the need for review and updating of some Rwandan laws.

The infertility problem is not particular to Rwanda; it is a worldwide challenge. Rwanda Family law was amended to introduce medically assisted methods of procreation in order to cope with the advancement of science and technology. This is an alternative method to the natural way of procreation. The interest of amending the previous Family Law to insert medically assisted reproduction techniques under Article 254 of Law N°32/2016 of 28/08/2016 governing Persons and Family,<sup>2</sup> reflects the paramount importance attributed to the fundamental right to reproduction by Rwandan Lawmakers and allow infertile couples to benefit from modern science while exercising their natural rights.

Medically assisted methods of procreation<sup>3</sup> include, among others, surrogacy<sup>3</sup> which uses the techniques of IVF. <sup>4</sup>The technique of IVF is artificial method of reproduction which needs medical assistance to facilitate the conception or fertilization to take place outside the body of the woman.

Generally, this method of surrogacy, which utilizes IVF technique,<sup>5</sup> is used due to male or female imperfection factors. This method of depositing a fertilized egg in the womb of the biological mother is called surrogacy. Surrogacy<sup>6</sup> is also another method against infertility which necessitates

<sup>2</sup> Official Gazette n°37 of 12/09/2016

<sup>3</sup> Health Ethics, Population Health, Global & Public Health, The surrogacy pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales; February 2018. Surrogacy is when a woman carries a baby for someone who is unable to conceive or carry a child themselves. Surrogacy is where doctors grow a baby in another woman's womb, who has agreed to carry a baby for the intended mother.

<sup>4</sup> Ibid, IVF is where the sperm from the father and the egg from the mother are mixed together in a petri dish in the laboratory, and the sperm is allowed to fertilize the egg, producing a "test-tube baby." The fertilized egg is then returned to the biological mother's womb where it develops, and nine months later the baby is born.

<sup>5</sup> Sara Fovargue, Re R (IVF: Paternity of the Child): Assisting Conception for the Single Infertile, 18(3) CHILD & FAM.L.Q. 423, 437–39 (2006).

<sup>6</sup> Surrogacy is presented as a method of medically assisted reproduction among others, a treatment for infertility. It is often depicted as a generous altruistic action meant to help couples who cannot naturally have children, to offer them the joy of parenting. Surrogate Motherhood: A Violation of Human Rights: Report Presented at the Council of Europe, Strasbourg, on 26 April 2012. European Centre for Law and Justice. Available at: <http://www.eclj.org>. Accessed on 17/06/2018

medical assistance, wherein doctors grow a fetus in another woman's womb, who has consented to bear the baby and relinquish him/her at birth.<sup>7</sup> Science has discovered two kinds of surrogacy: traditional and gestational. Through methods such as gestational and traditional surrogacy, it is possible to overcome problems of sterility or infertility for those requesting access to methods of this kind.

However, this law reform, which introduced Article 254 under family law to allow IVF techniques to be used, has opened a Pandora's Box of human rights problems, as well as ethical, legal, and social problems. These issues have brought attention to the researcher to illustrate that there is a need of specific laws instead of one single article to regulate these issues, mostly with regard to other parties, when the method of gestational or traditional surrogacy is used. This calls for reproduction policies related to surrogacy to remove existing legal ambiguity.<sup>8</sup>

## 2. OBJECTIVES OF THE RESEARCH PAPER

This research paper intends to elucidate how parenthood created by surrogacy arrangement can be defined and regulated under Rwandan law. It also intends to find out whether present law regulating persons and family adequately safeguards the rights and welfare of children born out of surrogacy arrangements and regulates other ancillary interests associated with family law in Rwanda. It is against this background that this research was conducted to answer following questions:

1. Is the surrogacy method accepted within the meaning of Article 254 of law N°32/2016 of 28/08/2016 Governing Persons and Family?
2. Can maternal filiation be established based on proof of genetic kinship or on the act of giving birth?

<sup>7</sup> Allen, Anita L., "Privacy, Surrogacy, and the Baby M Case" (1988). Faculty Scholarship. Paper 808. [http://scholarship.law.upenn.edu/faculty\\_scholarship/808](http://scholarship.law.upenn.edu/faculty_scholarship/808)

<sup>8</sup> Legal uncertainty can give rise to tremendous personal, family and social conflict. The American cases of Baby M, See, Bernard M. Dickens, "Artificial Reproduction and Child Custody" (1987) 66 Can. Bar Rev. 49 at 65. "A contract could be directed to the rendering of scientific or medical service, including maintenance of an embryo in vitro or in cryopreservation, and need not involve concept of property law. "With respect to the common law, it is commonly accepted that in the absence of approving legislation, surrogate motherhood agreement will be held void by the court as against public policy, Davis v. Davis, (21 Sept. 1989), Blount Cty E-14496 (Cir.Ct) at 1-2; this decision has since been reversed by 59 U.S.L.W.2205 (Tenn. App. 1990). and York v. Jones Institute, 717 F. Supp.421 (E.D.Va 1989) (Order of 10 July 1989 denying defendants' motion to dismiss) as well as the Rios case: In re Estates of Elsa and Mario Rios (May 1985), Los Angeles City P680682 (Sup. Ct). The California Superior Court decided not to appoint a guardian for the embryos and ruled that they were neither the heirs nor the property of the Rioses. All these examples are good illustration of this.

3. Is Article 254 sufficient to regulate all issues and challenges arising from the surrogacy method?

### 3. DEFINITION OF KEY CONCEPTS

It is very important to understand some of terminologies and meaning due to their uses throughout in this paper.<sup>9</sup>

- a. Surrogacy: The terms “surrogate,” “surrogate mother,” “gestational mother,” “birth mother,” and “gestational carrier” refer to the woman agreeing to become pregnant and carry the child as part of a surrogacy arrangement and relinquish him/her at birth. Notably, the most appropriate term is often debated due to the normative implications about motherhood suggested by the various terms.<sup>10</sup>
- b. Intended Parent(s): Sometimes also described as intending parent(s) or commissioning parent(s). Refers to the individuals who plan to receive the child into their home and raise the child as their own after the surrogate has given birth. It should not be confused with adoption<sup>11</sup> of the child.<sup>12</sup>
- c. Full Surrogacy: Refers to a surrogacy arrangement in which all of the genetic material involved originates either from the intended parents or donors.
- d. By contrast, Partial Surrogacy refers to surrogacy arrangements in which the surrogate’s genetic material is used to conceive the child as part of the contract. This method is also sometimes referred to as traditional surrogacy, because this was how surrogacy arrangements worked before ART was developed. In this paper, the author has used

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<sup>9</sup> The definitions and meaning of these terms have been retrieved from U.S. report titled as Alex Finkelstein, Sarah Mac Dougall, Angela Kintominas, Anya Olsen, Surrogacy Law and Policy in the U.S.A. National Conversation Informed by Global Lawmaking. *Report of the Columbia Law School Sexuality & Gender Law Clinic. Surrogacy Law and Policy in the U.S. Columbia Law School Sexuality & Gender Law Clinic (2016).*

<sup>10</sup> Surrogate Motherhood: A Violation of Human Rights: Report Presented at the Council of Europe, Strasbourg, on 26 April 2012. European Centre for Law and Justice. Available at: <http://www.eclj.org>. Accessed on 17/06/2018

<sup>11</sup> Article 2 (18°) of Law N°32/2016 of 28/08/2016 governing Persons and Family defines adoption as “a system that creates a parent-child relationship between a child and a person who is not the child’s biological parent”

<sup>12</sup> Surrogacy and adoption are both rewarding experiences that allow prospective parents to complete their families. However, while they share many similarities, there are also many differences to take into account when comparing adoption versus surrogacy. Each has its own unique process, benefits and challenges, and it is up to each growing family to consider all of the factors as they decide which path to parenthood is right for them.

the term partial surrogacy, because it is more accurate and current in its usage.

- e. Altruistic Surrogacy stands in opposition to commercial surrogacy. Altruistic surrogacy refers to arrangements in which the surrogate volunteers to perform a service without being paid, except potentially some payment for expenses.
- f. Commercial Surrogacy refers to surrogacy arrangements in which the surrogate is paid a fee above and beyond reimbursement for reasonable expenses.<sup>13</sup>

#### 4. SURROGACY METHOD OF MOTHERHOOD

Surrogacy is medically assisted reproductive technology. It uses the procedure wherein a medical doctor grows a baby in another woman's womb, who has agreed to carry the baby during the period of pregnancy and relinquish the baby at birth. In the context of this paper, a surrogate is a woman who agrees to carry a pregnancy with the intention of surrendering the newborn infant at birth to the contracting parents.<sup>14</sup> This is not a curative method; rather, it is a complementary or alternative measure for infertile couples to be able to have a child.

Notwithstanding the ethical and legal challenges brought by this reproductive technology, medical ethics only recognize that surrogacy should be adopted for therapeutic reasons.<sup>15</sup> It establishes only three situations in which surrogacy can be utilized<sup>16</sup>:

- a. The first reason to use surrogacy is when there is absence or significant abnormality of the uterus and surrogacy can be the last resort to have a child.
- b. The second reason is the environmental risks to the development

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<sup>13</sup> Notably, the distinction between what constitutes reasonable expenses and what constitutes payment for services has been and continues to be a difficult line to draw. Quite a few countries have legalized altruistic surrogacy while outlawing commercial surrogacy.

<sup>14</sup> Anne Casparsson, Surrogacy and the best interest of the child, Master's Thesis in Applied Ethics Centre for Applied Ethics Linköping University, June 2014, p. 2. Available at: <http://liu.diva-portal.org/smash/get/diva2:728301/FULLTEXT03.pdf>. Accessed on 14/10/2017.

<sup>15</sup> Surrogacy should not be used by those people who have no problems carrying a child, infertility, or impotency. It should not be used by those people who want to escape from natural way of conception and giving birth. For instance, women stars who do not want to spoil the shape of their bodies as they usually say.

<sup>16</sup> Jack A. Pritchard, Paul C. MacDonald and Norman F. Gant, Williams Obstetrics, 17<sup>th</sup> ed. (Norwalk, Conn.: Appleton-Century-Crofts. (1985) p.494, 592, 608 and 802.

of the fetus, where pregnancy may be disturbed due to the mother's health problems requiring her to continue taking medication.

- c. The third circumstance is when pregnancy poses a major threat to the mother's health due to, for instance, severe heart disease. The latter two situations suggest a safer environment for pregnancy but are not considered absolute indications.

There are numerous possibilities to combine parentage between the surrogate and future parents. For the pregnancy to be possible, the egg may be donated by the surrogate mother or the contracting woman, or it may be donated by a third party. In the case of sperm to fertilize the egg, the donor may be the contracting father or a third party. All combinations of biological parentage are possible.

Methods of fertilization are two-fold; fertilization in vivo and in vitro. The former utilizes gamete intra-fallopian transfer (GIFT), artificial insemination, and natural insemination, while the latter is more likely to be used in cases where the egg is not contributed by the surrogate mother. Surrogate embryo transfer (SET), in which the egg of the donor is fertilized in vivo by artificial insemination, collected by lavage, and transferred to the gestational mother, is sometimes included under the category of surrogacy.

The traditional surrogacy method, or *partial surrogacy*, is said to have happened when the mother who carried the baby in the womb is genetically linked to the child. This connotes that the surrogate mother is the donor of the egg. In traditional surrogacy, the woman could be impregnated via artificial insemination using fresh or frozen sperm. The semen is introduced into the woman's vagina who consents to carry the baby for another woman to achieve pregnancy. Fertilization is done in vivo. Gestational surrogacy, or *full surrogacy*, is said to have happened when the mother who carried the baby in the womb is not genetically linked to the child. This connotes that fertilization is done outside the body of the surrogate mother.

This is different from traditional surrogacy, wherein fertilization is done in vivo; in this case, the IVF procedure is used to fertilize the egg, which is then placed into the womb of the surrogate mother. The egg used is not from the surrogate mother; rather, it is from the mother, and it is fertilized from the sperm of the father. The fertilized egg is then placed in the womb of the surrogate mother to achieve pregnancy. When intended parent(s) travel overseas to engage a paid surrogate, this is called international commercial surrogacy, sometimes also described as reproductive tourism or fertility tourism.<sup>17</sup>

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<sup>17</sup> Mark V. Sauer, Robert E. Anderson and Richard J. Paulson, A Trial of Superovulation in Ovum Donor Undergoing Uterine Lavage; (1989) 51:1 Fertil. Steril, 131. The method of concepti

## 5. SOCIO-ETHICAL ISSUES AND SURROGACY

In the social context, one of the strongest issues opposing people may have against surrogacy arrangement is the motive behind performing this duty. One of the more popular reasons that surrogates themselves give for performing this duty is for the act of helping those who need it. Many argue that surrogate arrangements depersonalize reproduction and create a separation of genetic, gestational, and social parenthood. Others argue that there is a change in motives for creating children. They add that children are not conceived for their own sakes, but for another's benefit and interest, such as the interest of the intended parents to have a child and become parents.

The second social issue raised by opponents of this procedure is that there is a possibility that this procedure will be used by people who are not facing infertility problems, but who want to use it for the sake of convenience. In this context, the researcher raises the following questions: Should the surrogate arrangement be remunerated? Would this lead to the commercialization of surrogacy and expose the surrogate mother to possible exploitation? What happens when no one wants a handicapped newborn? Should the couple and the surrogate remain unknown to each other? Should the child be told? What kinds of records should be kept, and should the child have access to them?

As Martha Field pointed out, deontological opposition to surrogacy opposes legalizing surrogacy to any degree.<sup>18</sup> Elizabeth Scott, to support this view, pointed out that even if surrogacy is regulated to the highest degree, the State's approval is still required due to the fact that this procedure is a practice that degrades women and considers their bodies an object for exploitation to satisfy reproductive rights.<sup>19</sup> This surrogacy procedure is viewed as the exchange of money for a child, and is hence immoral, which the state should not allow or support for commodification reasons.<sup>20</sup>

However, the author argues that, the world is now in the era where culture and tradition grow and take the shape of technological advancement. Looking at and analysing surrogacy arrangements through the lens of culture and tradition, it seems that this new technological method has

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donation following superovulation, insemination and lavage is considered unacceptable in some jurisdictions because of the substantial risk of unwanted pregnancy to the donor.

<sup>18</sup> Martha Field, *Compensated Surrogacy in the Age of Windsor*, 89 WASH. L. REV. 1069, 1155 (2014).

<sup>19</sup> Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 J. L. & Contemporary Problems (2009) pp 131, 134.

<sup>20</sup> *Ibid.* p128.

modified culture and the natural way of procreation. However, this should not be grounds for branding the surrogate motherhood as something negative and immoral to be banned or prevented, since it is intended to attain good or positive purpose.<sup>21</sup> This will also prevent the concealment of surrogacy arrangements which may have negative impact in various ways. In this view, the State's regulation should provide for necessary safeguards to ensure that surrogacy operates in a way that protects the rights of the parties involved, particularly of the surrogate child and mother.<sup>22</sup>

### 5.1. Consent Between the Couple Intending to Have a Child

The decision to have a child is a private one, normally made within a marriage by both partners. Article 254 of Rwandan family law has also made consent mandatory for the couple who wants to have a child through medically assisted technologies. The first elementary principle that shall guide the couple who desires to have child by artificial means is autonomy. Respect for autonomy is said to reinforce the law of consent, which is hypothetically intended to protect the right of an individual to make decisions based on their own values and for their own reasons.<sup>23</sup> Ideally, an individual is to be given autonomy by virtue of being an autonomous person. The prerequisite of consent to medically assisted reproduction is always justified with an appeal to an individual couple's autonomy. Certainly, it is generally assumed that there is a theoretical connection between the principle of respect for autonomy and the prerequisite of consent.<sup>24</sup>

In most common law countries, tissue donation is covered by statutes based on the Uniform Human Tissue Gifts Act,<sup>25</sup> subsection 3(1). It states that any person who has attained the age of majority, is mentally competent to consent, and is able to make a free and informed decision may in a writing signed by them to consent to be removed forthwith from his body the tissue specified in the consent and its implantation in the body of another living person.<sup>26</sup>

<sup>21</sup> Jean Louis Baudouin and Catherine Labrusse-Riou, *Produire L'Homee: De quell droit?* (Paris: P.U.F, 1987) p. 120. In Quebec law, the provisions so adopted apply not only to organs themselves, but also body substances (blood, sperm, etc.)

<sup>22</sup> Janice C. Ciccarelli & Linda J. Beckman, Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy, 611 J. OF SOC. ISSUES, p 21, (2005);

<sup>23</sup> Sheila A.M. McLean, Autonomy, Consent and the Law. Available at: [http://books.google.co.in/books/about/Autonomy\\_Consent\\_and\\_](http://books.google.co.in/books/about/Autonomy_Consent_and_.). Accessed on 13<sup>th</sup> April, 2013

<sup>24</sup> Beauchamp and Childress, Principles of Biomedical Ethics, 4<sup>th</sup> ed. Oxford. 1994 <http://www.utcomchatt.org/docs/biomedethics.pdf>. 13<sup>th</sup> April, 2013

<sup>25</sup> Uniform Human Tissue Gift Act, repealed and replaced by Uniform Human Tissue Donation Act (1989), Uniform Law Conference of Canada, pp.21-22

<sup>26</sup> The Uniform Human Tissue Gift Act, repealed and replaced by the Uniform Human Tissue Donation Act (1989), the Uniform Law Conference of Canada, section 1 (c) defines "tissue" as



Thus, as sperm and eggs are parts of the body capable of regeneration,<sup>27</sup> statutory provisions on human tissue donation do not apply and the donation of gametes is governed by the common law; wherein an adult, when fully informed, can consent to have tissue removed from his body. It is in this regard that Article 254 of the family law has made consent mandatory between the couple intending to have a child, whatever methods and techniques may be used.

## 6. HUMAN RIGHTS AND SURROGACY

Children are not commodities, play things, or tools for the fulfilment of the parents' needs, or ungratified ambitions. They should be brought up to become happy human beings. Surrogate motherhood has engendered a series of issues of human rights such as well-being, and the best interests of the surrogate child, affiliation, identity, a child's right to know their biological parents, and heredity connected with medically assisted reproduction. In the following section the paper will analyze some of them.

### 6.1. Surrogacy Arrangement and the Best Interests of the Child

The supporters of surrogacy state that the right to enter into surrogacy arrangements is a part or natural extension of the right to personal autonomy. Opponents argue that surrogacy is against the natural way of reproduction and contrary to the interests of the surrogate child, which has spillover effects.

Surrogate children are unique in the sense that their existence is exceptionally intentional. They are the product of a surrogate contract<sup>28</sup> designed and executed not only before their birth but also before their very conception. The surrogate purposefully enters into pregnancy yet knows from the moment she conceives that she has no intention of later parenting/ nurturing the child. In cases of full surrogacy, the surrogate provides no genetic contribution to the embryos with which she is implanted. Thus, the

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follows: "*tissue*" includes an organ, but does not include any skin, bone, blood, blood constituent, or other tissue that is replaceable by natural process of repair."

<sup>27</sup> Bernard M. Dickens, *The Control of Living Body Material*, (1977) 27 UTLJ, p, 142 at 165. "The dividing line between permissible and prohibited tissue loss remains a matter of public policy, as judicially determined, but public policy evolves over the course of time and can be adapted to accommodate biotechnical developments and changing social priorities and recognition of the limits of self-sacrifice."

<sup>28</sup> Margalit, Yehezkel, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective* (March 10, 2013). 20 *William & Mary Journal of Women and the Law* 423 (2014). Available at SSRN: <https://ssrn.com/abstract=2231089> or <http://dx.doi.org/10.2139/ssrn.2231089> Accessed on 01/07/2018.

child that is born has no genetic connection to the woman who carried him or her.<sup>29</sup>

These distinctive aspects of surrogacy raise concerns about the commodification of children. These concerns include that children maybe left stateless if their parentage cannot be determined or will not be recognized by either the State in which they were born or in which they reside with their intended parent(s). There are questions of how a child's right to parentage should relate to the child's biological background, and uncertainty as to how the "*best interest of the child*" standard should apply to disputes over parentage, rather than custody. Surrogacy is critiqued due to the fact that surrogate children are conceived just to satisfy the need of intending parents to have children, not in the best interest of the children.<sup>30</sup> These children may also face questions of parentage that children born of traditional pregnancy avoid. For instance, children born of full surrogacy arrangements, where the surrogate has no biological connection to the child, may find themselves not only the subject of a potential custody dispute, but may also face legal uncertainty over which adult(s) even constitute their parents. In the case of a couple who enters a full surrogacy agreement, a child could be claimed by more than three parents.<sup>31</sup> This is complicated in a legal system that only recognizes two parents per child.

The issue of the best interest of the child born out of a surrogacy arrangement has been interpreted differently in various jurisdictions. In the United States for instance, although the standard for determining custody in U.S. courts is the 'best interest of the child' standard, courts faced with disputes surrounding surrogacy contracts have looked more often at issues related to the adults who entered into the contract. This includes questions such as intent, contract, genetics, and gestation.<sup>32</sup> Very few courts use the best interest of the child test in cases of surrogacy.<sup>33</sup>

In one instance where a court did look at the best interest of the child standard, an Appellate Court in California held that they did not need to determine the legality of the surrogacy contract because the best interest of the child determines custody decisions and because private ordering

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<sup>29</sup> Anne Casparsson, Surrogacy and the best interest of the child, Master's Thesis in Applied Ethics Centre for Applied Ethics Linköping University, June 2014, P. 10. Available at: <http://liu.diva-portal.org/smash/get/diva2:728301/FULLTEXT03.pdf>. Accessed on 14/10/2017.

<sup>30</sup> Ibid,

<sup>31</sup> The genetic mother, the commissioning mother, the surrogate mother, the genetic father, and the commissioning father.

<sup>32</sup> Carla Spivak, The Law of Surrogate Motherhood in the United States, 58 AM. J. COMP. L. 97,97; 106 (2010).

<sup>33</sup> Ibid. at 106.

plays a recognized role in family structures.<sup>34</sup> The court additionally noted that the public policy concerns related to surrogacy should be addressed by the legislature, rather than the courts.<sup>35</sup> However, the Supreme Court of California instituted an intent-based test for determining parentage two years later, stating that determination of parentage must precede, and should not be dictated by, eventual custodial decisions.<sup>36</sup> California courts now look at the intent of the contracting parties when faced with a surrogacy dispute, rather than the best interest of the child.<sup>37</sup>

In Europe, courts have also interpreted international human rights law on the rights of children to be applicable to the surrogacy context. For instance, the UN Convention on the Rights of the Child 1989<sup>38</sup>, (CRC) instructs that a child shall be registered immediately after birth and has the right from then on to a name, nationality, and to know and be cared for by their parents.<sup>39</sup> Particular concern is to be applied where a child would otherwise be left stateless.<sup>40</sup> The child's right to know his or her identity includes knowledge of nationality, name, and family relations, and any deprivation of this right should be speedily re-established.<sup>41</sup> The CRC also specifies that the best interests of the child shall be a primary consideration in all actions concerning children taking place in courts, administrative authorities, and legislative bodies.<sup>42</sup> Other international human rights agreements with similar provisions include the European Convention on Human Rights, which protects the right of each individual to respect for private and family life,<sup>43</sup> and the Universal Declaration of Human Rights, which identifies citizenship as a fundamental right and states that everyone has the right to a nationality.<sup>44</sup>

In Germany, in a case interpreting the European Commission of Human Rights determinations regarding surrogacy, the Supreme Court of Germany also prioritized the best interests of a child born through a surrogate over

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<sup>34</sup> Kerian, *supra* note 132, at 113 (citing *In re Adoption of Matthew B.* 232 Cal.App.3d 1239 (1991)).

<sup>35</sup> *Ibid.* at 127.

<sup>36</sup> *Johnson v. Calvert*, 851 P.2d 776, n.10 (Cal. 1993).

<sup>37</sup> Carla Spivak, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. (2010), p.103.

<sup>38</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, in accordance with article 49.

<sup>39</sup> UN Convention on the Rights of the Child, 1989, Art. 7(1).<sup>40</sup> UN

Convention on the Rights of the Child, 1989, Art. 7(2) <sup>41</sup> UN

Convention on the Rights of the Child, 1989, Art. 8

<sup>42</sup> UN Convention on the Rights of the Child, 1989, Art. 3(1)

<sup>43</sup> European Convention on Human Rights, Article 8.

<sup>44</sup> United Nations Universal Declaration of Human Rights, 1948, Art. 15.

the ban on the practice within the country.<sup>45</sup> The court recognized the UN Convention on the Rights of the Child's mandate that preference must always be given to the child's best interests, the recognized right to respect for private and family life, and the connection between this right and the legal parent-child relationship that forms an integral part of a child's identity. The court also emphasized the right to parental care and upbringing as protected under German law.<sup>46</sup>

In Canada, in 2009, the provincial Court of Quebec refused to allow an adoption proceeding between an intended mother and a surrogate, because surrogacy was prohibited in Quebec and commercial surrogacy was prohibited throughout Canada.<sup>47</sup> Declaring that the best interests of the child is not an autonomous standard of law in itself but rather a rule of interpretation, the court declined to apply the standard, saying it was not a catch-all argument that will justify anything.<sup>48</sup> However, this may no longer be the standard even in Quebec, as in 2014 a Quebec Court of Appeal granted custody of a child born of a surrogate to the intended parent(s).<sup>49</sup>

This may possibly happen in Rwanda. The judiciary would know how to deal with it.

## 6.2. Issue of Filiation Under Rwandan Law in Surrogacy Arrangement

With the beginning of new assisted reproductive technologies, the traditional family model has been subjected to significant challenges. There is a possibility that the genetic parents of a child are different from the gestational parents and the legal ones. In this case, affiliation would become ambiguous and hard to properly describe from a legal point of view. Article 46 of Rwanda Family Law provides the definition of filiation. It states that "filiation is the relationship between a child and his/her father or mother."<sup>50</sup>

In this perspective, the term "mother" becomes ambiguous. With medically

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<sup>45</sup> Supreme Court of Germany Decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13), Child

Rights International Network, <https://www.crin.org/en/library/legal-database/supreme-court-germanydecision-xii-zb-463/13-bundesgerichtshof-beschluss-xii>.

<sup>46</sup> Supreme Court of Germany Decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13), Child Rights International Network, <https://www.crin.org/en/library/legal-database/supreme-court-germanydecision-xii-zb-463/13-bundesgerichtshof-beschluss-xii>.

<sup>47</sup> Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. (2013), p.180.

<sup>48</sup> *In re X, R.J.Q.* 445, 69–70 (2009) (Can.).

<sup>49</sup> Adoption – 1445, QCCA 1162 (2014) (Can.).

<sup>50</sup> Law N°32/2016 of 28/08/2016; Official Gazette n°37 of 12/09/2016.

assisted reproductive technology, there is the possibility that the word mother can have various definitions. A mother can be a woman who has both the genetic and gestating link to the child, a woman declared by legal process/adoption to be the mother, a woman with a genetic but not gestating connection to the child, a woman who has given birth to the child, or a woman who has the intention (intended mother).

Moreover, article 47 of Rwanda Family law states how filiation should be proved. It states that:

“Paternal or maternal filiation of a person is proved by birth record. However, in the absence of a birth record, uninterrupted possession of status is sufficient to prove filiation. Nobody claims for filiation different from the one registered in the birth record and matching uninterrupted possession of status. In the absence of a birth record and of uninterrupted possession of status, evidence of filiation is proved by all means recognized by law.”

The Rwanda legal system dictates that, when there is maternal dispute over a child, a natural mother can be established by some proof that she is the woman who has given birth to the child such as a medical birth certificate issued by the health facility where the child was born. In cases of surrogacy, there is a possibility that a child may have more than one mother: a genetic, biological, and legal mother. Within the meaning of Article 47 (4) of said law, it shows that there is an alternative to proving filiation in the absence of a birth record, such as utilizing all means recognized by law, DNA tests included.

However, there are instances in which the surrogate mother refuses to relinquish the new born to the genetic parents or intended parents. In this situation, the latter may require a genetic test for establishing the genetic filiation with the new born, which can be used as objective proof in court. For a disputed child when they were conceived through gestational or full surrogacy,<sup>51</sup> and when there is no birth record, as per the meaning of Article 47(4), the result will show the link between the child and the genetic parents. In this situation proving filiation with a certificate of birth or birth record is challenged and becomes controversial. This legal issue shows the need of a specific legal instrument to govern medically assisted procreation technologies.

Additionally, under Article 257<sup>52</sup> of Rwandan family law, it states that the

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<sup>51</sup> Full surrogacy is when all of the genetic material involved originates either from the intended parents or donors.

<sup>52</sup> N°32/2016 of 28/08/2016 Law governing persons and family, Official Gazette n°37 of 12/09/2016.

mother of a child is presumed to be the one who gave birth to the child and who is registered in the birth record. With the advancement in health medicine there are situations in which the genetic parents of a child are different from the biological or the legal ones. Surrogacy arrangement requires that, at birth, the surrogate mother should relinquish the child and all rights. Within the meaning of Article 47<sup>53</sup> the mother is always certain and that is defined by the birth record. This means that maternity may be challenged, proving that the mother did not give birth to the child. By analyzing this article, it seems to be contrary to what is envisaged by Article 254<sup>54</sup> which stipulates that reproduction occurs naturally between a man and a woman or it is medically assisted. This means that any arrangement that requires relinquishment of child at birth is contrary to the law dealing with parental authority over the child and the right of the child to be breastfed, which is vital to both child and maternal health.<sup>55</sup>

Practically, the nullity of surrogate agreements does not stop parties to the contract from accomplishing their engagements expressed under the contract. The nullity of the contract will not prevent the surrogate mother from relinquishing the child if she wants to.<sup>56</sup> The author submits, however, that this can be facilitated by applying provisions regulating filiation.<sup>57</sup>

As the present law does not prohibit the surrogacy method, this means that it implicitly allows it. The author recommends that the law authorizing procreation through medically assisted technologies be amended to properly regulate surrogate motherhood. In the same spirit, a specific law should be

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<sup>53</sup> N°32/2016 of 28/08/2016 Law governing persons and family, Official Gazette n°37 of 12/09/2016.<sup>54</sup>  
N°32/2016 of 28/08/2016 Law governing persons and family, Official Gazette n°37 of 12/09/2016.<sup>55</sup>  
With respect to the common law, see the Ontario Law Reform Commission, Report on Human Artificial Reproduction and Related Matters, vols. 1 and 2 (Toronto: Ministry of the Attorney General, 1985) p. 22. "With respect to the common law.... The courts have long held that, subject to very few exceptions, parental rights and responsibilities are inalienable and incapable of transfer as matter of contract." The illegality of such agreements would be determined primarily by the interest of the child. Thus, the Supreme Court has recognized that some custody agreements, the main objective of which were the best interests of the child, were not illegal.

<sup>56</sup> Ontario Law Reform Commission, Report on Human Artificial Reproduction and Related Matters, vols. 1 and 2 (Toronto: Ministry of the Attorney General, 1985) P 99-100: It states that while a surrogate motherhood agreement may not be enforced as matter of contract law, the existing legal regime does not make it completely impossible to give effect to the wishes of the parties to such agreement. There are procedures by which a child, born or about to be born to a surrogate mother, might be neutralized in the care and custody of the prospective social parents, at least where the social father is also the biological father. The focus of attention here is not on the validity or enforceability of a surrogate motherhood agreement, but on the steps that may be taken today where a child is born or about to be born and the surrogate mother is willing to transfer the child.

<sup>57</sup> Article 47 of Law N°32/2016 of 28/08/2016 governing Persons and Family. Official Gazette n°37 of 12/09/2016.

enacted to make surrogacy agreements legally accepted and set out terms and conditions governing them. This will render surrogacy agreements legal and prevent them from being branded as against public policy.

## 7. LEGAL ISSUES AND CHALLENGES

Surrogacy is often considered to be the practice of renting a womb of another woman to grow a baby and relinquish it at birth.

### 7.1. Issue of Public Policy in the Surrogacy Contract

Legally speaking, in both civil and common law, surrogacy arrangements stand contrary to the standard requirements for the formulation of a contract. Even though there is no payment, the principle regulating the formulation of a legal contract requires the parties to form a contract which is in harmony with public policy. In that sense, a surrogacy contract between a surrogate mother and the intended parents is perhaps unsound and invalid.<sup>58</sup> Additionally, such kind of contracts are illicit in the sense that the custody of a child is not based on the best interest of the surrogate child; rather, it is based on the desires of the intended parents to become parents, or on their interests stated in the contract.<sup>59</sup>

Courts in the U.S. vary in how much importance they place on biology when considering the rights of a child born to a surrogate. The *Baby M. case*<sup>60</sup> is an example where biology played a focal point in determining parentage. In *Baby M.*, the New Jersey Superior Court emphasized that one reason surrogacy contracts should be voided is because they violate the public policy principle that children should remain with and be brought up by both their natural parents.<sup>61</sup> Ohio has also looked at the importance of biology, with a Court of Appeals stating in one case that the individuals who provide the genes of that child are the natural parents<sup>62</sup> and a Court of Common Pleas reflecting a similar sentiment in another, saying that the law requires that those who provided the child with its genetics must be designated as the legal and natural parents.<sup>63</sup>

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<sup>58</sup> Bernard M. Dickens, "Artificial Reproduction and Child Custody" (1987) 66 Can. Bar Rev. P.71: "It is commonly accepted that, in the absence of approving legislation, surrogate motherhood agreements will be held void by the courts as against public policy. Recall also the U.S. decision in *Baby M.* 537 A. 2d 1227 at 1234 (N.J. 1988): The Court held that the surrogacy contract is invalid because it conflicts with the law and public policy of the State.

<sup>59</sup> The precedence of the best interests of the child over contractual freedom is made clear in such provisions as SS 52(1) (c) and 56 (1) of Ontario's Family Law Act, 1986.

<sup>60</sup> *In re Baby M.*, 537 A.2d 1227, 1246-47 (N.J. 1988).

<sup>61</sup> *Ibid.*

<sup>62</sup> *J.F. v. D.B.*, 848 N.E.2d 873, 879 (Ohio Ct. App. 2007).

<sup>63</sup> *Belsito v. Clark*, 644 N.E.3d 760, 762, (Ohio Misc.2d 1994).

## 7.2. Object in Surrogacy Contract

Another issue which may render this type of contract void is the object of contract. It is said that the object of a contract is the thing which is agreed on. The object of a contract must be lawful when the contract is made, possible, and ascertainable by the time the contract is to be performed.<sup>64</sup> The object is the subject matter of the obligation. It is either the giving of a thing, or the doing or not doing of something. The object must be lawful, permitted by law, and possible to be performed. The object shall not be contrary to public order or morality. It must also be determined or determinable, clear, and precise. Analyzing the object in a surrogacy contract in lens of article 4(3) of Rwanda contract law, it is mentioned that the object matter of a contract is one of the requirements of formation of the contract. This sounds contrary to the surrogacy arrangement in the sense that it is difficult to ascertain the object of the contract. It is impossible to predict how a surrogate child will be, girl or boy, tall or short, brown eyes or black, etc. Article 254,<sup>65</sup> which introduces medically assisted procreation, is silent on the above issues. The author opines that the surrogacy contract does not meet the requirements envisaged under this article.

## 7.3. Licit Cause in Surrogacy Contract

Liberalists argue that the right to enter into a surrogacy arrangement is a part or natural extension of the right to personal autonomy. To prohibit or invalidate such contracts would be to violate women's right to self-determination and reinforce the negative stereotype of women as incapable of full rational agency.<sup>66</sup>

The opponents state that through a surrogacy arrangement, the women rent their bodies, which is illicit in nature. They emphasize that surrogacy should be taken as an alert to all human beings. That is, this is a new form of exploitation and trafficking in women where children are treated as a commodity and the object of a contract.<sup>67</sup> The aim of surrogacy is to fulfill the desire of parents to satisfy their wish of having a child at any price.<sup>68</sup>

<sup>64</sup> 2005 California Civil Code Sections 1595-1599 Chapter 4. Object of a Contract. Available; <http://law.justia.com/codes/california/2005/civ/1595-1599.html>. Accessed on 27/09/2017.

<sup>65</sup> N°32/2016 of 28/08/2016 Law governing persons and family, Official Gazette n°37 of 12/09/2016

<sup>66</sup> Liezl van Zyl and Anton van Niekerk, Interpretations, perspectives, and intentions in surrogate motherhood, *Journal of Medical Ethics* 2000; 26:404–40. p. 404. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1733290/pdf/v026p00404.pdf>. Accessed on 27/09/2017.

<sup>67</sup> Poonam Pariya, Womb on Rent: Surrogacy Tourism in India Ethical or Commercial, *International Journal of Recent Research in Commerce Economics and Management (IJRRCEM)* Vol. 2, Issue 4, pp: (194-205), Month: October - December 2015, Available at: [www.paperpublications.org](http://www.paperpublications.org). Accessed on 14/10/2017.

<sup>68</sup> A Paper by the Iona Institute; The Ethical Case Against Surrogate Motherhood: What We Can



#### 7.4. Commercial Aspect of Surrogacy

As previously expressed, the notion of surrogacy is not regulated and cannot be regulated by a single article. There is no specific regulation that governs this ever-increasing technology. The pecuniary feature of surrogacy agreements poses big challenges not only in terms of exploitation of human organs (such as “womb for rent”) but also the possibility of trade in children which is prohibited under Rwandan legislations (protection of children).<sup>69</sup> If unregulated, it may end up exploited by people with malicious intention to achieve their illicit objectives.

Beside public policy, the author points out that it is not illegal to come into a surrogacy agreement, because what distinguishes surrogacy from other medically assisted procreative methods is not the technology itself but rather the conditions and effects of its execution. It is an agreement whereby one fertile woman consents to carry a baby on behalf of another woman (intended parents) with the obligation and commitment of surrendering the baby at birth.

The second issue pertains to the parenthood of the child created out of the surrogacy agreement. Who is the rightful parent of the child? This point was illustrated in the case of *Joycee B. v. Superior Court* 42 Cal.App.4<sup>th</sup> 718 (1996). A child was born to a surrogate mother using sperm and eggs from anonymous donors because the infertile couple was unable to create their own embryo using the In Vitro Fertilization techniques. The child thus had five people who could lay claim to parenthood: the genetic mother, the commissioning mother, the surrogate mother, the genetic father, and the commissioning father.

What is mostly envisaged is altruistic surrogacy, which stands in opposition to commercial surrogacy. Commercial surrogacy refers to surrogacy arrangements in which the surrogate is paid a fee above and beyond reimbursement for reasonable expenses. Altruistic surrogacy, on the other hand, refers to arrangements in which the surrogate volunteers to perform a service without being paid, except potentially some payment for expenses. Notably, the distinction between what constitutes reasonable expenses and what constitutes payment for services has been and continues to be a difficult line to draw. Quite a few countries have legalized altruistic surrogacy while others outlawed commercial surrogacy. In the U.S. for instance, commercial surrogacy is most often referred to as compensated surrogacy, and altruistic surrogacy is called uncompensated surrogacy.

Learn from the Law of Other European Countries. Available at: [www.ionainstitute.ie](http://www.ionainstitute.ie). Accessed on 27/09/2017.

<sup>69</sup> Law N°71/2018 Of 31/08/2018 Relating to The Protection of The Child, Official Gazette no.37 bis of 10/09/2018.

Moreover, commercial surrogacy arrangements raise concerns of forced surrogacy and manipulation. Given the newness of reproductive technologies, the intersection between human trafficking and surrogacy has largely been overlooked.<sup>70</sup> For instance, India, which is at the forefront of the global surrogacy market, has raised concerns regarding the ethics of surrogacy because it is highly unregulated and open to exploitive situations.<sup>71</sup> For example, most surrogates are generally poor, illiterate, and are recruited from rural villages. Women's bodies are sold internally and on the global marketplace for sex trafficking, and it seems inevitable that organized crime will shift into the surrogacy market and the sale of women's reproductive capacity.<sup>72</sup> If not dealt with seriously, it may lead to a worse situation where surrogate women are exploited for money.

Within the meaning of Article 254 of the Rwandan law governing Persons and Family, surrogacy as one of the techniques of medically assisted procreation is permitted. The issue is that, due to the complexity of medically assisted procreation methods and techniques, these methods cannot be regulated by a single article. It must be noted that while no law declares the illegality of surrogacy agreements, it is legal in Rwanda within the meaning of Article 254 only for therapeutic purposes. It is also valid and enforceable, as no provision of Rwandan contract law declares the formation of such agreements to be against the law. There is simply a vacuum that broods about this issue.

## 8. STATES THAT PERMIT AND REGULATE NON-COMMERCIAL SURROGACY

A number of countries only permit non-commercial or altruistic surrogacy.<sup>73</sup> Although these countries often impose criminal sanctions on commercial surrogacy, they sometimes allow the payment of reasonable expense. In some jurisdictions only full surrogacy is permitted or expressly regulated.<sup>74</sup>

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<sup>70</sup> Karen Smith Rotabi & Nicole F. Bromfield, Will Global Surrogacy Be Regulated?, RH REALITY CHECK (July 7, 2010, 7:00 AM). Available at: <http://www.rhrealitycheck.org/blog/2010/07/07/will-global-surrogacy-regulated>. Accessed on 27/09/2017.

<sup>71</sup> Nicole Bromfield, Global Surrogacy in India: Legal, Ethical and Human Rights Implications of a Growing "Industry", RH REALITY CHECK (June 11, 2010, 9:00 AM).p.13. Available at: <http://www.rhrealitycheck.org/blog/2010/06/10/stateless-babies-legal-ethical-human-rights-issues-raised-growth-global-surrogacy-india>. Accessed on 27/09/2017.

<sup>72</sup> Ibid,

<sup>73</sup> Sonia Allan, the Surrogate in Commercial Surrogacy: Legal and Ethical Considerations, in Surrogacy American Style, in Surrogacy, Law, And Human Rights 113, 130 (Paula Gerber & Katie O'Byrne, eds., 2015); p 53,132.

<sup>74</sup> Ibid,

In Australia, surrogacy is regulated at the state and territory level.<sup>75</sup> All states and the Australian Capital Territory prohibit compensated surrogacy but permit altruistic surrogacy and allow reimbursement of some of the surrogate's costs.<sup>76</sup> In some Australian states, the prohibition against compensated surrogacy has extraterritorial application.<sup>77</sup>

In Canada, commercial surrogacy is prohibited under federal legislation.<sup>78</sup> All other aspects of surrogacy are regulated on a provincial level.<sup>79</sup> However, altruistic surrogacy generally remains unregulated. Only three provinces have enacted legislative provisions to address filiation in surrogacy contexts.<sup>80</sup>

In South Africa, both full and partial altruistic surrogacy are legal,<sup>81</sup> but compensation is not allowed except for reasonable expenses.<sup>82</sup> There are a number of legal requirements relating to the surrogate mother, including that she be a South African citizen and have one biological child living with her.<sup>83</sup> At least one of the intended parents must be a permanent resident of South Africa.<sup>84</sup>

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<sup>75</sup> Parentage Act 2004 (ACT); Surrogacy Act 2010 (NSW); Surrogacy Act 2010 (Qld); Surrogacy Act 2012 (Tas); Assisted Reproductive Treatment Act 2008 (Vic); Surrogacy Act 2008 (WA). There is no legislation in the Northern Territory.

<sup>76</sup> Castan Centre for Human Rights Law, Monash University, Submission to the Australian House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Surrogacy Arrangements (Submission 19) 3. [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/Inquiry\\_into-surrogacy/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Inquiry_into-surrogacy/Submissions).

<sup>77</sup> In the Australian Capital Territory (Parentage Act 2004 (ACT), § 45), New South Wales (Surrogacy Act 2010 (NSW), § 11) and Queensland (Surrogacy Act 2010 (Qld), § 54(b)). Id. at 4–6.

<sup>78</sup> See Assisted Human Reproduction Act (S.C. 2004), arts. 6–7.

<sup>79</sup> Susan L. Crockin, A Legal Primer on Fertility Law in Canada, American Society for Reproductive Medicine. Available at: [https://www.asrm.org/Legally\\_Speaking/A\\_Legal\\_Primer\\_on\\_Fertility\\_Law\\_in\\_Canada](https://www.asrm.org/Legally_Speaking/A_Legal_Primer_on_Fertility_Law_in_Canada). Accessed on 20/09/2017. See also Dave Snow & Rainer Knopff, Assisted Reproduction Policy in Federal States: What Canada Should Learn from Australia, 5(12) University Of Calgary, The School of Public Policy, SPP Research Papers (2012), available at: <http://www.policyschool.ucalgary.ca/sites/default/files/research/dave-snow-art-final.pdf>. Accessed on 20/09/2017

<sup>80</sup> British Columbia (Family Law Act, SBC 2011, c. 25); Alberta (Family Law Act, SA, 2003, c.F–4.5); Nova Scotia (Birth Registration Regulations N.S. Reg 390/2007); see also Ellen K. Embury, A National Review of the Law of Parentage Declarations, Fertility Consultants, <<http://fertilityconsultants.ca/blog/national-review-lawparentage-declarations-ellen-k-embury>.

<sup>81</sup> Children's Act 2005, § 298(1).

<sup>82</sup> Ibid p § 301.

<sup>83</sup> Ibid p. § 292, 295, 297.

<sup>84</sup> Ibid p. § 292.

In the United Kingdom, altruistic surrogacy is permitted<sup>85</sup> and a surrogate's reasonable expenses can be covered.<sup>86</sup> However, surrogacy contracts are unenforceable, meaning that U.K. law does not recognize surrogacy contracts as binding on either party.<sup>87</sup>

There are also a number of countries that have a permissive approach to surrogacy, including commercial surrogacy.<sup>88</sup>

Israel is a unique example of a permissive approach to commercial surrogacy. Full surrogacy is permitted under legislation enacted in 1996. Under the Israeli Act, surrogacy arrangements must be approved by a state appointed committee, composed of three physicians, a clinical psychologist, a social worker, a public representative who is a jurist by training, and a person of the clergy of the parties' religion.<sup>89</sup> The Committee's Guidelines also specify clauses that must be incorporated into the contract.<sup>90</sup> After the birth of the child, a governmental welfare agent is the guardian of the child until a court decides otherwise.<sup>91</sup> Surrogacy is only available to couples composed of a man and woman, and intended parents must be habitually residing in Israel.<sup>92</sup> Due to the requirements of religious law, the surrogate must be unmarried, the same religion as the mother, and not a blood relative of the parents.<sup>93</sup> Notably, this latter requirement makes the practice of commercial surrogacy practically inevitable.<sup>94</sup> Another factor that makes Israel particularly unique is that the Act authorizes the Committee to approve monthly compensation payments to the surrogate for pain and suffering, as well as reimbursement of expenses resulting from the contract, such as time spent for the procedure, loss of income, or temporary inability to work, and any other reasonable compensation.<sup>95</sup>

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<sup>85</sup> Surrogacy Arrangements Act 1985.

<sup>86</sup> For further discussion, see Michael Wells-Greco, United Kingdom, in *International Surrogacy Arrangements: Legal Regulation at the International Level* 367, 377–381 (Katarina Trimmings & Paul Beaumont eds., 2013).

<sup>87</sup> *Ibid.* p. § 1A.

<sup>88</sup> Countries in this category include: Armenia, China (which recently reversed its prohibition), Georgia, Israel, Kyrgyzstan, Russia, Uganda and Ukraine. *Id.*

<sup>89</sup> Sharon Shakargy, Israel, in *International Surrogacy Arrangements: Legal Regulation at the International Level* 231, 231–2 (Katarina Trimmings & Paul Beaumont eds., 2013).

<sup>90</sup> *Id.* at 232–3.

<sup>91</sup> *Id.* at 234.

<sup>92</sup> *Id.* at 235.

<sup>93</sup> *Id.* at 236.

<sup>94</sup> R. Schuz, *Surrogacy in Israel: An Analysis of the Law in Practice*, in *Surrogate Motherhood: International Perspectives* 36 (R Cook, S Day Schlater & F Kaganas eds., 2003)

<sup>95</sup> *Ibid.* p. 38.

## 9. GENERAL CONCLUSION

Surrogacy is a highly controversial issue in reproductive medicine nowadays, posing numerous socio-ethical, human rights, and legal issues.<sup>96</sup> In Rwanda, surrogacy is not explicitly allowed nor prohibited by existing legislation; there is just a broad interpretation.

Recently, the Rwanda Family Law has been amended wherein the notion of medically assisted reproduction technology has been legalized. This has created an impasse to know whether maternal filiation can be established based on a positive proof of genetic kinship or can only be established based on the act of giving birth.

In regard to medically assisted reproduction technologies, according to the Rwanda Family Law, under Article 254, no one can contest the filiation of the child for reasons pertaining to medically assisted reproduction, not even the child conceived by one of these procedures. According to the law, only the biological mother's husband can dispute the child's paternity if he did not consent to third-party reproduction, in which case legal regulations concerning the paternity dispute are applicable and paternity determination can subsequently be initiated.

The author submits that maternal filiation in case of surrogacy is clearly established by the act of giving birth. A forensic genetic report for establishing the filiation can only be used to prove the genetic kinship between the commissioning couple and the newborn. Various instances of these dilemmas are vulnerable to imperfection due to equally convincing counter arguments, and therefore the law needs to strike a delicate balance, not by attempting to take sides on the moral battle front, but by devising a framework in light of various interests involved.

The mere fact that Rwanda has no specific law governing Medically Assisted Reproduction, such as surrogacy and parenthood resulting from surrogacy arrangements, creates a legal dilemma.

While technology and science have advanced at a fast rate, the law has not, and this has created a level of uncertainty which is far from desirable.

The legal problems raised in this research paper are not exclusive or exceptional to Rwanda. Therefore, even if the emphasis is on Rwandan laws, this cannot stop best practices and model laws from being borrowed and applied whenever the same issues are experienced. The debate may, perhaps,

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<sup>96</sup> Hostiuc S, Badiu D, Hangan T, Hostiuc M, Rentea I, Lungu A, Vrapciu A, Marcus I, Vladareanu S, Navolan D, Rusu MC, Negoii I. Whole genome sequencing followed by pre-implantation genetic diagnosis. A translational approach to ethical issues. *Ginecoeu*. 2015; 11(3):128-13.

be adjusted and best practices be applied to Rwanda. However, none can say that surrogacy is illegal. This is supported by the argumentation given above on surrogacy. It is also said that what is not explicitly forbidden by law is allowed.

### 9.1. Recommendations

Article 254 cannot cover, regulate, and govern all aspects of medically assisted reproduction. Moreover, in the absence of any comprehensive law in this area it may give rise to many immoral practices, legal complexities, and human rights violations.

It is 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.

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## **Legislations**

1. European Convention on Human Rights, 1953
2. Law N°32/2016 of 28/08/2016 governing Persons and Family. Official Gazette n°37 of 12/09/2016.
3. UN Convention on the Rights of the Child, 1989
4. Uniform Human Tissue Gift Act, repealed and replaced by Uniform Human Tissue Donation Act (1989), Uniform Law Conference of Canada  
Victoria Assisted Reproductive