

**KIGALI INDEPENDENT UNIVERSITY [ULK]**

**SCHOOL OF LAW**

**DEPARTMENT OF LAW**

**FINAL DISSERTATION**

**TOPIC: CRITICAL ANALYSIS OF THE LEGALITY OF SURROGACY UNDER  
RWANDAN LEGAL SYSTEM**

**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS FOR THE AWARD OF BACHERLOR'S DEGREE IN LAW (LLB)  
AT KIGALI INDEPENDENT UNIVERSITY [ULK]**

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## **DECLARATION**

I, Deborah UMUMARARUNGU, a student at Kigali Independent University (ULK) do hereby declare this is my original work and that it has not been submitted for award of degree or the other academic credit in any other University or any institution, where people's work have been used references have been provided and in some cases quotation have been made in this regard I declare that this work is original.

Signature.....

Date.....

**Deborah UMUMARARUNGU**

**APPROVAL**

I hereby certify that I have supervised by recommend for the acceptance of this entitled critical analysis of the legality of surrogacy under Rwandan legal system

Supervisor name.....

Signature.....

Date.....

## **DEDICATIONS**

I dedicate this paper my lovely parents SUBUKINO Arstide and MUSABYEMALIYA Speciose for being loyal and supportive to me, my sisters and brothers who took care of me during a whole journey of my academic courses. I value your assistance and encouragement. To all my friends who give support throughout the process. A dedication goes also to all members of my institution.

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**I, Deborah UMUMARARUNGU**

## **LIST OF ABBREVIATION**

**ACHPR:** African Charter on Human and People's Rights

**ACRWC:** African Charter on the Rights and Welfare of the Children

**ARM:** Assisted Reproductive Method

**ART:** Assisted Reproductive Technologies

**ICESCR:** International Covenant on Economic, Social and Cultural Rights

**ICCPR:** International Covenant on Civil and Political Rights

**IT:** Intrafallopian Transfer

**IUI:** Intrauterine Insemination

**IVF:** In Vitro-Fertilization

**K.F and M.G:** Surrogate family in the case RCA 00161/2020/TGI/NYGE

**KICKI:** Kicukiro

**N.A and M.O:** Intending Parents

**NYGE:** Nyarugenge

**RC:** Role Civil

**RCA:** Role Civil d' Appel

**TB:** Tribunal de Base

**TGI:** Tribunal de Grand Instance

**UDHR:** Universal Declaration on Human Rights

**UN:** United Nations

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## GENERAL INTRODUCTION

This research focuses on the critical analysis of legality of surrogacy under Rwandan legal system, the call for a uniform regulatory system in Rwanda, in point of fact, the general introduction research proposal has the following main parts: Background of the study, Problem Statement, Research Questions, research hypothesis, Scope of the Study, Objectives of the Study, Research Methodology and lastly the structure of the study.

### 1.1. BACKGROUND OF THE STUDY

In Latin “Surrogatus” means a substitute i.e. a person appointed to act in the place of another.<sup>1</sup> Surrogacy as simple definition it refers to a form of third party reproductive practice in which intending parent contract a surrogate mother to give birth to a child.<sup>2</sup> Surrogate motherhood, also sometimes known as gestational surrogacy, is a practice where a woman carries and gives birth to a child for another person or couple, who are either unable to conceive or carry a pregnancy themselves due to infertility issue. The New Encyclopedia Britannica defines surrogacy as a practice in which a woman bears a child for a couple unable to produce children in the usual way.<sup>3</sup>

It is very important to understand some of terminologies and meaning due to their uses throughout in this research.<sup>4</sup> a. Altruistic Surrogacy refers to arrangements in which the surrogate volunteers to perform a service without being paid (no financial rewards for her pregnancy) except potentially some payment for expenses. b. Commercial Surrogacy refers to surrogacy arrangements in which the surrogate is paid a fee above and beyond reimbursement for

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<sup>1</sup> Surrogacy in Latin. Available at: <http://www.latindictionary.org/surrogatus>

<sup>2</sup> Surrogacy definition, Available at: <https://www.ohchr.org/en/special-procedures/sr-sale-o-children/surrogacy#:~:text=It%20refers%20to%20a%20form.give%20birth%20to%20a%20child>

<sup>3</sup> Surrogacy in New Encyclopedia, Britannica available at: <http://www.britannica.com/EBchecked/topic/575390/surrogate-motherhood>

<sup>4</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)

reasonable expenses.<sup>5</sup> The aim of surrogacy is to fulfill the desire of parents to satisfy their wish of having a child at any price.<sup>6</sup>

International Approaches to Surrogate Motherhood.<sup>7</sup> The approaches to surrogate motherhood actually, are different extensively across among countries. Some nations have implemented commercial surrogacy<sup>8</sup> in this regards the surrogate mother receives financial compensation for carrying the pregnancy. In contrast, where other countries have totally banned commercial surrogacy,<sup>9</sup> and only allow altruistic surrogacy,<sup>10</sup> where the surrogate mother does not receive monetary compensation beyond the reimbursement of medical expenses used at period of giving birth. When it comes to the court, when the conflict arose for instance 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>11</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>12</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>13</sup> The Supreme Court of Germany also prioritized the best interests of a child born through a surrogate over the ban on the practice within the country.<sup>14</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; court also emphasized the right to parental care and upbringing as protected

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<sup>5</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>6</sup> A Paper by the Iona Institute; *The Ethical Case Against Surrogate Motherhood: What We Can Learn from the Law of Other European Countries*. Available at: [www.ionainstitute.ie](http://www.ionainstitute.ie). accessed on 03/02/2024,

<sup>7</sup> "Surrogacy: A Global Perspective" by Susan J. Botchway and Rachel H. Hines (2017)

<sup>8</sup> Sara C. Davies (2019) *Surrogacy and the Human Rights of the Child*"

<sup>9</sup> Thailand has a thriving surrogacy industry, but the practice is illegal and carries a maximum sentence of six years in prison.

<sup>10</sup> India: In 2015, *India banned commercial surrogacy, allowing only altruistic surrogacy*, Ukraine and California while it is illegal in England, many states of United States, and in Australia, which recognize only altruistic surrogacy. In contrast, countries like Germany, Sweden, Norway, and Italy do not recognize any surrogacy agreements.

<sup>11</sup> Carla Spivak, J. COMP. L. (2010), *The Law of Surrogate Motherhood in the United States* 58 AM, p.103

<sup>12</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>13</sup> UN Convention on the Rights of the Child, 1989, Art7(1), Available at this link <https://www.ohchr.org/sites/default/files/crc.pdf>

<sup>14</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-courtgermanydecision-xii-zb-463/13-bundesgerichtshof-beschluss-xii>

under German law<sup>15</sup>. At the international field, there are no universally which are accepted as regulations governing surrogacy. Instead, each country has established its own set of laws and policies that prescription the practice of surrogacy within its borders.

In the context of Rwanda, there is a gap<sup>16</sup> that require for a uniform regulatory system to address the complexities surrounding surrogacy motherhood. However, the Law of 2016, governing persons and family in Rwanda introduced Article 254 to allow IVF (in-vitro fertilization) techniques, but do not say anything clear about that. This non-existence of clear legal provisions creates ambiguity and impending risks for all parties who are involved in surrogacy engagements. Alternatively, without a uniform regulatory system in place, there is a lack of legal transparency regarding parental rights, responsibilities and best interests of the child<sup>17</sup>, the protection of surrogate mothers' rights. Not only has that, but also poses challenges for healthcare providers and legal professionals who may be involved in facilitating surrogacy arrangements. Without clear guiding principle, there is a risk of inconsistent practices and potential legal disputes arising from unregulated surrogacy agreements.

## **1.2. INTEREST OF THE STUDY**

In this part is looking at; personal interest, academic interest, scientific and lastly societal interest

### **1.2.1. Personal interest**

Personally there are more interests in conducting this study, among others are; personal understanding the legal rights and protection or lack of, for individuals involved in surrogacy arrangements. Also involves in assessing the potential social and ethical implication of surrogacy practices under Rwandan community as well as evaluating the accessibility and fairness for the individual couples seeking to build their family.

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<sup>15</sup> Supreme Court of Germany Decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13), Child Rights International Network Available on this link: <https://archive.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zb-463/13-bundesgerichtshof-beschluss-xii.html>

<sup>16</sup> Current law allows assistance in production between a man and a woman but does not provide details on the procedure. Lawyers say loopholes in the law make the procedure risky

<sup>17</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: <https://www.diva-portal.org/smash/get/diva2:728301/FULLTEXT03.pdf>

### **1.2.2. Academic and Scientific interest**

Expanding scholarly discourse on the intersection of family law and other relevant laws with the reproductive technologies specifically in Rwandan contexts as well as exploring the theatrical and philosophical debates on morality and legality of commercial surrogacy comparatively with other legislations particularly EAC (East African Community). Scientifically examining the potential public health and medical considerations, like health of surrogate mother, genetic life of born baby as well as probing the clinical practices for assisted reproduction under Rwandan health care system if any.

### **1.2.3. Societal interest**

Socially integrating the perspectives from laws, sociology and bioethics<sup>18</sup>, to meet the socio-cultural norms, religious beliefs and legal framework, through implementing policies towards shaping the social acceptability and regulation of surrogacy within the Rwandan society

## **1.3. SCOPE OF THE STUDY**

In this part, the scope of study will tackle to the; delimitation in space (also considered as geographical delimitation), delimitation in domain and lastly delimitation in time period.

### **1.3.1. Delimitation in space**

Geographically, the study encompasses a critical analysis of the legal, ethical, and social aspects of surrogacy within national wide, to small extent, covering on the comparative analysis, case studies, legal framework analysis as a geographical scope, expert interview hence this research it involves an analysis of the existing regulatory frameworks for surrogacy in various countries, with a focus on their applicability to the Rwandan framework.

### **1.3.2. Delimitation in Domain**

The study researches the legality of surrogacy under Rwandan legal system from 2016 to 2024. It looks at ethical considerations surrounding surrogacy, including issues related to women's

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<sup>18</sup>. Bioethics; the study of ethical, social and legal issues that arise in biomedicine and biomedical research, available at: <https://www.niehs.gov/resources>

reproductive rights, exploitation, and the best interests of the child. It will see the sights on social and cultural dimensions of surrogacy, considering how it is perceived and practiced in different societies. This scope also will include an assessment of the possible benefits and challenges accompanying with implementing a uniform regulatory system for surrogacy in Rwanda. The research extends to ethical considerations surrounding surrogacy, particularly addressing women's reproductive rights, potential exploitation, and the paramount interests of the child.

### **1.3.3. Delimitation in Time**

This study analyzes surrogacy's legality in Rwanda from 2016 to 2024. A critical timeframe that focus on the adoption of the 2016 Family Law, which introduced provisions on medically assisted reproduction. The research examines the evolution, or lack thereof, of the legal framework in response to surrogacy. This allows for a comprehensive analysis of recent legal challenges and debates in Rwanda

## **1.4. PROBLEM STATEMENT**

The Rwandan Law Governing Persons and Families stipulate that the mode of reproduction in Rwanda is naturally between a man and a woman or it can be medically assisted. Medically assisted procreation must be by mutual consent of the concerned parties. Much as Rwandans have the right to infertility treatments, a lack of proper details deters the law from fully serving its purpose. For example, there are no regulations and legal assistance present to govern cases where couples choose to go for surrogacy. This lack of a consistent legal framework creates various challenges, together with ethical concerns<sup>19</sup>, exploitation of surrogate mothers (commercial surrogacy)<sup>20</sup>, and ambiguities regarding parental rights<sup>21</sup>.

Rwanda faces a similar dilemma regarding surrogate motherhood. This analysis examines the international approach and legitimacy of this practice in Rwanda, focusing on the need for a uniform regulatory system. As science and technology evolve, infertility is no longer a barrier for

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<sup>19</sup> Kok-Chor Tan (2018) "The Ethics of Surrogacy: A Comparative Analysis" available at this link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3708631/>

<sup>20</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>21</sup> Sharma RS, Bhargava PM, Chandhiok N, Saxena NC. New Delhi: Indian Council of Medical Research-Ministry of Health & Family Welfare, Government of India; 2005.

couples wanting to become parents. The quick development in medical science and genetic engineering has led to a need to review and update some Rwandan laws. Article 254 of Law N°32/2016 of 28/08/2016 governing persons and family only states that medically assisted reproduction technique is allowed<sup>22</sup>. Odette UWINEZA, Lecturer of Family Law at University of Rwanda, argues that opting for surrogacy based on the current law is risky due to gaps. "Does the child have the right to know the surrogate mother? These are all the loopholes that could cause conflicts in the future generation," Uwineza said. Legalizing medically assisted reproductive methods could mean more law reforms.

Surrogacy cannot be regulated by a single article. No specific regulation governs this increasing technology<sup>23</sup>. The pecuniary feature of surrogacy agreements poses challenges in terms of exploitation of human organs and possibility of trade in children, prohibited under Rwandan legislations<sup>24</sup>. If not officially regulated, it may be exploited for illicit objectives.

Surrogacy involves depositing a fertilized egg in the biological mother's womb or growing a fetus in another consenting woman's womb<sup>25</sup>. In Rwanda, surrogacy is neither explicitly allowed nor prohibited; there is just a broad interpretation. The recently amended Rwanda Family Law has legalized medically assisted reproduction technology. This has created an impasse to know whether maternal filiation can be established based on genetic kinship or only on the act of giving birth<sup>26</sup>. According to Rwanda Family Law, Article 254, no one can contest the filiation of a child conceived through medically assisted reproduction. Maternal filiation in surrogacy is established by giving birth. A forensic genetic report can only prove genetic kinship between the commissioning couple and newborn. These dilemmas are vulnerable to imperfection due to convincing counter arguments. The law needs to strike a balance by devising a framework considering various interests involved. Rwanda's lack of specific law governing Medically

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<sup>22</sup>Official Gazette n°37 of 12/09/2016 available at this link: [https://www.africa-laws.org/Rwanda/Family%20law/Law%20no%20322016%20of%20governing%20persons%20and%20family%20\(i%20Eng,Fr.%20Kinyarwanda\).pdf](https://www.africa-laws.org/Rwanda/Family%20law/Law%20no%20322016%20of%20governing%20persons%20and%20family%20(i%20Eng,Fr.%20Kinyarwanda).pdf)

<sup>23</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>24</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.

<sup>25</sup> Allen, Anita L., "Privacy, Surrogacy, and the Baby M Case" (1988), Faculty Scholarship, Paper 808 available at: [http://scholarship.law.upenn.edu/faculty\\_scholarship/808](http://scholarship.law.upenn.edu/faculty_scholarship/808)

<sup>26</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)

Assisted Reproduction creates a legal dilemma needing legalization<sup>27</sup>. Technology and science have advanced faster than the law, creating undesirable uncertainty<sup>28</sup>. The system hampers standardized procedures for screening surrogate mothers, ensuring their well-being during the process, and addressing potential medical or psychological risks associated with surrogacy.

### **1.5. RESEARCH QUESTIONS**

Main research question is to know how Rwanda can create a uniform regulatory system for surrogacy that ensures ethical practices, protects the rights of all parties involved, and promotes the well-being of children born through surrogacy considering the international landscape and Rwanda's specific context.

1. What are the legal and ethical implications of surrogate motherhood under Rwandan law?
2. What are the potential benefits and risks associated with surrogate motherhood, and how can they be mitigated by a legal framework?

### **1.6. RESEARCH HYPOTHESIS**

1. Surrogacy under Rwandan law operates in a legal vacuum, which poses potential ethical dilemmas and exploitation. The absence of specific legislation creates uncertainty regarding parental rights and responsibilities. This lack of clear legal frameworks may result in inconsistent judicial interpretations and inadequate protection for all parties involved in surrogacy arrangements.

2. While surrogacy offers hope to individuals facing infertility, it also runs the risk of commodifying reproduction and exploiting vulnerable women. A comprehensive regulatory framework could address these concerns by establishing clear legal definitions, implementing thorough screening processes, ensuring fair compensation, and addressing cross-border issues. These regulations would aim to maximize benefits while minimizing risks, creating a more secure environment for all parties involved in surrogacy arrangements in Rwanda.

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<sup>27</sup> Unless there are claims or drafts of laws about particular topics, there are no immediate plans to amend the family law, according to the Law Reform Commission. However, Jocelyne Uwamwezi, a legal awareness specialist at the commission said that if claims and calls to revise the law arise, it can be considered.

<sup>28</sup> Translational approaches to ethical issues, *Ginecoeu*. 2015; 11(3):128-13. 70 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.



## **1.7. OBJECTIVES OF THE STUDY**

Under this section we are having the general objective and specific objective as discussed hereinafter.

### **1.7.1. General objective**

Analyze the legitimacy of surrogate motherhood in Rwanda, including the social, cultural, and religious perspectives on the practice. This will involve identifying existing practices and informal arrangements related to surrogacy. Assess the legal and ethical challenges arising from the current unregulated surrogacy. Explore how existing law 29 and regulations indirectly impact surrogacy in Rwanda.

### **1.7.2. Specific objective**

The specific objective of this study is to evaluate the need for a uniform regulatory system in Rwanda to govern surrogate motherhood, and make recommendations for such a system.

## **1.8. RESEARCH METHODOLOGY**

This section outlines the systematic approach employed to investigate the legality of surrogacy in Rwanda. It describes the methods used to collect, analyze, and interpret data relevant to the research question. The methodology ensures a rigorous and comprehensive examination of the topic, incorporating both qualitative and quantitative elements to provide a well-rounded analysis of the Rwandan legal framework concerning surrogacy.

### **1.8.1. Research Techniques**

This subsection details the specific tools and strategies utilized to gather information for the study. The primary focus is on documentary research, which involves the systematic review and analysis of existing legal documents, scholarly literature, and relevant case studies. This

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<sup>29</sup> Marie Louise Mukashema, a lawyer at the Legal Aid Forum, said that surrogacy is legal in Rwanda but there is a need to detail the law with more information regarding the child's rights. Available link: <https://allafrica.com/stories/202206230394.html>

technique allows for a thorough exploration of the current legal landscape surrounding surrogacy in Rwanda, facilitating a critical evaluation of its legality

#### **1.8.1.1. Documentary technique**

The documentary technique is crucial for analyzing the legality of surrogacy in Rwanda. This method involves examining existing legal documents, including Rwanda's Family Law, reproductive health legislation, and any relevant court cases. It allows for a comprehensive review of the current legal framework, or lack thereof, regarding surrogacy.

### **1.8.2. RESEARCH METHODS**

This section outlines the methodological approach employed in the study, focusing on three distinct research methods. These methods are carefully selected to provide a comprehensive and multifaceted analysis of the legality of surrogacy within the Rwandan legal system. By utilizing a combination of analytical, exegetic, and comparative approaches, the research aims to offer a nuanced understanding of the subject matter

#### **1.8.2.1. Analytical method**

This method critically examine and look at the current the Rwandan legal text, analyzing case laws, doctrines, examining the underlying principles and values reflected in various legal provisions for the purpose of tracing ambiguities, lacuna (gaps) and potential conflict within legal framework. Ethical considerations play a crucial role in the analysis of surrogate motherhood. The research methodology would include an in-depth exploration of ethical issues such as exploitation of surrogate mothers, commodification <sup>30</sup>of children, and the rights of all parties involved.

#### **1.8.2.2. Exegetic method**

This method involves a detailed interpretation and analysis of existing Rwandan laws and regulations pertaining to surrogacy. It aims to uncover the underlying intentions, nuances, and complexities within the legal texts. By examining the language, context, and historical

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<sup>30</sup> Surrogacy and the Politics of Commodification, 72 J. L. & Contemporary Problems (2009) pp 128

background of relevant statutes, the research will provide a thorough understanding of the current legal status of surrogacy in Rwanda. Additionally, it will incorporate available statistics to gauge the prevalence and impact of surrogacy practices in the country.

### **1.8.2.3. Comparative method**

To small extent a comparative analysis, will be conducted as proposal for the uniform regulatory system. The first step would be to conduct an extensive literature review on international laws, regulations, and ethical considerations related to surrogate motherhood. This would involve studying academic journals, books, government reports, and international treaties to understand the various approaches taken by different countries and international organizations towards surrogate motherhood.

## **1.9. SUBDIVISION OF THE STUDY**

The study is comprised by the introduction and three chapters, conclusion and recommendation as well.

The introductory part is describing the current issue associated with surrogacy under Rwandan legal system, through understanding the matter of concern and explaining the structure of the study. Chapter.1 is composed of the key definitions of major terms, theories, meaning and interpretations as they are used ideally in the study. Chapter.2 looks at the problems of surrogacy arrangement in Rwanda. And finally, Chapter.3 is analyzing the mechanisms to be adopted to alleviate the problematic of surrogacy in Rwanda, concluding and recommending for establishing regulatory framework, legalizing and implementing the relevant laws, as well as encouraging the institutional framework so as to cope with this intrinsic issue under Rwandan socio-legal community.

## CHAPTER I: CONCEPTUAL AND THEORETICAL FRAMEWORK

This chapter highlights the conceptual and legal framework of surrogacy in Rwanda it very essential explore on Surrogacy in Rwanda as it brings up complicated conceptual and legal issues that need to be carefully examined and analyzed

### 1.1. Definition of Key Concepts

This section provides clear and concise definitions of essential terms and concepts related to surrogacy in the Rwandan context. By establishing a common understanding of these key terms, we lay the foundation for a more nuanced discussion of the complex legal and ethical issues surrounding surrogacy in Rwanda's legal framework

#### 1.1.1. Surrogacy

Term “surrogacy” refers to the process in which a woman undertakes to become pregnant and give birth to a child for another person.<sup>31</sup> Surrogacy is a newer way to have a baby where one woman carries and gives birth to a child for another woman. The first successful surrogacy pregnancy happened in 1985.<sup>32</sup> A surrogate sometimes also called a gestational carrier is a woman who conceives, carries and gives birth to child for another person or couple (intended parents. hence the surrogate agrees to give the child to that person or couple after the birth<sup>33</sup>. The surrogate mother comes to be pregnant through artificial insemination or the transfer of a fertilized egg, and after giving birth, she relinquishes her parental rights, allowing the intended parent(s) to become the legal parent(s) of the child.<sup>34</sup>

Undoubted that there are some improvements in science and technology which have made medically assisted reproductive methods possible, providing hope for infertile couples to have

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<sup>31</sup>.Ellenbogen, A., Feldberg, D., & Lokshin, V. (2021). Surrogacy: A worldwide demand Implementation and ethical considerations. *Gynecol Reprod Endocrinal Metab*, 2, 66-73. Available at:<https://www.tandfonline.com/doi/abs/10.1080/07399332.2024.2303520>

<sup>32</sup>. Nourizadeh R. [Ethical challenges of surrogacy in Iran] *Medical Ethic*. 2009; 3:155–186. (In Persian)

<sup>33</sup>. Bix, B. H. (2024). Surrogacy and contract law. In *Research Handbook on Surrogacy and the Law* (pp. 207-222). Edward Elgar. Available at this link: <https://www.elgaronline.com/edcollchap/book/9781802207651/book-part-9781802207651-17.xml>

<sup>34</sup>. Patel, N. H., Jadeja, Y. D., Bhadarka, H. K., Patel, M. N., Patel, N. H., & Sod agar, N. R. (2018). Insight into Different Aspects of Surrogacy Practices, *Journal of human reproductive sciences*, 11(3),212–218. [https://doi.org/10.4103/jhrs.JHRS\\_138\\_17](https://doi.org/10.4103/jhrs.JHRS_138_17)

children and bring joy to their families. In Rwanda, the law regulating Persons and Family was amended to allow couples unable to conceive naturally to use artificial reproduction methods like in vitro fertilization (IVF) and surrogacy. Article 254 of family law states that; reproduction can occur naturally between a man and woman, or through medical assistance. Despite the fact that giving infertile couples this option is important, leading these technologies raises complex issues around human rights, social implications, ethics, and potential criminal abuse that need consideration.

Regulating surrogacy in Rwanda should prioritize the rights and interests of all involved parties, including the surrogate mother, the parents who intend to raise the child and the child themselves. This would entail setting up rules for surrogacy agreements, making sure that everyone involved is fully aware and agrees to the terms, conducting medical checks on surrogates, and creating a dependable surrogacy registry. The ultimate goal of comprehensive regulation is to ensure clarity, fairness, and protection for all parties involved in surrogacy. By setting up detailed recommendations, Rwanda can encourage ethical and responsible practices, respecting the rights and interests of surrogate mothers, intended parents, and the children born through surrogacy.

### **1.1.2. Types of Surrogacy**

Surrogacy is further classified into two main types, that is, gestational and traditional surrogacy. Based on various scholars and researchers, gestational surrogacy is a method of surrogacy in which the surrogate mother's egg is not used, and the child is therefore not genetically related to her. Traditional surrogacy is a method of surrogacy in which the surrogate mother is also the genetic mother of the child. In other words, the child is conceived from the surrogate mother's own egg and biological father's sperm. This section will now provide detailed semantic meanings of several types of surrogacy through literature review and case laws in Rwanda.

#### **1.1.2.1. Traditional/Partial Surrogacy**

The practice of surrogacy, where a woman carries a child for another couple, has ancient roots dating back thousands of years before the Common Era. One of the earliest documented instances can be found in the Old Testament, where Sarah, unable to bear children herself,

arranged for her handmaiden Hagar to conceive a child with Sarah's husband Abraham. Hagar subsequently gave birth to Ishmael, who was raised as Sarah and Abraham's son.<sup>35</sup> Surrogacy has ancient roots, with Babylonian law and customs allowing it to prevent divorce.<sup>36</sup> In traditional surrogacy, the surrogate mother is artificially inseminated with the intended father's sperm or donor sperm. The surrogate mother is genetically related to the child as she provides her own egg and carries the pregnancy.<sup>37</sup> In other words 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 modern times, this arrangement is known as traditional or genetic surrogacy. It involves artificially inseminating a surrogate mother with the sperm of the intended father. The surrogate utilizes her own eggs in this process, resulting in a genetic link between her and the child, in addition to the intended father's genetic connection. As such, the surrogate mother is a biological parent of the child along with the intended father under this type of surrogacy arrangement.

### **1.1.2.2. Gestational/Full Surrogacy**

The surrogate mother is not genetically related to the child. An embryo is created through in vitro fertilization (IVF) using the intended parents' or donors' gametes and is then implanted into the surrogate's uterus<sup>38</sup>. In addition, gestational surrogacy, the surrogate mother has no genetic relationship to the child. IVF is used to fertilize the eggs of the intended mother or a donor with the intended father's sperm or donor sperm. The resulting embryo is then transferred to the surrogate's uterus, which carries the pregnancy to term. The child born through gestational surrogacy is genetically unrelated to the surrogate mother.<sup>39</sup>

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<sup>35</sup>. Lindenman E, Shepard MK, Pescovitz OH. Müllerian agenesis: An update. *Obstet Gynecol.* 1997; 90:307–12

<sup>36</sup>. Postgate JN. *Early Mesopotamia Society and Economy at the Dawn of History*, London: Routledge; 1992. p. 105.

<sup>37</sup>. Katz, M. J. (2024). Why's it gotta be so complicated: New York's regulation of compensated traditional surrogacy agreements creates a constitutional violation. *Family Court Review*

<sup>38</sup>. Herweck, A., DeSantis, C., Shandley, L. M., Kawwass, J. F., & Hipp, H. S. (2024). International gestational surrogacy in the United States, 2014–2020, *Fertility and Sterility* Available at this link: <https://pubmed.ncbi.nlm.nih.gov/38176517/>

<sup>39</sup>. Mohapatra, S. (2012). Stateless babies & adoption scams: A bioethical analysis of international commercial surrogacy. *Berkeley Journal of International Law*, 30(2), 412–450. Available at: <https://lawpublications.barry.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1015&context=facultyscholarship>

In gestational surrogacy, the surrogate mother serves as the "womb" for the pregnancy, but her DNA is not involved in the creation of the embryo. The child is genetically related to the intended parents or donors who contributed the egg and sperm, but not to the surrogate who carries the pregnancy.<sup>40</sup>

### **1.1.2.3. Altruistic Surrogacy**

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.<sup>41</sup> In other words, Altruistic Surrogacy is an arrangement where the surrogate mother receives no compensation beyond reimbursement for medical and other reasonable expenses related to the pregnancy and childbirth (Millbank, J. (2011). The new surrogacy parentage laws in Australia).

### **1.1.2.4. Commercial Surrogacy**

Commercial surrogacy is an arrangement where the surrogate mother is compensated beyond the reimbursement of expenses, often receiving a fee or payment for her services.<sup>42</sup> To make it very clear Commercial surrogacy refers to an arrangement where the surrogate mother is compensated with a fee or monetary payment for carrying and delivering a child for the intended parent(s), in addition to being reimbursed for medical and other related expenses.<sup>43</sup> It involves a legally binding contract and a considerable amount of compensation for the surrogate further than just covering her expenses (as said by Margalit, Y. (2013), in book a modern contract law perspective/surrogacy). The compensation amount can vary significantly based on factors like location, surrogate's experience, and other consideration.<sup>44</sup> Commercial surrogacy is legal in

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<sup>40</sup> Perkins, K. M., Boulet, S. L., Jamieson, (2016). *Trends and outcomes of gestational surrogacy in the United States*, Fertility and sterility, 106(2), 435-442

<sup>41</sup>Tieu, M. M. (2009). Altruistic surrogacy: the necessary objectification of surrogate mothers. *Journal of Medical Ethics*, 35(3), 171-175. <https://jme.bmj.com/content/35/3/171.short>

<sup>42</sup>. Damelio, J., & Sorensen, K. (2008). Enhancing autonomy in paid surrogacy. *Bioethics*, 22(5), 269–277.

<sup>43</sup>. Luckey, C. (2011). Commercial Surrogacy: Is Regulation Necessary to Manage the Industry. *Wis. JL Gender, & Soc'y*, 26, 213.

<sup>44</sup>. Deonandan R, Loncar M, Rahman P, Omar S. Measuring reproductive tourism through an analysis of Indian ART clinic websites. *Int J Gen Med*. 2012; 5:763–73.

some countries/states, but banned in many others due to ethical concerns around potentially exploiting or coercing surrogates.<sup>45</sup>

#### **1.1.2.5. Domestic Surrogacy**

Domestic surrogacy refers to a surrogacy arrangement where the intended parents and the surrogate mother reside in the same country without the foreign element.<sup>46</sup> Domestic surrogacy may be favored by intended parents who wish to maintain closer proximity and involvement all the way through the surrogacy process. In actuality, Domestic surrogacy is generally often preferred over international surrogacy as it avoids the legal complexities and potential complications associated with different jurisdictions and national laws. In this regards domestic surrogacy, the surrogate mother and the intended parents are typically subject to the same legal framework and regulations within their country of residence.<sup>47</sup>

This type of surrogacy arrangements possibly will be more easily facilitated and monitored, as all parties involved are within the same legal and geographical boundaries. Countries that permit domestic surrogacy often have specific regulations and requirements, such as psychological evaluations, legal contracts, and limitations on compensation for surrogates. The legal status and parentage of children born through domestic surrogacy arrangements are typically more straightforward and recognized within the same country.<sup>48</sup>

#### **1.1.2.6. Cross-Border Surrogacy**

International or cross-border surrogacy involves a surrogacy arrangement where the intended parents and the surrogate mother reside in different countries International or cross-border surrogacy refers to surrogacy arrangements that involve parties from different countries or

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<sup>45</sup>. Nurbel, E. (2014). Transnational commercial surrogacy in the Third-World: A criminology introduction to post-colonialism.

<sup>46</sup>. Dar, S., Lazer, T., Swanson, S., Silverman, (2015). Assisted reproduction involving gestational surrogacy: An analysis of the medical, psychosocial and legal issues, Experience from a large surrogacy program, *Human Reproduction*, 30(2), 345–352

<sup>47</sup>. Ergas, Y. (2013). Babies without borders: human rights, human dignity, and the regulation of international commercial surrogacy. *Emory Int'l L. Rev.*, 27, 117.

<sup>48</sup>. Pol, R. (2016). Proposing an international instrument to address issues arising out of international surrogacy arrangements, *Geo. J. Int'l L.*, 48, 1309



jurisdictions.<sup>49</sup> International surrogacy occurs when intended parents engage a surrogate mother from a different country than their own. Cross-border surrogacy arrangements often arise when the intended parents' home country prohibits or severely restricts surrogacy, or when the costs are significantly lower in another country. International surrogacy arrangements can be complex and fraught with legal and ethical challenges, as different countries have varying laws and regulations regarding surrogacy. The legal parentage of children born through international surrogacy may not be automatically recognized in the intended parents' home country, leading to potential legal battles and citizenship issues.<sup>50</sup>

### **1.1.2.7. Assisted Reproduction**

Assisted reproduction refers to a variety of techniques and procedures used to help individuals or couples conceive a child, including in vitro fertilization (IVF), intracytoplasmic sperm injection (ICSI), and other fertility treatments.<sup>51</sup> Assisted reproduction refers to a group of medical treatments that are used to help individuals or couples who are struggling with infertility to conceive a child. There are several techniques and technologies that fall under the umbrella of assisted reproduction, including in vitro fertilization (IVF), intracytoplasmic sperm injection (ICSI), donor insemination, and egg or sperm donation. These techniques normally involve the influence of human gametes (eggs or sperm) or embryos outside of the body in a laboratory setting. The resulting embryos are then transferred back into the woman's uterus, where they will hopefully implant and lead to a successful pregnancy. Assisted reproduction can help individuals or couples overcome a variety of fertility challenges, including problems with ovulation, tubal obstruction, low sperm count, and unexplained infertility. It is often used as a last resort after other fertility treatments have been tried and failed.<sup>52</sup>

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<sup>49</sup>. Trimmings, K., & Beaumont, P. (Eds.). (2013). *International surrogacy arrangements: legal regulation at the international level*. Bloomsbury Publishing.

<sup>50</sup>. Pryce, C. (2016). Surrogacy and citizenship: a conjunctive solution to a global problem. *Ind. J. Global Legal Stud.*, 23, 925.

<sup>51</sup>. Huang, J. Y. J., & Rosenwaks, Z. (2014). Assisted reproductive techniques. *Human fertility: methods and protocols*, 171-231.

<sup>52</sup>. Boivin, J., Takefman, J. E., Tulandi, T., & Brender, W. (1995). Reactions to infertility based on extent of treatment failure. *Fertility and Sterility*, 63(4), 801-807.

### **1.1.2.8. In vitro fertilization (IVF)**

IVF is a widely used assisted reproductive technique. It involves the retrieval of eggs from the woman's ovaries, which are then fertilized in a laboratory dish with sperm.<sup>53</sup> The resulting embryos are cultured for a few days before being transferred back into the woman's uterus.

### **1.1.2.9. Egg or sperm donation**

Around the world, using donor eggs or sperm can help those who may need some extra help to start a family. The process is very similar to standard IVF treatment, except for the fact that the eggs or sperm used come from a donor<sup>54</sup>. In cases where an individual or couple is unable to produce viable eggs or sperm, donated eggs or sperm from a third party can be used for fertilization<sup>55</sup>.

## **1.2. Generalities on Surrogacy**

This section provides a comprehensive overview of surrogacy, delving into its fundamental concepts and global perspectives on surrogacy. It delves into the historical evolution of surrogacy practices, the manifold manifestations it can assume, and the ethical considerations that envelop it. This background information offers valuable context for comprehending the role of surrogacy within Rwanda's legal and social framework

### **1.2.1. Legal Consideration of Surrogacy**

Surrogacy, as an assisted reproductive technology, presents a complex set of legal challenges that many legal systems, including Rwanda's, are still grappling with. The legal considerations surrounding surrogacy in Rwanda must be examined within the context of the country's existing laws, cultural norms, and international legal standards.

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<sup>53</sup>.Wilcox, L. S., Peterson, H. B., Haseltine, F. P., & Martin, M. C. (1993). Defining and interpreting pregnancy success rates for in vitro fertilization. *Fertility and sterility*, 60(1), 18-25.

<sup>54</sup>.ASRM Definition. Third-Party Reproduction. Available from: <https://docslib.org/doc/8627770/third-party-reproduction-asrm-patient-guide>

<sup>55</sup>. Sauer, M. V., & Genovese, H. G. (2023). Egg and embryo donation. In *Textbook of Assisted Reproductive Techniques* (pp. 802-812). CRC Press.

### 1.2.1.1. Current Legal Status

According to the most recent information available, Rwanda currently lacks specific legislation pertaining to surrogacy<sup>56</sup>. This legal void introduces uncertainty for all individuals involved in surrogacy arrangements. In the absence of explicit laws, surrogacy contracts may be subject to general contract law, family law, or both, depending on how the courts interpret such arrangements. The absence of clear regulations raises several pertinent questions: 1. Are surrogacy contracts legally binding in Rwanda? 2. What rights do the surrogate mother, intended parents, and the child possess? 3. How is legal parentage determined in surrogacy cases? These questions remain largely unanswered within the Rwandan legal framework, thus potentially exposing all parties involved in surrogacy arrangements to significant risks.

The Constitution of the Republic of Rwanda establishes certain guiding principles that may have an impact on the legal treatment of surrogacy. According to Article 17, the only recognized marital union is between a man and a woman (Constitution of the Republic of Rwanda). This provision could potentially have implications for surrogacy arrangements, particularly for same-sex couples or single individuals who wish to become parents through surrogacy. Additionally, Article 18 emphasizes the protection of the family as the fundamental and natural basis of Rwandan society. This could be interpreted to either support surrogacy as a means of family formation, or alternatively, to restrict it if it is seen as deviating from traditional family structures<sup>57</sup>.

In light of the consideration for child rights and the best interests of children born through surrogacy, Rwanda has become a signatory to the United Nations Convention on the Rights of the Child (UNCRC) (United Nations, 1989). The principle of the “*best interests of the child*” enshrined in this convention should be a primary focus when approaching surrogacy from a legal standpoint<sup>58</sup>. This principle raises concerns regarding the determination and protection of a child's best interests in surrogacy arrangements, particularly regarding issues of identity, citizenship, and access to information about genetic origins. Regarding parentage and birth registration, the absence of specific surrogacy laws in Rwanda has resulted in an unclear

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<sup>56</sup>. Kamatali, J. M. (2020). Introduction to Rwandan Law (1st ed.). London: Routledge

<sup>57</sup>. Article 17& 18 of the Constitution of the Republic of Rwanda

<sup>58</sup>. United Nations (1989), Convention on the Rights of the Child

determination of legal parentage in surrogacy cases. According to Rwandan civil law, the woman who gives birth is generally recognized as the legal mother. If this principle were to be applied to surrogacy cases, it could create complications for intended parents who seek to establish their legal parenthood. Additionally, the process of birth registration, governed by Law N°32/2016 of 28/08/2016 governing persons and family, may present challenges in surrogacy cases. The law does not explicitly address how to register births resulting from surrogacy arrangements, which could potentially lead to inconsistencies in practice<sup>59</sup>.

In light of the principles of contract law and its enforceability, the absence of specific surrogacy legislation means that surrogacy agreements may be analyzed within the framework of general contract law. However, due to the sensitive nature of surrogacy arrangements and potential considerations of public policy, the enforceability of such contracts is questionable. According to Rwandan contract law, contracts must have a lawful cause (licit cause) and object matter<sup>60</sup>. Whether surrogacy agreements fulfill these requirements remains subject to legal interpretation. The issue of compensation and commercialization is a contentious one in many jurisdictions when it comes to surrogacy. In Rwanda, where there is no specific legislation addressing surrogacy, the legality of compensated surrogacy remains unclear. This raises ethical and legal questions regarding the potential exploitation and commodification of women's reproductive capacities. In the absence of clear regulations in Rwanda, some prospective parents might consider cross-border surrogacy arrangements. This raises complex issues of private international law, including questions of jurisdiction, applicable law, and recognition of foreign surrogacy arrangements or birth certificates<sup>61</sup>.

The existence of legal ambiguity surrounding surrogacy in Rwanda highlights the necessity for comprehensive legislation. This legislation should address key matters, including: 1. the legal status of surrogacy agreements; 2. determination of legal parentage; 3. rights and responsibilities of all parties involved; 4. regulation of surrogacy agencies and medical facilities; 5. permissibility of compensated surrogacy; 6. protections against exploitation; 7. procedures for birth registration in surrogacy cases; 8. recognition of cross-border surrogacy arrangements. In

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<sup>59</sup>. Article 257 of Law N°32/2016 of 28/08/2016 governing persons and family, O.G. n°37 of 12/09/2016

<sup>60</sup>. Article 4 of Law N°45/2011 of 25/11/2011 governing contracts, O.G. n° 04bis of 23/01/2012

<sup>61</sup>. Trimmings, K., & Beaumont, P (2013), *International Surrogacy Arrangements: Legal Regulation at the International Level*. Hart Publishing

developing this legislation, Rwanda can draw from comparable experiences in other jurisdictions while taking into account its unique cultural, social, and legal context.

The legal consideration of surrogacy in Rwanda is marked by considerable uncertainty due to the absence of specific legislation. This legal void leaves numerous crucial questions unanswered, potentially jeopardizing the rights and interests of surrogates, intended parents, and children. As assisted reproductive technologies continue to advance and become more accessible, it is urgent for Rwanda to establish a comprehensive legal framework for surrogacy. This framework should strike a balance between the interests of all parties involved while upholding fundamental principles of human rights, child welfare, and ethical medical practice.

### **1.2.2. The Ethical Consideration of Surrogacy**

Surrogacy, while providing hope for individuals and couples facing infertility, gives rise to intricate ethical issues that must be thoroughly evaluated within the legal framework of Rwanda. The practice of surrogacy intersects with crucial matters of human dignity, reproductive rights, and the best interests of children, necessitating a nuanced ethical analysis. One primary ethical concern is the potential exploitation of surrogate mothers, particularly in the context of a developing country like Rwanda. Economic disparities may compel vulnerable women to enter into surrogacy agreements due to financial necessity rather than free choice<sup>62</sup>. This raises concerns regarding informed consent and the commodification of women's bodies. The Rwandan legal system must aim to strike a balance between the autonomy of potential surrogates and safeguards against exploitation. To address this concern, policymakers could consider implementing rigorous screening processes for potential surrogates, ensuring that they are fully informed about the medical, psychological, and legal implications of surrogacy. Moreover, mandatory counseling sessions and cooling-off periods could be introduced to allow women sufficient time to carefully consider their decision<sup>63</sup>. Additionally, establishing minimum compensation standards and regulating surrogacy agencies could help prevent exploitative practices.

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<sup>62</sup>. Twine, F. W. (2015), *Outsourcing the womb: Race, class and gestational surrogacy in a global market*, Routledge

<sup>63</sup>. Ber, R. (2000). *Ethical issues in gestational surrogacy*, *Theoretical Medicine and Bioethics*, 21(2), 153-169

The well-being of the resulting children must be paramount, including their right to know their genetic and gestational origins. This raises questions about the child's right to information and the potential impact on their identity formation. Some jurisdictions have implemented open surrogacy arrangements or registries to facilitate future contact between surrogacy-born children and their surrogates or gamete donors<sup>64</sup>.

The commercialization of surrogacy raises additional ethical concerns. Critics argue that treating reproduction as a commercial transaction undermines human dignity and the intrinsic value of children<sup>65</sup>. They contend that surrogacy commodifies both women's bodies and children, potentially leading to a "baby market" where genetic traits are selected and priced. This perspective often leads to calls for banning commercial surrogacy altogether. However, proponents of compensated surrogacy argue that it acknowledges the significant physical and emotional labor of surrogates and may lead to better outcomes for all parties. They contend that proper regulation can prevent exploitation while still allowing for fair compensation. Some suggest that a well-regulated commercial surrogacy system may be preferable to underground or international arrangements that lack oversight and protections<sup>66</sup>.

The legal and ethical frameworks surrounding surrogacy must also address issues of genetic relatedness and parental rights. Questions of legal parentage, especially in cases of international surrogacy arrangements, can lead to complex legal and ethical dilemmas. For example, conflicts may arise when the surrogate's country of residence does not recognize the intended parents' legal claim to the child. To address these issues, some countries have implemented bilateral or multilateral agreements to ensure consistent treatment of surrogacy arrangements across borders. Others have chosen to restrict surrogacy to domestic arrangements to avoid potential conflicts of law<sup>67</sup>. As Rwanda considers its approach to surrogacy, policymakers must weigh these ethical considerations carefully. A robust legal framework should aim to protect the rights and interests of all parties involved, minimize the potential for exploitation, and uphold the dignity of

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<sup>64</sup>. Readings, J., et.al (2011), *Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy*. Reproductive Bio-Medicine Online, 22(5), 485-495

<sup>65</sup>. Sandel, M. J. (2012). *What money can't buy: The moral limits of markets*, Farrar, Straus and Giroux

<sup>66</sup>. Wilkinson, S. (2016). *Exploitation in international paid surrogacy arrangements*, Journal of Applied Philosophy, 33(2), 125-145

<sup>67</sup>. Trimmings, K., & Beaumont, P (2013), *International Surrogacy Arrangements: Legal Regulation at the International Level*. Hart Publishing

surrogates, intended parents, and children born through surrogacy arrangements. This framework will include: 1. Thorough screening and counseling for all parties involved, 2. Precise delineation of legal parentage and inheritance rights, 3.Regulation of surrogacy agencies and medical facilities, 4.Implementation of minimum standards for surrogate compensation, 5.Safeguards for the rights and well-being of children born through surrogacy, 6.Mechanisms for resolving disputes and enforcing surrogacy contracts.

By addressing these ethical considerations thoughtfully and systematically, Rwanda can develop a surrogacy framework that balances the desires of intended parents, the rights of surrogates, and the best interests of children, while respecting the country's cultural and religious values.

### **1.2.2.1. Medical Procedures**

The medical procedures involved in surrogacy give rise to a number of ethical concerns that require careful consideration within the legal framework of Rwanda. These procedures, although intended to facilitate successful pregnancies, carry potential risks and ethical implications for both surrogates and intended parents. One primary concern is the health risks associated with fertility treatments and pregnancy for surrogate mothers. In gestational surrogacy, in vitro fertilization (IVF) is often used, which involves hormonal stimulation and egg retrieval. These procedures can lead to complications such as ovarian hyper-stimulation syndrome (OHSS)<sup>68</sup>. Additionally, the surrogate faces the typical risks of pregnancy and childbirth, which may be heightened in cases of multiple pregnancies resulting from IVF

Ethical concerns arise regarding the extent to which surrogates can be requested to undergo medical procedures or make health-related decisions for the benefit of the intended parents or the fetus. For example, should a surrogate be obligated to undergo amniocentesis or consent to selective reduction in cases of multiple pregnancies? These decisions involve intricate considerations of bodily autonomy, informed consent, and the balance between the surrogate's health and the desires of the intended parents. The utilization of prenatal genetic testing in surrogacy arrangements also gives rise to ethical concerns. While such testing can identify potential genetic disorders, it can also lead to challenging decisions about pregnancy termination.

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<sup>68</sup>. Kamath, M. S., Mascarenhas, M., Kirubakaran, R., & Bhattacharya, S. (2020), *Number of embryos for transfer following in vitro fertilization or intra-cytoplasmic sperm injection*, Cochrane Database of Systematic Reviews 2020, CD003416

This scenario becomes ethically complex when the perspectives of the surrogate and intended parents diverge<sup>69</sup>. Another factor to consider is the potential long-term health consequences of repeated surrogacy. Some women may be motivated by financial incentives to act as surrogates multiple times, thereby potentially jeopardizing their health. Policymakers must deliberate on whether to impose limitations on the number of times a woman can serve as a surrogate to safeguard her well-being.

The medical procedures involved in surrogacy raise questions regarding the commodification of women's bodies and reproductive capabilities. Critics argue that reducing women to their reproductive functions undermines their dignity and autonomy. However, proponents maintain that surrogacy can be an empowering choice for women with proper safeguards and informed consent<sup>70</sup>. In the Rwandan context, where access to advanced medical care may be limited in certain areas, ensuring equitable access to safe and high-quality fertility treatments and prenatal care for surrogates becomes a vital ethical consideration. This includes providing comprehensive health insurance coverage for surrogates and establishing standards for fertility clinics and hospitals involved in surrogacy arrangements<sup>71</sup> (Makinde et al., 2017). To address these ethical concerns, Rwanda's legal framework could consider implementing the following measures: 1. Mandatory comprehensive medical evaluations for potential surrogates to ensure their physical suitability for the procedure, 2. Informed consent protocols that clearly outline all potential medical risks and procedures, 3. Limits on the number of embryo transfers and regulations on selective reduction to minimize health risks to surrogates. By addressing these medical ethical considerations, Rwanda can work towards a surrogacy framework that prioritizes the health and well-being of surrogates while respecting the reproductive goals of intended parents.

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<sup>69</sup>. Deonandan, R., Green, S., & van Beinum, A. (2012). *Ethical concerns for maternal surrogacy and reproductive tourism*, *Journal of Medical Ethics*, 38(12), 742-745

<sup>70</sup>. Hammarberg, K., Stafford-Bell, M., & Everingham, S. (2015). *Intended parents' motivations and information and support needs when seeking extraterritorial compensated surrogacy*. *Reproductive Bio-Medicine Online*, 31(5), 689-696

<sup>71</sup>. Makinde, O. A., Olaleye, et.al. (2017). *Baby factories in Nigeria: Starting the discussion toward a national prevention policy*. *Trauma, Violence, & Abuse*, 18(1), 98-105.



### 1.2.2.2. Psychological Impact

The psychological impact of surrogacy on all parties involved is a crucial ethical consideration within the legal framework of Rwanda. This intricate arrangement can have profound emotional effects on surrogates, intended parents, and the resulting children. For surrogate mothers, the psychological journey is complex. While many report feelings of altruism and empowerment, others may experience emotional attachment to the fetus, leading to difficulties during relinquishment. Postpartum depression and feelings of loss are potential risks, especially in cases where there is limited post-birth contact with the child<sup>72</sup>. Intended parents may face anxiety and stress throughout the surrogacy process. The lack of control over the pregnancy, potential legal uncertainties, and societal stigma can contribute to psychological strain. Additionally, they may struggle with bonding issues or feelings of inadequacy, particularly if they have experienced previous fertility challenges<sup>73</sup>. Children born through surrogacy may face unique psychological challenges as they grow older. Questions of identity, belonging, and the nature of family can arise, especially when there is a genetic link to the surrogate or when gamete donors are involved. The child's right to know their origins and the potential impact of this knowledge on their psychological well-being must be carefully considered.

To tackle these psychological concerns, it is essential for Rwanda's legal framework to take into account the necessity of mandating comprehensive counseling for all parties involved in surrogacy, both before, during, and after the arrangement. The establishment of clear guidelines regarding information disclosure to surrogacy-born children and providing support for their identity formation is crucial. Furthermore, fostering support networks for surrogates and intended parents could effectively help mitigate psychological risks. By acknowledging and addressing the intricate psychological dynamics inherent in surrogacy, Rwanda can develop an ethical framework that places utmost importance on the mental health and well-being of all individuals participating in these arrangements.

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<sup>72</sup>. Söderström Anttila, et al., (2016). *Surrogacy: outcomes for surrogate mothers, children and the resulting families*, a systematic review. *Human Reproduction Update*, 22(2), 260-276

<sup>73</sup>. Hammarberg, K., Stafford-Bell, M., & Everingham, S. (2015), *Intended parents' motivations and information and support needs when seeking extraterritorial compensated surrogacy*. *Reproductive Bio-Medicine Online*, 31(5), 689-696

### 1.2.2.3. Religious Perspectives

In Rwanda the common associated behaviors concerning reproduction is commonly the traditional mode of reproduction. All over the world the religion have a great influence on everyday life of the society members. It is said that according a rough estimate, more than 4,200 religions function in this world, some of them support the surrogacy and others are against this practices<sup>74</sup>. In most cases within Christianity there is a wide range of views on surrogacy, mostly Catholic Church opposes the practices of surrogacy, viewing them as violating the dignity of procreation and the right of the child to be conceived by the married couples, however, protestants are more open in case of medical necessity.

Mostly the religions perceive that the child is the gift from God not a commodity, hence these artificial arrangements comes here to turn the gift into commodity (commercial surrogacy). Financially compensated surrogacy agreements are seen negatively since they unethically sale of human body, much like organ sales do. These contracts suggest an inappropriate kind of ownership over people, effectively amounting to the purchase of a kid. On the other hand, instances of altruistic surrogacy, including “*rescue surrogacies*” in which a woman carries an embryo to save it from destruction, are regarded as less morally troubling. When a surrogate participates in a rescue surrogacy, they do it voluntarily and without regard to financial gain, which elevates the arrangement to a higher ethical level may be tolerated<sup>75</sup>.

More importantly in addressing the desires of infertile couples, religion should not undermine the fundamental family relationships of natural mother, parental responsibilities and the long-term interest of the child. The careful consideration should be provided within the religious community so as to awake their mind not to be the slaves of unethical belief of condemning the artificial/scientific and technologically oriented method of procreation since it provide the best way of assisting the infertile couples to meet their desires.

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<sup>74</sup>. Lones, M. E. (2016). *A Christian ethical perspective on surrogacy*, Bioethics in Faith and Practice, 2(1), Article.5

<sup>75</sup>. Ibid

#### 1.2.2.4. Socio-cultural perspectives towards surrogacy in Rwanda

In Rwandan society, there are mixed perspectives and attitudes surrounding the practice of surrogacy. Surrogacy, which involves a woman carrying and giving birth to a child on behalf of another individual or couple, is not yet widely practiced or formally recognized. This diverges from traditional Rwandan cultural values that place a strong emphasis on biological lineage and kinship ties through blood relations. The notion of separating genetic parenthood from the gestational role can create resistance and be viewed as incompatible with long-held cultural traditions centered on procreation occurring within the context of marriage<sup>76</sup>.

In Rwandan society, there are mixed perspectives and attitudes surrounding the practice of surrogacy. Surrogacy, which involves a woman carrying and giving birth to a child on behalf of another individual or couple, is not yet widely practiced or formally recognized<sup>77</sup>. This diverges from traditional Rwandan cultural values that place a strong emphasis on biological lineage and kinship ties through blood relations. The notion of separating genetic parenthood from the gestational role can create resistance and be viewed as incompatible with long-held cultural traditions centered on procreation occurring within the context of marriage<sup>78</sup>. Surrogacy, the practice of a woman carrying and giving birth to a child for another individual or couple, raises significant socio-ethical concerns that must be carefully examined. One of the strongest critiques from opponents stems from questioning the true motives behind pursuing surrogacy<sup>79</sup>. While many surrogates mention altruistic reasons of helping those struggling with infertility, critics argue that surrogacy depersonalize the reproductive process<sup>80</sup>. They contend it creates an unnatural separation between genetic, gestational, and social parenthood roles.

Moreover, there are fears that surrogacy objectifies children by conceiving them not for their own sake, but primarily to fulfill the desires of intended parents. Another major issue is the

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<sup>76</sup>. LaRossa, R., Simonds, W., & Reitzes, D. C. (2005), Culture, cognition, and parenthood. Sourcebook of family theory and research, 423-445.

<sup>77</sup>. Ellenbogen, A., Feldberg, D., & Lokshin, V. (2021). Surrogacy: A worldwide demand. Implementation and ethical considerations. *Gynecologic Reprod Endocrinal Metab*, 2, 66-73.

<sup>78</sup>. Markens, S. (2007). Surrogate motherhood and the politics of reproduction. Univ of California Press.

<sup>79</sup>. Epstein, R. A. (1995). Surrogacy: the case for full contractual enforcement. *Virginia Law Review*, 2305-2341.

<sup>80</sup>. Soniewicka, M. (2019). Ethical and philosophical issues arising from surrogate motherhood. *Fundamental and Legal Problems of Surrogate Motherhood. Global Perspective*, P. Mostowik (ed.), Warsaw, 2019, 23-75.

potential for surrogacy to be exploited beyond cases of medical necessity<sup>81</sup>. Doubters worry about the practice could be misused by those without fertility issues, solely as a matter of convenience or personal preference. This raises ethical dilemmas around establishing acceptable boundaries for surrogacy's application. Closely tied to this is the contentious debate around whether surrogate arrangements should involve financial compensation. Opponents assert that compensating surrogates will inevitably lead to the commercialization of reproduction and leave surrogates vulnerable to potential exploitation. Difficult questions also emerge on parentage rights if a child is born with disabilities that the intended parents do not want<sup>82</sup>. Issues of privacy and disclosure create further socio-ethical complexities. There are separating views on whether the surrogate and intended parents should remain anonymous to each other throughout the process. *Similarly*, there are unresolved questions around informing children about their surrogate origins, maintaining records, and the degree of access children should have to that information<sup>83</sup>. These uncertainties underscore the life-long implications surrogacy can have for all parties. Possibly the most forceful opposition to surrogacy stems from a deontological moral stance that views the entire practice as unethical objectification. This perspective sees surrogacy as an unacceptable degradation of women by reducing those to mere vessels, commodifying their bodies and reproductive capabilities to satisfy others' rights and interests. From this view, the state should never sanction or support surrogacy arrangements due to this inherent immorality of objectification. Eventually, while there are significant cultural and religious undercurrents creating resistance to surrogacy in the current Rwandan context, attitudes are not static. Broader social changes, legal developments, and open dialogue have the capacity to gradually increase familiarity and acceptance of surrogacy as an option for building families, even in societies rooted in traditional values around biological parenthood. Navigating this socio-cultural landscape will be essential for any future policies or regulations aiming to govern surrogacy practices in Rwanda.

However, proponents would argue that while surrogacy may challenge conventional norms around reproduction, it serves the greater positive purpose of helping those unable to conceive achieve their deeply desired family goals. They contend that rather than outright prohibition,

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<sup>81</sup>. Hodson, N., Townley, L., & Earp, B. D. (2019). Removing harmful options: the law and ethics of international commercial surrogacy. *Medical Law Review*, 27(4), 597-622.

<sup>82</sup>. Cohen, I. G. (2007). The right not to be a genetic parent. *S. Cal. L. Rev.*, 81, 1115.

<sup>83</sup>. Field, M. (2014). Compensated surrogacy in the age of Windsor. *Washington Law Review*, 89, 1155.

robust regulation of surrogacy practices is needed to protect the rights of all parties involved, especially the surrogate and child<sup>84</sup>. This would allow society to ethically embrace valuable technological advancements in reproductive medicine while upholding key ethical principles<sup>85</sup>. The legalization and regulation of surrogacy can challenge traditional notions of family and parenthood. It may expand the definition of family beyond biological ties, acknowledging the importance of intended parents' emotional and financial investment in raising a child. Surrogacy regulation has the potential to reshape societal perceptions around what constitutes a family unit and parenthood roles. Legitimizing surrogacy through legal frameworks expands the definition of family beyond solely biological connections.<sup>86</sup> It recognizes that intended parents' emotional and financial commitment to raising a child can establish parenthood, even without a genetic biological link to that child. Surrogacy regulations challenge ingrained traditional notions by accommodating these diverse family formations.<sup>87</sup>

This chapter dealt with the framework of surrogacy within the Rwandan legal system. We have explored the definitions, types, and historical context of surrogacy, as well as its legal status in Rwanda. The legal and ethical considerations surrounding surrogacy, including potential exploitation, psychological impacts, and the rights of all parties involved, have been examined. This analysis highlights the complex nature of surrogacy and the need for a well-regulated approach in Rwanda. As the country addresses this issue, it is crucial to balance the desires of intended parents, the rights and well-being of surrogates, and the best interests of children born through these arrangements. A legal framework, grounded in ethical principles and responsive to Rwanda's cultural context, will be essential in navigating the challenges and opportunities presented by surrogacy arrangements. The next chapter will be analyzing the problematic of surrogacy under Rwandan law

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<sup>84</sup>. Gerber, P., & O'Byrne, K. (2016). *Surrogacy, law and human rights*, Routledge.

<sup>85</sup>. Peterson, M. M. (2005). *Assisted reproductive technologies and equity of access issues*, *Journal of Medical Ethics*, 31(5), 280-285

<sup>86</sup>. BURROWS, C. (2011) *Deconstructing Motherhood: A critique of the legal regulation of surrogacy* (Doctoral dissertation, Durham University)

<sup>87</sup>. Horsey, K. (2017). *Challenging presumptions: legal parenthood and surrogacy arrangements*, In *Parental Rights and Responsibilities* (pp. 287-312), Routledge.

## **CHAPTER II: PROBLEMATIC OF SURROGACY UNDER RWANDAN LAW**

### **2.1. Introduction**

This chapter explores the complex legal landscape surrounding surrogacy in Rwanda. It examines the challenges arising from the current lack of specific legislation governing surrogacy arrangements. The discussion focuses on the legal ambiguities that create uncertainties regarding the rights and obligations of all parties involved in surrogacy agreements. By analyzing these issues, the chapter aims to highlight the urgent need for a comprehensive legal framework to address the ethical, social, and legal implications of surrogacy in Rwanda. Surrogacy in Rwanda is currently operating within a legal void, which gives rise to numerous ethical dilemmas and risks of exploitation. The absence of specific legislation pertaining to surrogacy arrangements has created uncertainty surrounding the rights and responsibilities of intended parents, surrogates, and the children born through these agreements.

The lack of clear legal frameworks has far-reaching implications for all parties involved in surrogacy arrangements. In the absence of explicit laws governing the practice, there is a potential for inconsistent judicial interpretations when disputes arise. Furthermore, the absence of tailored regulations exposes participants to inadequate protection, thereby potentially compromising their rights and well-being. Given the increasing prevalence of surrogacy, it is imperative to address these legal gaps to ensure ethical practices and safeguard the interests of all stakeholders. This chapter will analyze the problematic of unregulated surrogacy in Rwanda as specified in hypothesis one of this research.

### **2.2. The Legality of Surrogacy under Rwandan Legal System**

In Rwanda, the legal landscape regarding surrogacy, a type of assisted reproduction, is both complex and constantly changing. Like many other countries, Rwanda's legal system is still grappling with the complexities posed by this practice. To fully understand the legal implications of surrogacy in Rwanda, it is important to consider the interaction between existing national laws, cultural values, and global legal standards. Taking this multifaceted approach is crucial to gaining a comprehensive understanding of the legal framework surrounding surrogacy within the Rwandan context.

Based on the latest available information, it is evident that Rwanda does include the assisted reproduction within the article 279 of 2023 family law, but it does not specifically suggest surrogacy and associated outcomes<sup>88</sup>. This legal void brings about uncertainty for all individuals participating in surrogacy arrangements. In the absence of explicit laws, surrogacy contracts may fall under general contract law, family law, or both, depending on how the courts interpret these arrangements. The lack of clear regulations gives rise to several important questions; what legal rights do the surrogate mother, intended parents, and the child have? This question remains largely unanswered within the Rwandan legal framework, potentially exposing all parties involved in surrogacy arrangements to significant risks.

In order to prioritize child rights and the best interests of children born through surrogacy, Rwanda has signed the United Nations Convention on the Rights of the Child (UNCRC). The principle of the "best interests of the child" outlined in this convention should be the main focus when considering surrogacy from a legal perspective<sup>89</sup>. This principle raises concerns about how to determine and safeguard a child's best interests in surrogacy arrangements, particularly in relation to issues of identity, citizenship, and access to information about genetic origins. When it comes to parentage and birth registration, the lack of specific surrogacy laws in Rwanda has resulted in uncertainty regarding the legal parentage in surrogacy cases. According to Rwandan civil law, the woman who gives birth is typically recognized as the legal mother. If this principle were to be applied to surrogacy cases, it could complicate matters for intended parents who wish to establish their legal parenthood. Additionally, the process of birth registration, governed by Law n° 71/2024 of 26/06/2024 governing persons and family, may pose challenges in surrogacy cases. The law does not explicitly address how to register births resulting from surrogacy arrangements, which could potentially lead to inconsistencies in practice<sup>90</sup>.

The lack of clear legal guidelines on surrogacy in Rwanda highlights the need for comprehensive legislation. This legislation should cover important aspects such as: 1. the legal status of surrogacy agreements; 2. determining legal parentage; 3. the rights and responsibilities of all parties involved; 4. regulating surrogacy agencies and medical facilities; 5. allowing compensated surrogacy; 6. protecting against exploitation; 7. establishing procedures for birth

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<sup>88</sup>. Article 279 of the Law n° 71/2024 of 26/06/2024 governing persons and family O.G n° Special of 30/07/2024

<sup>89</sup>. Ibid

<sup>90</sup>. Article 89 of Law n° 71/2024 of 26/06/2024 governing persons and family

registration in surrogacy cases; 8. recognizing cross-border surrogacy arrangements. When developing this legislation, Rwanda can learn from the experiences of other countries while considering its unique cultural, social, and legal context.

The legal situation surrounding surrogacy in Rwanda is uncertain due to the absence of specific legislation. This lack of clarity raises important questions that could potentially undermine the rights and interests of surrogates, intended parents, and children. Given the advancements and accessibility of assisted reproductive technologies, it is crucial for Rwanda to establish a comprehensive legal framework for surrogacy. This framework should strive to balance the interests of all parties involved while upholding fundamental principles of human rights, child welfare, and ethical medical practices

### **2.2.1. Surrogacy vis-à-vis the Constitution of Rwanda**

The Constitution of the Republic of Rwanda establishes certain principles that may affect the legal treatment of surrogacy. According to Article 17, the only recognized marital union is between a man and a woman. This provision could potentially impact surrogacy arrangements, particularly for same-sex couples or single individuals who want to become parents through surrogacy. Additionally, Article 18 emphasizes the protection of the family as the fundamental and natural basis of Rwandan society. This could be interpreted to either support surrogacy as a means of family formation or restrict it if it is seen as deviating from traditional family structures<sup>91</sup>.

The perspective of informed consent is guaranteed by the constitution of Rwanda within article 14 under paragraph 3 that “*No one shall be subjected to experimentation without his or her informed consent*”. The autonomy of the surrogate mother plays a crucial role in the surrogacy process. In light of surrogacy and informed consent, this refers to the surrogate mother's right to receive all relevant information about the surrogacy arrangement and make an informed decision based on that information<sup>92</sup>. Respecting the autonomy of the surrogate mother means recognizing her right to make decisions regarding her body, reproductive choices, and participation in the surrogacy journey. It acknowledges that she should have the final say in determining her level of

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<sup>91</sup>. Articles 17&18 of the Constitution of the Republic of Rwanda

<sup>92</sup>. Article 14(3) of the Constitution of Republic of Rwanda



involvement and whether to proceed with the surrogacy process. Rwandan perspectives on informed consent and autonomy of the surrogate mother are shaped by cultural, social, and legal factors.<sup>93</sup> These factors influence the understanding of reproductive rights, women's agency, and the recognition of individual autonomy in reproductive decision-making.

It is important for the legal framework and societal norms to ensure that surrogate mothers are well-informed about the potential risks, benefits, and implications of participating in surrogacy arrangements.<sup>94</sup> This includes providing comprehensive information about medical procedures, emotional aspects, legal rights, and financial considerations. Respecting the autonomy of the surrogate mother involves engaging her in the decision-making process and enabling her to exercise control over her own body and choices. This can be achieved through informed consent procedures that prioritize her well-being, protect her rights, and ensure that she fully understands the implications of her decision. Generally, Rwandan perspectives on knowledgeable consent and autonomy of the surrogate mother emphasize the importance of respecting her rights, ensuring her well-being, and maintenance her assistance during the course of the surrogacy process.

### **2.2.2. Surrogacy vis-à-vis Contract Law in Rwanda**

Given the absence of specific surrogacy legislation, surrogacy agreements may be analyzed within the framework of general contract law, considering principles of contract law and its enforceability. However, the enforceability of such contracts is questionable due to the sensitive nature of surrogacy arrangements and potential considerations of public policy. Under Rwandan contract law, contracts must have a lawful cause (licit cause) and object matter<sup>95</sup>. Whether surrogacy agreements fulfill these requirements remains subject to legal interpretation. The issue of compensation and commercialization is contentious in many jurisdictions regarding surrogacy. In Rwanda, where there is no specific legislation addressing surrogacy, it is unclear if compensated surrogacy is legal. This raises ethical and legal questions about the potential exploitation and commodification of women's reproductive capacities. In the absence of clear regulations in Rwanda, some prospective parents might consider cross-border surrogacy

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<sup>93</sup>. Murangira, T. (2020) *Medically assisted procreation technologies in Rwanda*: surrogacy as new method of motherhood.

<sup>94</sup>. Van den Akker, O. B. (2017). *Surrogate motherhood families*, Springer International Publishing

<sup>95</sup>. Article 4 of the law of 2011 governing contract in Rwanda

arrangements, leading to complex issues of private international law such as jurisdiction, applicable law, and recognition of foreign surrogacy arrangements or birth certificates.

### **2.2.3. Surrogacy vis-à-vis Rwandan Family Law**

The Rwandan Law Governing Persons and Family of 2016 represent a commendable effort in addressing reproductive technologies within the country. However, it is important to note that the law lacks explicit provisions regarding the practice of surrogacy. Despite the introduction of provisions for in-vitro fertilization (IVF) in Article 254, the law does not offer clear guidance on the subject of surrogacy, resulting in legal ambiguity<sup>96</sup>. The absence of specific guidelines within the legislation leaves surrogacy arrangements in a precarious situation. The law does not establish the legal status of surrogate mothers, the rights of intended parents, or the determination of legal parentage for children born through surrogacy. Additionally, it fails to address the complex ethical and legal issues that surround surrogacy agreements, such as compensation for surrogates and the protection of the rights of all parties involved.

The lack of explicit provisions regarding surrogacy in the family law creates a significant gap within Rwanda's legal framework. This regulatory void increases the risk of exploitation, ambiguity regarding contractual obligations, and disputes concerning parental rights. Furthermore, healthcare providers and legal professionals involved in surrogacy arrangements face challenges due to the absence of clear legal guidance. Therefore, it is imperative that legislative reform takes place promptly to address these gaps and establish a comprehensive legal framework for surrogacy in Rwanda.

### **2.3. Cases Involving Surrogacy in Rwanda**

The analysis of Rwandan case laws on surrogacy provides insight into the legal landscape of assisted reproductive technologies in the country. These cases highlight the challenges with modern reproductive options as Rwanda deals with evolving family structures and medical advancements. This examination explores case laws related to surrogacy in Rwanda.

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<sup>96</sup>. Article 254 of law governing persons and family in Rwanda of 2016

### **2.3.1. Case from Kicukiro Primary court in the case RC 00168/2020/TB/KICKI**

In 2020, the judge at Kicukiro Primary Court made a ruling on a surrogacy case brought by a husband identified as N.A and a wife identified as N.O. The couple sought the right to have a child through surrogacy, based on the provisions of Article 254 of the Law Governing Family and Persons. However, the court denied their request, stating that Rwandan law does not provide for what the applicants are seeking, and that reproduction is only allowed between a man and a woman, not between two families. In this case, the court was expected to address the following issues: Review the legality of surrogacy in Rwanda, the validity of the contract between the families of N.A and N.O and the families of K.F and M.G, and address the challenges raised by Dr. Ngoga regarding the determination of the child's mother.

It is important to note that, under Rwandan perspective, the person who gives birth is typically considered to be the mother of the child<sup>97</sup>. The court ruled against the applicant's allegation, stating that it lacked merit and left several issues unaddressed. Dissatisfied with this decision, the applicants appealed to the Nyarugenge Intermediate Court, seeking further interpretation of Article 254 of the family law. In addition to addressing the previous unresolved legal issues, the Nyarugenge Intermediate Court also considered the rights of a child born through surrogacy arrangements. The following legal issues were addressed by the court.

### **2.3.2. The case in Nyarugenge Intermediate court no RCA 00161/2020/TGI/NYGE**

Specifically in the case RCA 00161/2020/TGI/NYGE, Nyarugenge Intermediate Court dealt with issues regarding the legality of surrogacy, the registration of the child, and the child's right to remain with the surrogate mother for the first six months after birth. The court based its ruling on the provisions of Article 17 and 18 of the Constitution, as well as Article 254 of the law governing family and persons. Additionally, the court addressed the matter of child custody, stating that the surrogate mother is responsible for breastfeeding the child for the first six months after birth, after which the child is handed over to the intended parent. However, paragraph 23 of the case RCA 00161/2020/TGI/NYGE implies that if the surrogate mother fails to breastfeed the child, the child will be given to the intended parents.

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<sup>97</sup>. See RCA 00161/2020/TGI/NYGE, Para-13

According to the decision of the court regarding the classification of surrogacy contracts in Rwanda, it was determined that *“The agreement between the families of K.F and M.G and the families of N.A and M.O constitutes a gestational surrogacy arrangement and is consistent with Rwandan law. Therefore, it must be fully enforced”*. This implies that surrogacy contracts in Rwanda are recognized and accepted upon compliance with the requirements of a valid contract in Rwanda. Furthermore, the court ruled on the issue relating to the registration of a child born through surrogacy and held that in all surrogacy matters, the best interest of the child should be taken into account. This includes not only registration, but also extends to other rights that promote the welfare of the child<sup>98</sup>.

Undoubtedly, from a Rwandan legal perspective, the mother of the child is considered to be the one who gives birth. Consequently, Dr. Ngoga, a specialist in surrogacy, raised the issue of registration when a mother becomes attached to the baby, especially if she encountered difficulties during the pregnancy and refuses to give the baby to the intended parents. He stated that lawsuits could be raised on the grounds that Rwandan law stipulates that the mother of the child is the one who gives birth. To address this issue, the court took into account the agreement made between the parties and held that the child would be registered at birth as the child of N.O and N.A while they are still in maternity.

Nyarugenge Intermediate Court has recently examined three important legal aspects pertaining to surrogacy. These include: 1) the legality of surrogacy within the Rwandan legal framework, 2) the nature of surrogacy contracts in comparison to other types of contracts, and 3) the rights of children who are born through surrogacy. Despite being an emerging practice in Rwanda, surrogacy still presents various unresolved legal concerns that were not addressed in the Nyarugege Intermediate Court case RCA 00161/2020/TGI/NYGE. Therefore, the following subsection provides a more comprehensive analysis of these outstanding legal issues.

### **2.3.3. The Legal issues not addressed by Nyarugenge Intermediate Court in the case RCA 00161/2020/TGI/NYGE**

Although the court has addressed numerous legal issues surrounding surrogacy in Rwanda, it has left other important legal issues unaddressed. These include whether the Rwandan legal system

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<sup>98</sup>. RCA 00161/2020/TGI/NYGE Para 17-23

recognizes both altruistic and commercial surrogacy, whether all forms of assisted reproduction technology are recognized in Rwanda, and the rights and obligations of both surrogate mothers and intended parents. The court's acceptance of the contract between the families of K.F and M.G and the family of N.A and M.O, which lacks a compensation clause, as a valid contract implies that Rwandan law accepts altruistic surrogacy. However, the principle of legality, which requires strict provisions either accepting or prohibiting a practice, suggests that commercial surrogacy is implicitly prohibited. Nonetheless, the principle of "*nulla poena sine lege*" which is used in criminal matters indicates that without a law specifically prohibiting it, commercial surrogacy is not deemed illegal. This highlights how the lack of detailed regulations governing surrogacy in Rwanda opens the door to many legal issues that are not addressed in the contracts entered into by parties involved in surrogacy arrangements.

From the legal issues surrounding surrogacy in Rwanda, the main problem is the lack of regulations. Me. UWINEZA Odette, a lecturer at the University of Rwanda, has proven that Rwandan law accepts surrogacy, but the absence of clear regulations has caused misinterpretation by the previous judge at the Primary Court of Kicukiro. It is the Ministry of Health's responsibility to enact these regulations. Additionally, Dr. Ngoga expressed doubts about determining the mother of the child, as Rwandan perspective defines the mother as the one who gives birth. The registration of the child also raises concerns about what would happen if the surrogate mother refuses to give the child to the intended parents. Therefore, the absence of regulations for surrogacy in Rwanda leads to various legal issues, including the rights and obligations of the surrogate mother and intended parents, recognition of other assisted reproductive technologies, and rulings on traditional surrogacy cases.

#### **2.3.4. Insights from Rwanda's Limited Surrogacy Case Laws**

It is a fact that the case RCA 00161/2020/TGI/NYGE plays a significant role in family law matters, specifically addressing the confusion surrounding the legality of surrogacy. However, despite this progress, there are still many unresolved legal issues. For example, when examining the case, it becomes apparent that surrogacy in Rwanda is accepted as both commercial and altruistic, as the court's decision does not provide a clear explanation. This ambiguity raises questions regarding whether surrogacy can be classified as an enforceable contract under

Rwandan law, as outlined in Article 2(1) of the Law of 2011 Governing Contracts in Rwanda. The Rwandan law categorizes contracts into different types, but it remains silent on the classification of surrogacy<sup>99</sup>. Moreover, there is no consideration mentioned in the surrogacy contract. Considering the court's rulings in the case RCA 00161/2020/TGI/NYGE, readers may become confused about the scope of its application, particularly whether it applies to both traditional surrogacy and gestational surrogacy or solely one type. It is worth noting that the biological relationship between the surrogate child and the surrogate mother differs between these two types of surrogacy, resulting in different consequences. Therefore, in addition to developing case law, it is crucial to have clear and specific regulations in the Rwandan legal framework to address these confusions that may arise when legal practitioners interpret the articles of the law and case law precedents.

Consequently, the case does not address potential disputes that may arise from the surrogacy contract, such as one party failing to fulfill their obligations, refusing to surrender the child to the intended parents, failure to cover incurred expenses, or inappropriate behavior by the surrogate mother during pregnancy. The absence of clarity regarding these potential litigations can lead to inconsistent interpretations. Furthermore, given that the surrogate mother is obligated to surrender the child, there should be detailed duties and rights outlined for both the intending parents and the surrogate mother. Considering all these unresolved issues, there is a strong need to enact regulations that go beyond the mere recognition of surrogacy under the Rwandan legal framework.

Generally, from the cases discussed above the complexities arising from unregulated surrogacy arrangements in Rwanda highlight the utmost importance of establishing a comprehensive legal framework. This matter holds profound significance for several reasons. Firstly, it concerns the protection of human rights. Without regulation, there is a significant risk of exploitation, especially among vulnerable women who may engage in surrogacy due to economic pressures. Additionally, the rights of children born through surrogacy, including their right to identity and nationality, may be compromised. Secondly, legal clarity is indispensable. The current lack of clarity leaves all parties involved - intended parents, surrogates, and children - in a precarious

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<sup>99</sup>. Article 3 of the Law of 2011 Governing Contracts in Rwanda

legal position, which can lead to distressing disputes and uncertainties regarding parental rights and responsibilities. Thirdly, ethical considerations are of paramount importance.

Regulation can ensure that surrogacy practices adhere to ethical standards, preventing the commercialization of reproduction and upholding the dignity of all individuals involved. Furthermore, the social implications are significant. Clear regulations can help mitigate potential stigma and discrimination associated with surrogacy, fostering social acceptance and understanding. Lastly, from a broader perspective, addressing these issues is crucial for Rwanda's development as a nation committed to human rights and the rule of law. By tackling these complex challenges, Rwanda can set a precedent in the region for thoughtful and comprehensive regulation of assisted reproductive technologies. In essence, the establishment of surrogacy regulations is not only a legal necessity but also a moral imperative that touches upon fundamental aspects of human rights, ethics, and social cohesion.

In conclusion, the legality of surrogacy in Rwanda presents a complex landscape that necessitates comprehensive regulation. The current absence of specific laws has given rise to numerous ethical, social, and legal challenges, potentially compromising the rights and interests of surrogates, intended parents, and children born through surrogacy. The establishment of a uniform regulatory system is crucial to prevent exploitation, prioritize children's rights, strike a balance between confidentiality and transparency, and address evolving perceptions of family. Such regulation would also uphold ethical standards, mitigate social stigma, consider economic implications, and provide effective dispute resolution mechanisms. By implementing a well-crafted legal framework, Rwanda can ensure the protection of all parties involved in surrogacy arrangements, adhere to international human rights standards, and set a precedent for responsible regulation of assisted reproductive technologies in the region. This proactive approach is essential for safeguarding human rights, fostering social cohesion, and reinforcing Rwanda's commitment to the rule of law. The next chapter analyzes the mechanisms to be adopted to alleviate the problematic of surrogacy in Rwanda

## **CHAPTER III: MECHANISMS TO BE ADOPTED TO ALLEVIATE THE PROBLEMATIC OF SURROGACY IN RWANDA**

### **3.1. Introduction**

Rwanda, like many other countries, faces challenges regarding surrogacy. To tackle these challenges effectively, it is essential to adopt a comprehensive and professional approach. Firstly, the government should establish a legal framework specifically addressing surrogacy. This legislation must define the rights and responsibilities of all parties involved, including intended parents, surrogates, and the resulting children. It should also outline the legal procedures for establishing parentage and safeguarding the best interests of the child.

Additionally, Rwanda should establish a regulatory body to oversee surrogacy arrangements and ensure compliance with legal regulations and ethical guidelines. This body should vet potential surrogates and intended parents, monitor surrogacy agreements, and provide support and counseling services to all parties involved. It should also work actively to prevent exploitation or commercialization of surrogacy by setting and enforcing standards, as well as implementing penalties for violations. Lastly, public awareness and educational campaigns should be implemented to inform citizens about the legal and ethical aspects of surrogacy. These efforts should aim to reduce stigma, promote understanding, and encourage open dialogue within Rwandan society about surrogacy. By combining legal reform, regulatory oversight, and public education, Rwanda can effectively address the challenges associated with surrogacy while protecting the rights and well-being of all parties involved.

### **3.2. Adoption of legal remedial framework**

The potential impact of regulating surrogacy in Rwanda can vary depending on the specific regulations implemented. Below are the possible considerations from regulating surrogacy;

#### **3.2.1. Adoption of law governing surrogacy in Rwanda**

A pivotal measure in tackling surrogacy concerns in Rwanda is the establishment of a comprehensive legal framework. This framework would provide clear directives and regulations for surrogacy arrangements, ensuring legal certainty and protecting the interests of all parties



involved. Rwanda can create a regulated environment by implementing well-defined laws governing surrogacy, which would balance the rights and responsibilities of intending parents, surrogates, and children born through surrogacy agreements. This section will look at the why the legal framework regulating surrogacy is needed in Rwanda

There are several reasons why a regulatory system for surrogacy is needed in the Rwanda. We do need to make sure that there is the protection of rights and welfare of all parties involved help to ensure the rights and wellbeing of the surrogate mother, the intended parents, and most importantly, the child born through the surrogacy arrangement are protected and also it would establish the clear guidelines and safeguards to prevent exploitation or unethical practices. Alternatively, to provide legal certainty and clarity, hence without a clear legal framework, surrogacy arrangements in Rwanda exist in legal miserable area, leading to uncertainty and potential disputes. Not only this but also regulations would define the rights, responsibilities and obligations of each party involved, reducing ambiguity and potential conflicts. Correspondingly, address legal issues that surrounding surrogacy like parentage and citizenship in this manner regulations would establish clear rules on the legal parentage of the child born through surrogacy and their citizenship status.

The present absence of clarity places all parties involved - prospective parents, surrogates, and children in a precarious legal situation, which may result in distressing conflicts and uncertainties concerning parental rights and responsibilities. Additionally, ethical considerations take on utmost importance. Regulation can guarantee that surrogacy practices adhere to ethical standards, discouraging the commodification of reproduction and upholding the dignity of all individuals involved. Moreover, the social implications are substantial. Clear regulations can assist in minimizing potential stigma and discrimination related to surrogacy, cultivating social acceptance and understanding. Assisted reproductive technologies are increasingly being sought after by infertile couples who are eager to attain pregnancy. In 1972, physician and ethicist Leon Kass issued a cautionary statement, highlighting that infertility not only poses a threat to the

integrity of relationships between spouses, but also across generations<sup>100</sup>. It is important to mention that there is currently no specific legislation in Rwanda that governs surrogacy.

However, the country's legal framework does provide some specific clear guidance which might regulate the legal issues surrounding surrogacy matter. The Rwandan Law Governing Persons and Families stipulate that the mode of reproduction in Rwanda is naturally between a man and a woman or it can be medically assisted. Medically assisted procreation must be by mutual consent of the concerned parties, the article indicates<sup>101</sup>. Much as Rwandans have the right to infertility treatments, but we are still have problem of lack of proper details deters the law from fully serving its purpose. However, none can protect the family when natural reproduction is not possible because if no measures taken the family may disappear, in the case the technology as a solution is necessary. The Rwandan Constitution pursuant the provisions of 17 and 18 the government of Rwanda enacted the law No32/2016 of 28/08/2016 Governing the persons and family, and also this constitution of republic of Rwanda recognizes and guarantees reproductive rights, including the right to found family, the right to health care services, and the right to make decisions about reproduction and contraception<sup>102</sup>

Legally speaking in absence of specific laws on surrogacy, the Rwandan legal framework relies on general principles of contract law, family law, and constitutional law. For example, surrogacy agreements can be considered as contracts between the intended parents and the surrogate mother. The rights and obligations of each party would be governed by the terms of the contract. Additionally, the Rwandan family law grants children born through surrogacy the same rights and protections as children born through natural means. The surrogate mother cannot claim legal rights over the child, and the intended parents are recognized as the child's legal parents. Regarding to this rationale of why regulatory surrogacy system is needed, undoubtedly, that it would facilitate access to access to surrogacy for intended parents. In which it will make very clear regulations would provide a framework for intended parents to surrogacy services in Rwanda, if permitted, with predictability and legal security. Also, ensure informed consent and prevent coercion. This regulation would provide a framework consent processes and safeguards

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<sup>100</sup>. Lones, mark E. (2016.) *A Christian ethical perspective on surrogacy*, bioethics in faith and practice , Vol.2 article 5

<sup>101</sup>. Article 254 of Law N°32/2016 of 28/08/2016 governing Persons and Family in Rwanda

<sup>102</sup>. Article 17&18 of the constitution of the republic of Rwanda

to prevent the exploitation or coercion of surrogate mothers. This would ensure surrogacy arrangements are entered into voluntarily and with full understanding of the implications.

Ambiguities in legislation can lead to confusion and potential legal disputes, making it crucial to establish clear laws and guidelines. Furthermore, the absence of robust legal frameworks may hinder the ability to enforce agreements and protect the interests of all parties involved. Lastly, ethical considerations must be taken into account. The ethical implications of surrogacy, such as the commodification of reproductive services and the potential for exploitation, require careful examination and regulation to ensure the ethical integrity of the practice. Therefore, it is imperative to address this matter from an academic standpoint, considering its far-reaching implications on human rights, legal clarity, and ethical principles.

### **3.2.2. Adopting of the law preventing exploitation of surrogates**

To mitigate the risk of surrogate mothers being exploited and protect their wellbeing, several safeguards can be implemented. Enacting comprehensive legal frameworks that clearly define the rights and responsibilities of all parties involved in surrogacy, covering aspects like compensation, medical care, informed consent, and the ability to terminate pregnancy.<sup>103</sup> Establishing ethical guidelines that ensure surrogacy is conducted respectfully, with voluntary participation, provisions for psychological support, and prevention of coercion or pressure. Creating regulatory bodies or agencies tasked with overseeing surrogacy practices, monitoring compliance with laws/ethics through inspections, providing guidance, and investigating violations.<sup>104</sup> Promoting educational campaigns and awareness efforts to help surrogates and intended parents understand the risks, benefits, legal implications, and obligations of surrogacy arrangements. Providing accessible support services like counseling, legal counsel, and healthcare to assist surrogates in navigating the emotional, physical, and legal challenges of the surrogacy process. Implementing these measures aims to create a safe, ethical environment that protects surrogate mothers' autonomy, dignity and overall wellbeing

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<sup>103</sup> Berg, J. W., Appelbaum, P. S., Lidz, C. W., & Parker, L. S. (2001). *Informed consent: legal theory and clinical practice*. Oxford University Press

<sup>104</sup> Hodson, N., Townley, L., & Earp, B. D. (2019), Removing harmful options: the law and ethics of international commercial surrogacy, *Medical Law Review*, 27(4), 597-622

### **3.2.3. Prioritizing the rights and well-being of children born through surrogacy**

This emphasizes the importance of establishing clear procedures in surrogacy arrangements to enhance transparency and prioritize the rights and well-being of children born through surrogacy, with specific considerations given to aspects such as breastfeeding. It's important to have clear rules and procedures to protect everyone involved, especially the child. The main focus must be on the child's rights and wellbeing<sup>105</sup>. Measures should ensure the child can access information about their origins and genetic parents if they want. Decisions on breastfeeding<sup>106</sup> need careful thought, considering the surrogate's willingness, the intended mother's ability, and emotional factors.<sup>107</sup> Strong legal and ethical rules are needed too<sup>108</sup>. The law must be clear on the child's legal status, parental rights and responsibilities. Ethical rules should prevent exploitation and ensure surrogacy agreements are truly voluntary.<sup>109</sup> Lastly, while surrogacy raises many issues, prioritizing transparency, the child's well-being through defined processes, emotional support and clear laws/ethics can help create a more responsible approach that protects all those involved, most importantly the child. Surrogacy as very complex process that involves many different issues so in order to make surrogacy better and protect everyone involved, especially the children born through these arrangements the legal framework should be established.

### **3.2.4. Adopting of guidelines for medical practitioners**

Under Rwandan law, adopting guidelines for medical practitioners regarding surrogacy is imperative to ensure that ethical, legal, and medical standards are upheld in this intricate field. These guidelines would establish explicit protocols for medical practitioners involved in surrogacy, encompassing aspects such as the well-being and rights of the surrogate mother, the intended parents, and the child. They would also address matters concerning consent, eligibility criteria, medical procedures, and post-birth obligations. By embracing such guidelines, Rwanda can protect the interests of all parties involved, mitigate potential legal disputes, and harmonize

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<sup>105</sup>. Ben-Arieh, A., Kaufman, N. H., Andrews, A. B., George, R. M., Lee, B. J., & Aber, L. J. (2013). Measuring and monitoring children's well-being (Vol. 7). Springer Science & Business Media

<sup>106</sup>. American Academy of Pediatrics (2012). Breastfeeding and the use of human milk: Policy statement. *Pediatrics*, 115(2), 496–506.

<sup>107</sup>. World Health Organization and United Nations Children's Fund (2009), *Global strategy for infant and young child feeding*, Geneva: World Health Organization

<sup>108</sup>. Ghasemzadeh N, Saleh SM, Faramarzi-Razini F. Breast milk as the forgotten ethical right in surrogacy and suggestions for its recognition: Islamic perspective, Iranian experience. *Iran J Pediatr*. 2017; 27:4.

<sup>109</sup>. Damelio, J., & Sorensen, K. (2008). Enhancing autonomy in paid surrogacy. *Bioethics*, 22(5), 269-277.

its surrogacy practices with international standards. This measure is essential in establishing a regulated and transparent framework for surrogacy within the country.

### **3.3. Other policy consideration**

Below are some other policies that have been discussed to address the issues surrounding surrogacy arrangements under Rwandan law.

#### **3.3.1. Balancing confidentiality and transparency**

One of the primary concerns in surrogacy arrangements is maintaining the privacy and confidentiality of all parties involved while ensuring transparency in the process. Confidentiality safeguards the identities and personal information of the intended parents, surrogate, and the child born through surrogacy. Transparency, on the other hand, promotes trust and accountability within the surrogacy arrangement. To achieve this balance, legal frameworks need to be established that enforce strict confidentiality clauses while also allowing for transparent communication and documentation of the surrogacy process. This might involve: Implementing confidentiality agreements: Clear agreements should be drafted and signed by all parties involved, outlining the boundaries of confidentiality and the consequences of breaching it. Mediation and counseling: Providing mediation and counseling services can facilitate open communication between the parties, ensuring that any concerns or conflicts are addressed promptly and confidentially<sup>110</sup>.

#### **3.3.2. Changing perceptions of family**

The legalization and regulation of surrogacy can challenge traditional notions of family and parenthood.<sup>111</sup> It may expand the definition of family beyond biological ties, acknowledging the importance of intended parents' emotional and financial investment in raising a child. Surrogacy regulation has the potential to reshape societal perceptions around what constitutes a family unit and parenthood roles. Legitimizing surrogacy through legal frameworks expands the definition

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<sup>110</sup>. Laufer-Ukeles, P. (2018). The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood. *NCJ Int'l L.*, 43, 96.

<sup>111</sup>. Frati, P., La Russa, R., Santurro, et al . (2021). Bioethical issues and legal frameworks of surrogacy: A global perspective about the right to health and dignity. *European Journal of Obstetrics & Gynecology and Reproductive Biology*, 258, 1-8.

of family beyond solely biological connections; it recognizes that intended parents' emotional and financial commitment to raising a child can establish parenthood, even without a genetic biological link to that child. Surrogacy regulations challenge ingrained traditional notions by accommodating these diverse family formations<sup>112</sup>.

### **3.3.3. Upholding ethical integrity**

Ethical concerns in surrogacy comprise prioritizing the well-being of surrogate mothers, respecting their autonomy and informed consent, and safeguarding the rights of the child.<sup>113</sup> It is important to prevent exploitation and commodification of reproductive services, ensuring fair compensation for surrogates. Comprehensive counseling sessions for all parties involved help address emotional, psychological, and legal aspects. Clear legal frameworks and oversight mechanisms are necessary to protect the rights and interests of everyone involved.<sup>114</sup> Proper regulation is crucial in upholding ethical standards and promoting the well-being of all individuals in surrogacy arrangements.

### **3.3.4. Social acceptance and stigma**

Good rules for surrogacy can help people understand and accept it better, by providing a clear and fair way to practice it and clearing up any misunderstandings. They can also lower the stigma attached to it by making sure all parties involved are treated well and fairly, which can help change negative views and misunderstandings about surrogacy. These rules can lead to a change in culture by starting conversations about family values, how we have children, and the role of genes in being a parent, helping societies rethink traditional ideas of parenthood and family. By regulating surrogacy, societies can better support all kinds of families, including those formed by same-sex couples, people who can't have children naturally, or those with health conditions that make pregnancy difficult. Surrogacy rules can give these families legal protection and recognition. They also make societies think about the ethical aspects of reproductive technologies, encouraging discussions about the rights and interests of surrogate mothers, the

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<sup>112</sup>. Horsey, K. (2017). Challenging presumptions: legal parenthood and surrogacy arrangements, In *Parental Rights and Responsibilities* (pp. 287-312). Routledge.

<sup>113</sup>. Daly, A. (2017). Children, autonomy and the courts: Beyond the right to be heard. In *Children, Autonomy and the Courts*. Brill Nijhoff.

<sup>114</sup>. Ruggie, J. (2008). Protect, respect and remedy: A framework for business and human rights. *Innovations: Technology| Governance| Globalization*, 3(2), 189.

wellbeing of children, and the potential risks and benefits of surrogacy.<sup>115</sup> By dealing with acceptance and stigma, surrogacy rules can create a more understanding and welcoming society, allowing people and families to choose their own paths for having children in a way that is ethical and responsible.<sup>116</sup> Moreover, Regulation can influence societal acceptance and reduce the stigma surrounding surrogacy. Clear strategies and legal protections may foster a more positive perception of surrogacy, leading to increased acceptance and understanding within the broader community.

### **3.3.5. Economic implications**

Surrogacy rules have varied economic effects on various participants. For prospective parents, these rules can mean complicated and expensive legal and financial processes. For surrogates, these rules can lead to financial gain, especially in countries where surrogacy is commercial and well-regulated. However, they could also face potential exploitation if the rules are not strict enough or not enforced properly.<sup>117</sup> The aim of these rules should be to create a balance that protects everyone's rights and interests, ensuring fair and ethical surrogacy arrangements. This includes steps to prevent exploitation and to make sure surrogates are fairly compensated for their services. Furthermore, surrogacy regulations can impact the economy more broadly. For instance, the global surrogacy industry has been affected by these rules, with some surrogacy centers starting to regulate the industry.<sup>118</sup>

### **3.3.6. Effective dispute resolution mechanisms**

In the context of comprehensive surrogacy regulation in Rwanda, establishing effective dispute resolution mechanisms is paramount. A well-crafted regulatory framework should include provisions for resolving conflicts that may arise during surrogacy arrangements. These mechanisms could encompass mediation, arbitration, and specialized court proceedings tailored to surrogacy-related disputes. They should address potential conflicts between intended parents

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<sup>115</sup>. Brezina, P. R., & Zhao, Y. (2012). The ethical, legal, and social issues impacted by modern assisted reproductive technologies. *Obstetrics and gynecology international*, 2012.

<sup>116</sup>. Narayan, G., Mishra, H. P., Suvvari, T. K., Mahajan, I., Patnaik, M., Kumar, S., ... & Mishra, S. S. (2023). The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?. *Cureus*, 15(4).

<sup>117</sup>. Epstein, R. A. (1995). Surrogacy: the case for full contractual enforcement. *Virginia Law Review*, 2305-2341.

<sup>118</sup>. Lee, R. L. (2009). New trends in global outsourcing of commercial surrogacy: A call for regulation. *Hastings Women's LJ*, 20, 275.

and surrogates, issues related to contract interpretation, and disputes over parental rights or financial obligations. By providing clear, accessible, and fair dispute resolution processes, the regulatory framework can ensure that all parties have recourse in case of disagreements, thereby enhancing the overall stability and fairness of surrogacy arrangements in Rwanda. This proactive approach to conflict resolution can help protect the interests of all involved, including the resulting children born out of that surrogacy arrangement.

### **3.4. Mechanism to be instituted to alleviate the problematic of surrogacy**

To tackle the intricate challenges associated with surrogacy in Rwanda, it is imperative to establish a set of essential mechanisms. These measures should be designed to establish a comprehensive framework for the management of surrogacy arrangements, safeguard the rights of all parties involved, and promote ethical practices. Through the implementation of these mechanisms, Rwanda can strive to develop a well-rounded and regulated approach to surrogacy that is in line with the country's legal, social, and cultural landscape, while simultaneously protecting the interests of intended parents, surrogates, and children.

#### **3.4.1. Ethical concerns**

Ethical concerns surrounding unregulated surrogacy in Rwanda go beyond issues of exploitation and power imbalances. The commercialization of human life raises fundamental questions about how we value children and the potential emergence of a "baby market". Additionally, there is a risk of identity complications for children born through surrogacy, as they may struggle to understand their genetic and gestational origins. The absence of clear guidelines may also lead to disputes over parental rights, particularly in cases of genetic surrogacy or if intended parents separate during the process. Furthermore, the lack of proper screening and counseling for all parties involved could result in psychological trauma for surrogates, intended parents, and the children. The intersection of cultural beliefs, religious values, and modern reproductive technologies further adds complexity to the ethical landscape, highlighting the need for a carefully crafted legal framework that upholds human dignity while addressing the intricacies of surrogacy arrangements.



### 3.4.2. Social implications

Surrogacy poses a significant challenge to the conventional understanding of family and parenthood within Rwandan society. The absence of comprehensive regulations surrounding surrogacy gives rise to potential social stigma that could be directed towards both the children born through surrogacy and the surrogates themselves. This, in turn, may result in discrimination and social exclusion. Moreover, the unregulated practice of surrogacy has the potential to amplify existing social inequalities by placing economically disadvantaged women in a position where they are compelled to become surrogates out of financial necessity, rather than as a result of autonomous choice<sup>119</sup>.

### 3.4.3. Legal challenges

The legal ambiguity surrounding surrogacy in Rwanda gives rise to a multitude of uncertainties. The existing legal definition of motherhood, which hinges on the act of giving birth, complicates the legal status of intended mothers involved in surrogacy agreements. Issues surrounding legal parentage, inheritance rights, and the citizenship of children born through surrogacy are yet to be resolved. The complexity is exacerbated by cross-border surrogacy arrangements, which have the potential to result in stateless children or conflicts between disparate legal systems<sup>120</sup>

### 3.4.4. Contractual issues

Without a clearly defined legal framework, surrogacy contracts exist in a legal gray area. The absence of clear guidelines often results in disputes between the parties involved, leaving them with limited legal options for resolution. Key concerns, such as the enforceability of surrogacy agreements, the respective rights and obligations of each party, and the available remedies in the event of a breach, are left unaddressed. This lack of certainty can cause significant emotional and financial distress for all parties involved<sup>121</sup>.

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<sup>119</sup>. Murangira, T. (2020) *Medically assisted procreation technologies in Rwanda: surrogacy as new method of motherhood*

<sup>120</sup>. Ibid

<sup>121</sup>. Epstein, R. A. (1995). *Surrogacy: the case for full contractual enforcement*. Virginia Law Review, 2305-2341

### **3.4.5. Promotion of rights and interests of the child and parties**

The lack of regulation raises concerns about the potential compromise of rights and interests, especially those of the child. The UN Convention on the Rights of the Child underscores the child's entitlement to identity, nationality, and the right to know and be cared for by their biological parents. Unregulated surrogacy may put these rights at risk. Intended parents face uncertainty regarding their legal status and parental rights, while surrogates may lack protection concerning their health, well-being, and financial compensation. Additionally, there is a risk of abandonment for children born with disabilities or in cases where intended parents change their minds (Umuhoza, 2022). Furthermore, the absence of regulation leaves room for potential exploitation through unethical surrogacy agencies or brokers. This could give rise to human trafficking concerns and further marginalize vulnerable women. There is also a risk of inadequate medical and psychological screening processes for surrogates, which could endanger their health and well-being.

The international dimension adds another layer of complexity. Without domestic regulation, cross-border surrogacy arrangements may increase, leading to conflicts of laws and potential statelessness for children. This also raises concerns about "*reproductive tourism*" and the potential exploitation of women in developing countries. Given these multifaceted challenges, there is a growing demand for the establishment of comprehensive surrogacy regulations in Rwanda. Such regulations should address several key areas such as; 1. Precise definitions of legal parentage and the rights of all parties involved, 2. Ethical guidelines to prevent exploitation and ensure informed consent, 3. Protocols for medical and psychological screening of surrogates and intended parents, 4. Regulation of surrogacy agencies and brokers, 5. Guidelines for appropriate financial compensation to prevent commercialization, 6. Provisions for the legal status and rights of children born through surrogacy, and lastly 7. Measures to address cross-border surrogacy issues.

In the same way, promote ethical and transparent practices in this regards the regulations would set standards for the surrogacy industry, ensuring transparency, accountability, and adherence to ethical principles. This would help build public trust and acceptance of surrogacy in the country.

## **GENERAL CONCLUSION AND RECOMMENDATION**

This chapter will synthesize the key findings from our analysis of surrogacy within the Rwandan legal system. It will offer a comprehensive conclusion on the current state of surrogacy regulation and practice in Rwanda. Additionally, it will provide evidence-based recommendations for policymakers, legal practitioners, and stakeholders to address the challenges and opportunities identified in the preceding chapters.

### **General Conclusion**

In nutshell, the lack of specific laws and regulations governing surrogacy in Rwandan legal system brings inconsiderable issues that lead to persistent need for a comprehensive regulatory system. Without clear legal procedures, surrogacy arrangements in Rwanda exist in legal vacuum, leading to uncertainty and potential conflicts. A well-considered regulatory system would be essential to address this critical gap and ensure the ethical, rights based and socially responsible practice of surrogacy in the country. Such a regulatory framework will serve several areas as foresaid above: Firstly, framework will protect the rights and welfare of all parties involved the surrogate mother, intended parents and most importantly, the child born through surrogacy. Secondly, it will provide legal certainty and clarity by defining the rights, responsibilities, and obligations of each party, reducing ambiguity and potential disputes. Additionally, framework will address crucial issues of parentage and citizenship to ensure the child's rights are fully safeguarded.

Moreover, a regulatory system ensures informed consent and prevents the exploitation or coercion of surrogate mothers. It will also facilitate access to surrogacy services for intended parents within a predictable and secure legal framework. Lastly, the regulations will promote ethical and transparent practices in the surrogacy industry raise the public trust and acceptance. In absence of the clear regulatory system, the legal status of surrogacy in Rwanda remains uncertain, hindering the responsible development of this assisted reproductive technology (ART). Therefore, the establishment of a comprehensive surrogacy regulatory framework should be a priority for the Rwandan government to address this critical gap and uphold the rights and wellbeing of all parties involved.

## Recommendations

Recommendations for establishing a uniform regulatory system in Rwanda should consider international best practices while also reflecting the cultural and societal context of the country<sup>122</sup>. It is essential to engage in comprehensive interested party consultations involving legal experts, healthcare professionals, women's rights advocates, and representatives from religious and community organizations. This inclusive approach can facilitate the development of legislation that balances the protection of all parties' interests while upholding ethical standards. Putting more emphasis on establishing clear procedures in surrogacy arrangements to enhance transparency and prioritize the rights and well-being of children born through surrogacy, with specific considerations given to aspects such as breastfeeding

Emphasizing the transparency, accountability, and ethical considerations within the regulatory system is crucial to ensure that surrogate motherhood is conducted in a manner which complies with international standards that respect human dignity and rights. One of the primary concerns in surrogacy arrangements is maintaining the privacy and confidentiality of all parties involved while ensuring transparency in the process. Confidentiality safeguards the identities and personal information of the intended parents, surrogate, and the child born through surrogacy. Transparency, on the other hand, promotes trust and accountability within the surrogacy arrangement. To achieve this balance, legal frameworks need to be established that enforce strict confidentiality clauses while also allowing for transparent communication and documentation of the surrogacy process. This might involve: Implementing confidentiality agreements: Clear agreements should be drafted and signed by all parties involved, outlining the boundaries of confidentiality and the consequences of breaching it. Mediation and counseling: Providing mediation and counseling services can facilitate open communication between the parties, ensuring that any concerns or conflicts are addressed promptly and confidentially<sup>123</sup>.

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<sup>122</sup>. Referring to statement of Director of Centre for Health and Rights at Health Development Initiative, **Christopher Sengoga**, said that article 254 of the family law states the mode of reproduction but no more details. He said that it shows how reproduction occurs naturally between a man and woman or is medically assisted, but doesn't talk about the rights of the child born out of surrogacy, and no duties of both the intended parents and surrogate parent.

<sup>123</sup>. Laufer-Ukeles, P. (2018). The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood. *NCJ Int'l L.*, 43, 96.

Establishing ethical guidelines that ensure surrogacy is conducted respectfully, with voluntary participation, provisions for psychological support, and prevention of coercion or pressure. Ethical concerns in surrogacy comprise prioritizing the well-being of surrogate mothers, respecting their autonomy and informed consent, and safeguarding the rights of the child.<sup>124</sup> It is important to prevent exploitation and commodification of reproductive services, ensuring fair compensation for surrogates. Comprehensive counseling sessions for all parties involved help address emotional, psychological, and legal aspects. Clear legal frameworks and oversight mechanisms are necessary to protect the rights and interests of everyone involved.<sup>125</sup> Proper regulation is crucial in upholding ethical standards and promoting the well-being of all individuals in surrogacy arrangements.

Creating regulatory bodies or agencies tasked with overseeing surrogacy practices, monitoring compliance with laws/ethics through inspections, providing guidance, and investigating violations.<sup>126</sup> Promoting educational campaigns and awareness efforts to help surrogates and intended parents understand the risks, benefits, legal implications, and obligations of surrogacy arrangements. Furthermore, the regulatory framework addressing issues such as informed consent, financial compensation for surrogate mothers in case commercial surrogacy, medical screening and care standards, parental rights and responsibilities, more importantly setting the mechanisms for resolving disputes or unexpected outcomes that may arise from surrogacy arrangements.

In summing up, if these recommendations are put in practices and the regulation being established, putting the institutional frameworks and enhancing, upholding the ethical integrity the issues of surrogacy in Rwanda will disappears as it will be tackled by the legislations and institutional mechanisms that will be designed to cope with all issues concerning this modern artificial mode of reproduction .

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<sup>124</sup>. Daly, A. (2017). Children, autonomy and the courts: Beyond the right to be heard. In *Children, Autonomy and the Courts*. Brill Nijhoff.

<sup>125</sup>. Ruggie, J. (2008). Protect, respect and remedy: A framework for business and human rights. *Innovations: Technology| Governance| Globalization*, 3(2), 189.

<sup>126</sup> Hodson, N., Townley, L., & Earp, B. D. (2019). Removing harmful options: the law and ethics of international commercial surrogacy, *Medical Law Review*, 27(4), 597-622.

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