

Legal Protection against Surrogacy's Threat to Reproductive Human Rights of Women in Ethiopia

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Abstract: Surrogacy is a contract by which a woman accepts to bear a child for someone else, then abandon it at birth and hand it over to the contracting party. Currently Reproductive Human Rights of Women is recognized and protected with in international and national human right instruments of different countries in the world. However due to infertility not all women enjoy this right. Assisted Reproductive Technology especially through surrogacy, which is currently becoming a booming global business, tries to solve the problem of infertility. Though technological advancement comes up with surrogacy as a solution the legal status of surrogacy varies across countries. Some countries allow surrogacy as legal, while other totally prohibits it as illegal. Some other countries also make surrogacy unregulated and other countries make commercial surrogacy illegal and make noncommercial surrogacy legal within their national laws. As Ethiopia is part and parcel of global world there are evidences which show Ethiopian women make a surrogate motherhood agreement in abroad countries sending them by illegal brokers since 2006 to alleviate their economical problem.¹ In Ethiopia it is difficult to punish the surrogate, medical experts, commissioning parents and the brokers as in the FDRE Criminal Code surrogacy is not prohibited as a crime. In Ethiopia the FDRE Family Code says "maternal filiation is ascertained from the sole fact that the woman have given birth to the child". In other words, this code understand the surrogate mother is the legal mother of the child, even if she has no genetic relation to the child, while the commissioning mother has no legal relation to the child, even if she is the genetic mother. In addition this code presumes "A child conceived or born in wedlock has the husband as father". In Ethiopia the concept of surrogacy is in blurred mood between the fact and the law. Now a days due to surrogate motherhood Ethiopian law principle of proofing biological motherhood, biological fatherhood and knowing legal status of the childhood becomes argumentative one because surrogacy requires changes in the legal regulation of parentage and challenges traditional accounts of motherhood, fatherhood, parenthood, pregnancy and family status. These problems necessitate the study. In the study Doctrinal Methodology was adopted due to surrogacy is not practiced in Ethiopian jurisdiction. Although surrogacy is another arsenal for violation of women reproductive right, considers women as ordinary exchange goods and surrogacy arrangements made child a saleable commodity, and complications have arisen regarding the rights of the surrogate mother, the child, and the commissioning parents, the legal status of surrogacy Ethiopian legal system is not clearly regulated. Therefore, the purpose of this paper is to analyze legal protection against surrogacy as threat to reproductive human rights of women including the child under Ethiopian legal system in comparison with International human right instruments to which Ethiopia is a party. Finally recommendation is forwarded to the problem.

Keywords: ART, Surrogacy, Surrogate mother, Commissioning Parents, Reproductive Right

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¹ Metasebiya Kasaye, womb for rent in Ethiopia, Addis Addmas news paper, june 9,2014 06:20 am, <http://www.goolgule.com/womb-for-rent-in-ethiopia/>

CHAPTER ONE
INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Surrogacy is the major method of treatment for infertility in which eggs are removed from a woman's ovaries and combined with sperm to help a woman become pregnant.² Surrogacy is an "arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a 'surrogate mother' is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)"³

Reproductive rights are human rights that are already recognized in international human rights documents, national human rights documents. In Cairo International Conference on Population and Development Program of Action, State parties defined reproductive health as;

"a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its function and process. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capacity to reproduce and freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable method of family planning of their choice, as well as other method of their choice for regulation of fertility which are not against the law and the right of access to appropriate health care service that will enable women to go safely through pregnancy and child birth and provide couples with the best chance of having a healthy infant."

Reproductive rights rest on the recognition of basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and to attain the highest standard of reproductive and sexual health.⁴ A reproductive right also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in the human rights documents.⁵

Nature has bestowed the beautiful capacity to procreate a life within woman and every woman cherishes the experience of motherhood.⁶ However not all humans both a man and a woman got this reproductive right due to infertility. Rates of infertility vary considerably from country to country; in the worst-affected areas, over 25% of couples may be unable to have children.⁷

"Between 10 and 15 percent of couples trying to conceive—approximately 5 million couples—have fertility problems. Infertility exists when a couple has not conceived in over a year in spite of having sexual relations without contraceptives.

Male infertility accounts for about a third of the cases due to low sperm count, poor semen motility, and the effects of sexually transmitted diseases. Female infertility accounts for about another third due to blocked fallopian tubes, dysfunctional ovaries, hormonal imbalance, and the effects of sexually transmitted diseases. The other third is due to combined male and female problems and to unknown causes".⁸

The urge of motherhood leads them to seek alternative solutions like Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF), Intra-Uterine Injections (IUI), etc infusing hope into many infertile couples, who long to have a child of their own. With advances in medical sciences and technology, particularly in assisted reproductive techniques which have come in with techniques like donor insemination, embryo transfer methods, etc. revolutionizing the reproductive environment methods such as 'surrogacy' are also gaining popularity for varied reasons.⁹

Infertility of women and quest for offspring's always encourages medical community to go on experimenting to solve the problem. Over the last decade, there has been a mushrooming of IVF Clinics and services provided are questionable. But advancement of technology also leads to many legal, ethical and social issues before the medical fraternity.¹⁰

² WILLIAM P. STATSKY, FAMILY LAW 501 (5th ed. 2002).

³ INDIAN ART Reg. Bill art. 4(aa) (2010).

⁴ BARBARA STARK, TRANSNATIONAL SURROGACY AND INTERNATIONAL HUMAN RIGHTS LAW 377 (2011).

⁵ FAREDA BANDA, WOMEN, LAW AND HUMAN RIGHTS AN AFRICAN PERSPECTIVE 187(2005).

⁶ DR RANJA KUMARI, SURROGATE MOTHERHOOD. ETHICAL OR COMMERTIAL, 3 (ND).

⁷ Ibid.

⁸ WILLIAM P. STATSKY FAMILY LAW 482 (5th ed. 2002).

⁹ DR RANJA KUMARI, SURROGATE MOTHERHOOD. ETHICAL OR COMMERTIAL, 3 (ND).

¹⁰ Dr. Mukesh Yadav, *Medico-Legal & Ethical Aspects of Artificial Insemination*, J of Indian Academy of Forensic Medicine 131 (2006).

In fact, globalization, the medical achievements and declining fertility rates have put this subject on the agenda.¹¹ There are over 186 million couples in developing countries alone today that are affected by infertility and most of the infertility in developing countries is attributable to damage caused by infections of the reproductive tract, notably gonorrhoea and Chlamydia infection.¹² In addition to the personal grief and suffering it causes, the inability to have children especially in poor communities can create broader problems, particularly for the woman, in terms of social stigma, economic hardship, social isolation, and even violence.¹³

With the entry of financial arrangements in exchange of the surrogate child, where the child becomes a 'saleable commodity',¹⁴ complications arise and issues got involved such as the rights of the surrogate mother¹⁵, the child¹⁶ and the commissioning parents.¹⁷ In developing countries like Ethiopia the main reason for getting a fertile wife is born a child and up bring them and spouses need to strengthen relationships with other societies, to get prestige, to earn dowry, to get economical assistance when spouse get older and older etc, by getting them married.

For pronatalist countries, where children are highly desired, parenthood is culturally compulsory and childlessness is socially unacceptable, the Assisted Reproductive Technologies (ARTs) are rapidly globalizing.¹⁸ The society understood that women and men perceived infertility as a curse and only a baby could bring back all the happiness in their life.¹⁹

Various studies have found that childless women in developing countries are often abandoned by their husband, subjected to violence, or treated as servants by the husband's family.²⁰ Poor couples in developing countries like ours couldn't afford paying for surrogacy. In some societies, motherhood is the only way for women to improve their status within the family and the community.²¹ On a practical level, many families in developing countries depend on children for economic survival. While many people, therefore, would not consider infertility a disease in itself, it can certainly be said to be a social and public health issue as well as an individual problem.²²

To overcome this problem there is a growing demand for services that can help infertile couples to conceive.²³ In practice, this means ART, artificial insemination, *in vitro* fertilization, gamete or zygote intrafallopian transfer, intracytoplasmic sperm injection, embryo freezing and donation, and surrogate motherhood.²⁴ The fact that these services are expensive and controversial has not prevented their appearance in developing countries.²⁵

To mitigate the infertility a major problem of spouses a new science of motherhood treatment in general called assisted reproductive technologies (ART) is developed. ART methods of being motherhood includes surrogate motherhood, Artificial insemination, Gamete intrafallopian transfer (GIFT), Zygote intrafallopian transfer (ZIFT), Embryo transplant, In vitro fertilization (IVF).²⁶

¹¹ FILIPA REDONDO, ET AL, SURROGACY: A CLASH OF COMPETING RIGHTS, 1 (2017).

¹² Patricia A Butler, *ART in developing countries a response to individual need or a social priority?*, No 63 PROGRESS 2 (2003).

¹³ Ibid..

¹⁴ OXFORD DICTIONARY 444 (5th ed. 2003) "saleable commodity means product/good enough to be sold ;that some body will want to buy"

¹⁵ BLACK'S LAW DICTIONARY 1582 (9th ed. 2009). "Surrogate mother is the process of carrying and delivering a child for another"

¹⁶ CEDAW art. 1 A child means every human being below the age of eighteen years.

¹⁷ DR RANJA KUMARI, SURROGATE MOTHERHOOD. ETHICAL OR COMMERCIAL, 3 (ND). "Commissioning Parents are the couples, who are unable to have children naturally or with medical help and decide to acquire a child through a surrogacy arrangement."

¹⁸ Ibid.

¹⁹ Patricia A Butler, *ART in developing countries a response to individual need or a social priority?*, No 63 PROGRESS 2 (2003).

²⁰ DR RANJA KUMARI, SURROGATE MOTHERHOOD. ETHICAL OR COMMERCIAL, 3 (ND)..

²¹ Ibid.

²² Ibid.

²³ Ibid

²⁴ http://www.fertilityoptions.com//surrogate_motherhood : woman who is artificially inseminated with the semen of a man who is not her husband, with the understanding that she will surrender the baby at birth to the father and his wife. *Artificial insemination*: using a catheter (tube) to inject semen through the cervix directly into the uterus without sexual contact; the semen can be from the father or from a donor. *Gamete intrafallopian transfer (GIFT)*: surgically removing eggs from a woman's ovary, combining the eggs with sperm, and, using a laparoscope, placing the unfertilized eggs and the sperm directly into the fallopian tube, where they will fertilize and travel into the uterus. • *Zygote intrafallopian transfer (ZIFT)*: surgically removing eggs from a woman's ovary, fertilizing them with a man's sperm in a laboratory, and transferring the resulting zygote directly into the fallopian tube through a small incision in her abdomen (combining IVF and GIFT). • *Embryo transplant*: placing a fertile woman's embryo (an egg that has been fertilized via IVF) into the uterus of an infertile woman (this method is also called *embryo transfer*, *ovum transfer*, or *ovum transplant*). *in vitro* fertilization (IVF) The surgical removal of a woman's eggs and their fertilization with a man's sperm in the laboratory. Sometimes referred to as fertilization "in a glass" or conception "in a test tube."

²⁵ Dr ranjan 3

²⁶ http://www.fertilityoptions.com//surrogate_motherhood :

In 1996, approximately 65,000 ART treatment cycles were carried out at 300 programs in the United States.²⁷ This is an area in which the science of motherhood (called by some the “ovarian Olympics”) is moving much faster than the law.²⁸ Increasingly, courts are faced with legal issues for which there are no precedents²⁹.

The surrogate mother wants to support herself financially and want to share the happiness of having a child with those who are unable to do so as surrogacy is a booming, global business.³⁰ The Permanent Bureau of The Hague estimates that the industry grew by 1000 percent internationally between 2006 and 2010 and Other Commentators estimate that the industry is now worth up to \$6 billion annually.³¹

One of the most dramatic developments in this area of the law has been the use of a surrogate mother. She is a woman who arranges to become pregnant, usually by artificial insemination, so that she can give the child to an infertile woman to raise. In 1993, the Center for Surrogate Parenting estimated that 4,000 surrogate births had occurred in the United States.³² There is a great deal of media interest in surrogacy, particularly when something goes wrong, such as the refusal of the surrogate to relinquish the child. The number of surrogate births is probably increasing every year, as evidenced by the large number of World Wide Web sites devoted to attorneys, doctors, agencies, and (brokers) other intermediaries who are available to bring all the parties together and perform the various services that are required for the process.³³

*"In the natural process of pregnancy determining maternity is not difficult because maternal filiation is ascertained from the sole fact that the woman has given birth to the child. In modern world due to intervention of human being and science, which changes the natural process of pregnancy, determining maternity is too difficult. However, in Ethiopia, it is unthinkable in the near future this technological advancement got huge recognition and acceptability so the natural process of determining maternity continued to be binding. In the scientific world Surrogacy and in vitro fertilization (IVF) process of pregnancy development changes natural process of pregnancy. However in surrogacy and artificial insemination, concepts the woman who gives birth is a surrogate not a natural mother which doesn't have a genetic relation. Surrogate mother is the legal mother of the child, even if she has no genetic relation to the child because in Ethiopian family law maternal filiation is ascertained from the sole fact that the woman have given birth to the child. This law never considers the source of genetic relation. The intended mother has no legal relation to the child, even if she is the genetic mother. Ethiopian family code never regulates such scientific issues. The source of the genetic unless she gives birth to the child she is not a mother in Ethiopia family law. This situation made the family code backward and conservative stand because the law received without adequate evidence of biological link between the mother and the child. However before the family code crafted to regulate this confusion the Ethiopian government should takes a policy consideration and stand to surrogacy because there are different outlooks which support and condemn surrogacy. Hence with the policy consideration making the law scientific is appropriate."*³⁴ [Translated Author]

Factors such as growth of infertility in modern society coupled with the rising demand for having one's own genetically related child, adoption restrictions, the development of surrogacy contract and commercial surrogacy agencies has resulted in the increasing publicity and public interest in the formation of such agreements between infertile couples and surrogate mothers to alleviate the problem legally.³⁵ Today the surrogates offer their services by using the assisted reproductive technologies particularly IVF.

As Ethiopia is part and parcel of globale world there are evidences which show Ethiopian women make a surrogate motherhood agreement in abroad countries sending them by illegal brokers since 2006 to alivate their economical problem.³⁶ In Ethiopia it is difficult to punish the surrogate, medical experts, commissioning parents and the brokers as in the FDRE Criminal Code surrogacy is not prohibited as a crime. In Ethiopia the FDRE Family Code says "maternal filiation is ascertained from the sole fact that the woman have given birth to the child". In other words, this code understand the surrogate mother is the legal mother of the child, even if she has no genetic relation to the child, while the commissioning mother has no legal relation to the child, even if she is the genetic mother. In addition this code presumes "A child conceived or born in wedlock has the husband as father". In Ethiopia the concept of

²⁷ Carl Coleman, *Procreative Liberty*. . . , 84 MINNESOTA LAW REVIEW 55, 58 (1999).

²⁸ Ibid.

²⁹ Ibid.

³⁰ ALEX FINKELSTEIN ET. AL., *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Lawmaking* , Report of the Columbia Law School Sexuality & Gender Law Clinic 6 (2016).

³¹ Ibid .

³² WILLIAM P.STATSKY, FAMILY LAW 488 (5th ed. 2002).

³³ BLACK'S LAW DICTIONARY, (9TH ED. 219 (Broker: An agent who acts as an intermediary or negotiator, esp. between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation).

³⁴ መሐሪ ረዳዲ/ፕሮፌሰር/፣ የተሻሻለውን የቤተሰብ ህግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች ቅ 2፣ 3-4 (1999 ዓ/ም)።

³⁵ <https://ilussp.org/MOTHER'S MARKET: An Exploratory Study on the Surrogacy Industry in India>.

³⁶ Metasebiya Kasaye, womb for rent in Ethiopia, Addis Addmas news paper, june 9,2014 06:20 am, <http://www.goolgule.com/womb-for-rent-in-ethiopia/>

surrogacy is in blurred mood between the fact and the law. Now a days due to surrogate motherhood Ethiopian law principle of proofing biological motherhood, biological fatherhood and knowing legal status of the childhood becomes argumentative one because surrogacy requires changes in the legal regulation of parentage and challenges traditional accounts of motherhood, fatherhood, parenthood, pregnancy and family status.

1.2 STATEMENT OF THE PROBLEM

The exercise of the right to reproductive self-determination or reproductive freedom more especially through the use of Artificial Reproduction Technologies, surrogacy motherhood, has generated controversies particularly from women reproductive human rights Law perspective.

"The practicality of surrogacy in Ethiopia is gradually increased because of Ethiopian women ask low payment for the service of surrogate motherhood and their honesty manner. This increased demand of commissioning parents from abroad. There are foreign citizens' from Canada, Italy, America and Spain coming to Ethiopia searching for Ethiopian women for surrogacy. After secret screening with help of brokers, for fear of the prohibitions, Ethiopian women went to abroad especially India to deliver service of surrogacy."³⁷ (Translated Author)

Even though surrogacy never practiced in Ethiopia jurisdiction legally by Ethiopian women, Ethiopian legal system should have a concern to regulate surrogacy because women reproduction matters the creation of next generation of Ethiopia. Unless issue of surrogacy is regulated clearly by Ethiopian legal system, problems emanates from surrogacy will pay Ethiopia an immense price in formation of family. Surrogacy changes the whole status of natural family relations, duty, and rights which are recognized in Ethiopia family law.

In addition to this Ethiopia recognize freedom of movement in FDRE constitution as Every Ethiopian or any other person lawfully within Ethiopia shall have the freedom to freely move and establish his residence within Ethiopia as well as to travel abroad and Every Ethiopian shall have the right to return to his country.³⁸ Hence taking freedom movement as a pretext they may move abroad to overcome economical problems being a surrogate mother, for those IP(s) who had the infertility problem, in other countries where surrogacy is legal. Then after having a child through surrogacy, when they return to Ethiopia the issue of surrogacy should be regulated by law unless freedom of movement will be violated because surrogacy restricts rights which emanates from being Ethiopian nationality³⁹ such as freedom of association⁴⁰,right to vote and to be elected⁴¹,right to property⁴², economic, social and cultural rights⁴³, right to labour⁴⁴ and right to development⁴⁵ etc. So for the better protection of these rights in Ethiopia filling the legal lacuna on surrogacy has paramount importance.

Surrogacy is considered to have challenged the traditional notion of the family. They assault the meaning of parenthood by transforming procreation or reproduction into manufacturing of children. Surrogacy motherhood techniques bring about the problem of legitimacy of the resulting child, the issue of the right to inheritance, the issue of the right to maintenance, the issue of the right to custody and fosterage all of which arise out of kinship or legitimate relations as per Ethiopian Civil Code and FDRE Family Code.⁴⁶

As surrogacy changes in the legal regulation of parentage and challenges traditional accounts of motherhood, fatherhood, parenthood, pregnancy and family status determining the maternity and paternity is too difficult based on the family code. FDRE Family code follows the natural process of determining maternity because maternal filiation is ascertained from the sole fact that the woman has given birth to the child.⁴⁷ In other words, according to this code, the surrogate mother is the legal mother of the child, even if she has no genetic relation to the child, while the intended mother has no legal relation to the child, even if she is the genetic mother. However in surrogacy and artificial insemination concepts the woman who gives birth is a surrogate not a natural mother which doesn't have a genetic relation.

The problem of artificial methods of human reproduction as an exercise of one's reproductive freedom is not because of its being an unnatural way of having a child, but because of its negative impact on the concept of child-parent relationship as Andrea Stump

³⁷ Metasebiya see Supra note 1.

³⁸ ETH CONST art 32(1&2).

³⁹ ETH CONST art. 6 & 33

⁴⁰ ETH CONST art. 31

⁴¹ ETH CONST art. 38

⁴² ETH CONST art. 40

⁴³ ETH CONST art. 41

⁴⁴ ETH CONST art. 42

⁴⁵ ETH CONST art. 43

⁴⁶ ETH Civil Code art.834, FDRE FAMILY CODE. art.197, art 219.

⁴⁷ FDRE FAMILY CODE. art. 124.

posits that traditionally, the mother of a child “*was the one from whose womb the child came*” and traditionally, this was an unshakeable presumption.⁴⁸

In the absence of modifications to the rules related to paternal parentage, the husband of the surrogate mother is considered as the legal father of the child, in compliance to the rule relating to the presumption of paternity.⁴⁹ The intended father will have to either engage an adoption procedure to establish parentage to the child or contest the paternal parentage of the husband of the surrogate mother to establish his own paternity. If the surrogate mother is not married, the intended father can acknowledge the child with the consent of the surrogate mother⁵⁰, which allows him to establish parentage without engaging an adoption procedure. If there is no consent from the surrogate mother, a court tries to conciliate the parties and can reject the claim by the intended father in case conciliation is not attained and with the condition that it is proven that the intended father is not the biological father of the child. Moreover, the court can reject the acknowledgment if the child is a year or older and the acknowledgement is obviously against the child’s best interests.

Ethiopia Federal Family Code is doesn’t well regulate the ART i.e. surrogacy advancement because the proof of maternity is birth even the mother is genetically unrelated in gametes. The law didn’t solve the issue of legality and issue of factual contradiction. To the contrary our laws acknowledged DNA as a means of irrefutable proof with this legal lacuna.

Ethiopia has no legal policy consideration either outlawing or allowing surrogacy. This makes it difficult to solve surrogate motherhood cases contracted legally abroad which is legal in that country. Ethiopian women made a surrogacy contract abroad with help of contrabands because their national laws do not permit surrogacy. Going to another country to avoid local prohibitions is not always an option. This also faces a problem of determining citizenship of a child too.

Though surrogacy had human right violation impact on Ethiopian women, to address and to regulate surrogacy arrangements the Government of Ethiopia hasn’t taken any steps yet.

*"Due to poverty in Ethiopia there are illegal brokers since 2006 who are broking women for surrogate motherhood to send them abroad and in Ethiopia there are women who are making surrogate motherhood abroad without the knowledge of their husband and return to Ethiopia again having a payment of surrogacy. For Ethiopian women the payment of surrogacy becoming up to five hundred thousand birr and gradually increased. In Ethiopia surrogate motherhood is sent to abroad with secret and the commission for brokers’ costs up to sixty thousand birr."*⁵¹ (Translation Author)

In International and National human right documents the children best interest are the primary consideration. If so one cannot be denied their existence simply because they are product of a prohibited surrogacy contract. This shows Ethiopia allow AI and surrogacy in relation to the best interest of a child. Under FDRE Family Code disowning shall not be allowed where it is proved that the child has been conceived by means of artificial insemination with the written consent of the husband.⁵² This shows Ethiopian position about the issue of ART, surrogacy, is at confusion.

The FDRE Family law is simply not equipped to deal with problems of this dimension. Its conceptual basis is totally inadequate. Adultery implies the penetration of a man's penis into the genital tract of a woman, one of the parties being married to a third person. This does not happen in surrogate motherhood AID. But the birth issue to a married woman by a man other than her husband implies

⁴⁸ Andrea Stump, “*Redefining Motherhood: A Legal Matrix for New Reproductive Technologies*” Yale L.J.167,187 (1986).

⁴⁹ FDRE FAMILY CODE art.125/1/& art.126

⁵⁰ Ibid art 125/2/, art. 231

⁵¹ Metasebiya Kasaye, womb for rent in Ethiopia, Addis Addmas news paper, june 9, 2014 06:20 am, <http://www.goolgule.com/womb-for-rent-in-ethiopia/> (“*In Ethiopia surrogacy worths 500,000 birr. Brokers also got up to 60,000 birr as a commission for founding an Ethiopian surrogate. There were Ethiopian women who were serving as a surrogate in abroad without the knowledge of their husbands about became surrogate motherhood. In Ethiopia surrogacy is considered as illegal act by Ethiopian lawyers. However some years latter there are couples frome US and Europe coming to Ethiopia searching for surrogacy Ethiopian women. Three years ago one Ethiopian woman went to India to serve as a surrogate. After serving as a surrogate she got payment of 250,000 birr from IP(S) includingthey covered her 11 month different costs. Currently the service of surrogacy worths upto 500,000 birr in Ethiopia. Ethiopian brokers also got 60000 birr for the service but they said that the payment is not sufficient in comparision with other countries. Ethiopian brokers who broke eight Ethiopian women for surrogacy service said that "in the previous time it was difficult to get surrogate but now a days the need and willingness to become surrogate is increased gradually due to economical problem."* Currently the brokers also got payment from both from surrogate and from IP(S). There was IP(S) who came to Ethiopia from Canada, Italy, America, and Spain in need of Ethiopian women for surrogacy. They need them due to low amount of payment and their honesty manner to the service. After they got women the contract is made based on foreign contry which allow surrogacy contract as legal. Ethiopian women made the contract clandestinely and their families didn’t know about it. Even women didn’t toled the situation to their families why they went to abroad. ") (Translated Author).

⁵² FDRE FAMILY CODE art. 178

adultery. This does happen in surrogacy AID. A whole host of legal complexities arise from these anomalies which cannot be settled until the legislatures act.⁵³

In FDRE Criminal Code when the contracts of surrogacy are done the Code has no stand to criminalize surrogacy as a criminal act or not. The only prohibition in Food, Medicine and Health Care Administration and Control Council of Ministers Regulation⁵⁴ is difficult to penalize the act of surrogacy and the difficulty arises from no metered penalty as far as principle of legality in criminal law is concerned. In the regulation the role of prohibition is not clear. But, till now there is no such legal provisions directly dealing with surrogacy laws to protect the rights and interests of the surrogate mother, the child or the commissioning parents in Ethiopia. The law maker didn't think about the serious issue at hand.

1.3 OBJECTIVES OF THE STUDY

1.3.1 GENERAL OBJECTIVE

- To analyze legal protection against surrogacy in reproductive human rights of women including their child under Ethiopian law.

1.3.2 SPECIFIC OBJECTIVE

- To clarify the concept of surrogacy from women reproductive rights perspective.
- To know reality, legality and enforceability of surrogacy in Ethiopia legal system.
- To analyze legal protection against surrogacy as a threat to reproductive human rights of women and their child under international human rights instruments ratified by Ethiopia.
- To analyze legal protection against surrogacy as a threat to reproductive human rights of women and their child under Ethiopian law
- To know the real challenges of surrogate motherhood and reproductive human rights of women including their born children.

1.4 RESEARCH QUESTIONS

The research addressed the following research questions:

- What is surrogacy? Is really surrogacy a right for women?
- Is surrogacy really practical, legal and enforceable in Ethiopia?
- Is there legal protection against surrogacy as a threat to reproductive human rights of women and their child under international human rights instruments ratified by Ethiopia?
- Is there legal protection against surrogacy as a threat to reproductive human rights of women and their child under Ethiopian law?
- Is surrogacy a criminal act and punishable under Ethiopian law? What is the amount of penalty set in the law?
- What are the real challenges of surrogate motherhood in reproductive human rights of women including their born child?

1.5 SCOPE OF THE STUDY

The study mainly focused on the critical analysis and evaluation of legal protection against surrogacy in reproductive human rights of women including their child under Ethiopian law in comparison with International human rights ratified by Ethiopia. The thesis didn't discuss about Regional human rights instruments because of mere redundancy. In my thesis the Amhara Family Law is not discussed due to the reason that the "Amhara Family Law is the verbatim copy of the Revised Federal family Code except the former deals with betrothal and definition of marriage."⁵⁵

1.6 SIGNIFICANCE OF THE STUDY

The significance of the research had both legal and social significance in Ethiopia. Its legal significance related to the protection of the woman reproductive rights including the children from exploitation. It provoked more researchers on the subject matter and used as initial research materials for future researchers in Ethiopia context.

This research work would be beneficial to all those involved in women and child rights protection such as the government in the formulation of law and policy on women and child rights in Ethiopia. It used by the legislature and the executive branch of the

⁵³ C. LEE BuxToN M.D, *Artificial Insemination: Genetic, Legal, and Ethical Implications: A Symposium*, 9 J. No. 4, CURRENT REVIEWS 375 (1958).

⁵⁴ Regulation 299/2013 art. 57(2)." letting or hiring of womb for the purpose of artificial reproduction shall be prohibited"

⁵⁵ ASCHALEW ASHAGRIE & MARTA BELETE, LAW OF FAMILY TEACHING MATERIAL, 125 (2009).

government as reference material in making laws and policies in line with, surrogacy, technological advancement taking the lacuna into consideration.

Thus, the study would be of benefit to medical practitioners who engage in these unorthodox ways of surrogacy, family lawyers and legal practitioners who defend and prosecute cases bordering on rights of woman including the child, and judges who determine the claims on surrogacy motherhood since the research is innovative one for Ethiopia.

1.7 RESEARCH METHODOLOGY

This research is doctrinal. Hence, it examines the legal protection against surrogacy as threat to reproductive human rights of women including their child under Ethiopian law. However, due to lack of licensed surrogacy clinics in Ethiopia and clandestine nature of screening Ethiopian women for surrogacy by brokers⁵⁶, it is difficult to get full fledged information about surrogacy in Ethiopia. In order to achieve its objectives, this research makes analysis of secondary data sources on the relevant and publically available documents including books, research studies, journals and academic articles, reports, general comments. International human rights instruments ratified by Ethiopia and domestic laws that had some relevance to the issue at hand used as a primary data source to conduct this research. In addition, various legitimate internet sources were refereed for relevant data.

1.8 LIMITATION OF THE STUDY

The constraint this research encountered lack of relevant materials on the subject matter under the Ethiopian legal system. Absence of surrogacy medical practice in Ethiopia and becoming technology born issue conducting it for non medical student was the other limitation of this paper. These limitations are mitigated by accessing many documents concerning the practice of surrogacy in other jurisdictions comparatively. In addition accessing International instruments ratified by Ethiopia tried to overcome the limitation.

1.9 ORGANIZATION OF THE STUDY

The study organized in six chapters. Chapter one discussed the introduction part, the initial problems which necessitate the researcher, intended objectives and significance of the study. Moreover, this section outlined the research questions, the methodology and scope of the study.

Chapter two discussed about the conceptual framework of surrogacy in line with other countries jurisdiction. Chapter three discussed about surrogacy and international human rights instruments. In Chapter Four discussed about legal position of surrogacy and reproductive rights of women in Ethiopia laws. Chapter five discussed with the Challenges of surrogacy in women reproductive human right perspective. The last Chapter winded up by conclusion and recommendations.

⁵⁶ Metasebiya, *Supra* note 45.

CHAPTER TWO

2. CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 THE NEW SCIENCE OF MOTHERHOOD AND SURROGACY

For many infertile women, being unable to bear and raise children has severe emotional and psychological consequences. Advances in medical sciences and technology, particularly in assisted reproductive techniques, with techniques like donor insemination and embryo transfer methods have revolutionized the reproductive environment and have led to an increase in popularity of surrogacy⁵⁷

Artificial human reproduction is the general concept of technologically assisted human reproduction. It comprises of Artificial Insemination (AI), *In-vitro* fertilization (IVF), Sperm donor/ova bank, Embryo adoption, Egg transfer, Surrogate parenting, human cloning, and Genetic engineering among others.⁵⁸

The word 'surrogate' means 'substitute'.⁵⁹ According to Black's law Dictionary surrogacy is the act of performing some function in the place of someone else due to blocked fallopian tube or a complete absence of a uterus. In human assisted reproductive technology it is the process of carrying and delivering a child for another.⁶⁰

Etymologically, the term surrogacy is from the Latin word *subrogate* which means to replace, substitute or stand-in for.⁶¹ It therefore, suggests that there is an original or natural process or thing to be replaced by another process or thing which is not original or natural. In a situation where what is to be substituted is not about naturalness, it can concern what is legitimate being replaced by what is not. It is this substitution and its attendant consequences that made surrogacy a moral and legal issue, especially because human beings are involved.⁶²

Surrogate mother, as defined by the Collins English dictionary is, "*a woman who bears a child on behalf of a couple unable to have a child, either by artificial insemination from the man or implantation of an embryo from the woman*"⁶³ Oxford Dictionary define surrogacy as "The role of a woman (a surrogate mother) who is commissioned to bear a child by a married couple unable to have children themselves. The pregnancy is usually initiated through artificial insemination of the surrogate mother by the husband, although sometimes the wife's eggs are used; in this case the surrogate has no genetic relationship to the child, being simply a host for the embryo"⁶⁴

Women who are willing to help intended parents IP(s) to create families by carrying children for them called surrogate. Surrogate mother is woman who is artificially inseminated with the semen of a man who is not her husband, with the understanding that she will surrender the baby at birth to the father and his wife.⁶⁵

Surrogacy is an "arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a 'surrogate mother' is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)"⁶⁶

Terminologically the issue developed terms as "surrogate," "surrogate mother," "gestational mother," "birth mother" and "gestational carrier" refer to the woman agreeing to become pregnant and carry the child as part of a surrogacy arrangement.⁶⁷ It is sometimes referred to as womb leasing.⁶⁸

Surrogacy comes into existence by agreement as a contract. Surrogacy is a contract, a UN pregnant woman enters a contract to become pregnant, to give birth to a child, and then to relinquish all parental rights to the couple who will then adopt the child. The

⁵⁷ DR RANJA KUMARI, SURROGATE MOTHERHOOD. ETHICAL OR COMMERCIAL, 18 (ND).

⁵⁸ Nasirudeen MOHAMMED, A CRITICAL ANALYSIS OF ARTIFICIAL HUMAN REPRODUCTION: AN ISLAMIC LAW PERSPECTIVE 17 (March, 2016). Unpublished master thesis

⁵⁹ DR RANJA KUMARI, SURROGATE MOTHERHOOD. ETHICAL OR COMMERCIAL 3(---).

⁶⁰ BLACK'S LAW DICTIONARY 1582 (9th ed. 2009).

⁶¹ Akande Michael Aina, *An African Perspective on Surrogacy and the Justification of Motherhood*, BANGLADESH J.BIOETHICS 19 (2017).

⁶² Ibid.

⁶³ COLLINS ENGLISH DICTIONARY (2003). <http://www.thefreedictionary.com/surrogate+mother/>

⁶⁴ OXFORD DICTIONARY OF LAW 488 (5th ed. 2003).

⁶⁵ WILLIAM P. STASKY FAMILY LAW 488-489 (5th ed. 2002).

⁶⁶ INDIAN ART Reg. Bill art. 4(aa) (2010).

⁶⁷ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Lawmaking*, Report of the Columbia Law School Sexuality & Gender Law Clinic5 (2016).

⁶⁸ See *surra* note 33 at 20.

surrogacy agreements, parties involved in this agreement are surrogate mother, surrogate husband, commission parents, clinic, doctors and agencies

2.2 COMMISSIONING PARENTS

The Commissioning Parents, sometimes also called the intended parents, are the couples, who are unable to have children naturally or with medical help and decide to acquire a child through a surrogacy arrangement.⁶⁹ IP(s)/commissioning parent(S) are couples or individuals who cannot have a child themselves and who are considering surrogacy as a way to become a parent.⁷⁰ Clinics charge exorbitant (huge) amount for the complete package, including fertilization, the surrogate's fee, and delivery of the baby at a hospital, including the costs of flight tickets, agency fee, attorney fee, screening and surrogacy fee, immigration help, insurance costs, medical procedures and hotels.⁷¹

Reason for commissioning parents to opt for surrogacy are dysfunctional reproductive organs that appear to be a hindrance to have children in a natural way, repeated failed infertility treatment, complication in previous pregnancies, becoming gay /homosexual/ couples, in need of happiness, due to busy life style.⁷²

2.3 HISTORICAL PERSPECTIVE OF SURROGATE MOTHERHOOD

The basic concept dates back at least 4000 years to Rachel, wife of Jacob, the father of the twelve tribes of Israel. Unable to bear children, Rachel sent her husband into the tent of her maid, Bilah. It was understood that the child born of that union belonged to Jacob and Rachel⁷³. Some writers consider this situation as surrogacy.

Other says surrogacy has also been seen around a long time and dates back to biblical times. The Bible contains one of the earliest records of surrogacy when Abram's wife gave him her slave girl:

Abram's wife Sara had not born him any children. But she had an Egyptian slave girl named Hagar, and so she said to Abram, "The Lord has kept me from having children. Why don't you sleep with my slave girl? Perhaps she can have a child for me."⁷⁴

The bible promotes the idea of surrogate motherhood and surrogate fatherhood.

Today the surrogates offer their services by using the assisted reproductive technologies particularly IVF. The natural insemination method used by Abram and Hagar is relatively rare.⁷⁵ In ancient Hindu society there were existed a practice known as *Niyog Pratha*, wherein a woman who was childless because her husband was impotent was allowed to conceive through her brother-in-law. The child belonged to the couple and the brother-in-law had no claim over it. *Niyog pratha* was surrogate fatherhood. It was much less complicated, legally and emotionally, than surrogate motherhood.⁷⁶

Before the advent of modern assisted conception techniques, surrogacy by natural conception was the only means of helping certain barren women to have children. Before artificial insemination, babies were conceived by the natural way. Later as artificial insemination was accepted, this became the usual means of achieving pregnancy in the cases of infertility, being more socially acceptable than the natural way. When assisted conception methods such as *in vitro* fertilization (IVF) became available, it was a natural step to use the eggs of the woman wanting the baby/donor woman and the sperm of her husband/donor male, to create their embryos *in vitro* and transfer these to a suitable host⁷⁷.

If we look at records the history of surrogacy starts in ancient India, ancient Mesopotamia, and ancient Egypt. Surrogacy really began in the late 1800's with the American Indians who were the first one to truly begin the surrogate mother history. The first test tube baby, Marie Louise Brown, was born on July 25, 1978. Then Indian baby Kanupriya Agarwal was born on October 3, 1978.⁷⁸ The market for surrogacy first developed in the United States, making it the first providing country.⁷⁹ The first baby successfully

⁶⁹ DR RANJA KUMARI, SURROGATE MOTHERHOOD. ETHICAL OR COMMERCIAL, 99 (ND).

⁷⁰ U.K. & WALES, THE SURROGACY PATHWAY: SURROGACY AND THE LEGAL PROCESS FOR INTENDED PARENTS AND SURROGATES IN ENGLAND AND WALES 5 (2019).

⁷¹ Ibid., Jamie Cooperman, *International Mother of Mystery: Protecting Surrogate Mothers Participation in International Commercial Surrogacy Contracts*, 48 GOLDEN GATE U.L.REV.168 (2018).

⁷² See DR RANJA KUMARI, supra note 42 at 106-107

⁷³ Barbara S. Parish, *Test Tube on Trial: Let California Blaze the Trail to the Legitimation of Surrogacy*, Glendale L. Rev.19 (2013).

⁷⁴ GENESIS 16:1-2 (NIV).

⁷⁵ WILLIAM P. STATSKY, FAMILY LAW 488 (5th ed. 2002).

⁷⁶ SURROGATE MOTHERHOOD: HISTORY & CONCEPT 35 (ND)

⁷⁷ Pratibha Ganesh Chavan, *Psychological and Legal Aspects of Surrogate Motherhood*, AIR J. 103(2008).

⁷⁸ Ashley Kate, "History of Surrogate Motherhood" Available at: <http://www.ezinearticles.com> (visited on July 17, 2010).

⁷⁹ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHT IMPLICATION OF GLOBAL SURROGACY, 13 (2019).

born through commercial surrogacy was born in 1985 in Michigan.⁸⁰ In 2002, India legalized commercial surrogacy and became the largest providing country.⁸¹

2.4 TYPES SURROGACY ARRANGEMENTS

The hallmark of this form of assisted reproduction is that a woman bears a child for someone else. The surrogacy process involves a surrogate, intended parent(s), and medical professionals who perform and monitor the necessary procedures. Other parties may also be involved, including sperm and egg donor banks, intermediary agencies and legal counsel.⁸²

There are two major categories of surrogacy arrangements in general. Based on sources of the will be fertilized eggs and genetic relation of the embryo, surrogacy agreement can be classified as traditional (full) and gestational (host) surrogacy.

Another form of classification based on the financial income purpose of surrogate mother to be paid fee agreement of surrogacy classified as non-commercial (altruistic surrogacy) (uncompensated) and commercial (compensated) surrogacy. Types of surrogacy based on genetic relation with surrogate mother are the following:-

a) TRADITIONAL

This type of surrogacy is also known as full surrogacy; straight surrogacy classical because of the surrogate provides her own eggs to achieve the pregnancy. The person who supplies the egg/sperm is genetically related to the child (this category of surrogacy is sometimes called the genetic mother).⁸³ A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person.⁸⁴ The intended father, in either a heterosexual or male same-sex relationship, or an individual, provides a sperm sample for conception through either self-insemination at home or artificial insemination with the help of a fertility clinic. If either the surrogate or intended father has fertility issues, then embryos may also be created *in vitro* and transferred into the uterus of the surrogate.⁸⁵ This type of surrogacy was widely used before the discovery of in-vitro fertilization technology. One type is the traditional surrogacy arrangements, which can be traced back to biblical times. For example, in the Bible, Abraham's infertile wife, Sarah, requested that Abraham sleep with their maid in order to have a child.⁸⁶ The Bible also mentions that when Rachel was found to be infertile, she asked her husband, Jacob, to sleep with their maid Bilhah to have a child.⁸⁷ It is now very rarely used as it is out-dated.⁸⁸

b) GESTATIONAL

Another type of surrogacy arrangement is gestational surrogacy, which is more commonly used today.⁸⁹ Gestational surrogacy occurs through use of assisted reproductive technology.⁹⁰ This is now viewed as the most appropriate and acceptable type of surrogacy. The woman who carries an embryo that was formed from the egg of another woman; since someone else's fertilized egg was implanted in the woman's uterus, the woman is not genetically related to the child (this category of surrogacy is sometimes called a gestational carrier, a gestational surrogate, or surrogate host)⁹¹ The fertilized egg develops into an embryo, which is usually cultured in the laboratory for 3 – 5 days.

In this type of *gestational surrogacy* a pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child.⁹² Gestational surrogacy usually occurs following IVF treatment and the gametes may come from intending parents, one, or neither.⁹³ In such pregnancies, embryos are created *in vitro* and transferred into the uterus of the surrogate using: eggs of the intended mother fertilized with sperm of the intended father or donor; or eggs of a donor fertilized with sperm of the intended father, where the intended mother cannot use her

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Id at 8.

⁸³ Kate. *supra* note 70.

⁸⁴ BLACK'S LAW DICTIONARY 1582 (9th ed. 2009).

⁸⁵ U.K. & WALES, THE SURROGACY PATHWAY: SURROGACY AND THE LEGAL PROCESS FOR INTENDED PARENTS AND SURROGATES IN ENGLAND AND WALES 6 (2019).

⁸⁶ Genesis *Supra* note 66

⁸⁷ Jamie Cooperman, *International Mother of Mystery: Protecting Surrogate Mothers' Participation in International Commercial Surrogacy Contracts*, 48 Golden Gate U. L. Rev. 167 (2018).

⁸⁸ See *supra* note 33 at 20

⁸⁹ Cooperman, *supra* note 75

⁹⁰ Ibid.

⁹¹ WILLIAM P. STATSKY FAMILY LAW 488-489 (5th ed. 2002)

⁹² BLACK'S LAW DICTIONARY 1582 (9th ed. 2009).

⁹³ FILIPA REDONDO, ET AL, SURROGACY: A CLASH OF COMPETING RIGHTS, 2(2017).

own eggs or the IPs are a same-sex male couple.⁹⁴ Surrogacy gives rise to many issues, namely concerning the human rights of those involved in the process, in particular when we talk about for-profit cross-border surrogacy arrangements.⁹⁵

The difference between traditional surrogacy and gestational surrogacy is in gestational (Host) surrogacy process the surrogate doesn't provide her own egg to achieve the pregnancy. Where as in traditional (straight) surrogacy surrogate provide her own egg to achieve the pregnancy. Both type of surrogacy follow similar method of fertilization. It is possible for a baby born via surrogacy to have six different parents; the genetic mother and father; the social rearing mother and father; and the birth mother (surrogate) and, if she is married, her husband could be considered a father.⁹⁶

Types of surrogacy based on financial benefit with surrogate mother are the following:-

I. NON COMMERCIAL (ALTRUISTIC) SURROGACY

Noncommercial surrogacy or 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. Notably, the distinction between what constitutes "reasonable expenses"⁹⁷ 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. In the U.S. altruistic surrogacy is called "uncompensated surrogacy."⁹⁸

II. COMMERCIAL (COMPENSATED) SURROGACY

Commercial surrogacy refers to surrogacy arrangements in which the surrogate is paid a fee above and beyond reimbursement for "reasonable expenses." In the U.S., commercial surrogacy is most often referred to as "compensated surrogacy,"⁹⁹ When intended parent/s travel overseas to engage a paid surrogate, this is called "international commercial surrogacy," sometimes also described as "reproductive tourism" or "fertility tourism."¹⁰⁰

2.5 JURIDICAL PERSPECTIVES ON SURROGACY

Surrogacy as a concept is viewed from various perspectives. The views of the proponent's, opponents, liberal and feminist will be discussed as follows:

a) THE VIEWS OF THE PROPONENTS:

Others argue that women should not be restricted from engaging in surrogacy arrangements, but rather should be encouraged to make the choice to exercise their rights of reproduction and to contract.¹⁰¹ The pro-surrogacy argument is that pregnancy bonds are of no importance and can be undone without any damage to the woman or child.¹⁰² They submit that there is an eminent need to construe the intention of the parties from the contract, which they had signed¹⁰³. Both parties entered into the agreement with knowledge and precise information on the nature of the contract. The surrogate mother was not forced to do anything that she did not want. Therefore, she should not be allowed to back off from her promise when the baby is later born.

⁹⁴ U.K. & WALES, THE SURROGACY PATHWAY: SURROGACY AND THE LEGAL PROCESS FOR INTENDED PARENTS AND SURROGATES IN ENGLAND AND WALES 6 (2019).

⁹⁵ FILIPA REDONDO, ET AL, SURROGACY: A CLASH OF COMPETING RIGHTS, 2(2017).

⁹⁶ Brenwald & Redeker, *op cit.*, at 646 n.230 (discussing a 1997 California trial court's pronouncement of an ART child as "parentless" because six people were involved in the conception).

⁹⁷ U.K & WALES, SURROGACY GUIDELINES 10-11 (2019).

("In U.K as a guide, the court has generally accepted as reasonable expenses are: the surrogate's loss of earnings; the surrogate's partner/spouse's loss of earnings; additional childcare to support pregnancy and clinic/antenatal visits; help with additional cleaning to support pregnancy; additional food and other supplements; additional classes or therapies to support pregnancy; travel and accommodation before, during and after pregnancy (whilst setting up the surrogacy arrangement, treatment and in recovery); maternity clothes; a modest recovery break for the surrogate and her family; and other incidental expenses that relate to the treatment and pregnancy such as treatment cost, insurance, wills, agency fee & legal cost.").

⁹⁸ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Lawmaking*, Report of the Columbia Law School Sexuality & Gender Law Clinic 5 (2016).

⁹⁹ *Ibid.*

¹⁰⁰ *Id* at 6.

¹⁰¹ Copperman, *Supa* note 75 at 169

¹⁰² Palais Wilson, Request for a CEDAW recommendation against legalising surrogate motherhood 2 (2017).

¹⁰³ Posner, Richard A. (1989) *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, Journal of Contemporary Health Law and Policy, p. 23.

b) THE VIEWS OF THE OPPONENTS:

They are against surrogacy arrangement as it is a form of exploitation of women.¹⁰⁴ Objections towards surrogacy have similar undertones with the objection towards prostitution since it is for financial profits and treat her uterus as mere incubator for someone else's child. It would also leave a very unhealthy impact on the resulting child. Once born, he is already the subject of a legal dispute and should he be unfortunate enough to find out later in his life that the person who had carried him had done so for purely economic reasons would certainly bleak his future.¹⁰⁵

c) THE VIEWS OF THE LIBERAL

They opine that altruistic reasons for surrogacy should be allowed to help alleviate the sufferings of childlessness for some couples. Whatever the justification, some countries like the United States and the United Kingdom have seen it fit to consider surrogacy as a valid form of treatment for infertile couples.¹⁰⁶

d) THE FEMINISTS VIEWS

i. LIBERAL FEMINISTS

In the global marketplace, where women should receive equal treatment to men to participate in the economy, a woman's right to provide surrogacy services and engage in these contracts should be protected and encouraged.¹⁰⁷ They argue that a woman should be allowed to do whatever she wishes with her body. After all, if a man could sell his sperm, why a woman should be stopped from using her reproductive organ for getting a certain fee?¹⁰⁸ She is after all, helping unfortunate couples and not causing any difficulty to anyone but herself. Feminists are faced with a difficult position in determining the status of surrogacy contracts. The view mentioned here is one that is brought by the more liberal sets of feminists. The liberal feminist argument for surrogacy is autonomy and free choice. As long as one does not harm others, one has a wide sphere for doing what one wants. This relates to the intended parents as well as the surrogate mothers. Practice often tends to be slightly different though, because duress and coercion affect the extent to which someone has free choice. This will happen when there are parents who are eager for children and women - anxious to be surrogates. However, once this trade of parental rights is prohibited, black markets will come into existence.

Interestingly, there are very committed feminists on both sides of this issue. According to Radin, feminists who do want to fully legalize surrogacy follow the reasoning that the world is non ideal. Women and men are not equal and for years women have been relegated to a separate sphere at home, away from the market place. This has made women powerless, because the place of power is the marketplace, which is dominated by men. This power has meant the liberation of men. Women want to achieve this as well. They do not want men to tell them what sell and what not to. Whether or not it is morally wrong to engage in child selling and surrogacy should be decided by the women themselves. Many feminists use this reasoning as an argument for why surrogacy should be legal.

As to me A lot of emphasis needs to be given to the experience of the surrogate mothers which depends on a number of factors including their relationship with the Commissioning Parents, their place of stay, relationship with their husbands before and during pregnancy, management of their home and children in their 'absence', emotions felt during pregnancy for the baby, etc. ¹⁰⁹so it didn't do with concept of right to privacy. Surrogacy agreement has led to loss of contact with friends and family members as they did not disclose about it to their extended family members due to social stigma and also they had to relocate or stay in shelter homes during this phase.

ii. CONSERVATIVE FEMINISTS

Conservative set of feminist believes that surrogacy is a clear form of exploitation of women.¹¹⁰ However, on assessment of this view on surrogacy, couples are not on a freelance of their own to seek to alleviate their infertility problem by all means possible through surrogacy but that regard must be had to the established principles of integrity of the institution of marriage.¹¹¹ Thus, neither the contractual agreement of the couples nor the wishes of the parties could be allowed to alter the established principles-preservation

¹⁰⁴ Freeman Micheal. (1989) Is Surrogacy Exploitative? In: Shela McLean's Legal Issues in Reproduction, Cover Publishing Co. Ltd., Aldershort, p. 166. 22

¹⁰⁵ Posner, "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", op cit., p. 23

¹⁰⁶ Ibid

¹⁰⁷ Coopernan *supra* note 75 at 169.

¹⁰⁸ Richard A. *supra* note 102.

¹⁰⁹ DR RANJA KUMARI, SURROGATE MOTHERHOOD. ETHICAL OR COMMERTIAL, 73 (ND).

¹¹⁰ For interesting account of these differences, see Mahoney, Joan. "An Essay on Surrogacy and Feminist Thought", (1988) 16 Law, Medicine and Health Care Journal, p. 81.

¹¹¹ Ibid.

of lineage just to satisfy infertility grief.¹¹² The practice of surrogacy represents a new and unique form of slavery of women. During times of slavery, slave women were often used as birth or genetic mothers and as surrogate mothers nowadays, who possessed no legal rights as mothers.¹¹³

This set of feminists however agree that women have been kept out of the market for a long time, but historically women also have been seen (in their separate sphere at home) and treated like baby producing machines. Allowing baby selling and surrogacy would mean that women remain being treated as anonymous interchangeable breeders and reinforces the objectification and subordination of women. Entering the market in this context is therefore far from liberating, but rather degrading.¹¹⁴

2.6 ETHICAL ISSUES ON SURROGACY

Ethical debate on surrogacy becomes an issue when something goes wrong with the pregnancy. What happens if the baby is born with a defect and the commissioning parents refuse to accept him and neither does the surrogate? If precedence is to be taken from the *Stivers Mallahoff case*, then there can be no denying the fact that surrogacy arrangements are nothing more than contracts for the hiring of a womb and for the purchase of the resulting child.¹¹⁵ It has been suggested that, where the baby is born less than perfect, the parties should go back to the terms of the contract. As in defective goods, similarly a defective baby would have to be kept by the surrogate, as it did not fulfill the determined specifications¹¹⁶.

Some writers suggested that although the child will remain with the surrogate, the commissioning parents must still be responsible for payment of the agreed amount to the surrogate, as the whole set up was initiated by them. But the commissioning parents cannot claim for damages from the surrogate as pregnancy is not a situation which is totally controllable by her.

There has also been suggestion that, should the surrogate mother not want the care and responsibilities of the baby, she should be allowed to offer it for adoption as she did not have the intention to keep in the beginning anyway.

Due to the ethical and moral issues involved in surrogacy arrangements, many still frown at it especially if it has commercial motivation.¹¹⁷ However, according to them, in extreme circumstances, surrogacy should be allowed if purely done for altruistic reasons. This is noticeable in the United Kingdom where commercial surrogacy has been declared illegal but surrogacy is still allowed if it is not done for commercial purposes.¹¹⁸

Therefore, there is a middle view that opines that altruistic reasons for surrogacy should be allowed to help alleviate the sufferings of childlessness for some couples. Whatever be the justification, some countries like United States and the United Kingdom have seen it fit to consider surrogacy as a valid form of treatment for infertile couples¹¹⁹ but in Ethiopia it is prohibited act as far as Food, Medicine and Health Care Administration and Control regulation 299/2013 is concerned.

2.7 THE LEGAL POSITION OF SURROGACY IN OTHER JURISDICTIONS

In different countries the contract of surrogacy legality is different. Surrogacy is increasingly becoming an option for starting a family for people who are unable to conceive a child themselves.

In general terms, countries have adopted four approaches¹²⁰ about the legality of surrogacy motherhood in the world.

(1) Prohibiting all forms of surrogacy;¹²¹

¹¹² Nasirudeen Mohammed, *A Critical Analysos of Artificial Human Reproduction: An Islamic Law prespective* 22 (2016) (Unpublished Master thesis dissertation Ahmad Bello University).

¹¹³ Coren, G. *The Mother Machine*, op cit., p. 219; Shaler, C. (1989) *Birth Power? The Case for Surrogacy*, Yale University Press, New Haven, p. 97.

¹¹⁴ Macphee & Forest, "Surrogacy: Programme Comparisons and Policy Implications," op cit., p. 308.

¹¹⁵ Leon Speroff, et al., *Clinical Gynaecology, Endocrinology and Infertility*, Maryland, Williams & Wilkins, (1989), pp. 611-617

¹¹⁶ *ibid*

¹¹⁷ Nasirudeen Mohammed, *A Critical Analysos of Artificial Human Reproduction: An Islamic Law prespective* 23 (2016) (Unpublished Master thesis dissertation Ahmad Bello University).

¹¹⁸ *Ibid*.

¹¹⁹ Vayena, Effy et al., *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction", Geneva: World Health Organization, (2002), p. ix

¹²⁰ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Lawmaking*, Report of the Columbia Law School Sexuality & Gender Law Clinic 11 (2016).

¹²¹ Countries include: Afghanistan, Albania, Algeria, Austria, Bahrain, Bangladesh, Croatia, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Iceland, Indonesia, Italy, Jordan, Kuwait, Malaysia, Maldives, Malta, Mauritius, Mexico (Queretaro), Moldova, Morocco, Norway, Oman, Portugal, Qatar, Saudi Arabia, Serbia, Singapore, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Taiwan, Tajikistan, Tunisia, Turkey, Turkmenistan, the United Arab Emirates, US(New York, New Jersey, Indiana, and Michigan.), Vietnam and Yemen. Alex, *foot note* 54, at 12.

(2) Leaving surrogacy unregulated;¹²²

(3) Expressly permitting and regulating non-commercial (i.e., altruistic) surrogacy only;¹²³ and

(4) Allowing all types of surrogacy, including commercial surrogacy.¹²⁴

The law with regard to surrogacy varies across jurisdictions but the position in the US and UK, France, Germany, Italy and South Africa is of particular importance and is examined below assuming that Ethiopia may take a legal experience lesson how surrogacy is regulated and how courts decided the surrogacy cases presented to them if Ethiopian policy makers are concerned to the issue of surrogacy as far as regional human right instruments are not the focus of the research.

A. THE LEGAL POSITION IN UNITED STATES

The law with regard to surrogacy in the United States began to develop when the case of Baby M¹²⁵ was brought to court. In that case, the court decided that although the contract must be considered unenforceable, it was in the best interest of the child that the baby be given to the commissioning father and not the surrogate mother¹²⁶. See the judgment of Wilentz C.J. who also commented that if state laws prohibit monetary inducement to adoption then similar prohibitions would make paid surrogacy illegal. This set the judicial tendency in the United States courts whereby, although the surrogacy agreement in itself is considered as void and unenforceable, the custody of the child will usually be awarded to the commissioning parents and not the surrogate.¹²⁷

Judicial decisions from the United States courts tend to take the position of considering the best interest of the child resulting from a surrogacy arrangement rather than delving into the moral and ethical status of the act.¹²⁸ A number of the decision tend to point to a pattern of recognizing the rights of the commissioning parents to the neglect and/or subversion of the interest of the surrogate mother, regardless of her participation in the surrogacy arrangement. The case of Baby M¹²⁹ for example reflected this attitude. In that case, the Supreme Court of New Jersey had invalidated the surrogacy agreement and had held that the best interest of the child was best served if placed in the custody of the commissioning father.

Although the court acknowledges that, the consent given by the surrogate mother at the time of entering into the contract could have been full and informed consent, they merely restored her parental rights but not the custody of the child.

The decision in Baby M¹³⁰ was, however, criticized as being callous and unfeeling towards the surrogate mother. Wilentz C.J. in that case while holding that surrogacy contracts are invalid and unenforceable due to the lack of informed consent on the part of surrogate mother, nevertheless conveniently awarded custody of the child to the commissioning parents instead of the surrogate mother.

The court even suggested that, the surrogate mother cannot be considered to have given full informed consent before she delivers, as at that time the feelings which developed between her and the baby was yet to be formed. As such, for a surrogacy contract to be binding on her, her consent to part with the baby must be considered only after the baby has been born and she has had time to consider her feelings towards the baby thereafter, if she still decides to continue with the surrogacy agreement, only then can the agreement be enforced against her.

Although the intention of the court for awarding the custody of the baby to the commissioning parents is to deter women intending to venture into such commercial transaction from doing so, the end result is severe injustice caused to the surrogate mother. This was commented by a surrogate mother. *"Surrogacy is transferring the pain from one woman to another, from a woman who is in pain from her infertility to a woman who has given up her baby"*¹³¹.

¹²² Countries include: Argentina (legislative amendments to both allow and prohibit surrogacy have been proposed), Belgium (legislative amendments to criminalize commercial surrogacy have been proposed), Brazil, the Czech Republic (legislative amendments to allow altruistic surrogacy have been proposed), Ireland (legislative amendments to prohibit commercial surrogacy have been proposed), Japan, Mexico, Mexico (Mexico City) US (Massachusetts, Tennessee, and Oregon) and Venezuela. Alex et al., *foot note 72*, at 13

¹²³ Countries include: Australia, Belarus, Bulgaria, Canada, Denmark, Greece, Hungary, Latvia, some states in Mexico, the Netherlands, New Zealand, South Africa, South Korea, the United Kingdom, and Peru. Alex et al., *foot note 75*, at 14.

¹²⁴ Countries in this category include: Armenia, China (which recently reversed its prohibition), Georgia, Israel, Kyrgyzstan, Russia, Uganda and Ukraine. US (14 states Ala. Code § 26-17-801 (1984); Cal. Fam. Code §§ 7960-7962 (2013); Colo. Rev. Stat. § 19-4-106 (1987); Del. Code 13 § 8-807 (2013); Fla. Stat. §§ 63.213 (2003), 742.15 (2015); Ill. Comp. Stat. § 750-47 (2005); Me. Rev. Stat. 19-A §1931, 1932 (effective July 2016); Nev. Rev. Stat. §§ 126.500-126.810 (2013); N.H. Rev. Stat. § 168-B (2014); Tex. Code § 160 (2001); Utah Code §§ 78B-15-801, 78B-15-809 (2008); Va. Code §§ 20-156–20-165(1991); Wash. Rev. Code §§ 26.26.210–26.26.260 (1989).) *Id.* at 9, 15.

¹²⁵ In the matter of Baby M (1988) 109 N.J., 396, 537 A.2d 1227.

¹²⁶ See comments on this issue in Charo, R. A. *"United States: Surrogacy"* as edited in Mclean, Sheila (1992) Law Reform and Human Reproduction, Dartmouth, Aldershot, p. 227.

¹²⁷ Nasirudeen, *supra note 89* at 24

¹²⁸ *Ibid.*

¹²⁹ In the matter of Baby M (1988) 109 N.J., 396, 537 A.2d 1227.

¹³⁰ *Ibid.*

¹³¹ Macphee & Forest, *"Surrogacy: Programme Comparisons and Policy Implications,"* op cit., p. 308.

To further illustrate the nonchalant attitude towards the plights of the surrogates and the general willingness to accept surrogacy arrangements as a valid subject matter for commercial transaction, it would be interesting to look into Stivers Mallahoff case¹³².

In that case Mr Alexander Mallahoff of Queens, New York had contracted with Mrs. Judy Stivers to have her artificially inseminated with his sperm and the child to be delivered to him after it was born. In January, 1983, a baby boy was born with mental retardation¹³³. Both parties rejected the unfortunate baby and announced that it would be put up for adoption. While in the hospital, the baby developed infection and it was reported to Mr. Malakoff, who commissioned for the pregnancy had instructed the hospital not to treat the baby¹³⁴.

Treatment to the baby was however, given at the initiative of the hospital after obtaining the necessary court order.

It was further contended by the Stivers that not, only did Mallahoff refuse to pay her/them, but he had also asked Mrs. Stivers to “start over and make a new one for him”¹³⁵. Clearly the child was treated like defective merchandise that did not fit the specification for the goods, could therefore be replaceable.

Regardless of the outcome of the case, the issue to be pointed out here is that if the practice of surrogacy was to be accepted as a form of treatment for infertility, no matter how far the denial goes, the child remains to be perceived as the subject matter of the contract.

According to some American writers, this is just a risk that the contracting parties would have to take, as in the risk of surrogate mothers changing their minds when the child is born¹³⁶. The case then took an unexpected turn when Mr. Mallahoff was proven not be the genetic father of the child. Apparently, although abstaining from having sexual intercourse with her husband after the treatment, she had not done so just before the treatment was carried out on her. The Stivers then decided to keep the child.

To date, there is no federal legislation in America governing surrogacy arrangements and not all states have specific legislations governing surrogacy arrangements. Thus, the legal position in America on surrogacy is largely dependent on the states. Some states have specific legislation making commercial surrogacy unenforceable for example Indiana, Kentucky, Louisiana, Michigan, Nebraska, and Utah¹³⁷. Whilst other states such as New Jersey tend to rely on existing legislations which govern the adoption cases. One example of such laws is the prohibition of baby selling in adoption cases and the best interest of the child when deciding to award custody.

B. THE LEGAL POSITION IN UNITED KINGDOM

Initial reaction to surrogacy opened in 1978 when the **case of A v C** was brought to court. However, legislation only came into being approximately ten years later, after the baby cotton case. In 1985, the Surrogacy Arrangement Act was enacted and later on in 1990, the Human Fertilization and Embryology Act came into being.

These legislations make the surrogacy arrangement unlawful and any such contract is considered as void. The effect of considering a contract as void is that the court will take the position as if the contract had never happened. As a result, the commissioning parents will not get their baby and surrogate will not get her payment. The resulting child will be regarded as the child of the surrogate and she will be entitled to keep it. Therefore, this is the direct opposite of the legal situation in the United State.

Commercial surrogacy solely for material gain other than for the attainment of infertility relief has also been declared as unlawful under the Surrogacy Arrangement Act, 1985. However, it only awards criminal punishment to agencies or middlemen who take profit from the surrogacy transactions. No similar laws exist in the United States. The surrogate mother and commissioning parents however will not be punished for any offence. Although the intention of the legislation is to curb surrogacy arrangement, the leniency given to the commissioning parents and surrogate is a matter to be criticized.

It is submitted that, in order to ensure childless couples do not resort to this practice some form of deterrence must be provided and punitive punishment could be one way of doing so. As a result of the laxity of the treatment towards the commissioning parents and the surrogate mother, non-commercial is still being practiced in the United Kingdom. The Surrogacy Arrangement Act 1985, for example is directed towards commercial agencies which recruit surrogate mothers¹³⁸.

The Human Fertilization and Embryology Act, 1990 in turn tries to regulate altruistic surrogacy whereby the Act provides the procedure to be taken by the commissioning parents in order to ensure that the resulting child is legally placed with them after he is born.

¹³² Corea, G. *The Mother Machine*, op cit., p. 219; Shaler, C. (1989) *Birth Power? The Case for Surrogacy*, Yale University Press, New Haven, p. 97.

¹³³ This was indicated by the baby’s small head

¹³⁴ See supra note 69

¹³⁵ Ibid.

¹³⁶ Stumpf, “*Redefining Motherhood*”, Op cit, p. 204.

¹³⁷ Charo, R. Alta. (1992) “*United State: Surrogacy*” in Shiela MC Lean’s *Law Reform and Human Reproduction*, Dart Mouth Publishing Company, Aldershot, p. 231

¹³⁸ Section 2(1) and (4) of the 1985 Act.

Accordingly, the child must be registered as the child of the commissioning parent, and if she is married, her husband or partner will be treated as the father. Once this has been done and once a parental order has been granted the commissioning parent under section 30 of the Human Fertilization and Embryology Act 1990, the registrar general will make a separate parental order register, registering the child and cross referencing to the entry in the existing register of birth¹³⁹. It is therefore, not possible to “pretend” that the resulting child is the “natural” child of the commissioning parents. The record will stand and at the age of eighteen, the child may be supplied with information enabling him or her to obtain information pertaining to their history.

C. THE LEGAL POSITION IN FRANCE

In France, surrogacy contracts are void¹⁴⁰ and prohibited and Surrogacy act is punishable with significant fines and imprisonment.¹⁴¹ In some States surrogacy arrangements are expressly prohibited by law, usually on the basis that such agreements violate the surrogate mothers and child’s human dignity, reducing both to mere objects of contracts.¹⁴² However, in 2015 the highest civil court decided to recognize surrogate children born abroad as French citizens as long as they have one French parent.¹⁴³ The number of parents who have tried through various mechanisms to circumvent the prohibition against surrogacy has given rise to significant debates and proposed reforms by French authorities.¹⁴⁴

D. THE LEGAL POSITION IN GERMANY

Similarly, in Germany surrogacy contracts are void and prohibited. The main reason for prohibiting surrogacy in Germany is the perceived violation of the human dignity of the child and the surrogate by being reduced to objects of contracts. In Germany criminal penalties reached up to three year’s imprisonment or a fine. However, in 2014 the German Federal Court of Justice recognized the parental rights of a German same-sex couples who had a child through a surrogate in California, utilizing full surrogacy with the genetic material of one of the intended parents. The court expressly left open, however, questions of full surrogacy with no biological link to the intended parent/s, as well as cases of partial surrogacy.¹⁴⁵

E. THE LEGAL POSITION IN ITALY

In Italy, surrogacy is also prohibited and penalized three months to two years in jail and/or €600,000 to €1 million fine for anyone who organizes, promotes, or advertises donation in Italy.¹⁴⁶ An Italian court also recently ordered that a child born of surrogacy in Russia be taken away from his Italian parents and placed in a foster home.¹⁴⁷

However, in 2015, the European Court of Human Rights ruled that this decision violated Article 8 of the European Convention on Human Rights which provides a right to respect for one’s private and family life subject to certain restrictions that are “in accordance with law” and “necessary in a democratic society.”¹⁴⁸ In these types of States we can distinguish two different kinds of regulatory approaches: one where there is a pre-approval or post-approval system to engage in surrogacy; and other where the intended parents apply for the transfer of legal parentage after the child has been born. In the first type, the intending parents and the future surrogate mother have to present their arrangement to a designated body that verifies that the conditions of the legislation have been met and approves it prior to or after any medical treatment.¹⁴⁹

Thus, in some States, parental status can be transferred pre or postnatal to the intended parents without bureaucracy. In the second type, we find a variation in whether or not the birth certificate mentions the surrogate at all or is there a mandatory waiting period for the gestational mother in order for her to waive her parental rights over the child.¹⁵⁰

¹³⁹ 35 Lee, R. G. and Morgan, D. (2001) *Human Fertilisation and Embryology: Regulating the Reproductive Revolution*, Blackstone Press Ltd, London, p. 200

¹⁴⁰ FRENCH CIVIL CODE art. 16-17

¹⁴¹ FRENCH PENAL CODE, art. 227-13, art. 511-24. [There are also severe penalties for intermediaries such as agencies, clinics, and doctors who assist:]

¹⁴² Convention on Human Rights and Biomedicine, art.21(1997).

¹⁴³ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Lawmaking*, Report of the Columbia Law School Sexuality & Gender Law Clinic 12 (2016).

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ ITALY LAW 40.

¹⁴⁷ EUROPEAN COURT OF HUMAN RIGHTS, Second Section: Case of Paradiso and Campanelli v. Italy (Application No. 25458/12) (2015).

¹⁴⁸ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Law making*, Report of the Columbia Law School Sexuality & Gender Law Clinic 13 (2016).

¹⁴⁹ Permanent Bureau of HCCH, Preliminary Document No. 10, idem, page 12.

¹⁵⁰ RINTAMO, Sara, “Regulation of Cross-Border Surrogacy in Light of the European Convention on Human Rights & Domestic and the European Court of Human Rights Case Law”, Master Thesis, Faculty of Law, University of Helsinki, April, 2016, page 21.

F. THE LEGAL POSITION IN SOUTH AFRICA

In South Africa, both full and partial altruistic surrogacy is legal but compensation is not allowed except for “reasonable expenses.”¹⁵¹ There are a number of legal requirements relating to the surrogate including that she be a South African citizen and have one biological child living with her. In addition at least one of the intended parents must be a permanent resident of South Africa.¹⁵²

SUMMARY

Here one can conclude that the experience of US, UK, France, Germany, Italy and South Africa is dubious about this technology born issue called surrogacy motherhood. Though this countries prohibit surrogacy due to the rights of the born child there courts give a verdict, in contradictory way of the legal stand of the countries, the surrogacy’s motherhood is legal in the country.

CHAPTER THREE

3. SURROGACY AND INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Children, surrogates, and intended parent(s), as well as states and intermediaries, have distinct and often competing interests that must be considered and balanced when assessing the human rights implications of the practice of surrogacy.¹⁵³ There are currently no international legal instruments directly addressing surrogacy. However, experts, judicial entities and interpretive treaty bodies have addressed the practice of surrogacy and assisted reproductive technologies more generally within the context of the rights and interests expressed under international law.¹⁵⁴

This chapter tries to analyze the legal protection of international instruments ratified by Ethiopia against surrogacy as threat to reproductive human rights of women including their child. Among the relevant instruments are the UDHR, ICCPR, Tehran Declaration, ICESCR, the CEDAW, the UN convention on Slavery, the CRC, optional protocol to the CRC, additional protocol to the UN Convention against Transnational organized crime and the Convention on Inter country Adoption. These instruments address various rights relevant to the surrogate, including reproductive rights and the right to fair working conditions, and various rights relevant to the child born through surrogacy, including the best interest of the child principle and the right to an identity and nationality. Instruments also address rights and interests relevant to intended parent(s) in the surrogacy process, such as the right to found a family and to do so without discrimination.¹⁵⁵

The practice of surrogacy is recent as is its treatment under international law. It is unsurprising; therefore, that there has been a difference of opinion on the manner in which it invokes or infringes upon international human rights.¹⁵⁶

The position of Ethiopia being a party to an international treaty is one thing, and application of the treaty is another thing as it has to cross the hurdle of the Constitution which is largely predicated on federal structure reflecting unity in diversity. In Ethiopia this is why all international agreements ratified by Ethiopia are an integral part of the law of the land.¹⁵⁷ The fundamental rights and freedoms, like reproductive rights of women, specified in FDRE constitution Chapter three shall be interpreted in a manner conforming to the principles of the UDHR, International Covenants on Human Rights and International instruments adopted by Ethiopia.¹⁵⁸ Where no reservation was entered by Ethiopia with respect to any of the following mentioned international instruments, thus making it duty bound to observe them.

Reproductive health is comprehensively defined in Cairo International Conference on Population and Development Program of Action. In the conference, State parties to Convention in Elimination of Discrimination against Women committed themselves to further the right to reproductive health and defined reproductive health as “*a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its function and process. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capacity to reproduce and freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable method of family planning of their choice, as well as other method of their choice for regulation of fertility which are not against the law and the right of access to appropriate health*

¹⁵¹ Id. at 15.

¹⁵² Ibid.

¹⁵³ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY,15 (2019).

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ ETH CONST art.9(4).

¹⁵⁸ ETH CONST ART.13(2).

care service that will enable women to go safely through pregnancy and child birth and provide couples with the best chance of having a healthy infant.”

The above definition is very important as it disclose the wrongness of defining right to reproductive health as freedom from reproductive diseases. Right to reproductive health does not mean freedom from reproductive disease; it means ensuring that people have access to acceptable and affordable reproductive care that permits them to avoid or treat productive health.

Reproductive health rights the rights are some understood reproductive health rights as rights of both women and men, but most frequently the rights are advanced as women’s rights.

Different international, regional and national Constitutions recognized reproductive health right of women as a human right realizing the fact that women cannot experience the overall enjoyment of the right to health unless their reproductive health right is respected, fulfilled and protected.¹⁵⁹

3.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS

Indeed, in the UDHR the protection of human dignity¹⁶⁰ is considered a key goal to be pursued within the framework of both state sovereignty and international relations, thus the legitimacy of all exchange practices involving a human being, whether they be of a commercial or altruistic nature, is ruled out that surrogate motherhood be prohibited as a practice that is incompatible with human rights and the dignity of women.¹⁶¹

Surrogate motherhood consists in the specific appropriation of women's reproductive abilities; in this connection it is important to acknowledge the biological difference between women and men.¹⁶² Surrogate motherhood leads to the exerting of strict control over all aspects of women's lives during pregnancy and endangers their physical and mental health for the sole purpose of fulfilling the desire of third parties.¹⁶³

In this respect one should not be deceived by the rhetorical arguments on individual freedom and the 'wonderful gift of life'.¹⁶⁴ Surrogate motherhood leads to an actual objectification of the mother and the child because it consciously creates a situation of relinquishment and abandonment. The wish to become a father or mother cannot be elevated to the status of a client's individual right to control a woman's body for the purpose of gaining possession of the life of her child.¹⁶⁵

Everyone has the right to life, liberty and security of person¹⁶⁶ and no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.¹⁶⁷

"In surrogacy the term 'gestational carrier' is deliberately reductive, since it suggests that pregnancy may be merely reduced to the functions of the uterus as a container used to fulfill the desires of others. Leaving aside the fact that the 'gestational carrier' offers not just her uterus, but her whole body and her psyche, to others in order to 'manufacture a child' meant to be relinquished at birth, there is a glaring contradiction here between the advances in medical research that show the bonds and the biological and affective interaction between mother and fetus and the use of a technique that denies their existence."¹⁶⁸

Surrogacy endangers the physical and mental health of women, as complications may arise during pregnancy and childbirth that may lead to possible impairment or even death. The practice of surrogate motherhood (euphemistically called third-party parenting) entails a number of obligations and constraints which are veritable attacks on the private life and self determination of women: their bodies and their health are offered to clients and specialized agencies.¹⁶⁹ In many cases a 'surrogate' mother is not even consulted on decisions affecting her health. In those cases in which these decisions formally rest with her, she *de facto* loses control over them due to the economic consequences envisaged in the agreement if her actions run counter to the interests of the clients.¹⁷⁰ This has led to tragic human situations and legally inextricable cases, including the most evident one of a termination of pregnancy possibly imposed by third parties. In many countries where surrogacy is legal, the decision to terminate a pregnancy rests with the pregnant

¹⁵⁹ MEDHANIT ADAMU & SOFANIT MEKONNEN, GENDER AND THE LAW TEACHING MATERIAL 129(2009).

¹⁶⁰ UDHR art.1

¹⁶¹ Palais Wilson, Request for a CEDAW recommendation against legalising surrogate motherhood 1 (2017).

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Id. at 2

¹⁶⁶ UDHR art 3

¹⁶⁷ UDHR art 4

¹⁶⁸ Palais Wilson, Request for a CEDAW recommendation against legalising surrogate motherhood 2 (2017).

¹⁶⁹ Ibid

¹⁷⁰ Ibid

woman alone. In surrogacy, if continuing the pregnancy threatens her health or in case of foetal malformations, the mother loses the power to decide.

Contrary to what has been said and done, this is a new practice driven by the development of new reproductive technologies. Surrogate motherhood *per se* is not a reproductive technique, but a social practice that uses techniques originally designed for other purposes; it is driven by the rapid growth of a huge market in human reproduction that violates the freedom, dignity and physical integrity of women.¹⁷¹ Specialized agencies recruit surrogates and manage an international network of clients earning huge sums of money.

The UDHR which identifies citizenship as a fundamental right and states that everyone has the right to a nationality¹⁷² however surrogacy contravene the right to nationality because it paves away to become stateless.

3.2 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) is the second international treaty with provisions that can provide guidance protection of surrogate women. In 1966, the United Nations adopted ICCPR, which acknowledged the most basic human rights, such as the right to life for all humans. The treaty was entered into force in 1976. ICCPR explains that all individuals have the fundamental “right of self-determination” and this right guarantees individuals the ability to “freely determine their political status and freely pursue their economic, social, and cultural development.”¹⁷³ Furthermore, ICCPR protects individuals’ rights and freedoms by providing an effective remedy to violations.¹⁷⁴ Additionally, ICCPR prohibits the performance of compulsory labor by granting individuals the right to contract and “dispose of their natural wealth and resources based upon the principle of mutual benefit.”¹⁷⁵

Like CEDAW, ICCPR establishes a method for nations “to submit reports on the measures they have adopted which give effect to the rights recognized [in ICCPR] and on the progress made in the enjoyment of those rights.”¹⁷⁶ The reporting procedure holds countries accountable for their efforts, or lack thereof, to protect civil and political rights of all human beings. The reporting procedure also provides a way for countries to receive input from the Secretary-General of the United Nations and the Committee regarding how to address factors and difficulties these countries face that affect the implementation of the provisions in ICCPR.¹⁷⁷ ICCPR’s provisions, if mirrored in an international treaty addressing surrogacy, can be utilized by parties to surrogacy agreements in the event that the surrogate woman’s rights are infringed.¹⁷⁸ The Convention requires mutual benefit for agreements and the women cannot be forced into using their bodies to serve as surrogates.¹⁷⁹ At the same time, wo-for forming an international surrogacy treaty that would ensure the men can use ICCPR to demonstrate their right to “dispose of there . . . resources” by using the resource of their bodies to enter into these international commercial surrogacy arrangements.¹⁸⁰ Furthermore, with the right of self-determination established, women can use ICCPR to demonstrate to their home countries the need to allow women to serve as surrogates and “freely pursue their economic, social, and cultural development” through these contracts.¹⁸¹

3.3 TEHERAN DECLARATION

The idea of reproductive health rights as part of human rights was first discussed at the United Nation International Conference on Human Rights in Teheran, 1968. The sixteen Article of Teheran Proclamations recognized reproductive right as a subset of human right and states that parents have a basic human right to determine freely and responsibly the number and the spacing of their children.

3.4 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) is the third international treaty that creators of an international treaty on surrogacy should reference to enforce and protect surrogate mothers’ rights.¹⁸² Established in 1966, but not given force until 1976, ICESCR, for the 160 countries that ratified it, mainly serves as a “globally accepted international instrument

¹⁷¹ Id. at 3.

¹⁷² UDHR art. 15.

¹⁷³ Iccpr art 1.

¹⁷⁴ Iccpr art 2(3)

¹⁷⁵ Iccpr art 1(2)

¹⁷⁶ Iccpr art 40(3)

¹⁷⁷ Iccpr art 40(2)

¹⁷⁸ Cooperman, supra note 75 at 176

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid., art1(1)

¹⁸² Cooperman, supra note 75 at 177

on workers' rights.¹⁸³ The Covenant orders countries to acknowledge "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing and to the continuous improvement of living conditions."¹⁸⁴ This right to safe working and living conditions, as well as all other economic, social, and cultural rights, extends to both women and men.¹⁸⁵

ICESCR's provisions serve as an important resource to protect women who serve as surrogates if their rights are disregarded by the other parties to the contract or by the countries that are involved in the process.¹⁸⁶ ICESCR enforces women's "right to work, which includes the right . . . to the opportunity to gain [her] living by work which [s]he freely chooses or accepts."¹⁸⁷ If a woman decides to become a surrogate carrier, she is entitled to full compensation promised to her because acting as a surrogate carrier is a way in which she can gain her living.¹⁸⁸

Additionally, this Covenant entitles women to "fair wages and equal remuneration¹⁸⁹ for work" as well as any working conditions that she is guaranteed.¹⁹⁰ This provision in ICESCR provides guidance to enforce any promised section in a surrogacy contract that details the surrogate mother's working conditions and the fair compensation that she is owed.¹⁹¹

ICESCR allows states to furnish reports regarding any "factors and difficulties affecting the degree of fulfillment of obligations" of the Covenant.¹⁹² By using the report protocols, the Covenant provides an opportunity for countries to protect surrogate mothers from exploitation, while at the same time permitting commercial surrogacy agreements that affect their citizens.¹⁹³ Guidance from the committee set up by the Covenant presents a method of oversight during surrogacy processes.¹⁹⁴ Overall, the provisions in ICESCR can fortify individuals' rights involved with this economic process.¹⁹⁵

3.5 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

CEDAW is the first international treaty with provisions that can provide guidance for forming an international surrogacy treaty to protect the rights of surrogate women.¹⁹⁶ In the preamble of the CEDAW Convention great importance is attached to the elimination of all economic, political and especially social and cultural obstacles hampering equality between women and men. In addition, the fundamental value of gender equality is recognized, which thus appears to be superior even to the self-determination of different cultures and the principle of cultural relativism. In 1979, the United Nations adopted CEDAW, which was created in order to protect the cultural, economic, and social rights of women. Specifically, CEDAW serves as an international bill of women's rights.¹⁹⁷

The CEDAW reference to the physical and psychological protection of women, as recognized in the UDHR, is of crucial importance. Offering to others a surrogate mother's entire physical and mental life is an act that restricts the freedom of women - unprecedented since the abolition of slavery.¹⁹⁸

State parties to CEDAW affirmed the right to family planning and maternity health and have accepted the legally binding obligation to protect these rights and safeguard women's reproductive right.¹⁹⁹ So we can understand that legalizing surrogacy as women reproductive practice would be a defeat for women health right and for International law, especially CEDAW.

In addition, third-party parenting runs counter to many international legal instruments for the protection of women reproductive human rights. Surrogacy is against CEDAW. Indeed, as CEDAW consists in the specific appropriation of women's reproductive

¹⁸³ Ibid.

¹⁸⁴ Icescr art.11

¹⁸⁵ Icescr art 3

¹⁸⁶ Cooperman, supra note 75 at 177

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Id at 178., "The term 'remuneration' goes beyond the more restricted notion of 'wage' or 'salary' to include additional direct or indirect allowances in cash or in kind that should be of a fair and reasonable amount paid by the employer to the employee, such as grants, contributions to health insurance, housing and food allowances, and on-site affordable childcare facilities." Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the Right to just and favorable conditions of work*, ESCR-NET, <https://www.escr-net.org/resources/general-comment-no-23-2016-right-just-and-favorable-conditions-work> (last visited Feb. 28, 2018).

¹⁹⁰ Icescr art 7(1) i

¹⁹¹ Icescr art. 6(1).

¹⁹² ICESCR art 17

¹⁹³ Cooperman supra not 75 at 178

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Cooperman supra note 75 at 173

¹⁹⁷ Ibid.

¹⁹⁸ Palais Wilson, Request for a CEDAW recommendation against legalising surrogate motherhood 2 (2017).

¹⁹⁹ CEDAW art. 11(1) F & 11(2).

abilities, surrogacy is profoundly discriminatory and runs counter to the goal of women's full development and their advancement towards the full enjoyment of fundamental human rights.²⁰⁰ Similarly, surrogacy violates CEDAW which envisages the suppression of trafficking in women.²⁰¹ Indeed exploiting the economic and/or social weakness of some women to induce them to offer their reproductive abilities to the richest in exchange for money is nothing but baby selling trade.²⁰²

Regardless of the set-up of each country's social and economic systems, CEDAW mandates mutual cooperation among all countries.²⁰³ CEDAW also establishes a committee that monitors the implementation of the provisions of the treaty.²⁰⁴ The committee enforces the treaty's mandate to eliminate discrimination against women by collecting reports from countries, conducting its own investigations, and making general recommendations to countries.²⁰⁵

CEDAW's provisions are useful in both protecting against exploitation of surrogate mothers and in upholding the surrogate mothers' rights.²⁰⁶ First, CEDAW explicitly mandates countries to suppress all forms of exploitation and traffic of women.²⁰⁷ CEDAW also addresses countries' concern that surrogacy leads to exploitation of women, and especially the exploitation of rural or poor woman who tend to have less bargaining power.²⁰⁸ CEDAW guides countries to examine the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families.²⁰⁹ Countries such as India, which are concerned that rural women would constantly "rent out their wombs" and serve as surrogates, should regulate surrogacy in a way that does not completely eliminate it as a possibility for women to make a living.²¹⁰ CEDAW supports the right of rural and poor women to serve as surrogates because this is an important way for these women to contribute to the economic survival of their families.²¹¹ Additionally, CEDAW acknowledges that the right to work [is] an inalienable right of all human beings.²¹² Women are guaranteed the right to free choice of profession and employment,²¹³ which would include any choice a woman makes to serve as a surrogate carrier.

Furthermore, CEDAW serves as a regulatory framework that also enables women to access their contractual and economic rights.²¹⁴ CEDAW mandates those who adopt the treaty to give women equal rights to conclude contracts.²¹⁵ Additionally, CEDAW provides a method for countries to protect women from the potential of abuse in exercising their rights to work. CEDAW demands that all contracts with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.²¹⁶

Overall, these provisions of CEDAW can provide the Parentage/Surrogacy Committee guidance to address potential conflicts such as: (1) if intended parents breach any provision in the international surrogacy contract, (2) if the woman serving as the surrogacy at risk of being exploited, or (3) if a country uses its police powers to take away or limit the rights of the women to serve as surrogates.²¹⁷

3.6 UNITED NATION CONVENTION ON SLAVERY

As the slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold

²⁰⁰ CEDAW art.3

²⁰¹ CEDAW art. 6

²⁰²Johnson v. Calvert 85,1993 Ca.S.Ct. "In 1993 the California Supreme Court issued a landmark ruling declaring surrogacy contracts legal in California. The case, *Johnson v. Calvert 85*, involved a surrogacy contract between a married couple, Mark Calvert and Crispina Calvert, and Anna L. Johnson. Crispina Calvert was unable to bear children. In 1990 the Calverts and Johnson signed a surrogacy contract in which the Calverts agreed to pay Johnson \$10,000 to carry an embryo created from the Calverts' ovum and sperm. Disagreements ensued, and later that year, Johnson became the first surrogate mother to seek custody of a child to whom she was not genetically related. After the child's birth, the Calverts were awarded custody. Johnson appealed the decision. The state Supreme Court finally upheld the legality of surrogacy contracts under both the state and federal constitutions. The court held such contracts valid whether or not the surrogate mother provides the egg. The U.S. Supreme Court declined to hear Johnson's appeal.

²⁰³ CEDAW preamble.

²⁰⁴ CEDAW art17(1).

²⁰⁵ CEDAW art 18(1).

²⁰⁶ Cooperman, supranote 75 at 174.

²⁰⁷ CEDAW art 6

²⁰⁸ CEDAW art 14(1).

²⁰⁹ Ibid.

²¹⁰ Cooperman, supra note 75 at 175

²¹¹ CEDAW art. 14(1)

²¹² CEDAW art. 11(1) (a)

²¹³ CEDAW art. 11(1)(C).

²¹⁴ CEDAW art. 15

²¹⁵ CEDAW art. 15(2)

²¹⁶ CEDAW art. 15(3).

²¹⁷ Cooperman supra note 75 at 175

or exchanged, and, in general, every act of trade or transport in slaves²¹⁸ surrogacy agreement makes the child saleable good which is related with the prohibition of exchange of humans in the convention.

Ethiopia as a party to this law, surrogacy has no specified punishment in the criminal law, do have obligation to make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions laws and regulations which they may enact with a view to the application of the provisions of this Convention.²¹⁹ The convention recognize that recourse to compulsory or forced labour may have grave consequences²²⁰ surrogate mother hood is another form of forced labour because the contract is made between two economically imbalanced parties.

To sum up surrogacy also contravenes the UN Convention on Slavery as it defines slavery as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, in the case at hand the acquisition of a right of use on the person and body of a woman in order to gain possession of the child she is carrying.²²¹

3.7 INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD

International CRC the right to know and be cared for by his or her parents²²², that aims at ensuring that a child shall not be separated by his or her parents against their will²²³ and envisaging that measures be taken to prevent the abduction of, the sale of or trafficking in children for any purpose or in any form.²²⁴

Moreover, with regard to the existing cases of surrogacy, a procedure should be developed for the recognition of the newborn in compliance with the provisions on the rights of the child, especially with article of the CRC²²⁵ that should be interpreted as an article giving the child the right to know the mother who has brought him or her into the world after carrying him/her inside her womb for nine months and where possible to be cared for by her.

These distinctive aspects of surrogacy raise concerns about the co modification of children, worries that children may be left stateless if their parentage cannot be determined or will not be recognized by either the state in which they were born or in which they reside with their intended parent/s, questions of how a child's right to parentage should relate to the child's biological background, and uncertainty as to how the "best interest of the child" standard should apply to disputes over parentage, rather than custody.²²⁶

European courts have interpreted international human rights law on the rights of children to be applicable to the surrogacy context.²²⁷ For instance, the UN 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 his or her parents.²²⁸

Particular concern is to be applied where a child would otherwise be left stateless.²²⁹ The child's right to know his or her identity includes knowledge of nationality, name, and family relations, and any deprivation of this right should be speedily re-established.²³⁰ The CRC also specifies that "the best interests of the child shall be a primary consideration" in all actions concerning children taking place in courts, administrative authorities, and legislative bodies.²³¹

3.8 THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

The Optional Protocol to the CRC, concerning the sale of children, child prostitution and child pornography which defines the sale of children as any act or transaction whereby a child is transferred by a person to another for remuneration or any other consideration²³² and demanding that the sale of children or the act of improperly inducing consent for the adoption of a child in violation of applicable international legal instruments on adoption be considered a criminal offence²³³ as far as surrogacy is concerned.

²¹⁸ SLAVERY CONVENTION, Signed at Geneva on 25 September 1926 art. 1(2).

²¹⁹ SLAVERY CONVENTION art. 6 & art.7

²²⁰ SLAVERY CONVENTION art. 5.

²²¹ SLAVERY CONVENTION art. 1(1).

²²² CRC art. 7 § 1

²²³ CRC art. 9 § 1

²²⁴ CRC art. 35

²²⁵ CRC art. 7 § 1

²²⁶ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Lawmaking* Report of the Columbia Law School Sexuality & Gender Law Clinic 18 (2016).

²²⁷ Ibid.

²²⁸ CRC, art. 7(1).

²²⁹ CRC art. 7(2).

²³⁰ CRC art. 8.

²³¹ CRC art. 3(1).

²³² The Optional Protocol to the Convention on the Rights of the Children on the sale of children, child prostitution and child pornography art. 2(a).

²³³ Ibid art. 3

To sum up surrogacy contravenes the Optional Protocol to the CRC, on the sale of children, child prostitution and child pornography; surrogacy amounts to sale of children like ordinary trade transaction rather than guarantee the protection of the child.

3.9 THE ADDITIONAL PROTOCOL TO THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME

The Additional Protocol to the United Nations Convention against Transnational Organised Crime aimed at preventing, suppressing and punishing human trafficking, especially trafficking in people and children which defines trafficking in persons as the recruitment, transportation, transfer or harbouring or receipt of persons especially by means of the threat of use of deception, of the abuse of power or of a position of vulnerability for the purpose of exploitation.²³⁴ As per this protocol surrogacy is act of abuse of power especially vulnerable poor women. Hence surrogacy contravenes the Additional Protocol to the United Nations Convention against Transnational Organised Crime.

3.10 THE CONVENTION ON INTERCOUNTRY ADOPTION

The Convention on Intercountry Adoption (especially Article 4 on the absence of agreements before the birth of the child and the absence of compensation of any kind, as well as the general spirit of the Convention)²³⁵, This is not merely a theoretical concern: in 2014, the International Forum on Intercountry Adoption and Global Surrogacy cited instances of such statelessness.²³⁶ The Forum pointed to the connection between these instances and the lack of regulation and oversight in the surrogacy industry.²³⁷

David samolin points to anti-slavery and anti-trafficking norms and international prohibitions on selling children for adoption, all of which have no exception for “pre-conception” or “pre-transfer” contracts²³⁸

SUMMARY

To sum up since there are still no international legal provisions on surrogacy yet, it is necessary to refer to these treaties applicable to comparable situations. A review of surrogacy under international law shows that this practice is contradictory to current standards. In addition, third-party parenting runs contradict too many international legal instruments for the protection of human rights. Although independent comprehensive international regulation is urgently required in order to preserve the rights and welfare of the different parties to international surrogacy agreements, the above discussed, existing international treaties which Ethiopia is a party provide guidance for the creation of a new international treaty on surrogacy that specifically addresses the role of surrogate women and the child.

²³⁴ The Additional Protocol to the United Nations Convention against Transnational Organised Crime art. 3(a).

²³⁵ The Convention on Intercountry Adoption art.4

²³⁶ Brianne Richards, “*Can I take the Normal One?*” *Unregulated Commercial Surrogacy and Child Abandonment*, 44 HOFSTRA L. REV. 201, 223 (2015).

²³⁷ *Id.* at 223

²³⁸ David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children*, 43 PEPP. L. REV. 265, 316 (2016).

CHAPTER FOUR

4. THE LEGAL POSITION OF SURROGACY & REPRODUCTIVE RIGHTS OF WOMEN IN ETHIOPIAN LAWS

4.1 FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA CONSTITUTION

The FDRE Constitution gives a protection to reproductive right to both couples because family is the natural and fundamental basis of society and hence family is entitled to protection from society and the state.²³⁹ Men and women, without any distinction as to race, nation, nationality or religion, who have attained marriageable age as defined by law, have the right to marry and found a family. They have equal rights while entering into, during marriage and at the time of divorce. Laws shall be enacted to ensure the protection of rights and interests of children at the time of divorce.²⁴⁰

To prevent harm arising from pregnancy and childbirth and in order to safeguard their health, women have the right of access to family planning education, information and capacity.²⁴¹ The State shall enforce the right of women to eliminate the influences of harmful customs and Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.²⁴² Surrogacy endangers the physical and mental health of women, as complications may arise during pregnancy and childbirth that may lead to possible impairment or even death. The state, it is said, is a party to every marriage. This means simply that the state is interested in the well ordered regulation of the family organization of the persons within its borders.²⁴³

Despite major strides to improve the health of the population in the last one and half decades, Ethiopia's population still face a high rate of morbidity and mortality and the health status remains relatively poor.²⁴⁴ Vital health indicators from the DHS 2005 show a life expectancy of 54 years (53.4 years for male and 55.4 for female)²⁴⁵ so allowing surrogacy in Ethiopia paves the way to increase morbidity and mortality of women and children.

This also violates the obligation of the government incorporated in FDRE Constitution as State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.²⁴⁶ From this provision the FDRE Constitution gives legal protection against surrogacy as threat to reproductive human rights because surrogacy is harmful, oppressive and exploitive practice to women reproductive right including the child right. Additionally from legal point of view surrogacy motherhood is illegal because it is against the dignity of surrogate women and the child as the agreement of surrogacy make women ordinary exchange commodities.²⁴⁷ Surrogacy paves a way to divorce the marriage so the Ethiopian government didn't give protection to surrogacy motherhood because federal family code does not recognize surrogacy as a lawful natural method of procreation. It is evident that "one American woman told of how her fiancée left her for another woman. The husband of another surrogate mother would not look at her after she was inseminated."²⁴⁸

4.2 ETHIOPIAN CONTRACT LAW

Ethiopian civil code, in the book IV of the code defines the term contract as "an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of proprietary nature."²⁴⁹ The object of a contract shall be freely determined by the

²³⁹ ETH. CONST. art. 34(4).

²⁴⁰ ETH. CONST. art. 34(1).

²⁴¹ ETH. CONST. art. 35.

²⁴² Ibid.

²⁴³ Albert Jackobs, Marriage laws, 4

²⁴⁴ FDRE. Ministry of Health, Health Sector Development Programme IV. 3(2010/11 – 2014/15).

²⁴⁵ Ibid.

²⁴⁶ ETH. CONST. art. 34(4).

²⁴⁷ *Metasebiya Kasaye, womb for rent in Ethiopia, Addis Addmas news paper, june 9,2014 06:20 am, <http://www.goolgule.com/womb-for-rent-in-ethiopia>(Interview with Ato Gezahegn Tadesse Lawyer in Addis Admas News Paper, June 09 2014) we asked him is surrogacy legal in Ethiopia? He replied; Surrogacy has no legality in Ethiopia. It is an illgal act which contradicts the human dignity and honer. Surrogacy makes women as sealable commodity. Brokers who met surrogate and IP(S)for surrogacy service are also illegal. However there are countries that make surrogacy as legal. These countries didn't bother about the psychological harm and dignity of surrogate and the child. Meanwhile our contry never accept and recognize surrogacy as legal.)" (Translated mine)*

²⁴⁸ See Dr Ranja, *supera* note 34, at 11.

²⁴⁹ ETH. CIVIL CODE art. 1675.

contracting parties (surrogate mother and intended parents) subject to such restriction and prohibitions as are provided by law.²⁵⁰ In the contract a party may undertake to procure to the other party a right on a thing or to do or not to do something.²⁵¹

In a contract of surrogacy a surrogate mother has basic obligations to bear the child and to give to the child to the intended parents. Where as the intended parents have the obligation to pay the money and to receive the child. The surrogate woman has an obligation to do (bear the child) and an obligation to give (hand it over to intended parents or someone else). The “proprietary nature” and “to do something”, object of the contract, is therefore the conceived and the will be born child. Yet according to Ethiopian civil code only things which have proprietary nature in commerce may be the object of conventional obligations.

The child is therefore considered as a property, like in commercial transactions. Regarding the woman, she is used by the sponsors like a robot allowing the development of the foetus, *i.e.* as an incubator machine.

In the case Baby M in New Jersey, 1988,²⁵² specifying to the court that the couples had not turned to a surrogate mother but to a surrogate uterus. Such a contract supposes on the one hand the physical transfer of the child and, on the other hand, the modification of his or her affiliation.

By definition, the mother (the one who gives birth) gives the child to the sponsors and disappears from the ancestry of the child whose parentage is established with the name of one or two sponsors who *acquire* the child.

The child is the object of the contract, which poses in it self a major ethical problem. Moreover, the woman is only considered through her reproductive capacity, as a means to achieve a desired end. This seems hardly compatible with human dignity even in the rare cases where the woman is truly willing to do this procedure. Since there are still no international legal provisions which Ethiopia is a party on surrogacy yet, it is necessary to refer to other national legislations applicable to comparable situations. A review of surrogacy under international law shows that this practice is contrary to current standards of protecting women and child.

Legal Considerations in surrogacy in Ethiopia before entering into a surrogacy arrangement we need to be aware of the legal position of the country. Though surrogacy is done by Ethiopians abroad, especially in India, by brokers surrogacy is prohibited act in the Ethiopia by law²⁵³. No valid contract shall exist unless contract to be valid it shall contain elements of contract *i.e.* capacity, consent, objective / legality / & form if any should be fulfilled.²⁵⁴

First One element of lawful contract is consent, a contract shall depend on the parties who define the object off their undertakings and agree to be bound thereby.²⁵⁵ Consent is expressed either in the form of offer or acceptance. Offer and acceptance are ways of communicating one’s own intention to be bound by an obligation. Therefore; offer or acceptance is declared to another person by ordinary ways of communication .These ways of communication are oral, written, signal and conduct.²⁵⁶

In contract of surrogacy I do not dare to say the contract is done with free and full consent because most of the time, the carrier surrogate mother accepts to bear the child for an amount of money.²⁵⁷ In addition a normal reasonable man never let him go to exploit his own body and transfer his health right with money.

This means a child born to a surrogate mother is conceived, carried, brought into the world and transferred in execution of a contract. The surrogate disposes of the child, as owners of an object allowing them to satisfy their desire or earn money. This is clearly shows the interests of surrogate mother is money rather than free consent. Mostly the contract is done between rich and poor surrogacy lies

²⁵⁰ ETH. CIVIL CODE art 1711.

²⁵¹ ETH. CIVIL CODE art 1712(1).

²⁵² The issue of surrogate motherhood came to national attention during the 1980s, with the *Baby M case*. In 1984 a New Jersey couple, William Stern and Elizabeth Stern, contracted to pay Mary Beth Whitehead \$10,000 to be artificially inseminated with William Stern's sperm and carry the resulting child to term. Whitehead decided to keep the child after it was born, refused to receive the \$10,000 payment, and fled to Florida. In July 1985, the police arrested Whitehead and returned the child to the Sterns. In 1987 the New Jersey Superior Court upheld the Stern-Whitehead contract. The court took all parental and visitation rights away from Whitehead and permitted the Sterns to legally adopt the baby, whom they named Melissa Stern. A year later, the New Jersey Supreme Court reversed much of this decision. That court declared the contract unenforceable but allowed the Sterns to retain physical custody of the child. The court also restored some of Whitehead's parental rights, including visitation rights, and voided the adoption by the Sterns. Most important, the decision voided all surrogacy contracts on the ground that they conflict with state public policy. However, the court still permitted voluntary surrogacy arrangements.

²⁵³ Food, Medicine and Health Care Administration and Control Council of Ministers Regulation No. 299/2013 art. 57(2) "letting or hiring of womb for the purpose of artificial reproduction shall be prohibited."

²⁵⁴ ETH. CIVIL CODE, art. 1678 (1960)

²⁵⁵ ETH. CIVIL CODE, art 1679

²⁵⁶ ETH. CIVIL CODE, art 1681

²⁵⁷ Claire de La Hougue & Caroline Roux, *Surrogate Motherhood and Human Rights: Human, Legal and Ethical Issues--September 2015*.

in the exploitative nature of transactions involving unequally vulnerable parties. More specifically, the practice is exploitative of surrogates who are under problem of money due to a failure of consent within the contract and of fairness across contracts.

Even the contract is done with free consent from the beginning it is difficult to make reinstatement of effect of contract at all because reinstatement is made either by returning back the payment (thing) received or by paying appropriate compensation for the thing that cannot be returned. Where a contract is invalidated or cancelled, the parties shall as far as possible be reinstated in the position which would have existed, had the contract not been made.²⁵⁸ In contract of surrogacy if the surrogate mother later changing her mind or if the child is born disabled numerous questions will arise in the case of a problem during pregnancy.

For example, if disability is detected during the ultrasound, can the carrier mother be obliged to have an abortion? On the other hand, can she be prevented from having one if the pregnancy puts her life or health in danger? If the child is stillborn or dies shortly after birth, how will problems relating to the execution of the contract be resolved? The mother will have born the child, but the contracting parents will not have received it. Should they pay the agreed sum? If she has already been paid, should the mother return the money?²⁵⁹ Issues are not regulated in the Ethiopian civil code.

Second another element of contract is object of contract. A contract shall be of no effect where the obligations of the parties or of one of them are unlawful or immoral.²⁶⁰ As obligation is a legal duty or moral duty to do or not to do something.²⁶¹ As surrogacy is a contract by which a woman accepts to bear a child for someone else, then abandon it at birth and hand it over to the contracting party this contract obligation to transfer a child has no effect because the medical regulation clearly prohibit surrogacy contract for artificial reproduction purpose. In addition doing prohibited contract amounts to unlawfulness and clear violation of the law.

As Ethiopians are high religious and moral standard people surrogacy is seen with tremendous moral and ethical suspicions.²⁶² As morality is subjective from place to place, time to time, country to country, surrogacy contract is considered as illegal and immoral²⁶³ in Ethiopian society though the practice is not performed in Ethiopia because it is against dignity of woman and child. Surrogacy leads to abortion, disability and even worth to death of the woman. Hence a surrogacy contract shall be of no effect where it appears to be unlawful or immoral that the obligation assumed by one party be related to the obligations of the other party and also surrogacy arrangements are not enforceable in law because a contract to be enforceable the provisions of a contract lawfully formed which fulfill legal elements of contract shall be binding on the parties as though they were law.²⁶⁴

In a surrogacy, the child is the object of a contract. It is conceived, carried and delivered according to a contract, usually in exchange for money. The woman, meanwhile, is treated as a means to obtain the desired end, a reproductive machine. Some cases clearly constitute cases of exploitation and trafficking. This shows neither the woman nor the child is treated as human beings. They are treated as objects, as means. This is clearly contrary to the recognition of the inherent dignity of all members of the human family²⁶⁵. Though the civil code is replaced by federal family code the civil code give protection to natural reproduction. In the civil code one of a serious cause for divorce is when one of the spouses has committed adultery²⁶⁶.

The purpose of contract creates smooth functioning of business transaction by creating certainty, predictability, and enforceability, civil code has no room for recognition of surrogacy as a business. To the contrary our contract law commercial surrogacy became legal in India since 2002²⁶⁷ it do have protection like any ordinary business activities. A surrogate mother is a woman who conceives, gestates and delivers the baby on behalf of another woman who subsequently is to be seen as the real mother of the child and to whom the custody of the child is transferred immediately after birth.²⁶⁸

As surrogacy arrangement ones mother means a woman who carries a child in pursuance of an arrangement made:

- (a) Before she began to carry the child; and

²⁵⁸ ETH. CIVIL CODE, art 1815.

²⁵⁹ See *supra* note 92 at 8.

²⁶⁰ ETH. CIVIL CODE, art 1716(1) (1960).

²⁶¹ BLACK LAW DICTIONARY (9TH ED).

²⁶² ኔታሁን ወርቁ ፣ በህግ አምላክ፣ አገሪ ስለሚሰጠን ኪራይ ምን አለች፣ ሪፖርተር ጋዜጣ (February 2014) <http://www.ethiopianreporter.com/>

²⁶³ Metasebiya Kasaye, womb for rent in Ethiopia, Addis Addmas news paper, june 9,2014 06:20 am, <http://www.goolgule.com/womb-for-rent-in-ethiopia/>

²⁶⁴ ETH. CIVIL CODE, art.1678(a-c) &1731(1) (1960).

²⁶⁵ Universal Declaration of Human Rights, the preamble.

²⁶⁶ ETH. CIVIL CODE, art. 669 (1960).

²⁶⁷ MOTHER'S MARKET: An Exploratory Study on the Surrogacy Industry in India

²⁶⁸ Ibid.

(b) With a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons.²⁶⁹ Treatment in a licensed clinic is highly desirable because then the clinic can ensure that any man who goes for treatment with the woman, surrogacy arrangements on a commercial basis.²⁷⁰

A contract is enforceable when each party is able to legally compel other party or parties to fulfill their obligations under that contract. The issue of enforceability is an important one in the context of surrogacy, because it directly concerns the issue of whether the court can legally compel a surrogate to relinquish the child.

In the civil code Ethiopia contract law didn't govern the issue of surrogacy because a contract to be valid it shall contain elements of contract i.e. capacity, consent, objective / legality / & form if any should be fulfilled.²⁷¹ However the issue of surrogacy is against legality, morality. So the contract became void according to article 1716 of the civil code.²⁷²

A void contract is an act that the law holds to be no contract at all a nullity from the very beginning conclusion of void contract does not change the position of "contractants". They can assume as if the contract was never formed. This form of contract, therefore, cannot hold the term contract in real sense; categorizing such an empty act under contract is generally regarded as contradiction in terms. As a result, some authors prefer to use the terms "void agreement" in lieu of void contract.²⁷³

Surrogacy comes into existence by contract agreement as an unpregnant woman enters a contract to become pregnant, to give birth to a child, and then to relinquish all parental rights to the couple (usually a husband and wife), who will then adopt the child.²⁷⁴ In Ethiopian civil code, surrogacy contracts are illegal and surrogate parenting contracts are declared contrary to the public morality & void and unenforceable at law.

FDRE Federal family code follows mandatory legal rules concerning the ascertainment of paternity and maternity shall not be derogated by agreement²⁷⁵ However in surrogacy agreement fatherhood & motherhood status may be given to other 3rd party. Surrogacy contract according to the Ethiopian civil code (art.1808-1818) that deal with effects of defective contracts, appear to permit invalidation of a contract that is tainted with defects in object and form. Sub-article 2 of article 1808 envisages that a contract whose object is unlawful or not made in a prescribed form may be invalidated at the request of any contracting party or interested third party²⁷⁶

Surrogacy, generally presented as an altruistic and generous action, actually opens the door to all kinds of abuse because it does not respect the human dignity of the persons concerned.

4.3 FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA FAMILY CODE

Surrogacy is often opposed on the basis that it undermines the integrity of the familial unit and the role of the parent, especially motherhood. These concerns are rooted in a position that the family is the natural and fundamental unit underpinning society and that it is an institution that serves an indispensable role in contributing to the flourishing of children, adults, communities, and society at large. Anxiety surrounding surrogacy reflects a view that it threatens the integrity, stability, and functionality of the "natural" family, and is an "invalid" form of family formation.

As Elly Teman describes:

Surrogacy upsets the moral framework in which reproduction is regarded as a "natural fact" grounded in love, marriage, and sexual intercourse. Surrogacy constructs families through the marketplace, making them a matter of choice rather than fate. By threatening the understanding of families as biological facts, surrogacy reveals instead that families are social constructs.²⁷⁷

In federal family code the family, being the natural basis of society shall be protected by the society and the state, and that one of the means of protection is respected by regulating and governing family relation by law in mandatory provisions.²⁷⁸ This shows the

²⁶⁹ EUROPEAN CENTER FOR LAW AND JUSTICE, SURROGATE MOTHERHOOD:A VIOLATION OF HUMAN RIGHTS REPORT PRESENTED AT THE COUNCIL OF EUROPE,STRASBOURG, (26 APRIL 2012).

²⁷⁰ Ibid.

²⁷¹ ETH. CIVIL CODE, art. 1678 (1960)

²⁷²ETH.CIVIL CODE, art.1716 &1731(1960).

²⁷³ I Lantera Nadew, *VOID AGREEMENTS AND VOIDABLE CONTRACTS: The Need to Elucidate Ambiguities of Their Effects*, 2 MIZAN L. REV. (Jan 2008).

²⁷⁴ WILLIAM P. STASKY, *FAMILY LAW WEST STUDIES* (5th ed. 2002).

²⁷⁵ ETH. FED. REVISED FAMILY CODE, Proclamation no 213/2000. art. 123.

²⁷⁶Lantera Nadew, *VOID AGREEMENTS AND VOIDABLE CONTRACTS: The Need to Elucidate Ambiguities of Their Effects* ,MIZAN LAW REVIEW Vol. 2 No.1, Jan 2008

²⁷⁷ ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* 7 (2010).

²⁷⁸ ETH. FED. REVISED FAMILY CODE,Proclamation no 213/2000. art. 123 & 124.

family code has no a recognition to artificial insemination agreement other than adoption because artificial insemination agreement violate the mandatory rules of the family code changing that the position of natural mother & father.

*"Since one of the main purpose of marriage is to have a child, FDRE family code has a duty to have a legal rules concerning the ascertainment of maternity and paternity. Infertile couples who are unable to give birth a child rather than divorcing their marriage the law has a purpose of protecting their marriage by devised mechanism which govern and regulate adoption as another legal alternative by the law maker to have a child."*²⁷⁹["Translated Author"]

The husband and the wife owe a duty of fidelity to each other²⁸⁰As well as overarching concerns about the integrity of the family unit, other critics emphasize that surrogacy fragments the intrinsic meaning and integrity of motherhood. In particular, they object to the way in which gestational, genetic, social, and legal aspects of motherhood can be separated and no longer need to be housed in the one woman

a. WHO IS THE MOTHER?

In Ethiopian family code ascertainment of maternal filiation is a simple task in courts due to article 124 of federal family code and article 739 in the civil code in ascertainment of maternal filiation is ascertained from the sole fact that the woman has given birth to the child. Here the birth mother, not the artificial insemination mother, should be the legal mother since artificial insemination is not recognized in the Ethiopia. In civil code article 669 serious causes of divorce is committing adultery. Additionally other relations out of marriage which relations established between a man and a woman out of wedlock or out of an irregular union shall have no juridical effect attached to them but acknowledgement of paternity or Adoption, children born of such relationships shall have a juridical bond only with their mother.²⁸¹ From this we can conclude that the civil code has no recognition to artificial insemination mother & father at all. The woman, who has carried a child as a result of the placing in her of an embryo or of sperm and eggs, is the mother for all purposes. Federal family code way of ascertaining motherhood may deviate from biological DNA fact when the issue of artificial insemination appears in Ethiopia unless the law is amended. Surprisingly I am daring to say artificial insemination may come to Ethiopia because by illegal means through contrabandists Ethiopian women make artificial insemination contract agreement in abroad in USA and India with huge commercial payment up to 500,000 birr but it affects morality. The issue is aired in Ethiopian news paper that women will find it too difficult to relinquish a child.²⁸²

b. WHO IS THE FATHER?

In our family law, though DNA test minimize the problem, ascertainment of paternity is complex issues arise concerning who is the father of the resulting child. The husband of the mother could not genetically be the child's father. Paternal filiation is ascertained by Presumption of Paternity, Acknowledgement of Paternity, and Ascertainment of Paternity by Judicial Declaration. Here the issue of artificial insemination might make the ascertainment of paternity complex like maternity because artificial insemination and the act of intentional parenthood create a situation in which as many as five people can claim a parental status over the resulting child: the contracting parents, the genetic mother and father, and the surrogate. Ethiopia family laws prohibit plurality of motherhood & fatherhood at all. However the legislatives under federal family code proclaimed in Article 178 Disowning shall not be allowed where it is proved that the child has been conceived by means of artificial insemination with the written consent of the husband. This shows the law maker has the intention artificial insemination but they deny the effect due to women right & protecting from discrimination, harmful custom & laws that oppress bodily & mental harm.

4.4 FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA CRIMINAL CODE

According to Austin who are the founder of Positive Law theory, "Law is a command of the sovereign backed by sanction" to govern the norm of the subjects. Here the basic features of law are [generality, normativity, and sanction].²⁸³ Sanction may be criminal, civil and discipline measures. Criminal sanction is a penalty attached to criminal liability. If the fault committed is defined by criminal law, the person will be liable to a sanction provided under the criminal law.²⁸⁴ Civil sanction is attached to compensation (damages) to the fault amount of damage or injury. Discipline sanction is related to other institutional administrative penalties taken at wrong doers mostly by employees at employers.

²⁷⁹ MEHARI REDAI (PROFESSOR), SOME POINTS TO UNDERSTAND THE REVISED FAMILY CODE, VOL 2,1(1999 E.C)

²⁸⁰ ETH. FED. RE. FAMILY CODE, Proclamation no 213/2000. art. 56

²⁸¹ ETH. FED. REVISED FAMILY CODE, Proclamation no 213/2000. art. 107

²⁸² <http://www.addisadmasnews.com/> heath Saturday 07june 2014

²⁸³ TESFAYE ABATE, INTRODUCTION TO LAW AND THE ETHIOPIAN LEGAL SYSTEM TEACHING MATERIAL, 6-10(2009). *Generality* of the subject of the law may serve two purposes. Firstly, it promotes uniformity and equality before the law because any person falling under the group governed by the law will be equally treated under the same law. Secondly, it gives relative permanence to the law. *Normatively* Law creates norms by allowing, ordering or prohibiting the social behaviour. *Sanction* is a penalty or coercive measure that results from failure to comply a law.

²⁸⁴ Ibid.

Additionally, Law should be flexible and adaptive to technology to regulate technology created actions and issues. Currently one of technology born Legal issue to be regulated by law is ART in humans like surrogacy. Surrogacy is a booming, global business internationally between 2006 and 2010 commentators estimate that the industry is now worth up to \$6 billion annually.²⁸⁵ Globally, there is no consensus regarding the legality of surrogacy and the criminality of the act if committed by the wrong doer in different countries including our country Ethiopia.

In our country, Ethiopia, the issue of surrogacy is not clearly regulated in the country a clear and legal legislation although in our Food, Medicine and Health Care Administration and Control regulation 299/2013 says letting or hiring of womb for the purpose of artificial reproduction shall be prohibited.²⁸⁶ This shows, since our country Ethiopia is part and parcel of the global world, the law maker was thinking innovatively about surrogacy.

To show either or not the issue is incorporated in FDRE Criminal Code which is proclaimed by the Negarit Gazeta under proclamation number 414/2004 and come in to force as of may 9th 2005,²⁸⁷ under crimes against Life, Person and Health section, chapter II (art. 553-560), chapter III (art. 561-570), chapter IV (art. 571-579) the issue of surrogacy motherhood is at legal lacuna stage. The code didn't say anything about surrogacy though surrogacy on process may have a potential to endanger personal life and health.

Rather than surrogacy, starting from (art. 571-579) criminal code tries to govern endangering the human body at art. 573 is a criminal act. This article was not included in the previous penal code but in this newly amended criminal code the issue is included unlike surrogacy. The articling of the FDRE criminal code says "Endangering the Human Body with intent to obtain money or other advantage, gives while alive his organ or a part of his body to another; or enters into a contract with another person or institution to give his organ or a part of his body after his death, is punishable with simple imprisonment or fine."²⁸⁸

Additionally whoever, with intent to obtain money or other advantage, takes away an organ or a part of the body of another with the latter's consent, shall be punishable:

- a) With rigorous imprisonment from five years to ten years, where the act is committed while the victim is still alive; or
- b) With rigorous imprisonment not exceeding five years, where the act is committed after the death of the victim.²⁸⁹

This articling in the code shows the issue of surrogacy is not governed by FDRE criminal Code. In Ethiopia when someone commits a surrogacy act due to prohibition of creating a crime with analogy no one can be criminally liable in Ethiopia. The criminal code a spouse bound by a union recognized under civil law who commits adultery is punishable upon complaint by the injured spouse with simple imprisonment or fine²⁹⁰ but not surrogacy act though when without the consent of the husband the wife become pregnant and give birth a child amounts to adultery. FDRE criminal code understanding of adultery is having natural sexual intercourse with another third. So with this analogy of adultery punishing a person is unfair and unreasonable as far as principle of legality is concerned.

For stronger reason in criminal law Principle of Strict Interpretation a basic principle of legality. The duty not to depart from what the law prescribes for the purpose of creating new crimes does not preclude courts from interpreting the law if this is found necessary. As long as the courts take due precaution not to create crimes by analogy because the Court may not create crimes by analogy they are empowered to interpret the law in cases of doubt i.e. ambiguity of the law, language used, a provision is of such an uncertain or obscure meaning that its true sense is doubtful.²⁹¹

The main reason to repeal the 1957 penal code is another discernible gap in the Penal Code is its failure to properly address crimes born of advances in technology and the complexities of modern life.²⁹² The Penal Code does not incorporate crimes such as the hijacking of aircraft, computer crimes and money laundering. Besides, as regards crimes related to corruption and drugs although they are nowadays, attracting attention both in legislation and follow-up not only within national frontiers but also on the regional and international levels, due to the grave crises they are causing, the Penal code does not adequately deal with such crimes with the degree of seriousness they deserve.²⁹³

Similarly, since surrogacy motherhood is technology-born act and FDRE Criminal Code did not incorporate it, surrogacy may be another pushing factor to amend the will be coming criminal code of Ethiopia because without law it is impossible to punish wrong

²⁸⁵ Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANN. HEALTH L. 190, 193 (2012).

²⁸⁶ Ibid art 57(2).

²⁸⁷ FDRE CRIMINAL CODE, preamble 5.

²⁸⁸ Ibid. art 573,(1)

²⁸⁹ Ibid. art 573,(2)

²⁹⁰ FDRE. CRIM. CODE Proclamation no 414/2004, art 652.

²⁹¹ Ibid. art.2(4).

²⁹² FDRE Criminal code para 2

²⁹³ Ibid.

doers as far as principle of Legality is concerned.

Nicolas argues that, particularly given that a great number of intended parents are gay couples; criminalizing surrogacy violates equal protection and due process by excluding a specific class of parents from the right to procreate.²⁹⁴ Viewed in this way, not only banning but also criminalizing surrogacy cuts off one of the only options that gay couples might possess to have biological children. Criminalizing the practice goes one step further than simply banning surrogacy, given that surrogacy bans are often hard to enforce when there are no real enforcement mechanisms.

The object and purpose of the FDRE Criminal Code is to ensure order, peace and the security of the state, its' peoples and inhabitants for the public good.²⁹⁵ However where there is no law it is difficult to accomplish the object and the purpose of the law at all because according to Edwin Sutherland, Criminal Law of a place can be defined as "a body of special rules regulating human conduct promulgated by state and uniformly applicable to all classes to which it refers and is enforced by punishment."²⁹⁶

The Federal Food, Medicine and Health Care Administration and Control Proclamation main purpose which is stated in the preamble part of the proclamation is to protect the public health from unsafe inefficacious, avert health problems due to substandard health institutions, incompetent and unethical health professionals, poor environmental health and communicable disease.²⁹⁷ However this proclamation did not have a say about surrogacy and surrogacy motherhood. To the contrary, as the very purpose of regulation is to make a clarity those issues included in the proclamation, the Regulation No, 299/2013, Food, Medicine and Health Care Administration and Control Council of Ministers Regulation newly introduced and incorporated the issue of Artificial Reproduction method on human kind including the issue of surrogacy terming as " letting or hiring of womb" and issue of human "cloning" which are both technology born phenomenon.

In this regulation "artificial reproduction service" means the introduction of semen into a female's vagina or oviduct for the purpose of fertilization by means other than the natural way and includes uniting sperm and egg cells externally with a view to introduce the fertilized sperm and egg into such female's reproductive organ.²⁹⁸ Artificial reproduction service may be provided by a health institution and health professional authorized by the appropriate organ.²⁹⁹ No health institution may collect organ and tissues without obtaining special license from the Authority.³⁰⁰ This means from this provisions with accontrariou reading in Ethiopia artificial reproduction service is allowed with the express authorization of the respective organ unlike letting or hiring of womb (surrogacy) and cloning.

The Ethiopian law maker body clearly prohibit surrogacy because this intention of law maker is clearly seen in the definition part of the regulation as it defines tissue means collection of cells typical in structure, composition and function that are taken from organs excluding reproductive organs such as male and female reproductive organs, testosterone and progesterone, fetus and blood or blood products taken during blood donation.³⁰¹ In the regulation transplantation of human organ is allowed because the articling "No health institution may transplant organs and tissues without obtaining special license from the Authority"³⁰²is permissive.

Additionally in the regulation transplantation defined as substituting, through surgery, a patient's infected organ or tissue or that which is unable to perform its normal function by donated organ or tissue from a living or dead person³⁰³ prohibited surrogacy motherhood in Ethiopia by the law maker. According to the regulations, organ and tissues donation and transplantation principles acts such as a) trading in human organ or tissue; b) receiving, giving or promising ·to give monetary or non-monetary benefit for organ or tissue donation; c) advertising demand or supply of organ or tissues; d) using animal organ or tissue for the purpose of transplanting it to human³⁰⁴ are prohibited.

When we see the penalty of surrogacy in Ethiopia, the regulation says letting or hiring of womb for the purpose of artificial reproduction shall be prohibited³⁰⁵ and no person or research institute may engage in the technology of cloning of human being.³⁰⁶

²⁹⁴ Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1293 (2014).

²⁹⁵ FDRE CRIMINAL CODE art. 1

²⁹⁶ MRS. GLORY NIRMALA K. ATO SERKADDIS ZEGEYE, CRIMINAL LAW I TEACHING MATERIAL, SPONSORED BY THE JUSTICE AND LEGAL SYSTEM RESEARCH INSTITUTE 5(2009).

²⁹⁷ Proclamation No. 661/2009 Food, Medicine and Health Care Administration and Control

²⁹⁸ Regulation 299/2013 art. 2(42).

²⁹⁹ Ibid art.57

³⁰⁰ Ibid art 60(2).

³⁰¹ Ibid art 2(40).

³⁰² Ibid art 62(1).

³⁰³ Ibid art 2(41).

³⁰⁴ Ibid art 59(5).

³⁰⁵ Ibid art 57(2).

³⁰⁶ Ibid art 57(3).

However both in the proclamation and the regulation didn't set a metered penalty provision for those who make surrogacy. In addition FDRE Criminal Code other legal lacuna points to note: is it a criminal offence to advertise as looking for a surrogate or willing to act as a surrogate, is it a criminal offence for third parties to advertise that they facilitate surrogacy, is it a criminal offence for third parties to negotiate the terms of a surrogacy agreement for payment and gratuitous service, what is the fate of the child at birth and so on. These legal lacunas are another problem because if violation happened it is difficult to entail liability due to the following legal reasons.

First, the criminal law decides the special sanctions appropriate in each case. These sanctions range from death penalty through various kinds of degrees of deprivation of liberty, down to such measures as medical treatment, supervision as in probation, fines and mere warnings (admonishment)³⁰⁷ unlike surrogacy in Ethiopia medical law. According to the principles of legality maxim "*Nullum crimen, nulla poena sine praevia lege poenali.*" This maxim states that there can be no crime committed, and no punishment metered out, without a violation of penal law as it existed at the time. Another consequence of this principle is that only those penalties that had already been established for the offence in the time when it was committed can be imposed.³⁰⁸

Second, even when the judges try to fill the legal gap, the very purpose of interpretation of law is to know the intention of the lawmakers, to avoid over-vagueness and over-precision and where the language is not clear, vague to find the true meaning of the law to apply to certain situation not to make new law including the punishment.

To wind up my discussion on criminality and punishment nature of surrogacy in Ethiopia criminal law, criminal Law is the body of law defining crimes against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted criminals. In fact the law of crimes has been as old as the civilization itself.³⁰⁹ In the FDRE criminal code surrogacy is not prohibited as a crime. The principle of legality is that, 'there is no crime or punishment without a pre-existing law that prohibits that crime'.

Thus, the conduct of surrogacy motherhood must be deemed a crime in detail before the act is committed because the code did not govern it. Even the regulation prohibition of surrogacy as womb renting does not amount to crime. The policy behind the principle of legality is that "fair warning" should be provided to a criminal so that he does not inadvertently commit a crime that he has no reason to believe is illegal. The policy reasons are the same as the rule of legality. Also, the rule of legality encourages the legislature to write most clear criminal law statutes³¹⁰ which protect human dignity, respect in line with governing globalization and technology born issues like surrogacy.

Apart from the question of whether surrogacy should be restricted or limited, countries that do choose to restrict surrogacy and assign criminal or civil penalties to those in violation must be mindful of the human rights implications of those penalties. In making penalty in surrogacy prohibitions need due care unless surrogacy prohibitions are violated, penalties can unnecessarily or unintentionally harm all parties involved.³¹¹ In sum, where laws are implemented or applied so as to enforce a surrogacy ban or restriction, it is important that they do not injure vulnerable or innocent parties in the process.³¹²

4.5 ETHIOPIA MEDICAL LAWS: FOOD, MEDICINE & HEALTH CARE ADMINISTRATION CONTROL PROCLAMATION 661/2009 AND REGULATION NO 299/2013

In Ethiopia surrogacy motherhood is a purely new concept & area of medication. The 2013 enacted regulation no 299/2013 food, medicine & health care administration control council of minister regulation seems the issue of traditional artificial insemination is included with confusion. This is inferred from the regulation definition part says that "artificial reproduction service" means the introduction of semen into a female's vagina or oviduct for the purpose of fertilization by means other than the natural way and includes uniting sperm and egg cells externally with a view to introduce the fertilized sperm and egg into such female's reproductive organ.³¹³ It allows artificial reproduction service may be provided by a health institution and health professional authorized by the appropriate organ. However, letting or hiring of womb for the purpose of artificial reproduction shall be prohibited. Additionally no person or research institute may engage in the technology of cloning of human being.³¹⁴

³⁰⁷ MRS. GLORY NIRMALA K. ATO SERKADDIS ZEGEYE, CRIMINAL LAW I TEACHING MATERIAL, SPONSORED BY THE JUSTICE AND LEGAL SYSTEM RESEARCH INSTITUTE 4(2009).

³⁰⁸ Id at 57.

³⁰⁹ MRS. GLORY NIRMALA K. ATO SERKADDIS ZEGEYE, CRIMINAL LAW I TEACHING MATERIAL, SPONSORED BY THE JUSTICE AND LEGAL SYSTEM RESEARCH INSTITUTE 1(2009).

³¹⁰ Id. at 58.

³¹¹ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, 48 (2019).

³¹² Id .49

³¹³ Food, medicine & health care administration control, Fed. Reg. 299/2013 art. 2(42).

³¹⁴ Ibid art. 57.

As surrogacy is contract between a woman and typically an infertile couple under which the woman provides her uterus to carry an embryo throughout pregnancy; esp., an agreement between a person and a woman providing that the surrogate mother will (1) bear a child for the intentional parent, and (2) relinquish any and all rights to the child for consideration. The regulation contrary insemination contracts trading in human organ or tissue, receiving, giving or promising to give monetary or non-monetary benefit for organ or tissue donation, advertising demand or supply of organ or tissues, using animal organ or tissue for the purpose of transplanting it to human are prohibited.³¹⁵ This means the regulation don't allowed traditional surrogacy but allow artificial reproduction by making infertile spouses fertile through medication process.

Here one legal scholar may argue that in the proclamation 661/2009 Food, Medicine and Health Care Administration and Control Proclamation didn't mention the issue of artificial reproductive service so the regulation is illegal because the main purpose of the regulation is not to make new provision rather than clarifying the provisions set under proclamation.

The other legal lacuna of the regulation is even it has new issue of Artificial reproduction service, surrogacy; the regulation has no liability provision for the violation for surrogate mother, intended parents and Medical experts. These medical laws both the proclamation and regulation show us the issue of surrogacy and reproductive rights should under consideration by law makers since Ethiopia is part of global world. As it is indicated in the preamble of the proclamation the very corner aim of this law is protecting the health of a society. Hence to achieve this goal the proclamation and the regulation should be consistent.

4.6 ETHIOPIA HEALTH POLICY

The right to the highest attainable standard of health, including reproductive and maternal health care, is expressed in Article 25 UDHR and Article 12 ICESCR. Laws and policies implementing this obligation that establish certain standards of medical care apply in surrogacy contexts as well. Surrogates should have access to the same level of medical care as is required in other contexts, and privately-operated surrogacy facilities should meet requirements set for other health care facilities.³¹⁶

In addition, laws may protect the rights of patients to make their own medical decisions, and this may restrict the ability of intended parent(s) to dictate a surrogate's medical choices. Indeed, protections of autonomy and informed consent, especially in facilities operated by the surrogacy industry, are likely to be especially salient.³¹⁷ Even though surrogacy may involve more parties with potentially conflicting interests than in other medical contexts, surrogates' fundamental right to bodily integrity and autonomy should not be curtailed. Surrogacy regulations should therefore ensure that medical care in the surrogacy context meets standards established elsewhere, and that surrogacy contracts are not drafted or enforced in a manner that would undermine those standards.³¹⁸ Under human rights instruments such as CEDAW and CESCR, states have an obligation not only to refrain from certain rights violations, but also to ensure that private actors are upholding certain rights standards. States have violated CEDAW, for instance, by failing to ensure adequate health care was provided to women at private hospitals.

Accordingly, the general quality of health facilities run by surrogacy intermediaries should live up to the standards that apply elsewhere and should be regulated to ensure that surrogate interests are not subordinated to the interests of the intended parent(s) or the fetus. Because the competing interests in the surrogacy context are unusual, especially where contractual provisions purport to deprive surrogates of control of their medical choices, new protections may be necessary to curb bias and ensure that surrogates' health is prioritized.³¹⁹

Laws and policies create the framework by which governments affect the behavior of billions of people. In terms of reproductive health care, laws and policies are essential tools used to deny, obstruct, condition availability, or promote access to services.

Non enforcement of existing laws and the absence of law are equally important. For example, laws can act as barriers to reproductive health services by criminalizing medical procedures, such as abortions, or by imposing restrictions, such as requiring the consent of a spouse for obtaining contraceptives or a sterilization. Selective prosecution, or even non enforcement, of certain laws can lead to lowering the quality of care and providing a tool with which to discriminate against women and service providers.

In terms of reproductive rights, laws not only provide the basis for the recognition or negation of such rights, but also reflect the conditions that determine whether women and men are able to exercise these rights. For example, in societies in which women are legally unable to acquire or hold property or are legally unequal to men within marriage, women's ability to control their reproductive lives is limited by the social norms reflected in the laws that subordinate women.

The degree to which formal laws and policies influence people's lives depends on numerous factors relating to the actual enforcement of such norms. Yet there can be little doubt that formal laws and policies establish societal objectives and regulate the conditions of individual lives.

³¹⁵ Ibid art. 59.

³¹⁶ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, 46 (2019).

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, 47 (2019).

In Ethiopia surrogacy is absolutely uncontrolled unregulated even though there are a number of recognized fertility clinics in the country. There is no legal regulation of surrogacy despite the fact that the awareness and practice about surrogacy is increasing through contraband abroad and Ethiopians women are benefiting from the technology

There is no clear and specific local legislation dealing with or regulating the practice of surrogacy in Ethiopia. There is no judicial authorities either ever decided on any legal tussle or contest over any matter in respect of surrogacy or any way of achieving it.

This is largely because the technology is still new in Ethiopia hence lacks acceptability and legitimacy, not to talk of recording or reporting any judicial precedence on it.

CHAPTER FIVE

5. HUMAN RIGHTS IMPLICATIONS OF SURROGACY

5.1 SALE OF CHILDREN

International experts, government officials, academics and advocates around the world have raised the concern that surrogacy may amount to the sale of children under international law. 141 Under the Convention on the Rights of the Child, the sale of children consists of “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”³²⁰ The sale of children is prohibited under Article 35 of the Convention as well as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.³²¹ Prohibited actions include offering or accepting a child for exploitative purposes such as organ sale, sex work and forced labor, as well as improperly inducing consent as an intermediary for the adoption of a child.³²² The prohibition on the sale of children is concerned with the taking of children for “commercial or sexual motive[s].”³²³ Article 35 was meant to act as a “fail-safe protection”, to protect children “from being abducted or procured for financial gain, drug trafficking, sex trade, or other forms of exploitation.”³²⁴

The prohibition is aimed at protecting children from exploitation and abuse,³²⁵ and at preventing parents from being coerced into selling their children.³²⁶

5.2 AFFECT VESTED INTEREST OF A CHILD RIGHT.

To adhere to existing rights principles, surrogacy must comply with the ‘best interests of the child’ standard of the CRC. Article 3(1) of the CRC requires that “[i]n all actions concerning children...the best interests of the child shall be a primary consideration.”³²⁷ According to the Committee on the Rights of the Child, this means that states are required to continually assess how existing laws and policies actually impact children and their interests.³²⁸ Both Commercial and altruistic surrogacy are odds with ‘the best interests of the child’ standard. So in certain circumstances, prohibiting or criminalizing surrogacy may itself respect and recognize the ‘best interests of the child.’

Children born from surrogacy may also face questions of parentage that children born of traditional pregnancy avoid. For instance, children born of full surrogacy arrangements, where the surrogate has no biological connection to the child, may find themselves not only the subject of a potential custody dispute, but may also face legal uncertainty over which adult(s) even constitute their parents.³²⁹ In the case of a couple who enter a full surrogacy agreement, a child could be born with three adults claiming parental status; this is complicated in a legal system that only recognizes two parents per child.

According to FDRE constitution article 36/1/ artificial insemination violate the child’s right to know his or her origin and identity, his right to life; to a name and nationality, to know and be cared for by his or her parents or legal guardians as guaranteed in Article 7 of the Convention on the Rights of the Child.

Moreover multiple claims inevitably give rise to litigation child because of artificial insemination and the act of intentional parenthood create a situation in which as many as five people can claim a parental status. This reality fragments the reproductive function of marriage, resulting in several consequences: First, it separates sex from reproduction, second it separates motherhood from pregnancy and third, it separates the unity of one couple in the involvement of a third person within the potential family relationship.³³⁰

³²⁰ CRC, optional protocol on the sale of children , childprostitutionand pornography,art.2

³²¹ Ibid.

³²² optional protocol on the sale of children , childprostitutionand pornography art 3

³²³ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, 16 (2019).

³²⁴ Ibid.

³²⁵ optional protocol on the sale of children , childprostitutionand pornography art 3

³²⁶ Ibid.

³²⁷ CRC art 3

³²⁸ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, 23 (2019).

³²⁹ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Lawmaking* , Report of the Columbia Law School Sexuality & Gender Law Clinic 18 (2016).

³³⁰ FRANCES BURTON, FAMILY LAW (2003).

Children born of surrogacy as the objects of the contract also argue that these contracts ignore the best interests of the child in favor of the rights of the contracting adults.³³¹ Smolin, for instance, details how, if children are commodities being traded and paid for, market mechanisms would then apply to the contract.³³² He argues that, because these market mechanisms are adult-centered and focus on bargaining power between adults, they cannot properly account for the rights and best interests of children.³³³

Although the standard for determining custody in U.S. courts is the “best interest of the child” standard, courts faced with disputes surrounding surrogacy contracts have looked more often at issues related to the adults who entered into the contract. This includes questions such as intent, contract, genetics, and gestation.³³⁴ Very few courts use the best interest of the child test in cases of surrogacy.³³⁵

When a case happens in one instance where a court did look at the best interest of the child standard, an appellate Cassation court in *w/r/t tseedale demsie Vs. Ato kiflie Demssie*³³⁶ in Ethiopia held they need not even determine the legality of the surrogacy contract because this court focuses on the best interest of the child determines custody decisions and because private ordering plays a recognized role in family structures. However 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.³³⁷

Using similar reasoning in a recent judgment on an Italian case, the ECHR cited the CRC to emphasize that it is necessary to ensure a child is not disadvantaged because he or she was born to a surrogate, particularly in terms of citizenship or identity.³³⁸ The ECHR also emphasized that public policy consideration, such as a ban on surrogacy, cannot take precedence over the best interests of the child.³³⁹

5.3 RIGHT TO CITIZENSHIP AND IDENTITY

Surrogacy implicates the child’s right to an identity. This right is protected under Articles 7 and 8 of the CRC; it includes the right to a name, a nationality and family relations, and should be enjoyed by the child from birth. This right may be in jeopardy in the context of transnational surrogacy. As mentioned above, jurisdictional hurdles may arise when intended parent(s) from one country enter a surrogacy arrangement in another.³⁴⁰ Where the provider country recognizes only the intended parent(s) as parent(s), but the receiving country recognizes only the surrogate as a parent, the children may be left without legal statehood or parent(s).³⁴¹

Such a situation violates children’s right to an identity and nationality and goes against their best interests as discussed in the previous section. The European Court of Human Rights, for example, has directed states to register children as the intended parent(s)’s child, notwithstanding national laws to the contrary, given the citizenship, nationality and identity rights of the child.³⁴² According to the Strasbourg Court, in order to protect a child’s right to private life, national law must provide for the possibility of recognizing the legal relationship established abroad between the child born to a surrogate and the intended parent(s), at least when the parent is genetically related to the child.³⁴³

The lack of coordination or consistency among states on surrogacy, parentage, and citizenship give rise to these problems. International cooperation may help to address them.³⁴⁴ States have the duty to take all appropriate measures to ensure that children’s rights are protected and that they have citizenship and parentage from birth, in line with their best interests.³⁴⁵ These problems also highlight the fact that children’s rights may suffer from a state’s blanket ban on recognition of children born through surrogacy. Even if states decide to ban surrogacy in their own territory, they should not deny the rights of children already born.

³³¹ David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children*, 43 PEPP. L. REV. 265, 316 (2016).

³³² Ibid.

³³³ Ibid.

³³⁴ Carla Spivak, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 97; 106 (2010).

³³⁵ Ibid.

³³⁶ *W/r/t Tseedale Demsie V. Ato Kiflie Demsie c/f/no. 23632 vol 5(2008)*

³³⁷ Carla Spivak, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 97; 103 (2010).

³³⁸ Case of Paradiso and Campanelli v. Italy, ECHR Case No. 25358/12 (2015).

³³⁹ Clara Watson, *The European Courts of Human Rights Support Surrogacy*, WORLD YOUTH ALLIANCE, <https://www.wya.net/op-ed/the-european-courts-of-human-rights-support-surrogacy/>.

³⁴⁰ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, 25 (2019).

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

5.4 AFFECT A CHILD'S RIGHT TO KNOW HIS/HER BIOLOGICAL PARENTAGE AND HEREDITY

There is also uncertainty as to the rights of children born of surrogacy to know about their own biology and heredity. Because it is only recently that children can be born to women with whom they share no biological connection, there does not appear to be clear consensus on what rights a child has in relation to knowledge of, or connection with, its biological foundation.³⁴⁶ The fact that adoption is a widely accepted process across the globe further complicates this question.³⁴⁷

According to art 34 of FDRE Constitution & article 8 of the family code the family relationship consists of three distinct statuses. The status of being brother and sister, father and child is established only after the establishment of material filiation. Without it, a child cannot have the status of being a son or a daughter within a family for he/she will neither have a father or a mother.

Biology has also factored into the decisions courts make as to whether or not to issue prebirth orders of parentage in the case of surrogacy contracts.³⁴⁸ The Massachusetts Supreme Judicial Court has endorsed biology as an important factor in determining parentage, holding that in cases of full surrogacy, the biological parents should be listed on the birth certificate and that in cases of partial surrogacy, traditional adoption rules should apply.³⁴⁹

5.5 SYSTEMATIC OBJECTIFICATION AND EXPLOITATION OF DISADVANTAGED WOMEN

The concern that surrogacy exploits women who act as surrogates does not apply only to each individual case where a woman enters a surrogacy contract especially vulnerable to exploitation.³⁵⁰

A particularly vulnerable demographic of women are those in developing countries, where the surrogacy industry is likely to be poorly regulated and there is a larger pool of poor and uneducated women who may easily be used as surrogates.³⁵¹

Our starting point was the *Paradiso and Campanelli* case. In fact, it is the ECtHR's most recent case law on this matter. It is a very interesting case to analyze, since there was no biological link at all between the intending parents and the child, brought from a Russian clinic, which means this case dangerously approximates human trafficking.³⁵² The child's removal, amount to interference in the applicants' right to respect for their family life and/or their private life within the meaning of ECHR.³⁵³ Some surrogacy clinics provide real women catalogues, displaying each surrogate or egg donor photos and features, such as hair and eyes colors and personality traits, and even their hobbies.³⁵⁴

In Africa most of the nations like Ethiopia are low income, yet the extent of poverty varies greatly. Ethiopia is among the poorest countries in the world with average per capita gross national product ("GNP") estimated at \$100.³⁵⁵ In response to concern about power imbalances between the intended parent/s and the surrogate, some argue that the empirical evidence on surrogacy in Western countries tends to dispute the view that surrogates are poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure them into a surrogacy arrangement.³⁵⁶

The intended parent/s are likely to be from a higher socioeconomic class than the surrogate, which could cause coercion during decision-making.³⁵⁷

Stark also notes that recognition of maternity as "a social function" rather than a commercial function in Article 5 of CEDAW is difficult to reconcile with commercial surrogacy.³⁵⁸ John Tobin concludes that from the perspective of international human rights

³⁴⁶ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Law making*, Report of the Columbia Law School Sexuality & Gender Law Clinic 20 (2016).

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Law making*, Report of the Columbia Law School Sexuality & Gender Law Clinic 21 (2016).

³⁵⁰ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Law making*, Report of the Columbia Law School Sexuality & Gender Law Clinic 32 (2016).

³⁵¹ Ibid.

³⁵² FILIPA REDONDO, ET AL, *SURROGACY: A CLASH OF COMPETING RIGHTS*, 4(2017). The Chamber stated that when the Italian authorities decided to take the child from the applicants and place him under the care of the social services, they didn't reach a fair balance between the interests at stake, especially because they didn't preserve the best interest of the child. Actually, the child spent two years without an official identity. Therefore, the Court wasn't convinced that the Italian authorities respected the necessary conditions in order to justify the measures they take in this case.

³⁵³ THE EUROPEAN CONVENTION ON HUMAN RIGHTS art. 8 § 1 & 8 § 2.

³⁵⁴ Ibid.

³⁵⁵ THE CENTER FOR REPRODUCTIVE LAW AND POLICY, *WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES. ANGLOPHONE AFRICA* 9 (1997).

³⁵⁶ Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER SOC. POL'Y & L. 555, 562-3 (2013).

³⁵⁷ Ibid.

³⁵⁸ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Law making*, Report of the Columbia Law School Sexuality & Gender Law Clinic 23 (2016).

law it is arguable that transnational commercial surrogacy should be prohibited because it risks the exploitation of disadvantaged women especially in developing countries, and/or maintains gender inequality, although he concedes these propositions are subject to dispute.³⁵⁹

E.g. "Commercial gestational surrogacy is found to be more common in Kolkata. The surrogate mothers belong to very low socio-economic status and are mostly illiterate. All of these women had decided to be a surrogate for money. All of them reported that they were in extreme need of money. The various reasons given were to buy land, build a proper house, open a small shop, to send children to school, to repay the loans, to support family and save for daughters' marriage."³⁶⁰

"If my children do not get food to eat, will the people from the society come and feed them every day? I cannot see my children die out of hunger. I need money, not another child. I cannot dare to be weak." said Geeta, a surrogate mother.

Surrogates are mostly brought by agents and relatives who are somehow connected to the infertility clinics. These agents also sound very confident about their job. According Rohini (agent), "*we make these women understand that it is like renting a room and good amount is paid for the rent. In my area and village many know about surrogacy. It is becoming very common!*"

Most of the surrogates have the fear of leaving their home town during pregnancy. They fear they will be sold out or never be able to come back to the family. Another fear is to having a Caesarean section. The concept of „cutting open the stomach and taking out the baby“ as described by many surrogates, dreads them. The huge number of injections and medicines are described to be „extremely painful“ too. One of the surrogates was worried about her breast milk and the consequences if she is not able to breast feed. Surprisingly, none of them had a serious problem with their husbands or with other family members regarding being a surrogate.³⁶¹

Some risks of power imbalance and exploitation during contract bargaining can be reduced through legal regulation. Factors that may help to neutralize power imbalances include: (1) independent legal counsel and independent medical assistance and advice, particularly if paid for by the intended parent/s; (2) mandatory payment for a surrogate's health insurance and costs of prenatal and personal health care during pregnancy; and (3) the provision of sufficient information and counseling regarding the agreement in advance.³⁶² However, some of the overarching causes of socioeconomic disparities, such as economic policy that allows for economic inequality, may be difficult to completely address via legislative intervention.³⁶³

The surrogate is loved and used then forgotten. This is pure exploitation in contradiction article 34&35 of FDRE constitution. Surrogacy compromises the dignity of the child by making the child the object of a contract a commodity. It further compromises the dignity of the mother, even if her participation is voluntary, by merely treating her as a gestational oven. Commentators are also concerned about protecting presumably poorer, less educated surrogate motherhood from exploitation especially high once gestational surrogate allows a black surrogate to carry a white egg, of exploiting women of color.³⁶⁴

It also affects surrogate mother's reproductive rights if the surrogate mother changes her mind before birth and decides to have an abortion. Surrogacy incurs even greater risks and burdens than those usually associated with pregnancy and childbirth. The business of surrogacy is ripe & new form of human trafficking with opportunities to exploit women and children.

a. ECONOMIC EXPLOITATION

In some countries surrogates are recruited amongst the poorest people: in India they are recruited from villages and then admitted to clinics where they are kept until the babies are born. Thanks to the sum they receive as consideration, which is higher than the average yearly income, these women hope to lift themselves out of poverty.³⁶⁵ In the United States, for reasons linked to risk minimisation, surrogates are not recruited amongst the poorest classes, but amongst the lower middle class. Although the agencies try to convince people of the contrary, by extensively publicizing extremely rare cases, income inequality between the clients and the surrogate mother is the norm.³⁶⁶ There are some triggering factors including, poverty, unemployment and education of the children, which compel them to become the surrogate mothers.³⁶⁷

Beyond explicit economic exploitation, some scholars also voice concern about the potential for surrogacy to take advantage of larger structural economic inequalities built into society, which affect all women. There is a fear that some women may be pressured

³⁵⁹ Ibid.

³⁶⁰ <https://ilussp.org/> Mother's Market': An Exploratory Study on the Surrogacy Industry in India (accessed May 15, 2020)

³⁶¹ <https://ilussp.org/> Mother's Market': An Exploratory Study on the Surrogacy Industry in India (accessed May 15, 2020)

³⁶² Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1114 (2014).

³⁶³ Id at 1073.

³⁶⁴ REBECCA J. COOK, *WOMEN'S INTERNATIONAL HUMAN RIGHTS LAW: THE WAY FORWARD* (1993).

³⁶⁵ Palais Wilson, Request for a CEDAW recommendation against legalising surrogate motherhood 3 (2017).

³⁶⁶ Ibid.

³⁶⁷ DR RANJA KUMARI, *SURROGATE MOTHERHOOD. ETHICAL OR COMMERCIAL* 54 (ND)

into surrogacy to alleviate economic pressures at home, or that women's traditional role providing feminized work will lead some women to participate in surrogacy arrangements without feeling it is a choice they have freely made.³⁶⁸

b. COMMODIFICATION OF WOMEN AND REPRODUCTION

The focus on women's role in society as being primarily one related to reproduction leads some to worry that surrogacy commodifies women through its singular focus on one physical aspect of her being. Kerian describes the fear that valuing a woman for her reproductive capacity will turn her womb into a commodity, thus dehumanizing her by focusing on her womb's potential contribution to society rather than her own.³⁶⁹ Recognizing a compelling state interest in preventing the exploitation of women, some courts have echoed this concern that for-profit surrogacy has the potential to reduce women to the status of "breeding machines."³⁷⁰

5.6 HEALTH RISKS TO THE SURROGATE

5.6.1 RISKS TO PHYSICAL HEALTH

Horsburgh (1993) is opposed to women because he believes surrogates are physically exploited once they have signed contracts agreeing to give birth to babies for clients. If there is a reason to abort the foetus, because of medical reasons or client's demands, the surrogate mother must comply. To make matters worse, if the pregnancy is indeed aborted, the surrogates often receive just a fraction of the original payment (Horsburgh, 1993). The contracts can also place liability on the mother for risks including pregnancy-induced diseases, death and post-partum complications (Kembrell, 1988).

All pregnancies, including those which take place in developed countries with advanced public health care systems, carry certain health risks.³⁷¹ Sara Ainsworth further describes how "[s]hort of death, pregnant women face risks to their health such as gestational diabetes, high blood pressure, childbirth complications and injuries."³⁷²

Because the ART process involves multiple embryos being implanted in the surrogate, it is more likely that her pregnancy will result in twins or triplets, which makes pregnancy more difficult and dangerous.³⁷³ As noted in a recent review of studies into the obstetric, medical, and psychological outcomes for surrogates conducted by Viveca Söderström-Anttila et al, risks of almost all maternal health complications are increased by multiple pregnancies³⁷⁴

5.6.2 PSYCHOLOGICAL DETACHMENT & IMMORALITY & RISKS OF PSYCHOLOGICAL HARM³⁷⁵

Relinquishing of the child is the difficult part in the whole surrogacy arrangement, as in some cases, the surrogate mother becomes emotionally attached to the child but still has to part from him/her.³⁷⁶

Foster (1987) states that many surrogate mothers face emotional problems after having to relinquish the child. She recalls a woman who said that she started praying not to go in labour so that she and her child could stay together.

Along with the fact that surrogates face an increased risk of a physically difficult pregnancy, many commentators point to a concern that surrogates may suffer psychological or emotional trauma or other unanticipated emotional consequences when they relinquish the child after birth.³⁷⁷

³⁶⁸ Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND L.J. 205, 215 (1992)

³⁶⁹ Christine Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 725 (1997)

³⁷⁰ *Doe v. Attorney Gen.*, 487 N.W.2d 484, 487 (Mich. Ct. App 1992).

³⁷¹ Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT'L L.J. 665, 675 (2012).

³⁷² Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1097 (2014).

³⁷³ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Law making*, Report of the Columbia Law School Sexuality & Gender Law Clinic 28 (2016).

³⁷⁴ *Ibid.*

³⁷⁵ www.addisadmasnews.com/index.php?=-com-k2&view=item&id=1403 (Saturday 07 June 2014 13:49)"(an Ethiopian surrogate said that in short period of time, she got huge money which changes her life from surrogacy but it affects her psychological health and moral. She was working as boutique sales woman in Ethiopia but the monthly salary she got from boutique worke never covers her monthly expenditure. This economical problem makes her motivated to make surrogacy contract with ethio-italy couples. After making a contract she went to India and as per the contract she deliveres the child and got a payment.)"(treanslated Author)

³⁷⁶ Dr 84

³⁷⁷ Viveca Soderstrom Anttila et. al, *Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting families A Systematic Review*, 22 HUMAN REPRODUCTION UPDATE 260, 263;(2015).

They point to studies conducted in Western countries that indicate that few women have regretted participating in surrogacy contracts or experienced distress on giving up the child after birth, and that surrogates rarely refuse to relinquish the child after birth.³⁷⁸

Most artificial insemination and contracting couples view the artificial insemination pregnancy as a business transaction from the outset even when the artificial insemination is the genetic mother of the child. This causes the artificial insemination to psychologically detach herself from the child during pregnancy. The artificial insemination contract involves to some extent the "sale of self" which is morally questionable.³⁷⁹

In altruistic surrogacy contracts, some argue that it may be difficult for a surrogate to provide genuine informed consent in the context of close and complex family or friend relationships.³⁸⁰ Tieu refers to a study which revealed that, for some women, the motivation to become a surrogate was due to feelings about guilt over a previous abortion or having given up a child for adoption.³⁸¹

5.6.3 UNFORESEEN COMPLICATIONS

Some argue that the significant hormonal, biological, and physiological changes a woman experiences during pregnancy and birth, including the bonding that occurs between her and the child, make it too difficult for a woman to consent prospectively to acting as a surrogate.³⁸²

When baby becomes the unwanted object of a contractual transaction little is known as to what would happen if the baby, carried by the surrogate mother, is born with a disability. There have also been rumors that surrogates who have a moral objection to abortion have been pressured to abort a baby when, as a result of pregenetic testing, it is discovered that the baby may have a disability choosing the sex of a baby created.

Surrogates also must consume large doses of hormones in order to prepare their bodies for implantation, which may lead to serious side effects and also affect their decision making ability while negotiating a surrogacy contract.³⁸³

5.7 THE RIGHT FREE FROM FEAR

When Louise and Wesley Mullinder, 37 married in 2004, she had feared she would have trouble becoming pregnant as problems with infertility can often be inherited. But two years later, the couple, announced that they are expecting their first baby.³⁸⁴ In a surrogacy situation, individuals from more than one household have a claim of right as the child's legal parent. The surrogacy process is filled with inherent tensions for all the parties involved tensions that do not exist in a traditional pregnancy. Sometimes surrogate mother change their mind and want to keep in custody of children which may create a legal problem.

5.8 AFFECT ADOPTION

In the adoption context, for example, international law prohibits intermediaries and adopting parents from giving money to families putting their child up for adoption.³⁸⁵

Marriage as an institution is the social order through which a married couple wish to beget a child. But for an infertile couple, this desire remains unfulfilled. Over a couple of centuries, this desire of having a child by an infertile couple was being satisfied by adopting a child³⁸⁶ but the introduction of surrogacy people in need of genetically related issues, health issues disregard adoption. Even for gay/homosexual/ couples surrogacy is emerging as the only option because adoption is prohibited for such couples in different countries.

5.9 TRAFFICKING OF WOMEN AND CHILDREN

Restrictions or bans on the practice of surrogacy are often justified as a means of protecting vulnerable women and children from the threat of human trafficking. Here, again, the practice of surrogacy does not inherently constitute human trafficking. Human trafficking involves the procurement of an individual for the purpose of forced labor and/or sexual exploitation and is prohibited by

³⁷⁸ Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 51–52 (2010).

³⁷⁹ THE EUROPEAN CENTRE FOR LAW AND JUSTICE, *SURROGATE MOTHERHOOD: A VIOLATION OF HUMAN RIGHTS REPORT PRESENTED AT THE COUNCIL OF EUROPE, STRASBOURG*, (2012).

³⁸⁰ H. Ragone, *Surrogate Motherhood: Conception in the Heart* 74–78 (1994).

³⁸¹ Ibid.

³⁸² M. M. Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, J. MED. ETHICS 171, 172 (2009).

³⁸³ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Law making*, Report of the Columbia Law School Sexuality & Gender Law Clinic 25 (2016).

³⁸⁴ Dr. M. ukesh Yadav, *Medico-Legal & Ethical Aspects of Artificial Insemination*, J of Indian Academy of Forensic Medicine 131 (2006).

³⁸⁵ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, *HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY*, 16 (2019)

³⁸⁶ Dr. Nandita Adhakari, *Law and Medicine* 164 (2012).

various human rights instruments, including CEDAW and the 2002 Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children.³⁸⁷ The Protocol defines human trafficking by three components: an action consisting in the recruitment, reception, transfer or harboring of persons; using improper means to achieve that action (such as coercion, force, fraud or abduction); with an improper purpose (sexual exploitation or forced labor).³⁸⁸ At its core, human trafficking prohibits forced or coerced labor of any kind, including sexual services.

In some cases, surrogacy, as any other service or labor, can certainly raise human trafficking concerns of surrogate women and, arguably, because surrogacy is currently performed in unregulated environments by women who are economically vulnerable, concerns may be heightened. In studies on surrogacy in India, where surrogacy was not regulated at the time, some women reported that they were lured by false monetary promises or pressured into engaging in or continuing the process.³⁸⁹ For the children born through surrogacy arrangements, there is certainly a danger that they could be commissioned by individuals with the intention of exploitation. However, authors were not able to find documented examples of this.³⁹⁰

Moreover, banning surrogacy is likely to increase the risk of human trafficking for some, as a ban risks driving the industry underground and to less protective environments. In countries in which economic desperation is widespread and, in the absence of state regulation, unchecked intermediaries may create dangerous conditions for surrogacy. Human trafficking concerns are likely to be even worse if surrogates themselves are criminalized, as they will not dare come forward after suffering abuses in the black market for fear of being arrested and prosecuted. In such circumstances, an international mechanism for ensuring adequate oversight and protection may be necessary to safeguard against human trafficking concerns³⁹¹

5.10 FORCED LABOUR

Similar to human trafficking, there is little evidence that surrogacy has been widely performed under conditions of forced labor. Women could be coerced or pressured into surrogacy or forced to continue the process against their will. While this can and does happen with other forms of labor (including domestic work, restaurant work and garment labor), because a surrogate provides a service that requires dedication for a period of time and compromises her physical state through pregnancy, concerns of forced or compelled labor are arguably heightened and should be addressed by protective mechanisms to ensure a surrogate has the ability to make choices freely and engage in the process with proper consent.³⁹²

Many international and human rights instruments prohibit forced labor.³⁹³ The Forced Labor Convention defines this practice as “all work or service which is exacted from any person under menace of penalty and for which the said person has not offered himself voluntarily.”³⁹⁴ Cases in which an employer or recruiter makes certain false promises with serious consequences so that a worker takes a job she would not otherwise have accepted can constitute forced labor. Similarly, surrogacy arrangements could amount to forced labor where contract terms make it impossible for surrogates to break the agreement, perhaps by imposing extreme financial penalties for breach.

5.11 COMMODIFICATION OF CHILDREN

Some commentators who view surrogacy as the commodification of children argue that transportation of children across borders in the case of a transnational surrogacy thus becomes a violation of international agreements that prohibit the sale of children.³⁹⁵ The UN CRC, for example, contains language explicitly prohibiting certain kinds of transfer of children across international borders, and provides that signatory countries must take measures to combat illicit transfer and non-return of children abroad, as well as the

³⁸⁷ CEDAW; 2002 Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children; ASEAN Convention Against Trafficking in Person, Especially Women and Children.

³⁸⁸ The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, G.A. Res. 55/25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, art. 3(a), U.N. Doc. A/45/49 (Vol. I) (2001).

³⁸⁹ Richard S. Ehrlich, *Taiwan Company Accused of Trafficking Vietnamese Women to Breed*, THE WASHINGTON TIMES (Mar. 6, 2011), <https://www.washingtontimes.com/news/2011/mar/6/thai-company-accused-traffick-vietnamwomen-breed/>.

³⁹⁰ https://assets.hcch.net/upload/adoption_rpt1990vlooon.pdf (The Report identified rumors of “trafficking in fetuses and the use of children for organ transplants” but was unable to verify any such cases.).

³⁹¹ THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, 19 (2019).

³⁹² THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, 19 (2019).

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ ALEX FINKELSTEIN ET. AL. *Surrogacy Law and Policy in U.S. A National Conversation Informed by Global Lawmaking* Report of the Columbia Law School Sexuality & Gender Law Clinic 18 (2016).

abduction, sale of, or traffic in children for any purpose or in any form.³⁹⁶ The Hague Adoption Convention contains language similar to the CRC. One of the Convention's objectives is to establish a system of cooperation among states to respect safeguards and to prevent the abduction, sale, or trafficking of children.³⁹⁷ The preparatory materials for the Convention indicate that "child trafficking" was meant to include obtaining children illicitly for the purposes of adoption, as well as other illegal purposes.³⁹⁸

In general it is possible to interpret these international agreements as prohibiting transnational surrogacy, arguing that it represents a human rights violation for the child and the mother too.

5.12 STATELESSNESS

A related human rights concern is that children born of surrogate mothers could potentially be left without state recognition. In countries that lack laws regulating the establishment of legal parenthood, for example, there is the possibility that children may be left parentless, and thus stateless.³⁹⁹ Without state identification, it may be difficult to obtain travel documentation for children born of surrogates, stranding them in their birth country away from those who desire to raise them.⁴⁰⁰

Christine Kerian raises the concern that children seen as 'less desirable' after their birth may be particularly vulnerable to abandonment or statelessness.⁴⁰¹ For instance, intended parent/s who find out about a birth defect while the surrogate is pregnant may find an excuse to not assume responsibility for the child after its birth, or to potentially pressure the surrogate into an abortion.⁴⁰² In these cases the child will lose its right to nationality and identity, as protected by the CRC.⁴⁰³ This would occur where the initial contract of surrogacy did not address this scenario, or addressed it in a manner which was not enforceable at law.

³⁹⁶ CRC art. 11, 35.

³⁹⁷ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 1.

³⁹⁸ David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, 43 PEPP. L. REV. 265, 273 (2016).

³⁹⁹ Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L L. REV. 527, 593-94 (2013).

⁴⁰⁰ *Id.* at 593-94.

⁴⁰¹ Christine Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113 (1997).

⁴⁰² *Ibid.*

⁴⁰³ CRC art. 7(1); art. 8.

CONCLUSION AND RECOMMENDATION

CONCLUSION

There is no concrete legal framework to monitor and regulate surrogacy in Ethiopia. The FDRE Family Code didn't govern the filiation and civil status of children born to a surrogate mother. The Ethiopian government didn't have a legal stand in terms of conferring the surrogate baby Ethiopian citizenship as s/he is born in the womb of an Ethiopian (the surrogate mother) and in Ethiopia. Ethiopia didn't have a policy banning surrogacy because the contractual process is wrought with potential exploitation the mother and baby to commodities of a contract in violation of their human dignity.

Ethiopia never criminalizes the practice of surrogacy. Surrogacy is not criminal offence in FDRE Criminal Code. The Code didn't specified clearly metered sanction. Food, Medicine and Health Care Administration and Control Proclamation No 661/2009 and Regulation No ,299/2013 Food, Medicine and Health Care Administration and Control Council of Ministers Regulation and FDRE Family Code contradict each other. There is no legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. the surrogate mother, the commissioning parents and the child in Ethiopia. A clearly defined law needs to be drafted immediately which will pronounce in detail the Ethiopian government's stand on surrogacy; so that discrete activity leading to exploitation of the surrogate mother can be stopped.

Clandestinely in Ethiopia there are women, gamete providers, brokers and foreign commissioning parents participating for screening of surrogacy. Clandestinely in Ethiopia there are medical practitioners and health centers or services in which surrogacy screening techniques take place. Women in Ethiopia opts surrogacy as income alternative due to poverty. In proofing filiation's Ethiopian law makers' misunderstood law and fact in surrogacy especially in DNA tests.

Reproductive Human Rights of Women got recognition and protection with in international and national human right instruments of different sates including Ethiopia. However due to infertility and related problems not all women including their spouses enjoy this right. To avoid the problem people uses surrogacy method of motherhood which is invented by science including Ethiopian women. Surprisingly! Surrogacy and reproductive rights paradox each other with its very purpose. It becomes another arsenal for violation of women human right and considers women as ordinary exchange goods.

Merely! Ethiopian legal system gives legal protection against surrogacy as threat to reproductive human rights of women including their child by making. As the practice is real, legality and enforceability of surrogacy in Ethiopia legal system is blurred. Ethiopia prohibits surrogacy, to the contrary with no policy framework and clear laws the child got recognition based on best interest of a child and against the genetic relation of the mother. Though Ethiopian women are part of surrogacy contract, to become surrogate mother in foreign countries and consider it as a means of income the legal status of surrogacy in Ethiopia legal system is not clearly regulated.

With the entry of financial arrangements in exchange of the surrogate child, surrogate motherhood has raised difficult ethical, philosophical, and social questions. Surrogacy arrangements have made child a 'saleable commodity', and complications have arisen regarding the rights of the surrogate mother, the child, and the commissioning parents. As there is no legal provision to safeguard the interests of the surrogate mother, the child, or the commissioning parents in Ethiopia, looking at such an issue from commercial or business point of view has complicated the matter further.

In our country Ethiopia a number of surrogacy related questions remains unanswered, including: is it legal to become surrogate mother in Ethiopia? Will the child born to an Ethiopian surrogate mother be a citizen of this country? Who arranges the birth certificate and passport required by the foreign couple at the time of immigration? Whose name will appear on the birth certificate? How will the commissioning parents claim parenthood? What happens if the surrogate mother changes her mind and refuses to hand over the baby or blackmails for custody? Who will take the responsibility of the child if the commissioning parents refuse to take the child? What would happen if the child is born disabled? What would happen if the sex of the child is not to the liking of the commissioning parents? Such questions need thorough analysis before any policy relating to surrogacy is designed and legal provisions are made.

Surrogacy made as commodities both the surrogate mother and resulting baby in exploitation of the surrogate and a parental situation that is not in the principle of best interest of the child. All Ethiopian laws didn't give recognition to surrogacy because of protecting the rights of women & child. The challenge of surrogacy & reproductive human rights should get policy attention by government to continue manufacturing the next generation with due care unless our Ethiopia pay immense price.

Not only does surrogate motherhood pose numerous problems relating to the development and co modification of children, the health and possible exploitation of mothers, but it is also incompatible with national laws and international laws which Ethiopia is a party.

The only response that can be brought on the international level is banning surrogate motherhood, in the same way as the sale of children, and requiring the adoption of criminal sanctions for offenders, especially the intermediaries. Regulating the consequences

of surrogate motherhood, especially with regard to parentage, would amount to admit this practice is acceptable with regard to human dignity and validate the institutionalization of a real “reproductive proletariat”.

It would ratify the purchase of children and the exploitation of poor women. It would mean deliberately ignoring the serious violations of children’s rights, as if nothing had happened. It would encourage fraud in States that ban surrogacy, through the fait accompli.

In surrogacy a contract the object of which is a human being, a child whose abandonment was planned, whose parentage is deliberately made illegible, such a contract can produce no legal effect in Ethiopia who claim to respect human dignity. It then belongs to every state to resolve the individual cases due to the illegal use of surrogacy in the best interest of the child, without as a consequence encouraging this practice.

Motherhood becomes a choice linked to the development of the whole personality. However, it is precisely this choice that will no longer be available if surrogacy is legalized: by seemingly heightening the wish to procreate, motherhood - which is a unitary whole of desires, thoughts and emotions alongside chemical and biological processes affecting a woman and her unborn child – is broken down into many separate pieces as if it were an object. From being a result of human act, the highest expression of the human dignity of women is debased to a mechanical procedure whose separate components become commodities that can be marketed.

RECOMMENDATIONS

- I am not in favor of surrogacy, but, at the same time as far as globalization is concerned there is a need for concrete legal framework to monitor and regulate surrogacy in Ethiopia.
- The FDRE Family Code should craft to govern the filiation and civil status of children born to a surrogate mother.
- The citizenship right of the surrogate baby is also of crucial importance. The Ethiopian government needs to take a legal stand in terms of conferring the surrogate baby Ethiopian citizenship as he is born in the womb of an Ethiopian (the surrogate mother) and in Ethiopia.
- The public policy concerns, morality and filiation, related to surrogacy should be addressed by the Ethiopian legislature.
- Ethiopia must adopt a policy banning surrogacy because the contractual process is wrought with potential exploitation the mother and baby to commodities of a contract in violation of their human dignity.
- I strongly urge that the government of Ethiopia to criminalize the practice of surrogacy. Surrogacy should be criminal offence. The sanction should be clearly specified.
- Food, Medicine and Health Care Administration and Control Proclamation No 661/2009 and Regulation No ,299/2013 Food, Medicine and Health Care Administration and Control Council of Ministers Regulation should amended consistently to ban surrogacy.
- The individuals participating of a contract of surrogacy must be subjected to a penal sanction, as well as the individuals, brokers, the agencies and the institutions favoring it as well as the medical teams performing it.
- The health centers or services in which these techniques take place will be subjected to a sanction
- There should be legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. the surrogate mother, the commissioning parents and the child.
- A clearly defined law needs to be drafted immediately which will pronounce in detail the Ethiopian government's stand on surrogacy; so that discrete activity leading to exploitation of the surrogate mother can be stopped.
- The Ethiopian government must look into poverty alleviation programmes such as employment opportunities to empower women unless women opts surrogacy as alternative.
- Ethiopian law makers must be understood surrogacy as a global phenomenon in evidence law making especially proof in DNA tests