Surrogacy involves one woman (surrogate mother) carrying a child for another person/s (commissioning person/couple), based on a mutual agreement requiring the child to be handed over to the commissioning person/couple following birth. Reasons for seeking surrogacy in the context of this paper will depend on whether it is based on African customary reasons or it is merely a western practice such as situations where a woman has non-functional or absent reproductive organs, or as a remedy for recurrent pregnancy loss. Though a centuries' long practice, surrogacy is still surrounded by uncertainty. In practice, the African customary approach differs from the western approach. Be that as it may, the two approaches raise similar legal issues. In general, factors to be considered include, but not limited to, the ensuing contractual relationship; the rights of the surrogate mother; the involvement and the right of the husband’s family to ask for a surrogate mother; and the customary law treatment of the surrogate as an asset and a seedraiser, having virtually lost her personality. This paper will specifically look at the following legal aspect: the contract and the enforceability of the surrogate motherhood arrangement, and the constitutional issues involved.

1. INTRODUCTION
Surrogacy has been practised for centuries, and yet it is still a subject that arouses passion and controversy. In African customary law, if a woman cannot give birth to any children, the husband’s family has a right to approach the woman’s family and ask that he be given a substitute. The substitute could be an unmarried sister or another female relative of the barren woman to raise seed in his house. This arrangement does not call for the return of the original wife, or for the conclusion of a separate marriage with the substitute. The customary law

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1 This study will limit itself to the Pedi, Xhosa and Tswana customs. Customary law is defined in section 1 of the Recognition of Customary Marriages Act promulgated in 1998 as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.”

2 This is referred to as a Sororate marriage. In the Pedi custom, it is not only the man’s duty, but the woman will out of her own volition, approach her parents and request them to give her a sister to help her. See Mönnig The Pedi (1983) 203.

3 Bennet Customary Law in South Africa (2008) 355. “Should the wife’s family not provide a surrogate partner, then, strictly speaking, it was in breach of its marriage obligations and had to return at least part of the lobolo”.

position is that the substitute becomes an additional asset to the house of her sister. She has the rights and duties of an ordinary married wife, 4 but the children raised by her belong to the house of her sister. 5 No additional lobolo 6 is due because the arrangement is that the substitute is considered to be the womb of the childless wife, and because she is the womb, she has to raise up that house. The substitute wife is not given the rank or status of the original wife. 7 She virtually loses her personality 8 and becomes absorbed by the house to which she is a seed raiser. 9 She has no status but becomes the ‘body’ of the woman for whom she has to raise up seed, and the children born by her are regarded as being those of the woman to whom she is the seed bearer. 10 The surrogate mother becomes a surrogate as long as her relationship with the “other” mother is intact; should she claim the child to be hers, she then seemingly takes the place of that other woman.

The Western approach is different from that envisaged by customary law. As long as the woman is of a mature age, has a child or children of her own, she can become a surrogate mother. The issue of blood relations is unimportant in this regard, whereas to marry a complete stranger was contrary to custom in terms of customary law. 11 There is no emphasis in the involvement of the two families concerned. What is of paramount importance is that there should be a valid contract between the parties involved, which is between the surrogate mother and the commissioning parents.

2. SURROGATE MOTHERHOOD IN SOUTH AFRICA

In terms of common law, surrogacy has been established as a legally recognised procedure in South Africa. The legal consequences of surrogate motherhood are incorporated in the Children’s Act. 12 The Act defines surrogate mother as ‘an adult woman who enters into a

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4 Maqutu Contemporary Family Law of Lesotho (1992) 156
5 One of the essential implications of lobolo agreement is that the married woman should increase the lineage of the house of her husband.
6 But it is not unheard of for the husband’s family upon receipt of the additional wife to offer the wife’s family a cattle or two as a voluntary expression of their appreciation and gratitude.
7 See footnote 3 above at 338. See also footnote 4 above. The surrogate will only assume the senior status of the childless woman should she die.
8 See footnote 4 above at 156. Maqutu writes that the substitute wife “nevertheless becomes virtually a servant of the house she is married into and is completely under the shadow of the childless woman.”
9 The term “seed raiser” refer to a woman who will bear an heir. See also Bennet footnote 5 above at 346.
11 Ibid
12 No. 38 of 2005
surrogate agreement with the commissioning parent’.\textsuperscript{13} A common definition of a “surrogate”
is a woman who substitutes for another who is unable to become pregnant.\textsuperscript{14} The Act further
defines a surrogate motherhood agreement as:

“an agreement between a surrogate mother and a commissioning parent in which it is
agreed that the surrogate mother will be artificially fertilised for the purpose of bearing
a child for the commissioning parent and in which the surrogate mother undertakes to
hand over such a child to the commissioning parent upon its birth, or within a
reasonable time thereafter, with the intention that the child concerned becomes the
legitimate child of the commissioning parent”\textsuperscript{15}

In an African custom, like in the biblical times,\textsuperscript{16} the substitute wife and the original wife’s
husband should “lie together” for the process of pregnancy to take place. In other words,
surrogacy involves actual sexual intercourse with the husband of an infertile woman.\textsuperscript{17} The
western approach is different to the customary approach in the sense that no actual sexual
intercourse is involved and surrogacy is implemented by use of artificial techniques.
Furthermore, Western surrogacy is regulated by means of legislation whilst surrogacy in terms
of customary law is regulated by the customary rules of a particular traditional community.
The Western techniques unlike the customary one, replaces conception by natural means, and
there are different methods that can be used:

**- Traditional (Western) surrogacy** (also referred to as partial surrogacy); wherein the
surrogate is pregnant with her own biological child, but this child was conceived with the
intention of relinquishing the child to be raised by others such as the biological father and
possibly his spouse or partner, either male or female. The child may be conceived via home
artificial insemination using fresh or frozen sperm which is performed at a fertility clinic.
Sperm from the male partner of the ‘commissioning couple’ may be used, or alternatively,
sperm from a sperm donor can be used. The term ‘partial surrogacy’ is used when the
surrogate mother is also the genetic mother, that is, when her egg is the one that is fertilised.

\textsuperscript{13} Section 1 of the Act above.
\textsuperscript{14} Kindregan, Jr & McBrien *Assisted Reproductive Technology: A Lawyer’s guide to Emerging Law and Science* (2006) 129.
\textsuperscript{15} See footnote 13 above.
\textsuperscript{16} Genesis 16: 1, 2 Sarai (Abraham’s wife) could not bear a child, she admonished Abraham to “lie” with Hagar, her servant which subsequently bore them a child.
\textsuperscript{17} Meggitt (editor) *Surrogacy- In Whose Interest? Proceedings of the National Conference Melbourne February* (1991) 59. she further explains that although sexual intercourse with the husband of an infertile woman “might be viewed as a form of fornication or adultery, neither of the parties had the intention of violating the marriage bond nor of engaging in sexual intercourse outside marriage in the usual sense”. 

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Fertilisation is achieved by means of *in vitro fertilisation* followed by replacement of an embryo. \(^{18}\)

- **Gestational surrogacy** (also referred to as full surrogacy); where an already fertilised embryo from the biological parents or donors is transferred to the womb of the surrogate mother, the embryo develops within the uterus of a gestational carrier. She may have made an arrangement to relinquish it to the biological mother or father to raise or to a parent who is unrelated to the child. Full surrogacy occurs when all the genetic material is provided by the commissioning couple and the surrogate mother is a mere host mother,\(^ {19}\) she is merely offering her gestational function to an embryo which has been transferred.

The gestational surrogate mother has to go through many medical tests than the traditional (full) surrogate mother and lots of medical preparations to be able to successfully go through this procedure. Some of these tests include:

- Hysteroscopy/HCG, this procedure determines the fallopian tubes are clear and the size and shape of the uterus
- Infectious disease test, to ensure there are no contagious diseases present
- A mock cycle, to see how the uterine linings will react to hormone replacements (estrogen)
- Pap smear to check for a healthy uterus
- A physical, to see if there are any physiological impediments that would hinder the surrogate in carrying the baby
- Trial transfer, to check the length of uterus to find out how far to insert the catheter, which will be loaded with embryos
- Psychological testing, to check motivations, attitudes, and commitment.\(^ {20}\)

It should be noted that an African approach to surrogacy does not subject any party to undergo the series of tests to ensure a healthy pregnancy since the arrangement does not call for the use of artificial techniques. There is further no psychological or medical screening of the surrogate and the commissioning couple(s) as required by the Western approach. The surrogate mother does not receive any surrogacy costs either before, during and after the pregnancy, though medical costs are to a lesser extent involved. The African approach does not cater for death and disability cover, while the western approach does.

\(^{18}\) Tager “Surrogate Motherhood, Legal Dilemma” (1986) *SALJ* 381 – 404.

\(^{19}\) Pretorius “Practical Aspects of Surrogate Motherhood” (1991) *De Jure* 52 – 62.

\(^{20}\) [http://www.yale.edu/ynhti/curriculum/units/2000/7/00/07.05.x.html#](http://www.yale.edu/ynhti/curriculum/units/2000/7/00/07.05.x.html#). Visited on the 11 of October 2009.
Surrogacy for a fee (commercial surrogacy)\textsuperscript{21} is not permissible in South Africa, but altruistic surrogacy\textsuperscript{22}. Commissioning parents are only required to provide covering for the medical and other costs associated with surrogacy agreement. ‘Another argument which is raised against surrogacy for a fee is that it constitutes baby-selling, which is not only morally unacceptable but also legally prohibited in terms of the law on adoption’:\textsuperscript{23} In the USA case of \textit{Doe v. Kelley},\textsuperscript{24} the Wayne County Circuit Court stated that:

“Baby-selling is against the public policy of this State and the State’s interest in preventing such conduct is sufficiently compelling and meets the test set forth in \textit{Roe}. Mercenary considerations used to create a parent-child relationship and its impact upon the family unit strike at the very foundation of human society and are patently and necessarily injurious to the community. It is a fundamental principle that children should not and cannot be bought and sold. The sale of children is illegal in all States.”

In this case Jane and John Doe were a married couple. Jane could not have children; the couple arranged that Mary Doe be their surrogate mother. They agreed on the sum of $5000 plus medical expenses.

### 3. SURROGACY CONTRACTS

In an African approach, surrogacy agreements are not as complex as the Western approach. The agreement between the two families, the woman’s family and that of the husband involved is verbal.\textsuperscript{25} However, the agreement is governed through legislation in terms of the

\textsuperscript{21} Section 301 of the Children’s Act 38 of 2005. It reads:

“(1) …no person may in connection with surrogate motherhood arrangement give or promise to give to any person, or receive from any person a reward for compensation in cash or in kind.

(2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement is enforceable, except a claim for-

(a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement; (b) loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.

(3) Any person who renders a bona fide professional legal or medical service with a view to the confirmation of surrogate motherhood agreement… or in the execution of such an agreement, is entitled to reasonable compensation therefore.”

\textsuperscript{22} The surrogate is paid only for expenses incurred.

\textsuperscript{23} Clark “Surrogate Motherhood: Comment on the South African Law Commission’s Report on Surrogate Motherhood (Project 65)” 1993 (\textit{SALJ}) 769 – 778.

\textsuperscript{24} \textit{Family Law Report} (BNA) 3011, 3013 (1980).

\textsuperscript{25} In an African custom, writing is not essential to contractual validity, hence this type of an agreement is not written down. See further, C. Himonga and C Bosch “The Application of African customary law under the Constitution of South Africa: Problems solved or just beginning?” (2000) \textit{SALJ} 306. It is argued that custom “include the unwritten, normative customary practices that regulate the lives of South Africans in their day to day lives.”
western approach. The Children’s Act deals with surrogate motherhood agreements and provides some prerequisites for its validity. The Act requires the drafting of a valid contract for the surrogate motherhood arrangement. The High Court must confirm the agreement if it meets certain requirements as set out in the Act.

The contract reduces the risk of a breach of the surrogate motherhood arrangement and consequent litigation. An ordinary surrogate motherhood contract involves an agreement between the commissioning couple and the surrogate mother who undertakes to bear a child for them, handing it over after birth, thus terminating any parental power she may have over the child.

3.1. Validity of surrogate contracts
In terms of customary law, surrogacy agreements become valid the moment the surrogate’s family and the husband’s family agrees. This kind of agreements often take the form of verbal consent. On the other hand, with regard to common law, surrogacy agreements often take the form of written contracts. The nature of the obligations involved will raise complex issues concerning the basis and requirements of contractual liability, rights and duties of the parties, enforceability, breach of contract and remedies for such breach. Section 295 provides that “[a] court may not confirm surrogate motherhood agreements unless the commissioning parent or parents understand and accept the legal consequences of the agreement and their rights and obligations thereof”. In other words, the parties must be legally capable of concluding a binding contract.

Surrogacy contracts are controversial since such agreements will only be valid and enforceable if they are not considered as contra bonos mores. The contract can follow all the legalities as prescribed by the Act but still be contra bonos mores and therefore null and void.

26 S 292 (1) provides that: “No surrogate motherhood is valid unless (a) the agreement is in writing and is signed by all the parties thereto; (b) the agreement is entered into in the republic; (c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic; (d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and (e) the agreement is confirmed by the High court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident”
27 S 292 (1) (e) of the Act.
29 S 295 of the Act
30 Cecile Fabre Whose Body is it Anyway 2006 186.
in terms of the general principles of the law of contract. A contract which is not *contra bonos mores* requires the parties to complete their obligations under the contract. Sometimes problems arise and parties cannot or will not complete their obligations. Contracts may, therefore, be terminated by reasons of rescission, breach and impossibility of performance.

### 3.2. Termination of surrogate motherhood agreement

The Act allows a “surrogate mother who is also a genetic parent of the child concerned” to terminate the agreement. It must be borne in mind that Section 294 provides that:

“No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person”.

There appears to be a distinction between a surrogate mother who is a genetic parent and the one with no genetic relationship as far as termination of the agreement is concerned. Children’s Act presumes that the contracting couples are the legal parents but give the surrogate a period of time to change her mind. The court is empowered under this statute to give protection to the surrogate mother with genetic relationship to terminate the agreement “prior to the lapse of a period of sixty days after the birth of the child”, but there is no corresponding provision for the termination of the agreement to a surrogate mother with no genetic connection.

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31 Pretorius op cit (n 9) at 81. “There is ample support for the proposition that surrogate contracts are not *contra bonos mores* as they are governed by statutory law. It will be unreasonable of me to make an assumption that they are against good morals.”

32 Through such customs as the sororate, not only group alliances are maintained, but the marriage contract can be fulfilled even in the event of death. Because marriage involves an exchange of rights and obligations, the family of the wife can be assured that she will be cared for even if her husband dies. This is only fair if she has fulfilled her part of the marriage contract by providing domestic services and bearing children.

33 Section 298 of the Act. It provides that:

“(1) A surrogate mother who is also a genetic parent of the child concerned, may at anytime prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court.

(2) The court must terminate the confirmation of the agreement … upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination, and the court may issue any appropriate order if it is in the best interest of the child.

(3) The surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination in terms of this section, except for compensation for any payments made by the commissioning parents…”
In my view, a problem could be foreseen that a surrogate mother who is a genetic parent could at a later stage be emotionally attached and refuse to relinquish the child to the commissioning parent(s). However, a surrogate who is a biological mother should also be bound by contractual arrangements as such arrangements are not contrary to public policy.

3.3. Remedies and enforceability

The question is whether or not a contract to bear a child by surrogacy is enforceable, or should be enforceable. Regarding situations where the surrogate, particularly with a genetic connection, refuses to relinquish the child, what relief is available to the commissioning parent(s)? Are contractual remedies suitable in the context of surrogacy arrangements? In the case of *Conradie v Rossouw*, 34 De Villiers AJA, who gave the main judgement, expressed the true principle emerging from the old authorities, and applicable to our modern statutes. He concluded at 320:

“According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action. The agreement may be for the benefit of the one of them or of both (Grotius 3.6.2). The promise must have been made with the intention that it should be accepted (Grotius 3.1.48); according to Voet the agreement must have been entered into *serio ac deliberato animo*. And this is what is meant by saying that the only element that our law requires for a valid contract is consensus, naturally within the proper limits- it should be *in or de re licta ac honesta*.”

Solomon ACJ stated succinctly at 288:

“An agreement between two or more persons entered into seriously and deliberately is enforceable by action”

To the same effect is Wessels AAJA, at 324:

“I agree with the conclusion that arrived at that a good cause of action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established.”

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34 1919 AD 279 at 320.
However, though our law is clear that a plaintiff is always entitled to claim specific performance \(^{35}\) and, assuming he makes out a case, his claim will be granted, subject to the court’s discretion, specific performance seems not to be an appropriate remedy since the surrogate mother’s liability is restricted to “compensation for any payments made by the commissioning parents”.\(^{36}\) If a surrogate changes her mind after signing the contract and decides not to get pregnant, for example, thereby breaching the agreement, the intended parents would probably be limited at best to recovering any payments advanced to the surrogate for her services under the contract. The law will not force a woman to become impregnated, so the remedy of specific performance will be unavailable.\(^{37}\) The commissioning parent(s) will therefore be left with a limited contractual remedy, damages in terms of the Act. This mean that surrogacy agreement are to a large extend enforceable only in part.

The Act\(^{38}\) further seems to discriminate against the commissioning father who is a genetic parent of the child as far as parental and/or custody rights are concerned. Recognition is afforded the surrogate mother and “her husband or partner”. The commissioning father is the last to be considered regarding parental rights.\(^{39}\)

\(^{35}\) An order to perform a specified act in pursuance of a contractual obligation, in this context. See also the judgement of Innes J in Farmers’Co-op Society (Reg) v Berry 1912 AD 343 350: “Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze CJ in Thompson v Pullinger (1894) 1 OR at p 301, “the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt”. It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. The will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that the defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Storey (Equity Jurisprudence, sec. 717 (a)) , ‘it is against conscience that a party should have a right of election whether he would perform his contract or pay damages for the breach of it’. The election is rather with the injured party, subject to the discretion of the Court.”

\(^{36}\) See footnote 33 above, particularly ss (3).

\(^{37}\) Lupton “The right to be born: Surrogacy and the legal control of human fertility” (1988) De Jure 55. He argues that “damages would be a most inappropriate remedy if a surrogacy contract was breached by refusal to surrender the child. Monetary compensation would never replace the loss suffered by the commissioning parents.”

\(^{38}\) Section 299 of the Act provides that “the effect of the termination of a surrogate motherhood agreement in terms of section 298 is that- (a) where the agreement is terminated after the child is born, any parental rights established in terms of section 297 are terminated and vest in the surrogate mother, her husband or partner, if any, or if none, the commissioning father; (b) where the agreement is terminated before the child is born, the child is the child of the surrogate mother, her husband or partner, if any, or if none, the commissioning father, from the moment of the child’s birth…”

\(^{39}\) I am of the view that the definition of “natural father” as it appears in the Natural Fathers of Children born out of wedlock Act, 1997 (Act 86 of 1997) should be amended to include the commissioning parent(s). In terms of the Act, “natural father” is defined as that which “does not include a male person whose relationship with the child exists merely because he was a gamete donor in artificial fertilization of a person as defined in section 1 of the Human Tissue Act, 1983 (Act No. 65 of 1983), whereby that child was fathered, in the absence of any prior love relationship between the natural parents.”
4. CONSTITUTIONAL ISSUES

Legislative debates over surrogate motherhood prominently feature the rhetoric of reproductive choice.\(^{40}\) According to Western philosophy, the African approach to surrogacy is found to be patriarchal and patrilineal in nature, and it infringes upon a women’s “right to make decisions concerning reproduction”\(^{41}\) as it encompasses all forms of procreation. The World Health Organisation defines reproductive rights as follows:

“Reproductive rights rest on the recognition of the basic right 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 the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents.”\(^{42}\)

What is clear from the definition is that women have the right to decide whether, and how to procreate, they have the right to do so without interference.

Due to its patriarchal nature, the African approach to surrogate motherhood also interferes with the women’s right to equality\(^{43}\), and human dignity\(^{44}\). The latter and the Convention on Elimination of All Forms of Discrimination against Women\(^{45}\) require government to take action to eliminate all forms of unfair gender discrimination, even in the sphere of domestic relations.\(^{46}\) The Constitution describes South Africa as “one sovereign state founded on the… values of human dignity, the achievement of equality and the advancement of human rights

\(^{40}\) Whether it is exploitative of the birth mother, or in the interests of women, as a whole.
\(^{41}\) S 12(2)(a) of the Constitution
\(^{43}\) Sec 9 (1) of the Constitution of Republic of South Africa, Act 108 of 1996.
\(^{44}\) Sec 10 of the Constitution above. See also Alan Gewirth “Human Dignity as the Basis of Rights” in The Constitution of Rights, Human Dignity and American Values ed. Michael J Meyer and William A Parent (1992) 12. He describes human dignity as ‘signifying a kind intrinsic worth that belongs equally to human beings as such, constituted by certain intrinsically valuable aspects of being human. This is necessary, not a contingent, feature of all humans; it is permanent and unchanging; not transitory or changeable; … it sets certain limits to how humans may justifiably be treated’.
\(^{45}\) The convention was adopted by the UN General Assembly on 18 December 1979 (resolution 34/180) and entered into force on 3 September 1981. South Africa signed the Convention in January 1993 and ratified the Convention on 15 December 1995, without entering any reservations.
\(^{46}\) Article 5(a) of the Convention provides that states parties are obliged ‘[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women.’
and freedoms, non-racialism and non-sexism”. Judge Ackermann writes that ‘to say that people are equal before the law and that they enjoy the equal protection and the benefit of the law means that the law must protect and benefit all people equally with respect to their human dignity’. In the case of *S v Makwanyane*, O’Regan J explained the right to human dignity as follows: “Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in… the Bill of Rights”.

It is argued that adherence to cultural practices such as surrogacy, has perpetuated the social inequality of African woman based on gender. Nhlapo disputes the latter, stating that:

“In the context of a subsistence economy the very rules that appeared designed for the subjection of women often operated to ensure their security. The economic priorities underlying the pre-eminence of marriage and large families produced practices which worked in part to ensure that no woman was left without someone directly responsible for her maintenance”.

Bekker further writes that “there is more to customary law than one perceives and that it would be wrong to say that the rules constitute just another form of inequality and discrimination.” African traditional practices may, therefore, not have been considered detrimental by the societies as they currently do. Consideration should be given to people who adhere to cultural and traditional practices such as surrogacy and who do not find the practice offensive. Robinson writes “Culture and customs are valuable and important parts of people’s lives and women experience some aspects of customary law as affirming. The positive aspects of customary law can be measured by the way to which the extent to which they affirm woman’s personhood or are not experienced as oppressive.” It is therefore evident that some human rights principles actually undermine or conflict with certain human dignity orientations.

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47 Section 1 of the Constitution of the republic of South Africa, Act 108 of 1996.
49 1995 (3) SA 391 (CC) at 328
51 Ibid
that human rights are supposed to protect. The latter testifies to the fact that pure legal conceptions obtained from the west are not a true reflection of African realities.

It is further argued that an African traditional way of surrogacy renders a surrogate mother incapable of having an individual freedom of choice. This is mainly due to the fact that a customary African marriage is “essentially an agreement between two families, in which the individual interests of the groom and bride, though implicitly or formally recognised, are but a subordinate element of the wider dominating interests of their families”. Any individual exists as a member of a group. Consequently an individual’s rights are subject to the interests of the group, though it does not mean that individuals do not have rights. Further, that a person rooted in African culture considers the culturally universal values, guaranteed by the authority of a superhuman being, first before individual considerations. The ancestors have power of displaying wrath upon those who break the laws of the family and neglect their ancestors. This belief that ancestors bring harm to those who ignore them limits the surrogate mother’s individual freedom of choice.

The Children’s Act recognises the surrogate mother’s legal right to terminate the pregnancy. The termination may be done despite the wishes of the commissioning parents. The latter is entirely foreign to African custom. A woman who commits abortion will be called a witch, a dangerous person, and will be sent home to her own people. According to African custom,

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54 Baah Human Rights in Africa: The Conflict of Implementation (2000) 86. See also Rhoda E Howard ‘Dignity, Community and Human Rights’ in Human Rights in Cross Cultural Perspectives ed. Abdullah Ahmed An-Na’im (1989) 75 who views human dignity as ‘ something that is granted at birth or on incorporation into the community as a concomitant of one’s particular ascribed status, or that accumulates and is earned during the life of an adult who adheres to his or her society’s values, customs and norms … in many preliterate societies, individuals who chose not to earn such dignity, who consistently violated instead of obeying the underlying social norms, were cast out through exile or through conversion into slavery.’

55 Holleman Shona Customary Law (1952) 73

56 Nyamiti African tradition and the Christian God No. Date 46. He writes “In Africa, the living and their dead ancestors are related to one another as if the dead were still on earth, since the family relationship continue. The living are a continuation of the family line began by ancestors, who are believed to be usually benevolent to the family although they can become angry…”

57 Ibid

58 Section 300 of the Act, reads:
“(1) A surrogate mother agreement is terminated by a termination of pregnancy that may be carried out in terms of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996).
(2) For the purposes of the Choice on Pregnancy Act, 1996, the decision to terminate lies with the surrogate mother, but she must inform the commissioning parents of her decision prior to the termination and consult with the commissioning parents before the termination is carried out.
(3) The surrogate mother incurs no liability to the commissioning parents for exercising her right to terminate a pregnancy pursuant to this section except for compensation for any payments made by the commissioning parents in terms of section 301 where the decision to terminate is taken for any reason other than on medical grounds.”

59 van Tromp Xhosa Law of Persons: A Treatise on the Legal Principles of Family relations among the Amakhosa (1947) 130
abortion is wrong, unjust, unethical and detestable. This is evident from the way people who have lost their partners have to undergo a cleansing ceremony immediately thereafter. People who are directly affected by death are regarded as contaminated. A woman who has committed abortion will be expected to undergo a cleansing ceremony to rid her of the bad blood within her body.

6. CULTURAL RIGHT

The South African Constitution gives recognition to cultural rights. The choice of an endogenous definition of culture seems to entail that the African practice of surrogate motherhood is also recognised under the Act. 60 The constitution provides that: “everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do in a manner inconsistent with any provision of the Bill of Rights. 61 It further provides that “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:

- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.” 62

UNESCO also adopted the Draft Declaration on Cultural Diversity which provides that:

“Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent… all persons have therefore the right to express themselves, and to create and disseminate their work in the language of their choice, particularly their mother tongue; all persons are entitled to quality education that fully respect their cultural identity; and all persons have a right to participate in the cultural life of their choice and conduct their own cultural practises, subject to respect for human rights and fundamental freedoms.” 63

As much as cultural rights are recognised through statutory law, emphasis is put on respect for human rights and provisions of the Bill of Rights when exercising that right.

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60 Section 1 of the Recognition of customary Marriages Act 120 of 1998. See also footnote 1 above.
61 Section 30 of the Constitution of the Republic of South Africa.
62 Section 31 of the Constitution above. See also Art 27 of the International Covenant of Civil and Political Rights, UNGA Res 2200A (XXI) GAOR 21st Session, Supp no 16, 52 (1996), which states: “In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language.”
9. CONCLUSION

The argument that surrogacy encroaches on the woman’s right to complete autonomy over her body and also violates her basic right, should be unable to suffice for those who practice the western way to surrogacy. The mere agreement to act as a surrogate and the signing of surrogacy contract should be taken to have waived the fundamental rights of the surrogate.\(^64\)

The fact that woman are capable of freely consenting to act as surrogates without any form of duress proves that the western way of surrogacy cannot be infringing on their rights.

The African traditional practice of surrogate motherhood is moving towards being obsolescent.\(^65\) The comparative study shows that adherence to cultural practice of surrogacy caused, and still causes less tension, as opposed to the Western approach. A surrogate contract poses numerous problems, particularly with respect to breach of the contract and its remedies.

The validity and enforceability of the contract are also questionable since the surrogate mother can breach the contract before conception, or during the pregnancy or even after the birth of the child. The Act is also silent on the possible breach by the commissioning couple and their legal effects. What makes matters worse is that legal remedies are clearly inadequate as far as breach by the surrogate mother is concerned.

The African practice of surrogate motherhood promotes social cohesion and unity; on the other hand, it is not discriminatory, oppressive and dehumanising. It is therefore recommended that all efforts must be made by the custodians of culture and tradition to preserve the positive aspects of all cultures, including the practice of surrogate motherhood. This will make people to realise that not all of their cultural practices are negative.


\(^{65}\) See footnote 3 above at 355.