



MEMORANDUM ON AN AFRICAN FEMINIST ANALYSIS OF THE PROPOSED HUMAN ASSISTED REPRODUCTIVE TECHNOLOGY BILL, 2023.

A. Introduction

This memorandum is presented by Women's Probono Initiative (WPI), Akina Mama wa Afrika (AmwA), SRHR Alliance Uganda, Centre for Women Justice Uganda (CWJ), and Voluntary Service Overseas- VSO to the Health Committee of Parliament in consideration of the proposed Human Assisted Reproductive Technology Bill, 2023.

The Human Assisted Reproductive Technology Bill, 2023 (hereinafter referred to as "the Bill") is being proposed to address the gaps that exist in Uganda relating to scientific methods associated with fertility and giving birth. Methods such as In Vitro Fertilization (IVF) and surrogacy have become increasingly accepted methods that enable persons with infertility and/or health challenges to have children. The bill, therefore, seeks to broadly regulate the use of assisted reproductive technology. We welcome this bill given that it expands reproductive justice for women and enables them to exercise their right to have a child by putting in place safeguards and protections for those using Assisted Reproductive Technologies (ARTs) to do so safely.

We are, however, concerned with some of the clauses of the bill which could potentially become a tool to further patriarchal social control, exploitation, and coercion of women, so we argue that it is crucial that "*women define what is best for women*" concerning reproductive technologies and articulate thus the form and direction of the "politics of motherhood". Ibrahim Obadina argues that when legislating on reproductive rights for women, the 'woman question' should be front and center of the discussion addressing the impact of such legislation on the lives of women based on their lived realities.^[1] Reproductive justice seeks to center the lived experiences of women as they navigate reproductive rights moving away from mere freedoms and entitlements to actual protection and implementation of such rights.^[2]

B. General recommendations

- Reproductive justice is a concept often defined as.
"The complete physical, mental, spiritual, political, social, and economic wellbeing of women and girls based on the full achievement and protection of women's human rights."^[3]
- The concept was first floated by feminist women of color from the United States of America (USA) in 1994 after participating in the International Convention of Population and

Development conference and realizing that the broader reproductive rights movement was not addressing the lived realities of women of color.^[4] Reproductive justice is, therefore, a tool for achieving reproductive rights which focuses on intersectionality and recognition that reproductive decisions are only made based on the lived experiences of individuals; it prioritizes positive rights that require the state not just to stay away from interfering in the autonomy of a person but to actively create an environment where everyone can enjoy their reproductive rights.^[5]

- Reproductive justice as a concept is therefore intended to use human rights to draw attention to laws that discriminate against women to limit their reproductive autonomy because of their marital status, economic status, disability status, identity and health status.^[6] The proposed bill seeks to limit access to ARTs to wealthy women who are already in a heterosexual relationship, and they or their partner have been diagnosed with infertility.
- Reproductive justice uses three tenets to address the full breadth of reproductive rights, believing that everyone has a) a right to have children; b) a right not to have children; and c) the right to parent their children in a safe and healthy environment.^[7] The proposed bill targets the realization of the right to have children, which means it must acknowledge and actively address the very real legal and socio-economic environment within which people make their reproductive decisions, manage their fertility, give birth and parent.^[8]
- The Constitution contains several provisions recognising fundamental human rights that affect reproduction upon which the proposed bill must align. Key among the reproductive rights are the right to equality and freedom from discrimination, the right to dignity, the right to privacy and the right to found a family, albeit only for heterosexual couples.^[9] The Constitution equally recognises the historical marginalization of women within society and specifically calls for their protection, considering the maternal function that they play in society.^[10]
- The use of ARTs remains completely unregulated within Uganda, allowing for gross abuse and exploitation due to wide contractual liberty. The cost of using ARTs is so high that many people cannot afford it.^[11] Currently, the going cost for one IVF cycle is an average of \$7,500, putting it out of reach for many Ugandans who might otherwise wish to make use of such services, especially given that Uganda has a poverty rate of 20.3% with 56% of the population being food insecure, this means that most of the population is struggling to meet their daily necessities thus making ART a luxury instead of an entitlement provided for under Articles 31 and 33 of the Constitution.^[12] The hope is that the proposed bill shall cure this gap.
- The proposed bill is a step in the right direction because Uganda has a heavy burden of infertility, with over 30% of all couples and 3% of all women of reproductive age struggling with primary or secondary infertility, the major causes of which stem from unsafe abortions and poor postpartum health management.^[13] To manage infertility, many Ugandans have since

resorted to using ARTs to have children, especially since childlessness is stigmatized and women are under heavy societal pressure to reproduce; when a woman does not reproduce, she is often shunned by society and shamed for being childless.^[14] This has led to the mushrooming of several fertility clinics providing ARTs to individuals, both domestic and international, seeking to benefit from these services, but with the lack of regulation and exorbitant costs involved, the services have remained largely inaccessible to lay people and have been the scene of exploitation and abuse especially for those who play the role of donor or surrogate.^[15]

- The prayer is that this bill can curb the exploitation within the ARTs industry and ease access to ART services by limiting the contractual liberty that exists to protect the users of these services from those who only wish to profit off people’s misery.

C. Specific recommendations as per the clauses of the bill

Item	Proposed clause in bill	Recommended change
1.	<p>Clause 1 provides for the application of the bill as below:</p> <p>This Act applies to –</p> <p>(a) A man and woman who jointly seek to use assisted reproductive technology to obtain a child: and</p> <p>(b) A man and woman, where either the man or woman or both the man and woman, suffer primary or secondary infertility or health-related challenges which affect man or woman’s ability to reproduce.</p>	<p><i>Proposed change</i></p> <p>This Act applies to –</p> <p>(a) A person seeking to use assisted reproductive technology to obtain a child.</p> <p>(b) <i>Delete clause 1(b).</i></p> <p><u>Add 2. Every person has a right to access the highest attainable standard of quality and cost-effective human assisted reproductive technology services.</u></p> <p><i>Justification</i></p> <ul style="list-style-type: none"> • This clause seeks to limit the autonomy of an adult to use ART in their capacity as a single person and is confined to only using ART services jointly with a partner. Article 31(1) of the Uganda Constitution provides for everyone's right to found a family, this right is protected for people who are single and those who are coupled. • The bill is supposed to extend reproductive rights to those who might remain otherwise childless. We believe the ART will provide “solutions” to infertility and is therefore beneficial to not only infertile couples but also those who are not involved in

		<p>traditional heterosexual family situations or marriages.</p> <ul style="list-style-type: none"> • Also, reproductive rights support the rights of couples to reproduce in many ways: coitally and non-coitally through the intermediacy of donors or surrogates. The positive right to reproduce non-coitally through the intermediacy of donors and surrogates means that ARTs cannot be limited to only those who have been diagnosed as infertile since sometimes people are fertile and want to have a child but for various reasons cannot carry a pregnancy or they do not want to pass on genetic disorders or diseases to their children.^[16] • The Bill should ensure affordability and accessibility of ART services for all Persons irrespective of socioeconomic status or other factors.
<p>2.</p>	<p>Clause 2 on interpretation</p> <p>In this Act unless the context otherwise requires - “parent” means the biological mother and father of a child or a man and woman who obtain a child through human assisted reproductive technology or surrogacy;</p>	<p><i>Proposed change</i></p> <p>In this Act unless the context otherwise requires -</p> <p><i>Add</i> “Assisted Reproductive Technologies” means all treatments or procedures that include the in vitro handling of both human oocytes and sperm, or embryos, for the purposes of establishing a pregnancy.</p> <p><i>Amend</i> “parent” means the <u>legally recognised</u> mother or father <u>who have parental responsibility</u> of a child or <u>a person</u> who obtains a child through human assisted reproductive technology or surrogacy:</p> <p><i>Justification</i></p> <ul style="list-style-type: none"> • The definition of ART is drawn from WHO. Seen here https://www.cdc.gov/art/whatis.html • Expand the definition of parent to align with the definition under the Children Act and Succession Act. A parent is anyone

		<p>recognized as a legal parent of a child under the law. This includes both biological and non-biological parents, ie adoptive parents or individuals who have assumed parental responsibilities for a child.</p>
<p>3.</p>	<p>Part II provides for the appointment of UMDPC as the person responsible for the administration of the bill.</p> <p>Clause 4(2) on the functions of the Council</p>	<p><i>Proposed change</i> Without prejudice to the general effect of subsection (1), the council shall -</p> <p><u>Add 4(2)(f) Develop standards and guidelines on the provision of human assisted reproductive technologies.</u></p> <p><u>Add 4(2)(g) Create and implement awareness creation programs for the public on the use of human assisted reproductive technologies.</u></p> <p><i>Justification</i></p> <ul style="list-style-type: none"> • ART services currently have no standards and guidelines for practitioners, which leaves a lot of room for abuse of power. • Many people have limited information on the use of ARTs, and the little information that is available is plagued with misinformation and falsehoods; it, therefore, becomes imperative for the government and its bodies to provide accessible and accurate information to the public about ART.
<p>4.</p>	<p>Part III provides for the designation of fertility centers, banks and the authorities that approve and issue licenses.</p>	<ul style="list-style-type: none"> • Provide for a right to appeal where a practitioner’s license is denied, suspended, or revoked. • Administrative measures should entail a remedy in instances of unfair denial or revocation of a license. • There is a need for stringent regulation of the said clinics as well as the providers to prevent exploitation, coercion, and unethical practices, such as coercion to undergo unnecessary procedures or discriminatory treatment based on gender or other characteristics.

<p>5.</p>	<p>Clause 19 on parentage in human assisted reproductive technology.</p> <p>19. A man and woman who use –</p> <p>(a) (a) Their own gamete or embryo; or</p> <p>(b) (b) Another person’s gamete or embryo,</p> <p>To obtain a child through human assisted reproductive technology, shall be the parent of the child.</p>	<p><i>Proposed change</i></p> <p>19. A person who uses –</p> <p>(a) (a) Their own gamete or embryo; or</p> <p>(b) (b) Another person’s gamete or embryo,</p> <p>To obtain a child through human assisted reproductive technology, shall be the parent of the child.</p> <p><i>Justification:</i> See reasons in item 1 above</p> <ul style="list-style-type: none"> • The clause creates ambiguity or confusion in instances of traditional surrogacy, where the surrogate’s egg is used, as opposed to gestational surrogacy, where the surrogate has no biological link to the baby. • The definition section should clearly stipulate these two distinctions as they are important in safeguarding the rights of the parties involved in the agreement. • The difference between gestational and traditional surrogacy arrangements is an important legal distinction central to determining the legal status of those involved. In the case of traditional surrogacy, the surrogate is the biological mother of the child and, as such, has a claim to parental rights over the child through genetics.
<p>6.</p>	<p>Clause 21 of the Bill provides for the conditions for intending parents to use surrogacy.</p> <p>21. An intending parent may opt for surrogacy where a registered medical practitioner has, upon examination of the intending parent, established that –</p> <p>(a) The intending parent suffers primary or secondary infertility; or</p> <p>(b) The intending parent suffers health challenges which affect</p>	<p><i>Proposed change</i></p> <p>Delete all of clause 21.</p> <p><i>Justification</i></p> <ul style="list-style-type: none"> • This clause limits the reproductive choices of women who may choose for various reasons to use ART to have a child whether they are infertile or infertile. • Surrogacy as an alternative should be available for individuals who opt not to carry the baby as a matter of exercise of bodily autonomy.

	<p>the intending parent’s ability to reproduce.</p>	<ul style="list-style-type: none"> • Reproductive justice supports the rights of women to reproduce in many ways: coitally and non-coitally through the intermediacy of donors or surrogates. • The positive right to reproduce non-coitally using donors and surrogates means that ARTs cannot be limited to only those who have been diagnosed as infertile since sometimes people are fertile and want to have a child but for various reasons cannot carry a pregnancy or they do not want to pass on genetic disorders or diseases to their children. ^[17]
<p>7.</p>	<p>Clause 23 that provides for surrogacy agreements.</p>	<p><i>Proposed change</i></p> <p><u>Add 23(6) A surrogacy agreement may be terminated where –</u></p> <ul style="list-style-type: none"> (a) <u>(a) The pregnancy terminates prematurely.</u> (b) <u>(b) Before the implantation of a fertilized embryo in the surrogate mother’s womb.</u> (c) <u>Parties shall not terminate the agreement after the transfer of the embryo(s) into the womb of the surrogate mother.</u> <p><u>Add 23(7) In the event of multiple pregnancies arising out of a surrogacy agreement, all the children born out of the pregnancy shall be the children of the intending parent.</u></p> <p><u>Add 23(8) A surrogate mother shall have autonomy over all medical decisions concerning a pregnancy arising out a surrogacy agreement and the subsequent birth of a child.</u></p> <p><i>Justification</i></p> <ul style="list-style-type: none"> • The bill should be able to provide a standardized benchmark of a surrogacy agreement that imposes obligations on the surrogate and the intending parent(s) to limit exploitation and abuse by curtailing contractual liberty.

		<ul style="list-style-type: none"> The bill should clearly define and identify the rights of the surrogates; autonomy of the surrogate mother must be maintained up to the point they hand over the child to the intending parents. The bill should provide robust provisions to ensure that surrogates are fully informed and given consent before undergoing ART procedures. This includes comprehensive information about potential risks, alternatives, and implications for their health and well-being.
8.	<p>Clause 25 on medical care for surrogate mother.</p> <p>25. An intending parent shall provide medical care for a surrogate mother during surrogacy</p>	<p><i>Proposed change</i></p> <p>25. <u>Compensation for surrogate mother</u> An intending parent <u>shall compensate a surrogate mother for loss of income, time and provide medical care for them during the subsistence of a surrogacy agreement.</u></p> <p><i>Justification</i></p> <ul style="list-style-type: none"> The Act should not only limit expenses to medical bills for the surrogate mother, but it should also expand to other bills as well, such as stipends, rent, etc., considering that sometimes the surrogate (s) may lose their jobs due to the demanding nature of the conditions set up by the intending parents.

D. Organisations that have contributed to this analysis.

Item	Organisation	Address
1.	Women's Probono Initiative (WPI)	Plot 7, Suuna Road, Village 14 Ntinda, Kampala. info@womenprobono.org
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3.	Centre for Women Justice Uganda	iowomugishabazare@gmail.com
4.	Voluntary Service Overseas- VSO	Plot 2727

		Muyenga Tank Hill Road, Kampala Uganda. vsouganda@vsoint.org
5.	SRHR Alliance Uganda	Plot 29, Kimera Road Ntinda, Kampala srhr@srhrallianceug.org

Endnotes

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- [1] I Obadina ‘Addressing maternal mortality through decriminalising abortion in Nigeria: Asking the ‘woman question’ in E Durojaye and others (n 28) 32.
- [2] L Ross ‘Reproductive justice briefing book: A primer on reproductive justice and social change’ (2007) *Reproductive Technologies* at 4.
- [3] Ross (n 2) 4.
- [4] Ross (n 2) 4.
- [5] Obadina (n 1) 85.
- [6] Ross (n 2) 4.
- [7] Ross (n 2) 4.
- [8] Obadina (n 1) 86.
- [9] Arts 21, 24, 27 and 3
- [10] Art 33
- [11] Z Nampewo ‘Assisted reproductive technologies in Uganda: Law and practice’ *Routledge Handbook of Global Health Rights* (1st edn, 2021) at 20.
- [12] R Kudesia and others ‘Infertility in Uganda: A missed opportunity to improve reproductive knowledge and health’ (2018) 3(4) *Global Reproductive Health* at 4.
- [13] Kudesia (n 12) 3
- [14] BBC ‘Seventy-year-old Ugandan woman gives birth to twins – hospital’ (1 December 2023) <https://www.bbc.com/news/world-africa-67577038> (accessed 3 January 2024)
- [15] Zahara (n 11) 18
- [16] Feminist perspectives on reproductive technologies: The politics of motherhood
- [17] Feminist perspectives on reproductive technologies: The politics of motherhood