

AN EXAMINATION OF THE LEGAL FRAMEWORK FOR ASSISTED REPRODUCTIVE TECHNOLOGY IN NIGERIA

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Abstract

Medical interventions like Assisted Reproductive Technology (ART), which has far reaching effects on human existence are constantly developing. While these medical interventions may bring advantages to people, by way of opportunity to sustain their lineages through childbearing, they are also changing and modifying society in more significant ways. However, as sciences have advanced, traditional norms of conception and parenthood have been challenged while reproductive ethics and law struggle to keep pace. Controversies and debate have also arisen within the law as to the legality of this reproductive technology. This paper focuses on ascertaining whether there is any law regulating the practice of ART in Nigeria.

Keywords: Assisted reproductive technology, Nigeria, regulation, legislation, private clinics.

1. Introduction

Assisted Reproductive Technologies (ART) provides a new ability for many couples to overcome infertility and separate the reproductive process from sexual intercourse¹. Assisted Reproductive Technologies

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¹A.Oladapo, 'Assisted Reproductive Technologies: The Journey so Far'. *The Punch Newspaper*, 14. (2019). (24)

are innovative, non-coital medical procedures² that aid conception and pregnancy. They have the potential to separate sex from reproduction³, and they include a range of techniques for manipulating eggs and sperm in order to overcome infertility⁴. It is a collection of techniques and procedures that bypass the obstacles to achieving pregnancy using traditional methods.

ART as a conduct involving the creation of life deserves scrutiny through the eyes of the law. Records show that up to 20% of couples of reproductive age group in Nigeria suffer from infertility, and approximately 4% of women aged 30 years and above have never given birth to a child⁵. Again, it is opined that infertility cases constitute the majority of medical cases handled by Nigerian gynecologists in University Teaching Hospitals. This situation is problematic especially given the fact that childbearing is highly valued in Nigeria is often perceived as constituting the very essence of marriage⁶.

Abdulwasiiu⁷ posits that childbearing is central to some people's sense of fulfillment in Nigeria, while Umeora *et. al* assert that 'the paternalistic nature of the African society means that procreation is invaluable⁸. Hence, couples who are faced with fertility problem as a

²ECA. Agwu., and AO, Nwafor, 'Regulating Assisted Reproductive Technologies (ART) in Nigeria; Lessons from United Kingdom' (2020) *African Journal of Reproductive Health*: (24) (4) .4.)

³FO, Emir, *Medical Law and Ethics in Nigeria* (2nd.ed Malthouse Press Limited 2012)

⁴A .Sufiya, 'Regulating conception: A Medico-legal Analysis of Assisted Reproductive Technology'.(2017). Vol.(4) *International Journal of Innovative Social sciences and Humanities Research*.1

⁵N okafor et al., 'Perceptions of Infertility and In Vitro Fertilization Treatment among Maed Couples in Anambra State, Nigeria', *African Journal of Reproductive Health*, December 2017;

⁶Z Mustapha, 'The Practice of Assisted Human Reproduction Technologies (ATRs) in Nigeria: The Unanswered Legal and Ethical Questions', *Journal of Law and Judicial System*, vol. 1, Issue 1, 2018, p 47.

⁷OA., Abdulwasiiu, 'Assisted Reproductive Technology' <<https://www.lawexplorer.com>> accessed 24 August,2019.

⁸OJ.,Umeora, MC Umeora, NB Emma-Echiegbu, & FN Chukwuneke, 'Surrogacy in Nigeria: Legal, Ethical, Socio-Cultural, Psychological and Religious Musings', *AfrJ*

result of, or owing to one factor or the other, are faced with severe social stigma⁹, a reality that some individuals and couples particularly in Nigeria are contending with¹⁰.

There are profound reasons why affected couples elect to use ART. The South Africa have clearly articulated these reasons in their Constitutional Court in *AB and Another v Minister of Social Development*,¹¹ when it described the burden of infertility and the reliefs brought to humans by the evolution of the Assisted Reproductive Technologies as follows:

We are not in any way short of words when it comes to describing the effects of experiencing infertility: grief; sadness; despair; panic; helplessness; and isolation are but a few of the feelings that often ensue. For a large number of people, infertility has been “the most upsetting experience of their lives”. For others, infertility is rated as comparably stressful to the loss of a partner or a child. The likelihood of depression has been shown to double for women who are infertile. Disturbingly, infertility levels are on the rise globally, with one in every ten people facing infertility problems. We are fortunate, however, to live in an era where the effects of infertility can be ameliorated to a large extent through assisted reproductive technologies. The technological advances seen over the last half century have greatly expanded the reproductive avenues available to the infertile. These reproductive avenues

Med Health Sci, 2014, vol. 13, Iss. 2, 105-9; KP Anu & SN Inder Health Surveys, December 2012, p 12.

⁹D, Surrogacy and Women’s Right to Health in India: Issues and Perspective, *Indian J Public Health*, 2013; 57: 65-70.

¹⁰A A Nardelli, et. al., ‘Assisted Reproductive Technologies (ATRs): Evaluation of Evidence to Support Public Policy Development, *Reproductive Health* 11, Article Number: 76(2014).

¹¹

should be celebrated as they allow our society to flourish in ways previously impossible¹².

Worthy of note is that Assisted Reproductive Technologies are different from other medical treatments because the process involves forming the family and the child's interest. It has resulted in a tectonic shift in how physicians and the general population perceive infertility and ethics surrounding the process¹³.

Consequently, Assisted Reproductive Technologies (ART) became a "magical cure" for infertility and patients who undergo ART treatments are more likely to deliver multiple-birth infants than women who conceive naturally.¹⁴ Infertility belts are characteristic of Sub-Saharan African (SSA) countries, where between 20 and 35 million couples cannot have a child¹⁵, and is also the miracle of the new era, where high-tech babies are born through new reproductive technologies and genetic engineering, identification of health concerns and curing diseases have given people new hope in science.

However, while these scientific and technological advances bring great joy and relief, they also prompt controversial debates. Among such controversies surrounding (ART) are legal and ethical issues. For instance, posthumous conception brought in legal issues involving intestate inheritance and access to genetic material donated by a deceased spouse, which raises issues of informed consent and public policy principles, including legal parentage to allow surviving relatives to have sperm or eggs retrieved from the corpse of their love one.

Surprisingly, Assisted Reproductive Technologies, which are advancements in medical and biomedical sciences that have offered

¹² [2016] ZACC 4 paras 2-3.

¹³ "The Ethical, Legal and Social Issues Impacted by Modern Assisted Reproductive Technologies" <<https://www.hindawi.com/journals/org/2012/686253/>> (2012). Accessed on 12 September 2022

¹⁴ Assisted Reproductive Surveillance- United States <https://www.scholar.google.com/scholar?q=assisted+assisted+reproductive+technology&hl=en&as_sdt=0&as_vis1&oi=scholar#d=gs_qabs&u=%23p%3DKHOv20vbuYJ> (2002).> Accessed on 19 September 2022

¹⁵ J, Okafor., 'Perceptions of Infertility and In Vitro Fertilization Treatment among Married Couples in Anambra State, Nigeria.' (2017) *African Journal of Reproductive Health*. 21 (4) 55.

childless couples opportunities to procreate, have been rejected by some group of persons who do not accept these technologies and so denounced them. As a "new holy war" against human nature, they see ART as a threat to marriage and the sanctity of the human embryo¹⁶. To them, it is morally repugnant to let science and technology to intervene in the most sacred area of human life: Procreation.

Nevertheless, their rejection is like a drop of water in an ocean because the technology has gained wide acceptance in the society¹⁷. Others argue about the legitimacy of a child born through Assisted Reproductive Technologies, the rights and duties of parents, rights and responsibilities of parties, rights and obligations of the surrogate mother and rights and duties of the doctor on confidentiality, the role of the state in facilitating Assisted Reproductive Technologies, criteria for determining the deserved couple to the use of ART, restrictions on the use of ART, the commercialization and commoditization of human beings, the malpractices and misuse of Assisted Reproductive Technologies, among others.

The procedure was always conducted under a climate of ambiguity because there are no clear lines prohibiting unacceptable applications of rules, and no restrictions for ART providers or intermediaries who have identified a wildly lucrative niche in the market. ART has provided a lawless, free-for-all market where the most exploitative providers reign at the detriment of desperate couples who wants to have their babies.

ART has created a necessity, which did not exist previously, to define parenthood according to the law. In cases of ART, roles are duplicated or tripled, resulting in biological, social, and gestational parents, thus posing a legal challenge to the status of the child and the legality of the process. The use of aggressive marketing techniques to lure desperate and vulnerable couples is worrisome. Women are now defrauded and

¹⁶ "Religion, 'Infertility and Assisted Reproductive Technologies' <<https://www.sciencedirect.com/science/article/abs/pii/S1521693406001258>>(2007). accessed 12 September 2022

¹⁷J. D. Candidate, 'Guiding Regulatory Reform in Reproduction and Genetics' (2014) *DePaul University College of Law Journal*. 120.

deceived. Trial and error are common. The increased spate of cryptic pregnancy has been attributed to lack of regulatory framework; a woman who went for ART in Southern part of Nigeria ended up in cryptic pregnancy and illegal adoption¹⁸.

ART is a complex technology that requires expertise and should not be experimented with non experts or ill equipped facilities.

While enjoying the benefit of this modern technology, state legislatures still need to respond to this technology¹⁹. This apprehension has left a gaping hole for a booming, unregulated market fraught with ethical and legal issues. Technology that emerges as controversial and deeply rooted in society becomes difficult, if not impossible, to regulate. It is a glaring fact that Assisted Reproductive Technologies are directly challenging culture to reevaluate how human life, social justice and equality claim to genetic offspring.

India has become one of the major centers of this global fertility industry, with reproductive medical tourism becoming a significant activity. Clinics in India offer nearly all the ART services. With the advances of technology and availability of techniques in the country, the ART activities have grown faster. India has recorded the most significant growth in ART centers and the number of ART cycles being performed has steadily risen over the last decade.

India saw the need to regulate the Assisted Reproductive Technology Services, mainly to protect the affected women and children from exploitation. The oocyte donor needs to be supported by an insurance cover, multiple embryo implantation needs to be regulated and children born through ART needs to be protected, cryopreservation of sperm, oocytes and embryo by the ART banks need to be controlled,

¹⁸F Iketunbosin., 'Regulation of Assisted Reproductive Technology; The role of Government'. (2017-2019) *AFRH Registry*. Oral Presentation at International Annual Scientific Conference of the Association for Fertility and Reproductive Health; September 18-20, Hotel Presidential, Port Harcourt, Nigeria.2019.

¹⁹ RS, Brenda., "Accessing the Market for Human Reproductive Tissue Alienability: Why Can We Sell Our Eggs But Not Our Lives" (2008) *10 VAND.J.ENT AND TECH*,643.

provision made mandatory for the benefit of the child born through Assisted Reproductive Technology to be put in place²⁰

Past Research on ARTs has focused more on the availability of the services, effectiveness, awareness²¹, the effect of Assisted Reproductive Technology (ART) on babies born²², knowledge and perception²³, the costs and consequences of Assisted Reproductive Technology²⁴, Successful pregnancy outcome and practice²⁵. This present research critically assesses the legal framework of this innovative Technology in Nigeria view to draw the attention of various stakeholders to take positive actions.

2. Conceptual Framework

Infertility is a couple's inability to conceive after one year of regular unprotected sexual intercourse²⁶. It also refers to the failure to bring a pregnancy and deliver a baby. Male infertility refers to a man's inability to impregnate a woman after twelve (12) months of regular and unprotected sexual contact²⁷.

ART embrace all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body and transferring the gamete or the embryo back into the reproductive tract. These techniques help to promote fertility that

²⁰ S. Malik. The art of Assisted Reproductive Technology, the Indian Story. <<https://www.times.indiatimes.com>> accessed 03 March 2023

²¹ NA, Adesiyun., 'Awareness and Perception of Assisted Reproductive Technology Practice amongst Women with Infertility in Northern Nigeria'(.2011) *Open Journal of Obstetrics and Gynecology*, 144-148.

²² Q, Wu., 'Effect of Assisted Reproductive Technology (ART) on Babies Born: Compared by IVF Laboratories of Two Countries' (2019)

²³ J, Okafor.,(n 19). 58

²⁴HC, Connolly, "The Costs and Consequences of Assisted Reproductive Technology: An Economic Perspective. Human Reproduction Update, (2010) Healthcare journal 16, (6) 603–613.

²⁵F.Iketunbosi (17)

²⁶Merriam- Webster *Merriam-Webster's Collegiate Dictionary* (11th. Ed. Merriam Webster Incorporated Springfield, 2004).640

²⁷AL.Kwaghga and IA,Shimakaa.,' Demand for Children and Fertility Transition in Guma Local Government Area of Benue State'. .(2020).. *Benue Journal of Social Sciences* .Vol. (6)(1), 284-300

requires medical intervention at various stages of reproduction²⁸. Artificial insemination is technologically the basic one. It involves introducing fresh or frozen²⁹ semen into the vaginal cavity, mimicking the coital process. The use of husband's semen is called artificial insemination by husband (AIH)³⁰, while that of a donor is called artificial insemination by a donor (AID)³¹. Everything else being equal, the processes, offer a comparable success rate as coitus. *In vitro* fertilization with embryo transfer (IVF) involves collecting ova and sperm to fertilize in the laboratory. After that, the fertilized embryo is placed in the uterus for implantation, favoring women who have obstructed fallopian tubes with no other fertility issues. IVF is a widely recognized, modified and improved treatment of complex types of infertility that has become available. Early research revealed that the new procedure posed no additional risk to the mother and baby³². Hence its use is growing more prevalent worldwide³³.

Manual conceptions are intra fallopian gamete transfer (GIFT) and zygote intra fallopian transfer (ZIFT). GIFT involves placing ova and concentrated sperm in the fallopian tube; ZIFT utilizes IVF and places the resulting zygote in the fallopian tube. These techniques are roughly twice as effective as IVF. Surrogate embryo transfer (SET) involves the removal of an embryo from a surrogate's uterine lining and implantation in another woman. This is similar to a donated oocyte, except that the egg is fertilized in the donor's body, typically by artificial insemination. With the introduction of intra

²⁸MS, John., *Evaluation and Treatment of Infertility*. (6th. Ed. 45 Clinical Symp Merck Manual, 2016)

²⁹Centers for Disease Control and Food and Drug Administration both Suggest the Use of Frozen Semen to Reduce the Chance of Spreading Sexually Transmitted Diseases

³⁰A, Goodwin., 'Determination of Legal Parentage in Egg Donation, Embryo Transplantation and Gestational Surrogacy Arrangement', (1992).*26 Fam. L.Q.*275

³¹C, Cohen., et al. "*Current Practices of Artificial Insemination by Donor in the United States.*" (3rd.eds. New Eng. Press. 1979)

³²TM, Ola., 'Assisted Reproductive Technology in Nigeria: Flawed or Flavored', (2012). *International Journal of Social Science and Humanity*. Vol. (2), (4).

³³EA. Osian, (n 8) 135

cytoplasmic sperm injection (ICSI), ART can now help infertile couples with a male factor, a condition for which results of traditional treatment have not been satisfactory.

These procedures have brought hope and respite to many people and couples who had looked forward to having their children but are faced with medical difficulties preventing them from achieving their desires naturally.

3. History of Assisted Reproductive Technology in Nigeria

Our human species is not exactly known for its willingness to comply with divine instruction. But when God said unto them “Be fruitful and multiply”, they were more than eager to comply³⁴. They took the task to heart. They turned a duty into a pleasure. The majority of couples had no problem, however, minority were distressed because of delay or inability to procreate and bring forth children. Medicine tried to help them to conceive through ART. When the first baby conceived *in vitro* was born, a completely new frontier was opened up in reproductive medicine, and new hope was given to infertile couples. The new technology brought happiness and harmony to many families. Since the birth of first test ART baby in 1978, the field of Assisted Reproductive Technology (ART) has witnessed spectacular scientific advances and additional medical applications³⁵

An English gynecologist P. Steptoe and embryologist R. Edwards began joint research on the *in vitro* fertilization of animal oocytes.³⁶ After *in vitro* fertilization of the oocyte, the P. Steptoe’s research group received the first pregnancy, which unfortunately turned out to be ectopic, and on July 25, 1978, the treatment cycle ended with the best of the world’s first “test tube” child, a girl named Louise Joy

³⁴J Mayer., ‘The Everyday Life Bible’ 1st.ed. Faith World. Gen !:28.p.3.

³⁵PC Steptoe & RG Edwards. Birth after the re-implantation of a human embryo. *Lancet*, 1978, 366

³⁶A, Steptoe, ‘Biology: Changing the world – a tribute to Patrick Steptoe, Robert Edwards and Jean Purdy’[2015](18)(4), *Human Fertility*;232.

Brown³⁷.

While Louise Joy Brown was born on 25 July 1978 at 11.47pm in the United Kingdom,³⁸ baby Durga was born on the October, 3rd, 1978 is the world's second baby conceived through reproductive medical technology.³⁹ Incidentally, the medical process leading to the birth of both babies was commenced at the same time by Dr Mukhopadhyay of India and British scientists Robert G Edwards and Patrick Steptoe respectively. Similar births have been recorded in other countries including Australia on June 30, 1980, Canada on December 25, 1983, South Africa in 1983 and Nigeria on March 17, 1989.⁴⁰ Reports show there are more than eight million babies are born worldwide through ART as of July 3, 2018.⁴¹

The first successful of ART in Nigeria was invitro transfer. The success was championed by Prof. Oladipo Ashiru of department of Anatomy with his colleague Prof. Giwa-Osagie of Department of Obstetrics and Gynecology both of Lagos State university Teaching Hospital in the later part of 1983. This was after research on invitro fertilization in 1983 which resulted in a successful pregnancy in rats. Although the first attempt in achieving invitro fertilization in humans failed due to miscarriage, the erudite medical experts never relented. In

³⁷ A, Steptoe, 'Biology: Changing the world – a tribute to Patrick Steptoe, Robert Edwards and Jean Purdy'[2015](18)(4), *Human Fertility*;232.

³⁸ The Official Website for Louise Brown, 'The World's First Test-Tube baby' <<https://www.louisejoybrown.com/>> Accessed 21 March 2023.

³⁹ Scientific Indians, 'The Untold Story behind India's First Test Tube Baby' <<http://www.scientificindians.com/hall-offame/people/the-untold-story-behind-indias-firsttest-tube-baby>> Accessed 23 March 2023.

⁴⁰ L, Kerin 'First IVF baby turns 30' <<https://www.abc.net.au/news/2010-06-23/first-ivfbaby-turns-30/877426>> Accessed 24/03/2023; C, Muanya, 'HannatuKupchi is not Nigeria's first test tube baby' <<https://guardian.ng/news/hannatu-kupchi-is-notnigerias-first-test-tube-baby/>> Accessed 24 March 2023.

⁴¹ European Society of Human Reproduction and Embryology, 'More than 8 million babies born from IVF since the world's first in 1978' <<https://www.sciencedaily.com/releases/2018/07/180703084127.htm>> Accessed 24 March 2023.

1985, the delivery of a baby through Gamete intra fallopian transfer was successfully recorded by Dr. Olutunbosun led group, and was the first of its kind in Nigeria⁴².

Again, in 1986, the two unrelenting colleagues achieved another successful birth of a baby using Gamete Intra Fallopian Transfer (GIFT). However, Prof. Giwa-Osagie and Prof. Oladipo Ashiru of the Lagos University Teaching Hospital performed the first successful invitro fertilization in humans in 1989 with the delivery of a baby girl from a mother who had lost her fallopian tubes due to ectopic pregnancy. This was a watershed moment for these Nigerian medical specialists, and Nigeria, as it was the first successful effort in Nigeria, West Africa, and East Africa. Following this historic breakthrough, Dr. Wada and his colleagues at Nosa Premier (Nordica) Hospital in Abuja reported another successful pregnancy via embryo transfer. Aside from the above successful records, other successes have also been recorded in this regard by medical expert in Nigeria⁴³

4. Legal framework of Assisted Reproductive Technology in Nigeria

In Nigeria, ART regulation is a unique mix of laws and guidelines yet to be integrated into a comprehensive legal framework. The regulatory framework consists of Acts and Laws, and various guidelines set by selected agencies. However, these laws and guidelines are limited to ethical conducts of ART procedures and do not hold ART stakeholders accountable for any malpractice or breach of policy. The National Guidelines and Ethical Issues in ART⁴⁴ and the National Health Act⁴⁵ are examples of existing guidelines that attempt to regulate the ART industry in Nigeria

However, there are no specific reproductive rights under the Nigerian

⁴²A Nwotite., Examining the Legal Status of Assisted Reproductive Technology in Nigeria

⁴⁴Federal Ministry of Health(2017), National Guidelines and Ethical Issues in ART, Abuja.

⁴⁵National Health Act, 2014. Federal Republic of Nigeria Official Gazette No.112. Vol. 101. Abuja.

Constitution. For instance, the right to health which could have been an essential basis for the assertion of these rights is housed under chapter II of the Constitution of Nigeria which deals with Fundamental Objectives and Directive Principles of State Policy⁴⁶. The Chapter 11 rights are however non-justiciable in Nigeria.

Section 17(3) and (d) makes provision for adequate medical and health facilities for all persons. Pursuant thereto, for the provision of adequate medical and health facilities for all persons, the State shall direct its policy towards ensuring that there are adequate medical and health facilities for all persons; that there shall be provision made for public assistance in deserving cases or other conditions of need; and that the evolution and promotion of family life is encouraged⁴⁷. It is submitted that these provisions serve as a basis for action for infertile couples in Nigeria. However, where infertile couples are stigmatized, ridiculed and dehumanized traditionally, culturally and in society because of their conditions this will render section 17(2)(b) meaningless for lack of legislation to regulate the practice of ART in Nigeria.

The Constitution in its Section 17(3) (g) talks of provision of public assistance in deserving cases or other conditions of need. This provision will remain a mirage to infertile Nigerian couples in the absence of legislation regulating the practice of ART in Nigeria. The Constitution in its Section 17(3)(d) talks of the provision of adequate medical and health facilities. It is submitted that in the absence of legislation regulating the practice of Art in the country, infertile couples will not enjoy the Constitutional provision.

It could further be argued that the Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, to which Nigeria is a signatory, explicitly provides reproductive health rights⁴⁸ making reproductive rights applicable in Nigeria. This fact is punctured by the fact that Nigeria is yet to domesticate the said Protocol as required by the constitution to make these rights

⁴⁶S. 17, Constitution of the Federal Republic of Nigeria 1999 (as amended), LFN

⁴⁷ Section 17(3) and (d), (g) and (h) Constitution of Nigeria 1999 (as amended).

⁴⁸ Constitution of the Federal Republic of Nigeria 1999 (as amended), Article 16

enforceable in Nigeria⁴⁹.

A Bill for the establishment of a Nigerian Assisted Reproduction Authority was presented before the National Assembly in 2012 and was read for the second time on May, 2nd 2012⁵⁰. This Bill, however, was not passed into law as it did not enjoy the support of the majority of the legislatures. The provisions in the Act are complemented by the Code of Medical Ethics in Nigeria⁴¹ which principally deals with ethical issues applicable to medical practice.

The principle legislation regulating healthcare delivery in Nigeria is the National Health Act of 2014. The Act provides a framework for controlling, developing and managing the National Health System, and sets standards for rendering healthcare services in the Federation and for related matters.

There are glimpses but very scanty provisions in both the legislation and the Code that could impact Assisted Reproductive Technologies in Nigeria. Specific provisions on human tissues⁴² and gametes⁴² are contained in Part VI of the Act. The requirement of provisions on the use of human gametes as relevant to this discussion is contained in clause 50 of the Act as follows:

- (1) A person shall not: -manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; or engage in any activity including nuclear transfer or embryo splitting for the cloning of a human being import or export human zygotes or embryos.
- (2) Any person who contravenes a provision of this section or who fails to comply in addition to that is guilty of an offence and is liable on conviction to imprisonment for a minimum of five years with no option of fine.

It may be deduced from the above section that Assisted Reproductive Technology (ART) is prohibited. While ART is not expressly prohibited in Nigeria, it also is not legally acknowledged, as such, if a person engages in ART motherhood or enters into a surrogate contract

⁴⁹Constitution of the Federal Republic of Nigeria 1999 (as amended), Article 12

⁵⁰House of Representatives 'Votes and proceedings' (2 May 2012) 97
<<http://nass.gov.ng/document/download/5555>> Accessed 20 June 2023

in Nigeria, such a person cannot be said to have committed a crime. One cannot but wonder why several Assisted Reproductive Technology practices, such as zygote intra-fallopian transfer (*in vitro* fertilization) and gamete intra-fallopian transfers are widely practiced in major hospitals in Nigeria, including the national hospital, without any medical practitioner having been penalized so far.

The reason for this prohibition needs to be clarified especially as the Act respects the right of any Nigerian to seek medical check-up, investigation or treatment anywhere within and outside Nigeria⁴⁶. Treatment includes assisted reproductive medicine. Where a Nigerian in Nigeria requires such treatment; which involve using donor gamete or embryo outside Nigeria; it would be more convenient and less expensive to import such gamete or embryo to Nigeria for the treatment.

The underlying problem, however, is in terms of legally defining the legal parentage of the child as well as the contractual rights and duties of parties to the ART agreement. There is no judicial pronouncement on this form of contract in Nigeria. However, there is a likelihood of a biased judgment based on cultural sentiments if a dispute arises out of ART agreement and such dispute is presented before a Nigerian court, deciding such a case could prove problematic. The bias will likely to arise from socio-cultural influences that view conception through artificial means unacceptable⁵¹.

In this respect, a member of the Nigerian Parliament sponsored another Bill for an Act to provide National Framework for the Regulation and Supervision of Reproductive Technology and Matters in addition to that⁵². This Bill was presented to the upper legislature (Senate) for a first reading⁵³ on November, 3rd 2016 and scaled through the second reading in October 2017. The Assisted Reproductive Technology (Regulation) Bill (ART Bill) seeks to

⁵¹AS Jegede & AS Fayemiwo 'Cultural and ethical challenges of assisted reproductive technologies in the management of infertility among the Yoruba of South-Western Nigeria' (2010) 14 *African Journal of Reproductive Health* 115 121

⁵²Assisted Reproductive Technology (Regulation) Bill 2016 (ART Bill).

⁵³Senate of the Federal Republic of Nigeria 'Order Paper' (3 November 2016) 49 <<http://nass.gov.ng/document/download/8294>> Accessed 20 September 2022.

regulate ART in Nigeria⁵⁴. Some medical practitioners have kicked against the bill, saying it was a copy and paste from East Africa, the onus is on the legislators and stake holders to model, but must be done. The practice of ART in Nigeria is primarily driven by private clinics that do not have facilities but have continued due to perceived financial gain. Although a couple of Government hospitals provide these services, there is still a prevalence of private clinics in this area of practice.

It has been said that the reason the private sector dominates the public sector in this area of practice, like many other areas of practice, is a result of the lack of government's capacity to meet the health needs of its citizens.

As a responsive and responsible government, the Lagos State government decided to intervene to stem the tide in order to bring sanity and protect the citizenry from this aspect of medical practice in the State by promptly inaugurating a Committee in 2013 to conduct a literature and desk review on advanced medical procedures and research in the State. The result of the committee ushered in Lagos State Health Facility Monitoring and Accreditation Agency (HEFAMAA) law in 2019. Although some practitioners have formed the Association of Fertility and Reproductive Health (AFRH) to produce ethical guidelines that would govern the practice of assisted conception in the country they can not enforce these guidelines⁵⁵. The majority of Nigerian ART practitioners are practicing in a legal vacuum but with the AFRH guidelines of 2019, they can now all have a minimum reference standard for practices. Nevertheless, this guideline is not binding on all practitioners except for those who are members of the Association of Fertility and Reproductive Health

⁵⁴A Bill for an Act to amend the National Health Act to Provide for the Regulation of Assisted Birth Technology, for Safe and Ethical Practice of Assisted Reproductive Technology Services and for other Related Matters (2016) HB 16.05.610 C 3203 <<http://www.placbillstrack.org>> Accessed 12 July 2023.

⁵⁵Lagos state unveils guidelines to regulate ART. <https://www.lagosstate.gov.ng/blog.2019>

(AFRH)⁵⁶. In Nigeria, self regulation is likely not to work in the absence of legal backing. The participating clinic directors think that the AFRH guidelines are insufficient because it has no bite in other states of the Federation. The argument is that rather than regulate per states, there should be National regulation which will be binding on all practitioners across the nation. Another way of circumventing self regulation is by separating regulation from professional ethical guidelines.⁵⁷

In the absence of any legal and regulatory framework for ART in Nigeria, the Human Fertilization and Embryology Act⁵⁸ of the United Kingdom is the basis of regulation of ART procedures in most ART clinics in Nigeria. The use of this law is premised on the fact that Nigeria, as a commonwealth country, has the roots of her common law in the United Kingdom. Section 45 of the Nigerian Interpretation Act⁵⁹ allows statutes of General Application that were in force in England on or before 1 January 1900, to be directly in force in Nigeria, where there is a *lacuna* in Nigerian law, English law may be applied. However, since there no existing law in England before 1900 that could be used directly to resolve disputes related to ART in Nigeria, the refusal by a fertility clinic to follow the guidelines of the Human Fertilisation and Embryology Act cannot be said to be in contravening any law. Such a law will only serve as persuasive authority and will not be binding in Nigeria⁶⁰.

A legal framework for ART would enable government regulation and oversight, ensuring clinics adhere to established standards and

⁵⁶I V Ezeome et.al., Perception of Key Ethical Issues In Assisted Reproductive Technology (ART) Providers and Clients in Nigeria. International Journal of Womens Health. 2021. Available <https://www.dovepress.com/testimonials.php>. Accessed 23 July 2023.

⁵⁷I O Iyioha et.al., Regulation of Healthcare Practice: A Comparative Health Law and Policy, Critical Perspective on Nigeria and Global Health Law. England: Ashgate Publishing.Ltd. 2015

⁵⁸Human Fertilisation and Embryology Act 2008 sec 59.

⁵⁹Interpretation Act Cap I23 Laws of Federation of Nigeria 2014.

⁶⁰JO Fadare & AA Adeniyi 'Ethical issues in newer assisted reproductive technologies: A view from Nigeria' (2015) 18 *Nigerian Journal of Clinical Practice* S57 S59.

guidelines. This would protect health and safety, minimize unethical practices, ensure consistency, and promote standardization and quality control in ART clinics. The absence of regulation has led to the rise of several cases of exploitation and unethical practices in the industry. Suffice it to say that such a sensitive issue touching on the sanctity of human life requires express legislation by the Nigerian legislature. Silence over the subject matter cannot be construed as implying recognition.

5. Challenges of Implementation of the Legal Framework for ART in Nigeria

Although this paper makes a case for the Nigerian legislature to take a clear position as to the legal status of Assisted Reproductive Technology, doing so is going to be an uphill task that is subject to many challenges on account of the sensitive nature of the subject matter. Nigeria is one country where, to some extent, law is influenced by culture and religion which determines the essence of what can be passed and what cannot be passed into law. Even where certain issues are passed into law, implementation becomes another severe issue for the same cultural and religious reasons. Hence, the case of assisted reproduction which touches so much on some societal values is faced with many challenges likely to stall its coming before the legislature for the declaration of its legal status.

The delay in the passage of regulations governing assisted reproduction may be related to the fact that Nigerians' attitudes about assisted reproduction vary greatly. While some people see assisted reproduction as a positive development, others see it with trepidation because of the cultural implications that it might pose a challenge to the core values of family life.

5.1 Religious Constraint

The acceptance of assisted reproduction/ reproductive technology differs among the different religious groups in Nigeria. While some group rejects it *intoto*, some accept it to the extent that it does not involve a third party. More so, some groups are liberal in their view about assisted reproduction. For instance, the practice is not acceptable by Catholics as they consider it as both immoral and illegal because it

severs the act of procreation from normal sexual function. On the other hand, the Anglicans recognize IVF, gamete donation and ET as long as married persons use these. Among the Muslim faithful, the view varies according to groups- the Shi'as – recognize assisted reproduction involving a third party donation of sperm or egg, and the Sunni group recognize only reproductive technology not involving third parties. This variation in opinion and acceptance will affect the chances of formalizing assisted reproductive techniques in Nigeria. Even where it succeeds, implementing the law across these groups will be a problematic.

5.2 Cultural Constraint

In Nigeria, childbearing is held in great value. However, the culture did not envisage a situation where children would be begotten in any way other than the natural means of conception. This is because family lineage matters much in Nigeria, particularly in inheritance. Hence, the society frowns at this method of birth and children born out of it are often not acceptable to society. The commissioning mother is not spared either as she is stigmatized. It is noted that matters regarding assisted reproduction, a topic not made the subject of public discourse and children born out of this process are hardly disclosed. Thus, making it open at a point may also raise some uneasiness on the part of persons who have already benefited from the process, supposing the legislature declares the practice illegal. This constitutes a severe challenge.

The presiding opinions are based on the fact that Assisted Reproductive Technology impacts sanctity of human life and the essential value of family life, and so should not be left to human imaginations.

6. Recommendations

From the presiding, it is evident that assisted reproduction/reproductive technology now occupies an important place in the reproductive health of Nigerians, and the legislature cannot pretend to ignore this fact. There is, therefore, a urgent need to respond to these waves and musings about assisted reproduction/reproductive technology by enacting express laws as to

the legal status of the practice. This is to ensure certainty as to the legal effect of the practice and to help in deciding the rights of parties adopting assisted reproductive technology as an alternative to natural reproductive process.

It is again recommended that in passing such a law, care should be taken to accommodate the religious and cultural sentiments of Nigerians as it regards the sanctity of life and the fundamental value of family life. More so, the relevant authorities are called upon to put in place such institutional frameworks that will facilitate the coming into effect of a body of law upholding the legal status of assisted reproduction in Nigeria. Non-governmental organizations are also called upon to embark on an effective awareness campaign about the legal implications of such practices for mounting pressure on the legislature to do the needful. This will forestall the uncertainty surrounding the practice of assisted reproduction in Nigeria; strengthen the confidence of both parties in the choice they make, and reduce the incidence of commercializing reproduction.

7. Conclusion

The practice of assisted reproduction is soaring with the increase in the level of infertility cases in Nigeria. The Nigerian legislature must wake up to its responsibility by enacting laws stating the legal status of assisted reproductive technology to avoid a confusion and arbitrariness. The essence of any law is to provide a guide and, therefore, ensure certainty. Where the position in any matter cannot be ascertained confidentially, then there will be tendencies for abuse and conflict of interests.

Now is the right time for the Nigerian legislature to display its prowess by taking a clear position on the issue of assisted reproduction/reproductive technology. It is too sensitive to be left to the mercy of speculation. The legislature must act fast to fill in this cavity.