

RETHINKING A LEGAL FRAMEWORK FOR ASSISTED REPRODUCTIVE TECHNOLOGY*

Abstract

Assisted reproductive technology is the various medical procedures and techniques used to assist individuals and couples achieve pregnancy especially when the conventional means of procreation fails. Assisted reproductive technology, a very important breakthrough in reproductive medicine, is one of the treatment modalities for infertility and reproductive difficulties, through which couples conceive by means other than sexual intercourse. Nevertheless, as commendable as this technology is, it raises a number of ethical, legal, social, cultural and religious issues. Although, there are existing legal frameworks regulating reproductive health in Nigeria such as National Health Act, 2004, these laws do not envisage the issue of assisted reproductive technology and the emerging trends therein. It is against this backdrop that this paper appraised the existing legal and institutional framework regulating reproductive health in Nigerian for the purpose of making a case for the enactment of new laws or expansion of existing laws to accommodate assisted reproductive technology while taking cognizance of the cultural, religious, and social peculiarities of Nigeria. The paper finds that there are no specific laws regulating the conduct of assisted reproduction in Nigeria. It is the further findings of this paper that despite the absence of these direct laws; the practice of assisted reproduction goes on in Nigeria. The result is that both couples and donors remain unprotected. To address this seeming loophole, the paper recommended among other things, the expansion of the reproductive health laws or enactment of laws in Nigeria to accommodate assisted reproductive technology, this way, couples, donors and even medical practitioners will be better protected and confident in the use of assisted reproductive technology.

Keywords: Assisted Reproductive Technology, Infertility, National Health Act, Surrogacy, IVF, Conception

1. Introduction

Infertility is defined as the inability of a couple to achieve conception after one year of regular and unprotected sexual exposure (regular being an average of three (3) times or more weekly)¹. Infertility and its management are a major global public health and social challenge. It however takes a higher significance in our traditional society where procreation is accorded greater cultural and social value. According to World Health Organization, an estimated fifteen percent of reproductive aged couples are affected by infertility, while about forty eight million couples experience infertility globally². Infertility can be classified into primary infertility where a woman who was never pregnant and who cannot conceive after one year of not using birth control and secondary infertility when a woman cannot get pregnant again after having at least one successful pregnancy³. The causes of infertility can be multiple and overlapping. The risk factors for female infertility are abnormal menstruation, blocked fallopian tubes, kidney disease, past ectopic tube pregnancy, pelvic inflammatory disease, polycystic ovary syndrome (PCOS), ovarian cysts, and sickle cell anemia, uterine problems such as endometriosis, uterine fibroids, uterine polycystic thyroid disease etc. Infertility is not limited to the female gender alone⁴, men equally experience infertility problems such as genetic disorder, low sperm count or low testosterone, premature ejaculation, testicular cancer and treatments, undescended testicles, enlarged veins (varicocele in the scrotum)⁵ etc although male infertility in this part of the world is regarded as a taboo, a problem no one will admit exist, handled discreetly just to protect male dignity⁶. In Nigeria, the prevalence of primary infertility is 5% and secondary infertility is 8% and it's a condition that attracts stigma in our society⁷

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¹ L Aghoja, *Infertility and Assisted Conception in the Tropics* (Delta: Reproductive Health Initiative and Research Centre (2015) p19.

² World Health Organization Overview on Infertility <<https://www.who.int/health-topic/infertility#tab1>> accessed 1 March 2023.

³ ClevelandClinic: Infertility Types, Causes Symptoms, Diagnosis and Treatment<<https://my.clevelandclinic.org/health/diseases/16083>> accessed 12 March 2022.

⁴ T Ibitoye, 'Assisted Reproductive techniques in Nigeria: Imperative for legal framework' (a conference paper at Babcock University, Ilishan Remo, Ogun State [2019] <<https://researchgate.net>>accessed 12 March 2022.

⁵ Cleveland Clinic: Infertility Causes <https://my.clevelandclinic.org/health/diseases/16083> accessed 12 March 2022

⁶ O Akinloye, E Truter, A Review Of Management Of Infertility In Nigeria: Framing The Ethics Of A National HealthPolicy, *InternationalJournalOfWomen'sHealth* [2011](3)265-275 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3163656>> accessed 1 March 2023.

⁷ D Esan, K Nnamani *et al*, 'Infertility Affects The Quality Of Life Of South Western Nigerian Women And Their Partners' *InternationalJournalofAfricaNursingSciences*[2022] (17)100506<<https://www.sciencedirect.com/science/article/pii/S2214139122001135>> accessed 2 March 2023.

The various challenges linked to infertility has necessitated different healthcare seeking behaviour ranging from spiritual, traditional, alternative health care to orthodox medicine such as biotechnological devices like Assisted reproductive technologies, adoption and lately the increase in illegal baby making factories and baby sales in Nigeria⁸. Though the causes of infertility may not be discoverable in many couples, it seemed apparent that the most prevalent causes are medical conditions in males and females as well as due to ineffective health care service deliveries or post operation complications. Some of these challenges can be preventable.

Assisted Reproduction Technology is the highest breakthrough in the medical treatment of infertility in the world⁹. Assisted Reproductive technology has not only provided relief for couples who are not only childless nor faced with the increasing cultural and social barriers to adoption but it has also given couples an opportunity to have a child that may or may not be genetically connected to them.¹⁰ While assisted reproductive technology has given hope to millions of couples suffering from infertility, it has also introduced countless ethical, legal, religious and social challenges.

2. Overview of Assisted Reproductive Technology (Historical Evolution) in Nigeria

The first known medical action in the field of human reproduction took place at the end of the eighteenth century in the form of artificial insemination with the husband's semen, thus dissociating sexual intercourse from procreation¹¹. The earliest experiments in 1945-1948, involved fertilizing oocytes that had been collected from women with spermatozoa in a Petri dish¹². The 1st successful IVF was carried out in the United Kingdom by Edwards RG, a recipient of the Nobel Prize in medicine¹³.who delivered Louise Brown in July 25th 1978. At the birth Louise Brown he was reported to have a healthy and good birth weight. Subsequently, baby Durga was born on the 3rd day October 1978 in India as the World's second baby conceived through Reproductive Medical Technology. Similar births have been recorded in other countries including Australia on June 30th 1980, Canada on December 25th 1983, and South Africa in 1983¹⁴. In Nigeria, Prof Joseph Ikechebelu of Life Specialist Hospital Nnewi in 2011 is reputable in this regard¹⁵. Reports show that since the world's first test tube baby is 1978, there are more than eight million babies born in the World through ART as of 2018¹⁶. There has been a speedy advancement in the development of different assisted reproductive techniques making infertility problems more treatable than it had ever been hence, the world celebrated the start of a new era of assisted reproductive technology¹⁷.

In Nigeria, Oladapo Ashiru an embryologist and endocrinologist in collaboration with Prof. Osato Giwa Osagie pioneered the *in vitro* fertilization *In vitro* Fertilization program where his team successfully delivered the first *In vitro* Fertilization baby in 1984¹⁸ at the College of Medicine, University of Lagos, however due to the fear of stigmatization, the parents refused their consent for the child to be exposed to the media even up until now¹⁹. Following his birth, there have been reported births of *In vitro* Fertilization babies in both private and public funded health facilities in the country. Notwithstanding, that Assisted Reproductive Technology encompasses a range of techniques with varying complexities, designed primarily to aid couples who are unable to conceive without medical assistance, it has been discovered that it depends on the cause of the infertility as ascertained through clinical evaluation. The essence of this reproductive intervention is basically to allow a medically

⁸T Ibitoye, 'Assisted Reproductive techniques in Nigeria: Imperative for legal framework' (a conference paper at Babcock University, Ilishan Remo, Ogun State [2019] <<https://researchgate.net>>accessed 12 March 2022

⁹ O Lukman, AA Panti, KA Durowade *et al* 'Assisted Reproduction Technology in Nigeria: Challenges and the way forward' *African Journal for Infertility and Assisted Conception* [2018] (3) <<https://www.researchgate.net/publication/33544784>> accessed 12 March 2022.

¹⁰S Akintola 'Parenthoods: Is the Law in Nigeria fit for assisted reproductive technology?' *Indian Journal of medical ethics* [2018] (012) < <https://www.researchgate.net/publications/322800503>> accessed 23 March 2022

¹¹ An article published by Pubmed. Ncbi.nlm.gov.Evolution of Assisted Reproductive Technology.

¹² *ibid*

¹³ R Karmel Assisted Reproductive Technology after the Birth of Louise Brown J accessed 5 April 2022.

¹⁴ Scientific Indians: The Untold Story Behind India's First Test Tube Baby <<http://www.scientificindians.com/hall-of-fame/people/the-untold-story-behind-indians-first-test-tube-baby2019>> accessed 5 April 2022

¹⁵I Okwelogu , E Azubuike . J Ikechebelu , C Nnebue Invitro Fertilization Practice: Awareness And Perceptions Among Women Attendance Fertility Clinic In Okija, Anambra State Nigeria, *Africa Med Journal* [2012]

¹⁶ European Society of Human Reproduction and Embryology < <http://www.Science-dail.com/release/2018/07>> accessed 5 April 2022

¹⁷ L Omo Kanye, Olatinwo, A.Durowade , S Raji, Assisted Reproductive Technology 'Perceptions Among Infertile Couples In Ilorin Nigeria'

¹⁸ Muanya C Hannanh Kupehi is not Nigeria first test tube baby. < <https://guardian.ng/news/Hannah-kupchi-is-not-Nigeria's-first-test-tube-baby/2019>>

¹⁹ L Omokanye 'Assisted Reproductive Technology in Nigeria Challenges and the way forward' *African Journal for Infertility and Assisted Conception* Wolters Wuw Med Knowledge [2018].

scientific combination of sperm and ovum, for the purpose of fertilization and procreation²⁰. This is achieved by passing both male and female pathological factors inhibiting natural conception.

3. Legal Issues Arising from Assisted Reproductive Technology

Surrogacy Arrangement in Nigeria

The practice of surrogacy is gradually gaining a little ground and slowly accepted notwithstanding the pronatalist nature of our traditional society where procreation is invaluable²¹ and every woman wants to be a mother by delivering her child by herself (vaginally)²². Surrogacy has generated an intense global debate regarding the ethical, social and economic issues²³ particularly believe to distort family lineage. Undauntedly, surrogacy is an area that should be traded with caution because it bothers on issues of children's right, parental responsibilities, morality and public opinion etc as such, there are no uniform procedures nor laws regulating it in most countries as countries approach the subject from different perspective. Surrogacy is simply an arrangement where a surrogate mother bears and delivers a child for another couple or person²⁴. A traditional surrogate is the biological mother of the child; her egg is combined with the intended father's or donor's sperm. This is the type of surrogacy that has been practiced way back before modern technology allowed for creation of embryos outside the womb. While gestational surrogacy is done through *In vitro* fertilization or intrauterine insemination, the eggs or sperm to be used is taken from either the intended parents or from a donor. Technology now allows surrogate mother to carry another woman's egg with relative ease.²⁵ Surrogacy may be commercial or altruistic. When a woman agrees to be a surrogate without being compensated, this is known as altruistic surrogacy, the surrogate is only compensated for her time and efforts. This is typically helping someone they know such as a close friend or family member unlike commercial surrogate, where a surrogate mother is being paid for her services. While some countries out rightly permit surrogacy provided it is not to be commercialized, some other countries have no clear regulations of surrogacy.

In Nigeria, there is currently no legal framework for surrogacy and this lacuna has led to the abuse of its practice.²⁶ At a glance, surrogacy may seem like an attractive alternative as a poor surrogate mother gets very much needed money and an infertile couple gets their long desired biologically related baby, but the real picture reveals the bitter truth²⁷ in most cases due to lack of proper legislation, both the intended parents and the surrogate are exploited and profit is earned by the middlemen and commercial agencies. The whole process is not transparent which can give room for legal battles. Some are of the opinion that surrogacy should be considered just like any form of labor and there should be protection against exploitation²⁸ Surrogacy has not been criminalized since there is no written law which recognizes it as an offence, neither is there any punishment for it.²⁹

The law protects the right of a woman to privacy and reproduction but should it exclude her parental responsibilities to a child because of surrogacy agreement or contracts. Should these surrogacy contracts be enforceable in our Nigerian courts or should they be outlawed because they usually involve exploitation, reinforce gender inequality, it entails the commodification of children and objectify women because surrogates are seen as 'womb'.³⁰ Advocates of surrogacy believe that with adequate regulation these can be put to rest.

²⁰ C Ekechi-Agwu: Regulating assisted Reproductive Technologies (ART) IN Nigeria: Lessons from Australia and the United Kingdom, *Africa Journal of Reproductive Health* December [2020].

²¹S Sanni 'Nigeria: Legal Approach To Surrogacy in Nigeria' [2019] <<https://www.mondaq.com>> accessed on 15 February 2023

²²O Lukman, A Panti, K Durowade 'Assisted Reproduction Technology in Nigeria: Challenges and the way forward' <https://www.esearchgate.net/publication/335446784-assisted-reproductive-technology>>[2018] accessed 15 May 2023

²³Y Margalit: In Defense of Surrogacy Agreements: A modern Contract Law Perspective. *William & Mary Journal of Women and The Law* [2013-2014] 20 accessed < <https://scholarship.law.wm.edu/wmjow/7> accessed 14th February 2023>

²⁴ Different Types of Surrogacy <https://www.conciveability.com/about/blog/the-different-types-of-surrogacy>> accessed 19 February 2023

²⁵Different kinds of surrogacy [<https://www.conciveability.com/about/blog/the-different-type-of-surrogacy>] accessed 19 February 2023.

²⁶O Adelekan: The concept of surrogacy in Nigeria: Issues, prospects and challenges, *African Human Rights Law Journal* [2018]605-624 <<http://dx.doi.org/10.17159/1996-2096/2018>>accessed 19 February 2023.

²⁷P Saxena, A Mishra 'Surrogacy: Ethical and Legal Issues' *Indian Journal of Community Medicine* [2012] <https://pubmed.ncbi.nlm.nih.gov/23293432/>> accessed 19 February 2023

²⁸A Finkelstein et al. surrogacy law and policy in the USL A national conversation informed by global law school sexuality and gender law clinic.

²⁹M Eme 'Nigeria Legal framework for surrogacy in Nigeria' <<https://www.mondaq.com/Nigeria/family-law/1217952>> accessed 14 February 2023.

³⁰M Pietrini Sanchez 'A case for the Asymmetric Enforceability of Surrogacy contracts'

What happens in the event that the surrogate refuses to fulfill their contractual agreement/ obligations or in a situation where surrogate changes her mind and ask to keep the child? Like the case of a United States based couple whom the surrogate mother absconded with the baby boys who are the product of the surrogate agreement. The surrogate mother claimed that she was abandoned by the intending parent which was what informed her decision to abscond.³¹

Surrogates are subjected to medical, emotional risk from carrying pregnancy and delivery consequently; psychological screening, legal counseling and informed consent should not be down played. There is this trend of baby factories have been linked to surrogacy, where young innocent girls are coerced, forced, confused to be surrogate mothers, against their freewill. There has been a rapid increase and patronage of baby factories leading to the slow acceptance of surrogacy.³²The surrogate and intending parents should be properly counseled and guided on their rights and obligations and not allow children who were not privy to the contract between the parties suffer for any issue on custody, breach of contract, identity or legal parentage disputes.³³Surrogate agreements should be seen as a contract once the valid elements of a contract can be identified not minding the fact that morality and public policy may have an opposing perspective to it. Surrogacy agreement should be enforceable in our court when put to judicial tasking because they are legal contracts. The most criticism of the enforceability of surrogacy agreement is on the basis of morals, humanity and cultural sentiments. Some of the issues to be regulated who to bear the cost of health risk of potential surrogate mother, compulsory test for donors and Surrogate mothers, A written consent of all parties involved, rights of all parties involved, the welfare and status of the child.³⁴ Pregnancy related expenses, post natal expenses, insurance of the surrogate mothers to be borne by the commissioning parents, relinquishing of parental rights by the surrogate mother over the child, the eligible age of a surrogate mother and the pertinent issue of payment of compensation to the surrogate mother³⁵Conditions for cross border surrogacy, compulsory counseling session for all parties in order to educate them on their rights and obligations.

The regulation of surrogacy will drastically reduce child crime abuse and exploitation of both the surrogate and the commissioning parents. The ethnicity, cultural religious factor must be taken into cognizance while regulating surrogacy in Nigeria. Surrogacy contracts should be drafted, reviewed and signed at the beginning of the relationship between intended parents and the surrogate. In addition to the contract, intended parents must finalize their parental rights in order to be recognized as legal parents.

Assisted Reproductive Technology For Same Sex Couples, Trans Gender / Single Parent

It is important to state that people do not need to be married or be in a relationship to raise a family. The traditional concept of family has been characterized by non – traditional family structure that fulfils traditional family functions. Example of such is singles or non-married and lesbians, gays, bisexuals, Trans genders (LGBT) persons raising children. One of the options by which these sets of persons have children is through assisted reproductive technology which includes surrogate motherhood, artificial embryo donation, egg transfer etc. Single women may choose to get a donor sperm from a known donor or from an anonymous sperm donor banks and have an intrauterine insemination or in vitro fertilization to conceive but if age is a factor, she may decide to go for a donor eggs fertilized by a donor sperm increase chances of a positive result. On the other hand, a single lady who wishes to have kids in the future may freeze her egg still when she is ready to start a family. While in the case of LGBT, a gamete donation is needed, this could be eggs for a single man or male couple, sperm for a lesbian woman or couple or an embryo from anyone who cannot create a viable embryo on their own³⁶. This technology is now being used by people it was not originally meant for as the original use of assisted reproductive technology was for couples faced with infertility challenges. The battle over same sex marriage and technological developments in assisted reproduction have placed the questions of the right of gays

³¹Us based couple accuses Nigerian Surrogate mother of absconding with twins 'Premium time's newspaper. https://www.premiumtimesng.com/news/to_pnews/522663-us-based-couple_accused_-Nigerian-surrogate-mother_of_absconding_with_twins.html accessed 22 February 2023

³²O Makinde 'Baby factories taint surrogacy in Nigeria, Reproductive Biomedicine online [2015] <<https://doi.101016/rbmo.2015>> accessed 19 February 2023.

³³O Adedokun: The Concept of Surrogacy Rights and Obligations in Nigeria: Issues, Prospects and Challenges *African Human Right law Journal* (2018) <<http://www.ahrlj.up.ac.za/adedokun>> accessed 19 February 2023

³⁴S Sanni 'Nigeria: Legal Approach To Surrogacy in Nigeria' [2019] <<https://www.mondaq.com>> accessed on 15 February 2023

³⁵ Adedokun (n.186)

³⁶O Adedokun: The Concept of Surrogacy Rights and Obligations in Nigeria: Issues, Prospects and Challenges *African Human Right law Journal* (2018) <<http://www.ahrlj.up.ac.za/adedokun>> accessed 19 February 2023

and lesbians to procreate on the public agenda³⁷. LGBT rights movement have encourage people to be open about their sexuality, relationships and choice to have children, which has led to the rise in demand for gay persons seeking parenthood through Assisted Reproductive Technology. As more gays and lesbians seek to reproduce, the conflict over LGBT right to access ART has also increased. Protagonists argue that the choice of means by which conception is achieved between couples in a private matter and therefore, the right to procreate a fundamental right which cannot be fettered by restricting citizens to a particular mode of procreation.

The issue of same sex marriage debate has been laid to rest in Nigeria because of the criminalization of same sex relationships, despite pressure from the western government to preserve the rights of gays, lesbians and bisexual persons. Nigeria is a conservative society where LGBT is seen as taboo. Many African political, religious leaders and the public are of the view that decriminalizing homosexuality would be akin to promoting it, hence there was need to pass a law prohibiting same³⁸ Homosexuality is strongly opposed on the basis of religious beliefs and perception of what constitutes African culture and tradition. It is believed that the promotion of this practice would weaken the definition and respect for the institution of marriage which would further weaken the traditional family values essential to our society.³⁹ Marriage is a universal institution which is recognized and respected universally therefore the sanctity of marriage is a well accepted principle in the world. Nigeria's moral frame recognizes that marriage is the coming together of a male and female each as partner of a complete life in a heterosexual union which cannot be obtained in an LGBT marriage. Hence, the LGBT lifestyle is not to be encouraged and persons involved should not be accorded any right to be biological parent of any child. On January 2014, the Same Sex Marriage (Prohibition) bill was passed into law⁴⁰ with the aim of prohibiting marriage and solemnization between same sex. The law forbids any cohabitation between same sex sexual partners and bans any public show of same sex amorous relationship. The Act further imposes a ten to fourteen years prison sentence on any one who registers, operates or participates gay clubs, societies and organization or such even support activities of such organizations. In the same vein, while the colonial criminal code and Penal codes outlawed sexual acts between members of the same sex, the SSMPA effectively criminalizes lesbians, gay, bisexual and transgender person (LGBT) persons based on sexual orientation and gender identity in other words there is no legal protection for LGBT rights in Nigeria. Prior to the passing of same sex marriage prohibition Act, the Nigeria Criminal Code Act⁴¹ with origins in the colonial era, contains provisions dealing with offences against morality committed by men, even the Sharia Penal Code⁴² adopted by several northern Nigerian States prohibits and punishes sexual activities between persons of the same sex with the maximum penalty for men being death by stoning and for women whipping and or imprisonment. The law is under developed when it comes to transsexual who has undergone a sex reassignment through surgeries. If after the surgery they have sex with relations with a person who would have been a person of same sex, can the law still apply? Since there is no law on ART, it means that though LGBTs cannot legally marry, they can independently raise family through the help of ART. In other words, anyone can approach on a health practitioner to provide ART services⁴³ Being trans gender and bisexual is seen as a social and moral wrong, the culture and nature of the country makes it wrong but does not make it a crime. It is alien to our region and it is believed to have gained access into Africa by virtue of colonialization and importation of foreign laws.

Assisted Reproductive Technology Using Donor Gamete

Gamete donation may be used where a couple cannot conceive naturally using their respective eggs or sperm or where both couple are infertile or carries a genetic disease which should not be transmitted to the child. The donated gametes are then transmitted into the woman's womb for nurturing. The use of donor gamete has generated legal and ethical issues. Gamete donation may be done with full or partial disclosure in which case, only the names and personal data are withheld but family history and other physical attributed of the donor are disclosed⁴⁴. It could also be done anonymously and this has remained highly contentious. Proponents of

³⁷J Robertson! Gay and Lesbian Access to Assisted Reproductive Technology. *Case Western Reserve Law Review* (2004) (<https://scholarlycommons.law.case.edu/caserev>) accessed 16 April 2023.

³⁸A Nwaubani: 'LGBT acceptance slowly grows in Nigeria, despite an \gay laws; reported by Reuters in May 17, 2017<<https://www.reuter.com/article/us.Nigeria.perceptio- lgbt- survey-iduSKCN18>> accessed 16 April 2023.

³⁹L Aghoja, 'Infertility and Assisted Conception in the Tropics' Delta: Reproductive Health Initiative and Research Centre 2015.

⁴⁰ Same Sex Prohibition Act 2013.

⁴¹ Criminal Code Act, Laws of the Federation 2004.

⁴² Laws of the Federation 2004.

⁴³Do LGBT people have rights to marriage, family under Nigerian law? Article of the Nations Newspaper 7 January 2020<<https://thenationonlineng.net/do-lgbt-peoplehave-right-to-marriage-family-undernigerian-law>> accessed 19 April 2023.

⁴⁴J Beauchaine, *The Next Frontier of Stem Cell Debate Snow Flake Babies, Embryo Adoption and Being Preborn Again* (2009)

anonymity worry that informing the child of his birth through donor gamete may cause the child to have psychological problems⁴⁵. It may even expose the family to scorn due to the kind of environment we find ourselves. Therefore couples prefer to keep it as a secret between them and not even disclosed to close family members. It can be difficult to strike a balance between the privacy rights of donors and recipients as against the rights and interests of the children involved.⁴⁶ Sadly, Nigeria does not have a national gamete donation policy.

Another pertinent issue is informed consent and counseling of donors and recipients. Whereas sperm are easily harvested, egg donation comes with some discomfort and inconveniences to the donor because it requires a surgical procedure, an invasion of the donor's body, therefore the consent of the donor is needed⁴⁷ but where consent is absent, the health personnel may be guilty of battery. The woman is given drugs to induce her to super ovulate, therefore the information about the risk and discomforts of ovarian stimulation, monitoring and egg retrieval must not be withheld.⁴⁸ On the other hand, if excess gamete (sperm or eggs) retrieved are to be cryopreserved, consent must be received from donors. It is important that donors are fully aware of every nitty gritty of their procedure and consent must be fully and voluntarily obtained. The role of counseling should not be downplayed especially where a partner decides to conceal information or fact from his/ her partner when using donor gamete. In addition, /third party gamete should not be used without informing the couples as some overzealous doctors who are bent on achieving success may want to explore , consequently, legal action can be instituted if parties do not give consent.

Another issue is genetic screening of donors, compatibility of blood group and genotype of donors as this is used to avoid infectious or genetic disorder. Donors with diseases must not be used. There is need for a rigorous genetic screening, mental and emotional well being check and in order to avoid this, there should be a clearly defined professional standards rather than key players being business driven. The use of donor gamete is bears high risk of consanguinity relationship which is largely due to lack of donor's information. Therefore there should be a limit on the number of donation a donor can make⁴⁹. The absence of regulations and guidelines may lead to unwholesome practices. Anonymous donation should be discouraged rather if not full disclosure. There should be partial disclosure of donors.

Rights and Status of a Child Born Through Assisted Reproductive Technology

Considering the rate of application and successes of Assisted Reproductive Technology, there is an increased concern about the health and general welfare of children born through this technology. Children born alive have full protection in law⁵⁰that imposes enforceable parental responsibilities. Unfortunately this protection does not extend to embryos and foetus. Consequently those who provide Assisted Reproductive technology have the ethical and legal duties to consider not just the welfare of the children but also of the foetus. Considering the adverse health outcome that may be associated with ART. It has been observed that desperation associated with infertility may lead intending parents to take risk with both their own and their future child's wealth⁵¹. The persistence of high multiple pregnancy rates is largely due to the pressure brought to bear on the physicians to increase the overall success rate. One of the greatest risk to children conceived by assisted reproductive technology is a result of the increased incidence of multiple pregnancies caused by the implantation of several embryos to achieve better chances of conception⁵². Multiple births are associated with prematurity, low birth weight, social and economic cost related to taking care of their health, increased mortality and morbidity for mothers and babies, not forgetting that parenting high order multiples also carries risk of stress and relationship dysfunction⁵³,cesarean delivery even spontaneous abortion. Despite the fact that they are embryos, fetus, they have some rights. At most two or a maximum of three embryos should be transferred during an IVF cycle, in order to reduce the risk involved in the implantation of multiple embryos. As these kids born through ART grow

⁴⁵ Stanford Encyclopedia of Philosophy: the Donation and sale of Human Eggs and Sperm (2021) <<https://plato.stanford.edu/entries/gametes-donation-sale>>accessed 19 July 2023.

⁴⁶I Ezeome, Ethical Issues in Gamete Donation: *African Journal of Reproductive Health* [2022] <<https://www.ajrh.info/index.php/ajrh/article/view/3271>>accessed 19 July 2023.

⁴⁷V Riggins How does the egg donation process work?Medical news Today <<https://www.medicalnewstoday.com/articles/314750>>accessed 19 July 2023.

⁴⁸ Ibid (Fn201).

⁴⁹Parliament of Australia, riskofConsanguinityandlimitsonDonations<<https://www.aph.gov.au/parliamentary.business/committees/senate/legalandconstitutationalaffairs>>accessed 19 July 2023

⁵⁰Child's Right Act 2014; United Nations Convention on the Rights of children (1991).

⁵¹G Pennings 'Avoiding multiple Pregnancies in ART.' Multiple pregnancies, a test case for the moral quality of medically assisted reproduction <<https://pubmed.ncbi.nlm.nih.gov/11098012/3/>> accessed 21 April 2023.

⁵²V. Marcher 'the health of children conceived by Assisted Reproduction technologies' National Institute of Health <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2083883/ref>> accessed 28 April 2023.

⁵³Ibid.

they have the right to information about their birth and genetic parents. In addition there should be a comprehensive register and access to information about the donor the child born through donor gamete and the parent(s) of the child, this register enables the child to have access to information with a view to identifying their genetic parents, including their half siblings and to prevent sexual and marital relationships within the societal and culturally prohibited levels of consanguinity⁵⁴.

Legitimacy/Succession/Inheritance

The status of legitimacy or illegitimacy of a child is very vital as this will determine the child's entitlement to many rights especially those within the family circle. In the Nigerian cultural society blood relation is important as it is expected that people from the same family will share the same blood bodily substance and genetics either through blood relations or sexual relations⁵⁵. Legitimacy according to the principle of common law means when a child is born into lawful wedlock. To be legitimate at birth, the parents of the child must be lawfully married either at the time the child was conceived or born⁵⁶. In *Egwunwoke v Egwunwoke*⁵⁷. And *Lawal v Younan*⁵⁸, lawful wedlock in Nigeria refers not only to statutory marriage but to customary and Islamic marriage. Section 165 of the Evidence Act⁵⁹ provides *inter alia* that 'where a person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after dissolution of the marriage the mother remaining unmarried, the court shall presume that the person in question is the legitimate child of the man.' This simply implies that there is a presumption of legitimacy of a child where both parents have access to each other. Illegitimate child is one born out of wedlock on the other hand by a woman whose husband is not the father of the child or was not conceived in lawful wedlock. Under the customary law, an illegitimate child cannot be recognized and has no legal relations with his or her parents, especially in the issue of inheritance, succession nor benefits accrued to the child from the parent⁶⁰. Depending on different customs and traditions for the child to be legitimate, they must be subsequent marriage of both parents⁶¹ or even an acknowledgement of the paternity of the child in order to change the status from illegitimate to legitimate⁶². However prior to the enactment of section 39(2) of the 1979 Constitution, any child born of a void statutory marriage was illegitimate except the parents contracted a customary marriage before the statutory marriage the child will be legitimate as a result of the customary law. Section 42(2) of the constitution⁶³ provides that 'No citizen of Nigeria should be subjected to any disability or deprivation by the circumstances of his birth'. This section strictly prohibits discrimination against a child simply because of the circumstances of his birth. Therefore the issue of legitimacy and illegitimacy has been laid to rest by section 42(2) 1999 CFRN.

The advent of Assisted Reproductive technology has enabled reproduction independent of traditional intercourse which ordinarily should occur within the confines of marriage. However, when donor eggs, donor sperm or surrogate mother are used in assisted reproduction, the traditional blood tie that links family together is eroded because the essential elements such as blood, gene and sexual relation will not be present⁶⁴. This raises the question of what the status of a child born through third party reproduction since it is against the generally accepted definition of legality. It also raises the question of the status of a child born to an unmarried woman through artificial insemination by a donor, if such child can ever be legitimized. Assisted reproductive

⁵⁴A Nwafor. 'Regulating assisted Reproductive Technologies (ART) in Nigeria: Lessons from Australia and United Kingdom' *African Journal of Reproductive Health* [2020]. <<https://www.ajol.info/index.php/ajrh/article/view/203726>> accessed 27 April 2023

⁵⁵F Adegbite 'Offspring From Assisted Reproductive Technologies And Customary Law in Nigeria: Matters Arising' *US-China Law Review* [2022]. <<https://www.davidpublisher.com/public/uploads/contribute/63a90966a74a6.pdf>> accessed 27 April 2023.

⁵⁶A Jegede, A Fayemiwo 'Cultural and Ethical Challenges of Assisted Reproductive Technologies In The Management Of Infertility Among Southwestern Nigeria' *Africa Journal of Reproductive Health* [2010]. <<https://www.arjh.info/index.php/arjh/article/view>> accessed 26th April 2023.

⁵⁷E. Nwogugu *Family law in Nigeria* (Ibadan HEBN publishers 1974).

⁵⁸(1966) 2 All NLRI. (1961) WNLR 197

⁵⁹Sec 165 Evidence Act 2011.F. Adegbite 'Offspring from Assisted Reproductive Technologies and Customary Law In Nigeria: Matters Arising.' *US-China Law* <<https://www.davidpublisher.com/public/uploads/contribute/63a90966a74a6.pdf>> accessed 27 April 2023.

Review [2022] 9 <<https://www.Davidpublisher.com/public/uploads/contribute/63a90966a74a6.PD>> accessed 29 April 2023.

⁶⁰I.E Sagay, 'Nigerian Law of Succession Principles, Cases Statutes And Commentaries' (Lagos Malthouse Press limited 2006) P2

⁶¹*Alake v Pratt (1955) 15 WACA 20*

⁶²A Kolajo, *Customary Law in Nigeria Through Cases* (Ibadan Spectrum Books limited 2000) 248.

⁶³Constitution of the Federal Republic of Nigeria 1999.

⁶⁴F. Adegbite 'Offspring from Assisted Reproductive Technologies and Customary Law in Nigeria: matters Arising' *US-China Law Review* [2022] <<https://www.davidpublisher.com/public/uploads/contribute/63a90966a74a6.pdf>> accessed 27 April 2023

technology has present new sets of relationship unknown to our culture and how marriages are viewed under the Matrimonial Causes Act⁶⁵ in *Hyde v Hyde*⁶⁶, marriage is defined as being between one man and one woman to the exclusion of all others.

Currently, single persons, person with different sexual orientations which includes the LGBT all wants to leverage on assisted Reproductive technology to have children. It is not in contention that the Matrimonial Causes Act⁶⁷, Customary law, Islamic law prohibits same sex marriage and most importantly is the enactment of Same Sex Marriage (Prohibition) Act,⁶⁸ which clearly disallows same sex marriage; but there is no law prohibiting or restricting a single person from accessing Assisted reproductive technology⁸. This technology has challenged the conventional definition of family especially for unmarried persons who are not restricted by law to procreate. Therefore, the legitimacy of a child is no longer in contention under the constitution and a child can be legitimate under the customary law by subsequent marriage of the both parent or by acknowledgement by the man, there is need for consent by intended parents who are involved in the use of Assisted Reproductive technology and its procedures. So intended parents who for instance used donors sperm and donors eggs or even used a surrogate mother will not deny paternity of the resultant child. The court held in *Okoli v Okoli*⁶⁹, that if the spouse of a woman who undergoes artificial insemination consents to the procedure, that spouse is considered the legitimate parents of a resulting child. Consequently, the consent to create a child is sufficient to bring in the responsibilities of parenthood. Parenthood should *siqua non* follow when a husband consents to the use of Assisted Reproductive technology. This is an issue of concern that may give rise to litigation therefore the legislature needs to address this by putting laws in place. In the researcher's opinion, single persons should not be restricted from being parents, because circumstances of singlehood differ. The courts should honour the intention and agreement of single or unmarried couple⁷⁰

Succession and Inheritance

Succession is the transmission of the rights and obligations of deceased person's in respect of their estate to their successors⁷¹ such as the heirs, children, spouse and relatives. The law of succession governs the administration of property of a deceased⁷². Succession is testate when a deceased has a valid will, but when a deceased dies without a valid will then succession will be regarded as intestate and his property devolves in accordance with the applicable customary law. When it comes to succession and inheritance under customary law, it is traced to blood relation, but this is a challenge faced by children born through assisted reproductive technology, especially where the resultant child was fertilized by another man's sperm. It can be viewed as introducing strangers into the family lineage⁷³. The question is, can a child born through posthumous reproduction through assisted reproductive technology be recognized as a member of the late husband's family? Can a child fertilized by another man's sperm be entitled to inherit from the estate of their social father rather than their genitor (biological) father especially where the social father died intestate? This is more significant when the subject of inheritance is not only properties but traditional positions, stools or chieftaincy title⁷⁴. Africans and more particularly Nigerians can very sensitive about these issues; therefore there is still a need to tie these loose ends.

Citizenship

What is the right of a child born through assisted reproductive technology in Nigeria in event where this done by the use of donated sperm or donated eggs? Section 25(1)(b) of the 1999 constitution provides as follows

The following persons are citizens of Nigeria by birth namely

- (a) Every person born in Nigeria after the date of Independence either of whose parents or any of whose grandparents belongs or belonged to a community Indigenous to Nigeria.

⁶⁵Matrimonial Causes Act CAP M7 Laws of the Federation of Nigeria 2004

⁶⁶*Hyde v Hyde* (1886) LR IPD 130.

⁶⁷Matrimonial Causes Act CAP M7 Laws of the Federation of Nigeria 2004

⁶⁸Same Sex Marriage Prohibition Act 2014.

⁶⁹963 N. E2d 730(mass. App.Ct 2012).

⁷⁰ E Ekhatör: An Appraisal of the Legal Status and Inheritance Right of *In vitro* fertilization (IVF) Children in Nigeria. The *International Journal of the Law Students Society, Obafemi Awolowo University Ile Ife* (2021) 36th ed <<https://ssrn.com/abstract=4059144>> accessed 26 April 2023

⁷¹S Akinola 'Parenthood: Is the Law in Nigeria Fit for Assisted Reproductive Technology' *Indian Journal of Medical Ethics* [2018]

⁷²B Oni 'Discriminatory property Inheritance Rights under the Yoruba and Igbo customary Law in Nigeria 'The Need for Reforms 19(2)1QSR (*Journal of Humanities and Social Sciences* 2014) <https://www.researchgate.net/publication/269752917>> accessed 26 April 2023

⁷³ F Adegbite 'Offspring from Assisted Reproductive Technologies and Customary Law in Nigeria: matters Arising' *US-China Law Review* [2022] 19.

⁷⁴*Ibid.*

- (b) Every person born in Nigeria after the date of Independence either whose parents or any of whose grandparents is a citizen of Nigeria; and
- (c) Every person born outside Nigeria either of whose parents is a citizen of Nigeria⁷⁵.

Assisted Reproductive technology has greatly complicated the definition of parentage. It is unclear what the constitution construed by 'parents'. Does the 'parent' mean those whose DNA came together to form the embryo or those who nurtured the child after its birth⁷⁶. What becomes the nationality of a child whom the three patients are of different nationalities? Bearing in mind that Article 15 of the Universal Declaration of Human Rights⁷⁷ Provides that everyone has the right to a nationality and as such none should be deprived of his nationality none denied the right to change his nationality. The right to nationality is protected by different international statuses unfortunately in Nigeria, the determination of legal parenthood is potentially contentious⁷⁸ the researcher submits that children born through sperm donation should be granted nationality by virtue of birth.

4. Conclusion and Recommendations

Assisted Reproductive Technology has emerged as an advancement and innovation in reproductive medicine, widely used and adopted over the last century. It has brought tremendous relief to persons desirous of children. Assisted Reproductive Technology has extended the fertility circle giving room for more people to have children and have benefitted many couples and individuals in Nigeria, from 1989 when the first successful delivery was recorded. While giving hope, succor and joy to couples, Assisted Reproductive Technology has presented ethical, legal, cultural issues to be addressed in our society. In Nigeria, we have issues like financial accessibility, affordability of the treatment, licensing, lack of guidelines and policies, fate of unused and excess embryos, redefinition of the old philosophies of the family, issues related to legitimacy, succession, inheritance chieftaincy, reporting system of Assisted Reproductive Technology, number of embryos to be transferred, quality assurance and control, accessibility by same sex and single persons, dignity of human persons, Posthumous reproduction, religious issues bothering on why humans should tamper with the natural processes of childbearing, eradication of abuses and over manipulations of embryos associated with the use of this technology. The conclusion drawn from this work shows that there is an urgent need for stakeholders such as the government, fertility clinics, experts, professional organizations, bioethicists in Nigeria to formulate laws and specific guidelines to help address some of these emerging challenges.

In the light of the above analysis, the following recommendations are hereby made: There is need for a specific comprehensive, coherent culturally sensitive legal framework to be put in place to regulate the practice of Assisted Reproductive Technology. Until such legislation or regulations are enacted, there should be an amendment of the Child's Right Act National Health Act 2014 to incorporate ART and not to conflict or contradict same. There should be clarity on the strains of permissible genetic manipulation conducted for reproductive purposes. This law will prevent quackery and ensure the ART practitioners are law abiding. The legislative arm should be proactive to envisage loopholes and address them adequately. The legislature is to take cognizance of unmarried persons not to be unjustifiable neither discriminated nor restricted from accessing this technology. In addition, the law should also incorporate restrictions on lesbians, gays, bisexuals and transgender to accessing this technology. There is need to establish regulatory body that will oversee the activities of fertility clinics and surrogacy agencies just like the Human Fertilization and Embryology Authority (HFEA). This body is to be saddled with the responsibility of licensing fertility clinics and centres, oversees the use of gametes and embryos in fertility treatment and research.

⁷⁵1999 Constitution of the Federal Republic of Nigeria.

⁷⁶E Ekhaton 'An Appraisal of the legal status and inheritance Right of the *in vitro* fertilization (IVF) Child in Nigeria. *International Journal of the Law Students society, Obafemi Awolowo University Ile ife* <<https://SSM.com/abstract=459144>> accessed 6th May 2023.

⁷⁷United Declaration Human Right 1948.

⁷⁸S Akintola 'Parenthood: Is the Law In Nigeria Fit For Assisted Reproductive Technology? [2018] <https://pubmed.ncbi.nlm.nih.gov/29439940/> accessed 9 May 2023.