

REFRAMING REPRODUCTION: THEORETICAL PERSPECTIVES ON ASSISTED REPRODUCTIVE TECHNOLOGY*

Abstract

This paper explored the theoretical frameworks that underpin the study of Assisted Reproductive Technology (ART) and it briefly examined how each approach interacts with ART. The objectives of this study included identifying and analyzing key theoretical frameworks used in ART research, investigating how these frameworks inform our understanding of ART, and providing recommendations for future research. Using doctrinal and hermeneutic methodologies, it examined existing approaches so as to propose valid frameworks for understudying and understanding ART. It found that among all the competing approaches, the natural law approach to jurisprudence is best fitted for ART's research. From it, the bioethical approaches could be employed with best results. This paper therefore recommended that the natural law approach be recognized in law and ethics as the only approach proper for interrogating the evolving landscape of ART.

Keywords: Assisted Reproductive Technology (ART), Theoretical Framework, Natural Law Approach, Bioethical Approaches, Jurisprudence, Law and Ethics

1. Introduction

Assisted Reproductive Technology (ART) has actually transformed the landscape of human reproduction, offering hope and possibilities to individuals and families worldwide. However, the rapid advancement and increasing accessibility of ART raise fundamental questions about human experience, social norms, and ethico-moral boundaries. As the world witnesses this evolving and disquieting technology, it is essential to engage with the theoretical frameworks that underpin its varied reception and practice. This paper considers the theoretical foundations of ART, engaging, as it were, the diverse perspectives that shape the popular comprehension of assisted reproduction. By theoretically examining the intersections and tensions between western and african theoretical approaches, the instant paper, uncovers the nuances of harm, content and Jurisprudential considerations that underline ART. Furthermore, it probes the bioethical dimensions of assisted reproduction, revealing the moral and philosophical dilemmas that surround ART.

After examining various theoretical approaches, including harm related Western approach, content-related African approach, bioethical approach, and the jurisprudential approach, this paper argues that natural law jurisprudential approach is best fitted for the study of ART. According to Finnis, "Natural Law approach provides a moral framework that emphasizes the importance of human dignity and the common good,"¹ which are crucial considerations in the context of ART. As noted by George, natural law approach offers a valid understanding of human reproduction, recognizing the inherent value of human life and the significance of family and community.² Moreover, natural law approach provides a critical perspective on the ethico-moral consequences of ART, showcasing as it were, the need for responsible innovation and respect for human dignity³. By upholding the natural law Jurisprudential approach as the best fitted approach for engaging ART, this paper highlights the ways in which ART reflects and challenges our understanding of human nature and dignity, relationships and society. Through a critical analysis of ART's ethico-moral, social and cultural implications and by a considered navigation of the relevant approaches, this paper operates to contribute to a more informed and thoughtful conversation on the future of ART and its role in shaping our shared humanity.

2. Harm-related Western Theory

Under the Harm-Related Western Theory, the Liberal Approach known popularly as 'Harm to Others View' was credited to John Stuart-Mill when in 1859 and in furtherance of his 'utilitarianism', he advanced that power can only be legitimately exercised over a person or an individual member of a civilized society against the person's will for purposes of preventing him or her from actions capable of occasioning harm to other persons in the society. Indeed, he believed that the law should not be used to enforce moral principles on society but to protect harm to its citizens. Criminal offences such as murder and non-fatal offences against the person are examples of the type of harm which Mill thinks the law should enforce.⁴

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¹ J Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) p.23

² RP George, *In Defense of Natural Law* (Oxford: Oxford University Press, 1999) p.45

³ G Grisez, *The Way of the Lord Jesus*, Vol. 2, (Quincy: Franciscan Press, (1993) p.112

⁴All Answers Ltd 'Relationship between Morality and the Law' <<https://www.lawteacher.net/free-law-essays/medical-law/relationship-between-morality-and-the-law-medical-law-essays.php?vref=1>> accessed on 14/11/2023

Accordingly, preventing a person from harming oneself is not apropos for legal-moral intervention because nobody out there is to be harmed. By extension, legal intervention in the issue of the various forms of assisted reproduction would not be proper precisely because the decision to reproduce or not and the decision to reproduce via coitus or technology does not harm the next-person. Hence the Wolfenden Report, in accordance with this liberal approach, argues that the purpose of the law is to ‘preserve decency and protect people and not to interfere in private lives’⁵. But attention is hereby called to the validity and truth value of this liberal view. It is critically challenged as an unsustainable approach to law and morality. One thing which this work defends is that it is not every piece of legislation in a legal system that operates at core to protect other citizens from harm. There are more functions of law than this simple one. Hence, the liberal approach is in this work suspected of reductionism. Yet assuming but not conceding that the approach prevails, it is necessary to interrogate its restricted interpretation of ‘harm to others’. Thus it is important to examine how it is that a procedure (IVF, Surrogacy, Posthumous reproduction, cloning etc.) which impinges on the dignity of mother and child and radically offends social sensibility, does not outwork harm to others. It appears to be an attempt to use privacy rights argument to propose exaggerated autonomy at the expense of community’s deep-seated morals and natural human intuitions. With such an approach, law is used to sabotage human essence and flourishing which it is meant to serve. Under such theoretical ambience, embryo disposition, fetal reduction, and perhaps cryopreservation is justified because the embryo is not a person in law and so, no person is harmed. As it were, the liberal view is insufficient as a theoretical framework.

Another approach here is the moralistic approach, otherwise known as ‘Harm to Society view’, which has been more extensively proposed and defended by Lord Devlin. Minded on the defense and sustainability of society as the matrix of human development, Devlin theorized that ‘a recognized morality is essential to the very essence and being of society. He taught that individual liberty and freedom should be curtailed [by law] in order to protect the fabric of society’.⁶ The substance of the instant approach is that it is regular, permissible and reasonable for society to use the law in the safeguard of whatever is considered essential to its existence. Thinking in this way, Devlin ‘envisages morality in an objective fashion’⁷, precisely as something common and shared by all in society. One *locus classicus* that followed the reasoning in this approach is *R v Brown and ors.*⁸ In this case, the House of Lords re-affirmed the conviction of five men who involved themselves in consensual sadomasochistic sexual acts over a ten-year period. These men were convicted by the lower court of malicious wounding/assault occasioning harm. The court considered whether the defense of consent could validly avail these men in the circumstance and answered the question in the negative. Lord Temple argued that ‘because society is entitled and bound to protect itself’ from such depravity, their appeal ought to be dismissed and the appellants conviction upheld as found. And for Lord Jauncy, ‘it would not be in the public interest if such homosexuality be held as lawful. Indeed, the court warned itself that ‘Sado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of the society for which there cannot be a right under the law to indulge in them’. While this theoretical approach is sound as far as it goes, it is yet important to point out that harm to the individual ought to be seen to be co-extensive with harm to the society. If the lens is cast exclusively on the society as victim, it is possible to identify harm to persons which could be cited and/or adjudged as to not affecting the society at all or substantially at least. In such way, offences against the embryo may be considered inconsequential. Hence, the moralistic view has not covered the field.

Also, we have the paternalistic approach which questions whether the conduct or practice would afflict harm on the individual and perhaps others. The paternalistic approach is but an extension of the moralistic approach to the extent that it considers harm done to the individual person first but does not exclude harm done to others. As articulated by Prof. Hart, law should only intervene in the private lives of citizens to prevent harm to oneself and to others.⁹ In defining harm, Hart outrightly excluded the idea of moral harm. Hence, where a person’s conduct, without more, occasion’s moral harm to the individual, law would refrain from intervention. A theoretical framework such as this is overly dubious, for by excluding moral harm from its ambience, the cluster of assault on human dignity of the embryo and persons involved in ART would be dismissed as immaterial. Accordingly, this framework is also unsatisfactory.

3. Content-related African Theory

Here, reference is to six related African approaches of law and morality which interact with assisted reproduction in the progress of this work. These are the approaches: epiphenomenalism, accomodationism, culturalism, derivationism, assimilationism, and conceptual complementarism approaches. The gravamen of epiphenomenalism is to the effect that law is a by-product of morality or of the moral environment in which it is

⁵ *Ibid*

⁶ *Ibid*

⁷ *Ibid*

⁸ (1993) UKAL. 19; (1994) IAC 212

⁹ All Answers Ltd, *op. cit.*

rooted. It means that the essence of law is explainable in terms of a moral framework.¹⁰ The implications of this framework are many and include that ART are to be evaluated based on current societal values and moral beliefs. Also, context and circumstance operate to determine the propriety or otherwise of particular ART practices. Epiphenomenalism prioritizes individual reproductive choices and autonomy. Hence, laws and regulations on ART are subject to changes in response to changes and chances of times i.e. as societal values change. For instance, epiphenomenalism might support ART for same-sex couples or single individuals if societal values shift to accept these family norms. But the natural law position is different and unique. It evaluates ART based on universal moral principles which are timeless and unchanging. At all times, it emphasizes inherent human dignity and worth of human life. Under this unique framework, certain ART practices like surrogacy, embryo manipulation, etc. are prohibited for violations of the inherent norms. Hence, natural law focuses on the inherent morality of ART's practices regardless of consequences. For example, under the natural law framework, certain genetic engineering practices are prohibited for reasons of violations of natural order or human dignity.

The Accommodationist approach which presents law as an institutional accommodation of morality and is best described in the words of Gluckman to the effect that while at some time, the judges are compelled to go against their view of the moral merits of cases in order to meet the demand for certainty of law, on the other hand they try to vary the law to meet those moral merits¹¹. The approach of culturalism defines the relationship of law and morality as a unity of expression of the way of life of a people. Hence, 'what is legal and what is moral originate directly from the ontological framework which is prevalent within that culture'¹². Epiphenomenalism, Accommodationism, Culturalism tends to emphasize morality as being co-existence with the way of life of people. While it is not objectionable that morality and law should reflect a unity in the way of life of a people, this work steps up to argue that what is ontologically sound morally for a people ought to be sound for all peoples. Hence, law ought to ensure that the various practices of assisted reproduction reflect the demands of the moral nature of man as man and ought not to vary from race to race, nation to nation. This being the case, the above three approaches are dead on arrival, being unable to leverage a sound perennially sustainable theoretical framework for ART's law and practice.

The derivative approach considers law as that which is derived from certain principle of morality. It is to the effect that 'legal concepts are imbued with ethical imperatives'¹³. The implication of this approach is that the obligation to obey the law is a direct consequence of laws' moral foundation. In line with this derivative thesis, it is easy to observe a necessity for laws regulating assisted reproduction procedures to be rooted in the moral nature of man and to always consider moral consequences. But the derivative thesis does not promise to derive its moral temper/sentiment from the universal and immutable nature of man so as to anchor a brand of reproductive laws compliant to the unique moral nature of man. Hence, it falls on its weight.

Assimilationism approach stresses the point that law is nothing but an incorporation or assimilation of morality. This means that law gives innocuous morality a name and form. When Okafor argued that law is a superstructure upon an ontological base and when he further analyzed the said ontological base to be a moral foundation, he was leveraging on the assimilationist approach. In his words, 'what is ontologically good will therefore be accounted as ethically good and at length be assessed as juridically just'.¹⁴ Without prejudice to the position of Okafor as stated above, there is no known presentation of the assimilationist theory which is grafted on the ontological structure of man. It will be therefore going too far to assume that any is so grafted. The assimilationist theory therefore fails the test.

The Approach of Conceptual Complementarism analyses law and morality in terms of two complementary concepts than separable/separate ones. It concedes that in some legal systems like the precisely western, law and morality may be conceived as separable. It does observe that among the Africans, where a unitary worldview prevails over an atomistic type, separability of law and morality flies in the face of natural reality. Thus, such 'separation concept' becomes utterly unacceptable as it is unattractive. According to Riddall, so closely may law and morality be intertwined that in some societies the two may be regarded as not forming separate notions. In the societies of the western world, however, the two spheres have generally been seen, notwithstanding the numerous interrelationships, as concepts that are distinct¹⁵. The picture presented by the complementarist is that law is the epiphenomenon of morality while morality is the substratum of the law. In this way, laws certainly

¹⁰ O Adewoye, 'Proverbs as Vehicles of Juristic Thought among the Yoruba's' *Obafemi Awolowo University Law Journal*, [1987] 3(6), pp. 1-17.

¹¹ M. Gluckman, *Order and Rehabilitation in Tribal Africa* (London: Cohen and West, 1963) chp. 7

¹² S Fleishacker, *The Ethics of Culture* (Ithaca: Cornell University Press, 1994)

¹³ W Idowu and M Oke, 'Approaches of Law and Morality: Perspectives from Contemporary African Jurisprudence', *In-spire Journal of Law, Politics and Society*, (2008) 3(2), p 159

¹⁴ FU Okafor, 'Legal Positivism and the African Legal Tradition' [1984] vol. xxiv 2(94) *International Philosophical Quarterly* p.163

¹⁵ JG Riddall, *Jurisprudent* (London: Butterworths, 1991) p. 295

become a function of its moral foundation. Such that 'law is the enforcement of morality in fact and morality is the enforcement of law in conscience'.¹⁶ The weakness of this approach lies in its failure to identify the source and nature of the moral framework in question. No other morality except the objective type rooted in and arising from the human ontology can suffice.

4. Bioethical Theory

In resolving the complex ethical dilemmas' arising from assisted reproductive technologies and the law, relevant bioethical approaches must be considered. And the bioethical approaches against which background this discourse revolves are principally: teleological, deontological and virtue ethical approaches. The *Teleological Approach* is concerned with the merits and demerits of a given procedure as it relates to consequences and outcomes, measured in terms of potentials for maximization or otherwise of human welfare¹⁷. This approach is basically utilitarian in outlook and content. Hence, it is predicated on the idea of balance between utility and disutility. For being utilitarian, it anchors on satisfactory outcomes for the majority. And in reckoning with satisfactory consequences, regard is had not to the essential but to the existential values with emphasis on pragmatic workability. Thus, once any procedure of assisted reproduction could yield greatest benefit to the greatest number, it has passed the teleological test. But then what is right or wrong is not a matter of democracy. It is not to be determined by the numbers or majority votes. It is right or wrong objectively irrespective of the opinion of the people.

The *Deontological Approach* posits that 'in contrast to the teleological approach, the merit or demerit of an action does not depend on the consequences, but instead on its consistency with moral principles'¹⁸. Immanuel Kant of Koenigsberg is credited with the best elaboration of the deontological approach.¹⁹ In accordance with this, an action, and in this case, an act of assisted reproductive procedure, would be considered morally good not because of its product but by reason of some inherent characteristics of such an action or procedure. Hence, it holds that at least some acts are morally obligatory regardless of their consequences for human welfare.²⁰ While on the surface, it appears that the deontologists are on the same page with the natural law emphasis on ART, a more critical examination discloses otherwise. Conservative natural law exponents are essentially ontologists. While deontologists prioritize moral rules and duties and emphasize inherent rightness or wrongness of actions, the ontologists (including natural law experts) focus on the nature of humanity, human existence and consider broader metaphysical implications. In respect of ART, while the deontologists would reject using donor gametes because it exploits the donors and violates their autonomy, the natural law ontologists would reject it because it alters the fundamental nature of human reproduction and the concept of parenthood. For failing to predicate their conclusions on the human nature, the deontologists' position on ART is subject to alteration, manipulation and change merely by a change in logic and interpretation. By reason of this, the deontologist and his case are dropped as less useful.

The *Virtue Ethics* approach concerns itself with the question 'what is the good of man'? It then finds the answer in any 'activity in conformity with virtue.'²¹ It rejects all action-based moralities and favors character-based values²². Furthermore, it is concerned not merely with positive effects but also with flourishing of personality of an individual in such a way that a person does the right things for the right reasons. Note that a very important aspect of the virtue ethics approach relates to the refutation of the idea that the autonomy of the person is absolute. It advances the idea that personal autonomy is subject to other prevailing factors. This in effect means that because an individual has an intention of performing an act, does not in itself justify or prove the rightness of such an act²³. Suffice it to note that virtue ethical approach relates summarily to the following ingredients:²⁴ (a) an act is moral and right if it is chosen to be done by a person who is virtuous; (b) a person of virtue is one who has or exercises the right virtue and (c) these virtues determine human flourishing. The argument here is that virtue ethics is not sufficiently prepared to provide a sound framework for assisted reproductive technology. This is because it focuses on the character and moral virtues of the individuals involved in ART, evaluates ART in terms of its impacts on human progress, and considers the motivations, intentions and consequences of ART. These indices displayed above fail to graft ART on the human nature per se. The natural law approach is based on the idea that there is a universal moral law inherent in human nature and emphasizes the natural order and purpose of human reproduction. It considers ART to be morally problematic if it deviates from this natural order.

¹⁶*Ibid*

¹⁷ E Jackson, *Medical Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2013) p. 11

¹⁸ Y Olomjobi, *Medical and Health Law: The Right to Health* (Ikeja: Princeton and Associates Pub., 2019) p. 197

¹⁹ He emphasized the importance of universal moral norms in which humanity is seen not as a means to an end but as an end itself].

²⁰ 'Deontological Ethics' <<https://www.britannica.com/topic/deontological-ethics>> accessed on 13/11/2023

²¹ S. Rachels, *Elements of Moral Philosophy* (New York: Mc Graw-Hill, 2007) p. 173

²² See generally, D Statman (ed.), *Virtue Ethics* (Edinburgh: University Press, 1993)

²³ Y Olomjobi, *op. cit.*, p.198

²⁴ R. Hursthouse, 'Virtue Approach and Abortion' *Philosophy and Public Affairs* [1991] 20 (3), 223

5. Jurisprudential Theory

Having described the Western and African theories of law and morality which interact with assisted reproductive technologies, it is apropos to point out that all those can be subsumed in any legal system under three broad-based jurisprudential approaches which have far reaching relevance for this work. These approaches operating as frameworks have survived scholarship and prevailed as descriptive interpretation models for the interaction of law and morality. The said approaches are: Positivist approach, Historical school approach and Natural law approach. The first (Positivist Approach), ‘emphasizes the relationship between law and the political power; It sees both the ultimate origin of law and the ultimate sanction of law in the Will of the State’.²⁵ The second (Historical Approach) ‘emphasizes the relationship between law and the total historical development of the community; it sees both the ultimate origin of law and the ultimate sanction of law in tradition, custom and national character’.²⁶ And the third (Natural law Approach) ‘emphasizes the relationship between law and moral justice; it sees both the origin of law and the ultimate sanction of law in right reason’.²⁷

Note that for the natural law, morality lies in the heart of law, whereas legal positivists believe that the existence of law is one thing while its moral goodness or otherwise is quite another.²⁸ Isolated for particular emphasis, it is noted here that the instant approach has been an important part of jurisprudence throughout legal history. It considers that ‘there was a kind of perfect justice given to man by nature and that man’s laws should conform to this as closely as possible’²⁹. Simply put, natural law approach proposes a unique philosophical system of legal and moral principles which derive ‘from a universalized conception of human nature or divine justice rather than from legislative or judicial action; it reflects the moral law, embodied in principles of right and wrong’³⁰. For the avoidance of doubt, the approach espouses the following postulates³¹: (a) that natural law is the foundation of any moral judgment and hence the foundation of any just society. (b) that natural law has the objective moral principles which are dependent upon the nature of man and which nature is discoverable by reason. Accordingly, this approach presupposes the use of reason in the analysis of human nature and from the outcome of the analysis, to deduce binding principles of moral behavior³².

It is the fact that the natural law theory remains the prolegomenon to any authentic research, study and practice of ART, being the only theory that can drive ART to the safety of the embryo, the sanctity of human life in general and the human dignity of all parties involved in ART. Indeed, it provides the best framework for Assisted Reproductive Technology (ART) as it emphasizes human dignity, the right sense of autonomy and the natural order. It ensures that ethical considerations are grounded in universal moral principles, promoting responsible innovations and protecting human life’s inherent value. In this way, the natural law theoretical framework stands out as the most comprehensive approach to ART.

6. Conclusion

The instant examination of theoretical frameworks for understanding Assisted Reproductive Technology, reveals that natural law Jurisprudential approach offers the most compelling and befitting perspective on this rather complex issue. By recognizing the inherent value of human life and the significance of family and community, natural law approach provides a moral framework for evaluating the ethical implications of Art. As this paper has argued, ART raises fundamental questions about human identity, relationships, and society, and requires a thoughtful and informed response. The analysis made in the paper demonstrates that natural law approach is uniquely suited to address these questions, offering a critical perspective on the ethical dimensions of assisted reproduction. As society looks to the future of ART, it must prioritize an approach that values human life, respects integrity of family and community, and promotes the well-being of all individuals. By embracing natural law Jurisprudential approach, society can cultivate a more just and compassionate environment, where the benefits of ART, if any, are equitably shared and its challenges responsibly addressed. In furtherance of this conclusion, this paper recommends the development of ethical guidelines for ART grounded in Natural law Jurisprudential Approach, prioritizing human dignity and the common good. Also, it calls for the conduct of further research on applying natural law approach to emerging ART technologies, exploring ethico-moral implications and intersections.

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ HJ Berman and WR. Greiner, *The Nature and Functions of Law* (New York: The Foundation Press, 1972) p. 18

²⁸ M. Engelking and J. Alder, ‘Morality and Law: A Critical Examination of Legal Positivism and Natural Law Approach’ <https://www.academia.edu/318079666/morality_and_law_a_critical_Examination_of_legal_Positivism_and_Natural_Law_approach> accessed on 13/11/2023

²⁹ E. A. Martin (ed.), *Oxford Dictionary of Law* (New edition, New York: Oxford University Press) p. 304

³⁰ BA Garner, *Black’s Law Dictionary* (9th edn., Minnesota: West Publishing co., 2004) p. 1127

³¹ I Akomolede, *Introduction to Jurisprudence and Legal Theory* (Lagos: Niyak Prints and Law Publications, 2008) p.26

³² International Encyclopedia of the Social Sciences ‘Natural Law’, <https://www.academia.edu/1733500/Natural_law> accessed on 18/11/2023