

EXAMINING THE LEGAL STATUS OF ASSISTED REPRODUCTIVE TECHNOLOGY IN NIGERIA*

Abstract

Assisted reproductive technology, which includes all the procedures that help in the achievement of a successful pregnancy, is seriously gaining popularity in Nigeria as couples now resort to it to give effect to the societal demand on them to sustain their lineages through childbearing. Although a lot of children have born through this practice, the central problem of this paper is to ascertain the legal status of assisted reproductive technology in Nigeria and whether there is any law in place regulating the practice. Thus, the paper examined the various practice of assisted reproductive technology on-going in Nigeria today. It also made a comparative analysis of the situation in Nigeria with a few selected jurisdictions with the aim of stimulating the Nigerian legislature to action in that regard. It further made a case for the declaration of the legal status of assisted reproductive technology in Nigeria by way of legislation. The paper adopted doctrinal method of research by which it x-rayed the laws regarding assisted reproduction existing in other jurisdictions. It further adopted analytical/descriptive approaches to drive home the position of this paper. The paper found that although the practice of assisted reproductive technology has put a smile on the faces of many couples and even individuals in Nigeria, Nigeria is yet to take any legal position for against or against the practice; as such there is no known legal framework regulating this practice as at the time of writing the paper. This creates a lacuna as to the legal issues such as paternity and maternity of such children, may arise from the practice. The paper argued that the silence of the legislature as to the legal status of assisted reproductive technology in Nigeria creates a lacuna as parties to the practice are not sure of their respective rights and obligation under the arrangement. Hence, the paper recommends the enactment of a law for or against the practice of assisted reproductive technology in Nigeria so as to make for legal certainty; give direction to both the beneficiaries and agents of assisted reproduction in Nigeria; and forestall baby-selling.

Keywords: Assisted Reproduction, Assisted Reproductive Technology, Legal status, Nigeria, Infertility.

1. Introduction

Records show that up to 20% of couples of reproductive age group in Nigeria suffer from infertility¹ and approximately 4% of women aged 30 years and above have never given birth to a child.² Again, it is opined that infertility cases constitute the majority of medical cases handled by Nigerian gynaecologists in university teaching hospitals.³ This situation is worrisome especially given the fact that childbearing is highly valued in Nigeria and often perceived as constituting the very essence of marriage.⁴ In fact, Abdulwasii⁵ posits that childbearing is central to some people's sense of fulfilment in Nigeria while Umeora *et. al* assert that 'the pronatalistic nature of the Africa society means that procreation is invaluable.'⁶ Hence, couples who are faced with fertility problem as a result of hysterectomy, congenital absence of the uterus, high pregnancy risk, sperm duct blockages, abnormalities in sperm production or owing to some other factors, are faced with serious social stigma.

Infertility as a reproductive disorder⁷ is a reality that some individuals and couples particularly in Nigeria are contending with.⁸ Infertility is the inability to conceive after about one year of unprotected sex.⁹ However,

* By **Anita NWOTITE, LL.M**, Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigerianwotiteanita@gmail.com; 2348039574167

¹WHO, National, Regional, and Global Trends in Infertility Prevalence since 1990: A Systematic Analysis of Reproduction 277 Health Surveys, December 2012, p 12.

²Nneka I. Okafor, Ngozi N. Joe-Ikechebelu and Joseph I. Ikechebelu, 'Perceptions of Infertility and In Vitro Fertilization Treatment among Married Couples in Anambra State, Nigeria', *African Journal of Reproductive Health*, December 2017; 21(4):55.

³ *Ibid.*

⁴Z 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.

⁵O A Abdulwasii, 'Assisted Reproductive Technology' <<https://www.lawexplorer.com>> accessed 24 August, 2019.

⁶OJ Umeora, MC Umeora, NB Emma-Echiegbu, & FN Chukwunke, 'Surrogacy in Nigeria: Legal, Ethical, Socio-Cultural, Psychological and Religious Musings', *Afr:J Med Health Sci*, 2014, vol. 13, Iss. 2, 105-9; KP Anu & SN Inder D, 'Surrogacy and Women's Right to Health in India: Issues and Perspective', *Indian J Public Health*, 2013; 57: 65-70.

⁷A A Nardelli, et. al., 'Assisted Reproductive Technologies (ATRs): Evaluation of Evidence to Support Public Policy Development, Reproductive Health 11, Article Number:76(2014).

⁸DD Bingel. 'An Ethical Examination of the Challenges of In Vitro Fertilization in Nigeria', *Journal of Educational and Social Research*, 2013, vol. 3 No. 9, p 100.

⁹J C Petrozza, Assisted Reproductive Technology, <<https://emedicine.medscape.com>> accessed 23 August 2019.

advancement in modern medicine is gradually mitigating this situation as couples can now resort to certain infertility management procedures in particular, Assisted Reproductive techniques such as *In vitro* fertilization (IVF), Gamete Intra Fallopian Transfer (GIFT), Zygote Intra Fallopian Transfer (ZIFT) and Intracytoplasmic Sperm Injection, as alternative to natural method of conception.

Assisted reproductive technology is therefore a range of medical procedures adopted by medical experts to secure successful pregnancy for infertility patients.¹⁰ This is indeed one of the areas of the many breakthroughs of modern medicine which has gained ground and has even become a lucrative business in many jurisdictions around the world, with specific laws legalizing their usage. Nigeria has also keyed into the trend as many babies have been born through these techniques, although it is hardly made the subject matter of public discourse¹¹ because of cultural and religious conceptions. However, it is alarming to note that despite the spread of assisted reproduction in Nigeria, there is yet no law in place legalizing or outlawing such practice. The legislature is silent about the legality or otherwise of assisted reproductive technology while the practice continues on that basis. The pertinent question one will be inclined to ask here is, what is the legal status of assisted reproduction technology in Nigeria? Is there any law in place establishing that? Why the silence by the legislature? Does the silence imply legality or otherwise of the use of assisted reproductive technologies? However, the legality or otherwise of any act does not exist in a vacuum; it is very much dependent on the existence of law to that effect. There is no gainsaying that the issue of assisted reproductive technology touches on the sanctity of human life and thus occupies a central position in the reproductive health of the society. It is of such a nature that mere silence on the matter (by the legislature whose function it is to give the society a sense of direction by way of legislation), cannot be construed as according legal recognition to the practice of assisted reproduction/reproductive technology. Such a sensitive issue requires the Nigerian legislature to take a clear position by explicit laws legalizing or outlawing the practice. Hence, the silence as to the legality or otherwise of this practice is *non liquet* which creates some difficulty and uncertainty as to the position of the practice in Nigeria and the fate of persons who resort to it.

It is against this background that this paper makes a case for the declaration of the legal status of assisted reproduction/reproductive technology in Nigeria by way of legislative enactment as is obtainable in other jurisdictions. This will clear the waves and musings about the practice and serve the purpose of legal certainty for both the beneficiaries and other stakeholders.

2. What is Assisted Reproduction/ Reproductive Technology?

Assisted Reproductive technology developed in response to infertility problem and is in fact one of the numerous areas where contemporary medicine has made tremendous impact on the world given the fact that it enables thousands of couples, single males and even gay couples who medically or for some other reasons are incapable of bearing children to have this done through assisted reproductive technology. The term assisted reproductive technology has been differently defined. For instance, the International Committee Monitoring Assisted Reproductive Technologies defined assisted reproductive technologies as ‘all the treatments or procedures that include the *in vitro* handling of human oocytes and sperm or embryos for the purpose of establishing a pregnancy.’¹² It is also defined as ‘any technological procedure that helps infertile women to conceive.’¹³ Again, it is described as ‘the treatments used to assist people in achieving a pregnancy.’¹⁴ In summary, assisted reproductive technologies are a range of medical treatments and/or procedures given to persons suffering from infertility to help them achieve successful pregnancy. The choice of any type of assisted reproductive technology is dependent on compatibility with the health of each patient. This is because what is suitable to one patient might not be suitable to another.

However, some types of Assisted Reproductive Technologies available in infertility centres around the world include:

- a. ***In vitro* fertilization:** ‘*In Vitro*’ means within the glass. This is an assisted reproductive method where an egg is extracted from one of the ovaries of a woman through a medical procedure and then placed within a glass where it is fertilized outside of the womb before it is then placed back into the woman’s womb. This is considered the most effective and commonest type of assisted reproductive technology.¹⁵ The use of *In*

¹⁰AA Afolasade, ‘The Need for Assisted Reproductive Technology Law in Nigeria’, *Unib Law Journal*, Vol. 2, No1, 2012: p 24.

¹¹Umeora *et. al. Ibid.*

¹²LO Omokanye, AO Olatinwo, KA Durowade, ST Raji, SA Biliaminu & GA Salaudeen, ‘Assisted Reproduction Technology: Perceptions Among Infertile Couples in Ilorin, Nigeria’, *Saudi J Health Sci* 2017;6:14-8.

¹³Z Mustapha, *op. cit.*, p 41.

¹⁴<<https://www.varta.org.au>> accessed 23 August 2019.

¹⁵<<https://www.geosalud.com>> accessed 26 August 2019.

vitro fertilization is common in Nigeria and the first IVF was recorded in 1989 at the Lagos University Teaching Hospital (LUTH).¹⁶

- b. **Gamete Intra Fallopian Transfer (GIFT):** This is another type assisted reproductive technique where eggs are retrieved from a woman's ovaries and fertilized outside the womb and then placed into the woman's fallopian tube rather than directly into the womb. This method was successfully used for the first time in Nigeria in 1985 by Dr.Olutubasun led group.
- c. **Zygote Intra Fallopian Transfer:** Unlike Gamete Intra Fallopian Transfer, Zygote Intra Fallopian Transfer (ZIFT) is a method where an egg (zygote) is fertilized outside of the womb of a woman usually in a test tube and transferred into a woman's fallopian tube while the fertilized egg is still at its pronuclear stage. This procedure is similar to *in vitro* fertilization because it also uses the test tube method.
- d. **Intracytoplasmic Sperm Injection (ICSI) or Artificial Insemination:** This involves the injection of a single sperm into a mature egg in the womb of the woman. This method is normally used where there is male factor infertility or where an unsuccessful *in vitro* fertilization occurs or for older couples. The successful use of ICSI in Nigeria was recorded in 2001 at the Bridge Clinic located in Lagos.

The above three types of assisted reproductive technologies are almost the same except that in *in vitro fertilization* the fertilized egg is placed directly into the womb of the woman; in Zygote Intra Fallopian Transfer, the fertilized egg is transferred to the womb through the fallopian tube when it had matured; whereas in Zygote Intra Fallopian Transfer, the fertilized egg is transferred through the fallopian tube while the fertilized egg is still at its pronuclear stage. The above assisted reproductive technologies are available in Nigeria and are used at various degrees. But then the commonest of them is *in vitro* fertilization (IVF).

3. Brief History of Assisted Reproductive Technologies in Nigeria

As already noted, various types of assisted reproductive technologies are available around the world for the management of infertility. Nigeria is not an exception as such techniques as *In Vitro* fertilization, Artificial Insemination, Gamete Intra Fallopian Transfer all exist in Nigeria, although at different degrees. *In vitro* fertilization was the first successful of these technologies. This success was championed by Prof. Oladipo Ashiru of the Department of Anatomy alongside Prof. Giwa-Osagie of the Department of Obstetrics and Gynaecology both of Lagos University Teaching Hospital (LUTH) in the later part of 1983. This was after a research on *in vitro* fertilization in 1983 which resulted in a successful pregnancy in rats. Although the first attempt at achieving successful *in vitro* fertilization in humans in 1984 failed as a result of miscarriage, the erudite medical experts never relented. In 1985, the delivery of a baby through Gamete Intra Fallopian Transfer (GIFT) was successfully recorded by Dr.Olutubasun led group and was the first of its kind in Nigeria.

Again, in 1986, the unrelenting Prof. Oladipo Ashiru and his colleague Prof. Giwa-Osagie recorded another successful delivery of a baby through Gamete Intra Fallopian Transfer (GIFT). However, in 1989, the first successful *in vitro* fertilization in humans was achieved in Nigeria by Prof. Giwa-Osagie and Prof. Oladipo Ashiru of the Lagos University Teaching Hospital with the delivery of a baby girl from a mother who lost her fallopian tubes to ectopic pregnancy. This was indeed a landmark achievement for these Nigerian medical experts and indeed for Nigeria as this was the first successful attempt in Nigeria, West Africa and East Africa. This landmark achievement was followed by another report of successful pregnancy from embryo transfer by Dr. Wada and his team in the Nosa-Premier (Nordica) Hospital, Abuja. Furthermore, the first successful delivery of a baby through Intracytoplasmic Sperm Injection (ICSI) was also achieved in 2001 at the Bridge Clinic located in Lagos. Aside the above successful records of one type of assisted reproductive technologies or the other, other successes have also been recorded in this regard from 1985 till date by various medical experts at different fertility clinics.¹⁷ Hannatu Kupchi is for instance a product of assisted reproductive technologies in Nigeria. Hence, assisted reproductive technologies play an integral role in the reproductive health and many innovations are still underway.

4. What is the Legal Status of Assisted Reproductive Technology in Nigeria?

Assisted reproduction is such a contemporary topic that it evokes concern not just from individual persons but also from the society at large. This is given the nature of the subject matter. In Nigeria, for instance, the issue is not such that could be dismissed with a wave of hand because of the paternalistic idea putting pressure on couples to have

¹⁶Oyeyemi Gbenga Mustapha, 'History of IVF in Nigeria', Online Nation, Tuesday, December 2010, <www.ivfhistorynigeria.blogspot> accessed 25 August 2019.

¹⁷G M Oyeyemi, *ibid*.

children.¹⁸ The issue of assisted reproductive technology developed in response to infertility problems. Assisted reproductive technology has benefitted many couples and individuals in Nigeria, hence the continuous resort to it. From 1985 when the country recorded the first successful delivery of a baby from Gamete Intra Fallopian Transfer (GIFT) till date, there has been an increase in the use of assisted reproductive technology. Alarming, despite the spread of this practice, the legal status of this practice is not yet certain in Nigeria as there are yet no direct legislations on assisted reproduction.¹⁹ The Nigerian legislature has not taken any position as to the legality or otherwise of the practice. Although there has been an attempt by the National Assembly to pass the Nigerian Assisted Reproduction Authority Bill 2012 in the past, this Bill has not yet seen the light of day. Therefore, as it stands now, there is yet no law in Nigeria formalizing the legality or otherwise of assisted reproductive technology. The worry is that this practice may not always be smooth to the end. At one point or the other, legal issues such as the paternity or maternity of the resulting child or some other legal issue may arise. As such the pertinent question is: on what basis would parties to surrogacy agreement, for instance, enforce such an agreement. This is a fundamental question that can only be addressed where Nigeria has taken a legal position as to such practice. To that extent, there is a serious and urgent need for Nigeria to take a legal position as to the practice of assisted reproduction/reproductive technology. This is to enable the parties know with certainty the implication of their actions and whether or not they have any legal backing.

The delay in the enactment of laws with regards to assisted reproduction may be due to the fact that Nigerians differ very widely in their appreciation of assisted reproduction. While a section of the society views assisted reproduction as a welcome development, another section accepts it with some reservations because of its conceivable cultural implication as constituting a threat to the fundamental values of family life. More so, some religious groups perceive assisted reproduction as inconsistent with morality. The Catholic Church, for instance, considers it immoral and thus:

Techniques involving only the married couple (homologous artificial insemination and fertilization) are perhaps reprehensible, yet morally unacceptable. They dissociate the sexual act from the procreative act. The act which brings the child into existence is no longer an act by which two persons give themselves to one another, but one “that entrusts the life and identity of the embryo into the power of doctors and biologists and establishes the domination of technology over the origin and destiny of the human person. Such a relation of domination is in itself contrary to the dignity and equality that must be common to parents and children.”²⁰

According to the Catholic Church, marriage has both unitive significance and procreative significance because it unites husband and wife in the closest intimacy and renders them capable of generating new life. The basis of this argument is premised on the fact that assisted reproductive technology breaks the unitive and procreative significance which is inherent to the act of marital union and confers the origin and destiny of the human person on technology.²¹ The Catholic Church holds that it is not objectively evil to be infertile. It however encourages natural reproductive techniques or resort to adoption as an alternative to reproduction rather than assisted reproductive technology. On the other hand, Islam generally legalizes assisted reproductive technology that does not involve the donation of egg, embryo, uterus or sperm by a third party although there is a slight disagreement between the Sunni and Shia sects in that respect.²² It also prohibits adoptions from all illegal types of assisted reproduction such as surrogacy.²³

The basis of the above positions is that Assisted Reproductive Technology touches on the sanctity of human life and on the fundamental value of family life as such should not be left at the mercy of human imaginations. Unfortunately, the position is not clear in Nigeria as there is yet no law legalizing or prohibiting assisted reproductive technology. Issues of such a sensitive nature require a clear position by the legislature by way of legislative enactment. This is because law ensures certainty, consistency, and continuity. However, it may be contended that assisted reproduction is subsumed under reproductive rights and so a direct legislation may not be necessary to give effect to assisted reproductive technology since it logically flows from those rights. The next

¹⁸Z Mustapha, *op cit*, p 40.

¹⁹*Ibid*, p 48.

²⁰Catechism of the Catholic Church, Number 2377.

²¹Pope Paul VI, ‘*Humanae Vitae*: Encyclical of Pope Paul VI on the Regulation of Birth, 1968, section 12.

²²‘Religious Responses to Assisted Reproductive Technology.’ <<https://en.m.wikipedia.org>> accessed 29 August, 2019.

²³*Ibid*.

question is: what are reproductive rights? Does assisted reproduction form part of these rights? The World Health Organization describes reproductive rights as follows:

Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.²⁴

Reproductive rights are therefore a range of rights which enable individuals to decide on the number of children to have, the spacing of these children, the method of conception (vaginal or assisted method of conception), the method of delivery of these children (whether by natural delivery or Caesarean section), access to prevention and treatment of infertility,²⁵ the right to access lawful and safe termination of pregnancy; the right to consent to sterilization and contraception; the right to access good-quality reproductive health care; and the right to information in reproductive matters to enable them make informed decisions and so on. The Proclamation of Tehran was the first international document to recognize one of these rights when it provides that: 'Parents have a basic human right to determine freely and responsibly the number and the spacing of their children.'²⁶ The Beijing Platform for Action 1995 also reiterated this position when it states that 'the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.'²⁷ The United Nations International Conference on Population and Development (ICPD) also keyed in to this fact when in 1994 it adopted a Program of Action which sets out the scope of reproductive rights as encompassing the promotion of safe motherhood, treatment and care for persons living with HIV/AIDS and other STIs, safe abortion, and quality contraception and population control.

The Fourth World Conference on Women in Beijing, 1995 re-affirmed and strengthened the 1994 Cairo consensus on women's reproductive health and rights by recognizing women's right to control their sexuality and sexual relations on the basis of equality with men and further emphasized the importance of reproductive health rights in advancing the status of women. It again stressed the responsibility of the various States' governments to ensure the availability of reproductive health services and the removal of existing legal barriers to reproductive healthcare.²⁸ On the other hand, the United Nations' General Assembly affirmed women's reproductive rights under the Declaration on Social Progress and Development which amongst other things provides that: 'The family as a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community. It further holds that parents have the exclusive right to determine freely and responsibly the number and spacing of their children'²⁹ and perhaps how to have them. The international community, in furtherance of this view also met in 1999 to review the implementation of the 1994 International Conference for Population and Development and the Beijing Program of Action, 1995. This singular step constituted a turning point for reproductive health rights as the meeting reaffirmed the principles already enunciated in the 1994 Cairo Consensus on women's reproductive health and rights. However, this beautiful argument notwithstanding, there are no specific rights called reproductive rights under the Nigerian Constitution. For instance, the right to health which could have been an important 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 Policy.³⁰ The Chapter Two rights are however non-justiciable in Nigeria.

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, specifically provides for reproductive health rights,³¹ thereby making reproductive rights applicable in Nigeria. This fact is punctured by the fact that Nigeria has not yet domesticated the said Protocol as required by the constitution as to make these rights enforceable in

²⁴<<http://en.m.wikipedia.org/wiki/reproducti>> accessed 5 August 2019.

²⁵OA Ayanleye, *op. cit* p 129.

²⁶<http://en.wikipedia.org/wiki/reproductive_rights#cite_note-tehran_proc10> accessed 9 July 2019.

²⁷International Family Planning Perspective, 22(3): 115-21.doi:10.2307/2950752JSTOR 2950752

²⁸<<http://en.m.wikipedia.org/wiki/reproducti>>accessed 5 August 2019.

²⁹<http://en.wikipedia.org/wiki/reproductive_rights#cite_note_11>accessed 9 July 2019.

³⁰Section 17(3)(d).

³¹Article 16.

Nigeria.³² 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. Thus, the issue of assisted reproduction is not to be left at the mercy of imaginations, presumptions or speculations because these are not sources of law in Nigeria.³³ Even where the issue of long and continuous usage or practice is relied upon, it is common place that such usage must have been approved by Nigerians before it could metamorphose into law. But then this issue does not even arise in this case.

The worry about assisted reproductive technology stems from the fact that its practice gives rise to a lot of legal and ethical issues affecting the rights of the persons concerned. This is against the backdrop that it could sometimes require the use of donor eggs, embryo or sperm. Hence, legal issues such as paternity/maternity and the enforceability of such practice could arise. These legal issues cannot be adequately dealt with unless the legal position is clear. It is therefore safe to conclude that as far as Nigeria is concern, there is yet no direct legislation legalizing or prohibiting assisted reproductive technology.

5. Comparative Analysis

Assisted Reproductive Technology exists in one form or the other across the world. However, while some jurisdictions expressly outlaw them,³⁴ some permit certain types and prohibit other types³⁵ while some jurisdictions like Nigeria, neither legalize nor outlaw any of the techniques. This part will do a comparative analysis of the situation in some selected jurisdictions: United Kingdom, United States and South Africa to demonstrate the legal gap that exists in Nigeria in respect of assisted reproduction with emphasis to surrogacy.

United Kingdom

The choice of the United Kingdom for this comparative analysis is hinged on the fact that it is a common Law jurisdiction as is Nigeria. In the United Kingdom, surrogacy (which is a type of assisted reproductive technique) is specifically outlawed by the Surrogacy Amendment Act of 1985. A surrogate therefore remains the legal mother of the child and the husband of the surrogate or civil partner becomes the father unless he declines to do so. This applies even in a case of gestational surrogacy or where donor egg is used, and the parties entered into a signed agreement to pay the surrogate for such service. The only way a surrogate can forfeit her right to the child under the UK law is by Parental or Adoption Order made after the birth of the child.³⁶ Parental Order applies where one of the parents is genetically related to the child while Adoption Order applies where neither of the parents is genetically related to the child. However, where disputes ensue as to maternity of the child, the court will make orders bearing in mind the best interest of the child. This was the decision in *Baby M's case*³⁷ where the court observed that although the legal mother of the child was the surrogate, but however, gave the custody of the child to the intended parents.

On the other hand, where a person donates sperm for the purpose of surrogacy arrangement, his rights will be dependent upon whether he donated through a Human Fertilisation and Embryology Authority (HFEA) licensed clinic. Where he donated through HFEA licensed clinic, he will forfeit all the rights pertaining to his paternity of the child otherwise he will retain all his paternal rights where he donated through an unlicensed HFEA clinic. Application for Parental Order which is specific to surrogates resident in the UK must be made by either or both intended parents with the consent of the surrogate. The application must be made six weeks after the birth of the child and must be concluded within the period of six months of the birth of the child. This is done by filing an application through form C51 for Parental Order and form A101A (Agreement to Parental Order) with the birth certificate of the child attached and sent through a family court. To qualify for Parental Order, the intended parents must be eighteen; conception must have taken place artificially; at least one of the intended parents must be genetically related to the child; the intended parents must be domiciled in UK, Channel Islands or Island of Man; the child must have been living with the intended parents; the intended parents must be in a stable long term relationship with each other; and the surrogate mother must have freely given her consent. The Act³⁸ prohibits commercial surrogacy but allows gestational surrogacy where the surrogate is only a gestational carrier and not genetically

³²Constitution of the Federal Republic of Nigeria 1999 (as amended), Article 12.

³³USF Nnabue, *Law and Legal Process*, (Bons International Book Centre, Abuja, 2004), p 6.

³⁴Surrogacy Amendment Act, 1985.

³⁵Child-Parent Security Act of 2017, (New York); Uniform Parentage Act (Washington); and the South African Children's Act.

³⁶D Brahams, (1987). 'The Hasty British Ban on Commercial Surrogacy'. *The Hasting Centre Report*. 17(1): 16-19.

³⁷*Matter of Baby M*, 109 N.J. 396 (1988), 537 A.2d 1227.

³⁸Surrogacy Amendment Act, 1985.

linked to the child. Therefore, compensation of surrogates beyond reasonable expenses incurred in the cause of the medical procedure is forbidden under the Act. The said Act also forbids lawyers and agents from making profit from advertising or assisting intended parents.

Although some people are of the view that the Act is out-dated as it does no longer reflect contemporary practice, surrogacy is strictly regulated in the UK.

United States of America

The legality or otherwise of surrogacy in the United States of America varies from state to state within the country. For instance, it is unregulated at the federal level. In New York, gestational surrogacy is legal by virtue of the Child-Parent Security Act. In Canada, altruistic surrogacy is enforceable.³⁹ In Washington, surrogacy is legalized by virtue of the Uniform Parentage Act, 2017.⁴⁰ New Jersey has also taken a bold step to legalize surrogacy by virtue of New Jersey Gestational Carrier Agreement Act, 2019, which protects surrogates. The Act stipulates that a gestational surrogate must be above 21; must have a child of her own; must be legally represented; and must satisfy certain physical and psychological examinations to be qualified as such.⁴¹ Under this Act too, the intended parents are recognized as the legal parents of the child and the child's birth certificate bears their name as the legal parents.⁴² The United States of America is generally a surrogacy friendly country and have the best facilities in that regard.

South Africa

Surrogacy is legal in South Africa and is regulated by the Children's Act, No. 38 of 2008.⁴³ The Act requires that surrogacy agreement be validated by the High Court. The Act stipulates certain conditions that must be satisfied for the commissioning parents and surrogates to enter into a valid surrogacy agreement. These requirements includes the fact that the commissioning parents are not able to give birth to a child and that the condition is a permanent one and cannot be reversed; that they are competent to take care of a child; that they are willing to accept the legal implications of the surrogacy agreement between them and the surrogate, and so on. On the other hand, the surrogate must have a documented history of at least one pregnancy and viable delivery; the surrogate must have at least one living child of her own; and must not be a commercial surrogate. To be valid, a surrogacy agreement must be in writing and signed by all the parties; it must have been entered into in South Africa and validated by the High Court within whose jurisdiction at least one of the commissioning parents is domiciled or habitually resident; and the surrogate mother and her husband or partner must be domiciled in South Africa at the time of the conclusion of the agreement.⁴⁴ The agreement must also make adequate provisions in terms of contact, care, upbringing, general welfare and best interest of the child. It is only when the above conditions are met that the surrogacy agreement can be validated by the said court. The Children's Act prohibits commercial surrogacy and so it is illegal for anyone to make any payment or compensation whether in cash or in kind to any surrogate for any surrogacy agreement entered into except such payment or compensation is directly related to the cost of the medical procedure.

From the foregoing, the situation in other jurisdictions is quite different from what obtains in Nigeria. First and foremost, in most of these jurisdictions under review, surrogacy is either legalized or prohibited. Even where it legalized as in South Africa, the High Court is still required to make Orders validating the agreement. Furthermore, in the UK, although it is prohibited, surrogacy agreement can be validated through Parental or Adoption Order made by the court. Again, commercial surrogacy is prohibited in all the three jurisdictions although with a little variation in some states within the USA. More so, these jurisdictions have laws in place regulating surrogacy except for the USA where certain states have yet no law regulating the practice. The situation in above jurisdictions is a welcome development as it makes for certainty of the law. Nigeria is therefore called upon to follow suit by taking a definitive position as to the legality or otherwise of assisted reproductive technology in Nigeria.

6. Challenges to Assisted Reproduction/ Reproductive Technology in Nigeria

Although this paper makes a case for the Nigerian legislature to take a clear position as to the legal status of assisted reproduction/ 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 determine the nature of what could be passed and what could not be passed into law.

³⁹ Assisted Human Reproduction Act, 2004, Articles 6(1); 12(1)(c); 12(2) and 12(3).

⁴⁰ <<https://en.m.wikipedia.org>>, 'Surrogacy laws by States', accessed 30 September 2019.

⁴¹ New Jersey Gestational Carrier Agreement Act, section 5(a)(1)(2)(3)(4) and (5).

⁴² *Supra*, section 4(a)(1) and (2).

⁴³ Children's Act, No. 38, 2005, Section 292 (1) (a)-(e)

⁴⁴ *Supra*, section 292 (1) (b) (c) and (d).

Even where certain issues are passed into law, implementation becomes another serious issue for the same cultural and religious reasons. Hence, the issue 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. Below are some of these constraints.

Religious Constraint

The acceptance of assisted reproduction/ reproductive technology differs amongst the different religious groups in Nigeria. While some group rejects it *in toto*, 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 totally not acceptable by Catholics as they consider it as both immoral and illegal⁴⁵ 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 these are used by married persons.⁴⁶ Among the Muslim faithful, the view varies according to groups-while the Shi'as – recognize assisted reproduction involving a third party donation of sperm or egg, the Sunni group recognize only those reproductive technology not involving third parties. This variation in opinion and acceptance will surely affect the chances of formalizing assisted reproductive techniques in Nigeria. Even where it succeeds, implementing the law across all these groups will be a problem.

Cultural Constraint

In Nigeria, childbearing is held in great value. However, the culture did not envisage a situation where children will be begotten in any way other than the natural means of conception.⁴⁷ This is because family lineage matters a lot in Nigeria, particularly in matters of inheritance. Hence, the society frowns at this method of conception and children born out of it are most often not acceptable to the society. The commissioning mother is not spared either as she is stigmatized. It is to be noted that matters regarding assisted reproduction is such a topic that is not made the subject of public discourse and children born out of this process are hardly disclosed. Thus, making it open at point may also raise some uneasiness on the part of persons who have already benefitted from the process, supposing the legislature declares the practice illegal. This constitutes a serious challenge.

Enforcement

The issue of assisted reproduction raises some legal issues such as the paternity and maternity of the resulting child⁴⁸ and whether the practice is enforceable in Nigeria. Although the practice of *In vitro* fertilization and gestational surrogacy is common in Nigeria, they exist only at an informal level. It is very doubtful if the courts in Nigeria will order specific performance for a 'contract' of such a nature. Even where there is a law formalizing the practice, its enforcement will be very dicey given the cultural and religious undertones of the subject matter. This is a serious constraint that will require judicial activism.

7. Way Forward for Nigeria

From the foregoing, 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 the 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 implication of such practice for the purpose of 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.

⁴⁵Pope Pius XII Disclosure to those taking part in the Second Naples World Congress on Fertility and Sterility, AA. 1956; 48:470, cited in H N Sallam & N H Sallam, 'Religious Aspects of Assisted Reproduction', <<https://www.ncbi.nlm.nih>> accessed 18 September 2019.

⁴⁶H N Sallam & N H Sallam, *ibid*.

⁴⁷Umeoraet. al., *op cit*.

⁴⁸ P Anu, P Kumar, D Inder & N Sharma, 'Surrogacy and Women's Right to Health in India: Issues and Perspective', Indian J Public Health, (2013) 57, 65-70.

8. 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 clearly the legal status of assisted reproductive technology in order to avoid a state of 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 with certainty, then there will be tendencies for 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 a matter to be left to the mercy of speculation. The legislature must act fast to fill in this lacuna.