



**BUILDING ARTIFICIAL REPRODUCTIVE
TECHNOLOGY RIGHTS WITHIN THE WALLS OF
THE RIGHT TO PRIVACY IN NIGERIA**

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Abstract

Achieving reproduction through Artificial Reproductive Technology (ART) is phenomenal and a shift in the dynamics of medicine and biotechnology. All over the world ART has developed beyond leaps and bounds, thereby assisting parties who have fertility challenges and are unable to procreate to embrace parenthood. In Nigeria, ART has been practiced over thirty years and still there is no legislation for its development and over these years, people have undergone several ART procedures, which were either successful or unsuccessful. Where there are liabilities of unethical procedures, most people are unable to hold medical personnel responsible as the absence of a regulatory framework still poses a great challenge. This article postulates the need for people who utilize any of the Artificial reproductive technology procedures, to do so having in mind that their right to privacy is guaranteed, as it is their constitutional rights that should not be breached or violated. The research methodology adopted is doctrinal as the paper examined existing literature in this field of law. This paper while explaining ART, also considered the constitutional right to privacy for parties, as the choice of bringing to the limelight the identity of parties and their children who are born through ART should be the personal choice of the parties involved. More so, the paper analyzed the legal framework of some jurisdictions, so as to enable our legislature to reflect a semblance of those laws in our own legislation for a better re-defined and regulated use of ART. The authors made some recommendations and that, if put into practice, will help us in the growth and development of ART in Nigeria.

Keywords: Artificial Reproductive Rights Technology, Right to privacy, Constitution.

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Introduction

The quest for procreation in our world is age long and natural. People are keen on having children who will be called theirs and the society also has a way of putting pressure on people especially married ones to produce children, as they are quick to put the tag of “infertility” on people who experience delay of any sort. It is most unfortunate that there exist certain fertility and other allied issues that have inhibited many people from achieving their desire to procreate.¹ It is important to state, that irrespective of the fact that the challenge of fertility may be from the man or woman, there has been great advances in medical technology which has now provided viable alternatives to human insemination and procreation, through the use of Assisted Reproductive Technologies (ART).² The absence of regulation of ART in Nigeria is a quagmire and the lacuna it has created has led to the arbitrary use of power by medical personnel, who now act and operate without any form of control with respect to the use of ART procedure on people. The resultant effect has also destroyed lives and resulted in loss of income and in most extreme measures destroy the chances of some individuals having genetically – related – children in their lifetime³. This paper examines the need to factor in individual right to privacy as enshrined in our constitution as it relates to ART in order to safeguard the unborn child or children and the parties from unnecessary stigmatization and discrimination in society.

The Scope of Assisted Reproductive Technologies

Assisted Reproductive Technologies (ART) is the process that allows reproduction to occur without need to utilize the age long method of sexual intercourse between parties concerned⁴. This process makes procreation possible, without the need of heterosexual copulation (coitus). Although, ART is a medically acceptable panacea for persons and couples with a reproductive history of infertility, the method to be used depends on the cause of the infertility as ascertained through medical diagnosis. The essence of this reproductive intervention is basically, to allow a

¹ . A. Ojilere & M. Agugua (2019): Assisted Reproductive Technologies and the Menace of Baby Factories in Nigeria. *Journal of Commercial and Contemporary Law(JCCL)* Vol.9 Faculty of Law, Imo state University, Owerri, Nigeria.
²*Ibid.*

³ Adekile O.M(2013)- Financial Access to Reproductive Technologies: options and Issues for Reproductive Rights in Nigeria, *Acta Uniersitatis Danibius Administration* Vol. 5 No.2

⁴ Rose, A.P(1999) Reproductive misconception: Why cloning is not just another assisted reproductive technology. *Duke law journal*,48(5),1133-1156

medically scientific combination of sperm and ovum, for the purpose of fertilization and procreation.⁵ ART first began as far back as 1960 in the United States of America⁶, United Kingdom and Australia.⁷ The historic world's first test tube baby Louise Brown was born in 1978⁸ through IVF and since then, the use of ART has expanded to become a commonplace around the globe. In Nigeria, the practice of ART is on the rise, as there have been recorded successes and failures.⁹ It is pertinent to note that the success rate of ART has made it possible for spouses, and partners who were tagged barren to have children of their own. Also, through the use of ART, the sex of a child can be determined, and also the possibility of multiple babies can be assured.¹⁰ As much as the growth and development of ART has considerably helped in addressing the problem of infertility in men and women, it has also made it possible for a single person to have a child that is genetically connected to him or her without necessarily undergoing marriage, intercourse, pregnancy,¹¹ etc. More importantly is the fact that ART has opened the door of divergent views on the legal status of children born through these methods especially as it relates to legitimacy, succession and inheritance rights, and right to family life, bearing in mind that most of the children born through this procedure do not have genetic links with their parents. It is pertinent to add that the eggs received from the female and the spermatozoa of the male are the properties of the respective gender.¹²

The above view now brings to fore the need to build ART rights within the walls of right to privacy in Nigeria to enable the children born through these methods not to grow up to experience stigmatization, deprivation, discrimination, loss of inheritance because of the fact that the nature and procedure of their birth was made public. It is our belief that it is imperative that the rights to

⁵ C.Ekechi-Agwu & A.O Nwafor(2020)- Regulating Assisted reproductive technologies in Nigeria: Lessons from Australia and United Kingdom.

⁶ Frankel, M.S(1974) Role of semen cryobanking in American medicine.Br Med J, 3(5931),619-621

⁷ De Stoop, D.f (1976)- Human artificial Insemination and the law in Australia published by ; The Australian law Journal 50(6),298.

⁸ P. C Steptoe &R.G Edwards(1978): Birth after re-implantation of a human embryo. The Lancet Vol No 8085 p.36

⁹ Bamgbopa, Okonta, Ajayi, Ogebeche,Igbokwe & Onwuzuruigbo(2018) Public Perceptions on ethics in the practice of assisted reproductive technologies in Nigeria Global Reproductive Health Journal Vol. 3

¹⁰ Shola Adedeji; (2000)-Another Chance for Infertile Couples published by the Comet PP 30-31; Guardian newspaper (April 2000) P.3 -The media reported that a hospital in Abuja recorded over 20 successful IVF deliveries.

¹¹ Omokanye, Olatinwo, Salaudeen, Durowade, Balogun (2018)- Assisted reproduction technology in Nigeria: Challenges and the way forward; African Journal for Infertility and Assisted Conception

¹² Guido Pennings(2000): What are the ownership rights for gametes and embryos? Advance directives and the disposition of cryopreserved gametes and embryos. Human reproduction, Volume 15, Issue 5, May 2000, pages 979-986.

privacy as enshrined in our Constitution¹³ should be able to safeguard the parties utilizing ART and also the children born through it. The decision to undergo ART since it is an individual choice should be respected and be subject to the constitutional right of privacy which should not in any way affect the growth, development and societal acceptance of the children involved.

Types of Assisted Reproductive Technologies

ART has developed over these years from less complex procedures like artificial Insemination, to more complex and delicate procedures like In-vitro Fertilization (IVF), Cryopreservation, egg and sperm donation, surrogacy and most recently human cloning¹⁴. The following are the various types of ART:¹⁵

- i. Artificial Insemination
- ii. In-Vitro Fertilization(IVF)
- iii. Egg and Sperm Donation
- iv. Zygote Intra fallopian Transfer(ZIFT)
- v. Gamete Intra fallopian Transfer(GIFT)
- vi. Intracytoplasmic Sperm Injection(ICSI)
- vii. Surrogacy

The use of ART over time has shown its various advantages which includes but not limited to¹⁶helping in resolving issues of infertility in our society. It has greatly developed medicine and medical technology far beyond the human mind. In addition, it has recently improved the rate of multiple pregnancies and birth in recent times as it gives room for pre-meditated sex selection by parties concerned. In the same vein, ART has brought so much peace and joy to many families who over the years have experienced infertility and social stigmatization. It brought about the opportunity for couples and singles to have children genetically connected to them without been involved in marriage, intercourse or even undergoing the stress of pregnancy.¹⁷

¹³ Section 37 of the Constitution of the Federal Republic of Nigeria 1999(as amended)

¹⁴ Shah M.(2000); Modern Reproductive technologies: Legal Issues Concerning Cryopreservation and post humous Conception, 17 J Legal Med 547-589

¹⁵ Pitrolo E.A (1996) The Birds, the bees and the Deep freeze: Is there International Consensus in the Debate over Assisted Reproductive Technologies Hous J. Int;l Vol.9 p.147; Raymond J.G (1995);Women as wombs; Reproductive technologies and the battle over women's freedom published by Spinifex press.

¹⁶ A. Ojilere & M.Agugua(n.1)

¹⁷<https://www.reproductivefacts.org/news-and-publications/patient-facts-sheets-and-booklets/documents/fact-sheets-and-info-booklets/assisted-reproductive-technologies-booklet/> accessed on 23 July 2022.

In the light of the above, ART has been able to reduce drastically, the mental, emotional and psychological trauma which is heightened by the social stigma attached to infertility and reproductive inabilities in patriarchal African societies. Through ART, facilities such as Sperm bank, egg banks and gametes fertility centres have sprung up and the concept of parenthood have been greatly broadened. Pre-implantation genetic screening and pre-implantation genetic diagnosis (PGD) offer the unique ability to characterize the genetic composition of embryos before embryo transfer.¹⁸ Furthermore, the availability of better procedures such as sperm washing during ICSI and the prevention of mother-to-child transmission using highly active anti-retroviral treatment (HAART) have made the risk of transmission of infection insignificant especially for people living with HIV.¹⁹

Despite the above advantages, there also exists plethora of disadvantages that are associated with Assisted Reproductive Technologies since its evolution. Amongst these disadvantages are the commercialization that comes to play with respect to the purchase of gametes, payment of surrogate carriers, gamete donors have created room for illegal acts which calls for urgent regulation of this practice. Many scholars have over the years argued that ART has distorted lineage traits, family ties and more so, some of the children born through ART have several parents vis a viz, biological, genetic, social parents which is a drastic shift from the well-known traditional family structure. Unregulated usage of unused embryos is an ethical issue that calls for more attention. Many people have their gametes preserved for later use and most of these fertility clinics most at times discreetly sell these gametes out of their quest for material gain without recourse to the future problems it will bring.²⁰ It is estimated that about one million Cryo preserved embryos are being preserved and stored in various fertility clinics in America.²¹ This appears unhealthy for citizen's rights and crisis of identity. The use of ART causes pre – natal risks. Also, it causes multi-fetal gestations, prematurity of fetuses, abruption placentae.²² Furthermore, ART is often

¹⁸ Brezina PR, Zhao Y. The ethical, legal, and social issues impacted by modern assisted reproductive technologies. *Obstet Gynecol Int* 2012;2012:686253

¹⁹ du Plessis E, Shaw SY, Gichuh iM, Gelmon L, Estambale BB, Lester R, etal. Prevention of mother-to-child transmission of HIV in Kenya: Challenges to implementation. *BMC Health Serv Res* 2014;14 Suppl 1:S10

²⁰ P.R Brezina & Y. Zhao(2012)- The ethical,legal and social issues impacted by Modern Assisted Reproductive Technologies . <https://doi.org/10.1155/2012/686253> Accessed on 23 July 2022

²¹ Fadare J. O. & Adeniyi A.A (2015): Ethics issues in newer assisted reproductive technologies: A view from Nigeria; *Nigerian Journal of Clinical Practice* 18(7), page 57.

²² Aston, Peterson & Carell D.T(2008) Monozygotic twinning associated with reproductive technologies: A Review. *Reproduction and Health Journal* Vol 13 pg 377

associated with risk of Mono-zygotic twinning, which brings additional risk of growth abnormalities and twin to twin transfusion.²³

The Nigerian Constitution and Right to Privacy

Under the Nigerian Constitution,²⁴ the right to privacy involves a wide range of issues which includes confidential correspondence, email and internet use, medical history, personal data, eavesdropping, sexual orientation and personal life styles. It is not in doubt that the right to privacy is one of the fundamental human rights enshrined in the Nigerian Constitution. By the provisions of Section 37 of the 1999 Nigerian Constitution which provides thus:

“The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.”

The mere fact that this right is enshrined in the Constitution shows its importance. It is trite to note that the right to a private life is solely connected to human dignity and personal autonomy, which is derived from the right to be let alone. It is not out of place, for people to live to the exclusion from public eye and the ability to constrain the limit of public interference in their lives²⁵. Regard must be had to the fact that where a state has complete disrespect or less value for the right of privacy, life would be unbearable. It is sad to note that analyzing the bounds of the right to privacy under Nigeria law is a herculean task, due to the absence a unified definition of the concept of privacy.²⁶

Further to the above, we can state that the right to privacy has six components which are:²⁷

- i. personal autonomy;
- ii. limited access to the self

²³ OBOS Fertility Contributors(2011): The ethics of Assisted Reproductive technologies; <http://www.oubodiesourselves.org/book-excerpts/health-article/the-ethics-of-art> accessed 2/6/21

²⁴ Section 37 of the Nigerian Constitution 1999(As amended)

²⁵ Osita Ogbu, Human Rights Law and Practice in Nigeria, 2nd Revised edition [Enugu: Snaap Press Ltd, 2013] 280-281

²⁶ <https://webfoundation.org/2017/10/right-to-privacy-nigeria-needs-a-data-protection-law/> Accessed on 23 July, 2022.

²⁷ Solove, Daniel, J. Understanding Privacy. Cambridge, MA: Harvard University Press, 2008. 39 4 1.

- iii. confidentiality;
- iv. the management of personal information;
- v. the right of individuality;
- vi. relationship.

From the above constituent elements, it can be seen that privacy is only important when it seeks to protect the rights of an individual which he intends to keep private i.e., that is events that are not meant to be within the domain of the public. Therefore, it is right to state that actions or happenings in a person's life, which he or she does not want to protect from the public purview or from the society that he/she lives in would be deemed as acts that are not covered by the right of privacy. Succinctly, the right of privacy involves a range of activities that people tend to exclude from the knowledge of others.²⁸ It is of great importance to note, that the right of privacy implies that the public eye is removed from prying into an individual's affair. Another crucial aspect of the right to privacy entails the right to protect one's image and personality and to have unrestricted access to control one's zones of exclusivity, space and confidential information.²⁹ It is imperative to note further that the concept of right to privacy lies within the realm of self-ownership and it is the freedom of an individual to do what they deem fit to do with their individualism perspectives to life and furthermore, keeping others outside their sphere.³⁰

It is instructive to bring to fore, the provisions of the Universal Declaration of Human Rights, [1948]³¹. Article 12 of the Declaration provides thus:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks, upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

²⁸ Yinka Olomjobi (2017) Right to Privacy in Nigeria. SSRN online publishers accessed on 7/6/21.

²⁹ *Ibid.*

³⁰ J.O Akande, Introduction to the Constitution of Federal Republic of Nigeria 1999 [Lagos: MIJ Publishers, 2000]: 85. 7 [2001] 185 ALR 1

³¹ Article 12 of the UNDHR

Furthermore, the International Covenant on Civil and Political Rights [ICCPR]1966 specifically by the provisions of Article 17 provides thus:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

To further buttress the importance of right to privacy, the ICCPR does not contain a limitation clause nor an exception. More so, with respect to children, they are also entitled to have their privacy and the circumstances of their birth can remain in the private domain with no obligation by the society or whosoever to make it public. The Convention on the Rights of the Child³² putting into perspective the provisions of the International Covenant on Civil and Political Rights by its Article 16 states as follows:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Right to privacy is an essential element for the sustenance of a modern democratic society and it is vital to the protection and preservation of individual welfare and well-being.³³ Despite this obvious fact, Nigerians have witnessed a high level of gross violation of their right to privacy, while most people ignore and tolerate it. It is pertinent to note that violation of privacy is not a well litigated area in Nigerian legal jurisprudence, as culture has a way of downplaying the people's right to privacy. These violations stem from the fact that Nigerians tolerate a lot of things which normally should constitute a violation of their privacy.³⁴ A broad concept of privacy as

³² The 1989 United Nations Convention on the rights of a child

³³ *Op Cit.* (n 22)

³⁴ Egun Oluwadamilola (2017): An Evaluation of the Right to Privacy in the Digital Age. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062603 Accessed on 23 July, 2022.

enshrined in the Constitution involves the right to live in isolation of others, (a reclusive life), the right to protect social, interpersonal relationships, [inclusive of sexual and marital relationships] the right of concealment of one's nudity, [body anatomy] from public glare and the right of an individual over his own body [inclusive of what goes in and out of his body].³⁵ It follows that the right to privacy implies the right to protect his body from unauthorized intrusion or invasion. From the above discussion, it is the authors' view that the circumstances of birth of a child or children from ART procedures should not be the basis for them to be stigmatized or discriminated against by society or individuals. By the provisions of Section 42(3) of the Constitution, no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

Regulation of Assisted Reproductive Technology in Nigeria

Assisted Reproductive technology is one of the highest advancements that has been made in the treatment of infertility medically all over the world. Its evolution has brought multi-faceted ethical, legal and social problems which has resulted in a drastic shift in the way clinicians and society now perceive infertility and more so, the ethics surrounding this new normal.³⁶ The rapid advancement in this medical science, in spite of cultural and religious constraints and perceptions³⁷ does not seem to have been measured up by a commensurate development in the legal framework as seen in some other jurisdictions to regulate the practice. This lacuna has created room for unethical practices and abuses varying from medical negligence, infringement of right to privacy, extortion, commercialization of gametes sale, unsafe embryo preservation, breach of trust and confidentiality which an appropriate regulatory instrument and agency of government could have prevented.³⁸ In Nigeria, the first incidence of ART birth occurred over about thirty years ago.³⁹ That length of time is considered more than adequate for the country to have put in place an effective regulatory and institutional framework and to ensure that the use and practice of ART

³⁵Lloyd Megwara (2010):*The Law and Practice of Human Rights in Nigeria* published by Olive Printing & Publishing House, Akure.

³⁶ Omokanye, Olatinwo, Salaudeen, Durowade, Panti, Balogun (2019): *Assisted Reproduction Technology in Nigeria: Challenges and the way forward* published by the African Journal of Infertility and Assisted Conception

³⁷ Schenker J.G: Assisted reproductive practice-religious perspectives. *Reproductive Bio Medicine* 2005;10(3): 310-319, accessed at www.rbmonline.com/Article/1539 on 8/6/21

³⁸ Agwu C. E. & Nwafor (2020); *Regulating Assisted Reproductive technology in Nigeria; Lessons from Australia and United Kingdom.*

³⁹ Olooto W. E., and Adebayo A. Review of Female Infertility; Important Etiological Factors and Management. *Journal of Microbiology & Biotechnology Research* 2012; 2(3): 379.

and other medical developments or advancement which are quite novel are curtailed within the bounds of law. This is imperative because, where there is no law, chaos, disorderliness, violation of human rights and other negative vices will be the order of the day.

It is rudimentary that laws must be put in place for proper regulation, guidance, and punishment of offenders and protection of lives. When a law is made, people tend to have both moral and legal duty and obligation to ensure compliance within the precincts of that law⁴⁰. Presently in Nigeria, our legislature has not been able to enact any legislation that will specifically address the practice of ART in Nigeria, as is obtainable in other countries of the world. A lot of people, associations, global healthcare advocates have lent their voices for the enactment of a robust legislation as the way and manner ART is being practiced without proper regulation is a great setback in the medical profession in Nigeria.⁴¹

It is proper to note that the principal legislation regulating healthcare delivery in Nigeria is the National Health Act of 2014 (NHA 2014), which was signed into law on October 31, 2014.⁴² The Act provides a framework for regulating, developing and managing the sector and sets standards for rendering healthcare services in the federation and for related matters. The provisions in the Act are complemented by the Code of Medical Ethics in Nigeria⁴³ which primarily deals with ethical issues pertaining to medical practice. There are very scanty provisions in both the legislation and the Code that could impact on assisted reproductive technologies in Nigeria. The issue of informed consent which is one of the cornerstone of medical law was not adequately captured in the Act as, in procedures like IVF, informed consent is very important for every step of the process.⁴⁴ Similarly, regulation 44 of the Code of Medical Ethics provides that the profession takes very seriously the ethic of professional secrecy whereby any information about the patient that comes to the knowledge of the practitioner in the course of the patient-doctor relationship constitutes a secret and privileged information which must in no way be divulged by

⁴⁰ Nnabue U. Understanding Jurisprudence and Legal Theory. Owerri: Bons Publications, 2009, 148- 150.158-159.

⁴¹<https://www.google.com/amp/s/www.thisdaylive.com/index.php/2021/11/23/time-to-regulate-fertility-medicine/amp/> Accessed on 24 July, 20

⁴²O.Enabuele & .J.E Enabulele (2016) Nigeria's National Health Act: An assessment of health professionals' knowledge and perception published by the Nigerian medical Journal. Accessed on 13/6/21

⁴³ Code of Medical Ethics in Nigeria. Retrieved from <http://www.mdcnigeria.org/Downloads/CODE%20OF%20CONDUCTS.pdf> :2019 accessed 12/6/21

⁴⁴<https://www.google.com/amp/s/www.thisdaylive.com/index.php/2021/11/23/time-to-regulate-fertility-medicine/amp/> Accessed on 23 July, 2022

him to a third party except with informed consent of a patient given preferably in writing.⁴⁵ These, the authors' believe are not enough nor comprehensive to regulate a vast area of medical science and advancement like ART which is complex and requires its own detailed legislation.

Furthermore, over time, most ART centers in Nigeria and other developing countries operate based on Human Fertilization and Embryology Authority (HFEA) UK guidelines. This practice, however, is not optimal as there are several contextual differences among the different countries. Several attempts have been made to put forward a legislation to regulate the ART framework in Nigeria, but they didn't see the light of the day but presently, a bill for the establishment of the "Nigerian Assisted Reproduction Authority"⁴⁶ has been presented by the Association for Fertility and Reproductive Health (AFRH) to the Nigerian parliament for consideration and if passed, it is believed that it will be a good starting point for regulation of ART practice in Nigeria.⁴⁷

The said Bill for the establishment of a Nigerian Assisted Reproduction Authority was presented before the National Assembly in 2012 and was read for the second time on 2nd May 2012.⁴⁸ This Bill, however, was not passed into law as it did not enjoy the support of the majority of the legislature. Interestingly, in 2014, the National Health Act⁴⁹ was enacted. Section 10 prohibits the manipulation of assisted reproductive technology process for the purposes of reproductive cloning. The said section provides thus:

(1) A person shall not:

- (a) manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; or
- (b) engage in any activity including nuclear transfer or embryo splitting for the purpose of the cloning of human being;
- (c) import or export human zygotes or embryos.

⁴⁵ The NHMRC Guidelines complements the Assisted Reproductive Treatment Act 1988 (South Australia) and Assisted Reproductive Treatment Regulations 2010 in South Australia. The Code of Medical Ethics in Nigeria complements the Nigerian National Health Act of 2014

⁴⁶ National Assembly of the Federal Republic of Nigeria. The Nigerian Assisted Reproduction Authority (Establishment) Bill 2012. p. C4541-50. Available from: <https://www.nass.gov.ng/nass2/legislation.php?id=1521> Accessed on 12/6/21

⁴⁷Ibid

⁴⁸House of Representatives 'Votes and proceedings' (2 May 2012) <http://nass.gov.ng/document/download/5555> Accessed 13/6/21

⁴⁹National Health Act 8 of 2014

(2) A person who contravenes or fails to comply with the provision of this section commits an offence and is liable on conviction to imprisonment for a minimum of five years with no option of a fine. The keyword in subsection (a) is ‘manipulate’.

Regard must be had to the fact that there is a pending Bill before the Nigerian National Assembly to amend the National Health Act in order to regulate assisted reproductive technology, to encourage the safe and ethical practice of assisted reproductive technology services.⁵⁰ Also, clause 60 of the Bill purports to establish a regulatory body to be known as the National Registry of Assisted Reproductive Technology Clinics and Banks in Nigeria. The National Registry is to be the central database of assisted reproductive technology data in Nigeria. It further states that patients, surrogates and donors are not to undergo medical tests that may endanger any party to the assisted reproductive technology procedure or the child.⁵¹ In the proposed bill, it provides that ART clinics are under an obligation to provide counselling to the commissioning couple on the choices available to them and the likely consequences and effects of the procedure.⁵² Furthermore, the bill proposes that Surrogacy will not be considered for any commissioning mother who is able to carry a pregnancy to term, thus a commissioning mother must provide a medical report to attest to her inability to carry a pregnancy to term.⁵³ More so, the bill makes it mandatory for the written consent of all parties involved in ART to be obtained by the clinic for every stage of the ART process.⁵⁴ Such consent may be withdrawn by any of the parties at any time before the human embryo or gametes are transferred to the uterus of the woman who is to carry the pregnancy.⁵⁵ More importantly, all clinics registered for ART will maintain records at all times of the parties and the procedure used for such parties.⁵⁶ The bill prohibited the sale of gametes outside Nigeria and where a party chooses to transfer his or her gamete outside the country, approvals needs to be made by the appropriate authorities.⁵⁷ The option of all forms of assisted reproductive technology, except surrogacy, is available to married infertile couples.⁵⁸ The bill also made provisions for the rights of the parties to assisted reproduction in the sense that, a

⁵⁰ <https://www.premiumtimesng.com/health/445466-reps-to-amend-national-health-act-gbajabiamila.html> Accessed 24 July, 2022.

⁵¹ National Health Act (Amendment) Bill 2016 clause 68.

⁵² National Health Act (Amendment) Bill 2016 clause 68(6).

⁵³ Bill to amend the National Health Act 2016 (n 73) clause 68(10).

⁵⁴ National Health Act (Amendment) Bill 2016 clause 69

⁵⁵ National Health Act (Amendment) Bill 2016 clause 69(4).

⁵⁶ National Health Act (Amendment) Bill 2016 clause 70.

⁵⁷ National Health Act (Amendment) Bill 2016 clause 74.

⁵⁸ National Health Act (Amendment) Bill 2016 clause 76(2).

gamete donor has the right to decide the extent of information to be released and to whom, except otherwise ordered by the court.⁵⁹ The gamete donor must obtain the written consent of his or her spouse where married, although the rationale for this clause is not provided. One may wonder if this clause is not a breach of privacy and reproductive rights. Where a spouse chooses to donate a gamete without the knowledge of the other spouse, there should not be an impediment to this decision. Such a donor shall relinquish rights over the child or children that may be conceived using his gamete and, to this end the identity of the recipient is not made known to the donor.⁶⁰

It is interesting to note that although the Bill to amend the National Health Act is comprehensive in terms of procedure to regulate and ensure minimum standards in ART in Nigeria, minimal effort was made in the Bill to enumerate and guarantee the rights of the parties involved. There is a need to make a legislation having human rights perspective in order to secure the rights of the parties to ART as well as the child or children born through such procedures.⁶¹ It is of paramount importance to note that quality assurance of ART procedures remains an important factor that must be addressed in emerging economies of the world. Because of lack of national regulatory agencies in most developing countries like Nigeria, most IVF clinics make their own rules and follow different standards. This does not augur well for the practice of assisted reproduction in these climes.⁶²

Assisted Reproductive Technologies and Right to Privacy

The complex nature of Assisted Reproductive technologies has posed a lot of challenges, especially with the fact that there is no regulation of the practice in Nigeria. The parties involved and the children that are born through these methods have rights which should be preserved and one of such rights is the right to privacy. The pressures associated with infertility make many people to resort to seeking help from spiritual, traditional/alternative health care, orthodox medical routes, all in a bid to procreate and prove to the world that they are fertile. Also, considering the fact that disclosure in a less educationally developed country like Nigeria, with strong religious and cultural attachments on issues of procreation, cannot be separated from the obnoxious negative consequence such as stigmatization of the gamete donor, the donee and the child, it is therefore

⁵⁹National Health Act (Amendment) Bill 2016 clause 74.s

⁶⁰ National Health Act (Amendment) Bill 2016 clause 76.

⁶¹ O. Adelokun (2018); The concept of surrogacy in Nigeria, issues and challenges published by the African Human Right Law Journal

⁶² Fadare JO, Adeniyi A. A. Ethical issues in newer assisted reproductive technologies: A view from Nigeria. Niger Journal of Clinical Practical 2015;18 Suppl S1:57-61.

very important that parties retain the right not to disclose any information with respect to their children born through ART.

A typical example of this was witnessed in the secrecy surrounding the first test tube baby in Nigeria who was born in 1989.⁶³ While other countries publicly celebrated such a great milestone, in the field of medical science and technology, it was reported by the media in Nigeria about the In-Vitro Fertilization (IVF) baby in Nigeria. Ashiru faulted reports about Nigeria's first test-tube-baby. Ashiru, an embryologist and endocrinologist, told The Guardian that he, in collaboration with Osato Giwa-Osagie, performed the delivery of the first IVF baby at the College of Medicine University of Lagos (CMUL) Lagos University Teaching Hospital (LUTH) in 1989. However, due to fear of stigmatization, the parents refused their consent for the child to be exposed to the media even up till now.⁶⁴ This continues to show that many women in Nigeria who patronize fertility centres and undergo some of the ART procedures, does so in secret, owing to cultural and societal concerns prevalent in our country on this issue. It is not wrong to state that the parents of the first IVF baby, is entitled to their right of privacy and their refusal to allow the media have access to the details of the birth of their child should be respected. Also, due to the fact that gametes can be outsourced and there are donors who are paid to donate these gametes and more so, there is the possibility of parties having children who are not genetically related to them, citizens are often reluctant to expose the details of the birth of their children. The above context pre - supposes that there will be in existence legal parents, biological/genetic parents which context is alien to the family law structure in Nigeria.

The unenforceability of surrogate contracts in Nigeria is also a challenge, as where parties choose surrogacy as their means of procreation, the need to protect the identity of the surrogate and the need for the surrogate to agree to relinquish all parental rights over the child makes the right to privacy paramount when it comes to ART. Arguably, the unenforceability of surrogate contracts in Nigeria has not deterred people from having such contracts with their surrogate, since financial considerations are involved and there is need to hold the surrogate accountable for agreed terms between the parties involved. The African culture of measuring strength of motherhood on a

⁶³ Muanya C. Hannatu Kupchi is not Nigeria's first test tube baby. Retrieved from <https://guardian.ng/news/hannatu-kupchi-is-notnigerias-first-test-tube-baby/:2019> Accessed 14 June, 2021

⁶⁴*Ibid.*

woman's ability to carry a pregnancy to term is an honour, which then makes people who tend to pursue surrogacy to find a way of leaving their known environment where people are familiar with them and then hide under the pretence of travelling, to avoid prying eyes on them. This is very crucial to people undergoing surrogacy so that when they announce the birth of the child, no one will raise unnecessary questions. The above scenario is also one of the reasons why people patronize baby factories which is a fallout of lack of regulatory framework of ART in Nigeria.⁶⁵

Furthermore, the issue of inheritance, legitimacy and succession is a very vital point in the family law structure in Nigeria. It is absurd to note that in a family where a child is born through ART, the possibility of depriving him or her of their inheritance is high, as people tend to think and believe that children born through ART are not genetically connected to their parents. They liken these children to adopted children. Our Constitution prohibits discrimination on the basis of the circumstances of one's birth⁶⁶ but in reality, a lot of discrimination and stigmatization goes on by the day. It is therefore very necessary that ART is built within the walls of right to privacy. It is the view of the authors that, the legislation that will be enacted to regulate ART and related matters will appreciate the need for people's right to privacy to be preserved most especially as it pertains to ART. In another vein, it is expected that medical personnel, uphold their obligation in terms of confidentiality of the ART procedure as between them, their clinics and the parties involved. There is need for non-disclosure agreements so that the identity of the people involved together with the children born are protected from the society. The prevention of the commercialization of gametes sales, unregulated gamete preservation/banking is an issue that needs proper regulation. It is important to buttress the decision of the parents of the first test tube baby in Nigeria, who refused to consent to the exposure of the identity of their child to the media. This goes to show the need to respect the decision of choices of ART users as they are entitled to their privacy because their right to privacy is a constitutional right which is enshrined in our Constitution.

Lessons from Other Jurisdictions: Canada and South Africa

⁶⁵ <https://www.researchgate.net/publication/283082646-baby-factories-taint-surrogacy-in-Nigeria> Accessed 24 July, 2022.

⁶⁶Section 42(3) of the 1999 Constitution

Many Countries have robust legal framework which regulates ART and its attendant issues properly. Their medical personnel practice in line with these regulations, as they are aware that they can be punished if there is any use of any procedure or methods which is alien to the regulation over which will result to the death or adverse health complications of parties involved.

Canada and South Africa (which is the only African country that has regulated the use and practice of ART in their jurisdiction) have made very elaborate legislations which can guide Nigeria in its own legislation.

Canada

In Canada, there is the Canadian Assisted Reproductive Technologies Register (CARTR)plus, which is a national database, administered by Better Outcomes Registry & Network (BORN) Ontario, which has collected individual patient data for all patients undergoing IVF since 2013 from all 33 ART clinics across Canada. CARTR Plus is the only database in Canada to contain national IVF data, and the accuracy of the data has not yet been assessed. These data may be used to inform policymakers regarding ART funding decisions and as a source of information for clinicians and researchers about current fertility practices and the effectiveness and safety of ART treatments in Canada.⁶⁷ In Canada, the legislation that has been enacted to regulate ART is the Assisted Human Reproduction Act (AHR Act), which received Royal Assent in 2004 and was designed to protect and promote the health, safety, dignity, and rights of Canadians who use or are born through ART. The AHR Act achieves this purpose by setting out prohibited activities related to assisted human reproduction, that may pose significant human health and safety risks to Canadians or that are deemed to be ethically unacceptable or incompatible with Canadian values.⁶⁸ There exist other regulations under the Act, which have been put in place in order to have a comprehensive regulation of ART in Canada. These regulations are:

- i. Administration and Enforcement (Assisted Human Reproduction Act) Regulations (SOR/2019-194)

⁶⁷Bacal V., *et al* (2020)TheCanadian Assisted Reproductive Technologies Register (CARTR) Plus database: a validation study published bythe *Human Reproduction Open*, Volume 2020, Issue 2, 2020 hoaa005, <https://doi.org/10.1093/hropen/hoaa005> Accessed 14 June, 2021

⁶⁸<https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction.html>. Accessed on 13 June, 2021.

- ii. Consent for Use of Human Reproductive Material and In Vitro Embryos Regulations (SOR/2007-137)
- iii. Reimbursement Related to Assisted Human Reproduction Regulations (SOR/2019-193)
- iv. Safety of Sperm and Ova Regulations (SOR/2019-192)

Some specific sections of the Act provide thus;

Purchase of other reproductive material

(3) No person shall purchase, offer to purchase or advertise for the purchase of a human cell or gene from a donor or a person acting on behalf of a donor, with the intention of using the gene or cell to create a human being or of making it available for that purpose.

Marginal note: Exchanges included

(4) In this section, “purchase” or “sell” includes to acquire or dispose of in exchange for property or services.

Marginal note: Use of reproductive material without consent

8 (1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.

Marginal note: Posthumous use without consent

(2) No person shall remove human reproductive material from a donor’s body after the donor’s death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.

Marginal note: Use of *in vitro* embryo without consent

(3) No person shall make use of an *in vitro* embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.

Marginal note: Gametes obtained from minor

9 No person shall obtain any sperm or ovum from a donor under 18 years of age, or use any sperm or ovum so obtained, except for the purpose of preserving the sperm or ovum or for the purpose of creating a human being that the person reasonably believes will be raised by the donor.

Marginal note: Purpose

- **10 (1)** The purpose of this section is to reduce the risks to human health and safety arising from the use of sperm or ova for the purpose of assisted human reproduction, including the risk of the transmission of disease

In 2016, recognizing the need to strengthen the federal regulatory framework governing AHR in Canada, Health Canada (which is the government Establishment responsible for developing policy and regulations under the *Assisted Human Reproduction Act* (AHR Act. Government also administers and enforces the Act and its regulation),⁶⁹ announced its intention to bring into force sections 10 (safety of donor sperm and ova), 12 (reimbursement) and 45 to 58 (administration and enforcement) of the AHR Act and to develop the necessary supporting regulations.

Sections 45 to 58 of the AHR Act came into force on June 9, 2019, along with the *Administration and Enforcement (Assisted Human Reproduction Act) Regulations*.⁷⁰

Section 10 of the AHR Act came into force on February 4, 2020, along with most provisions of the *Safety of Sperm and Ova Regulations*.⁷¹ Section 12 of the AHR Act came into force on June 9, 2020, along with the *Reimbursement Related to Assisted Human Reproduction Regulations*.⁷²

The above shows the robust legislation obtainable in Canada, as the legislation made provisions for consent to the use of human reproductive material and In-vitro embryos, prohibitions related to purchasing reproductive material or selling In-vitro embryos, prohibitions related to scientific research and clinical application, rights to parties and issues of non-disclosure, confidentiality rights and duties of medical personnel are all stated there, making it a comprehensive legislation which Nigeria can look at in drafting their own legislation to be in line with global standards.

South Africa

In South Africa, with an increase in the use of assisted reproductive technologies (ART), reproductive rights have shifted from the traditional focus on the rights of individuals to avoid

⁶⁹<https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction.html>. Accessed on 13 June, 2021.

⁷⁰*Ibid.*

⁷¹*Ibid.*

⁷²*Ibid.*

reproduction to the rights of individuals to reproduce non-coitally.⁷³ The South African government has put in place National Health Act 61 of 2003 and the regulations relating to Artificial fertilization of Persons, 2012⁷⁴. Also, laws governing surrogacy in South Africa are set out in Chapter 19 of the Children's Act 38 of 2005⁷⁵. The law on surrogacy is quite robust and comprehensive. The legislative history of reproductive rights in South African can be divided into three phases: legislations which predate 1996, the Constitution of the Republic of South Africa, 1996 (the Constitution) and post 1996 legislations. Prior to the promulgation of the Constitution, legislation pertaining to reproduction consisted primarily of the Abortion and Sterilization Act.⁷⁶ With the enactment of the Constitution, reproductive rights have found protection under section 12(2)(a), which recognizes the rights of every one to make decisions regarding reproduction. The National Health Act (NHA) and the Regulations relating to Artificial Fertilization of Persons (Regulations), which are legislations regarding artificial fertilization, which potentially affirms the right to reproduce non-coitally provide that post-humous reproduction is not allowed, even where a deceased person's consent was obtained. In respect of embryo donation, the regulations state that parties who make use of donated gametes may have repeated recourse to the same genetic material, provided that a particular donor may not be used more than twelve times.⁷⁷ Section 1(1) of the Children's Act recognizes surrogate agreement and defines it: 'surrogate motherhood agreement' as an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilized for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such child to the commissioning parent upon its birth, or within reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent. The Act defined a "surrogate mother" as an adult woman who enters into a surrogate motherhood agreement with the commissioning parent. The Act also defined "commissioning parent" as a person who enters into a surrogate motherhood agreement with a surrogate mother.

⁷³ Van Niekerk (2017); Assisted Reproductive Technologies and the Right to reproduce under the South African Law <http://dx.doi.org/10.17159/1727-3781/2017/v20n0a1305> Accessed on 14 June, 2021.

⁷⁴ South Africa National Health No. Act 61 of 2003; South Africa. National Health No. Act 61 of 2003. Regulations Relating to Artificial Fertilisation of Persons. Government Gazette No. 40312, 30 September 2016. Accessed on 14 June, 2021.

⁷⁵ <https://www.gov.za/documents/childrens-act> Accessed on 13 June, 2021

⁷⁶ *Op Cit*(n.65s)

⁷⁷ Robertson J. A. (2001) "Ethical and Legal Issues in Human Embryo Donation" 1995 Fertility and Sterility 885

Stemming from the definition of 'surrogate motherhood agreement' (SMA)⁷⁸, it is clear that only an adult woman can agree to be surrogate mother, fertilization must take place by artificial means (conception of the child by means other than natural sexual intercourse) and the surrogate mother must intend to handover the child to the commissioning parent after birth with the intention that the child becomes the legitimate child of the commissioning parent. Section 294 of the Children's Act reads as follows:

'No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person'.

Section 294 of the Act clearly requires that a child contemplated in terms of a valid SMA must be genetically related to both the commissioning parents or, if this is impossible as a result of medical or biological or other valid reasons, related to at least one of the commissioning parents. Where the commissioning parent is a single person, the child must be genetically related to the commissioning single parent. The Constitutional Court decision in *AB v. Minister of Social Development*⁷⁹ suggests that if the person claiming right under ART is physically involved in the reproductive process, then it obviously excludes those who cannot contribute to the reproduction of the child (right of privacy inclusive). The impact of the right of privacy on specific forms of ART, namely mitochondrial transfer, posthumous reproduction and embryo donation is worthy of note. While the first two forms of ART would meet the criteria set down in *AB v Minister's* case, embryo donation would not. Individuals denied access to embryo donation could thus not rely on either the right to reproductive autonomy or the right to privacy to aid them.⁸⁰ Fortunately, the existing legal framework provides some assistance to these individuals, although sadly the same legislative framework does not support the use of mitochondrial transfer and posthumous reproduction.

⁷⁸ Miss Veruksha Bhana research on the right to know one's own biological origins in partnership with South African Law reform <https://justice.gov.za/salrc/QNRs/20170929-ip32-Worksheet.pdf> Accessed on 14 June, 2021

⁷⁹ 2017 3 BCLR 267 (CC)

⁸⁰ van Niekerk, Carmel, Assisted Reproductive Technologies and the Right to Reproduce Under South African Law (May 9, 2017). Potchefstroom Electronic Law Journal, Vol. 20, 2017, Available at SSRN: <https://ssrn.com/abstract=2982289>

Appraisal of Jurisdictional Framework for ART in Canada, South Africa and Nigeria

From the two legal frameworks of Canada and South Africa, it is clear that we need comprehensive legislation in Nigeria that will make provisions for all incidental matters related to ART in Nigeria and also emerging trends like the posthumous reproduction rights and liabilities. It is worthy to note that lessons could be learnt from the provisions of the Assisted Human Reproduction Act (AHR Act) of Canada and the National Health Act (NHA), the Regulations relating to Artificial Fertilization of Persons (Regulations), Children’s Act in South Africa to enact an appropriate law to regulate ART in Nigeria. It is trite to note that Nigeria is already on the right path with the National Health (Amendment) Bill 2016 and the Assisted Reproductive Technology Bill 2016. However, to avoid duplicity and conflict in the laws, the two Bills should be harmonized with the National Health Act for robust and all-inclusive legislation. ART should be recognized and efforts should be made by medical practitioners to ensure that the Bills are enacted into law. The ART Bill, if passed into law, will be a model for African countries. The Bill is commendable as it goes a step further more than the South African law and regulations by comprehensively recognizing the rights of donors, surrogate mothers, commissioning parents and the child. Regulation of ART is the best thing to do, as unethical practices still abound which ought not to be. It is expected that this present National Assembly, will make great progress with the bill.

Recommendations

From the discussion and analysis as presented in this paper, the following are the recommendations the writers have proffered to help the growth and development of ART in Nigeria:

- i. The pending legislations at the National Assembly should fast track the enactment of the legal framework to holistically cater for ART and other related matters in Nigeria. The enactment of this law will go a long way in providing guidelines for the use of ART.
- ii. All fertility Clinics must be properly registered in a National Register which will be opened to aid proper monitoring and enhanced database.
- iii. Parties that intend to utilize ART must undergo proper counseling, so as to help them understand the complexity and intricacies of what they want to do. On this note, each fertility clinic must have a certified medical counselor for this purpose.

- iv. The issue of right to privacy must be respected by medical personnel and fertility establishments. Parties' choice of privacy must be respected as it is a right provided for in the constitution and other statutes.
- v. The issue of commercialization of gametes must be well provided for in the legislation, as most fertility clinics are illegally trading it for their own monetary gain against medical ethics and societal values.
- vi. The issue of non-disclosure agreement for both parties, medical personnel's, gamete donors must be made available at every fertility clinic and offenders must be brought to book.
- vii. It is important that lawyers must be involved in the drafting of surrogacy agreement, gamete donor agreement, and gamete preservation contracts etc so as to capture the rights and liabilities of parties involved.
- viii. The judicial arm of government should be trained in readiness for developments relating to cases where the onus of proof lies on the claimant for the protection of his right to privacy among others. In essences, judicial personnel should be abreast of medical terms and ethics as it applies to ART.

Conclusion

The advent of ART has opened up plethora of views, challenges and development over time. This paper has been able to discuss ART in general and the need to factor in right to privacy of parties to ART. Due to our dynamic cultural, religious and social inclinations, most people are ashamed to state the procedure by which they were able to achieve reproduction, due to fear of stigmatization and discrimination which is prevalent in our society. The right of the child which comes into being as a result of ART procedure ought to be protected throughout his lifetime. The paper is a wake up to the three arms of government to be proactive with the evolution of technological developments vis – a – vis the protection of rights likely to be violent as a result of this. The need for comprehensive legislation is paramount, a critical look at the jurisdictions in comparison in this paper, shows that where there is adequate legislation, it aids for proper regulation, the guidance of medical personnel's involved and the protection of the rights of parties involved. Also, the punishment of defaulters is key in ensuring less casualties and this will deter others from engaging in unethical practices which is dangerous to the society and parties involved.