



An evaluation of the need for legal regulation of medically assisted reproductive technology use in Nigeria

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Abstract

The quest of infertile persons to resolve the problem of infertility has resulted in the patronage of various treatment outlets with different treatment options. Medical treatment of infertility generally involves the use of fertility medication and alternative treatment. If conservative medical treatment fails to achieve a full-term pregnancy, the patient may undergo artificial reproductive technology procedures. This-procedures have been employed in Nigeria for more than 40 years, yet there is no legal instrument that oversees this technical, sensitive and widely explored aspect of medical practice which advances with the times. This paper questions the continuous state of non-regulation of this branch of reproductive science. It was identified that in regulating artificial reproductive technology techniques, harm must be avoided by restricting the use of artificial reproductive technology procedures for persons who need not undergo it, checking unprofessionalism, and prohibiting techniques if that would do harm to members of society. The advancement in artificial reproductive technology has generated a reproductive revolution and Nigeria is no exception. The absence of law in this field leaves the rights of persons who seek technological solutions to infertility, at the mercy of an anarchical system, where abuses, neglect, and ignorance thrives.

Keywords: Medically assisted reproduction, artificial reproductive technology, infertility, conception, human rights

Introduction

When two people decide to become parents, they procreate by copulation and produce a child. In order that it may continue, humanity must reproduce itself. Males and females have different organs, the male being the progenitor, or giver, and the female; the receiver. Men and women each give a cell of themselves to be joined together and developed in the woman, until a new human being capable of existing in the world is born. Human beings reproduce sexually (two organisms are necessary) as opposed to asexual reproduction (where one organism can do it alone), and a fertilization process forms a zygote, which divides and develops to form a new individual ^[1]. Sometimes this process may be unsuccessful in achieving the desired result. At this point, children are sought to be artificially conceived using gamete (eggs or sperm or both) donation, from the couple themselves, or from other persons and through medically proven scientific techniques that achieve the ultimate goal of reproduction ^[2].

Age, environmental factors, and medical conditions are some factors influencing the prevalence of infertility. Due to the premium placed on motherhood and children in several regions of the world and the societal assumption about men's virility as a mark of masculinity hinged on the premise that real men get women pregnant, infertility is regarded as a serious global problem ^[3]. The advancement in medical technology in assisted reproduction has indeed been a major milestone in medical history. Couples who wanted children but cannot produce children due to infertility challenges now have medical options to access. Prior to now, adoption had been an alternative in countries where child adoption is a viable option. However, the child adoption system in Nigeria is not robust despite statutory provisions in that regard. Very few couples resort to

adoption in Nigeria and it does not constitute at present a first alternative or a promising complement to infertility treatment, as the social environment makes people to prefer to have a child that is genetically or biologically theirs.

The philosophical justifications of statutory provisions on Artificial Reproductive Technology (ART) and resolution of human rights issues arising from law, donor rights, parent rights and child rights, and consequent enforcement continues to raise questions in legal and medical arenas. Infertility treatments in an unregulated environment results in low standardization within the assisted reproduction system, commodification of gametes, issues of quality assurance in service delivery, challenges with execution of donor contracts, issues of remuneration, donor anonymity, exploitation, medical impropriety, unrestrained donations, and other human rights abuses. Concerns over ART includes status of embryo, safety of the process, justice, autonomy, and risk benefit. The commercialization of the process has also raised ethical argument against exploitation, dignity, risk for distinctions in genetic pedigree ^[4]. All of the above have continued to challenge the rights of the parties involved in ART as it relates to; the right of autonomy and privacy of the parents; the right of privacy of the donor; and the right of the child ^[5].

This paper seeks to justify the urgent need for regulation of medically assisted reproductive technology use against the background of non-prioritization of ART legislation by Nigerian legislators for many years, and an increase in unwholesome practices that negate human rights. It makes an evaluative case for gamete donation, assisted reproduction, and artificial reproductive technology. People have a right to procreate, and the use of donated gametes has been established as an available and explorable means of achieving pregnancy for infertile persons and couples,

activities that limit the accessibility of donor egg or sperm, may infringe upon human rights. Fallout on the issue of regulation and monitoring is that incompetent practitioners and quacks have hijacked the procedure. While preying on their patient's vulnerable state and desire to have children, unethical practices are carried out in Nigeria against the rights of donors. Medical procedures carried out without consent could lead to litigation and award of damages. Thus, even in the lack of current legislation on ART procedures and processes, the human rights of donors, of conceived children and of parents, as well as the human rights issues surrounding creating a legal environment for ART in Nigeria remain paramount.

Conceptual Clarification

1. Infertility

Medically, infertility is a disorder in the reproductive system defined by the inability of a human to attain a clinical pregnancy with repeated unprotected sexual intercourse without the use of contraceptives [6]. It is the failure to get pregnant after one year of consistent unprotected sexual intercourse or the failure to get a woman pregnant within that period [7]. Fertility is the human ability to procreate through heterosexual intercourse. Majority of adult males and females engaging in regular unprotected sex will achieve pregnancy after a while if they are fertile [8]. Women who can conceive but not carry a pregnancy for a term may also be diagnosed with infertility. When a woman is unable to conceive, it is usually termed primary infertility (PIF). A woman who had at least one successful pregnancy in the past will be diagnosed with secondary infertility (SIF) [9]. Infertility has variously been defined by medical experts and international agencies [10].

Clinically, the World Health Organization sees it as a disease of the reproductive system identified by inability to accomplish the goal of a clinical pregnancy after 12 months or more of consistent unprotected sex [11]. Infertility is also used to describe persons or couples who have undergone more than three miscarriages or still births. Infertility is a problem of both sexes [12]. PIF refers to situations where a person or couple cannot conceive a child despite being sexually active over a period of time without protection or contraceptive. SIF on the other hand is found in couples who have difficulty to conceive another child after having conceived a child (either carried the pregnancy to term or had a miscarriage) [13].

Numerous factors are responsible for the increase in infertility ranging from medical, social, environmental to genetic factors [14]. Infertility affects millions of people of reproductive age worldwide and has an impact on their families and communities [15]. Thus, women alone should not be blamed for childlessness in domestic relationships as various studies have indicated significant contribution of male factors to infertility incidence in Nigeria. Practical understanding of the cause of infertility is relevant to the mode of treatment or application of ART [16]. In the male, infertility is most commonly caused by problems in the ejection of semen, absence or low levels of sperm, or abnormal shape and movement of the sperm, retrograde ejaculation, varicocele-swelling in the veins around the testicles, testicles that have not descended into the scrotum, antibodies that attack and destroy sperm and hormonal imbalance [17]. In the female, infertility may be caused by a

range of abnormalities of the ovaries, uterus, fallopian tubes, and the endocrine system, among others [18].

These causes generate from erectile dysfunction in male, use of illicit or harmful drugs, poor lifestyle choices (drinking alcohol, smoking), thyroid gland problems, excess weight, intense exercise that cause a significant loss of body fat, stress, addictions, sexually transmitted infections, environmental and occupational hazards, such as exposure to toxic elements, environmental pollution and toxins, endometriosis, polycystic ovary syndrome (PCOS), illness (cancer treated with chemotherapy), disruptions of food chain, poor nutrition and diet (eating chemically processed foods), ovulatory disorders or tubal damage, uterine or cervical abnormalities, endometriosis, early menopause, pelvic adhesions and certain medical treatment like radiation and chemotherapy, as well as some medical procedures with unintended effects like contraception, female genital mutilation, unsafe abortions, postpartum pelvic infections, among others could be traceable to causative factors to infertility [19]. Though medical factors like blockage of the sperm ducts, low sperm density/count, occlusion of the fallopian tubes and abnormal uterus, dominate causative factors of infertility [20], social factors like late marriage or late childbearing, couples waiting longer before producing children, couples seeking medical advice very late after several attempt, have also caused a rise in infertility in Nigeria [21].

2. Artificial Reproductive Technology

Artificial reproductive technology (ART) is treatment of human infertility with the use of medical techniques and technology to produce a child through conception and birth. Assisted reproduction (AR) is any method of conception not achieved through sexual intercourse. AR engages intrauterine birth and conception, intracervical or vaginal insemination; donation of gametes and embryos, and *in-vitro* fertilization and transfer of embryos. Different health technologies have been developed to aid reproduction and overcome infertility. In developing AR methods, ART is the technological procedure that assists infertile women to conceive. ART includes medical procedures that process female human egg and a male sperm through technological means [22]. It has generated a world-wide reproductive revolution [23]. Access to reproductive technology has substantially benefited people's wellbeing, enabling infertile couples to have children [24]. Indeed, ART is the process where sexual intercourse is bypassed, and conception occurs in the laboratory environment [25].

ART is activated when the procedure involves surgically removing egg from a donor woman's ovaries, combining them with donor sperm in the laboratory and returning them to a woman's body. However, where the treatment involves only sperm - intrauterine - or artificial insemination or procedure where a woman takes medicine only to stimulate egg production without the intention of having the egg harvested, then it is not ART [26]. ART involves technologically handling eggs, sperm, or both outside the human body for conception. Since 1978, ART procedures have been used to overcome human infertility challenges. The birth of Louise Brown on July 25, 1978, was the peak of decades of scientific research in reproductive medicine. Since then, abundance of breakthrough in both clinical medicine and basic science have all allowed increasing numbers of infertile couples the chance to have a baby [27].

The most performed ART is called In-Vitro Fertilization (IVF), other types of AR procedures include; Artificial insemination by Husband (AIH), Artificial Insemination by Donor (AID), oocyte donation, cryopreservation, gestational surrogacy, Gamete Intrafallopian Transfer (GIFT), Intra-Cytoplasmic Sperm Injection (ICSI) and Sub Zonal Insemination (SUZI) ^[28]. During a typical procedure, eggs and semen are obtained from the individual or couple and placed together in a conducive laboratory environment to facilitate fertilization the resultant embryos are subsequently transferred into the uterus of the woman with the hope of implantation and pregnancy ^[29].

A Legal Justification for the Regulation of Medically Assisted Reproduction and Artificial Reproductive Technology Use in Nigeria

Underlying all models is the need to enable active positive social mobilization without which, legal approaches to rights lack sustainability and power. The right to have children correspondingly includes the right to use the advancement in medicine and technology to address the problems of infertility posed to couples; especially those with irreversible cases, in order to enable them to have their own children. According to Aquinas, the law of nature is the first rule of reason. Any law that contradicts the principle of natural law is not to be seen as law but a perversion of law. To him, a just law serves the common good, and has to distribute the burden of the state fairly; it has to promote religion, and such just law has to be within the bounds of the law-makers authority ^[30].

If every person is entitled to life, liberty, and the preservation of private and family life, then the right to procreate or to have children of one's own follows human rights principles of justice for all. Indeed, health and well-being are deeply personal matters. Nothing is more intimate than the experience of conceiving and bearing a child and giving birth to a unique human being. Laws and policies which dictate what level of health care provision is guaranteed, what kinds of service will be offered, how priorities are established between competing claims, where resources are concentrated and what alternatives are available all become far more immediate when they affect loved ones.

Since infertility is no respecter of persons, the idea of remaining childless is indeed no option for infertile couples especially in Nigeria and presumably anywhere else, owing to the social and cultural importance of having children. Childless couples are most time treated with contempt, ridicule, and disdain; they are usually humiliated, socially stigmatized and in extreme cases ostracized. This medical condition and the pressure of couples having children at all costs have given rise to the increase in Medically Assisted Reproduction (MAR), even as milestones achieved in the medical science though ART continue to increase. Providentially, medical progressions in the area of reproductive technology enables persons with challenges of procreation, to have enabled infertile couples and individuals to seek options in biologically connected ways that are medically and legally afforded within the State. Indeed, the effect of primary infertility ^[31], is the increased rate in the use of secondary means in the treatment of childlessness.

ARTs embrace all infertility treatments, and it is a dynamic and rapidly developing field of medical practice in Nigeria.

In spite of this, the techniques are still not available to majority of infertile couples with irreversible forms of infertility in Nigeria because it is unaffordable ^[32]. The practice of ARTs usage in Nigeria, has gone on for many years, but it remains deprived of comprehensive legal regulation. ARTs processes are dynamic, and some procedures are regarded as dangerous, and call on the ethical, cultural, and religious sensibilities of major beliefs in Nigeria. Indeed, the lack of adequate or comprehensive legal regulation for administration of ART across Nigeria has led to medical, legal, and ethical abuses in the country. Many pre-natalistic ideas put pressure on individual and couples in Nigeria to bear children of their own. However, all methods for the procreation of children should always have the well-being of the family in mind, so that both the children who are conceived and the persons whose genetic materials were used in the reproduction process are not harmed. In regulating ART techniques, harm must be avoided by restricting the use of ART procedures for persons who need not undergo it, checking unethical and unprofessional manners and or prohibition of the techniques if that would do harm to members of society ^[33].

Medical practitioners, those seeking children from medical technology, and those whose gametes are donated for use, are all significant stakeholders in the framing of ART practice guidelines, or laws ^[34]. Countries that have legitimized the use of donor eggs and sperm have found their way around the management, protection of, and promotion of positive processes surrounding ARTs. The continuous growth of various levels of human rights has led to identification of more forms of rights and consequent violations as jurisprudence grows within the international scene and individual states. Most countries that regulate the use of ARTs have adopted models for human rights protections and management of medical health issues and violations as well as the rights of parties within the ART environment ^[35].

Legal positivism agrees that law is a matter of what has been posited, ordered, decided, practiced, and tolerated. Positive law is that which is man-made, and the positivist believes that law is a command handed out by a sovereign to an obedient subject which must be backed up by sanction. Human rights are protected through legislation, constitutional protections, and an independent judiciary. The judicial system and the judiciary are the protectors of the laws and preserve these rights and proactively fill the gap of silence in the laws. But if law is a matter of what has been ordered and decided, it is therefore necessary in protecting the rights of parties to gamete donation, for there to be statute(s) that have clear provisions enhancing, prohibiting, and maintaining a fair medical environment, for the rights interpreted by the court and the enforcement of any such right to be clearly understood and for the right holder to know the extent of his or her rights.

The first reported ART birth in Nigeria resulted from the pioneering efforts of Emeritus Professor Osato Giwa Osagie and Professor Oladapo Ashiru at the College of Medicine, University of Lagos in 1989. Since then, the practice has grown, with registered and unregistered providers spread across the country. The Assisted Reproduction Authority (Establishment) Bill 2012 was read in May 2012, but is yet to be passed into law. Although some medical practitioners kicked against the bill at the time, alleging it as 'copy and paste', the responsibility was on the legislators and the

relevant stakeholders to remodel the bill, but nothing has been done so far^[36]. Also, the ART Regulation Bill 2016 also exists, but is equally at abeyance. Due to a largely non-regulated ART environment in Nigeria, clinics practice and offer services arbitrarily, dictate terms and manipulate the rights of patients and donors^[37].

In a bid to self-regulate, the Lagos State Government in collaboration with Association for Fertility and Reproductive Health (AFRH), developed guidelines and minimum ART standards for member; applicable in Lagos, in May 2019. However, enforcing the guidelines remain a challenge. Legislations from the National Assembly and the States Houses of assembly are required to properly regulate the sector and protect rights^[38]. Absence of a holistic law and a statutorily empowered authority to oversee or set acceptable standards for MAR practice at the federal level affects the range of growing rights, duties and privileges associated with the use of ART as well as a clog in the development of medical jurisprudence in Nigeria. With development in technology and increased awareness and rights come increasing medico-legal issues. AR needs to be regulated, as issues surrounding it capture consent, ethics, safety, ownership, identity, rights, crime, exploitation, duty of care and other aspects of jurisprudence.

States have the responsibility to regulate ARTs, including legal and ethical questions for users, donors, and embryos. They range from equal access, gamete donor compensation, ethical and professional negligence, unregulated cost of procedures, identity and anonymity in gamete donation and surrogacy, issues of legal parentage, marketing and sale of gametes, preconditions for accessibility to ART use, health system and medical insurance in Nigeria, monitoring of outcomes of ART, dispute settlement amongst others. Though these emerging issues transcend legal questions, ethical, cultural, and religious considerations have to be made in regulating ART in Nigeria.

Infertility is generally within the scope of health challenges and states, or civilized countries are responsible to pursue the health challenges as a matter of citizens right. State attention is of paramount importance considering the fact that the continued failure of the government to give some measure of attention to infertility and the infertility treatment may be seen as an abdication of its constitutional obligation to protect life. It has been said that reproduction is a right for which the state has a positive obligation to provide or at least not interfere with^[39]. A social change must occur to mitigate this disequilibrium and can be achieved by adjusting various societal components.

The human rights to health means that everyone has a right to maximum standard of physical and psychological health and the key standards for the assessment of health standards includes; availability of health care infrastructure, access to health care, respect for patients dignity and appropriate and quality standards in health operations^[40]. A human rights approach to health is critical to address growing global health inequalities, and these can only be achieved through the indivisibility of socio-economic rights, proving active agency by those vulnerable to human rights abuses and providing powerful normative role of human rights for accountability in protections and freedoms through ethical codes. This can be achieved by holding states and other parties accountable, developing policies and programmes consistent with human rights, facilitating redress platform for victims of abuse or violations^[41]. Unlike the position in

some countries such as the United Kingdom, Italy, and South Africa, efforts to produce an ART regulatory law that establishes a regulatory authority and for related matters is yet to see the light of day^[42].

With this lacuna in Nigeria's laws, together with the level of awareness and presence of ART centres in Nigeria, it is only those who are financially capable, that can take advantage of the technology. Indeed, government is required to step up in recognizing health as a fundamental human right and take the responsibility of addressing ART through it legislature. Clinic directors have expressed that the Lagos State AFRH guidelines are insufficient to manage the ART field in Nigeria. According to Ezeome and Others, in the absence of legislative oversight functions, ART providers in Nigeria will continue to provide these services based on the strengths of their consciences, and not all consciences are well-formed and rational^[43].

The Irony of the Perks of an Unregulated Artificial Reproductive Technology System in Nigeria

Pressure from society on childbearing pushes many persons to seek assisted reproduction alternatives. Yet, reports of substandard services to couples seeking ART are being given, with some not only disappointed by failed outcomes but that they end up having serious health concerns relating to the procedures. Other unscrupulous persons pay huge amounts to get young, and in many cases; underage girls, to carry their unborn babies. Some simply buy these babies from the girls under the arrangement of fraudulent ART centres. In the absence of any regulatory law, institution, or ART body to check unwholesome practices, these clinics and persons manipulate regulatory and ethical loopholes and take advantage of the current system to avoid liability or punishments. Furthermore, the uncontrolled system shows poor management of the number of times a man or woman donates gamete. This uncontrolled environment increases chances of unsuspecting incestuous marriages and spread of diseases^[44].

Many ART clinics benefitting from the unregulated environment, conspire with middlemen and agents to defraud vulnerable donors and recipients. Donors are under-compensated, and recipients are over-charged. Some connive with medical professionals to manipulate surrogates and donors for commercial babies. The Nigerian Supreme Court in *Akalazu v The State*,^[45] stated that the offence of conspiracy is the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. It is a unique offence in the sense that it is usually started and completed behind closed doors and is hardly ever capable of being proved by direct evidence. Jauro JSC stated that the element of the offence of conspiracy lie in the meeting of the minds of the conspirators to do an unlawful act or to do a lawful act by unlawful means^[46]. Unscrupulous health personnels conspire to feed off the vulnerable infertile man, woman or couple who are often desperate and do not possess all the necessary information concerning the endeavour.

In light of modern medical practice and professional medical negligence, while there are regulations and ART laws in the United Kingdom, South Africa, and Australia, quacks, unregistered assisted reproduction clinics, criminals and those profiting from an unregulated ART system continue to support a disregard for legislation to regulate MAR and ART use in Nigeria^[47]. Wide abuse of powers,

offices, knowledge, and practice go unnoticed and unchecked even where the facts speak for themselves. Taking undue advantage of the current system is unprofessional for medical practitioners, but this ethical issue also comes from donors, recipients, and society. Children are raised in a communal manner in Nigeria, and it is not uncommon for grandparents to raise children as they often bring economic stability, parental responsibility, and maturity to the family unit^[48]. With the absence of legal regulation, elderly women and people with illnesses engage in ART use in order to raise their own children. This is seen across many states in Nigeria, with testimonies of women in their 50s, 60s, 70s still bearing children for their family because they can afford the services. It is reasoned that the family that surrounds the woman will help her raise the child as she would have confirmed her womanhood. Any regulation that prevents the continuous enjoyment of this right by woman and men of all ages, would not be welcomed.

Sadly, it may even be considered discriminatory to prevent older women from having children if it is considered acceptable for men to procreate at similar ages. When the system is to one's advantage such women and men do not consider postmenopausal pregnancy as challenging, or that parenting at an elderly age poses significant emotional and physical demands that they may not be able to handle, in addition to a high likelihood that the children may experience the loss of one or both parents before reaching adulthood, which may lead to depression, drug abuse, social oppressions, and financial burdens. Such persons ignore the possible harm to a child as being outweighed by the harm to parents of not being able to use assisted reproduction.

Conclusion

Providing equitable access to infertility treatment and also legislating on the many facets of the practice of ART are two urgent calls on the Nigerian government with regards to ART. The State can no longer ignore the rights of citizens to explore a regulated ART system within the medical and legal environments. The absence of law in this field of study leaves the rights of persons who engage in ART, or seek technological solution to infertility, at the mercy of an anarchical system, where abuses, neglect, and ignorance thrives. The advancement in ART has generated a reproductive revolution and Nigeria is no exception. Procreation is a fundamental human drive, which people set out to quench, but many aspects of ART raise legal and ethical issues which only legal regulation can address.

The implication of the existing legal lacuna in the Nigerian medical law field is that clinics and health practitioner self-regulate the process and may choose which international guideline or foreign practice to follow. It is this gap in jurisprudence that this paper addresses in order to provide a more solid foundation for exploring the use of medically artificial reproductive technology in Nigeria and addressing human rights issues that arise from it. Indeed, whether questions over existing or future rights are positive or negative, government are obliged to juxtapose and balance the expression of these rights by and among the citizens and also offer appropriate pedestals or conducive environment for the mutual enjoyment of rights for the overall benefit of the society.

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 44. Malami E, *The Law of Tort* (2nd edn, Princeton Publishing Co, 2013) 363; ThisDay Editorial (36); Mustapha (n22) 45.
 45. [2022] 13 NWLR (Pt 1848) 453 at 481.
 46. *Ibid*, 481; *Sani v State* [2021] 5 NWLR (Pt 1770) 502 at 528.
 47. *Ojo v Gharoro* [2006] 10 NWLR (Pt 987) 175 SC; Denning MR, *The Discipline of Law* (Butterworth and Co Publishers, 1979) 88; Human Fertilization and Embryology Authority (HFEA) United Kingdom Regulation in 1992; American Society of Reproductive Medicine (ASRM); Omokanye and Others (n5) 3.
 48. Ezeome and Others (n34) 1043.