An Appraisal of the Adoption of Assisted Reproductive Technologies in Nigeria: New Challenges to Law and Ethics

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Abstract

This research sets out to explore Assisted Reproductive Technology (ART) in Nigeria with the purpose of analysing the new problems it portends to Law and Ethics. The study undertook this investigation by understudying the various ethical and legal frameworks of assisted reproductive technology by reviewing the International Committee for Monitoring Assisted Reproductive Technology (ICMART), World Health Organization (WHO), Constitution of the Federal Republic of Nigeria, Nigerian National Health Act, 2014, and the Nigerian Code of Medical Ethics, 1990. In this exploration, the study found that ART is used by many people who are infertile and have tried other conventional methods, but also by those without fertility problems to minimize genetic risk or reproduce without a partner of the opposite sex. ART has helped many overcome barriers to reproduction but has generated significant ethical, religious, and legal issues. By adopting a doctrinal methodology of legal research, it revealed the numerous gaps in the practice of ART. This inter alia include the fact that Nigeria lacks a specific legal framework for ART practice, and that the practice is not consciously regulated and is prone to abuse, there are also possibilities of birth defects and identity clash of ART children finally, the study proposed beneficial suggestions aimed towards conformance to the numerous local and international treaties on Assisted Reproductive Technology. The study is crucial given the need to underline the quality and amount of progress/ milestone that Nigeria has made in the use of assistive reproductive technologies and the related legal and ethical issues.

KEY WORDS: Law and Ethics, ART, Fertility, Nigeria, Medical Ethics, WHO, ICMRT, Assisted Reproductive Technology

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1.0.**INTRODUCTION**

Infertility is a condition where a couple cannot conceive after one year of regular unprotected sexual contact, leading to the inability to bring a pregnancy to term and deliver a healthy baby[1]. Around 168 million couples worldwide have been recognized as infertile due to their inability to have children through normal intercourse and conception processes[2].

In Sub-Saharan African (SSA) countries, between 20 and 35 million couples are unable to have a child. Nigeria for instance, has a crude birthrate (CBR) of 50 births per thousand (50/1000) during 1965 and 1966, with a Total Fertility Rate (TFR) of 6.60[3]. The current TFR of 5.5 is 0.2 children per woman lower than the 5.7 reported in the NDHS in 2003 and 2008, which is notably different from UN and NPC predictions[4]. To help these couples, various treatments are available, including Assisted Reproductive Technologies (ARTs).

The introduction of Assisted Reproductive Technologies (ARTs) has increased the ability of couples, particularly infertile and elderly couples, to produce children. ARTs are techniques and procedures that bypass traditional methods to allow pregnancy and childbirth to occur where otherwise the chances of pregnancy and childbirth would have been nil. The first ART (in vitro fertilization IVF) technology was created to assist women who have obstructed fallopian tubes but no other fertility issues[5]. IVF became widely recognized and modified improvements, and the treatment of complex types of infertility became available after early research revealed that the new procedure posed no additional risk to mother and baby.

Given the high prevalence of infertility in Nigeria, ART therapies are likely to be in high demand. The first ART baby was successfully delivered through IVF in the United Kingdom on July 25, 1978. In Sub-Saharan Africa, there were eight assisted conception centres performing IVF in 2001,

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[1] Kwaghga A. L, Shimakaa I. A and Chinta T. Demand for children and fertility transition in Guma Local Government area, Benue State. Benue Journal of Social Sciences. (2018) Vol 6 No.1, pp 284-300

[2] Oladapo A (2019) Assisted Reproductive Techniques: the journey so far. The Punch Newspaper, July 24.

[3] National Population Commission (NPC) [Nigeria] and ICF International. (2014). Nigeria Demographic and Health Survey 2013.Abuja, Nigeria: National Population Commission and ICF International.

[4] Okafor, Joe-Ikechebelu and Ikechebelu (2017) Perceptions of Infertility and In Vitro Fertilization Treatment among Married Couples in Anambra State, Nigeria. African Journal of Reproductive Health December 21 (4):55.

[5]Kovacs P (2014) Embryo selection: the role of time-lapse monitoring. Reproductive Biology and Endocrinology 12:124.

as well as a slew of additional centres offering artificial insemination. In Nigeria, roughly eight ART centres were created in 2005 and are owned by commercial entrepreneurs[6].

Past research on ARTs has focused more on the availability of services, effectiveness, awareness, patterns and perception, effect of Assisted Reproductive Technology (ART) on babies born[7], knowledge and perception, costs and consequences of assisted reproductive technology, successful pregnancy outcome, and practice. Little or no effort has been made to examine the legal and ethical issues related to ART. This present study aims to critically assess the new legal and ethical challenges of Assisted Reproductive Technology in Nigeria.

2.0.CONCEPTUAL CLARIFICATIONS

2.1.Assisted Reproduction/Reproductive Technologies (ARTS)

ICMART Glossary of terms in Assisted Reproductive Technology defined the term Assisted reproductive technology (ART) as all interventions that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of reproduction. This includes, but is not limited to, IVF and embryo transfer ET, intracytoplasmic sperm injection ICSI, embryo biopsy, preimplantation genetic testing PGT, assisted hatching, gamete intrafallopian transfer GIFT, zygote intrafallopian transfer, gamete and embryo cryopreservation, semen, oocyte and embryo donation, and gestational carrier cycles[8].

Assisted Reproduction/Reproductive Technology (ART) is any technological procedure that helps infertile couple to impregnate/conceive and bear a child(ren). ARTs refer to all treatments or procedures that include the in vitro fertilization (IVF) handling of human oocytes and sperm or embryos for the purpose of establishing a pregnancy[9] .

According to American Centre for Disease Control definition, ART includes all fertility treatments in which either eggs or embryos are handled. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and

[6] Oladapo op cit
[7] Adesiyun, Nkeiruka, Avidime, Muazu (2011) Awareness and perception of assisted reproductive technology practice amongst women with infertility in Northern Nigeria. Open Journal of Obstetrics and Gynecology, 1, 144-148.
[8] ICMART Glossary. Available from https://www.icmartivf.org/glossary/a-d/#:~:text=Assisted%20reproductive%20technology%20(ART), for%20the%20purpose%20of%20reproduction. Accessed 6th May, 2022
[9] Ibid

returning them to the woman's body or donating them to another woman. They do NOT include treatments in which only sperm are handled (i.e., intrauterine—or artificial—insemination) or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved[10].

Orhue [11] argued that it encompasses several techniques to by-pass the problems preventing conception through the normal sexual intercourse in a stable relationship. These techniques involve either artificial insemination or artificial fertilization in which there is alteration in the inherent process leading unto conception and without sexual intercourse[12] . The Centre for Disease Control defined "assisted reproduction technologies" as those that involve the handling of both sperm and eggs.

A range of medical treatment options exist for infertility, which fall into two broad categories: Low-tech treatments, which accounts for more than 95 per cent of modern, medical infertility treatments. They are those that do not involve the retrieval of oocytes or fertilization outside the body, which often include the use of fertility drugs to stimulate superovulation, the development and release of more than one egg per ovulatory cycle, and intrauterine insemination, a process by which sperm are placed inside a woman's cervix to facilitate fertilization and pregnancy; and high-tech treatments, also called Assisted Reproductive Technologies (ARTs)[13]. This includes, but is not limited to artificial insemination; in vitro fertilization; surrogate motherhood; human cloning; gene replacement therapies; artificial embryo donation; ectogenesis; embryo adoption; and egg transfer etc[14] . The two sources of extramarital gametes that are commonly used are those donated by relatives or friends, or those from completely anonymous sources.

2.2. **TYPES OF ART**

2.2.1. **Artificial Insemination (AI)**

[10] https://www.cdc.gov/art/whatis.html. accessed 6th May,2022
[11] Orhue A.A.E (2010) Assisted Reproduction Technology in a Resource-Limited Setting. University of Benin Teaching Hospital, Benin City, Nigeria.
[12] Supra
[13] Ola T. M (2012) Assisted Reproductive Technology in Nigeria: Flawed or Favored? International Journal of Social Science and Humanity, Vol. 2, No. 4, July.
[14] Supra

AI is a routine treatment for conceiving in women if natural insemination is frequently ineffective. It includes the delivery of semen into the cervical canal directly by mechanical techniques, helping to overcome male and female infertility difficulties. AI may be used when a male has low sperm count, poor sperm, or a genetic condition, or when a woman's inability to conceive is due to antibodies against the partner's sperm. Sperm may be acquired by masturbation or electrical stimulation[15].

2.2.2. **Zygote Intrafallopian Transfer (ZIFT)**

This is an assisted reproductive treatment similar to in vitro fertilization and embryo transfer, but with the fertilized egg put into the fallopian tube instead of the uterus[16]. This method may be more successful than GIFT since the physician has a higher probability of guaranteeing that the egg is fertilized. The lady must have healthy tubes for ZIFT to operate.

The fundamental difference between ZIFT and GIFT is that ZIFT sends a fertilized egg straight into the fallopian tubes, whereas GIFT employs a combination of sperm and eggs. The woman's ovaries are stimulated with drugs to improve the possibility of generating numerous eggs, which are harvested by an aspiration operation. Fertilized eggs are transferred within 24 hours, as compared to the 3-5 days needed in a typical IVF procedure[17].

2.2.3. In **vitro Fertilization (IVF)**

This is a straightforward method that includes taking a ripe human egg from the ovary, combining it with the semen of the husband or partner, and transporting the fertilized egg back to the mother's uterus. The retrieval of eggs, their cultivation outside the mother's body, and the transfer of the growing embryo to the uterus must be done out under carefully regulated circumstances[18].

Laparoscopic procedures developed throughout the 1960s made egg harvest reasonably straightforward in situations where ovaries were accessible. However, the true problem comes in the implantation of the embryo in the uterus following transfer. A pregnancy established in this

[15] Onunwa, C. 2013. Infertility and Contraception; A Cause or A Choice. LL.B. Thesis. Faculty of Law. University of Ibadan. xii + 127pp.
[16] *Ibid*
[17] Ibid
[18] Warnock Committee, Report of the Committee of Inquiry into Human Fertilization and Embryology, Cmnd 9314, 1985, London: HMSO (the Warnock Report).

method must not only survive regular risks of implantation in vivo conception but also the added issues of IVF and embryo transfer.

IVF, or Intrauterine Fertilization, is a therapeutic process that includes fertilization outside the body and may be used to heal infertility caused by numerous disorders such as endometriosis, immunological difficulties, unexplained infertility, and male factor infertility. It includes fertilizing eggs in a laboratory, which is then implanted into the uterus of the woman who created the egg. If implanted into another woman, it becomes embryo transfer or embryo donation[19].

IVF is used to bypass infertility caused by different conditions, including endometriosis, immunological difficulties, unexplained infertility, and male factor infertility. It takes just three things: eggs, sperm, and a uterus. Before commencing the IVF cycle, physicians examine these three things and follow five fundamental steps: super ovulation/ovulation enhancement, (promoting the formation of more than one egg in a cycle), egg retrieval/harvest, insemination/fertilization, embryo culture, and embryo transfer.

2.2.4. **Gamete intrafallopian transfer (GIFT)**

This is similar to IVF but transfers gametes (egg and sperm) to the woman's fallopian tubes rather than her uterus. A laparoscopy is essential to transfer the sperm and egg to the tubes[20]. GIFT may be utilised for unexplained infertility, unobstructed fallopian tubes, low sperm count, or poor motility, objections to IVF on religious or other reasons, or if IVF has failed to result in a viable pregnancy.

2.2.5. **Intrauterine insemination (IUI)**

IUI is a fertility procedure that includes inserting sperm into a woman's uterus to aid conception. The purpose of IUI is to increase the quantity of sperm that reach the fallopian tubes and thus enhance the possibility of conception[21]. IUI offers the sperm an edge by giving it a head start. The most prevalent causes for IUI are a low sperm count or poor sperm motility.

IUI may be utilised if there is unexplained infertility, a hostile cervical condition, cervical scar tissue from prior operations, or ejaculation malfunction. Before IUI, ovulation-stimulating

[19] Ibid
[20] Ibid
[21] Ibid

medicines may be utilised, and careful monitoring will be essential to identify when the eggs are mature. The IUI treatment is conducted around the time of ovulation, often approximately 24-36 hours following the spike in LH hormone that signals ovulation will occur shortly. A semen sample will be cleansed by the laboratory to separate the semen from the seminal fluid, and a catheter will be used to transfer the sperm straight into the uterus. This technique enhances the quantity of sperm cells put in the uterus, therefore boosting the probability of pregnancy. However, there are several chances for dispute in IUI, such as whether the donor of given sperm may claim to be the parent/father of the kid at its birth or in the future. Additionally, it is uncertain if the husband of the lady would be treated as the father by virtue of the common law presumption of legitimacy applied in Nigeria.

2.2.6. **Reproductive cloning**

This is the development of a genetic copy of an existing organism, such as a human clone. This procedure entails generating an embryo that is a genetic clone of an existing person by nucleus substitution or cell nuclear replacement, then implanting the embryo into a uterus to be gestated to term[22]. Somatic cell nuclear transfer (SCNT) is the most frequent cloning process, which involves transferring the nucleus of a body cell into an egg from which the nucleus has been removed. This generates a clonal embryo, which is stimulated to begin growing using chemicals or electricity. Placing this clone into the uterus of a female animal and carrying it to term develops a clone similar to those of the animal from which the original body cell was extracted[23].

Cloning may also be done via embryo splitting, which starts with in vitro fertilization. The zygote (from here onwards also called an embryo) splits into two and then four identical cells, which may then be separated and allowed to grow into separate but identical blastocysts, which can subsequently be placed in a uterus. Surrogacy is the practice wherein one woman bears a child for another with the expectation that the kid should be given up after delivery. There are two basic

[22] Stauch, M., Wheat, K. and Tingle, J. 2006. Text, Cases and Materials on Medical Law. 3rd Ed. New York: Cavendish Publishing.

[23] Reproductive cloning. Centre for Genetics and Society. Available from www.geneticsandsociety.org/section.php?id=16. Accessed 7th May, 2022

forms of surrogacy: gestational surrogacy (also known as partial, genetic, or direct surrogacy) and conventional surrogacy[24].

2.2.7. **Surrogacy**

Intending parents may seek a surrogacy agreement when pregnancy is medically impossible or pregnancy risks pose an intolerable harm to the mother's health. This approach is also the favoured technique of reproduction among same-sex couples. Monetary remuneration may or may not be involved in these agreements. If the surrogate gets money for the surrogacy the arrangement is labelled commercial surrogacy, but if she receives no remuneration beyond reimbursement of medical and other reasonable expenditures, it is referred to as altruistic surrogacy[25].

2.2.8. **Intracytoplasmic Sperm Injection (ICSI)**

This is an effective kind of therapy for men who are infertile and is utilised in approximately half of all IVF operations. ICSI involves one sperm, which is injected directly into the egg, and the fertilized egg is delivered to the uterus of the woman[26]. ICSI is beneficial in circumstances when the man has a very low or zero sperm count, a large proportion of improperly shaped sperm, or sperm that cannot be ejaculated but may be retrieved from the testicles or duct where sperm is kept (epididymis).

2.3.**ETHICAL CODES IN ART**

The Assisted Reproductive Technology (ART) sector is supervised by many ethical guidelines, which guide both sides of the procedure. These standards contain consent aspects, donor information, conflicts of interest, hazards of treatment abroad, and counseling services.

2.3.1. Consent

Consent problems are outlined in the NHMRC Ethical Guidelines, 2015[27], going beyond standard legal expectations of significant risk and information disclosure[28]. The ART Ethical Code requires

[24] The National Academies Press. 2002. Scientific and Medical Aspects of Human Reproductive Cloning. Washington: National Academic Press.
[25] Brinsden, P. 2003. Gestational Surrogacy. Human Reproduction Update 9.5: 483-491.
[26] Ibid
[27] NHMRC Ethical Guidelines on the Use of Assisted Reproduc- tive Technology in Clinical Practice and Research(2017)https://www.nhmrc.gov.au/_files_nhmrc/file/guidelines/ethics/16506_nhmrc__ethical_guidelines_on_the_use_of_assisted_reproductive_technology-web.pdf.
[28] Rogers v Whitaker (1992) 175 CLR 479; (1992) 109 ALR (1992) 67 ALJR 47; BC9202689.

consideration of options for the use or discard of gametes or embryos, whether the proposed procedure or treatment is accepted practice or innovative practice, the experience of the clinic and clinician with the procedure, any clinically relevant outcomes and success rates, an explanation that certain procedures may be undertaken by persons other than the individual's or couple's treating clinician, and whether any training activities are intended to be conducted in the course of the treatment.

2.3.2. Donor Information

Donor information is necessary for recipients of donated gametes or embryos, including medical history, family history, and any existing genetic test findings relevant to the future health of the individual who will be born. Details regarding the physical features of the gamete donor and the number, age, and sex of individuals previously born from the gametes donated by the same gamete donor and the number of families involved are also requested.

2.3.3. Conflict of Interest

Conflicts of interest are critical, since the safety and wellness of patients should take precedence over the commercial, financial, personal, or other interests of the clinic or physician. Clinics are expected to guarantee that the clinical team discloses any interests linked to the services offered or any therapy or procedure advised by the treating professionals.

2.3.4. Risks of Treatment Overseas

Risks of treatment abroad are handled by the ART Ethical Guidelines, with doctors having an ethical duty to warn of any concerns about the level of care at the foreign facility. Conscientious objections are not obligated to be engaged in the treatment or procedure, as long as it does not infringe applicable anti-discrimination legislation and does not jeopardise the therapeutic care of the patient.

2.3.5. Counselling Services

Counselling services are also necessary for individuals and couples engaged in a donor conception program, since the complex nature of the problems involved necessitates a full discussion of possible long-term psychological repercussions for each person and family involved.

3.0.**LEGAL FRAMWORK FOR ART IN NIGERIA**

3.1. INTERNATIONAL FRAMEWORK

3.1.1. The International Committee for Monitoring Assistive Reproductive Technology (ICMART) Instruments

ICMART is an independent international non-profit organization that has been essential in the creation, gathering, and sharing of global statistics on aided reproductive technology (ART). Established in 2003, ICMART is administered by an international board of reproductive medicine specialists and is in formal connections with the World Health Organization. Its key aims include disseminating information about ART practice, usage, efficacy, and safety to health professionals, authorities, and the public. ICMART was officially incorporated in California, USA as a 501(c) (3) non-profit corporation in 2003 and is governed by an international board of reproductive medicine professionals. ICMART is a non-State actor (NSA--formerly a non-government organization or NGO) in official relations with the World Health Organization[29].

ICMART has produced the first ICMART ART Glossary in partnership with the World Health Organization (WHO), which improves the distribution of ART data via agreed-upon terminologies. Additionally, the ICMART Toolbox was established to assist international data gathering and monitoring of ART cycles and results. This toolkit is freely accessible on request and serves as a model for nations to follow for internationally agreed practice guidance on ART.

3.1.2. The World Health Organization (WHO) Guidelines

The World Health Organization (WHO) is a specialized organisation of the United Nations that represents the greatest ambitions of the people and its workers are bound by international civil servants' ethical norms. These values include honesty, accountability, independence and impartiality, respect for the dignity, worth, equality, diversity, and privacy of all individuals, and professional dedication[30]. These principles apply to all WHO staff members, regardless of their location or grade, including temporary appointment holders, secondees, and junior professional officers.

3.2. NATIONAL FRAMEWORK

3.2.1. The 1999 Constitution of the Federal Republic of Nigeria (as Amended)

[29]Culled from ICMARF website. Available from https://www.icmartivf.org/. accessed on 4th May, 2022
[30] Culled from WHO website https://www.who.int/about/ethics . accessed on 4th May, 2022

The 1999 Constitution has two chapters that are considered relevant to this discussion. These are chapters two and four of the Constitution. The provisions are quite direct and wide in explanation.

In fact, the former has a number of high-sounding provisions that appears that they can ordinarily be evoked in favour of legal framework in Nigeria for medically assisted reproduction.

Some of the very relevant provisions will be explored below.

Section 15(3)(c):

> "For the purpose of promoting national integration, it shall be the duty of State to:
> (c) Encourage intermarriage among persons from different places of origin, or different religious, ethnic or linguistic association or ties"

Section 17(2) (b): "In furtherance of the social order:

> (b) The sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced"

Section 17(3) and (d):

> (d) The State shall direct its policy towards ensuring that: „there are adequate medical and health facilities for all persons"
> (g) Provision is made for public assistance in deserving cases or other conditions of need;
> (h) the evolution and promotion of family life is encouraged.

As earlier mentioned, these provisions ordinarily are direct and wide enough to serve as legal catalyst for infertile couples in Nigeria. For instance, any promotion of intermarriage among Nigerians as provided in section 15(3) (c) is meaningless if such couples are involuntarily childless. Also, social order of according dignity and sanctity to the persons of Nigerians as desired by section 17(2) (b) will mean next to nothing, if infertile couples continue to be stigmatized, dehumanized, and downgraded for infertility, the infertile women spouses are culturally and traditionally seen as failures and objects of ridicule by the larger society; yet, they have no legal shield or sword against their affliction under the organic law of the State.

More so, the assurance of provision of public assistance in deserving cases or other conditions of need captured in section 17(3)(g) will be a mere paper tiger if there are no legal framework to actualize such assurances for the specific need of infertile Nigerian couples.

Lastly, of the State voluntary undertaking as to the provision of adequate medical and health facilities, section 17(3)(d) is only honoured in its breach rather than in its observance, at least, in the specific case of infertile couples in Nigeria, then the successive political leadership in the country should be taken to have failed and the law only an existence of a bookish expression and perhaps, weak and useless to the citizens.

Note worthily, a learned author, after critical examination of the same set of constitutional provisions in Nigeria, has this to say:

> These provisions (in addition to the National Health Policy Declarations), offer the strongest basis to hold Nigerian government accountable to provide reasonable access to infertility treatment in the country[31]. (Emphasis supplied)

With the greatest respect to the learned author, it is submitted that his conclusion cannot be supported in view of the other express provision of the same Constitution which expressly makes the provisions of Chapter **II** titled '***Fundamental Objectives and Directive Principles of State Policy***" of the said 1999 Constitution non-justiciable[32]provides that

> The judicial powers vested in accordance with the foregoing provisions of this section… shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is inconformity with the fundamental objectives and directive Principles of State Policy set out in Chapter II of this Constitution'.

Oputa, JSC, commenting on the justiceability or otherwise of the provisions of Chapter II under reference has this to say:

> … why fundamental rights are enforceable by the courts and the courts are bound to declare as void any law that is inconsistent with the fundamental right, the directive principles are not so enforceable by the courts, nor can the law declare

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[31]Yusuf, Abdulwasiu Ojo Akorede, Legal Enhancement of Reasonable Access to Infertility Treatment 'in' legal Issues for Contemporary Justice in Nigeria' Essays in honour of Justice Onalaja, published 2007 by Dept of Jurisprudence , Faculty of Law, Obafemi Awolowo University, Ille-ife p273).

[32]Section 6(6)(c) of the1999 Constitution

> as void any law which is otherwise valid on the ground that it contravenes any of the directives in the directive principles of the State Policy[33](emphasis supplied)

It is submitted that the controversy as to whether or not the provisions of Chapter II are justiceable arose from the inability to distinguish between enforceability of those provisions and their fundamental nature in directing policies of government in Nigeria.

Whilst the provisions are not enforceable, they are capable of and should influence government policies. Therefore, what should be done is to call on the legislature to make necessary legislation that will actualize the good principles stated therein. Until that is done, no citizen of Nigeria can enforce any of those provisions.

The provisions of Chapter IV on fundamental human rights will now be examined.

Such rights include rights to life, dignity of human person, personal liberty, fair hearing, private and family life, freedom of thought, conscience and religion, expression of the press, personal assembly and association, movement, freedom from discrimination and acquisition of property.

Most importantly, of all the foregoing fundamental rights, only rights to private and family life can be considered near the purpose of this examination. Unfortunately, apart from the marginal note of that right, the actual words under it are miles away from the expectation of Nigerians as far as the marginal note of the right is concerned. It says, ***the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications are hereby guaranteed and protected***[34]

Commenting on this section, Yusuf opined that:

> The marginal note to this section reads, "rights to private and family life"; it does not appear however, that the section guarantees any meaningful right of any one to establish a family, let alone to receive State assistance to establish a family. It perhaps might be read to mean that individuals have rights against unjustifiable State's intrusion into their reproductive choices including to seek access to infertility treatment"[35].

[33]Oputa, ChukwudifuAkunne, JSC in Okeke, Chris (ed.) (2007), Towards Functional Justice, p9

[34] S. 37 of the 1999 Constitution of the Federal Republic of Nigeria
[35]Supra

Conclusively, it is submitted in agreement with Yusuf, that what section 37 guarantees may not have anything to do with family institution, in spite of the marginal note of the section. Therefore, it is submitted that the provisions of the 1999 Constitution do not offer any right to infertile Nigerian couples, talk less of other intending single parents who may want to take advantage of the medical technological breakthroughs in infertility.

3.2.2. **Nigeria National Health Act, 2014**

The major specific legislation for that guides the activities around healthcare delivery in Nigeria is the National Health Act of 2014. The Act provides a legal framework for regulating, developing and managing the national health system, 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 Nigeria[36] which principally deals with ethical issues pertaining to medical practice. There are glimpses but very scanty provisions in both the legislation and the Code that could impact on assisted reproductive technologies in Nigeria.

Section 26 of the National Health Act protects a patient's confidentiality by declaring that:

> (1) All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment is confidential.
> (2) Subject to section 27, no person may disclose any information contemplated in subsection (1) unless- (a) the user consents to that disclosure in writing;
> (b) a court order or any law requires that disclosure; or
> (i) in the case of a minor with the request of a parent or guardian; and
> (ii) in the case of a person who is otherwise unable to grant consent upon the request of a guardian or representative.
> (c) non-disclosure of the information represents a serious threat to public health.

Section 64 defines a 'user' as a person receiving treatment in a health establishment, including blood or blood products, or using a health service. If the person is below the majority age, they may be their parent or guardian or another authorized by law to act on their behalf. If the person is incapable of taking decisions, they may be their spouse or another authorized person. The statutory definition ensures optimal protection of patient information, even in cases of physical or mental incapacity.

[36]Code of Medical Ethics in Nigeria. Available from http://www.mdcnigeria.org/Downloads/CODE%20OF%20CONDUCTS.pdf :2019. Accessed 7th May, 2022

Section 23 of the Health Care Act mandates that healthcare providers must provide users with clear information about their health status and treatment options, including the user's health status, available diagnostic procedures, benefits, risks, costs, and consequences of each option, and the user's right to refuse health services. This provision should cover counselling, as seen in other jurisdictions. Without counselling, the information cannot be effectively communicated to the patient, requiring them to make a decision on consent. Section 25 requires the keeping of medical records, which must be available to every user of health service. Access to a healthcare record can only be granted for treatment with the user's authorization, or for study, teaching, or research with the authorization of the user, the head of the health establishment, and the relevant health research ethics committee.[37]. The keeping of medical record of 'user' falls short of the central register under the control of the regulatory authority as seen in other jurisdictions which contains details of all the processes in assisted reproductive technologies, including details of the donor, the donee and the child. The Nigerian health records is health institution based and relates only to the user which explains why only the user can grant consent for the disclosure of such information.

Specific provisions on human tissues and gametes[38]are contained in Part VI of the Act. The provisions on the use of human gametes that are relevant to this discussion are contained in section 50 of the Act as follows:

> (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.
>
> (2) Any person who contravenes a provision of this section or who fails to comply therewith is guilty of an offence and is liable on conviction to imprisonment for a minimum of five years with no option of fine. Manipulation of gametes including embryo splitting and cloning of human being is prohibited in other jurisdictions as matters of ethics. Otherwise, there could be the urge through medical science and technology to create human beings from animal gametes and vice versa.

Respecting a patient's confidentiality and informed consent are cardinal rules of medical practice in Nigeria. Although there are exceptions to this general rule as provided in the Act, disclosure of

[37]NM v Smith [2005] 3 All SA 457 (W) para 40
[38]Section 64 of the Nigerian National Health Act 2014

health information cannot be made in Nigeria at the request of a donor-conceived child even when the child is of age as under section 24 of the UK Act. Such a child does not fall within the definition of 'user' under section 64 of the Nigerian Act which refers primarily to the person that received treatment and does not include the product of that treatment when such a person is of the requisite physical and mental capacity. The foreseeable negative consequence of the absence of legislation authorizing disclosure in Nigeria at the request of a donor conceived child is that babies born through assisted reproductive technologies could fall into such social and family relationships which the laws in the other jurisdictions have taken steps to prevent by authorizing a disclosure of information in a similar situation.

The none inclusion of a donor conceived child in section 26 of the Nigerian National Health Act, or in any other provision for that matter, can only be attributed to the fact that that piece of legislation does not have the interest of such child within its contemplation.

3.2.3. **The Code of Medical Ethics**

The Code of Medical Ethics in Nigeria outlines a set of standardized behaviours expected of medical practitioners. Regulation 44 emphasizes the importance of professional secrecy, stating that any patient-doctor relationship-related information must be kept confidential and not shared with third parties without written consent. This is based on the principle that private and confidential medical information contains sensitive and personal information about individuals, reflecting delicate decisions about bodily and psychological integrity and personal autonomy. The non-consensual disclosure of such information can be the basis for a claim for damages, as is held in *NM v Smith Madala J*[39].

4.0.**THE PROSPECT OF ART IN NIGERIA**

Having one's biological child(ren) is one of the most powerful innate drives known to the human adult. Should there be fertility challenges hindering this dream, the emotional, financial and physical burden that ensues in the course of surmounting them can be extraordinarily daunting[40].

[39] Op cit
[40]Comprehensive Ranking of Fertility Clinics in Nigeria by Fertility Hun Nigeria. Available from https://www.fertilityhubnigeria.com/comprehensive-ranking-fertility-clinics-nigeria/. Accessed 6th May, 2022

While the majority of couples will have no problem conceiving through natural reproductive means, the World Health Organization reports that one in five couples in the world have infertility[41].

Interestingly, advances in reproductive health have led to the rise of assisted reproductive technology, and with this development, couples having fertility challenges still have a chance to carry that bundle of joy, and put back happiness into their marriage and lives[42].ART has grown to the extent that as far back as 2018, it was predicted that nearly 400 million people in 2100 may be alive as a result of assisted reproductive technologies (ART)[43].

Since its inception in the 20th century in Nigeria, ART has continued to grow as an enduring source of hope for infertile couples. There are a number of clinics offering fertility services in Nigeria today. According to Ajayi et al., Bridge Clinic the very first focused assisted conception unit in Nigeria. Established in 1996 with full operations in 1999 has continued to provide quality fertility services in Nigeria as evidenced by the birth of over 1,300 babies from her clinics[44].In fact, there are statistics that Nigeria success rate of ART is about 60 per cent[45]. While these figures are in dispute, they point towards the fact that ART is indeed growing in Nigeria and there is a future for it. There are an estimated 74 registered ART service providing centres in Nigeria, with 24 of these in the Lagos metropolitan area. There are, in addition an unknown number of unregistered practitioners of IVF[46].

From the foregoing, it is surmised that while there is a huge prospect for ART practice in Nigeria, the fact that practice is largely not regulated will create room for illegal activities and proliferation in the practice as Bangbopa et al rightly observed in their work 'This proliferation spawned the problem of quackery in the practice of assisted reproduction especially with the occurrence of

[41]Culled from WHO Fact sheet. Available from https://www.who.int/news-room/fact-sheets/detail/infertility. Accessed on 6th May, 2022
[42] Supra
[43]Three percent of world may be from ART by 2100 By Kathryn Ashe. https://www.bionews.org.uk/page_134977. Accessed on 6th May, 2022
[44]Supra
[45]Supra
[46]Bamgbopa, Kehinde T; Okonta, Patrick I.; Ajayi, Richardson; Ogbeche, Rose; Igbokwe, Cynthia MBBS; Onwuzurigbo, Kingsley;Public perceptions on ethics in the practice of assisted reproductive technologies in Nigeria, Global Reproductive Health: September 2018 - Volume 3 - Issue 3 - p 13

"baby factories" (a form of human trafficking) in many parts of the country, all providing "fertility" services to an unsuspecting and often desperate members of the public[47].

5.0.**PROBLEMS ASSOCIATED WITH THE PRACTICE OF ART**

The subject of assisted reproductive technology (ART) in Nigeria poses various problems, including the likelihood of multiple births owing to religious and ethical scorn, the validity of a child born by ART, the danger of birth abnormalities, and the possible disintegration of family life.

5.1.**Possibility of Multiple Birth vis-à-vis the increased in Population**

Multiple births with ART may lead to large population expansion, straining resources and leading to social and economic instability. Additionally, young restiveness may stem from lack of effective planning for their educational, employment, and social future by those in charge of government.

5.2.**Legitimacy of a child born from ART**

Artificial insemination by donor (AID) is a process that introduces a third person to create semen used to fertilize the wife's egg. This creates problems concerning the status of a CHILD born by this procedure, since it de-emphasizes legal marriage and de-emphasizes lawful nuptials. It also raises the issue of the status of a child born to an unmarried woman via AID, since it does not correspond to the reality of those married under the Act. This is because the definition in *Hyde v Hyde*[48], which is the locus classicus when it comes to the definition of marriage, regards marriage as being between one man and one woman to the exclusion of all others. Anything done outside of this would be tantamount to adultery. The logical conclusion is that a couple which wants to undergo an ART procedure via a donor must be married under customary law. This, however, is impracticable, as couples do not foresee the possibility of their infertility. Thus, the question as to whether children born via AID are legitimate or illegitimate remains unanswered.

5.3.**Possibility of Birth Defect**

[47] Supra,
[48]Hyde v Hyde and Woodmansee. (1886) LR IPD 130

The likelihood of faulty birth in ART is similarly greater compared to normal births, although this may not be regarded a major concern since life itself is a result of risk-bearing.

5.4. **Possible Destruction of Family Life**

Family structures are vital for morality, discipline, and leadership in a society. Any unfavourable impact on the family system might have major ramifications on the greater community.

5.5. **Citizenship and the question of the Parenthood of the Child.**

Section 25(1)(b) of the 1999 Constitution of the Federal Republic of Nigeria[49], provides: The following persons are citizens of Nigeria by birth- namely- every person born in Nigeria after the date of independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria. By this provision, a child receives his identity from his parents, although it is unclear what "parents" in this context refers to. In the instance of three possible parents of a kid all of whom are of different nations, the subject of who the infant would trace his nationality to remains difficult.

5.6. **Prospect for controversy and ethical challenges**

Under this section we concentrate on three types of ART that have aroused controversy: gamete donation, in vitro fertilization (IVF), and commercial surrogacy.

1. Gamete donation is a practice when a man or woman transfers gametes to another person without intending to be the ensuing child's social parent. This technology has been questioned by some owing to religious, cultural, and secular reasons[50]. Some philosophers contend that gamete donation is ethically questionable because providers take their parental obligations too lightly[51]. Unmarried women and homosexual couples may utilise donated sperm and eggs to create a successful pregnancy without copulation. However, Section 1 of the Nigerian Same Sex Marriage Prohibition Act of 2013 outlaws marriage and civil

[49]The Constitution of the Federal Republic of Nigeria, 1999 (as amended)
[50] Bevan H. Child Law. London: Butterworths; 1989:1–856
[51] Nelson J. Parental obligations and the ethics of surrogacy: A causal perspective. Public Affairs Quarterly. 1991;5:49–61.

union between individuals of the same sex and says that benefits of marriage would not accrue to the pair.

2. In Vitro Fertilization (IVF) involves fertilizing eggs outside the womb and transferring the resultant embryos into the uterus. The lady whose eggs are utilised is treated with hormones that encourage the generation of numerous ova, which are retrieved using a needle introduced through the vaginal wall. Fertilization may entail incubating the ovum in sperm or inserting a single sperm into the ovum, known as intra-cytoplasmic sperm injection (ICSI). Several embryos are placed into the uterus after three to five days[52].

   IVF has been a reasonably popular method for resolving some kinds of infertility since the birth of the first "test-tube baby" in 1978. Similar criticisms have been voiced against IVF, such as monetization of children and female reproduction. Feminists have created a criticism that is more sophisticated than this, suggesting that the great desire that many individuals, particularly women, feel for their own biological children is the outcome of faulty social structures and cultural ideals[53]. While reproductive technologies like IVF may assist some (rich) women obtain what they want, they also further reinforce the repressive cultural beliefs that engender these tremendous wants in the first place. The Catholic Church to which a majority of Eastern Nigeria belongs is also strongly opposed to IVF. According to its adherents, IVF has repercussions on the child's identity and self-esteem in the future. Thus, the Catholic Church does not recognize ART as a lawful form of procreation[54].

3. Surrogacy is described by the Warnock committee as "the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth[55]." Contrary to what one may imagine, surrogacy is not a wholly new notion in Nigeria[56]. Under some traditional rules in Nigeria, some marriages are formed that may superficially be regarded as the union of two women. In *Meribe v Egwu*, the Supreme Court

[52] Hamilton B, McManus B. Infertility treatment markets: The effects of competition and policy. Unpublished Manuscript, Olin School of Business, Washington University, St. Louis, 2005.
[53] Sherwin S. Feminist ethics and in vitro fertilization. Canadian Journal of Philiosophy. 1987;10(1):74–103
[54]Koyonda SO. Assisted reproduction in Nigeria: Placing the law above medical technology. Comp Int Law J South Afr. 2001 Jul;34(2):258–79.
[55]Warnock Committee, Report of the Committee of Inquiry into Human Fertilization and Embryology, Cmnd 9314, 1985, London: HMSO (the Warnock Report).
[56] Adewumi A. The need for assisted reproductive technology law. University of Ibadan Law Journal. 2012;2(1):19–41

was called upon to declare on the legitimacy of a woman-to-woman marriage identical to the one mentioned above.

5.7.Succession

Succession refers to the transfer of a dead person's estate rights and duties to their heirs and successors. It may be testate or intestate, with testate succession including a will, whereas intestate succession occurs when the dead dies intestate. This may pose complications for infants conceived by artificial fertilization (ART). The legal status of a child is intimately tied to the person acknowledged as the father or mother. In common law, a child born during a lawful marriage is believed to have been born to the parties to the marriage, based on genetic and biological relationships. Section 49 of the Lagos state Administration of Estates Law acknowledges issues from a marriage as entitled to the deceased's property.

The concept of a kid includes an unborn child, however the methods of conceiving the child are not indicated. There is no clear legal opinion on whether a kid from a frozen embryo may inherit from a deceased parent. The practice of ART raises problems regarding whether children fertilized by another man's sperm are entitled to inherit from their social father's inheritance, rather than their biological father's, particularly in circumstances where the supposed father dies intestate.

Finally, the essence of the foregoing for the political leadership to put their thinking on with a view to finding solutions to the likely negative effects of the system in Nigeria along with the encouragement of the technological breakthrough.

6.0.**CONCLUSION**

The use of Assisted Reproductive Technology (ART) in infertility treatment is increasing in Nigeria, but the practice is largely unregulated and ethical issues are not fully considered. To address this, the Nigerian legislature must enact laws clearly stating the legal status of ART to avoid confusion and arbitrariness, which can lead to exploitation and illegal practices. The country should borrow from countries like the USA, UK, Australia, and South Africa to develop its own legal regime on ART.

7.0.**RECOMMENDATIONS**

The study recommends adopting more specific legislation on ART use in Nigeria, as the country is lagging behind in regulating the practice of ART. This will provide an opportunity for optimal performance and give the country a pride of place in the world ART practice. Ethical standards for ART operation should reflect the cultural, social, and religious beliefs of citizens, and the Nigerian Assisted Reproduction Regulatory Society should be established to superintend and oversee the overall practice of ART in Nigeria.

Public enlightenment campaigns on ART in Nigeria should be holistically carried out to educate the public on its workings and address misconceptions about the concept. Government involvement in ART will shift the practice from privately run to government-private run practices, increasing accessibility to ART services at affordable yet qualitative rates.

Preventing infertility is cost-effective and efficient than waiting for it to occur and hanging hopes on ART. The researcher recommends checking causative indicators such as STDs, poor abortion, and other complicated practices to reduce infertility.

In conclusion, the Nigerian legislature must take a clear position on the use of ART and adopt specific legislation to ensure optimal performance in fertility treatment.