

**INHERITANCE RIGHT OF CHILDREN OF ASSISTED REPRODUCTIVE  
MECHANISM: LEGAL ISSUES AND FRAMEWORK IN NIGERIA**

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UNIVERSITY OF BENIN  
BENIN CITY**

**MAY, 2021**

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**A LONG ESSAY WRITTEN AND SUBMITTED TO THE FACULTY OF LAW IN  
PARTIAL FULFILLMENT OF THE BACHELOR OF LAW (LL.B) PROGRAMME,  
UNIVERSITY OF BENIN, BENIN CITY.**

**MAY, 2021.**

## **CERTIFICATION**

**I, Osahenoma ERHABOR, MAT. NO. LAW1504315**, hereby certify that apart from references made to other people's work as duly acknowledged herein, this entire project is the product of my personal research. I further certify that the work reported in this project has not been submitted and will not be submitted, either in part or in full, for the award of any other degree in this institute or elsewhere.

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## APPROVAL

We certify that this project work was completed by **Osahenoma ERHABOR**, Mat. No.

**Law1504315**, in partial fulfillment of the requirements for the award of Bachelor of Laws (LL.B)

Degree of the University of Benin.

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Signature and Date

## **DEDICATION**

I dedicate this work to God Almighty my creator, my strong pillar, my source of inspiration, wisdom, knowledge and understanding. He has been the source of my strength throughout this program and on His wings only have I soared.

This piece of work is especially dedicated to my lovely Grandmother, Mrs. Enotiemwen Asemota. Even though she do not have formal education, she loves sharing her wisdom, tutelage, support and encouragement to study. She is my bedrock and this work is a fulfilment of the promise I made to her.

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## **ABSTRACT**

Contemporary reproductive technology has in recent times made extraordinary advances in responding to the desire of women and men to have children. The success of these advancements in developed countries and lately Nigeria has made it possible for couples who would otherwise have been unable to conceive and bear children to avail themselves of these techniques that are today commonly known as “Assisted Reproductive Technology (ART).

This essay examines the meaning, the concept and the historical development of Assisted Reproductive Technology. It goes further to explain in details the various types of assisted reproductive technology. This research also examines the legal issues such as legitimacy, successions, the status of a child, citizenship of a child which would arise as a result of assisted reproductive technology. The succession and inheritance rights of the children of assisted reproduction in Nigeria are not exactly as clear and settled as those of the adopted child even though such children can ordinarily trace their genetic ties to their genetic parents.

This thesis examines the position of the law with respect to assisted reproduction in other jurisdiction and also the need for laws to be made in Nigeria to protect the rights of children born through assisted reproductions

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.0 Introduction

The desire of human beings generally to biologically reproduce themselves through the family institution seems to have been for ages, and as old as creation itself. From the scriptures of the Holy Books, it is evident that a lot of importance is attached to childbearing by both of the most widely practiced religions in Nigeria.

According to the Holy Bible, the Almighty God gave the injunction of procreation to his creatures after he has created them thus:

So God created Man in his own image, in the image of God created he him; Male and Female created he them. And God blessed them, and God said unto them, be fruitful, and multiply and replenish the earth, and subdue it.<sup>1</sup>

In Islam, similar injunctions are found in the Holy Quran.

And God has made for you mates (and Companions) of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for your sustenance of the best.<sup>2</sup>

Thus, the adherents of these faiths take the divine injunctions, without questioning, as both the sources of their right and necessity to procreate.

Children are very important to the society because a childless marriage is often viewed in our society as an incomplete marriage.<sup>3</sup> In fact, women in particular do not naturally joke with the issue of child bearing. They literally assume and accept that the only reason for their existence as

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<sup>1</sup> Genesis 1:27-28 *Holy Bible, King James Version*. Oxford: Oxford University Press.

<sup>2</sup> Chapter 16 verse 72 *Holy Qur'an*.

<sup>3</sup> Adewumi A. Afolasade, 'The Need for Assisted Reproduction Technology' (2012) 2 (1) *University of Ibadan Law Journal* 19-41.

women is to procreate. Thus, any form of denial of that right is fought with the last pint of blood in their vein. However, as significant as childbearing is, not all couples are able to bear children at will. This condition is referred to as infertility. The juxtaposition of a child completing a family and the fact of inability to procreate to continue the family lineage leaves the married couple a difficult situation. The situation might be emotional, psychological, social and even physical breakdown. Usually, there is pressure from the family especially that of the husband and the stigma or ridicule from society on the couple to procreate which most times leads to matrimonial breakdown irretrievably. The desire for parenthood leads them to look for alternative solutions. Thus, affected couples and their close relatives often flock religious centers and houses of traditional healers for solution while others, who could not withstand the unorthodox methods being employed by the so called spiritualists, still spend fortunes in the clinics of Gynecologists for the conventional medical treatment of infertility. Fortunately, contemporary reproductive technology has in modern times made advances in responding to the desire of women/men to have children.

Medicine, particularly in the area of reproduction has in fact witnessed a phenomenal revolution. This revolution first began in the 1960s with the development of contraceptives that separated reproduction from sexual intercourse without having to be overly concerned.

with the possibility of causing pregnancy.<sup>4</sup> More recently, this revolution has involved the development of reproductive technologies that allows reproduction without the usual traditional intercourse between partners.<sup>5</sup> The success of these clinical advancements in developed countries and lately Nigeria<sup>6</sup> has made it possible for couples who would otherwise have been unable to

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<sup>4</sup> R. Blank & J.C. Merrick, *Human Reproduction Emerging Technologies* (1995) 85.

<sup>5</sup> Andre P. Rose, 'Reproductive Misconception: Why Cloning Is Not Just Another Assisted Reproductive Technology' (1999) 48 Duke LJ 1133 at 1135.

<sup>6</sup> Shola Adedeji, 'Another Chance for Infertile Couples' (2000) 27 (6) *The Comet* 30.

conceive<sup>7</sup>and bear children to avail themselves of these techniques that are today commonly grouped under the heading “Assisted Reproductive Technologies (ART)”.<sup>8</sup>

Any “procedure or method designed to enhance fertility or to compensate for infertility” outside the traditional means of procreation can be labeled as assisted reproductive technology.<sup>9</sup>These technologies which began (in the western countries, notably the United States of America, United Kingdom and Australia) as far back as 1960s<sup>10</sup> have developed rapidly from the less complex, simplest and oldest of them all artificial insemination(AI) to more delicate and controversial techniques like in-vitro-fertilization(IVF) and cryopreservation egg and sperm donation, surrogacy and more recently cloning.<sup>11</sup>

The development of these technologies, it must be noted, was a direct medical response to the problems of infertility.<sup>12</sup> This development is indeed a great victory for modern medicine and a huge relief for couples, who are not only childless but face the increasing difficulties and societal hostilities towards adoption.<sup>13</sup> These advances in medicine, as it may be imagined, have not been free from moral and indeed legal difficulties. The success of these technologies has today brought a plethora of vexing and controversial legal questions to which answers are not readily available in Nigeria. Current reproductive technologies in the first place challenge old philosophies of families and family law. The technologies indicate the third parties who are not

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<sup>7</sup> Valerie L. Baker, ‘Surrogacy: One Physician’s View of the Role of Law’ (1994) 28 Univ San FL Rev 603.  
<sup>8</sup> I. Kennedy & A. Grubb, *Medical Law: Text with Materials* (2nd edn. Cambridge University Press 1994) 759.  
<sup>9</sup> Samson O Koyonda, ‘Assisted Reproduction Technology in Nigeria; Placing the Law above Medical Technology’ (2001) 34 Comp & Int’l LJ S Afr 258  
<sup>10</sup> Marylyn Mayo, ‘The Legal Status of the AID Child’ (1976) 50 The Aust L J 562 at 562.  
<sup>11</sup> Andre P. Rose, ‘Reproductive Misconception: Why Cloning Is Not Just Another Assisted Reproductive Technology’ (1999) 48 Duke LJ 1133 at 1138, Marylyn Mayo, ‘The Legal Status of the AID Child’ (1976) 50 The Aust L J 562 at 563, Monica Shah, ‘Modem reproductive Technologies: legal issues concerning cryopreservation and posthumous concept’ (1996) 17 J Legal Med 547.  
<sup>12</sup> The Canadian law reform commission working paper on “Medically assisted procreation” no. 65 (1992) cited in I. Kennedy & A. Grubb, *Medical Law: Text with Materials* (2nd ed. 1994) 758.  
<sup>13</sup> Samson O Koyonda, ‘Assisted Reproduction Technology in Nigeria; Placing the Law above Medical Technology’ (2001) 34 Comp & Int’l LJ S Afr 258

members of the family are introduced into the procreation process. Before the increased popularity of assisted reproductive mechanism, parenthood was relatively simple to define.<sup>14</sup>

The constitutionality or the legality of the entire assisted reproductive system process is another area. The availability of the current technologies makes it possible for people without fertility problems who ordinarily can conceive in a normal heterosexual copulation to opt for any of the techniques. This makes it increasingly possible that in no distant future children will be raised (with the help of these technologies) by "parents" with little or no genetic Nexus to such children. Today, since pungent doubts can be expressed over the legality of these technologies, it follows too that the legal status of children born via these practices will also be in doubt. It is not exactly clear whether such children can lay claims to be legitimate children of their social/nurturing parents. Where they are declared to be illegitimate, their succession right may be severally circumscribed particularly where such social/nurturing parents died intestate.<sup>15</sup> The right of these children should be clarified by law which seeks to protect the succession rights and settle for once their legal status.

This research work critically examines the legality of assisted reproductive technologies in line with the provisions of Nigerian law and also the implications of assisted reproductive technologies on the status of the child conceived therefrom as well as the rights of such child under Nigerian law. The outcome of the research work will provide necessary and relevant recommendations that would guide the legislature on the appropriate approach for effective regulation.

In the light of the forgoing, Chapter one of this research contains issue such as the background to the study, aims and objective of the study, research methodology, the scope of the research, definition of terms as well as the organizational layout of the research.

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<sup>14</sup> Robert H. Blank, *Regulating Reproduction* 9 (1990).

<sup>15</sup>*Salubi v Nwariaku & Ors* (1997) 5 NWLR [pt 505] 442.

Chapter two examines the definition and methods of assisted reproduction in Nigeria. The various types of assisted reproductive technologies commonly used are considered here. Chapter three analyzes and examines contemporary legal issues and implications issues accompanying the use of assisted reproductive technologies. Chapter four examine the legal and regulatory framework on assisted reproduction in Nigeria. Chapter five suggests a way forward with recommendations and conclusion.

### **1.1 Scope of the Study**

This research work essentially examines Assisted Human Reproduction Methods such as artificial insemination, in-vitro fertilization, intra-uterine injections, intra cytoplasmic sperm injection, surrogacy, etc., in Nigeria. The scope of this work also analyze the legal right of children begotten out of Assisted Reproduction and the legal framework of such rights in Nigeria.

### **1.2 Statement of Research Problem**

With the advent of technology, the whole world is said to be a global village. Consequently, the recent, comparatively, technological cum medical breakthroughs in the treatment of infertility among couples are no longer alien in Nigeria. However, like any other area of human advancement generally, there are some legal issues associated with Assisted Reproductive Technologies.

Assisted Reproductive Technology is considered to have challenged the traditional notion of the family and parenthood. It assaults the meaning of parenthood by transforming procreation or reproduction into manufacturing of children. This technique brings about the problem of legitimacy of the resulting child, the issue of the right to inheritance, the issue of the right to maintenance, the issue of the right to custody of the child. It also causes uncertainty as to the determination of whether the child begotten out of ART owe certain legal rights towards its

parent and whether its parents owe a corresponding legal responsibility towards their ART begotten children.

In Nigeria, although the ART have been embraced, there is no codified law on the issue of assisted reproductive technology and consequently the lack of regulatory framework on assisted reproductive technology poses legal problems for Government agencies and private individuals. The above put together make a research work such as this work inevitable.

### **1.3 Aim and Objectives**

The aim of this work is to examine the legal framework for assisted reproductive technologies in Nigeria, and the issues arising from such methods of reproduction. The objectives of this work are as follows:

- I. To examine the different methods of assisted reproductive mechanism.
- II. To examine the legal status of children born via assisted reproduction technology in Nigeria.
- III. To identify and discuss the contemporary legal issues pertaining to Assisted Reproduction of Assisted Reproduction in Nigeria
- IV. To examine the inheritance Rights of children begotten out of assisted reproduction in Nigeria
- V. To recommend a comprehensive legislative guideline for the Right of children of Assisted Reproduction in Nigeria.

### **1.4 Research Methodology**

The method employed in this research is doctrinal, relevant primary and secondary materials such as textbooks, journals, statute, international instruments will serve as a pillar in the formulation of this work. Judicial authorities to be employed will not be restricted solely to that of Nigerian courts, comparative analysis of foreign statute and authorities will also be considered.

## **1.5 Research Findings**

The findings of this research shall include;

- i. Assisted Reproduction Technology is a newly emerging practice in Nigeria in response to the issue of infertility.
- ii. Presently there is no legislation or judicial pronouncement on Assisted Reproduction Technology in Nigeria, if a dispute arises out of an Assisted Reproduction Technology practice and such dispute is presented before a Nigerian court, deciding such a case could prove problematic.
- iii. The legal status of the child born via Assisted Reproduction Technology is uncertain in Nigeria, as this has challenge the legal bases of parenthood.
- iv. The right to medically reproduce through Assisted Reproduction Technology is legal provided for currently in countries such as United Kingdom and Australia.

## **1.6 Contribution to Knowledge**

This research would be beneficial to all those involved in child rights protection such as the government in the formulation of law and policy on child rights in Nigeria especially those children born through Assisted Reproduction; to parents and guardians as well as families in determining their rights and responsibilities towards their children begotten out of Assisted Human Reproduction, etc.

Moreover, this study is justifiable as the area of research raises legal and ethical questions about whether or not theses innovative scientific methods of human reproduction are inimical to Nigeria legal system especially the institution of family formation and whether it contravenes the basic notion of lineage and child legitimacy in Nigeria.

## **1.7 Definition of Terms**

It is essential to define the following keywords used in this project.

i. **Assisted Reproductive Technology (ART).**

Assisted Reproductive Technology is defined as any “procedure or method designed to enhance fertility or to compensate for Infertility” outside the traditional means of procreation.<sup>16</sup>

According to Merriam Webster Medical Dictionary<sup>17</sup>, Assisted Reproductive Technology is defined as the use of technology to assist human Reproduction in the treatment of infertility.

All treatment or procedure that includes the in vitro handling of human oocytes and sperm or embryo for the purpose of establishing a pregnancy is called Assisted Reproductive Technology.

This includes but not limited to, in vitro fertilization and Trans - cervical embryo transfer, gamete intra fallopian transfer, gamete and embryo cryopreservation, oocyte and embryo donation and surrogacy. Assisted Reproductive Technology (ART) does not include assisted insemination using sperm from either a woman's partner or sperm donor.<sup>18</sup>

Assisted Reproductive Technology (ART) includes a range of procedures that vary in complexity.

Assisted Reproductive Techniques does not include reproduction through sexual intercourse.

ii. **Infertility**

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<sup>16</sup> R. Blank & J.C. Merrick, *Human Reproduction Emerging Technologies* (1995) 85.

<sup>17</sup> ‘Assisted reproductive Technology’ Merriam –Webster.com, 2011 <<https://www.merriam-Webster.com>> Accessed 11 May 2020.

<sup>18</sup> E. Vayena, P.J Rowe, P.D Griffin Current practices and controversies in Assisted Reproduction, Report of a meeting on Medical, Ethics and social Aspects of Assisted Reproduction Held at WHO Geneva (2002) XVIII

The term “infertility” is generally defined as the “inability to achieve pregnancy after one year of unprotected intercourse”<sup>19</sup>. Infertility is a disorder of the productive system that affects the body's ability to perform basic function of impregnating and or conceiving children.<sup>20</sup>

Infertility could also mean in fecundity, that is the inability to conceive or impregnate and pregnancy wastage, meaning failure to carry pregnancy to term through spontaneous abortion and still birth; infertility include primary infertility, where a couple has never achieved conception, and second infertility, where at least one conception has occurred but the couple is currently unable to achieve pregnancy.<sup>21</sup>

Infertility or barrenness, mostly as a result of medical or biological inhibitions, on the other hand, causes untold grief to the couples and cast over them a stigma of some sort of unearthly curse, misfortune or retribution for some misdeeds such victim has done in the past. It is not surprising therefore that those couples would do or submit to anything or use any method available particularly medical technology that would enable them bear children of their own. The problem of infertility affects both men and women, infertility seems to be a multidimensional health issue which occurs not only due to health problem related to the fallopian tubes, the ovaries and the endometrium, but it may also be a result of the choices imposed by the modern lifestyle, like higher average age of people who get married, stress, non- conducive framework for assistant Reproduction, etc.

### iii. **Human Reproduction.**

Human Reproduction is any form of sexual reproduction resulting in human fertilization<sup>22</sup>. It typically involves sexual intercourse between a man and a woman. During sexual intercourse,

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<sup>19</sup> AM. SOC'Y FOR REPROD. MED., INFERTILITY: AN OVERVIEW 3 (2003), available at <<http://www.asrm.org/patientbooklets/infertility-overview.pdf>> Accessed 11 May 2020.

<sup>20</sup> A.O Akorede, Legal Enhancement of Reasonable Access to Infertility Treatment in Nigeria, (2007) 17 Lesotho Law Journal 158.

<sup>21</sup> G. Douglas, *Law, Fertility and Reproduction* (London; Sweet and Maxwell, 1991) 104-105.

<sup>22</sup> 'Reproduction' <<https://en.m.Wikipedia.org/Wiki/Reproduction>> Accessed 11 May 2020.

the interaction between the male and the female reproductive systems results in fertilization of the woman's ovum by the Man's sperm.

Human reproduction is essential for the continuance of the human species. Human reproduce sexually by the uniting of the female and male sex cell. Although the reproduction systems of the male and the female are different, they are structured to function together to achieve internal fertilization.

iv. **Adoption.**

The action or fact of legally taking another's child and bringing it up as one's own<sup>23</sup>.

Adoption is a legal process which transfers parent's responsibilities from the child's birth parents to their adoptive parents. It gives the adopter and adopted the right to inherit each other.

v. **Surrogacy**

This is an arrangement whereby a woman who for whatever reason cannot conceive or carry the pregnancy to term commissions another woman to carry the pregnancy on her behalf. This other woman is usually called surrogate mother.

Surrogate contract, this is an agreement between the intentional parent and the surrogate mother which provides that the surrogate mother will bear a child for the intentional parent and relinquish any and all right to the child. Where a surrogate mother is married, her husband also must consent to the terms of the surrogacy contract. According to the agreement, upon the birth of the child the woman will relinquish to the couple any parental rights that she may have<sup>24</sup>. A surrogate is a person appointed to act in a place of someone else.

vi. **Offspring**

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<sup>23</sup> 'Adoption' <[www.dictionary.com/browse/adoption](http://www.dictionary.com/browse/adoption)> Accessed 12 May 2020.

<sup>24</sup> Surrogate Parenting Agreement Law and Legal Definition <<https://definitions.uslegal.com/s/surrogate-parenting-agreement/>> Accessed 11 May 2020.

Children or young of particular parents on progenitor, it is also defined as a child or animal in relation to parent or parents.<sup>25</sup> Offspring has also been defined as young born of living organisms, produced either by a single organism in the case of sexual reproduction, two organisms.<sup>26</sup>

#### vii. **Reproductive Rights**

Human Rights Activists have argued that the right to reproduce and the right to start a family is a human right which ought to be protected.

Reproductive rights were first established as a subset of human rights at the United Nation's 1968 International Conference on Human Rights. The sixteenth article of the resulting Proclamation of Teheran states that: "Parents have a basic right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect".

A reproductive right therefore, was first directly defined as a type of fundamental human rights by the World Health Organization as follows:

Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.<sup>27</sup>

Also, according to the 1994 Cairo Programme of Action which was adopted in 1994 at the International Conference on Population and Development (ICPD) in Cairo.

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<sup>25</sup> 'Offspring' <[WWW.dictionary.com/browse/offspring](http://www.dictionary.com/browse/offspring)> Accessed 11 May 2020.

<sup>26</sup> 'Offspring' <<https://en.m.wikipedia.org/wiki/offspring>> Accessed 11 May 2020.

<sup>27</sup> 'Gender and Reproductive Rights' <<http://www.who.int/reproductive-health/gender/index.html>> Accessed 26 October 2020.

Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community.<sup>28</sup>

Broadly speaking, reproductive rights encompass two principles: the right to reproductive healthcare and the right to reproductive self-determination. It can also be argued that Human Rights also include “the right to the benefits of scientific progress”<sup>29</sup> and make use of assisted reproductive technology.

Reproductive rights may also be understood to include education about contraception and sexually transmitted infections, and freedom from coerced sterilization and contraception, protection from gender-based practices such as female genital cutting (FGC) and male genital mutilation (MGM).<sup>30</sup>

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<sup>28</sup> *Programme of action of the International Conference on Population and Development, Cairo, 1994* (New York: United Nations; 1995) paragraph 7.2-7.3.

<sup>29</sup> Article 15(1)(b), International Covenant on Economic, Social and Cultural Rights of the U.N.

<sup>30</sup> ‘Reproductive rights’ <[https://en.wikipedia.org/wiki/Reproductive\\_rights#cite\\_note-autogenerated1-2](https://en.wikipedia.org/wiki/Reproductive_rights#cite_note-autogenerated1-2)> Accessed 26 October 2020.

## **1.8 Structure of Research**

The research is structured into five chapters, Chapter one of the study is the general introduction to the subject. It contains the scope of study, the aims and objectives of the study, research findings, contribution to knowledge, definition of terms as well as the structure of the research.

Chapter two examines the definition and methods of assisted reproduction in Nigeria and the history of assisted reproductive technologies. The various types of assisted reproductive technologies commonly used are considered here.

Chapter three analyzes and examines contemporary legal issues and implications issues accompanying the use of assisted reproductive technologies such as legitimacy, succession right and citizenship of the child, constitutionality of ART, right of the donor, legal status of the embryo, legal parenthood and other sundry issues.

Chapter four examine the legal and regulatory framework on assisted reproductive technologies in Nigeria and an attempt to a comparative analysis of Nigeria law with other common law jurisdiction.

Chapter Five is the final chapter of the study. It consists of the following subtitles: Summary, Recommendations of Study and Conclusion. The chapter summarized the study, gave the study's recommendation and a final conclusion.

## **1.9 Conclusion**

ART has emerged as one of the most widely adopted and successful medical technologies in the last century. While giving hope to millions of couples suffering from infertility, ART also has presented new ethical, legal, and social questions that society must address. Many countries have taken steps to regulate certain aspects of ART. However, such is in evolution in Nigeria. There is an urgent need for stakeholders (fertility specialists, clients, professional organizations, religious bodies, bioethicists, and government) in developing countries to formulate cultural and context-specific guidelines to help address some of these ethical dilemmas.

## **CHAPTER TWO**

### **ASSISTED REPRODUCTION IN NIGERIA**

#### **2.0 Introduction**

Modern innovations in the field of science have brought about a solution to the problem of infertility and thereby provide choices that will liberate couples from the problem of childlessness.

The introduction of assisted reproductive technologies as an alternative to the natural means of reproduction has been a direct medical response to the problems of infertility and has also been able to provide couples with a child biologically or socially linked to them, an option which is not afforded by adoption.

With the changing concept of family or marriage where there has been recognition of same sex marriages, the couples in such union can also resort to the process of assisted reproductive technologies to have their own offspring. Also, unmarried individuals can also avail themselves of the benefit of assisted reproductive technologies.

Assisted reproductive technologies have been used for a long period of time, with the high success rate of resulting pregnancy.

This chapter examines in details the concept of assisted reproductive technology, its type and the introduction of the concept into Nigeria. The chapter further looked into the history of the concept. **2.1 The Concept of Human Reproduction**

Human sexuality is programmed in such a way that the coming together of Man and Woman as one flesh during sexual intercourse is an expression of intimacy and self-giving. Life begins at

the expression of this intimacy. This is not simply a doctrine of religious belief but also evident from reality.<sup>31</sup>

It is arguable that the term “reproduction” is not the most appropriate term to describe what happen when a new human being comes into existence through the sexual intercourse between a man and a woman. The nature of "reproduction" sufficiently captures the biological dimension of human generation, but it is inadequate to express the mystery of how man and woman, through their human love making, cooperate with the creative capabilities of God. An alternative term, which may better express this personality dimension of human life- giving, is procreation.

However, for many couples, the inability to bear children is a tragedy. The convergence of personal, interpersonal, social and religious expectations brings a sense of failure, loss and exclusion to those couples not able to bear children. Relationship between couple can become strained when this happens. One partner may even seek to blame the other as being impotent or unwilling to bear children.<sup>32</sup>

Also, the incidence of infertility in a population has important demographic and health implications as well. This is because high infertility has a dampening effect on overall Fertility and the rate of population growth. Improvements in the ability to bear children may impede effort to lower the fertility rate<sup>33</sup>

In light of the above, technology has emerged to make an important contribution in remedying infertility. One of such technological interventions is the Artificial Reproductive Technology (ART). ART simply means that it is no longer necessary to achieve reproduction through physical contact of sex alone,<sup>34</sup> where technology plays a supporting role, it seldom generate

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<sup>31</sup> Bishop’s Committee for Bioethics, *Assisted Human Reproduction: Facts and Ethical Issues* (Veritas Publications, Dublin 2000).

<sup>32</sup> O. Shea and I.H. shah, ‘infecundity, infertility, and Childlessness in Developing Country’, DHS Comparative Report calverton, ORC Macro and the World Health Organization, Geneva (2004) No. 9, 1.

<sup>33</sup> Ibid

<sup>34</sup> F.O Emiri, *Medical law and Ethics in Nigeria* (1st Ed, Lagos, Malthouse Press Limited, 2012) 63

ethical issues. However, the more dominant technology becomes, the more the personality dimensions of human sexuality tends to be separated from the act of life-giving, and the more easily the creative act of God is obscured and discomfort when they experience the intrusiveness of ART.

Ethical questions arising from reproductive medicine, as it relates to the use of technology, are many and varied because they throw up issue of the heart of contemporary social, economic, and political struggles over sexuality, reproduction, gender and family.<sup>35</sup> There is, therefore, need to periodically ask ourselves whether a procedure which is completely controlled, which tends towards predictability, and which may also be highly selective, truly express what human life giving is about.<sup>36</sup>

Also, ART explicitly, means that it is no longer necessary to achieve reproduction through physical contact of sex. This makes it look like some form of technological incest, thereby minimizing the repugnancy which might otherwise attach to the process, despite this, not all persons share the fear and concern for the family introduced by modern technology.<sup>37</sup>

## **2.2 History of Assisted Reproductive Technology**

Advances in assisted reproductive technology (ART) for infertile couples were among the great medical success of the last century.<sup>38</sup> Assisted reproductive technologies have made huge strides and rapid progress towards finding suitable treatment options for each infertile couple. Public interest in assisted reproductive technology has remained high since the birth of the world's first in-vitro fertilization baby, 'Louise Brown', in the United Kingdom.

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<sup>35</sup> F.O Emiri, *Medical law and Ethics in Nigeria* (1st Ed, Lagos, Malthouse Press Limited, 2012) 63

<sup>36</sup> F.O Emiri, *Medical law and Ethics in Nigeria* (1st Ed, Lagos, Malthouse Press Limited, 2012) 63

<sup>37</sup> Ibid at 63 -64.

<sup>38</sup> R.M.A kamel, 'Assisted Reproductive Technology after the Birth of Louise Brown' (2013) 3 (3) *Gynecology Obstetric* 1.

The beginning of the in-vitro fertilization (IVF) was an inspiring one. Lesley Brown and her husband John, from Bristol city in the United Kingdom were unable to conceive naturally throughout the nine years of their continuous marriage. Lesley Brown has bilateral tubal blocks this is one of the causes of infertility in woman. Bilateral Salpingostomy was done but sadly, it was unsuccessful. This led her to Dr. Patrick Christopher Steptoe, a gynecologist in the Oldham general hospital Manchester City, United Kingdom in 1976 who advised her to try a new experimental technique to bypass her tubal blockage. Accordingly, Lesley underwent a laparoscopic oocyte retrieval during a natural non- stimulated ovulatory cycle. Mr. Robert Goffery Edwards, a British physiologist used her husband's sperm to fertilize the refined oocyte in the lab. A few days later, an 8- cell stage embryo was placed in inside Lesley's uterine cavity. It was reported that at 11.47 pm on July 25th 1978, Louis Brown was delivered by an elective caesarian section at Oldham hospital by the Registrar John Webster at gestational age of 38 weeks and 5 days due to coincidence of maternal pre-eclampsia.<sup>39</sup> Louise was healthy at birth and her weight was 5 pounds and 12 ounces (2700grams). By the birth of Louise Brown, the world celebrated the start of a new era of assisted human reproductive technology.<sup>40</sup>

### **2.2.1 The Early Attempt of Assisted Reproductive Technology.**

It is important to know that many attempts of assisted reproductive technology have been made before 1978. In fact, the history of in-vitro fertilization can be dated back as far back as the early 1890's when Walter Heape, a renowned professor at the University of Cambridge UK, was said to have reported the first known case of embryo transplantation in rabbits. Although from inception of medicine, biomedical research and experimentation preceded with the use of human objects. The techniques of IVF were described by Aldous Huxley in his science fiction novel

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<sup>39</sup> R.M.A kamel, 'Assisted Reproductive Technology after the Birth of Louise Brown' (2013) 3 (3) Gynecology Obstetric 1.

<sup>40</sup> Ibid.

“Brave New World” in the year 1932. Thus in 1934, rabbits were used. The rabbit’s eggs and sperm were collected and mixed by Gregory Pincus in the glass top of his watch and implanted the fertilized embryo in a surrogate rabbit. There were many developments that followed. For instance in the year 1959, a young Chinese known as Minchuh Chang, who is also a reproductive investigator succeeded through IVF for the first time in accomplishing live births from a white rabbit by mixing the eggs and sperms from black ones.<sup>41</sup>

### **2.2.2 The Progress of Assisted Reproductive Technology.**

Although Louise Brown was the first child given birth to through IVF but was not the last and the only child. The birth recorded in July 25th 1978 was followed by the birth of Courtney cross on October 16th 1978 and Alastair MacDonald on January 14th 1979, the world first three IVF babies.<sup>42</sup> Since then IVF has become a common procedure with a global record of more than 5 million births.<sup>43</sup> The years after brought rapid progress that allowed more infertile couples to have their own babies that are genetically related to them<sup>44</sup>.

The world’s first IVF baby was a boy known as Alastair MacDonald who was born on the 14th January 1979. Consequently, there have been many research teams one of the teams that made headway on the history of the IVF was a team called “MEL BOURNE IVF'S team in 1980 in the same year that the American IVF Agency was opened in Virginia, United States.<sup>45</sup>

Through the stimulation of the Ovarian by human Menopausal Gonodotrophin, Elizabeth Jordan Carr became the first American IVF baby to be delivered in 1981 and the same year Samantha

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<sup>41</sup> D. De Kretzer P. Dennis et al, ‘Transfer of a human zygote’ (1973) 2 lancet 728-729.

<sup>42</sup> R.M.A Kamel, ‘Assisted reproductive technology after the birth of Louise Browns’ (2013) 3 Obstetrics and Gynecology Faculty of Medicine and Dentistry University of Bristol 3.

<sup>43</sup> History of assisted reproductive technology <<http://www.ncbi.nlm.nih.gov/pubmed/79723>> Accessed 3 June 2020.

<sup>44</sup> R.G Edwards, ‘An Astonishing Journey into Reproductive Genetics since the 1950’s’ (2005) 45 Reproductive Journal 299.

<sup>45</sup> J. Cones, A Trouson, K Dawson et al, ‘The Early days of IVF Outside the UK’ (2005) 11 Human Reproductive update 439.

Steel was recorded to be the first baby born through IVF to American parents in England.<sup>46</sup> Before 1981, all the babies that were born through IVF were one but the world recorded the first IVF twins in 1982 at Queen Elizabeth hospital in the United Kingdom. They were named Taylor and Freddie Axton. The world first delivery after intrauterine insemination (IVI) and the first frozen embryo twin born in Australia in the year 1982.<sup>47</sup> There was another record of Germany's first test tube baby who was born by Caesarian section in the University hospital in Erlangen. The name of the baby was Oliver in April the same year.

Then Culture media for growing embryo started to be used.<sup>48</sup> In 1983, Alan Trounson's working group in Australia also achieved the first pregnancy in a woman with bilateral oophorectomy. This was achieved by using donor oocytes and in an infertile woman with primary ovarian failure by using donor embryo.<sup>49</sup>

In Australia, there was another research team called Monash team. They also reported a successful pregnancy of the first frozen embryo.<sup>50</sup> It was the same year that in-vitro Maturation (IVM) began which was introduced to fertility immature oocytes.<sup>51</sup> In 1984, the world's first IVF quadruplets were born in January 6th at the Royal Women's Hospital in Melbourne, Australia. There was another breakthrough in the history of assisted reproductive technology in March 1984. It was the year the world's first embryo Zoe Leyland was delivered although through Caesarian section again at the Queen Victoria Medical Center Melbourne Australia by

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<sup>46</sup> History of assisted reproductive technology <<http://www.ncbi.nlm.nih.gov/pubmed/79723>> Accessed 3 June 2020.

<sup>47</sup> Ibid.

<sup>48</sup> L. Hamberger, M. Wikland L. Nilsson, et al. 'Methods for Aspiration of Human Oocytes by Various Techniques. (1982)20 Directory of open access journals Acta Medical Anatolia 370.

<sup>49</sup> S.Lenz and J.G Lauritsen 'Ultrasonically Guided percutaneous Aspirations of human follicles under local Anesthesia: a New Method of Collecting Oocytes for in-vitro fertilization' (1983) 38 PubMed Journal of fertility and sterility 673.

<sup>50</sup> A. Trounson, J Leeton et al, 'A Pregnancy Established in an Infertile Patient after Transfer of a Donated Embryo Fertilized in Vitro' (1983)286 British Medical Journal 835.

<sup>51</sup> L. Mohr et al 'Human Pregnancy following Cryopreservation, Thawing and Transfer of an Eight Cell Embryo's Nature' (1983) 305 PubMed Journal 707.

Alan Arousnon and Carl Wood.<sup>52</sup> In that year, the first legislation to regulate the IVF and human embryo research in Australia was enacted. It was known as the Infertility Medical Procedures Act 1984<sup>53</sup>

In 1985; the first pregnancy achieved by IVF using percutaneous Epididymal Sperm Aspiration (PESA) was successful.<sup>54</sup> That year was also the year of the first human birth after replacement of hatching. Blastocyst cryopreserved at an expanded blastocyst stage.<sup>55</sup> A Nordic group led by a gynecologist Matte Wikland in Gothenburg, Sweden described for the first time the possibility of using trans - vaginal scanning for oocyte retrieval.<sup>56</sup> The procedure could be done under local Anesthesia and the patient could leave the IVF center after an hour. Dan Szollosi with Jacqueline Maridelbaum described the Micro structures of the human oocytes which become known as “Oocyte Dysmorphia”<sup>57</sup>

Similarly, in 1986, Monash IVF team reported the world’s first pregnancy achieved by surgical sperm retrieval obstruction<sup>58</sup>. Zev Rosenwaks achieved the first pregnancy following IVF donated oocyte in a non-ovarian failure woman.<sup>59</sup> There was also a report by Devroey et al, of the first successful pregnancy following laparoscopic zygote intra fallopian transfer (ZIFT).<sup>60</sup>

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<sup>52</sup> L. Mohr et al ‘Human Pregnancy following Cryopreservation, Thawing and Transfer of an Eight Cell Embryo's Nature’ (1983) 305 PubMed Journal 707.

<sup>53</sup> C. Wood, et al ‘The Establishment and Main Finance of Pregnancy Using an Intro Vitro Fertilization and Embryo Donation an A Patient with Primary Ovarian Failures’ (1984) 307 Nature PubMed Journal 174.

<sup>54</sup> P.D. Temple Smith, A. O. Trounson, and D.M. De Krestler, ‘Human Pregnancy by In-vitro Fertilization(IVF) Using Sperm Aspirated from the Epididymis’ (1985) 2 Journal of In Vitro Fertilization and Embryo Transfer 119.

<sup>55</sup> J. Cohen, R.F Simons, C.B Fehily et al ‘Birth After Replacement of Hatching Blastocyst Cryopreserved at Expanded Blastocyst Stage’ (1985) 1 Lancet 647.

<sup>56</sup> ‘Birth after the reimplementaion of a human embryo’ <[http://www.ncbi.nlm.nih.gov/pubmed \(79723\)](http://www.ncbi.nlm.nih.gov/pubmed/79723)> Accessed 3 June 2020.

<sup>57</sup> D. Szollosi, J. Mandelbaum, M Plachot, J. Salot- Baroux, J. Cohen ‘Ultrastructure of the Human Pre Ovulatory Oocytes’ (1986)3 Journal of In-Vitro Fertilization Embryo transfer 232.

<sup>58</sup> Ibid.

<sup>59</sup> Z. Rosenwaks, LL Veecks, Hc Liu ‘Pregnancy Following Transfer of In-Vitro Fertilized Donated Oocytes’ (1986) 45 PubMed Journal of Fertility and Sterility 417.

<sup>60</sup> P. Devroey, P. Braeckmans, J. Smits ,L. Van Waesberghe, A Wisanto et al., ‘Pregnancy after Translaparoscopic Zygote Intra Fallopian Transfer in a Patient with Sperm Antibodies’ (1980) 1 Lancet 1329.

A few months later, another IVF child, Kirill, Lena's brother was born in Saint Petersburg and Melissa stem (Baby M) who was born in March 27th in the United States. Her surrogate and biological mother, May Beth Whitehead (who conceived by artificial insemination) refused to yield custody of Melissa to the couple (Williams Stem and his wife, Elizabeth Stem) with whom she made the surrogacy contract. The court of new Jersey found it in the best interest of the infant to award custody of Melissa to her biological father William Stem and his wife Elizabeth Stem rather than to have a surrogate mother, May Beth Whitehead. Before 1986 there were only frail laws on ART but in June 12, 1987 Norway passed a law on assisted Reproductive technology (ART) which was the first in the world record. Thus the Norwegian law on assisted reproduction and genetics known as Nordic law limited treatment to the married or cohabited couples. Thus, some sex couples, lesbian and single women were excluded from the IVF treatment and further surrogacy and embryo donation was not permitted.

In 1990, the British Human fertilization and embryology Act set out a framework for ART practice and research under license from Human fertilization and embryology Authority (HFES). In 1992, the first successful pregnancy after intra cytoplasmic sperm injection (ICSI) by Gianpiero Palermo and Andre Van Steirteghem was in Brussels, Belgium.<sup>61</sup> There was a record of a first successful IVF baby, Hannatu kupchi in Nigeria in the year 1998.<sup>62</sup> In December 1998, the first set of octuplets in the world 8 babies, 6 girls and 2 boys was born at St Luke's Episcopal hospital in Houston, Texas, U.S.A after the use of ovulation induction therapy to a Nigerian born

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<sup>61</sup> G. Palermo, H. Joris, P. Devroey, et al, 'Pregnancies after Intra Cytoplasmic Injection of Single Spermatozoa Vitro Oocytes' (1992) 340 Lancet 17.

<sup>62</sup> J. Itskovitz- Eldor, S. kol, et al, 'First Established Pregnancy After Controlled Ovarian Hyper Stimulation with Recombinant Follicles Stimulating Hormone and Gonadotropin Releasing Antagonist Ganirelix' (1998) 13 Human Reproduction 294.

American couple Nkem Chukwu and Iyke Louis Udobi.<sup>63</sup> In 1999, the first unaffected gestation was reported after using preimplantation genetic diagnosis (PGD) for sickle cell anemia.<sup>64</sup>

In 2007, the first baby had born alive from an egg that had matured in- vitro frozen, and then fertilized at McGoil Reproductive Centre Canada.<sup>65</sup> A report published from the McGoli Reproductive center in Canada and the Maria infertility hospital in Korea on successful births after transfer of blastocyst that derived from matured oocytes by IVM.<sup>66</sup> The concept of mild treatment strategy that substantially reduces the risk of multiple gestation and overall costs was hosted.<sup>67</sup> A group of scientists led by Shoukhr of Mitalipor, a reproductive biology specialist at Oregon Health Science University (OHSU) published a report on successful human cloning. The approach involved nuclear transfer from human fibroblasts to enucleated oocytes and resulted in viable embryos developing to the blastocyst stage. The researcher planned to obtain embryonic stem cell from this developed blastocyst for purpose of therapeutic cloning. Alison Campbell a senior British clinical embryologist in Manchester introduced the novel time lapse imaging for early developing pre- implantation embryos for clinical suction of healthy looking embryo without the need for biopsy and pre- implantation genetic screening in cases vitro recurrent IVF failure.<sup>68</sup>

Advances in the assisted reproductive technology for infertile couples were among the great medical successes of the last century. Assisted Reproductive technology has wide steps and fast progress aiming to find a hope with a suitable treatment option for each infertile couple. Costs

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<sup>63</sup> 'History of assisted reproductive' <<http://www.ncbi.nlm.nih.gov/pubmed/79723>> Accessed 3 June 2020.

<sup>64</sup> K. Xu, Z.M Shi, et al 'First Unaffected Pregnancy Using Pre - Implantation Genetics Diagnosis for Sickle Cell Anemia' (1992) 81 Journal of the American Medical Association Anemia 1701.

<sup>65</sup> J. Cohen et al, 'The Early days of IVF Outside the UK' (2005) 11 Human Reproduction Update 439.

<sup>66</sup> W.Y son, S Y Les , Yoon SH, et al 'Pregnancies and Deliveries After Transfer of Human Blastocyst Derived from In Vitro Matured Oocytes' (2007) 81 In Vitro Maturation Cycles Fertility Sterilization 1491.

<sup>67</sup> E.M Heijnen, M.J Eijkemans, De Klerk C, Polinder S, Becker's NG, et al, 'A Mild Treatment Strategy for In Vitro Fertilization: A Randomized Non Inferiority Trial' (2007) 369 Lancet 743.

<sup>68</sup> A. Campbell, S. Fishel, et al, 'Retrospective Analysis of Outcomes After IVF Using an Aneuploidy Risk Modes Derived from Time Lapse Imaging Without PGs' (2013) Reproductive Biomedicine Online Journal.

and complexity of treatment have reduced to alleviate the stress and social troubles. Problems related to the risk of multiple pregnancy and the use of stimulated cycles are abridged and new techniques for management of severe male factor infertility and the detection of genetic anomalies in the embryo prior to transfer are being introduced. Undoubtedly, further refinements of the techniques and modifications of treatments will probably occur with ongoing use and practice.

### **2.3 Assisted Reproduction Technology Defined**

Assisted reproduction is one of the procedures that allow scientists or medical professionals to manipulate the fertilization process in order to bypass some pathological obstacles such as blocked Vas deferens (bad) and low sperm count in the male.<sup>69</sup>

Assisted reproductive technology (ART) refers to a number of advanced techniques used by physicians to aid infertile couples in achieving pregnancy.<sup>70</sup>

Assisted reproductive technology are methods used via scientifically assisted means of possessing pregnancy, it is not the conventional or natural ways of achieving children. Assisted Reproductive technology is the general concept of technologically assisted human reproduction. It comprises of Artificial insemination (AI), In-Vitro-Fertilization (IVF), Sperm donor/Ova bank, Embryo adoption, Egg transfer, Surrogate parenting, human cloning, and Genetic engineering among others. The most common method of assisted reproductive technology are; Artificial Insemination, Surrogacy, and In-Vitro fertilization (IVF).

### **2.4 Methods of Assisted Reproductive Technology**

There is a process by which pregnancy can be achieved through assisted technology. As the problems of infertility varies so also the methods of assisted reproductive technology. When

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<sup>69</sup> R.M.A Kamel, Assisted Reproductive Technology after the Birth of Louise Brown' (2013)3(3) *Gynecology Obstetric* 1.

<sup>70</sup> Ashley Pittman, 'Assisted Reproductive Technology and the status of Embryo' (2011) 81 *Miss. L. J* 99.

parties are presented with the challenge of fertility, experts in the field will first and foremost conduct thorough examination on the medical history of the patient and circumstances surrounding the problems. Investigative procedures will thereafter follow, these may include blood tests, urine test, ultrasound, pelvic analysis for women sperm or semen analyst for men if necessary more intense test or examination of the fallopian tube, uterus or the man's sperm passage may be done.<sup>71</sup> At this stage there is a high tendency that the results may reveal where the problems or faults lies. When the fault is detected, it will direct the professionals to know the type of treatment for the case. There are various available methods of assisted reproductive technologies and they are recognized globally. They will be discussed below.

#### **2.4.1 Artificial Insemination (AI)**

Artificial insemination involves the collection of sperm of a man outside the body and the introduction or insertion into the uterus of the woman for the primary purpose of inducing conception. It can be used to overcome both female infertility problems when especially the cervix of the fallopian tube pose barriers to normal insemination and make infertility problems by concentration of sperm before insemination.<sup>72</sup>

According to Osborne's Concise Law Dictionary, artificial insemination is defined as the placing of sperm inside the woman's vaginal or uterus by means other than sexual intercourse. The sperm may be that of the woman's husband (artificial insemination buy husband), partner (AIP) or third party donor (AID).<sup>73</sup>

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<sup>71</sup> 'Treating infertility' <<http://www.healthhatoz.com.healthhatoz/atoz/repr/infertility:jis>> Accessed 4 June 2020.

<sup>72</sup> A. O. A Yusuff, 'Infertility Treatments and The Conceptual Dilemma of Involuntary Childlessness: Is There A Right To Reproduce?' (2009) 1 J.D. P.L.J, Usman Dansfodiyo University Sokoto 73.

<sup>73</sup> *Osborne's Concise Law Dictionary* edited by Sheila Bone (9th Ed Sweet and Maxwell 2001) 38.

According to Black's law dictionary, artificial insemination is a "method by which a female is impregnated through injection of semen from a donor other than her husband and other than through sexual intercourse"<sup>74</sup>

Artificial insemination is also defined by I.A Aliyu as "a process through which female ova are fertile with male sperm and then resultant embryo is planted into the uterus of a woman who will carry the pregnancy and deliver the baby".<sup>75</sup>

The sperm for assisted insemination may be procured either from partner or husband of the woman who is to be inseminated (assisted insemination by partner) or (assisted insemination by husband) or a donor (assisted insemination by a donor).<sup>76</sup>

From these two definitions, it may therefore be noted that artificial insemination is an unnatural method of conceiving a baby which involve the use of scientific means of retrieving genetic materials from a particular man and woman whether they be husband and wife or simply third party donors in order to cure infertility and satisfy the condition of childlessness.

Assisted insemination is a more or less simple procedure therapy which may be performed without the help of medical practitioners except when the male partner has a low sperm count or low sperm motility. It is about the most widely accepted of the assisted method of reproduction.<sup>77</sup>

#### **2.4.1.1 ARTIFICIAL INSEMINATION BY HUSBAND (AIH)**

This method of artificial insemination is considered less objectionable on moral grounds though its procedure could be questioned on the grounds that it does not produce pregnancy by natural,

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<sup>74</sup> M.A. Black, *Black's Law Dictionary* (5th Ed, 1979) 103.

<sup>75</sup> I.A Aliyu, *In-Vitro Fertilization and Artificial Insemination in Islamic Law* (1999-2000) A.B.U.L.J 135.

<sup>76</sup> A. O. A Yusuff, 'Infertility Treatments and The Conceptual Dilemma of Involuntary Childlessness: Is There A Right To Reproduce?' (2009) 1 J.D. P.L.J, Usman Dansfodiyo University Sokoto 73.

<sup>77</sup> J .McHale. et al. *Health Care Law; Text, Cases and Materials London* (2nd Ed, Sweet & Maxwell) 631-633.

physical sexual contact. On this basis, it can be said that it alters the natural course of nature.<sup>78</sup> The objection takes on weighty consideration especially in the context when the AIH procedure is combine with some other bio-technology device that raise complete issue. With the improved medical methods, it is now possible to preserve the semen of a husband in a bank. So many controversies surrounds this procedure, some of these concerns are the aftermath of a wife that undergoes AIH and bear Children after the death of one husband, how the children of such procedure will be treated, whether or not the birth will affect testamentary disposition and do on. All of these are not easy reconcilable with established legal rules. <sup>79</sup> If Parenthood is determined by the genetic make-up of a child, then it would be proper to treat the child as a progeny of the deceased husband. But the answer may not be all together satisfactory because this common law rule when formulated did not envisage the novel practice of preservation of semen in a bank for use after the death of a donor. It was rather formulated to deal with situation then prevailing. <sup>80</sup>

#### **2.4.1.2 Artificial Insemination by Donor (AID)**

Artificial insemination by husband (AIH) in all aspects is similar with Artificial insemination by Donor as a procedure. This is often resorted to if the husband of the woman is infertile. The sperm obtained from the donor will be injected into the uterus of the woman. Many couples who use Artificial insemination by Donor (AID) are usually not willing to abdicate all hope of husbands/wife offspring. So medical personnel mix the semen of the husband with that of other donor so that the couple can still symbolically feel that that the oven fertilized is that of the husband. This type of procedure has been described as Artificial Insemination by Husband and Donor (AIHD) some suggested that it is tantamount to an invasion of the sanctity of marriage.

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<sup>78</sup> F.O Emiri, *Medical law and Ethics in Nigeria* (1st Ed, Lagos, Malthouse Press Limited, 2012) 31.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

This issue was considered in the case of *Orford v. Orford*,<sup>81</sup> the husband contended that his wife committed adultery as she bore a child outside of their wedlock. The wife, on the other hand, argued that the child was born from artificial insemination and she did not engage in any sexual activity. It was further submitted that the artificial insemination took place twice and consequently she become pregnant. The wife testified that she was artificially inseminated in a flat when she lay unconscious and unnamed physician injected the semen of the donor. Also the donor was present in the flat along with the physician. The court expressed its doubts regarding the procedure of “artificial insemination” performed on the wife. The court adopted a reasoning that the essence of adultery or immorality is not expressed in the moral turpitude of physical sex outside the marriage but rather it is the voluntary surrender of the reproduction facilities of the body to another equally as reprehensible as adultery and it is tantamount to it.

In contrast to this, the Scottish court in *MacLennan v MacLennan*,<sup>82</sup> thought otherwise when it was stated that since assisted insemination by donor does not involve any physical sexual contact, it is not adultery. It is possible to argue that if assisted insemination by donor is employed by a woman without the consent of her husband, it would amount to an unreasonable behavior for the purpose of dissolution of marriage. This means that a spouse especially the wife cannot single handedly make the decision for both in this regard. The husband must be well informed and signify his consent respectively. In the case of *Doornbos v Doornbos*<sup>83</sup>, it was here that the surrounding of the woman’s Reproductive facilities without her husband’s consent amounts to adultery.

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<sup>81</sup> (19 21) 58 D.L.R 251

<sup>82</sup> (1958) SC 105.

<sup>83</sup> (1956)12111. App.2d 473, 139 N.E 20 844.

Notwithstanding the acceptance of AID by a couple, it could be interpreted as testimony of strength and bond in the face of physical difficulties.<sup>84</sup> This explains why Human Embryology Fertilization Act makes for illegal AID without license and the parties consent. Mutual consent by the couple to accept AID as treatment for infertility is not free from other difficulties. The difficulties of information and single women request among others. Allied to the question of whether submission to AID is adulterous behavior is whether the resultant child is legitimate. Assuming that the presumption of legitimacy, which is later discussed, is overcome because the husband is absolutely sterile or there is proof of lack of access because of either separation or the husband's impotence, the child would not under common law rules be legitimate, his natural parents not being married. Nor can advantage be taken of the legitimization statutes of the various jurisdictions, as these usually presuppose a post-natal marriage of the natural parents. Adoption procedures by the mother and her husband ordinarily cannot be employed since they generally provide for adoption by persons other than the parents or by a spouse to whom one of the parents was married after the birth of the child.

It is expected that an agency or hospitals that performs assisted insemination by donor (AID) should keep a register of information that relate to the identity of the donor in confidentiality.<sup>85</sup> The desirability of this cannot be over emphasized. The preservation of information would help prevent donation by closely related persons, either by blood and or marriage to the couple. Since it is expected that AID would be employed only where there is close resemblance of race between the parties and donor, so as not to raise social issue. A hospital facility must be careful not only in keeping information but also in observing this minimum safeguard. The exception to this principle is that a child who is of full age born through the method may require the authority

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<sup>84</sup> F.O Emiri, *Medical law and Ethics in Nigeria* (1st Ed, Lagos, Malthouse Press Limited, 2012).

<sup>85</sup> Section 24 of the Human Fertilization Embryology Act 2008

to establish whether or not he was born by infertility treatment<sup>86</sup>. The question of full age is a matter of jurisdiction. For example, in Nigeria anyone who has reached the age of 18 is said to be of full age. Thus such person may seek information and the authority may seem fit to disclose. The authority in that respect may disclose to him whether the person he proposes to marry is related by blood to him or her. This provision does not however require the authority to give information as to the identity of the donor, it only authorizes access to information about a child of his genetic background.

#### **2.4.2 In-Vitro Fertilization (IVF)**

In-vitro is a Latin phrase which means “in glass”, in embryology. It is used in contrast with in-utero meaning in the uterus.

In-vitro fertilization is a treatment which may only be carried out under license from Human Fertilization Embryology Authority<sup>87</sup>. IVF is a medical process which involves the implantation of an Embryo in the woman’s womb. The process involves the use of instrument to harvest eggs from the woman’s ovaries. The eggs are then put in a test tube when it is fertilized. The fertilized eggs are placed in the woman where it grows into fetus and then a baby. IVF is popularly referred as test tube baby technique. This new resolution in baby making is available in Nigeria. It is the collected ova from the woman that is fertilized with the husband’s sperm in a laboratory. The procedure based closely resembles assisted insemination by husband. It therefore poses less ethical problem which can safely be brought within the category of assisted insemination by husband. In rare cases, the sperm used may be donated if the husband’s sperm cannot produce pregnancy. If the woman is unable to produce eggs from her ovary or the eggs carry an X linked genetic disease in which case it would be medically advisable to have ovum donated to her, she

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<sup>86</sup> Section 25 of Human Fertilization Embryology Act of United Kingdom 2008

<sup>87</sup> Section II of the Human Fertilization Embryology of United kingdom Act 2008

would have it donated to her. Donated ovum may be obtained from another woman by surgery during sterilization treatment. Once these eggs are harvested there is need to use them because if they are persevered “cryopreserved” medical evidence indicate that they could suffer a risk of chromosomal abnormality. But once it is successfully harvested and fertilized in the laboratory with the sperm, subsequent implantation into the woman hardly ruins the risk. If a birth results, the woman who carries the pregnancy to term is considered the mother of the child whether the fertilization results from donation or from her husband.<sup>88</sup> Once fertilized and implanted into the wife it is natural to consider the couple as the parents of the baby<sup>89</sup>. Asides the ethical issues, IVF treatment resembles AID in many ways some of which are genetic defects from manipulations, sex relocation, eugenic, burden on the national health resource and several others In-vitro fertilization treatment is an expensive medical treatment, with a low rate of success worldwide. The live birth rate in IVF depends largely on the size and expertise of the treatment center<sup>90</sup>. There is no difference in pregnancy or birth rates when 2 or 3 embryos are implanted but the triplet rate is unacceptably high in the latter event.

As a result the Human Fertilization and Embryology Act has limited the number of embryos inserted to 2 per cycles for instance in the case of a woman of 40 years of age using her own eggs then three may be used.<sup>91</sup> Thus while IVF may well be the optimal treatment for one of the commonest female causes of infertility, the expectation of success are relatively low- an important point to be made when counseling childless couples. The pregnancy and live birth rates following IVF shows no significant differences when related to the underlying reason for the treatment.<sup>92</sup>

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<sup>88</sup> Per Lord Simon in the Ampthill peerage (1977) AC 547 (HL) at 577.

<sup>89</sup> Section 33-44 of Human Fertilization Embryology Act of United Kingdom 2008

<sup>90</sup> J.K Mason, G.T Lauren, *Law and Medical Ethics* (7th edition Mason & McCall Smith’s Oxford) 89.

<sup>91</sup> Section 3 of Human Fertilization and Embryology Act of United Kingdom 2008

<sup>92</sup> Ibid

As regards the duration of the storage of an Embryo, section 14 of the English Human Fertilization and Embryology Act 1990 provides that an Embryo can be legally stored up to 5 years. By this provision, a woman who does not want any disturbance with her social or economic life or status may simply request that the embryo created should be persevered until she is ready to have a baby. Women who have passed menopause can therefore have babies. Singles and Lesbians can bear children without needing to have sex or heterosexual intercourse. The greatest objection to IVF remains religious and most orthodox religions considers it as an attempt by science to play the position of a creator thus deny the glory of creation of God.<sup>93</sup>

### **2.4.3 Gamete Intra Fallopian Transfer (GIFT)**

With this procedure, Fertilization occurs inside the body as in case of IVF, the woman is given medications that stimulates multiple egg development. Immediately after her mature eggs are removed they are mixed with her partners or donors sperm and a catheter is used to transfer this mixture into the woman's fallopian tube. Fertilization may then take place in the fallopian tube, the resulting embryos will move down to the uterus if all goes well. The resulting embryos will implant in the uterine lining, and pregnancy will progress normally resulting in a live birth<sup>94</sup>.

In Gamete intra-fallopian transfer, Fertilization actually takes place in vitro. This procedure requires the use of laparoscopic and involves general anesthetic this method involves placement of the gametes in the fallopian tube, it requires that the woman has healthy tubes. This method works well for couples with unexplained infertility and mild endometriosis. In for a G.I.F.T involves Fertilization in vitro, it does not involve many of the ethical difficulties which are associated with I.V.F. In so far as it does not involve the storage of surplus embryos, however, this method does not expose the woman to repeating the harvesting of ova, if no pregnancy is

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<sup>93</sup> 'Infertility' The treatments, The Questions in Awake, Sep 22, 2004 (Watchtower Bible and Tract Society of New York Inc.) 3

<sup>94</sup> A. O. A Yusuff, 'Infertility Treatments and The Conceptual Dilemma of Involuntary Childlessness: Is There A Right To Reproduce?' (2009) 1 J.D. P.L.J, Usman Dansfodiyo University Sokoto 73.

achieved in the first cycle. In many centers also I.V.F tends to be a fallback position in the event that GIFT fails, using the surplus ova obtained. However, G.I.F.T does respect the life and bodily integrity of the embryo. It does replace the place of intercourse rather than assisting it, but it is arguably less intensive in terms of the integrity of sexuality because it does not totally remove the elements of mystery and the randomness of natural Fertilization<sup>95</sup>.

#### **2.4.4 Zygote Intra Fallopian Transfer (ZIFT)**

This technique is a combination of in-vitro fertilization and Gamete intra fallopian tube. As with IVF, Fertilization occurs outside the body, however the resulting embryos are curtailed for only two days instead of three and they are transferred to the woman's fallopian tube via a catheter<sup>96</sup>.

#### **2.4.5 Intra - Cytoplasmic Sperm Injection (I.C.S.I)**

This is the most recently developed method for by passing the problem of infertility. It is similar in many ways to IVF. The difference is that each ovum is injected with a single sperm cell. I.C.S.I ensures the penetration by the sperm of the outer layer of the ovum and therefore facilitates the beginning of Fertilization. Practitioners recommend this method in cases where regular IVF has failed and particularly in involving low sperm count or when sperm is not ejaculated naturally.

I.C.S.I makes it possible to respond to infertility in men with severe sperm abnormalities. In the course of natural fertilization, the individual sperm which ultimately fertilized on ovum has survived a process of natural selection and achieved first place in a competition of millions. In IVF, some degree of natural selection has occurred in I.C.S.I however, the chosen sperm has no competition. This in itself may be contributory factor in genetic malformation<sup>97</sup>.

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<sup>95</sup> Bishop Committee on Bioethics Assisted Human Reproduction, Facts and Ethical Issues' (2nd edition, Veritas Publications 2000) 9.

<sup>96</sup> 'Diseases and conditions infertility' <<http://www.healthoz/atoz/DC/caz/repr/infertility.jsp>> Accessed 6 June 2020.

<sup>97</sup> 'Assisted Human Reproduction: Facts and Ethical Issues' <[www.catholicbishops.i.e/208/07a](http://www.catholicbishops.i.e/208/07a)> Accessed 6 June 2020.

## 2.4.6 Embryo Donation

Embryo donation is a form of third party reproduction. It is defined as the giving generally without compensation of embryos remaining after one couple in-vitro fertilization to either another person or couple for implantation or to research<sup>98</sup>. When embryo is given for the purpose of implantation the donation is followed by the placement of those embryo into the recipient woman's uterus to facilitate pregnancy and child birth in the recipient.<sup>99</sup> Couples who have previously undergone the process of I.V.F and who decided that their family is now complete, may still have surplus embryo in storage. Clinics in some countries are now facilitating Embryo donation, whereby these surplus embryos are made available for couples for whom embryo transfer is possible for.

In the United Kingdom, there is a government proposal that children of I.V.F when embryo donation (or indeed the donation of sperm, or ovum) is concerned, will have the right of the age of eighteen to have information about the donor parent(s). As already suggested, this right, if accepted, would conflict with the current practice of guarantying anonymity to the donor in many jurisdictions, subsequent to I.V.F, it is a common practice for surplus embryos to be used, with the consent of the natural parents, to provide Children for other infertile couples it must be said at the initial stage, that instead of disposing surplus embryo it can be used as Object of research. This is not to say however, that there are no ethical implications involved. The practice of placing an embryo or embryos in the uterus of a woman who is not the natural mother, and in the care of parents who are not the natural parents, does not separate Parenthood from the responsibility of care. It creates a whole new complex relationship, in which family is redefined to include two sets of parents. This inevitably gives scope for some confusion about

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<sup>98</sup> 'Embryo Donation' <<http://en.m.wikipedia.org/wiki/embryo-donation>> Accessed 6 June 2020.

<sup>99</sup> Ibid.

the identity of the child who will be born. Parents may, of course, die or separate. Children may be born to or brought up by single mothers. They may be adopted too. None of these circumstances lessen in anyway the dignity of the child. There is a fundamental difference however, between responding constructively and lovingly to the child who already exists (in or out of the womb) and deliberately creating a situation in which a child's sense of identity and family membership is blurred. What is significant is the initial decision, to generate surplus embryos, a decision which is taken in isolation from any current plan for future personal core of the human individual's concerned.<sup>100</sup> Embryo freezing is available in fertility agencies in Nigeria it is available in two centers which oocyte donation is available in four centers. One center in Lagos, has practiced surrogate motherhood and many centers are involved in nearly all procedures.<sup>101</sup>

#### **2.4.7 Reproductive Cloning**

It is a procedure which is different from the normal Assisted Reproductive Technology Techniques. It's in fact a sexual form of Representation which does not involve the use of a male sperm, through what is known as nuclear transfer, a somatic cell is taken from any part of the body which will then be fused with enucleated Ova by administering determined amount of electric pulse.<sup>102</sup>

It consists of removing the nucleus of an egg and replacing those with nucleus of a donated unfertilized egg or the nucleuses of a body cell. The re-nucleated cell is then implanted and brought to term in the womb.

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<sup>100</sup> 'Assisted Human Reproduction: Facts and Ethical Issues' <[www.catholicbishops.i.e/208/07a](http://www.catholicbishops.i.e/208/07a)> Accessed 6 June 2020.

<sup>101</sup> O.F Giwa –Osagie, 'ART in Developing Countries with Particular Reference to Sub Saharan Africa' A Report of WHO Meeting on Medical, Ethical and Social Aspects of Assisted Reproduction, Geneva (2002) edited by Effy Nayana, Patricia J and David Griffin 23.

<sup>102</sup> R.G. Lee and D. Morgan, *Human fertilization and Embryology: Regulating the Reproductive Revolution* (Blackstone Press Ltd, Lander, 2001) 200.

The child has only genetic material of the donor of the nucleus. Since only a male or female seed is used, this is a process without conception. This artificial virgin birth a child with the same D.N.A as the (one) Parent.

#### **2.4.8 Surrogacy**

This is an arrangement whereby a woman who for whatever reasons cannot conceive or carry pregnancy to term commissions another woman to carry the pregnancy on her behalf. This other woman is the Surrogate mother. Surrogate pregnancy may be established in a number of ways. The Surrogate mother or woman may be fertilized with commissioning man's sperm either as a result of sexual intercourse with the man or through assisted insemination. Thus she not only carries the baby but has a genetic link too. Another way is when the commissioning couple provide both sperm and ovum so that the resulting child is genetically entirely theirs, although carried by another woman.<sup>103</sup> A third possibility is where the commissioning couple secured donor Sperm and egg or an embryo which is subsequent Fertilized and implanted in the surrogate. This arrangement is otherwise term womb leasing. Surrogacy alleviate infertility when a woman suffers from severe pelvic diseases, had no uterus, pregnancy is medically undesirable or where a woman who is otherwise fertile decided not to go through the burden or risk of pregnancy.<sup>104</sup> Surrogacy can, theoretically, take various forms. The Surrogate is usually also the biological mother i.e., she also provide the ovum which is used. Alternatively, her womb may simply be made available for a period of time between I.V.F and birth. In so far as respect for the identities of Origin is concern, the difficulty is that the surrogate mother is outside the partnership of marriage. There is also sufficient evidence to show that the bonding which takes place between a

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<sup>103</sup> J. McHale, M. Fox, J. Murphy, *Health Care Law, Text, Cases and Materials* (Sweet and Maxwell 1997) 634 – 635.

<sup>104</sup> A. O. A Yusuff, 'Infertility Treatments and The Conceptual Dilemma of Involuntary Childlessness: Is There A Right To Reproduce?' (2009) 1 J.D. P.L.J, Usman Dansfodiyo University Sokoto 89.

surrogate mother and the child in her womb can and does give rise to situations in which the child subsequently becomes the victim of a struggle between the surrogate and the intended social parents.

## 2.5 Infertility and Assisted Reproduction in Nigeria

Infertility could be a life crisis with a wide range of social Cultural, emotional, physical and financial problems.<sup>105</sup>

In the second decade of this new millennium, infertility remains a highly prevalent global condition. In fact, it is one of the most important conditions in the reproductive system.<sup>106</sup> In developing countries, children are highly valued for social, cultural and economic reason<sup>107</sup> . Many religions and faiths put a great emphasis on fertility and child bearing, thus, infertility is defined as inability of a couple to access pregnancy after twelve months of regular, unprotected intercourse.<sup>108</sup>

Although there is reliable estimate for global prevalence of infertility.<sup>109</sup> Records has shown that the incidence of female infertility that is rising ranges from 10% to 20%<sup>110</sup>. Infertility, often either primary or secondary, occur in almost 15% of all women worldwide. <sup>111</sup> Female infertility occurs in about 37% of all infertile couples. It ranged from 0.6% to 3.4% for the secondary

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<sup>105</sup> A.L Greil, K. Slauson – Blerins, J Mcquillan, ‘The Experience of Infertility: A Review of Recent Literatures’ (2010) Social Health Illn. 140.

<sup>106</sup> A. D Moghadam, A. Delpisheh, and A. khosrari, ‘Epidemiology of Female Infertility; A Review of Literature’ (2013) 10(2) Bio – science Biotechnology Res Asia. 559 – 564.

<sup>107</sup> W. Ombelet, *False Perception and Common Misunderstandings Surrounding the Subject of Infertility in Developing Countries* (Eshre Monographs Oxford University Press,2008) 8 – 11.

<sup>108</sup> A. Direkvand Mognadam, K. Sayehmini, A. Delpisheh, ‘The Global Trend of infertility; An Original Review and Meta – Analysis’ (2004) International Journal of Epidemiology 35.

<sup>109</sup> M.N Mascarenhas, H. Cheung, C.O Mathers, and G.A Stevens, ‘Measuring Infertility in Population: Constructing a Standard Definition for Use with Demographic and Reproductive Health Surveys’ (2012), 10(1) Population Health Metrics 1.

<sup>110</sup> A. Direkvand Mognadam, K. Sayehmini, A. Delpisheh, ‘The Global Trend of infertility; An Original Review and Meta – Analysis’ (2004) International Journal of Epidemiology 35. 45

<sup>111</sup> S.B Hasanpoor, A. Z. ghdy, M. Simbar, A. Vedadhir, ‘The social consequences of infertility Among Iranian women. a Qualitative study’ (2005) 8(4) International Journal Fertilization. Sterilization 409.

infertility<sup>112</sup>. Infertility is a prevailing problem during reproductive age and is defined as failure to conceive after one year of regular unprotected sexual intercourse without any known reproductive pathology. <sup>113</sup>Infertility is also defined as the inability to get pregnant after trying for at least 6 months or one year, for women over 35year old, without the use of birth control pills and while having normal sexual intercourse.<sup>114</sup>.

The actual prevalence of infertility is unclear; this is because most couples successfully conceive after 12months of regular, continuous unprotected sexual intercourse<sup>115</sup>. However, it has been reported that about a quarter off all couples could be affected in developing countries.<sup>116</sup> In some developing countries, for example Nigeria, infertility is the leading reason for gynecological consultation<sup>117</sup>. Therefore, Infertility or inability to conceive seems to be a global problem.

The Problem of Infertility is even shared because it affects both men and women. Yet women, particularly women in developing countries, may bear the sole blame for barren marriage<sup>118</sup>. In some Jurisdiction, infertility has been generally accepted as one of the ground for divorce in marriage, especially by the husband, his family or the Society at large.<sup>119</sup>

In the past, people had little control over their fertility and couple that could not get a child had no other choice but to accept the fact. In recent times, however, infertility has become a global health issue affecting approximately most of couples. It is a multi-dimensional problem with

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<sup>112</sup> Ibid.

<sup>113</sup> S.O Rutsein, H. Iqbal shah, 'Infecundity, Infertility and Childlessness in Developing Countries DHs. Comparative Report Calverton, Maryland, and USA: ORC. Marco and the world Health Organization' (2004), No 9, 56.

<sup>114</sup> W. Ombelet, I. Cooks, S. Dyer, G. Serour, and P. Devroey, 'Infertility and the provision of Infertility medical services in Developing Countries' (2008) 14(6) Human Reproduction Update 605.

<sup>115</sup> S. Bhattacharya, N. Johnson, H.A Tijani, R Hart, and S. Pandey, 'Female Infertility' (2010) 17(2) British Medical Journal Clinical Evidence 259.

<sup>116</sup> M.N Mascarenhas, S.R Flaxman, T. Boerma, S. Vanderpoel, and G. A Sterens, 'National Regional, and Global Trade in Fertility prevalence since 1990: A systematic Analysis of 277 Health Surveys' (2012) 9(12) PLOS Med. 1001.

<sup>117</sup> F.E Okonofua, 'The Code Against New Reproductive Technologies in Developing Countries' (1996) 103 British Journal of Obstetrics and Gynecology 957.

<sup>118</sup> R. J. I. Leke, et al, 'Regional and Geographic Variations Infertility: Effect of Environmental, Cultural and Social-Economic Factors' (1993) 201 (2) Environmental Health Perspective Supplements 73.

<sup>119</sup> Section 36, Matrimonial Causes Act 1970, CAP M7 L.F.N 2004

social, economic and cultural implications, which can take threatening proportion in countries with strong demographic problems. Thus, unlike the post medical science, today there are increased chances of resolving infertility with the Assisted Reproduction Technology.<sup>120</sup> The increase in the prevalence of Infertility cases gave birth to the establishment of ART centers. More than 30years has passed since the publication reporting the first birth of a child after In vitro fertilization (IVF)<sup>121</sup> and other Techniques.

Too many couples who have lost hope, assisted reproductive technology has brought a robust hope to them especially those whose lost chance of having a biological child related to them. Although globally, ART is now a common solution for couples that are not fertile, there is a great lack in the availability of the treatment in Nigeria and other developing countries, and in the developed countries many couples have difficulties of accessing it due to the fact that the cost of the treatment is very high in private agencies while in public sector there is a limited or low services offered.

## **2.6 The Ethics of Assisted Reproduction**

Issues concerning the beginning of life and medical intervention in the onset of human existence are very delicate in their nature, they involve multi-dimensional knowledge, they are difficult to comprehend and sensitive to handle. When pure scientific elements are combined with profound emotions, when the genius of technological discoveries touches upon human dignity and sanctity when passion for the technological achievements intervene in basic human rights, then the sense of inadequacy and ignorance becomes intense and critical.<sup>122</sup>

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<sup>120</sup> R. J. I. Leke, et al, 'Regional and Geographic Variations Infertility: Effect of Environmental, Cultural and Social-Economic Factors' (1993) 201 (2) Environmental Health perspective supplements 73.

<sup>121</sup> E. Vayena, H. B Peterson, et al, 'Assisted Reproductive Technologies in Developing Countries: Are We Caring Yet?' (2009) 92(2) Fertility sterilization 413.

<sup>122</sup> N. Chatzinkolaou, 'The Ethics of Assisted Reproduction' (2010) 85(10) PubMed Journal of Reproductive Immunology 3.

Assisted reproduction raises complicated challenges for the individuals involved, health care professionals and the society. Infertility, today creates new definitions of parents and children and requires a rethinking of conventional notions of family. For families, facing infertility, decisions about family building become complex<sup>123</sup>. The introduction of chloroform in the nineteenth century brought passionate protests.<sup>124</sup> Many considered it unnatural or even a satanic intervention, removing the pain inflicted by God to punish us for our sins. One dilemma associated with embryos not used. For instance, many couples fertilize as many eggs they can during their treatments and freeze the remaining embryos for later use. These were the same concerns that were raised following the creation of Louise Brown in 1978. More so, six years later, the special committee issued a report in which it was thought necessary to address similar arguments. One of the committees that reported on the issue was the Warnock Committee. The report addresses claims that such techniques are not natural and it interferes with God's will, and where donated gametes are used comparable to adultery.<sup>125</sup> Such claims have notorious problems. Medicine exists to defeat the effect of nature like pain, distress, illness and death. There are difficulties determining what God's will and the use of donated gametes lacks most of the features of adultery but does not involve deceiving a partner for the purpose of sexual gratification.

While many ethically arguments continue to be made against particular technologies or particular uses of the technology, few now reject assisted reproduction as such. IVF and assisted reproduction are now generally accepted as means of addressing involuntary childlessness. Involuntary childlessness is the physical inability to fulfill the desires to have a biologically

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<sup>123</sup> 'The Ethics of Assisted reproductive technologies' <[www.ourbodiesourselves.org/health-info/the-ethics-of-art/](http://www.ourbodiesourselves.org/health-info/the-ethics-of-art/)>Accessed 14 June 2020.

<sup>124</sup> D. K Sokol et al, 'Medicine, "Yuk" is not a Useful Guide' (2004) *Journal of Medical Ethics* Blog International Herald Tribune 11.

<sup>125</sup> Mary et al, *The Report of the Warnock Committee of Inquiry into Human Fertilization and Embryology* London.

related child. That physical inability can be caused by one's own reproductive dysfunction for instance low sperm count or blockage of fallopian tube, the reproduction dysfunction of one's partner, or the absence of a partner of the opposite sex. Infertility and sterility are merely examples of the physical inability to reproduce.

The desire to have a biological related child itself might be the product of or at least influenced by social norms. It has been argued that this desire is a social product and infertility is the medicalization of these factors and as such, a medical construct<sup>126</sup>. However, as one commentator puts it, the view that medical infertility is a medical construct and the desire to have a biologically related child is a social product does not deny the consequences of such definitions.<sup>127</sup> Whatever the origin of this desires, it does not follow that its subjects are thereby deprived of the capacity for choice. The empirical evidence suggests that involuntary childlessness can be distressing as grief, emotionally crippling it's victims with feelings of inadequacy, loss and confusion.<sup>128</sup> It does not suggest that involuntary childlessness is a compulsive or psychotic disorder removing free will and the capacity for decision making.

Assisted reproduction can be used to overcome physical inability but it rarely permanently removes that inability. Even when successful, assisted reproduction usually only sidesteps that inability in one particular instance. Many are not even this lucky, as success rates remain low. There is however evidence that even where IVF is unsuccessful, it can reduce the surgery of the involuntary childlessness by leading to acceptance of the condition.<sup>129</sup>

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<sup>126</sup> R. Klein, 'Resistance from the exploitation of Infertility to an exploration of Infertility' in Renate D. Klein (ed) *Infertility, Women Speak Out About Experience of Reproduction Medicine* (London, Pandora Press)246

<sup>127</sup> S L Roach Arikku, 'The Legal Regulation of Medical Science' (2001) 23(4) *Law and Policy* 72.

<sup>128</sup> B.E Menning and Barbara Eck 'The emotional needs of infertile couples' (1980) 34C4) *Fertility and Sterility* 313.

<sup>129</sup> J. Boivin et al, 'Reactions of Infertility Based on the Effect of Treatment Failure' (1995) 63(4) *Fertility and Sterility* 805.

Assisted Reproduction Techniques are not restricted to use by those suffering from a physical inability to have a biologically related child they can be used for reasons of convenience or to achieve goals that are not connected to any Infertility.

Assisted Reproduction therefore raised questions far beyond the interest of potential parents to find a family; it raises questions about the weight of the desire to create a particular type of family in a particular way.<sup>130</sup>

## **2.7 Effect of Assisted Reproduction Mechanism.**

Multiple gestations is a major effect with ART and risky for both the woman and the unborn human.<sup>131</sup> Risks to the mother include hypertensive disorder, pre-eclampsia thromboembolism, urinary tract infection, anemia and vaginal-uterine hemorrhage (placental abruption, placenta previa) and fluid overload in association with parental tocolysis.<sup>132</sup> Risk of stillbirth and early postnatal deaths is on the increased. Obstetrics, neonatal and long term consequences of multiple gestations for the health of ART children are enormous, resulting mostly from premature birth and low birth weight.<sup>133</sup> Cerebral palsy is one of the most significant neurological impairments associated with multiple births and increase in line with the number of f unborn humans.<sup>134</sup> The risk of developing cerebral palsy is nearly doubled and the risk of developing epilepsy is also higher.

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<sup>130</sup> S.D Pattison, *Medical Law and Ethics* (2nd Ed, Sweet and Maxwell 2009) 266.

<sup>131</sup> E V Adashi, N Barri, R Berkowitz et al, 'Infertility Therapy -Associated Multiple Pregnancies (Birth) on Ongoing Epidemia Report on The Meeting' (2003)7 RBM 515-542

<sup>132</sup> Ibid.

<sup>133</sup> E V Adashi, N Barri, R Berkowitz et al, 'Infertility Therapy -Associated Multiple Pregnancies (Birth) on Ongoing Epidemia Report on The Meeting' (2003)7 RBM 515-542

<sup>134</sup> Ibid.

Children born after ICSI have a small increased risk of both inherent and de-novo chromosomal abnormalities.<sup>135</sup> The risk of congenital malformations among children born after ICSI is similar to that of IVF children.

Even though the association of IVF with longer term, clinical events has not been fully resolved, the causes of infertility, the in-vitro techniques, the controlled ovarian stimulation, culture media and possibly additional freezing seem to play a role. These increased effects are multifactorial and related both Assisted Reproductive Technology and Underlying Infertility.

## **2.8 Conclusion**

Human beings are the most progeny through reproduction. But several deformities are existing in the morphology and physiology of human reproductive system. In order to correct those deformities assisted reproductive technology came in to picture and it is a born to human beings to become parents for those who are childless. Thus the medical procedures like In vitro fertilization, intra uterine insemination, intra cytoplasmic sperm injection etc. are very much helpful in conceiving children in human beings.

## **CHAPTER THREE**

### **LEGAL IMPLICATIONS OF ASSISTED REPRODUCTIVE MECHANISM**

#### **3.0 Introduction**

In the past, couples unable to conceive were expected to turn to adoption to achieve their parenthood dreams. Nowadays there are many options for infertile couples, as well as singles and

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<sup>135</sup> M Hanson and C Bowen, 'The Impact of Assisted Reproductive Technologies on Intra- Uterine Growth Aid Birth Defects in Singletons' (2014) 19 Semi Fetal Neonatal Med 228.

homosexuals who want children. The urge of parenthood leads them to seek alternative solutions including Assisted Reproductive Technology (ART), *In Vitro* Fertilization (IVF) and surrogacy. Today, there is increasingly need to legally accommodate families formed through ART, and, in doing so, recognizes parents on not only biological but also social grounds this is because those who form families through assisted reproductive technologies (ART) frequently establish parental relationships in the absence of gestational or genetic connections to their children. In seeking legal parental recognition, they do not deny the importance of biological ties, but simply urge courts and legislatures to credit social contributions as well.<sup>136</sup>

This chapter examines the legal aspects of parenthood and how it is, or could be, determined in Nigeria given the wide popularity and uptake of assisted reproductive technology (ART) and establish whether the existing national laws can sufficiently protect the interests of the child who is born, with an emphasis on the determination of the status of the parents.

### **3.1 Legitimacy**

A child is legitimate if born in a lawful wedlock. Lawful wedlock in Nigeria refers, not only to statutory marriage, but includes customary and Islamic marriages<sup>137</sup>. To be legitimate at birth, the parents of the child must be lawfully married either at the time when he/she was conceived or born. The marital presumption, or presumption of legitimacy, recognized the mother's husband as the child's legal father.<sup>138</sup> At English common law, overcoming the presumption required showing that "the husband be out of the kingdom of England ... for above nine months, so that no access to his wife can be presumed."<sup>139</sup>

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<sup>136</sup> Douglas Nejaime, 'The Nature of Parenthood' (2017) 126 Yale Law Journal 2260.

<sup>137</sup> I.E. sagay, *Nigeria Law of Succession Principles, Cases Statutes and commentaries*, (1<sup>st</sup> ed, 2006, Malthouse Press Limited) at 3.

<sup>138</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1765) 258

<sup>139</sup> *Ibid* at 259

This Common law principle is contained in Section 165 of the Nigeria Evidence Act 2011, this section provides *inter alia* that:

... Where a person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after dissolution of the marriage, the mother remaining unmarried, the court shall presume that the person in question is the legitimate child of that man.<sup>140</sup>

The underlying principle of the presumption of legitimacy is that it is most undesirable to enquire into the paternity of a child where the parents have access to each other. Indeed, neither the husband nor wife were permitted to testify to the husband's non access, meaning that the couple themselves could not penetrate the presumption with inconsistent biological facts.<sup>141</sup>

However, where the wife alleges that the man is impotent and thus cannot be the father of the child, such allegation or assertion must be proved to the reasonable satisfaction of the court.<sup>142</sup>

Also in *Francis v Francis*<sup>143</sup> it was held that the presumption of legitimacy is not displaced where a woman committed adultery and subsequently had sexual intercourse with her husband.

By allowing the marital presumption to hide situations in which the husband was not in fact the biological father, the law ensured the child's legitimacy.<sup>144</sup>

Customarily, an illegitimate child, has no recognized legal relations with his or her parents, particularly not those of inheritance.<sup>145</sup> Also at common law, a child born outside a marital

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<sup>140</sup> Section 165 of the Evidence Act 2011, Cap E14, Laws of Federation of Nigeria, 2004.

<sup>141</sup> *Goodright v Moss* (1777) 98 Eng. Rep. 1257,

<sup>142</sup> *Oduche v Oduche* (2006) 5 NWLR [pt. 972] 102

<sup>143</sup> (1959) 3 All ER 206

<sup>144</sup> Douglas Nejaime, 'The Nature of Parenthood' (2017) 126 Yale Law Journal 2260

<sup>145</sup> A.A. Kolajo, *Customary Law in Nigeria Through the Cases* (Ibadan, Spectrum Books Limited, 2000)

relationship was deemed the child and heir of no one (*filius nullius*).<sup>146</sup> He has no legal right to succeed to his parents' property, to receive maintenance<sup>147</sup> "or other benefits deriving from the status of parent and child."<sup>148</sup> Also, an illegitimate child has no right to participate in the intestacies of either of his parents. Likewise, neither of his parent had a right to success on the intestacy of the illegitimate child. He also had no right to take on the intestacy of a grandparent or brother or sister (whether legitimate or not) and vice versa<sup>149</sup>

For the child to be legitimate, the father still has to acknowledge the paternity of the child or marry the mother in order to change their status to that of a legitimate child.<sup>150</sup> Once this is done, the child is entitled to succession right and is free to intermingle with the other children of the putative father.<sup>151</sup>

In Nigeria, prior to the enactment of Section 39(2) of the 1979 Constitution now Section 42(2) of the 1999 Constitution, any child born of a void statutory marriage was illegitimate<sup>152</sup>. By virtue of section 42(2) of the 1999 constitution the fact that a child was born out of wedlock is totally irrelevant and cannot thus militate against the child inheriting the estate of his father<sup>153</sup>. If the parent contracted a customary marriage before the statutory marriage, the child will be legitimated as a result of the subsisting customary law marriage between his parents. This is one of the effects of "double-deck" marriages in Nigeria.<sup>154</sup> On the other hand, if the child is born

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<sup>146</sup> *Galloway v Galloway* (1965) A.C. 229, 311 per Viscount Simonds (dissenting); *Kent v. Barker*, 68 Mass. (2 Gray) 535, 536 (1854) "It is well settled ... that at common law the words 'child' and 'children' mean only legitimate child and children".

<sup>147</sup> I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1sted, 2006, Malthouse Press Limited) at 73

<sup>148</sup> Cretney, *Principles of Family law* (4th. Ed, London; Sweet & Maxwell 1984) at 594.

<sup>149</sup> Cretney, *Principles of Family law* (4th. Ed, London; Sweet & Maxwell 1984) at 604

<sup>150</sup> A.A. Kolajo, *Customary Law in Nigeria Through the Cases* (Ibadan, Spectrum Books Limited, 2000) 248

<sup>151</sup> *Alake v Pratt* (1955) 15 WACA 20.

<sup>152</sup> *Ukeje v Ukeje* (2014) 11 NWLR 384

<sup>153</sup> *Anode v Mmeka* (2008) 10 NWLR (Pt.1094) 1.

<sup>154</sup> Kasumu & Salacus, *Nigerian Family law* ( London; Butterworth, ,1966) at 165, see also I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1<sup>st</sup> ed, 2006, Malthouse Press Limited) at 73

during the subsistence of a voidable statutory marriage, the child will be regarded as legitimate, and he maintains his legitimate status after the marriage has been annulled.<sup>155</sup>

ART usually introduces a third part, the question then arises as to what the status of a child born through ART is, since it is against the generally accepted definition of legality and it de-emphasizes lawful wedlock. It also raises the question of what the status of a child born to an unmarried woman through ART is, and whether such a child can ever be legitimized.

As explained above, children are classified as legitimate when either conceived or born during the subsistence of marriage. For legal purposes, paternity is a question based on the generic factor. Use of the husband's sperm for inseminating the wife's either *in vitro* or in uterus does not pose any problem to the question of paternity of the offspring. However, the use of donated sperm in Artificial Insemination Donor (AID) inevitably creates conflict with the social reality and genetic truth. While it is true that the father is not biologically related to the child, so long as he intended and consented to the ART the child can be presumed to be his legitimate child as this amounts to acknowledgment by the man. In the California case of *Buzzanca v Buzzanca*,<sup>156</sup> Luanne and John Buzzanca, used IVF with donor eggs and donor sperm. The embryos were subsequently implanted in a genetically unrelated woman - the gestational mother for gestation and birth. The Buzzancas intended to rear the resulting child as their own. Before the child, Jaycee, was born the couple separated and John wanted to have nothing to do with the child. At a trial held to determine the legal parents of Jaycee, the identity of the genetic parents remained secret, and the gestational mother disclaimed any interest in the child. Because neither John nor Luanne was genetically or biologically related to Jaycee, the judge concluded that Jaycee was

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<sup>155</sup> See generally provisions of section 38 of the Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004.

<sup>156</sup> 61 Cal. App. 4 1410 (1998),

parentless.<sup>157</sup> On appeal, the decision was reversed. The Court of Appeal reasoned that under California law, a husband who consents to his wife's artificial insemination becomes the legal father of the child, "a husband and wife" should be deemed to be the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf; since in each instance a child is procreated because a medical procedure was initiated and consented to by intended parents. They did not like the idea of people who are responsible for the creation of a child turning around and disclaiming any responsibility after the child is born. The appeal court nonetheless concluded that it would be preferable for the legislature to set the rules in this arena; "we still believe it is the legislature... which is the more desirable forum for law making".<sup>158</sup>

Also coming under the provisions of section 42 of the Constitution of the Federal Republic of Nigeria 1999, which provided that nobody shall be discriminated merely by reasons of circumstances of his/her birth, it is to some extent reasonable to assert that so long as the parents acknowledged the child to be theirs, the child is legitimate.

If the couple are married under customary law, it is possible for the child to be the legitimate considering the fact that some customary law allows surrogacy. In *Meribe v Egwu*,<sup>159</sup> the Supreme Court was called upon to pronounce on the validity of a woman to woman marriage similar to the one described above. In that case, the land in dispute belonged to one Nwanyiakoli, who died in 1937 without leaving a child behind. She was one of the wives of Chief Egwu, who had pre-deceased her in 1935. The plaintiff, who contended that the land devolved on him under customary law, claimed that because Nwanyiakoli was barren, she married one Nwanyiocha (the plaintiff's mother) for her husband as a wife. The trial court resolved the case in favour of the

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<sup>157</sup> See, George J. Annas, 'The Shadowlands - secrets, lies and Assisted Reproduction' (1998) 24 (9) *New EngJ Med* 938 noting at 935 that the conclusion that a child with six potential parents assuming the gestational mother was married was legally parentless - was untenable.

<sup>158</sup> *Ibid*

<sup>159</sup> (1976) 1 ALL NIR (Pt. 1) 266, (1976) 6 ECLSR 342.

plaintiff. On appeal, the Supreme Court dismissed the appeal and agreed unanimously on the validity of woman to woman marriage. Notwithstanding the supreme court decision deliver some decades ago, The biblical account of Abraham and Sarah leading to the birth of Ishmael is the first recorded account of traditional surrogacy in the Holy Bible<sup>160</sup>, In that arrangement Sarah who was barren gave Hagar her maid to her husband to get her pregnant so she could bear a child for her. By that arrangement the child so produced was to be that of Sarah. The account of Jacob and his wives Rachael and Leah who gave their maids to be impregnated by their husband to bear children for them is another recorded account of traditional surrogate motherhood in the Holy Bible<sup>161</sup>. The practice therefore is not new and has received wide acceptance in many traditions and cultures all over the world.<sup>162</sup> The Igbo culture even to the present times accepts surrogacy as a legal means of child acquisition<sup>163</sup>.

In conclusion, the research reasonably submits that for the individuals concerned to have “carefully and intentionally orchestrated the procreation act, bringing together all the necessary components with the intention of creating a unique individual whom they intend to raise as their own”<sup>164</sup>, they should be regarded as parents and the child resulting from such act as their legitimate child.

### **3.2 Succession**

Succession is the process of transmitting the rights and duties of a deceased person pertaining to his estate, office and dignity to persons who succeed him, such as his heirs, children, spouse or

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<sup>160</sup> Gen. 16:1-2 Holy Bible, King James Version. Oxford: Oxford University Press.

<sup>161</sup> Gen. 30:1-32 Holy Bible, King James Version. Oxford: Oxford University Press.

<sup>162</sup> O.I. Kenneth, ‘An Ethical Evaluation of Traditional Surrogacy in Igbo Culture; South East Nigeris’ *Sapientia Global Journal of Arts, Humanities and Development Studies (SGOJAHDS)*, ; ISSN: 2695-2319 (Print); ISSN: 2695-2327 (Online)Culture, South East Nigeria’ (2020) 3 at 14.

<sup>163</sup> *Ibid* at 14

<sup>164</sup> J.L. Hill, ‘What does it mean to be a “parent”? The claims of biology as the basis for parental rights’ (1991) 66(2) *N Y Univ Law Rev* 353.

relatives, in a manner sanctioned by the law.<sup>165</sup> It deals primarily with the distribution of a deceased person's estate to his/her heirs.<sup>166</sup>

Succession is of two type, testate or intestate. The rules governing testate and intestate succession differ and both circumstances may give rise to problems for children born via ART.

The practice of ART especially *in vitro* fertilization raises the question as to whether children who were fertilized by another man's sperm are entitled to inherit from the estate of their *pater* (social father), rather than their *genitor* (biological father), especially in cases where the putative father died intestate.

### 3.2.1 Testate Succession

In Nigeria, there is no uniformity of applicable laws relating to wills. Consequently, among the states that were created out of the former western region,<sup>167</sup> the applicable law is the Wills Law.<sup>168</sup> By virtue of the provisions of the Applicable Laws Edict of 1972,<sup>169</sup> Lagos State adopted the Western Nigerian Law. On the other hand, the rest of the country<sup>170</sup> consisting of the states from the Northern and the Eastern part, still applies the English Wills Act 1837 and the Wills Amendment Act 1852 by virtue of the Statute of general application in Nigeria.

A critical analysis of the provisions of the Wills Law shows that the legislation basically re-enacted the provisions of the Wills Act 1837 and the Wills Amendment Act 1852 together with the provisions of the Wills (Soldiers and Sailors) Act 1918, but with inclusion of some provisions that took into consideration the prevailing customary laws principles that regulate

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<sup>165</sup> Titus Adekunle, 'Succession and inheritance law in Nigeria: Resolving the discriminatory proprietary rights of widows and children' (2016) 1 Prop L Rev 1

<sup>166</sup> Akintola S.O, Egbokhare O.O, 'Parenthood: Is the law in Nigeria fit for Assisted Reproductive Technology?' (2018) 3(2) Indian J Med Ethics 107

<sup>167</sup> Oyo, Ondo, Ogun, Osun, Ekiti, Edo and Delta States.

<sup>168</sup> Cap. 133, Laws of Western Nigeria 1959, this have been reenacted by the various states to be their personal laws, Legitimacy Act, Cap 88, Laws of Bendel State applicable in Edo State,1976.

<sup>169</sup> No 11 of 1972.

<sup>170</sup> With the exceptions of some few states that have enacted their own Wills Laws in line with the Laws of Western Nigeria, 1959 or the Wills Act 1837.

succession under customary law in the affected states. For example, Section 3 (1) of the Wills Law provides that real and personal estate, which cannot be affected by testamentary disposition under customary law, cannot be disposed of by will thereby subjecting the testamentary freedom of the testator to customary law.<sup>171</sup>

Under testacy, the issue of the inheritance right of the ART child is not in so much contention since the testator has testamentary freedom to devise his property to those he wishes to be beneficiaries under his will. It is the will that determines the all benefit accruing to anyone.

### **3.2.2 Intestate Succession**

Intestacy occurs where a person dies without effectively disposing of his property by will. Intestacy<sup>172</sup> may be total or partial.<sup>173</sup> In Nigeria intestate succession is of two types: Non – customary and succession under customary law.

There are basically three systems of law governing intestate succession in Nigeria. These are:

- i. The common law
- ii. The Administration of Estates Laws of various states and
- iii. Customary Law (customary law includes Muslim law).

The factor which determines which system is to apply in every case, is the type of marriage contracted by the intestate person.<sup>174</sup>In the case of Muslims the religion practised by the deceased is also relevant.<sup>175</sup>

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<sup>171</sup> See *Idehen v. Idehen* (1991) 6NWLR (Pt.198) 382 and *Lawal-Osula v. Lawal-Osula* (1995) 9 NWLR. (Pt.419) 259 where the Supreme Court, discussed extensively the legal implication of the provisions of section 3(1) of the Wills Law of Bendel State applicable to Edo State.

<sup>172</sup> Where there is no Will, or the Will was revoke or declared void for some reasons.

<sup>173</sup> Where there is a will but the will did not dispose of all the property.

<sup>174</sup> I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1sted, 2006, Malthouse Press Limited) at 73

<sup>175</sup> Ibid

Where a person contracts a Christian (monogamous) marriage outside Nigeria, the common law of England governs the distribution of his estate.<sup>176</sup> If he contracts a statutory (Act) marriage in Nigeria, then if he dies domiciled in Lagos or any of the states comprising the old Western Region, then the Administration of Estate Law<sup>177</sup> will govern. If thus he contracts a statutory marriage, but dies domiciled in any of the states comprising the former Northern or Eastern Regions, which are yet to enact their own law on non-customary succession, then the common law will also govern the distribution of his estate.<sup>178</sup> Lastly, if the intestate person was an indigenous Nigerian and he did not contract a Christian or Act marriage, or even if he did, and no issue or spouse of such a marriage survived him, his estate will be distributed in accordance with the relevant customary law. If the intestate was a Muslim, then Islamic law would govern.<sup>179</sup>

It is imperative to bear in mind that the above stated position of the law is subject to many qualifications. For instance, in cases involving the distribution of immovable properties of intestate persons, the applicable law is the *lex situs*, in other words, the law of the place where the land is situated. Therefore, the above generalization is only correct with respect to movable. Also, where a person who is subject to customary law or Islamic law dies intestate, it is his personal law that will apply to the distribution of his immovable property and not the *lex situs*.<sup>180</sup>

In addressing the question of inheritance right of an ART child, Section 49 of the Administration of Estates Law (of Lagos state)<sup>181</sup> on succession to real and personal estate in the case of intestacy recognizes the usage is from a marriage as being entitled to the real and

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<sup>176</sup> The common law principle that governs the administration of the estate of persons, who dies intestate while domiciled in Nigeria, but having contracted a Christian Marriage outside Nigeria, is the rule in *Cole v. Cole* (1898) 1NLR 15

<sup>177</sup> Laws of Western Nigeria Cap. 1, 1959.

<sup>178</sup> See *Administrator –General v Egbuna and Others* (1945) 18 NLR 1

<sup>179</sup> I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1<sup>st</sup> ed, 2006, Malthouse Press Limited) at 73.

<sup>180</sup> See *Zaidan v. Zaidan* (1974) 4 UILR 283.

<sup>181</sup> Administration of Estates Law (of Lagos state) 1959.

personal property of the deceased. The definition of a child includes an unborn child.<sup>182</sup> The means of conceiving the child, however, is not stated. So if we agree that the social parents of the ART child are the parents then the child born via ART can inherit.

Under customary law, rules of inheritance follow blood line and it is usually based on the primogeniture rule. However, adopted children are allowed to inherit from their adoptive parents. In *Aduba & Ors v Aduba*<sup>183</sup> The issue in the said case is whether an adopted child can be deprived of inheriting and sharing of the estate of the deceased adopter. The facts of the case are that the Respondent was adopted by the parents of the Appellants in 1975, when the Respondent was only five (5) years old, from the Ministry of Health and Social Welfare. After the death of the Respondent's parents, the Appellants came up with the idea that the Respondent was not a member of Late Aduba Nwaemere family. They excluded him (Respondent) in the share of the estate of their father, Aduba Ohagwam Nwaemere. Hence an action was instituted by the Respondent at the High Court to challenge the Appellants. The High Court resolved that the Respondent was an adopted child of Aduba Ohagwam Nwaemere and his wife Felicia, that the Constitution of the Federal Republic of Nigeria 1999, Section 42(2) thereof, applied, to protect the Respondent's right against discrimination and so he was entitled to share in the landed property and the estate of Aduba Ohagwam Nwaemere as his adopted son. It also granted him customary right of occupancy over the particular land in dispute.

If the adopted child that was not a biological child of the adoptive parents can inherit, a child born via ART should not be discriminated against by virtue of Section 42(2) of the Constitution<sup>184</sup> the child should be allowed to inherit from the Adoptive parents. Also the definition of a "child" in the Nigerian constitution includes:

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<sup>182</sup> Section 17 of the Child Right's Act 2003.

<sup>183</sup> (2018) LPELR-45756 CA.

<sup>184</sup> See Section 10 of the Child's Right Act 2003 for a similar provision.

a step-child, a lawfully adopted child, a child born out of wedlock and any child to whom an individual stands in the place of a parent<sup>185</sup>

It may be argued that since the section recognizes anyone who stands in *loco parentis* to the child, it includes persons who undergo ART or collaborative reproduction. Hence, it is plausible that the Nigerian constitution does not constrain or limit parenthood to biology or genetics, but recognizes the existence of social parents. Therefore, the child can inherit from the social parents.

### **3.3 Citizenship**

Issues such as whether the parent country of the parents recognizes and accepts the citizenship of the ART child are of great importance since the constitution does not expressly accord citizenship to a child born via ART and such matters can leave the child in a no-man's land where citizenship is denied from both countries.

Under the Nigerian Constitution, a child derives his identity from his parents. Section 25(1)(b) of the 1999 Constitution of the Federal Republic of Nigeria, 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.<sup>186</sup>

It is unclear what the constitution meant by “parents” in section 25(1)(b). It is uncertain whether “parents” in this context refers to those whose DNA came together to form the embryo or those who nurtured the child and intended to parent the child after its birth. Besides, in the event that there are three potential parents of a child all of whom are of different nationalities, the question will arise as to who the child will trace his nationality to.

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<sup>185</sup> Fifth Schedule, Section 19.

<sup>186</sup> Section 25(1) (b) of the 1999 Constitution of the Federal Republic of Nigeria.

Various international instruments have been enacted to prevent the issue of statelessness of a child.

Article 15 of the 1948 Universal Declaration of Human Rights declares:

Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

This right is founded on the existence of a genuine and effective link between an individual and a State. The first time this link was acknowledged as the basis of citizenship was in a case decided by the International Court of Justice in 1955, the *Nottebohm Case*.

In that case, the Court stated that:

According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.<sup>187</sup>

The genuine and effective link, made manifest by birth, residency, and/or descent, is now reflected in the provisions of most States' nationality legislation as well as in recent international instruments relating to nationality, such as the 1997 European Convention on Nationality.

Nationality is also defined by the Inter-American Court of Human Rights as "the political and legal bond that links a person to a given State and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that State"<sup>188</sup>

Article 24 of the 1966 International Covenant on Civil and Political Rights states that:

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<sup>187</sup> [1955] ICJ 1.

<sup>188</sup> *Castillo-Petruzzi et al v. Peru, Judgment of May 1999, IACHR [ser.C] No. 52 1999*

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth the right to such measures of protection as are required by his status as a minor, on the part of his family, society and State.

Every child shall be registered immediately after birth and shall have a name.

Every child has the right to acquire a nationality.

Article 7 of the 1989 Convention on the Rights of the Child, which has been ratified by almost every State, states that:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for...

Article 6 of the 1999 African Charter on the Rights and Welfare of the Child asserts that:

- Every child shall have the right from his birth to a name;
- Every child shall be registered immediately after birth;
- Every child has the right to acquire a nationality;
- States Parties to the Charter shall undertake to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory in which he was born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

The right to nationality is a right that is jealously guarded by international statutes, therefore, States like Nigeria must take into consideration the international repercussions of their domestic

nationality legislation, particularly if the application of that legislation may result in statelessness.<sup>189</sup> For children born via ART they should be granted nationality by virtue of birth and nothing more and if we will also agree that the ART parents are the child's social parents there is therefore a link between the child and his or her social parents' nationality.

### 3.4 The Status of the Embryo

Etymologically, the term *embryo* comes from the Greek noun *émbryon*, which means *ingrow*. According to the *Stedman's Medical Dictionary*<sup>190</sup>, the embryo is an organism in the early stages of development, from conception until the end of the eighth week.

It is common practice during *in vitro* fertilization to remove and fertilize more embryos than needed so as to improve the chances of the woman at getting pregnant. However, not all the embryos are returned into the woman's womb and this has been taken up by the pro-life advocates. Their argument is that the fertilized embryo represents life, and that if such an embryo will not be replaced into the mother's womb, then they should not be taken out at all as that would amount to terminating the life of a child.<sup>191</sup>

In the American case of *Davis v Davis*,<sup>192</sup> which involved a custody battle over frozen embryos, the Tennessee Supreme Court was concerned with the question of whether embryos should be categorized as "persons" or "property" or as having an interim *sui generis* legal status. The court concluded that embryos are not, strictly speaking, either "persons" or "property" but occupy an

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<sup>189</sup> "Despite the fact that it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area and that the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction." Inter-American Court on Human Rights, Advisory Opinion, on "*Amendments to the Naturalization Provision of the Constitution of Costa Rica*" paragraphs 32-34.

<sup>190</sup> *Stedman's Medical Dictionary for the Health Professions and Nursing* (7th edition, Wolters Kluwer Health, Lippincott Williams & Wilkins, Philadelphia, 2012) 541.

<sup>191</sup> With respect to this line of argumentation see in general C. Starck, *The Human Embryo is a Person and not an Object*, Vöneky/Wolfrum (eds.), *Human Dignity and Human Cloning*, (2004) 62; Niels Petersen, 'The Legal Status of the Human Embryo *in vitro*: General Human Rights Instruments' (2005) 65 *ZaöRV* 447.

<sup>192</sup> (1992) 842 SW 2d 588

interim category that entitles them to special respect because of their potential for human life. Similarly, in the English case *Evans v Amicus Healthcare Ltd*,<sup>193</sup> the English Court of Appeal rejected the notion that the embryo was a legal person for the purposes of Article 2 of the European Convention on Human Rights.

.Section 33 of the Constitution of the Federal Republic of Nigeria 1999 regulates the Right to life of every person, however, this right cannot be extended to protect the embryo because from all indications an Embryo is not a human being. Another reason the embryo cannot have a legal status, is because it has not regulated the problem of its nature. In other words, the legislator does not know what a human embryo is and which its nature is. This is the reason for which the human embryo does not belong to a judicial category.<sup>194</sup>

### **3.5 Reproductive Tourism**

Globalized trade, travel and communication are now part of the context of human life. With globalization comes reproductive tourism, as individuals are free to travel abroad for treatments not offered, or perhaps not even legal, in their country of origin.<sup>195</sup> Reproductive tourism refers to the travelling of citizens from their country of residence to another country in order to receive fertility treatment through assisted reproductive technology (ART).<sup>196</sup> It has also been described as practice of citizens leaving their home country for another in hopes of receiving treatment that has been banned in their home country, typically for safety or moral reasons.<sup>197</sup>

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<sup>193</sup> (2004) EWCA Civ 727, CA

<sup>194</sup> Maria Aluaş, Claudia Diana Gherman and Cristiana Iulia Dumitrescu, 'Is the human embryo legally defined and protected? Causes and consequences' (2017) 58 (2) Romanian Journal of Morphology and Embryology 695.

<sup>195</sup> <[www.lajollaiivf.com/what-is-reproductive-tourism/](http://www.lajollaiivf.com/what-is-reproductive-tourism/)> [Accessed 10 October 2020](#).

<sup>196</sup> Ferraretti Anna Pia, Pennings Guido, Gianaroli Luca, Natali Francesca and Magli M Cristina, 'Cross-border reproductive care: a phenomenon expressing the controversial aspects of reproductive technologies' (2010) 20 Reproductive Biomedicine Online 261.

<sup>197</sup> Guido Pennings, 'Legal Harmonization and Reproductive Tourism in Europe' (2004) 19 (12) Human Reproduction 2689, 2690.

Reproductive tourism occurs for a variety of reasons. People may have to seek out cell donations and in vitro treatment elsewhere because these treatments are unavailable, due to general lack of medical expertise in cell donation, laws that have banned cell donation because it is adjudged to be unsafe, long waiting lists in the home country, or lower costs abroad.<sup>198</sup>

There have been a number of high profile cases of reproductive tourism involving patients traveling to other countries for treatment. For instance in the case of *R v HFEA Ex. P Blood*<sup>199</sup>, the woman was able to export sperm to be used for fertility treatment in Belgium as she was not able to use it lawfully in the United Kingdom.

### **3.6 Rights of Donor**

Thousands of children have been born from donated gametes or embryo, in the world. Since sperm banks are springing up in Nigeria, and donation of eggs is becoming mainstream, it is expected that soon enough, Nigeria will produce a whole lot of babies from donated gametes. Parents are allowed to choose from a catalog of donors, with information such as their age, height, IQ, and other physical features, but never their names or addresses.

The practice of sperm banking and preservation of eggs by donors raises the question of whether such practices can rightly be classified as baby factories, or if they can be likened to the practice of organ trafficking which is a crime.

It also raises the question as to what rights such donors have to the child or children produced as a result of their donation, especially in cases whereby the children later desire closure and seek out their biological parents.

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<sup>198</sup> Morris Elizabeth Ferrari, 'Reproductive Tourism and the Role of the European Union' (2008) 8 (2) Chicago Journal of International Law 701.

<sup>199</sup> (1999) Fam. 151.

Some objections have a religious or cultural basis.<sup>200</sup> There are also secular objections to gamete donation by both sexes, such as to the practice of paying gamete providers.

Thomas Murray criticizes “insemination by vendor” on the ground that it inserts the values of the marketplace into family life and thereby threatens to undermine it.<sup>201</sup>

The donor under legal circumstance should not be seen to be the parents of the child this due to the fact that donors are usually anonymous and by donating means they have waived their right to the child, so he/she has no right to the child.

### **3.7 Applicability of the Constitution.**

The Nigerian Constitution makes no specific mention of the right of married couples to employ ART as a means of becoming parents. The right to procreate is a “fundamental right” protected by the Constitution.<sup>202</sup> Section 37 of the CFRN 1999 provides for the right to private and family life.

It is worthwhile to mention that the Universal Declaration of Human Rights 1948 provides, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family”.<sup>203</sup> These have been variously interpreted by courts in other jurisdiction to include the right to procreation.

For instance, in the Indian case of *B. K. Parthasarathi v. Government of Andhra Pradesh*,<sup>204</sup> The Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as a facet of his “right to privacy”.

Now, if reproductive right gets constitutional protection, ART which allows an infertile couple to exercise that right should also get the same constitutional protection. Put differently, the right to

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<sup>200</sup> Alaro A. ‘Assisted Reproductive Technology (ART): The Islamic Law Perspective’ In: V. Arda and Rispler-Chaim (eds). *Islam and Bioethics* (B. Ankara University Turkey; 2012) 87

<sup>201</sup> T Murray, *The Worth of a Child* (Berkeley: University of California Press;1996) 95

<sup>202</sup> Section 37 of the CFRN 1999.

<sup>203</sup> Article 16(1) of the Universal Declaration of Human Rights 1948

<sup>204</sup> AIR 2000 AP 156.

procreation embodied within the right to private and family life should not cease merely because a person/couple is unable to achieve procreation via the traditional means. In one of the earliest American cases on procreative liberty *Skinner v Oklahoma*,<sup>205</sup> the United States Supreme Court recognized procreation as a basic and fundamental right. At issue in *Skinner* was the constitutionality of an Oklahoma statute that authorized the state Attorney General to sterilize thieves after their third offence. Holding the State law unconstitutional, the court asserted that procreation is “fundamental to the very existence and survival of the race”

The court further reasoned “strict scrutiny should be applied when considering the constitutionality of a law that infringed upon this fundamental right”.<sup>206</sup>

This right to procreate either as a married couple or as a single individual was further broadened and given a constitutional protection in the latter American case of *Eisenstadt v. Baird*<sup>207</sup> where the court stated inter alia:

If the right of privacy means anything, it is the right of individual married or single to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>208</sup>

In what appears to be an expansion of the frontiers of the accepted methods of pursuing this procreative liberty, the New Jersey Supreme Court in *Re Matter of Baby M*,<sup>209</sup> gave a subtle

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<sup>205</sup> 316 US 535 (1942).

<sup>206</sup> 316 US 542 (1942).

<sup>207</sup> 405 US 438 (1971).

<sup>208</sup> See also, *Casey v. Planned Parenthood*, 505 US (1992) where Justices O. Connor, Kennedy and Souter stated, “our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationship, childbearing and education. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment”.

<sup>209</sup> (1988)537 A 2d 1227.

approval to one of the current reproductive procedures. In that case, while holding the surrogacy contract which resulted in the birth of the baby in the case as void and a violation of the New Jersey public policy; the court slightly broadened its spectrum of procreative liberty as well as Simultaneously providing limits on any further expansion. In defining the nature of procreative liberty, the court explained “the right to procreate very simply is the right to have natural children whether through sexual intercourse or artificial insemination. It is no more than that”<sup>210</sup> This statement very explicitly recognized that an ART should be included within an individual's procreative liberty rights.

In the case of *Lifchez v Hartigan*<sup>211</sup> the federal district court held that the constitutionally protected right to make procreative decisions includes the right of an infertile couple to use certain ARTs. In a well-reasoned statement, the court opined:

It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to medical procedure that may bring about rather than prevent, pregnancy.<sup>212</sup>

The court in defining procreation in *Lifchez v Hartigan*<sup>213</sup> takes into account of diverse means that may bring about a pregnancy just as there exist a cluster of choices that may prevent a pregnancy.

Although these decisions are persuasive on the Nigeria Court, the writer urge the courts to hold same when issues on constitutionality of ART come before them given the fact that the American constitution have almost the same wordings as the Nigeria constitution.

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<sup>210</sup> Ibid at 1253

<sup>211</sup> 735 F Supp 1361 (N.D.III. 1990).

<sup>212</sup> Id. at 137

<sup>213</sup> 735 F Supp 1361 (N.D.III. 1990).

### 3.8 Assisted Reproduction and Legal Parenthood.

A parent is a person who begets or brings forth offspring; especially the natural parents of a child born of their marriage; or a person who legally adopts a child; or a person or entity that owes to a child a legally imposed duty of support; or a step-parent where designated by statute.<sup>214</sup>

Parenthood was understood to be largely a natural relation founded upon biological reproduction, and legal status as a parent followed easily from recognition of that natural fact- or, in the case of adoption, from the formal creation of a substitute relation designed to replicate as closely as possible the biological original.<sup>215</sup>

Biological and social factors have long shaped the law of parental recognition.

The common law tied parenthood to marriage and thus made parentage a legal, rather than biological, determination. Pursuant to the marital presumption (also known as the presumption of legitimacy), when a married woman gave birth to a child, the law recognized her husband as the child's father.<sup>216</sup> Traditionally, motherhood has been defined biologically and the mother is the woman who delivers the child. Motherhood is earned first through pregnancy and childbirth and later through nurturing.<sup>217</sup>

Where there was no pretense of a genetic connection, traditional law provided only one route to parenthood: formal adoption. If parentage was not founded on blood (or the presumption of blood ties arising from marriage or other circumstances), then it must be founded on paper in the form of an adoption decree.<sup>218</sup> Now, even if outside of biology, a path to parenthood is expressly recognized, biological parenthood remains the preferred route to parenthood. In several ways, the

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<sup>214</sup> Merriam-Webster's Dictionary of Law. 2011. Harrisonburg VA.

<sup>215</sup> J. Carbone, 'The Legal Definition of Parenthood; Uncertainty at the Core of Family Identity' (2005) 65 (4) Louisiana Law Review 1295; see also Douglas Nejaime, 'The Nature of Parenthood' (2017) 126 Yale Law Journal 2260.

<sup>216</sup> Douglas Nejaime, 'The Nature of Parenthood' (2017) 126 Yale Law Journal 2260.

<sup>217</sup> J. Carbone, 'The Legal Definition of Parenthood; Uncertainty at the Core of Family Identity' (2005) 65 (4) Louisiana Law Review 1299.

<sup>218</sup> D. Meyer, 'Parenthood in a Time of Transition: Tensions between Legal, Biological and Social Conceptions of Parenthood' (2006) 54 The American Journal of Comparative Law 130.

law often reflected an assumption that adoptive parents were second-best “stand-in” in circumstances where the real, that is, biological parents were simply unavailable.<sup>219</sup>

However, these traditional models and modules have proven themselves to be outdated with the recent enhancements in reproductive technology especially the advent of ART. One of the effects of ART is that it may create a scenario where it would be wrong to assert that the woman who bears a child, is the mother and her husband is the father. This is because in surrogacy agreements- for instance, most times, the surrogate has no ties or connection whatsoever to the resulting child. Thus, ART has especially raised many different needs, one of which is the need to ascertain parenthood.

Nigerian law is unclear in relation to new technologies as to who a parent is. It can be assumed that the Nigerian constitution which is the ground norm is, in section 25(1) (b) talking about traditional parenthood, since that is what was in practice at the time of the enactment of the constitution. However, that is a risky assumption, because it would mean that no provision is made for children conceived of non-natural means; that is, via ART. In view of this provision, a problem, rather than solution may arise if there is any controversy with respect to perhaps the nationality of children born via these new technologies.

Generally, parenthood can be classified under two broad heads; depending on the position of a child in relation to an individual. Nevertheless, the rights and duties which attach to both types of parents are the same regardless of the difference in nomenclature given to the relationship. In the following paragraphs, we will examine the types of parenthood. Broadly speaking, there are at least two distinct notions captured in the term “parenthood”. We may refer to them as social parenthood and biological parenthood.

#### **i. Social Parenthood**

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<sup>219</sup> Ibid.

Social parenthood is easy to grasp on an intuitive level, but it is not very clear what makes a person a social parent. Social parenthood cannot be exhibited merely by performing the actions that constitute taking care of a child. If that were the case, then many nannies and baby sitters would, counter-intuitively, be the social parents of the child they watch over. The general contention is that social parents and their children are bound together in a collection of interlocking norms that reflects the values and expectations of their society.<sup>220</sup> It must be noted that a genetic connection is not an essential requirement for social parenthood as exemplified by adoption. Society expects the parents of adopted children to fulfil the very same obligations toward them that biological parents fulfil. For example, In Nigeria Section 125 of the Child Rights Act, 2003, makes provision for adoptive parents other than natural parents. Section 141 of the same Act, terminates the rights of the “natural” parents to the child, and transfers the same to the adoptive parents.

## **ii. Biological Parenthood**

A biological parent has been defined as the lawful and natural father or mother of a person,<sup>221</sup> or a parent who has conceived (biological mother) or sired (biological father) rather than adopted a child and whose genes are therefore transmitted to the child. Others have defined biological parents as those whose sperm and eggs come together to form the embryo that will eventually develop into a child.<sup>222</sup> Genetic theories ground parenthood in direct derivation, thus placing parenthood in the confines of familial relations.<sup>223</sup>

Nigerian law is silent on issues that are peculiar to children born via ART. Thus, it is unclear how the courts will construct the concept of parenthood in ART in the event of any litigation.

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<sup>220</sup> Akintola S.O, Egbokhare O.O, ‘Parenthood: Is the law in Nigeria fit for assisted reproductive technology?’ (2018) 3(2) Indian J Med Ethics 107.

<sup>221</sup> <<http://legal-dictionary.thefreedictionary.com/biological+parent>> Accessed 12 October 2020.

<sup>222</sup> Akintola S.O, Egbokhare O.O, ‘Parenthood: Is the law in Nigeria fit for assisted reproductive technology?’ (2018) 3(2) Indian J Med Ethics 107.

<sup>223</sup> J.L. Hill, ‘What does it mean to be a “parent”? The claims of biology as the basis for parental rights’ (1991) 66(2) N Y Univ Law Rev 353.

However, given the elaborate definition of a child in the constitution,<sup>224</sup> it may be argued that since the constitution recognizes anyone who stands in *loco parentis* to the child, it includes persons who undergo ART or collaborative reproduction and intended the child to be theirs.<sup>225</sup>

### **3.9 Conclusion**

The status of children of unmarried parents also ultimately placed more emphasis on the obligations and rights of biological fathers, which was consistent with the neoliberal privatization agenda of the 1980s and 90s and the increasing emphasis on both genetic ties and fatherhood in relation to child welfare upon separation or divorce. By contrast, women in lesbian relationships and single mothers directly challenge a child's need for fathers or genetic parents and to some degree, the privatization agenda. Thus, the question of what serves the well-being of children generally is still contested in the context of assisted conception. Finally, while illegitimacy presented a clear violation of formal equality, the resolution of claims arising from assisted conception is complex, and legislative efforts have varied across jurisdictions. Even in the face of the multiple pressures that favored the abolition of illegitimacy, there was a significant delay in legislative reforms in Nigeria.

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<sup>224</sup> The Section 19 of fifth Schedule to the Constitution of the Federal Republic of Nigeria 1999 define a child to include: step-child, a lawfully adopted child, a child born out of wedlock and any child to whom an individual stand in the place of a parent.

<sup>225</sup> See *Buzzanca v Buzzanca* 61 Cal. App. 4 1410 (1998).

## **CHAPTER FOUR**

### **LEGAL AND REGULATORY FRAMEWORK ON ASSISTED REPRODUCTION IN NIGERIA.**

#### **4.0 Introduction**

Assisted reproductive technologies provide a new ability to overcome infertility and to separate the reproductive process from sex. When the use of such procedures is seen as a private decision to seek medical treatment or to decide to raise a family, statutory and constitutional protections may attach<sup>226</sup>. In the Nigeria, assisted reproduction is virtually unregulated. There are also no judicial authorities either ever decided on any legal tussle or contest over any matter in respect of artificial reproduction or any way of achieving it. This is largely because the technology is still new in Nigeria.

#### **4.1 International Standard for the Recognition and Regulation of ART**

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<sup>226</sup> Section 33 of the 1999 constitution.

One of the most hallowed human rights is the right to self-determination or personal autonomy which allows individuals to structure their lives in accordance with their self-chosen values and beliefs. This right is particularly relevant in the consideration of reproductive choices.

Countries all over the world are committed to the protection and promotion of human rights which can be assessed through the ratification of international human rights conventions and Nigeria is a signatory to various international human rights provisions, notably the African Charter on Human and People's Rights(ACHPR);<sup>227</sup> Universal Declaration of Human Rights(UDHR),<sup>228</sup> International Covenant on Economic, Social and Cultural Rights(ICESCR),<sup>229</sup> International Covenant on Civil and Political Rights (ICCPR),<sup>230</sup> UN Convention on the Rights of the Child(CRC),<sup>231</sup> Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW)<sup>232</sup>.

With regard to health rights, Article 16(1) of the African Charter of Human and people's Right provides:

Every individual shall have the right to enjoy the best attainable

state

Of physical and mental health

Article 16 (2) equally provide that:

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<sup>227</sup> African Charters on Human and People's Rights 1987, Nigeria has domesticated it by virtue of section 12 of the 1999 constitution and applicable in Nigeria Court as the African Charter on Human and People's Right (Ratification and Enforcement) Act 1983.

<sup>228</sup> Article 16 of the Universal Declaration of Human Rights 1948.

<sup>229</sup> International Covenant on Economic, Social and Cultural Rights 1966.

<sup>230</sup> International Covenant on Civil and Political Rights 1966 is a multilateral treaty adopted by United Nations General Assembly on 16 December 1966, and in force 23 March 1976 in accordance with Article 49 of the Covenant.

<sup>231</sup> Convention on the Rights of the Child 1990.

<sup>232</sup> Article 12 of the Convention On The Elimination Of All Forms Of Discrimination Against Women

States that are parties to the present charter shall take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The UN Declaration of Human Rights recognizes that; “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and form a family”.<sup>233</sup>

Article 23 of the International Covenant on Civil and Political Rights contain similar provision.

In addition, Article 12 of the Convention on The Elimination of All Forms of Discrimination against Women obliges States to take;

all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a bases of equality of men and women, access to health care services including those related to family planning.<sup>234</sup>

These international instrument, enjoin and require governments to facilitate good health of its citizens. Access to Reproductive Treatment cannot be separated from the state of health of the people since infertility is a disorder of the reproductive system that affects the body’s ability to perform basic function of impregnating and of conceiving children and taking into consideration the definition given to health by the World Health Organization, as a state of physical, mental, and social well-being and not merely the absence of disease or infirmity.<sup>235</sup>

It can be argued that these provisions create a positive right to access assisted reproductive technologies (ART).

#### **4.2 Constitutional Provision on the Recognition of ART.**

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<sup>233</sup> Article 16 of the Universal Declaration Of Human Rights 1948.

<sup>234</sup> Article 12 of the Convention On The Elimination Of All Forms Of Discrimination Against Women.

<sup>235</sup> UN International Conference on Population and Development (Cairo, 1994), Programme of Action, 7.2 (U.N. Doc.A/CONF.171/13/Rev.1).

The constitution<sup>236</sup> is the fons et origo, from which all other laws derive their validity, that is, the source and the origin of all laws in operation in Nigeria.

There are two chapters of the Constitution considered relevant here. These are chapters two and four of the Constitution. In fact, the former has a number of high sounding provisions that can ordinarily be evoked in favor of legal framework in Nigeria for medically assisted reproduction. Some very relevant ones of the provisions will be examined.

Section 17(3)(d), (g) and (h) provide that the state should direct its policy towards ensuring adequate medical care and promote family life.

These provisions offer the strongest basis for the recognition of ART in Nigeria, as it can be said to provide for the right to reasonable access to infertility treatment in the country. While it is understood that these provisions are non-justiciable in court.<sup>237</sup> The importation therefore is that individuals cannot hold the government accountable when they fail to provide medical facilities for treatment of infertility. However, that does not stop the individual from seeking the required treatment personally.

Oputa, JSC, while 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 as void any law

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<sup>236</sup> Constitution of the Federal Republic of Nigeria 1999, as amended

<sup>237</sup> Section 6(6)(c) of the Constitution provides: 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 in conformity with the fundamental objectives and directive Principles of State Policy set out in Chapter II of this Constitution.

which is otherwise valid on the ground that it contravenes any of the directives in the directive principles of the State Policy<sup>238</sup>

It must be noted, that the above provisions cannot be said to be a holistic legal framework on ART or collaborative reproduction in Nigeria as it did not provide for guidance for the regulation of ART however, the provisions are ordinarily direct and wide enough to serve as legal catalyst for infertile couples in Nigeria to seek medical assistance.

The provisions of Chapter IV on fundamental human rights will now be examined. Of all the fundamental human rights contained in the constitution, only rights to private and family life can be considered near the purpose of this examination, as discussed in Chapter three of this research work, it can be implied that the right to private and family life include right to reproduction. In the American case of *Lifchez v Hartigan*<sup>239</sup> the federal district court held that the constitutionally protected right to make procreative decisions includes the right of an infertile couple to use certain ARTs. In a well-reasoned statement, the court opined:

It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to medical procedure that may bring about rather than prevent, pregnancy.<sup>240</sup>

The court's definition of procreation in *Lifchez v Hartigan* takes account of diverse means that may bring about a pregnancy just as there exist a cluster of choices that may prevent a pregnancy. On the status of the Child, The constitution, defines a child to include "a step-child, a lawfully adopted child, a child born out of wedlock and any child to whom any individual stands in place

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<sup>238</sup> Oputa Chukwudifu Akunne, JSC in Okeke Chris (ed.) *Towards Functional Justice* (2007).

<sup>239</sup> 735 F Supp 1361 (N.D.III. 1990).

<sup>240</sup> Id. at 137.

of a parent”.<sup>241</sup> This definition is given under the Interpretation Section of the Code of Conduct provisions of the constitution. A critical look at this definition will reveal that a child could include a person given birth to through ART since the couple who give birth through ART are considered the social parents of the child in this context.<sup>242</sup>

If we agree that children born via ART are children strictly so called, then the provisions of Chapter IV of the constitution on human rights, which 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 can apply to the child.

### **4.3 Child’s Rights Act**

The Child’s Right law<sup>243</sup> only seeks to domesticate the Child’s Right Convention and the African Union (AU) Charter on Rights and Welfare of the Child, The Act begins on the note that the best interest of the child will be of paramount consideration in all actions concerning a child.<sup>244</sup>

The law stresses the need for the protection and care of the child which is necessary for the wellbeing of such child.<sup>245</sup>

The law provides that Chapter IV of the Constitution of the Federal Republic of Nigeria or any other provisions of the constitution relating to fundamental human rights will apply as if those provisions are expressly stated in the law<sup>246</sup>

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<sup>241</sup> Section 19, Part I of the Fifth Schedule.

<sup>242</sup> In *Re Carlton*, (1945) 1 Ch. 372 Cohen J. stated that the meaning of child must in every case depend on the context in which it applies.

<sup>243</sup> Child’s Right law 2007 applicable in Edo state.

<sup>244</sup> Ibid, Section 1. In actions such as dissolution of marriage where child custody has to be determined and also cases that involve children the judge can exclude the public from sitting at the proceedings if he has reason to believe that it will be in the best interest of the child

<sup>245</sup> Ibid, Section 2.

<sup>246</sup> Ibid, Section 3.

The law guarantees the right of children such as their right to survival and development,<sup>247</sup> right of the child to be given a name and registration of birth,<sup>248</sup> freedom of the child to association and peaceful assembly,<sup>249</sup> freedom of thought, conscience and religion subject to guidance by parents and legal guardians.<sup>250</sup> The law also protects the right of the child to freedom from discrimination on grounds of his sex or circumstances of birth.<sup>251</sup>

The law provides for the right of the child to adequate medical care,<sup>252</sup> right of the child to parental care, duty and maintenance,<sup>253</sup> the right of the child to free, compulsory and universal primary education and the duty of the parents to ensure that the child completes junior secondary education and either go further to senior secondary education or learn a vocation or trade.<sup>254</sup>

The act also prohibits marriage by persons under the age of 18 years,<sup>255</sup> it also prohibits child betrothal and marriages. The Act prohibits economic or sexual exploitation of the child.

Every child is entitled to be loved, cared for, maintained and protected by its parents. A child should be surrounded by family members who should provide affection, a proper upbringing and provide the basic necessities of life for the physical, moral and mental growth of the child.

There is also the need to create a warm and comfortable environment for children to freely associate and relate with others, the duty of parents and legal guardians to observe the kind of company kept by a child and protect the child from destructive influences.

Part VII contains provisions affecting the judicial and evidential system operating in this country.<sup>256</sup> It deals with the use of scientific tests in determining the paternity and or maternity of

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<sup>247</sup> Ibid, Section 4.

<sup>248</sup> Ibid, Section 5.

<sup>249</sup> Ibid, Section 6.

<sup>250</sup> Ibid, Section 7.

<sup>251</sup> Ibid, Section 10.

<sup>252</sup> Ibid, Section 13.

<sup>253</sup> Ibid, Section 14.

<sup>254</sup> Ibid, Section 15.

<sup>255</sup> Ibid, Section 21.

<sup>256</sup> Part VII of the Child's Rights Act 2003.

a child. Section 63 of the Act clearly empowers court to require the use of scientific test to determine the paternity of a child.

#### **4.4 Matrimonial Causes Act<sup>257</sup>**

The matrimonial causes in Nigeria was enacted to regulate matrimonial issues, this Act was enacted in 1970.

On the issue of legitimacy of a child of a marriage, Section 69 of the MCA, proffers a definition of who a child of a marriage, that is a legitimate child, is. The section provides thus:

... “children of the marriage” includes-

(a) any child adopted since the marriage by the husband and wife or by either of them with the consent of the other;

(b) any child of the husband and wife born before the marriage, whether legitimated by the marriage or not; and

(c) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife.

This provision gives us a way to identify the child of a marriage, and perhaps the parents of such a child, it does not go a long way in providing how to identify the parents of a child born via ART and collaborative reproduction.

It is worthy of note that the Section recognizes both biological and social parenthood, because according to the section both adopted and biological children can be children of the marriage. Impliedly, we can say that in the case of conflict resulting from the parenthood of a child born via ART, the provision of this section can be called in aid to resolve the dispute because the

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<sup>257</sup> Cap M7, LFN 2004.

section tends to accommodate not just biological children but children who are adopted and who were otherwise illegitimate to either of the part. So where both parties to the marriage decide to give birth through ART any child resulting from such decision should be regarded as both of the parties to the marriage, which is likening to child adoption, however, where one of the party decide to go ahead and have a child via ART, I do not believe that the provisions of this section can be interpreted to address such a situation.

#### 4.5 Customary Law

Customary law is the ancient regulatory rules or norms which are generally accepted by the people subject to it as binding among them. It is a measure of acceptable way of life of the people from time immemorial.<sup>258</sup> Customary Law has been defined differently by scholars and given different interpretation by Judges. According to Obilade, “Customary Law consists of customs accepted by members of a community as binding among them”.<sup>259</sup> Evidence Act<sup>260</sup> defines custom as “a rule which, in a particular district, has from long usage, obtained the force of law”. Oyewo and Olaoba, defined customary law as the “unwritten law or rules which are recognized and applied by the community as governing its transaction and code of behavior in any particular manners”.<sup>261</sup> In the case of *Kharie Zaidan v. Fatimah Khalil Mohsen*<sup>262</sup> the Supreme Court defined customary law as:

A system of law, not being the common law (of England), and not being a law enacted by a competent legislature in Nigeria, but which is enforceable and binding within Nigeria as between parties subject to its sway.

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<sup>258</sup> Usi I. Osemwowa, *The Customary law of The Binis* (Benin city, Fine-Fare Int’l Company, 2000).

<sup>259</sup> A.O. Obilade, *The Nigeria Legal System* (Ibadan, Spectrum Books Ltd, 2009)

<sup>260</sup> Section 258(1) of the Evidence Act 2011.

<sup>261</sup> Oyewo and Olaoba, *A survey of Africa law and custom with particular reference to the Yoruba speaking people (Nigeria)*, Jafor publishers 1999) 94

<sup>262</sup> (1973) All NLR 740 at 753

In Nigeria, customary law may naturally be divided into two classes, namely, ethnic or non-Islamic customary law and Islamic law. Ethnic customary law in Nigeria is indigenous; each system of such customary law applies to members of a particular ethnic group. Islamic law is religious law based on Islam and it is applicable to Muslims.

Islamic law and indigenous customary law have different ways of determining parenthood and inheritance rights of children. There are laid down rules in Islamic law defining parenthood and inheritance rights of children, and there are also practices in customary law which may aid the court in determining the parenthood and inheritance rights of children. As a result, these will be discussed separately.

#### **4.5.1 Indigenous Customary Law**

The system of customary law varies from one ethnic group to the other, Nigeria has over two hundred and fifty (250) ethnic groups and even greater number of customary laws.<sup>263</sup> This means that the customary law in Nigeria veers into as many forms as there are ethnic groups existing in the country. However, there are some ethnic groups whose customary law has become so notorious and pronounced that any major work on that aspect of law cannot avoid touching on them.<sup>264</sup>

In all of these customary law there is none that have specifically addressed the issue of assisted reproduction technology, the fact is not farfetched as these custom are usually the ancient laws of the people long before the advent of colonialism in Nigeria. However, there are some customary practices that can be related to assisted reproduction technology.

Under some indigenous customary laws in Nigeria, certain marriages are contracted which may superficially be described as the union of two women. On the surface, such arrangement may be

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<sup>263</sup> Babatunde Adetunji Oni, 'Discriminatory Property Inheritance Rights Under the Yoruba and Igbo Customary Law in Nigeria: The Need for Reforms' (2014) 19 (2) Journal of Humanities and Social Science 30.

<sup>264</sup> Igbo, Yoruba, Hausas, Benin.

said to contravene the basic precept of marriage as a union between a man and a woman. However, there is more to these cases than meets the eye. The true position in each case is that there is at the background, a man in whose name, or on whose behalf the marriage is contracted. For example, at times, a barren married woman, as a means of safeguarding her position in the family provides her husband with funds for the bride-price in respect of a new wife who is expected to bear children in her place. In that case, the marriage is in fact contracted in the name of the husband and there is no question of one woman being married to another.<sup>265</sup> Where a barren woman, in an effort to fulfill her obligation to bear children for her husband marries another wife for him, children born of that other wife are regarded as the legitimate children of the husband.<sup>266</sup> This is a clear evidence that surrogacy is not a new concept under some indigenous customary laws in Nigeria and has been in practice under the identity of woman-to-woman marriage. According to this custom, where a child is born via a surrogate, customary law would award parenthood of that child to the commissioning parents. In *Meribe v Egwu*,<sup>267</sup> the Supreme Court was called upon to pronounce on the validity of a woman to woman marriage. In that case, the land in dispute belonged to one Nwanyiakoli, who died in 1937 without leaving a child behind. She was one of the wives of Chief Egwu, who had pre-deceased her in 1935. The plaintiff, who contended that the land devolved on him under customary law, claimed that because Nwanyiakoli was barren, she married one Nwanyiocha (the plaintiff's mother) for her husband as a wife. The trial court resolved the case in favour of the plaintiff. On appeal, the Supreme Court dismissed the appeal and agreed unanimously on the validity of woman to woman marriage.

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<sup>265</sup> E.I Nwogugu, *Family Law in Nigeria* (Third Edition 2014) 286.

<sup>266</sup> Ibid.

<sup>267</sup> (1976) 1 ALL NLR 266

Madarikan, J.S.C. (as he then was), who delivered the unanimous opinion of the court, dealt specifically with validity of the alleged woman-to-woman marriage thus:

In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a „woman-to-woman“ marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso of the Evidence Act 218 and ought not to be upheld by the court.

On the status of the particular relationship before it, the court observed that:

We however do not think that on a close examination of the facts of this case, there was a “woman-to-woman” marriage between Nwanyiakoli and Nwanyiocha. The true nature of the arrangement was appreciated by the learned trial judge when he, rightly in our view, made the following observations:

The facts disclosed in evidence did not show that Nwanyiakoli married Nwanyiocha for herself, a fact naturally impossible – but that she ‘married’ in that context is merely colloquial, the proper thing to say being that she procured Nwanyiocha for Chief Egwu to marry her. There was no suggestion in evidence that there was anything immoral in the transaction.

Thus, it is evident that biology has little or no effect on the concept of parenthood as far as some custom is concerned. It follows that in a situation of conflict in ART related proceedings

concerning parties subject to this customary law, the court would lean in favour of the woman who commissioned the creation and delivery of such a child, as opposed to the gestational mother.

There are also instances of a child being regarded as the legitimate child of a man who is not its natural father. If, for instance, a widow remains in her late husband's family without re-marrying and her marriage with her late husband is not formally dissolved, any child she bears posthumously is at birth regarded as the legitimate child of the late husband.<sup>268</sup>

This custom was judicially approved in *Nwaribe v President Oru District Court & Anor*,<sup>269</sup> as not being contrary to natural justice and equity. In that case, the husband of Oyibo died and she continued to live in the matrimonial home, in the family of the deceased. She became pregnant by the applicant, Nwaribe, while still living there, but before delivery she left to stay with her people. Subsequently, she took action in the customary court for a formal divorce. The court held that her marriage to the deceased, Obiora, was not dissolved by death in 1952, and awarded Oyibo's child to the brother of the deceased. Although the applicant did not participate in the customary court proceedings, he challenged the decision of the court as being contrary to natural justice and equity. Egbuna, J. distinguished the case before him from *Edet v Essien*,<sup>270</sup> on the ground that in the case under consideration Oyibo continued to reside in her late husband's house after his death and became pregnant while staying there.

Furthermore, the learned judge urged that the applicant did not appear to contest the issue of the custody of the child in the customary court proceedings. He was aware and admitted in his affidavit that by the custom of his locality the child was that of Oyibo's late husband. Hence he

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<sup>268</sup> E.I Nwogugu, *Family Law in Nigeria* (Third Edition 2014) 286-287.

<sup>269</sup> (1964) 8 ENLR 24

<sup>270</sup> (1932) 11 NLR 47

held that the custom was not contrary to natural justice and equity. It is important to note that this custom is peculiar to the eastern part of Nigeria and has no equivalent in the south.

Under the Yoruba customary law, adopted children are recognized, it is an uncommon phenomenon to adopt children in the West African subcontinent. A close look at the Yoruba, for instance, suggests that scholars such as Johnson,<sup>271</sup> Ogunbowale,<sup>272</sup> Morton-Williams,<sup>273</sup> Hopkins<sup>274</sup> and Fadipe<sup>275</sup> that have carried out studies that tend to establish adoption as a cultural practice among the Yoruba since the early days. Johnson<sup>276</sup> alludes to adoption as one of the practices of the Yoruba in his exposition of their funeral procedure and Morton-Williams<sup>277</sup> mentions the adoption of *ilaris* (palace eunuchs) by “palace mothers” in the old Oyo kingdom. Both Hopkins<sup>278</sup> and Fadipe<sup>279</sup> equally make reference to adoption or assimilation of slaves by their masters and owners after such slaves might have redeemed themselves. From this practice, it can be urged that the Yoruba people accepted both biological and sociological children. The concept of social parenthood is therefore not strange to them. In *Akinwande v Dogbo*<sup>280</sup> took the child of his deceased sister into his household and the child lived there over a long period of time. During this time, X was responsible for the child’s maintenance and upbringing. Thompson J. held that the child was adopted by X’s under customary law.

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<sup>271</sup> S Johnson, *The History of the Yorubas from the Earliest Times to the Beginning of the British Protectorate* (CSS Books Limited, Lagos, 1921).

<sup>272</sup> PO Ogunbowale, *Asa Ibile Yoruba (The Custom of the Yoruba)* (Oxford University Press, Ibadan, Nigeria, 1966).

<sup>273</sup> P Morton-Williams, “The Yoruba Kingdom of Oyo” in D Forde and PM Kaberry (eds), *West African Kingdoms in the Nineteenth Century* (Oxford University Press, Oxford, 1969).

<sup>274</sup> AG Hopkins, “A Report on the Yoruba, 1910” (1969) 5(1) *Journal of the Historical Society of Nigeria* 67.

<sup>275</sup> NA Fadipe (FO Okediji and OO Okediji (eds)), *The Sociology of the Yoruba* (Ibadan University Press, Ibadan, Nigeria, 1970).

<sup>276</sup> S Johnson, *The History of the Yorubas from the Earliest Times to the Beginning of the British Protectorate* (CSS Books Limited, Lagos, 1921).

<sup>277</sup> P Morton-Williams, “The Yoruba Kingdom of Oyo” in D Forde and PM Kaberry (eds), *West African Kingdoms in the Nineteenth Century* (Oxford University Press, Oxford, 1969).

<sup>278</sup> A G Hopkins, “A Report on the Yoruba, 1910” (1969) 5(1) *Journal of the Historical Society of Nigeria* 67.

<sup>279</sup> N A Fadipe (FO Okediji and OO Okediji (eds)), *The Sociology of the Yoruba* (Ibadan University Press, Ibadan, Nigeria, 1970).

<sup>280</sup> Suit AB/26/68(unreported)High court ,Abeokuta.14 July 1969.See E.I Nwogugu, *Family Law in Nigeria* (Third Edition 2014) 344.

In *Aduba & Ors v Aduba*<sup>281</sup> The issue in the said case is whether an adopted child can be deprived of inheriting and sharing of the estate of the deceased adopter. The facts of the case are that the Respondent was adopted by the parents of the Appellants in 1975, when the Respondent was only five (5) years old, from the Ministry of Health and Social Welfare. After the death of the Respondent's parents, the Appellants came up with the idea that the Respondent was not a member of Late Aduba Nwaemere family. They excluded him (Respondent) in the share of the estate of their father, Aduba Ohagwam Nwaemere. Hence an action was instituted by the Respondent at the High Court to challenge the Appellants. The High Court resolved that the Respondent was an adopted child of Aduba Ohagwam Nwaemere and his wife Felicia, that the Constitution of the Federal Republic of Nigeria 1999, Section 42(2) thereof, applied, to protect the Respondent's right against discrimination and so he was entitled to share in the landed property and the estate of Aduba Ohagwam Nwaemere as his adopted son. It also granted him customary right of occupancy over the particular land in dispute.

#### **4.5.2 Islamic Law**

The Hausa community occupying the northern part of the Niger-Benue confluence had originally been converted to Islam around 1804 when Shehu Usman Dan Fodio launched his *jihad* against what he believed to be the corrupt and irreligious practices of the Habe or Hausa rulers.<sup>282</sup> Islamic law has different schools, with the applicable one in the North being the Maliki School of Islam. This school regulates the affairs of Muslims even on inheritance.<sup>283</sup>

The Islamic law's position on ART is informed by its perception of the cause of the usage itself. Thus, if the cause for using any assisted reproductive technique is to cure the couple's infertility,

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<sup>281</sup> (2018) LPELR-45756 CA.

<sup>282</sup> S. J. Hogben and A.H.M. Kirkgreen, *The Emirate of Northern Nigeria, A Preliminary of Their Historical Traditions* (Oxford University Press, London, 1966) xvii.

<sup>283</sup> Titus Adekunle, 'Succession and inheritance law in Nigeria: Resolving the discriminatory proprietary rights of widows and children' (2016) 1 Prop L Rev 1.

the act is utterly permissible, provided that no other law of Islam is contravened in so doing. The Noble Qur'an attests to the curability of infertility when it states:

And (remember) Zakariya, when he cried to his Lord: "O my Lord! leave me not without offspring, though You are the best of inheritors. So We answered his call, and We granted him Yahya (his son). We cured his wife's (infertility) for him."<sup>284</sup>

Furthermore, Muslims are allowed and even encouraged to seek lawful cure of any form of illness or disorder they may have. The hadith narrated on the authority of Usamah bin Shuraik succinctly put it as follows, "The Prophet (*salla Allah alai wa sallam*) said, "Seek remedy (of your illnesses), for Allah has never created an illness unless He has also created a cure for it, save the (illness of) old age".<sup>285</sup> With the exception of surrogacy, all other known Assisted Reproductive Techniques are, in principle, in keeping with the Shariah norms; as they all constitute one form of medical intervention or another, to cure a barren woman of her infertility. The early quoted hadith of Usamah bin Shuraik clearly establishes that For every illness there is a cure, and taking advantage of such a cure, which is not in itself forbidden, is in total keeping with the law of Islam. Based on this premise, Artificial Insemination (AI) and *In-Vitro* Fertilization (IVF) as remedies to infertility are adjudged by Muslim jurists as permissible, provided these are not predicated on frivolous medical reasons, and are devoid of any introduction of a third party donor.<sup>286</sup>

However, as indicated by Marcia C. Inhorn,<sup>287</sup> non-binding but authoritative Islamic religious proclamations (*fatwas*) have profoundly affected the practice of IVF in ways that are not

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<sup>284</sup> Qur'an 21: 89-90.

<sup>285</sup> An authentic hadith narrated by Tirmidhi vol. iv p. 383; Abu Dawud vol. ii p. 396; and Ibn Mājah vol. ii p. 1137.

<sup>286</sup> Jeddah, (1987) 3 (1) Journal of International Islamic Fiqh Academy 515-516; Jayzani, Muhammad, *Fiqh al-Nawazil*, (Dammam, Ibn al-Jawzi Publishers, 2005,) 85-87

<sup>287</sup> Marcia C. Inhorn, *Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi'a Islam*, (2006) 30 Journal of Culture, Medicine and Psychiatry 427-450. Available online at: <<http://www.marciainhorn.com/olwp/wp-content/uploads/Globalization-and-Gametes1.pdf>> accessed 14 January 2021.

commonly seen in the West. Indeed, in the Muslim world, infertile couples are usually extremely concerned about making their test-tube babies in the religiously correct fashion. To that end, they seek out the “official” Islamic opinion on the practice of IVF in the form of a *fatwa*.

In recent years, many such *fatwas* on a wide variety of reproductive health issues have been issued in Egypt and other Muslim countries.<sup>288</sup> Thus, the major divergences that have occurred between Sunni and Shi’ite religious authorities regarding the permissibility of ART may be summed up as follows. The main points of the Sunni Islamic position on medically assisted conception, is as follows:

1. Artificial insemination with the husband’s semen is allowed, and the resulting child is the legal offspring of the couple.
2. In vitro fertilization of an egg from the wife with the sperm of her husband followed by the transfer of the fertilized embryo(s) back to the uterus of the wife is allowed, provided that the procedure is indicated for a medical reason and is carried out by an expert physician.
3. No third party should intrude into the marital functions of sex and procreation, because marriage is a contract between the wife and husband during the span of their marriage. This means that a third party donor is not allowed, whether he or she is providing sperm, eggs, embryos, or a uterus. The use of a third party is tantamount to *zina*, or adultery.
4. Adoption of a donor child from an illegitimate form of medically assisted conception is not allowed. The child who results from a forbidden method belongs to the mother who delivered him/her. He or she is considered to be a *laqit*, or an illegitimate child.
5. If the marriage contract has come to an end because of divorce or death of the husband, medically assisted conception cannot be performed on the ex-wife even if the sperm comes from the former husband.

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<sup>288</sup> Ibid, 431.

6. An excess number of fertilized embryos can be preserved by cryopreservation. The frozen embryos are the property of the couple alone and may be transferred to the same wife in a successive cycle, but only during the duration of the marriage contract.
7. Multifetal pregnancy reduction (or so-called selective abortion) is only allowed if the prospect of carrying a high-order pregnancy (i.e., twins, triplets, or more) to viability is very small. It is also allowed if the health or life of the mother is in jeopardy.
8. All forms of surrogacy are forbidden.
9. Establishment of sperm banks is strictly forbidden, for such a practice threatens the existence of the family and the race and should be prevented.
10. The physician is the only qualified person to practice medically assisted conception in all its permitted varieties. If he performs any of the forbidden techniques, he is guilty, his earnings are forbidden, and he must be stopped from his morally illicit practice.<sup>289</sup>

On the other hand, for Shi'ite Muslims, attitudes toward gamete donation have changed considerably since the late 1990s. Until recently, most Shi'ite religious authorities have supported the majority Sunni view: namely, they have agreed with Sunni clerics who say that third-party donation should be strictly prohibited. In the late 1990s, however, the Supreme Jurisprudent of the Shi'a branch of Islam, Ayatollah Ali Hussein Khamanei, the handpicked successor to Iran's Ayatollah Khomeini, issued a fatwa effectively permitting donor technologies to be used. This fatwa has proved to be very significant for those Shi'a who follow the lead of Ayatollah Khamanei in Iran. This would include Lebanon's Hizbullah leaders, who consider Ayatollah Khamanei to be their *marja'taqid*, or spiritual reference (literally, source of emulation). With regard to egg donation, Ayatollah Khamanei stated in his initial *fatwa* that egg

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<sup>289</sup> Ibid, 432-433.

donation is not in and of itself legally forbidden. But he stated that both the egg donor and the infertile mother must abide by the religious codes regarding parenting. Thus, the child of the egg donor has the right to inherit from her, as the infertile woman who received the eggs is considered to be like an adoptive mother.

Shi'a religious authorities who now accept the idea of donation, but are strict in their interpretation of how donation should be practiced, argue that:

1. when a couple needs a donor, they should go to a Shi'ite religious court, where a decision can be made on a case-by-case basis;
2. there should be a determination about which religious reference (i.e., source of spiritual emulation) the infertile couple follows;
3. the decision should be made in the presence of witnesses, the IVF doctor, and with the agreement of both parties (the infertile couple and the donor);
4. the husband should do a *mut'a* marriage with the egg donor for the period of time in which the whole procedure (egg retrieval to embryo transfer) is taking place, because polygyny is legal in Islam and avoids the implications of *zina*, or adultery;
5. but because a married Shi'ite Muslim woman cannot marry another man other than her husband (since polyandry is illegal in Islam), she cannot do a *mut'a* marriage with a sperm donor. Technically, the child born of a sperm donor would be a *laqit*, or out-of-wedlock child, without a family name and without a father. Thus, in theory, only widowed or otherwise single women should be able to accept donor sperm, in order to avoid the implications of *zina*. However, in the Muslim countries, single motherhood of a donor child is unlikely to be socially acceptable.<sup>290</sup>

In conclusion Islamic law frowns on any use of ART with no medical justification.<sup>291</sup> As explained above, the only legal ground for permissibility of ART procedures is when they are

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<sup>290</sup> Ibid, 434-436.

<sup>291</sup> I. A. Aliyu, 'In-vitro Fertilization and Artificial Insemination in Islamic Law' (1999-2000) A.B.U.L.J 137

resorted to as a therapeutic approach to assist couples with one form of reproductive disorder or another. Any ART process predicated on superfluous reasons is therefore an illegality in the eyes of the law.<sup>292</sup>

#### **4.6 Legal Framework on ART in Selected Jurisdiction**

It is expedient to examine the practice of medically assisted reproduction in other jurisdictions or countries most especially on their legal framework and to see some of the things worthy of emulations and which when apply to the practice of ART in Nigeria can be of tremendous help. Some of the countries to be examine include the following; United Kingdom, Australia.

##### **4.6.1 United Kingdom**

In the United Kingdom, ART is governed by legislation, in particular, the Human Fertilisation and Embryology Act, 1990 (HFE Act) and a regulatory body set up under that legislation: the Human Fertilisation and Embryology Authority.

The Human Fertilisation and Embryology Act 1990 established the legal framework that governs infertility treatment, medical services ancillary to infertility treatment such as embryo storage, and all human embryological research performed in the UK. The law also defines a legal concept of the parent of a child conceived with assisted reproductive technologies. Section 5 of the Act establishes the Human Fertilisation and Embryology Authority, the first of its kind in the world, to enforce and regulate the responsibilities that scientists, doctors, and prospective parents have towards embryos and to each other.

A license, which may be granted by the HFE Act, is necessary to carry out any of the activities covered by the legislation. Sections 9 through 22 of the HFE Act list conditions upon which the Authority can grant and revoke licenses to medical providers, storage centers, and research

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<sup>292</sup> Abdul-Razzaq Abdul-Majeed Alaro, 'Assisted Reproductive Technology (ART): The Islamic Law Perspective' in Berna Arda & Vardit Rispler-Chaim (eds.), *Islam and Bioethics*, (Ankara University, Turkey) 85-97

scientists, who research human gametes and embryos. Schedule 2 details all of the conditions that govern the HFE Authority for the license of professionals and institutions using or storing human embryos. The activities authorized by the license can only be carried on in premises to which the license relates and under the supervision of the “person responsible”. The HFEA is required by law to publish a Code of Practice.<sup>293</sup>

The law also enjoins the Human Fertilisation and Embryology Authority to yearly reporting and auditing. Schedule 1 describes the operational details of the authority: how the authority is to appoint members and staff, as well as conditions on their tenure of office and general terms of remuneration.

The Act banned certain activities, such as reproductive cloning storage of gametes<sup>294</sup> and established the world's first national regulatory body to oversee licensable activities, such as *in vitro* fertilisation (IVF). Clinics in the UK offering assisted reproductive procedures, storage of sperm, eggs, or embryos, or those undertaking human embryo research were required by law to be licensed by the Human Fertilisation and Embryology Authority (HFEA). Commercial surrogacy is also prohibited in the UK by the Surrogacy Arrangements Act, 1985. The HFEA license inspects and monitors all assisted human reproduction (AHR) clinics in the UK.<sup>295</sup>

In addition to being about assisted reproductive technologies, the HFE Act also covers the use of human embryos in scientific research. Under the HFE Act, scientists could undertake human embryological research for a limited number of reasons: to increase knowledge of the causes of congenital diseases and miscarriage; to encourage advances in the treatment of infertility and the development of more effective contraception; and to detect genetic or chromosomal abnormalities before an embryo is implanted.

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<sup>293</sup> The United Kingdom Human Fertilisation and Embryology Authority Code of Practice, 4th edition July 1998.

<sup>294</sup> Human Fertilisation and Embryology Act, Section 4.

<sup>295</sup> Human Fertilisation and Embryology Act, Section 8.

The act deals with the concept of consent in Schedule 3 for all participants in assisted reproductive technologies.<sup>296</sup> In addition to providing the Human Fertilisation and Embryology Authority with enforcement powers over licensing conditions,<sup>297</sup> many of the final sections of the HFE Act articulate punitive judicial guidelines, including fines and imprisonment, not to exceed ten years, for violations of the various conditions of licensing.<sup>298</sup>

The HFE Act amended several existing laws, including the Surrogacy Arrangements Act of 1985,<sup>299</sup> the Abortion Act of 1967,<sup>300</sup> Schedule 4 offers further amendments to previous laws, including the Family Law Reform Act 1969, the Social Security Act 1975, the Adoption Act 1976, and the Human Organ Transplants Act 1989.<sup>301</sup>

## **4.6.2 Australia**

### **4.6.2.1 Assisted Reproductive Treatment Act 2008 (Vic).**

The Assisted Reproductive Treatment Act 2008 (Vic), which was passed by the Legislative Council in December 2008, came into effect on 1 January 2010. The proclamation of this legislation altered eligibility for assisted reproductive technology, the types of services able to be provided by clinics and the assessment of people accessing ART through licensed clinics.

The Assisted Reproductive Treatment Act 2008 (Vic) is based on the recommendations made by the Victorian Law Reform Commission in its *Final Report, Assisted Reproductive Technology and Adoption* (2007).<sup>302</sup> The main intention of this Act is to regulate ART and artificial insemination and to make provisions in regard to surrogacy arrangements. Its purposes include:

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<sup>296</sup> Human Fertilisation and Embryology Act, Schedule 3.

<sup>297</sup> Human Fertilisation and Embryology Act, Section 39.

<sup>298</sup> Human Fertilisation and Embryology Act, Section 41.

<sup>299</sup> Human Fertilisation and Embryology Act, Section 36.

<sup>300</sup> Human Fertilisation and Embryology Act, Section 37.

<sup>301</sup> Human Fertilisation and Embryology Act, Schedule 4.

<sup>302</sup> Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption (Final Report)* (2007).

- regulating the use of assisted reproductive treatment and artificial insemination procedures (other than self-insemination);
- regulating access to information about treatment procedures;
- promoting research into the incidence, causes and prevention of infertility;
- making provision for surrogacy arrangements; and
- establishing the Victorian Assisted Reproductive Treatment Authority (VARTA).<sup>303</sup>

The new guiding principles are broader than their predecessors. The paramountcy of the child principle is retained but other interests are now included. These include:

- the welfare and interests of persons born or to be born as a result of treatment procedures are paramount;
- at no time should the use of treatment procedures be for the purpose of exploiting, in trade or otherwise, the reproductive capabilities of men and women, or children born as a result of treatment procedures;
- children born as a result of the use of donated gametes have a right to information about their genetic parents;
- the health and wellbeing of persons undergoing treatment procedures must be protected at all times; and
- persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.<sup>304</sup>

The *Assisted Reproductive Treatment Act 2008* (Vic) permits single and lesbian women who are not clinically infertile to have access to IVF and assisted insemination (AI) in Victorian clinics.<sup>305</sup> The Act also decriminalises self insemination carried out by a woman or her partner or

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<sup>303</sup> Assisted Reproductive Treatment Act 2008 (Vic), section 1.

<sup>304</sup> Assisted Reproductive Treatment Act 2008 (Vic), section 5.

<sup>305</sup> Assisted Reproductive Treatment Act 2008 (Vic), section 10(1), (2).

friend.<sup>306</sup> However, all women undergoing treatment and their partners are required to complete a criminal records check and a child protection order check before undergoing treatment. If either the woman or her partner has had charges proven against them for a sexual or a violent offence, then a presumption against treatment applies to the woman.<sup>307</sup> Similarly, if a child protection order has been made removing a child from the custody or guardianship of the woman or her partner, a presumption against treatment applies to the woman.<sup>308</sup>

The Assisted Reproductive Treatment Act 2008 (Vic) provides for the establishment of a Patient Review Panel (PRP) which, while adding a layer of bureaucracy, provides an avenue for reviewing some treatment decisions and making applications under this legislation. The PRP consists of five members: a chairperson, deputy chairperson and three other members appointed by the Governor in Council (on the recommendation of the Minister for Health). One of the PRP's functions is to consider all applications for surrogacy arrangements.<sup>309</sup> The PRP may also consider applications

- to have a presumption against treatment overturned;
- where treatment has been refused by a doctor or clinic due to concerns about the welfare of the child;
- for posthumous use of gametes and embryos;
- for treatment when the applicant fails to meet the criteria for treatment; and
- to extend the storage period of gametes or embryos or removal of embryos from storage.<sup>310</sup>

As for surrogacy, surrogacy arrangements may be approved by the PRP<sup>311</sup> but only after the parties have undergone counselling, obtained legal advice and satisfied the following

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<sup>306</sup> Assisted Reproductive Treatment Act 2008 (Vic), section 9.

<sup>307</sup> Assisted Reproductive Treatment Act 2008 (Vic), sections 11, 14.

<sup>308</sup> Assisted Reproductive Treatment Act 2008 (Vic), sections 12, 14.

<sup>309</sup> Assisted Reproductive Treatment Act 2008 (Vic), sections 39-42.

<sup>310</sup> Assisted Reproductive Treatment Act 2008 (Vic), section 85.

<sup>311</sup> Assisted Reproductive Treatment Act 2008 (Vic), section 39.

conditions.<sup>312</sup> The PRP must be satisfied on the basis of medical opinion that the commissioning parent(s) are unlikely to be able to have a family, that the surrogate mother is over 25 years of age, has previously given birth to a live child and her oocyte was not used in the conception of the child.<sup>313</sup> The PRP must also take into account the counsellor's report and an acknowledgment by the parties that they have undergone counselling and obtained legal advice.<sup>314</sup> As there are no statutory restrictions on the sex or relationship status of the commissioning parent(s), single women, lesbian women and gay men may enter into an arrangement with a surrogate mother.

#### **4.7 Conclusion**

ART activities have increased steadily in countries worldwide. The methods are regulated in countries like United Kingdom and Australia as a way of procuring children. All the legal provisions converge to promote the best quality of practices and the protection of individuals against abuses, However law is being reviewed and many sensitive issues are arising. It is difficult to imagine now what provisions will be modified, suppressed or added as regard such laws. Nigeria needs to consider the status and related rights of children for establishing equal status of children before the law and providing for all children.

## **CHAPTER FIVE**

### **SUMMARY, CONCLUSION AND RECOMMENDATIONS**

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<sup>312</sup> Assisted Reproductive Treatment Act 2008 (Vic), section 43.

<sup>313</sup> Assisted Reproductive Treatment Act 2008 (Vic), section 40(1).

<sup>314</sup> Assisted Reproductive Treatment Act 2008 (Vic), section 40(2).

## **5.0 Summary**

The aim of this research work was to examine the dynamics of assisted reproductive technology and the inheritance rights of children of assisted reproductive mechanism in Nigeria. The research work also sought to establish the definition of legal parenthood according to Nigerian law and to see how the available laws in the country provided that parenthood should be determined. In doing justice to this work five chapters are dedicated to the work.

Chapter one contains issue such as the background to the study, aims and objective of the study, research methodology, the scope of the research, definition of terms as well as the structure of the research.

Chapter two examines the concept of human reproduction and the history of assisted reproductive technologies. The chapter dealt with the dynamics of ART in great detail. It presented ART as any procedure that involves fertilization of eggs or impregnation outside of the traditional sex and marriage. The chapter also presented an in-depth analysis of the different types of ART and their individual implications for the concept of parenthood in Nigeria. The various types of assisted reproductive technologies commonly used are considered here.

Chapter three analyzes and examines contemporary legal issues and implications issues accompanying the use of assisted reproductive technologies such as legitimacy, succession right and citizenship of the child, constitutionality of ART, right of the donor, legal status of the embryo. It also discussed the implications ART might have on parenthood. One of the issues identified is the introduction of third parties into the conception process which could lead to a possibility of a child having up to three or more parents. This occurrence would constitute a problem at law in determining who the legal parents of such a child is and who has parental rights to and responsibility for such a child. It was established that the determination of parenthood at law is very essential, not only with respect to maintenance of the child, but also

with respect to the identity of the child. For instance, under the 1999 Constitution, a child traces his citizenship to his parents. Thus, where a parent is unidentifiable or parenthood is contested at the time of the birth of the child, such a case will pose as a problem in the long run for that child. To resolve this conflict, several authors and scholars came up with several theories to aid their arguments in the determination of parenthood. Some of these theories were based on biology or genetics, whilst the others were based on social parenthood. It seems that the theories based on social parenthood, especially the intention theory was the most viable for the ART situation. This is because in some cases, the couple may be unable to provide the necessary genetic properties to conceive a child and may need donations from separate parties. In these situations, it would be unconscionable for the law to award parenthood to third parties who intended to sever all parental rights to the child after its conception and delivery.

Chapter four examined the legal and regulatory framework on assisted reproductive technologies in Nigeria. A comparative analysis of Nigeria law with other common law jurisdiction was examined. Upon the analysis of the law in Nigeria it was observed that the level of the Nigerian municipal laws on ART seriously lags behind on the subject. As a matter of fact, apart from the international conventions and treaties to which Nigeria is a signatory and which can be used inferably on the subject, there is no legal framework in Nigeria for now.

Chapter Five is the final chapter of the study. The chapter summarized the research work, gave the research work's recommendation and a final conclusion.

## **5.1 Conclusion**

The institution of marriage is one of the oldest legal institutions. The family is an integral unit of that institution and it is one of the most important units of society. The recognition and regulation of these institutions is largely dependent on the history, morals, customs and religious

belief of a particular society, this accounts for the progression from rejection of the concept especially as regards Artificial insemination by Donor as to recognition of the legitimacy of children born therewith.

Nigeria's values as a nation are constantly being challenged and ART has the potential of changing the value of human lives. The reality of ART practice has come to stay as is evident from the proliferation of ART agencies or centers in many countries of the world. The acceptability which ART is increasingly receiving makes it more imperative, therefore the legal, moral, social-cultural, as well as economic implications should be carefully considered by Nigeria as a nation. If it is left unregulated, it would unavoidably evoke moral divisions over issues as fundamental as the value to be attached to early human life.

The wish of an individual to have a complete family in relation to the right of an individual to seek an alternative method to help in achieving fertility can also be justified along the fundamental objectives and directives of state principle in the constitution which provides that the state shall direct its policy towards ensuring that the evolution and promotion of family life is encouraged. Can there be a family life in the absence of children? The answer is no because based on the high premium that is placed on children in the Nigerian society, a family without children is deemed incomplete.

In the consideration of the constitutionality or legality of ART lies the critical issue of ascertaining the status and rights of the children born through artificial insemination.

It is imperative for the law to clearly define the status of these children in light of certain issues that may arise from such practice such as the right of the donor or recognition of the legal parent of such child.

## **5.2 Recommendations**

Taking into consideration that the impact and effect of infertility are so severe in Nigeria, and the peculiarity of our society which places much emphasis on children, infertility treatment (ART) should be regulated in Nigeria. Assisted Reproductive Technology has been regulated in other jurisdiction like Australia and United Kingdom, which have made such children born via this system recognized in the society and remove the stigma of infertility. The following are some recommendation which can help or assist the practice of medically assisted reproduction.

### **5.2.1 Need for Specific Legislation on Medically Assisted Reproduction**

Law exists to protect the innocent from unjust harm. Given the potential, inherent to assisted reproduction, for violation of the basic rights of human beings it is vital that the law in this area be particularly dynamic. There is the need for government both at the federal and state level to enact laws that will guide the practice of assisted human reproduction and laws that will protect the reproductive right of the citizens in Nigeria. A legislative framework should be put in place and provision should be made for regular review of the legislation in order to accommodate medical, scientific and social developments in ART.

### **5.2.2 Establishment of Regulatory Body**

There should also be a regulatory body that would be established by an Act to regulate assisted human reproduction services in Nigeria. The regulatory body should have the function of advising the government on all matters relating to ART and have the authority to issue guidelines in relation to the provision of ART services and associated procedures including research within the country, and be authorized to issue licenses for ART procedures Including clinical, laboratory, storage and research, have power to suspend or revoke a license for wrong practice. There is a need to regulate availability of the services in the interests of the children who may be born as a result of them.

### **5.2.3 Preference should be given for intended parenthood**

It is also recommended that where applicable preference be given to the rules of customary law which define parenthood more in line with social ties than genetics. That is, the intention and social parenthood theories should hold sway in the case of conflict. The parents should be seen as the commissioning couple whose intention is the reason for the child's existence in the first instance.

#### **5.2.4 Best Interest of the Child should be taken into Consideration**

The welfare of the child should be a primary consideration in the provision of ART services. In fact, the welfare of the child should be a major factor in the statutory regulation of ART practices. The best interests should focus on the rights of the child and reflect notions of autonomy and respect for the child's wishes.

Children should not be at the receiving end of the decision of adults, therefore leaving the status of children born through AI to conjectures and uncertainty is exposing them to hardship which is against the best interest of the child which should be the primary objective of the state.

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