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The Legal Spectrum of Parenthood Through Assisted Reproductive Technology in Nigeria

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Abstract

The capacity to bear children who resemble their parents and inherit their genes and heredity has been a mark of genuineness and joy of parenthood. Some couples cannot experience due to infertility. It is estimated that infertility affect over 50-80 million persons worldwide. Infertility may be as a result of genital tract infections, sexually transmitted diseases, postpartum or post aborted infections, pelvic tuberculosis, tubal blockage amongst other causes. The solution to infertility lies not only in the prevention of the earlier cited maladies but also include adapting to novel Assisted Reproductive Technology (ART) treatments. ART refers to the medical procedure that aim to achieve pregnancy by manipulating sperm and egg to make conception a reality. There has been dire contention over who should use ART; what is the legal spectrum of parenthood through ART; what are the regulatory framework for ART; who owns the gametes and embryos? This article is poised to anaylse these issues. The doctrinal research method will be utilized. The article found out that lack of regulation of ART in Nigeria has led to rapid multiplication of illegal baby factories, it was discovered that lack of regulation led to private reproductive health practitioners charging high fees. The article suggests the need for urgent passing of ART law in Nigeria and education of the public of its advantages.

Keywords; Parenthood, Artificial Reproductive Technology, Surrogacy, Legal Regulation

1.1 Introduction

The yearning of infertile couples to hold their babies in their hands have moved them to seek alternative reproductive techniques known as Assisted Reproductive Technology (ART) which include In-Vitro Fertilization, Intra-uterine injections, and many others.[939]

Recently individuals with different social orientation who desire to bear children use this option to acquire the status of parenthood. Some others use the method for conditions related to health or scientific observations and predictions.[940] It is estimated that infertility affects 15% couples globally, and over 50- 80 million persons are passing through this agony.[3] Most of those who suffer infertility live in developing countries where infertility services in general and ART in particular

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[939] Y. Olomojobi, *Medical and Health Law: The Right to Health*. (Ikeja: Priceton and Associates Publishing Co. Ltd 2019) 316.

[940] A. Nandita and J. Herdiman, 'Surrogacy' (2007) *Journal of Obstetrics and Gynaecology*. <https://dor.org/10.1080/014436107011947889> accessed 12 June 2023. [3] WHO, 'Mother or Nothing: The Agony of Infertility.' (2010) 88 (12) WHO Bulletin.
<https://www.who.int./reproductivehealth/publications/infertility/en/index> accessed 12 June, 2023.

are not available. Infertility may be because of genital tract infections which include sexually transmitted infections, postpartum or post-abortal infection, pelvic tuberculosis, tubal blockage amongst other causes.[941]

The solution to infertility may not only lie in the prevention of sexually transmitted infections and unsafe abortions but include adapting to ART treatments.[942] Although infertility is not recently a public health priority in many countries, it is a central issue in the lives of the individuals who suffer from it. It is a source of social and psychological suffering for both men and women and can place great pressures on family relationship thus leading to unstable marriage, domestic violence, stigmatization and even ostracism.[943]

The first ART baby Louise Joy Brown was born in 1978 and after her birth; there has been an enhanced quest to improve the understanding and development of this technique for health practitioners, patients and the general health community.[944] In Nigeria, the first ART baby was delivered in 1989 and reports have shown that there are more than eight million babies born in the world through ART as at July 2018.[945] There has also been increased demand for these alternative methods of reproduction leading to continuous development in the international and domestic perspective. Are parents who conceive through ART inferior parents? What are the legal implications of ART?

While this paper discusses the various types of ART, the aim is to draw attention to the need for education and extant legal framework for ART in Nigeria. Reference is made to other jurisdictions such as United Kingdom, Australia, and Kenya and international covenants and conventions as a guide to a definite legal framework for Nigeria. While considering the Nigerian Constitution, Child's Right Act and the National Health Act as attempt to lay down some guidelines, we show that other jurisdictions such as United Kingdom, Australia and Kenya have a more developed legal framework from which Nigeria can draw lessons. Inevitably, case law jurisprudence is more developed in these countries. The last part of this paper makes recommendations to enhance and maximise the practice of ART in Nigeria.

1.2 Conceptual Clarification of Terms

The various terms to be considered in this paper include: Parenthood, Types of Parenthood, Assisted Reproductive Technology and Surrogacy. Due to the relevance of these terms to the understanding of this paper, they shall be explained hereunder.

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[941] E. Vayena and Others, *Current Practices and Controversies in Assisted Reproduction*. (Geneva:Switzerland, WHO Publishers 2002).

[942] *Ibid,* 88.

[943] *Ibid,* 305.

[944] Olomojobi, (n1) 317.

[945] C. A. Ekechi-Agwu and A. O. Nwafor, 'Regulating ART in Nigeria: Lessons from Australia and UK.' (2020) 24 (4) *Afr J. Reprod Health*. 82-93.

1.2.1 Parenthood

Parenthood is the state of being a parent; it specifically refers to the position, function or standing of a parent. The word Parent is derived from the Latin maxim *Parentem* which means a caregiver of the offspring.[946] Thus Parenting is the process of raising a child from birth to independent adulthood. It involves facilitating the upbringing of a child through all the stages of development, caring for and nurturing a child, fulfilling the parental responsibilities that accompany child care.[947]

1.2.2 Types of Parenthood

Parenthood types may relate to the mode of bringing family into existence. A group of individuals may be related either by blood, marriage, court order, social welfare or adoption. **a. Social Parenthood**

This involves having the primary responsibility for the care of a child. A sperm donor is genetically related to the baby that results from the egg it fertilized, but he is largely exempted from the responsibilities that social parenthood entails. 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 can share; this includes intentions, actions and emotional or conceptual bonds.[948] **b. Genetic or Biological Parenthood**

Genetic theories ground parenthood by direct derivation, thus placing parenthood in the confines of familial relations.[949] A biological parent has been defined as the lawful and natural father or mother of a person or a parent who has conceived (biological mother) or (biological father) rather than an adopted child.[950] Others have defined biological parents as those whose sperm and eggs come together to form the embryo that will eventually develop into a child. The concept of 'biological parent' may appear straight forward and possibly self-evident. However, modern reproductive technology complicates this traditional mode of deciphering parenthood. A child can have genetic parents, gamete providers (who supply the sperm or the egg) and a third gestational parent. Each of these is a type of biological parent, by virtue of the fact that he/she makes a biological contribution to producing the child.[951]

Hall defends the genetic/biological approach to parenthood by appealing to the Lockean notion of self-ownership, that since genetic parents own the genetic material from which the child is

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[946] 'The Parent Coach Plan, Root meaning and List of Parental Responsibilities.' <https://www.parentcoachplan.com> cited in G.A. Ahiakwo, 'Healthcare Decision Making for the Minor: Scope of Parental and State Responsibilities.' (2020) 13 (1) *The Journal of Property Law and Contemporary Issues*, Rivers State University, 108.

[947] T.J. Paterson, 'What it means to be a Parent.' <www.healthyplace.com> accessed 12 June 2023.

[948] D.J Eninger, *Genes, Gestation and Social Norms, Law and Philosophy* (20120 31 (3) [check]

[949] J.L.Hill, '*What does it mean to be a 'parent'? The Claims of Biology as the basis for parental rights'* NY Univ Law Rev [1991] May, 66(2) 353-420.

[950] W. Burton, 'Burton's Legal Thesaurus' 4E 2007 http://legaldictionarythefreedictionary.com/biological+parent accessed 15 June 2023.

[951] *Ibid.*

constituted, they have a *prima facie* parental claim to the child. This position has been criticized because it subsumes parental relations under property relations, by attempting to derive a claim about parenthood from premises involving claims about ownership.[952]

2.1 Assisted Reproductive Technology (ART)

Assisted Reproductive Technology refers to medical procedures that aim to achieve pregnancy. It is a treatment that manipulates the sperm or the egg to make pregnancy more likely.[953] ART is effective in couples who have an issue with sperm or who have a diagnosis that makes it difficult for the sperm to fertilize the egg.[17] Women who ovulate infrequently may also benefit from the Technology as ART cycle greatly increases the odds of a successful pregnancy.[954] ART is also a viable option in couples who have unexplained infertility.[955]People attempting to get pregnant without partner may also choose ART.[956] ART is an assisted method of conception or reproduction using technology other than the natural process of creation of human life. It establishes the fact that human life is not only created by conventional natural means but also through ART.[957] There are many variations of ART including:

1. In Vitro Fertilization (IVF)
2. Intra Uterine Insemination (IUI)
3. Intra Fallopian Transfer (IFT)
4. Frozen Embryo Transfer (FET)
5. Intra Cytoplasmic Sperm Injection (ICSI)
6. Third Party ART

2.2 In Vitro Fertilization (IVF)

In Vitro Fertilization is a method of assisted reproduction in which a man's sperm and a woman's eggs are combined outside of the body in a laboratory dish. One or more fertilized eggs may be transferred into the woman's uterus, where they may implant in the uterine lining and develop.[958]

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[952] B. Hall, 'The Origin of Parental Rights', *Public Affairs Quarterly* 1999 cited in Akintola S.O and Eghokhare O.O, *Parenthood: Is the law in Nigeria fit for Assisted Reproductive Technology?* htpps:doc.prg/10.20529/IJME 2018 accessed 30 May, 2023.

[953] Editor, 'Assisted Reproductive Technology' <2021 infertility Texas.com> assessed 24 June 2023.

[17] *Ibid*.

[954] *Ibid*

[955] M.O. Araoye 'Epidemiology of infertility: Social Problems of the Infertile Couples (2003) (22) West African Journal of Medicine 190-6.

[956] *Ibid.*

[957] J.So-Oriari and I.M. So-Oriari George, 'Parenthood through Reproductive Technology and Parental Responsibility. An Appraisal' (2019) (9) ABUJPIL 290.

[958] M. L. Shanley, *Making Babies, Making Families: What Matters most in an age of ART Surrogacy, Adoption and Same sex and Unwed Parents*. (Boston: Beacon Press, 2001) 124-47

Excess embryos may be cryopreserved (frozen) for future use. It is mostly used to treat women with blocked, damaged, or absent fallopian tube. It is also additionally used now for many causes of infertility. The basic steps in an IVF treatment cycle include:

(a) Ovarian Stimulation
(b) Egg retrieval
(c) Fertilization
(d) Embryo culture
(e) Embryo transfer

(a) Ovarian Stimulation

In variance with natural conception whereby the ovulation of egg is controlled by pituitary gland in ART a special procedure called ovarian stimulation is followed for egg production. During ovarian stimulation fertility drugs are used to stimulate multiple eggs to grow in the ovaries rather than the single egg that normally develops each month.[959]

The reason for multiple egg stimulation is that some eggs may not fertilize or develop normally after fertilization. Using ultrasound examinations and blood testing the doctor can determine when the follicles are ready for egg retrieval. Generally, 8 to 14 days of stimulation are required.

(b) Egg Retrieval

Egg retrieval is usually accomplished by transvaginal ultrasound aspiration which is a minor surgical procedure whereby an ultrasound probe is inserted into the vagina to identify the follicles, and a needle is guided through the vagina and into the follicles. The eggs are then removed from the follicles through the needle connected to a suction device. The removal can usually be completed in less than 30 minutes.[960]

(c) Fertilization

After the eggs are retrieved from the follicle, they are examined in the laboratory for maturity and quality.[961]. Mature eggs are placed in an IVF culture medium and transferred to an incubator to await fertilization by the sperm. Sperm is separated from the semen. Semen may be obtained through:

(a) Masturbation: This is the stimulation of genitals with hands to aid the release of sperm.

(b) Special condom used during intercourse.

[959] American Society for Reproductive Medicine, 'Assisted Reproductive Technology Guide' (2018) 5.
[960] (n 24) 6.
[961] J.S Hyde, Understanding Human Sexuality. (4th edn USA: Mc Graw Publishers 1990) 693.

(c) From the testicle of men whose semen is void of sperm.[962]

Fertilization may be accomplished by insemination, where motile sperm are placed together with the oocytes and incubated overnight[963] or by intra cytoplasmic sperm injection where a single sperm is directly injected into each mature egg.

(d) **Embryo Culture**
This is the growth of the Embryo in a laboratory or culture dish.

(e) Embryo Transfer
Under this procedure, the doctor first identifies the cervix, and thereafter suspend one or more embryos in a drop of culture medium using transfer catheter with a syringe on one end.[964] Embryos are transferred to the uterus at any time between one and six days after the egg retrieval, if successful development continues in the uterus, the embryo hatches from the surrounding *zona pellucida*[965] and implants into the lining of the uterus.[966]

2.3 Intrauterine Insemination (IUI)
It is a micro-manipulation procedure in which a single sperm is injected into an egg to attempt fertilization. Intrauterine insemination fertilizes the egg inside a woman's uterus.[31] IUI works best in instances where a man's sperm has issues travelling to meet the egg at the uterus; often due to low mobility or due to a chemical mismatch between the man's semen and the woman's vaginal fluids.

2.4 Intra Fallopian Transfer
An intra-fallopian transfer fertilizes the egg inside the woman's fallopian tube mostly in cases where the woman has a blocked fallopian tube. This method is preferred because of religious or ethical beliefs dictating that fertilization should occur inside the body.[967]

2.4.1 Variations of Intra fallopian Transfer
There are many types of intra fallopian transfer, but the paper will briefly discuss two types.

a. Gamete Intra fallopian transfer (GIFT): This is similar to IVF, but the gametes (egg and sperm) are transferred to the woman's fallopian tubes rather than her uterus, and fertilization takes place in the fallopian tubes rather than in the lab. A laparoscopy (a surgical procedure) is necessary to transfer the sperm and egg to the fallopian tubes. **GIFT** is a good option for women who have

[962] ASRM, 'Assisted Reproductive Technology; Guide for Patient' (2018) 8.
[963] *Ibid.*
[964] K. Davies, 'What to know about Assisted Reproductive Technology.' (2021) <https//healthline medical news today> accessed 25 June 2023.
[965] The egg's outer layer that a sperm must penetrate in order to fertilize the egg.
[966] O.J. Umeora and others, what drives Grand Multiparous Women in Rural Areas in Nigeria to seek treatment for infertility (2013) 12 AJMHS 15. [31] *Ibid*, 65.
[967] F.O. Emiri, Medical Law and Ethics (Lagos Mathouse Press Ltd, 2012) 68.

normal fallopian tubes and for religious reasons.[968] With GIFT fertilization cannot be confirmed as with IVF. In United States, **GIFT** comprises less than 1% of ART procedures performed. **b. Zygote Intrafallopian Transfer (ZIFT)**
This process allows an egg to be fertilized in the laboratory and the zygote is transferred to the fallopian tube before cell division takes place, Eggs are retrieved and fertilized on one day and the embryo is transferred the following day.[969]

2.5 Frozen Embryo Transfer (Cryopreservation)

Extra embryos remaining after the embryo transfer may be frozen for future transfer. Cryo preservation makes future ART cycle simpler, less expensive, and less invasive than the initial IVF cycle since the woman does not require ovarian stimulation or egg retrieval.[35]

Once frozen, embryos may be stored for prolonged periods and live births have been reported using embryos that have been frozen for almost 20 years. It is to be noted that not all embryo service the cryopreservation. Couples should elect if they are going to cryopreserve embryo conventionally or consider nitrification (fast freezing).

2.6 Intracytoplasmic Sperm injection

This method allows a doctor to select the healthiest sperm and implant it in the egg. It works well when the man's sperm has issues for example where significant DNA damage in the sperm increases the risk of early miscarriage.[36]

2.7 Third Party ART

A Third Party ART occurs when another individual donates eggs, sperm or embryos to an individual or couple. Surrogacy is a variation of a Third party ART.

2.7.1 Surrogacy

According to Umeora Surrogacy contemplates a situation where a woman (third party) carries a pregnancy for the commissioning parents and hands the child over to the commissioning parent after delivery. There are usually surrogacy agreements reached to enforce compliance. It may be commercial or non-commercial in nature.[970] A couple may choose to use a donor if there is a problem with their own sperm or eggs, or if they have a genetic disease that can be passed to a child.[971]

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[968] *Ibid*, 13

[969] O.J. Umeora et al 'Surrogacy in Nigeria: Legal, Ethical, Social, Cultural, Psychological and Religious musings', (2014) 13 *African Journal of Medical and Health Sciences*. 105-106. [35] ASRM,' Assisted Reproductive Technology: Guide for Patient. '(2018) 20. [36] ASRM, (n36), 12.

[970] Umeora, (n35).

[971] K. Horsey and S. Sheldon, 'Still hazy after all these years: the Law Regulating Surrogacy' (2012) 20 (1) *Medical Law Review* 67-8.

Donors may be known or anonymous. In most cases, donor sperm is obtained from the sperm bank. Both egg and sperm donors undergo extensive medical and genetic screening, as well as testing for infectious diseases. Donor sperm is frozen and quarantined for six months, the donor egg is an option for women with a uterus who are unlikely or unable to conceive with their own eggs. [972]

There are two types of Surrogates namely: The Gestational Surrogate and the Genetic Surrogate. The genetic surrogate donates both the egg and the womb and thus can be seen to be the biological parent in the sense that she will carry the pregnancy and give birth. If the embryo is carried by a gestational carrier or surrogate, the eggs are removed from the fertile woman, fertilized with her partner's sperm, and transferred to her uterus. The gestational carrier is not genetically related to the child.[973]

The debate around the acceptability of surrogacy in many countries including Nigeria centres on the exploitation of those women who serve as surrogate mothers and the commercialization of babies. Different countries have adopted different approaches to the regulation of surrogacy, others expressly prohibit surrogacy, and some permit and regulate non-commercial surrogacy. In Nigeria surrogacy is left unregulated.[974]

3.0 Legal Framework for Assisted Reproductive Technology (ART)

The issue of assisted reproductive technology constitute a pivotal point of legal discuss at the national and international levels. Where the laws regulate health procedures, the practitioners, patients, and the general populace stand to benefit. Advancement in the field of ART appears to be facing abuses, government in some countries have responded by enacting legislation or allowing professional associations in those countries to establish guidelines regulating practice of ART.[975] It is therefore in this context that the discussion is unveiled.

3.1 National Legal Framework

Nigeria does not have a regulatory legal framework on ART or Surrogacy, but this is not to suggest that there are no professional guidelines or grundnorm which either expressly or implicitly regulate ART.[976] The Nigerian Constitution, The National Health Act have laudable provisions supporting ART.

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

The Constitution of Nigeria guarantees a right to privacy of family life and the need for government to promote and protect family.[977] These set of rights embodies the right for consenting adults to

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[972] ASRM, (n37), 19.
[973] *Ibid.*
[974] O.J. Umeora et al 'Surrogacy in Nigeria: Legal . Ethical, Social, Cultural, Psychological and Religious musings, (2014) 13 *African Journal of Medical and Health Sciences*. 105-106.
[975] C. A. Ekechi-Agwu and A. O. Nwafor, 'Regulating ART in Nigeria: Lessons from Australia and UK.' (2020) 24 (4) *Afr J. Reprod Health*. 85.
[976] *Ibid,* 88.
[977] Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 15 (3) (c), 17 (3) (h) & 37.

establish a family and beget children. The Government is obligated to make rules that will preserve the parenthood and family unit. One of such laws made by government is the Child's Right Act.

3.1.2 The Child's Right Act

The Child's Right Act makes specific provisions for parental rights over their children and parental responsibilities.[978] The Act also specifically provides that every child has a right to survival and development.[46] The child here includes the foetus in the womb. The Act prohibits early child marriage which may lead to future reproductive health problems and hinder the future procreation. The Act also makes provision for access, custody, and care of the child by the parents whether they are married or not. The law allows for legal adoption of the child. With the implementation of this laudable children's legislation, family life is protected and guaranteed.

3.1.3 The National Health Act

The National Health Act 2014 establishes the framework for the regulation, development, and management of the national health system. Part II of the Act deals with health establishment and technologies. The National Health Act also specifically provides guidelines for doctors on how to handle tissues and gametes which are the end product of ART.[979]

An attempt was made in 2016, for the enactment of an Act to provide for a National framework for the regulation and supervision of Reproductive Technology and matters connected therewith. But the said bill did not enjoy the support of the Senate nor assented to by the President. Hence Nigerians rely on ART legislation of other Countries like Australia and UK.

3.2 Foreign Legal Framework

Foreign Legal Framework refers to those laws, regulations that have established in other countries of the world which have relevance to the parental rights and parenthood under the Assisted Reproductive Technology. The countries here under discussed are Australia, United Kingdom, and Kenya.

3.2.1 State of Victoria Assisted Reproductive Treatment Act 2008

The State of Victoria in Australia is recorded as the first Country to enact a legislation to regulate ART in 1984. A more comprehensive legislation covering various aspects of ART was enacted in 2008.[48]

Section 1 of the Act sets parameters for the implementation of the statutory provisions of ART. Section 5 provides for the welfare and interests of persons born or to be born because of treatment procedure. It stipulates that at no time should the use of the treatment procedures be for the purpose of exploitation of the reproductive capabilities of men and women.[49] It further states that children

[978] Child's Right Act No. 26 of 2003 ss 12 & 14.
[46] *Ibid,* s 4.
[979] National Health Act 2014 No 145 Federal Republic of Nigeria, Official Gazettes, s 51. [48] State of Victoria Assisted Reproductive Treatment Act 2008 (No 76 of 2008). [49] *Ibid*, ss 7,11 and 13

born as the result of the use of donated gametes have a right of information about their genetic parents.[980]

The qualification to carry out the ART procedure is meant for registered medical doctors.[981] Part 6 of the Act contains comprehensive provisions on the keeping of registers and access to information about the donor, the child born through donor-gamete and parents of the child.

Under the Australian Law a woman need not be married or cohabit with a partner to undergo the ART procedure.[982]

3.2.2 UK Human Fertilization and Embryology Act 2008

UK enacted comprehensive legislation to regulate ART namely Human Fertilization and Embryology Act of 1990. It was subsequently amended in 2008.[983] The Act was to monitor the activity and provide license to hospital that carry on the ART treatment.[984] The Act prohibits the use of gamete and embryos which have not been certified or licensed by the Human Fertilization and Embryo Authority.[55] This implies that only permitted embryos can be implanted into the uterus using any technique in ART. The Act also prohibits human cloning.[985] The Act provides for mandatory counselling of all parties before any fertility service is offered to anyone. Consent and record keeping is also a requirement of this Act.[986] Section 33 of the Act defines a mother of the Child as the woman carrying or who carry the pregnancy to term.

3.3.3 The Kenyan Constitution of 2010

In Africa, Nigeria is not the only country that has made significant achievement in the incorporation of issues of reproductive health and rights into her constitution. Other countries are gradually following suit and have even made copious provisions that are more elaborate than that of the Nigeria constitution. An example of such nation is Kenya which has entrenched the right to health in its 2010 Constitution.

Section 43 (1) provides that every person has the right (a) to the highest attainable standard of health. By the tenor of the provisions of the Kenyan Constitution, the standard of health includes the right to health care services,[58] reproductive health care,[987] and education on health-related activities.[988]

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[980] *Ibid*, s 16
[981] State of Victoria Assisted Reproductive Treatment Act 2008, s 46.
[982] *Pearce v South Australian Health Commission* (1996) 66 SASR 486 par 23.
[983] UK Human Fertilization and Embryology Act 2008, Cap 22.
[984] *Quintavalle, R (on the application or) v HFEA* (2002) EWHC 2785.
[55] UK Human Fertilization and Embryology Act 2008, s 3.
[985] *Ibid*, 4.
[986] In re A and others (Legal Parenthood: Written Consents) 2015 EWHC 2602 (Fam) 3.
[58] KC, 2010, S 41(1)(a)
[987] *ibid,* s 41(2)
[988] *Ibid* s 41(1)(1)

3.3 International Legal Framework

International Legal Framework includes guiding principles or soft laws meant to guide or regulate the practice of ART on the international hemisphere. It is apposite to state that there is no specific ART Convention but there are other conventions that touch on the subject matter.

3.3.1 Universal Declaration of Human Right, 1948

The Universal Declaration of Human Right[989] (UDHR) serves as foundation of all human rights instrument and makes provision for the protection of the rights of women to reproductive health. It emphasizes the liberty of the woman to decide for herself on issues relating to family planning and ART. Article 25 of the Convention states: *Motherhood and childhood are entitled to special care and assistance.*[990] This provision entitles women to free medical advice, treatment, and accessibility to reproductive health care treatment. The declaration is against commodification and commercialization of women' reproductive organs.

3.3.2 International Covenant for Economic, Social and Cultural Rights, (ICESCR) 1966 The International Covenant for Economic Social and Cultural Rights[991] (ICESCR) came into force in 1966. The covenant commits its parties to work at granting economic, social, health and cultural rights to all. In respect to reproductive health, Article 12 of International Covenant for Economic, Social and Political Right provides for the right of everyone to the enjoyment of the highest standard of physical and mental health. The right to enjoy health encompasses the right to procreate and reproduce one's kind.

3.3.3 Convention for the Elimination of Discrimination Against Women (CEDAW) 1979 Convention on the Elimination of all forms of Discrimination against Women [992] was the culmination of more than thirty years of work by the UN Commission on the Status of Women, a body established to monitor the situation of women and promote women rights. The Convention devotes major attention to women reproductive rights. It states "*The adoption by State Parties of special measures…aimed at protecting maternity shall not be discriminatory.*"[993] This section provides that the role of women in procreation should be protected. It further calls for special measures for maternity protection which shall not be discriminatory. The Convention also affirms women right to reproductive education, child spacing, abolition of customary practices in reproduction, equal choice in the training and upbringing of children.[994]

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[989] UN General Assembly, *Universal Declaration of Human Rights,* 10 December 1948, 217 A (III) (UDHR).
[990] UDHR (1948), art 25 (2)
[991] UN General Assembly, *International Covenant for Economic, Social and Cultural Rights*, 16 December 1966, A/RES/2200.
[992] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*,18 December 1979, UN Treaty Series, vol 1249 at 13. (CEDAW)
[993] CEDAW 1979, art 5
[994] *Ibid,* art 4(2)

3.3 Legal and Ethical Implications of Assisted Reproductive Technology

There is an underlying problem of legally defining the legal parentage of the child as well contractual rights and duties of third parties in surrogate arrangement. Ethical issues arise around the creation, selection and disposal of embryos. Ethical issues arise between sperm and egg donor, surrogate and commissioning parents on who has the right to custody and to raise the child as each of these parties could claim parental involvement in the birth of that child. For artificial insemination, legal and ethical problems center around liability for the egg, custody issues over the egg and inheritance rights over the egg. What will be the fate of extra embryos? For how long will it be stored? There have been no judicial pronouncements in respect of the ethical or legal implication of ART in Nigeria. But there are foreign cases.

In 1986, the Supreme Court in United State was called to determine the validity of surrogacy contract in the case of *Baby Melisa.*[995] The brief fact of the case was that for a fee of Ten Thousand Dollars, a surrogate (Mary Beth White Head) agreed to be artificially inseminated with the semen of another woman's husband (William Stern). She was to conceive the child and carry it to term and upon birth, surrender the child to the commissioning parents. The intent of the surrogacy contract was to the effect that the genetic mother will thereafter be forever separated from the child.

The commissioning mother (Mrs. Elizabeth Stern) was to adopt the child and become the mother for all purposes.

The Supreme Court invalidated the commercial surrogacy contract on the grounds that it conflicts with the law and public policy of the State. The Court reasoned that while they recognize the depth of the yearnings of infertile couples to have their own children, that they find the payment of money to the surrogate mother illegitimate, perhaps criminal, potentially degrading to women and against public policy. The surrogate contract and adoption were voided. Custody was awarded to the natural father as evidence tilted in favor that custody of the child with the father will be in the best interest to the infant.

The Supreme court in its *obiter dictum* said that there was no offence if the surrogate renders such services voluntarily without payment provided, she is not subject to a binding agreement to surrender the child.

In contrast, another case decided differently in *Baby H Case.*[996] Montover agreed to pay 13, 000 Dollars to Muscatine woman who was gestational carrier of the child. The surrogate gave birth to twins and one died, she wanted to keep the child. The court ruled that Paul Montover was the biological father and will have permanent custody of the child. The Surrogate had four children earlier and had voluntarily signed the surrogacy agreement. Baby H was created with Paul Motover sperm and a donor's egg. The Court held that gestational surrogacy contracts are consistent with Iowa administrative Code and concluded that gestational surrogacy agreements promote families

[995] *Re Baby M*, 537 A. 2nd 1227, 109 N.J. 396 (N.J. 02/03/1988).
[996] *P.M & C.M. v T.B & D.B.* No. 17-0376 (February 16, 2018)

by enabling infertile couples to raise their own children and help bring new life into the world through willing surrogate mothers.

3.4 ART and the Challenges of the Non-Regulation of the Sector in Nigeria

When advancements in the field of ART appeared to be facing abuses, governments in countries earlier discussed responded by enacting legislation and allowing the professional associations in those countries to establish guidelines regulating the practice of ART.[997] Nigeria has no cogent law regulating the practice of ART. There is urgent need for a distinct ART law in Nigeria to eliminate quackery in the industry and to check the issues of baby factories all over the nation.[998] As at present there are an estimated 74 registered ART service providing centres in Nigeria, with 24 of these in Lagos metropolitan area. There are, in addition an unknown number of unregistered practitioners of IVF.[71] The cost of these ART centres is highly exorbitant. It is not within the reach of the lower and even middle-class citizens.

As noted above, there are no specific laws regulating the sector and so are the absence of the needed institutional framework. This has been the reasons for the unwholesome practices and lack of specialization in Nigeria. However, certain bodies are in the fore front of taking the lead in regulation of the ART practice in Nigeria. Key among these in Nigeria is the Nigerian Medical Association (NMA), the Association of Fertility and Reproductive Health in Nigeria (AFRH) though registered under by law but has no legal backing.

3.5 Conclusion and Recommendations

Natural conception and ART are similar because they all fulfil the desire of parenthood. They both have the potential of bringing into the society children. As scientific advancements continue in the field of fertility science, our definition of parentage, specifically what it means to legally be a parent, as well as the possibility for parenthood where it never existed before, have all evolved.

Technology such as cryogenics and laboratory *in-vitro* fertilization now make it possible for egg and sperm donations from multiple parties to be combined into one embryo that is then carried by one of those parties or by someone else.[999] With ART has come not only a social broadening in the traditional understanding of what it means to be a parent, but also the ethical and legal implications of the same. As rightly noted, laws in this area are evolving almost as quickly as the technology itself and the Nigeria policymakers must do all to fill in the lacuna so created by the absence of legislation in this area so as to regulate the practice in Nigeria.

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3.6 Recommendations

The following recommendations are made to enhance and maximize the practice of *ART*:

i. The National Assembly should cooperate with Reproductive Health Practitioners to draft a potent ART legal framework. The National Assembly should thereafter pass this legal framework as law in Nigeria.

ii. Nigerian Universities should introduce and offer Reproductive Health law: which course content will include ART as an aspect of law to help educate the students of alternative birthing technology.

iii. There should be proper communication between ART health care providers and for all the parties contemplating to become parents by ART. Consents obtained must be safely recorded. Surrogates should be medically and emotional taken care of up to six months after delivery of the baby.

iv. Like in other developed countries Egg and sperm banks should be set up and proper documentation of donors and babies delivered through this process should be maintained for future purposes.

v. There should be access to *ART* information in hospitals and other public domain to enable couples who are not informed to benefit from the process.

vi. The cost of ART should be affordable to enable more intending parents access it and avoid patronizing illegal baby factories.