



IFE JURIS REVIEW

*Journal of Contemporary Legal and Allied Issues,
Published by the Department of Jurisprudence and Private Law,
Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria.
IFJR, 2017 Vol. 11 (2) (May - August) ISSN: 0794-1048*

ARTICLES

- ▶ Imran Oluwale Smith: *Laying Ambush with a Sinister ' Subject to Contract' Cudgel to take Advantage of a Party under an Estate Contract before Exchange: Whither Nigerian Law?* 1 - 18
- ▶ Amuda-Kannike A., Opubo I. West & Abila, Sylvannus Elijah: *Strengthening the Landlord/ Tenant Relationship in Nigeria* 19 - 30
- ▶ Folake M. Tafita & Folakemi O. Ajagunna: *Assisted Reproductive Technology in Nigeria: Tackling the Issues of Commodification and the Dearth of Legal Regulation* 31 - 52
- ▶ Taiwo Ajala: *Acquisition of Rural Lands in African Countries and the Mirage of Legal Remedy for Affected Communities: Rethinking the Compensation Framework in Nigeria* 53 - 76
- ▶ Wole Kunuji: *Towards a Universal Theory of Federalism: Critical Review of the Classical and Contemporary Literature* 77 - 106
- ▶ Akinbola, Bukola R. & Uwadi, Enyinnaya C.: *Antitrust as a Panacea for Economic Development in Nigeria* 107 - 128
- ▶ Osifunke Ekundayo: *The Proliferation of Low-Cost Private Schools: A New Challenge to the Enjoyment of the Right to Free Education in Nigeria* 129 - 152
- ▶ Alaka Oladipupo, Ojekunle Ademola & Akinsanya Olusola Adesina: *The Making, Termination and Setting aside of Arbitral Award* 153 - 194
- ▶ Adewale, Sikiru Akinpelu: *Appraisal of Law, Practice and Machinery of the African Union* 195 - 214
- ▶ Bello, Adesina Temitayo: *Arbitral Awards and its Ramifications under the Nigerian Law* 215 - 226
- ▶ Jerome Okoro & Obutte P. C.: *Corporate Restructuring Options for Marginal Field Operation in Nigeria* 227 - 242
- ▶ Oluwayemisi A. Adewole: *An Examination of the Scope of Judicial Intervention in the Arbitral Process Under the Arbitration and Conciliation Act, 2004* 243 - 258
- ▶ Peter Ademuyi Anyebe: *Military Justice System in Nigeria: Reforming it to Conform to Current Trends of International Standards in Military Justice* 259 - 280
- ▶ Oluwadamilola A. Adejumo: *Pollution Abatement Mechanisms in Nigeria: Implementation Challenges* 281 - 314
- ▶ Kingsley Nwabueze Edeh: *An Appraisal of the Composition of the Security Council of the United Nations* 315 - 332
- ▶ Adepoju Adebisi Anthony: *Succession and the Rights of Female Children and Widows against Male Counterparts under Customary Law in Southern Nigeria* 333 - 362
- ▶ Ibrahim Shehu: *Electronic Transaction Bill 2015: A Critical Analysis* 363 - 372
- ▶ Ijalana, Emmanuel Folayan, Livinus I. Okere & Aloy-Nzofutachi C. Theophilus: *Appraising Policing, without the Stricture of Law, by Private Security Outfits in Nigeria* 373 - 398

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ASSISTED REPRODUCTIVE TECHNOLOGY IN NIGERIA: TACKLING THE ISSUES OF COMMODIFICATION AND THE DEARTH OF LEGAL REGULATION

Folake M. Tafita* & Folakemi O. Ajagunna**

ABSTRACT

Having children is an extremely important event in the life of individuals, particularly married couples. The success and advancement attributed to invention of assisted reproductive technology (ART) in developed countries, and developing countries such as Nigeria has now made it possible for infertile persons and couples who would otherwise have been unable to conceive and bear children to now have children. However, despite the feats and advancement of medical science in this area, infertility or inability to conceive remains a problem of global proportions. In many developing countries, particularly sub-Sahara countries like Nigeria, ARTs and other related services remain ill-regulated and expensive, leading to abuse, exploitation and commodification. This article examines the issue of commodification in various means of assisted reproductive technology, the various abuses of commodification such as the 'baby factories' and sale of babies in Nigeria. The article exposes the challenges facing assisted reproduction and ill-regulation in Nigeria. The article advocates for a specific legislation to curb the nefarious practice of 'commodification' and also, the recognition and promotion of the reproductive rights of infertile individuals and couples to access and benefit from ARTs.

1.

INTRODUCTION

Despite the scientific breakthroughs and feats accomplished in the area of assisted reproductive technology, access to affordable assisted reproductive

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technology remains a mirage to many childless persons and infertile couples in Nigeria and many developing countries alike.¹ Infertility, or the inability to conceive, remains a problem of global proportions. According to the World Health Organization (WHO), approximately 8- 10% of couples face some form of infertility or the other.² On a global scale, this means, some 50 – 80 million people are burdened with the problem of infertility. It is also said to affect between 8 and 12% of reproductive-aged couples worldwide.³ Childbearing and ability to conceive is an important event in the life of every individual, most particularly married couples. This is so because childbearing is strongly associated with the ultimate goal of completeness and family integration. Childbearing and ability to conceive remain very important in many African cultures. For example, amongst the Igbos and the Yorubas of Southern Nigeria, high social value is placed on procreation. Therefore, inability to conceive often results in severe psychosocial stress for couples.⁴

In many situations inability to conceive has been the basis for discrimination, stigmatization divorce or separation of married couples.⁵ The psychological and social burden of infertility in most societies is much heavier on the woman as inability of a woman to conceive and have children is seen as a social disgrace.⁶

The burden and social expectation placed on the childless couple particularly the woman often leads to the desperation to have a child by any means whether through Assisted Reproductive Technology (ART) or other unconventional or illegal transactions; considered less expensive, less intrusive and quicker than ART. This article discusses the problem of commodification and illegal transactions in assisted reproductive technology in Nigeria. From local and

¹Koyonda S. O, 'Assisted Reproductive Technologies in Nigeria' (2001) *Indian Law Institute Journal* 79

²World Health Organization, 'Sexual and Reproductive Health: Infertility Definitions and Terminology' <www.who.int/reproductivehealth/topics> accessed 27 February 2017

³Inhorn M. C, and Patrizio P. 'Infertility around the Globe: New thinking on Gender, Reproductive Technologies and Global Movement in the 21st century' (2014) 21(4) *Human Reproduction Update* 411

⁴Amujiri B, 'Human trafficking and Child abuse' [2013] *Journal of Religion and Human Relations* 1

⁵Rebecca Cook and others, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Clarendon Press 2003) 17

⁶*Ibid*

foreign perspectives, the article will discuss the following; What is infertility? What are the social consequences of infertility for the infertile couple and female? What is assisted reproductive technology and to what extent has ART been able to assist infertile couples in Nigeria? What is commodification/commercialization and why commodification in ART? How has commodification impacted child bearing and assisted reproduction? Is there currently a legal framework for the regulation of assisted reproductive technology in Nigeria? Can the problem of infertility, commodification or commercialization be addressed via regulation?

The position of this article is that commodification and proliferation of illegal transactions of the childbearing process is attributable to non-regulation of assisted reproductive technology in Nigeria. The high cost of bearing children through assisted reproductive technology violates reproductive health rights and the benchmark criterion for access to reproductive health services. Governments are under obligation to ensure and safeguard through legislation the rights of couples to bear children.⁷

2. INFERTILITY AS A REPRODUCTIVE HEALTH PROBLEM

When a woman is unable to conceive or a man is unable to get a woman pregnant through the normal process of sexual intercourse, for a considerable period of time, such a person is termed to be infertile. Clinically, infertility is “a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.”⁸ The prevalence of infertility in most countries in Sub-Saharan Africa ranges between 20% - 30%. An infertility belt has been described in Africa.⁹ This stretches from West Africa, through Central to East Africa. Several countries with high rates of infertility that lie within this belt include Nigeria, Cameroon, Gabon, Democratic Republic of Congo, Central African Republic, Chad, Burundi, Uganda and Kenya.¹⁰ By contrast, in the United Kingdom, it is estimated to be in the

⁷ Zakariyah Mustapha, 'The practice of Assisted Human Reproduction Technologies in Nigeria' (2018) 1(1) *Journal of Law and Judicial System* 40, 49

⁸ World Health Organization, 'Sexual and Reproductive Health: Infertility Definitions and Terminology' <www.who.int/reproductivehealth/topics> accessed 27 February 2017

⁹ Etuk S.J., 'Reproductive Health: Global Infertility Trend' *Nigerian Journal of Physiological Sciences* (2009) 24 (2) 85

¹⁰ *Ibid*

region of 6%. In the United States of America, it is about 10%. In Nigeria, infertility has been said to affect between 20 – 25% of married couples. In addition, 40- 45% of all consultations in gynaecological clinics are infertility related.¹¹

Although male infertility contributes to more than half of all cases of global childlessness, infertility remains a woman's social burden.¹² For years, many studies have documented the high premium placed on child bearing in several African societies which makes infertility a major disaster for couples. Several adverse consequences of infertility for women's reproductive health in Africa are now being increasingly recognized. Apart from being a major cause of marital disharmony, infertility can lead to distress and depression as well as discrimination, ostracism and physical violence.¹³ In addition, the repercussions of infertility go beyond 'not just having a child of your own', it is associated with incomprehensible and immeasurable psychological and social consequences which impact more on the female.¹⁴

Even though infertility is a problem that touches deeply the soul of couples involved in this, medical science has increased the chances of giving solutions to the problem with Assisted Reproductive Technology (ART).¹⁵ ART refers to all treatments or procedures that include the *in vitro* handling of human oocytes and sperm or embryos for the purpose of establishing a pregnancy. This includes, but is not limited to, *in vitro* fertilization and trans cervical embryo transfer, gamete intra-fallopian transfer, zygote intra-fallopian transfer, tubal embryo

¹⁰ *Ibid*

¹¹ Fadare J O and Adeniyi A A, 'Ethical Issues in Newer Assisted Reproductive Technologies: A View from Nigeria' (2015) 18(7) Nigerian Journal of Clinical Practice 57

¹² Cui W, 'Mother or Nothing: The Agony of Infertility' (2010) 88 World Health Organization Bulletin 881 See also Chachamovich J R and others, 'Investigating Quality of life and Health-related Quality of life in Infertility: A Systematic Review' (2010) 31 (2) Journal of Psychosomatic Obstetrics and Gynecology 101

¹³ Okonofua F E and others, 'Serological and Clinical Correlates to Gonorrhoea and Syphilis in Fertile and Infertile Nigerian Women' (1997) 73 Genitourinary Medicine 194

¹⁴ Adebisi A G and others, 'Awareness and Perception of Assisted Reproductive Technology Practice Amongst Women with Infertility in Northern Nigeria' (2011) 1 Open Journal of Obstetrics and Gynecology 144

¹⁵ Roupa Z, and others, 'Causes of Infertility in Women at Reproductive Age (2009) 3(2) Health Science Journal 80

transfer, gamete and embryo cryopreservation, oocyte and embryo donation and gestational surrogacy.¹⁶

The success attributed to this clinical advancement in developed countries, and in developing countries such as Nigeria has now made it possible for couples who would otherwise have been unable to conceive and bear children to now have children. It indeed has become a great victory for modern medicine and a huge relief for couples and individuals who face increasing difficulties in conception.¹⁷

ART as an advancement in medical science is not bereft of legal and moral difficulties. One of such is the issue of commodification. Commodification refers to the practice of commercialisation of human sperm, eggs, embryo and surrogacy. In the field of reproductive technology as we have it today, assisted reproduction operates with enormous reliance on “donated” human eggs and sperm, meaning dependence on young, fertile women for the eggs their bodies produce and on men for the sperm they produce. The effect of this practice is to commodify women’s bodies, human eggs and human sperm.

3. THIRD PARTY ASSISTED REPRODUCTION

Assisted Reproductive Technology includes a wide array of techniques that primarily assist infertile couples to conceive with medical assistance. It includes all treatments that involve the medical and scientific manipulation of human gametes and embryos¹⁸ in order to produce a term pregnancy. Since the birth of the first test-tube baby in 1978, over 1.5 million children have been born following IVF treatment.¹⁹

¹⁶ World Health Organization, *Current Practices and Controversies in Assisted Reproduction* (Effy Vayena, Patrick J Rowe, P David Griffin eds, WHO 2002)

¹⁷Koyonda S. O, ‘Assisted Reproductive Technologies in Nigeria’ (2001) *Indian Law Institute Journal* 79

¹⁸ Adrienne A and Marmor R, *Assisted Reproduction: From Birth to Death and Bench to Clinic The Hastings Center Bioethics Briefing Book for Journalists, Policymakers and Campaigns*, Garrison (The Hastings Center 2008)

¹⁹Akande E O, ‘The Pros and Cons of Assisted Reproductive Technology in Developing Countries’ (2008) 8(1) *Oxford University Journal* 12

According to the Centre for Diseases Control and Prevention,²⁰ ART includes all fertility treatments in which both eggs and sperm are handled outside of the body. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman. Assistance here can consist of sperm donation, egg donation, surrogacy and gestational carriers.

Chaudhary defines assisted reproductive technologies to include any fertilization involving the manipulation of gametes/embryos outside the human body and transfer of gametes/embryos into the body.²¹ Assisted Reproduction has been said to account for about 1.5% of births in the United States in 2012.²² In the United Kingdom, the number of children conceived using IVF, surrogacy and egg donation and freezing climbed from around 90,000 in the 1990s to an estimated 2.5 million in 2007. Since then, additional 1.5 million births have resulted from ART.²³

4. REGULATORY RESPONSES TO ASSISTED REPRODUCTION IN OTHER JURISDICTIONS

In the United Kingdom, the domain of assisted reproductive technology has been well regulated over the years with series of legislation enacted to address various aspects of assisted reproduction. Although, when the first British surrogate baby was born on January 4, 1985,²⁴ the United Kingdom had not yet enacted any law. All that was done then was to establish a committee, the Warnock Committee, to investigate and report its findings on human reproduction issues such as the use of human embryos and in-vitro fertilization and surrogacy. While the Committee's findings were still being deliberated on, Baby Cotton was born in 1985. This birth generated a lot of controversies that the British Government quickly passed the Surrogacy Arrangements Act, 1985 which criminalized the

²⁰Centre for Disease Control, 'Reproductive Health' <www.cdc.gov/reproductivehealth/infertility> accessed 12 August 2016

²¹Chaudhary B, 'Assisted Reproductive Techniques Ethical and Legal Issues' (2012) 34(4) Indian Journal of Forensic Medicine 350

²²Saswati S and others, 'Assisted Reproductive Technology Surveillance- United States 2012' (2015) Morbidity and Mortality Weekly Report < www.cdc.gov> accessed 19 October 2016

²⁴David Mercer, 'Britain's first Surrogate Mother still longs for Baby Cotton Thirty years on' *Express* (London, 4 January 2015) <<https://www.express.co.uk>> accessed 31 August 2018

act of third parties commercially benefitting from surrogacy arrangements.²⁵ The Warnock Committee recommended that all surrogacy arrangements be banned and enforced with criminal penalties. It specifically advised the imposition of criminal penalties on the creation or operation of profit-making and non-profit making surrogate agencies.²⁶

The Warnock Committee's 1984 Report led to the Human Fertilization and Embryology Act 1990 and the wide-ranging licensing and monitoring functions given to the Human Fertilization and Embryology Authority, HFEA, which commenced operations under the provisions of the 1990 Act in 1991. The HFEA is an independent body, funded partly by government and partly by licensed ART centres, that inspects and licenses facilities, and produces a Code of Practice for ART in the United Kingdom.²⁷ The main legislation on assisted reproduction in the United Kingdom remains the Human Fertilization and Embryology Authority Act 2008. The framework of the legislation was the result of the recommendations of the Warnock Committee.

The 2008 Act regulates donated genetic materials such as sperm, eggs or embryos or other materials involved in the creation of an embryo outside of the human body. Its regulation includes and covers the storage of these materials. However, the Act does not directly regulate the practice of surrogacy in so far as it does not involve the use of donated genetic material or IVF techniques. Surrogacy is regulated by the Surrogacy Arrangement Act of 1985.²⁸ The United Kingdom surrogacy law regime contains two separate Acts regarding surrogacy. On the one hand is the one preventing commercial arrangements and on the other, the one providing rights to intended parents.

²⁵Richardson Wilson and Shriya Luke, 'Surrogacy Law and Medical Ethics' (2012) 3(7) International Journal of Scientific & Engineering Research 1

²⁶*Ibid.* Surrogacy as at present is not illegal in the United Kingdom but is restricted by various legal rules. For instance, it is a criminal offence to advertise that one is looking for a surrogate or to act as a surrogate. It is also an offence to broker a surrogacy arrangement on a commercial basis. Surrogacy agreements are not enforceable in the UK courts. This means that it is not possible to enter into a legally binding surrogacy agreement in the UK. See generally 'Legalities: Surrogacy Law in the UK' www.surogacyuk.org accessed 31 August 2018

²⁷Bernard Dickens and Rebecca Cook 'Some Ethical and Legal Issues in Assisted Reproductive Technology' (1999) 66 International Journal of Gynecology and Obstetrics 55

²⁸Human Fertilization & Embryology Act 2008.

The United States has little federal or state regulations pertaining to the assisted reproductive technology (ART) industry. This is in contrast to other developed nations, which provide more extensive regulations on the use of ART and in many cases restrict its use for certain ends, such as reproductive cloning. The only federal legislation in the United States passed pertaining to ART is the *Fertility Clinic Success Rate and Certification Act of 1992* establishing the reporting of pregnancy success rates to the Centers for Disease Control and Prevention for publication. Regulation of ART varies at the state level. Seven states have legislation that prohibit human cloning for both reproductive and research purposes, while eight states ban reproductive cloning. Other states prohibit commercial surrogacy or regulate surrogacy agreements. Several states require private insurance coverage of ART and regulate the donation of sperm, eggs, and embryos. Only Pennsylvania extensively regulates and monitors ART clinics and activities.²⁹

5. SPERM DONATION

Sperm donation can be used in different types of fertility treatment including intrauterine insemination, where sperm is used to fertilise a woman's egg inside her body, and in-vitro fertilization, where sperm is used to fertilise a woman's egg or donor eggs in a laboratory. There are a number of reasons why one may need to have donated sperm i.e. sperm that is not from one's husband/partner. Patients often resort to donor sperm because of any of the following reasons:

1. A partner has a low sperm count, or poor quality sperm which has resulted in previous failed In-Vitro Fertilization treatments, or even azoospermia (an absence of sperm)
2. In instances where there is a risk of passing on an inherited disease, a couple may elect to have sperm donation which frees them from the risk of bearing children with inherited diseases.
3. Where a partner has had a vasectomy, and cannot impregnate a woman again.

²⁹ Kirsten R, 'G12 Country Regulations of Assisted Reproductive Technologies' <<https://cbhd.org>> accessed 10 February 2017

4. Where a woman is single and has the desire to bear children.³⁰

Couples can use donated sperm when a man does not produce sperm or produces very low numbers of sperm. Donor insemination (DI) in which a fertile man provides semen for an infertile couple or individual was first reported by Addison Hard in 1909. Oocyte provision by a fertile woman for an infertile couple dates back little more than ten years. Records of the origin and history of DI indicate that semen was supplied with no money changing hands. It was therefore appropriate to describe this first provider as a "donor". As the practice of DI increased, semen supply became a major issue. Donor insemination was shrouded in secrecy for much of its early history and a culture developed where the semen provider's involvement was limited to the physical act of supplying gametes. Payment for this act could be construed as representing closure of the transaction and provider's anonymity was guaranteed.³¹

According to Professor Ian Craft, a major frustration experienced by gynaecologists in England is the inability to recruit enough gamete providers to meet the demand. He further stated that the demand for eggs far outstrips the supply from women who donate for altruistic reasons. The end results are an inordinate delay, often from 1-2 years, for the treatment of women who are barren, and the proliferation of private organisations that put donors and recipients in contact for financial reward.³²

6. EGG DONATION

On the other hand, egg donation can be used when a woman does not produce healthy eggs that can be fertilized. In this instance, an egg donor undergoes ovary stimulation and egg retrieval steps, after which the donated egg can be fertilized by sperm from the woman's partner, and the resulting embryo is placed into the woman's uterus. The growing and unmet demand for egg donation has been the subject of considerable discussion worldwide. Different health care systems

³⁰The Agora Fertility Centre Information Fact Sheet on Sperm Donation www.agoraclinic.co.uk accessed on 13 February 2017

³¹Daniels K, 'To Give or Sell Human Gametes- the Interplay between Pragmatics, Policy and Ethics' (2000) 26 (1) *Journal of Medical Ethics* 206

³²Lui S and others, 'Attitudes and Motives of Semen Donors and Non-Donors' (1996) 11 (1) *Human Reproduction* 2061.

permit different forms of anonymous egg donation which in general fall into one or more of the following four categories: (i) altruistic egg donation in which anonymous donors who are non-patient volunteers undergo egg collection for the benefit of someone unknown to them; (ii) commercial egg donation in which women accept money in return for donating eggs; (iii) known-anonymous egg donation, a scheme whereby the matched donor and recipient remain anonymous to each other but the identity of the donor is known to an unmatched recipient; and (iv) the infertile-anonymous egg donors in which patients would volunteer to donate a proportion of their eggs in return for subsidized in-vitro fertilization (IVF) treatment (shared egg donation).³³

Egg donation raises challenging questions about the role of the State in regulating procreation and the appropriate balance of individual and collective societal rights. In the United States, there is an active market for gametes and this often meets the demand of infertile couples seeking treatment, however, the government has not implemented any policy to restrict the practice.³⁴

In the United Kingdom, the law on donation of sperm, eggs and embryo is set by national legislation and a European Union directive which was implemented in 2007. By this legal framework, the UK government is mandated to ensure that donation is voluntary and unpaid. In addition, donors are to act from altruistic motives in the spirit of contributing to a wider social good.³⁵ The strict regulations put in place by the British Government have greatly reduced the availability of donor eggs to disadvantaged infertile couples. In Nigeria, there has been an upsurge in demand for eggs and sperm donations in recent times. This has been linked to the increase in awareness and acceptance of assisted reproduction methods. Coupled with this, over the last two decades, the success rates of conception through ART has increased. Findings also revealed that ART is feasible and successful in low resource settings where staff are trained and equipment is available.³⁶

³³ Ahuja K, Mostyn B. and Simon E, 'Egg Sharing and Egg Donation: Attitude of British Egg Donors and Recipients' (1997) 12 (12) *Human Reproduction* 2845

³⁴ Sargent M, 'Regulating Egg Donation: A Comparative Analysis of Reproductive Technologies in the United States and United Kingdom' (2007) 4(1) *Michigan Journal of Public Affairs* 2

³⁵ Human Fertilization & Embryology Authority 'Donating Sperm and Egg: A Review of the HFEA's Sperm and Egg Donation' < www.hfea.gov.uk/donationreview > accessed 7 March 2017

³⁶ Ola M T, 'Assisted Reproductive Technology in Nigeria: Flawed or Favoured' (2012) 2(4) *International Journal of Social Science and Humanity* 331

7. SURROGACY

Where a woman is unable to carry a pregnancy to term, she and her partner may choose a surrogate or gestational carrier.³⁷ Surrogacy is the sexual reproductive procedure by which a woman enters a contract to carry and give birth to another's child. With "traditional" surrogacy, the surrogate mother's own eggs may be naturally or artificially inseminated by a donor or intended father's sperm. With "gestational" surrogacy, the surrogate mother is implanted with an embryo created by in vitro fertilization (IVF), generally using the intended mother's egg and intended father's sperm. In this latter case, the surrogate mother is not genetically related to the baby.³⁸ It is common practice for the surrogate mother to be promised a financial reward for her inconvenience that would last the nine months of pregnancy.

Surrogate practice is not novel as it is believed that it had been in existence in ancient times when Sarah suggested to Abraham that her slave, Hagar should act as a surrogate mother to help them conceive a child.³⁹ The only difference between what obtained then and what obtains now is that while the former involved physical contact, surrogacy as it exists today is usually accomplished by artificial insemination.⁴⁰

The Warnock Committee defined surrogacy as the practice whereby a woman carries a child with the intention that the child should be handed over to another after birth.⁴¹ Surrogacy can be used when the female of the couple does not produce healthy eggs that can be fertilized. In contrast, a gestational carrier is implanted with an embryo that is not biologically related to her. This alternative can be used when a woman produces healthy eggs but is unable to carry a pregnancy to term. If needed, egg or sperm donation can be used in this situation.

³⁷ National Institute of Health, 'Assisted Reproductive Technology' <www.nichd.nih.gov.org> accessed 8 February 2017

³⁸ Plaster G, 'Surrogacy: The Commodification of Motherhood and Human Life' <<https://lozierinstitute.org>> accessed 10 February 2017

³⁹ The Holy Bible Genesis 16 vs. 1-4, (New King James Version, Thomas Nelson Publishers)

⁴⁰ Festus Emiri, *Medical Law and Ethics in Nigeria* (Malthouse 2012)

⁴¹ Festus Emiri, *Medical Law and Ethics in Nigeria* (Malthouse 2012) 79

8. WHAT IS COMMODIFICATION?

According to Rothman, the key unifying concept in the development and application of new reproduction technology has been the increasing commodification of life, treating people and parts of people as marketable commodities. This commodification process is made firstly in prenatal diagnosis, in which the foetus is treated as a product subject to quality control measures and secondly, when women are treated as producers without emotional tie to their products and lastly in so-called "surrogacy" arrangements in which an actual price tag is placed on pregnancy, and women sell both their "labour" and their "product."⁴²

Commodification has been defined as the practice of giving something a market price.⁴³ Inhorn opines that commodification of reproductive parts such as sperm, ova, embryos and gestational services of surrogates has in recent times been resorted to service the transnational ARTs industry. Following this, commodification research by ethnographers of organ trafficking, scholars and others have expressed concern with the exploitative potential of these practices, particularly as it affects vendors of eggs and surrogate mothers.⁴⁴

The issue of commodification according to Ola is a cloudier sub issue for ART since it could be argued in two ways. Firstly, from the very beginning, when a woman decides to donate her eggs, or a man his sperm, some people can argue that these acts amount to buying and selling of human beings, or at the very least, the make-up of humans.⁴⁵

⁴² Rothman B, 'Reproductive Technology and the Commodification of Life' (1987) 13(1-2) *Women's Health* 95

⁴³ Holland S, 'Contested Commodities at Both Ends of Life; Buying and Selling Gametes, Embryos and Body Tissues' (2001) 11(3) *Kennedy Institute of Ethics Journal* 263

⁴⁴ Inhorn M C, 'Globalization and Gametes: Reproductive Tourism, Islamic Bioethics and Middle Eastern Modernity' (2011) 18(1) *Journal of Anthropology and Medicine* 87

⁴⁵ Ola M T, 'Assisted Reproductive Technology in Nigeria: Flawed or Favoured' (2012) 2(4) *International Journal of Social Science and Humanity* 331

9. ARGUMENTS FOR AND AGAINST COMMERCIALIZATION

Dickens⁴⁶ believes that, a principal argument against allowing human gametes and embryos to be the subject of commercial or profit exchange stems from the ethical principle of respect of persons. Neither gametes nor embryos are persons but both may be considered as potential persons who require to be treated with respect and dignity and not as objects nor means to an end. Although humans have inherent worth and value, it is inconsistent with their inherent worth that human gametes and embryos should become the subject of commercial value, barter and trade.

Proponents of this view believe that human life begins at conception or fertilization, thus an embryo ought to be afforded the same respect and protection as any other individual. Another view is that some interests, objects and functions such as motherhood should not be amenable to market transactions because of the damage that would result to human values and dignity.⁴⁷ Holland further suggests that the sense of dignity of humanity is fundamentally disturbed by the suggestion that that which bears the marks of personhood can somehow be equated with property. Eggs should not be regarded as property because the human body is inalienable.⁴⁸

Radin⁴⁹ on the other hand, criticized paid surrogacy as devaluing women generally by making them objects of exchange. Emiri⁵⁰ argues that surrogacy has been questioned on the ground that it is tantamount to the sale of a child which is criminalized in some jurisdictions, for example, the English Adoption Act of 1976⁵¹, and the American Adoption Act of 1958⁵². Surrogacy is motivated by payment of money in one form or the other. However, the increase in the preference for surrogacy over and above adoption is an indication that it enjoys several advantages over adoption. This is so because the child born through surrogacy is genetically related to the commissioning couple, for wholly or

⁴⁶ B M Dickens, 'Ethical Issues arising from the Use of Assisted Reproductive Technologies' <www.pdfsemanticscholar.org> on 10 March 2017

⁴⁷ *Ibid*

⁴⁸ Holland S, (n 43) 266.

⁴⁹ Margret Radin, 'Market-Inalienability' (1987) 100 Harvard Law Review 1849

⁵⁰ Festus Emiri, *Medical Law and Ethics in Nigeria* (Malthouse 2012) 89

⁵¹ S. 67

⁵² S. 50

partly formed from their reproductive organs. And on this guise, Emiri further argues that it can hardly be said that surrogacy ought to be classified as a sale arrangement but rather as an urge to help childless couples who are in agony because of their inability to have children⁵³ On the strength of this, surrogacy cannot be likened to a sale transaction.

Ogundipe⁵⁴ views egg and sperm donation as not being different from blood donation. He sees egg and sperm donation as an expression of the very human nature of being our brother's keeper by assisting men and women who cannot conceive except by assisted reproductive methods. He concludes by asserting that as blood donation gives life to individuals in dire need of it, so does egg and sperm donation as a societal call and a commendable act assisting infertile couples to have children of their own. From the belief of this author, no amount of money in exchange for sperm and egg donation would be too much so long as the ultimate goal of such would be to produce children which otherwise would have been impossible to achieve without the donation.

The Royal Commission of the Canadian Government in the Baird Report⁵⁵ stated that to allow commercial exchanges of this type [buying and selling embryos, use of financial incentives, e.t.c.] would undermine respect for human life and dignity and lead to the commodification of woman and children. Legislative prohibitions were thus placed, amongst other things, on commercial preconception or "surrogacy" arrangements; buying and selling of eggs, sperm and embryos and egg donation in exchange for *in vitro* fertilization services.

Statements from most international ethical committees have stressed that semen donors should not be reimbursed for their donation.⁵⁶ The International Federation of Gynaecology and Obstetrics recommends that the number of

⁵³ Festus Emiri, (n 50) 89.

⁵⁴ Ogundipe S, 'Answering a Distress Call Through Sperm and Egg Donation' *Vanguard News* (June 25, 2016) <www.vanguardnews.com> accessed 23 October 2016

⁵⁵ In response to mounting concerns and pressure from women's groups, religious groups, medical and legal professional groups, academics and advocacy groups, the Canadian Government appointed the Royal Commission on New Reproductive Technologies in October 1989. The mandate of the Commission was to conduct a comprehensive study and to report on developments in medical science related to new reproductive technologies, along with their social, ethical, health, research, legal and economic implications

⁵⁶ United States Congress Office of Technology Assessment, *Infertility, Medical and Social Choices* (Diane Publishing 1988) 24, 27

donations from any single donor should be limited to avoid the future danger of consanguinity or incest.⁵⁷ However, the severe shortage of sperm donors has generated an increasing interest in the need for their motivation. In a survey carried out in Europe, findings revealed that donors in almost all European countries are initially attracted to sperm donation by the opportunity to earn money.⁵⁸

The concept advanced by the German secular philosopher Immanuel Kant is that people, and by implication, potential people should not be treated as objects, nor only as means to ends. As ends in themselves, individuals have inherent worth and value, not simply the instrumental or utilitarian value ascribed to objects, which are valued only for what can be done with them. Accordingly, it is inconsistent with their inherent worth that human gametes and embryos should become the subject of commercial value, barter and trade.

The argument that has been put forward against commercialization through commodification is that such acts damage important ethical values by raising functional utility over inherent human worth. It is also said to invite competitive bidding for superior over inferior products, in the case of gametes and embryos. As a result of offensive distinctions in genetic pedigree and racial or ethnic properties, patients "selectively determine" what characteristic traits they want in their desired offspring. Commercialization in addition imposes a monetary tariff on all means by which children are conceived and born. As aptly summed up by Dickens, a man's loving act by which his wife conceives their child becomes reduced to his transfer of sperm of a given market value, and her gestation becomes a service.⁵⁹

Some who view surrogacy as the commodification of children argue that transportation of children across borders in the case of a transnational surrogacy is an explicit violation of international agreements that prohibit the sale of children. The United Nations Convention on the Rights of the Child, for example, contains language prohibiting certain kinds of transfer of children across

⁵⁷Gong D and others, 'An Overview on Ethical issues about Sperm Donation' (2009) 11 Asian Journal of Andrology 645

⁵⁸Schenker J G, 'Assisted Reproduction Practice in Europe: Legal and Ethical Aspects' (1997) 3(2) Human Reproduction Update 173

⁵⁹Dickens (n 46).

international borders, and provides that signatory countries must take measures to combat illicit transfer and non-return of children abroad, as well as the abduction, sale of, or traffic in children for any purpose or in any form.⁶⁰

The Hague Adoption Convention⁶¹ similarly contains language close to the provisions of the Child Rights Convention. One of the Convention's objectives is to establish a system of cooperation among states to respect safeguards and to prevent the abduction, sale, or trafficking of children. It is possible to interpret these international agreements as prohibiting transnational surrogacy, arguing that it represents a human rights violation for the child.⁶²

In the English case of *A v C*,⁶³ a cohabiting couple had entered into an arrangement with a prostitute to act as a surrogate mother in return for a fee of three thousand pounds. At birth, the surrogate mother had a change of mind and refused to give the child to the couple. The father thereafter brought an application for access to the child. This was granted by the court. This decision was however reversed by the English Court of Appeal. Learned authors are of the opinion that the decision may have been reversed because the contract may have been susceptible to exploitation and thus reprehensible to public policy. In the words of Emiri,⁶⁴ the very objection of many concerned people to surrogacy is that it is unthinkable for a woman to rent or hire her womb for the purpose of making money. The arrangements to hand over the baby to the commissioning parents have been likened to selling babies, which is expressly forbidden in many jurisdictions.⁶⁵

⁶⁰ Article 11 & 35 UN Convention on the Rights of the Child

⁶¹ Article 1 The Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption

⁶² Funkelstein A, Dougall S, Kintominas A and Olsen A, 'Surrogacy Law and Policy in the US, A National Conversation Informed by Global Lawmaking' Report of the Columbia Law School Sexuality and Gender Law Clinic <www.lawcolumbia.edu> accessed 30 January 2017

⁶³ [1978] 8 Family Law 170

⁶⁴ Emiri (n 50) 81.

⁶⁵ In the US states of New York, Indiana and Michigan, surrogacy contracts are expressly forbidden. In France, surrogacy contracts are void. In Germany, surrogacy contracts are void and prohibited as a result of the perceived violation of human dignity of the child and the surrogate being reduced to objects of contract. In Canada, commercial surrogacy is also prohibited.

There are some surrogacy friendly jurisdictions, for instance Ukraine is considered a popular destination for intended parents where commercial surrogacy is explicitly allowed by a statute.⁶⁶ It has also been said that there is an overriding importance of limiting the number of donor offspring from a single sperm donor as this will prevent accidental consanguinity between donor and offspring. Countries have different regulations on this aspect. In China, for example, sperm donors can only impregnate five women through artificial insemination by donor or by in-vitro fertilization. The American Society for Reproductive Medicine recommends a limit of twenty-five children per population of eight hundred thousand for a single donor.⁶⁷

10. THE NIGERIAN EXPERIENCE WITH COMMODIFICATION

In Nigeria, there are differing dimensions to commodification and commercialization. On the one hand is the practice whereby virile men and women offer their “professional services” as semen providers and egg donors for participants in ART in return for a fee. According to a report, egg and sperm agencies staff actively seek for prospective donors. Young men and women likewise see trading of their reproductive parts as a means to make a living. Not minding the effects of the drugs administered to stimulate their ovaries to secrete more than the usual eggs, girls could be paid as much as N120,000 for each donation they make.⁶⁸ In addition to this, fertility clinics even pay more when sellers have exceptional features that the beneficiaries are looking for.

On the other hand, there is the issue of menace of baby factories. The term ‘baby factory’ has been used to describe a location where women are encouraged or forced to become pregnant and give up their newborn babies for sale. These factories are usually disguised as maternity homes, orphanages, social welfare homes, clinics, and informal water bottling factories and are operated by well-organized criminal syndicates. It was observed that the perpetrators are usually the owners of these facilities, with some of them being medical doctors and

⁶⁶Funkelstein (n 62)

⁶⁷Gong (n 57) 648

⁶⁸Ogundipe S ‘Ovum Trading : Inside Nigeria’s Multi-Million Naira Human Egg Business’ *Punch Newspaper* (9 August 2015)

they run this 'business' with the help of employees, among whom may be men specifically hired to impregnate women and girls.⁶⁹

There is no legal definition for the phenomenon of "baby factories" or "baby selling". These terms are generally used to describe activities in Nigeria involving restriction of a person's movement against such person's will, forced impregnations, sale of babies and illegal adoptions. Based on media reports, these "baby factories" thrive in the South-East of Nigeria, in particular, the States of Anambra, Lagos, Abia, Imo, Enugu and Ebonyi.⁷⁰ As stated by Onuoha, baby trafficking refers to all acts involved in the transfer, sale or receipt of a baby within national or across international borders through stealing, false adoption, fraud, or deception to be used for satisfying social, material and ritual purposes among others and a baby is any child from birth to the age of one.⁷¹

The first cases of "baby harvesting" in Nigeria were officially reported in the year 2006. The detected cases had a similar fact pattern in which pregnant teenagers or adult women with unwanted pregnancies approached doctors, clinics, nurses or orphanages that subsequently took care of these girls and women during their pregnancies. When these babies were born, they were sold to couples. The biological mothers of the babies signed papers repudiating their claims on the babies and received monetary compensation.⁷²

Huntley outlined a catalogue of instances of baby factories in Nigeria in the past six years. For example, in May 2008, the Nigerian Police rescued about 25 teenage girls from a hospital in Enugu. Similarly, in June 2011, 32 teenage girls were freed from a "baby factory" located in the city of Aba, Abia state. In October 2011, 17 pregnant girls were saved from an orphanage in Lagos. In May 2013, the police rescued 6 teenage girls from a "baby factory" in Enugu, 17 pregnant

⁶⁹ Ezeadi C., Achagh W., Ilomuanya A., and Ogbuabor S. 'Prevalence of Baby Factory in Nigeria: An Emergent Form of Child Abuse, Trafficking and Molestation of Women' (2015) 2(1) *International Journal of Interdisciplinary Research Methods* 12

⁷⁰ The Guardian, June 2, 2011 "Nigerian Baby farm raided-32 pregnant girls rescued cited in Ezeadi C. Achagh W. Ilomuanya A. Ogbuabor S. (n 69) 2

⁷¹ Onuoha F C, 2014 'New Wares of Trade: Understanding Evolving Baby Factory and Trafficking in Nigeria' Presentation made at the 5th International Conference on National and International Perspectives on Crime Reduction and Criminal Justice on 14-15 August 2014

⁷² Huntley S, 'The Phenomenon of Baby Factories in Nigeria as a New Trend in Human Trafficking' (2013) 3 *International Crimes Database Brief* 10

teenage girls and 11 babies in the southern part of Imo State, and about 26 teenage girls in Umuaka village, Imo State. In June 2013, the police freed 16 pregnant young women from a clinic in Aba City, Abia State. In July 2013, the police arrested the owner of an illegal maternity home “Moonlight Maternity Home” and a nurse working for him for selling babies from unwanted pregnancies. In August and September 2013, the police unveiled two more cases of baby factories in Imo State. Meanwhile, several “baby factories” were also reported in Anambra State⁷³.

There are a number of factors responsible for commodification of assisted reproduction in Nigeria. These include socio-cultural, economic, ill-regulation/lack of regulation and governmental attitude to the promotion and protection of reproductive health rights. Many infertile couples undergo a lot of emotional and psychological stress from family relations and friends over the inability to conceive. The fear of ostracism, rejection, discrimination and threat to continuance of marriage are major contributors to couples seeking ‘commercial services’ to bear children. These ‘services’ include illegal surrogacy contracts, buying of, babies, egg and sperm and child trafficking.

The commercialization and commodification of eggs and sperm by young women and men for economic gain has contributed to the proliferation of illegal activities of sorts. Many unscrupulous medical experts have also involved themselves in soliciting for ‘donors’ of sperms and eggs for gain without informing the unsuspecting donors of the dangers that too much harvesting and donation portend for their reproductive life cycle.⁷⁴

Illegal commercialization and commodification of the reproductive process is thriving due to ill-regulation or lack of regulation.

⁷³ *Ibid*

⁷⁴ ‘Egg Donation and Exploitation of Women’ < <http://www.cbc-network.org/issues/making-life/egg-donation-and-exploitation-of-women/>> accessed 29 March 2017 ‘The Sobering Facts About Egg Freezing That Nobody is Talking About’ <https://www.wired.com/2014/10/eggfreezing-risks> accessed 29 March 2017

11. ARTS AND GOVERNMENTAL OBLIGATION TO FULFIL A RIGHT

Infertile couples suffer discrimination and social stigma due to health depravity. Where there is advancement in medical sciences, this group of people are entitled to some form of protection or assurance by government. Under human rights, the right to enjoy the benefits of scientific progress⁷⁵ and its application require governments to give high priority to conducting reproductive health research including biomedical research and to apply the findings of this research. These rights may be invoked where reproductive and sexual health services are not financially or geographically accessible to individuals who have one form of reproductive disability or the other. Government thus has the obligation to fulfil the right to benefit of scientific advancement by putting in place policies, mechanisms or regulatory framework for the attainment of these rights.⁷⁶

The Nigerian National Health Act 2014 was enacted to provide a framework for the regulation, development and management of a health system and to set standards for rendering health services in Nigeria.⁷⁷ However, there is no clear regulation in the National Health Act as regards ART except Section 50 which prohibits reproductive and therapeutic cloning of any kind and punishes offenders with a five year imprisonment without an option of fine. Furthermore, regulation on ART is excluded by the provisions of the interpretation section of the Act where it explicitly provides that the word "tissue" in the Act does not include blood or gametes. The improvements in health need more than better science and healthcare, they require state action to correct injustices.⁷⁸

The rights to the benefits of scientific progress support the claim that governments should spend public funds on research designed to benefit reproductive and sexual health. Government through national reproductive health policies must provide and cater for reproductive health services, even to finance

⁷⁵Article 27 of the Universal Declaration on Human Rights 1948 includes the right to share in scientific advancement and its benefits. The right to enjoy the benefits of scientific progress and its applications is included in the International Covenant on Economic Social and Cultural Rights in Article 15(1) (b). See also, Ss17 and 18(2) 1999 Constitution of the Federal Republic of Nigeria (as amended)

⁷⁶ Cook (n 5) 194

⁷⁷ See Explanatory Memorandum to the National Health Act, Cap A8

⁷⁸ Cook (n 5) 194

reproductive health services for infertile men and women so that they could access the services through subsidized costs for ART services when necessary, and where these resources are available, government should be able to provide free services for indigent people. Non provision of these services could be one of the reasons for commodification practices. If ART services are made available, the populace will be more enlightened and social and cultural barriers could be removed. Infertility could then be viewed as a health problem that can be addressed. This can reduce clandestine activities in ART.

12.

CONCLUSION

The foregoing has extensively discussed infertility, ARTs and the menace of commodification of human gametes and embryo in Nigeria. Despite the fact that Assisted Reproductive Technology as a breakthrough in reproductive medicine has been in existence for a while, the terrain is still fraught with a lot of issues and unresolved controversies. Unlike other jurisdictions, where to a large extent issues and problems arising from efforts at responding to infertility are being met with some degree of legislative and policy responses, infertility and assisted reproductive technologies give rise to a wide variety of legal consideration which today remains ill-regulated in Nigeria.

There is need to establish a legal framework that will regulate the practice of ART and also stem the menace of commodification and illegal transactions in the reproductive process. One can safely infer that the incidences of baby making factories and the illegal sale of babies, swapping of babies in hospitals, amongst other acts, are the direct result of the void created by a lack of specific regulation on ARTs and policy framework for assisting infertile couples and women.

ART should be made accessible and affordable through subsidization or access to free infertility treatment. This will go a long way in curbing commodification and other illegal practices in the reproductive process.

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