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Dichotomy Between Law And Morality: A War Without End?	<i>Nnadozie, Eric Chi</i>	193
Assessing The Security Management In Nigeria: The Boko Haram Challenge	<i>Dr. Joel Barde</i>	204
Termination Of Appointment In A Master And Servant Employment: <i>Dr Timothy A. Akingbade</i> <i>V. First Bank Of Nigeria Plc, Unreported Suit No: Nicn/Ben/24/2015</i>	<i>Akintunde Abidemi Adebayo</i>	215
The Alliance Between Islamic Law And International Humanitarian Law: Theory And Practice	<i>Sani Abdul-Aziz</i>	220
Statutory Control Of Assisted Reproductive Technologies In Nigeria: To Be Or Not To Be?	<i>Itunu Kolade-Faseyi & Oluwaseun Deji-Jayeoba</i>	233
Stamp Duty In Nigeria: The Law, The Relevance And The Prospects	<i>Hassan I. Adebowale</i>	242
The Effects Of Terrorism On The Nigerian Economy	<i>Sunday John Apochi</i>	251
A Critical Examination Of The Role Of The Institutions Saddled With The Responsibility Of Combating Terrorism And Engendering National Security In Nigeria	<i>M. Y. Danung</i>	264
X-Raying China's 'Debt Trap Diplomacy' And The Jurisprudence Behind The Sovereign Immunity Clause On The Loan Agreement Between Nigeria And The Export-Import Bank Of China	<i>Godfree Matthew</i>	277
Mechanisms And Challenges For The Enforcement Of Environmental Claims	<i>Abusomwan J.O.</i>	293
Administrative Tax Dispute Resolution Mechanism Under The Tax Laws	<i>W. O. Otuagoma</i>	303
An Overview Of Arbitration As An Alternative Dispute Resolution Mechanism	<i>Akinbisola Boluwatife Adebola & Kingsley Osinachi N Onu</i>	321
Issues And Challenges With Inter-State Assets Recovery And Repatriation	<i>Olusegun Victor, Adesanya</i>	329
A Critical Analysis Of Judicial Pronouncement On The Right To Education And The Challenges Of Enforcement In Nigeria	<i>Lilian Uche</i>	345
The Puzzling (In) Dependence Of The Judiciary In The Face Of Corruption: Who Judge The Judges?	<i>Muinat T. Abdulgani</i>	355

STATUTORY CONTROL OF ASSISTED REPRODUCTIVE TECHNOLOGIES IN NIGERIA: TO BE OR NOT TO BE?

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Abstract

Infertility is a personal as well as global health challenge. When it occurs, couples seek medical help and may undergo different procedures or treatments to change their status, become fertile and cuddle their children. Extraordinary advances have been made in medicine to respond to couples' desires in having children where same cannot be achieved naturally. One of such medical interventions or procedures usually resorted to is known as Assisted Reproductive Technology (ART). While the procedure has given hope to a lot of couples battling infertility in Nigeria, it has introduced numerous ethical, social and legal challenges in its wake especially in Nigeria where there is no statutory framework to regulate its practice. While adopting the doctrinal methodology for the study, this paper posits that the curbing the incessant proliferation and preventing quacks from hijacking that aspect of medical practice. The study reveals that the lack of regulatory framework in Nigeria has led to unethical and unfavorable sharp practices. The current status of ART practice in Nigeria is accessed, some of the challenges of the procedure like unethical practices, accessibility and affordability among others are discussed and workable regulatory frameworks are recommended.

Keywords: Infertility, Child(ren), Reproductive Technology, Fertilization

Introduction

The birth of Louise Brown¹ in 1978 has expanded the use of IVF and other related ART procedures to become a common place around the world. There has been tremendous improvement in its procedure and practice which comes in handy in the treatment of infertility especially where natural conception is difficult or almost impossible to achieve. The procedure being a highly specialized one, requires the use of high-tech medical equipment and expertise, the fallout of which has resulted into it being a highly expensive treatment with prices varying from one ART center to another. In many jurisdictions, treatments geared towards solving infertility are being regulated by the government in accordance with provisions of appropriate laws² but in Nigeria, there is no such legal framework.

There is no doubt that with the advancement in Assisted Reproductive Technologies, statutory control of the procedure and its practitioners should be made one of the major concerns of government. This paper appraises ART in Nigeria while making a case for its statutory control and regulation.

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¹Louise Joy Brown is the world's first test-tube baby <<https://www.louisejoybrown.com>> accessed 2 October 2018

²The Human Fertilization and Embryology Act 1990 (amended in 2008) of the United Kingdom and the Infertility Treatment Act 1995 of Australia.

The Burden Of Infertility

Infertility is a problem of both sexes.³ According to a World Health Organization's statistics, infertility affects up to 15% of reproductive-aged couples worldwide.⁴ It is estimated that about 40-45% of gynecological consultations in Nigerian hospitals are fertility related.⁵ Infertility could best be described as the inability or failure to conceive or impregnate after at least one year of frequent unprotected coitus.⁶ The term also refers to the biological inability of an individual to conceive or carry pregnancy to full term through spontaneous abortion or stillbirth.

Due to the premium placed on motherhood and children in some parts of the world and the societal assumption about men's virility as a mark of masculinity hinged on the premise that 'real men get women pregnant' a lot of couples are unnecessarily pressurized whenever they experience delay in conception. Infertility is thus regarded as a serious problem. Also, the Holy Books not only amplify God's injunction of fruitfulness, procreation and reproduction⁷ but also underscore the importance of children in the family.⁸ Some of the socio-cultural myths held by people are fueled by the notion that a woman with children is happy, fulfilled in life and death. Sometimes, couples having challenges or delay in birthing children are stigmatized and snide remarks made about them as being the cause of their problem, the resultant effect is that they see themselves as "unfortunate" and "barren" especially in a society where adoption is not a readily popular option for couples who desire a biological connection with their would-be-offspring.

Infertility could be classified into two major broad types: Primary infertility and secondary infertility. Primary infertility refers to when couples are not able to conceive a child despite being sexually active over a period of time without protection or contraceptive while secondary infertility is found in couples who have difficulty to conceive a child after having conceived a child (either carried the pregnancy to term or had a miscarriage). This state of affairs could affect the man (male infertility), the woman (female infertility) or the couple (combined infertility).⁹

Numerous factors are responsible for the increase in infertility ranging from medical, social, environmental to genetic factors. The common causes are sexually transmitted infections and diseases, disruptions of food chain, poor nutrition and diet (eating chemically processed foods), poor lifestyle choices (drinking alcohol, smoking), thyroid gland problems, excess weight, intense exercise that causes a significant loss of body fat, stress, addictions, environmental pollution and toxins, endometriosis, polycystic ovary syndrome (PCOS), illness (cancer treated with chemotherapy), some medical procedures with unintended effects like contraception, female genital mutilation, unsafe abortions, postpartum pelvic infections,

³ Infertility in men and women <<https://www.sexeducationnow.com/infertility-men-women-causes-treatment.html>>
⁴ Mother or Nothing: The Agony of Infertility [2010] (88) (12) World Health Organization Bulletin
 <<https://www.who.int/bulletin/volumes/88/12/10-011210/en/>>

⁵ Editorial. Rise of infertility in Nigerian Couples <<https://www.mamalette.com/blog/fertility/rise-of-infertility-amongst-nigerian-couples/amp>> accessed on 3rd October, 2018

⁶ The World Health Organization's standard is two years of normally frequent unprotected sexual intercourse. Perhaps the reason for this is to discourage couples who are still within the window period of conception from seeking fertility services and being unnecessarily agitated when pregnancy is not achieved in due course. See Canadian Health Law and Policy 2nd ed (Canada, Ontario: Butterworth, 2002) 372

⁷ Genesis 1: 28, Genesis 9:1,7, Genesis 28:3, Genesis 35:11, Genesis 128:3 The Holy Bible.
⁸ Sura Al Anbiya 21:89-90, Psalm 127:3-5, Qu'ran 21:89-90.

⁹ Daar, A. S., and Merali, Z., 'Infertility and Social Suffering: The Case of ART in Developing Countries' in E. Vayena et al (eds), *Current Practices and Controversies in Assisted Reproduction* (Geneva, 2002), 15-21
 <<https://www.who.int/reproductivehealth/publications/infertility/9241590300/en>> accessed on 3rd October, 2018.

among others¹⁰ could lead to infertility. It is imperative therefore to identify the causative factor or underlying cause of infertility to know the treatment or steps to be taken to either eradicate or improve same.

A general estimate is that between eight and twelve percent of couples experience some form of involuntary infertility during their reproductive lives. In Nigeria, as well as in most of the developing countries in Africa, cases of infertility are linked with or connected to untreated sexually transmitted infections or infections of the reproductive tract like gonorrhea and chlamydia. Untreated infections during or after an abortion, during or after childbirth could also be attributed to female infertility.¹¹

Although the incidence of infertility is worldwide, global infertility prevalence rates are difficult to determine due to the presence of both male and female factors which complicate any estimate which may only address the woman and an outcome of a pregnancy diagnosis or live birth. It is recorded that more than one hundred and eighty six million ever-married women of reproductive age in developing countries maintain a child wish, translating into one in every four couples in developing countries affected by infertility.¹²

Since infertility is no respecter of persons, couples affected see it as a personal tragedy. This is coupled with the fact that in some societies, childless couples are treated with contempt, ridicule and disdain; they are usually humiliated, socially stigmatized and ostracized.¹³ The infertile couple may consequently reduce or totally stop attending social functions, baby shows, naming ceremonies or child-centered gatherings where they are probed and asked embarrassing questions. This social stigmatization of some sort affects the healthy relationship which they have cultivated over time with each other and the other members of the society.

The psychosocial burden of infertility on the infertile couple is amplified because of the unnecessary societal pressures mounted on the affected persons. Mahmoud Fathalla opined that women are coerced into childbearing because the society makes children the 'only goods they can deliver and are expected to deliver.'¹⁴ Whenever these 'goods' are not delivered as expected, pressures are mounted on them. Couples who find themselves in that situation, therefore, are always eager to change their status and make a choice from the several options which may be presented to them.

It is noteworthy to state here that any treatment suggested to the infertile couple that offers even the slightest hope and capable of easing their pain is taken. Complementary and alternative medicines like acupuncture, herbal medicine, body work like chiropractic or massage, hormonal treatment and corrective surgeries are several of such alternatives.¹⁵ When these alternatives fail, the infertile couple makes a choice between other alternatives within their reach like treatment by Assisted Reproductive Technologies, adoption or voluntary childlessness. The last two options maybe less favourable and not go down well for those help-seeking individuals because the societal concerns and bias towards an "ideal" family comprising of biologically related children are still very high in a society like ours.

¹⁰ <<https://www.medicalnewstoday.com>> see also Ige Ilesanmi Bolarinwa Common Causes of Infertility in Nigeria <<https://www.pharmanewsonline.com/common-causes-of-infertility-in-nigeria-by-ige-ilesanmi-bolarinwa/>> accessed 4 July, 2018.

¹¹ Adewumi, A.A. 'The need for Assisted Reproductive Technology Law in Nigeria' [2012] (2) (1) *University of Ibadan Law Journal*, 22.

¹² WHO Infertility definitions and terminology <(www.who.int/reproductivehealth/topics/infertility/burden/en)> accessed 2 February, 2018.

¹³ Daar, A S., and Merali, Z., *Op cit*, 16.

¹⁴ Fathalla, M., 'Current Challenges in Assisted Reproduction' in *Current Practices and controversies in Assisted Reproduction* in Vayena, E., et al (eds), *Current Practices and Controversies in Assisted Reproduction* (Geneva, 2002), 11 <<https://www.who.int/reproductivehealth/publications/infertility/9241590300/en>> accessed on 3rd October, 2018.

¹⁵ Peoples, L., 'Alternative Remedy Use Common among Infertile.'

<<https://www.reuters.com/article/amp/idUSTRE62U4CF20100331>> accessed 2 October, 2018.

The complex process of adoption¹⁶ and the basic social unacceptability of the "live with it" option have contributed to the increasing demand for reproductive technologies due to the fact that the several available options are either difficult to accomplish or undesirable.¹⁷

Assisted Reproductive Technologies (ART) In Nigeria

Assisted Reproductive Technology is described as all treatments or procedures that include the in vitro handling of both human oocytes and sperm, or embryos for the purpose of establishing a pregnancy. This includes but is not limited to IVF, embryo transfer, gamete intra fallopian transfer, zygote intra transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation and gestational surrogacy.¹⁸ The medical procedure is also used when naturally conceived pregnancy might carry serious risk to the offspring.

The ART procedure in Nigeria is not of recent origin as the first government authenticated test tube baby in black West Africa (West Africa, East Africa and Central Africa), and indeed Nigeria was delivered in 1989 with the IVF procedure at the Lagos University Teaching Hospital, Lagos State. After this great monumental medical feat, several other pregnancies have been conceived through In Vitro Fertilization-Embryo Transfer method and babies recorded thereafter.¹⁹

With the intervention of ARTs, chances of conception have greatly increased with different types of procedures adopted around the world. The most commonly performed ART is called In Vitro Fertilization (IVF), other types of procedure include: Artificial insemination by Husband (AIH), Artificial Insemination by Donor (AID), Gamete Intrafallopian Transfer (GIFT), Intra-Cytoplasmic Sperm Injection (ICSI) and Sub Zonal Insemination (SUZI). Apart from the fact that there are wide range of available reproductive technologies to choose from, the opportunity to select sex of the fetus, eliminate risky pregnancies or freeze fetal tissue until a more convenient time for childbirth is embedded in the procedure. During a typical procedure, eggs and semen are obtained from the individual or couple and placed together in a conducive laboratory environment to facilitate fertilization the resultant embryos are subsequently transferred into the uterus of the woman with the hope of implantation and pregnancy.²⁰

In Nigeria, the exact numbers of ART clinics are not known due to constant proliferation, but while speaking at an event, Faye Iketubosin, President of Nigerian Association for Fertility and Reproductive Health said there are over seventy (70)²¹ registered private and public fertility centers and clinics offering ART services and many others springing up on a daily basis. The problem however is that with the proliferation of these centers, ethics and professionalism are thrown to the winds all in the bid to record success at all cost. This is also fueled by the fact that no statutory mechanism or legal framework is available to control or regulate the practice in Nigeria.

¹⁶ Problems like establishment of genetic or blood link, non availability of children, family or societal assimilation or acceptability of adopted children. See Anigbogu, I.E., and Ogunro, P.E.O., 'Legitimacy or otherwise of Children born through Artificial Insemination with Donor Sperm (A.I.D): A Medico-Jurisprudential Discourse' in Izunwa, M.O., and Izunwa, D.R., (eds), *Law and Ethics of Healthcare* (2016) (4) *Nnewi Diocesan Archival Series*, 132.

¹⁷ Adewumi, A.A. *op cit*.

¹⁸ WHO Revised Glossary on ART Terminology

<https://www.who.int/reproductivehealth/publications/infertility/art_terminology2/en> accessed 2 February, 2018.

¹⁹ Mustapha O. G., 'The history of IVF in Nigeria.' <<https://www.ivfhistorynigeria.blogspot.com/2010/12/history-of-ivf-in-nigeria.html?m=1>> accessed 2 October 2018.

²⁰ Yusuff, A.O. 'Legal Justification for Statutory Control of Access to IVF Services in Nigeria' [2010] *Akunbana Law Journal* 2010 ;135.

²¹ 'Nigeria has over 70 Fertility Clinics' *Punch Online* (9th May, 2018) <<https://www.punchng.com/nigeria-has-over-70-fertility-clinics-afrrh-president/>> accessed 29 July, 2019.

Fallout from this lacuna is the fact that fertility centers in Nigeria merely self-regulate themselves by following the guidelines or procedures of the countries to which they are affiliated.²² The British Human Fertilization and Embryology Authority, the American Society of Reproductive Medicine is some of the regulatory bodies abroad whose guidelines are voluntarily adopted by fertility experts in Nigeria. If this gap is left unattended to in Nigeria, quality assurance and safety of procedures may not be guaranteed and this may lead to unqualified professionals exploiting infertile couples or taking over the fertility industry.²³

A survey conducted by Okonta et al²⁴ on attendees of the International Conference of Association for Fertility and Reproductive Health revealed that 81.96% of the conferees/respondents agreed the absence of law regulating ART practice in Nigeria contributes to the noticeable unethical practice in that field which includes, inadequate information or counseling especially about the success or failure rate of procedure, sex selection, fetal reduction, transfer of four or more embryos, use of 3rd party or donor gametes without informing couples, fake pregnancies, etc.²⁵

We agree with this position and hold the opinion that in the absence of statutory regulation or where fertility experts in Nigeria continue to self-regulate, abuse by practitioners and patients is imminent; there may be diverse non uniform fertility procedures in the country which invariably will lead to a downward slope of the procedure.

Assisted Reproductive Technologies - Prospects And Challenges

Couples battling infertility and who desire some sort of biological connection with their children have resorted to treatment by reproductive technology which generally covers a range of highly specialized and technical procedures designed to help them achieve conception where this cannot be achieved naturally. Although ART helps to achieve a successful pregnancy, it is associated with a couple of risks and challenges. Some of the challenges of ART in Nigeria will be examined briefly:

Affordability and accessibility is one of the foremost problem identified by help seeking individuals battling with infertility in Nigeria. The cost of acquiring an ART procedure in Nigeria is said to be beyond the reach of an average Nigerian. It is noted that due to the nature of the procedure; it being high-priced, its access and usage is limited to only those who can afford it. Perhaps that explains the WHO's estimate of 1500 cycles per one million population per year²⁶ utilizing the procedure.

Although the cost of performing a procedure per live birth varies among countries with many countries subsidizing the price by providing full or partial coverage through governmental insurance. This indulgence is not available in Nigeria as ART is not covered by National Health Insurance Scheme (NHIS). Affordability and availability of the procedure to couples without huge financial means is a big issue in Nigeria due to the fact that most of the service providers are in the private sector making the treatment accessible only to the middle and upper classes.²⁷

A survey conducted by us from the websites of popular service providers in Nigeria reveal that the cost of IVF or other forms of ART procedure varies depending on patients' need or diagnosis with an average procedure costing between five hundred thousand and

²² Adewumi *op cit*, 38.

²³ Egbokhare, O.O., and Akintola, S.O., 'Rethinking Parenthood with Assisted Reproductive Technology: The Need for Regulation in Nigeria' [2020] (34) (6) *Bioethics*, 580 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/bioe.12759>

²⁴ Okonta, P.I. and others. 'Ethical Issues in the Practice of Assisted Reproductive Technologies in Nigeria: Empirical Data from Fertility Practitioners.' [2018] (22) (3) *African Journal of Reproductive Health*; 51-58.

²⁵ Ibid.

²⁶ Mother or Nothing: The Agony of Infertility *op cit*; 2.

²⁷ Ola, T.M., 'Assisted Reproductive Technology in Nigeria: Flawed or Favored?' [2012] (2)(4) *International Law of Social Science and Humanity*; 332.

three million naira.²⁸ In a country where most states still struggle to implement or pay the thirty thousand naira minimum wage,²⁹ the procedure cannot be accessed by most infertile couple because of its high cost even where they earnestly desire children of their own.

On the issue of accessibility, it is noted that most ART centers in Nigeria restrict access to their services by streamlining their eligibility criteria to certain conditions peculiar to them with reasons ranging from 'safety concerns to maximizing success rate of the procedure.'³⁰ Some fertility centers, select patients based on age, sexual orientation, medical condition, marital status among others. It has even been suggested that fertility treatment be available only to heterosexual married couples in the interest of any child that may be born as a result.³¹ Most of these limitations are not peculiar to Nigeria. In the case of *R v. Sheffield Health Authority, Ex parte Seale*³² where a lady with endometriosis was denied access to fertility treatment, the court held that the health authority had not acted irrationally as they were not obliged to provide the service on demand. The court was of the opinion that eligibility criteria could be set where the fertility center is faced with budgetary restrictions.

For now, as far as accessibility is concerned, there is no international consensus regulating access to reproductive technologies, or enforceable international obligations for States. Several interest are considered and balanced in such a way that fundamental rights of the infertile couple are not infringed and the child (ren)'s rights are protected.³³ It is our humble opinion that most of the criteria limiting accessibility to treatment in Nigeria pose serious legal and ethical questions and such denial of access could be tantamount to an infringement on the procreative liberty of couples and discrimination on all fronts. Where fertility centers deny prospective parents the opportunity of undergoing fertility procedures because of their status or affiliations, they risk law suits filed against them especially where such denial is not permitted by any regulatory guideline or Statute. Access therefore, should not be exclusively based on the legal status of marriage but on the child's need.³⁴

It is observed that one of the several strategies adopted by Nigerian fertility service providers to bypass the accessibility and affordability challenge of ART is by announcing discounted promotional offers. A survey of some of fertility centers in Nigeria reveals that the promo appears to be the rave of the moment with different packages offered by the centers. While technical fees and drugs are excluded from the overhead cost of some centers,³⁵ it is included in the promo pricing package of others.³⁶ In some centers, pricing plan is influenced by the cycle package³⁷ adopted by patients. The common ground for most of these centers however is that certain technical ART offerings like gamete freezing, pre

²⁸ See <<http://www.thebridgeclinic.com/about-us/our-fees/The-leading-fertility-clinic-in-Nigeria>> and Chijoma Obinna. LASUTH delivers 74 babies through Assisted Reproductive Technology *Vanguard* (Lagos, 15 November 2017) <<http://www.vanguardngr.com/2017/11/lasuth-delivers-74-babies-assisted-reproductive-technology/amp/>> accessed 30 January, 2018.

²⁹ See the National Minimum Wage Act 2019. See also, Young, V., 'Minimum Wage: 11 States yet to Implement, 15 Months After' *Vanguard Newspaper* (Lagos, 15 July 2020) <<https://www.vanguardngr.com/2020/07/minimum-wage-11-states-yet-to-implement-15-months-after/>> accessed 12 October, 2020.

³⁰ Yusuf, A.O. 'Legal Justification for Statutory Control of Access to IVF Services in Nigeria' [2010] *Akungba Law Journal*;135.

³¹ Inhorn, M.C. and Birenbaum-Carmeli, D. 'Assisted Technologies and Culture Change' [2008] (37) *The Annual Review of Anthropology*; 177 <<http://www.arjournals.annualreviews.org/>> accessed 30 January 2018.

³² (1994) 25 BMLR, 1.

³³ Arora, P., 'Right to Access Reproductive Technologies – A Right or A Wrong?' [2017] (2) (1) *Journal of Forensic Medicine and Legal Affairs*, 5.

³⁴ See section 13 (5) Human Fertilization and Embryology Act 1990.

³⁵ Cheap IVF Promo <<https://www.elraphahospital.com.ng/elraphahospital/cheap=ivf-promo/>>

³⁶ Grabbo 2018 Festive and End of Year Promo <<https://www.grabbofertilityclinic.com/grabbo-festive-end-year-promo/amp>>

³⁷ <<https://www.diffohospital.com/salt-foundation>>

genetic screening, gender selection, genotype selection are excluded from the promotional packages.

It is noted that through the instrumentality of offering discounted procedures or installment payments ART becomes affordable and accessible to wider range of patients. However, we hold the opinion that as laudable as this initiative may seem, without statutory regulations and constant monitoring, it is subject to misuse and exploitation- hidden terms and conditions, stringent selection criteria which might infringe on prospective patients, variation of time and venue of promo are some of the peculiarities of most promotional offers in Nigeria.

Multiple birth as one of the possible outcomes of ART procedure could be challenging as well as exhilarating. Multiple births are usually the resultant effect of transfer of multiple embryos which eventually get fertilized. In countries like Finland, Sweden, United Kingdom and Australia practitioners are not permitted to place more than one or two embryos in vitro fertilization because of the challenges encountered as a result of such births but there is no such regulation in Nigeria and The United States.³⁸ As a matter of fact it has been reported that due to economic reasons and fear of failure of procedure, some fertility clinics in Nigeria transfer as much as five (5) embryos!³⁹ Although the birth of multiple children could be exciting, taking care of the mother while pregnant and the children after delivery could be stressful and costly. Families with multiple births face significant and increased parenting, marital and social challenges including impaired maternal bonding, sibling problem, maternal exhaustion, and psychological problems.⁴⁰

In addition, cases of pregnancy induced hypertension, premature birth or caesarean deliveries, stillbirth or disappearing twin cannot be totally ruled out when the procedure is adopted. The average financial cost of neonatal care for a twin infant has been estimated to be about thirteen times that for a singleton with a triplet costing forty one times and a quadruplet seventy seven times that of a singleton infant. This means that for the neonatal care alone, the infants from a quadruplet pregnancy cost three hundred and eight times more than that from a singleton pregnancy.⁴¹ Assisted reproductive procedures when combined with obstetric and pediatric care especially with multiple births in view could be very expensive emotionally draining and challenging. Where this aspect of Assisted Reproduction is not statutorily regulated in Nigeria, an upsurge in population with its attendant problem is imminent.

In many jurisdictions, ART treatments geared towards solving infertility issues are being carried out and regulated in accordance with provisions of appropriate laws⁴² or set guidelines⁴³ to ensure uniformity, standardized practice and increase success rate. Except for the ethical and regulatory guidelines set by fertility and reproductive health associations and international organizations, and the newly unveiled Lagos State Regulations and Guidelines in ART practice⁴⁴ there exist no legal framework or statutorily empowered authority or body charged with the responsibility of overseeing or setting acceptable standards for fertility

³⁸ Giwa Osagie, O.F., Op Cit;162.

³⁹ Fadare, J.O., and Adeniyi, A.A., 'Ethical Issues in Newer Assisted Reproductive Technologies: A View From Nigeria' [2015] (18) *Nigerian Journal of Clinical Practice*, S 58.

⁴⁰ Adamson, D. and Baker, V. 'Multiple births from assisted reproductive technologies: a challenge that must be met' [2004] (81)(3) *Fertility and Sterility*; 517 <<http://www.ncbi.nlm.nih.gov/pubmed/15037394>>

⁴¹ Denton, J., and Bryan, E., 'Multiple Birth Children and their families following ART' in E Vayena et al (eds) *Current Practices and Controversies in Assisted Reproduction* (Geneva, 2002), 243 <<https://www.who.int/reproductivehealth/publications/infertility/9241590300/en>> accessed on 3rd October, 2018.

⁴² The Human Fertilization and Embryology Act 1990 amended in 2008 and The Infertility Treatment Act 1995.

⁴³ Geneva Foundation for Medical Education and Research. *Obstetrics and Gynecology Guidelines* <https://www.gfmer.ch/Guidelines/Ethics_jurisprudence/Ethics_jurisprudence_reproductive_techniques.htm> accessed 31 July, 2019.

⁴⁴ Afuwape, A., LASG unveils Guidelines to regulate ART <<https://www.lagosstate.gov.ng/blog/2019/05/09/lasg-unveils-guidelines-to-regulate-assisted-reproductive-technology/>> accessed 31 July, 2019.

practice at the federal level. Although there was a Nigerian Assisted Reproduction Authority (Establishment) Bill 2012 which proposed such body, same did not see the light of the day as it never translated into an enactment. At the moment, there are two⁴⁵ (consolidated into one) bill(s) aimed at regulating ART practice in Nigeria. It is surprising however that several months after being read for the second time and sent to the Committee on Health who were given four weeks to report back to the Nigerian Senate, nothing concrete has been done.⁴⁶ Apart from the Lagos State Guidelines,⁴⁷ the only form of regulation seem to be the minimum standard/ ethical guidelines set in 2012 by the Association for Fertility and Reproductive Health (AFRH) of Nigeria which most practitioners have thrown overboard all in the bid to achieve result, gain financial benefits and patronage.⁴⁸

Fallout on the issue of regulation and monitoring is that incompetent practitioners and quacks have hijacked the procedure. While preying on their patient's vulnerable state and desire to have children, illegal baby factories are springing up and unethical practices are carried out without informed consent.⁴⁹ In addition, if a third party's genetic material, such as sperm is used on a woman without her partner's consent, her partner can hold that adultery has taken place and that the doctor is an accomplice to the act.⁵⁰ There are instances where fertility doctor fraudulently used his own sperm to artificially inseminate his unsuspecting patients,⁵¹ or where court declared it illegal to inseminate a widow with deceased husband sperm because consent was not given prior to his death⁵² and a donor egg used for patients without their consent.⁵³ It is strange that despite the long practice of ART procedures in Nigeria, there appears to be paucity of cases in that field. The reproductive industry's preference for anonymous, out of court settlement provides a more likely explanation for this dearth of litigation.⁵⁴

Conclusion And Recommendations

The phenomenal breakthrough in fertility medicine especially with the over five million babies⁵⁵ born through ART worldwide is heartwarming. The infertile do not need to be envious of the fertile or lament like the biblical Rachael did.⁵⁶ The right to marry and found a family,⁵⁷ and the command to be fruitful, multiply and replenish the earth⁵⁸ is feasible as infertile couples are being assisted to conceive. Notwithstanding this breakthrough, there is

⁴⁵ A Bill for the Regulation of In-Vitro fertilization SB 127 <www.placng.org/wp/wp-content/uploads/2017/10/Lead-Debate-on-in-Vitro-Fertilization-Bill-2017.pdf> consolidated with Assisted Reproductive Technology (Regulation) Bill, 2016 SB 325 <<https://www.nass.gov.ng/document/download/8294>> accessed 13 March, 2019.

⁴⁶ PLAC, 'IVF Bill Scales Second Reading in Senate' *Policy and Legal Advocacy Centre* (Lagos, 24 October, 2017) <<http://www.placng.org/wp/2017/10/ivf-bill-scales-second-reading-in-senate/?responsive=true>> accessed 13 February, 2018.

⁴⁷ Afuwape, A., *op cit*.
⁴⁸ Ezeaku, C., 'Regulating IVF treatment in Nigeria' *The Tide* (Lagos, 8 November, 2013) <<http://www.thetidenewsonline.com/2013/11/08/regulating-ivf-treatment-in-nigeria>> accessed 10 February 2018.

⁴⁹ Informed consent here means the consent obtained without inducement or deception. Note that medical procedures carried out without consent could lead to litigation and award of cost for damages against such health worker. See the cases of: *Okekearu v Tanko* (2002) 15 NWLR (Pt 791) 657 and *Re F (Mental patient: sterilization)* 1990 AC 1(1989) 4 BMLR 1.

⁵⁰ Giwa-Osagie, O. F., and Kayode, B., 'Medico-Legal Aspects of Assisted Reproductive Technology (Assisted Conception)' in A.S Ogwuche (ed) *Compendium of Medical Law under the Commonwealth & United States Legal Systems* 1st ed (Maiyati Chambers, 2006), 150-166.

⁵¹ *James v Jacobson* 6 F. 3d 233(4th Cir. 1993).
⁵² *R v Human Fertilization and Embryology Authority Ex parte Blood* (1997) 2 All ER 687.

⁵³ Ezeaku, C., *op cit*.
⁵⁴ Hecht, A.N. 'The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology' [2001] 1 *Houston Journal of Health Law and Policy* 272-261.

⁵⁵ Omokanye, L.O., and others 'ART: Perceptions among infertile couples in Ilorin, Nigeria' [2017] (6) (1) *Saudi Journal for Health Sciences* <<http://www.saudihealthsci.org/text.asp?2017/6/1/14/210809>> accessed 30 January, 2018.

⁵⁶ It was recorded in Genesis 30:1 that '...when Rachael saw that she bare Jacob no children, Rachael envied her sister; and said unto Jacob, give me children or else I die.'

⁵⁷ Article 12 European Convention on Human Rights 1950 and Article 9 European Charter of Fundamental Rights
⁵⁸ The Holy Bible, New Living Translation Genesis chapter 1:28.

an urgent need to declare a state of emergency in the practice of ART in Nigeria. If the practice continues unregulated; without constant monitoring and statutory control, practitioners may become lords unto themselves engaging in unethical and illegal practices.

The right to medically reproduce available in jurisdictions like France, United Kingdom, Canada, United States of America among others appears strange to Nigeria.⁵⁹ It is therefore high time Nigerian government gave more attention to fertility issues and saw it as a medical challenge and not merely a social or personal problem peculiar only to the infertile couple. Actions should be expedited on the two bills⁶⁰ relating to Assisted Reproductive Technology (ART) and In Vitro Fertilization (IVF) which were consolidated and read for the second time⁶¹ by the Nigerian Senate sometimes in October 2017,⁶² several months after its first reading.

It is an open secret that assisted reproduction is usually shrouded in secrecy. A practitioner stated that among the first fifteen IVF babies in Lagos state, only six parents were happy to reveal this fact to other persons once the babies were born.⁶³ The development of the practice, success rate, research on efficacy and long term safety and eventual appraisal will be difficult if people keep silent without acknowledging the successes or failures of the procedure or attribute the conception/birth of their children to a 'miracle.' This culture of silence should be discouraged. In addition to this, it is also recommended that a form of regulated follow-up mechanism be put in place to know the status of children born with the assistance of ART, track their mental and psychological development from infant to adulthood. With this mechanism in place, the success rate of procedures *vis a vis* live births will be gauged.

Baring the non-availability of a workable legal framework for Assisted Reproductive Technologies in Nigeria, it is believed that when actions are expedited on the passage into law of the bills before the Nigerian Senate and the above recommendations implemented, most of the challenges bedeviling the procedure will be eradicated or at best reduced.

⁵⁹ Adewumi, J.O., 'Human Rights and Medically Assisted Reproduction in Nigeria: Problems and Prospects' (Unpublished Undergraduate Thesis for Award of Bachelor of Laws Degree of Faculty of Law, Obafemi Awolowo University Ile Ife, 2009); 112.

⁶⁰ A Bill for an Act for the regulations of in-vitro fertilization, to prohibit certain practices in connection with in-vitro fertilization process, to establish an in vitro fertilization authority to make provisions in respect of children born of in-vitro fertilization process and for connected purposes, 2017 (SB. 127) and A Bill for an Act to provide for the regulation and supervision of Assisted Reproductive Technology and for matters connected therewith, 2017 (SB. 325).

⁶¹ The first time being 3rd December, 2016.

⁶² <www.orderpaper.ng/reproductive-technology-bills-scale-second-reading-senate/> accessed 13 February, 2019.

⁶³ Giwa-Osagie, O. F., 'Social and Ethical Aspects of Assisted Conception in Anglophone Sub-Saharan' in E. Vayena et al (eds), *Current Practices and Controversies in Assisted Reproduction* (Geneva, 2002), 30 <<https://www.who.int/reproductivehealth/publications/infertility/9241590300/en>> accessed on 3rd October, 2018.