

Offspring From Assisted Reproductive Techniques and Customary Law in Nigeria: Matters Arising

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Having children in African and indeed Nigerian is very important; there are numerous reasons why people have children, in fact, the stability or otherwise of marriage is often anchored on the presence and number of children in each home. Consequently, there are lots of attendant problems in marriages where there are no children, such as emotional and psychological trauma, disquietedness, neglect, deprivation, and many other challenges. Indeed there is a very high negative impact of childlessness on marriage in Africa. Modernity has however, brought some cure to childlessness through the Assisted Reproductive Techniques (ART) whose main aim is to establish pregnancy through scientific methods aside the natural means. ART in spite of its success rate has equally brought alongside some issues within the customary law regime particularly when the treatment options require donor gametes which removes consanguinity and affinity between the child and the parent. This paper using the doctrinal method, therefore examines the interference, impact and challenges of ART on marriage, succession, and some other aspects of customary law and institutions.

Keywords: offspring, customary law, assisted reproductive techniques

Introduction

The importance of having children cannot be overemphasized particularly in the African societies; motives for having them differ and are unquantifiable. The irrefutability of this is simple seen from the negative impact of infertility in homes. Pregnancy is firmly associated with marriage institution within the African cultural context, lack of which brings about a number of challenges and consequences such as emotional and psychological trauma, marital problems, deprivation and neglect and many more (Mohammed-Durosinlorun et al., 2019). The negative aftermath of involuntary childlessness reflects the values placed on children by families and society. Children are necessary for securing conjugal happiness, family continuity, and lineage sustainability. Notwithstanding the magnitude and value placed on children by society, there is the reality of infertility in a percentage of every marriage. Worldwide, infertility affects about 5%-8% of couples (Okonufua, 2003), in sub-Saharan Africa it is higher, and in Nigeria it is about 10%-13% (Chimbatata & Malimba, 2016).

Over the years, science and technology have provided a leeway in tackling infertility by helping many patients who would have otherwise been unable to conceive to have children. Through vigorous researches,

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production of new instruments, good enabling environment, and a number of other factors there has been a considerable increase in its achievement rate seeing that the success in each treatment cycle has increased up to 60% (Zhao et al., 2011). In spite of the success recorded from assisted reproductive techniques (ART), there are various legal and ethical issues constantly emanating from this scientific infertility treatment option. This paper does not aim at examining these various legal and ethical issues; however, it is examining the customary perspective to the status of children gotten from ART knowing full well that some ART treatment options challenge or tamper with consanguinity. Blood relation is very important in Nigeria cultural society as there must be a nexus of kinship through blood which implies that there must be a shared and exchange of blood, bodily substances, and genetics. Infertility treatment derived through ART may be unable to guarantee this, depending on the causes and treatment options employed. This paper therefore examines assisted reproductive techniques, the meaning of offspring, and their utility in African society before moving to analyze how it affects various institutions under customary law and society.

Customary Law

Customary law is “the starting-point of Nigeria’s legal history” (Nwabueze, 2002, pp. 153-200); and has been described as

a mirror of acceptable usage, a reflection of social attitudes and habits of various ethnic groups; and derives its validity from the consent of the community which it governs, applicable only to people indigenous to the locality where such customary law holds sway. (Salacuse, 1965, pp. 2, 8)

It refers to customs that are generally accepted by a particular community as binding.¹ One major characteristic of customary law is that it is unwritten; it was handed down from generation to generation and like a creed, lives in the mind of men. Usually, parties that are subject to it are no strangers to each other; they share a bond of kinship, be it social, tribal, or marital. In Nigeria, methods by which customary law can be established include: proof by evidence;² judicial notice;³ use of books and manuscripts;⁴ use of Assessor.⁵

Assisted Reproductive Techniques

Louise Brown was the first successful attempt to use IVF techniques to aid reproduction on 25 July 1978. IVF, however, wasn’t the first Assisted Reproductive Technology (ART) technique to be used for reproductive process, as Artificial Insemination,⁶ has been used since the mid-1800s to achieve conception (Braun, 2016). ART is defined as “all treatments or procedures that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy” (Zegers-Hochschild et al., 2009).⁷ The main aim of ART is to establish pregnancy through scientific methods aside the natural means. Although infertility is the leading cause why ART is sought after, some fertile individuals may equally access ART for personal reasons.

¹ Remigus (n5) 200.

² Section 17(1) of the Evidence Act (EA)2011 Cap 112 LFN 2010.

³ Section 17(2) EA, Cap 112 LFN 2010.

⁴ Section 59 EA, Cap 112 LFN 2010, see also *Ibrahim v Barde* (1996) 9 NWLR (Pt474) 513.

⁵ This is common in Northern Nigeria, and can be considered as expert within the meaning of Section 57(2).

⁶ This can be AID (Artificial Insemination by Donor) or AIP (Artificial Insemination by Partner).

⁷ See also ART Practice in Lagos State; Regulations and Guidelines.

ART therefore, gives people, who may have ordinarily not been able to, the opportunity to have a child (that may or may not be) genetically connected to them, without the necessity of marriage, intercourse, or even pregnancy to term (Inhorn & Birenbaum-Carmeli, 2008).

ART encompasses a number of procedures which include, but are not limited to Artificial Insemination (AI), In-vitro Fertilization (IVF), Gamete Intrafallopian Transfer (GIFT), Zygote Intrafallopian Transfer (ZIFT), Tubal Embryo Transfer (TET), Cryopreservation, Gamete and Embryo Donation, and Surrogacy.⁸ Artificial Insemination involves the collection of sperm outside the body and its introduction into the uterus usually with the help of a syringe, turkey baster, or drinking straw (Saksena, 2008). This technique is simple and popular and it has been used for centuries. In-vitro Fertilization is a procedure whereby the egg of a woman is retrieved and fertilized with sperm outside of her body. The resulting embryo is then transferred into the uterus to implant. In Gamete Intra-Fallopian Transfer, eggs are removed from a woman's ovaries, and placed in one of the fallopian tubes, along with the man's sperm while in Zygote Intra-fallopian Transfer, fertilized embryo is transferred directly into the fallopian tube instead of the uterus. Surrogacy is: whereby a woman who cannot conceive or carry pregnancy to term commissions another woman to carry the pregnancy on her behalf.

Gamete donation is simply the donation of egg or sperm to enable an infertile couple or individual conceive or for the furtherance of research. Embryo donation arises in instances where parties have fertilized their gametes but have elected to cryopreserve them for future use. Where these individuals later decide that they would not like to use the excess embryos themselves, they may choose to donate them to other parties, who will use them in the reproductive process (Niekerk, 2021). Cryopreservation is the process of cooling and dehydrating an embryo to allow it to be stored for a long period.

The practice of ART in Nigeria is largely driven by private clinics. Although a couple of Government hospitals provide these services, there is still a prevalence of private clinics in this area of practice. In fact, conception of the first IVF baby on record in Nigeria was done in the Lagos University Teaching Hospital (LUTH).⁹ The baby boy who was born on March 17, 1989 (Ashiru, 2015), was carried out by the duo of Professor Oladapo Ashiru and Professor Osato Giwa-Osagie. It has been said that the reason the private sector dominates the public sector in this area of practice, like many other areas of practice, is as a result of the lack of government's capacity to meet the health needs of its citizens (Ajayi & Dibosa-Osador, 2011). More concerning is the fact that infertility is not seen as a healthcare priority (Adekile, 2013).

ART procedures have, however, created the possibility of three potential parents: the genetic parent (biological) whose genes have been transmitted to the child; gestational parent (mother) who carries a pregnancy and gives birth to the child; and social (legal) parent who commissioned the process and whom the law recognises as the parent of the child. These days, singles, and people with other sexual identities, including homosexual female (lesbian) couples, homosexual male (gay) couples and, more recently, transsexual men and women are taking advantage of ART. While access to ART by same sex couples may be settled in some other jurisdictions, in Nigeria, it is still a highly controversial issue. The *Matrimonial Causes Act*, customary law, and Islamic law make no provision for same sex marriage. In fact, The *Same Sex Marriage (Prohibition) Act* (SSMPA), in 2014

⁸ Central Carolina Ob/Gyn, <<http://www.ccobgyn.com/gynecological-care/infertility-service/what-are-the-different-types-of-assisted-reproductive-technology-art/>> accessed on 30 April 2021.

⁹ Other reports however claim that the first recorded IVF in Nigeria was by Dr Wada of Nisa Hospital, Abuja in 1999.

expressly forbids same sex union and prescribes a jail term of 14 years for offenders.¹⁰ Although there is a nexus between marriage and parenthood, it is well established that parenthood can occur outside of, or devoid of marriage. Presently in Nigeria, there is no law that prohibits single people from accessing ART.

In Nigeria, there is no Federal regulation of ART; some private clinics operate based on the Human Fertilisation and Embryology Authority Guidelines (Fadare & Adeniyi, 2015). In the words of Adewunmi, “ART practitioners in Nigeria and other developing African countries have a voluntary adherence to guidelines set by the American society of Reproductive Medicine, the British Human fertilization and Embryology Authority or the equivalent body in France or Germany” (Adewunmi, 2012). Although there have been attempts at the national level to regulate ART by the introduction of the In-vitro Fertilization Bill 2015¹¹ and the Assisted Reproductive Technology (Regulation) Bill 2016,¹² Lagos state is the first to formally regulate this area of medicine. Both the IVF and ART passed the second reading and were to be consolidated but died a natural death at the end of the 7th Session of the National Assembly. The Lagos State guidelines, the ART Practice in Lagos State: Regulations and Guidelines were unveiled in May 2019 by the Lagos state Ministry of Health in conjunction with HEFAMAA,¹³ AFRH,¹⁴ and other stakeholders.

The Lagos State guidelines deal with both clinical and ethical issues. It provides guidance on maximum number of embryos, cryopreservation, cross-border treatment, counselling, confidentiality for special cases, donation of gametes and embryo, posthumous use of gametes, surrogacy, pre-implantation genetic testing, record keeping, clinical best practices, research and even sanctions. It also delegates HEFAMAA as the regulatory agency in charge of ART Practice in Lagos State.

Offspring, Parenthood, and Legitimacy

The word “offspring” is synonymous to “children” as they mean same thing. It is the young of a particular parent or progenitor, a descent.¹⁵ For the existence of offspring there is naturally parentage and parenthood. It flows therefore that offspring are the young of parents. Haim, using Bainham definition, states “parentage” as the socially perceived genetic link between the child and her parents. It is the indicator of the child’s genetic origins and as such it is set at the time of conception and is constant from that point on (Bainham, 1999). He opined further that for legal status or genetic link, then parenthood and parentage should be used.

Section 69 of the Matrimonial Causes Act (MCA), describes what it refers to as children of the marriage, it provides that:

Children of the marriage includes—

1. any child adopted since the marriage by the husband and wife or by either of them with the consent of the other
2. any child of the husband and wife born before the marriage, whether legitimated by the marriage or not; and
3. any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife.

¹⁰ Section 1, Same Sex Marriage (Prohibition) Act.

¹¹ <<http://placbillstrack.org/8th/view.php?getid=1779>> accessed on 15 March 2021.

¹² <<http://placbillstrack.org/8th/view.php?getid=2380>> accessed on 15 March 2021.

¹³ Health Facilities Monitoring and Accreditation Agency.

¹⁴ Association for Fertility and Reproductive Health.

¹⁵ <<https://www.dictionary.com/browse/offspring>> accessed on 15 March 2021.

However, the MCA is applicable only to statutory marriage and in fact the initial part of the section 69 states that marriages according to Muslim rites or other customary law are not covered by the provision.

The status of children under customary law marriage in Nigeria differs greatly from that of statutory marriage. Strictly in customary law, concepts such as paternity, marriage, and legitimacy have no necessary connection, because a child can be regarded as legitimate though the two natural parents are not married and the person with respect to who the child is legitimate is not his/her natural parents (Nwogugu, 2014, p. 286). There are so many ways under customary law (depending on the customs involved) in which a child can become a legitimate and having same legal effect as legitimate children. An illegitimate child can be legitimated by various ways: the subsequent marriage of the parents,¹⁶ acknowledgment by the father (verbally or by conduct).¹⁷ One thing that stands out in the whole issue of legitimacy and legitimation under customary law is the fact that children in questions were procure through the heterosexual relationship of a man and a woman. This new comer to marriage and family (ART) is not part of the customary law arrangement for reproduction. Notwithstanding, the practice obtainable in some parts of the country whereby daughters stay behind and do not marry in order to produce a male child for succeeding her father and thereby save the lineage from extinction, has the involvement of heterosexual relationship whereby there is a male who does the impregnation. There is this other custom whereby a barren woman provides bride price for the husband in order to procure other women who bears children for her (Obi, 1977, p. 258).

The 1999 Constitution appears to have put the issue of legitimacy and illegitimacy into rest by its provisions in section 42(2) which provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. Further, the *Child's Right Act* promotes and protects the rights and wellbeing of children as well as prevents abuse in whatever way. Section 1 provides that the best interest of the child shall be the paramount consideration in all actions in every action concerning a child. It further provides that every child shall have the right to parental care and protection and accordingly no child shall be separated from his or her parents against his or her wishes except for the purpose of his or her education, exercise of a judicial determination in accordance with the provision of the Act, in the best interest of the child.

Adoption is another way in which child-parents relationship is created under the law. Adoption is a process whereby the legal relationship between a child and his/her biological parents is terminated and re-established between another people who legally assume the role of parent.¹⁸ Under this process, the parental rights and duties are vested on the adoptive parents while these rights and duties are thereby terminated from the biological parents. This process can be made in Nigeria under the statutory law or customary law. There are various laws governing adoption across States in Nigeria.¹⁹ Adoption under the customary law varies across cultures in Nigeria. However, what appears to be constant in all is that adoption under customary law is more of guardianship and fostering.²⁰ Adoption often happens between extended family members sharing blood ties who offer to cater for the needs of the child instead of the biological parents transferring all the rights and duties accruing to parents to the adoptive parents. An adopted child can inherit from his biological parents and his adopter under customary law (Tajudeen,

¹⁶ Nwogugu (n32) p. 294.

¹⁷ *Phillip v Phillip* (1946) 18 NLR 102.

¹⁸ Nwogugu (n32) p. 312.

¹⁹ *Ibid.*

²⁰ *Ibid.*

2013), (although, sometimes, it appears that succession under adoptive parents is based on the benevolence of the adoptive parents). Essentially, there is no literature in Nigeria that has been able to identify a custom under which there is a permanent and irreversible severance of relationship between the child and his/her biological parents and original family under customary system of adoption (Larry & Chukwu, 2003; Uzodike, 1991; Kasunmu & Salacuse, 1966; Oyebanji, n.d.).

Utility of Children in African Society

In African society, children occupy a strategic space and are critical for a number of reasons (Omobowalem, Omobowale, & Falase, 2018). There is an unquantifiable value and importance attached to children's right from pre-colonial times which remain sacrosanct even in modern times. The first of this is that having children ensures continuity particularly of the lineage and the society at large. Marriage is viewed as a means of producing children and so infertility and infant mortality are serious personal tragedies for couples because children are essential for becoming immortal (Siegel, 1996). This is the reason polygamy and early marriage thrives in African customary society. Most customs in Nigeria are patriarchy wherein lineage is traced through males, descent lines, and authority congregate in the person of one's father or husband (Siegel, 1996). It is therefore very disheartening for any family to be bereft of male children who will perpetuate their lineage and name; although there are very few matrilineal societies (Ene-Obong, Onuoha, & Eme, 2018).

Another importance of children in customary African society is for succession and inheritance. Qualification for inheritance is generally traced or dependent on blood relation (Bello, 2017). Persons are not qualified to inherit under customary law outside being of the same blood with the deceased.²¹ The children of the deceased are usually the primary beneficiaries of his estate. Inheritance under customary law differs from culture to culture in African and indeed Nigeria. Although, there has been several incursion of the Courts into customary laws in succession on what is perceived as inequality, discrimination, and unconstitutional. *Ukeje v Ukeje* readily comes to mind when the court made the pronouncement that the Igbo Customary Law which disentitles a girl child from inheriting her deceased father's estate is in breach of Section 42(1) of the Nigerian Constitution and that no matter the circumstances of the birth of a girl child she is entitled to inheriting from her deceased father.²²

A very important type of inheritance in African society is traditional positions and offices, that is, kingship and chieftaincies. Traditional institution in customary African society is sacred and normally held in awe. The manner of appointing traditional rulers varies across cultures, depending on the custom and traditions of each society, though in most culture the tenure is for life. In pre-historic periods, kings are regarded as deities, "a negligible shade lower than a higher ranking angel" (Alade, 1950, p. 25; Kayode & Ogunwole, 2010). They are often regarded as "Death lieutenant of God", "terror personified", and "supreme judge",²³ the legitimate representation of their kingdoms (Adepegba, 1995, pp. 10-18). The oracle usually has an enormous role to play in the selection of kings in traditional society, although the role of the oracle in modern times has been downplayed as a number of kings are selected without the due consultation (Oladumiye & Kashim, 2013). In spite of the dwindling interference from the esoteric, one major factor for selection is blood tie. The crown prince

²¹ Bello (n43).

²² Per Bode Rhodes-Vivors, JSC.

²³ Alade (n48).

must share blood relationship with royalty.

Economic benefit and social security plan are other essential and basic functions of children in customary society. The economic importance of having large number of children is major particularly in olden days. Children are source of labour which aids the expansion of the parent's trade, whether farming, fishing, or other forms of vocations. Also, children are expected to take good care of their parents when the parents are old and feeble and unable to care for themselves again. This includes both the physical and financial needs. Unlike the Western and developed nations where there are legal provisions for social security for old people, children are the major source of provisions and protection to parents in their old age in customary society.

Another very important function of children in traditional society is that children are the cement in the relationship between husbands and wives, they are stabilizing factors. "Children can be considered as a marriage-specific investment that increases the value of the marriage" (Bellido, Molina, Solaz, & Stancanelli, 2013).²⁴ Childless marriages may result in divorce, breakups, polygamy, or extra-marital affairs (Omobowalem, Omobowale, & Falase, 2018). Children are also seen as replacement of ancestors, since they provide continuity and maintain lineage through re-incarnation.

Other benefits of children include running of errands both for the parents and the communities; satisfaction of emotional needs, acts as security/defender of the community particularly during the pre-colonial times when each community has its leagues of warriors (Dyer, 2009). Children are generally regarded as signs of God's blessings and the more they are, the more it signals to everyone that God has indeed blessed a household.

Matters Arising

As examined above the benefits and functions of children in customary society cannot be over emphasized or under rated as children occupy a very important position in traditional African society; Parent-child relationship can be entered into through various avenues under the customary law, ranging from natural birth, to legitimization and adoption. However, a new narrative coming into the post-modern world is the ART wherein unknown forms of begetting children come into existence. All the known forms entail blood relationship between the child and the parents. The new entrants (ART) have introduced concepts unknown to customary law and this raises a number of issues which are discussed hereunder.

Blood, Genetics, and Sexual Relation as Basis for Family Relationship in Traditional African Society

Africans recognise the family as the foundation of the society and family to them is founded on blood relationship, both nuclear and extended. Family (or household) often refers to what westerners would call "extended family", that is, aunties, uncles, grannies, cousins, and other family relationships which defy singular word for its description. In Africa, the family is basically constituted by three processes: blood relations, sexual unions, or adoption (Makiwane & Kaunda, 2021). Family relation is shared through affinity and consanguinity which relation is beyond the nuclear family set up. This can be aptly illustrated by the wordings of Nelson Mandela in his autobiography wherein he stated that

²⁴ For schungs institut zur Zukunft der Arbeit Institute for the Study of Labor, <<http://ftp.iza.org/dp7858.pdf>> accessed on 25 April, 2021.

My mother presided over three huts at Qunu, which as I remember, were always filled with babies and children of my relations. In fact, I hardly recall any occasion as a child when I was alone. In African culture, the sons and daughters of one's aunts and uncles are considered brothers and sisters, not cousins. (Mandela, 1995)

However, when donor eggs, donor sperm or surrogate mother are used in ART, the traditional blood tie that links family together is eroded because the essential elements such as blood, gene, and sexual relation will not be present.

Succession and Inheritance Under Customary Law

Succession is the method of inheritance and the rules regulating same. In Nigeria, it falls under two broad headings: testate and intestate succession. Testacy is when a deceased has a valid will and the applicable law is the Wills law. When a deceased dies without a valid will, then such succession is regarded as intestate and his property devolves in accordance with the applicable customary law (Oni, 2019, pp. 11-18). This paper is concerned with intestate succession under the customary law. Succession under customary law in Nigeria operates under various practices depending on the customs of the people involved. In Bini and Onitsa where primogeniture rule is being practices, the eldest son exclusively takes all in order to take care of his younger ones (Elias, 1971). The Yorubas practice the *idi-igi* and the *ori-ojori* system (that is sharing property according to number of wives, or according to number of children).²⁵ Among the Igbos, the cardinal rule is that of primogeniture that is, succession by the first born in the line.²⁶ The eldest male in the family is known as Okpala, Diokpala, or Diokpa. Although, there are various discriminatory practices in succession and inheritance under customary law, ranging from gender imbalances, to disinheriting of wives, rights of legitimate children, and rights of adopted children. These several imbalances are outside the scope of this paper.

One major qualification that resounds under all the customary laws is that inheritance is generally traced or dependent on blood relation. This blood link is sometimes absent in offspring from ART, particularly when donor gametes are used for the commissioning parents who therefore shares no blood ties with the child. This particular issue is more prominent when the subject of inheritance transcends properties but traditional positions, stool, and offices such as kingship and chieftaincy title. Royalty in the African traditional system is quite a touchy issue in which it hereditary is fought with a lot of passion. The question which will then be asked is: can a child who does not share the lineage blood rise to the headship of royalty? In traditional societies, there is often the use of esoteric and divination in the appointment of kings and traditional stools holders. Among the Yorubas as an example, often, the Ifa diviner is called upon to convey the hidden information and uncover secrets both past and future in order to guide the choice of candidate aright (Ayantayo, 2008; Idowu, 1996). In most of traditional society, there is no difference between religion and politics.²⁷ Apparently, there is the unresolved conundrum between science and customs, an unresolved poser between esoteric, divinity, and science; blood tie usually is the medium through which divinity identifies or chooses candidates.

Social Construction of “Bastard” and “Manhood”

Legally, the word “bastard” synonymies “illegitimacy”, which means, a child born out of wedlock or whose parents were unmarried (Olomjobi & Onuoha, 2017). At common law a child in that category is regarded as

²⁵ *Dawodu v. Danmole* (1958) 3 FSC 46.

²⁶ Oni (n56) pp. 18-19.

²⁷ Ayantayo (n60).

child of nobody (*nullius filius*). A legitimate child on the other hand is a child born during the subsistence of a valid statutory or customary law marriage between the parents. However, the use in social context could be derogatory and offensive particularly when it is used on someone who behaved very badly indicating lack of manners or “home training”. There have been a plethora of statutory and judicial interventions concerning the rights of children referred to as illegitimate.²⁸ An illegitimate child can be legitimized through acknowledgement by the father; but in the absence of acknowledgement, which has produced severe hardship on such children, the court has moved further by stating other processes by which paternity can be established. The first is through documentary evidence as stated in the Supreme Court in *Ukeje v Ukeje*,²⁹ or secondly through the use of scientific tests and results as provided for under section 63 (91) (a) of the Child’s Right Act.³⁰ All these is to ensure that children born out of wedlock are not in any way disqualified from enjoying their rights to succession and inheritance as those of children born within wedlock. Moreover, section 42(2) of the Constitution provides that “No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth”.³¹ Essentially, it is a settled position of law that no child should be considered a bastard by circumstances of his or her birth.

Nonetheless, a raging question on issue of legitimacy and bastard is what gives legitimacy—presumably it is blood connection and relations which give paternity to an erstwhile illegitimate child, but when the father shares no blood or genetic relationship with the child, can legal parenthood suffice for blood link? Particularly when this science used in treatment of infertility is novel and unknown to customary law. Is it enough and acceptable to customs that all that a child shares with the parents is legal link (as commissioning parents) and not blood link?

Ancillary to this is the perception of manhood in customary society. Inability of a man to father a child is a sentence worse than death in the traditional societies. According to Olawoye et al. (2004), an impotent man is considered not a man, irrespective of his success in other areas of human endeavor, if he is unable to father a child; he is regarded as having lived a wasted life. Impotency is seen as a curse perhaps from the gods and a reward for evil done either by the man or his ancestors. When the phallus of a man is unable to perform the act of sexual intercourse differs from when his gametes are sterile and unable to fertilize an ovum. The later is unknown in traditional society because once a man is able to perform his sexual obligations irrespective of the sterility or otherwise of the sperm produced, he is seen as a man; therefore, his wife must necessarily produce a child regardless (at times) of who actually father such child. But science has shown vividly the predominance of male infertility as male infertility accounts for 40%-50% percents of infertility challenges (Uadia & Emokpae, 2015). Most adoptions or customary assisted birth in customary societies is based on the infertility of the woman.³²

Identity, Nationality Ancestral, and Lineage Issue

Identity means to prove or recognise as being a certain person or thing, to consider as the same or

²⁸ *Okonkwo v Okonkwo* (2014) 17 N.W.L.R (pt 1435) 18.

²⁹ (2001) 14 WRN, 31.

³⁰ Cap C50, Laws of the Federation of Nigeria, 2010.

³¹ 1999 Constitution of the Federal Republic of Nigeria.

³² Assisted birth occurs for example when a barren woman marries for her husband another woman who produces offspring for him but such children are regarded as the wife’s. See *Meribe v Egwu* (1976) 1 All NLR 266.

equivalent.³³ Nationality is the fact of being a citizen of a particular nation or body of people sharing common descent, history, language etc;³⁴ “ancestral” is an adjective that emanates from the word “ancestor” and it simply means a person from whom another is directly descended; and lineage is the direct descent from ancestors.³⁵

One area that is most interesting and crucial is the nationality, ancestral, lineage, and race of the child procured through ART (particularly, through donor egg or sperm). Take for instance a situation where the various participants in the ART process are multinational or multi-tribal; say the commissioning parents are Ijaws, the donor sperm is from Fulani man, the donor ovum an Ebira woman while the surrogate is Yoruba; or the donor sperm is even an Hispanic, what then is the nationality or the race of such a child that proceeds out of this arrangement? Under which line is he to trace his lineage? This has really distorted the natural known order. Even if it is proposed that the child should bear the nationality of the commissioning parents, what about the obvious physical attributes that may negate this? Such a child loses his identity for he is a product of various “biological gatherings”. He becomes related via law alone and not through blood.

Identity is the starting point of life for every individual, when a man knows his identity; he knows his person, strength, limitation heritage, and purpose. A man’s personhood is known in relation to others or in relations to other relationships around him. For example, a man knows he has the nomenclature of an uncle because there is another man whom he regards as his brother who also begets a son regarded as his nephew. In customary African society, a man is identified through ancestral and lineage tracing which is regarded as family tree. With the introduction of ART, , the ancestral and lineage chain is broken and strangers are introduced into the family line, who shares no blood connection with others, and who will have to battle with his/her identity throughout life.

Perhaps, attached to the above issue is the right of such child to uncover his biological parent upon attaining the age of majority. In other jurisdiction, the law allows the child born through ART (donor gametes) to trace his/her biological parents so as to uncover his natural heritage. How will customary law treat this?

Posthumous Child and Customary Law

Generally, a child can be posthumous particularly if the mother had taken in before the demise of the father but the range is between one day and nine months, and if the time of delivery exceeds nine months after the death of the biological father then there is a question as to who fathered the child. Therefore, a child born posthumously but delivered within this gestational time frame and belonging to the dead man under customary law is legitimate and has the right to inherit from the dead father.³⁶ But ART has evolved sophisticated preservative techniques which enable reproductive materials like sperm, ovum, embryo to be frozen and used at a later date. Thus, semen can be frozen and used for artificial insemination after the husband (donor) is dead (Sherman, 1980, p. 95). This brings to focus the question of the legal status of children born or conceived posthumously which fails to fall within the acceptable nine months. This issue has been the focus of debate not only in the light of customary law but in the international ethics and moral law.

In some countries like UK the issue of the status of the child may not create a lot of problems though the marriage has come to an end through the death of the husband, children of posthumous conception have a right

³³ Collins Dictionary <<https://www.collinsdictionary.com/dictionary/english/identify>>.

³⁴ Merriam-Webster Dictionary <<https://www.merriam-webster.com/dictionary/nationality>>.

³⁵ Merriam-Webster Dictionary <<https://www.merriam-webster.com/dictionary/ancestor>>.

³⁶ Nwogugu (n32) pp. 306-410.

of succession.³⁷ This issue of posthumous child through ART poses moral, legal, and ethical challenges to customary law since it is outrightly alien to customary law in Nigeria. How does a widow explain to an illiterate society that it was the stored embryo of both hers and her late husband that she is now carrying as pregnancy a couple of years after the death of her husband? How will she handle this particularly if her motive is to beget sizeable number of children for late husband but has rebuffed the family's customary approved method of widow-inheritance by the deceased brother? A third layer of mischief to this can be created by promiscuous widows if this process is permitted, because the pregnancy could be from a complete third party (a secret lover) and since no one is going to ascertain paternity through DNA.

Evolving Family Pattern Versus Customary Traditional Pattern

Another issue that is worth considering is the issue of the new family patterns that are coming up as a result of the ART. A good example is same-sex marriage and single parentage of which ART has been a factor that has encouraged and enhanced the evolvement of which is both an abomination and unknown to the customary system in Nigeria. The arrival of ART is presenting new sets of relationships that are strange to customary law. The customary perception of marriage is a man and a woman or women as the case may be in polygamous union, but the basic procedure is for two heterosexuals to have conception and children.

Conclusion and Recommendation

The negative aftermath of involuntary childlessness reflects the value placed on children by families and society. This is so because children occupy a very vintage position in traditional African society and the utility and value of having children is quite enormous. It is a tragedy not to have children who will look after parents when the parents are no more. Further, families in customary society are created through blood affiliations. However, the evolvement of assisted reproductive technique is a scientific innovation that has brought into fruition; people's dream of having children particularly in African society like Nigeria where premium is placed on having children. It has however posed dissimilar sets of antithesis on the traditional family construction. This seemingly helpful scientific method of curing barrenness, has posed a number of issues to the customary law and society in Nigeria and indeed Africa. These sets of issues may persist for the next scores of years or till another century. However, life itself is dynamic and progressive; there will be continuous incursion of science in our daily lives which will keep solving several life's challenges including childlessness. For couples who have trailed this pathway of curing childlessness and who perhaps made use of donor gametes, it will be good if they take certain precautions which can protect both themselves and the children begotten from ART. To this effect this paper recommends that:

(1) Married persons who had children through ART should celebrate statutory marriage: Statutory marriage gives a leverage or succor to the parties because the union has transcended the operational control of the customary law and the laws governing it are the *Matrimonial Causes Act*, the *Marriage Act*, and other written ancillary laws (such as some sections under *Evidence Act*, *Criminal Code*). Also when a deceased dies without a valid will, but married under the statute, his property will be distributed according to the *Administration of Estate Law*.

³⁷ Though this may create enormous problem for the administrator of such estate if the widow continues to conceive children until she reaches menopause.

(2) Couples who have children using ART particularly without blood ties, should write a valid will which will help secure such children: The existence of a valid will makes it mandatory that properties will be disposed according to the dictate of such will, this will eliminate the acrimony that may arise after the demise of the parents as.

(3) There should be statutory intervention from the government in this area. There are a number of porous areas on this issue, there should be a statutory intervention which will lay to rest some of these issues.

References

- Adekile, O. M. (2013). Financial access to reproductive technologies: Options and issues for reproductive rights in Nigeria. *Acta Universitatis Danubius Administration*, 5(2), 18-35.
- Adepegba, C. (1995). A historical reconnaissance of Yoruba traditional crowns (Ph.D. thesis, University of Ibadan, 1995).
- Adegunmi, A. (2012). The need for assisted reproductive technology law in Nigeria. *Unib Law Journal*, 2(1), 14.
- Ajayi, R. A. O., & Dibosa-Osador, J. (2011). Stakeholders' views on ethical issues in the practice of in-vitro fertilizations and embryo transfer in Nigeria. *African Journal of Reproductive Health*, 15(3), 73-80. Retrieved March 14, 2021 from <https://www.jstor.org/stable/41762347>
- Alade, S. (1950). *The awakening of Akure Osogbo*. Washington, DC: Titilayo Press.
- Ashiru, O. (September 4, 2015). Hannatu Kupchi is not Nigeria's first test-tube baby. *The Guardian Online*. Retrieved December 19, 2019 from <https://guardian.ng/news/hannatu-kupchi-is-not-nigerias-first-test-tube-baby/>
- Ayantayo, J. K. (2008). Socio-religious dimensions to chieftaincy affairs in Yoruba land, Nigeria, West Africa. *Prajñā Vihāra Assumption University Journal*, 9(2), 1. Retrieved April 20, 2021 from <https://core.ac.uk/reader/233619150>
- Bainham, A. (1999). Parentage, parenthood and parental responsibility: Subtle, elusive yet important distinctions. In *What is a parent? A socio-legal analysis* (pp. 28-29). Oxford: Hart Publishing. Retrieved March 15, 2021 from https://www.bloomsburycollections.com/book/what_is_a_parent_a_socio_legal_analysis/ch2_parentage_parenthood_and_parental_responsibility_subtle_elusive_yet_important_distinctions
- Bellido, H., Molina, J. A., Solaz, A., & Stancanelli, E. (2013). Which children stabilize marriage? Discussion Paper No. 78 58 December 2013.
- Bello, M. A. (2017). Principles and practice of succession under customary law. Presented at *Ficmc President Customary Court of Appeal, FCT-Judiciary 2017*. Retrieved from https://nji.gov.ng/images/Workshop_Papers/2017/Refresher_Judges_and_Kadis/s4.pdf
- Braun, W. (March 14, 2016). The history of assisted reproductive technology in under 1000 words. *HuffPost*. Retrieved March 14, 2021 from https://www.huffpost.com/entry/what-do-christmas-trees-a_b_8851496
- Chimbatata, N. B. W., & Malimba, C. (2016). Infertility in sub-Saharan Africa: A woman's issue for how long? A qualitative review of literature. *The Open Journal of Social Sciences*, 4, 96-102.
- Dyer, S. J. (2009). The value of children in African countries—Insights from studies on infertility. Retrieved April 25, 2021 from <https://doi.org/10.1080/01674820701409959>
- Elias, T. O. (1971). *Nigerian land law* (4th ed.). London: Sweet & Maxwell.
- Ene-Obong, H. N., Onuoha, N. O., & Eme, P. E. (2018). Gender roles, family relationships, and household food and nutrition security in Ohafia matrilineal society in Nigeria. Retrieved May 3, 2021 from <https://doi.org/10.1111/mcn.12506>
- Fadare, J. O., & Adeniyi, A. A. (2015). Ethical issues in newer assisted reproductive technologies: A view from Nigeria. *Nigerian Journal of Clinical Practice*, 18(7), 57-61. Retrieved March 15, 2021 from <https://www.njponline.com/article.asp?issn=11193077;year=2015;volume=18;issue=7;spage=57;epage=61;aulast=Fadare>
- Idowu, E. B. (1996). *Olodumare: God in Yoruba belief (revised and enlarged)*. Lagos: Longman Nigeria.
- Inhorn, M. C., & Birenbaum-Carmeli, D. (2008). Assisted reproductive technologies and culture change. *Annual Review of Anthropology*, 37, 177. Retrieved March 14, 2021 from <https://www.jstor.org/stable/20622620>
- Kasunmu, A. B., & Salacuse, J. W. (1966). *Nigerian family law*. London: Butterworths.
- Kayode, O. F., & Ogunwole, S. O. (2010). Quantitative analysis of some Nigerian wood species as local material. *Journal of Emerging Trends in Educational Research and Policy Studies*, 2(2), 139-143.
- Larry, O. C., & Chukwu, E. (2017). Adoption of children in Nigeria under the child's rights act 2003. Retrieved from <http://www.law2.byu.edu/isfl/saltlakeconference/papers/isflpdfs/Chukwu.pdf>

- Makiwane, M., & Kaunda, C. J. (2021). Families and inclusive societies in Africa' by human sciences research council, South Africa. Retrieved April 19, 2021 from <https://www.un.org/development/desa/family/wp-content/uploads/sites/23/2018/05/1-2.pdf>
- Mandela, N. (1995). *Long walk to freedom*. London, England: Abacus.
- Mohammed-Durosolorun, A., Adze, J., Bature, S., Abubakar, A., Mohammed, C., Taingson, M., & Airede, L. (2019). Use and pattern of previous care received by infertile Nigerian women. *Fertility Research and Practice*, 5, 14. Retrieved February 20, 2021 from <https://doi.org/10.1186/s40738-019-0068-6>
- Niekerk, V. C. (2021). Assisted reproductive technologies and the right to reproduce under South African law. Retrieved March 14, 2021 from <http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1305>
- Nwabueze, R. N. (2002). The dynamics and genius of Nigeria's indigenous legal order. *Indigenous Law Journal*, 1, 153-200.
- Nwogugu, E. I. (2014). *Family law in Nigeria* (3rd ed.). Ibadan: HEBN Publishers.
- Obi, S. N. C. (1977). *The customary law manual*. Enugun: Government Press.
- Okonufua, F. E. (2003). Infertility in sub-Saharan Africa. In F. E. Okonufua and O. A. Odunsi (Eds.), *Contemporary obstetrics and gynecology for developing countries* (pp. 128-156). Benin City: Women's Health Action Research Center.
- Oladumiye, E. B., & Kashim, I. B. (2013). Papervisual illustration using printmaking as a medium: A case study of coronation ceremonies of kings among the Yoruba of South West Nigeria. *Journal of Fine and Studio Art*, 3(1), 5-15. doi:10.5897/JFSA12.002 ISSN 2141-6524. Retrieved from <http://www.academicjournals.org/JFSA>
- Olawoye, J., Omololu, F., Aderinto, Y., Adeyefa, I., Adeyemo, D. D., & Osotimehin, B. (2004). Social construction of manhood in Nigeria: Implications for male responsibility in reproductive health. *African Population Studies*, 19(2), 1-20.
- Olomajobi, Y., & Onuoha, J. (March 25, 2017). Public perception on illegitimacy and succession rights in South Western Nigeria. Retrieved from <https://ssrn.com/abstract=2940847> or <http://dx.doi.org/10.2139/ssrn.2940847>
- Omobowale, A. O., Omobowale, M. O., & Falase, O. S. (2021). The context of children in Yoruba popular culture. *Global Studies of Childhood*, 9(1), 18-28. Retrieved April 25, 2021 from <https://doi.org/10.1177/2043610618815381>
- Oni, B. A. (2019). *The law of succession in Nigeria: Principles and ase*. Lagos: University of Lagos Press.
- Saksena, P. (2008). Artificial insemination and the family. *National Law School of India Review*, 20(1), 76-94. Retrieved March 14, 2021 from <https://www.jstor.org/stable/44283673>
- Salacuse, J. W. (1965). *A selection: Survey of Nigeria family law*. Zaria: Ahmadu Bello University Bookshop Zaria.
- Sherman, J. K. (1980). *History synopsis of human semen cryobanking' in human artificial insemination and semen preservation*. New York: Mauthern Publisher.
- Siegel, B. (1996). African family and kinship. In *Anthropology publications: Paper 3*. Retrieved from <http://scholarexchange.furman.edu/ant-publications/3>
- Tajudeen, O. I. (2013). Adoption practice in Nigeria—An overview. *Journal of Law, Policy and Globalization*, 19, 7-13.
- Uadia, P. O., & Emokpae, A. M. (2015). Male infertility in Nigeria: A neglected reproductive health issue requiring attention. *Journal of Basic and Clinical Reproductive Sciences*, 4(2), 45-53.
- Uzodike, E. N. U. (1991). Law and procedure for adoption in Nigeria. *Nig. J. Contemp. Law*, 1, 6.
- Zegers-Hochschild, F., Adamson, G. D., de Mouzon, J., Ishihara, O., Mansour, R., Nygren, K., ... World Health Organization (WHO). (2009). International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology, 2009. *Fertility and Sterility*, 92(5), 1520-1524. Retrieved March 14, 2021 from https://www.who.int/reproductivehealth/publications/infertility/art_terminology2.pdf?ua=1
- Zhao, Y., Brezina, P., Hsu, C. C., Garcia, J., Brinsden, P. R., & Wallach, E. (2011). In vitro fertilization: Four decades of reflections and promises. *Biochim Biophys Acta.*, 1810(9), 843-852.