



Egg And Sperm Donation Regulation In South Africa: Lessons For Nigeria Towards A Future For Medically Assisted Reproduction

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ABSTRACT

Most countries that regulate the use of Artificial Reproductive Technologies have adopted models for human rights protections and management of medical health issues and violations. Despite the fact that the field of infertility treatment is mostly unregulated by law in Nigeria, it has become a highly competitive industry today. When compared to other developed countries, Nigeria's legal system is behind the times in managing medically assisted reproduction, and gamete donation procedures must be performed for the purpose of improving health and preventing harm. South Africa is one of the leading African countries in institutionalized sperm and egg donation. The legislations and guidelines apply to all parties involved, including agencies, clinics, donors, and recipients. These laws protect the emotional, physical, and financial well-being of parties. This article therefore seeks to examine the extent to which egg and sperm donation in artificial reproductive technology use, is regulated in South Africa. As step in the right direction, future artificial reproductive technology legislation is expected to address complex and important issues as the prohibition of cloning, compensation for gamete donation, establishment of a framework to regulate gamete donation activities and embryo research. Any such legislation must assert the value of assisted reproduction and the importance of protecting the health and wellbeing of parties to egg and sperm donation and artificial reproductive technology in general.

Keywords: Egg donation, Sperm donation, Law, Artificial Reproductive Technology, Assisted Reproduction.

1.0 INTRODUCTION

Counties that have legitimized the use of donor eggs and sperm have found their way around the management, protection of, and promotion of positive processes surrounding the use of artificial reproductive technology (ART). Sperm or egg cells are referred to a 'gametes,' and while some aspects of sperm and egg donation are the same, others are specific to the type of gamete donated. Most countries that regulate the use of ARTs have adopted models for management of medical issues and violations as well as the human rights of individuals.¹ When compared to other countries, Nigeria's legal system is behind the times, despite the industry and field of infertility treatment becoming highly competitive.

Regulations are utilized to ensure safe and responsible usage of new technologies, to prevent systematic and traditional abuse in gamete donation.²

¹ UN Convention on the Rights of the Child (UNCRC) 1989, arts 3, 7; Parliamentary Assembly, 'Anonymous Donation of Sperm and Oocytes: Balancing the Rights of Parents, Donors and Children' *Parliamentary Assembly* (12 April 2019) <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27680>> accessed 14 June 2023.

² Z Mustapha, 'The Practice of Assisted Human Reproduction Technologies (ARTs) in Nigeria: The Unanswered Legal and Ethical Questions' [2018] (1)(1) *Journal of Law and Judicial System*, 41.

The ninth Annual Scientific Conference of the Association for Fertility and Reproductive Health (AFRH) which held in Port Harcourt, Nigeria in September 2019 emphasized that regulation is one of the challenges with ART in the region and this was key to its future in Nigeria. Since the first birth from in-vitro fertilization (IVF), in 1978 in the United Kingdom, most countries in which ART is established have laws or regulations guiding its practice. Except for the 2019 Lagos State AFRH guidelines on ART Practice, there exists no federal law regulating gamete donation. Medical practitioners in Nigeria remain guided by the ethics of their institution and profession, and legal practitioners rely on contracts, foreign judgments and international legal instruments.

But is that enough to manage gamete donation? States have the responsibility to regulate ART practice in general, but also to regulate the exchange of the primary human cell which allows for procreation by alternative means. Within these regulations are answers to legal and ethical questions for users, donors, and the embryos. As much as gamete donation has been effective intervention for infertility, the processes resulting from it bear several challenges. This paper therefore examines the extent to which egg and sperm donation is regulated in South Africa, in order to draw lessons for Nigeria towards a future of regulated medically assisted reproduction.

2.0 Conceptual Clarification

2.1 Egg Donation

Egg donation is a process in which a fertile woman donates an egg or oocyte, to another woman to help her conceive.³ Egg donation occurred more recently than sperm donation.⁴ Experiments with IVF in the 1930s did not conclude in human birth until 1978. Although IVF assisted a woman with her own eggs, such as with issues of blocked fallopian tubes, it failed to assist a woman who no viable eggs.⁵ Medically, the invention of IVF broke down to (fallopian) tubes, eggs, uterus, and sperm. To this day, that is how infertility is solved, with the presence of sperm, eggs, and a womb. ART provides the platform for getting what you need to add to what you have (if any).

Egg donation typically involves a doctor removing an egg or eggs from the donor, fertilizing them in a laboratory and then transferring the resulting embryos into the recipient's uterus. Doctors do this using an implantation procedure such as IVF.⁶ Egg donation is a complicated procedure and requires extensive time and discomfort for the person donating her eggs as well as the woman receiving them. The first positive child delivery created using donor egg was in 1984. Before this development, infertile couples and women had adoption as the alternative remedy.⁷ This scientific breakthrough changed the outlook for those unable to have children due to female infertility.⁸ With egg donation, intended parents create natural link to the descendant only if they contribute the sperm used to fertilize the egg.⁹ As IVF technology developed, the procedure used in egg donation parallel that development; the egg donor's eggs are now

³ VR Nwadike and J Leonard, 'How Does the Egg Donation Process Work' *Medical News Today* <<https://www.medicalnewstoday.com/articles/314750>> accessed 14 June 2023.

⁴ CM Eagtman, 'Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination' [2010] (14) (377) *Mc George L. Rev.* 377.

⁵ Nwadike and Leonard (n3).

⁶ R Almeling, 'Gender and The Value of Bodily Goods: Commodification in Egg and Sperm Donation' [2009] (72) (37) *Law and Contemporary Problems*, 37, 43.

⁷ JL Sauer 'Competing Interest and Gamete Donation: The Case for Anonymity' [2009] (39) *Seton Hall L. Rev.* 930; AOA Yusuff, 'Infertility Treatments and the Conceptual Dilemma of Infertility: Is There a Right to Reproduce', <<https://www.nigerianlawguru.com/articles/human%20rights%20law/INFERTILITY%20TREATMENTS%20AND%20THE%20CONCEPTUAL%20DILEMMA%20OF%20INFERTILITY,%20IS%20THERE%20A%20RIGHT%20TO%20REPROD%20UCE.pdf>> accessed 14 June 2023.

⁸ American Society of Reproductive Medicine, *Third Party Reproduction Sperm, egg, and embryo donation and surrogacy A Guide for Patients* (Revised edn, American Society of Reproductive Medicine, 2017) 4.

⁹ *Ibid.*

Sperm donation is a crucial factor to ART, allowing single women, and couples challenged by an infertile male partner to achieve conception. Although sperm can be given by family or friends, oftentimes it is donated in secret through a sperm bank or fertility clinic.¹² Sperm donation is the procedure in which a man donates semen - the fluid containing sperm that is released during ejaculation- to help an individual harvested from her ovaries in an outpatient surgical procedure and fertilized in the laboratory.¹⁰ Egg donors are first recruited, screened, and they give consent before participating in the IVF process.¹¹

2.1 Sperm Donation

or a couple conceive a baby.¹³ Where the donor is known, donor is seen as the genetic father of the child, but he will not be considered the legal or social father. Consequently, the child may have three parents, two fathers and a mother.¹⁴

The man is known as a sperm donor and the sperm donated is known as donor sperm, because the sole purpose of the donation is that the man will give up all his legal rights to any child produced from the sperm and will not be the legal father. Sperm donation enables a man to father a child for third party woman or women and is therefore categorized as a form of third-party reproduction.¹⁵ Institutionalized donation is sperm donation through a sperm bank through the technology for preserving or banking human sperm called cryogenic methods, and this dates back to 1779.¹⁶ The first recorded use of donor sperm in the medical setting occurred in the USA in 1884. The extent of the practice was not known as it was shrouded in secrecy until 1945 when the British Medical Journal outlined in some detail how insemination with donor sperm could be used to treat male factor infertility.¹⁷ It took until 1992 for UK law to legitimise the use of donor sperm in medical treatments. This provided both legal protection for the donor and allowed official recognition of the infertile male as the legal father by allowing his name to be registered on the birth certificate of any child born.¹⁸

Sperm donation preserves the sexual integrity of a recipient but a woman who becomes pregnant by a sperm donor benefit from his reproductive capacity. Sperm donation is usually done by the donor masturbating to ejaculate semen or by the use of electric stimulator although a special condom known as a collection condom may be used to collect the semen. The semen can be collected in a small container. The sperm when produced is frozen and quarantined usually for a period of six months and the donor is re-tested prior to the sperm being used for artificial insemination.¹⁹ Sperm donors are to be men of legal age and ideally not old. This is to minimize the potential increased risks of older male parents and men can generally only be accepted as donors if they have higher than average semen quality.²⁰ Again, laws limit the number of offspring that a sperm donor can give rise to and reciprocate also.²¹

¹⁰ DK Gardner and Others, *Assisted Reproductive Techniques; Laboratory and Clinical Perspective Vol 1* (5th edn, CRC Press, 2018) 3.

¹¹ *Ibid.*

¹² VL Pi, 'Regulating Sperm Donation: Why Requiring Exposed Donation is Not the Answer' [2009] (16) *Duke Journal of Gender Law & Policy*, 382.

¹³ Mayo Clinic <<https://www.mayoclinic.org/tests-procedures/sperm-donation/about/pac-20395032>> accessed 14 June 2023.

¹⁴ M Aluas, 'Clinical Ethics at the Cross Road of Genetic and Reproductive Technologies' [2018]

<<https://www.sciencedirect.com/topics/medicine-and-dentistry/sperm-donation>> accessed 14 June 2023.

¹⁵ *Ibid.*

¹⁶ S Fader, 'Sperm Banking: A Reproductive Resource', <<https://www.cryobank.com/leasing-center/sperm-banking-101/sperm-banking-history>> accessed 14 June 2023.

¹⁷ M Bartom, 'Artificial Insemination' (1945) (1) *Br. Med. J.*, 40.

¹⁸ A Pecey, 'Ethics Sperm Donor Recruitment in the UK' [2010] (12) *The Obstetrician & Gynaecologist*, 43.

¹⁹ JM Acker and M Jacqueline, 'The case for An Unregulated Private Sperm Donation Market' [2013] (20) (1) *UCLA Women's Law Journals*, 1.

²⁰ Aluas (n14); Association of Biomedical Andrologist and Others, 'UK Guidelines for the Medical and Laboratory Screening of Sperm, Egg, and Embryo Donors' [2008] (11) (4) *Hum Fertil.*, 10; Pacey (n18); ASRM, 'Third-Party Reproduction: Sperm, Egg and Embryo Donation and Surrogacy' <reproductivefacts.org/news_and_Publications/patient-fact-sheets-and-booklets/documentations/fact-sheets-and-

3.0 Egg and Sperm Donation Regulation in South Africa

Gamete donation in South Africa is regulated by the National Health Act 61 of 2003, the Regulations Relating to Artificial Fertilization of Persons, 2012, the Children's Act 38 of 2005 and the National Guidelines from the South African Society for Reproductive Medicine (SASREM)

3.1 National Health Act 2003

Under South Africa laws, there is no wrong way to have a child, whether a person needs donor tissue such as egg or sperm, a surrogate, IVF, or adoption. In the end, what is important is that the intending parents receive a child of their own, with the help of a person, institution, or medical technology.²² Chapter 8 of the South African National Health Act 2003 (NHA) provides for the control of use of blood, blood products, tissue, and gametes in humans. Where Gamete is to be used, such removed gamete from a living person may only be used for medical purposes.²³ However, gamete cannot be removed from a mentally ill person,²⁴ or from a person below 18 years, without the authorization of the Minister.²⁵ Section 57 of the NHA 2003 prohibits reproductive cloning of human beings through the manipulation of any genetic material, and under section 58 of the NHA 2003, the removal and transplantation of human tissue from a living person must be done in a hospital or authorized institution with the written authority of the medical practitioner in charge of clinical services or any other medical practitioner authorized by him or her; and such medical practitioner who authorized the procedure, may not participate in a transplant for which he or she has granted authorization.

Where payment is to be made in connection with the importation, procurement or supply of gametes, it is the hospital or an institution contemplated in section 58(1)(a), or such authorized institution that can receive payment in respect of such supply, importation or export of gamete under the NHA 2003.²⁶ Compensation for egg and sperm donors is done because of the much time or effort required. In addition, the same compensation is paid to all donors, regardless and irrespective of how many eggs or sperm are donated at a time. This is because the payment is not for the number of eggs or quantity of sperm donated, but compensation for the donor's input of time and effort. In line with the NHA 2003, the maximum permissible compensation allowable in SA under the National Guidelines from the South African Society for Reproductive Medicine (SASREM), is currently R8000 per donation cycle as of January 2023. This amounts to about ₨200,000.²⁷

Section 60 of the NHA 2003 does not also prevent a registered health care provider from getting remunerated for professional work done. Nonetheless, the section makes it a crime for a gamete donor to receive financial reward or other form of reward for the donation, apart from the reimbursement of practical costs incurred in the process of the donation by the donor.²⁸ sperm and egg donation is guided by of the NHA 2003, and there is no such thing as an egg donor registry, and details of egg donations and successes are not recorded in an international egg donor registry. To support the anonymity and

infobooklets/third-party-reproduction-system-egg-and-embryo-donation-and-surrogacy/> accessed 14 June 2023; Almeling (n6) 37.

²¹ J Malvern, 'Sperm Donor Forced to Pay Child Support After Lesbian Couple Split' *The Times London* (December 4, 2007) 4.

²² PTA, 'Donor Sperm' *PTA Fertility Centre* <<https://ptafertility.co.za/treatments/donor-sperm/>> accessed 14 June 2023.

²³ National Health Act 2003 (NHA), s 56(1).

²⁴ Mental Health Care Act 2002, s 1

²⁵ NHA 2003, s 56 (2).

²⁶ NHA 2003, s 60.

²⁷ O Linda, 'Money for Eggs is Not Legal, But Donation, Compensation and Care Is' *Cape Fertility* <<https://eggdonationcapefertility.co.za/egg-donation-legality/#:~:text=Egg%20donation%20is%20legal%20and,and%20Gynaecological%20Endoscopy%20>> accessed 14 June 2023.

confidentiality of South African egg and sperm donor programs, South African sperm and egg donation do not participate in an international egg donor registry.

3.2 Children's Act 2005

The Children's Act (CHA) 2005 aims to give effect to the constitutional rights of children,²⁹ to the State's obligations concerning the child's wellbeing and to provide structures, services and resources for encouraging and supervising the development of children.³⁰ Section 7 of the South African CHA 2005 protects the best interests of a child by setting a standard requiring the child's best interest to be paramount in all considerations.³¹ Sections 19, 20 and 21 of the CHA 2005 deal with the responsibilities and rights of mothers and fathers. Section 40 of the CHA 2005 deals with the rights of a child conceived by artificial fertilization. Under this section, whenever the gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilization of one spouse, any child born of that spouse as a result of such artificial fertilization must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilization, and it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.

Subject to section 296 of the CHA 2005,³² no right, responsibility, duty, or obligation arises between a child born of a woman as a result of artificial fertilization and any person whose gamete has or gametes have been used for such artificial fertilization or the blood relations of that person, except that person is the woman who gave birth to that child; or that person was the husband of such woman at the time of such artificial fertilization. Furthermore, section 41 of the CHA 2005 prohibits the revelation of the identity of the person whose gamete or gametes were used for artificial fertilization or the identity of the surrogate mother. The gestational mother otherwise called a 'surrogate,' who donates her womb, will carry the fertilized embryo, but her eggs are in most cases not be used to create the embryo. In South Africa, surrogacy is legalized and must be covered by a surrogate motherhood agreement in writing and confirmed by a High Court.³³ Section 301 of the CHA 2005 prohibits payments in respect of surrogacy or the receiving from any person, a reward or compensation in cash or in kind. Nonetheless, any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement or in the execution of such an agreement, is entitled to reasonable compensation. No person may publish any facts that reveal the identity of a person born as a result of a surrogate motherhood agreement.³⁴

3.3 Regulations Relating to Artificial Fertilization of Persons 2012

The South African Regulations Relating to Artificial Fertilization of Persons 2012 (AFP Regulation) only applies to removal of gamete from living persons,³⁵ and only a 'competent person' may remove or withdraw a gamete or cause a gamete to be removed or withdrawn from the body of a gamete donor.³⁶ Under regulation 4 of the AFP Regulations 2012, where compensation is involved, a person who donated gamete may be reimbursed for any reasonable expenses incurred by him or her in order to donate a gamete as contemplated in regulation 60 (4)(a) of the AFP Regulations 2012. The law in South Africa allows financial compensation for reasonable expenses incurred by the donor, such as injectable medication, regular consultations, regular ultrasound examination, blood tests and travel expenses to the

²⁹ Constitution of the Republic of South Africa 1996, s 28.

³⁰ D Thaldar, 'Performing IVF For Surrogacy Before Confirmation of The Surrogacy Agreement by The Court: A Critical Analysis of Recent Case Law in South Africa' [2023] (10) (5) *Humanities and Social Sciences Communications*, 1.

³¹ Children's Act (CHA) 2005, s 9.

³² Surrogacy Arrangement.

³³ CHA 2005, s 292.

³⁴ CHA 2005, ss 302, 303.

³⁵ South African Regulations Relating to Artificial Fertilization of Persons 2012 (AFP Regulation), reg 2.

³⁶ *Ibid*, reg 3 (1).

Competent institution.³⁷ An egg donor may have no more than a certain number of live born children from their donated gametes. Therefore, as a donor, a woman is allowed to donate more than once.³⁸

Artificial fertilization may be effected after the 'competent person' has applied for and received the approval of the Director General in writing of such intended artificial fertilization or embryo transfer.³⁹

Where a competent person changes his or her name or address of practice; changed the person in charge of an authorized or prescribed institution, or the name or address of the institution has been changed, the Director-General shall within 30 days of such change, be informed in writing.⁴⁰ Reporting of all birth delivered after the conception through artificial fertilization shall be recorded by the person in charge of the facility, into the central data bank within 3 months of such birth.⁴¹ The South African Reproductive Council supports egg donor anonymity and confidentiality. No meeting can take place between egg donation recipient and egg donor, and donor agencies who renders professional and ethical services are bound to comply with the relevant laws and supporting guidelines. Without the anonymity of sperm and egg donation, there may be limited donation, or no willing participants as recipients.

3.4 Regulatory Enforcement in South Africa

The South Africa legislations and guidelines apply to all parties involved, including agencies, clinics, donors, and recipients. These laws protect the well-being of parties and ensures that each party fully understands their rights and roles. Egg donors are not employees of an egg donation agency, so there is no ownership of the women in question.⁴² Due to the nature of South Africa laws on ART, different agencies have responsibilities towards the achievement of gamete donation. Section 77 (2) of the NHA 2003 requires the Inspectorate of Health Establishments to monitor and evaluate compliance with the NHA 2003. The law also requires The Office of Standards Compliance to inspect health agencies.⁴³ Health Officers in the employ of the National Department are appointed by the Minister, and mandated to monitor and enforce compliance with the NHA 2003.⁴⁴ The Health Officer has power to enter any premises, to inspect, require to produce, take samples, issue compliance notice, issue receipts, as well as to enter and search premises with warrant.⁴⁵

With respect to Chapters 8 and 19 of the CHA 2005, section 41 of the CHA 2005 requires that every child has the right to bring, and to be assisted in bringing, a matter to a court, provided the matter falls within the jurisdiction of that court. Section 306 of the CHA 2005 gives the Minister powers to administer the Act, and in consultation with the Minister for Justice and Constitutional Development where courts, court orders and the review of decisions by the courts are regulated.⁴⁶ In enforcing ART laws, the South African Society for Reproductive Medicine, and Gynaecological Endoscopy Guidelines (SASREG) guidelines for egg donation agencies manages donor agency actions. Regulation 1 of the SASREG guidelines provides for advertising for egg donation. Such materials are to be designed and written with care. The wording of their advertising and marketing campaigns should take into consideration the sensitive issues involved in recruiting donors. Statements about earning money or financial gain should be avoided, but reference to reimbursements or compensation is acceptable.⁴⁷

South Africa is currently working on a new Medically Assisted Reproduction Draft Regulations.⁴⁸ The 2021 draft regulations adjust the meaning of 'competent person' to designate a natural person who is

³⁷ VITALAB 'Egg Donation' *Vitalab* <<https://www.vitalab.com/donors/south-african-legislation/>> accessed 14 June 2023.

³⁸ *Ibid.*

³⁹ AFP Regulation 2012, reg 10.

⁴⁰ *Ibid.*, reg 14 (3).

⁴¹ *Ibid.*, reg 15.

⁴² South African Society for Reproductive Medicine, and Gynaecological Endoscopy Guidelines (SASREG) 2008.

⁴³ NHA 2003, ss 78,79.

⁴⁴ *Ibid.*, ss 80, 81.

⁴⁵ *Ibid.*, ss 83-86.

⁴⁶ CHA 2005, s 307.

⁴⁷ SASREG 2008.

⁴⁸ The [Draft] Regulations Relating to Assisted Conception of Persons GN 251 GG 44321 (25 March 2021).

authorized to perform medically assisted reproduction procedures, including removing an egg from a woman and causing sperm to be removed from a man, creating embryos in vitro, and transferring such gametes or embryos to a woman's reproductive organs. In the AFP Regulations 2012, a competent person is defined in two parts to include a medical practitioner specializing in Gynecology with training in reproductive medicine, and also a medical scientist, medical technologist, clinical technologist, with training in reproductive biology and related laboratory procedures. The proposed definition featured in the 2021 draft regulations; if implemented, would exclude some class of health professionals. Furthermore, new definitions would also narrow the scope of medical practitioners who qualify as competent persons from those who have had training in reproductive medicine to only those with a subspeciality in reproductive medicine. This would have unfair consequences for the medically assisted reproduction industry in South Africa.

The 2012 regulations restrict the number of times that a gamete donor's gametes may be used to six children that have been conceived using such donor's gametes. The 2012 regulations were criticized as being too restrictive in this regard. The 2021 draft regulations address this concern by introducing a new maximum of twelve live births for a maximum of six recipients, and in the case of an egg donor, a maximum of six donations.⁴⁹ Also, the 2021 draft regulations introduce a provision on sperm retrieval, that for purposes of assisted reproduction, male gametes must be procured only after self-stimulation. The effect of this provision would be to ban sperm retrieval by any means other than self-stimulation. It has been queried that this would bar several persons from seeking assisted reproduction; especially men who cannot provide sperm via self-stimulation for medical, religious, or cultural reasons, and spouses who wish to procure sperm from a comatose or deceased husband for the purpose of posthumous conception.⁵⁰

4.0 Lessons for Nigeria Towards a Future for Assisted Reproduction

The bottom-line of gamete donation is to achieve pregnancy. This should be a basic right for every human being: to be able to procreate. The absence of law regarding this area of medical practice in Nigeria is a clear dysfunction which is a result of utter disregard for human wellbeing and the promotion of corruption. Laws in a democratic State exists through lobbying and continuous efforts from members of the legislative houses. Why will an ART Bill not manifest itself after over three decades of ART use in Nigeria? The legal status of egg donation varies from country to country. It is totally illegal in countries like Italy and Germany but may be allowed in others like France if the donor is non-anonymous and gracious enough (without compensation). In Spain and South Africa, it is legal if only it is anonymous, and the donor is compensated. In the United States of America, it is legal whether anonymous or non-anonymous and or compensated.⁵¹

The variations in ethical and legal standards across jurisdictions over the complex nature of gamete donation, implies that no country need to be represented by a legal attitude of 'anything is applicable.' The basic principles of medical ethics; autonomy, justice, beneficence, and non-maleficence,⁵² require Infertility specialists, donor recruitment agencies, donors, medical ethicists, patients, and health insurers to consider conflicts of interest when proposing, formulating and evaluating policies regarding gamete donation. These principles revolve around the philosophy of assisted reproduction. Patients may be incapable of fully understanding all the potential risks and treatment options without substantial background in biology and medicine. Clearly, this shows that there exists potential coercion and

⁴⁹ The [Draft] Regulations Relating to Assisted Conception of Persons 2021, reg 7.

⁵⁰ D Thaldar and B Shozi, 'South Africa's Latest Medically Assisted Reproduction Draft Regulations: Close, But No Cigar' [2022] (1) *Journal of South African Law*, 1.

⁵¹ M Sargent, 'Regulating Egg Donation: A Comparative Analysis of Reproductive Technologies in The United States and United Kingdom' [2007] (4) *Michigan Journal of Public Affairs*, 3.

⁵² 'Infertility Treatment: An Overview'

<<https://web.stanford.edu/class/siw198q/websites/reprotech/New%20Ways%20of%20Making%20Babies/Outline.htm>> accessed 14 June 2023.

uninformed consent especially for egg donation which requires special medication and subsequent extraction of egg for ART procedures.⁵³

The judicial attitude to gamete donation in regulating the medical practitioner is that the obligation to treat on the part of a physician must yield to the patient's autonomy as embedded in the right of self-determination, and that any treatment of an adult person of sound mind against the person's wish may result in a civil wrong. Also, because of the shortage of qualified and available egg and sperm donors, infertility treatments in Nigeria are subject to distributive injustices which medical practitioners cannot ignore. Women and men who can afford higher payments for sourcing, compensation, and agency and medical fees are more likely to receive treatment than people from lower socioeconomic levels. Injustice may also occur in the management of needs, rights, and obligations involved in sperm and egg donation. Conflict of interest may exist over the doctor's need to serve a patient or recipient, and the responsibility for protecting the health of donors.⁵⁴ Justice requires equal access to all who need the ART services.

However, with a national minimum wage of ₦30,000, monthly,⁵⁵ and without any governmental intervention, access to assisted reproduction can be adjudged as a subject for the rich. Consequently, the design of health care systems must be guided by the key human rights standards of universal access guaranteed for all on an equitable basis; availability of health care infrastructure; and services like primary care and maternal and child health, and mental health must be available in all geographical areas and to all communities; as well as affordability and accessibility over cost of acquiring an ART procedure to have a child.

Gamete donation procedures must be performed for the purpose of improving health and preventing harm. However, there is an inherent aspect of maleficence in respect to donors, who undergo risks without clinical benefit. Doctors and legislative bodies in many countries decide whether placing a young, fertile donor at risk for harm is justifiable for the benefit of a seemingly older, infertile patient. This concept of harm-avoidance is especially problematic because the side effects of ovulation enhancing drugs on donors are known, and studies recognize the increasing frequency of clinical reports linking ovarian stimulation with ovarian cancer, ovarian hyperstimulation syndrome, ovarian trauma, infection, future infertility, and lacerations. Religion and cultural justifications also play prominent roles in ART regulation, and these are factors that influence the acceptance or tolerance for assisted reproductive techniques, and the reasons for any state intervention.⁵⁶

When does the right to choose the number, spacing and timing of children freely and responsibly through assisted reproduction result into one that affects the State? From the standpoint of legal theory that so-called 'right' is no more than a privilege and is not absolute and there is therefore no reason why state cannot regulate the exercise of the right to enjoy the benefits of ART and gamete donation.⁵⁷ Where the state shows a compelling governmental interest, it can equally override an individual's fundamental rights. This means that classifying something as a compelling state interest would justify reasonable regulation of individual or group rights,⁵⁸ as certain legislative limitations of individual rights are necessary for the common good.

⁵³ 'What Are the Ethical Concerns Regarding Egg Donation?' <<https://web.stanford.edu/class/siw198q/websites/reprotech/New%20Ways%20of%20Making%20Babies/eggethic.htm>> accessed 14 June 2023.

⁵⁴ 'What are the Ethical Concerns Regarding Egg Donation?' (n53).

⁵⁵ Nigerian National Minimum Wage Act 2019, s 3.

⁵⁶ FA Bello and Others, 'In-vitro Fertilization, Gamete Donation and Surrogacy: Perceptions of Women Attending an Infertility Clinic in Ibadan, Nigeria' [2014] (18) (2) *African Journal of Reproductive Health*, 127.

⁵⁷ S Eisenhauer, 'Legal Implications of Population Control: A Practical Re-evaluation of Some Human Rights Considerations' [1978] (2) (1) *Fordham International Law Journal*, 1.

⁵⁸ *Griswold v Connecticut* 381 US 479 (1965) at 496, per Justice Goldberg; CC Means, 'The Constitutional Aspects of a National Population Policy' [1970] (15) (4) *Villanova Law Review*, 854.

5.0 RECOMMENDATIONS

As steps in the right direction, ART legislations are expected to address complex and important issues like the prohibition of practices such as cloning, compensation for gamete donation, establish a framework to regulate activities such as IVF, donor insemination and embryo research through government agencies, professional bodies and private institutions. It is therefore recommended that:

- a. Regulatory measures must be set in all States in Nigeria. The legislations need to clearly state that free and informed decision-making is central and imperative in all ART procedures. Inconsistency and incoherence in definitions under State laws and regulations must be avoided, as observed in the South Africa system, between the 2012 and 2021 SASREG.
- b. Professional bodies and ART institutions across the country must provide consistent and updated guidelines that extensively reveal international best practices and professional standards and deal with possible situations and issues relating to gamete donation. There must be high level of uniformity in legal regulatory provisions and professional practices in all parts of Nigeria.
- c. In addition to enacting specific ART laws across the federation, all states must set up specific agencies on ART Monitoring, data gathering and enforcement of the regulations. These agencies must be equipped with modern technological devices to investigate medical cases, monitor clinics and detect fraud or legal violations, and they must possess adequate and professional staff, functional divisions within the agency and must be fully funded.
- d. Re-orientation, awareness creation, education and mindset change will promote acceptance and tolerance of ART and gamete donation and increase the desire of eligible men and women to donate gamete, members of the Nigerian society need to understand what it means. This enlightenment across the different regions will create a better atmosphere for donors and recipients, as well as for childless or infertile persons. Religious institutions are important stakeholders in the transformation of society to a tolerable level. Religious centres must periodically organize seminars and outreach programmes where professional counsellors and medical practitioners; not just pastors, positively enlighten the people on the need for a violence free society, the causes of infertility and the consequences of an unregulated ART society.
- e. Donation must be altruistic and must be given freely. The State must be able to determine when a donor is being exploited due to illiteracy, impoverishment or a promise of a privilege. Increase in altruistic donations can be achieved with positive campaigns and religio-medical evangelism. This will reduce sharp practices in donor hunting and clients abuse. Variations in compensation across the country will do more harm than good. While legislation need not peg compensation to a fixed amount, regulatory policy or professional guideline applicable across Nigeria must indicate the minimum amount payable as reimbursement for expenses and due compensation to either an egg donor or a sperm donor, and guidelines must provide thresholds as applicable in South Africa.
- f. Upper and lower age limits must be set for both donors and recipients, and legislation in Nigeria must set the maximum number of births allowed by any individual donor.
- g. The role of the private sector is not limited to creating wealth and jobs and paying of taxes. For the private sector to participate fully in the implementation of assisted reproduction goals, there is need to raise awareness of the character of assisted reproduction. Not many African countries have adopted the Public-Private Partnership model across the health sector due to a number of challenges such as migration of medical personnels, scarcity of specialists, weak institutions, lack of accountability and transparency in contracts, conflicts of interest, corruption and lack of political will to promote Public-Private Partnerships and popular distrust of service providers, consultants. Public-Private Partnerships are required in strengthening the health sector in Nigeria.
- h. The Media must also provide platforms for debates and engagements, enlightenment and awareness creation on infertility management and healthcare, and the need for positive resort to gamete donation, and legal use of ART procedures.

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