



Classification of Infertility in Woman as a Disability Under Nigerian Law

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Abstract

Infertility in women was ranked the fifth highest serious global disability among populations under the age of 60. In Nigeria a woman's worth is defined mainly in terms of her ability to bear children and though infertility is not lethal, it is a radical life changing problem that carries with it significant psychological trauma. Although women and men tend to be equally susceptible to infertility, women are often blamed for the infertility so most treatments are focused on women who bear the burden of infertility as childless women suffer discrimination and other untold hardship. Once the cause of infertility is known, treatment by Assisted Reproductive Technology is expensive and unregulated. Nigeria ratified the United Nations Convention on the Rights of People with Disabilities 2007 domesticated as the Discrimination against Persons with Disabilities (Prohibition) Act 2018 but failed to recognize infertility in women as a disability. The paper adopted the doctrinal research methodology and interrogated the propriety of classifying infertility in woman as a disability. The paper is structured into seven parts. The paper found that the right to marry and found a family is a human right and recommended legal reforms to protect women with infertility in Nigeria.

Key Words: *Infertility, Disability, Discrimination and Nigeria*

Introduction

The reason for the existence of law in society is define the rights and duties of citizens and a breach of these rights entitles the citizen to a remedy. The Constitution of the Federal Republic of Nigeria (CFRN) 1999 has set out the basic rights of all citizens of Nigeria and one such basic right is the right against discrimination.¹ The science is settled that infertility is traceable to abnormalities with the reproductive systems of either male or female reproductive systems or with both partners, blame of infertility is mostly borne entirely by women as even foremost male consultants in Obstetricians and Gynaecologists are habitually fast to link couple infertility to female factors.² The societal consequences like deprivation, discrimination, humiliation and exclusion from society are borne.³ Traditionally, African men are beyond reproach and have several options available to them like shifting the blame for the infertility to the wife, divorce, remarriage and polygamy which is permissible in many cultures in Africa. The Abrahamic religions view fertility as a command from God to mankind to "be fruitful and multiply"⁴ and the scorn for women with infertility is that it is against divine order. Infertility generally is a misnomer not tolerated by God as depicted by the swift judgment of Jesus Christ on the fig tree because is contrary to the original design of God

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¹ CFRN 1999, s. 44

² R. Horton, Fertility Rights and Wrongs, [1993] (342)(8862) Lancet, 45–54;

³ D. A. Gerrity, The Biopsychosocial Theory of Infertility, [2001] (9) The Family Journal, 151

⁴ Genesis 1:28

from the beginning for any creation of God to be barren. No wonder Rachael demanded from Isaac "give me children or I shall die."⁵

A child represents the essence of marriage and the absence of children for couples is akin to a repudiation of the contract of marriage making the marriage void by reason of infertility. African societies are altruistic and communalist by nature with family members playing the role of caregivers to their aged parents and family members. Children are seen as retirement benefit for the grandparents and parents the practice of institutionalizing the elderly which is the norm in Europe and North America does not arise.⁶ In Nigeria it is a thing of pride and display of wealth when the roll of children is made in the community or family square. Land for cultivation under the African subsistence farming method by the family based on the number of male children in the family. The wisdom behind this practice is that the children in a family represent the workforce for that family and more children come with the demand for more mouths to feed. A barren couple will only be allowed just a plot because giving them more land is waste of resources.⁷ Another practice in northern Nigeria is the almajiri system in Northern Nigeria where the male children are pushed out of the home to fend for themselves while the female children are kept at home and well provided for with the expectation that a prominent suitor will come for hand in marriage even though this practice contradicts the provisions of the Child Rights Act 2003.⁸ In the Niger Delta, the Iria rituals prepare maidens for marriage in the Niger Delta region which is a thing of pride to parents.⁹ Children mean a lot of things to Africans.

Infertility is akin to bad luck or an affliction by a wicked force and this ancient view of infertility that is the force behind the extra-marital affairs by women to save their marriages in many Nigerian cultures and cause those affected personal distress, significant treatment costs, exclusion and discrimination.¹⁰ The Ijaw Tribe in Nigeria deny barren women privilege to attain full womanhood and join appropriate age grade associations since they cannot be circumcised without having given birth and uncircumcised women cannot be buried within the town, rather, their corpses are buried in a designated forest.¹¹ The Yoruba kingdom of Ile-Ife in Osun State, Nigeria, women suffer physical and mental abuse, economic denial and social ostracism as a result of bareness.¹² In Abua Kingdom, Rivers State - Nigeria, barren women are refused decent burial until the cleansing is performed. Barrenness is a curse that comes with shame extended family and relatives. This increases the guilt and shame felt by the infertile individual.¹³

It is important to note under most of the customary law in Nigeria, women are treated as chattel and the husband has unfettered powers to divorce the wife whenever it suits him.¹⁴ The

⁵ Matthew 21:20-22; Mark 11:12-14, 20-25; Genesis 30:1

⁶ B. Fiveash, *The Experience of Nursing Home Life*. [1998] (4) *International Journal of Nursing Practice*, 166-74.

⁷ A. O. Akinola, *Women, Culture and Africa's Land Reform Agenda*, [2018] (23)(9) *Frontiers in Psychology*, 2234.

⁸ Mobolaji et al, *Ethnicity, Religious Affiliation and Girl-Child Marriage: A Cross-Sectional Study of Nationally Representative Sample of Female Adolescents in Nigeria*, [2020] (20) *BMC Public Health*, 583

⁹ Daly et al, *Male and Female Artistry in Kalabari Dress*, [1986] (19)(3) *African Arts*, 48-83.

¹⁰ W. Cui, 'Mother or Nothing: The Agony of Infertility', [2010] (88)(12) *Bulletin World Health Organization*, 881

¹¹ M. Hollos, 'Profiles of Infertility in Southern Nigeria: Women's Voices from Amakiri'. [2003] (7)(2), *African Journal of Reproductive Health*, 46 - 56.

¹² Okonofua et al, 'The Social Meaning of Infertility in Southwest Nigeria', [1997] (7)(2) *Health Transition Review*, 205-220.

¹³ W. Cui, 'Mother or Nothing: the Agony of Infertility', [2010] (88) *Bull World Health Organ*, 881-882

¹⁴ M. Ndulo, *African Customary Law, Customs, and Women's Rights*, [2011] (18)(1) *Indiana Journal of Global Legal Studies*, 87-120.

discrimination and stigmatization continue unabated despite the provisions of the CFRN 1999 and several international, regional and multilateral treaties protecting the rights of women in Nigeria. In a bid to stem the tide of human rights abuses, Nigeria ratified the United Nations Convention on the Rights of People with Disabilities (CRPD) 2007 now domesticated in as the Discrimination against Persons with Disabilities (Prohibition) Act 2018 (DPDPA). This paper interrogates the propriety of classifying female infertility as a disability under Nigerian law.

A. Conceptual Framework

a. Infertility

Infertility as “a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.”¹⁵ WHO provides as that “Infertility is the inability of a sexually active, non-contracepting couple to achieve pregnancy in one year. The male partner can be evaluated for infertility or subfertility using a variety of clinical interventions, and also from a laboratory evaluation of semen.”¹⁶ Infertility in women is classified into primary and secondary. Primary infertility refers to the condition in which a couple has never been able to conceive. Secondary infertility refers to those cases where a couple has been successful in conceiving at least once, but has been unsuccessful after that.¹⁷ About 30% of infertile couples worldwide are diagnosed with unexplained or idiopathic infertility and the problem is defined as the lack of an obvious cause for a couple's infertility and the females' inability to get pregnant after at least 12 cycles of unprotected intercourse or after six cycles in women above 35 years of age for whom all the standard evaluations are normal.¹⁸ Unexplained infertility affects 10–20% of women.¹⁹

b. Discrimination

Discrimination is a word that is commonly used in everyday interactions and the word means many things to different people. For the definition of discrimination to achieve the aim and objectives of this paper, reliance will be placed on the definition used in the leading laws and treaties, conventions and protocols on disability like the DPDPA, CRPD and in Convention on the Elimination of all Forms of Discrimination Against Women 1979 (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa 2018. The DPDPA defines discrimination as “differential treatment and its verb and infinite form, discriminate, to discriminate have the corresponding signification.” The CRPD defines “discrimination on the basis of disability” as:

*Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.*²⁰

¹⁵ Zegers-Hochschild *et al.*, [2009] (92)(5) *Glossary of ART Terminology*, 1522.

¹⁶ WHO Laboratory Manual for the Examination and Processing of Human Semen, 5th ed.

¹⁷ U. Larsen, 'Primary and Secondary Infertility in Sub-Saharan Africa', [2000] (29)(2) *International Journal of Epidemiology*, 285–291

¹⁸ M. R. Sadeghi, 'Unexplained Infertility, the Controversial Matter in Management of Infertile Couples', [2015]. (16)(1), *Journal of Reproduction and Infertility*, 1–2.

¹⁹ S. Sunderam *et al* 'Centers for Disease Control and Prevention, Assisted Reproductive Technology Surveillance-- United States, 2009', [2012] (61)(7) *Morbidity and Mortality Weekly Report. Surveillance Summaries* 1 – 23

²⁰ CRPD, art. 2

The definition of discrimination under the CRPD was adopted under art. 1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities 2018 and art. 1 CEDAW though with slight variations as follows:

*Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*²¹

c. Disability

The term 'disability' means, with respect to an individual "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment."²² The CRPD provides that "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."²³ The definition of disability in the CRPD is expectedly adopted under s. 57 DPDA since it is a domestication of the CRPD. WHO defines disability as follows:

*Disability results from the interaction between individuals with a health condition, such as cerebral palsy, Down syndrome and depression, with personal and environmental factors including negative attitudes, inaccessible transportation and public buildings, and limited social support.*²⁴

d. Human Rights

Human rights are rights natural to all persons regardless of the colour of their skin, sexual orientation, country of origin, ethnic affiliation, language, religious beliefs or status in society. Human rights are intrinsic and everyone is entitled to them without any discrimination and include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Human rights are interrelated, interdependent, indivisible, universal and recognized as belonging to every human being equally. Umozurike defined human rights as "claims which are incurable supported by others and which should be supported by law, made on society, especially on its official manager, by individuals or groups on the basis of their humanity".²⁵ Igwe defined human right as "cherished entitlement endowed upon every person in virtue only of being a human and which are not extinguishable by derogations (even when they are massive, consistent and systematic) as they carry the status of innateness, being inherent inalienable and therefore immutable."²⁶ The foundations of this body of law are the UN Charter 1945 and UDHR.

B. Theoretical Framework

²¹ CEDAW, art. 1

²² Americans with Disabilities Act of 1990, s. 3(2)

²³ CPRD, art. 1

²⁴ WHO, Disability <<https://www.who.int/health-topics/disability>> Accessed 19 November 2022

²⁵ U. O. Umozurike, the African Charter on Human & Peoples' Rights (Martinus Nijhoff Publishers, 1979).

²⁶ O. W. Igwe, Tracing the Nativity and Contents of Human Rights (Harey Publication Coy.) 2.

This paper is based on the feminist legal theory or feminist jurisprudence which is founded on the belief that the law has been fundamental in women's historical subordination.²⁷ The crux of feminist jurisprudence is to throw light on the ways the law played a pivotal role in women's former subservient status and efforts to changing women's status through an amendment of the law and its approach to gender. The school of jurisprudence emerged in the late 1970s pioneered by Ann Scales and the term first published in 1978 in the first issue of the Harvard Women's Law Journal.²⁸ Scales referred to feminist struggle as a movement where; we must look for that which we have not been trained to see and that we must identify the invisible and take responsibility for the violence built into the genderised world.²⁹ This feminist critique of American law was developed as a reaction to the fact that the legal system was too gender-prioritized and male-controlled. After trailblazing work of Scales in 1978, other scholars in like Fineman joined the fray and challenged laws that limited women to the home, advocated for financial independence of women and freedom from abuse in the workplace, promoted the liberation of women from marginalization, gender discrimination and inequality.³⁰ Atsenuwa defined feminism as a movement that seeks to redress the endemic nature of discrimination and other forms of injustice against women.³¹ Akande advocated for more than a shift from the status quo of a male dominated world but to a change in attitude and political inclusiveness of women for the greater good of society as the continuous exclusion of women is akin to going into a boxing bout with one hand tied to the back or playing a football with half of your team, a recipe for colossal defeat.³² Vassallo et al argued that "Feminism and infertility are inextricably intertwined, varying viewpoints on the relationship between the political and the physical can be plotted in a typology of different and related issues."³³

C. Legal and Institutional Framework on Disability in Nigeria

a. National Legal Framework

A consideration of the local legislation related will start with the CFRN 1999 which is the basic law in Nigeria and other laws acquire legitimacy based on the level of compliance and any other law or custom that derogates from the provisions of the CFRN 1999 is to the extent of the inconsistency void.³⁴ Apart from the right against discrimination which will form the crux of this paper, the CFRN 1999 has provided for other inalienable rights that a breach of these rights will result to payment of compensation and a public apology to the victim.³⁵ The execution of a convicted felon by the State while his appeal was pending before a higher court was pronounced as a breach of the right to life and compensation ordered to be paid by the state to the family of the

²⁷ M. A. Fineman, "Feminist Legal Theory"[2005] (13)(1) *Journal of Gender, Social Policy & the Law*, 13–32

²⁸ P. A. Cain, *Feminist Jurisprudence: Grounding the Theories*, [2013] (3) *Berkley Journal of Gender, Law & Justice*, 193; A. Scales, *Legal Feminism: Activism, Lawyering and legal Theory*. (NY University Press. 2006).

²⁹ A. C. Scales, 'The Emergence of Feminist Jurisprudence: An Essay', [1986] (95)(7) *Yale Law Journal*, 1373 @ 1395; A. C. Scales, *Legal Feminism: Activism, Lawyering and legal Theory* (New York University Press. 2006)1.

³⁰ A. Atsenuwa, 'In Search of Transformative Justice: Thee Proselytism of Legal Feminism', *Inaugural Lecture Delivered at the University of Lagos Main Auditorium on Wednesday, 23rd July, 2014*

³¹ A. Atsenuwa, *Constitution and legal feminism: Stepping stones or impediments on the long road to freedom for Nigerian women* (Nigerian Institute of Advanced Legal Studies, 2011).

³² J. Akande, *Apartheid in Gender Miscellany in Law and Gender Relations*, (MIJ Publishers), 1

³³ C. Vassallo et al, 'Infertility in Science Fiction as a Feminist Issue,' [2017] (316) *Science Fiction Research Association Review*, 4 – 9.

³⁴ CFRN 1999. s. 1

³⁵ CFRN 1999, ss. 35(6) & 46(2); *Jim-Jaja v. C.O.P., River State* 6 NWLR (Pt. 1350) 225

victim by the Supreme Court in *Nasiru Bello v. AG Oyo State*.³⁶ The provisions of the Public Order Act,³⁷ a statute of general application and relic of colonial hegemony which prohibits the holding of rallies or processions without police permit was declared unconstitutional having regard to s. 40 CFRN 1999 by the Court of Appeal (CA) in *IGP v. ANPP & Ors*.³⁸ The law is settled in the famous maxim “*Ubi jus, ibi remedium*” which is interpreted to mean 'where there is a right, there is a remedy'. There is a fundamental right to a remedy when a right has been breached. There is a right against discrimination yet disabled persons are discriminated against without any remedy in Nigeria. The National Population Commission (NPC) estimated that at least nineteen (19) million Nigerians are living with disabilities in Nigeria.³⁹ There is a lot of discrimination and violence against women in different spheres of life as it relates to politics, health, education, reproduction, inheritance and so on. The Rivers State Government in Nigeria enacted the *Rivers State Prohibition of the Curtailment of Women’s Right to Share in Family Property Law No. 2 of 2022*, designed to protect women are deprived from sharing in the inheritance of their families and aligns with s. 44 CFRN that granted the right to hold property.

The CFRN 1999 sets the yardstick for which international treaties Nigeria has entered into can become operational through the process of domestication.⁴⁰ So a treaty or convention acceded to by Nigeria will not have the force of law until it is domesticated. The CFRN 1999 enumerates the fundamental human rights which are justiciable rights, that is, rights citizens could go to court to enforce them if denied particularly the “right to freedom from discrimination on the grounds of ethnic group, place of origin, circumstance of birth, sex, religion or political opinion”.⁴¹ In interpreting s. 42 CFRN 1999 in *Ukeje v. Ukeje*,⁴² the Supreme Court held that an unknown intestate succession under customary law of the Igbo people in Nigeria is full of discrimination, especially to the female and illegitimate children among others.

The DPDPA is a statute that holistically provides for the protection of the rights of persons living with disabilities in Nigeria and domesticates Nigeria’s obligations under the CRPD. Before the enactment of the CRPD, the military junta of Gen. Babangida promulgated the Nigerian with Disabilities Decree 1993 which provided equal treatment with able bodied Nigerians and mandated employers to reserve 10% quota for disabled persons in exchange for a 15% tax deduction.⁴³ Unfortunately, the Nigerian with Disabilities Decree is not listed in the current Laws of the Federation of Nigeria 2004. The DPDPA provides for full integration of persons with disabilities into the societies, established the National Commission for Peoples with Disabilities (NCPD) to

³⁶[1986] 5 NWLR (Pt. 45) 828. The SC in *AG Anambra State v. AG Federation*.(2005) 9 NWLR (PT 931) 572 confirmed the position of s. 215(1) CFRN 1999 that empowered governors to issue directives to commissioners of police with respect to public order and security in their respective states.

³⁷ Cap P42, Laws of the Federation of Nigeria (LFN), 2004

³⁸ (2007) 18 NWLR (Pt.1066) 457

³⁹ C. Okocha, INEC: 19 Million Nigerians Living with Disabilities are Registered Voters, Thisday, 20 October 2022 <<https://www.thisdaylive.com/index.php/2022/10/20/inec-19-million-nigerians-living-with-disabilities-are-registered-voters/>> Accessed 8 November 2022

⁴⁰ s. 12 CFRN 1999; C. N. Okeke, ‘The Use of International Law in the Domestic Courts of Ghana and Nigeria’, [2015] (32)(2), *Arizona Journal of International & Comparative Law*, 407.

⁴¹ CFRN 1999, s. 42

⁴² (2014) 11 NWLR (Pt.1418) 384, In *Mojekwu v. Mojekwu* (1997) 7 NWLR (Pt.512) 283 the deceased had two females surviving him, his male nephews claimed to be entitled to his estate. The court rejected the view that the case was governed by Nnewi Customary Law but added that even if this were so, such a customary law which discriminated against women but the SC rejected the decision of the CA and upheld the “Iri-ekpe” custom.

⁴³ A. A. Tijani and P. E. Oamen, Global Best Practices on Disability Rights, [2016] (4)(1) *Akungba Law Journal*, 31

be responsible for the education, health care, social, economic and civil rights and for related matters to persons with disabilities.⁴⁴The DPDPA prohibits all forms of discrimination against persons with disability.⁴⁵The Federal Ministry of Information (FMOI), an arm of the Federal Government of Nigeria (FGN) is vested with the responsibility of promoting of awareness regarding the rights, respect, dignity and contributions of disabled person.⁴⁶

b. International Legal Framework

The Universal Declaration of Human Rights (UDHR) 1948 is the *numero uno* in human rights documents and provides for **equality** irrespective of physical and social differences.⁴⁷The UDHR provides for the right of men and women of all backgrounds to found a family, that is, the right to reproduction.⁴⁸The UDHR is a quasi-legal instrument without the force of law so this limitation led to the emergence International Covenant on Civil and Political Rights (ICCPR) 1966, an expanded and standardized legal instrument providing the basic fundamental rights.⁴⁹The ICCPR amongst other civil and political rights guarantees the right of men and women of marriageable age to marry and found a family, that is, the right to reproduce.⁵⁰CEDAW, the international bill of rights for women, provides for all the basic rights contained in the CFRN 1999 and outlines a course of action for nations to follow in order to put an end to all forms of discrimination against women.⁵¹The CRPD and the 2010 Optional Protocol restate that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. The CRPD provides the elimination of “discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others.”⁵²The African Charter on Human and Peoples Rights 1981 (ACHPR) which is apex human rights treaty in Africa provides that persons living with disabilities shall have the right to special measures of protection taking cognizance of their physical and moral needs⁵³and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa 2018 to protect persons living with disabilities and respect their inherent dignity.⁵⁴ The African Union Convention for the Protection and Assistance of internally Displaced Persons in Africa 2009 and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003, African Youth Charter 2006 and many more make provisions for the rights of persons with disabilities in Africa.

c. Institutional Framework

Section 31 DPDPA establishes and provides for the function of the National Commission for Persons with Disabilities (NCPWD)⁵⁵and provides for a Governing Council to direct its affairs

⁴⁴ DPDPA, preamble

⁴⁵ DPDPA, s. 1

⁴⁶ DPDPA, s. 2

⁴⁷ UDHR, arts. 1 & 2

⁴⁸ UDHR, art. 16

⁴⁹ ICCPR, arts. 6-22; C. Harland, The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through UN Human Rights Committee Documents, [200] (22)(1) Human Rights Quarterly, 187-260.

⁵⁰ ICCPR, art. 23

⁵¹ CEDAW, arts. 2 – 14; M. Freeman, The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities of Compliance, [1997] (91) Proceedings of the Annual Meeting (American Society of International Law), 378-383.

⁵² CRPD, s. 23(1)

⁵³ ACHPR, s. 18(4)

⁵⁴ OP-ACHPR, art. 2

⁵⁵ DPDPA, ss. 31 & 39

headed by a part-time chairman and six members who shall be persons with disabilities from geographical zones of the federation, representatives of the federal ministries, National Human Rights Commission and National Planning Commission.⁵⁶ Appointment is subject to Senate confirmation for a four-year term of office in the first instance and may be renewed for a second term of four years and no more. NCPWD is an agency under the Federal Ministry of Humanitarian Affairs, Disaster Management and Social Development and the Council manages and superintends, make rules and regulations, serves as a link to the public and private sector and other bodies to ensure the interests of persons living with disability are taken into consideration in every government policy and many more.⁵⁷ The DPDPA reserves the position of Executive Secretary to person with disability who shall be responsible for the daily administration and execution of policies with five-year tenure in the first instance and may be reappointed for a second term and no more.⁵⁸ The Executive Secretary of NCPWD is James David Lalu (npom).⁵⁹

The right against discrimination is a human right and it is therefore apposite to consider the role of the National Human Rights Commission (NHRC) which is the apex regulatory institution in Nigeria on human rights matters established by the National Human Rights Act 1995.⁶⁰ Mr. Anthony Okechukwu Ojukwu, SAN as the Executive Secretary of the NHRC appointed by the President on the recommendation of the Attorney General of the Federation with five-year tenure in the first instance and may be reappointed for a second term and no more.⁶¹ The NHRC is to promote, protect, enforce and deal with all matters relating to the protection of human rights as guaranteed by the CFRN 1999 and other treaties to which Nigeria is a party. The NHRC has quasi-judicial powers to summon persons, acquire evidence, award compensation and enforce its decisions and visit any place of detention to ensure that detainees' rights are not violated.⁶²

D. Causes and Treatment of Infertility in Women

Infertility can be traceable to abnormalities with the reproductive systems of either male or female reproductive systems or with both partners. Numerous factors can interrupt the process of fertility at any step and female infertility may be due to one or more reasons such as congenital uterine anomalies, endometriosis, environmental factors, fallopian tube obstruction, genital infections, hormonal disorders, polycystic ovarian syndrome, premature ovarian failure, uterine synechiae or other medical complications and many others.⁶³

There is incontrovertible evidence that lifestyle choices account for the overall quality of health and life reflecting many potential lifestyle risks widely associated with alterations of the reproductive function up to the infertility. Many lifestyle factors such as the age at which to start a family, nutrition, weight, exercise, psychological stress, environmental and occupational exposures and others can have substantial effects on fertility. Man has a constant and unbroken interaction with his environment since the food, air, water and many more resources he needs for survival come from the environment which is man's closest friend is one factor that several studies

⁵⁶DPDPA, s. 32

⁵⁷DPDPA, s. 37

⁵⁸ DPDPA, s. 40

⁵⁹ NCPWD, Who we are <<https://ncpwd.gov.ng/Apps/Web/about>> Accessed 20 November 2022

⁶⁰ Cap. N46 LFN 2004 as amended in 2010 by the National Human Rights Commission (Amendment) Act 2010.

⁶¹ NHRCA, s. 7

⁶² NHRA, ss. 5 – 6

⁶³ W. E. Olooto et al, 'A Review of Female Infertility; Important Etiological Factors and Management,' [2012] (2)(3)*Journal of Microbiology and Biotechnology Research*, 379 – 385.

conducted have linked to female infertility.⁶⁴ The studies are consistent that physical agents, toxins in the form of glue, pesticides and volatile organic solvents (silicones) are connected with female infertility.⁶⁵ Obesity is an unusual or extreme fat accumulation that presents a risk to health has serious negative effect on natural fertility as obese women are three times more likely to be infertile and it is also connected with a higher risk of pregnancy problems, including congenital anomalies, fetal macrosomia, gestational diabetes, induction of labour, miscarriage, operative delivery and pre-eclampsia.⁶⁶ Cigarette smoking, illicit drug use and alcohol and caffeine consumption can negatively influence fertility.⁶⁷ The sedentary lifestyle in the urban centres and pursuit for education laced with the modernization has made Nigerian families rely so much on fast-food vendors scattered all over Nigeria leading to obesity reported to range between 8.1% – 22.2% in adults.⁶⁸

The right nutrition in her early life environment has been linked to be a major factor for later fertility. Fertility is a function of the right nutritional investment on the early life of a woman.⁶⁹ The age of anything in life is very important in almost everything in life. As a sportsman is very lethal and productive in his early twenties so is the age of a woman an important factor that affects her fertility as the chance of having a child is much higher for women younger than 35 years and men younger than 40 years than for older women and men. The pursuit of fame, education, career and many more has made couples to delay child-bearing resulting in an increased rate of infertility due to advanced maternal age which is an additional obstetric risk factor.⁷⁰ **Figure 1:** shows age-specific live delivery rates per initiated autologous fresh cycle by two-year age groups. The highest live delivery rates were for women aged between their mid-20s to early-30s. For women aged 45 or older, only one live delivery resulted from every 80 initiated cycles compared with one live delivery from every four initiated cycles in women aged between 25 and 34.⁷¹

Women with hormonal imbalance will not produce enough follicles to ensure the development of an ovule, possibly due to poor hormonal secretions from the pituitary gland or the hypothalamus. Hormonal imbalance is an important cause of anovulation.⁷² Tubal factor infertility is the commonest cause of infertility seen in hospitals in Nigeria.⁷³ Most cases of tubal factor infertility are attributable to untreated sexually transmitted diseases that ascend along the reproductive tract

⁶⁴R. J. Hart, *Physiological Aspects of Female Fertility: Role of the Environment, Modern Lifestyle, and Genetics*, [2016] (96)(3) *Physiological Reviews*, 873–909

⁶⁵Mendiola et al, [2008] (16)(6) *Reproductive BioMedicine Online*, 842–850.

⁶⁶Dinatale et al, 'Obesity and Fetal-Maternal Outcomes', [2010] (4)(1) *Journal of Prenatal Medicine*, 5–8

⁶⁷R. Sharma, K. R. Biedenharn, J. M. Fedor and A. Agarwal, 'Lifestyle factors and reproductive health: taking control of your fertility', [2013] (11)(66) *Reproductive Biology and Endocrinology*, 1 - 15

⁶⁸Abubakar et al, *The Burden of Obesity in Nigeria* [2021] (1)(1) *Nigerian Journal of Basic and Applied Medical Sciences*, 23 - 26

⁶⁹D. M. Sloboda et al, 'Reproduction in Females: The Role of the Early Life Environment', [2010] (17) (2), *Human Reproduction Update*, 210–227

⁷⁰J. Balasch and E. Gratacós, 'Delayed Childbearing: Effects on Fertility and the Outcome of Pregnancy', [2012](24)(3) *Current Opinion in Gynecology and Obstetrics*, 187-193.

⁷¹Macalldowe et al, *Assisted reproductive technology in Australia and New Zealand 2013*, National Perinatal Epidemiology and Statistics Unit, the University of New South Wales, Sydney, September 2015

⁷²A. H. Balen and A. J. Rutherford, 'Managing Anovulatory Infertility and Polycystic Ovary Syndrome', [2007] (335)(7621) *British Medical Journal*, 663 – 666.

⁷³Audu et al, 'Prevalence of Utero-Tubal Infertility', [2009] (29)(4) *Journal of Obstetrics and Gynaecology*, 326

and are capable of causing tubal inflammation, damage, and scarring.⁷⁴ When the fallopian tubes are compromised it leads to serious complications that affect fertility in women. Uterine factors are other main causes of infertility in women result from either a deformity of the uterus or a complete lack of uterus and could be inborn or acquired.⁷⁵ Female childhood cancer survivors have a 50% increased risk of clinical infertility compared to their relations as exposure of the ovaries or uterus to radiation increases the risk of infertility in a dose-dependent manner.⁷⁶

Treatment for infertility must start with the right diagnosis because once the cause of infertility is identified, therapy aimed at correcting reversible etiologies and overcoming irreversible factors can be implemented. Some of the fertility tests in the diagnosis of infertility in women are genetic testing, hysterosalpingography, imaging tests, laparoscopy, other hormone testing, ovarian reserve tests, ovulation testing and others. Lifestyle adjustments such as quitting smoking, reducing excessive caffeine and alcohol consumption and appropriate frequency of coitus every one to two days around the expected time of ovulation will help improve fertility. The patient should be involved in fertility treatment choices depending on the cause, how long the problem has persisted and the age of the patient. Female infertility can be corrected by restoring fertility through medications or surgery and use of Assisted Reproductive Technologies (ART) a term that covers all treatments for infertility which include *in vitro* handling of both human oocytes and sperm, or embryos, for the purpose of establishing a pregnancy but does not include artificial insemination and includes gamete and embryo cryopreservation, gamete intrafallopian transfer, gestational surrogacy, in vitro fertilization and embryo transfer, oocyte and embryo donation, tubal embryo transfer, zygote intrafallopian transfer and many more.⁷⁷ The use of surgery to correct infertility in women is rarely adopted lately because of the success rate of ART with IVF as the commonly used after it was first used in 1978 with a record of over eight million babies and other advance fertility treatment worldwide. Advances in ART have led to live births from frozen semen stored for 40 years⁷⁸ and embryos frozen 30 years ago eclipsing the record set in 2020 from an embryo frozen for 27 years.⁷⁹

ART is a generally expensive medical procedure worldwide and the challenges with ART in Nigeria are multifaceted - ethical, legal, economic and social. The ethical challenge bothers on the inequitable distribution of access to care and the significant economic barriers resulting in the restricted accessibility of ART to couples with requisite financial muscle. The endemic poverty with 63% of persons living within Nigeria, about 133 million people are multi-dimensionally poor⁸⁰ and a national monthly minimum wage of N30,000.00 (\$68 USD), a cost of a cycle of IVF

⁷⁴ E. Noeggerath, 'Latent Gonorrhoea, Especially with Regard to its Influence on Fertility in Women', [1951] (62)(4) *American Journal of Obstetrics and Gynecology*, 726-73

⁷⁵ E. Taylor and V. Gomel, 'The Uterus and Fertility', [2008] (89)(1) *Fertility and Sterility*, 1 - 16.

⁷⁶ K. L. Singh et al, 'Fertility in Female Cancer Survivors: Pathophysiology, Preservation and the Role of Ovarian Reserve Testing', [2005] (11)(1) *Human Reproduction Update*, 69-89; R. A. Anderson et al, 'The impact of cancer on subsequent chance of pregnancy: a population-based analysis', [2018] (33)(7) *Human Reproduction*, 1281-1290

⁷⁷ Zegers-Hochschild et al, The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology, 2009 [2009] (24)(11) *Human Reproduction*, 2683-2687

⁷⁸ Szell et al, Live births from frozen human semen stored for 40 years, [2013](30) *Journal of Assisted Reproduction and Genetics*, 743-744

⁷⁹ J. Christensen and N. Kounang, Parents welcome twins from embryos frozen 30 years ago, CNN, 21 November 2022 <<https://edition.cnn.com/2022/11/21/health/30-year-old-embryos-twins/index.html>> Accessed 26 Nov. 2022

⁸⁰ S. J. Ichedi, Nigeria launches its most extensive national measure of multidimensional poverty, National Bureau of Statistics, 17 November 2022 <<https://nigerianstat.gov.ng/news/78>> Accessed 26 November 2022

treatment at \$2800 and \$3000 is outside the reach of many couples who are in need of the treatment.⁸¹ Due to the huge cost outlay, several advanced nations takes care of the cost for ART while developing countries like Nigeria do not take care of the cost making ART unreachable to many persons who need the services. This huge cost outlay has affected a lot of families from accessing this very important care. IVF is not covered by insurance even when the having a baby is a human right, the FGN should support the realization of this fundamental and laudable objective by making sure that IVF is covered under the NHS in Nigeria.

The use of ART in Nigeria has thrived with the establishment several fertility centres in Nigeria and the practice is regulated by the Association for Fertility and Reproductive Health (AFRH) which had been in existence in Nigeria since 1992 operating under the name Nigerian Fertility Society (NFS) before it registration with the Corporate Affairs Commission in 2010 as AFRH. The AFRH is affiliated to the International Federation of Fertility Societies (IFFS) and UK fertility Registry. The AFRH maintains a register of individual and corporate members of the association. The FRH has produced robust guidelines like those in other developed climes as formulated by the IFFS, America Society for Reproductive Medicine (ASRM) and the European Societies for Human Reproduction and Embryology (ESHRE).⁸² It is important to note the role Medical and Dental Council of Nigeria (MDCN) established pursuant to s. 1 **Medical and Dental Practitioners Act**⁸³ is responsible for the discipline of doctors of all specialties in Nigeria as decided in *Denloye v. Medical and Dental Practitioners Disciplinary Committee*.⁸⁴ Unfortunately, there is no law governing the practice of ART in Nigeria despite the relatively long duration of practice.⁸⁵ What is needed further is that many countries provide a broad enabling law to empower the professional to affect the operation of their guidelines. The bill before the NASS about ART is the Regulation of In-Vitro Fertilization Bill 2017 which seeks to prohibit certain practices in connection with IVF, establish an IVF Authority, regulate the IVF process and make provisions in relations to children born through IVF and was consolidated with the Assisted Reproductive Technology (Regulation) Bill 2016. The proposed IVF Authority will have the power to regulate the process and develop standards and guidelines on IVF; licensing of health practitioners specialized in IVF; set the benchmark for infrastructure of IVF fertilization centers and encourage research on IVF in Nigeria. The Regulation of In-Vitro Fertilization Bill 2017 scaled second reading in the Senate and was referred to the Committee on Health but is yet to see the light of day. The NASS should expedite action on the passage of this bill.⁸⁶

It is noteworthy that the need for strict regulation of the practice of ART is the United Kingdom (UK) led to establishment of the Human Fertilization and Embryology Authority (HFEA) pursuant to the Human Fertilisation and Embryology Act 1990. The HFEA is the independent regulator for IVF treatment and human embryo research and came into effect on 1 August 1991.⁸⁷ The US,

⁸¹ Omokanye et al 'Assisted Reproduction Technology in Nigeria: Challenges and the Way Forward', [2018] (3)(1) *African Journal of Infertility and Assisted Conception*, 2-5

⁸² AFRH, Our History <<https://afrhnigeria.org/about/>> Accessed 24 November 2022

⁸³ Laws of the Federation of Nigeria, Cap M8, LFN 2004

⁸⁴ [1968] 1 ALL NLR 306; *Medical and Dental Practitioners Disciplinary Tribunal v Dr. John Emewulu Nicholas Okonkwo*[2001] WRN 1

⁸⁵ C. A. Ekechi-Agwu and A. O. Nwafor, *Regulating Assisted Reproductive Technologies (ART) in Nigeria: Lessons from Australia and the United Kingdom*, [2020] (24)(4) *African Journal of Reproductive Health*, 82-93

⁸⁶ Policy and Legal Advocacy Centre, *IVF Bill Scales Second Reading in Senate*, 24 October 2017 <<https://placng.org/i/ivf-bill-scales-second-reading-in-senate/>> Accessed 28 Nov. 2022

⁸⁷ HFEA, About < <https://www.hfea.gov.uk/about-us/>> Accessed 26 Nov. 2022

South Africa and Australia are other countries with legislative framework on IVF procedures and Nigeria should hasten up and pass Regulation of In-Vitro Fertilization Bill 2017. The practice of ART is prone to abuses like unregulated advertisement on the success rate of the ART procedure, illegal and unregulated human egg harvesting contrary to the extant guidelines of the WHO, substandard services rendered to couples seeking IVF, financial inducement to underage girls to serve as surrogate mothers and poor or total lack of facilities to offer IVF services. The ARFH guidelines lack the force of law and cannot be enforced and the National Health Act 2014 which provides for the development and management of a National Health System and set standards for rendering health services in Nigeria but was not far-reaching as far as ART practice was concerned.⁸⁸

E. Classification of Female Infertility as a Disability

The privilege to marry and establish a family is considered a fundamental human right by the some of the leading international human right documents and treaties and the right to ensure a healthy and promotion of wellbeing for all at all ages pursuant to Goal 3 of the UN Sustainable Development Goals (SDGs). The provision for exemption of payment of health services to certain category of persons like the women, children and people with disabilities is contemplated under s. 3(2)(d) National Health Act (NHA) 2014. The DPDPA has provisions on the right and privileges of disabled persons except that it failed to include female infertility as a disability but gives comprehensive cover for free medical and health in all public institutions to persons suffering from mental disability.⁸⁹ It is suggested that infertility in women should be so designated as disability in line with the provisions of DPDPA so as to help reduce the financial burden on women with infertility so they can access the much needed treatment that they require.

It is noteworthy that the US Congress enacted the Pregnancy Discrimination Act (PDA) 1978, a fallout of the US Supreme Court decision in *General Electric Co. v. Gilbert*,⁹⁰ that discrimination based on pregnancy did not constitute discrimination based on sex. The first issue for determination in tying infertility to the Americans with Disabilities Act (ADA) 1990 was whether infertility was a “major life activity.” During the 1990s, lower courts were divided on the issue formulated as *Pacourek v. Inland Steel*,⁹¹ decided in the affirmative that infertility was a major life activity and *Krauel v. Iowa Methodist Medical Center*⁹² was in the negative that reproduction was a “lifestyle choice” not a major life activity. In *Skinner v. Oklahoma*,⁹³ the court noted that reproduction is a fundamental human right and on procreation held that it “involves one of the basic civil rights of man...fundamental to the very existence and survival of the race” and referred to the case as “touching a sensitive and important area of human rights...the right to have offspring.” *Bragdon v. Abbott*,⁹⁴ constituted a “substantial limitation” on reproduction. Therefore, infertility met the ADA’s criteria as a disability.” The judgment is commended and a step in the right direction to ensuring protection for female infertility from discrimination. In three ADA cases

⁸⁸ O. Enabulele and J. E. Enabulele, Nigeria’s National Health Act: An Assessment of Health Professionals’ Knowledge and Perception, [2016] (57)(5) Nigerian Medical Journal, 260-265.

⁸⁹ S. 21 (2) DPDP Act.

⁹⁰ 429 U.S. 125 (1976),

⁹¹ (916 F. Supp. 797)

⁹² 915 F. Supp. 102

⁹³ 316 U.S. 535, 536, 541 (1942).

⁹⁴ 524 U.S. 624 (1998)

–*Albertson’s Inc v. Kirkinburg*⁹⁵*Murphy v. United Parcel*⁹⁶and*Sutton v. United Airlines*,⁹⁷ - following *Bragdon v. Abbot*, decided that a person is not considered largely limited in performing a major life activity that is disabled, if the impairment can be overcome by mitigating measures. These measures included corrective lenses, prescription medication for hypertension, and self-corrective measures to compensate for an eye condition. The Court also held in these cases that individuals are regarded as disabled only when they are unable to perform a class or range of jobs, not merely when they cannot perform a particular job. In *Saks v. Franklin Covey*⁹⁸ infertility was declared a disability but that the boss did not discriminate against an infertile woman by excluding infertility treatment from its health insurance plan because the exclusion applied to all employees. The court also held that the plan's exclusion, which predated passage of the ADA, did not constitute “subterfuge” under the ADA's Title V. Saks appealed but not on her ADA claim. Her original suit was also based on claims that the employer's health plan exclusion for infertility treatment violated the federal PDA and Title VII of the Civil Rights Act of 1964. The court rejected both claims. It held that infertility alone is not a condition unique to women and therefore, in this case, was not subject to the special protections of the PDA, which prohibit employers from discriminating in providing fringe benefits on the basis of pregnancy, childbirth, or related medical conditions. The exclusion did not constitute sex discrimination because the need for the ART procedure may be due to either male or female infertility and requires participation by both male and female partners.⁹⁹

The definitions of disability also include the disorders of the reproductive and endocrine system responsible for the control of all the processes in the human body. So infertility in women should also be included in the category of disability under the provisions of the DPDPA because it disturbs participation in areas of life and can have an incapacitating effect on an individual. Like any other disability the woman has to adjust and integrate infertility in their sense of self thus infertility comes as a major life crisis. Socially, women with fertility issues are treated as outcast and accused as eaters of the eggs in their wombs as depicted in several movies in Nollywood. Infertility in most cultures remains associated with social stigma and taboo just like the social model of disability. Women who are unable to reproduce in Nigeria are despised, scorned upon and discriminated against by her husband, family members and society at large. Infertility can lead to divorces and separation leading to a broken family life. Without classification of infertility in women as a disability, it is difficult for the people to access services and welfare benefits offered by the government under the DPDPA and NHA. Infertility treatments are highly sophisticated so they are very expensive and are even excluded from coverage by health insurance schemes and government aid. In the light of all this it becomes appropriate to classify infertility in women as a disability.¹⁰⁰

F. Concluding Remarks

Woman from birth are discriminated against in Nigeria by the prevailing native laws and custom that foist on women so much hardship. A woman is comparable to a chattel that can be dealt with in whatever manner the owner wishes. The paper considered the cultural background which is

⁹⁵ 527 US 555

⁹⁶ 527 US 516

⁹⁷ 527 US 471

⁹⁸ 117 F. Supp 2d 318 (2000)

⁹⁹ *Saks v. Franklin Covey*, 316 F. 3d 337 (2003)

¹⁰⁰ A. Khetarpal and S. Singh, ‘Infertility: Why can't we classify this Inability as Disability?’ [2012] (5)6 *Australasian Medical Journal*, 334–339.

fertile for the discrimination against infertile women vis-à-vis the provisions of the CFRN 1999 and the DPDPA in Nigeria. The paper found the enactment of the DPDPA a welcome development in the protection of people with disabilities but woefully omitted to include infertility in women as a disability. The paper also found that once the cause of infertility is known, treatment by the use of ART is expensive and unaffordable base on the minimum wage and endemic poverty and there is no law governing the practice of ART in Nigeria and therefore prone to abuse by the ART practitioners. The paper notes that the right to marry and establish a family is a fundamental human right and therefore the classification of female infertility as a disability under the DPDPA is long overdue and recommends the amendment of the DPDPA to reflect this position because once there is a right, there is a remedy. The paper advocates for the speedy passage by the NASS of the Regulation of In-Vitro Fertilization Bill 2017 to prevent quackery, unethical conducts and regulate ART practice in Nigeria.