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EXAMINING THE RIGHTS OF CHILDREN BORN THROUGH ASSISTED REPRODUCTIVE TECHNOLOGY IN NIGERIA: SDG3 IN PERSPECTIVE

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The rapid increase in the use of Assisted Reproductive Technology, which includes techniques such as intrauterine insemination (IUI), in-vitro fertilization (IVF) and surrogacy, raises significant legal, ethical, and social questions concerning the rights of children born through these techniques and by extension has proliferating and underexplored implications for children. Children born through ART are colloquially called "test-tube babies" and are not considered as "normal" children. In the absence of comprehensive regulation in Nigeria, children face uncertainties regarding their legal status, parental rights, and societal acceptance, which can impact their well-being and identity. There is a need for clearly defined rights tailored for children born through ART and these rights must be recognized, enforceable and sustainable as fundamental rights. Sustainable Development Goal 3 (SDG3) 'ensure good healthy lives and promote well-beings for all at all ages'. This means that preventable deaths of new-born babies may be ended and access to reproductive health-care services would be made available by year 2030. One important way of achieving this is the use of assisted reproductive technology because it ensures birthing children who are free from genetic diseases. This study examines the discourse on rights of children born through ART against the backdrop of Sustainable Development in Nigerian society. Relying on the doctrinal method of research, the study finds that absence of specific policies and guidelines regulating the practice of ART in Nigeria has indirectly rendered unspoken the rights of children produced through these methods. The study concludes that, although children constitute a minority in the country's population, their rights should be held sacrosanct regardless of the nature of their birth.

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1. INTRODUCTION

Nigeria faces a unique challenge of fertility crisis which has undermined reproductive rights.[1] Infertility remains a global reproductive health challenge affecting approximately one in six couples and individuals.[2] According to the World Health Organisation, infertility is the inability to conceive after two years of unprotected sexual intercourse.

Advancements in medical diagnostics and therapeutic technologies in human reproduction have led to the development and use of Assisted Reproductive Technology (ART).[3] In other words, these technologies have made it increasingly possible to procreate without the necessity of heterosexual copulation. The success of these clinical advancements in developed countries and lately Nigeria, has made it possible for couples who would have been unable to conceive and bear children to avail themselves of these techniques called "Assisted Reproductive Technologies (ART)". This is a procedure or method designed to enhance fertility or to remedy infertility outside traditional means of procreation. ART procedure includes Intra-Uterine Insemination, In-vitro Fertilization (IVF) and Embryo Transfer, Gamete Intrafallopian Transfer, Zygote Intrafallopian Transfer, Gamete and Embryo Cryopreservation, Oocyte and Embryo Donation, and Surrogacy.[4]

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[1] Agency Report, 'UN agency links Nigeria's high fertility rate to weak reproductive rights' Premium Times *(*Lagos, June 18 2025) <https://www.premiumtimesng.com/health/health-news/801510-un-agency-links-nigerias-high-fertility-rate-to-weak-reproductive-rights.html> accessed 18 June 2025.

[2] C Farquhar and J Marjoribanks, 'Assisted reproductive technology: an overview of Cochrane Reviews' (2018) 8
Cochrane Database of SystematicReviews.

[3] T. Barnes and Others, 'Legal and Ethical Challenges in Assisted Reproductive Technology Practice in Ghana' (2024) 58 Ghana medical Journal 78

[4] DA Wiggins and E Main, 'Outcomes of pregnancies achieved by donor egg in vitro fertilization—a comparison with standard in vitro fertilization pregnancies' (2005) 192 American journal of obstetrics and gynecology 6.

According to Judith Lind,[5] The first baby conceived through in-vitro fertilisation was born in 1978. Since then, it is estimated that more than seven million babies have been born worldwide as the result of treatment with assisted reproductive technologies.[6] Like child and family policies in general, policies that serve to regulate assisted reproduction govern the relationship between children, parents and the state. In family policies, the interests of the child and the parents must be balanced, and what justifies state intervention into the private sphere of the family is commonly framed as the welfare or the best interests of the child.[7] The child in assisted reproduction, however, is an intended child, and the rights of the adults are reproductive, rather than parental rights. This means that the status of the best interests of the child principle[8] in assisted reproduction cannot be taken for granted to be the same as in other areas of family, child welfare or protection policies. Indeed, of 68 countries participating in a World Health Organisation survey on assisted reproduction in 2015, only 46% reported having ART legislation that addressed the welfare of the child.[9]

In some other, more liberal jurisdictions, a right of adults to have children has been recognised, but without due regard for the rights of children born as a result. And in other countries, the open market decides. The Convention on the Rights of the Child (CRC) is clear that '[in] all actions concerning children… the best interests of the child shall be a primary consideration' (Art. 3). Accordingly, although the rights of children are not the only necessary consideration when regulating the technological assistance of adult fertility, in this research, it is viewed that

[5] J Lind, 'The best interest of the child as an argument in assessments of parent potential in Sweden' (2008) 22 International Journal of Law, Policy and the Family 1–21.

[6] European Society of Human Reproduction and Embryology, 'ART fact Sheet' (2018) <https://www.eshre.eu/Press-Room/Resources> accessed 20 January 2025.

[7] R Dingwall, J Eekelaar and T Murray, *The Protection of Children, State Intervention and Family Life* (2nd edn, Avebury 2014).

[8] DW Archard, 'Children's rights' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition) <https://plato.stanford.edu/archives/sum2016/entries/rights-children/> accessed 13 February 2025.

[9] IFFS Global Reproductive Health Surveillance, 'International Federation of Fertility Societies' (2016) 1 <http://journals.lww.com/grh/Fulltext/2016/09000/IFFS_Surveillance_2016.1.aspx.> accessed 20 January 2025.

they ought to be the very first; children are the most vulnerable party and have the least influence - none in fact. Indeed, the regulation of assisted reproduction has far-reaching implications for children's rights, including the rights to health, to information, to nationality, and to know one's parents, among others.

The world leaders came together in 2015 at a special United Nation Summit in New York to adopt Agenda 2030 and declared adherence to the 17 Sustainable Development Goals (SDGs).[10] These goals reflect an understanding that social, economic, and environmental systems are deeply interdependent. For example, climate change disproportionately affects marginalized communities, highlighting the intersection between environmental degradation and social injustice. Sustainable development thus demands integrated solutions that address root causes rather than symptoms, fostering resilience and adaptability across systems. Amongst the SDGs agreed upon is a pledge to 'ensure healthy lives and promote well-being for all at all ages (SDG3).'[11]

Generally, SDG3 aims to put a stop to preventable death of new-born babies and ensure access to sexual and reproductive health-care services together with the incorporation of reproductive health into national policies and agendas[12] The UN and its partners in Nigeria are working towards achieving the Sustainable Development Goals: 17 interconnected Goals which address the major development challenges faced by people in Nigeria and around the world.[13]

Against this backdrop, the increase in the use of ART techniques, including but not limited to; intrauterine insemination (IUI), in-vitro fertilization (IVF) and surrogacy, raises significant legal, ethical, and social

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[10] Haniwarda Yaakob, 'The Role of Assisted Reproductive Technologies in Promoting Sustainable Development Goals' (A Conference Proceedings of the International Conference on Law, Environment and Society, 2018).

[11] United Nations, 'The Sustainable Development Agenda' <https://www.un.org/sustainabledevelopment/development-agenda/> accessed 22 November 2024.

[12] Ibid

[13] United Nation Nigeria, 'Our Work on the Sustainable Development Goals in Nigeria' < https://shorturl.at/V3BSE> accessed 22 November 2024.

questions concerning the rights of children born through these techniques. In the absence of comprehensive regulation on the use of ART in Nigeria, these children face uncertainties regarding their legal status, parental rights, and societal acceptance, which can impact their well-being and identity. This research examines the rights of children born through ART in Nigeria, situating the analysis within the framework of Sustainable Development Goal 3 (SDG 3), which aims to ensure healthy lives and promote well-being for all at all ages. Specifically, SDG 3.7 emphasizes universal access to sexual and reproductive health services, which includes Assisted Reproductive Technology, while also promoting the need to protect the rights of children born through these technologies. By exploring the intersection of ART and SDG 3, this research discusses the urgent need for a tailormade legal framework to safeguard the rights of children, ensuring their psychological, mental, physical, and social well-being in line with global health and development objectives.

2.0. CONCEPTUAL CLARIFICATION

In most African Countries, children are the fabric of the society, without which no meaningful social and economic progress is considered worthwhile. The purpose of this research which is to look into the Rights of Children born through Assisted Reproductive Technology (ART) with regards to Sustainable Development Goal 3, will be achieved by accessing some concepts. These selected concepts are the pillars of this research and as such when clarified will give the research richer meanings and help readers and researchers perceive the topic in a more positive light. In this regard, the concept of 'Child', 'Assisted Reproductive Technology' and 'Sustainability' will be clarified.

2.1. Who is a Child?

Article 2 of The African Charter on the Rights and Welfare of the Child,[14] defines a child as every human being below the age of 18 years. Also, Article 1 of The Convention on the Rights of the Child, 1989 states that for the purposes of the present Convention, a child means every human

[14] The African Charter on the Rights and Welfare of the Child 1990.

being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.[15] Section 277 of the Child Righst Act[16] defines a Child as a person under the age of eighteen years.

There is no case law available in the African Human Rights system that addresses embryonic or fetal personhood. However, there are a few cases that may be useful in determining the stance of African countries toward embryonic personhood. In the case of *Republic of Kenya v. Nyamu*,[17] the Kenyan High Court ruled that children are only considered "persons" under the law when they "[proceed] in a living state from [their] mother."[18] South Africa's Constitutional Court ruled similarly in *The State v. Mushumpa and Best*,[19] ruling that a fetal death due to assault may aggravate a crime, but that killing the fetus itself is not murder.[20] The Court noted that this determination would involve complicated questions of when a fetus becomes a person, thus further indicating that the Court believes that there is some stage where the fetus is not a person.[21]

The only multilateral human rights instrument to explicitly recognises rights from the moment of conception is the American Convention on Human Rights, negotiated by countries with some of the world's most restrictive laws on access to abortion. Article 4(1) states: "Every person has the right to have his [sic] life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."[22] The Inter-American Commission on

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[15] Gerison Lansdown and Ziba Vaghri, 'Article 1: Definition of a Child' (2022) 407 <file:///C:/Users/ADMIN/Downloads/Lansdown-Vaghri2022_Chapter_Article1DefinitionOfAChild.pdf> accessed 10 February 2025.

[16] The Childs Right Act 2003.

[17] Legal Ground, 'Reproductive And Sexual Rights in African Commonwealth Courts' (2010) 2 <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_legalgrounds_vol2_2.10.pdf > accessed January 27th 2025.

[18] Ibid

[19] *State v. Mashumpa* [2008] 1 SACR 62

[20] Ibid. p. 63

[21] Ibid

[22] Despite the Convention text stating that the right to life begins with conception, a ruling by the Inter-American Court clarified the definition of the child's right to life in relation to IVF as beginning from the moment of implantation. See *Artavia Murillo et al v. Costa Rica* (2012) <www.crin.org/en/node/42441> accessed 11 Janaury 2025

Human Rights (IACHR), which oversees States' compliance with the Convention, has adopted a "gradual approach" to this right,[23] indicating that, as gestation proceeds, it becomes progressively less permissible to alter or destroy the foetus.

2.2. What is Assisted Reproductive Technology (ART)

ART encompasses a wide range of techniques designed primarily to aid couples unable to conceive without medical assistance. It can also be defined as including all treatments that include medical and scientific manipulations of human gametes and embryos in order to produce a term pregnancy.[24] The concept of Assisted Reproductive Technology can be perceived to include any fertilization involving manipulation of gametes/embryos outside the human body and transfer of gametes/embryos into the body. Furthermore, Assisted Reproductive Technology allows scientists to manipulate the fertilization process in order to bypass some pathological obstacles such as blocked fallopian tubes, nonfunctioning ovaries in the females, and blocked vas deferens and low sperm count in the males in order for procreation to take place where it has been adjudged to be impossible or absolutely difficult.[25] Assisted Reproductive Technology (ART) includes; Intra-Uterine Insemination (IUI), Gamete Intra-fallopian Transfer (GIFT), Zygote Intra-fallopian Transfer (ZIFT), In-vitro Fertilisation (IVF), Intra-cytoplasmic Sperm Injection (ICSI) and Surrogacy.

2.2.1. Intra Uterine Insemination (IUI)

This is the process by which sperm is placed into the reproductive tract of a female for the purpose of impregnating her by using means other than

[23] N Petersen, 'The Legal Status of the Human Embryo in vitro: General Human Rights Instruments' (2005) 457 <http://www.zaoerv. de/65_2005/65_2005_2_a_447_466.pdf> accessed 12 February 2025.
[24] AA Adewunmi, 'The Need for Assisted Reproductive Technology Law in Nigeria' (2012) 2(1) University of Ibadan Law Journal 19-41.
[25] TG Obagboye and ST James, 'The Legal Dynamics of Assisted Reproductive Technology in Nigeria' (2022) 6 Irish International Journal of Law, Political Sciences and Administration 3

sexual intercourse. The sperm used in this method can be from the husband or from a donor. This technique was first developed for the dairy cattle industry to allow many cows to be impregnated with the sperm of a bull with traits for improved milk production.[26] Intrauterine insemination (IUI) is an infertility treatment that is often called artificial insemination. In this procedure, specially prepared sperm are inserted into the woman's uterus. Sometimes the woman is also treated with medicines that stimulate ovulation before IUI.[27] IUI is often used to treat mild male factor infertility and Couples with unexplained infertility.[28]

2.2.2. Gamete Intra Fallopian Transfer (GIFT)

This process occurs when eggs are retrieved but not fertilized. Instead, they are mixed with the sperm and immediately placed into the fallopian tubes. (GIFT) was developed in 1984 for women with unexplained infertility.[29]

2.2.3. Zygote Intra Fallopian Transfer (ZIFT)

This is a procedure where fertilized egg (zygote), in its pronuclear stage of development, is transferred into the fallopian tube.[30]

2.2.4. In Vitro Fertilization (IVF)

In vitro fertilization (IVF), meaning fertilization outside of the body, is the most common form of ART. Eggs and sperm are combined in a laboratory to create embryos. After about three to five days, the embryo (or embryos) is transferred into the woman's uterus. Embryos can also be frozen for a future transfer. When a frozen embryo is thawed and transferred into a woman's uterus it is called a frozen

[26] Kigbu K Salome, 'Regulating Assisted Reproductive Technology in Nigeria: An Urgent Need' (2024) 12 (3) Global Journal of Politics and Law Research 72
[27] T.G. Obagboye (n 24)
[28] Kigbu (n 25) p.73
[29] Kigbu (n 25) p.73
[30] Kigbu (n 25) p.73

embryo transfer (FET).[31] (IVF-ET). Under this technique, an egg is removed from one of the infertile woman's ovaries, fertilized outside her body, and then replaced in her womb. A baby that develops from IVF procedure is called test-tube baby.

2.2.5. Intracytoplasmic Sperm Injection (ICSI)

Intra cytoplasmic sperm injection (ICSI) is a type of IVF that is often used for couples with male factor infertility. With ICSI, a single sperm is injected into a mature egg. The alternative to ICSI is "conventional" fertilization where the egg and many sperm are placed in a petri dish together and the sperm fertilizes an egg on its own.[32]

2.2.6. Surrogacy

Surrogacy has been defined as "an arrangement whereby a woman agrees to become pregnant and deliver a child for a contracted party".[33] The surrogacy agreement will state that after the birth the surrogate mother breaks her parental link with the child and hands him or her over to the commissioning parents who legally become his or her parents.[34] The woman delivering the child is known as the surrogate mother while the couple to whom she is handing over the child are known as the commissioning or intending parents. Surrogacy, especially through international arrangements, is increasingly used as a method of family formation around the world. Although there are no precise global figures on how many children have been born through surrogacy, the development of assisted reproductive technology (ART), changes in social norms and the trend for having children later are leading to more children being born

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[31] Center for Disease Control and Prevention; Infertility FAQs <https://www.cdc.gov/reproductivehealth/infertility/index.htm> accessed February 10, 2025.
[32] Ibid
[33] US Legal, 'Surrogacy Law and Legal Definition' <https://definitions.uslegal.com/s/surrogacy/> accessed 13 February 2025.
[34] Danna, 'Contract Children: Questioning Surrogacy' (2015) 19.

through surrogacy.[35] There are two types of Surrogacy; Traditional Surrogacy and Gestational Surrogacy.

2.3. Sustainability

Sustainability is a long-term goal for society to meet the needs of economic growth at its current speed with the least amount of impact on the environment. But it's more than preserving the natural world and its fragile ecologies. It's also about enabling the growth and development of businesses and government entities so that all parts of society work in harmony to ensure that future generations have the natural resources needed to survive.[36] Sustainability refers to society's ability to exist and develop without depleting the natural resources necessary to live in the future. Sustainable development supports this long-term goal with the implementation of systems, frameworks, and support from global, national, and local entities.[37]

The concept of sustainability builds on the notion that natural resources on Earth are finite, so supporting sustainable practices helps maintain a balance between environment, economy, and equity.[38] It's the movement and energy behind ensuring that Earth can continue to be liveable, all the while controlling and reducing resource depletion. Sustainability is important for preserving the planet and natural resources like water and air. Building a sustainable future and cultivating sustainable ways of living can reduce pollution and protect the habitats of plants and animals.[39]

A key part of sustainability involves sustainable business practices and economic development, including green technology, eco-friendly

[35] Unicef, 'Child Identity Protection' <https://www.unicef.org/media/115331/file> accessed February, 11 2025
[36] Coursera, 'What is sustainability and why is it important' (2025) < https://www.coursera.org/articles/what-is-sustainability> accessed 12 February 2025.
[37] Ibid.
[38] UCLA, 'What is Sustainability?' <https://www.sustain.ucla.edu/what-is-sustainability/> accessed 12 February 2025.
[39] Coursera (n 35).

supply chains, and more. When businesses and governments follow sustainable practices, it creates a ripple effect on individuals and communities to decrease greenhouse gas emissions and fossil fuels. All of this contributes to a better quality of life.[40]

3.0. ASSISTED REPRODUCTIVE TECHNOLOGY AND SUSTAINABLE DEVELOPMENT GOAL (SDG3); 'ENSURE HEALTHY LIVES AND PROMOTE WELL-BEING FOR ALL AT ALL AGES (SDG3)'

In September 2015, there was a United Nations Summit in New York for the adoption of Agenda 2030 and adherence to the 17 Sustainable Development Goals (SDGs) was declared and formulated therein. Amongst the SDGs agreed upon is a pledge to 'ensure healthy lives and promote well-being for all at all ages (SDG3)'.[41] Generally, SDG3 aims to put a stop to preventable death of new-born babies and ensure access to sexual and reproductive health-care services together with the incorporation of reproductive health into national policies and agendas[42] Nigeria is one of the 193 nations that have agreed to and adopted the SDGs and have been committed ever since in achieving them.

Promoting healthy lives and well-being of people of all ages is one of the essential components of Sustainable Development Goals. In realising this goal, tremendous efforts have been put in place so as to increase life expectancy and reduce deaths of new born babies.[43] Assisted Reproductive Technologies (ART) are also connected with sustainable development where access to ART could be viewed as part of achieving

[40] Coursera (n 35).
[41] United Nations, 'The Sustainable Agenda' <https://www.un.org/sustainabledevelopment/development-agenda/)> accessed 12 Febrruary 2025.
[42] Ibid
[43] Sustainable Development Goals, 'Goal 3: Ensure Healthy Lives and Promote Well-being for all at all Ages' <https://www.un.org/sustainabledevelopment/health/> accessed 12 February 2025.

sustainability.[44] However, Richie (2015)[45] believes that access to ART should be limited to those who are biologically infertile only so as to combat climate change concerns and maintain sustainable development.[46] Nonetheless, the use of ART as a mechanism to achieve SDG3 has yet to be explored nor critically discussed.

This study, therefore, undertakes the challenge to analyse the role that ART can play in promoting sustainable development goals, particularly SDG3,[47] and in enforcing the rights of children born through the procedure.

The improvement in ART has not only enables couples to produce any child but has extended to ensuring the birth of healthy babies who are free from genetic diseases. The advent of these technologies, arguably, may assist in achieving one of the sustainable development goals (SDGs), that is to promote healthy lives and well-being of people of all ages (SDG3). The use of ART as to assist human reproduction is founded upon the notion of individual reproductive autonomy.[48] Harris (2000),[49] for example, believes that upholding the notion of individual reproductive autonomy includes the freedom to, "…reproduce with the genes we chose and to which we have legitimate access or to reproduce in ways that express our reproductive choices and our vision on the sorts of people we think it right to create".[50] On this basis, the same freedom should be extended to the decision to produce a healthy child free from genetic diseases by using the ART methods identified herein, in achieving this, two ART techniques would be considered; In-vitro-Fertilisation and

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[44] MC Inhorn, 'Right to Assisted Reproductive Technology: Overcoming Infertility in Low-Resource Countries' (2009) 106 (2) International Journal of Gynaecology & Obstetrics 172-174.
[45] C Richie, 'What Would an Environmentally Sustainable Reproductive Technology Industry Look Like' (2015) 41 (5) Journal of Medical Ethics 383-387.
[46] Ibid.
[47] Haniwarda Yaakob, *The Role Of Assisted Reproductive Technologies In Promoting Sustainable Development Goals* (1st edn, Future Academy Publisher 2019) 70.
[48] Ibid.
[49] J Harris, 'Rights and Reproductive Choice' in J. Harris & J. Holm (eds), *The Future of Human Reproduction* (Oxford: Clarendon Press 2000) 34.
[50] Ibid.

Surrogacy. In this research, a description on the functions of each of the technology identified in order to illustrate their role in fulfilling SDG3, particularly goal 3, to put a stop to preventable deaths of new-borns and children under 5 years old by the year 2030.[51]

4.0. EXAMINING THE RIGHTS OF CHILDREN BORN THROUGH ASSISTED REPRODUCTIVE TECHNOLOGY (ART)

The advance in medical technology which has brought about the Assisted Reproductive Technologies (ARTs) has become an indeed complex issue, and its implications for children are underexplored by both governments and children's rights advocates This research has made an attempt to discuss the impact of Assisted Reproduction on the rights of children. In achieving this, the rights of children will be accessed under the following methods of Assisted Reproductive Technology; In-vitro Fertilisation (IVF) and Surrogacy.

4.1. In-Vitro Fertilisation (IVF)

In-vitro Fertilisation is a treatment for infertility, which involves complex series of procedures that can lead to pregnancy. As a result of this complexities, the rights of children born through the procedure may be affected. These rights are discussed below.

4.1.1. The right to health

By screening out embryos with serious genetic disorders, the suffering of the children who would be born with them is effectively avoided, in line with their right to the highest attainable standard of health. Conversely, in-vitro testing stresses the embryo and carries some risks to foetal health, and thus to the health of the child after birth.[52]

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[51] World Health Organisation, 'Sustainable Development Goals (SDGS)' <https://www.who.int/sdg/en/> accessed 12 February, 2025.

[52] Child Rights International Network, 'A Child's Right Approach to Assisted Reproduction' (Discussion Paper) 4 <

Advances in reproductive medicine have helped not only infertile couples, but also couples who risked transmitting a genetic disease to their children.[53] Initially, a woman who was a haemophilia carrier could avoid giving birth to an affected child by opting for egg donation. Preimplantation genetic diagnosis (PGD) is used to screen out genetic embryos affected by the relevant genetic diseases.[54] Only healthy embryos are selected for implantation. By screening out embryos with serious genetic disorders, the suffering of the children who would be born with them is effectively avoided, in line with their right to the highest attainable standard of health. In some cases, PGD involves sex selection for medical reasons.[55]

4.1.2. Succession Right

Succession deals with the transmission of the rights and obligations of a deceased person in respect of his estate to his heirs and successors. This involves the distribution of the deceased estate to his heirs.[56] Succession may involve circumstances that deal with testacy or intestacy. Where it is testate, the testator has already made a will in which he has devised his property to those he wishes to be beneficiaries under his will. In intestate succession, on the other hand, the deceased made no will before his death and therefore died intestate.[57] The rules governing testate and intestate succession differ and both circumstances may give rise to problems for children born via Assisted Reproductive Technology.

The practice of Assisted Reproductive Technology especially in vitro fertilization raises the question as to whether children who were fertilized by another man's sperm are entitled to inherit from the estate of their pater (social father), rather than their genitor (biological father),

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https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf> accessed 12 February 2025.

[53] Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th Ed Manchester University Press 1824) 380

[54] Ibid

[55] CRIN (n 51) p. 4.

[56] Kigbu (n 25) p. 74.

[57] Kigbu (n 25).

especially in cases where the putative father died intestate.[58] It also raises the question of whether post-humous babies who were not included in the will, are capable of challenging such wills, where the father died testate.[59] Moreover, in situations where the father died intestate, it raises the question of whether they will be considered as his children although the father did not know about their existence or intended existence. With respect to inheritance, the question is if a frozen embryo be taken as a person who can inherit when its genetic parents die, so that if later transferred and carried to term it will be an heir. It can be argued that if adopted children can have equal rights as biological children then a child given birth to as a result of the procurement of a donor sperm should be able to inherit the father just like a biological child.[60]

4.1.3. The right to be protected from discrimination

Prenatal testing is controversial. Many children with Down's syndrome, for example, live happy and healthy lives, but Down's pregnancies are commonly terminated, which has been criticised as disability discrimination. This practice, alongside the prospect of 'designer babies', raise challenging questions about which children are deemed to be acceptable members of society, and which are not.[61]

4.2. Surrogacy

This is a third-party reproduction with the aid of one or more persons in addition to the intending parent(s). It makes use of donated genetic material and/or surrogacy arrangements, in order to offer an infertile heterosexual couple, or a same-sex couple, the prospect of parenting a child. This arrangement usually put the fundamental rights of children that results from it at risk. These rights are discussed below.

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[58] Kigbu (25) p. 74.
[59] Kigbu (n 25).
[60] Kigbu (n 25) p. 74.
[61] CRIN (n 51) p. 4

4.2.1. The rights to non-discrimination:

Children may be deprived of certain rights based on their gender, race, colour, disability, language, sexual orientation, religion and/or the circumstances of their birth. Discrimination against children is usually due to their dependence on adults for basic needs, their immaturity and their inadequate access to justice.[62] Article 2 of the UNCRC provides that the rights of children should be respected without any form of discrimination based on their birth or parents' status. The United Nations (UN) Committee on the Rights of the Child, which monitors the enforcement of the UNCRC,[63] affirmed this position by stating in General Comment that States Parties must monitor and combat discrimination against children based on circumstances of their birth that deviate from the traditional process.[64] Therefore, children born through surrogate mothers must enjoy the same rights as children born through natural methods.[65] Their status, role and position in the home and society should not be different from those of children born through natural methods.[66] In schools and communities, children born through surrogacy agreements should not be stigmatised. All privileges obtained by other children should be available to them.

4.2.2. The right to know one's biological origins

Article 7 of the UNCRC provides that "a child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents". The right to know one's parents in article 7 has been interpreted to mean providing children with information

[62] CRIN 'Discrimination and the CRC' <https://archive.crin.org/en/guides/introduction/discrimination-and-crc.html> accessed 12 February 2025.
[63] UNCRC Article 43 (1).
[64] United Nations Committee on the Rights of the Child General Comment 'Implementing Child Rights in Early Childhood' (2005) 7 <http://www.refworld.org/docid/460bc5a62.html> accessed February 12 2025.
[65] University of Chicago Law School, 'Global Human Rights Clinic' <https://chicagounbound.uchicago.edu/ihrc/10> 23 accessed 12 February 2025.
[66] Wade 'The Regulation of Surrogacy: A Children's Rights Perspective' 2017 29(2) Child Family Law Quarterly 113, 131.

concerning their biological origins and the circumstances surrounding their birth.[67] In the case of *Rose v Secretary of the State for Health,*[68] the European Convention on Human Rights (ECHR) held that the applicant had a right to be given details about her father. Failure to avail children of this information affects their ability to develop a sense of identity. Identity is a person's unique profile of which genetic origin is a key feature.[69]

Article 8(1) of the UNCRC recognises a child's right to preserve his or her identity, including nationality, name and family relations. Article 8(2) further states, "where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity".[70]

Donor gametes, particularly sperm, have been used to conceive children since ancient times, and this practice has "traditionally been shrouded in secrecy" so as to protect men who have challenges with fertility.[71] Sperm donors were also granted anonymity out of concern that a lack of anonymity would reduce the willingness to donate and cause a shortage in the availability of gametes to cure infertility.[72]

In surrogacy agreements, donor gametes are sometimes used when either of the intending parents cannot use their own. However, lack of information about biological origin deprives children born through surrogacy agreements of the freedom to define their genetic relationships

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[67] South African Law Reform Commission, 'The Right to Know One's Own Biological Origins' 32 Issue Paper <http://pmg-assets.s3-website-eu-west1.amazonaws.com/170720righttoknowonesownbiologicalorigns.pdf > accessed 13 February 2025.

[68] Ibid

[69] McCombs and Gonzalez, 'Right to Identity' 2007 International Human Rights Law Clinic 1

[70] (n 68)

[71] Clark, 'A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins' 2012 4 (3) Georgia Journal of International and Comparative Law 619-621.

[72] Mason and Ekman, 'Babies of Technology: Assisted Reproduction and the Rights of the Child' (2017) 189.

and connect with their heritage.[73] It can also pose medical risks as uninformed decisions can be made in the absence of a person's family medical history.[74]

This is contrary to article 24 of the UNCRC, which protects the rights of the child to the highest attainable standard of health.[75] Jancic[76] is of the opinion that sharing information concerning the biological parents of children does not mean that a relationship will be established between them, but it can fulfil a usual human desire (on the part of the child) to discover from whom they originated. Many countries have ruled against the child's right to know his or her parents owing to privacy protection established by law for donors in these countries.[77] Parents also prefer the non-disclosure rule because of the connection they have with the child and the fear that the attitude of the child might change when he or she learns of his or her biological origin. They also do not want to destabilise the child and disclose the fertility status of the parent(s).[78]

The UN Committee on the Rights of the Child also states that article 7 of the UNCRC should take preference where there is a conflict between a child's right to information about his or her biological parents and the rights of others to privacy.[79]

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[73] Shalev Moreno, Eyal Leibel Schuz and Eldar-Geva, 'Ethics and Regulation of Inter Country Medically Assisted Reproduction: A Call for Action' (2016) 5 Israel Journal of Health Policy Research 59, 66.

[74] Ravitsky, 'The Right to Know One's Genetic Origins and Cross-Border Medically Assisted Reproduction' (2017) 6(3) Israel Journal of Health Policy Research 1–3.

[75] Child Rights International Network, 'A Children's Rights Approach to Assisted Reproduction' https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf accessed 12 February 2025.

[76] Jancic, 'Introduction' in Jancic (ed), *Rights of the Child in a Changing World: The UN Convention on the Rights of the Child: 25 Years After* (2015) 15–16.

[77] See the Canadian case of *Pratten v British Columbia (Attorney General)* 2012 BCCA 40, where this right was denied to a woman.

[78] Clark, 'A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins' (2012) 4(3) Georgia Journal of International and Comparative Law 619–621.

[79] The UNCRC Article 7. provides that a child shall have the right "to know and be cared for by his or her parents"

4.2.3. Right of Protection from Harm

Children conceived through surrogacy agreements can experience various forms of harm and exploitation if their rights are not considered. In the event of parents losing a legal claim, a child could experience psychological trauma if taken from the parents who had cared for him or her and given to the surrogate.[80] The child's right to be protected from harm would mean parties not making decisions that negatively affect his or her well-being and health. Medical screening for genetic diseases and counselling before implantation in the surrogate will protect the child from harm. There should also be a limit to the number of agreements in which surrogates can participate, as the higher the number of pregnancies and births achieved, the higher the risk to the children produced. Another form of preventable harm is the risk of sexual, physical or emotional abuse by the partner of a single parent who has a child through a surrogate mother when that partner is not the biological parent of the child.[81]

5.0. GAPS IN THE LAW ON ASSISTED REPRODUCTIVE TECHNOLOGY IN NIGERIA AND ETHICAL DILEMMAS

Laws are systematic set of rules, established by the government to direct the conduct of the people, and to maintain order in the society. The law sets out policies which determine rights and obligations of persons and organizations in the society. The law also stipulates offences and penalties for a breach of it. Anyone involved in conducts that are regulated by law bear both a legal and moral duty to ensure compliance with the prescripts of the law. There are also diverse ethical issues arising from the use of Assisted Reproductive Technology (ART). These legal and ethical dilemmas would be discussed explicitly in this section.

5.1. Gaps in the Law

In Nigeria and other developing countries in sub-Saharan Africa, there is

[80] Shanley, 'Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same Sex and Unwed Parents' (2001) 46.
[81] UNCRC (n 78).

no national regulation of Assisted Reproductive Technology (ART) despite the fact that we have several ART centers in Nigeria. This has created a huge lacuna that is being exploited by various unscrupulous practitioners. The effects of non-regulation and other gaps in law would be reviewed below.

5.1.1. Non-Regulation of Assisted Reproductive Technology (ART) in Nigeria

Nigeria is yet to provide specific comprehensive state legislation to regulate ART and there are also almost no judicial decisions made in that regard, especially with surrogacy even though we have several ART centers in Nigeria. This has created a huge lacuna that is being exploited by various unscrupulous practitioners and the implication is that, the rights of children are not protected and parties could make decisions concerning them, whether harmful or not. 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.[82]

There is no gainsaying that voluntary adherence to guidelines from different countries by the various ART centers is not the best for regulating ART in Nigeria bearing in mind the fact that Africa has more of the type of infertility that can be solved by ART procedures and ART awareness is increasing in the country.

There are, however, certain provisions in Rule 23 of the Code of Medical Ethics, 2004[83] that regulate assisted conception and related practices. Rule 23 recognises gestational surrogacy and permits the donation of gametes for that purpose. It states that necessary statutes to govern assisted reproduction have not yet been established; nevertheless, medical practitioners must resolve all ethical issues that may arise with respect to the counselling and consent of the donor. The Code states that

[82] Mutcherson, 'In Defence of Future Children: A Response to Cohen's Beyond Best Interests' (2012) 96 Minnesota Law Review 49.

[83] The Code of Medical Ethics is a guideline for medical practitioners in Nigeria and any form of misconduct against this Code will amount to professional misconduct by the medical practitioner.

gamete and embryo donation should not be commercialised. With respect to children, the Code notes that in the absence of a legal framework protecting them in these agreements, the basic principles applied in child adoption cases should be considered as best practice.

However, in 2016, a Bill was introduced in the Nigerian National Assembly to amend the National Health Act and includes the regulation of ART.[84] The Bill mandates the Federal Ministry of Health to regulate the practice of ART and establish a National Registry of Assisted Reproductive Technology Clinics and Banks, which will have the function of creating and maintaining a central database of ART data in Nigeria. Medical tests and screening are required for surrogates and donors to ensure that children are not harmed in any way. Clinics are also to counsel the commissioning parents on the options [85]available to them and the consequences and risks involved. Before surrogacy will be supported, a medical report must confirm the inability of the commissioning mother to carry a child to term. Written consents must also be obtained by all parties to the agreement for every stage of the assisted reproduction process.[86] They may, however, withdraw such consent any time before the surrogate is implanted with the required gametes.[87] Children are protected through the prohibition of implantation of gametes from more than one man and woman,[88] sex pre-determination or selection[89] and freezing of embryos without consent from all parties.[90] Clinics must also inform the commissioning couple of the rights of children born through ART.[91] The Bill allows ARTs, except surrogacy, for married infertile couples.[92] This provision is not drafted clearly as that would mean surrogacy is declared

[84] An Act to Amend the National Health Act to provide for the Regulation of Assisted Birth Technology, for Safe and Ethical Practice of Assisted Reproductive Technology Services and for Related Matters <http://placbillstrack.org/upload/HB610.pdf accessed> accessed 12 January 2025.
[85] National Health Act (Amendment) Bill 2016, Clause 68(10).
[86] Ibid, Clause 69.
[87] Ibid, Clause 69(4).
[88] Ibid, Clause 71(3).
[89] Ibid, Clause 72(1) and (2).
[90] Ibid, Clause 69(2).
[91] Ibid, Clause 68(7).
[92] Ibid, Clause 75(1).

illegal by the Act, when it has already been deemed lawful in previous provisions in the same Act.[93]

In 2017, a Bill for the regulation of reproductive technology[94] was also introduced in the National Assembly. This Bill has yet to be passed but has scaled the second reading.[95] The ART Bill spells out more clearly the rights and duties of all parties in assisted reproduction. The status and welfare of children born through ARTs are included. For example, it is a crime for commissioning parents to refuse to accept a child, regardless of any disability that he or she may have.[96] The child must be registered at birth in the name of the commissioning parents.[97] Only one surrogate may be employed at a particular point in time[98] and a woman cannot be a surrogate more than three times in her lifetime, in order to prevent harm to the resulting children.[99] As in the case of the South African Children's Act, a child has the right to apply for information concerning his or her biological parents, with the exception of information concerning their identity. However, a child could apply to know the biological parents' identity if there were a medical emergency that required the physical testing of the biological parents. The consent of the biological parents is, however, required before the release of such information.[100]

From the above stated, it is apparent that 2016 National Health Act Amendment Bill and 2017 Bill for regulation of Reproductive Technology in Nigeria, could not pass for a comprehensive regulation of ART practices in Nigeria. Infertility should not be treated with kid's gloves but should be considered as a public health issue and not as personal challenges of individuals or a social problem. All ART practitioners should therefore come together and form a national body that would come out

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[93] Ibid, Clause 68(5) and (10).
[94] An Act to Provide for a National Framework for the Regulation and Supervision of Reproductive Technology and Other Matters Connected Therewith <http://placbillstrack.org/upload/SB325.pdf> accessed February 12 2025.
[95] Umoru, "Senate Moves to Approve Birth via In-Vitro Fertilization" <https://www.vanguardngr.com/2017/10/senate-moves-approve-birth-via-vitro-fertilization/ > accessed February 12, 2025.
[96] ART Bill 2017, Clause 34(11).
[97] Ibid, Clause 34(10) and (11).
[98] Ibid, Clause 34(20).
[99] Ibid, Clause 34(5).
[100] Ibid, Clause 36(1)–(3).

with a standard of practice suitable for the Nigerian Society and also create a supervisory body for the centers. This will go a long way in setting a good foundation for the future of ART practice in the country and even prevent a situation where quacks will hold themselves out as ART practitioners and commit atrocities that would scare the populace from having confidence in the technology and its practitioners.[101]

5.1.2. The Child Rights Act, 2003

A child is legitimate if born in lawful wedlock. To be legitimate at birth, the parents of the child must be lawfully married either at the time when he/she was conceived or born.[102]
Artificial insemination by donor (AID) introduces a third party who produces the semen that is used to fertilise the wife's egg. The question then arises as to what the status of a child born through AID is, since it is against the generally accepted definition of legality and it de-emphasises lawful wedlock. It also raises the question of what the status of a child born to
an unmarried woman through AID is, and whether such a child can ever be legitimised.

The need to define children legally is becoming compelling in Nigeria. For instance, the legal position of a child who is born via ART and whose would-be social parents have made no genetic contribution is uncertain.[103] The "best interest of the child" model is fallible, and should be re-evaluated. The Child's Rights Act of 2003 in Nigeria aims to protect the welfare of children, but it doesn't provide clear guidance on assisted reproductive technology (ART). This lack of guidance in ART practices, can result in child abuse and exploitation.

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[101] UNCRC (n 78)
[102] EI Nwogugu, *Family Law in Nigeria. Ibadan* (HEBN Publishers Plc 1974) 1–510
[103] SO Koyonda, 'Assisted reproduction in Nigeria: Placing the law above medical technology' (2001) 34(2) Comp Int Law J South Afr 258–79.

5.2. Ethical Dilemma

Non-regulation of ART has posed a serious threat on the rights of children and has given rise to several ethical issues, some of which are discussed below.

5.2.1. Pre-Implantation Genetic Diagnosis

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The UK Human Fertilisation and Embryology Act (HFEA) of 2008 made no express provision for PGD but the Human Fertilisation and Embryology Authority developed a frame within which PGD could lawfully be offered to couples at risk of transmitting a genetic disease. Not everyone applauded this development and PGD has been criticised both on the ground that it involves deliberate destruction of embryos and that in screening out disabled embryos it discriminates against disabled people and reinforces negative images of disability.[104] Pro-life groups challenged the legality of PGD arguing that the HFEA had no power to license a treatment for couples who could have children without assistance. The Court of Appeal[105] confirmed that HFEA policy pertaining PGD was lawful under the Act in that for couples affected by a risk of transmitting such disease PGD constitutes treatment 'for the purpose of assisting women to carry children to carry children'.[106] What about late onset diseases where a child is born healthy but carries a gene that results in serious illness later in life? For example, if BRAC1, the gene predisposing family members to breast cancer, is present in the prospective mother, can she seek PGD to ensure that any child she bears is free from that gene?[107] What if a couple wanted to screen in a particular condition, for example a deaf couple wanted to ensure that their child was also deaf?[108]

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[104] R Scott, 'Choosing Between Possible Lives: Legal and Ethical Issues in Pre-Implantation Genetic Diagnosis' (2006) Oxford Journal of Legal Studies 153.
[105] *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2003] 3 All ER 257, CA.
[106] Ibid.
[107] Margaret (n 52) p. 381.
[108] Savulescu, 'Deaf Lesbians, "Designer Disability" and the Future of Medicine' (2002) 325 BMJ 771.

5.2.2. Saviour Siblings

Parents who have a child already afflicted by potentially fatal genetic disorder can seek to have another baby whose stem cells, taken from the umbilical cord, could 'cure' her brother or sister. Preimplantation genetic diagnosis is used to screen out embryos with genetic match with an existing child. By this means, a baby is created who is both unaffected by the genetic disorder in question, and an exact tissue match for the sick sibling. Opponents of this argued that it was wrong to create a baby purely as a means to an end.[109] Utilitarians for example, will see the potential to maximise utility by saving the life of a sick child.[110] The parents' loving motives are likely to influence virtue theorists.[111] For rights-based theorists, it is all a matter of whether anyone's rights are violated by donor selection, and the wights of those rights.[112]

5.2.3. What Should a Child be told?

Does a child born after the use of donor gamete have a right to know the identity of his genetic parent? An adopted child has, at 18, a right of access to his original birth certificate and so has the opportunity to trace his natural parents.[113] If an adopted child may trace his birth mother and genetic father, should the children born from gamete donation be afforded a similar right? Until 2005[114], anonymity protected all gamete donors while affording some limited rights to children born as a results of donation. The UK HFE Acts required the HFE Authority to keep a register detailing the provision of treatment services and the use of gamete.[115] At the age of 18 a person could, after proper counselling, request information from the register. Clinics fear that loss of prospective

[109] Margaret (n 52) p. 381.
[110] Shaun D Pattinson, *Medical Law and Ethics* (3rd edn, Thomson Reuters (Professional) UK Limited 2011) 307.
[111] Ibid.
[112] Ibid.
[113] UK Adoption Act 1976, S 51(2).
[114] HFEA (Disclosure of Donor Information) Regulations 2004.
[115] Human Fertilisation and Embryology Acts 1990, Section 31.

anonymity will exacerbate the acute shortage of gamete donors.[116] Some children will acquire right to know the identity of a genetic parent at the expense of couples who remain childless for lack of donors. If donation is seen as an ethical, altruistic act why must it be kept secret? If adopted children need to know the identity of their genetic parents, why are the needs of children born from gamete or embryo donation less pressing?[117]

In Nigeria, because of the cultural beliefs and religious diversity, it is almost impossible for parents to reveal their child's identity to him or her. In fact, parents don't often reveal to well wishers that they got pregnant through an ART technique because of the importance attached to natural means of procreation. Also, in practice, ART centres do not usually take records of eggs and sperm donors because there's no strict measure on that, this lacuna might make it impossible for children to know their identity upon attaining the age of majority.

6.0. CONCLUSIONS

Sustainable development is an approach to growth and human development that aims to meet the needs of the present without compromising the ability of future generation to meet their own needs. The 17 goals include the promotion of healthy lives and well-being that consists of a specific target to inter alia, reduce preventable deaths of new-born babies (SDG3). As part of the possible efforts that may be adopted in achieving SDG3, this study has argued for the rights of children born through ART procedures to be spelt out in the policy regulating ART practices in Nigeria.

Nigeria has no specific policy yet on ART, Adequate regulation is therefore important so as to create standards for the practice, to protect the interest of children and to prevent the abuse of parties, especially children who are the most vulnerable member in the society. All parties must consider the best interests of children when drafting agreements and clauses. Medical practitioners must conduct medical and psychological

[116] Margaret (n 52) p. 383.

[117] K O'Donovan, 'What Shall We Tell the Children? Reflections on Children's Perspective and the Reproduction Revolution' in RE Lee and D Morgan (eds), *Birthrights Laws and Ethics and the Beginning of Life* (Routledge 1989).

evaluations to access the fitness of donors and surrogate mothers and such reports must be attached with the ART consent form before procedures can be approved. All medical procedures should be performed in registered facilities and by qualified doctors to prevent harm to the child. Commissioning parents should also be seen to possess the capacity to care for the child in a safe environment and should be informed about their rights. Children should be registered at birth so that their right to identity and nationality can be ensured. It is also important for parents to inform their children of their biological heritage when they attain the age of majority.

7.0. RECOMMENDATIONS

This in-depth policy on ART in Nigeria must define and spell out roles and status for the all the collaborators in the procreation effort. The rights and duties of physicians in the exercise must be clearly defined. Categories of persons which shall be entitled to fertility must be unambiguously stated. The Nigerian Government can borrow a leaf from developed countries around the world that have successfully regulated ART.[118] To achieve this, the amendments in the Human Fertilisation and Embryology Act of 1990 must be looked into and incorporated into the proposed Nigerian Assisted Reproductive Technology Act. The main new elements of the UK HFE Act include:[119]

Ensuring that the creation and use of all human embryos outside the body - whatever the process used in their creation - are subject to regulation, a ban on selecting the sex of offspring for social reasons, requiring that clinics take account of "the welfare of the child" when providing fertility treatment, and removing the previous requirement that they also take account of the child's "need for a father", allowing for the recognition of both partners in a same-sex relationship as legal parents of children conceived through the use of donated sperm, eggs or embryos, enabling people in same sex relationships and unmarried couples to apply for an order allowing for them to be treated as the parents of a child born using

[118] Kigbu (n 25) p. 78.
[119] Ibid, P. 78 & 79.

a surrogate, changing restrictions on the use of data collected by the HFEA to make it easier to conduct research using this information.

Finally, it is pertinent to note that the 2016 National Health Act Amendment Bill and 2017 Bill for regulation of Reproductive Technology in Nigeria must be merged together in order to accommodate the rights of parties especially children. This is important so as to foster child inclusivity and promote healthy lives and well-being that consists of a specific target that would reduce preventable deaths of new-born babies (SDG3).