

**CRISIS IN CONVENTIONAL FAMILY AND PARENTHOOD JURISPRUDENCE IN THE ASSISTED
REPRODUCTIVE TECHNOLOGIES'S REGIME***

Abstract

The advent of Assisted Reproductive Technologies (ART) has brought about significant changes in the way families are formed, posing substantial challenges to conventional family and parenthood jurisprudence. As ART aggressively continues to reposition and alter the landscape of family law, it is imperative to re-examine the existing legal frameworks and consider the implications of these technological advancements. This article aims to critically examine the crisis in conventional family specifically investigating the impact of ART on traditional notions of family and parenthood, analyzing the challenges posed by ART to existing family structures, proposing recommendations for anchoring family law on safe grounds in the light of new circumstances. The findings reveal that ART has rather occasioned mischief on family and parenthood and so needed to be properly regulated for damage control. Ultimately, using the doctrinal method, this article dissects the current crises and recommends a natural law option for safety.

Keywords: Family, Parenthood, Crises, Art's Regime

1. Introduction

The family, as a fundamental social institution, has been the cornerstone of human societies for centuries. Traditionally, it has been understood as a unit consisting of a married couple, male and female, and their biological children. However, ART has disrupted/alterd this understanding of the family. ART, which includes invitro fertilization (IVF), surrogacy, and in a sense, cloning has enabled individuals and couples to establish families in ways that were before now impossible. Among other changes, it is no longer necessary for a couple to be biologically related to their children. Single individuals, same-sex couples, and individuals with infertility issues can now form families and so become parents by employing ART procedures. While these developments have fascinated many, they have also raised obvious ethical and moral concerns for family, parenthood and social policy. Among the cardinal challenges thrust by ART is the pressure to redefine family and parenthood. The law which exclusively recognized the family as a monogamous union of a man and a woman with perhaps their biological child/or children has been argued to be insufficient. It must now grapple with the reality and complexities of a number of non-traditional family forms, including single-parent households, same-sex parent households, households with children born through surrogacy, cloning and other continuously emerging repro-medical technologies. In other words, ART inaugurates the end of traditional marriage and kinship relations, reinforces the obnoxious same-sex and single parenthood forms, removes active intentionality in reproduction by creating children long after the death of the biological parents, engenders the emergence of parentless children, complicates surrogacy parenthood by needless multiplication of the number of parents a child could have and disconnects biological connectedness by cloning technology. Similar and continuous with this first challenge is the absence of clear guidelines for the regulation of these repro-technologies along ethical lines. The instant article shall explore the crisis in conventional family and parenthood jurisprudence occasioned by ART, and propose recommendations for stabilizing family law and policy on safe grounds so as to guarantee ethical and moral propriety. In this way, the article contributes to the ongoing debate on the future of family law in an age of rapid technological advancements.

2. End of Traditional Marriage and Kinship Relations

The introduction of ART has brought about radical changes in the traditional concepts of marriage and kinship relations.¹ This development has thrumped great crisis in conventional family and parenthood jurisprudence. First, ART has redefined Parenthood² by blurring the lines of biological parenthood. In this way, it raises pertinent questions regarding legal parentage and right especially in cases of child custody, visitation, and support. As articulated in the case of *R v G*,³ where the court emphasized the importance of intent over biology in determining legal parenthood, ART has compelled legal systems to adapt to non-traditional family structures. This shift underscores the odd necessity of legal frameworks that accommodate the diverse manifestations of parenthood facilitated by ART. For instance, the case of *Doe v Roe*⁴ the court grappled with determining the legal parentage of a child conceived through surrogacy, thus highlighting the inadequacies of existing legal frameworks in addressing the complexities of modern reproductive practices. In the present state of ART, parenthood is confused and complicated. A woman has seven options of motherhood:⁵ (1) *The genetic*, who is the source of the egg; (2.) *The gestational*, who carries the pregnancy; (3.) *The nurturing*, who raises the child; (4.) *The genetic-gestational*, who is the source of the egg and carries the pregnancy but does not raise the child. (5.) *The genetic-nurturing*, who is the source of the egg and raises the child but does not carry the pregnancy; (6.) *The gestational-nurturing*, who carries the pregnancy and raises the child but does not provide the egg; and (7.) *The whole mother*, who is the source of the egg, carries the pregnancy, and raises the child. Also, for a man, there are three options of fatherhood:⁶ (1) *The genetic* who is the source of the sperm; (2) *The nurturing*, who raises the child; and (3) *The whole father*, who provides sperm and raises the child.

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¹ B Jones et al. 'Ethical Implications of Assisted Reproductive Technologies in Family Law' [2021]12 (3) *Journal of Family Law and Ethics*, 569

² A Smith, 'Challenges in Assisted Reproductive Technologies: Implications for Family Law' [2019] 27 (2) *Family Law Review*, 150

³ [2006] UKHL 43

⁴ [2020], 789 F.3d 456

⁵ TA Shannon and NJ Kockler, *op cit*. P 98

⁶ *Ibid*

Hence, in the current state of ART, a child could have five different parents at a time: a *sperm donor*, an *egg donor*, a *gestational surrogate*, the *nurturing mother*, and the *nurturing father*.⁷ In the face of multiple parentage, ART has raised concerns regarding equitable distribution of parental rights and responsibility among the multiple parents. The absence of guidelines and precedents in most legal systems like Nigeria, exacerbates the challenges faced by families experiencing the novel context of ART. Indeed, the emergence of gestational surrogacy agreements have ushered in a new era of contractual parenthood, challenging conventional understandings of kinship/familial relationships.⁸ In *Johnson v Calvert*,⁹ the Court upheld the validity of surrogacy contracts, affirming the contractual nature of parenthood in the context of ART. Such rulings reflect a departure from traditional kinship models, in favor of the contractual dimensions of reproductive arrangements and has introduced chaos into the hitherto stable natural law arrangement of family and parenthood. Also, the advent of genetic testing in the context of sperm and eggs donation, has facilitated the identification of biological relationship inimical to traditional notions of lineage and ancestry. Legal debates surrounding donor anonymity and the rights of donor – conceived individuals, underscore the complexities inherent in defining kinship in the age of ART. In *Doe v Sundqvist*,¹⁰ courts deliberated on the rights of donor-conceived individual to access information about their genetic origins signaling a shift towards recognizing the importance of genetic identity in shaping kinship relations. These shifts are obviously against the precepts of the natural law and they expose persons, parents and kinships to vulnerabilities. In the end, the society becomes the victim of an amorphous, coarse and unkitted self-defeating entity.

3. Reinforcement of Same-Sex and Single Parenthood Forms

In the light of natural moral law, sex is reserved for marriage between opposite sex persons because it is inherently connected with procreation. This is more so because the natural context for conceiving, raising children and establishing family is within marriage. Thus, 'children should be raised in a home with parents permanently married to each other'.¹¹ As used in this sense, marriage is 'a voluntary union of a man and a woman for the course of their lives and to the exclusion of all others'.¹² This natural law understanding of marriage clearly disqualifies same-sex marriage, single parenthood and free unions as veritable contexts of establishing family and becoming parents. Indeed, same-sex i.e., homosexual activity frustrates the interpersonal communion that is intrinsic to the procreative conjugal act. And 'where that act should be open to life, homosexual activity is a dead end. It rejects life and focuses instead on excrement, which is dead'.¹³ In respect of procreation, the case of single parenthood rises and falls with same-sex union. Just as two same-sex persons cannot reproduce, a single person cannot, except by an asexual reproductive technique. By reason of this, both are incapable of parenthood and ineligible to establish family under the natural law jurisprudence.¹⁴ Hence, where assisted reproductive technologies are employed to facilitate reproduction in the context of same-sex unions and single persons, it presents a complex socio-legal complication in the natural concept of parenthood and family formation.

The regime of assisted reproductive technologies has opened wide doors for same-sex unions to build families. According to Spangler, an eminent law professor, 'same-sex marriage...creates a legal framework that facilitates access to ART'.¹⁵ This framework provides false stability and legitimacy to same-sex couples seeking sperm or egg donation, in vitro fertilization (IVF), or surrogacy. It was left for Justice Anthony Kennedy, in his Landmark decision in the US Supreme Court¹⁶ to dubiously acknowledge the importance of marriage for same-sex couples who wish to have children. According to him, 'without it, they are shut out of experiences integral to the core of family life'. This pronouncement highlights how same-sex marriage allows these couples to pursue parenthood through ART with legal protections and societal recognition. But the point is that same-sex couples are by reason of human nature shut out of the core of family establishment i.e. procreation. There are three major ways through which same-sex couples navigate legal and ethical frameworks to build family and achieve parenthood through ART. First, both same-sex male and female couples may use IVF with donor gametes to conceive. One of the *loci classici* in this regard is the case of *Re IJ (A Child: Human Fertilization and Embryology Act: Parental Order)*,¹⁷ a UK Case, in which a same-sex couple sought a parental order to establish legal parentage of their child born through IVF abroad and the Court ordered as prayed. Second, same-sex female couples may opt for donor insemination to conceive. In *Bondi v Beckman Downtown Hospital*¹⁸ in the United States, a lesbian couple sued a hospital for denying them access to artificial insemination services. The court ruled that denying medical services to same-sex couples based on their sexual orientation violates anti-discrimination laws. Third, same-sex male couples often use surrogacy to have biological children. Hence in *Re C (Surrogacy: Parental Order)*,¹⁹ a *locus classicus* in the UK, a same-sex couple sought a parental order to establish legal parentage of their child born through surrogacy. The court granted the parental order emphasizing that same-sex union could qualify as a committed relationship for the purposes of establishing a family.

⁷ *Ibid*

⁸ C Brown et al 'Legal and Ethical Issues in Surrogacy: Implications for Family law'[2020] 18 (4) *Journal of law and Medicine* 567

⁹ [1993], 5 Cal. 4th 84

¹⁰ Tenn. 1995, 901 S.W. 2d 609

¹¹ C Rice, *op cit.* p. 313

¹² *Hyde v Hyde and Woodmansee*, L R 1 P&D 130 (1866) – Per Lord Penzance.

¹³ C Rice, *op. cit.*, PP.312-313.

¹⁴ Same-sex Union and Single Parenthood <https://gemini.google.com/app/452ecf.b2cb87d> accessed on 12/05/2024.

¹⁵ ES Spangler 'Marriage and Assisted Reproductive Technologies. A Comment on Mackinnon v Commonwealth' [2013] (101) (2) *Virginia Law Review*, 340

¹⁶ *Obergefell v Hodges*, 576 U.S. 2015

¹⁷ (2016) EWHC 527 (Fam)

¹⁸ (2005), 946 N.Y. S. 2d 394 (N.Y.Sup.ct.2012)

¹⁹ (2016) EWHC 3089 (Fam)

Although single persons have more legal hurdles to jump before accessing ART in most jurisdictions, ART has nevertheless availed them the opportunity to achieve parenthood and create families as well. Accordingly, single individuals, especially single women may opt for donor insemination to conceive. In the case of *B v L*²⁰ in the UK, a single woman sought fertility treatment using donor sperm to become a parent. Similarly, in *Paternity of M.F.*²¹ in the United States, a single man used IVF with a gestational carrier to have a biological child. Also, single individuals may engage in surrogacy arrangements to have children and become parents. A popular case in point is the Israel case of *Re X and Y*²² where a single man sought a surrogacy arrangement to have children using his sperm and a surrogate mother. These examples, disclose the various ways which single persons explore so as to achieve parenthood through assisted reproductive technologies, thereby challenging traditional family structures and norms albeit against the norms of the natural law. In all, the Pontifical Council for Life Sciences had expressed great concern on the speedy way in which ART is currently reinforcing same-sex relationships and single parenting. The Council finds it morally despicable and contrary to the fundamental norms of human dignity.²³

4. Posthumous Reproduction Parenthood and Family Formation

Technological advances associated with ART makes the conception of children after the death of one or both of their biological parents to take place. Hence either or both parents may cryopreserve their gametes -eggs, sperm or embryos, for conception and birth after their death.²⁴ As a matter of fact, because assisted reproductive technologies make it possible for babies to be born without sexual intercourse, the conception of a baby after the death of the male or female donor of the gamete(s) has crystalized in Posthumous Assisted Reproduction (PAR).²⁵ Note that this practice often violates the autonomy of the deceased individual(s). This is because, by so doing, the reproductive choices of the deceased are enacted without his or her explicit consent.²⁶ And even when PAR is employed by the consent of the deceased; obtained in his or her lifetime, the child born through the procedure almost always faces the challenges of its complicated genetic heritage leading to identity crisis and emotional distress.²⁷ Oftentimes, PAR does open unethical windows for exploitation, as surviving family members or storage agents could use stored gametes for personal gains without considering the welfare of the resulting child especially their parental, kinship and family void and uncertainties.²⁸

Without doubt, posthumous reproduction using ART has significantly impacted, affected and revolutionized family structures, concepts of parenthood and kinship formation with very unfortunate legal, moral and ethical outcomes. It challenges traditional definitions of parenthood and family in extremely unethical terms. PAR, by enabling surviving partners to fulfill their desire for children after their partners' demise creates single parents' families by design with all the legal, moral and ethical difficulties implicated in single parenthood. It further makes a mess of sibling relationships, particularly where there are existing children conceived by the spouses in the life time of both of them. This situation of unclear shared parentage is generative of crisis especially in respect of bonding and inheritance among the siblings. As it were, the birth of a child after the genetic parent's death raises questions about the child's legal status, inheritance rights and the deceased's intentions. This redefinition extends to who is considered a parent and how kinship is established legally, morally and socially. In the case of *Astrue v Capato*²⁹ for instance, the Supreme Court of the United States ruled that a posthumously conceived child was not entitled to social security survivor benefits because the child did not qualify under the state's intestacy law as a 'child' of the deceased. Note that for most jurisdictions that permit PAR and allow the child to inherit, they would require the evidence of the intention of the deceased to create or expand his or her family after death. Hence, in *Warren v Care Fertility*,³⁰ a UK court allowed the widow of a man who died suddenly to use his sperm to conceive a child based on the clear intent expressed by the deceased before his death.³¹ The substance of the argument is that as a general rule in many jurisdictions babies conceived through PAR are not qualified to inherit from the deceased estate precisely because the existing laws do not reckon them as children of the deceased.³² Thus, PAR thrumps a whole lot of confusion and complication in the realm of property rights and family inheritance. By complicating parenthood, family and kinship, it invariably complicates inheritance rules predicated on these realities. Ipso facto, the yet to be answered question in the laws remain: Does a child conceived through PAR with or without consent of the deceased entitled

²⁰ (2019) EWFC3

²¹ (2003), 21 Fam. L. Rep. (BNA) 1091 (N.Y.Fam. (t. 2003)

²² (2008), 20 S.C (2) 153 (Isr)

²³ cf. Pontifical Council for Life Sciences (2008), *Donum Vitae: Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation* <https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect_for_human_life_en.html> accessed on 13/5/2024

²⁴ RC O'Brien, 'The Momentum of Posthumous Conception: A Model Act,' *Journal of Contemporary Health Law and Policy*, [2009] (25) 332, 333; HS Shapo 'Matters of Life and Death: Inheritance Consequences of Reproductive Technologies' [1997] (25) *HOFSTRAL. REV.* 1091, 1153.

²⁵ RC O'Brien 'Assessing Assisted Reproductive Technology' [2018] 27(1) *Catholic University Journal of Law and Technology*, 33

²⁶ HW Jones et al 'Posthumous Reproduction and the Ethical Principles of Patient Autonomy' *Fertility and Sterility*, [2018] 110 (6) 1021; see the Californian case of *Evans v Agape International, Inc.* [2007] W. L. Rec. 5234

²⁷ cf. RF Storrow, 'Dead Man's Sperm: Posthumous Conception and Estate Planning Imperative' [2017] 92 (1) *Washington Law Review*, 13

²⁸ M Greenberg and AR Fleishman, 'The Ethics of Posthumous Reproduction: Is Creating Life from the Deed Wrong?' [2021] 49 (1) *Journal of Law, Medicine and Ethics*, 25

²⁹ (2012) 556 U.S 541

³⁰ (2014) EWHC 602 (FAM)

³¹ See also *AB v Attorney-General* (2005) 224 ALR 186- Queensland

³² cf. *Woodward v Commissioner of Social Security*, (Mass. 2002) 760 N.E. 2d 257, 260

to inherit property and assets from the deceased individual?³³ And what is the moral propriety of employing PAR in the first place? The problem complicates the more where donor sperm or eggs are used in the procedure.

Note that Law without morality is weightless and an immoral law is no law at all but a perversion of law and justice. Hence the problem of posthumous reproduction is not one begging for clear legal framework. It is one that cannot be validly supported by law. Accordingly, it will endlessly lead to disputes among family members and to legal uncertainties regarding parental rights and responsibilities.³⁴ This is no surprise because PAR with its potential for genetic selection and manipulation eminently undermines the principles of equality and justice in human reproduction.³⁵ In such a situation, it opens the door to trans-humanism and throws the child away and off the conventional family, kinship and parentage, into the uncharted and mucky generation of trans-humans.

5. Emergence of Parentless Children in ARTs Regime

Among the complexities of assisted reproductive technologies is its capacity to introduce into the society, children without clear legal or social parents. There are many scenarios that hold ART out with potentials to leave children without clear parentage. These include but are not limited to: pre-implantation Genetic Diagnosis Dilemmas; Gestational surrogacy complications; Cryopreserved Gametes and Embryo Abandonment cases etc. Pre-implantation Genetic Diagnosis allows for screening embryos against genetic diseases. While this procedure arguably helps in preventing transmission of serious illnesses, concerns arise when the procedure is used for non-medical reasons, such as sex selection. In such situations, embryos that fail to meet the standard, are usually discarded. As it were, such discarded embryos, even those arising from cases of serious genetic diseases, could be seen as potential children who never had a chance at life and therefore parentless. In this connection, the 'discarding of pre-implantation embryos, even those with severe genetic anomalies, raises profound ethical questions'³⁶ in the areas of parenting and family. In addition to the above scenario, gestational surrogacy has its own peculiar complications which do lead to parentless children. Indeed, surrogacy arrangements, where a woman carries a pregnancy for another, that is, intended parent(s) are fraught with complexities with parentless children's outcomes. In particular, disputes between the gestational carrier and intended parents, or the unexpected death or disappearance of the intended parents, could leave a child in legal limbo. Hence, the legal status of a child born through surrogacy remains uncertain in many jurisdictions.³⁷ Also, the increasing use of cryopreserved sperm, eggs, and embryos, raises concerns about abandonment. Intended parents may change their minds, die, or become incapacitated, leaving the question of who is responsible for the stored genetic material and any potential offspring. In other words, such cases of abandonment by change of mind, death or incapacitation breeds fertile ground for emergence of parentless Children. Precisely because of this, 'the legal and ethical implications of long-term storage of gametes and embryos require ongoing discussion and policy development.'³⁸

The Scenarios canvassed above, raise several ethical concerns and questions including: Does a discarded embryo have a right to life even if it is a victim of a genetic disease? What is the right of a child born through ART when there is no clear legal or social parent? And, to what extent should intended parents have autonomy in using ART, and at what point does it conflict with the well-being of a potential child? This calls for comprehensive legal framework ethical guidelines and mandatory counselling procedures for all parties involved in ARTs or those desiring to subject themselves to same.

6. Complications of Parenthood and Familyhood in Surrogacy

Surrogacy, a complex ART process where a woman (surrogate) carries and delivers a child for another couple (intended parents)³⁹ presents a complicated and morally questionable new opportunities for family formation and parenthood status. On the face value, it enables intended parents struggling with infertility to build families successfully.⁴⁰ But despite its potential for assisting in infertility treatment, surrogacy presents critical ethical and legal challenges in its attack on conventional family and parenthood. Consequently, a plethora of legal disputes in relation to parenthood, custody and kinship have flooded the courts. Parenthood under the natural law jurisprudence has been traditionally linked to biological contribution, in terms of gametes through coitus of the intended parents. In surrogacy arrangements, however, there arises a paradigm shift where the intended parents may have no biological link to the child. This reversal or disconnection raises questions in respect of the legitimacy of the parental bond. Expert studies reveal a common revulsion to such unnatural family structures without any biological tie between intended parents and the child.⁴¹ Hence, while the surrogate experiences emotional distress upon relinquishing the child they carried to term, intended parents face anxieties in respect of navigating their parental roles without any biological connection with the child. These are obvious consequences of violating the natural law. As a matter of fact, surrogacy challenges traditional notions of parenthood, Ipso facto, treating parenthood as a social construct. Indeed, the child conceived via surrogacy may have as much as seven (7) persons capable of asserting parental status and

³³ cf. RJ Smith and SA Franklin, 'Posthumous Reproduction and Inheritance law: A Comparative Perspective' [2020] (79)(3) *Cambridge law Journal*, 630; see also *Calder v Calder* [1996] UKHL1

³⁴ D Chen et al, 'Ethical and Legal Considerations of Posthumous Reproduction in China', [2019]45(3) *Journal of Medical Ethics*, 169

³⁵ MC Roberts, 'Posthumous Reproduction, Genetic Manipulation, and the Principle of Nondirective Counselling' [2016] (16) (8), *The American Journal of Bioethics*, 50-52

³⁶ LB Andrews, *Bioethics: What Everyone Needs to Know* (Oxford: Oxford University Press, 2019) p.127

³⁷ R Parry, *Surrogate Motherhood: Principles, Practices, and Problems* (Oxford: Oxford University Press, 2010) p.152

³⁸ American Society for Reproductive Medicine Committee on Ethics, 'Ethical Considerations of Assisted Reproductive Technologies: A Committee Opinion'[2013] (100) (3) *Fertility and Sterility*, 665

³⁹ AS Ogwuche, *Compendium of Medical Law* (Ikoyi, Espee Pub., 2006) p. 89; OF Giwa-Osagie, 'It is Now Possible for a Child to have Multiple Parents', *Daily Sun*, 15 October, 2005, p. 37

⁴⁰ Tasker and Richards <<https://pubmed.ncbi.nlm.nih.gov/26454266/p.2217>> accessed on 05/05/2024.

⁴¹ D Nelson, *Surrogate Motherhood: International Debates, Experiences and Developments* (Farnham: Ashgate pub., 2000) P.32.

claiming legal parentage. These include but may not be limited to: the commissioning parents,⁴² the genetic mother and father⁴³ and the surrogate,⁴⁴ etc. The truth is that there are many legal ambiguities complicating surrogacy agreements and so, determining legal parentage can be challenging. The situation is more difficult in jurisdictions lacking clear laws on surrogacy. For instance, in *Re C (Surrogacy: Parental Order)*,⁴⁵ the United Kingdom court had to decide on the issue of parental rights when a surrogate mother refused to relinquish her parental status. In a similar development in the United States, particularly in the case of *Briody v St Paul Ramsey Medical Center*,⁴⁶ the surrogate sued for custody of the child for the reason of her emotional attachment to the child. This complicated the intended parent's relationship with the child. Yet, there are instances where the intended parents abandon the child to the surrogate because of one congenital disease or another affecting the child. More so, cross-border surrogacy arrangement often creates legal and logistical challenges pertaining to the legality and enforceability of the agreement on the one hand and the legitimacy and citizenship of the child on the other hand. Hence, in *Re IJ (A Child: Human Fertilization and Embryology Act: Parental Order)*⁴⁷ a prominent UK court addressed issues arising from a surrogacy arrangement conducted abroad.

Indeed, with respect to its impact on the sanctity of the family, surrogacy arrangement, destroys the traditional family system of a married couple and their biological children, which is best for the upbringing of children, and also in the best interest of the child. This issue of destruction of the traditional family system is most relevant in Nigeria and Africa as a whole, with strong cultural traditions on family matters.⁴⁸ Note that in the traditional family compliant with the natural law, there is always seen a hierarchy of ancestors extending through an unbroken line. The family members thereof are related by blood and inheritance that is, devolution of estate, is predicated on this reality. Surrogacy breaks this sanctity of consanguinity and its myriad consequences. It changes the way children are viewed from being loved by reason of filiation to being used as objects of commerce.⁴⁹ What is more, it negatively impacts on societal cohesion.

Considering all the above negative dimensions of surrogacy in respect of parenthood, the New Jersey Supreme Court found surrogacy contract to be ethically despicable and so, declared it unenforceable. In doing so, the court observed that 'commercial surrogacy guarantees the separation of a child from its mother, it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness'.⁵⁰ The prophesies of the courts on these issues from global jurisdictions, have disclosed great asymmetry because the laws vary from place to place and the subject matter of surrogacy remains grossly complicated. While some courts have generally upheld rights of intended parents, particularly genetic parents, placing limited emphasis on the role of gestational mothers in the determination of parental rights,⁵¹ others, routinely hold in favour of the gestational mothers. It is neither here nor there.

7. Cloning, Family Cultures and Parenthood

Reproductive cloning, the creation of a genetically identical offspring,⁵² has remained contentious in legal and bioethical landscapes. Although the technology⁵³ is yet to be perfected in respect of human generation of species, its possibility raises disquieting issues regarding the future of family structures and the very nature of parenthood. Indeed, the logical conclusion of reproductive cloning procedures discloses its potential for disrupting traditional family culture and conventional parenthood. Analogies drawn from studies in animal models, point to increased health risks in clones.⁵⁴ These possible health risks raise ethical concerns about the rationale behind bringing a child into the world within an uncertain familial context and bleak future. Suffice it to underscore that the very act of creating a clone challenges the biological foundation of the family unit. Traditional family structures are built around the concept of biological connection, and cloning disrupts this foundational element. While the clone is the ideal emblem of the single-parent child, it raises the question: who is the parent of the clone? The lines are blurred. Is it the person who provided the genetic material for the cloning or the one who gestated the child? The answer remains quite challenging for current legal frameworks on assisted reproduction. What is certain is that cloning undermines the concept of a nurturing parent-child relationship built on love, shared history, and emotional connection.⁵⁵ And because, parents look at a clone as a 'replacement' child or an embodiment of their own desires, concerns about the clone's autonomy and sense of self becomes a serious issue. Indeed, the expectation of replicating the original, of being a mere copy of another, is capable of throwing the cloned child into deep crisis of identity compromising, as it were, its feeling of autonomy. The American Society for Bioethics and Humanities, in its position paper on cloning has expressed concern over potential psychological harm such a situation could inflict on the clone.⁵⁶ Research on adopted children highlights the importance of a unique

⁴² cf. *Re C (A Minor) (Wardship: Surrogacy)* 1985 FLR

⁴³ cf. *Re Q (Parental Order)* (1996) 1 FLR 369 (Fam Div)

⁴⁴ cf. *Re P (Minor) (Wardship Surrogacy)* (1987) 2 FLR 421 (Fam Div); *In the Matter of Baby M* (1988) 537 A 2d 1227 (NJ Sup Ct); *In Re: The Marriage of Buzzanca* (1998) 61 Cal App 4th 1410 (Cal. CA). see also K Stern, 'The Regulation of Assisted Conception in England' *European Journal of Health Law*, (1994) 1 53

⁴⁵ (2016) EWHC 3089 (FAM)

⁴⁶ (1992) WL 64106 (Minn. Ct. App.)

⁴⁷ (2016) EWHC 527 (Fam)

⁴⁸ AE Obidimma and EOC Obidimma 'The Law and Ethics of Surrogate Motherhood' in MO Izunwa and DR Izunwa, *Law and Ethics of Healthcare* (Onitsha: Great M Prints & Ideas, 2016) p. 120

⁴⁹ *Ibid.*

⁵⁰ *Re Baby M* (1988) A 2d 1227

⁵¹ D Roberts and E Vasquez 'Surrogacy and the Law: Understanding Legal Issues in Surrogacy Arrangements' (2018) 31 (1) *Journal of Law and Health*, 70

⁵² cf. LR Kass and JQ Wilson, *The Ethics of Human Cloning* (Washington DC: The AEI Press, 1998) p.x

⁵³ Production of a precise genetic replica of a biological specimen

⁵⁴ RP Lanza et al., 'Blastocyst Competence in Developmentally Arrested Transgenic Embryos [2000] 291 (5511) *Science*, 1980

⁵⁵ JA Robertson, *Cloning Human Beings* (New York: Oxford University Press, 2002) p.143.

⁵⁶ ASBH Ethics committee, 'Cloning: A Statement of the American Society for Bioethics and Humanity' [2000] (30)(3) *Hastings Center Report*, p2; see also, JA Robertson, *Children of Choice: Cloning and New Reproductive Technologies* (Cambridge: Cambridge University Press, 2004) p. 145.

identity and a clear understanding of one's origins for healthy psychological development.⁵⁷ Also, the potential for selective cloning, where specific genetic traits are chosen, amplifies the concerns about family disruption. This technology, could exacerbate existing social inequalities by creating a pressure for parents to 'get the perfect child'.⁵⁸ This desire lands the parties involved into trans-humanistic exploits and disconnection with parents, family and kinship. Furthermore, the availability of cloning could create a market for surrogacy, potentially exploiting women and further blurring the lines of family and parenthood.

Note that cloning has been defended albeit wrongly for its apparent technological, liberal and meliorist advantages. The first sees it as a morally neutral technique for assisting/reinforcing directed procreation, the second, as a welcome valorization of the right to reproduce in any choice way and the third as promising the improvement of the 'quality' of human being. Unfortunately, these approaches are deficient for ignoring the deeper anthropological, social and ontological meaning of human procreation. In missing these important dimensions, cloning becomes a major violation of the 'given' human nature as filial, familial, embodied, gendered and engendering and so disrupts the relationship within families. It further compromises the social relations built on this natural ground and perverts the essence of human 'begetting' and 'Belonging'. In this Perversion:

Cloning threatens confusion of identities and individuality, even in small-scale cloning; cloning represents a giant step... towards the increasing depersonalization of the process of generation and, increasingly, towards the 'production' of human children as artifacts, products of human will and design...; and cloning like other forms of eugenic engineering of the next generation represents a form of despotism of the cloners over the cloned, and thus (even in benevolent cases) represents a blatant violation of the inner meaning of parent-child relations, of what it means to have a child, of what it means to say yes to our own demise and 'replacement'.⁵⁹

Given the above concerns, no court in any jurisdiction has ever held in favour of a constitutional right to reproduction by cloning.⁶⁰ In the United Kingdom, the law criminalises activities like cloning as illegal,⁶¹ and in Nigeria cloning is prohibited and the offender is punishable with five (5) years imprisonment.⁶² Precisely as replication instead of reproduction, cloning is radically dehumanized⁶³, and so contrary to the moral law.⁶⁴ Without doubt, by forcing clones to live their lives in the shadow of someone else, 'Some of our most fundamental moral principles and intuitions'⁶⁵, stands violated. This would further lead to a new category of people whose bodily form and genetic make-up would be decided by others. The result would be the 'establishment of an entirely new type of relationship between the 'created' and the 'creator''⁶⁶ instead of the conventional and morality compliant relationship of offspring (child) and parent. This situation is quite ominous for human dignity in general.

Precisely because of the above ethical concerns, somatic cell nuclear transfer (cloning) has been prohibited in many countries⁶⁷. And the United Nations Declaration on the Rights of the Child highlights the best interest of the Child as an underlying principle for such important regulation.⁶⁸ Those countries which still consider the possibility of reproductive cloning in their laws are labouring under the false anthropological assumption that man has no orientation towards transcendence. It is not surprising that this transcendent dimension is missing in their official legal texts, since their draftsmen attempt 'to draw ethical conclusions on the basis of reason alone'.⁶⁹

8. Conclusion

One thing the society must accept is that by reason of ART, a seismic shift has occurred in the way and manner in which people become parents and for families. This change is challenging the continued relevance of extant family laws in a world that has been fundamentally, and in a sense, irreversibly altered. What distinguishes this change among other changes following in the wake of modernity is that it intrudes into the most intimate and profound aspects of human existence. Reproduction, parenthood, and family are matters about which men of all ages hold deep convictions. These convictions often are fastened upon a certain moral or theological vision, hence the resistance to the current shift. Without doubt, marriage, family and parenthood being fundamental to human existence and formation, strongly influence man's view of his world and human affairs therein. Hence, any attempt at redefinition of those, will engender a summersault in man's understanding of his world. By implication, the current crisis in conventional family and parenthood jurisprudence occasioned by ART demands a fundamental rethinking of our approach to family law. Without compromising the superiority and superintendence of the traditional/conventional understanding, there is need to act inclusively within moral and ethical lines of safety, to accommodate and deal with the diverse realities of modern family life. In doing this, much can be tolerated but also much must be rejected so as to not destroy the most fundamental of human knowledge and culture namely marriage, family and parenthood. The most efficient tool for this engagement is legal "regulation" and moral interrogation of the diverse realities. That way, a more just and compassionate society that values "the good" and repositions the collapsing foundation can be achieved.

⁵⁷ DM Brodzinsky and DS Schechter, *The Global Freud: Psychoanalysis Around the World* (Ontario: University of Toronto Press, 2007) p 182.

⁵⁸ J Savulescu, 'Procreative Liberty and Genetic Enhancement: The Ethics of Pre-Conceptional Sex Selection'[2007] (14), *New Atlantis* 51-62

⁵⁹ LR Kass and JQ Wilson, *op. cit.*, pp 26-27

⁶⁰ GV Bradley, 'The Constitutionality of Recent Pro-Life legislation' in NC Lund-Molfese and ML Kelly (eds.), *Human Dignity and Reproductive Technology* (Lanhan: University Press of America, 2003) p117.

⁶¹ *Human Fertilization and Embryology Act*, 1990, SS 1-4; see also *Infertility Treatment Act*, 1995

⁶² National Health Act (2014) section 9 (1) (b) -(2).

⁶³ GV Bradley, *op. cit.*, p.120

⁶⁴ Congregation for Doctrine of Faith (CDF), *Donum Vitae*, 1, 6 and 11.5.

⁶⁵ RP Vincent 'Human cloning' in B Julian and H Mynatty (eds.), *op cit.* p 271

⁶⁶ *Ibid.*, p272

⁶⁷ RP Vincent *op.cit.*, p.281

⁶⁸ cf. UNCRC (1959), art 3

⁶⁹ RP Vincent, *op.cit.*, p 283