

**A CRITICAL ANALYSIS OF THE HUMAN ASSISTED REPRODUCTIVE TECHNOLOGY BILL,
2023**

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ABOUT THE AUTHOR

The author is a Ugandan student pursuing a Bachelor's of Laws (LLB). Her academic and career journey has been characterized by a strong passion for legislation drafting, human rights laws especially the reproductive rights of women and the field of International policy making.

The author has worked with Uganda Women's Network (UWONET) wherein she got a vivid insight into the challenges faced by women. She also worked with Platform for Labour Action and WOLO an NGO based in Eastern Uganda that advocates for the rights of women and children.

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These various experiences have offered her a unique perception on the sprouting needs of society and have pushed me to actively participate in community development predominantly in areas related to social justice and human rights.

AUTHOR'S DEDICATION

I, **ALIBA MARIA MIREMBE**, do hereby declare that this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Research Degree Programs and that it has not been submitted for any other academic award. Other works cited or referred to are accordingly acknowledged.

Signature.....Date:.....

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APPROVAL

This dissertation has been submitted for examination with my approval as University Supervisor.

SIGNED:.....DATE.....

DR. MULUMBA MOSES

DEDICATION

This research paper is dedicated to my family, parents Mr. & Mrs.Kalisengawa Fred, my brothers Alibawa Frank, Gerald, Saire Andrew and Joseph and my sister Aliba Lydia for the continuous love, encouragement kaput were all taught tall and provision. To my mentors Kwagala Dorothy, Phillip Karugaba, Gilbert Bwire, to my friends Abbo Linda Sharon, Kenneth Musasizi, Calvin Kahiigi, Tyler Wamala, Magero Joshua, Byaruhanga Francis, Dean Natukunda, Ampaire Blair Prince, Katana Lynn, Ainembabazi Lynnette, Natukwasa Patricia, Patience Kwagala, Peace Namono, Drake Onen, Polite Innocent, Brian Kamusiime, Grace Butagabo, Aronda Regan el at for the love, encouragement and over time shoulder to lean. To my dearest niece Victorious Natalie for the bundle of humor and continuous relief of stress.

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CHAPTER 1: BACKGROUND AND INTRODUCTION

1.0 Introduction

A number of African families depend on children for social status. As a result of the prominence of child bearing, failure to have children is seen as an outrageous disgrace and it is often the women in comparison to the men who suffer with the societal consequences of childlessness according to Zahara Nampewo, a lecturer at Makerere University¹. Some of the societal consequences include intimate partner violence, lack of social support and mental illness. Zahara Nampewo expounds that African women are raised in the belief that procreation is their primary goal in life.² Failure to reproduce, in most cases makes many women lose their identity. The position in Uganda is not different from the extensive image of Africa.³

Assisted Reproductive Technology (ART), an invention of science and technology has gained popularity as a method of assisting couples who are infertile to bear a blessing of a child according to Zahara Nampewo.⁴ Much as ART is over 130 years old, it gained popularity after the successful birth of the World's first IVF baby **Louise Brown** in 1978 from the United Kingdom according to **Kayode O Fayokun**⁵. On the other hand, the first IVF baby in Uganda was born in 2005. **Dr. Edward Tamale Sali** of Women's Hospital International and Fertility Centre in Kampala and his team of embryologists facilitated this notable and historic event. Important to note is that the later clinic started the program of IVF in 2004⁶.

Surprisingly a 70-year-old Ugandan woman **Safina Namukwaya** made headlines as one of the world's oldest mothers and Africa's oldest mother after she gave birth to twins through IVF in

¹ Zahara Nampewo, Assisted Reproductive Technologies in Uganda <https://www.taylorfrancis.com/chapters/edit/10.4324/9780429297021-9/assisted-reproductive-technologies-uganda-zahara-nampewo?context=ubx> accessed on 29th May, 2024.

² Ibid

³ Ibid

⁴ Ibid

⁵ Kayode O Fayokun, 3 November, 2010 [file:///C:/Users/LENOVO/Downloads/ajol-file-journals_445_articles_67764_submission_proof_67764-5281-139404-1-10-20110711%20\(9\).pdf](file:///C:/Users/LENOVO/Downloads/ajol-file-journals_445_articles_67764_submission_proof_67764-5281-139404-1-10-20110711%20(9).pdf) accessed on 31 May, 2024.

⁶ Four years of IVF/ ICSI experience in Kampala (Uganda) June, 2008 https://www.researchgate.net/publication/5393456_Four_years_of_IVFICSI_experience_in_Kampala_Uganda accessed on 30 May, 2024.

December, 2023 according to Euronews.⁷ Safina became pregnant using a donor egg and the sperm of her husband and gave birth to babies prematurely at 31 weeks, weighing more than 1.3 kg each. These notable, outstanding and incredible milestones exhibit the progress and impact of Assisted Reproductive Technology in Uganda.

Assisted Reproductive Technology allows scientists to manipulate the fertilization process in order to bypass some pathological obstacles such as blocked fallopian tubes and non-functioning ovaries in the females and blocked vas deferens and low sperm count in the males. Examples of ART include cryopreservation, IVF, Intracytoplasmic Sperm injection (ICSI), Intrauterine insemination (IUI), Intrafallopian transfer, Frozen embryo transfer, and surrogacy among others.

In the recent years, there has been an increase in the number of people opting for Assisted Reproductive Technology. This is necessitated by the rising cases of primary and secondary infertility and other health obstacles among different persons in quest to have children. As a result, medical clinics and health centers have emerged to cure infertility and also fulfill the desires of persons who opt for ART. IVF is by far the most common ART procedure performed in Ugandan Fertility clinics. As relatively new development in Uganda, it has generated pervasive controversy along religious, cultural, moral and ethical ways. There is too much rigidity to embrace Assisted Reproductive Technology. On addition to that, ART is antagonized by exorbitant high costs of treatment and inadequate number of trained physicians. The absence of public hospitals with assisted reproductive technology facilities has greatly hindered the development of ART in Uganda. This explains why ART is mainly accessed through private facilities because Mulago Specialized Women and Neonatal Hospital is the only public hospital that has ART facilities.

In a quest to have children, people are so vulnerable and can easily be. This is because ART is largely unregulated in Uganda and as a result doctors amicably run it based on contract.

This chapter examines the existing law in Uganda surrounding Assisted Reproductive Technology, an area of medicine and discovers that there is a gap in relation to the regulation of

⁷ 70-year-old Ugandan woman becomes Africa's oldest mother after giving birth to IVF twins, 6 December [https://www.euronews.com/health/2023/12/01/70-year-old-ugandan-woman-becomes-africas-oldest-mother-after-giving-birth-to-ivf-twins#:~:text=A%20Ugandan%20woman%20has%20given,in%20vitro%20fertilisation%20\(IVF\)](https://www.euronews.com/health/2023/12/01/70-year-old-ugandan-woman-becomes-africas-oldest-mother-after-giving-birth-to-ivf-twins#:~:text=A%20Ugandan%20woman%20has%20given,in%20vitro%20fertilisation%20(IVF)) accessed on 30 May,2024.

ART. In a bid to bridge the gap of lack of a legal framework on ART, **Hon. Sarah Opendi** on Tuesday, 5th March, 2024 tabled **The Human Assisted Reproductive Technology Bill, 2023** with the aim of regulating the use of human assisted reproductive technology. Hon. Sarah Opendi pointed out that a number of Countries do not have legislation on ART and therefore Uganda will be one of the Countries where they will benchmark if the Bill is passed. However, the Bill raises

Given its nature, and the impact that it has on Sexual and Reproductive Health Rights (SRHR), a critical component of human rights. The Bill should focus on protecting and promoting SRHR. However, due to the indivisibility and inter-dependence of human rights, several human rights ranging from equality and non-discrimination to women's rights, the right to life, dignity among others are implicated as well. As the United Nations Development Program has observed, human rights are central to human development – they exist to ensure that humanity and injustice are prevented or redressed. As such, this study will analyze the bill, and how it incorporates the human-rights based approach, if at all.

1.1 Background

Human Assisted Reproductive Technology is not new in the field of medicine but it has recently gained popularity in Uganda as a number of persons are opting for it. This is due to the rise in secondary and primary infertility. **A report by BBC in 2020⁸** revealed that 10 -15% of couples in Uganda suffer from infertility.

The state under has an obligation to uphold the rights of women through provision of facilities that enhance the welfare of women to enable them realize their full potential and also to protect women and their rights taking into account their natural maternal functions in society according to **Article 33 of the Constitution⁹**. Human Assisted Reproductive Technology enables the state to enrich this right.

⁸The SheWord, Why haven't most African Countries created policies around egg donation? (13th June, 2022) [https://www.bbc.co.uk/programmes/p0cdkqvz\(video\)](https://www.bbc.co.uk/programmes/p0cdkqvz(video)) accessed 29th March, 2024.

⁹ The Constitution of the Republic of Uganda 1995(as amended)

The Human Assisted Reproductive Technology Bill, 2023 was tabled in parliament by Hon. Sarah Opendi on 5th March with the spirit to regulate the use of Human ART; to designate the Medical and Dental Practitioners Council as the body responsible for the administration of the Act; to provide for designation of health units as fertility centres; to provide for establishment of sperm, oocyte and embryo banks within fertility centres; to regulate the donation and storage of gametes and embryos; to provide for the rights and duties of persons involved in human assisted reproductive technology; to provide for a register for information collected on human assisted reproductive technology under this Act; and related matters.

In the course of this study, various articles and regulations both within the Ugandan jurisdiction and other jurisdictions are to be relied on but the Human Assisted Reproductive Bill, 2023 will serve an important anchor on which this research is to be built on. This is because once it is passed by parliament, it will be the law regulating the practice of ART in Uganda.

1.2 Statement of the problem

Assisted Reproductive Technology a new invention in Uganda that provides solution to persons with infertility has been largely unregulated despite an increase in the number of people that opt for IVF. The Human Assisted Reproductive Bill, 2023 was tabled on Tuesday 5th March, 2024 with the objective to regulate the use of Assisted Reproductive Technology.

At the core of the Sexual and Reproductive Health Rights movement is the principle of bodily integrity. The idea that a woman, whether capable of fostering a natural birth or not, should be able to obtain assisted reproduction, should be the main focus of the Bill. However, the Bill unjustifiably discriminates against women in general, projecting its focus on the women that are incapable of administering natural birth. In this regard, the Bill not only undermines the principle of equality and non-discrimination but also throws women's rights down the drain. As Maria Nassali (2022) observes in *A Walk Through the CEHURD Garden*, the struggle for human rights manifests itself both at the wider structural context within which individuals are located as well as an internal battle of individual values. Indeed, as Moses Mulumba (2022) denotes, individuals have complex and multi-identities. Therefore, all women, whether capable of fostering natural births or not, should be able to obtain assisted reproduction.

To make matters worse, the Bill undermines the physical integrity of women and negates their human security. It seems to suggest when and how women should foster births. The Bill, as it is, is only a manifestation of the State's constant need and desire to control women's fertility. It is important to make mention of Article 14(a) of the Maputo Protocol which obliges states to respect and promote the right of women to control their fertility. Retrogressively, as Maria Nassali (2022) observes, Uganda has made reservations regarding the aforesaid provision. And the State continues to reinforce such ideologies by enacting laws that undermine women's bodily integrity, a case in point being the HART Bill. Additionally, there is limited awareness and material in the public that address Assisted Reproductive Technology. All in all, the Human Assisted Reproductive Technology Bill does not completely align with the human rights. and it lacks clarity on addressing the moral and ethical criticisms faced by ART.

This research aims to enrich existing knowledge base in this area and to critically analyze key provisions of the Human Assisted Reproductive Technology Bill 2023 evaluating its impact on the human rights of stake holders and identifying strengths and weaknesses of the Bill in relation to human rights. This research will additionally propose recommendations that can be adopted for effective regulation of Assisted Reproductive Technology in Uganda.

1.3 Objectives of Study

1.3.1 General Objective

To critically analyze the Human Assisted Reproductive Bill,2023 from a human rights

1.3.2 Specific objectives

To undertake a human rights impact assessment of the HART Bill, 2023.

To evaluate the societal reactions of ART not addressed by the HART Bill, 2023.

To propose recommendations aimed at addressing the gaps in the HART bill, 2023.

1.4 Research Questions

Does the HART bill, 2023 address the human rights of individuals?

What are the moral and ethical aspects of ART that are not addressed by the HART Bill, 2023?

What recommendations can be implemented to address the gaps in the HART bill, 2023?

1.5 Conceptual framework

The researcher uses a feminist conceptualization of SRHR which encompasses of three areas; health, sexuality and the extent to which one can exercise choice on all matters of sexual and reproductive life and well-being.¹⁰

1.6 Justification of the Study

This research is necessary for evaluating the HART Bill, 2023 whether it adheres to the human rights. This research is also important because it points out the moral and ethical challenges faced by ART that are not addressed in the bill. The research suggests recommendations that will bridge the gaps in the Human Assisted Reproductive Technology Bill, 2023.

1.7 Significance of the Study

Human Assisted Reproductive Technology Bill, 2023 was tabled in Parliament for its first reading on Tuesday 5th March, 2024 however the public has little knowledge about ART and the Bill does not conform to all the human rights of individuals.

This research will provide recommendations that policy makers can adopt to come up with the HART Act that encompasses with the human rights of individuals. This research will also contribute to the academic arena and serve as a reference for future research work. Further, the research will create awareness about ART and the importance for its regulation in Uganda. This research will also help in debunking myths and misconceptions surrounding ART.

1.8.0 Scope of study

1.8.1 Subject/thematic scope

This study will focus on examining the Human Assisted Reproductive Technology Bill, 2023 and the pre-existing legislation regarding Assisted Reproductive Technology in other jurisdictions.

1.8.2 Temporal (time based) scope

This study will take place over a period of two months from 26th March 2024 to May 2024. The literature that is to be relied on in this study will date back to the early 2000s to understand the

¹⁰ (Mukasa, 2009 p.112, quoting McFadden, 2003, p.8)

backdrop as to how Assisted Reproductive Technology, a remedy to infertility has existed over the years unregulated in a number of Countries.

1.8.3 Geographical scope

This research shall be carried out in the Capital City of Uganda, Kampala.

1.9.0 Literature review

1.9.1 Introduction

Significant studies have been conducted by various scholars, researchers and activists on the significance of Assisted Reproductive Technology, and specifically on its intersection with human rights. There is also a growing body of literature on how different laws have impacted the SRHR movement. However, with specific reference to the HART Bill, there is little to no literature on the analysis of its shortcomings in line with fundamental human rights and freedoms. The research literature about ART in Uganda is limited because the field has not yet been fully explored therefore the researcher will also consider literature from other Countries. As such, this segment will encompass ; the effect of HART bill, 2023 on the human rights, societal reactions on ART.

In “Human Rights and Assisted Reproductive Technologies (ART): A Contractarian Approach, Marcelo de Araujo (2020), focuses on the human right to found a family and have children and also shows how the contractarian approach to human rights can explain the current relevance of reproductive rights in the human rights discourse, and how the emergence of ART has contributed to this shift. According to him, the contractarian approach of human rights looks at firstly, which basic needs and desires can be ascribed to any human being regardless of gender, nationality, sexual orientation and age among others. Secondly, which human rights do state representatives and individuals consider so important that they would agree to create institutional frameworks, both at the domestic and international level. To him, human rights exist and can only be claimed through these frameworks.

The author considers the human right to found a family and have children, and points out that it did not exist for instance in the 1789 Declaration of the Rights of Man and of the Citizen. But now, the right is enshrined in several human rights instruments such as Article 16 of the

Universal Declaration of Human Rights (UDHR), 1948; Article 23 of the International Covenant on Civil and Political Rights (ICCPR), 1966; Article 12 of the European Convention of Human Rights, 1953 among others.

1.9.2 Effect of HART bill, 2023 on the Human rights

Elizabeth Kamurungi & Arthur Arnold Wadero¹¹ journalists with Nation Media Group expound on **Clause 21 of the Bill** which provides that only individuals with proven health complications that impede natural ability to reproduce will be eligible to contract the services of a surrogate, locking out those who may have opted for a free will.

This clause is unjustifiably discriminative against the reproductive rights of women in general and contradicts with **Article 21 of the Constitution**¹² which provides for equality of all persons before and under the law. Further women should be given a right to control their fertility as stated in Article 14 of the Maputo Protocol.

Angualia Daniel and Resty Nalwanga of Angualia Busiku & Co. Advocates notes that **Clause 1** of the Bill which provides that the Act applies to a man and woman who jointly seek to use ART is potentially be construed as limiting the application of reproductive technology services to only cases where both a man and woman are involved.¹³ This is violate the right to reproductive autonomy as the individuals or single persons are restricted from obtaining ART services.

Elizabeth Kamurungi & Arthur Arnold Wadero highlight that the Bill also bars contracting of persons under the age of 18 for egg donation and penalties are attracted to medical practitioners who contract with such persons under **Clause 17**.¹⁴

Restriction of children as egg donors is objective as it aims at ensuring the welfare of children inclusive of the right to education and health. A child is a person below the age of 18 years

¹¹ Elizabeth Kamurungi & Arthur Arnold Wadero, New law seeks to limit surrogacy to persons with health complications (Daily Monitor, 6th March 2024) <https://www.monitor.co.ug/uganda/news/national/new-law-seeks-to-limit-surrogacy-to-persons-with-health-complications-4546874> accessed 1st April, 2024

¹² Supra (n, 2)

¹³ Angualia Busiku & Co. Advocates

¹⁴ Supra (n,3) <https://www.lawyers-uganda.com/human-assisted-reproductive-technology/> accessed on 12 May, 2024.

according to **Article 257(1) c of the Constitution.**¹⁵ **Pumla Nabachwa**, a Ugandan Economist with Bank of Uganda and a regular donor enlightened that egg donation is an emotionally and physically draining practice as one is expected to be on injections for period of one month daily to stimulate the ovaries.¹⁶

Elizabeth Kamurungi & Arthur Arnold Wadero¹⁷ further point out **Clause 33 of the Bill** which seeks to protect confidentiality of users by introducing a fine of Twenty Million Shillings or five years' imprisonment or both for illegal disclosure of this information.

The principle of confidentiality is an embodiment of the right to privacy is reflected in **Article 27(2) of the Constitution.**¹⁸ Therefore inclusion of **Clause 33** which restricts disclosure of information without the consent of the person under ART upholds and validates the Constitutional right of privacy under **Article 27(2) of the Constitution.**¹⁹

1.9.3 Societal reactions of ART

At a time when the Assisted Reproductive Technology Bill was tabled in **Kenya** in 2023, there was widespread opposition that ART should not be legalized. **James Nyiha of Nyiha, Mukoma & Company Advocates**²⁰ expounds on some of the comments raised by citizens against legalization of ART. One of the comments was that Assisted Reproductive Technology reduces people to objects for use in both surrogacy and egg donation even if resorted to with the best of intentions and therefore it is unconstitutional. Further that it also reduces children to commodities and lastly that ART is detrimental to the family, which the state has a constitutional duty to protect.

Assisted Reproductive Technology is of benefit to the family and not a detriment. The plight of infertility causes a lot of family instability ranging from domestic violence, emotional and mental breakdown as a result of being insulted for lack of children. Therefore, once couples battling with infertility bear children through ART, it is a benefit to the family as happiness is

¹⁵ Supra (n,2)

¹⁶ Supra (n,1)

¹⁷ Supra (n,3)

¹⁸ Supra (n,2)

¹⁹ ibid

²⁰James Nyiha, Comments on Assisted Reproductive Technology Bill, 2023(19th May, 2023)

<https://nyihamukoma.com/2023/05/19/comments-on-the-assisted-reproductive-technology-bill-2023/> accessed 30th March, 2024..

experienced in the family. **Article 31 of the Constitution**²¹ provides that every person has a right to a family, this right includes a right to children. Therefore, the legalization of ART is an act that enables the state to fulfill the Constitutional right of citizens to have a family through assisting them to procreate through Assisted Reproductive Technology.

Furthermore, Assisted Reproductive Technology does not reduce people to objects and children to commodities. These are misconceptions about ART. The identity of a person does not perish or diminish because they have opted for Assisted Reproductive Technology. ART actually enhances the welfare of women to enable them realize their full potential and advancement taking into account their natural maternal functions as stipulated under **Article 33 of the Constitution**.²²

Article 21(1) of the Constitution²³ states that all persons are equal before and under the law in all spheres. This therefore implies that whether one opts for ART or not, or one is born as a result of ART or not, they all have equal rights and none of them should be lowered to the level of objects or commodities. Thus, the ideology of referring to persons who opt for ART as objects and those born out of ART as commodities is discriminatory in the light of **Article 21 (3) of the Constitution**.²⁴

Marcia Claire found that cultural norms surrounding fertility and procreation often collide with the use of ART, leading to skepticism and resistance among individuals. Furthermore, she revealed that beliefs in ancestral spirits and supernatural forces can impact the perception of ART as meddling with natural processes, thus hindering its acceptance²⁵. These findings underscore the need for a deeper understanding of how traditional beliefs intersect with modern medical practices in Ugandan society. By acknowledging and addressing these cultural factors, healthcare providers and policymakers can work towards improving the accessibility and uptake of ART services in the country.

1.9.5 Conclusion

²¹ Supra (n,2)

²² ibid

²³ ibid

²⁴ ibid

²⁵ Marcia Claire Inhorn, Frank van Balen "Infertility Around the Globe" University of California Press, 2002-05-30.

It is important to consider the human rights while implementing the law on ART. The moral and ethical beliefs surrounding ART should as well be considered providing means on how to break the bias about ART. This could be fostered by community sensitization programs.

1.10.0 Methodology

1.10.1 Introduction

This will show the framework within which the data was collected and analyzed to achieve the intended objectives highlighted for the study. This part will further show the area of study, research design and lastly the techniques used in data collection.

1.10.2 Area of Study

This research was carried out in Uganda. The researcher chose Uganda as the area of study because the Human Assisted Reproductive Technology Bill, 2023 was recently tabled in Uganda as a means to provide regulation of Assisted Reproductive Technology. The Bill was tabled because of the rise in the number of people that opt for ART. As an area of interest, the researcher intends to show through their research how it is profound to have a legal framework to regulate ART through providing a critical analysis of the Human Assisted Reproductive Technology Bill, 2023.

1.10.3 Research design

The researcher used the qualitative method in collecting and analyzing the data which included articles, statutes, internet, working papers, and guidance from other legal principles. The sources cited above are both from Uganda and other jurisdictions hence arriving at the overall depiction created by the study.

1.10.4 Data collection and analysis

The researcher obtained data through secondary data collection methods geared towards acquiring appropriate data relating to the area of study. The data was obtained journals, articles, reports and other materials that were pertinent to the study.

Using the qualitative analysis, content analysis techniques were used for describing the data. The data was obtained from existing documents which the researcher read and analyzed the content

therein. The findings from the research were then linked to the research objectives to generate meaning to the topic of the study.

The data assembled in this study was summarized as to establish the fundamental results.

1.11 Chapter synopsis

The study is structured into four systematic facets which are meant to guide the reader on how to comprehend the crux of this research chronologically.

Chapter one gives a brief introduction and background to the study, it describes the problem it anticipates to solve through the statement of the problem, predominately gives objectives of the study as well as zeros it down to specific objectives of this study. The chapter lists the research questions envisioned to be solved through the study. It also points out the justification and significance of the study. It further gives a synopsis as to the scope of the study categorically; the thematic, time and geographical lenses. Lastly, this chapter vividly highlights the literature to be reviewed and the conceptual framework used.

Chapter Two will define Human Assisted Reproductive Technology and give examples of ART practiced in Uganda. This chapter will highlight the objectives of Human Assisted Reproductive Technology Bill, 2023. Lastly, this chapter will undertake a critical analysis of human rights assessment of the HART Bill, 2023.

Chapter Three will focus on identifying the societal reactions of ART and gaps in the Human Assisted Reproductive Technology Bill, 2023.

Chapter Four will comprise of a summary of the findings in this research study, the conclusion or deductions arrived at and propose recommendations that are directed towards addressing lacunas identified along the full length of the study.

CHAPTER TWO: HUMAN RIGHTS ASSESSMENT OF THE HART BILL, 2023.

2.0 Introduction

This chapter will define Human Assisted Reproductive Technology and give examples of ART practiced in Uganda. This chapter will highlight the objectives of Human Assisted Reproductive Technology Bill, 2023. Lastly, this chapter will undertake a critical analysis of human rights assessment of the HART Bill, 2023.

2.1.0 Examples of Assisted Reproductive Technology

ART is practiced in both females and males. Among females.

2.1.1 In Vitro Fertilization (IVF)

This is the most common form of ART used worldwide and in Uganda as well. IVF is a procedure by which an egg is fertilized outside a woman's body and then inserted into the womb for gestation according to the **Black's Law Dictionary**.²⁶

2.1.2 Gamete intrafallopian transfer (GIFT).

This refers to a procedure where mature eggs are implanted in a woman's fallopian tubes and fertilized with the semen according to the **Black's Law Dictionary**.²⁷

2.1.3 Zygote intrafallopian transfer (ZIFT)

This is quite similar to IVF as fertilization takes place outside the body, the difference is that young embryo is placed in the fallopian tubes and not the uterus. It is also known as tubal embryo transfer.

2.1.4 Surrogacy

Much as surrogacy is not a form of ART, it is a modern means to assist women have children in circumstances of either primary or secondary infertility. Surrogacy means a practice where a

²⁶ Supra (n,22)

²⁷ ibid

woman carries and gives birth to a child for another person according to the **Clause 2 of the Human Assisted Reproductive Technology Bill.**²⁸

2.1.5 Intrauterine insemination (IUI)

This is known as the best treatment to male infertility. During IUI procedure, sperm is placed directly into the uterus using a small catheter so as to improve the chances of fertilization by increasing the number of healthy sperm that reach the fallopian tubes when the woman is most fertile according to **Johns Hopkins Fertility Centre.**²⁹

2.2 Objectives of the Human Assisted Reproductive Technology Bill, 2023.

2.2.1 To regulate the use of human assisted reproductive technology

This is the fundamental objective of the Bill and it ensures that ART practices are carried out in a manner that protects and fulfills the human rights of all persons involved including children born through ART. Through regulation of the ART, the Bill ensures that individuals can access safe and quality reproductive services thereby upholding the right to health. The right to health includes availability, accessibility, acceptability and quality of health services including reproductive health services according to Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2.2.1 From the above objective springs other objective such as to provide for designation of health units with ART services. This objective aims at creating more fertility centres with ART services. Mulago Specialized Maternal and Neonatal Hospital is the only public hospital in Uganda with ART services alongside a few private fertility centres, however these are located in Kampala. Therefore, creating more fertility centres in different districts will ease accessibility of ART services to those who opt for them hence enhancing their right to health.

2.2.3 To provide for establishment of sperm, oocyte and embryo banks within fertility centres.

This objective will ensure efficiency as it will create ready availability of materials for ART which are under safe custody and free from harm. The storage of sperms, oocytes and embryos

²⁸ Supra (n,21)

²⁹ Johns Hopkins Fertility Centre <https://www.hopkinsmedicine.org/gynecology-obstetrics/specialty-areas/fertility-center/infertility-services/intrauterine-insemination> accessed on 26th April, 2024.

with banks in fertility centres will ease accessibility of these materials without unnecessary delays which will improve on the ART services.

Further providing for access to stored sperm, oocyte and embryo implies that the Bill supports reproductive autonomy of the individuals since it allows them to make informed decisions about their futures. This aligns with the principles set out in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which emphasizes the importance of reproductive autonomy and the right to make decisions about one's own reproductive health.

2.2.4 To provide for a register for information collected on human assisted reproductive technology under the Act.

3 Keeping of records ensures accountability and transparency among the facility centres which carried out ART. This promotes the right to access to information as the records to be accessed are available. The registers should protect the privacy of persons involved in the ART process and align with the ICCPR which recognizes the right to privacy as a fundamental human right. Therefore, data protection safeguards should be implemented to ensure that sensitive information is secured and only accessible to authorized persons.

2.3.0 Critical analysis of provisions of the Human Assisted Reproductive Bill, 2023 in relation to human rights.

2.3.1 Clause 32 of the Human Assisted Reproductive Technology Bill prohibits advertising of any information on the media or other means about surrogacy.³⁰ This contradicts with the constitutional right of freedom of expression. A number of International and Regional Conventions to which Uganda is a signatory provide for freedom of Expression. In the case of **Charles Onyango Obbo and Andrew Mwenda v AG**³¹ freedom of expression was defined as a right to express one's opinion by words of mouth or through writing. Article 19 of the ICCPR, Article 19 of the UDHR and Article 9 of the ACHR provide for the right of freedom of expression. Enthused by the International and Regional human rights conventions and the history of human rights violations in Uganda especially in 1970's under the regime of Idi Amin, Uganda

³⁰ ibid

³¹ Charles Onyango Obbo and Andrew Mwenda v AG (Constitutional Petition No. 15 of 1997)

enacted laws exhibiting this right. **Article 29 (1) of the Constitution**³² provides that every person has a right to freedom of speech which shall include freedom of the press and other media. However, this right is violated under **Clause 32 of the Human Assisted Reproductive Technology Bill**³³ which prohibits advertisement of surrogacy. Due to the fact that a number of people in Uganda are not so much familiar with ART and surrogacy services it is important that these arrangements are advertised so as to create awareness among those in need of them.

2.3.2 Part 11 of the Human Assisted Reproductive Bill³⁴ provides for regulation and administration of health centres offering Assisted Reproductive Technology services which include; designation and publishing a list of health centres in the Gazette or a newspaper of nationwide circulation under Clause 6 and annual accreditation of facilities by the Minister of health, on recommendation of the Medical and Dental Practitioners Council as stipulated under **Clause 8** of the Human Assisted Reproductive Bill.³⁵ This therefore implies that all the designated health centres offering ART services will be known to citizens since they will be published in various newspapers. Further **Clause 29** of the Human Assisted Reproductive Technology Bill³⁶ provides for access of information by any person above the age of eighteen years upon payment of a prescribed fee. Much as the above clauses conform to the right of access to information which is stipulated under **Article 41 of the Constitution**³⁷ and **Section 5(1) of the Access to Information Act**,³⁸ the practice of charging a fee upon a person who intends to access information as stated in Clause 29(1) will prevent a number of citizens from accessing the required information hence limiting this right.

2.3.3 Clause 16 of the Human Assisted Reproductive Technology Bill³⁹ provides for a set of information which a registered medical practitioner will obtain from a person intending to donate a gamete or embryo which include age, name, ethnic origin, nationality, family health history, medical history, physical traits and professional qualifications and skills. This is an eminent provision as it creates room for proper tracing of the roots of a child born through a donor egg or

³² Supra (n,2)

³³ Supra (n,21)

³⁴ ibid

³⁵ ibid

³⁶ ibid

³⁷ Supra (n,2)

³⁸ Access to Information Act, No. 6 of 2005

³⁹ Supra (n,21)

embryo, therefore in future the parents of such a child will be able to tell why the child behaves in a specific manner. **Clause 14** of the Human ART Bill provides that a registered centre shall maintain a register of all information collected by the fertility centre. Further **Clause 33** of the Human Assisted Reproductive Bill⁴⁰ restricts disclosure of information except in accordance the provisions enshrined in the Bill. This is vital and important in a democratic Country. The right to privacy is provided for under **Article 27 of the Constitution**.⁴¹ In furtherance of this Article parliament enacted the Data Protection and Privacy Act. Important to note is that the collection of data under the Human Assisted Reproductive Technology Bill⁴² should be in accordance with **Section 7 of the Data Protection and Privacy Act**⁴³ which provides for consent of the data subject before collection of data. However much as the right to privacy is greatly uphold in the Bill the question that is left unanswered in the bill is “how long the information or data collected is to be stored?” It is important to ascertain this question because **Section 18 of the Data Protection and Privacy Act**,⁴⁴ prohibits retention of personal data for a period longer than is necessary to achieve the purpose for which the data is collected.

2.3.4 Clause 21 of the Human Assisted Reproductive Technology Bill⁴⁵ provides that a registered medical practitioner will arrange for surrogacy where it is proven that the intending parent suffers from primary or secondary infertility or suffers health challenges which affect the intending parent’s ability to reproduce. This provision excludes parents that are fertile and have ability reproduce from accessing surrogacy arrangement and limits it only those parents that are suffering from primary or secondary infertility. In reference to **Clause 15 of the Assisted Reproductive Technology Bill of Kenya**,⁴⁶ a person is allowed to undertake assisted reproductive technology services for procreation. Comparing the two clauses, the researcher finds the Clause in the Kenyan Bill, broad and in line the principle of equality as it accommodates all women to access assisted reproductive technology services. It is important to note that much as Clause 21 is in conformity with the common law doctrine of equity, it does not

⁴⁰ *ibid*

⁴¹ *Supra* (n,2)

⁴² *Supra* (n,21)

⁴³ Data Protection and Privacy Act, No. 9 of 2019

⁴⁴ *ibid*

⁴⁵ *Supra* (n,21)

⁴⁶ The Assisted Reproductive Technology Bill, 2022

portray the human right principle of equality of all persons before and under the law in all spheres which is enshrined under **Article 21(1) of the Constitution**.⁴⁷

2.3.5 Clause 17 of the Human Assisted Reproductive Bill⁴⁸ restricts registered practitioner from harvesting a gamete from a person below the age of eighteen years. Further also **Clause 22** provides for only contracting of persons above the age of eighteen years as surrogates. The provision further stipulates penalties to person that harvesting a gamete from a person below the age of eighteen years is an offence attracting a fine not exceeding ten thousand currency points or imprisonment exceeding ten years or both. On the other hand, contracting with persons under the age of years as a surrogate is an offence attracting a fine not exceeding five thousand currency points or imprisonment not exceeding five years or both. At profundity, the researcher finds that the two clauses above were enacted in the best interests of children and their rights. **Article 34 of the Constitution**⁴⁹ provides for the rights of children which include right to education, health care among others. However, the aforementioned age limit is insufficient. It is not merely enough to be a consenting adult (18 Years old), but, as provided for under the South African National Health Act, it is prudent for a surrogate to be at least 21 years of age, or better, someone who has given birth before. The rationale for this is that the best interest principle, as enshrined under Article 34 of the Constitution and Section 3 of the Children Act, provides inter alia that all matters relating to children must be done in their best interest, or welfare. Accordingly, it is my argument that it would be in the child's best interest for the surrogate mother to be at least 21 years, and have given birth before.

2.3.6 Clause 13 of the Human Assisted Reproductive Bill⁵⁰ mandates a medical practitioner before providing human assisted technology services to carry out a medical examination on a person who intends to donate a gamete and where it is established by the medical examination that the person has a genetic disease, the registered medical practitioner shall not harvest a sperm or oocyte from the person. This provision is important and an extension to the rights of children aimed at protection of the health of the inborn from Mother to Child Transmission diseases.

⁴⁷ Supra (n,2)

⁴⁸ Supra (n,21)

⁴⁹ Supra (n,2)

⁵⁰ Supra (n,21)

2.3.7 The bill bars medical practitioner from using their own gamete or embryo or other than the one selected by the person under **Clause 30** of the Human Assisted Reproductive Bill.⁵¹ This provision further stipulates a penalty of imprisonment for life. This instills a virtue among the medical practitioners to follow their clients' instructions. Furthermore, a registered medical practitioner is prohibited from implanting a human admixed embryo or any other embryo that is not a human embryo into a woman's uterus under **Clause 31** of the Human Assisted Reproductive Technology Bill⁵². The bill further defines human admixed embryo to mean an embryo created by replacing the nucleus of an animal egg or an animal cell, or two animal pronuclei, with two human pronuclei or one nucleus of a human gamete or of any other human cell or one human gamete or other human cell. **Article 33(3) of the Constitution**,⁵³ provides that the state shall protect women and their rights, taking into account their unique and natural maternal functions in society. Thus the Clause 31 included in the Bill makes it one of the ways the state can achieve its mandate under **Article 33 of the Constitution**.⁵⁴

2.3.8 Further the Bill under **Clause 35** of the Human Assisted Reproductive Technology Bill⁵⁵ provides for Transitional provisions wherein the health facilities that were previously carrying out ART services will be given two years to comply with the requirements enshrined in the proposed bill. This therefore entails that both the previously and new health facilities to be designated by the Minister of Health should all comply with the requirements formulated in the Human Assisted Reproductive Technology Bill⁵⁶. This as well is aimed at ensuring that women and other persons who intend to get the assisted reproductive technology services are provided with good ART facilities which as well is a way of upholding the rights of women stipulated under **Article 33(2) of the Constitution**.⁵⁷

2.5 Conclusion

Conclusively, this chapter brings clarity, as to the rationale of the clauses enshrined in the Human Assisted Reproductive Bill, 2023 taking into consideration whether they adhere to the

⁵¹ *ibid*

⁵² *Supra* (n,21)

⁵³ *Supra* (n,2)

⁵⁴ *ibid*

⁵⁵ *Supra* (n,21)

⁵⁶ *ibid*

⁵⁷ *Supra* (n,2)

human rights enshrined under **Chapter 4 of the Constitution**.⁵⁸ Lastly, this chapter lays down a legal framework to which the subsequent chapters draw relevance and applicability.

CHAPTER THREE: GAPS IN THE HART BILL AND MORAL AND ETHICAL CHALLENGES FACED BY ART.

3.0 Introduction

This chapter will address the moral and ethical challenges faced by ART. This chapter will also identify the gaps in the Human Assisted Reproductive Technology Bill, 2023.

3.1.0 Gaps existing in the Human Assisted Reproductive Technology Bill, 2023

ART has existed in Uganda from around early 2000 till date unregulated. Due to the rise in the number of people opting for ART, on 5th March, 2024 Hon. Sarah Opendi introduced the Human Assisted Reproductive Bill, 2023 with the objective of regulating the use of human assisted reproductive technology. However, the bill does not satisfactorily cover all issues relating to assisted reproductive technology.

3.1.1 Costs and affordability

Much as the bill intends to lower the costs of ART services in Uganda, it does not expressly delve into comprehensive techniques for attaining this goal. Thus, the high exorbitant costs associated with ART services will still surface as a great barrier for many individuals seeking fertility treatments despite the enactment of the law on regulation of ART.

3.1.2 International Collaboration

The bill does not explicitly address international collaboration, harmonization of standards, or cross-border reproductive care. Cooperation with other countries could facilitate knowledge exchange and best practices. Further International collaboration will boost tax revenue in Uganda. **Dr. Edward Tamale Sali** of Women's Hospital International⁵⁹, points out that the fertility centre is faced with a lot of patients from neighboring Countries such as Kenya, Tanzania, Rwanda, Congo, Sudan, Somalia and Ethiopia. This vividly depicts how it is important

⁵⁸ ibid

⁵⁹ Edward Tamale Sali, Four years of IVF/ICSI experience in Kampala (Uganda)
<https://academic.oup.com/eshremonographs/article/2008/1/90/620313> accessed on 30th/April/2024.

to include a clause on international collaboration in the laws regulating assisted reproductive technology.

3.1.3 Public health facilities

It should be pointed out that currently there is one public health facility in Uganda that offers ART services despite increasing number of persons that opt for ART services. The state has an obligation to provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement according to **Article 33(2) of the Constitution**.⁶⁰ Thus the failure of the Human Assisted Reproductive Technology Bill to provide a clause that establishes ART facilities for women is a gap in the bill. It would have been more resourceful if the bill was providing for establishment of a public health facility in each district. The establishment of ART services in each district will reduce on the long distances people face to get treatment for ART.

3.1.4 Advertising and marketing

The bill prohibits advertising and marketing practices related to ART services. **Article 29(1) of the Constitution**⁶¹ provides that every person shall have a right to freedom of speech and expression which shall include freedom of the press and other media. Therefore, the aspect of prohibiting and marketing of ART and surrogacy services is in contradiction with **Article 29(1) of the Constitution**⁶². It is also imperative to note that since a number of people are not aware about ART services, it is better if ART services are advertised in a bid to sensitize and create awareness among people about ART services.

3.1.5 Dispute resolution mechanisms

Much as **Clause 23(1) of the Human Assisted Reproductive Technology Bill**⁶³ provides that an intending parent who wishes to get a child through surrogacy, shall enter into a surrogacy agreement with a surrogate mother, there is a loophole in this clause as it does not provide for enforcement of the surrogacy agreement in circumstances of breach of the agreement by one of the parties. The bill does not provide mechanisms for resolving disputes that arise out of the

⁶⁰ Supra (n,2)

⁶¹ ibid

⁶² ibid

⁶³ Supra (n,21)

ART process. Establishing procedures for handling disagreement and controversies that arise out of breach of a contract is essential for determination for a valid law.

3.1.6 Pricing of drugs

One of the challenges fertility centres face is high prices imposed on drugs and this issue is not addressed by the bill. **Dr. Lalobo of Paragon Fertility Centre**⁶⁴ expounds that drugs used in ART are not on the list of the National Drug Authority making them not readily available on the local market hence each fertility centre imports its own drugs.

3.2.0 Moral and ethical challenges faced by ART (Non-legal aspects of ART)

3.2.1 Emotional distress

ART involves uncertainties in a way that much as it brings hope to couples longing to have a child, it also arouses anxiety among the couples. Emotional distress in ART is also evidenced through treatment. It is important to note that the treatment of by fertility centres is so stressful, some women are expected to be on treatment of injections for over a month. **Priya** in her article, **The Dark Side of IVF**⁶⁵ notes that the practice of egg retrieval in IVF is painful and one is expected to experience a vaginal bleeding and mild to severe pain for 24-72 hours after the procedure. Further the aspect of continuous failures for a successful IVF makes a number of couples distressed.

3.2.2 Bonding

Much as the ART causes emotional distress, it is also often a ground for bonding between the partners. In most circumstances, the journey of IVF faces a lot of resistance from the male partner at the beginning of the process however as time evolves, the partners bond more during the journey of IVF so as to achieve their aim.

3.2.3 Costs

⁶⁴ lubegah@ug.nationmedia.com <https://www.monitor.co.ug/uganda/special-reports/-i-was-told-not-to-wear-underwear-to-bear-children--1726000> accessed on 30th /April/2024

⁶⁵ Priya, The Darks side of IVF <https://awakenlife.ca/dark-side-of-ivf-understanding-ivf-risks/> accessed on 30th /April/2024.

ART is costly and as such a number of citizens cannot afford it hence, most people tend to refer to it as a practice for the rich. Dr. Lalobo of Paragon Fertility Centre states that a successful IVF comes a total cost of \$ 9000, with inclusion of medical bills⁶⁶.

3.2.4 Cultural and religious beliefs

ART faces a lot of criticisms from arising from cultural and religious beliefs. A number of religious beliefs do not affirm to the practice of ART. ART is viewed as man trying to play God thus Christians who undergo ART practice are often viewed as those impatient with God according to **Kayode O Fayokun**⁶⁷. On the other hand, a number of cultural beliefs do not conform to the practice of ART.

3.2.5 Health risks

Although ART makes it possible for infertile couples to bear children, the practice is associated with health risks to individuals undergoing treatment and the off springs. Priya notes⁶⁸ that the practice of egg retrieval may cause pelvic bleeding, pelvic infection and ovarian abscesses that require surgical correction. Further Priya states that IVF involves risks such multiple gestations, ovarian hyper stimulation and ectopic pregnancies. Further ART increases the risk of birth defects in babies. In a research by Mayo Clinic, it was observed that ART such as IVF are linked with a slightly higher risk of a baby being born with heart issues, digestive problems or other conditions⁶⁹.

3.2.6 Designer babies

ART techniques such as preimplantation genetic diagnosis (PGD) can be used to select specific traits and characters of the embryo thus it has been argued that this could lead to designer babies.

3.3 Conclusion

⁶⁶ Supra (n,62)

⁶⁷ Kayode O Fayokun, 3 November, 2010 [file:///C:/Users/LENOVO/Downloads/ajol-file-journals_445_articles_67764_submission_proof_67764-5281-139404-1-10-20110711%20\(9\).pdf](file:///C:/Users/LENOVO/Downloads/ajol-file-journals_445_articles_67764_submission_proof_67764-5281-139404-1-10-20110711%20(9).pdf) accessed on 31 May, 2024.

⁶⁸ ibid

⁶⁹ Mayo Clinic, In Vitro Fertilization (IVF) <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716#:~:text=This%20is%20the%20procedure%20to,keep%20you%20from%20feeling%20pain>. accessed on 12th May, 2024.

This Chapter has handled issues to do with the gaps in the Human Assisted Reproductive Technology Bill,⁷⁰ the risks that arise from the use of assisted reproductive technology techniques and lastly this chapter has made an evaluation of the non-legal aspects associated with the use of ART.

CHAPTER FOUR: SUMMARY, CONCLUSION AND RECOMMENDATIONS

4.0 Introduction

This chapter will comprise of a summary of the findings in this research study, the conclusion or deductions arrived at and propose recommendations that are directed towards addressing lacunas identified along the full length of the study.

4.1 Summary of findings

The desktop research study conducted led for a period of about two months led to the summary of findings below.

Much as the Human Assisted Reproductive Technology Bill was introduced to regulate the practice of ART, it does not address all issues relating to this practice. There are a couple gaps in the bill that need to be addressed before it is assented to such as issues relating to costs of ART, dispute resolution in cases of breach of the surrogacy agreements among others as discussed in the research paper.

From the analysis of the objectives of the Human Assisted Reproductive Technology Bill,⁷¹ it is worth noting that the establishment of a regulation for the use of assisted reproductive technology is imperative. However, it is also important to ascertain if the regulation implemented is in compliance to the human rights.

There is need to create awareness among the public how assisted reproductive technology can help infertile persons to procreate. This is so because from the literature review, it is evident that ART still faces lot of criticisms arising from religious, cultural, moral and ethical ways, thus there is need to break those criticisms.

⁷⁰ Supra (n,21)

⁷¹ibid

There is an increase in the number of people opting for ART. This is so because there is a rise in the number of people battling with infertility. Important to note is that IVF is the most commonly used ART technique.

One of the issues that makes ART expensive is the fact that drugs used in ART are not on the list of the National Drug Authority making them not readily available on the local market hence each fertility centre is required to import its own drugs.

ART is treatment of infertility is filled with uncertainties which leads to severe emotional distress among the couple. However, emotional distress could also arise due to the painful treatment practice of egg retrieval in IVF is very painful and may lead to pelvic bleeding, pelvic infections and ovarian abscesses.

Mulago National Referral Hospital is the only public hospital in Uganda with ART treatment amidst the increase in the number of persons opting for assisted reproductive technology.

4.2 Recommendations

Government should organize and fund seminars in different parts of the Country creating awareness about infertility, its causes and ways to prevent it. The seminars should create awareness and advocate for assisted reproductive technology services.

Government should draft cost scales for the different assisted reproductive technology services. It is important to note that infertility makes a number of couples to be desperate and as such at times they are prone to do anything thus in order to avoid exploitation of patients by the medical practitioner,

Government should adjust the **National Social Security Fund Act**,⁷² so as to provide for midterm access to benefits for people in need of assisted reproductive technology services. This should be done so as to assist citizen with infertility issues to be able to access the expensive assisted reproductive services.

In a bid to protect children, surrogacy arrangements should be carried out by a surrogate who at least has ever given birth. This is so because one that has ever given birth has experience in child care and can teach the intending parent on how to take care of the child. Clause 27(1) of the

⁷² National Social Security Fund, Cap 222

Assisted Reproductive Technology Bill of Kenya⁷³ provides that a surrogate should be a person of twenty-five years and has given birth before. Therefore, I recommend that this clause should as well be incorporated into Uganda.

Government should also create more ART facilities in all public hospitals across the Country to ease accessibility to the assisted reproductive technology services by the couples that need them.

Government should extend efforts to include drugs used in assisted reproductive technology on the list of the National Drug Authority. This will make these drugs to be readily available on the local market hence each fertility centre will not be required to import its own drugs. Thus, this will reduce on the price of ART in Ugandan fertility centres.

4.3 Conclusion

This research will contribute to the pool of knowledge in regard to regulation of assisted reproductive technology and suggest measures to address the lacunas in the Human Assisted Reproductive Technology Bill.⁷⁴ Finally, this research will create awareness about ART.

⁷³ Supra(n,45)

⁷⁴ ibid

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