

# **Human Embryonic Stem Cell Research and Its Legal Status**

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These efforts, I hope, are not in vain.

## Declaration

I, JEFFREY KIRIRA MUCUHA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma.

Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

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

Signed: .....

Professor Patricia Kameri-Mbote

## **Abstract**

While it has become the object of humanity to achieve the greatest good for the greatest number, it is of central importance that this goal does not coincide with the violation of the very right that makes us human, the very right that ensures equality among all born within the species, and the very right that gives meaning to mutual and beneficial co-existence.

This research paper deals with human embryonic stem cell research – a procedure that, in its roots, contains the element of destruction of a human embryo. The respect of the right to life is such that, as Kenyan law provides, life begins at conception. This is the single most significant occasion in a living being's actuality. When this is taken away in the name of research or whatever it may be, the innate right to living is obliterated. And who knows what next.

As it is a new field in the area of medicine and law, this research has been conducted using secondary sources. Accredited articles, journals, books and presentations have been used to bring out the issue of human embryonic stem cell research.

This paper has brought to light the fact that both Kenyan municipal law and international law are very clear on the right to life, its essence and protection. I have found, within this research, that not only is the violation of the right to life unfair upon the unknowing being, but it is a burden, torture and a silent source of anguish and depression among those vulnerable groups of people close to the life that is lost. This is unjust and thoughtless.

In an effort to forestall these dangers, this analysis therefore suggests a total ban of embryonic stem cell research in humans and urges states, especially developing ones, to focus on more pressing issues in which their funds will be better applied. Additionally, the medical field with the assistance of technology has made many more forms of medical therapy and treatment available and achievable.

The needless loss of life **MUST STOP**.

## Chapter 1: Introduction

For years, embryonic stem cell research has been at the forefront of much controversy and both negative and positive global attention. The benefits that the application of this research would be able to produce are unquestioned. Treatment of body ailments would be revolutionized by the use of embryonic stem cells<sup>1</sup>. However, the ethics and morality of embryonic stem cell research in particular is subject to many a debate, fiery dispute and confrontation. This debate goes all across the board, to all affected professions and societal sectors, not least the legal field.

Like abortion, itself a sensitive and prominent issue in legal circles<sup>2</sup>, embryonic stem cell research has its core issue rooted in the conundrum posed simply as: where does life begin? The ensuing question pro-embryonic stem cell researchers ask is: could we sacrifice a small number for a greater good<sup>3</sup>?

While the latter question is, as we shall see, an express no-go zone legally, the former creates a slippery slope. Different nations have differing laws concerning the beginning of life and on abortion<sup>4</sup>, and this is where pro-stem cell researchers will first look to delve into.

Stem cells are undifferentiated<sup>5</sup> cells that can develop into any type of somatic cell<sup>6</sup>. They are therefore classified as pluripotent. It is this pluripotency that eventually gives rise to the flurry

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<sup>1</sup> Rippon H and Bishop A, *Embryonic stem cells: Cell proliferation*, EBSCO Publishing, 2004, 23-34.

<sup>2</sup> Between 1996 and 2013, the percentage of Governments permitting abortion increased gradually for all legal grounds, except to save a woman's life which remained at 97 per cent. Despite overall expansion in the legal grounds for abortion, policies remain restrictive in many countries. Source: United Nations, Department of Economic and Social Affairs, 'Population Division. Abortion Policies and Reproductive Health Around the World', *United Nations publication*, 2013, 3.

<sup>3</sup> This is the main proponent statement of utilitarianism, the main theory used by those in favour of human embryonic stem cell research.

<sup>4</sup> Since 1996, legal grounds for abortion have expanded in a growing number of countries in both developing and developed regions, but abortion policies remain much more restrictive in countries of the developing regions. See more on, United Nations, Department of Economic and Social Affairs, 'Population Division. Abortion Policies and Reproductive Health around the World', *United Nations publication*, Sales No. E.14.XIII.11) or at

<http://www.un.org/en/development/desa/population/publications/pdf/policy/AbortionPoliciesReproductiveHealth.pdf>

<sup>5</sup> Undifferentiated cells are cells that perform no specific function in the body. Their merit is that since they are non-specific, they can evolve or differentiate into any cell type that the body means. This makes the application of undifferentiated cells limitless.

<sup>6</sup> A somatic cell is a body cell.

of applications for stem cells. Their unlimited potential to give rise to new cells makes them exemplary cures for leukemia, Parkinson's disease, juvenile-onset diabetes and other ailments arising from cell deficiency<sup>7</sup>. Stem cells spontaneously differentiate into different cell types, as desired in a tissue culture process.

In organs that are deficient of stem cells, such as the heart, regeneration of the cells does not happen. This is why heart diseases prove very costly and fatal in a very short span of time. The introduction of embryonic stem cells into heart muscles will therefore cure a host of heart diseases, as the destroyed cells will be regenerated into brand new cardiac cells.

Embryonic stem cells are derived from a human blastocyst<sup>8</sup>, which develops when the embryo is about six days old - after fertilization<sup>9</sup>. The stem cells are then extracted from the blastocyst. During this stage of embryonic development, stem cells are of even greater importance as they are essential to the formation of body organs. The embryo therefore cannot survive after the extraction of the stem cells. It is therefore destroyed.

Utilitarians are pro-embryonic stem cell research. They use the argument that the sacrifice of the embryos for the greater good of man is justifiable. In addition, several utilitarians do not consider an embryo to satisfy the benchmark for personhood<sup>10</sup>.

Such is the immense capability this research and its subsequent application pose. And similarly, such is the risk and legal, moral and ethical implications.

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<sup>7</sup> Holland S, Lebacqz K, Zoloth L, *The human embryonic stem cell debate: Science, ethics, and public policy*, The Massachusetts Institute of Technology Press, 2001, 3-7.

<sup>8</sup> The blastocyst is a thin, hollow structure in early embryonic growth that contains a mass of cells from which the embryo arises. The outer layer of cells gives rise to the placenta and other tissues needed for foetal development within the uterus while the inner cells give rise to the tissues of the body.

<sup>9</sup> Holland S, Lebacqz K, Zoloth L, *The human embryonic stem cell debate: Science, ethics, and public policy*, The Massachusetts Institute of Technology Press, 2001, 3-7.

<sup>10</sup> Hug K, 'Therapeutic perspectives of human embryonic stem cell research versus the moral status of a human embryo – does one have to be compromised for the other?' (2006), 3.



## **1.1 Statement of the problem**

The United Nations Convention on the rights of the Child<sup>11</sup> provides for the inherent right to life and the protection by the state, to the furthest extent possible, the development and survival of the child. This is mirrored in the Universal Declaration of Human Rights<sup>12</sup> Constitution of Kenya<sup>13</sup>.

Embryonic stem cell research will halt of the development of an embryo after its life and development has already begun. This right should be protected by local and international bodies, in accordance with law.

It is therefore a breach of international and municipal law, as embryonic stem cell research violates the right to life and the right to development of a person.

## **1.2 Hypothesis**

- i. Life begins at conception.
- ii. Embryonic stem cell research, and its subsequent practice, is a derogation of the right to life and development of a child.
- iii. The state and the international community are aware of the potential breach of the rights above.

## **1.3 Research objective**

The research involving human embryonic stem cells is a human rights matter. This study aims at achieving several objectives. The objectives are based largely on the protection and sensitization of the non-derogable human rights that are under threat in the carrying out of the stated research.

The objectives of this research are therefore as follows:

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<sup>11</sup> Article 6, The *United Nations Convention on Rights of the Child*, 20<sup>th</sup> November 1989, UNTS 27531.

<sup>12</sup> Article 3, *Universal Declaration of Human Rights*, 10<sup>th</sup> December 1948.

<sup>13</sup> Article 26, *Constitution of Kenya* (2010)

1. The main objective of the research is to demonstrate the breach of the fundamental human right - the right to life - in the carrying out of embryonic stem cell research.
2. The secondary objective of this research is to make evident the repercussions that would arise from the legalization and continuous practice of embryonic stem cell research.

#### **1.4 Research Questions**

The following questions will be posed and addressed in the course of this research:

1. How is the right of life and development being breached by embryonic stem cell research?
2. How will vulnerable groups, in this case prospective parents and children, be affected by the carrying out of embryonic stem cell research?
3. Is there any justification for embryonic stem cell research to be carried out?
4. Why should the state and international bodies protect the right to life?

#### **1.5 Literature review**

Human embryonic stem cell research poses potent legal, ethical and political arguments. The issue of derivation of pluripotent<sup>14</sup> stem cells from embryos is afloat with disputes regarding human reproduction and commencement of human life. Most other methods of obtaining stem cells barely raise ethical concerns. The reprogramming of somatic cells to produce induced pluripotent stem cells avoids the ethical problems specific to embryonic stem cells. This is because no destruction of life or potential life occurs in extraction of adult stem cells. With embryonic stem cell research however, there are challenging dilemmas, such as consent to donate materials for human stem cell research, early clinical trials of human stem cell treatments, and oversight of the research<sup>15</sup>. From these quandaries is where we need to find not

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<sup>14</sup> Pluripotency is the ability of a cell to give rise to different types of cells that make up a living body.

<sup>15</sup> Bernard L, Lindsay P, 'Ethical issues in stem cell research: Endocrine reviews', (2009), 204-213.

only consensus, but justice for the affected and the potential lives that are vulnerable to premature death, while balancing all this with the overflowing potential this research holds.

While the literary community is not awash with works on embryonic stem cell research, there is certainly no shortage of fact and opinion on this volatile matter. In her book, *The Human Embryonic Stem Cell Debate*<sup>16</sup>, Suzanne Holland is of the view that policy concerning the harvesting and usage of human embryonic stem cells must reflect full commitment to full personhood for marginalized people specifically, since they are the ones in imminent danger. In addition, the policy must be in line with promoting and safeguarding one's right to flourish, which is the ultimate human goal. Social policy that honors rationality and human dignity should therefore, considering the above, be enforced.

The *New England Journal of Medicine* concurs. It reaffirms that while the final end of any given process is important, the means should not be irrelevant in consideration<sup>17</sup>. Therefore, the process of acquiring information or resources that are bound to improve human life should not violate the very fundamental rights of human beings. The journal goes on to state that the permitting of procedures such as embryonic stem cell research may lead to the opening of other dehumanizing practices such as human or baby cloning, embryo fields and use of foetuses as spare parts. This ultimately is the commodification of life.

Berrin Okka is of a different but similarly concerned view. He assesses that the upsurge of stem cell research in the absence of proper legal and social regulation would lead to the increase of egg donation and the exploitation of women<sup>18</sup>. In this sense, scientists concerned with this research would easily feel the urge to exploit women for the extraction of their embryos and eventually, the stem cells. This is not only commercialization and commodification of human life but also exploitation of women.

Kristina Hug<sup>19</sup> views the situation in this way: human stem cells should be protected by the very fact that they are indeed, human. She provides a very swaying argument, that fertilization is a morally decisive moment from which full protection should be guaranteed. In human life,

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<sup>16</sup> Holland S, Lebacqz K, Zoloth L, *The human embryonic stem cell debate: Science, ethics, and public policy*, The Massachusetts Institute of Technology Press, 2001, 3-7.

<sup>17</sup> 'Embryo ethics: The moral logic of stem cell research' *New England Journal for Medicine* (2004).

<sup>18</sup> Okka B, 'Ethical conflicts in stem cell research and education' (2015). Available online at [www.sciencedirect.com](http://www.sciencedirect.com)

<sup>19</sup> Hug K, 'Therapeutic perspectives of human embryonic stem cell research versus the moral status of a human embryo – does one have to be compromised for the other?' (2006), 5.

Kristina explains, there is no other similarly decisive moment. This is the sole occasion that decides your personhood and hence its status should entitle the embryo to protection.

In Executive Order no. 13505<sup>20</sup>, United States President Barack Obama reversed a nine-year long ban on embryonic stem cell research, put on by his predecessor, George W. Bush in 2001 in Executive Order 13435. The President lifted bans that had been placed on the national health institute of the country, which prohibited taxpayer money from being used to obtain embryonic stem cells for research. Obama's Executive Order states that scientists should be able to receive federal funding to purchase and perform research on human embryonic stem cells<sup>21</sup>.

The president installed a body to oversee the implementation of this research<sup>22</sup>, fully aware of the procedures and technicalities that would be undertaken in the course of the research. He further added that consent from the donors of the embryos is fundamental to the research and that the donor may order for the halting of the research being done on the embryo at any time during the research duration.

In January 1973, the Supreme Court of the United States of America set one of the most groundbreaking decisions of the modern legal age: the legalization of abortion<sup>23</sup>. The ensuing pro-choice movement henceforth became larger and more prominent, as it was now backed by legal precedent. In the context of embryonic stem cell research, United States federal law hence permitted research with fetal tissue<sup>24</sup> provided that the donation of tissue for research is considered only after the decision to terminate pregnancy has been made<sup>25</sup>. While this may, *prima facie*, seem reasonable, it is a glaring incentive for a parent to consider abortion. This is because the parent will see the merit in donating her foetus for research, therefore wrongly justifying her decision to abort. This will be a sorry loss in the fight for the preservation of the right to life, as embryonic stem cell research will encourage, and console, a parent who would otherwise have been able to keep the child.

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<sup>20</sup> Presidential Documents: *Removing barriers to responsible scientific research involving human stem cells*, 2009, 2.

<sup>21</sup> Khokhar A, *Barack Obama Executive Order 13505, Embryo Project Encyclopedia*, 17<sup>th</sup> June 2010.

<sup>22</sup> Section 3, *Presidential Documents: Removing barriers to responsible scientific research involving human stem cells*, 2009.

<sup>23</sup> See *Roe v. Wade*, 410 U.S. 113, 1973.

<sup>24</sup> Foetal tissue refers to the stem cells in an aborted body.

<sup>25</sup> United States Code, Edition Title 42, *The Public Health and Welfare Chapter 6A: Public Health Service Subchapter III National Research Institutes, Part H: General Provisions* Sec. 289g-1: Research on transplantation of foetal tissue, 2010. See more on [www.gpo.gov](http://www.gpo.gov)

The above justifications are however not from a legal stand point. What this paper strives to demonstrate is that the very act of embryo destruction is against the Constitution of Kenya and is fundamentally in contradiction of international law. The right to life is a fundamental right of man, not given by the state, but inherently acquired by the very fact of the humanity of each and every person<sup>26</sup>. Putting this right into one's hands is not only a brazen breach of this right but is also instilling in someone the power that one does not hold.

The Latin principle, *nemo dat quod non habet*, states that good title can only be given by one who owns the title. Similarly, one cannot take title that he cannot own. The right to life has no owner, and therefore no one can give good title to it, and hence, no one can take it. It is by this logic that suicide is also criminalized<sup>27</sup>.

## **1.6 Scope of the Study**

The emergence and the ever-increasing popularity of embryonic stem cell research has picked up speed in many nations, especially the more developed. As is with several emerging trends in different fields, the impact of the research will put pressure on non-conforming states to adopt the said practice. In Africa, only South Africa has given the go-ahead for this research to be carried out<sup>28</sup>, albeit in special situations. This research therefore focuses on embryonic stem cell research in Africa, its possible implications, drawbacks and merits, to be objective.

Comparative study with South Africa's case is therefore carried out, as it provides a more candid view on how Kenya may likely adopt (or not) the research. In addition, this work views legislation, practice and regulation of embryonic stem cell research in the United States of American and in Britain, world leaders in the research. This is to inform best practice in Kenya, as a result of learning what has worked and what has not, in the said countries.

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<sup>26</sup> L Kurki 'International standards for sentencing and punishment', 2001, 204-275.

<sup>27</sup> Section 226, *the Penal Code (2010)*

<sup>28</sup> Section 57, *National Health Act (South Africa)*

## 1.7 Justification of the Research

Human life is sacred and worth protecting. The very fact that the right to life is innate and not acquired provides no human the right to take it away arbitrarily. This research aims at sensitization more than anything else. It is of paramount importance that governments and world leaders, legislators and medical practitioners are well-informed and briefed on the massive and glaring defects of embryonic stem cell research.

Without this, the right to life would be a ceremonial right; no legal significance. As seen earlier in this paper, medical justifications, social explanations and utilitarian rationalizations have been brought about by the people promoting this research. It is easy to be overcome by the mentioned justifications while forgetting the moral, ethical and most significantly, legal ramifications of the research. If giving medical, social and other justifications for the breaching of a human right is validated, then Chapter Four of the Constitution of Kenya would be irrelevant, as rights would be subject to the arbitral desire of those in power.

The Africa Child Policy Forum explains that the term 'survival' covers a child's right to life and the right to meet the needs that are the most basic in a child's existence. These needs include adequate standard of living, shelter, nutrition, and access to medical services. Amongst other things, states are urged to take all possible measures to improve neo-natal care for mothers and babies, reduce infant mortality, and improve conditions that promote the well-being of children. The survival and the development of a child therefore depend on the health conditions and the socio-economic and cultural environment in which the child grows<sup>29</sup>. It is therefore important that what society cultivates and enacts as its laws are in the best interests of child survival.

The right to life is a fundamental right and must be protected at all costs. The loss of one non-consenting life to save one hundred is not justified. This is what this research strives to prove. The presence of a legal framework to protect this will therefore be advocated for in this paper.

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<sup>29</sup> The African Child Policy Forum: *In the best interests of the child: Harmonising laws on children in West and Central Africa*, 2011, 36.

## 1.8 Definition of terms

Adult Stem Cells – Stem Cells found within the body of a grown human being, which differentiate and multiply so as to replenish and heal injured tissues and organs.

Blastocyst – The basic initial form of an embryo, within four to seven days of existence.

Cloning – The replication of an individual's genetic make-up by transferring his DNA to the formation of another being.

Conception – The event of successful fertilization of the female egg by the male spermatozoa.

DNA – Short for deoxyribonucleic acid, DNA is a molecule in an individual's genetic make-up that carries the characteristics of the person, e.g. colour of eyes, baldness, voice depth, et cetera.

Embryonic Stem Cell Research – This is the research of, and aimed at, obtaining human embryos that have already undergone fertilization, extracting stem cells from it and then killing the embryo, since it cannot survive any more.

Fertilization – The event of fusion of the spermatozoa (male reproductive cell) with the female egg, after intercourse. This forms a zygote.

First Trimester – Pregnancy is measured in trimesters. The first trimester lasts about three months and is when abortion and embryonic stem cell research is most easily carried out, as the organs are not yet fully developed, making extraction simpler.

Foetal Viability – The quality that would allow a foetus to survive independently, outside of the mother's womb. A foetus become viable after about twenty-one weeks from the date of conception.

Gestation Period – The time between conception and birth of offspring, normally around nine months in human beings.

*In vitro* Fertilization – A method of modern reproductive technology whereby a male sex cell and a female sex cell are fused in a laboratory and then transferred to the uterus of a woman when fertilization has taken place.

Pluripotency – The ability of a stem cell to evolve into any type of somatic cell, when subjected to the right conditions.

Somatic Cell – Any cell in the male or female human body, excluding reproductive cells which are known as sex cells.

Stem Cell – An undifferentiated somatic cell in a body.

Undifferentiated – Performing no specific function and hence capable of being manipulated into different types of cells.

Vulnerable Persons – This term refers to the people directly and most adversely affected by a procedure that takes away a developing life. It mainly encompasses the women who are forced into abortion or selling their growing offspring to the research process.

Zygote – The product of fertilization of male and female reproductive cells.



## **1.9. Chapter Breakdown**

### **Chapter I: Introduction to Embryonic Stem Cell Research**

This section details in brief to the reader what is to be expected in the paper. It provides the hypotheses taken, the research questions that guide the paper and also introduces the reader to the technical terms that will be used in the course of the paper.

### **Chapter II: Theoretical Framework and Methodology**

The second chapter focuses on the theory of law on which the paper is grounded. It is the backbone of the paper, as without providing the legal reasoning behind the research, the work would be in vain. This section covers the paper's theoretical framework by way of rebutting the utilitarian claim of 'greatest good for greatest number'.

### **Chapter III: The Legal Framework against Embryonic Stem Cell Research**

By use of abortion as an analogy to explain the effects of human embryonic stem cell research, this chapter analyses the practice of abortion in the United States of America and in South Africa, in an effort to demonstrate the consequential effects of the latter. This chapter also deals with the legal framework, municipal and international, regulating the right to life.

### **Chapter IV: Discussion: The Argument against Embryonic Stem Cell Research**

How developing countries ought to deal with the emerging issue of the research is handled in this chapter. It also tackles the necessity of the research and the scope of obligation a state has with regard to the research and healthcare in general

### **Chapter V: Conclusion and Recommendations**

Shortly and succinctly, this chapter concludes the paper by emphasizing the findings of the research and more so, underlining the very swaying lessons from the paper.

## Chapter 2: Theoretical Framework and Methodology

While the expected go-to theory with regard to the substance of this paper would be rights theory, this paper shall use a more substantive and in-depth approach and will use the work of Jean Jacques Rousseau, and provide explanation on the invalidity of the justification of utilitarianism for embryonic stem cell research. It will show how man's civilization has step by step eroded the 'good nature' that is innate to man. This is the method taken because to uncover the issue at the bottom of embryonic stem cell research, the violation of rights has to be taken from its historical perspective to its present nature. This lineage is fundamental.

Additionally, we shall view the work of Thomas Hobbes and the warning he gives concerning social breakdown, which occurs when law is avoided and people live by their own means. Hobbes' work is based on the underlying principle the all men are born equal and are forever equal, but for the constructs society wrongfully bestows. John Locke's similar view also comes into play in the paper, where he stated that chaos will arise from the lack of order than consistent law brings in.

The 'Purpose of Law' consideration is the final means of analysing embryonic stem cell research that this paper will provide a theoretical framework for. Hans Kelsen articulated this theory by providing that while law is based on the need of justice, it serves the greater purpose of ensuring social orderliness. That it is by law that man can live together, support one another and hence not cause friction with is fellow man.

As seen, the conceptual structure will thereby be based on social contract theory and majorly on natural law. This is so due to the fragile nature of the matter at hand – embryonic stem cell research. It is only by looking at the initial purpose of the law from history of man that we can consider how to move forward and what not to do, by fear of going back to the state of nature described by Thomas Hobbes. Natural law theorists therefore provide adequate fodder as regards the path necessary to be taken by states in view of the situation at hand.

Hans Kelsen provided what he called the 'theory of law'. In it, Kelsen said that the law is an instrument used to govern human behaviour<sup>30</sup>. He enforces that the law is enacted and promulgated to tell man to do some things, and not to do others<sup>31</sup>. He perceives norms as the

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<sup>30</sup> Edwin Patterson W, 'Hans Kelsen and His Pure Theory of Law' *California Law Review* (1952), 8.

<sup>31</sup> Kelsen H, *Pure theory of law*, 1967. 34-72.

foundations from which laws are made. The adherence to these norms then creates social order. These norms are held by each community<sup>32</sup> and are regarded as the general individual and common goods that harm not. Following of social norms is therefore a precursor to the presence of the law.

Natural law theory led to natural rights theory and the chief proponent John Locke reasoned that all individuals were endowed by nature with the inherent rights to life, liberty and property, which were their own and could not be removed or abrogated by state<sup>33</sup>.

From the Lockean view of natural rights two things were evident

1. The individual is an autonomous being capable of exercising choice.
2. The legitimacy of government depends not only upon the will of the people, but also upon the government's willingness and ability to protect those individual natural rights<sup>34</sup>.

Jean-Jacques Rousseau additionally avowed that natural law conferred inalienable sovereignty on the citizens of the state as a whole<sup>35</sup>. Thus, whatever rights were derived from natural law resided within the people collectively and could be identified by reference to the 'general will'.

Kelsen finishes by saying the sole and most important purpose of the law is to ensure that there is social orderliness<sup>36</sup>.

Human rights theory postulates that each person has in him rights inherent to all human beings regardless of nationality, sex, religion, national or ethnicity, colour, or any other status. Human rights theory has developed over time and was possibly best put by Thomas Aquinas when he stated that right action is naturally right and can be ascertained by human beings through the application of right reason to human nature<sup>37</sup>.

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<sup>32</sup> 'European Journal of International Law' (1998), 325-3.

<sup>33</sup> Strauss L, *Natural right and history*, University of Chicago Press, 1950, 94-103.

<sup>34</sup> Tully J, *A Discourse on Property: John Locke and his adversaries*, Cambridge University Press, 1980, 40-52

<sup>35</sup> Gourevitch V, *Rousseau: 'The Social Contract' and Other Later Political Writings*, Cambridge University Press, London, 1997, 153-176.

<sup>36</sup> Edwin Patterson W, 'Hans Kelsen and His Pure Theory of Law' *California Law Review* (1952), 20-43.

<sup>37</sup> Finnis J, *Natural law and natural rights*, Oxford University Press, 2011, 401-402.

This work will therefore look at the law, stem cell research and the quest for social orderliness, in light of the purpose of the law, seeing as the law is present to govern human behaviour. It will also seek to use the application of ‘right reason’ to justify the right to life of the embryo.

## 2.1 The Unnaturalness of Civilization

In his enunciation of utilitarianism, John Stuart Mill states that the greatest happiness principle holds that actions are right in the proportion that they promote happiness. He adds that actions are wrong in so far as they do not bring happiness<sup>38</sup>. Happiness, in utilitarianism, is the absence of pain and the presence of the desired pleasure while unhappiness is the deprivation of pleasure<sup>39</sup>, which is often replaced by pain. Individuals who advocate for the commencement, continuation and promotion of embryonic stem cell research often use the utilitarian argument as justification for the research. In this view, happiness is achieved when more of the human population is cured and given higher life expectancy at the expense of the unfortunate embryos. This line of thought would however be contestable in the view of other legal theorists, as seen below.

The ‘general will’ was a term propagated by the Frenchman Jean Jacques Rousseau in his explanation of the overall will and desire of man. In his elucidation of his natural law theory, Rousseau said that the general will refers to the will of the society or of all people as a whole<sup>40</sup>. The general will is therefore what all people generally agree upon as being of primary importance to survival and eventual happiness.

Rousseau said that all men are born good – that man is innately good and in his state of nature, man is innocent and only corrupted by the ‘unnaturalness of civilization’. According to Rousseau, the benevolence of the laws of nature added to man’s goodness, as the natural laws were harmless and full of proper intent<sup>41</sup>. The wise and magnanimous nature of man was therefore compounded by the good natural law. However, upon introduction of civilization, came competing interests and this occasioned the rise of malevolence of man and the innate good nature of the human person was replaced by selfishness brought about by the civilized world order. The initial order of man was that all men of different age, gender and background

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<sup>38</sup> Sen A and Williams B, *Utilitarianism and beyond*, Cambridge University Press, 1982, 2-7.

<sup>39</sup> Sen and Williams, *Utilitarianism and beyond*, 23.

<sup>40</sup> Gourevitch V, *Rousseau: 'The Social Contract' and Other Later Political Writings*, Cambridge University Press, London, 1997, 20-23.

<sup>41</sup> <https://plato.stanford.edu/entries/rousseau/> on 4 October 2015.

were equal and ought to be treated equally. Distinction and separation of man according to class was therefore a product of civilization and this caused the prejudice among men and division of classes<sup>42</sup>. Civilization, in Rousseau's perspective, therefore corrupted man and man him 'unnatural'.

In his vivid explanation on the corruption of man's nature by civilization, Rousseau brought out the lucid example of private property. Initially, he began, post-state of nature and pre-industry, in the communal and shared ownership of property, man was able to give to each what he needed for his sustenance<sup>43</sup> – that man was able to have the kindness of heart to ensure that no one is left without means of survival while another has surplus. This is the basis of equity – that fairness must rule in that we need not give equally, but we must attribute equitably. A family of ten having ten acres and a family of two having two acres is not equal distribution but it is equitable and fair. Under this principle, man survived happily and this attributed to his good nature. However, upon the advent of private property, *cuique suum* (to each his own), the very definition of justice, was replaced by the practice of property to the wealthy and powerful – in that the more influence, power and wealth one has, the more property he can own.

This created the utterly inequitable and inexcusable conundrum of the *Tragedy of the Anti-Commons*, exquisitely described by Michael Heller, whereby a limited resource is held by a chosen few who have the power to exclude the inclusion of others in the exploitation of the resource. This leads to an outcome that is socially detrimental and causes the unjust decline of a fellow man, as he is brought down by the selfishness of the powerful<sup>44</sup>. Likewise, Rousseau claims that institutions formulated by modern civilisation have caused the downfall of man and his morals<sup>45</sup>. The institution of private property as given by Rousseau is just but a single example of this.

Similarly, the institution of social service provision works the same way. The average person is biologically similar to the other and is therefore equally predisposed to sickness. In the broken society that it is, the more disenfranchised citizens are even more susceptible to illness. It is therefore only just that everyone is able to attain similar standards of and accessibility to

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<sup>42</sup> <https://plato.stanford.edu/entries/rousseau/> on 4 October 2015.

<sup>43</sup> Gourevitch V, *Rousseau: 'The Social Contract' and Other Later Political Writings*, Cambridge University Press, London, 1997, 24.

<sup>44</sup> Heller Michael A, 'The Tragedy of the Anti-commons: Property in the Transition from Marx to Markets' *Harvard Law Review* 111, 3 (1998), 624-632.

<sup>45</sup> Gourevitch V, *Rousseau: 'The Social Contract' and Other Later Political Writings*, Cambridge University Press, London, 1997, 29.

healthcare and medical services. While acknowledging the limited resources in medical care however, due regard should therefore be taken to the plight of the poor and medical costs alleviated.

In the same way, embryonic stem cell research is a product of the medical and social services field. As is the case in Heller's *Tragedy of the Anti-Commons*, embryonic stem cell research similarly takes advantage of the helplessness of the destitute and using it to advance the interests of a minority number of people. This institution seeks to injure the livelihoods and very lives of those who cannot claim for their rights, in the name of scientific advancement and at the expense of the disenfranchised. This is at the very nature of Rousseau's work on law theory – that while society served in and should still serve in advancing everyone's interests, it is conversely serving to promote the minority interests and institutions are promoting the degradation of values, in this case, the very value of life and the right to it.

## **2.2 Avoidance of breakdown of social co-operation**

In the 17<sup>th</sup> century, there came Thomas Hobbes. In his book *Leviathan*, he described the early state of nature of man as anarchical. That before the social contract, life was short, nasty, brutish and poor. This is known as the state of nature and Hobbes dictated that it arose from three precursors. The first is equality of need – that each man has equal needs that require fulfilment, for instance the need for food and shelter. Each human being is equal to the other in the sense that these needs are common. Secondly, scarcity was a factor. The very character of resources such as land is that they are scarce. This therefore caused brutality in the fight for the attainment and usage of these resources. The third cause of the state of nature was limited altruism. In the selfish clamour for each to gain his own, resources were too scarce for people to share, and those that had more only used it for their benefit or for profit, and therefore philanthropy was kept at a bare minimum. The fourth cause is the essential equality of human power, which refers to the general equality of all people in intellect and strength<sup>46</sup>. In the words of Thomas Hobbes, '*Nature hath made men so equal, in the faculties of body and mind.....the difference between men is not considerable*'<sup>47</sup>. This aided the maintenance of the status quo.

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<sup>46</sup> Thomas Hobbes, *Leviathan*, Penguin Classics, 1982, 99.

<sup>47</sup> Hobbes, *Leviathan*, 99.

It is of great importance particularly for the purpose of this paper to note that in the state of nature, there existed no social goods<sup>48</sup> such as agriculture, industry and education. Not only did they not exist, but they could not. This is because social goods require the collaboration of people – something which people living in a state of nature cannot achieve. This results in what this paper calls a Common Failure<sup>49</sup>. A common failure occurs where the society can no longer operate because the conditions requiring it to remain alive cannot be met. Hobbes stated that to avoid such a predicament, then there must be solid guarantees that people will not harm each other. In our modern world, such guarantees are enshrined in law<sup>50</sup>. Additionally, Hobbes states that people must be prudent enough and therefore able to rely on one another to keep their end of the agreement not to harm others<sup>51</sup>.

John Locke provided an alternative interpretation of the social contract theory. He conversely states that the state of nature is not necessarily brutish and ugly. He avers that it is a condition natural to mankind, where man does as he deems fit, without restraint<sup>52</sup>. However, axiomatically, without decree comes disorder and Locke admits<sup>53</sup> that such uncontained freedom will almost inevitably lead to chaos and eventually, brutality. In this way, the Lockean scheme of things then merges with the nasty state of nature described by Hobbes, leading to their similar application thereof.

In embryonic stem cell research, it is clear, as previously explained in this paper, that the right to life is at risk. This right, enshrined in law, is part of the social contract that seeks to end the short, nasty and brutish nature of earlier life. Therefore, as this law is allowed to be objected to and to potentially be finally breached, the contract that guarantees people should not harm each other is violated. The prudence of man is put into question. In this way, man is not keeping his end of the bargain to his fellow man. In Hobbes' words, the fate of social cooperation is achieved, regrettably. A common failure is at risk of occurring. This is because, if the fundamental right upon which all others are built is breached, it is Childs play for the others to

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<sup>48</sup> Hobbes, *Leviathan*, 102.

<sup>49</sup> Borrowed from the phrase 'Market Failure' which in economics refers to the lack of equilibrium in demand and supply of goods that therefore causes shortages and uncertainties, this paper has coined this term so as to as clearly as possible explain the concept of society failing as a result of one rule after the other failing to be taken heed to.

<sup>50</sup> Hobbes calls this 'Sovereignty by Institution'. This refers to the collective agreement by all men to obey and abide by a common government.

<sup>51</sup> <https://plato.stanford.edu/entries/hobbes-moral/#HobWomFam> on 24 October 2016.

<sup>52</sup> Locke J and Laslett P, *Locke: Two Treatises of Government*, Cambridge University Press, London, 1988, 271-275.

<sup>53</sup> Locke and Laslett, *Locke: Two Treatises of Government*, 271-275.

be dishonoured as well. The social contract prohibits the singular and collective destruction of societal norms and agreements and therefore must be abided by.

### **2.3 The Orderliness Necessitation**

Society thrives as a result of the consistent and programmed adherence to laws and regulations. As seen above, the state of nature was remedied by the introduction of one factor – law. The law is present not only to guide behaviour in relation to one’s neighbour, but as it achieves this, it strives to additionally attain social orderliness. This was the perception and indeed, the well-reasoned out ‘purpose of law’, given by Hans Kelsen<sup>54</sup>.

The progress of man from governance in the state of nature to the rule of law is however not straightforward. Hans Kelsen proceeds to explain the prerequisites for a valid and effective rule of law that brings forth social orderliness. In his portrayal of what he called ‘the theory of law’, Kelsen enunciates that norms are the foundations upon which good law is grounded<sup>55</sup>. In this way, law in one society might be entirely different from law in another, but this does not make neither one valid nor the other immoral. This is because members of a society are more likely to accept and implement laws that are derived from known and pre-practised norms and deeds<sup>56</sup>. In this way, law respects the inherent quality and character of society and is therefore easily respectable.

African, and indeed the general human society, has since time immemorial put emphasis on the value of human life. For a long time, this right has been free from derogation, other than for the axiomatic exceptions of lawful judicial order in punitive undertakings and self-defence. This long and consistent practice of man has not been as a result of lack of human progress or technological advancement, for this is not true, but because of the innate value given to human life since days back yonder. It is no wonder that this right has of late been given much higher protection, as the international community moves towards total abolition of the death penalty. It is therefore paradoxical that, after and during this extensive protection of a fundamental right, an exception is granted in the form of embryonic stem cell research – destroying the very basis and beginning of human life. This is against the quintessential human norms and in the opinion of Hans Kelsen, such will inevitably lead to the loss of social orderliness.

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<sup>54</sup> Edwin Patterson W, ‘Hans Kelsen and His Pure Theory of Law’ *California Law Review* (1952), 4-7.

<sup>55</sup> ‘European Journal of International Law’ (1998), 325-327.

<sup>56</sup> Kelsen H, *Pure theory of law*, University of California Press, 1967, 34-72.



## 2.4 Research Methodology

While embryonic stem cell research has not yet set a strong foothold in Kenya, it is an emerging field of medical curative practice, and debate on its inclusion is fast and surely approaching Sub-Saharan Africa. This unavailability of current practice in Kenya therefore makes primary research methods be unfeasible.

Nevertheless, the magnitude of the potential of embryonic stem cell research makes it a topic worth studying and capable of being studied using purely secondary methods. This is because literature on the topic is rife, and the medical and legal world is abuzz, in efforts to ensure that the procedure is, or not, adopted.

This paper shall therefore use secondary methods of data collection, from heralded research papers, well-founded journals and acclaimed books. Additionally, data and information gained will be gained from statistics on abortion, which is comparable to embryonic stem cell research, in its fundamental basis of the right to life being derogated from and the repercussions on vulnerable persons, the state and the law of human rights. Focus will be drawn unto the lessons learnt from abortion and its effects since *Roe v Wade*<sup>57</sup>, comparing this to the foreseeable effects of embryonic stem cell research and the standing laws on the right to life, and then finally providing a discussion on the obligation of Kenya and the developing world in considering this issue, along with the proposed practice for nations such as Kenya.

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<sup>57</sup> 410 U.S. 113, 1973.

### **Chapter 3: The Legal Framework against Embryonic Stem Cell Research**

Human embryonic stem cell research has not yet set foot in Kenya. In Africa, only South Africa has begun substantial work on embryonic stem cells. However, the emerging issue is consistently expanding and its undeniably large benefits will cause it to spill over to Kenya and other developing countries in no time.

The principle of rule of law is the basis for any successful society to have a fruitful existence. The main precept of this principle is that the law is the ultimate guide and no person or body has the right nor the allowance to defer from the law, on any grounds other than those permitted by the law. This principle is the fortification against arbitrary action of the state or other powerful bodies in relation to violating rights.

Human embryonic stem cell research involves the development of real human embryos by means of *in vitro* fertilization. After a week of this fertilization, stem cells are surgically derived from the embryo. The harvested stem cells are of vital importance to the embryo and the child cannot continue developing without these cells. The life is destroyed. Killed and disposed away.

The right to life is enshrined in multiple laws and subsidiary legislation, as we shall see below. And derogation from these laws is not allowed in any legislation. Hence, the violation of the right to life can easily be seen from the actions of embryonic stem cell research conductors.

This chapter focusses on the guidance the law gives as regards the right to life therefore coherently demonstrates this breach.

## **3.1 Kenyan Law on the Right to Life**

### **3.1.1 The Kenyan Constitution and the Children's Act**

While controversy over the abortion clause in the Constitution (Article 26 (4)) has been aplenty, the spirit of Kenyan law concerning the right to life remains clear. This was made evident even before the current constitution, when the 1963 Constitution of Kenya also protected the life of Kenyans by prohibiting the deprivation of life for any reason other than legal, court-sanctioned ones such as executions<sup>58</sup>.

Article 26 of the Kenyan Constitution now additionally states that every person has the right to life. Life of which, as sub-article 2 states, begins at conception. This is a fundamental right of every person of Kenyan citizenship. The very fact that the Supreme Law of the nation denounces the purposeful taking away of life at any time after conception is reason enough to inform the decision of the state concerning matters such as abortion and human embryonic stem cell research.

Since independence, Kenya's Supreme Law has enlisted the right to life as the top fundamental right. This is reinforced in the Children's Act of Kenya. The Act imputes responsibility of the protection of a child's<sup>59</sup> life on two levels of guardians: the family and the government. Section 4 commands that the right to life is inherent to the child and it is therefore upon the family and the government to ensure its protection and advancement. Sub-section 2 is of additional importance, as it states that in all matters involving the life and development of the child, whether taken by government, administrative institutions or any other bodies, the best interests of the child should be the major consideration. This section will be of primary scrutiny as we tackle the merits, or lack thereof, of embryonic research in this paper. (See 4.4 on this too).

### **3.1.2 The National Police Service Act and the Penal Code (CAP 63):**

The National Police Service Act provides its exceptions to the right to life. This occurs when it is necessary, in the apprehension of a criminal, to use deadly force<sup>60</sup>. This occurs in

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<sup>58</sup> Article 71, *Constitution of Kenya* (1963)

<sup>59</sup> Section 2, Children's Act: 'child' is a human being under the age of eighteen years.

<sup>60</sup> Sixth Schedule, *National Police Service Act* (2011)

circumstances where it would be unreasonable or ineffective to use threats and non-violence. Furthermore, the Act increases its protection for children by specifically stating the use of deadly force against children suspects must only occur when it is the only option<sup>61</sup>.

The Penal Code<sup>62</sup> provides its exception to the causing of death in its punishment clauses, whereby it is legal for death to be caused upon the commission of a capital offence and the eventual sentencing by a court of competent jurisdiction.

### **3.2 Ratified International Law**

Upon attainment of independence in 1963, Kenya became a member of the United Nations and in 1990, ratified what is generally considered as the most influential agreement in the realm of human rights – the Universal Declaration of Human Rights. Since its adoption in Paris on 10<sup>th</sup> December 1948, the UDHR has provided a guideline to states in the protection of rights of its people and of foreigners as well.

#### **3.2.1 The Universal Declaration of Human Rights**

The third article of the Universal Declaration of Human Rights states that each person has the right to life, liberty and his security. This is qualified further by the preceding article of the Agreement, which states that these rights are to apply equally, without regard to sex, age, religion, gender or any other status<sup>63</sup>.

#### **3.2.2 The International Convention on Civil and Political Rights**

When Kenya ratified the International Convention on Civil and Political Rights<sup>64</sup>, another major legal document protecting the right to life was added into Kenyan law. Article 6 of the ICCPR states as follows:

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

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<sup>61</sup> Sixth Schedule, *National Police Service Act* (2011)

<sup>62</sup> Section 24, *Penal Code*

<sup>63</sup> Article 2, *Universal Declaration of Human Rights*, 10 December 1948.

<sup>64</sup> Adopted by the United Nations General Assembly in resolution 2200A (XXI) of 16 December 1966.

In conjunction with Kenya's constitution<sup>65</sup> that states that life begins at conception, the ICCPR therefore ensures protection of life of Kenyans from this stage of life. Moreover, the convention recognises the death penalty as an exception to the rule<sup>66</sup> but enforces the right of any person on death row to seek for amnesty or pardon from the relevant able authority. The Second Optional Protocol to the ICCPR<sup>67</sup> however goes further and is the only statute of worldwide application that calls on all its members to work towards abolishing the death penalty, except in times and circumstances of war<sup>68</sup>, for the countries that still practise it.

### **3.2.3 The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography**

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography<sup>69</sup> provides supplementary guidance on this matter. Article 3 states that distribution of organs of a child for profit is prohibited. As shall be discussed later in this paper, one of the risks of embryonic stem cell research is the possibility of its commercialisation. This will make the stem cells to be so widely sought after that the harvesting of blastocysts and foetal organs may be done for profit, rather than for curative purposes only. This protocol is therefore a decent preventive measure for this eventuality.

Article 8 of the protocol goes further as to assign to the state the responsibility of ensuring that all these regulations are followed. It is known that the law does not work in a vacuum and hence, it is in the spirit of this protocol to ascertain that while the practice is illegalised, steps are also being taken to ensure the practical denunciation and elimination of these practices that endanger the lives of children.

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<sup>65</sup> Article 26 (1) (2), *Constitution of Kenya* (2010)

<sup>66</sup> Article 6 (4), *International Convention for Civil and Political Rights*, 16 December 1966, 220A XXI.

<sup>67</sup> Adopted by the United Nations General Assembly in resolution 44/128 of 15 December 1989.

<sup>68</sup> Protocol No. 13 of the European Convention on Human Rights is the only statute that compels abolition of the death penalty in all circumstances.

<sup>69</sup> Adopted by the United Nations General Assembly resolution 54/263 of 25 May 2000.

### **3.3 The African Charter**

The African Charter on Human and People's Rights, ratified by Kenya in 1992, posits that the life and integrity of a person is inviolable and therefore subject to protection<sup>70</sup>. Article 3 states that every individual is to be treated equally before the law and therefore all individuals, from conception to elderly age, are all entitled to be protected by law, for their lives and their dignity. The African Charter on the Rights and Welfare of the Child also provides complementary provisions, whereby it states that every child has an inherent right to life that ought to be protected by law. It further avers that state parties to this charter must work to ensure the survival and developmental rights of the child<sup>71</sup>.

### **3.4 Lessons from Abortion**

Abortion and embryonic stem cell research have several common factors, not the least of which is the exploitation of vulnerable groups of persons. In this sense, this paper analogises abortion so as to demonstrate its effects on the population, as the consequences would be exceedingly similar to those of human embryonic stem cell research. This is because both largely occur during the first trimester of pregnancy and involve the complete destruction and elimination from the world, of developing life.

Like human embryonic stem cell research, abortion was itself a major issue in not only medical circles, but legal ones as well. The United States of America has been the pioneering nation in both legislation and practice of both these issues and practices. In Kenya, the status quo has more or less remained the same, notwithstanding the queer constitutional provision<sup>72</sup> regarding abortion brought about in 2010. Abortion in Kenya has been illegal all through since independence.

Abortion legislation worldwide is generally restricted or permitted based on four primary justifications:

- i. Abortion only to save a woman's endangered life.
- ii. Abortion only to preserve the woman's health.

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<sup>70</sup> Article 4, *African Charter on Human and Peoples' Rights*, June 27 1981.

<sup>71</sup> Article 5, *African Charter on the Rights and Welfare of the Child*, 1990.

<sup>72</sup> Article 26 (4), *Constitution of Kenya* (2010)

- iii. Abortion based on socio-economic grounds, in that the woman may not be able to accommodate and provide for the child due to poverty.
- iv. Abortion without restriction as to reason. Here, a nation permits abortion for whatever reason the woman may have. This is in many states however restricted by the number of weeks the woman has been pregnant, as we shall see in South Africa's study below.

### **3.4.1 Abortion in the USA**

The United States of America prohibited abortion up until 1973, when the infamous case of *Roe vs Wade*<sup>73</sup> permitted abortion. The court in this matter in the state of Texas held that, based on right of privacy confined the Due Process Clause of the Fourteenth Amendment, a person has the right to have an abortion as long as the foetus has not yet become viable. Viability of which, is the quality that enables a foetus to be capable of independent living, outside of the womb<sup>74</sup>. A foetus usually becomes viable at from about 21 weeks of the gestation period<sup>75</sup>.

The United States legislation on abortion is now firmly grounded on the Fourteenth Amendment and is in category IV in the above categorisation, whereby no reason is needed to be given by the woman to justify the abortion.

The effect of *Roe vs Wade* has been, to say the least, immensely momentous. Since the case was decided in favour of Ms. Roe<sup>76</sup>, the United States has experienced a staggering sixty million abortions<sup>77</sup>. This is equivalent to one and a half times the population of Kenya – lives cut short at will of the woman.

This has not only given women the free choice to abort as often as they wish, but has also increased the rate of unprotected sexual intercourse, thereby increasing the transmission of sexually transmitted diseases – a burden which comes back to the government as its healthcare budget constantly increases so as to take care of such cases. In addition, in the ten years from

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<sup>73</sup> See *Roe v. Wade*, 410 U.S. 113, 1973.

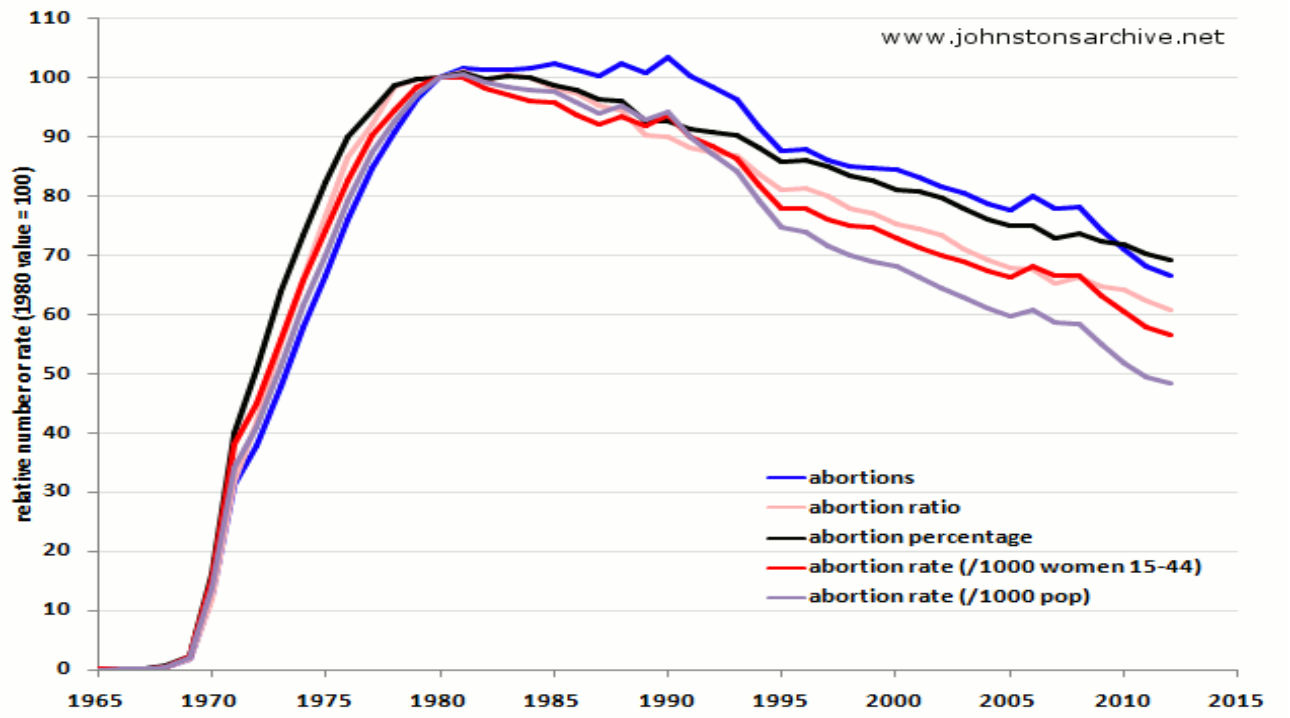
<sup>74</sup> South Australian Perinatal Practice Guidelines: Perinatal Care at the Threshold of Viability (2013).

<sup>75</sup> South Australian Perinatal Practice Guidelines (2013).

<sup>76</sup> Pseudonym of Norma McCorvey, the real claimant. The court allowed the use of this name to protect the identity of the claimant, seeing as it was a sensitive case.

<sup>77</sup> National Right to Life Educational Foundation. See more on <http://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf>

1981 to 1991, sixty two deaths of women because of abortion were reported<sup>78</sup>. These were avoidable deaths.



#### A: Rate of abortion since *Roe v. Wade* vis-à-vis the prior period.

As seen above, the post-Roe effect was very widespread. An increasingly larger population of mothers chose death for their offspring, rather than life. This was shown in the rise in the percentage portion of women predicted to abort their child instead of keeping it. By 1980, this was at thirty percent. Thirty one years later, 2011 sees the rate at a lower, but still staggering high of 21 percent<sup>79</sup>. This means that almost a quarter of all pregnancies are likely to end up being terminated by American women, most for no reason at all.

Medical practitioners and anti-abortion activists have hence provided one swaying and persuasive argument: abortion stops a beating heart. From sonograms, mothers can hear and see the pulse rate of their infant, and abortion puts all this activity to a grinding halt. This is the

<sup>78</sup> Saraiya M, 'Spontaneous Abortion-related Deaths among Women in the United States' *United States National Library of Medicine National Institutes of Health* (1999), 7-9.

<sup>79</sup> <http://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf> on 2 November 2016.



basis of pro-life activism and why, like abortion, human embryonic stem cell research is a violation to the right to life and the right to proper healthcare, parental protection and state care.

### **3.4.2 Abortion in South Africa**

As stated, the insufficiency of solid law on embryonic stem cell research is not grounds of implementation of the process, rather, one for further scrutiny. It is for this reason that abortion suffices as a proper and direct means of comparison of the effects arising from this premature loss of life.

South Africa has legislation similar to that of the United States on matters of abortion. It is generally permitted, but the legality of it, pending the reason, is dictated by the number of weeks for which the woman has been pregnant.

South African legislation states that:

A pregnancy may be terminated;

- a) Upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;
- b) From the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that;
  - i. The continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
  - ii. There exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or
  - iii. The pregnancy resulted from rape or incest; or
  - iv. The continued pregnancy would significantly affect the social or economic circumstances of the woman; or
- c) After the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy-

- i. Would endanger the woman's life;
- ii. Would result in a severe malformation of the foetus; or
- iii. Would pose a risk of injury to the foetus<sup>80</sup>.

Additionally, for a pregnancy that has lasted less than twelve weeks, a registered midwife, not a medical practitioner necessarily, is allowed to perform the procedure<sup>81</sup>.

This legislation is fathered by the country's constitution, which states that everyone has the right to life<sup>82</sup>. However, it further avers that the right to freedom and security of the person is also important<sup>83</sup> and that it includes the freedom to make one's own reproductive choices<sup>84</sup>.

South Africa's population is part of the sixty percent of world population that live in countries where abortion is permitted. This translates to the fact that more than half of the women in the world have the free will to terminate their pregnancies upon their own wishes, and taking a life which they do not have authority over.

Moreover and more worryingly, South Africa's stance on abortion was upheld in a 1998 case<sup>85</sup> whereby the court stated that a foetus is not a person and has no right to life. This was a curious and controversial decision as it had no scientific backing or grounding but was the mere opinion of the judge in the matter. The presence of a mere heartbeat indicates movement and pulse rate, two characteristics fundamental to the presence of life.

From 1998 to 2015, 1.2 million babies have hence lost their inherent right to life<sup>86</sup>, through this heartless procedure that additionally takes away taxpayers' money.

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<sup>80</sup> Section 2, *Choice on Termination of Pregnancy Act*, 1996 (South Africa)

<sup>81</sup> Section 2 (2), *Choice on Termination of Pregnancy Act*, 1996 (South Africa)

<sup>82</sup> Article 11, Constitution of South Africa (1996)

<sup>83</sup> Article 12, Constitution of South Africa (1996)

<sup>84</sup> Article 12 (2) (a), Constitution of South Africa (1996)

<sup>85</sup> *Christian Lawyers Association of South Africa and Others v Minister of Health and Others* (1998) BCLR 1434 (T); 1998 (4) SA 1113 (T).

<sup>86</sup> <http://www.lifenews.com/2015/02/04/south-africans-have-paid-for-abortions-of-1-2-million-babies-since-1997/> on 3 November 2016.

### **3.5 The Learning Point from Abortion**

As seen, the United States of America has, through its legislation, killed sixty million babies in forty years, while South Africa has taken away the lives of 1.2 million in fifteen years. It would seem that in the ordinary sense of the numbers, this would be enough to dissuade the pro-abortionists from their side of the divide. But it's not.

The truth of the matter and the merit of it are not in the murdered lives but in the mere gross violation of the right to life. The preservation of one life need not come at the expense of an innocent life.

Additionally and more concerning, this is also an ethical matter. Dr. Richard Stavis, the then Director at the Neonatal Unit at Bryn Mawr Hospital, admitted<sup>87</sup> that the occurrence of a live birth after an attempted abortion would not inspire his medical team to go to much further efforts to sustain the life of the child. This is a major concern, as doctors are seen to be probably unwilling to save a life due to the defects and effects brought about by an attempt at abortion.

The next chapter furthers the argument concerning embryonic stem cell research vis-à-vis auxiliary lessons on abortion. In it shall be discussed the personal and social effects of embryonic stem cell research as learnt from abortion.

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<sup>87</sup> Newsweek Magazine, Special Edition on Abortion, 14 January 1985.

## Chapter 4: Discussion: Argument against Embryonic Stem Cell Research

### 4.1 The Effect of Embryonic Stem Cell Research on Vulnerable Groups

The victims of abortion, embryonic stem cell lives and such arbitrary medical procedures are not limited to the embryos that are destroyed in the womb. There are secondary victims whose pain and vulnerability are just as serious and its effects just as intense.

After the shock decision in *Roe v Wade*<sup>88</sup>, renowned sociologist Mary Zimmerman conducted a research and reported on the effects of abortion on women who had had the procedure done. This study was furthermore done on first trimester abortions, same as the time in which embryonic stem cell extractions take place.

The results were staggering, distressing and a wake-up call to the abortion debate. Firstly, over sixty six percent of the women that had abortion stated the decision to terminate the pregnancy was not voluntary – they had been either forced or threatened to get the abortion, either by their male partner or by immediate family<sup>89</sup>. Additionally, many times, the decision was a catch 22 situation: an abortion would cause one party to be left in anger and another content. Zimmerman reports that on average, a whopping thirty six percent of women who had an abortion had a major disruption with at least one member of their social lives, mostly family<sup>90</sup>. Women reported disruptions in their relationships with their sisters, spouses or parents. Some had disruption with all these relationships<sup>91</sup>. An astounding half of the women who had abortions suffered a break up or separation from the man after the procedure, whether it was consensual or not<sup>92</sup>.

Moreover, a month and a half after the abortion, forty eight percent of the women interviewed admitted to ‘suffering’ and being ‘disturbed’ as a result of the termination of gestation<sup>93</sup>. This, said Zimmerman, was not surprising, as in the same research, only fifteen percent of the women did not regard the infant as a living being. This means that a large, landslide majority consider a stage one pregnancy to be harbouring a living organism, as is the truth. A similar number also

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<sup>88</sup> 410 U.S. 113, 1973.

<sup>89</sup> Zimmerman MK, *Passage Through Abortion: Personal and Social Reality of Women's Experiences*, Praeger Publishers Inc, 1978, 193.

<sup>90</sup> Zimmerman, *Passage Through Abortion*, 189.

<sup>91</sup> Zimmerman, *Passage Through Abortion*, 190.

<sup>92</sup> Zimmerman, *Passage Through Abortion*, 190.

<sup>93</sup> Zimmerman, *Passage Through Abortion*, 43.

consider the procedure ‘deviant and immoral’<sup>94</sup>. This research has been heralded among the medical community.

The statistics and numbers are in themselves raw, useless data if not interpreted as should be. It is blatantly obvious that the pressure of abortion largely comes from exterior forces and this causes pain, depression and anguish to the woman, weeks later. Pain that is not easily washed away. It is evident that abortion hurts social relationships – family breakdowns, relationship separations and degradation to the status of a social pariah all ensue from the decision to abort. Of course this is not true for all cases, but for many, more than a third of the cases, according to Zimmerman, as seen above.

#### **4.2 Are There Any Justifications to Human Embryonic Stem Cell Research?**

Pro-choice activists and philosophers have given two justifications, in the context of this paper. The first is utilitarianism. This theory is based on the principle of ‘greatest good for the greatest number’. One of its chief proponents was Englishman John Stuart Mill, and he stated that utilitarianism is grounded on the ‘greatest happiness’ principle. This is that, actions are right inasmuch as they promote happiness<sup>95</sup>, with happiness being the absence of pain and presence of pleasure<sup>96</sup>. In this manner, actions that bring fullness of joy are right and those that cause absence of pleasure are wrong.

As seen above in the assertion of vulnerable persons and their traumatizing effects after abortion, it is clear that abortion is in many cases a source of pain and displeasure. By this evident flow of idea and experience, utilitarianism cannot be a valid response for justifying abortion and embryonic stem cell research.

The second rationalization of the killing of embryos given by pro-abortionists is that, since abortion gives away unwanted children, it therefore reduces the propensity of child abuse by family and society, and that it as well reduces the rate of infanticide among mothers.

While this seems like a rational and straightforward explanation, it is extremely faulty and erroneous, as statistics since *Roe v Wade* have shown the following: child abuse increased by

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<sup>94</sup> Zimmerman, *Passage Through Abortion*, 192.

<sup>95</sup> Sen A and Williams B, *Utilitarianism and beyond*, Cambridge University Press, 1982, 2-7.

<sup>96</sup> Sen and Williams, *Utilitarianism and Beyond*, 3-7.

a whopping 456% between 1973 (the year *Roe v Wade* was decided) and 1982<sup>97</sup>. Child abuse injuries that led to eventual hospitalization of the child also rose, by 4.9%<sup>98</sup>. It is important to note that these statistics of increase in child abuse are not proportional to the rate of population growth, as should be expected in a quintessential population. They are astoundingly and unignorably higher. This second rationalisation of embryo-killing is not justified either.

### 4.3 Inference

Legally, ethically, morally, economically or however else, this paper has thus proved and will continue to in the ensuing chapters, that there is in truth no justification for embryonic stem cell research. Its similarities with abortion in terms of justifications and the greater good principle are exceedingly similar, and so will be their results, if this stem cell research is given the go-ahead.

*Roe v Wade*<sup>99</sup> brought about a mind-numbing increase in societal vices, as seen above, in child labour, reckless sexual behaviour and infanticide, not to mention its flagrant disregard for a fundamental human right.

The state and governments world over therefore have an overwhelming responsibility to ensure that these vices do not interact with society – that they are eliminated as quickly as possible, and in nations like Kenya that have not yet adopted it, that prevention is better than cure should be the guiding light.

In light of this discussion and the visible consequences of embryonic stem cell research, we shall look at how the state should handle this emerging issue.

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<sup>97</sup> Quint Kalebic C, 'Children: The Unprotected Minority: A Call for the Re-examination of Children's Rights in Light of *Stenberg v. Carhart*', *Regent University Law Review* (2003), 223.

<sup>98</sup> Phend C, 'Child Abuse Injuries on the Rise' *ABC.go.com*, October 1, 2012.

<sup>99</sup> 410 U.S. 113, 1973.

## 4.4 Scope of Obligation

### 4.4.1 The Osman Test

In 1998, the European Court of Human Rights provided a comprehensive guideline on the scope of obligation a state has to protect its citizens. This was in the Osman Test, which has since been used in the interpretation of state obligation ever since. In this matter, a male teacher developed a strange mania to a male student in the same school. This went on to absurd extremes, up to which the teacher changed his name to the student's. The obsession grew and the teacher became a prime suspect in a robbery in the student's home. Eventually, the teacher attacked the family, killing the father and significantly wounding the student. The complete immunity that the United Kingdom had until then granted its police officers in relation to their actions was now put into question. The court held that this immunity was unjust, impractical and too broad, making it capable of infringing on the rights of people<sup>100</sup>. Ten years prior to this case, a dangerous precedent had been set by the House of Lords – that the police and the state in general owed no duty of care in the detection of a crime<sup>101</sup>. This led to the multiple problems and cases involving state negligence in criminal activities and violations and the state was never held liable, as per the 1988 *Hill* precedent.

The court therefore strived to change this and hence developed the Osman Test in relation to state responsibility and liability. The Osman Test is a test on the violation of the right to life. It states that if the state knows or ought to have known about a risk on the right to life of an individual or a group and did nothing to protect against said violation, and failed to take measures so as to prevent such happenings, then the state can be held liable. This was a victory, especially to grieving family and friends, as was in the case in many decisions such as in *Hill* and the *McCann* decision as well<sup>102</sup>, families were left with no recourse upon governmental negligence and breach of the right to life.

This test was revolutionary in two ways. Firstly, as stated above, it enabled those left grieving to have recourse in law and to feel that some justice has been recovered. Secondly, it burdened upon the state the positive responsibility of ensuring that the right to life is protected at all

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<sup>100</sup> *Osman v. The United Kingdom*, ECtHR Judgement of 28 October 1998.

<sup>101</sup> *Hill v Chief Constable of West Yorkshire*, [1988] 2 WLR 1049.

<sup>102</sup> *McCann and others v The United Kingdom*, ECtHR Judgement of 6 October 1995. In this matter, the state made wrongful and costly assumptions in its attempt to kill terrorists.

costs. This is to ensure reduction of arbitrary murders as seen in the McCann case and also to ensure diligent, careful and expedient investigations on matters pertaining to the right to life.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is very clear on the obligation of states to protect the lives of those under its care. It provides that no one ought to be deprived of his life intentionally by another person, other than in the obvious instance of a court order<sup>103</sup>. Therefore in *Van Colle vs. United Kingdom*, the European Court of Human Rights stated that authorities in a state have the positive obligation to take action where they know or ought to know that there is immediate risk to life<sup>104</sup>. This was a 2012 decision, which, by the statement given, reinforced the Osman Rule.

The similarity of these matters and the Osman principle to embryonic stem cell research is unmistakably striking. It is clear that the Osman Test served to protect those who had no voice. In all the aforementioned cases, the victims were dead and the families were all that were left to rue the loss of their kin. Similarly, in embryonic stem cell research, the victims have no voice, no means of legal standing of their own accord, and no way of making their voice heard by their own effort. International law and municipal law, guided by the cases seen and the conventions mentioned, are therefore present so that such lives can be heard. The Osman Rule is applied so that the lives gone are not taken for granted and forgotten. Similarly, the lives that have no voice ought not to be disregarded. It is unfathomable that law gives opportunity to one set of the unheard and denies another. The legislative and judicial processes must not allow for such arbitrary exemptions to occur. It is true that the law does not legislate morality, or in the words of Martin Luther King Jr, *'it may be true that the law cannot make a man love me, but it can stop him from lynching me, and I think that's pretty important'*. This, is rather important.

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<sup>103</sup> Article 2, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, Rome, 4.XI.1950.

<sup>104</sup> *Van Colle v. United Kingdom*, ECtHR Judgement of 13 November 2012.



#### 4.4.2 The Asero Outlook

In 2008, Patricia Asero, a Kenyan living with HIV, along with like-infected colleagues, took to the High Court a motion to edit the sections of the Anti-Counterfeit Act 2008 that brought up a risk to the valued right to life<sup>105</sup>. Section 2, 32 and 34 of the said Act were in issue in this matter. Section 2, especially, was confusingly ambiguous on the definition of counterfeit drugs. While it is an obvious aim of law to reduce and eliminate intellectual property infringement, it is also essential that infringement and lawful adoption are differentiated.

The Act prohibited the purchase and use of generic drugs, whose actual definition does not fall within that of counterfeit drugs. The definition given by the World Health Organisation of a generic drug is a pharmaceutical product usually intended to be interchangeable with an innovator product, which is manufactured without a licence from the innovator company and marketed after the expiry date of the patent or relevant exclusive right<sup>106</sup>. It further defines counterfeit drugs as medicines that are deliberately and fraudulently mislabelled with respect to identity and source<sup>107</sup>. The Anti-Counterfeit Act however seemingly equates the two<sup>108</sup>. Patricia Asero therefore brought up the matter in court so as to ensure that their constitutional guarantee of a dignified and decent access to quality healthcare<sup>109</sup> is not undermined.

In her judgement in 2012, Justice Mumbi Ngugi stated that there was indeed an infringement to the right to life and human dignity and health. She directed for the amendment of Article 2 of the Anti-Counterfeit Act of 2008 so as to be in line with the constitution<sup>110</sup>. This case served as a legal tool in two ways as well. First, it showed the rising importance and usefulness of public interest litigation among citizens. It enforced the principle of rule for the people and by the people. Secondly and more relevant to this paper, *Patricia Asero* showed that the right to life is not subject to the arbitrary will of the state government. The right to life is of utmost importance and any derogation from it must be accompanied by near-unanimous public approval.

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<sup>105</sup> *Patricia Asero Ochieng' & 2 others v The Attorney General* [2012] eKLR

<sup>106</sup> World Health Organisation "Trade, Foreign Policy, Diplomacy and Health". See at <http://www.who.int/trade/glossary/story034/en/> on 4 November 2016.

<sup>107</sup> World Health Organisation Guidelines. Accessed at <http://www.who.int/medicines/services/counterfeit/faqs/QACounterfeit-October2009.pdf> on 4 November 2016.

<sup>108</sup> Articles 32, 33 and 34, *Anti-Counterfeit Act*, (2008)

<sup>109</sup> Article 43, Constitution of Kenya (2010)

<sup>110</sup> Petition No. 409 of 2008.

More importantly, legislation that is unconstitutional and anti-life can and must be revoked. This case showed that the fact that there is a predominant and emerging trend in legal and moral ethics, the fundamental principles that led us away from Hobbes' state of nature must not be derogated from. The right to life must be protected at all cost. The failure of this will lead to what Patricia Asero was avoiding – lack of medical protection, leading to the eventual and inevitable loss of life.

### **4.3 The Church-State Conundrum**

This is the practical reasoning behind the proposed practice that will follow the introduction of a bill to legislate on embryonic stem cell research.

The separation of church and state has been used since time immemorial to justify the need for politics to be run aside from religion. Aristotle believed that religion was subordinate to and intertwined with the city-state<sup>111</sup>. In this, he stated that politics was the superior form of social co-ordination and all other elements of social practice were subordinate to it. Politics and religion, according to him, were therefore inseparable. However, it is noteworthy to recognize that Aristotle was speaking in a time where aristocracy and authoritarian rule was striving. In the words of George Orwell's *1984*, if the government in such an authoritarian regime states that two plus two equals to five, then such is the undeniable truth<sup>112</sup>. Aristotle was therefore speaking at a time where free thought was largely curtailed and the state controlled the church fully and hence, while it was true of his statement at the time, it is unquestionably misplaced and impractical to say the same at the current moment. The thought of the time was cautioned, while we now live in a liberal and free thinking world.

In this sense, we adopt the words of thinkers such as the Father of Liberalism, John Locke. In his argument for the separation of church and state, Locke provides the example of punitive measures of the state. That while he admits that a state can punish someone based on the crime, it cannot control the person's judgement nor perception toward the act<sup>113</sup>. In his words, we cannot let the civil magistrate take care of souls<sup>114</sup>. He continues, that the state is not responsible

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<sup>111</sup> <https://plato.stanford.edu/entries/aristotle-politics/> on 5 December 2016.

<sup>112</sup> Orwell G, *1984*, Signet Classic Publishers, 1961, 80.

<sup>113</sup> Locke J, *A Letter Concerning Toleration*, 1689, 7-8.

<sup>114</sup> Locke, *A Letter Concerning Toleration*, 7-8.

for the salvation of one's soul but for the protection of people from harm<sup>115</sup>. Locke further states that the state cannot introduce punishment against the choice of religion<sup>116</sup>. This is similar to the Establishment Clause of the Constitution of the United States – which provides that Congress ought not to introduce legislation in favour of an established religion.

Modern thinking from the legal and philosophical fields have also led to similar conclusions. Countless cases have been brought forward in the name of secularism. However, it is of the essence that while we agree that the state and the church should be separated, it is of no doubt the influence religion gives to the state. In modern day Europe, teachers are being banned from wearing head scarfs<sup>117</sup> signifying adherence to the Islamic faith, students are being prohibited from the same hijab-wearing<sup>118</sup> and general public significations of marginalised faiths are being halted<sup>119</sup>. It has been of noted concern from these cases that while secularism is said to rule in Europe, it is quite obvious to note the favouritism being granted to Christianity, or inversely, the prejudicial treatment of smaller religions, especially Islam. This is even seen in the severity of the cases. While *Lautsi* only concerned prohibition of a crucifix, *Sahin* and *Dahlab* are seen to control the very dressing of Muslims. The illusion of a religious-free state should therefore be dealt with with adequate care.

Consider the situation in Kenya especially. As per the 2009, general census, 94% of Kenyans identified with a religion<sup>120</sup>. Of this number, a similar 93% identified themselves as Christian<sup>121</sup>. While a secular state by the letter of the law<sup>122</sup>, by practice, Kenya is extremely religious, more so, vehemently Christian. This is in contrast to the United States, where just over 70% now identify as religious<sup>123</sup> and Europe<sup>124</sup>, which is the most secular region of the world. Therefore, taking into account their lower religiously affiliated population and their

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<sup>115</sup> Locke, *A Letter Concerning Toleration*, 7-9.

<sup>116</sup> Locke, *A Letter Concerning Toleration*, 9.

<sup>117</sup> *Dahlab v Switzerland*, ECtHR Judgement of 15 February 2001.

<sup>118</sup> *Leyla Sahin v Turkey*, ECtHR Judgement of 10 November 2005.

<sup>119</sup> *Lautsi v Italy*, ECtHR Judgement of 18 March 2011.

<sup>120</sup> Kenya Bureau of Statistics: Census 2009 Summary of Results: Religious Affiliation. See more on [http://www.knbs.or.ke/index.php?option=com\\_content&view=article&id=156:religious-affiliation&catid=112&Itemid=638](http://www.knbs.or.ke/index.php?option=com_content&view=article&id=156:religious-affiliation&catid=112&Itemid=638) on September 22 2016.

<sup>121</sup> Kenya Bureau of Statistics: Census 2009 Summary of Results: Religious Affiliation. See more on [http://www.knbs.or.ke/index.php?option=com\\_content&view=article&id=156:religious-affiliation&catid=112&Itemid=638](http://www.knbs.or.ke/index.php?option=com_content&view=article&id=156:religious-affiliation&catid=112&Itemid=638) on September 22 2016.

<sup>122</sup> Article 8, Constitution of Kenya (2010)

<sup>123</sup> [http://www.nytimes.com/2015/05/12/upshot/big-drop-in-share-of-americans-calling-themselves-christian.html?\\_r=0](http://www.nytimes.com/2015/05/12/upshot/big-drop-in-share-of-americans-calling-themselves-christian.html?_r=0) on 1 December 2016

<sup>124</sup> <http://www.bbc.com/news/world-33256561> on 17 December 2016

comparative high religious dependency, it is simple to extrapolate the same to Kenya's situation. Kenya is massively religious, the evident conclusion.

The purpose of this religion analysis is as follows. The heart of embryonic stem cell research is that of the arbitrary taking away of life after harvesting of the cells. In religion, this amounts to 'playing God'. It is unimaginable the level and intensity of antagonism that will go into opposing this medical proposition. By the sheer force of religion in Kenya as seen above, especially that of the Christian faith, it is obvious that an effort to introduce legislation allowing human embryonic stem cell research will fail, and fail horribly. This is however not the problem.

The issue is concerns the money, time and resources that will be devoted by the minority advocates of the procedure into trying to convince the populace into the idea and in trying to incorporate it into law. Parliament will debate it for months on end, committees will be formed to look at its probable application and eventual effects, bills will be drafted and consultancies carried out. The inevitable result of all this is waste of money, time and resources. Allowances will be paid to committee members, to professionals educating Parliament on the procedure and the August House will spend good time on the matter. As discussed above, Kenya has 'better things to do', than to focus on a failing scheme.

Developed states have the funds to disperse money for projects such as embryonic stem cell research. However, it would be very insensitive of the Kenyan government to devolve funds that way, taking into account the dire needs of the forty seven percent of Kenyans living in poverty. This therefore is not only the practical reasoning behind the proposed practice for Kenya, it is simultaneously the humane and logical reasoning.

#### **4.4 The Illusion of Necessity**

This focusses on the economic and fiscal rationale behind the proposed way forward for Kenya as regards embryonic stem cell research.

As mentioned earlier in this paper, stem cells are regenerative cells in the body that can differentiate into a variety of different cells of the body. The merit of stem cells are therefore in their regenerative capacity. Most parts of the body contain stem cells. For instance, the liver.

If the liver is for some reason amputated or injured, stem cells allow it to grow back the lost part. This is caused by the accumulation of undifferentiated stem cells in the injured organ<sup>125</sup>. They then adopt the properties of the body part and grow into, in this case, new hepatic (liver) cells. Smaller and less complicated organisms such as amphibians contain more stem cells and hence, such animals easily regrow limbs and other essential parts necessary for their survival. In humans however, several vital organs most notably the heart, do not contain stem cells. Therefore, this makes heart-related ailments notoriously fatal. Stem cells are therefore, so to speak, the SI unit of healing.

In Kenya, the Kenya Heart National Foundation was set up to investigate and eventually reduce on the number of cardiac sicknesses in the country. The foundation is an umbrella body of the World Heart Foundation and a collaborator with the African Heart Network<sup>126</sup>. These foundations have been tasked to reduce heart ailments worldwide. While it is true that most cardiac (heart) ailments are genetic and hence unavoidable, most ailments to vital organs are inherently preventable and caused by self-inflicting harm such as tobacco smoking and drug addiction. In their analysis of heart illnesses, they have found out that most heart ailments are caused by, in decreasing order of likelihood and number: high blood pressure, lack of physical activity, high blood cholesterol, obesity, diabetes and tobacco smoking<sup>127</sup>. It is noteworthy that all of the above are preventable and quite easily avoidable. This is other than the occasionally-genetic diabetes, which is still mostly not hereditary. By simple physical exercise, regulation of food intake, ingestion of a balanced diet and a general healthy lifestyle, all of the above are prevented and the rate of heart disease plummets. It is therefore now medically proven that heart disease is mostly self-inflicted, especially among Kenya's population<sup>128</sup>.

Furthermore, according to the World Health Organisation's latest statistics, heart disease was the cause of just under three thousand deaths in the year 2014 in Kenya. This amounted to about 2% of the total deaths in the country<sup>129</sup>. This ranked Kenya at number 149 among countries with reported heart disease deaths. This is, among the twenty reported diseases, the ailment in which Kenya performed best. As per this information, it is abundantly clear that

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<sup>125</sup>EuroStemCell Organisation: Stem Cell Factsheet. See more on <http://www.eurostemcell.org/de/node/19896>

<sup>126</sup> <http://www.kenyanheart.or.ke/aboutUs.html> on 3 September 2016.

<sup>127</sup> Kenya Heart National Foundation: Cardiovascular Disease Protection. See more on <http://www.kenyanheart.or.ke/cardiovascularDisease.html> on 3 September 2016.

<sup>128</sup> Business Daily Newspaper, November 7<sup>th</sup> 2016. See at <http://www.businessdailyafrica.com/Corporate-News/Is-Kenya-sitting-on-ticking-heart-attack-time-bomb--/539550/2538092/-/wslpih/-/index.html> on 5 September 2016.

<sup>129</sup> <http://www.worldlifeexpectancy.com/kenya-coronary-heart-disease> on 30 September 2016.

Kenya does not need embryonic stem cell research; and additionally, with the avoidance measures set out above by the Kenya Heart National Foundation, it is clear that by the stated precautionary measures, this number can go as low as under one percent. It is indeed possible to ensure that cardiac disease is limited to only those affected genetically.

The gross lack of necessity of human embryonic stem cell research is further demonstrated in the United Nations' approach to the matter. In 2005, by a margin of 71—35, which is more than double of the states that voted, the United Nations voted to ban all cloning<sup>130</sup>. This was mainly due to the reason that cloning was increasingly being performed for its therapeutic function – that is, cloning so as to derive stem cells from the cloned offspring<sup>131</sup>. While only a recommendation and not legally binding, the resolution says a lot concerning the general thinking on the matter. More than ten years later, the United Nations has not changed its view on the matter.

Kenya should therefore not join the embryonic stem cell research bandwagon based purely on worldwide practice but on its own statistics and data. The needlessness of this procedure is glaring. Citizens just need to ensure they make proper lifestyle choices. However in sensitivity to those still affected and who will be affected by the disease, Kenya must adopt helpful measures. Aga Khan Hospital has for example set up a fast-response heart attack unit to deal with emergency cardiac arrest cases<sup>132</sup>.

The government should borrow a leaf from this private institution and develop more such centres. Also, since the ideal number would be below one percent, it would be prudent for the government to fund foreign stem cell patient treatment according to each one's ability to pay for treatment at a foreign jurisdiction. As seen earlier in this Chapter, the government has an obligation to provide care for its citizens proper care in as far as it can provide it. This begins with proper care locally, which should be supplemented by proper funding for foreign treatment where local remedies fail.

This would achieve to purposes: firstly, the rate of heart disease would be slowed down without the introduction of embryonic stem cell research and secondly, proper health policy would be

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<sup>130</sup> <http://news.stanford.edu/news/2005/march2/med-undivided-030205.html>

<sup>131</sup> <http://www.washingtonpost.com/wp-dyn/articles/A18205-2005Mar8.html>

<sup>132</sup> Business Daily Newspaper, November 7<sup>th</sup> 2016. See at <http://www.businessdailyafrica.com/Corporate-News/Is-Kenya-sitting-on-ticking-heart-attack-time-bomb--/539550/2538092/-/wslpih/-/index.html> on 29 October 2016.

advanced, as the government would save money from building its own stem cell facilities to minor-budgetary funding of the few affected patients. More so, the inception of embryonic stem cell treatment would cause an incentive to continue with poor lifestyle choices such as poor feeding and smoking. This has ripple effects on the budget and economy in general, as money that ought to be spent elsewhere will then be expended on healthcare that could have been avoided.

The misapprehension of the necessity of human embryonic stem cell research in a developing state, in this case Kenya, should therefore be seen as it is – an illusion that draws focus from more flagrant and pertinent medical and societal issues.

## Chapter 5: Conclusion and Recommendations

From the foundations of the right to life, to the reasons on the importance of its protection, to the finalisation of this paper by recommendations on state practice, the purpose of this paper has been fulfilled.

The manifest breach of this right by states and powerful bodies has been shown, and the parallelism to the barriers the law provides is undeniable. Further, this paper has demonstrated the harm that results from disregarding the right to life. This harm, as has been shown, penetrates to affected vulnerable people who are left with the burden of regretting the loss of the life that was to be.

In recommending the proposed practice for Kenya and other developing nations as to how to implement (or not) the research and procedure, this paper will use four swaying arguments: a fiscal one, a social argument, an economic argument and an argument based on the human person and his protection.

It is evident from the discussion provided in this paper, that there is an illusion of necessity as regards human embryonic stem cell research. As discussed, not only is the research illegal and harmful, it is also unnecessary on one major front: means of treatment are evolving every day and technology is providing the medical field with increasingly efficient and reliable methods of therapeutic control. The introduction of embryonic stem cell treatment as a permanent means of healing would therefore constitute an unnecessary loss of life.

As seen in Chapter 4 as well, the fiscal ramifications of human embryonic stem cell research to a developing nation are way more significant and consequential than its effects to developed countries. The far less spending power of developing nations and their need for further development and social, economic and political progress renders embryonic stem cell research an undertaking too much to bear and too expensive, vis-à-vis its eventual effects. It goes without saying therefore, that considering Africa's need and its already-existent and rampant corruption and financial fraud, it is not only illogical, but also inconsiderate and careless for developing nations in the content to put a lot of resources on this treatment method.

Additionally, as was seen in the third chapter of this paper, sociologist Mary Zimmerman provided a comprehensive account on the personal struggles of the vulnerable groups that are affected by abortion. In it, she demonstrates how women are forced into abortion, the imposing



of which leads to two stark consequences: an intolerably abysmal feeling of regret upon the loss of a child and an eventual breakdown in relationships with the male partner and also with family members and the larger community, in more protuberant cases. It is an objective of the state to protect its citizens from harm inasmuch as it can prevent it and this definitely falls within the mandate of the state to protect its citizens.

More practically, *Roe v Wade* has provided additional substantive evidence concerning the economic effects of the allowance of the loss of developing life. As seen in Chapter 3, the legalisation of abortion in the United States caused increased gross carelessness as regards sexual behaviour, especially among the younger members of a population. This is not only harmful to the population in a personal nature as seen in Zimmerman above, but also has a detrimental effect on the state and its economy. Each year, a sizeable portion of a nation's budget is distributed to the medical field and ministry. The increasing carelessness in sexual behaviour with people knowing there is a way out via abortion or embryonic stem cell treatment will cause an inevitable increase in sexually transmitted diseases. This then balloons the nation's budget on medical care. Such unnecessary expenditure should be avoided at all costs, as nations with limited resources should be allowed to put to use their revenue in the most efficient way possible.

It is therefore evident, and nations must see it as it is. Human embryonic stem cell research is in flagrant disagreement with human rights principles world over and is an abuse not only to law, but to sense, humanity and basic human dignity. The protection of law must not be kept sacred because of its status as a law, but due to the sacrosanct duty it plays in the protection of people world over, protection from personal injury, emotional pain and societal discomfort. Laws, in the words of Hans Kelsen, are made from norms and these norms are societal agreements on what governs human behaviour. This is the basis of peaceful co-existence and must be honoured as is.

Finally, it is a plea, not just on the basis of law, but on the strong and sensitive quality of the human heart, that this arbitrary nature of governmental and institutional acts be halted with rapid effect, for have we not known, since time immemorial, which is of better substance – prevention or cure?

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