



**Strathmore University**

**Law School**

**ANONYMOUS SPERM DONATION IN KENYA: ADVOCATING FOR PROPER  
REGULATION**

**TO SAFEGUARD THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD**

**SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE  
BACHELOR OF LAWS DEGREE, STRATHMORE UNIVERSITY LAW SCHOOL**

**BY**

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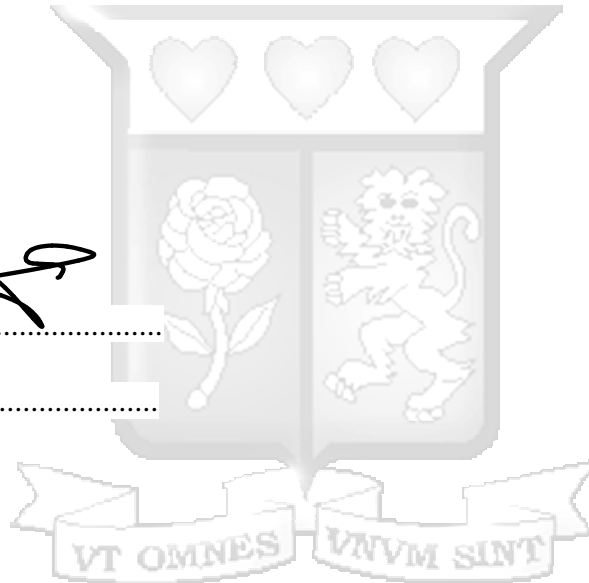
**DECLARATION**

I, **AISHA GUTHMY**, 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 03/04/2025 .....



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



Signed .....

PATRICK NZOMO WAMBUA

Date 3-4-25 .....

## **DEDICATION**

Dedicated to the children whose rights and futures are protected by compassionate and well-crafted regulations,



## ACKNOWLEDGEMENT

I sincerely thank God for His unwavering guidance and protection throughout my academic career.



## **LIST OF ABBREVIATIONS**

ACRWC	African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49
ART	Artificial Reproductive Technology
BIC	Best interests of the child
CRC	Convention on the Rights of the Child, 1577 UNTS
IVF	In vitro fertilization
NHA	National Health Act 2003 (South Africa)



## LIST OF LEGAL INSTRUMENTS

### **INTERNATIONAL LAW**

1. Convention on the Rights of the Child, 2 September 1990, 1577 UNTS.
2. African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49.
3. UN Declaration on the Rights of the Child, 10 September 1959.

### **DOMESTIC LAWS**

1. The Constitution of Kenya, 2010
2. Law of the Contract Act (Cap 23)
3. The Children Act (Cap 141 of 2022)
4. Births and Deaths Registration Act (Cap 149 of 1928)
5. The Access to Information Act (Cap 31 2016 of 2019)
6. The Data Protection Act, (Cap 411C of 2019)
7. The Health Act, (Cap 241 of 2017).



## **LIST OF CASES**

1. Charles Muturi Macharia & 6 Others v Standard Group & 4 Other (2022) eKLR
2. AB and Another v Minister of Social Development (2016), Constitutional Court of South Africa.
3. LNW v Attorney General & another; Kenya National Commission on Human Rights (2016) eKLR.



## **ABSTRACT**

Anonymous sperm donation is a widely practiced but ethically nuanced component of Assisted Reproductive Technology (ART), raising critical concerns about the rights and well-being of donor-conceived individuals. In Kenya, the absence of a comprehensive legal framework regulating sperm donation exposes these children to considerable risks, including identity deprivation, restricted access to genetic and medical history, and the potential for accidental incest. Central to this issue is the principle of the Best Interests of the Child (BIC), a cornerstone of international human rights law that remains insufficiently protected in the context of ART. This study examines the legal and ethical challenges surrounding anonymous sperm donation in Kenya and advocates for the development of a regulatory framework that balances the rights of all stakeholders while prioritizing the welfare of donor-conceived children. Utilizing a qualitative methodology, the research incorporates legal analysis, case studies, and comparative reviews of international best practices, with a particular focus on South Africa's progressive regulatory approach to ART. The findings reveal a critical tension between maintaining donor anonymity and upholding a child's fundamental right to know their genetic origins—an essential factor in identity formation, psychological well-being, and access to vital health information. While anonymity has historically been safeguarded to encourage sperm donation, evolving legal and ethical norms increasingly emphasize transparency and the rights of donor-conceived individuals, challenging traditional practices. To address these complexities, this paper proposes a structured regulatory framework incorporating donor tracking systems, limitations on the number of offspring per donor, and mechanisms granting donor-conceived individuals access to essential genetic and medical information. As a signatory to international human rights treaties, Kenya has both a legal and moral responsibility to align its reproductive laws with global best practices.

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## CHAPTER ONE: INTRODUCTION

### 1.1 Background

The family unit plays a pivotal role in shaping societal values, traditions, and continuity.<sup>1</sup> In sub-Saharan Africa, children are regarded not only as carriers of family heritage but also as a source of security, pride, and legacy.<sup>2</sup> Parenthood is a highly esteemed social and marital obligation, with children symbolizing familial identity and cultural lineage.<sup>3</sup> Consequently, infertility is often viewed as both a personal and societal challenge, prompting many couples to seek solutions through both conventional and non-traditional methods.<sup>4</sup> Assisted Reproductive Technologies have emerged as critical tools in addressing infertility, offering individuals and couples opportunities to conceive despite biological barriers.<sup>5</sup> Among these technologies, anonymous sperm donation has been particularly significant, enabling single women or couples to achieve genetic parenthood on the maternal side using donor sperm.<sup>6</sup>

The history of sperm donation dates back to the late 19<sup>th</sup> century, with one of the earliest recorded cases occurring in 1884 when Professor William Pancoast discreetly performed artificial insemination using donor sperm.<sup>7</sup> Shrouded in secrecy, this early procedure reflected the broader societal discomfort with assisted reproduction.<sup>8</sup> A major milestone came in 1953 when the first successful human pregnancy using frozen sperm was achieved, paving the way for modern sperm

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<sup>1</sup> Ebrahim G J, 'The family as a child-rearing unit of society' in Ebrahim G J (ed) *Child health in a changing environment*, London, 1983, 68-69.

<sup>2</sup> Ebrahim G J, 'The family as a child-rearing unit of society' 68-69.

<sup>3</sup> Kwena Z, 'Reproductive Health Ethics' 5 *KEMRI Bioethics Review* 4, 2015, 5.

<sup>4</sup> Kwena Z, 'Reproductive Health Ethics' 5.

<sup>5</sup> Lenaola I and Mutugi M, *Bioethics of medical advances and genetic manipulation* Longhorn Publishers and Worldreader, 2018, 136.

<sup>6</sup> Stina I, Gunilla S, Agneta S and Claudia L, 'Managing absence and presence of child-parent resemblance: a challenge for heterosexual couples following sperm donation' 8 *Reproductive Biomedicine & Society Online*, 2019, 38-46.

<sup>7</sup> Elizabeth Y, 'The First Artificial Insemination Was an Ethical Nightmare' *The Atlantic*, 8 January 2016- <<https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/>> on 17 September 2024.

<sup>8</sup> Elizabeth Y, 'The First Artificial Insemination Was an Ethical Nightmare' *The Atlantic*, 8 January 2016- <<https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/>> on 17 September 2024.

donation.<sup>9</sup> However, the practice remained relatively rare until the 1970s and 1980s, when shifting social attitudes and medical advancements led to greater acceptance.<sup>10</sup>

In 1984, Sweden became the first country to prohibit anonymous sperm donation, thereby granting donor-conceived individuals the right to access identifying information about their genetic origins upon reaching adulthood.<sup>11</sup> For much of the 20<sup>th</sup> century, however, sperm donation operated largely in secrecy, with minimal formal documentation to preserve donor anonymity.<sup>12</sup> Over time, legislative reforms in Europe and Australia shifted the paradigm toward greater transparency, recognizing the significance of genetic identity for donor-conceived individuals.<sup>13</sup> Currently in the 21st century many countries today have introduced or are actively considering laws granting access to donor information, reflecting broader societal and ethical shifts.<sup>14</sup> However, many African countries, including Kenya, still lack comprehensive legal frameworks to regulate sperm donation, leaving unresolved questions about donor anonymity, genetic identity, and ethical safeguards.<sup>15</sup>

The practice of anonymous sperm donation essentially refers to the act in which a man donates his sperm under the explicit condition that his identity will remain confidential, preventing both the recipient and the offspring from accessing any identifying information about him.<sup>16</sup> This approach raises important ethical and legal considerations, particularly regarding the rights of donor-conceived individuals to access information about their genetic origins. As the global conversation

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<sup>9</sup> The Evolution of Fertility Treatments and Development of IVF -<<https://www.scrxivf.com/the-evolution-of-fertility-treatments-and-development-of-ivf>> on 17 September 2024.

<sup>10</sup> The Evolution of Fertility Treatments and Development of IVF' -<<https://www.scrxivf.com/the-evolution-of-fertility-treatments-and-development-of-ivf/>> on 17 September 2024.

<sup>11</sup> Lucy F, 'Gamete donation and anonymity: The ethical and legal debate' 16 Human Reproduction 5, 2001, 818–824.

<sup>12</sup> Elizabeth Y, 'The First Artificial Insemination Was an Ethical Nightmare' The Atlantic, 8 January 2016- <<https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/>> on 17 September 2024.

<sup>13</sup> Elizabeth Y, 'The First Artificial Insemination Was an Ethical Nightmare' The Atlantic, 8 January 2016- <<https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/>> on 17 September 2024.

<sup>14</sup> Elizabeth Y, 'The First Artificial Insemination Was an Ethical Nightmare' The Atlantic, 8 January 2016- <<https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/>> on 17 September 2024.

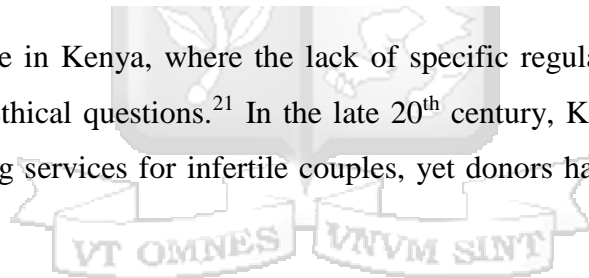
<sup>15</sup> John M, 'Africa's sperm donor industry 'lacks vital safeguards' SciDevNet, 13 January 2025- <<https://www.scidev.net/global/scidev-net-investigates/africas-sperm-donor-industry-lacks-vital-safeguards/>> on 18 February 2025.

<sup>16</sup> 'Sperm donation', -<<https://www.fertilitycentre.co.za/sperm-donation/>> on 18 September 2024.

around assisted reproduction evolves, the movement toward transparency continues to challenge long-standing norms, reshaping the future of sperm donation and the rights of those it affects. What began as a secretive, informal practice has transformed into a regulated, ethically scrutinized procedure in many parts of the world, mirroring broader developments in reproductive medicine and the growing recognition of donor-conceived individuals' rights to know their genetic origins.<sup>17</sup>

At the heart of this arrangement lies the resulting child, who is the most vulnerable yet lacks decision-making power. The absence of a comprehensive legal framework governing the roles and responsibilities of donors, recipients and fertility clinics pose significant risk to the child's welfare.<sup>18</sup> Furthermore, the child's right to know their name, nationality, and biological parentage is critical to their health, psychological well-being, and personal identity.<sup>19</sup> These concerns form the basis of ongoing ethical debates about identity rights and the implications of anonymous sperm donation. These concerns are at the heart of ongoing debates surrounding identity rights and the ethical implications of sperm donation. Critics argue that such practices may verge on exploitation or even commodification, raising significant moral and societal questions about the treatment of children as individuals with inherent rights rather than as products of reproductive technology.<sup>20</sup>

Similar concerns resonate in Kenya, where the lack of specific regulations on sperm donation raises crucial legal and ethical questions.<sup>21</sup> In the late 20<sup>th</sup> century, Kenyatta National Hospital introduced sperm banking services for infertile couples, yet donors have remained anonymous,



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<sup>17</sup> Elizabeth Y, 'The First Artificial Insemination Was an Ethical Nightmare' The Atlantic, 8 January 2016- <<https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/>> on 17 September 2024.

<sup>18</sup> Sifris A, 'The family courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach' *23 Journal of law and medicine* 2, 2015, 396–412.

<sup>19</sup> Caroline O, 'Sperm donation: A different kind of bank' The Standard, - <<https://www.standardmedia.co.ke/entertainment/sunday-magazine/article/2001234043/sperm-donation-a-different-kind-of-bank>> on 18 September 2024.

<sup>20</sup> Bokek C, Gonen L, 'Sperm and simulacra: emotional capitalism and sperm donation industry' *34 New Genetics and Society* 3, 2015, 243–273.

<sup>21</sup> Caroline O, 'Sperm donation: A different kind of bank' The Standard, - <<https://www.standardmedia.co.ke/entertainment/sunday-magazine/article/2001234043/sperm-donation-a-different-kind-of-bank>> on 18 September 2024.

and the legal rights of donor-conceived individuals remain undefined.<sup>22</sup> The Assisted Reproductive Technology Bill 2022 represents a significant step towards regulating sperm donation and acknowledges the right of donor-conceived individuals to be informed about their conception through assisted reproduction. However, despite this progress, the Bill has remained pending in Parliament for several years.

## **1.2 Problem statement**

The increasing use of sperm donation in Kenya raises significant concerns regarding the welfare of donor-conceived children, particularly due to the lack of a comprehensive legal framework. Anonymous sperm donation deprives children of essential knowledge about their genetic origins, affecting their identity, medical history, and overall well-being. A well-structured legal framework must prioritize the best interests of the child by ensuring transparency, accountability, and ethical integrity in the sperm donation process. Such a framework would also establish mechanisms to track donors, limit the number of offspring per donor, and ensuring the right of donor-conceived individuals to access genetic information

However, Kenya currently lacks specific legislation regulating sperm donation, resulting in legal ambiguity and inadequate safeguards. Existing laws, including the Children's Act (Cap 141 of 2022), provide fragmented and insufficient guidance. A comprehensive review of current legislation is necessary to bridge these gaps and enhance protections for donor-conceived children.

The absence of regulation poses serious risks, including violations of children's rights, increased chances of accidental incest, and complications related to hereditary health conditions. The lack of transparency further complicates legal disputes regarding parental rights and access to genetic information. To protect donor-conceived individuals, Kenya must develop a robust, ethically sound, and culturally sensitive legal framework that aligns with international best practices while considering local values and social realities.

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<sup>22</sup> -<<https://knh.or.ke/index.php/history/>> on 19 September 2024.

### **1.3 Hypotheses**

The study is founded on the premise that the existing legislative and regulatory frameworks governing anonymous sperm donations in Kenya falls short in adequately protecting the BIC. Additionally, the study posits that the introduction of targeted regulatory reforms, guided by a comparative analysis of practices in South Africa, significantly enhances the safeguarding of BIC in the realm of anonymous sperm donations in Kenya.

### **1.4 Research Objectives**

The research objectives of this study are as follows:

1. To assess the effectiveness of Kenya's current legislative and regulatory frameworks governing anonymous sperm donations in safeguarding the Best Interest of the Child (BIC).
2. To explore how whether regulatory changes in Kenya can strengthen the protection of the BIC within the context of anonymous sperm donations.
3. To provide recommendations for enhancing Kenya's anonymous sperm donation regulation by conducting a comparative analysis with South Africa's legal framework and best practices.

### **1.5 Research Questions**

1. Do the current legislative, regulatory, and policy frameworks on anonymous sperm donations in Kenya sufficiently ensure the protection of the BIC?
2. Can regulation of anonymous sperm donation in Kenya better safeguard the BIC?
3. What recommendations can be proffered based on a comparative analysis with South Africa's approach to anonymous sperm donations?

## 1.6 Theoretical Framework

### 1.6.1 Utilitarianism Theory

Utilitarianism is a consequentialist ethical theory that assesses morality based on outcomes, striving to maximize happiness while minimizing suffering.<sup>23</sup> Developed by Jeremy Bentham and later refined by John Stuart Mill, this theory asserts that the best action is the one that produces the greatest good for the greatest number.<sup>24</sup> Bentham's approach was quantitative, treating all pleasures as equal and introducing the Hedonic Calculus, a systematic method for measuring pleasure and pain.<sup>25</sup> This calculus considered factors such as intensity, duration, certainty, and the number of people affected to determine the moral worth of an action.

Bentham's framework was influential in shaping early utilitarian thought, but it faced criticism for oversimplifying human experience and failing to account for the quality of pleasures.<sup>26</sup>

John Stuart refined this theory by introducing qualitative distinctions between pleasures. He argued that intellectual and moral fulfillment is superior to mere physical gratification, classifying pleasures into higher and lower categories.<sup>27</sup> Higher pleasures, such as intellectual and artistic pursuits, contribute more to human well-being than lower pleasures, which include physical sensations and temporary gratification.<sup>28</sup> Mill famously stated that "it is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied." This distinction emphasized the importance of cultivating human potential and moral development

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<sup>23</sup> Henry R, Brian D, 'utilitarianism' Britannica, 2024, 1-10.

<sup>24</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>25</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>26</sup> Henry R, Brian D, 'utilitarianism' 'Britannica, 2024, 1-10.

<sup>27</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>28</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

rather than simply seeking momentary pleasure.<sup>29</sup> His version of utilitarianism provided a more nuanced and human-centered approach to ethics, addressing some of the limitations in Bentham's purely numerical evaluation of pleasure

Later thinkers expanded on utilitarian principles, refining the theory into different branches. Henry Sidgwick introduced rule utilitarianism, which argues that moral rules should be designed to maximize happiness in the long run rather than assessing individual acts in isolation.<sup>30</sup> By following established ethical rules—such as honesty and justice—society can achieve greater stability and well-being. G.E. Moore further refined utilitarian thought by arguing that morality should not only focus on happiness but also consider intrinsic values like truth, beauty, and friendship.<sup>31</sup> His ideal utilitarianism broadened the scope of ethical evaluation beyond pleasure, incorporating other meaningful aspects of human life. Peter Singer, a modern proponent of preference utilitarianism, argues that ethical decisions should respect the preferences and interests of all sentient beings, including animals.<sup>32</sup> His work in effective altruism has encouraged people to maximize their moral impact by donating resources efficiently to reduce global suffering.<sup>33</sup>

Utilitarianism has had significant practical applications, particularly in public policy and healthcare.<sup>34</sup> Governments often use cost-benefit analysis to implement policies that maximize

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<sup>29</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>30</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>31</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>32</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>33</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>34</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

overall well-being, such as prioritizing vaccination programs to protect the majority from disease.<sup>35</sup> In regulating anonymous sperm donations, utilitarianism seeks to balance the interests of donors, donor-conceived individuals, parents, and society to enhance overall well-being. This theory supports regulations that address risks such as accidental incest, consanguinity, and genetic disorders by ensuring access to genetic and medical histories, thus minimizing harm. It also justifies balancing donor anonymity with the right of donor-conceived individuals to access identifying information, promoting trust in reproductive technologies. Parents benefit from increased transparency, which fosters stronger family relationships, while society benefits from measures such as limiting offspring per donor to prevent genetic overrepresentation and promote diversity.

Despite its strengths, utilitarianism faces significant criticisms and ethical dilemmas. One of the major concerns is the tyranny of the majority, where actions that benefit the majority could justify sacrificing minority rights. For example, if 90% of society benefits from a policy that harms 10%, strict utilitarianism might deem it morally acceptable. Critics argue that this fails to protect individual rights and can lead to unjust outcomes. Another issue is the difficulty of measuring happiness—pleasure and suffering are subjective experiences that cannot always be quantified accurately. Additionally, utilitarianism can be overly demanding, requiring individuals to prioritize the well-being of others over their personal happiness.<sup>36</sup> This raises questions about the limits of moral obligation—should people be required to donate all their wealth if it maximizes global happiness? Proponents respond by advocating for moderate utilitarianism, which balances self-interest with altruism, ensuring moral duties are practical and sustainable.<sup>37</sup>

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<sup>35</sup> “The History of Utilitarianism” -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>36</sup> “The History of Utilitarianism” -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>37</sup> “The History of Utilitarianism” -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

Despite these criticisms, utilitarianism remains one of the most influential ethical theories in shaping modern governance, legal frameworks, and social policies. Bentham's hedonic calculus provided an early attempt to apply rational principles to moral decision-making, while Mill's higher and lower pleasures emphasized human dignity and intellectual growth. Later refinements by Sidgwick, Moore, and Singer further expanded its scope, making utilitarianism adaptable to complex ethical dilemmas in contemporary society.<sup>38</sup> While not without flaws, the theory continues to offer a pragmatic and structured approach to balancing individual rights, collective well-being, and long-term societal progress. In the context of regulating anonymous sperm donation in Kenya, utilitarianism provides a robust ethical foundation for advocating policies that protect donor-conceived individuals while ensuring the sustainability and ethical integrity of reproductive technologies.

## 1.7 Literature Review

Uche E. Ogwudu critically examines how the lack of formal legislation in assisted reproductive technology (ART) sector leaves both donors and patients vulnerable to exploitation and exacerbates inequitable access to ART services.<sup>39</sup> Ogwudu asserts that reproductive rights and healthcare equity must form the cornerstone of any healthcare system, and that ART services should not be reserved for wealthy elites, which marginalizes lower socioeconomic groups and exacerbates social inequalities. He calls for comprehensive reforms that harmonize the protection of donor rights, patient access, and ethical considerations.<sup>40</sup>

Through a comparative analysis of ART regulations in Spain, South Africa, and the United States, Ogwudu contrasts their structured and regulated approaches with the unregulated system in

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<sup>38</sup> "The History of Utilitarianism" -< <https://plato.stanford.edu/entries/utilitarianism-history/#:~:text=The%20Classical%20Utilitarians%2C%20Jeremy%20Bentham,good%20for%20the%20greatest%20number>'. >on 2 April 2025.

<sup>39</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction' 11 International Journal of Innovative Legal & Political Studies 3, 2023, 13-23.

<sup>40</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction,' 13-23.

Nigeria.<sup>41</sup> He underscores that unlicensed practitioners pose great risks of the exploitation of donors, particularly those from economically disadvantaged backgrounds.<sup>42</sup> Ogwudu proposes the establishment of a national legislative framework tailored to the cultural, social, and religious context of the country. This framework should include the creation of a national oversight agency, the implementation of clear guidelines for compensation and informed consent, and the provision of psychological support for both donors and recipients.<sup>43</sup> Additionally, he advocates for public education campaigns to reduce stigma and for the involvement of religious leaders to facilitate informed public discourse.<sup>44</sup>

Ogwudu's analysis, while focused on Nigeria, holds significant relevance for Kenya, given the shared challenges both countries face concerning sperm donation regulation, including unequal ART access, donor exploitation, and insufficient legal protections. However, Ogwudu's paper does have certain limitations that this research seeks to address. It heavily relies on international models without sufficiently considering the unique socio-economic, cultural, and religious dynamics of Nigeria—and by extension, Kenya. While he acknowledges these cultural and religious sensitivities, he does not explore potential resistance from these groups that could hinder reform efforts. Moreover, his proposal for an oversight agency lacks a concrete strategy to address Kenya's political and institutional challenges, or ensure the long-term sustainability of such reforms.

Bolt, Maas, Indekeu, and van N provide an analysis of the legal, ethical, and psychological implications of age restrictions on accessing donor information in ART.<sup>45</sup> Their study examines

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<sup>41</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction,' 13-23.

<sup>42</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction,' 13-23.

<sup>43</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction,' 13-23.

<sup>44</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction,' 13-23.

<sup>45</sup> Bolt S, Maas A, Indekeu A and van N, 'Legal age limits in accessing donor information: experiences of donor-conceived people, parents, sperm donors and counsellors' 48 *Reproductive Biomed Online* 6, 103846.

the experiences of donor-conceived individuals, parents, sperm donors, and counselors, emphasizing how legal barriers negatively impact the identity formation and emotional well-being of donor-conceived children.<sup>46</sup> The authors stress that timely access to donor information is crucial for psychological development, but legal age limits in many jurisdictions delay access, leading to confusion, emotional distress, and feelings of betrayal, especially when individuals discover their donor origins later in life. The study highlights the challenges parents face due to legal restrictions, which complicate decisions on how much to disclose to their donor-conceived children.<sup>47</sup> While some sperm donors advocate for transparency to support children's right to know their heritage, others prioritize anonymity. Counselors emphasize the importance of open communication between parents and children to protect emotional well-being.<sup>48</sup>

From a legal perspective, the authors criticize frameworks that prioritize donor anonymity over the rights of donor-conceived individuals, arguing that this violates the fundamental right to know one's biological origins, as recognized in international human rights law. They advocate for legal reforms to provide earlier access to donor information, aligning ART practices with contemporary understandings of identity rights and promoting greater transparency.<sup>49</sup> The findings are particularly relevant for Kenya, where ART regulation is underdeveloped, leaving donor-conceived individuals without adequate legal protections. Kenya's lack of comprehensive sperm donation regulations heightens the psychological risks of delayed discovery of biological origins. However, the paper has certain limitations. It oversimplifies the complex balance between donor anonymity and the rights of donor-conceived individuals, overlooking potential resistance from sperm donors who oppose early disclosure. It also lacks practical strategies for overcoming the

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<sup>46</sup> Bolt S, Maas A, Indekeu A and van N, 'Legal age limits in accessing donor information: experiences of donor-conceived people, parents, sperm donors and counsellors', 103846.

<sup>47</sup> Bolt S, Maas A, Indekeu A and van N, 'Legal age limits in accessing donor information: experiences of donor-conceived people, parents, sperm donors and counsellors', 103846.

<sup>48</sup> Bolt S, Maas A, Indekeu A and van N, 'Legal age limits in accessing donor information: experiences of donor-conceived people, parents, sperm donors and counsellors', 103846.

<sup>49</sup> Bolt S, Maas A, Indekeu A and van N, 'Legal age limits in accessing donor information: experiences of donor-conceived people, parents, sperm donors and counsellors', 103846.

cultural, social, and political challenges to legal reform, particularly in resource-constrained countries like Kenya. Additionally, the authors do not sufficiently explore the long-term consequences for donor-conceived individuals and donors in jurisdictions with varying attitudes toward anonymity.

**Vanessa L. Pi** provides a thorough critique of regulatory gaps in sperm donation, emphasizing key risks such as accidental consanguinity and inadequate transparency regarding donor health information.<sup>50</sup> Pi highlights that many sperm banks operate under voluntary guidelines rather than binding legal regulations, allowing them to avoid tracking the number of offspring per donor or disclosing complete health histories.<sup>51</sup> This self-regulation leads to serious ethical and biological risks, including accidental consanguinity, where donor-conceived half-siblings may unknowingly form relationships. Pi illustrates this risk with the case of Fairfax Cryobank's donor 1476, who fathered at least 36 children in five years, underscoring the potential scale of the problem caused by a lack of oversight.<sup>52</sup>

Pi also critiques the insufficient medical screening and monitoring of sperm donors. While U.S. guidelines mandate screening for infectious diseases, there are no requirements for genetic testing or ongoing health checks.<sup>53</sup> This regulatory gap means that donors are not obligated to report any health issues that develop after donation, putting donor-conceived children at risk of inheriting undisclosed genetic conditions. Pi argues that these deficiencies are unethical and jeopardize the long-term health and welfare of children born through ART.<sup>54</sup>

Pi's analysis contributes to broader debates about anonymous sperm donation by emphasizing the importance of addressing consanguinity risks and improving medical transparency. These issues

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<sup>50</sup> Vanessa L, 'Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer' 16 Duke Journal of Gender Law & Policy, 2009, 379-402.

<sup>51</sup> Vanessa L, 'Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer', 379-402.

<sup>52</sup> Vanessa L, 'Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer', 379-402.

<sup>53</sup> Vanessa L, 'Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer', 379-402.

<sup>54</sup> Vanessa L, 'Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer', 379-402.

are particularly relevant for Kenya, where sperm donation remains largely unregulated. Her recommendations, such as limiting the number of offspring per donor and tracking genetic relationships, could inform Kenyan regulatory reforms aimed at minimizing accidental consanguinity. Pi's emphasis on medical transparency also supports calls for Kenyan sperm banks to require comprehensive health disclosures from donors, including genetic testing and ongoing updates about hereditary conditions. While Pi's work provides a strong foundation for advocating greater transparency and accountability in sperm donation, it primarily focuses on the U.S. context, which limits its applicability to non-Western countries like Kenya. Pi does not sufficiently address cultural differences that shape perceptions of family, kinship, and anonymity in African societies, where biological identity is often deeply tied to social norms. Kenyan cultural values surrounding family and biological connections may influence how sperm donation is perceived and regulated, a factor overlooked in Pi's analysis.

*Symons and Kha* emphasize the critical role of a central register in addressing the ethical and practical challenges posed by anonymous sperm donation.<sup>55</sup> They argue that such a register is essential for ensuring donor-conceived individuals' right to access information about their genetic origins, which is vital for fostering psychological well-being and affirming identity.<sup>56</sup> Drawing on case studies from various jurisdictions, they demonstrate the effectiveness of central registers as repositories for donor information, enabling donor-conceived individuals to access identifying and non-identifying details about their genetic parentage in a structured and equitable manner. The literature also highlights the broader societal benefits of central registers, including the prevention of accidental incest, early identification of genetic health risks, and enhanced trust in ART.<sup>57</sup> Symons and Kha explore legislative frameworks in countries like Australia, where retrospective laws have granted donor-conceived individuals access to donor information, even when donations were made under anonymity agreements. This example underscores how central registers can

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<sup>55</sup> Symons X, Kha H, 'An Ethical Examination of Donor Anonymity and a Defence of a Legal Ban on Anonymous Donation and the Establishment of a Central Register' 21 J Bioeth Inq 1, 2024, 105-115.

<sup>56</sup> Symons X, Kha H, 'An Ethical Examination of Donor Anonymity and a Defence of a Legal Ban on Anonymous Donation and the Establishment of a Central Register, 105-115.

<sup>57</sup> Symons X, Kha H, 'An Ethical Examination of Donor Anonymity and a Defence of a Legal Ban on Anonymous Donation and the Establishment of a Central Register, 105-115.

address historical injustices without significantly deterring donor participation. Their analysis demonstrates that these registers are critical tools for balancing stakeholder interests while ensuring ethical compliance in ART practices.

In advocating for a central register, Symons and Kha delve into practical considerations, including integrating the register into broader ART regulatory frameworks, ensuring data security, and addressing privacy concerns.<sup>58</sup> They argue that privacy challenges can be mitigated through controlled access protocols and legal provisions that prioritize donor-conceived individuals' best interests.<sup>59</sup> They also highlight the growing impact of direct-to-consumer genetic testing, which has eroded donor anonymity, making a central register an ethical and pragmatic response to technological and societal shifts.<sup>60</sup> Their argument is grounded in ethical principles such as justice, autonomy, and beneficence, as the register provides donor-conceived individuals with access to genetic information while standardizing record-keeping and enabling oversight of donor contributions.<sup>61</sup>

The work by Symons and Kha is particularly relevant to this research, which advocates for the establishment of a central register as part of a comprehensive regulatory framework for anonymous sperm donation in Kenya. Their exploration of international best practices offers valuable insights for designing and implementing such registers, particularly in addressing issues like accidental incest and genetic health risks. Their discussion of retrospective applications provides a potential roadmap for Kenya to reconcile past anonymous donations with emerging ethical imperatives, especially in a context where ART regulations and donor tracking are minimal or nonexistent. However, their analysis reveals several gaps that this research seeks to address. Symons and Kha primarily focus on jurisdictions with well-established ART regulatory frameworks, leaving

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<sup>58</sup> Symons X, Kha H, 'An Ethical Examination of Donor Anonymity and a Defence of a Legal Ban on Anonymous Donation and the Establishment of a Central Register, 105-115.

<sup>59</sup> Symons X, Kha H, 'An Ethical Examination of Donor Anonymity and a Defence of a Legal Ban on Anonymous Donation and the Establishment of a Central Register, 105-115.

<sup>60</sup> Symons X, Kha H, 'An Ethical Examination of Donor Anonymity and a Defence of a Legal Ban on Anonymous Donation and the Establishment of a Central Register, 105-115.

<sup>61</sup> Symons X, Kha H, 'An Ethical Examination of Donor Anonymity and a Defence of a Legal Ban on Anonymous Donation and the Establishment of a Central Register, 105-115.

unexplored the socio-cultural, legal, and economic challenges of implementing a central register in resource-constrained settings like Kenya. Additionally, they do not examine how African cultural norms and values—such as communal family structures, kinship traditions, and perceptions of parentage—might shape the design, acceptance, and functionality of a central register. These gaps underscore the importance of localized research that accounts for Kenya’s unique socio-cultural and legal landscape.

**Ignovska E** critically examines the transformative role of sperm donors in enabling single women to pursue parenthood, while addressing the ethical, legal, and societal complexities surrounding assisted reproductive technologies (ART).<sup>62</sup> The author situates sperm donation within the broader context of reproductive autonomy, emphasizing its role in challenging traditional family structures and empowering single women to overcome societal and institutional barriers.<sup>63</sup> The paper provides a nuanced analysis of the motivations behind sperm donation, its implications for evolving family models, and the ethical tensions associated with practices such as donor anonymity.

Its exploration of the societal stigma faced by single women accessing ART is particularly significant, as it underscores the resilience required to navigate cultural judgments and challenges prevailing perceptions of family in contemporary societies.<sup>64</sup> Additionally, it identifies anonymity as a critical ethical concern, given its implications for donor-conceived individuals’ rights to access genetic heritage. The lack of transparency in anonymous sperm donations not only affects psychological well-being but also poses significant health risks, as essential genetic and medical histories may remain inaccessible. The author calls for a reevaluation of anonymity policies, advocating for comprehensive legal frameworks to safeguard the interests of donor-conceived individuals while fostering societal acceptance of diverse family structures.<sup>65</sup>

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<sup>62</sup> Ignovska E, ‘Sperm donors as assisters of reproduction in single women’ 25 *Global Bioethics* 4, 2014,226–238.

<sup>63</sup> Ignovska E, ‘Sperm donors as assisters of reproduction in single women,’ 226-238.

<sup>64</sup> Ignovska E, ‘Sperm donors as assisters of reproduction in single women,’ 226-238.

<sup>65</sup> Ignovska E, ‘Sperm donors as assisters of reproduction in single women,’ 226-238.

The insights provided in this paper align with the proposition of regulating anonymous sperm donations in Kenya, particularly in advocating for legal reforms that balance the reproductive autonomy of recipients, the privacy of donors, and the rights of donor-conceived individuals. However, the paper focuses primarily on western contexts rather than extending the discussion by incorporating African cultural and ethical considerations. To bridge this gap, my research uses South Africa as a comparative state to provide a framework for recommending regulations that take into account the African context. South Africa's legal framework for ART, which mandates disclosure and limits on donor anonymity, offers a model for balancing ethical considerations and practical challenges in regulating sperm donations.

While the paper provides valuable insights into the broader ethical and societal implications of sperm donation, it does not address these unique cultural dimensions, which are central to my analysis. By building on the insights from "*Sperm Donors as Assistors of Reproduction in Single Women*" and integrating lessons from South Africa, my research aims to develop a comprehensive, context-specific framework for regulating anonymous sperm donations in Kenya.

**Whittaker, Gerrits, Hammarberg, and Manderson** provide an in-depth examination of fertility professionals' perspectives on the accessibility and affordability of ART, with a focus on sub-Saharan Africa, including Kenya.<sup>66</sup> Using qualitative research methods, the study collects data from fertility specialists, embryologists, and clinic managers across multiple countries through semi-structured interviews conducted between 2021 and 2023. It identifies key financial, infrastructural, and policy-related barriers that hinder the widespread adoption and utilization of ART services.<sup>67</sup> A central finding is the lack of consensus among healthcare providers on how to make ART both accessible and affordable without compromising care quality. The study

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<sup>66</sup> Whittaker A, Gerrits T, Hammarberg K, Manderson L, "Access to assisted reproductive technologies in sub-Saharan Africa: fertility professionals' views" 32 Sexual and Reproductive Health Matters 1, 2024, 1-9.

<sup>67</sup> Whittaker A, Gerrits T, Hammarberg K, Manderson L, "Access to assisted reproductive technologies in sub-Saharan Africa: fertility professionals' views,"1-9.

emphasizes the need for government intervention in the form of funding and regulatory frameworks to ensure equitable access, particularly for lower-income populations.<sup>68</sup>

This study is highly relevant to ongoing research on anonymous sperm donation in Kenya, as it sheds light on systemic barriers within the broader reproductive healthcare landscape. Discussions on affordability, regulatory oversight, and ethical considerations in ART offer a useful foundation for understanding the implications of sperm donation. The findings highlight the pivotal role of government policies and institutional frameworks in improving ART access, aligning with the need for regulatory measures to address anonymous sperm donation's ethical, legal, and welfare challenges. Additionally, the study's emphasis on government involvement in ART regulation resonates with the research objective of pushing for legal reforms in Kenya. By leveraging fertility professionals' insights on the importance of governmental and institutional support, the research underscores the urgency of establishing structured policies for sperm donation that protect children's rights. The economic dimensions discussed in the study, particularly regarding the financial implications of ART, also offer valuable perspectives on how economic incentives and disincentives may affect donor availability and public acceptance of regulatory reforms in sperm donation.

However, the paper does not explicitly address the ethical and legal complexities unique to anonymous sperm donation, which presents unique challenges related to genetic heritage, identity rights, and the social and psychological well-being of donor-conceived individuals. This gap creates an opportunity for the current research to delve deeper into these specific issues and advocate for a regulatory framework that prioritizes the best interest of donor-conceived children.

**Jennifer Nadraus** examines the legal ambiguities surrounding the parental rights and obligations of sperm donors, particularly in cases where ART is involved.<sup>69</sup> She highlights that despite advancements in ART and the increasing use of artificial insemination, courts and legislatures

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<sup>68</sup> Whittaker A, Gerrits T, Hammarberg K, Manderson L, "Access to assisted reproductive technologies in sub-Saharan Africa: fertility professionals' views,"1-9.

<sup>69</sup> Nadraus J, 'Dodging the Donor Daddy Drama: Creating a Model Statute for Determining Parental Status of Known Sperm Donors' 53 *Family Court Review* 1, 2015, 180–197.

have yet to create a consistent legal framework to determine the parental status of sperm donors.<sup>70</sup> This uncertainty often leads to conflicting outcomes, such as cases where sperm donors are unexpectedly asked to provide child support or, conversely, where donors seek visitation rights with their biological children. To address these issues, Nadraus proposes a model state statute that establishes non paternity as the default legal status for sperm donors, thereby clarifying that donors would have no parental rights or obligations unless otherwise agreed upon in writing prior to insemination. The proposed statute also includes an exception to this default rule if a donor actively participates in the child's life. Nadraus argues that such clear legislation would create legal predictability, facilitate the sperm donation market, and respect the concept of intentional parenthood in ART.

Nadraus's work is highly relevant to research on anonymous sperm donation in Kenya, particularly in its emphasis on establishing legal certainty for sperm donors, intended parents, and donor-conceived children. Her analysis of the ambiguity surrounding donor statutes in the U.S. underscores the potential legal challenges that may arise in unregulated contexts, such as Kenya, where ART laws are still underdeveloped. By exploring the gaps and inconsistencies in existing legislation, Nadraus's work offers valuable insights for shaping a comprehensive legal framework that could address similar issues in Kenya, including clarifying the legal status of sperm donors and safeguarding the best interests of donor-conceived children.

While Nadraus largely focuses on parental rights and duties, her proposed model law does not adequately explore the consequences of donor anonymity on the right of donor-conceived persons to access their biological origins. This is a critical gap that research on sperm donation in Kenya seeks to fill by examining the balance between donor anonymity and the right of children to know their genetic heritage. By incorporating Nadraus's insights on the importance of legal clarity and intentional parenthood, the Kenyan context could benefit from additional safeguards that prioritize transparency and the psychological well-being of donor-conceived individuals, thus aligning ART regulations with international human rights standards.

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<sup>70</sup> Nadraus J, 'Dodging the Donor Daddy Drama: Creating a Model Statute for Determining Parental Status of Known Sperm Donors,' 180–197.

*Oliver Hallich's* exploration of the ethical tensions between donor privacy and the rights of donor-conceived children is central to the debate on anonymous sperm donation, making his work a crucial reference for the current research on sperm donation regulations in Kenya.<sup>71</sup> Hallich addresses two pivotal questions: whether sperm donors have a right to remain anonymous and whether parents (recipients of donor sperm) have the right to withhold information about the circumstances of conception from their child.<sup>72</sup> His nuanced analysis of these conflicting rights offers a framework for evaluating anonymity and transparency in the context of ART. He argues that sperm donors do have a basic right to anonymity, suggesting that they should be allowed to keep their identities private when they donate.<sup>73</sup> However, he stresses that this right is not absolute and must be weighed against competing interests, particularly the welfare and rights of the children born from sperm donation. He contends that withholding information about biological parentage can have adverse emotional consequences for donor-conceived children, potentially leading to confusion, identity crises, and distress if the truth is disclosed later in life without preparation.<sup>74</sup> To mitigate these risks, Hallich advocates for increased openness in sperm donation practices and proposes a shift toward “direct donation,” where the donor’s identity is known to the recipient family and, eventually, the child.<sup>75</sup> He argues that openness supports the child’s emotional development and sense of identity and reflects broader societal trends toward transparency in ART.<sup>76</sup> His conclusion emphasizes that a child’s right to know their genetic origins should take precedence over the donor’s right to remain anonymous.

Hallich’s arguments directly inform the proposed regulatory framework in the current research on anonymous sperm donation in Kenya. His emphasis on balancing donor privacy with children’s right to access information about their genetic identity aligns with the broader goal of safeguarding

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<sup>71</sup> Hallich O, ‘Sperm Donation and the Right to Privacy’ 23 *The New bioethics: a multidisciplinary journal of biotechnology and the body* 2, 2017, 107–120.

<sup>72</sup> Hallich O, ‘Sperm Donation and the Right to Privacy,’ 107–120.

<sup>73</sup> Hallich O, ‘Sperm Donation and the Right to Privacy,’ 107–120.

<sup>74</sup> Hallich O, ‘Sperm Donation and the Right to Privacy,’ 107–120.

<sup>75</sup> Hallich O, ‘Sperm Donation and the Right to Privacy,’ 107–120.

<sup>76</sup> Hallich O, ‘Sperm Donation and the Right to Privacy,’ 107–120.

the best interests of donor-conceived children. His critique of secrecy and delayed disclosure strengthens the case for legal reforms that promote transparency and encourage early, open discussions about donor conception to prevent long-term psychological harm. Furthermore, Hallich's analysis provides a theoretical foundation for understanding how Kenyan sperm donation regulations could adopt more transparent practices while considering cultural sensitivities. In many African societies, including Kenya, family, kinship, and biological lineage hold significant cultural importance. Hallich's emphasis on transparency offers valuable guidance for developing culturally sensitive policies that strike a balance between respecting traditional values and ensuring children's access to their biological identity.

However, while Hallich's work is insightful, it primarily addresses Western contexts and does not fully account for the distinct social, cultural, and legal dynamics in Kenya and other African countries. In Kenya, the introduction of open sperm donation practices may face resistance due to cultural norms surrounding family, parentage, and privacy. This research aims to bridge this gap by adapting Hallich's recommendations to the Kenyan context and proposing tailored legal and regulatory measures that balance the rights of donors and donor-conceived children while respecting Kenyan social norms.

**Terry M and George G** offer a comprehensive analysis of the BIC principle, emphasizing its transformation into both a fundamental right and a procedural rule that anchors modern child rights jurisprudence.<sup>77</sup> They highlight that, despite the principle's widespread recognition and codification in numerous international and domestic legal frameworks, it lacks a precise, universally accepted definition. This ambiguity has fueled scholarly debates about its interpretation, scope, and practical application. A prominent element in their research is the principle's intrinsic subjectivity, which, while allowing for flexible, context-specific implementation, presents challenges with ensuring consistency and predictability in child protection results

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<sup>77</sup> Terry M and George G, 'The nexus between the best interests of the child and detention of children in conflict with the law' 7 *Kabarak Journal of Law and Ethics*, 2023, 29-33.

The authors further explore how scholars have grappled with the definitional complexities of the BIC principle. James R. Himes, for instance, underscores that its interpretation is increasingly complicated by global forces, including ethical dilemmas surrounding reproductive technologies and conflicting societal values. Robert Mnookin takes this argument further by emphasizing that societies often lack consensus on the values that should guide decisions concerning children's welfare.<sup>78</sup> He argues that these decisions frequently reflect ideological and cultural biases, especially since children, being unable to articulate their interests, rely on external decision-makers whose perspectives may be shaped by subjective interpretations. Peter Bisong adds that while African values historically emphasize social cohesion and collective responsibility, these norms are increasingly being challenged by the forces of globalization, further illustrating the dynamic nature of cultural interpretations of the principle.<sup>79</sup>

Terry M. and George G. also analyzes the discretionary power that the BIC principle grants to courts and child protection agencies. This flexibility enables nuanced, case-specific decisions, yet it also raises concerns about variability and inconsistency, as interpretations may differ significantly both within and across legal systems. This divergence is evident in case law. For instance, Marit Skivenes examines a 2007 Norwegian Supreme Court case in which the child's long-term safety, welfare, and expressed wishes were prioritized, leading to his adoption by foster parents.<sup>80</sup> Similarly, Sarah Elliston explores situations where courts have intervened to protect children's right to health, such as when parents refuse medical treatment like blood transfusions on religious grounds. These cases illustrate the delicate balance courts must strike between respecting parental autonomy and upholding the child's welfare and rights.

In response to the challenges posed by the BIC principle's subjectivity, some legal scholars have advocated for refining it within a rights-based framework. Yvonne Dausab argues that the principle

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<sup>78</sup> Terry M and George G, 'The nexus between the best interests of the child and detention of children in conflict with the law,'29-33.

<sup>79</sup> Terry M and George G, 'The nexus between the best interests of the child and detention of children in conflict with the law,'29-33.

<sup>80</sup> Terry M and George G, 'The nexus between the best interests of the child and detention of children in conflict with the law,'29-33.

should be guided by the unique circumstances of each child, centering their welfare in every decision. Degol and Dinku further propose a holistic interpretation of the BIC principle that integrates all aspects of child rights, a perspective that aligns with the African Child Policy Forum's definition, which encompasses a child's moral, physical, mental, and material well-being.

Despite its central role in child rights jurisprudence, the BIC principle remains inherently indeterminate. Its adaptability allows it to reflect diverse socio-cultural realities, but this same flexibility presents challenges in achieving uniformity and predictability. Terry M. and George G. conclude that continuous scholarly engagement and judicial scrutiny are essential to ensure that the principle remains effective in genuinely upholding children's welfare and rights across varying legal and cultural contexts.

While Terry M. and George G.'s work provides valuable insights into the complexities and applications of the BIC principle, their analysis is primarily centered on its relevance in the context of children in conflict with the law, particularly in detention cases. This focus creates a gap in their study, as they do not address the principle's application in other emerging areas of child rights, such as reproductive technologies. This research hence, aims to fill this gap by examining how the BIC principle can be applied in the context of anonymous sperm donation, an area that remains underexplored in Kenya's legal framework. Specifically, it will contribute to the broader discourse by assessing how the BIC principle can protect the rights of donor-conceived children, particularly their right to access information about their biological origins, and by proposing regulatory reforms to address this issue in a manner that balances transparency, privacy, and children's welfare.

### **1.7 Justification of the study**

This research is noteworthy because it addresses the overlooked issue of anonymous sperm donation in Kenya's legal landscape, filling a critical gap in academic literature. As ART practices, including sperm donation, become more common, the study proposes comprehensive regulatory reforms that align with international best practices while incorporating African cultural values. Its aim is to protect the rights and welfare of donor-conceived children, respect family dynamics, and address ethical concerns. By doing so, the paper seeks to strengthen Kenya's legal framework and contribute to the broader academic discourse on reproductive technology in Africa.

## **1.8 Research Methodology**

The study adopts a doctrinal research approach, conducting comprehensive library-based research through desktop analysis. It draws on diverse sources, including books, scholarly articles, theses, reports, and legal documents, to facilitate detailed textual analysis of existing frameworks, treaties, and conventions. This approach is justified by its capacity to critically assess gaps and shortcomings in Kenya's current regulation of reproductive donations. Additionally, the study adopts a comparative study methodology and undertakes comparative analysis of South Africa's laws on anonymous sperm donation, aiming to extract insights and best practices that could inform and strengthen Kenya's regulatory framework.

## **1.9 Chapter Breakdown**

The study is sectioned into five chapters, each covering key aspects of the research:

### **1.9.1 Chapter One: Introduction**

This chapter provides the research background, highlights the central legal issues on anonymous sperm donation, and outlines the research questions, objectives, hypotheses, theoretical framework, and literature review. It also justifies the study's significance, details the methodology, and presents the chapter organization.

### **1.9.2 Chapter Two: Evaluating the Legislative and Regulatory Frameworks in Kenya**

This chapter critically examines Kenya's current framework on anonymous sperm donation, focusing on gaps in safeguarding donor-conceived children's right to biological information and the principle of the Best Interests of the Child. It analyzes existing strengths, weaknesses, and challenges in the regulatory mechanisms.

### **1.9.3 Chapter Three: Analyzing the Best Interest of the Child**

This chapter mainly examines whether the regulation of anonymous sperm donation in Kenya can better protect the BIC. It also incorporates international and regional best practices to inform the necessary regulatory approach in Kenya.

#### **1.9.4 Chapter Four: The Regulation of Anonymous Sperm Donation in South Africa**

This chapter offers a comparative analysis of anonymous sperm donations regulation in South Africa. It examines successful regulatory practices and frameworks from South Africa, assessing their potential applicability and adaptability to the Kenyan context. The chapter ultimately aims to draw lessons and propose future initiatives for enhancing Kenya's regulatory landscape.

#### **1.9.5 Chapter Five: Research Findings, Recommendations and Conclusion**

This chapter summarizes the study's findings and provides practical recommendations, drawing from South Africa's regulatory model and tailoring suggestions to Kenya's context to better protect donor-conceived children's rights



## **2.0 CHAPTER TWO: EVALUATING THE LEGISLATIVE AND REGULATORY FRAMEWORKS ON ANONYMOUS SPERM DONATION IN KENYA**

### **2.1 Introduction**

ART have significantly transformed the concept of parenthood in Kenya, introducing complex legal and ethical considerations, particularly in the context of anonymous sperm donations.<sup>81</sup> While sperm donations have provided individuals and couples with opportunities to conceive, it has also sparked increasing scrutiny, especially as the right to know one's genetic origins gains global recognition.<sup>82</sup> This section of the research critically examines Kenya's existing regulatory landscape, highlighting key legal gaps and underscoring the urgent need for comprehensive legislative reforms.

### **2.2 Domestic framework**

#### **2.2.1 Constitution of Kenya, 2010**

The Constitution of Kenya, 2010 stands as the supreme law of the land, providing an overarching legal framework that takes precedence over all statutory provisions.<sup>83</sup> It guarantees and safeguards fundamental rights and freedoms, including those pertaining to reproductive health and assisted reproductive technologies. These rights are enshrined in Chapter IV, the Bill of Rights, which applies universally to all Kenyan laws and binds both State and non-state actors.<sup>84</sup> Central to this framework is Article 20, which affirms the broad applicability of the Bill of Rights, ensuring that all State organs and individuals are bound by its provisions.<sup>85</sup> Article 21 further reinforces the State's duty to respect, protect, promote, and fulfill these rights, emphasizing the proactive role of

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<sup>81</sup> 'Who is our father?' Nation, 2 July 2022 -<<https://nation.africa/kenya/life-and-style/dn2/who-is-our-father--811282> on 14 March 2025.

<sup>82</sup>Gong D, Liu Y, Zheng Z, Tian Y, Li Z, 'An overview on ethical issues about sperm donation' 11 Asian journal of andrology 6 ,2009, 645–652.

<sup>83</sup> Constitution of Kenya, (2010).

<sup>84</sup> Chapter IV, Constitution of Kenya, (2010).

<sup>85</sup> Article 20, Constitution of Kenya, (2010).

government institutions in their realization.<sup>86</sup> Additionally, Article 21(4) mandates the enactment and implementation of legislation that aligns with Kenya's international human rights obligations, underscoring the country's commitment to global legal standards.<sup>87</sup> However, most of these rights are not absolute.<sup>88</sup> Additionally, the rights under Article 43 including the right to highest attainable health are subject to progressive realization.<sup>89</sup>

The regulation of anonymous sperm donation is essentially rooted in five key constitutional rights. Foremost among these is the right to form a family and the right to reproductive healthcare, both of which primarily safeguard the interests of intending parents. Article 26 explicitly upholds the right to life, affirming that life begins at conception.<sup>90</sup> Complementing this, Article 45 recognizes the right to family, establishing it as the fundamental unit of society.<sup>91</sup> As such, intending parents are constitutionally entitled to the right to form a family, a right that is intrinsically linked to the State's obligation to recognize and protect the family as a fundamental institution within society.<sup>92</sup> Moreover, the Constitution guarantees every individual the right to the highest attainable standard of health under Article 43(1), a provision that explicitly encompasses reproductive healthcare services.<sup>93</sup> This right ensures that individuals seeking fertility treatments, including sperm donations, can access reproductive healthcare without undue barriers.

The Constitution also upholds the protection and welfare of donor-conceived children through several key provisions. Kenya's commitment to child welfare extends beyond its domestic legal framework to its international obligations. Articles 2(5) and 2(6) incorporate ratified international

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<sup>86</sup> Article 21, Constitution of Kenya, (2010).

<sup>87</sup> Article 21(4), Constitution of Kenya, (2010).

<sup>88</sup> Article 24, Constitution of Kenya, (2010).

<sup>89</sup> Article 21(2), Constitution of Kenya, (2010).

<sup>90</sup> Article 26, Constitution of Kenya, (2010).

<sup>91</sup> Article 45, Constitution of Kenya, (2010).

<sup>92</sup> Article 45(1), Constitution of Kenya, (2010).

<sup>93</sup> Article 43(1) (a), Constitution of Kenya, (2010).

treaties and conventions into Kenyan law, ensuring alignment with global child welfare standards and reinforcing the State's responsibility to uphold the rights of donor-conceived individuals.<sup>94</sup> Article 260 defines a child as persons under the age of eighteen,<sup>95</sup> while Article 21(2) explicitly classifies children as a vulnerable group, thereby imposing a duty on all State organs to address their unique needs.<sup>96</sup> Article 53 further guarantees every child the right to a name and nationality from birth, the right to healthcare, as well as parental care and protection, irrespective of their parents' marital status.<sup>97</sup>

Central to this protection is Article 53(2), which establishes the BIC as the paramount consideration in all matters concerning them.<sup>98</sup> This principle is particularly significant in the context of anonymous sperm donation, as it necessitates a legal approach that prioritizes the rights and well-being of donor-conceived individuals. Additionally, Article 43 guarantees every individual the right to the highest attainable standard of health, a provision that is particularly relevant in the context of donor-conceived children who may require access to medical and genetic information.<sup>99</sup> Complementing this is Article 35 which provides for the right to access information, affirming that every citizen has the right to obtain information held by the State or any other entity when necessary for the exercise or protection of fundamental rights and freedoms.<sup>100</sup> In the realm of anonymous sperm donation, this raises critical legal and ethical questions regarding a donor-conceived child's right to access information about their biological origins and medical history.

Lastly is the right to privacy which is considered a pivotal constitutional consideration in the regulation of anonymous sperm donation, particularly in determining whether a sperm donor's

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<sup>94</sup> Article 2, Constitution of Kenya, (2010).

<sup>95</sup> Article 260, Constitution of Kenya, (2010).

<sup>96</sup> Article 21(2), Constitution of Kenya, (2010).

<sup>97</sup> Article 53, Constitution of Kenya, (2010).

<sup>98</sup> Article 53(2), Constitution of Kenya, (2010).

<sup>99</sup> Article 43, Constitution of Kenya, (2010).

<sup>100</sup> Article 35, Constitution of Kenya, (2010).

right to privacy includes the right to remain anonymous and whether it extends to withholding genetic information from the donor-conceived child. Article 31 explicitly guarantees every individual the right to privacy, encompassing protections over personal data including the protection of personal data that is not necessarily required to be disclosed.<sup>101</sup> However, this raises another critical question: Is genetic information a form of personal data that must be protected, or is it information that must necessarily be disclosed? This debate lies at the heart of the legal and ethical complexities surrounding ART, where privacy rights must be weighed against the interests of donor-conceived individuals in accessing their genetic origins.

Overall, the Constitution enshrines fundamental rights that are crucial to human dignity and well-being. However, these rights are often framed in broad terms, failing to effectively address the intricate legal, ethical, and social challenges emerging from advancements in ART, as exemplified by the issue of anonymous sperm donation.

### **2.2.2 The Children Act, Cap 141**

The Children Act, 2022,<sup>102</sup> stands as Kenya's principal legal framework for safeguarding and promoting children's rights, replacing the Children Act, 2001, and introducing critical reforms to address contemporary challenges affecting children.<sup>103</sup> Its primary objective is to ensure the full realization and protection of children's rights in alignment with both domestic legal provisions and international human rights standards.<sup>104</sup> In line with the Constitution, the Act provides a clear definition of a child, recognizing all individuals under the age of 18 as children and thereby guaranteeing their entitlement to legal protections.<sup>105</sup> Central to the Act is the principle of the best interests of the child, enshrined in Section 2,<sup>106</sup> which incorporates the child's rights to survival,

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<sup>101</sup> Article 31, Constitution of Kenya, (2010).

<sup>102</sup> The Children Act, (Act No 29 of 2022).

<sup>103</sup> 'Kenya's new children act takes effect' End violence against children, 29 July 2022-<<https://www.end-violence.org/articles/kenyas-new-children-act-takes-effect> >on 14 January 2025.

<sup>104</sup> Section 3, The Children Act, (Act No 29 of 2022).

<sup>105</sup> Section 2, The Children Act, (Act No 29 of 2022).

<sup>106</sup> Section 2, The Children Act, (Act No 29 of 2022).

protection, participation, and development, in line with Article 53(1) of the Constitution of Kenya. Section 5 imposes an obligation on the State to take progressive measures toward the full realization of these rights,<sup>107</sup> while Section 7 affirms every child's right to a name, nationality, and—where possible—the right to know and be cared for by their parents.<sup>108</sup> Additionally, Section 8 mandates that in all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities, or legislative bodies, the best interests of the child must remain the primary consideration.<sup>109</sup> The First Schedule of the Act further expands on this, providing a comprehensive framework for evaluating the BIC, Consider the child's age, maturity, developmental stage, gender, background, and any other pertinent aspects.<sup>110</sup> It also considers the child's relationship with their parents or guardians, as well as with others who may significantly influence the child's welfare. Additionally, the preference of the child, provided they are old enough to express a meaningful choice, is a crucial element in the evaluation. The Act further examines the ability of each parent or guardian to facilitate and maintain regular contact between the child and the other parent or guardian, including physical access. The influence on the kid of one parent or guardian having sole power over the child's upbringing is also addressed, as are any other circumstances that may directly or indirectly affect the child's mental and physical well-being.

Central to the discussion on regulating anonymous sperm donations is Section 16 of the Act, which upholds children's right to healthcare.<sup>111</sup> This provision guarantees access to the highest attainable standard of physical, mental, and psychological well-being, along with the right to health-related

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<sup>107</sup> Section 5, The Children Act, (Act No 29 of 2022).

<sup>108</sup> Section 7, The Children Act, (Act No 29 of 2022).

<sup>109</sup> Section 8, The Children Act, (Act No 29 of 2022).

<sup>110</sup> First Schedule, The Children Act, (Act No 29 of 2022).

<sup>111</sup> Section 16, The Children Act, (Act No 29 of 2022).

information.<sup>112</sup> Additionally, it establishes confidentiality over such information, except in cases where disclosure is deemed necessary to protect the child’s best interests.<sup>113</sup>

Overall, the Act seems to have a consistent theme of prioritizing the best interest of the child in all matter and has been a progressive step in protecting children’s rights and welfare. However, despite these progressive provisions, the Children Act, 2022 notably omits explicit recognition of modern reproductive technologies. While the Act comprehensively addresses matters of child identity, custody, and welfare in traditional contexts, it remains silent on the complexities introduced by ART, such as access to biological parentage and the implications of donor anonymity.

### **2.2.3 Births and Deaths Registration Act, Cap 149**

This Act serves as a fundamental legal framework governing the registration of births and deaths in Kenya.<sup>114</sup> At its core, it mandates the registration of all births, a crucial process that establishes a child's legal identity and confers upon them a formal recognition at birth. By documenting the identity of those who physically bore the child, the act ensures that children can access legal protections and seek redress in cases of rights violations, thereby safeguarding their fundamental rights.<sup>115</sup>

Section 7 of the Act obligates the Registrar of Births and Deaths to maintain a comprehensive register containing prescribed particulars of every notified birth and death.<sup>116</sup> Additionally, the Act

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<sup>112</sup> Section 16(2) and 16(3) (b), The Children Act, (Act No 29 of 2022).

<sup>113</sup> Section 16(3)(d), The Children Act, (Act No 29 of 2022).

<sup>114</sup> Births and Deaths Registration Act (Act No 149 of 1928).

<sup>115</sup> ‘Birth registration’ International Confederation of Midwives, 5 June 2023-  
<<https://internationalmidwives.org/resources/birth-registration/>> on 15 January 2025.

<sup>116</sup> Section 7(1), Births and Deaths Registration Act (Act No 149 of 1928).

mandates strict adherence to data protection principles as provided in the Data Protection Act to safeguard the confidentiality and integrity of sensitive personal information.<sup>117</sup>

A particularly contentious provision of the Act is Section 12, which governs the entry of a father's name in the birth register. It stipulates that no individual shall be recorded as the father of a child unless both parents make a joint request or provide evidence, as required by the Registrar, that they were legally married or had a recognized customary marriage.<sup>118</sup> However, in the case of *L.N.W v. Attorney General & Others*, the High Court's Constitutional and Human Rights Division declared this provision unconstitutional.<sup>119</sup> The Court held that such a restriction was discriminatory, as it placed children born out of wedlock at a disadvantage compared to those born within marriage, thereby violating their constitutional right to identity and legal recognition.

The Court's ruling underscored the principle that every child, irrespective of their parents' marital status, is entitled to equal legal recognition and protection from discrimination. The judgment further highlighted the far-reaching implications of excluding a father's name from a birth certificate, as this omission affects a child's social standing, access to essential services, and overall well-being. Importantly, the ruling has profound implications for donor-conceived children, particularly in the case of anonymous sperm donation. It reinforces the notion that the right to identity for child extends beyond the mere inclusion of a father's name—it encompasses access to critical genetic and medical information, which is indispensable for both personal development and healthcare decision-making. Moreover, by acknowledging the role of DNA testing in resolving paternity disputes, the judgment underscores the growing legal significance of biological identity within the broader framework of children's rights.

Despite these judicial advancements, the Act remains silent on its applicability to ART. Enacted before the widespread adoption of modern reproductive technologies, the Act lacks a clear legal framework to address cases where a Kenyan child's identity is derived from a sperm donor,

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<sup>117</sup> Section 7(3), Births and Deaths Registration Act (Act No 149 of 1928).

<sup>118</sup> Section 12, Births and Deaths Registration Act (Act No 149 of 1928).

<sup>119</sup> *LNW v Attorney General & another*; Kenya National Commission on Human Rights (2016) eKLR.

resulting in donor-conceived children being routinely registered without any reference to the donor's identity. These legislative gaps raise critical legal and ethical concerns, particularly as Kenya emerges as a regional hub for fertility treatments. The effectiveness of any regulatory framework lies in its ability to bridge such gaps by ensuring legal clarity, ethical integrity, and the protection of all stakeholders. It is, therefore, imperative that the Act be updated to reflect the realities of modern reproductive technologies.

#### **2.2.4 The Health Act, 2017**

This Act establishes an integrated legal framework designed to ensure that every individual in Kenya attains the highest standard of physical, mental, and social well-being.<sup>120</sup> By embracing a holistic approach to health, the Act goes beyond the absence of sickness or infirmity to recognize health as a fundamental human right that includes access to appropriate healthcare, nourishment, and medical services.<sup>121</sup> This comprehensive perspective aligns with Kenya's constitutional commitment to safeguarding the well-being of all citizens, particularly vulnerable populations such as children requiring healthcare.<sup>122</sup>

One of the main goals of the Act is to protect the health and well-being of children, ensuring they receive proper nutrition and healthcare services critical for their growth and development.<sup>123</sup> The Act obligates both national and county governments to take progressive measures toward enhancing child healthcare services, expanding immunization programs, and ensuring early childhood medical interventions, thereby mitigating preventable diseases and improving child survival rates.<sup>124</sup>

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<sup>120</sup> The Health Act, (Act No 21 of 2017).

<sup>121</sup> Section 2, The Health Act, (Act No 21 of 2017).

<sup>122</sup> Section 4(c), The Health Act, (Act No 21 of 2017).

<sup>123</sup> Section 3(c), The Health Act, (Act No 21 of 2017).

<sup>124</sup> Section 69, The Health Act, (Act No 21 of 2017).

A core principle of the Act is the obligation of the State to protect, respect, promote, and fulfill the right to health,<sup>125</sup> as enshrined in Articles 43(1)(a) and 53(1)(c) of the Constitution of Kenya.<sup>126</sup> Section 5 guarantees every individual the right to the highest attainable standard of health, including progressive access to promotive, preventive, curative, palliative, and rehabilitative services.<sup>127</sup> Meanwhile, Section 6 upholds the right to reproductive healthcare, ensuring access to safe and affordable services.<sup>128</sup> These provisions serve to empower individuals with reproductive autonomy, enhance maternal and infant survival rates, and promote family well-being through informed reproductive choices. To actualize these rights, the Act requires the government to adopt policies, enact laws, and implement measures aimed at enhancing the accessibility, affordability, and quality of healthcare services.<sup>129</sup> This includes prioritizing investments in health research, medical innovation, and healthcare infrastructure, thereby fostering an equitable and efficient healthcare system that meets the needs of all persons, regardless of socioeconomic status.<sup>130</sup>

Additionally, Section 8 primarily outlines a healthcare provider's duty to inform a user—or their guardian, in the case of minors or incapacitated individuals—about their health status, except in circumstances where disclosure would be contrary to the user's best interests.<sup>131</sup> In the context of anonymous sperm donation, this provision falls short by failing to explicitly extend the right to health information to donor-conceived children, particularly regarding their genetic origins and medical history. The Act also strongly emphasizes confidentiality in medical treatment, as outlined in Section 11, which mandates that all information concerning a patient's health status, treatment, or medical history remains confidential.<sup>132</sup> Exceptions to this rule exist only when disclosure is

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<sup>125</sup> Section 4, The Health Act, (Act No 21 of 2017).

<sup>126</sup> Article 43(1)(a) and 53(1)(c), Constitution of Kenya, (2010).

<sup>127</sup> Section 6, The Health Act, (Act No 21 of 2017).

<sup>128</sup> Section 6, The Health Act, (Act No 21 of 2017).

<sup>129</sup> Section 4(a) and 15, The Health Act, (Act No 21 of 2017).

<sup>130</sup> Section 4(b), The Health Act, (Act No 21 of 2017).

<sup>131</sup> Section 8(1)(b), The Health Act, (Act No 21 of 2017).

<sup>132</sup> Section 11(1), The Health Act, (Act No 21 of 2017).

required by a court order or necessary for health research and policy planning, provided the individual gives informed consent.<sup>133</sup> While this provision safeguards a sperm donor's right to privacy regarding their health information, it fails to create an exception for donor-conceived individuals seeking access to their genetic origins and medical history. This omission raises critical ethical and legal concerns, as a donor-conceived child's right to essential genetic health information—vital for informed medical decisions—remains unaddressed.

Despite its progressive stance on healthcare and reproductive rights, the Act lacks explicit provisions on ART. While it affirms reproductive healthcare as a fundamental right, it fails to establish a legal framework for regulating practices like sperm donation. This omission raises significant legal and ethical concerns, particularly regarding the rights of donor-conceived individuals to access genetic and medical information vital to their health and identity. The absence of clear regulations not only creates gaps in protecting these children but also highlights the urgent need for a structured legal framework that upholds ethical, medical, and legal safeguards for all stakeholders.

### **2.2.5 Data Protection Act, Cap 411C 2019**

The Data Protection Act, 2019,<sup>134</sup> enacted in Kenya, operationalizes the constitutional right to privacy under Article 31(c) and 31(d) of the Constitution by creating a legal framework for regulating personal data processing.<sup>135</sup> Key to the Act is the establishment the Office of the Data Protection Commissioner, responsible for enforcing data protection laws, investigating breaches, and ensuring compliance.<sup>136</sup>

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<sup>133</sup> Section 11(1) and 11(2), The Health Act, (Act No 21 of 2017).

<sup>134</sup> The Data Protection Act, (Act No 24 of 2019).

<sup>135</sup> Article 31(c) and 31(d), Constitution of Kenya (2010).

<sup>136</sup> Section 5, The Data Protection Act, (Act No 24 of 2019).

The Act defines "data subjects," as identifiable individual whose personal data is processed,<sup>137</sup> and includes a specific definition for "health data," which refers to any information concerning an individual's physical or mental health, medical conditions, treatment, and related interventions.<sup>138</sup> The Act also defines "health data" as information on an individual's physical or mental health, medical conditions, treatment, and related interventions.<sup>139</sup> It also categorizes "personal data" and "sensitive personal data,"<sup>140</sup> which includes genetic and familial information, critical to sperm donation regulation. A notable concept is "anonymization" which involves removing personal identifiers from data to protect donor anonymity.<sup>141</sup> These provisions are particularly relevant in the context of anonymous sperm donation, as it encompasses sperm donors who are, in effect, data subjects under the Act

The Act places stringent obligations on data controllers, including transparency about data collection purposes, usage, and security measures.<sup>142</sup> Part IV codifies key principles such as lawfulness, fairness, transparency, and data minimization, ensuring proportionality in data processing.<sup>143</sup> Furthermore, the Act mandates the registration of data controllers and processors,<sup>144</sup> a requirement that is particularly pertinent to the regulation of anonymous sperm donation, as such donations typically occur within regulated fertility clinics and sperm banks.

A particularly consequential provision is found in Section 30, which prohibits the processing of personal data without the data subject's consent, except in circumstances where such processing is necessary to protect the vital interests of the data subject or another individual.<sup>145</sup> This raises a

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<sup>137</sup> Section 2, The Data Protection Act, (Act No 24 of 2019).

<sup>138</sup> Section 2, The Data Protection Act, (Act No 24 of 2019).

<sup>139</sup> Section 2, The Data Protection Act, (Act No 24 of 2019).

<sup>140</sup>Section 2, The Data Protection Act, (Act No 24 of 2019).

<sup>141</sup> Section 2, The Data Protection Act, (Act No 24 of 2019).

<sup>142</sup> Section 29, The Data Protection Act, (Act No 24 of 2019).

<sup>143</sup> Part IV, The Data Protection Act, (Act No 24 of 2019).

<sup>144</sup> Part III, The Data Protection Act, (Act No 24 of 2019).

<sup>145</sup> Section 30, The Data Protection Act, (Act No 24 of 2019).

compelling legal question: could donor-conceived individuals invoke this provision to assert their right to access genetic information for medical purposes? The Act defines consent as a freely given, specific, informed, and unequivocal indication of an individual's agreement to the processing of their data, thereby reinforcing the principle of autonomy over personal information.<sup>146</sup> In parallel, Section 36 grants data subjects the right to object to the processing of their personal data unless the data controller can demonstrate a compelling legitimate interest that outweighs the individual's rights.<sup>147</sup> This provision presents significant challenges to the enforcement of donor anonymity, particularly in cases where donor-conceived individuals seek access to genetic information for health-related or identity purposes.

Ultimately, while the Act aims to protect donor privacy, it inadequately addresses the rights of donor-conceived individuals to access genetic and health information. The Act's general applicability to all data processors overlooks the unique legal and ethical complexities of assisted reproductive technologies. This gap raises ethical concerns, including donor-conceived individuals' right to identity, access to medical history, and potential risks of genetic disorders.

### **2.2.6 The Access to Information Act, 2016**

The Act was enacted in 2016,<sup>148</sup> and upholds the constitutional right articulated in Article 35 of the Constitution, which guarantees access to information. The Act defines "information" in broad terms, encompassing all records regardless of their format, storage medium, source, or date of creation.<sup>149</sup> Section 2 provides an expansive definition of 'personal information', referring to any information related to an identified or identifiable natural person.<sup>150</sup> Additional personal information is further defined to include details pertaining to an individual's race, gender, sex, pregnancy, marital status, national, ethnic, or social origin, color, age, physical, psychological,

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<sup>146</sup> Section 2, The Data Protection Act, (Act No 24 of 2019).

<sup>147</sup> Section 36, The Data Protection Act, (Act No 24 of 2019).

<sup>148</sup> The Access to Information, Act (Act No 31 2016 of 2019).

<sup>149</sup> Section 2, The Access to Information, Act (Act No 31 2016 of 2019).

<sup>150</sup> Section 2, The Access to Information, Act (Act No 31 2016 of 2019).

or mental health, well-being, disability, religion, conscience, belief, culture, language, and birth.<sup>151</sup> It also extends to encompass information regarding an individual's education, medical, criminal, or employment history, financial transactions, identifying numbers or symbols, contact details, and any private or confidential personal correspondence.<sup>152</sup>

Furthermore, the Act reinforces the fundamental right to access information in section 4, affirming that every citizen is entitled to obtain information held by the State or any other entity, particularly when such access is necessary for the exercise or protection of a right or fundamental freedom.<sup>153</sup> This provision fosters transparency and accountability within both public and private sectors, while also intersecting with other legislative frameworks, such as the Data Protection Act, which similarly classifies certain categories of personal information as "sensitive personal data." The significance of these definitions and protections becomes particularly relevant in the context of emerging reproductive technologies, including anonymous sperm donation. A critical legal issue arising in this domain is whether donor-conceived individuals possess a fundamental right to access genetic information concerning their biological origins, which the act fails to address or make reference to.

Under Section 6, disclosure is prohibited where it would unreasonably infringe upon an individual's privacy, cause substantial harm to the legitimate interests of a third party, or violate professional confidentiality.<sup>154</sup> If a sperm donor's identifying details are classified as private data, access to such information may be restricted unless the donor has provided consent or the information is deemed necessary for the protection or exercise of a fundamental right, such as a donor-conceived child's right to health and identity. This creates a legal dilemma: while a donor's right to privacy is legally safeguarded, a donor-conceived individual's need to access genetic and medical history may also be recognized as a fundamental right under constitutional and human rights frameworks.

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<sup>151</sup> Section 2, The Access to Information, Act (Act No 31 2016 of 2019).

<sup>152</sup> Section 2, The Access to Information, Act (Act No 31 2016 of 2019).

<sup>153</sup> Section 4, The Access to Information, Act (Act No 31 2016 of 2019).

<sup>154</sup> Section 6(1), The Access to Information, Act (Act No 31 2016 of 2019).

Despite the broad scope of the Act, its application to anonymous sperm donation remains ambiguous. This uncertainty arises due to the absence of explicit provisions addressing genetic data or ART. As of now, the Rules and Regulations under the Access to Information Act have not specifically addressed the ambiguities concerning access to genetic information for donor-conceived children. The absence of explicit guidelines leaves the balance between a donor's privacy rights and a donor-conceived individual's right to know their genetic origins unresolved. This gap suggests a need for more targeted legislation or amendments to existing laws to clarify these issues and protect the rights and interests of all parties involved

### **2.2.7 The Assisted Reproductive Technology Bill, 2022**

The ART Bill, 2022, introduced by Millie Odhiambo, seeks to legalize and regulate ART procedures including sperm donation in Kenya. It mandates the creation of the Assisted Reproductive Technology Authority to oversee ethical and professional compliance.<sup>155</sup> The Cabinet Secretary is empowered to establish an ART Directorate to regulate clinics, accredit training institutions, license providers, and maintain a confidential database.<sup>156</sup>

The Bill defines the roles of both national and county governments in ensuring access to ART services and sets strict ethical guidelines. It requires written consent from donors, prohibits commercial exploitation and genetic modifications,<sup>157</sup> and imposes age restrictions on sperm donation.<sup>158</sup> Violations attract severe penalties, including fines up to KES 5 million and imprisonment.<sup>159</sup> The Bill also regulates the management and disclosure of records related to ART.<sup>160</sup> The Directorate, established under Part II of the Bill, is responsible for maintaining a registry that records details of ART services, including sperm and embryo storage, as well as personal data of donors and recipients. The registry serves both regulatory and monitoring

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<sup>155</sup> Part II, The Assisted Reproductive Technology Bill, 2022.

<sup>156</sup> Part II, The Assisted Reproductive Technology Bill, 2022.

<sup>157</sup> Section 12, The Assisted Reproductive Technology Bill, 2022.

<sup>158</sup> Section 17, The Assisted Reproductive Technology Bill, 2022.

<sup>159</sup> Part III, The Assisted Reproductive Technology Bill, 2022.

<sup>160</sup> Sections 33-37, The Assisted Reproductive Technology Bill, 2022.

purposes, ensuring compliance within the industry while also allowing donor-conceived individuals to access information about their genetic origins.<sup>161</sup> However, the Bill imposes restrictions on the disclosure of such information, particularly regarding minors and familial connections, balancing the right to know one's origins with privacy considerations.

The Bill also enforces strict licensing for ART providers, requiring compliance with professional standards.<sup>162</sup> Section 26 of the ART Bill outlines the rights of children born through assisted reproductive technology, ensuring they are granted the same legal status as those conceived naturally.<sup>163</sup> However, if the Bill is enacted, Section 11 of the Births and Deaths Registration Act would require amendments to clarify who is responsible for registering such children. Overall, the Bill aims to fill gaps in ART regulation and makes various provisions regulating for sperm donations unlike the previous ART bills in Kenya. However, the bills is yet to be implemented.

## **2.3 International framework**

### **2.3.1 The 1989 Convention on the Rights of the Child (CRC)**

The CRC,<sup>164</sup> adopted by the United Nations General Assembly on November 20, 1989, stands as a milestone in the global recognition and protection of children's rights. With an unprecedented 196 states ratifying the treaty, the CRC enjoys near-universal acceptance, underscoring the international community's commitment to safeguarding the welfare of children.<sup>165</sup> At the heart of the CRC lies the BIC principle, enshrined under Article 3(1) of the CRC which explicitly states:

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<sup>161</sup> Sections 33-37, The Assisted Reproductive Technology Bill, 2022.

<sup>162</sup> Sections 38-49, The Assisted Reproductive Technology Bill, 2022.

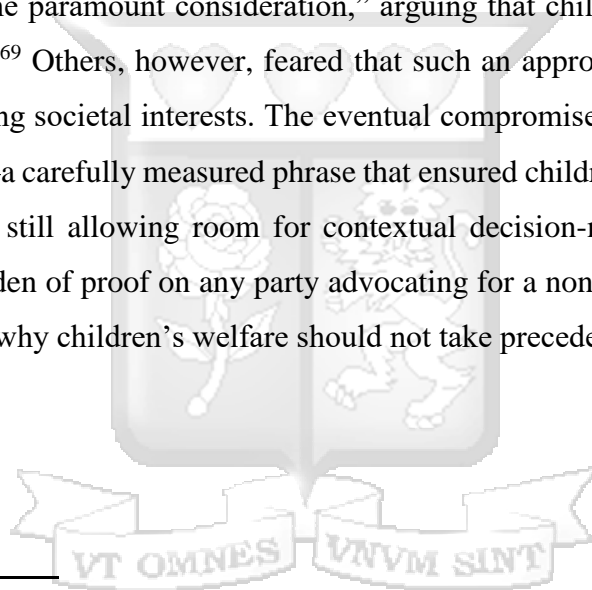
<sup>163</sup> Section 26, The Assisted Reproductive Technology Bill, 2022.

<sup>164</sup> Convention on the Rights of the Child, 2 September 1990, 1577 UNTS.

<sup>165</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'327-329.

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.”

The origins of this principle can be traced to the 1959 Declaration of the Rights of the Child, where it was first articulated under Article 2.<sup>166</sup> However, the Declaration lacked legal enforceability, leaving children's rights largely dependent on the goodwill of states.<sup>167</sup> A turning point came in 1978, when Poland introduced the first draft of the CRC—a bold initiative aimed at transforming these aspirational ideals into binding international obligations.<sup>168</sup> As the drafting process unfolded, intense debates emerged over the strength and scope of the BIC principle. Some delegations pushed for the phrase “the paramount consideration,” arguing that children's interests should be absolute and overriding.<sup>169</sup> Others, however, feared that such an approach might unduly restrict the balancing of competing societal interests. The eventual compromise led to the adoption of “a primary consideration”—a carefully measured phrase that ensured children's interests would carry significant weight while still allowing room for contextual decision-making.<sup>170</sup> Crucially, this formulation placed a burden of proof on any party advocating for a non-child-centered approach, requiring them to justify why children’s welfare should not take precedence.<sup>171</sup>



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<sup>166</sup> Aron D and Shimelis D, 'Notes on the principle “Best Interest of the child”: meaning, history and its place under Ethiopian law,' 327-329.

<sup>167</sup> Aron D and Shimelis D, 'Notes on the principle “Best Interest of the child”: meaning, history and its place under Ethiopian law,' 327-329.

<sup>168</sup> Aron D and Shimelis D, 'Notes on the principle “Best Interest of the child”: meaning, history and its place under Ethiopian law,' 327-329.

<sup>169</sup> Aron D and Shimelis D, 'Notes on the principle “Best Interest of the child”: meaning, history and its place under Ethiopian law,' 327-329.

<sup>170</sup> Aron D and Shimelis D, 'Notes on the principle “Best Interest of the child”: meaning, history and its place under Ethiopian law,' 327-329.

<sup>171</sup> Aron D and Shimelis D, 'Notes on the principle “Best Interest of the child”: meaning, history and its place under Ethiopian law,' 327-329.

The UN Committee on the Rights of the Child, established under Article 43 of the CRC, has since reinforced the broad and binding application of Article 3(1).<sup>172</sup> It has emphasized that the BIC principle extends not only to courts, administrative bodies, and legislative institutions but also to private entities and social welfare organizations—ensuring that children’s rights are safeguarded across all sectors of society.<sup>173</sup> Importantly, this duty goes beyond child-specific laws and policies; it extends to broader legislative, administrative, and judicial actions that may indirectly impact children’s well-being.<sup>174</sup> The BIC principle thus acts as a foundational benchmark, against which all legal, policy, and institutional decisions must be assessed.<sup>175</sup> It demands that children’s welfare is not treated as an afterthought or a secondary consideration, but rather as a fundamental priority—ensuring that every decision affecting children is made with their rights, dignity, and future at the forefront.<sup>176</sup>

### **2.3.2 The African Charter on the Rights and Welfare of the Child 1990**

The ACRWC,<sup>177</sup> adopted by the Organization of African Unity (now the African Union) in 1990, serves as a region-specific legal framework aimed at safeguarding and promoting the rights of children within the African context. It complements the CRC while incorporating cultural, historical, and socio-economic realities unique to Africa.<sup>178</sup> The primary justifications for a separate charter on the rights and welfare of the African child are the necessity for a "more

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<sup>172</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'327-329.

<sup>173</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'327-329.

<sup>174</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'327-329.

<sup>175</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'327-329.

<sup>176</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'327-329.

<sup>177</sup> African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49.

<sup>178</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'329-330.

elaborate" legal regime that can provide "better protection to the African child" and the need for "an African touch to the overall concept of child rights.<sup>179</sup> At the core of the ACRWC is the principle of the best interests of the child, which is enshrined in Article 4(1) of the Charter. This provision mandates that:

"In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration."

A defining feature of the ACRWC is its explicit recognition of African communal values and the socio-economic realities that shape children's welfare on the continent. Unlike the CRC—which primarily adopts an individualistic approach to child rights—the ACRWC integrates the collective responsibility of families and communities in upholding children's well-being.<sup>180</sup> The Charter acknowledges that extended families and social structures play a pivotal role in child welfare, offering a contextually relevant interpretation of the BIC principle.

Scholars debate whether the ACRWC establishes a higher standard than the CRC in safeguarding children's interests. The Charter states that "in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration." Some argue that this wording places a stronger obligation on states compared to the CRC, which only requires that the BIC be "a primary consideration". However, other scholars contend that while the ACRWC strengthens child protection in some respects, it remains silent on key obligations found in the CRC such as Article 3(3), which explicitly mandates states to ensure that child welfare institutions, services, and facilities adhere to established safety, health, staffing, and supervision standards.<sup>181</sup>

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<sup>179</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'329-330.

<sup>180</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'329-330.

<sup>181</sup> Aron D and Shimelis D, 'Notes on the principle "Best Interest of the child": meaning, history and its place under Ethiopian law,'329-330.

## 2.4 Conclusion

In light of the growing demand for ART services, it is crucial for Kenya to finalize and implement comprehensive legislation explicitly regulating sperm donation. This would enhance legal clarity and address issues related to donor anonymity, the rights of donor-conceived individuals, and ethical concerns associated with unregulated sperm donation. While legislative efforts have been made through previous bills, none have been enacted and had primarily focused on surrogacy, embryo use, and IVF, leaving gaps in sperm donation regulation



## CHAPTER 3: ANALYSING THE BEST INTEREST OF THE CHILD

### 3.1 Introduction

Children are the heartbeat of society, carrying both the promise of future generations and the cultural and familial legacies of those before them.<sup>182</sup> Their well-being is a shared responsibility, even when they are unable to voice their own rights. At the core of child protection lies the BIC principle, a fundamental legal and ethical standard that guides decision-making in all matters affecting children. This chapter mainly examines whether the regulation of anonymous sperm donation in Kenya can better protect the BIC. It also incorporates international and regional best practices to inform the necessary regulatory approach in Kenya.

### 3.2 Breaches of BIC in unregulated sperm donations

One of the most egregious breaches of the BIC principle in unregulated sperm donation is the denial of a child's right to know their biological origins. Identity is a crucial component of personal development, influencing self-awareness, psychological well-being, and social relationships. Article 7 of the CRC explicitly guarantees every child the right to know and be cared for by their parents.<sup>183</sup> However, in the absence of regulation, donor anonymity often takes precedence over this right, depriving donor-conceived individuals of essential information regarding their genetic heritage. The psychological impact of this anonymity can be severe, as research has consistently demonstrated that individuals who are unaware of their biological origins often experience identity confusion, emotional distress, and challenges in forming familial and romantic relationships.<sup>184</sup> Many express frustration and a sense of disconnection, feeling that a fundamental aspect of their identity has been deliberately obscured.<sup>185</sup> The secrecy surrounding donor conception can also

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<sup>182</sup> Brian O, 'Children: Our Legacy for the Future' vision-<<https://www.vision.org/children-our-legacy-future-449> on 15 January 2025.

<sup>183</sup> Article 7, Convention on the Rights of the Child, 2 September 1990, 1577 UNTS.

<sup>184</sup> Julianne E, 'Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child' 104 American Society for Reproductive Medicine 3, 2015, 513-519.

<sup>185</sup> Julianne E, 'Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child' 104 American Society for Reproductive Medicine 3, 2015, 513-519.

create mistrust within families, particularly when children discover their origins later in life through unexpected means such as DNA testing.<sup>186</sup> Ensuring that donor-conceived individuals have access to their genetic heritage is not only a matter of personal identity but also an ethical and legal imperative that necessitates robust sperm donation regulations prioritizing the child's right to identity over the privacy interests of sperm donors.

Several countries have abolished anonymous sperm donation to ensure that donor-conceived individuals have the right to access information about their biological origins.<sup>187</sup> Sweden was the first country to take this step in 1984, establishing that donor-conceived children should have access to their donor's identity upon reaching a certain age.<sup>188</sup> The UK followed suit in 2005, amending its laws to grant donor-conceived individuals access to identifying information at age 18.<sup>189</sup> Germany's highest court ruled in 2013 that the right to know one's biological origins is a fundamental right, and the Netherlands has similarly prohibited anonymous sperm donation to support children's identity rights.<sup>190</sup> These legal changes are grounded in extensive psychological research indicating that knowledge of genetic origins is essential for identity formation, self-esteem, and emotional stability. Studies from jurisdictions that removed anonymity show that donor-conceived individuals who have access to their genetic background experience greater psychological well-being compared to those deprived of this information.<sup>191</sup> Conversely, countries that still permit anonymous donation have seen rising numbers of donor-conceived individuals

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<sup>186</sup> Julianne E, 'Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child' 104 American Society for Reproductive Medicine 3, 2015, 513-519.

<sup>187</sup> Julianne E, 'Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child' 104 American Society for Reproductive Medicine 3, 2015, 513-519.

<sup>188</sup> Julianne E, 'Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child' 104 American Society for Reproductive Medicine 3, 2015, 513-519.

<sup>189</sup> Julianne E, 'Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child' 104 American Society for Reproductive Medicine 3, 2015, 513-519.

<sup>190</sup> Julianne E, 'Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child' 104 American Society for Reproductive Medicine 3, 2015, 513-519.

<sup>191</sup> Julianne E, 'Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child' 104 American Society for Reproductive Medicine 3, 2015, 513-519.

seeking biological information through private DNA testing, demonstrating the intrinsic human need to know one's origins.<sup>192</sup>

Beyond identity, access to genetic and medical history is another critical concern that unregulated sperm donation fails to address, posing significant health risks.<sup>193</sup> Unlike naturally conceived children, donor-conceived individuals may unknowingly inherit genetic disorders if they are denied access to medical information about their biological lineage.<sup>194</sup> Genetic history is vital for preventive healthcare, influencing early disease detection, risk assessment, and treatment planning. For instance, individuals with a family history of conditions such as sickle cell anemia, cystic fibrosis, or hereditary heart disease require specific medical screenings to manage and mitigate potential health risks.<sup>195</sup> Without mandatory regulations requiring sperm donors to disclose their medical and genetic history, donor-conceived children remain vulnerable to preventable illnesses and hereditary conditions.<sup>196</sup> The lack of transparency in genetic information directly undermines their long-term well-being, violating the BIC principle by neglecting a fundamental aspect of child welfare, health and safety. Moreover, recipient parents may unknowingly use sperm from donors carrying serious genetic conditions, thereby placing both the child and the mother at risk.

Recognizing the medical importance of knowing one's genetic history, several jurisdictions have introduced legal requirements for sperm donors to provide detailed medical histories, which are stored in national databases. Australia, Austria, and Switzerland have implemented such regulations, with Victoria, Australia, going further in 2016 by making all past donor records available to donor-conceived individuals, even retroactively.<sup>197</sup> This decision was based on evidence that knowledge of one's genetic history is crucial for diagnosing and preventing hereditary diseases, such as heart conditions, sickle cell anemia, and certain cancers. By contrast,

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<sup>192</sup> Lucy F, 'Gamete donation and anonymity: The ethical and legal debate,' 818–824.

<sup>193</sup> Lucy F, 'Gamete donation and anonymity: The ethical and legal debate,' 818–824.

<sup>194</sup> Lucy F, 'Gamete donation and anonymity: The ethical and legal debate,' 818–824.

<sup>195</sup> Lucy F, 'Gamete donation and anonymity: The ethical and legal debate,' 818–824.

<sup>196</sup> Lucy F, 'Gamete donation and anonymity: The ethical and legal debate,' 818–824.

<sup>197</sup> Lucy F, 'Gamete donation and anonymity: The ethical and legal debate,' 818–824.

in countries where anonymous donation remains unregulated, children conceived from sperm donors often lack access to critical medical information.<sup>198</sup> This can lead to misdiagnoses, failure to detect genetic conditions early, and preventable health complications. The need for accurate medical records has led many jurisdictions to regulate sperm donation and prohibit anonymity to ensure donor-conceived individuals receive necessary health protections.

Additionally, the unregulated practice of anonymous sperm donation raises serious concerns regarding the risk of accidental incest, particularly in societies with small genetic pools or inadequate donor tracking mechanisms.<sup>199</sup> In the absence of legal safeguards, individuals conceived from the same donor may unknowingly enter into consanguineous relationships, leading to severe genetic and social consequences. This risk is not merely theoretical but has been documented in jurisdictions where unregulated sperm donation has resulted in numerous half-siblings inadvertently crossing paths. The BIC principle demands proactive legal interventions to mitigate such risks, reinforcing the need for structured regulatory frameworks that protect donor-conceived individuals from both genetic and social harm.

Jurisdictions like Denmark, the UK, and Canada have introduced strict limits on the number of children a single donor can father to reduce the likelihood of genetic relatives unknowingly forming relationships.<sup>200</sup> In the Netherlands, where unregulated donation led to cases of one donor fathering over 100 children, legal reforms were introduced to enforce stricter donor limits.<sup>201</sup> In contrast, countries without robust regulation have experienced cases where individuals later discovered they had dozens or even hundreds of half-siblings. In the U.S., where sperm donation is loosely regulated, cases have emerged where a single donor fathered over 200 children, raising

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<sup>198</sup> Lucy F, 'Gamete donation and anonymity: The ethical and legal debate,' 818–824.

<sup>199</sup>John M,'Africa's sperm donor industry 'lacks vital safeguards' SciDevNet, 13 January 2025- <<https://www.scidev.net/global/scidev-net-investigates/africas-sperm-donor-industry-lacks-vital-safeguards/>> on 2 April 2025.

<sup>200</sup>Lucy F,' Gamete donation and anonymity: The ethical and legal debate' 16 Human Reproduction 5, 2001,818–824.

<sup>201</sup> M Mercuri, 'The Crazy True Story Behind ' The Man With 1000 Kids- Where Is Jonathan Meijer Now?' Forbes ,2024 <https://www.forbes.com> on 2 April 2025.

serious concerns about genetic intermixing.<sup>202</sup> These incidents underscore why legal safeguards must be in place to track donors and limit the number of offspring per donor—a principle that regulated jurisdictions have successfully implemented.

Some jurisdictions have adopted a compromise model that balances donor privacy with the rights of donor-conceived individuals. In New Zealand and Finland, donors can remain anonymous at the time of donation, but their identifying information is stored in national databases. Once the child turns 18, they gain the right to access this information.<sup>203</sup> This model recognizes that while some donors may prefer anonymity, the rights of the child must take precedence. Similarly, in Germany, courts have ruled that the right to know one's biological origins outweighs a donor's right to anonymity.<sup>204</sup> France has also taken a firm stance, abolishing anonymous sperm donation in 2021 and affirming that biological identity is a fundamental right.<sup>205</sup> These legal shifts indicate a growing international consensus favoring transparency and prioritizing the rights of donor-conceived individuals over absolute donor anonymity.

### **3.3 A discussion of how regulation can address the breaches of the BIC**

Regulation plays a crucial role in addressing breaches of the BIC principle, particularly in the context of anonymous sperm donation. Effective regulatory frameworks serve two primary functions: implementing preventative measures to mitigate potential harm and providing legal redress for children whose rights have been violated.<sup>206</sup> By establishing clear legal standards, regulations ensure that donor-conceived children are granted specific rights and protections, reinforcing accountability among all stakeholders, including parents, fertility clinics, policymakers, and legal authorities. A well-structured regulatory framework helps to create a legal

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<sup>202</sup> 'Understanding the Risks of Consanguineous Reproduction' < <https://www.nature.com/articles/d42473-018-003405> > on 19 November 2024.

<sup>203</sup> Lucy F, ' Gamete donation and anonymity: The ethical and legal debate' 16 Human Reproduction 5, 2001,818–824.

<sup>204</sup> Lucy F, ' Gamete donation and anonymity: The ethical and legal debate' 16 Human Reproduction 5, 2001,818–824.

<sup>205</sup> Lucy F, ' Gamete donation and anonymity: The ethical and legal debate' 16 Human Reproduction 5, 2001,818–824.

<sup>206</sup> Standard vs Framework vs Laws vs Regulations < <https://community.trustcloud.ai/docs/grc-launchpad/grc-101/compliance/standard-vs-framework-vs-laws-vs-regulations/> > on 1 April 2025.

environment in which children’s welfare is the priority, preventing violations of their fundamental rights and ensuring that reproductive technologies are used responsibly and ethically.<sup>207</sup>

Preventative regulation involves setting legal mandates that explicitly safeguard the rights and interests of donor-conceived children. One key preventive measure is the requirement for fertility clinics to maintain comprehensive donor records. These records should include medical histories, genetic information, and identifying details that may be necessary for children to access later in life. Additionally, regulatory bodies can establish strict tracking systems to monitor sperm donations, ensuring that the number of offspring per donor remains within medically and socially acceptable limits to reduce the risk of genetic complications and accidental incest.<sup>208</sup> Such regulations not only protect the child’s right to identity and medical history but also promote transparency and accountability in the assisted reproduction industry. By embedding these safeguards within the legal framework, regulation helps to preemptively address potential breaches of the BIC principle before they arise.

Beyond preventative measures, regulation must also provide effective avenues for legal redress when breaches occur. An effective legal framework should empower children, or their legal guardians, to challenge violations of their rights through judicial or administrative processes.<sup>209</sup> Courts and regulatory bodies should be equipped to handle cases where the BIC principle has been disregarded, offering remedies such as granting donor-conceived children access to their biological information or enforcing stricter regulatory compliance among fertility clinics. By offering clear pathways for redress, regulation ensures that breaches of children’s rights do not go unaddressed and that those affected receive the protection and justice they deserve.

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<sup>207</sup> Uche E, ‘Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction’, 13-23.

<sup>208</sup> Uche E, ‘Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction’, 13-23.

<sup>209</sup> ‘Standard vs Framework vs Laws vs Regulations’ < <https://community.trustcloud.ai/docs/grc-launchpad/grc-101/compliance/standard-vs-framework-vs-laws-vs-regulations/> > on 1 April 2025.

Kenyan courts have demonstrated a progressive approach in interpreting the BIC principle, consistently emphasizing child welfare over competing considerations. A notable example is the Muturi case, in which the Supreme Court ruled that matters of public interest must sometimes yield to the paramount importance of child protection.<sup>210</sup> This legal reasoning is directly applicable to sperm donation regulation, as it underscores the principle that the anonymity of sperm donors—often justified as a matter of adult privacy—should not take precedence over the well-being of donor-conceived children. Just as Kenyan courts have prioritized the welfare of children in cases related to custody, adoption, and guardianship, the same legal logic should extend to reproductive technologies.

### 3.4 Conclusion

The experiences of multiple jurisdictions prove that regulating sperm donation, particularly by restricting or abolishing anonymity, is the correct legal and ethical approach. Countries that have done so have seen better psychological outcomes for donor-conceived individuals, improved medical safety, and a reduced risk of accidental incest. By contrast, jurisdictions that lack regulations face ongoing ethical and legal challenges, as individuals increasingly turn to private DNA testing to uncover concealed biological information. These global legal trends reinforce the necessity for Kenya and other unregulated jurisdictions to adopt similar reforms, ensuring that reproductive technologies uphold the Best Interests of the Child while maintaining ethical and legal integrity.

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<sup>210</sup> Charles Muturi Macharia & 6 Others v Standard Group & 4 Other (2022) eKLR.

## **CHAPTER FOUR: REGULATION OF ANONYMOUS SPERM DONATION IN SOUTH AFRICA**

### **4.1 Introduction**

South Africa stands at the forefront of Africa's regulatory advancements in the field of assisted reproduction, particularly in the institutionalization and governance of sperm donation.<sup>211</sup> The country has developed a comprehensive legal and ethical framework that are crafted to protect the emotional and physical well-being of all parties while ensuring transparency, ethical integrity, and accountability in reproductive practices.<sup>212</sup> This chapter will hence undertake a comparative analysis of the country's approach to the regulation of anonymous sperm donation. By examining the underlying rationale behind its regulatory choices and the legal mechanisms employed to govern sperm donation, this chapter will evaluate how South Africa has navigated complex issues such as donor anonymity, limitations on donor contributions, genetic tracking, and the balance between privacy and transparency.

### **4.2 Constitution of South Africa**

The legal foundation for sperm donation in South Africa is anchored in a constellation of key statutes and regulatory instruments. At the constitutional level, Article 28 of the South African Constitution outlines fundamental rights pertaining to children, emphasizing their entitlement to a name and nationality from birth, parental or alternative care, and access to essential services such as nutrition, shelter, and healthcare.<sup>213</sup> Notably, Section 28(2) underscores the principle that the best interests of the child are of paramount importance in all matters concerning them.<sup>214</sup> Additionally, Article 12(2) (a) of the Constitution affirms that "everyone has the right to make

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<sup>211</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction', 13-23.

<sup>212</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction', 13-23.

<sup>213</sup> Article 28, Constitution of South Africa (1997).

<sup>214</sup> Article 28(2), Constitution of South Africa (1997).

decisions concerning reproduction".<sup>215</sup> Initially, this provision was interpreted as guaranteeing the right not to reproduce. However, in the landmark case of *AB v Minister of Social Development*,<sup>216</sup> the Constitutional Court expanded this right to include the ability to reproduce through non-coital means, thereby reinforcing legal recognition of assisted reproductive technologies (ART).

### **4.3 National Health Act 2003**

The NHA of 2003 serves as the principal legislative framework governing health-related practices in South Africa, including reproductive health and assisted reproductive technologies.<sup>217</sup> Chapter 8 of the NHA establishes a comprehensive regulatory regime for the collection, storage, and utilization of human biological materials, encompassing blood, blood products, human tissue, and gametes.<sup>218</sup> Under this provision, gametes obtained from living donors may be used solely for medical purposes.<sup>219</sup> Furthermore, individuals under the age of 18 or those diagnosed with mental illness are prohibited from donating gametes unless explicitly authorized by the Minister of Health.<sup>220</sup> To reinforce these protections, Section 58 mandates that the removal and transplantation of human tissue, including gametes, may only be conducted within accredited medical institutions under the supervision of qualified healthcare practitioners.<sup>221</sup> This regulatory oversight is designed to ensure strict adherence to ethical and medical standards, thereby safeguarding both donors and recipients within the reproductive health sector.

In addition to upholding ethical medical practices, the NHA imposes stringent financial regulations to prevent the commercialization of gamete donation. Payments related to the importation, procurement, and distribution of gametes are restricted to authorized medical institutions, thereby

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<sup>215</sup> Article 12(2) (a), Constitution of South Africa (1997).

<sup>216</sup> *AB and Another v Minister of Social Development* (2016), Constitutional Court of South Africa.

<sup>217</sup> National Health Act, (Act 61 of 2003).

<sup>218</sup> Chapter 8, National Health Act, (Act 61 of 2003).

<sup>219</sup> Section 56, National Health Act, (Act 61 of 2003).

<sup>220</sup> Section 56(2), National Health Act, (Act 61 of 2003).

<sup>221</sup> Section 58, National Health Act, (Act 61 of 2003).

mitigating the risk of financial exploitation.<sup>222</sup> Gamete donors do not receive compensation based on the quantity of gametes provided; rather, they are remunerated for the time, effort, and inconvenience incurred during the donation process. The South African Society for Reproductive Medicine has established a maximum allowable compensation of between R8,000 and R10,000, a measure intended to uphold ethical integrity by preventing the commodification of gamete donation while ensuring that donors receive fair and reasonable reimbursement.<sup>223</sup> Further reinforcing ethical safeguards, Section 60 of the NHA specifies that while healthcare providers may receive remuneration for professional services rendered, gamete donors are strictly prohibited from profiting beyond reimbursement for legitimate expenses incurred during the donation process.<sup>224</sup>

Complementing the NHA, the Regulations Relating to Artificial Fertilization of Persons (2012) outline specific protocols for the collection, handling, and utilization of gametes in ART.<sup>225</sup> Regulation 3 mandates that only qualified professionals may remove or extract gametes from donors for artificial fertilization.<sup>226</sup> Regulation 5 establishes a central data bank to record and maintain information regarding the use of donated gametes and the outcomes of artificial fertilization treatments.<sup>227</sup> Additionally, Regulation 6 stipulates that a single gamete donor may contribute to a maximum of six children.<sup>228</sup> This regulatory limitation is strategically designed to mitigate the risk of accidental consanguinity while ensuring robust ethical and medical oversight in gamete donation programs.

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<sup>222</sup> Section 60, National Health Act, (Act 61 of 2003).

<sup>223</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction', 13-23.

<sup>224</sup> Section 60, National Health Act, (Act 61 of 2003).

<sup>225</sup> Regulations relating to the artificial fertilisation of persons, National Health Act, (Act No. 61 of 2003).

<sup>226</sup> Regulation 3, Regulations relating to the artificial fertilisation of persons, National Health Act, (Act No. 61 of 2003).

<sup>227</sup> Regulation 5, Regulations relating to the artificial fertilisation of persons, National Health Act, (Act No. 61 of 2003).

<sup>228</sup> Regulation 6, Regulations relating to the artificial fertilisation of persons, National Health Act, (Act No. 61 of 2003).

Another set of regulations complementing the NHA is The Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products, and Gametes which provides the clearest legal framework regarding the disclosure of a gamete donor's identity in South Africa.<sup>229</sup> Contrary to the widespread belief that gamete donation must always be anonymous, Regulation 24(1)(c) explicitly permits the disclosure of a donor's identity, provided the donor gives their consent.<sup>230</sup> This provision affirms that South African law does not impose a blanket requirement for anonymity in gamete donation but instead allows for an open-identity model when the donor voluntarily agrees to disclose their information. This regulation marks a significant departure from rigid anonymity rules and aligns with global trends advocating for greater transparency in assisted reproduction. It recognizes the rights of donor-conceived individuals to access information about their biological origins while balancing the donor's right to privacy.<sup>231</sup> The inclusion of donor consent as a prerequisite for disclosure ensures that both parties' interests are protected, preventing unauthorized breaches of confidentiality while allowing for informed choices regarding identity disclosure.<sup>232</sup> Furthermore, the permissibility of open-identity gamete donation under this regulation suggests a shift toward a more child-centered approach in reproductive law.

Ultimately, through these legislative and regulatory measures, the NHA and its accompanying regulations provide a rigorous framework to uphold ethical standards, protect donor rights, and ensure responsible medical practices within South Africa's reproductive health sector

#### **4.4 Children's Act 2005**

This Act is South Africa's primary legal framework governing matters related to children,<sup>233</sup> including assisted human reproduction with donor gametes. It aims to protect children's

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<sup>229</sup> Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products, and Gametes (2012), issued under National Health Act 61 of 2003 (South Africa).

<sup>230</sup> Regulation 24(1)(c), Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products, and Gametes (2012), issued under National Health Act 61 of 2003 (South Africa).

<sup>231</sup> Thaldar D, 'Is open-identity gamete donation lawful in South Africa?', 409-412.

<sup>232</sup> Thaldar D, 'Is open-identity gamete donation lawful in South Africa?', 409-412.

<sup>233</sup> Children's Act, (Act 38 of 2005).

constitutional rights and promote their well-being through legal protections, institutional support, and enforcement mechanisms. The Act prioritizes the best interests of the child, as outlined in Section 7, ensuring that children's rights, welfare, and development are considered in all legal and social decisions.<sup>234</sup>

Key provisions of the Act address parental rights and responsibilities for children born through anonymous sperm donation. Sections 19-21 define the legal duties of biological and adoptive parents,<sup>235</sup> while Section 40 affirms that children conceived with donor gametes in assisted reproduction are legally recognized as the children of the married couple who consented.<sup>236</sup> Section 296 clarifies that such children have no legal relationship with the gamete donor or the donor's family, except in specific circumstances, ensuring legal stability within the family.<sup>237</sup> The Act also emphasizes the right of donor-conceived individuals to access genetic and medical information about their biological parents. Section 41 ensures that children born through artificial fertilization or surrogacy can access medical history, which is vital for their health.<sup>238</sup> Upon reaching 18, they can access non-medical information about their genetic origins.<sup>239</sup> However, Section 41(2) prohibits the disclosure of identifying information about the donor, preserving donor anonymity within institutional records.<sup>240</sup>

While the Act maintains donor anonymity in institutional records, it does not prevent donors from voluntarily disclosing their identities, allowing for both anonymous and known donation options. This balanced approach protects donors' privacy while accommodating the interests of donor-conceived individuals. Ultimately, the Act ensures donor-conceived children are legally

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<sup>234</sup> Section 7, Children's Act, (Act 38 of 2005).

<sup>235</sup> Section 19, 20 and 21, Children's Act, (Act 38 of 2005).

<sup>236</sup> Section 40, Children's Act, (Act 38 of 2005).

<sup>237</sup> Section 296, Children's Act, (Act 38 of 2005).

<sup>238</sup> Section 41, Children's Act, (Act 38 of 2005).

<sup>239</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction', 13-23.

<sup>240</sup> Section 41(2), Children's Act, (Act 38 of 2005).

recognized and protected, with access to essential medical information, while also maintaining a framework that respects the privacy and autonomy of donors. The principle of the best interests of the child remains central to the Act's provisions, guiding all decisions to prioritize the child's well-being.

#### **4.5 Lessons Kenya can draw from South Africa**

South Africa's regulatory structure provides an intricate framework from which Kenya may learn important lessons about protecting the rights and welfare of donor-conceived persons. A key element of this model is the balance achieved between preserving donor anonymity and ensuring that children have the right to access essential genetic and medical information.<sup>241</sup> South African law permits donor anonymity at birth while allowing donor-conceived individuals to obtain non-identifying data initially and identifying details upon reaching adulthood.<sup>242</sup> This mechanism ensures that the child's right to know their biological origins is not compromised, a practice that Kenya could adopt to counter the current *laissez-faire* approach where individual fertility clinics decide on donor anonymity.

In addition, South Africa's comprehensive legal framework clearly delineates the rights and responsibilities of all parties involved in sperm donation. Explicit legal provisions prevent sperm donors from acquiring parental status, thereby avoiding potential disputes over custody and inheritance,<sup>243</sup> a gap in Kenya's current legislation. The South African system also mandates rigorous medical and genetic screening of donors, including tests for infectious diseases and psychological evaluations to ensure that only healthy and suitable individuals contribute to the

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<sup>241</sup> Thalдар D, 'Is open-identity gamete donation lawful in South Africa?', 409-412.

<sup>242</sup> Uche E, 'Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction', 13-23.

<sup>243</sup> 'Regulations and legal considerations' -< <https://www.wijnlandfertilityspermbank.co.za/regulations-legal-considerations/#:~:text=In%20South%20Africa%2C%20anonymous%20donors,order%20to%20ensure%20legal%20adherence> on 3 April 2025.

donor pool.<sup>244</sup> Furthermore, strict limits on the number of offspring per donor help prevent genetic complications, such as accidental incest, by maintaining a controlled donor usage environment.<sup>245</sup>

South Africa further reinforces its regulatory framework through dedicated oversight bodies that monitor fertility clinics, ensuring ethical practices and proper record-keeping, while public education campaigns reduce stigma and inform stakeholders about their rights.<sup>246</sup> By incorporating similar measures Kenya can develop a tailored regulatory framework. Such a framework would address its unique socio-cultural and legal context, thereby protecting donor-conceived individuals while maintaining donor privacy, and ultimately aligning with internationally recognized child protection standards.



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<sup>244</sup> Vermeulen M, Swanevelder R, Chowdhury D, Ingram C, Reddy R, Bloch E, Custer B and Murphy E, ‘Use of Blood Donor Screening to Monitor Prevalence of HIV and Hepatitis B and C Viruses, South Africa’ *23Emerging infectious diseases* 9,2017, 1560–1563.

<sup>245</sup> Uche E, ‘Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction’, 13-23

<sup>246</sup> Uche E, ‘Egg and Sperm Donation Regulation in South Africa: Lessons for Nigeria Towards a Future for Medically Assisted Reproduction’, 13-23

## **CHAPTER FIVE: RESEARCH FINDINGS, RECOMMENDATIONS AND CONCLUSION**

### **5.1 Research findings**

Based on this study, Kenya has failed in establishing a comprehensive legislative framework to protect the rights and welfare of donor-conceived children. The absence of such regulations has created significant legal gaps, particularly in ensuring the child's right to identity, access to genetic and medical history, and protection from potential socio-legal challenges. Consequently, this study highlights the urgent need for targeted regulatory interventions to align Kenya's legal framework with internationally recognized child protection standards.

Furthermore, the study emphasizes that regulating anonymous sperm donation is critical to preserving the BIC, as a lack of such rules results in infringement of these rights. South Africa is identified as a key jurisdiction that demonstrates the advantages of a structured regulatory approach, offering valuable insights into balancing the rights and interests of all parties involved. However, rather than advocating for the direct adoption of South Africa's model, the study emphasizes the significance of developing a regulatory framework that is specifically tailored to Kenya's unique socio-cultural, ethical, and legal landscape. While international best practices provide useful guidance, any reforms must be carefully adapted to reflect the specific needs and values of Kenyan society, ensuring both legal effectiveness and societal acceptance.

### **5.2 Conclusion**

The outcomes of this study clearly support the notion that Kenya's current legislative and regulatory frameworks on anonymous sperm donation are insufficient to protect the BIC. This judgment is supported by the lack of explicit legislative provisions addressing the unique rights and needs of donor-conceived children. Instead, the existing system favors donor anonymity over critical safeguards required to ensure the welfare and basic rights of donor-conceived persons.

## **5.3 Recommendation**

### **5.3.1 Establishing Legal Limits on Donor Offspring**

One of the most essential regulatory initiatives is to impose explicit legal restrictions on the number of kids that a single donor can create. Without such constraints, biological half-siblings are more likely to engage in love or married partnerships without realizing it, which can have serious genetic and societal consequences. International best practices advocate for limiting the number of offspring per donor, often capping it at ten, depending on factors such as population size and geographical distribution. Kenya should adopt similar guidelines, adapting them to its demographic realities to ensure a sustainable and ethically sound approach to gamete donation. This policy must be uniformly enforced across all ART clinics and institutions to prevent discrepancies in donor tracking and accountability.

### **5.3.2 Implementing a Centralized Donor Registry**

A fundamental step towards effective regulation is the creation of a centralized and secure donor registry, managed by an independent regulatory authority. This database should serve as a comprehensive repository of donor information, including identity (where disclosure is permitted), medical and genetic history, the number of gametes donated, and the number and location of donor-conceived offspring. A centralized system would enable fertility clinics to cross-reference donor records in real time, preventing the unauthorized or excessive use of gametes and ensuring compliance with established limits. Additionally, the registry would act as a safeguard against the risks of consanguinity by tracking and managing donor-related data efficiently.

### **5.3.3 Mandating Genetic Screening and Medical Oversight**

To enhance the safety of ART procedures, mandatory genetic screening and continuous medical oversight of donors should be institutionalized. Pre-donation genetic screening would help identify hereditary conditions that could pose risks to donor-conceived children, enabling clinics to select donors based on health and genetic compatibility. Moreover, periodic health assessments should be required to ensure that donors remain eligible for gamete donation over time. Regulatory

authorities must establish detailed screening protocols aligned with international medical standards to bolster confidence in ART services and ensure donor suitability.

#### **5.3.4 Strengthening Regulatory Oversight and Compliance Mechanisms**

Regulatory compliance is a cornerstone of an effective ART framework. ART clinics and institutions must be subject to stringent licensing requirements, periodic audits, and continuous oversight by regulatory bodies. Regular inspections should be conducted to verify adherence to record-keeping protocols, data submission requirements, and donor screening guidelines. Institutions found to be in violation of these regulations should face stringent penalties, including license suspension, hefty fines, or legal action. These enforcement mechanisms are crucial to maintaining the integrity of ART practices and preventing the proliferation of unregulated and unethical reproductive procedures.

#### **5.3.5 Addressing Informal and Unregulated Gamete Donation Practices**

Public education campaigns should be launched to raise awareness about the importance of formal ART procedures and the potential dangers associated with unregulated donations. Additionally, healthcare professionals and community leaders should be engaged in outreach efforts to disseminate accurate information about ART and donor regulations.

#### **5.3.6 Balancing Donor Anonymity with Transparency**

A critical consideration in ART regulation is the balance between donor anonymity and transparency. Donors should be required to consent to their genetic information being stored in a centralized registry, with the understanding that such data will be used to prevent consanguinity and uphold public health standards. Donor-conceived individuals should be guaranteed access to non-identifying information about their biological origins, including genetic and medical history, from birth. Additionally, upon reaching adulthood, they should have the legal right to request access to identifying information about their donor. This model, already adopted in several jurisdictions, respects the rights of donor-conceived individuals while upholding the privacy and autonomy of donors within reasonable limits.

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