

**EMBRYO PERSONHOOD AND HOW IT AFFECTS DISPOSAL PROCEDURES IN  
IN VITRO FERTILIZATION**

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## **Declaration**

I, **NYAKUNDI TONY ARERI** do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

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

Signed:.....

**JONAH MNGOLA**

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## **DEDICATION**

To my mum for her morning texts, unmatched wit and candour, inspiring strength and grace as well as countless personal sacrifices that make me a better student, brother, son and friend.

For as long as she believes, I will persist.

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## **ABSTRACT**

Assisted reproduction technologies are fairly new to Kenya and therefore have not been subjected to the necessary legal scrutiny. This is especially true of in vitro fertilization which describes the process where the female egg is fertilized in a laboratory after being retrieved from the lady and the now fertilized egg is guided into the uterus of either the biological mother or a surrogate who carries it to term. This study aims to bridge the gap in academic and particularly legal commentary on the issue especially as regards the disposition of embryos.

The issue of disposal of embryos raises the basic question of how the legal system sees the embryo. The Kenyan Constitution views the embryo as persons and this study analyses the effect of this personhood approach. Any legislation that pertains to in vitro fertilization will therefore have to consider this key issue when considering matters such as disposal, storage and conveyance. However, as the study will demonstrate, this should not translate to excessive measures such as absolute bans since the practice is part of the greater framework on reproductive freedom.

The study investigates various jurisdictions to ascertain their approach to in vitro fertilization and finds that it is possible to preserve reproductive rights while remaining true to the Constitution. To achieve this, the study recommends careful legislative drafting and balanced interpretation of rights as has been the case in various jurisdictions the world over. Fidelity to the Constitution is never a reason for unnecessary restrictions on basic rights and this is true in this case as well.

It is the recommendation of this study that Parliament should pass laws to adequately legitimize the practice of in vitro fertilization in the country and provide ethical and medical standards on the same. The reproductive rights and freedoms of couples should also be respected in drafting of the same. The study also recommends that more research should be done on the practice in Kenya in order to provide better informed legislative, judicial and executive decision making.

Finally, this study has adopted a qualitative approach based on journal articles, case law, books and other internet sources.

## LIST OF ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
IVF	In vitro fertilization
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHRC	UN Human Rights Council
UNFPA	UN Population Fund

## REGIONAL AND INTERNATIONAL INSTRUMENTS

1. *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123.
2. *International Covenant on Civil and Political Rights*, 1 May 1972, 999 UNTS 171.
3. *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
4. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.
5. *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
6. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13.
7. *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS, 3.

## **NATIONAL LEGISLATION**

1. *Constitution of Kenya*, (2010).
2. *Reproductive Health Care Bill*, (2014)
3. *In Vitro Fertilization Bill*, (2014).

## LIST OF CASES

*Davis v. Davis*, (1992), Supreme Court of Tennessee, United States.

*Kass v. Kass*, (1998) Court Of Appeals of New York, United States.

*Roe v Wade* (1973), The Supreme Court of the United States.

*A.Z v B.Z*, (2000), Supreme Judicial Court Of Massachusetts, United States.

*Vo v. France*, ECtHR Judgement of 8 July 2004, 80.

*In Re The Matter Of Zipporah Wambui Mathara* [2010] eKLR.

*Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, IACtHR, Judgement of November 28, 2012, (Preliminary Objections, Merits, Reparations and Costs).

*Roe v Wade* (1973), The Supreme Court of the United States.

*Kenya Section of The International Commission of Jurists v Attorney General & Another* [2011] Eklr.

# CHAPTER ONE; BACKGROUND

## 1.1 Introduction

This study aims at producing the first legal commentary on the issue of disposal of embryos in Kenya. It will investigate the effect of conferring personhood to the embryo as per Article 26(2) of the *Constitution of Kenya*, (2010) which asserts that life begins at conception. This is an articulation of the Kenyan view towards personhood and when it begins. Nevertheless, it is rather inappropriate to assume that this provision is straightforward in its application.

The term person according to Tauer refers to the “sort of beings who are moral agents, have moral rights and who are respected simply because they exist”.<sup>1</sup> Legally, personhood is ascribed to these persons depending on the legislative conception of the beginning of life. As stated earlier, in the 2010 Constitution, this is at conception<sup>2</sup>. This concept is important as it determines the limits of any activity involving the unborn including but not limited to, in vitro fertilization.

There is general consensus that the term “embryo” refers to the earliest stages of development of a fertilized oocyte<sup>3</sup> usually three weeks after conception but before the entity develops into a foetus.<sup>4</sup>

At least in Kenya, there is little by way of judicial consideration or even academic commentary on the subject of embryos outside the confines of termination of pregnancies. Despite this limited academic focus, there have been unmistakable developments in science and technology and there are now diverse ways of conception.<sup>5</sup> Aside from sexual intercourse, couples, or indeed individuals, are able to cause pregnancy through assisted reproductive technologies which include in vitro fertilization.

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<sup>1</sup> Tauer C, ‘Personhood and human embryos and fetuses’, 10 *The Journal of Medicine and Philosophy* (1985), 255.

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

<sup>3</sup> The female gamete.

<sup>4</sup> <http://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/prenatal-care/art-20045302> on 18th March 2016.

See also, Australian Government, Human Embryo<sup>7</sup> – A Biological Definition, December 2005, 1, available at [https://www.nhmrc.gov.au/\\_files\\_nhmrc/file/research/embryos/reports/humanembryo.pdf](https://www.nhmrc.gov.au/_files_nhmrc/file/research/embryos/reports/humanembryo.pdf) on 17th February, 2016.

<sup>5</sup> Kindregan PC, ‘The current state of assisted reproduction law’, 34 *Family Advocate*, (2011), 1.

In vitro fertilization refers to a procedure where a female egg is fertilized in a laboratory after being retrieved from the lady.<sup>6</sup> The now fertilized egg is guided into the uterus of either the biological mother or a surrogate who carries it to term.<sup>7</sup> To increase chances of success, multiple eggs are extracted from the woman in an invasive, painful and expensive procedure.<sup>8</sup> Due to this reason, the excess eggs are stored through cryopreservation<sup>9</sup> for use in other cycles.<sup>10</sup>

One of the options available to the progenitor for the embryos in cryostorage is to destroy these embryos and therein lies the controversy that this work aims to investigate.<sup>11</sup>

One party to the issue is the group that ascribes to the sanctity of the embryo by virtue of its status as a human.<sup>12</sup> This school of thought holds that as life begins at conception, so does

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<sup>6</sup> <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/definition/prc-20018905> on 18th March 2016.

<sup>7</sup> See also Kindregan 'PC, The current state of assisted reproduction law', 10.

<sup>8</sup> <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/what-you-can-expect/prc-20018905> on 18<sup>th</sup> February.

<sup>9</sup> Cryopreservation is the process of freezing biological material (in this case the pre-implantation embryo) in liquid nitrogen in order to prevent tissue degeneration. Cryopreservation delays further development while the embryo is in frozen storage in case there is a later desire to achieve pregnancy See <http://www.cryogenetics.com/products-and-services/cryopreservation/> on 18th March 2016.

<sup>10</sup> Frozen storage of embryos raises a separate set of moral and legal questions in itself. Storing these embryos is done at a contractual cost and is subject to the same contractual arrangements as any contract for bailment of goods. Seemingly, this implies that the embryos constitute property subject to whatever connotations that accompany this status. This creates a moral quandary especially for those who assert that embryos are persons. The other potential problem is determining the status of these frozen embryos on occurrence of events such as divorce or death. Who owns them if couples divorce? If a couple dies and leaves the embryos behind, does the estate inherit the embryo or does the embryo inherit the estate? These are but some of the practical issues that law or the courts will have to decide sooner rather than later. Nevertheless, the object of this study remains the disposal of embryos since it possesses a sense of immediacy compared to storage. The issue of storage of embryos especially on issues to do with family and succession law, is contingent on the occurrence of other events such as divorce or death. Disposal of embryos is part and parcel of the in vitro fertilization process and for this reason, is especially relevant to this discussion.

For more on issues to do with the freezing of embryos, see Robertson JA, 'Precommitment strategies for disposition of frozen embryos', 991-995.

<sup>11</sup> Lysterly A et al., 'Factors that affect infertility patients decisions about disposition of frozen embryos', 85 *Fertility & Sterility*, (2006), 1623, 1628.

<sup>12</sup> Carbone and Cahn interestingly call this group, "embryo fundamentalists". See Carbone J, Cahn N, 'Embryo fundamentalism', 18 *William & Mary Bill of Rights Journal*, (2009), 1016.

personhood and therefore we are bound to protect the legal right these embryos have to life and to treat the embryo in any contrary manner is an affront to inherent human dignity.<sup>13</sup> This absolutist view is by no means limited to the religious among us, but also to academics such as Robert P. George and Christopher Tollefsen who argue who argue that the fact that an entity's potential to develop into a human with similar capacities such as thought means they have already been conferred personhood.<sup>14</sup>

This therefore means that production of multiple embryos and/or their subsequent destruction is both immoral and illegal.

On the other side are a variety of groups who believe that the embryo has no ascertainable rights to enjoy or interests to be protected.<sup>15</sup> Proponents of this school of thought use this as justification for any procedure carried out on the embryo before it is implanted and by extension, this includes in vitro fertilization and the disposal of embryos.<sup>16</sup> As pointed out by Carbone and Cahn this way of thought suggests that embryos enjoy the status conferred upon them by those who create them who are therefore justified in attributing whatever value they see fit on the embryo.<sup>17</sup>

However skewed the moral dynamics of this conversation are, what is clear is that this is not merely an academic debate. Legislators and courts have been called to decide on the status of the unborn several times over and have adopted varied approaches. The result is the adoption of different frameworks for treatment of these embryos. The dominant frameworks regard embryos either as property as persons.<sup>18</sup>

Treating embryos as persons means regarding them as beings with similar inherent rights to other humans the most important being the right to life. On the other hand, treating them as

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<sup>13</sup> Momeyer R, 'Embryos, stem cells, morality and public policy: difficult connections', 31 *Capital University Law Review*, (2002), 93, 94.

<sup>14</sup> George R, Tollefsen C, *Embryo: A Defence of Human Life* Doubleday, 2008, 75.

<sup>15</sup> Coleman CH, 'Procreative liberty and contemporaneous choice: an inalienable rights approach to frozen embryo disputes', 84 *Minnesota Law Review*, (1999), 55, 67.

<sup>16</sup> Robertson JA, 'Symbolic issues in embryo research', 25 *Hastings Center Report* (1995), 37, as cited in Howsepian AA, 33 *Journal of Medicine and Philosophy*, (2008), 140-157.

<sup>17</sup> Carbone J, Cahn N, 'Embryo fundamentalism', 1015. See also; <http://www.nytimes.com/2008/12/04/us/04embryo.html> on 17th February.

<sup>18</sup> Berg JW, 'Owning Persons: The Application of Property Theory to Embryos and Fetuses', 40 *Wake Forest Law Review*, (2005), 162

property would mean that they have no rights to be protected and as such are subject to the control of their progenitors. Jurisprudence around the world has endorsed either view based on the unique law and culture of each jurisdiction although the issue is far from settled. In the United States for example, it has been decided that the Constitution gives no rights to the unborn and therefore embryos cannot be persons.<sup>19</sup> However, reluctance to assign property status to these embryos influenced the same Court to rule that the embryos instead occupy an interim category between persons and property.

This goes to show that there is little or no certainty about the status of these embryos.

Further jurisprudence from South America, for example, in *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica* addressed the production of embryos.<sup>20</sup> In this issue at the Inter-American Court of Human Rights, the Court considered a Costa Rican ban on the use of in vitro fertilization based on Article 4 of the *American Convention on Human Rights* that provides for the protection of the right to life “...in general from the moment of conception”. Its aim was to ostensibly prevent the perishing of embryos. The Court however struck out the ban stating that Article 4 should not be understood as an absolute right that justifies the negation of other rights but a balance between competing rights and interests.<sup>21</sup>

In Kenya, the issue of disposal of embryos has scarcely been discussed either through Parliament or scholarly work. In attempt to fill this gap, Parliament proposed the *In Vitro Fertilization Bill* with substantive positions on prohibited activities when dealing with embryos and other issues such as rights of parents, donors and children.<sup>22</sup> However, The Bill remained silent on issues related to the production and disposal of embryos.<sup>23</sup> The absence of any legislative or ministerial policy certainly does not help in advancing clarity on the issue.<sup>24</sup>

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<sup>19</sup> *Davis v. Davis*, (1992), Supreme Court of Tennessee, United States.

<sup>20</sup> *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, IACtHR, Judgement of November 28, 2012, (Preliminary Objections, Merits, Reparations and Costs).

<sup>21</sup> *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, 263.

<sup>22</sup> Part III and IV, *In-Vitro Fertilization Bill*, (2014).

<sup>23</sup> Only the Kenyan Christian Health Professionals Forum pointed out this glaring gap. See <http://www.nation.co.ke/news/KCPF-IVF-Bill-Health-Ministry/-/1056/2707136/-/geutlyz/-/index.html> on 29th February, 2016.

<sup>24</sup> Passing of the *In-vitro Fertilization Bill* (2014) stalled after assertions by the Departmental Committee on Health that the anticipated *Health Bill* (2015) would cover issues in the Bill and therefore there was no need to enact the same. According the Committee, the proposed *Health Bill* (2015) provides powers to the Cabinet Secretary of

This lack of clear direction by Parliament poses the risk of an unregulated industry with no clear delimitation of rights and liabilities of various parties involved in the in vitro fertilization process.

It is the aim of this study to provide the first academic commentary on the issue.

## **1.2 Statement of Problem.**

The problem is that there is a lacuna not only in Kenyan law but also in academic discussion on the effect that the extension of personhood to embryos will have to assisted reproductive technologies especially regarding disposal of embryos. This research will aim at filling this gap.

## **1.3 Justification of the Study.**

This study is justified by the observable rise of in vitro fertilization practices in the country without corresponding policy development. While it is difficult to access credible statistics, estimates from the Nairobi IVF Centre indicate that 400 hundred babies were delivered at the clinic in 2014 alone.<sup>25</sup> This is remarkable considering the first test tube baby was delivered as recently as 2006.<sup>26</sup>

The foregoing means that our legal system has to be sensitive to pertinent issues arising from the practice. One of the standout issues is about the status of the embryo and the practicality of applicable laws. Sooner rather than later, the country will be forced to decide on a proper framework on assisted reproductive technologies and therefore this study is justified on the basis of contributing to a sober and inclusive discussion. Adding any measure of certainty to the field of assisted reproductive technologies will help in the creation of a policy framework to regulate the practice of in vitro fertilization as well as assist in the decision making process that couples interested in the procedure undergo.

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Health to create rules regarding assisted reproductive technologies including in vitro fertilization. As a result, there is no need for a new Act. See National Assembly Hansard Report, 15<sup>th</sup> April 2015, 19.

<sup>25</sup> <http://nairobiivf.com/> on 17<sup>th</sup> February, 2016. See also <http://www.nation.co.ke/news/Kenyans-embrace-In-Vitro-Fertilisation/-/1056/2515898/-/gah6db/-/index.html> on 17<sup>th</sup> February, 2016.

<sup>26</sup> See above.

## 1.4 Statement of Objectives.

1. To investigate the jurisprudential debate informing the status of embryos and how it will relate to Kenya.
2. To investigate judicial approaches to cases involving disposal of embryos.
3. To make recommendations on an applicable legal framework on assisted reproductive technologies specifically regarding disposal of embryos.

## 1.5 Research Questions.

1. Is it possible to reconcile the jurisprudential debate influencing Article 26(2) of the *Constitution of Kenya*, (2010) and the practicality necessary in in vitro fertilization?
2. What legal effect does this extension of personhood have on the practice of *in vitro* fertilization?
3. Can the right to start a family be construed from the Constitution and if so, do limitations placed on in vitro fertilization infringe on this right?

## 1.6 Literature Review.

Kenya has a remarkable dearth of academic commentary in this area and Thiankolu remarks as such in his exposition of the challenges faced in the Kenyan legal system due to the lack of regulation of modern assisted reproductive technologies.<sup>27</sup>

While the constitution is clear that life begins at conception it is interesting to observe how any legislative framework will work around this while still maintaining the necessary level of pragmatism needed to accommodate assisted reproductive technologies.<sup>28</sup> The balance between this and procreative liberty as in *Murillo v Costa Rica* will also be worth noting.<sup>29</sup>

The issue of embryos and their legal and moral status has been the subject of a wealth of literature and jurisprudence. As a matter of introduction to the field, Kindregan presents a palatable discussion on the often-technical subject of assisted reproductive technologies.<sup>30</sup> Tauer discusses the concept of personhood and this substantiates the important link between

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<sup>27</sup> Thiankolu M, Towards a legal framework on assisted human reproduction technologies in Kenya, 2007, Kenya Law, 1.

<sup>28</sup> Article 26 (2), *Constitution of Kenya*, (2010).

<sup>29</sup> *Artavia Murillo et al. ("in vitro fertilization") v. Costa Rica*.

<sup>30</sup> Kindregan PC, 'The current state of assisted reproduction law', 10.

personhood and life beginning at conception.<sup>31</sup> Dickens and Cook discuss the ethical issues in reproductive health especially regarding the legal status of in vitro embryos.<sup>32</sup> The authors discuss the embryo as property, which is important since property is linked to the concept of ownership which in turn justifies the right to destroy.<sup>33</sup> Perhaps most importantly, they also distinguish between judicial approaches to stored embryos which is often pragmatic and legislative approaches which tend to reflect a sort of moral or religious ordering. Robertson discusses the larger issue of strategies for the disposition of embryos and this is important in understanding the greater problems around enforcement of agreements on what to do with excess embryos.<sup>34</sup> Dolgin<sup>35</sup>, Carbone and Cahn<sup>36</sup> discuss the biology, ideology and politics surrounding the embryo conversation particularly in the United States. Katz also investigates the legal status of the embryo with an exposition on the different views on the moral status of embryos.<sup>37</sup>

Affording an embryo “personhood” implies possession of intrinsic rights that do not depend on the progenitor’s relationship with the embryo.<sup>38</sup> In this instance the embryo is very much like a child and issues arising include custody and its best interests.<sup>39</sup>

However, regarding embryo as property brings about the bundle of rights conception by Hohfeld that sees property not as things but as legal relationships with regard to the subject.<sup>40</sup> In this instance, focus shifts from intrinsic embryo rights to progenitor rights such as control under a contractual framework.<sup>41</sup>

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<sup>31</sup> Tauer C, ‘Personhood and human embryos and fetuses’, (1985), 253.

<sup>32</sup> Dickens MB, Cook R, ‘Ethical issues arising from the use of assisted reproductive technologies’ 66 *International Journal of Gynaecology and Obstetrics*, (1999), 55.

<sup>33</sup> Strahilevitz LJ, ‘The right to destroy’, *Yale Law Journal*, (2005), 781, 854.

<sup>34</sup> Robertson JA, Precommitment strategies for disposition of frozen embryos, 989.

<sup>35</sup> Dolgin J, ‘Surrounding embryos: biology, ideology, and politics’, 27.

<sup>36</sup> Carbone J, Cahn N, Embryo fundamentalism, 1015.

<sup>37</sup> Katz K, ‘Legal status of the ex utero embryo: implications for adoption law’, 35 *Capital University Law Review*, (2006), 303.

<sup>38</sup> Parsi K, Metaphorical imagination: the moral and legal status of fetuses and embryos, 2 *DePaul Journal of Health Care Law*, (1997), 703.

<sup>39</sup> Berg JW, Owing Persons: The Application of Property Theory to Embryos and Fetuses, 162.

<sup>40</sup> Hohfeld WN, Fundamental legal conceptions as applied in judicial reasoning, 26 *The Yale Law Journal*, (1917), 710-770.

<sup>41</sup> Berg JW, Owing Persons: The Application of Property Theory to Embryos and Fetuses, 162.

## 1.7 Theoretical Framework.

Our Constitution expressly states that life begins at conception. This is the starting point in considering all jurisprudential debates.

In the analysis of the personhood movement, this study relies on the natural law concept of natural capacities. Lee and George posit that human embryos from conception onward possess the ability and potential to develop into a full human being.<sup>42</sup> As such, the rights accruing to an adult, particularly the right to life, similarly accrues to this embryo. In *Embryo: A Defence of Human Life*, George similarly argues that life begins at conception but from a distinctly scientific angle.<sup>43</sup> Together with Tollefsen, he argues that a human's developmental programme begins at conception and so does personhood.

As per George, different rights have different weight and accrue at different times. The right to vote for example varies with maturity, ability and other factors. Nevertheless, the right to life is not subject to these variations. Instead, it belongs to a human being by virtue of his existence. This right to life accrues to every living human being regardless of his state (either born or unborn). It is therefore inconsequential that embryos or foetuses do not have the same mental acuity as actual persons. All that is important is that they possess the potentiality to develop that mental function.

The premise of opposition to this viewpoint is rather nuanced. Naturalists like George argue that life begins at conception and the drafters of our Constitution agree. However, as mentioned earlier, this study will also be informed by the property approach.

As will be discussed later, property describes a bundle of rights in relation to the subject matter of application of property theories. In *Ownership*, Honore discusses the value of the concept of ownership to human society and continues to describe essential attributes of the same.<sup>44</sup> Relevant to our purposes in considering disposal of frozen embryos is the right to have exclusive physical control of a thing being the right to possession and use of the subject. This is related to another right in the bundle that allows the owner to exclude all others from the use of the subject. Additional rights include the right to transfer the interests or rights in the subject

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<sup>42</sup> Lee P, George R, "*The Wrong of Abortion*", Blackwell Publishers, New York, 2005.

<sup>43</sup> George R, Tollefsen C, *Embryo: A Defence of Human Life*, Doubleday, 2008.

<sup>44</sup> Honoré AM, *Ownership*, in Guest AG (ed), *Oxford Essays In Jurisprudence*, (1961), 107.

to others and immunity from expropriation meaning that transfer must be mutually consensual save for a few circumstances like eminent domain or bankruptcy.

Importantly, the right to capital is also included in this bundle and “consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it”.

An outlier group of opponents to the personhood proposition advance the symmetrical view of humanness.<sup>45</sup> This is a basic extrapolation of the occurrence of death on the cessation of brain activity which has general consensus.<sup>46</sup> This theory reasons that if life ends when the brain “dies”, it is not unreasonable to extend the same argument to when it begins. Therefore, life begins when brain activity is evident. As with many scientific concepts, there is no agreed criteria of determining when this activity can be detected but if we choose to rely on electroencephalographic waves, this could be between eight and ten weeks after fertilization.<sup>47</sup> Before this period, the organism exhibits uncoordinated activity that is only synchronised on the emergence of the brain.<sup>48</sup>

As a result, however we treat the organism in in vitro fertilization or indeed in other procedures is contingent on the singular event of brain function.

## **1.8 Hypothesis.**

1. Kenya should adopt a balanced interpretation of the right to life and reproductive rights.

## **1.9 Research Design and Methodology.**

The method to be used in collecting information for this paper will mainly be qualitative research. This will be a combination of library research and internet searches on books, journal articles and research papers. Library research will be important in analysing jurisprudential debate around personhood. On the other hand, internet searches will be vital in analysing

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<sup>45</sup> See Goldenring JM, The brain-life theory: towards a consistent biological definition of humanness, 11, *Journal of Medical Ethics*, (1985), 198-204, Shea M, embryonic life and human life, 11, *Journal of Medical Ethics*, (1985),205-209.

<sup>46</sup> The National Health Service in the United Kingdom for example, establishment of death is only on the establishment of brain death. Once brain death is established, the body is removed from life support, if any. See <http://www.nhs.uk/conditions/brain-death/Pages/Introduction.aspx> on 21<sup>st</sup> March 2016.

<sup>47</sup> This is the measurement of brain activity. See <http://www.nhs.uk/conditions/eeg/pages/introduction.aspx> on 21<sup>st</sup> March 2016.

<sup>48</sup> Goldenring JM, The brain-life theory: towards a consistent biological definition of humanness, 200.

different interpretations by different scholars on this sensitive issue. It will also be important to investigate how different jurisdictions have approached the issue.

Lastly, internet searches will also be necessary in analysing case law from other jurisdictions.

## **1.10 Limitations.**

This study is limited by time constraints.

It is also limited by the research design and methodology that does not incorporate fieldwork and will therefore rely on qualitative analysis

## **1.11 Chapter Breakdown.**

### **1.11.1 Chapter One**

This chapter provides a background to the study that serves as the introduction. It also contains the statement of the problem, objectives and research questions. Finally, it contains the literature review, conceptual framework, and hypothesis and research design of the study.

### **1.11.2 Chapter Two**

This chapter will carry out a jurisprudential analysis around personhood, its origin in philosophy and its proponents. It will also include contrarian views to the same.

### **1.11.3 Chapter Three**

This chapter will carry out a comparative analysis of judicial and legislative approaches to the disposal of embryos in other jurisdictions.

### **1.11.4 Chapter Four**

This chapter will frame the general practice of in vitro fertilization into the framework on reproductive health.

### **1.11.5 Chapter Five**

This chapter will review the findings and make a determination on the legal effect of the extension of personhood to embryos particularly regarding their disposition.

## **1.12 Timeline**

Chapter Two- End of April 2016

Chapter Three-End of April 2016.

Chapter Four- End of May 2016.

Chapter Five- End of June 2016.

## CHAPTER TWO; PERSONS OR PROPERTY?

### 2.1 Introduction

The law can easily be summed as a profession of words meaning that the life of the law and its manifestation into positive form relies on the linguistic construction of the relevant matter. For this very reason, there are two predominant frameworks of analysing the legal status of embryos being either the “embryo as person” framework or “embryo as property” framework.

Affording an embryo “personhood” implies possession of intrinsic rights that do not depend on the progenitor’s relationship with the embryo.<sup>49</sup> In this instance the embryo is very much like a child and issues arising include custody and its best interests.<sup>50</sup> Under this lens, any detrimental action to the embryo, such as voluntary disposal, would engender liability under criminal law such as abortion.<sup>51</sup> In extreme cases, such as in El Salvador, convictions for aggravated homicide have been obtained on women following miscarriages under a personhood framework.<sup>52</sup>

On the flipside, regarding embryo as property reignites the Hohfeldian bundle of rights conception that sees property not as things but as legal relationships with regard to the subject.<sup>53</sup> In this instance, focus shifts from intrinsic embryo rights to progenitor rights such as control under a contractual framework.<sup>54</sup> Under the property framework, voluntary disposal of cryopreserved embryo would not lead to any criminal or even tortious liability for assault since it would be covered by the bundle under the right to destroy.<sup>55</sup>

The above conceptions are not abstract in nature and remain extremely relevant in a variety of legal fields. Issues such as conveyance of frozen embryos acquire greater significance if viewed through these contrasting frameworks. For example, if persons, any transfer of embryos would

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<sup>49</sup> Parsi K, Metaphorical imagination: the moral and legal status of fetuses and embryos, 703.

<sup>50</sup> Berg JW, Owning persons: the application of property theory to embryos and fetuses, 162.

<sup>51</sup> Guzman KR, Property, progeny, body part: assisted reproduction and the transfer of wealth, 31 *University of California, Davis Law Review*, (1997), 193.

<sup>52</sup> <https://www.amnesty.org/en/latest/news/2015/03/el-salvador-and-las-17/> On 7<sup>th</sup> November, 2016.

See also <http://www.nytimes.com/2015/03/03/opinion/el-salvador-and-las-17.html> On 7<sup>th</sup> November, 2016.

<sup>53</sup> Hohfeld WN, Fundamental Legal Conceptions As Applied In Judicial Reasoning, 710-770.

<sup>54</sup> Berg JW, Owning Persons: The Application of Property Theory to Embryos and Fetuses, 162.

<sup>55</sup> Strahilevitz LJ, The Right to Destroy, 781.

be rightfully restricted since trade in humans is not permissible. Such issues would not be pertinent in a property framework simply because the embryos can be owned.

This chapter will therefore dissect the two frameworks which derive legitimacy under natural law (person) or labor and occupation theories (property) in order to provide a basis for analysis of the legal issues under study.

## **2.2 Embryos as Property**

This discussion analyses whether and when property theories that explain the application of private property rights can be contextually applied in the case of frozen embryos and will form the basis of an eventual conclusion on the propriety of the same.<sup>56</sup>

Sprankling describes property as rights among people that concern things.<sup>57</sup> Property therefore describes rights and interests in a thing in relation to others. Natural aversion that may arise due to reference to potential human life as “thing” or “property” should be overcome by the fact property theory does not focus on the subject of application. Instead, it considers the interests in the said subject that define application of property theories.

As discussed earlier, property describes a bundle of rights in relation to the subject matter of application of property theories and constitutes ownership. In *Ownership*, Honore discusses the value of the concept of ownership to human society and continues to describe essential attributes of the same.<sup>58</sup> Relevant to our purposes in considering disposal of frozen embryos is the right to have exclusive physical control of a thing being the right to possession and use of the subject. This is related to another right in the bundle that allows the owner to exclude all others from the use of the subject. Additional rights include the right to transfer the interests or rights in the subject to others and immunity from seizure meaning that transfer must be mutually consensual save for a few circumstances like eminent domain or bankruptcy.

Importantly, the right to capital is also included in this bundle and “consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it”. While

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<sup>56</sup> Berg JW, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 170.

<sup>57</sup> Sprankling JG, *Understanding Property Law*, LexisNexis, 2007, 2.

<sup>58</sup> Honoré AM, *Ownership*, in Guest AG (ed), Oxford, 107.

this will be discussed later in this work, interesting jurisprudence such as in *Davis v Davis*<sup>59</sup> regards the right to destroy frozen embryos as part of procreative liberty.

What follows is an analytical breakdown of property theories that explain property rights.

### **2.2.1 Natural Rights**

According to Aristotle, the right to property is inherent in the moral order and should be encouraged so that man can tend to his own affairs rather than meddle in others.<sup>60</sup> On the other hand, the related labour based theories argue that rights arise in nature, and are not dependent on government.<sup>61</sup> This implies that the work of government is to enforce natural law that exists in nature which is in direct opposition to positivism that posits that property rights exist only to the extent that the legal system recognizes them. According to Locke, these property rights arise out of man's "labour and work of his hands" in adding value to anything that he removed from the state of nature. This is justified by the necessity to sustain free individuals.

Importantly according to Locke, man had a right to property not only to the products of his labour but in his or her own body.<sup>62</sup> Using this formulation therefore, embryos would be property since it is constituted of products belonging to the progenitor (gametes.)

A limitation that is evident in this conception is therefore whether children, being the "product" of procreation would also be classified as property.<sup>63</sup> This would of course go against inherent human sensibilities against commoditization of persons. Furthermore, Margaret Radin criticises the notion that this theory is justified by the necessity to sustain and produce free individuals since it implies that any form of property inconsistent with people who are not free is not justified.<sup>64</sup>

### **2.2.2 Utilitarian Theory**

Classic utilitarianism is seen through the pioneering works of Jeremy Bentham and John Stuart Mills and focuses on maximizing the greatest good for the greatest number. Applied to property

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<sup>59</sup> Discussed in Strahilevitz LJ, The right to destroy, 781.

<sup>60</sup> Bell A, Parchomovsky G, A theory of property, 90 *Cornell Law Review*, (2005), 542.

<sup>61</sup> Sprankling JG, *Understanding Property Law*, 2.

<sup>62</sup> <http://www.thenewatlantis.com/publications/is-the-body-property> on 7<sup>th</sup> November, 2016.

<sup>63</sup> Berg JW, Owning persons: the application of property theory to embryos and fetuses, 182.

<sup>64</sup> Radin M, Property and Personhood, 34 *Stanford Law Review*, 1982, 979.

theory, it supports property as a means to achieving social wealth.<sup>65</sup> Benthamite writings are deeply critical of natural theories and so it is no surprise that he dismisses that conception above and goes ahead to state that;

“Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases.”<sup>66</sup>

The law and economics approach has been adopted by scholars in order to incorporate economic theory into utilitarian theory and through it, some have analysed of property rights in children and body organs though not necessarily frozen embryos. Richard Posner, who defines property as rights to the exclusive use of valuable resources, has advanced some intellectually sound but fairly controversial ideas bridging reproduction with economic efficiency.<sup>67</sup> In "*The Economics of the Baby Shortage*" Landes and Posner argue for a free market in babies in the adoption process meaning in essence permitting agencies to sell children to the highest bidder.<sup>68</sup> Other scholars have argued for the right to commercially exploit body organs for sale.<sup>69</sup> In *Moore v. the Regents of the University of California*, the Court of Appeals in California held that;

The rights of dominion over one's body, and the interests one has therein, are recognized in many cases. These rights and interests are so akin to property interest that it would be subterfuge to call them anything else.<sup>70</sup>

The problem with this conception is that it is dangerously blind to disinclinations people have to relegating the human body to a purely academic and economic variable. This leads to a disproportionate focus on the human body as property in its colloquial meaning as opposed to a focus on the interests in the body that is more palatable. Commodification of the human body is not an easily acceptable concept and immediately generates revulsion not just in the

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<sup>65</sup> Berg JW, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 176.

<sup>66</sup> Sprankling JG, *Understanding Property Law*, 16;

<sup>68</sup> See Landes EM, Posner R, *The Economics of the Baby Shortage*, 2 *The Journal of Legal Studies*, (1978), 323-348.

<sup>69</sup> Hardiman R, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 *University of California Law Review*, (1986).

<sup>70</sup> Dorney MS, *Moore v. the Regents of the University of California: Balancing the need for biotechnology innovation against the right of informed consent*, 5 *Berkeley Technology Law Journal*, (1990), 342.

particular case it is being considered but due to the fear that it may “open the door to an array of terrible distributive consequences.”<sup>71</sup>

Radin explored the problem of universal commodification in cases where our system of traditional liberalism considers some rights to be inalienable and nonsalable but is faced by the concept of “negative liberty” which essentially provides for the right to be left alone as long as one does not interfere with the rights of others.<sup>72</sup> Laws establishing non-transferability due to legal or moral rules are considered to be paternalistic meaning that authority is justified to exert coercion to guide individuals to their good.<sup>73</sup> Opponents of this would argue that this position interferes with personal liberty, freedom and choice.<sup>74</sup> Radin contends that this is inconsistent with the notion that the concept of freedom necessarily requires that some individual rights should not be commodified.<sup>75</sup>

To solve this, Radin suggests that certain personal aspects should be alienable but this does not extend to extremely intimate aspects.<sup>76</sup> According to Radin, this would justify allowing prostitution, surrogacy and baby selling so long as limits are put in place to reduce negative effects to aspects of personhood.

### **2.2.3 Personality Theories**

Personality theories justify private property as essential to the full development of the individual.<sup>77</sup> Georg Hegel, who pioneered this field argued that the institution of private property is central to freedom and through it, an individual becomes a person.<sup>78</sup>

Professor Radin is the preeminent scholar on modern personality theories through her work in *Property and Personhood*. After considering various theories of the person including Kantian

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<sup>71</sup> Render M, The Law of the Body, 62 *Emory Law Journal*, (2013), 5.

<sup>72</sup> Radin M, Market Inalienability, 100 *Harvard Law Review*, (1987) 1849.

<sup>73</sup> Radin M, Market Inalienability, 1899.

<sup>74</sup> Radin M, Market Inalienability, 1899.

<sup>75</sup> Radin M, Market Inalienability, 1903.

<sup>76</sup> Radin M, Market Inalienability, 1907-1914.

<sup>77</sup> Sprankling JG, *Understanding Property Law*, 21.

<sup>78</sup> Berg JW, Owing Persons: The Application of Property Theory to Embryos and Fetuses, 183.

and Lockean personalities<sup>79</sup>, she describes her “theoretical opposites”. One such opposite is property that is so intimately connected to a person so much so that its loss cannot be relieved by its replacement while the other category is property that is held purely as a means to an end and is replaceable with other goods of equal market value.<sup>80</sup> Radin calls the former *personal property* and the latter *fungible property* and according to her, personal property should be given greater protection.<sup>81</sup> In this conceptualization therefore, property rights in the embryo are essential to provide the liberty for individual development if we are to consider embryos as private property.<sup>82</sup>

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<sup>79</sup> For Kant, The person is a free and rational agent whose existence is an end in itself while for Locke, The person is a thinking intelligent being with reason and reflection and can consider as itself the same thing in different times and places. See Radin M, Property and Personhood,962-963.

<sup>80</sup> Radin M, Property and Personhood, 960.

<sup>81</sup> Radin M, Property and Personhood, 960.

<sup>82</sup> Berg JW, Owning persons: the application of property theory to embryos and fetuses, 185.

## 2.3 Personhood Theory

There are divergent views on the meaning of the word “person” articulated by different writers. Legally speaking, it describes those entities entitled to constitutional protection and individual rights especially the right to life due to the mere fact of existence.<sup>83</sup> This position considers embryos as full human persons deserving of a similar moral status and the accompanying rights that living persons possess. The natural law concept of natural capacities discussed by Lee and George posit that human embryos from conception onward possess the ability and potential to develop into a full human being.<sup>84</sup> As such, the rights accruing to an adult, particularly the right to life, similarly accrues to this embryo. In *Embryo: A Defence of Human Life*, George echoes our Constitution and argues that life begins at conception.<sup>85</sup> Together with Tollefsen, he argues that a human’s development begins at conception and therefore so does personhood. However, different rights have different weight and accrue at different times. The right to vote for example varies with maturity, ability and other factors. Nevertheless, the right to life is not subject to these variations. Instead, it belongs to a human being by virtue of his existence. This right to life accrues to every living human being regardless of his state (either born or unborn). It is therefore inconsequential that embryos or foetuses do not have the same mental acuity as actual persons. All that is important is that they possess the potentiality to develop that mental function.

As discussed earlier, ascribing embryos the right to life has significant legal consequences as far as the progenitors or even the doctors involved are concerned. Seeing as the embryo is very much a child, ownership cannot be conferred on any individual and issues arising include custody and its best interests. Harming the embryo for example would therefore be tantamount to abortion, homicide or manslaughter. A claim under the tort of assault would also be justified under this conception.<sup>86</sup> Fertility centres that refuse to render back possession of the embryos to the rightful parents (not owners) would be liable for a claim for kidnapping.<sup>87</sup> This also has

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<sup>83</sup><http://rewire.news/article/2013/01/03/fetal-personhood-laws-juridical-persons-are-not-natural-persons-and-why-it-matter/> on 7<sup>th</sup> November, 2016.

<sup>84</sup> Lee P, George R, "The Wrong of Abortion", 15.

<sup>85</sup> George R, Tollefsen C, *Embryo: A Defence of Human Life*, Doubleday, 2008, 59.

<sup>86</sup> See Guzman KR, Property, progeny, body part: assisted reproduction and the transfer of wealth, 205-206.

<sup>87</sup> Embryo-napping as it were. See Guzman KR, Property, progeny, body part: assisted reproduction and the transfer of wealth, 205.

significant effects on property ownership and transfer especially in succession issues since if the embryos is a person, then it can very well own property.

## **2.4 Conclusion**

This chapter has traced the conflicting property and person frameworks in discussions on embryos. Seeing as Kenya has chosen to adopt the latter, it also a demonstration of the legal effect of the choice to adopt a personhood conception.

The best and most succinct summary is as follows; “if a person, the embryo can own property; if property, the embryo can be owned.”<sup>88</sup>

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<sup>88</sup> Guzman KR, Property, progeny, body part: assisted reproduction and the transfer of wealth, 205-206.

## CHAPTER THREE; COMPARATIVE STUDY

### 3.1 Introduction

It has been previously observed in this thesis that Kenya has clearly adopted a personhood approach through Article 26(2) of the Constitution.<sup>89</sup> This chapter therefore looks at different interpretations regarding the treatment of embryos with the aim of demonstrating the potential effects that our chosen approach will have on legislation on assisted reproductive technologies.

It will look at case studies in El Salvador and Costa Rica where seemingly extreme interpretations of personhood provisions have resulted in potentially absurd outcomes.

The chapter will also analyse the United States' position on the moral and legal status of the embryo as well as reproductive rights in general.

### 3.2 Costa Rica and El Salvador

The selection of these two jurisdictions is based on the interpretation of personhood provisions in their constitutive documents.

In Costa Rica's case, the Inter American Court of Human Rights (IACtHR) demonstrated tempered judgement and a careful balancing of rights while considering a case involving a ban on in vitro fertilization (IVF).

The opposite is true in El Salvador's case where the courts have adopted an extremist and decidedly absurd interpretation of its personhood conception of the rights of the unborn.

#### 3.2.1 Costa Rica

Similar to our Article 26(2) of our Constitution, the *American Convention on Human Rights*, that Costa Rica is party to, provides in Article 4(1) that "Every person has the right to have his life respected. This right shall be protected by law and, in general, *from the moment of conception.*"<sup>90</sup>

In Article 11(2), the Convention also provides for the right of privacy by stating that persons shall not be subjected to abusive interference in private life. Finally, Article 17 protects the right to start a family.

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<sup>89</sup> *Constitution of Kenya*, (2010).

<sup>90</sup> Article 4(1), *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123.

All these rights were under contention when brought before the IACtHR in *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*.<sup>91</sup>

In the year 1995, the Costa Rican Ministry of Health issued regulations aimed at mainstreaming the emerging technology of in vitro fertilization.<sup>92</sup> Soon after, the decree was challenged on the basis that IVF and its procedures, including embryo disposal, contradicted right to life provisions in the Costa Rican Constitution and in the *American Convention on Human Rights*. In endorsing this challenge, the Costa Rican highest court stated that indeed life begins at conception and therefore any dealing with embryos is inconsistent with the “life and dignity of a human being.”<sup>93</sup>

This decision spawned numerous tales of heartbreak, hardship and despair from couples who faced insurmountable obstacles to achievement of their right to start a family due to problems with fertility.<sup>94</sup> For many of them, IVF offered the only chance at successful conception and the judgement now effectively condemned them to childlessness.<sup>95</sup>

Against this backdrop, aggrieved couples filed a petition with the Inter American Commission on Human Rights who subsequently made recommendations to the state to lift the ban on IVF and make reparations to the victims.<sup>96</sup> Costa Rica’s reluctance to meet their obligations pushed the Commission to present their case before the IACtHR on the basis of violations of the above mentioned rights.

In a rejection of the state’s objections, the Court ruled that the ban violated the victims’ rights including rights to personal integrity, privacy, access to reproductive services and the right to start a family.<sup>97</sup>

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<sup>91</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 224-244.

<sup>92</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 22.

<sup>93</sup> Peterson C, *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 38 *Loyola of Los Angeles International and Comparative Law Review*, (2016), 1348.

<sup>94</sup> See Peterson C, *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 1346-1354 for a detailed explanation of the travails of each couple.

<sup>95</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 28.

<sup>96</sup> *Gretel Artavia Murillo Et Al. (In Vitro Fertilization) v Costa Rica*, IACmHR Case 12.361 (2010), 30.

<sup>97</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 93.

Further the Court gave an interesting interpretation of “conception”. Taking into account contrasting views of when conception occurs (fertilization<sup>98</sup> versus implantation<sup>99</sup>), the court declined to treat conception as an occurrence independent of the female body without which the embryo’s chance of survival would be obviously be significantly reduced. Instead, it regarded conception to have occurred only when implantation would have taken place and as such, ousted the jurisdiction of Article 4(1) of the Convention.<sup>100</sup> In any case, the court concluded that the phrase “*in general*” implied that the article was not intended for absolute application.<sup>101</sup>

Additionally, the limitation of the above mentioned rights through a total ban of IVF was ruled not to be justifiable in an open and democratic society since it constituted discrimination of those who could not achieve natural conception.<sup>102</sup>

Considering that the risk of losing the embryo in assisted reproductive technologies such as IVF also persists in normal conceptions, the court found that the ban was disproportionately interfering in private life by giving absolute protection to the embryo.<sup>103</sup>

In its final and binding judgement, the Court ordered the unconditional lifting of the ban and compensation to the plaintiffs.

This is therefore the law in all 22 countries that have ratified the Convention.

### **3.2.2 El Salvador**

The El Salvador illustration shows the possibility of an extremely narrow interpretation of personhood provisions. While it does not specifically apply to IVF procedures, it is necessary to show that judicial interpretations can vary wildly. The Salvadorian constitution clearly states that life begins at conception.<sup>104</sup> Coupled with absolute prohibition on abortion, the country maintains restrictive provisions on reproductive rights. While the morality or otherwise of abortion is certainly a hot button issue that this thesis would not like to litigate, the reality is

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<sup>98</sup> As decided by the Supreme Court in Costa Rica.

<sup>99</sup> Fertilization describes the fusion between the male and female gametes while implantation describes the attachment of the result of fertilization on the uterine walls. In IVF, fertilization occurs outside the womb.

<sup>100</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 57.

<sup>101</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 78; refers to the phrase “Every person has the right to have his life respected. This right shall be protected by law and, *in general*, from the moment of conception.”

<sup>102</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 93.

<sup>103</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 93.

<sup>104</sup> Article 1, *Constitution of the Republic of El Salvador*, (1983).

that strict application of the rules on personhood and abortion has led to manifestly unjust outcomes. Amnesty International details cases in which women suffering miscarriages or any other pre-natal complications that result in premature termination of the pregnancy are prosecuted for aggravated homicide on the constitutional basis that life begins at conception.<sup>105</sup> This unjust result is justified by the narrow interpretation of the “life begins at conception” constitutional provision and goes to demonstrate that debates about personhood are not abstract classroom simulations as they influence judicial opinion which inevitably impacts women’s rights.

### 3.3 United States

Any discussion on prenatal personhood in the United States inevitably begins with Harry Blackmun’s opinion in the seminal case, *Roe v Wade* where he restated the fact that the law has not endorsed any formulation that accrues legal personality to the unborn.

In his own words, “...the unborn have never been recognized in the law as persons in the whole sense.”<sup>106</sup>

The United States therefore does not accord any rights to the unborn and this partly explains why litigation on cryopreserved embryos has been as part of other disputes such as divorce.

The latest data indicates that there may be up to six hundred thousand cryopreserved embryos in the United States.<sup>107</sup> Further statistics on in vitro fertilization in the United States show that 97% of IVF clinics are willing to proceed with cryopreservation methods for extra embryos and out of these 84% are open to disposal of the embryos.<sup>108</sup>

The very first case to address issues of personhood in relation to in vitro fertilization in the United States was *Davis v Davis*.<sup>109</sup> In this case, the two litigants had completed divorce proceedings but could not agree on what to do with their frozen embryos. The (former) husband

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<sup>105</sup> <https://www.amnesty.org/en/latest/news/2015/03/el-salvador-and-las-17/> on 23rd January 2016. In each of these cases, the small issue of intention is deemed irrelevant.

<sup>106</sup> *Roe v Wade* (1973), The Supreme Court of the United States.

<sup>107</sup> <http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption/> on 23rd November 2016.

Some have referred to this situation as an “embryo glut”; <http://www.motherjones.com/politics/2006/07/souls-ice-americas-embryo-glut-and-wasted-promise-stem-cell-research> on 23rd November 2016.

<sup>108</sup> Gurmankin AD, Sisti D, Caplan AL, Embryo disposal practices in IVF clinics in the United States, 22 *Politics And The Life Sciences* (2004), 2.

<sup>109</sup> *Davis v. Davis*, (1992), Supreme Court of Tennessee, United States.

wanted them destroyed while the (former) wife wanted them donated to another couple. In its decision, the court affirmed the position in *Roe* that personhood does not accrue to the unborn until live birth. The court also commented on the persons or property dichotomy and decided that embryos cannot be persons whether under state or federal law.<sup>110</sup>

Interestingly, the court also declined to assign property status to the embryos and instead ruled that they “occupy an interim category that entitles them to special respect because of their potential for human life.”<sup>111</sup> This position was later rejected in *Kass v Kass* which asserted that progenitors in fact have a bundle of rights in their frozen embryos.<sup>112</sup>

Just as in Kenya and other developing countries, the law in the United States is largely behind the science meaning that disputes on frozen embryos remain unresolved by precedent. An example of this is the ongoing high profile dispute between actress Sofia Vergara and her former partner, Nick Loeb over two frozen embryos.<sup>113</sup> Vergara wishes to freeze the embryos indefinitely while Loeb argues that this goes against his religious sensibilities and would like to carry the embryos to term via a surrogate. The dispute hinges on whether the court will agree to uphold a contract between the two that requires mutual consent in any dealing with the embryos. This shows that normal contractual certainty is absent in the field of assisted reproductive technologies since courts may refuse to uphold the agreements.

This fact that some jurisdictions may refuse to uphold advance agreements further complicates the issue of dealing with cryopreserved embryos. As a matter of precaution, parties may enter into agreements such as consent forms or contracts to determine what to do with the embryos on the occurrence of an event such as a divorce or even death.<sup>114</sup> Despite arguments that these agreements promote certainty and prevent unwanted parenthood as well as promote reproductive freedom<sup>115</sup>, some courts have nevertheless refused to enforce these agreements.<sup>116</sup>

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<sup>110</sup> *Davis v. Davis*, (1992), Supreme Court of Tennessee, United States.

<sup>111</sup> *Davis v. Davis*, (1992), Supreme Court of Tennessee, United States.

<sup>112</sup> *Kass v. Kass*, (1998) Court Of Appeals of New York, United States.

<sup>113</sup> <http://nypost.com/2016/09/16/sofia-vergaras-court-fight-over-frozen-embryos-could-set-a-legal-precedent/> on 23rd November 2016.

<sup>114</sup> Robertson JA, Precommitment strategies for disposition of frozen embryos, 20.

<sup>115</sup> For example for women whose last chance at reproduction may lie with the frozen embryos.

<sup>116</sup> Robertson JA, Precommitment Strategies for Disposition of Frozen Embryos, 29.

In *A.Z v B.Z*, the Court rejected an attempt to enforce a consent form signed by both parties that would have resolved the dispute between the parties on what to do with frozen embryos.<sup>117</sup>

While pre-commitment strategies like contractual agreements may be useful in resolving disputes over frozen embryos, including their disposal, it is apparent that this legal gap throws the constitutionality of these agreements into uncertainty. As a simple matter of contract law, it is unclear why courts would subvert the will of parties simply because one party had a change of mind.

In conclusion, it is readily observable that since *Roe*, there have been state-wide efforts aimed at incorporating personhood provisions into state constitutions despite the clarity in the United States Constitution on rights accruing at birth.<sup>118</sup> These efforts are usually done through popular initiatives like referenda although federal amendments introducing sanctity of human life have also been proposed extending rights to the unborn.<sup>119</sup>

However, these efforts have largely failed due to concerns on the status of in vitro fertilization as well as pregnant women who suffer miscarriages or some other complication just as has been observed in the El Salvador case study detailed above.

The strength of the precedent set in *Roe* which has survived numerous challenges in the forty three years since it was pronounced also serves as a significant obstacle to these campaigns.

### **3.4 Conclusion**

The United States shows that despite the strides in technology in the IVF industry, it is still nascent and more will need to be done to increase certainty and resolve some of the pertinent issues.

Costa Rica demonstrates a situation where the courts exercised judicial power wisely and achieved a just outcome. Such an interpretation is needed to balance the latent public policy interest in protecting life against the imperative of protecting reproductive justice. After all, the *European Court on Human Rights* has ruled that if the unborn has a right to life, this right is

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<sup>117</sup> *A.Z v B.Z*, (2000), Supreme Judicial Court of Massachusetts, United States.

<sup>118</sup> See Will J, Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice, 39 *American Journal of Law & Medicine*, (2013), 593.

<sup>119</sup> <http://d3n8a8pro7vhmx.cloudfront.net/themes/54bd55622213936cf2000001/attachments/original/1430762309/Why-Personhood-eBook.pdf?1430762309> on 24<sup>th</sup> November, 2016; Speaker Ryan proposed *Sanctity of Human Life Act*.

not absolute and is in fact limited by the mother's rights and interests.<sup>120</sup> It also demonstrates that our judicial approach to interpreting Article 26(2) on the right to life need not be excessively restrictive.

El Salvador represents the potential danger of a restrictive interpretation on the wellbeing of women who are innocent by any stretch of the imagination. Manifestly unjust outcomes such as the one witnessed in the cases detailed above should as much as possible be avoided as they unfairly discriminate women's rights and personal dignity.

In conclusion, one of Blackmun J's most iconic statements comes in *Roe* when he states that;

“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.”<sup>121</sup>

This is not an implicit abdication of the duties that bind judicial officers, it is merely a demonstration of the inherent difficulties of resolving issues to do with life. It is also an acknowledgment of the futility of getting bogged down in debates and culture wars about the moral, philosophical and religious status of the embryo especially in pluralist societies.

The law and by extension the judiciary should therefore attempt to negotiate an acceptable middle ground that respects the sanctity of life without unduly restricting personal rights.

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<sup>120</sup> *Vo v. France*, ECtHR Judgement of 8 July 2004, 80.

<sup>121</sup> *Roe v Wade* (1973), The Supreme Court of the United States.

## CHAPTER FOUR; IN VITRO FERTILIZATION IN KENYA AND REPRODUCTIVE RIGHTS

### 4.1 Introduction

This chapter will attempt to investigate the development of the practice in the country as well as how it fits into the right to reproductive healthcare.

It will involve an investigation into Kenyan international and local commitments regarding reproductive rights.

### 4.2 In vitro fertilization in Kenya

As earlier observed, the in vitro fertilization Industry in Kenya is still in its embryonic stages and unsurprisingly, there is little by way of statistics on the practice in the country.<sup>122</sup> The fact that there is only one in vitro fertilization (hereafter IVF) clinic in Nairobi further demonstrates this point.<sup>123</sup>

However, available information from the Nairobi IVF Centre indicates that the practice is slowly gaining traction in the country. In its first three years, the clinic performed three hundred and sixty two (362) treatment cycles for over three hundred (300) couples.<sup>124</sup> Similar to the cases reported in the *Murillo Case*, these couples suffered a variety of issues that restricted their ability to perform one of the most basic and sacred human functions. A variety of factors contributed to this infertility ranging from blocked tubes and uterine disorders for the ladies to low sperm count for the men.<sup>125</sup>

Overall, female factors made up for about 58% of the causative issues while male factors made up for 31.4% of the reported cases.<sup>126</sup>

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<sup>122</sup> See note 26 above.

<sup>123</sup> The Nairobi IVF Centre.

<sup>124</sup> Noreh LJ, Tucs O, Sekadde-Kigonde CB, Noreh LJ, Outcomes of assisted reproductive technologies at the Nairobi *in vitro* fertilisation centre, 86 *East African Medical Journal*, 159.

<sup>125</sup> Noreh LJ, Tucs O, Sekadde-Kigonde CB, Noreh LJ, Outcomes of assisted reproductive technologies at the Nairobi *in vitro* fertilisation centre, 158.

<sup>126</sup> Noreh LJ, Tucs O, Sekadde-Kigonde CB, Noreh LJ, Outcomes of assisted reproductive technologies at the Nairobi *in vitro* fertilisation centre, 159.

The clinic also reported a pregnancy rate of 28.9% which seems modest but compares well to the average in the United Kingdom of 20% at the time of reporting.<sup>127</sup>

### **4.3 Review of the *In Vitro Fertilization Bill* (2014)**

The *In Vitro Fertilization Bill* (2014) was introduced in the National Assembly by the Member of Parliament for Mbita, Hon. (Ms.) Odhiambo-Mabona.<sup>128</sup> Currently at the Second Reading stage, the Bill enjoys strong bipartisan support by members of all faiths who see it as a way to alleviate the suffering of couples unable to conceive. However, it has encountered opposition from members of the Departmental Committee on Health who argue that the issue has been sufficiently covered in the *Health Bill* (2015) and therefore, there is no need for a standalone Act.<sup>129</sup>

The stated purpose of the Bill is to pass legislation for the “regulation of In vitro fertilization, to prohibit certain practices in connection with in-vitro fertilization, to establish an in-vitro fertilization Authority; to make provision in relation to children born of in-vitro fertilization process and for connected purposes.”<sup>130</sup> The Bill justifies state intervention in private matters by asserting that it has legitimate interest in regulating matters that may have negative impacts on society and to protect individuals from any adverse impacts due to the application of new technology.<sup>131</sup> Additionally, the fact that third parties like fertility clinics are involved moves the practice to the public sphere.<sup>132</sup>

#### **4.3.1 Summary of the Bill**

##### **4.3.1.1 Part I**

This part contains preliminary provisions including the preamble and definition of terms used in the Bill. *Clause 3* of the Bill provides that the Bill shall apply to any process of fertilization that takes place outside the human body.<sup>133</sup>

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<sup>127</sup> Noreh LJ, Tucs O, Sekadde-Kigonde CB, Noreh LJ, Outcomes of assisted reproductive technologies at the Nairobi *in vitro* fertilisation centre, 160.

<sup>128</sup> National Assembly Hansard Report, 15<sup>th</sup> April 2015, 13.

<sup>129</sup> See note 23 above.

<sup>130</sup> Preamble, *In Vitro Fertilization Bill*, (2014).

<sup>131</sup> Memorandum of Objects and Reasons, *In Vitro Fertilization Bill*, (2014).

<sup>132</sup> See above.

<sup>133</sup> Clause 3, *In Vitro Fertilization Bill*, (2014).

#### **4.3.1.2 Part II**

Under this part, the Bill aims to establish the In-Vitro Fertilization Authority.<sup>134</sup> The authority is tasked with developing guidelines on the practice including on the treatment of embryos and providing general supervision of in vitro fertilization clinics among other functions.<sup>135</sup> It further provides for the composition of the Board that will manage the Authority.<sup>136</sup>

#### **4.3.1.3 Part III**

In this section, the Bill provides for activities that are prohibited in the practice of IVF. This includes using the embryo in any manner apart from that provided in the Bill<sup>137</sup> using any reproductive material from a donor without written consent,<sup>138</sup> undertaking IVF for any other purpose apart from reproduction such as for experimental purposes<sup>139</sup> among other practices.

Importantly, before commencing IVF, a doctor is supposed to certify that person wishing to undertake IVF, is unable to conceive naturally due to factors related to age or lifestyle.<sup>140</sup>

The aim of this part is to restrict IVF to purely procreational purposes in order to avoid use of embryo tissue in research or some other controversial manner that is yet to be discussed by Parliament. This addresses any possible reservations by people who ascribe to the point of view that life is sacred and should not be interfered with arbitrarily.

#### **4.3.1.4 Part IV**

This part provides for the rights of parents, donors and children. It addresses key legal issues on who is a mother under a surrogate motherhood agreement and who is a “father” in instances where insemination has occurred in a woman married to the man or in a surrogate arrangement.<sup>141</sup> It generally deals with the rights that accrue to each party in vitro fertilization including the child born out of IVF.<sup>142</sup>

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<sup>134</sup> Clause 4, *In Vitro Fertilization Bill*, (2014).

<sup>135</sup> Clause 5, *In Vitro Fertilization Bill*, (2014).

<sup>136</sup> Clause 7, *In Vitro Fertilization Bill*, (2014).

<sup>137</sup> Clause 18, *In Vitro Fertilization Bill*, (2014).

<sup>138</sup> Clause 19, *In Vitro Fertilization Bill*, (2014).

<sup>139</sup> Clause 23, *In Vitro Fertilization Bill*, (2014).

<sup>140</sup> Clause 22, *In Vitro Fertilization Bill*, (2014).

<sup>141</sup> Clause 28, *In Vitro Fertilization Bill*, (2014).

<sup>142</sup> Clause 31, *In Vitro Fertilization Bill*, (2014).

#### **4.3.1.5 Part V**

In this Part, the Bill provides that the Authority must maintain a public register in order to allow individuals interested in knowing whether or not they were conceived by means of IVF to access such information.<sup>143</sup>

The Register shall include information on;

- IVF services provided to persons;
- Storage or use of gametes of persons or of an embryo;
- Persons who undergo IVF;
- Donors of embryos and gametes;
- Persons conceived in consequence of in-vitro fertilization treatment services.

#### **4.3.1.6 Part VI**

This part gives the Authority the power to issue or revoke licenses to persons carrying out IVF.<sup>144</sup> It also prescribes a statutory storage period for embryos as for a period not exceeding five years.<sup>145</sup>

#### **4.3.1.7 Part VII**

This contains provisions on the financial management of the Authority.

#### **4.3.1.8 Part VIII**

This provides miscellaneous provision including offences and penalties.

#### **4.3.1.9 Part IX**

This part provides for delegated powers of the Cabinet Secretary including preparing regulations on the number of embryos that may be implanted in a woman.

### **4.3.2 Constitutional Concerns**

The main constitutional concern with the Bill is its conformity to Article 26 on the right to life. While it is silent on the issue of disposal of embryos, it provides for a maximum statutory period for the storage of embryos.<sup>146</sup> It is unclear what is to be done with the embryos once the statutory period expires and this ambiguity may be interpreted as allowing for the disposal of

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<sup>143</sup> Clause 35, *In Vitro Fertilization Bill*, (2014).

<sup>144</sup> Clause 39, *In Vitro Fertilization Bill*, (2014).

<sup>145</sup> Clause 44, *In Vitro Fertilization Bill*, (2014).

<sup>146</sup> Clause 44(1), *In Vitro Fertilization Bill*, (2014).

the same. This of course means that the clause may be declared unconstitutional for being inconsistent with Article 26(2) of the *Constitution of Kenya*, (2010).

#### **4.4 IVF as Part of Reproductive Freedom**

The Commission on Human Rights through resolution 2003/28 unequivocally stated that States have a duty to protect sexual and reproductive health since they are integral elements of the right to enjoy the highest attainable standard of physical and mental health.<sup>147</sup>

During the International Conference on Population and Development (ICPD), held in Cairo in 1994, it was resolved that an essential element of reproductive health is the freedom to decide “if, when and how” to reproduce including the right to access health services that will enable women to go safely through childbirth and provide couples with the “best chance of having a healthy infant.”<sup>148</sup> Additionally part of its action plans, governments are encouraged to provide appropriate ethical and medical standards for IVF procedures.<sup>149</sup> While the Cairo Programme for Action is not binding on States, it remains persuasive on both governments and legislators and in fact influenced Parliamentary discussions on the *In Vitro Fertilization Bill* (2014).<sup>150</sup>

IVF is therefore very much a part of the regime on the right to reproduce which should be formally legislated once the *Reproductive Healthcare Bill* passes into law.<sup>151</sup> The Bill interestingly acknowledges IVF when it provides for the right to gestational surrogacy.<sup>152</sup>

Nevertheless the Constitution has general provisions that can be purposively interpreted to protect the practice of IVF including the right to the highest attainable standard of health and access to health care services including reproductive health care.<sup>153</sup>

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<sup>147</sup> UNCHR *Resolution 2003/28: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 22 April 2003, 6.

<sup>148</sup> UNFPA, *Report of the International Conference on Population and Development*, Document A/Conf. 171/13(hereafter, *ICPD Programme of Action*), New York, United Nations (1994).

<sup>149</sup> *ICPD Programme of Action*, 7.17.

<sup>150</sup> National Assembly, Official Reports, Wednesday, 15<sup>th</sup> April 2015,19.

<sup>151</sup> *Reproductive Health Care Bill*, (2014).

<sup>152</sup> Defined as “the process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has made no genetic contribution”. Section 7, *Reproductive Health Care Bill*, (2014).

<sup>153</sup> Article 43(1) (a), *Constitution of Kenya*, (2010).

In the *Murillo Case*, it was also conceded that the absolute ban on in vitro fertilization constituted an unfair violation of private and family life which it interpreted to include reproductive freedom.<sup>154</sup>

#### **4.5 International Framework for Reproductive Rights**

The *Constitution of Kenya* (2010) settled the debate on whether Kenya is a monist or a dualist State when in Article 2(6) it stated that any treaty or convention ratified by Kenya shall form part of our law. In Article 2(5), it also affirms that the general rules of international law shall form part of the law of Kenya.

By virtue of the above mentioned provisions, Kenya is not only a monist state bound by the treaties and conventions it ratifies, it is also bound by rules and norms established as part of customary international law.<sup>155</sup>

Case law has confirmed this position in *In Re The Matter of Zipporah Wambui Mathara* where the Court declined to commit the applicant to civil jail in enforcement of a debt despite an Act of Parliament mandating the opposite.<sup>156</sup> The Court held that the ratification of the *International Covenant on Civil and Political Rights* (ICCPR) which legislated against civil jail implied that the Covenant is part our law and therefore should have been applied to protect the applicant's rights.<sup>157</sup>

Meanwhile, in *Kenya Section of the International Commission of Jurists v Attorney General and Another* the Court ruled that the High Court has universal jurisdiction under Article 2(5) to enforce peremptory norms under customary international law.<sup>158</sup>

The import of these provisions is that international law which legislates on the right to reproductive healthcare has the same force of law as any other legislation so long as they are not inconsistent with the Constitution.<sup>159</sup>

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<sup>154</sup> *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, 93.

<sup>155</sup> See Lumumba PLO, Franceschi L, *The Constitution of Kenya, 2010: An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 72-75 for a succinct discussion on the two articles.

<sup>156</sup> *In Re The Matter Of Zipporah Wambui Mathara* [2010] eKLR.

<sup>157</sup> Article 11, *International Covenant on Civil and Political Rights*, 1 May 1972, 999 UNTS 171.

<sup>158</sup> *Kenya Section of The International Commission of Jurists v Attorney General & Another* [2011] Eklr.

<sup>159</sup> Lumumba PLO, Franceschi L, *The Constitution of Kenya, 2010: An Introductory Commentary*, 74.

#### **4.5.1 International Treaties and Conventions protecting Reproductive Health**

As mentioned above, access to alternative forms of health services that enable safe childbearing is an element of reproductive health. This section will therefore indicate different international treaties which Kenya is signatory to that mandate the protection of the right to health which necessarily includes reproductive health.

##### **4.5.1.1 *Universal Declaration of Human Rights (UDHR)***

Article 25(1) provides that for the right to a standard of living adequate for the health and wellbeing of himself and of his family.<sup>160</sup>

##### **4.5.1.2 *International Covenant on Economic, Social and Cultural Rights (ICESCR)***

In Article 12 of the ICESCR, the Covenant provides that States have the duty to recognize the right to the highest attainable standard of health.<sup>161</sup> General comment 14 of this right by the *Committee On Economic, Social And Cultural Rights* elaborates that the right includes certain freedoms and entitlements including sexual and reproductive freedom and equal access to a good healthcare system.<sup>162</sup> Additionally, Article 15(1) (b) gives the right of all to benefit from scientific progress which presumably includes assisted reproductive technologies.

A provision similar to the Article 12 is found as Article 16 in the *African Charter on Human and Peoples' Rights*.<sup>163</sup>

##### **4.5.1.3 *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)***

This Convention adopted in 1979 provides in Article 12 that States shall undertake to eliminate discrimination against women in the field of health care in order to ensure, access to health care services, including those related to sexual and reproductive health.<sup>164</sup>

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<sup>160</sup> Article 25(1), *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>161</sup> Article 12, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

<sup>162</sup> *CESCR General Comment No. 14, General comment No. 14: The right to the highest attainable standard of health (Article 12)* 11 August 2000, 8.

<sup>163</sup> Article 16, *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>164</sup> Article 12, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13.

#### 4.4.2 Position of International Human Rights Law on Personhood

It is of perhaps critical importance to note that the international human rights law regime that is entrenched in the Kenyan legal system does not attribute personhood to the embryo in any way. In fact, the various human rights treaties, as seen in preparatory documents, have deliberately avoided treating the embryo as a child.

A look at the *UDHR* reveals an intentional exclusion of the unborn when coming up with the first article which states that “All human beings are *born* free and equal in dignity and rights.”<sup>165</sup> Additionally, during the drafting of the *ICCPR*, attempts by Lebanon to protect life “from the moment of conception” were rejected and the final Article simply reads that “Every human being has the inherent right to life.”<sup>166</sup> Finally, while the *Convention of the Rights of the Child* is equivocal on the definition of the child as it defines it as every human being who has not obtained the age of majority, there is no direct reference to the unborn.<sup>167</sup> In fact, the preparatory work again indicates that this exclusion was intentional.

From the foregoing, it is therefore correct to say the rights of the unborn are not recognised in international human rights law.

## 5 Conclusion

This chapter demonstrates that access to IVF in fact constitutes part of the greater regime on sexual and reproductive health and access to reproductive health services.

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<sup>165</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 224.

<sup>166</sup> Article 6(1), *International Covenant on Civil and Political Rights*. See, *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, 225.

<sup>167</sup> Article 1, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS, 3.

## **CHAPTER 5; CONCLUSION AND RECOMMENDATIONS**

### **5.1 Introduction**

This chapter will conclude the study and make a determination on the legal effect of the extension of personhood to embryos particularly regarding their disposition.

It will also give recommendations on an acceptable balance between reproductive rights and the practicality necessary in in vitro fertilization (hereafter IVF).

### **5.2 Summary of the Study**

#### **5.2.1 Chapter One**

Chapter one introduced the problem facing the assisted reproduction industry in Kenya particularly regarding in vitro fertilization and the disposal of excess embryos. Despite the practice gaining traction in Kenya, the lack of legislation or policy direction coupled by a potentially conflicting Constitutional Article that confers personhood to the unborn rendered the situation potentially untenable. This means that practices involved in IVF like disposal of embryos, which is the focus of this study, are potentially illegal and any law allowing the same, unconstitutional.

#### **5.2.2 Chapter Two**

This chapter traced the conflicting property and person frameworks in discussions on embryos which is necessary to contextualize the problem the study attempts to solve in legal and jurisprudential terms and demonstrate the effect of extension of personhood to the unborn.

The embryo as property framework seeks to apply property theories to the frozen embryos and under this framework, destroying any excess embryo would be perfectly justifiable as exercising the right to destroy. Legislation embracing this framework would therefore contain no restriction on embryo transfer and eventual destruction.

Meanwhile, the embryo as a person framework seeks to extend constitutional guarantees to the embryo. The most controversial of these guarantees is the right to life. By stating that life begins at conception, our Constitution has embraced this framework and therefore any legislation we enact regulating the practice has to be in line with this provision lest it risks being unconstitutional.

### **5.2.3 Chapter Three**

This chapter investigated the status of embryos across different jurisdictions. The aim of the selection of jurisdictions was to demonstrate both judicial and legislative approaches to the issues at hand both from balanced and extremist angles. The standout case was the *Murillo Case* that I propose as a model for a balanced and equitable interpretation of rights and interests involved in IVF procedures. It demonstrates that while we have adopted a personhood approach, this does not necessarily translate to an excessively restrictive interpretation on the right to life to exclude any form of IVF.

### **5.2.4 Chapter Four**

Chapter four framed access to in vitro fertilization as part of reproductive freedom and entitlement of access to reproductive health services. It also sampled the treatment of the aforementioned reproductive freedom in international human rights law as well as in local legislation. The chapter instructively noted that our constitutional drafting of life as beginning at conception is the exception not the rule as far as international human rights law is concerned.

## **5.3 Recommendations**

### **5.3.1 Need for a National Policy on IVF**

In its final report, the ICPD notably recommended that governments should provide appropriate standards and ethical guidelines for in vitro fertilization. This should be done at the Ministerial level in a way that accommodates the views of all interested parties including faith leaders and medical practitioners.

### **5.3.2 Need for a legislation on the in vitro fertilization**

Noting the increase in people turning to in vitro fertilization, there is urgent need to pass legislation regulating the practice. While the progress made in drafting the *In Vitro Fertilization Bill* (2014) is laudable, Parliament need to take the final step in passing the Bill into law. However, drafting of the law should be done carefully and should include diverse opinions to achieve consensus.

### **5.3.3 Need to align any law passed with the Constitution**

As mentioned earlier, Kenya affords life at conception. This means that any legislation has to reflect this position. As discussed earlier, the *In Vitro Fertilization Bill* (2014) contains certain ambiguities such as what is to be done to embryos once the maximum statutory period for storage lapses. Conventional wisdom in the industry indicates that

these embryos would either be donated or destroyed. Any law should thereby clarify this ambiguity or risk unconstitutionality and this study recommends that the legislation should include a provision mandating that all embryos produced have to be implanted. While this is a restriction of the rights of the couples, it does not constitute a severe interference with the right of the individual. It also fulfils the requirements set out in Article 24 of the *Constitution of Kenya* (2010) on the limitation of rights since the legitimacy of any law or executive policy depends on a justifiable restriction that protects the right to life.

Similarly, the legislation has to ensure the rights accruing to individuals including reproductive freedom are not eroded.

#### **5.3.4 Need to provide protection for contractual agreements entered by persons**

This study recommends that the form of agreements entered into by persons willing to undergo the in vitro fertilization process on the disposal of embryos should be provided for either in legislation or through ministerial direction. The reason for this is to avoid any conflicts over the enforceability of these agreements by persons looking to renege on their contractual commitments.

#### **5.3.5 Need for more studies on IVF in Kenya**

This study repeatedly notes that there is a dearth of academic literature on the practice of IVF in Kenya. As a result of this, this study strongly recommends more inquiries into the practice in order to foment a coherent discussion on what needs to be done.

Such inquiries should focus on the ethical, medical and constitutional issues in the practice as well as the social impacts of the same.

This will inevitably provide better informed legislative, judicial and executive decision making.

### **5.4 Conclusion**

By discussing the property and personhood frameworks, this study has met its first objective of investigating the jurisprudential debate informing the status of embryos and how it will relate to Kenya. It has also done a comparative analysis of comparative jurisdictions in order to learn judicial and legislative approaches to cases involving disposal of embryos and has thus met its second objective. Finally it made recommendations on an applicable legal framework on assisted reproductive technologies specifically regarding disposal of embryos and fulfilled its third objective.

In agreement with the hypothesis in Chapter One, this study recommends a balanced interpretation of the right to life and reproductive freedom in order to maintain constitutionality and fairness.

In conclusion, for many couples, IVF remains the last hope of fulfilling their longing of starting a family and is therefore a key part of reproductive freedom. To this end, the State should make attempts to ensure that unnecessary restrictions on IVF do not hinder the enjoyment of this fundamental freedom. However, this should be done well within the confines of our constitution.

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