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# *Towards a Legal Framework on Assisted Human Reproduction in Kenya; Some Thoughts on the Law, Technology and Social Change*

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What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.<sup>1</sup>

## 1 Introduction

Scientific and socioeconomic developments progressively make ours a smaller world. Legal systems are arguably more strained today than at any other time in humanity's history. Contemporary Kenyan society is faced with things unknown (some unimaginable) a few decades ago. These include human artificial insemination, surrogacy and many more. The Kenyan legal system, as with most legal systems, has failed to keep abreast with socio-economic developments of the day. Kenyan law stands still in spite of great leaps in human reproductive technologies since the late 1970s.<sup>2</sup> Countries which have designed a legal framework on human

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<sup>1</sup> Denning LJ in *Packer v. Packer* [1954] P.15 at 22, quoted in Denning, *The Discipline of Law*, London Butterworths 1979.

<sup>2</sup> The first remarkable feat in human reproductive technologies was arguably the birth of Louise Brown in 1978 at Oldham District Hospital (United Kingdom) in 1978. Brown was the first child born in the world as a result of in vitro fertilisation techniques. Her birth dramatically increased the options available to couples unable to conceive naturally. The United Kingdom's Public reaction to the birth of Ms Brown was described as a mixture of "*pride in technological achievement, pleasure at the new-found means to relieve, at least for some, the unhappiness of infertility, and unease at the apparently uncontrolled advance of science, bringing with it new possibilities for manipulating the early stages of human development.*" For further insights on the development and regulation of human reproductive technologies in the UK since the birth of Ms Brown, see the *Fifth Report of Session 2004-2005 of the House of Commons Science and Technology Committee*, volume 1, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007).

reproductive technologies have had to deal with a number of weighty and somewhat controversial issues. These include (a) the appropriate balance between legislation, regulation and reproductive freedom/liberty; (b) the interplay between ethics and legislative intervention in human reproduction and (c) keeping the law abreast with continuous and tremendous advancement in modern science and technology.<sup>3</sup>

Modern human reproductive technologies continue to evoke significant (often-emotive) ethical and scientific debate in many countries. More importantly, these technologies have brought novel legal challenges, particularly in the areas of marital relations, reproductive liberty, reproductive privacy, child rights and parental rights and responsibility. This paper seeks to provide a simple exposition of the challenges posed by these technologies on the Kenyan legal system, which lacks laws for the regulation of modern human reproduction technologies.<sup>4</sup> This paper has been inspired by the fact that Kenyans continue to enter into arrangements involving modern reproductive technologies in spite of the absence of a legal regime for their regulation.<sup>5</sup> This paper explores the options available for Kenya in designing a legal framework for regulation of human reproductive technologies. This paper

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<sup>3</sup> In the UK, for instance, the Human Fertilisation and Embryology Act, 1990 defines the terms embryo and gamete based on fertilisation. It defines “Embryo” as “a live human embryo where the process of fertilisation is complete.” This includes “an egg in the process of fertilisation.” The Act defines “gamete” as including live human eggs or sperm but not eggs in the process of fertilisation. According to the British House of Commons Science and Technology Committee, these definitions have been problematic, because scientists have shown that a technique called Cell Nuclear Replacement, involving the replacement of an egg nucleus with that of an adult cell, could lead to a live birth—without the necessity of fertilisation! See the *Fifth Report of Session 2004–2005 of the House of Commons Science and Technology Committee*, volume 1, at para 51, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007).

<sup>4</sup> A detailed scientific discourse on modern human reproductive technologies is beyond the scope of this paper. The author will only give a passing, non-technical explanation of the various technologies covered in the paper, and delve into legal issues arising from the technologies. For a scientific account of the various technologies covered in this discourse, the reader is advised to read medical and scientific publications, including those cited in this discourse.

<sup>5</sup> Notably in vitro fertilisation and sperm donation. During the author’s pre-bar training, he interacted with many clients who sought legal services, mostly advice and the drafting of documents, involving assisted human reproduction technologies. The briefs were a most arduous task, because there were no Kenyan laws on these matters.

particularly delves into the legislative framework available in the UK, because Kenya has traditionally looked to the UK on matters of legislation.

## 2 Gamete & Embryo Donation

Among the options available to today's infertile couples are gamete and embryo donation. The donated gamete may be an egg or sperm.<sup>6</sup> Studies in the UK indicate that a significant number of children have been born as a result of donated sperm, eggs or embryos since the early 1990s.<sup>7</sup> Experience from most countries indicates that the most frequently recurring themes on gamete and embryo donation relate to anonymity of donors and the scope of regulation.

Where sperm is donated, conception is normally achieved through artificial insemination. Artificial insemination of humans may be homologous or heterologous. Insemination of a married woman with semen from her husband is called homologous insemination. Insemination of a woman with semen of a donor not married to her is called heterologous or donor insemination.<sup>8</sup> In most countries, the legal rights of parties to donor insemination, as well as the rights and status of children conceived and born from such insemination, largely depend on whether the sperm donor is anonymous or known, and whether the woman's husband (where she is married) had assented to artificial insemination of his wife by the sperm of another man.

Gamete and embryo donation in an unregulated environment, as is the case in Kenya, can lead to unexpected outcomes and challenges to persons involved, and the children conceived from such donation. A good legislative framework in Kenya must address the anonymity of gamete donors and related matters, such as the right of

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<sup>6</sup> See note 3, *supra*.

<sup>7</sup> See the *Fifth Report of Session 2004-2005 of the House of Commons Science and Technology Committee*, volume 1, at para 146, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007).

<sup>8</sup> Donor insemination will be the focus of this paper, as it raises more complications and legal issues than homologous insemination.

children born as a result of assisted reproduction to trace their genetic parents.<sup>9</sup> A good legislative framework should provide, *inter alia*, for the establishment of a regulatory agency. Such agency would be charged with the responsibility of ensuring the keeping of a database on the information of gamete donors, among other functions.<sup>10</sup> The benefits of such a database are innumerable. Intending couples, for instance, would be able to establish whether they are within the prohibited degrees of consanguinity.<sup>11</sup> Further, children born as a result of donated sperm, eggs or embryos would be able, preferably upon reaching the age of majority, to trace their genetic parents.

#### **(a) Gamete/Embryo Donation & Parental responsibility**

There having been no dispute so far, it remains to be seen whether a gamete or embryo donor in Kenya acquires parental responsibility for any children conceived through his egg/sperm. "Parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.<sup>12</sup> The duties entailed in parental responsibility include the duty to maintain the child and in particular to provide him with (i) adequate diet; (ii) shelter; (iii) clothing; (iv) medical care (including immunization); and (v) education and guidance.

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<sup>9</sup> During an interview in 2006 with gynecologists at a fertility centre in Nairobi, the author established that the medical profession in Kenya had a policy of permitting gamete donation strictly on anonymous terms. The gynecologists argued that due to the absence of a legal framework on assisted human reproduction, they had adopted the policy for precautionary reasons, particularly to minimize the risk of being dragged into possible legal disputes between couples and "disclosed" gamete donors.

<sup>10</sup> In this regard, Kenya may establish an agency fashioned on the lines of the Human Fertilisation and Embryology Authority in the UK. The Authority regulates all matters relating to human reproductive technologies, including the issuance of licenses for research and certain types of infertility treatment. For an enumeration of the functions of the Authority, see the Human Fertilisation And Embryology Act, 1990 (UK).

<sup>11</sup> Section 14 of the Matrimonial Causes Act (Chapter 152 of the Laws of Kenya, available at <http://www.kenyalaw.org>) provides, *inter alia*, that a decree for nullity of marriage may be made on the ground that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity. It appears from a literal reading of the section that persons born as a result of donated sperm/egg/embryo, and who share common genetic (as opposed to legal) parentage, would be liable to have their marriage annulled irrespective of whether they were aware of their consanguinity at the date of the marriage.

<sup>12</sup> Section 23 of the Children Act, 2001 (Kenya).

Parental responsibility also includes the duty to protect the child from neglect, discrimination and abuse. The rights entailed in parental responsibility include the right to (i) give parental guidance in religious, moral, social, cultural and other values; (ii) determine the name of the child; (iii) appoint a guardian in respect of the child; (iv) receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child; (v) arrange or restrict the emigration of the child from Kenya; and (vi) upon the death of the child, to arrange for the burial or cremation of the child.<sup>13</sup>

The Children Act, 2001 defines “parent” as the mother or father of a child. The term includes any person who is liable by law to maintain a child or is entitled to his custody. While the second limb of the definition is not problematic, the words “mother or father of a child” can bring serious disputes where the child has been born through gamete or embryo donation, or other forms of assisted human reproduction. The natural interpretation of “mother or father of a child” means the genetic father or mother. It appears from the foregoing that a wedded couple who beget a child through gamete or embryo donation may not, as a matter of strict legal interpretation, necessarily be the child’s parents. In the case of sperm donation, the couple may even have bigger problems. The first would be the question of legitimacy of the child, particularly where the woman undergoes heterologous artificial insemination without her husband’s consent. It appears Kenyan law would almost inevitably presume the husband to be the child’s father, whether or not he had consented to the insemination of the wife with the donor’s sperm.<sup>14</sup> Why would a Kenyan husband acquire parental responsibility for his wife’s children fathered by other men through artificial insemination? Section 118 of the evidence Act (Chapter 80 of the Laws of Kenya) provides, *inter alia*, that the fact that a person is born during the continuance of a valid marriage between his mother and any man, or within

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<sup>13</sup> *Ibid.*

<sup>14</sup> The Children Act, 2001 does not define a father. The Guardianship of Infants Act (Chapter 144 of the Laws of Kenya, repealed by the Children Act, 2001) provided that a father did not include the father or putative father of an illegitimate infant.

180 days of its dissolution, (the mother remaining unmarried) shall be conclusive proof that he is the legitimate son (child?) of that man.

The husband would escape from the presumption of legitimacy (paternity?) if he can show that there was no (sexual) contact between him and the wife at any time when the child might have been begotten. While section 28 of the Human Fertilisation and Embryology Act, 1990 (UK) contemplates the question of paternity of children conceived as a result of assisted human reproduction, it does not solve the problem of the common law presumption of legitimacy (paternity?) embodied in section 118 of the Kenyan Evidence Act. Though section 28 of the Human Fertilisation and Embryology Act, 1990 (UK) lays primacy on the husband's consent to a wife's infertility treatment in determining the question of paternity, it is rather unsatisfactory in cases where the wife undergoes treatment without the husband's consent. Subsection 5 of that section renders the issue of the husband's consent irrelevant in relation to any child who, by virtue of the rules of common law (codified in section 118 of the Kenyan Evidence Act), is treated as the legitimate child of the parties to a marriage. Since there are no Kenyan precedents in this area, it is difficult to tell how Kenyan courts would deal with the matter where the wife is proved to have undergone artificial insemination with the sperm of another man without her husband's consent. If such a dispute were to arise under the current state of Kenyan law, section 118 of the Evidence Act would visit an injustice on husbands.<sup>15</sup>

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<sup>15</sup> It is unlikely that section the qualification set out under 3(1) (c) of the Judicature Act (Chapter 8 of the Laws of Kenya, available at <http://www.kenyalaw.org>) would offer any help in this regard. The qualification makes the applicability of the English common law (and the doctrines of equity and statutes of general application) subject to the circumstances of Kenya and its inhabitants, and subject to such qualifications as those circumstances may render necessary. Although section 118 of the Kenyan Evidence Act is in substance a common law rule, it is nonetheless part of "all other written laws," within the meaning of Section 3 (1) (b) of the Judicature Act, removing it from the scope of the qualification on the applicability of the substance of the common law. On the applicability of the substance of the English common law (and doctrines of equity) in Kenya, and the resolution of conflicts between the these laws and African Customary Law, see *Virginia Edith Wambui Otieno versus Joash Ochieng Ougo* [1982-88] KAR 1048, popularly known as "the SM Otieno Case." The S M Otieno case

Complications do not end at the foregoing scenario. Unless the gamete donation is on conditions of anonymity, it appears that the genetic parent (gamete donor) may be sued for maintenance of the child– or for the performance of other duties incidental to parental responsibility. Since assisted human reproduction in Kenya is still at the early years of development, it remains to be seen whether the genetic parent (the gamete donor) would fall within the meaning of “*any person who is liable by law to maintain a child or is entitled to his custody.*”<sup>16</sup> In the absence of a Kenyan law to regulate assisted human reproduction technologies, it is conceivable that we could even witness the absurd situation where a married woman brings child maintenance proceedings against a sperm donor who is not her husband in relation to a child born during the continuance of her marriage to the husband. It appears the proceedings would be maintainable under current Kenyan law, since all she needs to demonstrate is that the donor Defendant, and not her husband, is the child’s biological father/parent.

Besides the foregoing, unregulated gamete and embryo donation could lead to other problems. It could lead to new challenges to the institution of marriage and its termination. Suppose a married woman underwent heterologous artificial insemination without the consent of her husband, would this be a ground of divorce under Kenya’s fault-based divorce law?<sup>17</sup> A literal (positivist?) reading of the Matrimonial Causes Act indicates that the wife’s conduct would not necessarily be a ground of divorce. The likelihood of the husband being forced to live with the woman under these circumstances appears quite high, because of the tendency by judges

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is the longest succession litigation in Kenya’s history. The protagonists made innumerable applications, most of which are reported in [1987] KLR at 371 *et seq.*

<sup>16</sup> See definition of “parent” under section 2 of the Children Act, 2001.

<sup>17</sup> Kenya has four legal regimes on marriage, divorce and other matters of personal status and personal law. These are African Customary Law, Statutory (English in design) Law, Mohammedan Law and Hindu Law.

under the common law tradition to read divorce law restrictively and terminate marriage only in extreme cases.<sup>18</sup>

**(b) Gamete/Embryo Donation & Inheritance:**

Unregulated gamete and embryo donation, as is currently the case in Kenya, could pose future problems as regards inheritance of the estates of the donors. Would a child conceived through gamete/embryo donation qualify as the genetic parent's dependant and child within the meaning of sections 26 and 29 of the Law of Succession Act?<sup>19</sup> Although the matter has not yet come before Kenyan courts, it appears the question would most likely be answered in the affirmative—if such a dispute were to be litigated under the current Kenyan laws. Absent a comprehensive legal framework on assisted human reproduction technologies and incidental matters, prospective gamete and embryo donors in Kenya should be wary of the prospects of children born to recipients of their gamete or embryo claiming a portion of their estate. In the case of sperm donation, since a donor's sperms could inseminate a very large number of recipients, donors should worry of the prospects of there being tens or even hundreds of Claimants to their estates. Unless they do not mind the prospects of complex legal battles over their estates, gamete donors, particularly the wealthy ones, may need to obtain proper legal advice before donating their sperm.

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<sup>18</sup> There are four grounds of divorce as regards statutory marriages in Kenya. These are adultery, desertion, cruelty and insanity. See section 8 of the Matrimonial Causes Act, Chapter 152 of the Laws of Kenya, available at <http://www.kenyalaw.org>. In addition, a Kenyan wife who is married under the Marriage Act (Chapter 150 of the Laws of Kenya, available at <http://www.kenyalaw.org>) or the African Christian Marriage and Divorce Act (Chapter 151 of the Laws of Kenya, available at <http://www.kenyalaw.org>) may petition for divorce on the ground that her husband has since the celebration of the marriage been guilty of rape, sodomy or bestiality. The inclusion of the husband's conviction for rape as a special ground on which a Kenyan wife may petition for divorce is peculiar, because a Kenyan husband is by law incapable of raping his wife. Assuming the term rape under the Section 8 of the Matrimonial Causes Act refers to the rape of third parties, it raises a further question as to why married Kenyan men who are convicted of rape are liable to be divorced by their wives while those Kenyan men who commit other sexual offences are not necessarily liable to be faced with divorce proceedings.

<sup>19</sup> Chapter 160 of the Laws of Kenya, available at <http://www.kenyalaw.org>).

### 3 Surrogacy & In Vitro Fertilisation

#### (a) Surrogacy

A surrogacy arrangement is one in which one woman (the surrogate mother) agrees to bear a child for another woman or a couple (the intended parents) and surrender it at birth.<sup>20</sup> Surrogacy enables those women who are unable to carry a child, or who are unable to carry a child to full term, to overcome childlessness.<sup>21</sup> Surrogacy may be classified as partial or full. In partial surrogacy (also known as traditional or straight surrogacy), the surrogate mother provides the egg. The sperm from the intended father is placed into the surrogate mother's reproductive tract, through artificial insemination, to achieve fertilisation. With full surrogacy (also known as host, gestational or IVF surrogacy), the surrogate mother has no genetic link with the child. The surrogate mother only gestates the embryo, which is usually created from the eggs and sperm of the intended parents.<sup>22</sup> Compared to partial surrogacy, full surrogacy is by far the more difficult way to get pregnant. Its preference mainly lies in the fact that many intending parents feel more comfortable knowing the surrogate mother has no biological ties to the Surrogate baby she is to carry.

As with other modern reproductive technologies, there is no Kenyan law, as at the typing of this paper, regulating surrogacy arrangements. The author did not come across any Kenyan law prohibiting it either. Accordingly, it is safe to assume that Kenyans may enter into surrogacy arrangements. Would Kenyan courts enforce a surrogacy arrangement/agreement? While this might be a hypothetical question for the moment, the drafters of a legal framework on assisted human reproduction in

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<sup>20</sup> <http://www.bma.org.uk/ap.nsf/Content/Considering-surrogacy> (last accessed on 23 May 2007).

<sup>21</sup> *Ibid.* A variety of causes have been propounded within medical circles to account for this, including failure of the embryo to implant, repeated miscarriage, hysterectomy (surgical removal of the uterus) or a pelvic disorder. Some women experience problems such as dangerously high blood pressure, a heart condition or liver disease, so that pregnancy would entail a serious health risk for them.

<sup>22</sup> <http://www.bma.org.uk/ap.nsf/Content/Considering-surrogacy> (last accessed on 23rd May 2007). Where the intended mother is unable to produce eggs from her ovaries, the egg may be obtained from an anonymous donor and fertilized with the intended mother's husband's sperm. The embryo is implanted into the surrogate mother's womb for gestation using in vitro fertilisation techniques.

Kenya must address several issues with regard to surrogacy. Such a legal framework must, for instance, define who the child's legal mother is, whether the genetic mother or the surrogate mother. The question as to the legal mother is important since it touches on many aspects of children law, including parental rights and responsibility, welfare of the child *etc.* In the UK, the surrogate mother is always treated in law as the mother of the child.<sup>23</sup> However, under section 30 of the Human Fertilisation and Embryology Act, 1990 the court may on application make parental orders in favour of the gamete donors. It appears from a literal reading of the section that the orders can only be made where the gamete donors are a married couple. Further, the application must be made within six months of the child's birth and with the concurrence of all the parties involved, including the woman who carried the child (surrogate mother?).<sup>24</sup>

Further, our legal drafters must address their minds to the question of enforceability of surrogacy arrangements/agreements.<sup>25</sup> The question of enforceability of surrogacy arrangements is important to the extent that surrogacy may be commercially exploited (abused?), particularly by wealthy women who may wish to

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<sup>23</sup> Section 27 (1) of the Human Fertilisation And Embryology Act 1990 provides that "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child."

<sup>24</sup> The section does not expressly mention surrogacy, but it provides if "*the child has been carried by a woman other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination.*" Under the Act, parental orders may not be made if it is shown that money (money's worth?), other than for expenses reasonably incurred, has changed hands between the parties involved.

<sup>25</sup> Section 1A of the UK Surrogacy Arrangements Act, 1985 provides that no surrogacy arrangement is enforceable by or against any of the persons making it. Although void and illegal contracts are undoubtedly unenforceable, an unenforceable contract need not be void or illegal; neither does it have to be tainted with any vitiating factors like fraud, mistake, misrepresentation etc. An unenforceable contract may be a valid contract, legally and in terms of technical requirements. Absent illegality or vitiating factors, the performance of an unenforceable contract depends on the good will of the parties involved, for neither can look to the court for aid in compelling the other to perform his part of the contract.

avoid the physical, social, psychological or other drawbacks of bearing a child themselves.<sup>26</sup>

### (b) In vitro Fertilisation

In vitro fertilisation is a technique for conception of a human embryo outside the mother's body.<sup>27</sup> Ova (eggs) are harvested from the mother's body and placed in special laboratory culture equipment. Sperm from the intended father (or anonymous donor) are then added. In many cases, a sperm is injected directly into an ovum, a process known as *intracytoplasmic sperm injection*. If fertilisation is successful, a fertilized ovum (or several fertilised ova), after undergoing several cell divisions, is either transferred to the mother's or a surrogate mother's body for normal development in the uterus, or frozen for later implantation.

In vitro fertilisation is particularly helpful in cases of infertility when the woman's fallopian tubes are damaged or the man's sperm count is low. It is also used to enable prospective parents with other reproductive problems to bear a child.<sup>28</sup>

Besides infertility treatment, in vitro fertilisation may be used to overcome life's other perils. Since gametes and embryos can be frozen and implanted later, in vitro fertilisation would enable a person who is undergoing treatment which is likely to render them infertile to have children in future.<sup>29</sup> It may also offer a chance for widows and widowers who lose spouses to war, disease and other calamities to have children with the deceased spouse.<sup>30</sup> The ability to store gametes and embryos for future implantation can nonetheless bring its own complications. Suppose a couple

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<sup>26</sup> See <http://www.bma.org.uk/ap.nsf/Content/Consideringsurrogacy> (last accessed on 23<sup>rd</sup> May 2007). On 23<sup>rd</sup> May 2007, there was an intense debate on a Kenyan FM Radio Station (*Classic 105*) on whether it is African to have few children. Most female participants (callers) cited physical trauma during childbirth as one reason why they would wish to avoid having many children.

<sup>27</sup> <http://www.encyclopedia.com/doc/1E1-invivro.html> (last accessed on 29 May 2007).

<sup>28</sup> E.g., prospective parents who suffer from inability to produce eggs, poor sperm quality, or endometriosis.

<sup>29</sup> Treatment for certain types of ailments, especially cancers, can result in infertility.

<sup>30</sup> See, for instance, the Human Fertilisation And Embryology (Deceased Fathers) Act 2003 (UK). On whether a widow has a right to be inseminated with her deceased husband's sperm, see *R versus Human Fertilisation and Embryology Authority Ex Parte Blood* [1999] Fam. 151 [1997] 2 W.L.R. 807.

divorces, can the wife, subsequent to the divorce, be implanted with embryos created with her former husband's frozen sperm? Would the former husband's consent be necessary in this case? These questions have been the subject of litigation in the UK. In *Evans versus Amicus Healthcare & Others*,<sup>31</sup> the Claimant wished to use stored embryos, created with her gametes and those of her former partner, to have a child. However, her former partner withdrew his consent for the procedure. Although a gamete donor who participates in IVF treatment in the UK may withdraw his consent, argued the Claimant, the Defendant was estopped by his past representations from withdrawing his consent; because he had assured the Claimant that any embryos created with his sperm could be frozen and would always be available for her to use in future. Allowing the former partner to withdraw his consent, argued the Claimant, would have been unconscionable. The Claimant had, relying on the former partner's representations, had her last eggs harvested from her and frozen.

By his words and actions (Mr. Johnston) gave (Ms Evans) to understand that any embryos created from his sperm would always be available for her to use and that there was no need to consider other options...he told the Claimant that he loved her, wanted to share his life with her, would never leave her and was anxious to be a father...When agreeing to fertilise all the eggs, (Mr. Johnston) knew that these eggs would represent (Ms Evans') last chance to bear a child naturally. He knew...(Ms Evans) would, but for his assurances, have sought advice about and investigated in discussions with the clinic the possibilities of 'insuring' against the breakdown of their relationship, whether by freezing unfertilised eggs...or by storing eggs fertilised by a donor other than (Mr. Johnston).<sup>32</sup>

The Claimant also contested the withdrawal of consent on human rights grounds.<sup>33</sup>

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<sup>31</sup> [2003] EWHC 2161.

<sup>32</sup> *Ibid*, para 6-7. The principle of estoppel is that what one has once alleged by his words or conduct, he should not subsequently be allowed to contradict. The rule of estoppel operates to prevent a party to litigation from asserting or denying certain facts. It arises especially when the assertion or denial is inconsistent with their previous express or implied representations. There are three kinds of estoppel, by record, by deed and by conduct. While scholars differ on whether estoppel is a rule of evidence or a substantive rule of law, the predominant view is that it is a rule of evidence. For further insights on estoppel, see *inter alia*, Adrian Kean, *The Modern Law of Evidence*, 4<sup>th</sup> Edition, at p. 543 *et seq.*

<sup>33</sup> Particularly the right to found a family. The matter was lost at the English court. The Claimant has since taken the case to European Court of Human Rights.

While the Evans case would only be of persuasive authority in Kenya, it raises an important question for this discourse. Suppose Ms Evans had had the embryos implanted into her without her former partner's consent? Would the resultant child(ren) have been deemed as legitimate offspring of the former partner? It may be asked whether a former husband would acquire parental responsibility for children conceived by his ex-wife using frozen sperm without his consent. The questions of parental responsibility and the welfare of the resultant children also arise. Section 13(5) of the Human Fertilisation and Embryology Act (UK) 1990 provides that a woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment, (including the need of that child for a father),<sup>34</sup> and of any other child who may be affected by the birth. A good legislative framework on assisted reproduction must address these questions.

It appears, at least in theory, that couples may resort to in vitro fertilisation for reasons other than infertility, and some of which may be quite controversial. Due to advancement in modern technology, it is possible, through techniques such as pre-implantation genetic diagnosis, to create designer babies. By this, we mean it is possible for couples under the guise of seeking fertility treatment to select an embryo which will lead to a baby of a particular sex,<sup>35</sup> height, intelligence, physical appearance etc.

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<sup>34</sup> It appears from a reading of the decision in Evans that section 13 (5) of the Act influenced the decision of the judge. The House of Commons Science and Technology Committee faulted the provisions of section 13 (5) for requiring the clinicians to have regard to the need to any child born as a result of fertility treatment to have a father. The Committee found the requirement to consider whether a child born as a result of assisted reproduction needs a father "too open to interpretation and unjustifiably offensive to many. It is wrong for legislation to imply that unjustified discrimination against 'unconventional families' is acceptable." See the *Fifth Report of Session 2004-2005 of the House of Commons Science and Technology Committee*, volume 1, at para 101, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007).

<sup>35</sup> Sex selection may be achieved through many ways, including natural ways. Artificially, various sperm sorting techniques can enhance the conception of a child of a particular sex. The use of assisted reproduction techniques for sex selection is somewhat controversial, and has attracted legislative censure in some quarters. Article 14 of the European Convention on Human Rights and

## 4 Human Cloning, Embryo and Stem Cell Research

### (a) Human Cloning

Human cloning entails the creation of a genetically identical copy of an existing or previously existing human being, or clone tissue from that individual.<sup>36</sup> The term is generally used to refer to artificial human cloning.<sup>37</sup> The most successful common artificial cloning technique is called somatic cell nuclear transfer.<sup>38</sup> Cloning involves the transfer of a nucleus from a body cell (somatic cell) to a de-nucleated egg. The process begins by taking an ovum/egg from a donor and removing its nucleus. The egg nucleus is replaced by the nucleus of a body cell, the latter containing the genetic material to be cloned. The resultant embryo is then implanted into the womb for gestation.

Human cloning may be reproductive or therapeutic. Reproductive human cloning entails the implantation into a woman of an embryo created by processes other than fertilisation.<sup>39</sup> While reproductive human cloning raises weighty ethical questions,

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Biomedicine, for instance, provides that “*The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided.*”

<sup>36</sup> This is neither a scientific nor technical definition of human cloning; it only describes what human cloning would entail. Though individuals and corporations have made sporadic claims of successfully cloning a human being, there is no confirmed case so far in the world of a human being born as a result of (artificial) reproductive cloning. Most countries have passed legislation or put in place administrative or policy regulations prohibiting reproductive cloning of human beings.

<sup>37</sup> [http://en.wikipedia.org/wiki/Human\\_cloning#column-one](http://en.wikipedia.org/wiki/Human_cloning#column-one) (last accessed on 28<sup>th</sup> May 2007). Human clones in the form of identical twins are commonplace, with their cloning occurring during the natural splitting of an ovum shortly after fertilisation.

<sup>38</sup> Also called cell nuclear replacement. This is the Process that was used to create Dolly the Sheep.

<sup>39</sup> The Preamble to the Human Reproductive Cloning Act, 2001(UK) states that it is “an Act to prohibit the placing in a woman of a human embryo which has been created otherwise than by fertilisation.” As stated in the foregoing parts of the discourse, the most feasible technique of achieving this so far is cell nuclear replacement. Besides fertilisation and Cell Nuclear Replacement, it appears an embryo may also be created through a process called parthenogenesis. Parthenogenesis is a form of reproduction in which an unfertilised egg develops into a new individual. It is common among invertebrates and plants, and present in some fish, amphibians, and reptiles. Although Parthenogenesis does not occur naturally in mammals, researchers have been able to stimulate artificially unfertilised mammalian eggs by chemical or electronic means into starting embryo development. For further insights on this, see *inter alia* the *Fifth Report of Session 2004-2005 of the House of Commons Science and Technology Committee*, volume 1, at p. 41, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007).

and has been the subject of near universal ban so far,<sup>40</sup> therapeutic human cloning is far less controversial.<sup>41</sup> Why has reproductive cloning been so controversial as to attract a near universal ban? While there may be genuine reasons for opposing reproductive human cloning, the censure it has so far attracted seems to be based more on sentiment and ethics than any qualitative objective reasons. Some authors have even argued that most common objections to cloning are false or exaggerated.<sup>42</sup> Granted, besides the nery idea of artificially creating an individual who is a genetic copy of another existing or previously existing individual, reproductive cloning can bring substantial real life challenges. It might put forensic science and its benefits in disarray, by thwarting, for instance, commonplace procedures like DNA paternity tests and forensic crime detection techniques.<sup>43</sup>

Just like reproductive cloning, therapeutic cloning is mainly conducted through somatic cell nuclear transfer technology.<sup>44</sup> Scientists first remove the nucleus, the part of the cell that contains the genetic material, from a normal egg cell of a woman. They then extract a nucleus from a somatic cell—that is, any body cell other than an

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<sup>40</sup> See *inter alia* the United Nations Declaration on Human Cloning, the (UNESCO) Universal Declaration on the Human Genome and Human Rights and the European Convention on Human Rights And Biomedicine. The European Convention on Human Rights and Biomedicine obliges State Parties to protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine. Article 1 of the 1998 Protocol on Cloning prohibits “Any intervention seeking to create a human being genetically identical to another human being, whether living or dead.”

<sup>41</sup> Under section 1 of the Human Cloning Act, 2001 (UK), for instance, it is an offence to place in a woman of a human embryo which is created otherwise than by fertilisation. The offender is liable to imprisonment for a term not exceeding ten years or to a fine, or both.

<sup>42</sup> See, for instance, Macintosh, Kerry Lynn *Illegal Beings: Human Clones and the Law*, Cambridge University Press, 2005.

<sup>43</sup> Since it would be impossible to tell whether the father (or criminal, as the case may be) is the original or cloned person. Recent Kenyan legislation indicates that the value of forensic science in crime prevention and detection is gaining appreciation. Section 36 of the Sexual Offences Act (No. 3 of 2006), for instance, empowers the court, whenever a person is charged with an offence under the Act, to direct that appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence as to whether or not the accused person committed an offence. Having been drafted and enacted under a considerable degree of controversy, it remains to be seen whether many sections of the Sexual Offences Act, 2006 would stand the test of constitutionality.

<sup>44</sup> For a detailed scientific analysis of the procedures involved in therapeutic cloning, visit *inter alia* <http://www.stemcellresearchfoundation.org> (last accessed on 29<sup>th</sup> May 2007).

egg or sperm from a patient who needs an infusion of stem cells to treat a disease or injury, and insert the nucleus into the egg. The result is that the egg, having been infused with the patient's genetic material, is allowed to divide and soon forms a hollow sphere of cells called a blastocyst. The blastocyst has an outer layer of cells and an inner cluster called the inner cell mass. Cells from the inner cell mass are isolated and used to develop new embryonic stem cell (ESC) lines. These cells are pluripotent, i.e. they can give rise to all the cells in the body and therefore can be used to replace cells that have been damaged or destroyed. The resulting ESCs have the patient's proteins on their surfaces because the patient's genes in the nucleus control protein production. With the patient's proteins on the ESC surfaces, the ESCs are unlikely to be rejected by the patient's immune system when transplanted into the body.

Besides cell nuclear replacement, it appears therapeutic cloning, especially for mitochondrial diseases,<sup>45</sup> may be achieved through a technique called Oocyte Nucleus Transfer. Oocyte nucleus transfer entails taking the nucleus from a woman's egg and placing it into an egg donated by another woman, from which the nucleus has been removed— especially where the former woman's egg is deemed to carry genes for mitochondrial or hereditary diseases. The latter woman's egg is then fertilised by sperm using in vitro fertilisation and the resultant embryo transferred into the womb for gestation.<sup>46</sup> This is a different type of cell nuclear replacement from reproductive cloning. It leads to the production of a new egg, which would still need to be fertilised with sperm. It does not lead directly to the production of an embryo. It would, if adopted as a treatment, be intended to produce a healthy baby. Such

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<sup>45</sup> These are very serious diseases, which are caused by defects in a woman's egg outside the nucleus.

<sup>46</sup> Which woman would be the child's mother in these circumstances? While the father would be easy to ascertain, the child would have resulted from material from two women, one of whom offers a de-nucleated egg and the other of whom offers an egg nucleus. If maternity is just a question of genetics, it appears that the woman who provides the nucleus would be the mother, since the egg nucleus carries the genetic material. But it might also happen in these circumstances that the woman who provides the de-nucleated egg is actually the one who carries the baby, in an arrangement somewhat akin to surrogacy.

treatment would not produce an individual genetically identical to anyone else because the modified egg would have to be fertilised by sperm using in vitro fertilisation techniques.

Therapeutic cloning could provide multiple benefits to human beings. It could, for instance, provide badly needed organ transplants. This would overcome the nagging problem of rejection of donor organs, thereby ameliorating or ending the misery of patients who would otherwise have to wait for compatible donor organs for transplants. Further, therapeutic human cloning could lead to better treatments for heart attacks and many congenital diseases.

### **(b) Embryo and Stem Cell Research**

Embryo research may be conducted for myriad purposes. It may be aimed at useful and therapeutic purposes, but it may also be aimed at controversial and roguish ends. The possibility of scientists using embryo research for roguish and unethical ends is arguably the strongest case for legislative intervention. Countries with a legislative framework on assisted human reproduction stipulate in their laws the purposes for which embryo research, including genetic research, may be carried out. In the UK, for instance, embryo research is only licensable for specified purposes.<sup>47</sup> These include (a) promoting advances in the treatment of infertility; (b) increasing knowledge about the causes of congenital disease; (c) increasing knowledge about the causes of miscarriages; (d) developing more effective techniques of contraception; (e) developing methods for detecting the presence of gene or chromosome abnormalities in embryos before implantation; (f) increasing knowledge about the development of embryos; (g) increasing knowledge about serious disease; or (h) enabling any such knowledge to be applied in developing treatments for serious disease. Besides the requirement of a license, embryo research in the UK can only be carried out with the consent of the donors of the gametes used to create the embryo.

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<sup>47</sup> See section 11 (1) (c) of the Human Fertilisation And Embryology Act 1990 and Paragraph 3 of Schedule 2 to the Act. Also, see the Human Fertilisation and Embryology (Research Purposes) Regulations, 2001 (UK).

As the foregoing part of the discourse reveals, stem cells are unspecialized cells, which have not yet differentiated into any specific type of tissue. Stem cells may be derived from myriad sources.<sup>48</sup> First, stem cells may be derived from early embryos (blastocysts) created by in vitro fertilisation, either those which are not needed for infertility treatment (sometimes called “spare embryos”) or created specifically for research.<sup>49</sup> They may also be obtained from early embryos created by inserting the nucleus from an adult cell into a denucleated egg through Cell Nuclear Replacement (cloning). Further, stem cells may be derived from the germ cells or organs of an aborted foetus. They may be obtained from the blood cells of the umbilical cord at the time of birth. Lastly, stem cells may be obtained from some adult tissues (such as bone marrow) and from mature adult tissue cells reprogrammed to behave like stem cells.

Stem cell research is still at the infancy stages of development. The successful application of stem cell research would depend upon (a) whether stem cells can be successfully isolated and grown in the laboratory; (b) whether stem cells grown in the laboratory can be influenced to turn into specific cell types; (c) whether stem cells that have formed particular cell types could be used to treat patients whose tissue was diseased or damaged through injury; (d) whether tissue grown in this way would develop normally or whether there might be risks to the patient.

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<sup>48</sup> For a detailed analysis of sources of stem cells, and more, including the legal and ethical framework for stem cell research, see *inter alia* the Department of Health (UK), *Stem Cell Research: Medical Progress With Responsibility*, June 2000.

<sup>49</sup> Stem cells derived from early embryos have the greatest potential to develop into most types of tissue, hence the reason they are often referred to as “pluripotent.” One of the controversies surrounding in vitro fertilisation is the question of spare embryos. In practice, many eggs are fertilised in preparation for infertility treatment but gynecologists normally put into a woman the embryo that looks most viable, i.e. most likely to result in a pregnancy. Some people consider the destruction of the spare embryo morally impermissible. The reasoning is that the spare embryo is a human life entitled to all human rights, including the right to life. Italian legislation, informed by this view, states that only three embryos may be created for in vitro fertilisation and all of them must be implanted in the woman. For further insights on the status of the embryo, and various positions advanced in this regard, see *Chapter 3* of the *Fifth Report of Session 2004–2005 of the House of Commons Science and Technology Committee*, volume 1, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007).

Though stem cell research is at an early stage of development, scientific advancement could unlock considerable potential for the use of tissues derived from stem cells in the treatment of a wide range of disorders by replacing cells that have become damaged or diseased.<sup>50</sup> Stem cell research could also offer treatment for various mitochondrial and congenital diseases.<sup>51</sup>

### (i) Ethical Considerations on Embryo and Stem Cell Research

While the issue has not yet arisen in Kenya, studies from other jurisdictions indicate that embryo and stem cell research, just like other facets of assisted reproduction, can raise considerable and emotive ethical debate. Studies from the UK have indicated two extremes of the ethical debate.<sup>52</sup> On one end, a significant body of opinion holds that, as a moral principle, the use of any embryo for research purposes is unethical and unacceptable, (because) an embryo should be accorded full human status from the moment of its creation. At the other end of the spectrum, a significant body of opinion holds that the embryo is not a human person (legal person?). It is just a collection of cells. According to this line of argument, the embryo requires and deserves no particular moral attention whatsoever. Studies from the UK still reveal a “middle-ground” body of opinion between the two extremes. The middle ground opinion recognizes the special status of an embryo as a potential human being, but holds that the respect due to the embryo gradually increases as it develops.<sup>53</sup>

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<sup>50</sup> Examples might include the use of insulin-secreting cells for diabetes; nerve cells in stroke or Parkinson’s disease; or liver cells to repair a damaged organ.

<sup>51</sup> It appears the only feasible way of achieving this, particularly for mitochondrial diseases, would be through cell nuclear replacement. This raises the fear of the research sliding into reproductive cloning of human beings. This can nonetheless be avoided by expressly prohibiting reproductive cloning of human beings.

<sup>52</sup> See *inter alia* Chapter 3 of the *Fifth Report of Session 2004-2005 of the House of Commons Science and Technology Committee*, volume 1, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007).

<sup>53</sup> Apparently, the gradualist approach to the status of the embryo is recognized within some Christian and Jewish faiths. In 2005, a study in Britain concluded that while the “gradualist approach to the status of the embryo may cause difficulties in the drafting of legislation …it represents the most ethically sound and pragmatic solution…[because it] permits in vitro fertilisation and embryo research

Ethical moderates hold that the respect due to an embryo, especially in the early stages, may properly be weighed against the potential benefits arising from proposed research. In designing a legal framework on assisted human reproduction and incidental matters, Kenya may borrow from this moderate position. Our drafters should design a legal and regulatory framework which, though providing the human embryo with a degree of protection, nonetheless allows the benefits any proposed research to be weighed against the respect due to the embryo.

## 5 Towards a Legal and Regulatory Framework on Assisted Reproduction in Kenya

Ordinarily, decisions touching on reproduction and copulation fall within the private domain of individuals. Legal tradition, especially in the common law world, holds that reproductive decisions and actions, being so private, are not of sufficient interest to the state. Reproductive freedom, privacy and liberty are part of fundamental rights and freedoms of citizens of any liberal state:

“[...]the only purpose for which [state] power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. The only part of the conduct of any one, of which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”<sup>54</sup>

The constitution of Kenya provides, *inter alia*, that every person in Kenya is entitled to the fundamental rights and freedoms of the individual, including the right to life, liberty and the protection for the privacy of his home.<sup>55</sup> One of the recurring themes in any debate on introduction of legislation on a matter deemed private is whether the state has a sufficient stake in it to warrant intrusion into private lives of its citizens. As at the time of typing this paper, the Kenyan High Court had not heard any dispute

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within certain constraints set out in legislation.” See the *Fifth Report of Session 2004-2005 of the House of Commons Science and Technology Committee*, volume 1, at p. 20, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007).

<sup>54</sup> John Stuart Mill, *Utilitarianism & Liberty* (ed. M. Warnock), 1962 Fontana Press. Are these rights absolute? If so, does the state have the right to influence these decisions through contraceptives? More controversially, does the state have the right to intrude on personal decisions touching on abortion?

<sup>55</sup> The Constitution of Kenya, section 70.

on whether the right to life, liberty and privacy extend to reproductive liberty and privacy. The drafters of a legislative framework on assisted reproduction in Kenya must address their minds to the foregoing constitutional provisions, because any legislative framework that unreasonably transgresses or vitiates the enjoyment of fundamental rights is likely to be annulled by the High Court in the event of a dispute.<sup>56</sup>

Several arguments have been advanced in favour of legislative control on assisted reproduction. First, it has been argued that the state has a legitimate interest in restricting (regulating?) reproductive freedom if there is demonstrable harm or negative impacts on society.<sup>57</sup> It has also been argued that due to reliance on technology in assisted reproduction, the state has a legitimate interest in ensuring high standards of treatment, with a view to enhancing safety and protecting individuals from exposure to high levels of risk.<sup>58</sup> More interestingly, it has been argued that the intervention of a third party in assisted reproduction (i.e. a doctor or clinic) removes the matter from private domain to public domain, warranting legislative intervention.<sup>59</sup>

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<sup>56</sup> Section 3 of the Constitution of Kenya provides that the Constitution shall have the force of law through out Kenya and, subject to section 47, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. There are legion cases on the supremacy of the constitution of Kenya over ordinary legislation. The most notable (controversial?) among recent cases in this regard are Njoya & 6 Others versus Attorney General & 2 Others [2004] 1 KLR 261 and Patrick Ouma Onyango & 12 Others versus Attorney General & 2 Others [2005]eKLR, both discussed in Muthomi Thiankolu, *The Constitutional Review Cases; Emerging Issues in Kenyan Jurisprudence*, available at <http://www.kenyalaw.org>.

<sup>57</sup> On whether the state has a legitimate interest in regulating reproductive freedom of citizens, particularly as regards assisted human reproduction technologies, see Chapter 3 of the *Fifth Report of Session 2004-2005 of the House of Commons Science and Technology Committee*, volume 1, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007).

<sup>58</sup> Some commentators feel the question of technical standards could adequately be regulated by the medical profession without recourse to legislative intervention. As regards exposure to high levels of risk, it is difficult to draw a bright line between acceptable and unacceptable levels of risk. What is the limit of the risk that individuals may voluntarily assume without inviting the interest of the state?

<sup>59</sup> See Chapter 3 of the *Fifth Report of Session 2004-2005 of the House of Commons Science and Technology Committee*, volume 1, available at <http://www.parliament.uk/s&tcom>. (Last accessed on 28 March 2007). The Committee observed that there are other aspects of reproduction that involve the intervention of third parties, e.g. reversing a vasectomy or unblocking fallopian tubes, which are not regarded as warranting state intervention. In this regard, it was observed that the mere

Designing a legal framework on assisted reproduction in Kenya is bound to invoke strong ethical debate. There is need for widespread consultation among stakeholders, including scientists, religious leaders, the medical and legal professions, among others, to build as much consensus as possible.<sup>60</sup> Since ethical sentiments are inevitable, our concern should be on the framework itself. A proper legal framework on assisted human reproduction must address not only questions of reproduction but also incidental matters. These include embryo, genetic and stem cell research. Our drafters must address issues of reproductive as well as therapeutic cloning. Since reproductive human cloning seems to be the subject of a global ban so far, Kenya may have to adopt this position, because rogue scientists from other jurisdictions may otherwise take advantage of loopholes in our legal system to conduct research projects that are banned in other countries. A ban on reproductive cloning would also save Kenyans from being (genetically?) exploited by rogue scientists, as well as being exposed to levels of risk which are considered unacceptable in other jurisdictions. To reduce administrative bureaucracy, Kenyans should abandon the British model and formulate a comprehensive statute that covers all aspects of assisted human reproduction and incidental matters.<sup>61</sup>

The modern trend of globalization notwithstanding, any legislative framework on assisted reproduction and related matters in Kenya must be informed by peculiar needs of Kenya. Our drafters should be wary of the copy-and-paste mentality that

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intervention of a third party would not necessarily form a sound basis for legislative control on assisted reproduction.

<sup>60</sup> A UK study revealed that it is almost impossible to achieve consensus on ethical issues relating to assisted human reproduction technologies, particularly on cloning and embryo and stem cell research. The House of Commons Science and Technology Committee concluded that the British society [as with most modern societies] is both multi-faith and largely secular. In particular, the Committee found that there is never going to be consensus on the level of protection accorded to the embryo or the role of the state in reproductive decision-making. It found that “there are no demonstrably “right” answers to the complex ethical, moral and political equations involved.”

<sup>61</sup> It appears that there is a multitude of statutes in the UK regulating assisted human reproduction and incidental matters, including the Human Fertilisation and Embryology Act 1990, the Human Fertilisation And Embryology (Deceased Fathers) Act 2003, the Surrogacy Arrangements Act 1985 and the Human Reproductive Cloning Act 2001. Notably, the Human Fertilisation and Embryology Authority is the foremost regulator of all aspects of assisted reproduction in the UK. As stated elsewhere in this discourse, Kenya should form such a central regulatory agency.

that seems to invariably inform our legislative drafting. In these premises, any proposed legislative framework on assisted human reproduction and incidental matters must address Kenya's unique socioeconomic and cultural realities. Most importantly, it must address questions of safety and integrity of the human person; it must be alive to fundamental rights and freedoms of Kenyans.

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*This country  
this wonder-wander country  
this plunder-blunder country  
had liaisons social and asocial  
Grannies wedded grandsons  
Roosters swallowed tractors  
Understandings sired misunderstandings*

*This wonderland  
was replete with other wonders  
replete with legion wonders  
Predators hosted their prey  
Men milked wild elephants  
among other things  
among other wonders<sup>62</sup>*

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<sup>62</sup> Adapted from "African Babel" in Muthomi Thiankolu, *Poems from the Slopes*, 2006 (Unpublished).