# 'Averting a Clash between Culture, Law and Science' An Examination of the Effects of New Reproductive Technologies in Kenya.

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## ABSTRACT

The purpose of this thesis is to investigate the legal and ethical consequences of new reproductive technologies in the context of Kenya's two systems of law, namely, English-based statutory law and native customary law. The paper starts by examining how infertility was dealt with by traditional Kenyan societies before the advent of reproductive technologies and proceeds to look at some of these customs that have survived in contemporary Kenya.

Currently reproductive technologies are being carried out in a legal vacuum in Kenya and in the event of any dispute involving the procedures, courts have to refer to existing laws, both customary and statutory. The thesis therefore examines what these technologies are and how Kenya's dual system of law would respond to some of the family law dilemmas raised by the use of these reproductive procedures. The thesis then discusses whether there is enough justification to enact a new, uniform, hybrid Act that takes into consideration both systems of laws in relation to the challenges brought on the technologies.

It is the position of the author that an integrated hybrid Act ought to be passed. This Act would act as a broad framework for regulation, however the Act would not be the exclusive form of regulation. The last part of the thesis therefore makes recommendations on other forms of control that ought to be considered by legislators and policy makers in Kenya, to deal with the myriad of legal and ethical issues precipitated by reproductive technologies.

## Resumé

Le but de cette thèse est d'examiner les conséquences légales desnouvelles technologies de reproduction dans le contexte des deuxsystèmes juridiques du Kenya, notamment le Droit statutaire anglais et le Droit coutumier du pays. Cette étude examine d'une part, la manière que l'infertilité est abordé au Kenya et d'autre part, les effets combinés complexes des lois du Kenya.

En ce moment, les technologies de reproduction sont éxécutées dans le contexte d'un vacuum légal au Kenya. En cas de toute dispute impliquant les procédures, les tribunaux doivent se référer aux lois existantes. La thèse examine ces lois et cherche à découvrir s'il existe une justification pour donner force de loi à un Acte spécifique concernant les technologies de reproduction.

C'est la position de cet auteur qu'un nouvel Acte devrait être passé mais ne devrait pas demeurer la forme exclusive de régulation. La dernière partie de cette thèse propose des recommendations pour d'autres formes de contrôle qui devraient être considérées par les législateurs et les auteurs des politiques au Kenya.

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Re Sapara [1911] Ren 605.

Re Zainab A. Nathoo (An infant) [1959] EA 917.

Sherlock v Stillwater Clinic 260 N.W. 2d 169 at 174 (Minn. 1977).

Skinner v Oklahoma 316 US 536.

Smith v. Cote 513 A.2d 341, 351-55 (N.H. 1986)

Sultan Bin Ahmed El-Mugheiri v Ismail Dharamsi 1 Z.L.R. (1868-1918) 140.

Trimble v. Gordon 430 U.S. 762, 776 (1977).

Turpin v. Sortini 643 P.2d 954 (Cal. 1982).

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Walkin v South Manchester Health Auth. [1995] 4 All E.R. 132.

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## Introduction

In Kenya as elsewhere, fertility forms the basis of and is itself a product of social and economic organization.[1] Since the 1950s when the population explosion was raised, population control became a critical issue for Kenya, which reportedly had one of the highest fertility rates in the world.[2] This rate has been encouraged in part by African tradition which dictates that married couples ought to have as many children as they possibly can.[3] This factor, coupled with the relatively low cost of raising children led to the higher fertility rates found in sub-Saharan Africa.

Due to the huge emphasis placed on the high fertility rate, the opposite problem of infertility is rarely discussed and few studies have actually been carried out to determine the extent of this problem in Kenya.[4] Infertility however, has always existed and this is manifested in the manner

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[1] A. Radcliffe-Brown, African Systems of Kinship and Marriage (London: Oxford University Press, 1967) 1

[2] Fertility levels in Kenya dropped from 6.7 children per woman in 1984-88 to 5.4 in 1990-2 and this is attributed largely to family planning efforts in the country. See National Council for Population and Development, Central Bureau of Statistics of the Government of Kenya, Kenya Demographic and Health Survey (Nairobi: Government Printer, 1993). It has been alleged that the so-called 'population explosion' in sub-Saharan Africa was nothing more than a Western scheme to control the increasing population of Africans on the continent. One of the reasons for this would be to reduce the economic burden Africa imposes on developed nations. See generally C. Mann, 'How Many is too Many?' (1993) 27 The Atlantic. Dorothy Roberts argues in her book Dark Side of Birth Control, that long acting birth control methods such as Norplant and Depo Provera are used to truncate black women's childbearing options and to suppress the growth of the black race. See D. Roberts, Killing the Black Body: Race, Reproduction and the Meaning of Liberty (New York, NY: Pantheon Books, 1997) at 373. See generally, Beth Maina Ahlberg, Women, Sexuality and the Changing Order (Philadelphia: Gordon and Breach, 1991) at 191. See also Saleem O, 'Be Fruitful and Multiply, And Replenish The Earth, And Subdue It: Third World Population Growth And The Environment' (1995) 8 Geo. Int'l Envtl. L. Rev. (1) 3. See also J.C. Caldwell, 'Is the Asia Family Planning Program Model suited to Africa?' (1988) 19 Studies in Family Planning 19-28. Birdsall N, 'Population Growth and Poverty in the Developing World' (1980) 35 Population Bull 9.

[3] I. Shapera , Married Life in an African Tribe (Evanston: North Western University Press, 1966) 243.

[4] See S.M. Farid, S.H. Cochrane, 'Fertility in sub-Saharan Africa-Analysis and Explanation' in The World Bank, ed., The World Bank Discussion Papers (Washington DC: The World Bank, 1989).

in which traditional Kenyan societies devised specific methods to deal with the problem.

In traditional Africa, procreation was considered a societal affair and it was the duty of the community to produce individuals to ensure continuity of the clan or lineage.[5] This mentality did not die with the passage of time, but has been carried over to modern Kenya. The need to have children is evident in everyday life in Kenya and couples are still under societal pressure to have children.[6] Due to this pressure and the erosion of traditional methods to counter infertility, reproductive technologies are slowly filtering into Kenya and finding a ready market among the elitist population who are able afford these technologies.[7]

These reproductive methods are being carried out without any form of legal regulation or control.[8] Further as will be shown, some of the practices are in direct conflict with the prevailing written law, and Kenyan culture embodied in customary law.

This thesis is therefore an examination of the impact of reproductive technologies in the context of Kenya's present laws. I will make a case for the enactment of sound policies and laws in Kenya to deal with the new legal possibilities created by the technologies and to hopefully avert the imminent collision between law, culture and science.

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[5] See T.O. Elias, The Nature of Customary Law (Manchester: Manchester University Press, 1956) 76-95.

[6] D. Kayongo-Male and P.Onyango, The Sociology of the African Family (New York: Longman Group 1987) i – iv. See also L.P. Kilbride and J.C. Kilbride, Changing Family Life in East Africa (University Park and London: The Pennsylvania State University Press, 1990) 87.

[7] In Mombasa, Kenya for example these services are offered at 'The Assisted Conception & In Vitro Fertilization Clinic' located at a private hospital. This clinic provides a wide range of reproductive technologies including in vitro fertilization, embryo transfer and artificial insemination to the Kenyan population.

[8] Kenya has not passed any specific legislation dealing with reproductive technologies.

The first chapter will focus on the history of infertility in traditional Kenya. I will investigate the manner in which traditional society, though limited in terms of technology, dealt with the problem of infertility. This section will provide an insight on how important fertility was and still is in traditional and contemporary societies in Kenya. It will also help to conceptualize the extent of infertility in Kenya, given the types and numbers of solutions that were devised to deal with it traditionally.

Since the attainment of independence,[9] Kenya's legal system has evolved into a unique and complex regime where two distinct legal orders, namely English statutory law and customary rules, co-exist, are recognized and applied simultaneously by courts of law throughout Kenya. A basic understanding of the intricate interplay between these two systems is necessary in any discussion involving the application of law in Kenya. Before examining specific provisions of the two legal orders in relation to reproductive technologies, I will first provide a detailed explanation on how these two systems operate contemporaneously in Kenya. This discussion will form the first section of chapter two.

Within the last two decades, science and technology have completely revolutionized the very concept of 'life', as we knew it. In the realm of reproductive technology, it is now possible to 'create' a being and further determine the types of characteristics such being will have even

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[9] Kenya attained independence from Britain in 1963. For a detailed history of Kenya's struggle for independence, see W.R. Ochieng, A History of Kenya (Nairobi: Longman 1985) Chs. 5 & 6.

before conception.[10] By virtue of the high level of technology and expense involved in developing and actually carrying out these procedures, new reproductive techniques have been confined to developed nations such as Canada, United Kingdom, the United States, France, Germany, Australia, Israel Switzerland, Sweden and Spain.[11] Intergovernmental organizations such as the Council of Europe and the European Union and European Parliament have played active roles in the field of health and medical ethics and have either passed legislation or set out guidelines or mandates on legal or ethical issues surrounding reproductive technologies.[12]

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[10] It is now possible to predict the genetic make-up of a fetus before birth. See K. Nobles, 'Birthright or Life Sentence: Controlling the Threat of Genetic Testing', (1992) 65 S. Cal. L. Rev. 2081.Advances in molecular biology and genetics will soon produce a 'genetic map' which prospective parents can use to assess a full complement of the genetic traits of a child. See M. Malinowski, 'Coming into Being: Law, Ethics, and the Practice of Prenatal Genetic Screening' (1994) 45 Hastings L.J. 1435, V. Norton, 'Comment, Unnatural Selection: Non-therapeutic Preimplantation Genetic Screening and Proposed Regulation' (1994) 41 UCLA L Rev. 158. See also B. Modell, 'The Ethics of Prenatal Diagnosis and Genetic Counseling' (1990) 11 World Health Forum 184. and K.R. Grant, 'Perceptions, Attitudes, and Experiences of Prenatal Diagnosis: A Winnipeg Study of Women Over 35.' in Royal Commission on New Reproductive Technologies, ed., Research Volumes of the Royal Commission on New Reproductive Technologies (Canada: Ministry of Government Services, 1993). See also J. Botkin, 'Ethical issues and Practical Problems in Preimplantation Genetic Diagnosis (1998) 26 J. L. Med & Ethics 17. See also R. Tasca & M. Mclure, 'The Emerging Technology and Application of Preimplantation Genetic Diagnosis' (1998) 26 J. L. Med & Ethics 7.

[11] The Canadian Government, in response to the need for national action in policy making in the realm of new reproductive technologies, appointed a Royal Commission to examine the impact of the technologies n societies, identified groups and the ethical, legal, social, economic and health implications of these technologies. The Commission published its findings in a publication called Proceed With Care : Final Report of the Royal Commission on New Reproductive Technologies (Canada: Minister of Government Services, 1993) These findings culminated in a Bill known as Bill C-47, 'Human Reproductive and Genetic Technologies Act' 2d. Sess., 35th Parl., 1996. This Bill has not become law and it died on the order paper in April 1997 when a Federal election was called. The Canadian Commission had a mandate similar to the U.K. Warnock Commission set up in 1989 and whose recommendations were published in A Question of Life: The Warnock Report on Human Fertilization and Embryology (Oxford: Basil Blackwell, 1985). Germany has a penal law called the Embryo Protection Law of 1990, Spain has also passed the Embryo Protection Law of 1988. Israel, Switzerland, Germany, Spain, France, Greece, Norway and Britain have laws that specifically ban commercial surrogacy. See L. Uzych, 'The Mother of All Questions: How to Govern Surrogacy' (1993) Pa. L. J. 2

[12] See for example, Council of Europe, Draft Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Strasbourg, June 1996, Strasbourg Directorate of Legal Affairs, Council of Europe, CDBI (96). See also The Council of Europe Convention on Human Rights and Biomedicine (visited March 21, 1999)

Today, in this age of globalization, developing countries are adopting technologies almost wholesale from western countries and reproductive methods are no exception[13]. As mentioned earlier, in vitro fertilization is being carried out in certain clinics in Kenya and this technology is being applied to a social arrangement known as surrogate motherhood.[14]

The second part of chapter two will be a brief technical examination of these two reproductive procedures. This discussion in necessary because very little is known in Kenya in terms of how the procedures actually work and the technologies involved. This section will also be useful in determining the players in reproductive arrangements. The discussion will also help to identify some of the ethical issues arising out of the use of these technologies in Kenya.

Once these procedures have been described, it will be necessary to examine the various legal contexts in which they are being practiced. For this reason, chapter three will be a discussion of the actual legal provisions in either regimes, that are affected by or that affect the new reproductive technologies. To this end, I will examine customary law, statutory laws instruments and a bill on matrimonial rights and duties, custody of children, succession and administration of estates. The questions that will run throughout this entire discussion are; whether there is any need to enact new legislation specific to the new technologies; or if the

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<http://www.coe.fr/cp/97/190a(97). html>

[13] Other examples of such technologies are information technologies and telecommunications. Organizations that monitor technological advancement in Africa are inter alia, The African Center for Technological Studies, African Information Society Initiative, African Technology Forum and African Computer & Communication Companies of Africa.

[14] I carried out a personal interview with Dr. Dave of the Assisted Conception and In Vitro Fertilization Clinic, Mombasa, Kenya in December 1998, and he explained to me that he has carried out embryo transfers into third

existing legal provisions as they are, are sufficient to deal with the challenges brought on by reproductive technologies; or whether other alternative approaches to deal with the possible conflicts should be explored.

What steps should Kenya make in response to the new technologies? My final chapter seeks to address this very question as it searches to find points of reconciliation between the technologies, positive law and customary law. I argue that Kenya must not simply ape western approaches to the issue, but rather seek solutions that are culturally sensitive and legally appropriate to the Kenyan experience. I will make suggestions on different approaches that can and should be considered by Kenyan policy makers and legislators.

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party host wombs only at the insistence of the infertile couple and with the legal consent of the surrogate mother.

## Chapter One

## Setting the Stage: A History of Infertility in Kenya.

One of the most instinctive and indeed fundamental characteristics of the human race is the drive to reproduce.[15] The process of reproduction ensures continuity of life and constitutes growth and permanency of a community. The ability to reproduce governs the morphology of living beings, their organity, functions and internal control system, and also contributes towards the social and economic stability of a given population.[16]

Nature in her wisdom provided a natural mechanism for procreation, namely sexual intercourse between a man and woman. This has for time immemorial, been the primary method for procreation in society.

Without prejudice to her noble intentions, Mother Nature does not provide a guarantee for the mechanical workings of her method. Consequently, her natural process has not always produced the desired results. Cries for the treatment and alleviation of this devastating

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[15] Indeed this drive to reproduce has now been translated into the constitutionally protected 'right to reproduce or procreate' in many countries. In the United States, this right was affirmed in the case of Skinner v Oklahoma 316 US 536 where the court stated that the right to produce offspring was basic to the perpetration of a race. The US case of Meyer v Nebraska 262 US 390 (1923) also affirmed the right to 'marry, establish a home and bring up children'. It must be noted that in these cases, the question whether the right to procreate encompassed activities other than traditional sexual reproduction. For a discussion of the 'right to procreate' see J. Robertson 'Families and Procreative Liberty: The Legal Structure of the New Reproduction' (1986) 59 Cal L. Rev. 942.

[16] The right to establish a home and raise children is among the most basic of civil rights, long recognized as essential to the orderly pursuit of happiness. See In re Carmaleta B., 579 P.2d 514 (Cal. 1978) (holding that parenting is a fundamental right which may be disturbed only in extreme cases where the parent or parents act in a fashion incompatible with parenthood); See also In re B.G., 523 P.2d 244 (Cal. 1974) (holding that a juvenile court may award custody of a child to a non-parent only upon a clear showing that such award is essential to avert harm to the child).

condition have been heard since the Biblical age of Abraham, Sarah and Hagar.[17]

In Africa, procreation is considered the most important function of society and among traditional Kenyan populace, bringing forth children was not considered an individual affair, but a communal concern.[18] It was the duty of all members of society to reproduce in order to maintain the life and identity of the community.[19] The importance of a given clan depended largely on its size. The larger the clan was, the more respect it garnered in the community.[20]

Although Kenya is a country characterized by great ethnic diversity[21], it is relatively homogenous with respect to the importance of family continuity and survival of lineage. Each ethnic community in Kenya has its own distinct language and not simply a dialect, as well as it's own cultural identity.[22] There are however a number of traditions that run common among the

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[17] Sarah was Abraham's wife and she was not able to bear children. She then encouraged her husband to 'take' her maid Hagar and from that union, a son, Ishmael was born. In effect, what Abraham and Sarah were engaged in was 'surrogacy by natural intercourse' see Genesis 16:1-16:2.

[18] D. Kayongo – Male & P. Onyango, The Sociology of the African Family (New York: Longman Group, 1984) 3 For a discussion on the family structures in various African groups, see, Cotran and Rubin, Readings in African Law (London: Cass, 1970).

[19] The inability to reproduce is considered one of the greatest misfortunes in African society. Barrenness and sterility are considered threats to human existence and are condemned by many African societies, so much that in certain communities, childless people cannot be regarded as ancestors after death. See Saleem O, supra note 2 at 20.

[20] Among the Luo of Kenya, a man's status was determined by the number of wives, children and livestock and land he owned. See J. Ndisi, A Study in the Economic and Social Life of the Luo (Nairobi: Oxford University Press, 1974) 84

[21] Kenya's existence as a nation can be traced to the British invasion in 1888 and the Berlin Conference that declared Kenya a British territory in 1895. Prior to that, the territorial boundary of what is now Kenya was occupied by 42 different ethnic groups, each constituting autonomous political, economic and social units. See B.A. Ogot, Kenya Before 1900 (Nairobi: Longman Publishers, 1976) vii describing the social and economic aspects of the various tribal communities.

[22] The major groups in Kenya are the Bantu's, Nilotes and Cushites. See G.P. Murdock, Africa: It's Peoples and

different groups such as the concepts of kinship and lineage[23] Whereas rapid changes are taking place in Kenya, so that traditional ideas are being abandoned, modified or colored by western influence, it would be wrong to imagine that everything traditional has been forgotten or changed. The importance of procreation and 'passing down one's name' is a tradition that survives in modern day urban Kenya.[24]

Traditional concepts therefore, still form the essential background of many Kenyan people and the emphasis on family and larger kin groups remains one of the central features of traditional social relations in Kenya. For Kenyans, marriage is the focus of existence and it is thus a duty and indeed a requirement from the community to get married.[25] It is an essential rite of passage in which everyone without exception must participate.[26]

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their Culture History (New York and London: McGraw Hill, 1959). It must be noted that within these groups there are several tribes that do not speak the same language but share a common history.

[23] See for example, M. Wilson, Rituals of Kinship among the Nyakyusa, (London: Oxford University Press, 1959).

[24] J.S. Mbiti, African Religions & Philosophy (New York: Frederick A. Praeger 1969) xi.

[25] Kenyatta, infra note 37 at 157.

[26] The importance of African marriage is three-fold; **First** and foremost, marriage involves some modification or partial rupture of the relations between the bride and her immediate kin. This aspect of marriage is frequently given symbolic expression in the simulated hostility between the two bodies of kin at the marriage ceremony. This custom expresses the recognition that marriage entails the breaking of the solidarity that unites a woman to the family in which she has been born. When this aspect of marriage is considered, the marriage payment or dowry can be regarded as an indemnity or compensation given by the bridegroom to the bride's kin for the loss of their daughter. The **second** important aspect of marriage is that it gives the husband and his kin certain rights in relation to his wife and children she bears. The husband would acquire certain rights over his wife; for example, if she was killed or injured, or committed adultery, he would be indemnified for the injury to his rights. Also, if a woman proved to be barren, her kin would either return the marriage payment or provide another woman to bear children. The **third** aspect of marriage is that in Africa, a marriage is not simply the union of a man and woman, but an alliance between two families or bodies of kin. See A. Radcliffe-Brown, African Systems of Kinship and Marriage (London; Oxford University Press, 1967) 48-51. For an extensive discussion on the importance of marriage in Africa, see A. Phillips, Survey of African Marriage and Family Life (London:

Marriage and procreation in African communities are a unity; without procreation, marriage is incomplete and even considered void. Children seal and validate a marriage agreement.[27] Biologically, both husband and wife are reproduced in their children, thus perpetrating the chain of humanity. In some communities, it is believed that the living dead[28] are reincarnated in part, so that aspects of their personalities or physical characteristics are re-born in their descendants. It then follows that a person who has no descendants in effect 'quenches the fire of life' and becomes forever dead since his lineage comes to a halt.[29]

Another example that underlines the importance of marriage and procreation is a concept known as 'remembering' the living dead.[30] In traditional Kenyan communities, as long as there are persons in the family who still remember a dead family member, that dead member of the family is still considered 'alive', albeit in a spiritual sense.[31] This remembrance is extremely important in African societies. It is not uncommon to hear elderly people say to their

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Oxford University Press, 1953)

[27] The importance of children in African society is expressed in the following African Proverbs:

- 'There is no wealth where there are no children.'
- 'Nothing is as painful as when one dies without leaving a child behind.'
- 'A cow gave birth to a fire; she wanted to lick it, but it burned, she wanted to leave it, but she couldn't because it was her own child.'

[28] The term 'living dead' refers persons who died up to five generation's back. They are considered still in the state of personal immortality and their process of dying is not yet complete. They are considered the closest links that man has with the spirit world. Mbiti, supra note 24.

[29] This belief is especially strong among the Luo of Kenya. See E. Cotran, Restatement of African Law, Kenya (London: Sweet and Maxwell, 1968) at 158.

[30] Mbiti, supra note 24 at 1-15.

[31] It must be remembered that the term family in the traditional setting refers to the entire extended family as opposed to the nuclear family consisting of only parents and their children. N. Chazan, R. Mortimer, J. Ravenhill, D. Rothchild, Politics and Society in Contemporary Africa (Colorado: Lynne Rienner Publishers, 1988) at 1-20.

grandchildren that if they do not get married and have children, there will be no one keep them 'alive' in the world This is a serious philosophical concern among traditional African people. [32]

To lack someone close to keep the departed in their personal immortality is the worst misfortune and punishment that any African person could suffer. Thus among many traditional African societies, to die without getting married and without children is considered to be completely cut off from human society, disconnected, and an outcast of mankind.[33]

This goes to illustrate the special kinship system that exists in Africa. Almost all the concepts connected with human relationships can be understood and interpreted through the kinship system.[34] This system governs the behavior, thinking and whole life of the individual in the society in which s/he is a member.[35]

The kinship system can be described as a vast network that stretches in every direction, embracing everybody in any given local group. This means that each individual is a brother or sister, father or mother, grandmother, grandfather, or cousin, or brother-in -law, uncle or aunt, or something else, to everybody within the distinct clan.[36] Practically, what this implies is that

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[32] See generally E.E. Evans-Pritchard, Witchcraft, Oracles and Magic among the Azande (London: Oxford, 1937) and J. Middleton and E.H. Winter eds., Witchcraft and Sorcery in East Africa (London: Oxford University Press,1963).

[33] Mbiti, supra note 24 at 134.

[34] Id.

[35] Id.

[36] Id.

everybody is related to everybody else within a clan. There are many kinship terms to express the kind of relationship pertaining between two individuals and this gives an African individual a sense of depth, historical belonging, feelings of deep-rootedness and a sense of sacred obligation to extend the genealogical line.[37]

Inability to reproduce, that is, sterility and barrenness especially on the part of women is considered a huge tragedy and is a valid ground for divorce under African customary law.[38] A woman who was incapable of reproducing was considered a disgrace to society and in some Kenyan communities, she was perceived as cursed or she was branded a witch and banished from the community.[39] In the past, the Akan of Ghana drove thorns into the feet of childless people when they died to prevent them from walking back into society to be 'reborn'.[40] In certain societies, when a barren woman died, she was buried without ceremony, as even in death she was considered unworthy of recognition.[41]

Among the Gikuyu of Kenya, because of the belief in the unity of kindred relationships

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[37] It must be noted that in Africa extended families also have a legal personality. J. Kenyatta, Facing Mt Kenya (New York: AMS Press, 1978) at 21.The extended family can acquire rights and interests and be subject to obligations such as property rights. The extended family has also been a 'social security system' in Africa. For example, when a family member died, his children would be taken in by one of the households within the family and these children were thus given an equal chance to grow and develop. When there were disputes, the entire extended family participated in reconciliation as they felt that they were better placed to help resolve the problem than outsiders. For a discussion on the intricacies of the kinship system, see Radcliffe-Brown and Forde, African Systems of Kinship and Marriage (London: Oxford University Press, 1967).

[38] Opoku Kofi Asare, West African Traditional Religion (London: Oxford University Press, 1978) 1.

[39] Id.

[40] Id.

[41] This practice was common among the Bantu and Nilotes of Kenya. Radcliffe-Brown AR and Forde D, supra note 37 at 262.

between the living and the dead, taboos and prohibitions were observed in the daily conduct of the individuals.[42] It was believed that if a person committed an act that was considered taboo, the dead would become angry and would punish such person for their actions in a variety of ways; one such punishment was sterility or barrenness.[43]

In other communities in Kenya, when a woman failed to conceive after she was married, the entire extended family, on both sides, consulted a traditional healer. If all the healers failed to 'cure' the infertile woman, other practices were resorted to as an attempt to ensure that children were brought-forth in the home.[44] Although armed with limited resources, certain Kenyan societies attempted to overcome the problem of infertility in a number of ways. Some of these attempts were reflected in practices such as polygyny, sororate unions, levirate unions and woman-woman marriages.

### *(i) Polygyny*

In almost all societies in Africa, a man was allowed to marry more than one wife.[45] This custom fits well into the social structure of traditional life, in the sense that the more wives the man had, the more children he was likely to have, and the more children he had, the stronger the

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[42] See C. Cagnolo, The Agikuyu: Their Customs, Traditions and Folklore, (Nyeri, Kenya: Mission Printing School, 1933).

[43] Beth Maina Ahlberg, Women, Sexuality and the Changing Order (Philadelphia: Gordon and Breach, 1991) at 59.

[44] Id.

[45] See generally on philosophical beliefs attached to Polygyny; Radcliffe-Brown and Forde, African System of Kinship and Marriage (London: Oxford University Press, 1967) 43-54.

sense of 'immortality' in that particular family.[46]

In Kenya, it is believed that he who has many descendants has the strongest possible manifestation of 'immortality', as he is reborn in the multitude of his descendants.[47] Therefore, to have many wives and children is to ensure that one never really 'died' even if one's physical being no longer existed.[48]

Polygyny raised the social status of the family concerned. The richer the man was, the more wives he married.[49] Because he had to maintain a number of households he naturally had to be wealthy. If the first wife was not able to bear children, or only had daughters, it followed without question that her husband would marry another wife. This second marriage was partly to remedy the immediate concern of childlessness, and partly to remove the shame and anxiety of apparent unproductivity.[50]

Polygyny was thus resorted to where the first wife was barren or only bore her husband daughters.[51] This was a well-accepted practice and the second marriage was in many cases sanctioned by the first wife. The children of the second wife would refer to the first wife as

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[46] Mbiti, supra note 24 at 142.

[47] Id.

[48] Id.

[49] Ndisi, supra note 20 at 62-3

[50] Id.

[51] Id.

*'mama mkubwa'* which literally means 'older mother'[52] and in terms of maternal respect, there would be no difference between mothers; both were considered of equal importance by the children. If the husband subsequently married more wives, the children from all the wives regarded each other as 'real' siblings.[53] There was no discernible distinction amongst the children simply on the basis that their mothers were different, rather the usual sibling rivalry found in any family, existed among the children.[54]

Polygyny has received the most criticism for its role as a male mechanism for sexual exploitation and control over African women. It is viewed as discriminatory against women because, while men can have more than one wife, women are not allowed to have more than one husband and are as a result, placed in a low bargaining position with respect to marriage and family relations.[55] Most African women are brought up to believe that their only goals in life are to marry, satisfy their husbands numerous needs and bear him children.[56] This belief, coupled with traditional male child preference in a male dominated society, leaves women competing with each other to give their husbands as many male children as possible.[57] The reproductive labor of women is thus considered a duty to the family.[58]

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[52] This is a Swahili term that is commonly used in communities living in the coastal areas of Kenya.

[53] Ndisi, supra note 20 at 63.

[54] Id.

[55] N.F. Adjetey, 'Reclaiming The African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy And African Society and Culture' (1995) 44 Am. U. L. Rev 1351 at 1357.

[56] Id.

[57] Id.

[58] Id at 1358.

In the context of past African sexuality and reproduction, polygyny protected women in the sense that it functioned as a security valve for childless women who now easily fitted into activities such as collective labor and childcare.[59] With missionary condemnation of polygyny, barren women often escaped into urban areas to engage in prostitution and other informal trades such as the brewing of illicit liquor.[60]

Polygyny also interestingly played a role in child spacing and related fertility control. There was a highly developed internally consistent social order among many Kenyan communities with regard to sexual practices and these rules were practiced even within the context of polygyny.[61] For example, when a child was still breastfeeding, sexual relations between the mother and her husband was forbidden.[62] Thus wives would have periods of 'rest' between bearing children and this would ensure that the mother had enough time to bond with her child before the birth of another child.[63] These periods of abstinence therefore traditionally protected the health of the newborn babies and also served to space the birth of children in a given household. It must be mentioned that traditional abstention from sexual intercourse did not necessarily reduce the number of children eventually born; it merely spaced the ages of these children.[64]

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[59] Ahlberg, supra note 2 at 183.

[60] Id.

[61] See generally C. Cagnolo, supra note 42.

[62] See B. Ahlberg, supra note 2.

[63] Kayongo-Male and Onyango supra note 6 at i - v

### *(ii) Levirate Unions*

In some cases where it was determined that the husband was infertile, a levirate union would be arranged.[65] In such instances, the husband would engage the 'services' of his brother or close male relative for his wife, and a child resulting from this union between his wife and relative, would be deemed as the husband's own.[66]

In situations where the husband died, a levirate marriage would also be arranged and the death of her husband did not sever the wife's relationship with her late husband's family.[67] The deceased's wife would be inherited by a brother or close relative and the children born after this inheritance generally belonged to the deceased.[68] The main critique of this custom is that it perpetually restrains the widow from marrying any other person other than the customary successor of her dead husband or member of his family.[69] The effect of this custom is that many women are treated as chattels and are thrust into unwanted marriages.[70]

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[64] Id.

[65] Levirate unions also occurred during Biblical times. Deuteronomy 25:5-6 "If brethren dwell together, and one of them die, and have no child, the wife of the dead shall not marry without unto a stranger: her husband's brother shall go unto her, and take her to him to wife...and it shall be, that the firstborn which she beareth shall succeed in the name of his brother which is dead..."

[66] In the case where the husband died this custom was referred to as 'widow inheritance'. See G. Wilson, Luo Customary Law and Marriage Laws and Customs (Nairobi: Government Printer, 1961) 118-119.

[67] Id.

[68] Id.

[69] This practice puts the woman in a position of subservience and he eventually lacks capacity to be married and can only be inherited. It has been suggested that the custom of wife inheritance be abolished except where the wife expressly consents. Further it is being advocated that the man wishing to marry her must have capacity to do so, that is, be potentially polygamous or single. Adjetey supra note 55 at 1361.

[70] A widow who resists being inherited runs the risk of eviction from her home by her husband's relatives. See Adjetey, supra note 55 at 1361.

Where the husband was infertile, the entire transaction was usually done in secret and after the wife became pregnant, the issue was never revisited.[71] In cases where the husband had died, the children born to his wife through a levirate union, kept his genealogical line 'alive'. They would also inherit the property that would have belonged to their deceased 'father' and they would also pour out libation[72] to him even though they may not have known him physically.[73] The children were thus recognized as the children of the deceased husband and were entitled to share in the inheritance of his estate. Levirate unions were therefore one of the methods which traditional society used to deal with the problem of male infertility.[74]

### *(iii) Sororate Unions*

This practice was similar to levirate unions in the sense that services of a third party were engaged on behalf of the infertile party, who in this case was the wife. Rather than having her bridal price returned, a barren wife's father would offer another daughter, usually the wife's

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[71] This practice is very common among the Luo of Kenya. For a discussion, see E .Cotran and N. Rubin, Readings in African Law (London: Frank Cass, 1970) 130-131.

[72] To 'pour libation' to the departed is an African ritual where food and drinks are scattered on the burial site of the deceased. The significance of this ritual is that the food and drinks are regarded as a token of fellowship with the dead. They reflect family continuity and contact with the physically dead. J. Kenyatta supra note 37 at 20-5.

[73] Mbiti, supra note 24 at 144.

[74] Another form of marriage among the Luo is known as 'siweho' and this is a marriage with a sister or close agnatic relative of a wife. It is customary for most Luo women to bring a girl from their own village to act as a nurse for their children. The nurse, 'japiti', lives with the family as a sister-in-law and gradually over time, begins to perform the functions of a wife. The wife who brought her is then regarded as 'jagam' and frequently this relationship ends in marriage. If a woman is barren, she will try and bring 'siweho' from her village to marry her husband as her 'nyar ot' in order to bring forth children not only to her husband, but also to her house. See G. Wilson, supra note 28 at 119.

younger sister to go and 'assist' her older sister.[75] The term 'sister' in this case must be understood in it's wider usage, within the kinship system, thus the younger sister was not necessarily a blood sister, but might be a female cousin.[76]

A child born from union of the younger sister and the husband was considered as belonging to the wife and there was no issue as to the parentage of the child. She was brought up by the wife and referred to her as 'mother'.[77]

Sororate unions also occurred where a wife had died childless. Because bridal price had been paid to the father of the deceased, the father would 'compensate' the deprived husband by 'giving' him another daughter to replace the deceased wife. This form of marriage, like levirate unions, also infringed on the rights and freedom of the new wife. [78] The children born from this

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[75] This practice was also common among the Ashanti of West Africa. See R.S. Rattray, Ashanti Law and Constitution (London: Oxford Press, 1929) 27-28. Among the Sukuma however, a man was not allowed to marry his wife's sister so long as his wife was alive, nor was he allowed to marry his stepdaughter so long as her mother was alive. For a discussion, see H. Cory, Sukuma Law and Custom (London: Oxford University Press, 1953) 55-57.

[76] Mbiti, supra note 24 at 144.

[77] This practice was common among the Akamba and Abagusii of Kenya.

[78] An obvious consequence of this form of marriage is the curtailment of women's freedom of choice. This reflects on the issue of the African woman's inferiority of status. It must be noted that throughout Kenya's historical, colonial and contemporary experience, two factors have been the hallmark of the country's existence; the preservation of the patriarchy and the marginal role of women in public life. This fact is manifested in almost all spheres of life and the African woman is still struggling to free herself from cultural, social, political and economic powers that treat her as a second class citizen. One of these manifestations is seen in sororate, levirate and polygnous arrangements where the woman's right to choose is grossly undermined. See M. Mathangani, 'The Triple Battle: Gender, Class, and Democracy in Kenya' 1997 39 How. L.J. 287. The African woman is subject to serious legal disabilities and is deprived of fundamental rights, not just in relation to specific conditions such as those discussed in this chapter, but also, more generally, by reason of her condition of perpetual minority. A. Phillips argues however in Survey of African Marriage and Family Life (London: Oxford University Press, 1953) at xi - xvii,

'Apart from the fact that the legal status is merely one and perhaps not the most important among the factors which determine

union would be considered as those of the deceased wife, thus enforcing the traditional belief that even when one was no longer in physical existence, one's spirit lived on in the children. Among the Luo of Kenya, sororate unions also occurred when a wife attained menopause because Luo custom forbids a man to cohabit with a woman who has reached this stage. A younger sister or relative would then be brought to the home to take over the wife's reproductive role in the home.[79]

### *(iv) Woman to Woman Marriages*

This was an interesting social phenomenon that occurred where a woman did not want to get married, but wanted to raise children of her own. The woman in this case was usually wealthy and old. She would identify another woman, usually younger and also unmarried, and for a price, she would 'marry' her.[80]

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the actual position and influence of women in a particular society, there are certain considerations which seem to make hasty judgement in this matter inadvisable. First, it must be remembered that African girls were almost invariably married at an age in which they would in any case have to be regarded as minors. Secondly, the problem of the African spinster was, under the indigenous regime, unknown, and has indeed not seriously arisen. Thirdly, the granting to married women of legal independence in such matters as property rights is a comparatively recent development in Western Europe; and it represents the kind of reform which, however strongly it may be favoured in principle, demands a realistic approach, taking full account of the social and economic background. While such customs as levirate are manifestly open to abuse, and even apart from the possibility of abuse are unacceptable to a European mind, they seem to form an integral part of the traditional system of 'social security': from which it follows that their disappearance would necessitate some alternative provision for 'unattached women. It is no doubt, only in relation to possible alternatives that value judgements can profitably be made on African marriage customs. Where no such alternative presented itself, there would be comparatively little tendency toward revolt: and much that now seems objectionable, not only to the foreign observer but also to many Africans, was probably in the past, within the closed circle of the traditional environment, a matter of in questioning acceptance. It is probably that even at the present day the actual 'victims' of customs which shock the outside world are often oblivious of their own grievances...There are, of course some practices, tolerated (if not approved) by custom, which call for unequivocal condemnation and suppression, nevertheless, the majority of cases in which African traditional practice offends European principles, and sentiments seem, on examination, to involve issues which from a secular point of view at any rate - are neither so plain nor so simple as might at first sight appear'.

[79] See G. Wilson, supra note 28 at 118.

[80] This custom is common among the Nandi and Gusii ethnic groups of Kenya although it has been argued that it is a custom that is repugnant to justice and morality because the younger woman in the marriage usually has

This union was temporary, during which the older woman would choose an unmarried man to 'take' her wife. As soon as the younger woman became pregnant, the man would be dispensed with and once the young wife gave birth to the child, she would be paid her dues by her 'wife' who could choose not to have any further obligations to the biological mother and vice versa or they would raise the child together as a married couple. The child would however be considered as belonging to the woman 'husband' and would owe allegiance to her family or clan.

### *(v) Discussion*

The above practices were the various cultural responses of traditional Kenyan communities trying to come to terms with the problem of infertility. During the latter part of this century, developing nations such as Kenya have been the focus of international concern and attention due to their high fertility rates.[81] As stated elsewhere, since the 1950s when the population alarm was raised, population 'control' has become a huge issue for developing countries.[82] The ultimate goal of family planning in poor countries has been to lower the fertility rates and this has been done with significant degrees of success in many African countries.[83]

In Kenya, high fertility rates have been encouraged by the low cost of raising children,

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no right to choose which man shall have sexual relations with her. See the case of Maria Gisese w/o Angoi v Marcella Nyomenda [High Court of Kenya, May 24, 1982] Civil Appeal No.1 of 1981.

[81] World Health Organization, Kenya: Country Health Profile (Nairobi: WHO Country Office, 1995)

[82] B. Ahlberg, supra note 2 at 191.

[83] In Kenya, fertility levels dropped from 6.7 children per woman in 1984-88 to 5.4 in 1990-2. At the same time,

especially where schools and other basic amenities are unavailable. The high fertility rates have also been largely encouraged by tradition, which dictates, as seen in this section, that the more the children one has, the better, in terms of continuity of lineage.[84]

The huge emphasis on reduction of birth rate as the road to prosperity has led to the problem of infertility in African countries being left largely un-addressed. Not enough scientific studies have been initiated to determine the extent of the problem. As manifested in the above-described practices, the problem did exist and still exists in modern Kenya. In a recent international conference on Better Health for Women and Children Through Family Planning held on the 5th to 9th October1987, in Nairobi, Kenya[85], the issue was brought up and it was stated that the prevalence of secondary infertility is proportionately higher in Africa, with twice as many cases as in any other region.[86] Secondary infertility is often the outcome of complications, or infection following delivery or abortion. In a study carried out in a part of Africa, over half the women between the ages of 25 and 40 suffered from gonorrhea.[87] If left untreated, this disease is a common cause of female infertility.[88]

In some areas in Africa, primary infertility may be as high as 5-15% and occasionally even up

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family planning use almost doubled from 17% in 1984 to 33% in 1993. Supra note 2.

[84] See A. Molnos, Cultural Source Materials for Population Planning in East Africa: Beliefs and Practices (Nairobi: East African Publishing House, 1973).

[85] Population Council, Better Health for Women and Children Through Family Planning (New York: Population Council, 1987).

[86] Id.

[87] Id.

[88] Id at 36.

to 40%.[89] The examination of the problem of infertility in contemporary Africa is therefore very legitimate and pertinent. It is also important to study the methods currently used to treat overcome infertility in Kenya and establish the legality and ethics involved in the carrying out of these procedures. Part of the next section will investigate the various new reproductive procedures currently available in Kenya, in order to identify the players and the issues involved in the carrying out of these technologies.

Before examining the procedures, it is important to examine the existing legal regime in Kenya in order to set the stage for a discussion of the various specific provisions that are relevant to the consequences of modern reproductive procedures currently being carried out in Kenya.

[89] Id.

# Chapter Two

## *(i) A Dualism of Laws*

Basic to an understanding of present day Africa is the phenomenon of cultural and legal pluralism. This means that in most parts of Africa peoples of different ethnic, cultural and religious groups live within one and the same political unit, but are governed under different systems of law.[90] This form of legal pluralism arose as a result of colonial rule in Africa.[91]

Prior to the establishment of British rule in Kenya, each ethnic community followed its own body of unwritten customary law.[92] Such bodies of law had considerable similarities and differences both in the content of the laws and the manner in which such laws were administrated. For example, there were semi-formal courts presided over by chiefs existing in the chiefdom states and there were also less institutionalized gatherings of elders performing similar functions in other communities.[93] Because there are over forty different ethnic groups in

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[90] See generally, A.N. Allott, 'The Unity of African Law' [1960] Essays in African Law 55-71.

[91] Plural legal systems are common in countries of sub-Saharan Africa, that were colonized by Britain, and France. In commonwealth countries, they exist because British law was received or imposed on these states, while at the same time the colonial authority granted limited recognition to existing indigenous systems of law and religious laws. See B. Rwezaura, 'Tanzania: Building a New Family Out of a Plural Legal System' (1995) 33 U. Louisville J. Fam. L. 523 at 524.

[92] W. Ochieng , supra note 9 at 6

[93] For example, among the Gikuyu of Kenya, a council of elders comprised of men headed Government and this group formed the highest tier in the hierarchy of power in the clan. This council performed a multiplicity of purposes, the most significant being resolving disputes and making decisions pertaining to the political and social welfare of the community. See J. Kenyatta, supra note 37 at 20-21. See also L.A. Fallers, 'Customary Law in the New African States' in Baade and Everett eds., African Law, New Law for New Nations (Dobbs Ferry N.Y.: Oceana Publications, 1963).

Kenya, each with its own distinct language and governed by its own customary rules[94], these administrative institutions differed slightly, if only in form.[95] It was against this backdrop that the British imposed a foreign system of law, essentially that of England.[96]

Kenya's statute law can be traced back to 1897 with the East Africa Order-in-Council which applied certain Indian and British Acts to the East Africa Protectorate, as it was then called, and provided for the future application of other Indian Acts and subject thereto, applied the common and statute law of England in force at the commencement of that Order.[97] This however did not replace the already existing traditional legal systems and structures and the two systems carried on side by side, interacting upon one another to some extent but each operating within its own sphere of jurisdiction and hierarchy of courts.

The colonial period in Kenya[98] was as a result, characterized by the separateness in the application of customary law in the sense that the British administration, while giving

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[94] Customary rules or law, the primary source of African law is based on popular customs and traditions handed down through generations. Such laws were preserved by oral tradition and unwritten by nature of development in mostly agrarian societies. See J. Barton, L.V. Gibbs, & Merryman, Law in Radically Different Cultures (Minnesota: West Publishing Company, 1983), 43. Compared to Western systems introduced during colonization, customary law is less formal, less technical and procedurally more lax, all consistent with its oral heritage. Judges are usually elders, chieftains or appointed arbitrators and because the relationship between such judges and potential litigants is often close, anonymity of courts as seen in the West is unusual. Id at 43

[95] The major ethnic and linguistic groups in Kenya are the Kikuyu, Luo, Luhya, Kamba and Kalenjin. The Luo system of administration was in contrast with the Gikuyu system in the that the Luo Council was based on a system of delegated authority that stemmed from the family unit in which the men were revered as the heads and, therefore, were the natural representatives of the family at the clan, village and tribal level. Ndisi, supra note 20 at 62-3.

[96] Kenya became a British Protectorate in 1895 and a British colony in 1920.

[97] Republic of Kenya: Report of the Commission on the Law of Marriage and Divorce (Nairobi: Government Printer 1967) 9.

recognition to customary law, interfered little with its content and application. As seen above, this separateness or isolation was mainly the result of the dual system of courts under which one set of courts, the High court and Magistrates courts, dealt with the written legislation while the other set, the African or native or local courts, primarily administered customary law and had jurisdiction over Africans or natives.[99]

In 1902 however, another Order-in-Council was passed which provided that:

'...In all cases civil and criminal, in which Africans are parties, every court shall be guided by native law and custom, so far as it is applicable and is not repugnant to justice or morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay...'[100]

The above provision did not empower the High Court or magistrates to administer or apply customary law, but they were merely 'guided' by it. Because most of the judges in these courts were British, this guidance was largely ignored and there was an almost complete isolation of customary law and this became a dominant characteristic of the colonial era.[101] The non-African courts continued to apply English and English-based law while African courts applied

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[98] Kenya attained its independence from British rule on the 12th of December 1963.

[99] As would be expected, the majority of people for whom indigenous law was applicable were African, while Europeans and people of other cultures preferred Western law. See A.N. Allott, Judicial and Legal Systems in Africa (London: Butterworths, 1970) 132.

[100] Kenya Order-in-Council article 20 (emphasis added). This provision is now a part of the Judicature Act, s.3 (2). Laws of Kenya.

[101] See Commonwealth Law Series, East Africa Law Today (London: British Institute of International and Comparative Law, 1966) 75.

customary law. Advocates were not allowed to appear before African courts during the colonial era, with the result that few customary law cases were ever heard by the High Court.[102] Government appointed administrative officers who in many occasions were not village elders and were not experts in the rules of all the different prevailing customs resolved such cases. It must be noted that the introduction of a system of courts within the customary legal regime was a problem in itself largely due to the fact that the idea of an organized system of courts was alien to Kenyans and further, it was not possible to establish a uniform set of customary rules applicable to all the different ethnic groups.[103]

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[102] This is evident in a cursory glance of East African Law Reports where only a handful of cases reached the High Court. There was generally lack of interest by the colonial powers in issues pertaining to customary law and to a large extent, customary law remained unwritten and treated as a matter of fact rather than law in the courts. See East Africa Law Today, Id at 75-77. The cases that did reach the High Court were on matters such as pregnancy compensation and breach of promise to marry where the father of an unmarried girl would sue the man who made his daughter pregnant and refused to marry her, for compensation (See the case of Eliud Mamati v Milia Makaya d/o Daruna [High Court of Kenya at Kisumu, December 5, 1977] Civil Appeal No. 47 of 1976. Other customary law issues that were decided by the High Court were divorce, return of dowry and custody of children. See the cases of Marcella Okutoyi v Frederick Nyongesa DMCC at Bungoma, May 22, 1978, Civil Case No. 17 of 1978 and Grace Otieno v Richard Bwala HCCC No. 6 of 1973. Under customary law, grounds for divorce include refusal of intercourse, witchcraft, habitual theft, desertion, cruelty, failure to maintain by a husband, frequent adultery by a wife and these grounds have to proved before a customary law court much in the same way as a common law court for example, witnesses testify before the court. Procedure is however overlooked there is minimal paperwork as much of the case is heard orally.

[103] According to Professor William Twining in William Twining: 'The Place of Customary Law in the National Legal Systems of East Africa,' in Commonwealth Series, East Africa Law Today (London: British Institute of International and Comparative Law 1963) 76

'...With the introduction of local courts system set up and supervised by the colonial rulers there were radical departures from indigenous patterns. To a large extent, efforts were made to use existing institutions, but it was easier to do this with peoples who had developed governmental institutions than with people who had minimal government, just as it was easier to control and influence the settled agriculturists than the wandering pastoralists. To everybody the local courts system presented at least some unfamiliar features and to some people, the whole idea was totally and incomprehensibly alien. Judicial bodies with defined jurisdiction and fixed personnel were superimposed on less clearly defined institutions and often the geographical area of jurisdiction cut across tribal and even ethnic boundaries. The personnel of the courts were by no means always elders according to native law and custom and in a number of places government appointed chiefs owing greater allegiance to government that to tribe exercised judicial powers. Moreover, the functions that those bodies were required to perform being built on. Most significant of all, perhaps was the creation of a ladder of appeals and revisions with expatriates stationed at the top of the ladder and the provisions, in some instances, enabling the same expatriates to participate in proceedings at all levels. it was this general overlordship of the local courts by European administrators that provided the most important channel for the infusion of alien ideas into the administration of justice at the lower levels and at the same time it acted as a unifying influence. Local court holders came to know what was expected of them and some of them may sometimes have imitated what they had seen when acting as witnesses or assessors in the superior courts...'

The result of this dual system of law is that Kenyan Africans now have the option of governing their legal relationships by either customary laws that are not repugnant to morality and justice or Western based law.[104] For the vast majority of the inhabitants of Kenya however, it is customary law and not statutory or common law that governs their domestic relations and personal matters.[105] By their very nature, issues surrounding reproductive technologies fall within the realm of family law.[106] As seen, many Kenyans still look to customary law to govern

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[104] Upon attaining independence, many African countries dispensed with customary law because the regimes felt that such law was a colonial relic. For example, in Ethiopia, the legal system was changed dramatically by virtually abolishing customary law because it was felt that customary law was not stable, not jurisprudential and differed too greatly from place to place. See R. David, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' (1962) Tul. L. Rev 187 at 188-9.

[105] This is clearly illustrated in obligations in marriage, death and burial. In the landmark case of Virginia Edith Wambui Otieno v Joash Ochieng Ougo and Omolo Siranga (otherwise known as the SM Otieno case) Court of Appeal at Nairobi [Nyarangi, Platt and Gachuhi, LL.A0 13th February 1987] Civil Appeal No. 31 of 1987, the importance of custom and the legal status of one's clan and ethnic community even in modern Kenya became evident.

Briefly the facts of the case were that Mr. S.M Otieno, a prominent law practitioner in Nairobi died intestate on or about the 20th day of December 1986. A disagreement erupted between the parties in the case as to who had the legal right to bury the body of the deceased and where the body should be buried. The plaintiff in this matter was the deceased wife who incidentally was of a different ethnic group than her deceased husband who was came from the Umira Kager clan. She asserted that she wished to bury the body of her deceased husband either in Upper Matasia where she and the deceased owned a farm, in Kajiado district where she originally came from, or in Langata which is a public cemetery in the outskirts of Nairobi. The defendants who belonged to the deceased's clan contended that they were entitled to claim the body of the deceased and cause it to be buried at Nyalgunga Sub-location, Central Alego, Siaya District. The lower court held that the first defendant and the plaintiff both had the right under Luo custom to bury the deceased and decide where the burial was to take place. The court therefore handed the deceased's body to the first defendant and plaintiff jointly or to any one of them for burial at Nyamila Village, Nyalgunga sub-location, Siaya District. The Plaintiff appealed. During the appeal the court stated as follows

'...it matters not that the deceased was sophisticated, urbanized, and had developed a different lifestyle. It seems to us quite unsustainable on the grounds...that a different formal education, and urban life-style can affect adherence to one's personal law...Otieno was born and bred a Luo and as such under Luo customary law his wife on marriage became a part and parcel of her husband's household as well as a member of her husband's clan. Their children are also Luo as well as members of their deceased's father's clan...On the death of a married Luo man the customs are that the customs take charge of his burial as far as taking into account the wishes of the deceased and his family. Under Luo custom, the wife has no right to bury her husband and she does not become the head of the family upon the death of her husband. As with other African communities a man cannot change his tribal origin. There are the burial rites, some of which are obligatory and some are not...'

[106] These issues include custody of children, determination of parentage and succession.

their family or domestic relationships and it is therefore necessary to examine customary law alongside statutory or written law in any discussion involving family matters, such as reproductive technologies.

### *(ii) Conflict of Laws*

The dual system of law which Kenya, like most other African countries of the commonwealth, has inherited from the colonial period inevitably presents problems of conflict. These problems primarily arise due to the fact that Kenyans rarely confine their actions within one system of law and they in effect draw from the two systems whenever it suits them best.[107] The position is perhaps untidy from a legal point of view as there are no clearly formulated rules for guidance on matters of conflict but the dual system has in practice, worked in respect of certain legal relationships. However, with two systems of law both governing the majority of inhabitants of the country questions of jurisdiction often arise.

Statutory law enacted in Kenya prevails over both customary law and the common law received from England. But in a customary and common law conflict, it is not clear which takes precedence. In the Ugandan case of The Kabaka's Government v Musa N.S.W Kitonto[108], this question arose and the court stated that common law applies in Uganda 'only in so far as the circumstances permit and subject to such qualifications as local circumstances

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[107] B. Rwezaura, supra note 91at 524.

[108] Civil Appeal No.14 of 1965.

render necessary'.[109]

In the famous SM Otieno Case,[110] the issue was visited by a Kenyan court and the court explained that the main difference between African customary law and the common law was that the former was and still is a set of individual rules adhered to by each tribe, whereas common law is a synthesis of judicial general principles, with the exception of a small number of specific customs that have not yet been integrated.[111] Once customs have been overtaken by judicial decisions, which have 'harmonized' them, the customs, as such, cease to have effect.[112] Generally speaking, the court was of the view that the personal law of Kenyans is their customary law in the first instance.[113] Common law may thus be resorted to where the primary source or law of first instance is silent or considered repugnant to justice and/or morality.[114]

On issues pertaining to marriage and succession, the conflict between laws is very evident and the position created by the duality of laws is far from satisfactory. For example, if a Kenyan African wishes to contract a monogamous marriage under statutory law, he marries under the Marriage Act[115] or the African Christian Marriage Act.[116] If on the other hand, he wishes to

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[109] Id.

[110] S.M. Otieno Case, supra note 56.

[111] Id.

[112] Id.

[113] Id.

[114] See E. Cotran Casebook on Kenya Customary Law (Nairobi: Professional Books Limited, 1987) at 340.

[115] Chapter 150 of the Laws of Kenya, ss. 35(1) and 37 state as follows:

35. (1) No marriage in Kenya shall be valid which, if celebrated in England, would be null and void on the ground of kindred or affinity, or where either of the parties thereto at the time of the celebration of such marriage

contract a second marriage, he can do so equally well by carrying out the customary requirements for the such marriage (such as the payment of bridal price) even if he got married to his first wife under the African Christian Marriage Act.[117] The result would be that contrary to the couple's expectations, the second marriage would be considered void under statutory law and the resulting children would also be illegitimate. If such man died without leaving a will, the courts had to determine whether his way of life was such that he considered himself a member of his customary community.[118] If so, customary law would apply and if not, statutory law would be applicable.

Although the territorial law in Kenya recognizes the validity of different types of marriages,[119] this recognition does not necessarily have the same legal effect when specific rules of law are applied. For example, under the Evidence Act[120] a wife by a polygamous marriage is not

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is married by native law or custom to any person other than the person with whom such marriage is had.

37. Any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage any native law or custom, but save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or any manner apply to marriages so contracted

[116] s. 5, Chapter 151 of the Laws of Kenya.

[117] The case of Bishan Singh v R [Uganda High Court Criminal Appeal No 13 of 1923: unreported] the court stated that professing Christians are unable to contract a valid marriage by customary law since the Marriage of Africans Act provides for the marriage of African Christians. This judgement has, however been bitterly attacked by administrative and legal officers as 'being hopelessly and utterly wrong' and in practice has no effect on the recognition which the courts give to such marriages. See H.F. Morris, Uganda: The Development of its Laws and Constitution (London: Stevens & Sons, 1966) 395.

[118] According to the Judicature Act, s 3: 'Customary law shall be applicable to, and courts shall exercise Jurisdiction in accordance therewith, in matters of a civil nature relating to any matter of status, or succession to, a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted...except in cases where it is apparent, from the nature of any relevant act or transaction, manner of life or business, that there is or was to be regulated otherwise than by customary law.'

[119] See chapter three for a discussion of the different legally recognized marriages.

[120] Chapter 80 of the Laws of Kenya.

recognized as a legal wife and may be called upon as a witness at her husband's trial. On the other hand, she may be regarded in the same way as a wife by a monogamous marriage if her husband alleges that he was provoked to kill the adulterer, by finding her in the act of adultery.[121]

The problem is further compounded by the fact that many Kenyan Africans combine statutory marriages with customary law marriages and adhere to the rules of their respective cultures.[122] The choice of a statute marriage is in many cases taken, not because the parties believe in the virtues of monogamy as such, but because of the social prestige attached to a church wedding. This latter form of marriage is looked upon as a superior form of marriage by the general public and one which is indeed, socially obligatory upon men and women of high social status. It is hardly surprising that a very large proportion of those men who marry in church under the two Acts subsequently marry additional wives by native custom. In doing so, they of course commit a criminal offence under the Marriage Act[123], but prosecutions are rarely made against such offenders, the majority of whom are quite unaware that they are committing an offence.[124] This

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[121] See Morris, supra note 63 at 396.

[122] For more details of typical 'Christian–Customary' law marriage in Kenya, see J. S. Mbiti, African Religions & Philosophy (New York: Frederick A Praeger, 1969) 133-146.

[123] Marriage Act , supra note 115.

[124] See the case of Lucy Nyokabi Muigai v Arthur Ochwada [District Magistrate's Court at Nairobi, January 11, 1969] Divorce Case No. 8 of 1968 where it was stated that any person married under the Marriage Act or whose marriage is declared by the Act or whose marriage is declared by the Act to be valid, cannot confess a valid marriage under any native laws or custom while the prior marriage subsists. See also the case of Re Ogola's Estate [High Court of Kenya at Nairobi (Simpson, J), February 6, 1978] Kenya L.R. 18 where the court held that an African in Kenya is not obliged to marry under the Marriage Act or the African Christian Marriage and Divorce Act, but if he chooses to do so, he is choosing the Christian way of life which recognizes one wife only. Upon his death, his widow and children are removed from the ambit of tribal customs affecting cohabitation and guardianship. (This position was overturned by the SM Otieno case (Civil Appeal No. 31 of 1987)

conflict also presents itself when parties have to decide which legal regime should govern certain issues stemming from marriage such as divorce and maintenance.[125]

In reality, the typical Kenyan marriage today is one governed by both statutory and customary law.[126] It is however only the rights and obligations under customary law which are likely to concern the parties. To illustrate this point clearly, let us examine the legal position of a wife in such a marriage, that is, where a statutory marriage has been followed by the completion of the marriage procedure under customary law. Legally, the marriage is monogamous, but in many respects, this does not, in fact, give the wife a position fundamentally different from that of a woman married under customary law alone.[127] For example, if her husband has children by other women, then customary law will determine the legal status of such children.[128] Her own

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[125] This is conflict was illustrated in the case of Ayoob v Ayoob. Civil Appeal No. 34 of 1967 [1968] E.A. 72. This case involves statutory law and Mohammedan law which is the customary law governing certain sects within the Muslim community. The facts were that the appellant,(husband) a Sunni Muslim and the respondent(wife), a Shiite Muslim, were married in accordance with the Marriage Act on the 10th of August 1956. A marriage under this Act is monogamous. Subsequently they went through a ceremony of this marriage according to Mohammedan law, the respondent by then having adopted the doctrines of her husband's sect. On February 2 1967, the appellant purported to divorce the respondent by pronouncing talak. A Mohammedan marriage can be lawfully terminated in such way. The appellant then, by petition to the High Court, sought a declaration that his marriage to the respondent was lawfully dissolved. The learned judge held that a marriage under the Marriage Act was not a Mohammedan marriage and that it could only be dissolved during the joint lifetime of the spouses by a valid judgment of divorce pronounced under the Matrimonial Causes Act (Chapter 152 of the Laws of Kenya). He accordingly dismissed the petition and the appellant appealed against such dismissal. The Court of Appeal in this case affirmed the lower court decision stating that because the parties had been married under the Marriage Act, the second ceremony had no legal effect and could not convert what was not a Mohammedan marriage into one. Thus while a person could in some respects change his personal law by changing his religion, he could not necessarily do so regarding his existing obligations.

[126] Due to the social and economic transformation, including the influence of Christianity, as well as the growth of urban centers, a number of Africans are partially incorporated into the Western system. Hence, although they remain largely traditional in outlook, they engage in transactions governed by Western Law. See B. Rwezaura, supra note 91 at 524.

[127] Rwezaura, supra note 91 at 524-5.

[128] Id.

children, therefore, will not necessarily enjoy the consequences of the status of legitimacy under the common law which the Marriage Act[129] might have been expected to grant them. Furthermore, the wife is not in a strong position to enforce her rights to maintenance.[130] She may have rights under customary law, but she would have to go through the lengthy process of petition for divorce or for legal separation to obtain an order for the payment of alimony.[131]

It would be interesting to see what the courts would decide if the wife, relying on statutory law, applied for the custody of her children where customary law denied this to her.[132] Whereas the principle of the child's best welfare[133] is of paramount importance and ought to be applied in any court proceedings involving the custody of children, in reality this might nevertheless result in the application of rules of customary law, due to the traditional kinship network surrounding the marriage and children of the marriage regardless of statute.[134]

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[129] Chapter 150 of the Laws of Kenya.

[130] Rwezaura, supra note 91 at 525.

[131] This would also be quite problematic because the powers of the court are limited by the archaic provisions of the current law, as was observed in the case of Barrett v Barrett [1961] E.A. 503.

[132] For example, among the Luo of Kenya, all children born during the existence of marriage belong to the husband even if other men father them. This was stated in the case of Odhiambo Okeno v Otewa Owich [High Court of Kenya at Kisii, November 25, 1977] Civil Appeal No. 2 of 1977.

[133] This principle was affirmed in the East African Case of Halima Rashidi v Amon Peter [High Court Civil Appeal No. 34 of 1993] (22/3/93) per Maina J.

[134] See the cases of Re G.M (An infant) [1957] EA 714 and Re Zainab A. Nathoo (An infant) [1959] EA 917. In the case of Fazalan Bibi v Tehran Bibi (1921) 8 EAPLR 200, the Court of Appeal for Eastern Africa upheld a decision of Guthrie Smith J in the Uganda High Court, holding that the jurisdiction of the court to make orders for the custody of children or their property, as court of equity, was exercisable according to English law and not according to Islamic law in the case of Muslims; but the judge might follow special customs of the community concerned although he would not 'be bound by one which would be so inhuman as to deprive a mother of her custody of an infant child'

Further, upon her husband's death, all the legal consequences of her statutory marriage appear to cease, since statutory laws on succession may have no bearing on his 'family'[135] which subscribes to custom and to whom customary law grants rights and duties in succession matters.[136] Thus, not only will she be entitled to nothing from her husband's estate, except that which customary law allows her, but her 'legitimate children' will be in no different position from their father's 'illegitimate' children by wives of customary law marriages which statute has declared to be void and indeed criminal.[137]

Customary law has received its greatest critique as being a major promoter of the subjugation of women in society. The role of women in traditional Kenya is limited and subordinate. Men still have control over the means and distribution of wealth.[138] Division of labor, social events and initiation rites are divided along age and gender lines in traditional societies.[139] A woman's exercise of authority is usually confined to her children regarding matters of a domestic nature and over the other wives if she was the eldest wife in the homestead.[140]

Certain traditional practices such as polygyny, sororate unions and levirate unions keep African women in cultural subordination and put them in such a low bargaining position that they have

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[135] The term family in this context refers to the extended family as described in chapter one of this study.

[136] B. Rwezaura, supra note 91 at 531-532.

[137] Id.

[138] J. Kenyatta, supra note 37 at 20-21.

[139] M. Mathangani, supra note 78 at 293.

[140] Id.

little, if any control over decisions that affect their bodily integrity.[141] Traditional cultures thus greatly impede a woman's ability to exercise her reproductive rights and indeed result in the infraction a woman's right to reproduce, which right new reproductive technologies seek to assert.

Another critique of customary law is that it is seen to be unprogressive in many respects. Because customs are dynamic, customary law must not be static, but should be ready to change to suit the needs of the society. Customary law however is often deemed as unyielding in its espousing principles. The concept of equity for example, does not exist in traditional law.[142]

Some African states view customary law with hostility. Since colonizers applied customary law on a racial basis, many Africans consider its use to be tainted by discrimination and antithetical to the goals of African nationalism.[143] Many nationalists see customary law as representative of the old, unprogressive order, while both capitalist and socialist western law have been seen as representing the forces of modernity, especially in the civil and economic arenas.[144] Others however recognize the return to customary law as a triumph over cultural imperialism and will

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[141] Adjetey, supra note 55 at 1352-3.

[142] Allot, supra note 99 at 144.

[143] L. Berat, 'The Future of Customary Law in Namibia: A Call for an Integration Model' (1991) 15 Hastings Int'l & Comp. L. Rev. 1 at 6.

[144] Id.

not adopt European law indiscriminately.[145]

Customary law is however still a major legal force in Africa with the majority of the population adhering to certain customary rules.[146] It is unrealistic to think that people will suddenly abandon their traditions because of an edict from a remote central government. Attempts to remove customary law in this manner, and thereby undermine the power of the traditional authorities that uphold it, may have the opposite effects from that intended. Namely they may cause great resentment on the part of the population whose law is challenged and instead of fostering national unity, invigorate separatist claims.[147] Further, due to low literacy levels in African countries, written codes hold little attraction to the majority of the population who are better served by oral laws based on traditions upon which they are brought up.[148]

The above clearly shows some of the problems arising from the duality of law, especially in terms of jurisdiction in the realm of family law. British statutory law, which was imposed on traditional Kenyan society, has a major flaw in that it was not supplemented by the prevailing customs.[149] Whereas various steps have been taken towards the integration of these systems,[150]

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[145] R. David, and J. Brierly, Major Legal Systems in the World Today (London: Oxford Clarendon Press, 1985) 569-70.

[146] Mbiti, supra note 24 at 3-5

[147] L. Berat, supra note 143 at 8.

[148] Id.

[149] It bears mention that in recent years, governments around the world have shown considerable interest in customary or indigenous law. This interest affects the development of both national and international policies. In the international sphere, the use of customary law is clearly protected as a matter of international human rights law which guarantees indigenous people the right to enjoy their culture, including the use of their own law. See UNESCO, 'The Problem of Indigenous Populations' (1971) E.S.C.Res. 1589, UNESCO, 50th Sess., Supp. (1), at

it is unlikely that Kenya will be content to merely evolve a legal system based only upon the fusion of elements of traditional laws and introduced English law. The challenge to legislators, judges and advocates in modern African states remains the promotion of a unified and effective legal system which, while serving the economic and social needs of the people, will retain those vital elements of both customary and received laws which are now part of Kenya's rich legal heritage.

In the backdrop of these laws and traditions, a fresh challenge is imposing itself upon Kenya's already complex legal system namely, reproductive technologies. These highly technical procedures bring with them new definitions in family law that defy the very assumptions upon which both customary and statutory laws on parentage, family and succession are based. [151]

The next section discovers what these technologies are and very briefly describes which such practices have taken root in Kenya and what they involve in term of technology.

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16, U.N. Doc. E/5044.

[150] As the British empire began to be dismantled in the late 1950s, a conference on the future of Africa was held in Britain from December 1959 to January 1960 and chaired by Lord Denning, who concluded the meeting by stating:

'Uniformity of law would undoubtedly make a valuable contribution to the administration of the law, and is therefore desirable in principle...between communities and areas there are many variations—especially in the native law and custom which could and should be eliminated, thereby creating a greater degree of uniformity than at present exists.

Quoted in A. Allott A, 'What is to be done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950' (1984) 28 J.AFR.L 56 at 64.

[151] Reproductive technologies are still seen as miracle procedures and have featured in futuristic literature. Some of the more prominent references have depicted these technologies as science fiction. See M., The Handmaid's Tale (Toronto: ECW Press, 1996) where enforced surrogacy is institutionalized as a form of slavery in post nuclear holocaust society. Also see A. Huxley, Brave New World (New York: Harper & Row, 1932) at 1-14 where the author refers to hatcheries used for human reproduction in a totalitarian world.

### *(iii) The Arrival of Reproductive Technologies in Kenya*

The poverty that characterizes African countries is often expressed through health indicators such as life expectancy, mortality levels including infant mortality, disease and health conditions, availability of basic amenities like housing, water supplies and trained manpower.[152] African countries have been struggling to provide basic and affordable health care and whereas government initiatives have brought certain levels of success, much more needs to be done in terms of health management, infrastructure and administrative structures.

Upon the attaining of independence in 1963, the Kenyan government committed itself to providing 'free' health services as part of its development strategy.[153] Through the government's efforts, there has been rapid growth in the number of public health facilities, beds and medical personnel. For example, from independence to 1993, the crude death rate dropped from 20 per 1000 to 9 per 1000, the infant mortality rate dropped from 120 per 1000 live births to 60 per 1000 live births, and life expectancy increased from 40 to 60 years.[154]

The effectiveness of the healthcare system in Kenya is hampered by its curative, rather than

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[152] See World Bank, World Development Report 1993:Investing in Health (New York: World Bank, 1994).

[153] Government of Kenya, Sessional Paper No. 10 on African Socialism and its Applications to Planning in Kenya. (Nairobi: Government Printer, 1965).

[154] Government of Kenya, Strategic Action Plan for Financing Health Care in Kenya (Nairobi: Government Printer 1993). It must be noted that the life expectancy rate has dropped significantly due to the AIDS/HIV scourge. See World Health Organization, 'Kenya: Country Health Profile' (Nairobi: WHO Kenya Country Office, 1995) and Ministry of Health AIDS in Kenya: Background, Projections and Impact Interventions. (Nairobi: National AIDS Control Program, Ministry of Health and the National Council for Population and Development, 1997).

preventative approach,[155] as well as by the poor distribution of services. Urban areas take the largest share of the medical resources, both in terms of infrastructure and human resources.[156] In spite of the increase in the number of medical facilities and medical personnel, the effectiveness of the medical care in meeting health needs is also limited by the nature of its orientation and structure.[157]

Apart from state funded hospitals,[158] Kenya has private hospitals and clinics run by individuals, non-governmental organizations and charitable organizations.[159] Alongside these facilities are private physicians and specialists who offer a wide range of modern, state of the art health services.[160] It must be noted that apart from the subsidized health services offered by state run institutions, individuals seeking treatment must arrange for payment of medical services.[161] In

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[155] The Ministry of Health allocates 65% of the health budget for curative care and 21% for rural and preventive health services, despite the fact that the major causes of morbidity and mortality are diseases like malaria, respiratory tract disease, skin disease, intestinal worms and diarrhea, all of which could be avoided through enhanced primary and preventive health care promotion. See P.S.W. Owino, The Impact of Structural Adjustment on the Production and Availability of Pharmaceutical Products in Kenya. D.Phil. Thesis, University of Sussex, UK, 1993.

[156] Id.

[157] B. Ahlberg, supra note 2 at 8.

[158] These range from national hospitals like Kenyatta National Hospital, which also serves as the University of Nairobi's teaching hospital, to provincial and district hospital whose staff are paid by the Government. See Africa Health, Autonomy for Hospitals: the Kenya Experiment March 1997.

[159] See P. Berman et al, Kenya: Non-Governmental Health Care Provision. (Boston: Harvard University, AMREF, 1995).

[160] An example is the recently opened diagnostics center set up in Nairobi by a prominent Nairobi radiologist, which center offers very modern, state of the art radiology and x-ray services and serves East and Central Africa.

[161] Government health institutions are also funded by a social insurance fund called the 'National Hospital Insurance Fund' and this scheme provides cover for the contributors (who are usually salaried people) and their families for inpatient care in approved hospitals. Unfortunately due to its nature, it only covers approximately 25% of the population. See J.D. Quick and S.N. Musau, Impact of cost sharing in Kenya (Nairobi: Management for Health Sciences and the Ministry of Health, 1993).

fact most private hospitals in Kenya demand a deposit up front before admitting patients.[162] This obviously limits those who can afford excellent health care and other health services. Many Kenyans now opt for private health insurance and a number of companies' offer a variety of health insurance packages for their employees.[163] Large segments of the population, mostly those in rural areas still rely on traditional healers and herbalists who prescribe cheaper homeopathic treatments.[164]

Whereas sexually related illnesses carry considerable social stigma in Kenyan society, today, more and more people are seeking medical help for reproductive health problems such as infertility.[165] A reason for this may be found in the erosion of some traditional practices that used to act as 'back-up' systems for infertile couples; in addition to this, more and more families are resorting to the western 'nuclear' model of family and naturally want children of

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[162] There has been a rising number of cases in Kenya where private hospitals are being sued for refusing to release patients due to non-payment of bills.

[163] Examples of such companies in Kenya are Medivac and African Air Rescue. It must be mentioned that private health insurance companies are being frustrated due to problems such as inefficiency and corruption in health care institutions, unregulated charges in fees by medical professionals and private hospitals and the lack of an enabling environment in which to conduct business. See generally Quick and Musau, supra note 161.

[164] Traditional herbalists are registered to 'practice' with the Ministry of Home Affairs and National Heritage because the use of herbs to treat is seen as an important tradition or custom that ought to be preserved and protected by the government.

[165] There are now 15 qualified urologists in Kenya and according to Professor Sobbie Mulindi, a psychologist attached to the Kenyatta National Hospital (the largest referral hospital in Kenya), 40% of the patients that seek psychological help at the Patients Support Center at the hospital have sexually related problems, with impotence being the major complaint amongst the men. See Sunday Standard Newspaper, 15th November 1998 at 'Features Page X'. Dr Nathan Thagana, a consulting obstetrician/gynecologist says that 15-20% of married couples of child-bearing age in Kenya are infertile and that 70% of women who visit gynecologists in Nairobi suffer from infertility. That means, for every 100 women at a gynecological clinic at Kenyatta Hospital, 70 have infertility problems! See Daily Nation Newspaper, November 4th 1998 at Features Page III.

their own.[166]

In Kenya today, some doctors in private practice are carrying out hi-tech procedures such as in vitro fertilization and they are also facilitating surrogacy arrangements through this procedure.[167] The most prominent of these is the Assisted Conception & In Vitro Fertilization Clinic situated in Mombasa, Kenya where both these procedures are offered to the general public.[168] According to the doctor in charge, approximately six in vitro procedures are carried out in the clinic each month with a success rate of 10%.[169] Further, the cost of each attempt is approximately 4,200 US dollars and this obviously goes to limit the number of people who have access to this facility.[170] The clinic however also offers cheaper reproductive services such as artificial insemination.[171]

It is not impossible to imagine that in the next ten years, there will be more clinics serving the reproductive needs of infertile Kenyans who are able to afford these services. The real danger

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[166] This nuclear model has been largely promoted by the spread of Christian principles, which preach that a man can only have one wife. This belief is embodied in the Christian Marriage Act which outlaws having more than one legally recognized form of marriage. Further due to the rising cost of living on towns and rural areas, men cannot afford taking care of more than one household. For a discussion of other social challenges facing the extended family in East Africa, see P.L. Kilbride and J.C. Kilbride, Changing Family Life in East Africa (University Park, London: Pennsylvania State University Press, 1990) 87-95.

[167] A prominent example of a clinic offering such services is the Assisted Conception & In Vitro Fertilization Clinic located in Mombasa, Kenya's second largest city. Excerpts of an interview I had with the doctor running this clinic can be found at the end of this thesis at Appendix A)

[168] See Appendix A

[169] Id.

[170] Id.

[171] Id.

however lies in the fact that there are no laws, regulations or ethical codes to guide doctors as they offer these services to the unsuspecting public. Given some of the complex legal and ethical implications associated with reproductive technologies, there is just cause to address this new challenge, with a view to creating a legal and/or regulatory framework within which clinics offering reproductive procedures can continue to operate.

In view of the above, one of the purposes of this paper is to raise an understanding of the potential legal, ethical and cultural conflicts that may arise due to the unmonitored practice of in vitro fertilization and its application to the social arrangement known as surrogate motherhood in Kenya.[172]

It is important to undertake a technical examination of these two procedures in order to identify the players and the issues that arise due the practice of these procedures. This investigation will set the stage for our later discussion on the potential conflicts of these technologies with existing provisions in the two main legal regimes in Kenya.

### *(iv) In Vitro Fertilization* [173]

#### A. Introduction

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[172] In contrast with in vitro fertilization, surrogate motherhood is more accurately conceptualized s a social arrangement rather than as a medical procedure. It describes a relationship rather than a technology, however it emerges from and involves reproductive technologies and plays an important role in collaborative reproduction. See A. King, 'Solomon Revisited: Assigning Parenthood In The Context Of Collaborative Reproduction. (1995) 5 UCLA Women's L.J. 329.

[173] Hereinafter referred to as 'IVF'

Human fertility depends upon the successful fertilization of a human egg in the outer end of the fallopian tube, its subsequent transport from the tube into the uterus after about three days and it's implantation there.[174]

IVF was developed in Great Britain where the technology assisted the birth of Louise Brown on July 25, 1978.[175] The original reason for attempting IVF, which term literally means 'in the glass' referring to the dish in which the gametes are combined, was to by-pass damaged or blocked tubes where their function was inadequate to produce a normal pregnancy.[176] Implantation and pregnancy resulting from this technique is identical with that of a pregnancy conceived by sexual intercourse.[177]

Other fertility problems that in vitro fertilization seeks to solve are unexplained infertility, endometriosis, low sperm count or reduced sperm activity, infertility caused by immunological factors such as the presence of antisperm antibodies in the semen or cervical mucous.[178] IVF is also offered as a last option in-patients with poor or absent cervical mucous.[179] IVF may also

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[174] J. Hollinger, 'From Coitus to Commerce: Legal and Social Consequences of Non-coital Reproduction' (1985) 18 U. Mich. J. L 870.

[175] A. Burfoot, 'The Normalization of New Reproductive Technology' in The New Reproductive Technologies 58, 62 (Maureen McNeils et al.eds., 1990)

[176] J. Lasker & S. Borg, In Search of Parenthood: Coping with Infertility and High-Tech Conception (Boston: Beacon Press, 1987) 2. See also Walters and Singer, Test-Tube Babies: A Guide to Moral Questions, Present Techniques and Future Possibilities (London: Oxford University Press, 1982) 3. See also D. Steinberg, 'The Depersonalization of Women Through the Administration of 'In Vitro Fertilization', in McNeil et al. Eds., The New Reproductive Technologies (New York: MacMillan, 1990) 74-77.

[177] Lasker & Borg, Id at 2.

[178] For a variety of reasons, infertility has been found to be twice as likely to affect women of African descent than Caucasian women. Id at 2.

[179] Id.

be used as a diagnostic test to determine whether abnormalities of the egg or sperm cells or their transport are causing infertility.[180]

In Kenya, infertility has been associated with harmful traditional practices such as the application of potentially dangerous roots, leaves and juices in the reproductive tract in order to treat sexually transmitted diseases.[181] Female genital mutilation is another practice that can result in severe urinary tract infection, pelvic inflammatory disease and other complications, which may cause infertility.[182] In many Kenyan communities, girls are initiated into marriage and sex at an early age, some as early as nine years old, and when these girls become pregnant, the risk of miscarriage or still birth is very high and complications arising during pregnancy and birth can cause infertility.[183] Abortion is another contributor to the escalating reproductive infections that lead to infertility.[184] IVF can be thus be used in cases where some of the

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[180] Walters and Singer, supra note 200 at 3.

[181] Daily Nation, Horizon 3, Thursday, November 26, 1998.

[182] Female Genital Mutilation is the name given to several traditional practices that involve the cutting and removal of the female sexual organs. For a full discussion of social, medical, legal and ethical effects of female circumcision, see Note, 'What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision' (1993) 106 Harv. L. Rev. 1944. Also see H. Lightfoot-Klein, Prisoners of Ritual: An Odyssey into Female Genital Circumcision in Africa (New York: Harrington Press, Inc. 1989) 27, M. Kouba, 'Female Circumcision in Africa: An Overview' (1985) 28 African Studies Review, E. Dorendo, Female Genital Mutilation: Proposals for Change (London: Manchester Free Press, 1992).

[183] A common complication arising from such childbirth is vesicovaginal fistula which is a disability resulting from a ruptured uterus accompanied by tearing of the intestine or bladder. As estimated 20,000 women in predominantly Muslim Northern Nigeria suffer from vesicovaginal fistula. See N. Wimborne, 'Customs and taboos Hinder Progress of Women in Modern Africa' Reuters News Service, Dec. 11, 1989, J. Brooke, 'A Nigerian Shame: The Agony of the Child Bride' NY Times, July 17, 1987, at A4.

[184] Because abortion is illegal in Kenya, the practice has been driven underground. Sections 158,159, 227, 228, 240 of the Penal Code of Kenya as well as section 38 of the Pharmacy and Poisons Act recognize three felonies and one related misdemeanor on abortion. They are the act of abortion itself, supplying the instruments of abortion, killing an unborn child and concealing birth. Abortion in Kenya is thus carried out in unsafe, unhygienic conditions and many girls die from complications arising due to botched abortion procedures. See Daily Nation, 'Causes of Infertility in Men and Women in Kenya' Thursday, November 26th 1998.

mentioned practices cause infertility.

IVF is also used in the treatment of male infertility where the number, movement or structure of the sperm is considered to be abnormal. Through a procedure known as Intracytoplasmic Sperm Injection (ICSI), using a single pipette, a doctor injects a single sperm from a man's ejaculate into an egg.[185] This method is used for low or 'lethargic' sperm where as a result, normal fertilization cannot occur.[186]

Reproductive efficiency declines with increasing age, and the successful outcome of IVF is thought to follow this trend too and due to this fact, some clinics exclude women over forty five years of age or who have attained menopause.[187] At the assisted conception clinic in Mombasa, Kenya, in vitro procedures are not carried out on women who have already attained menopause.[188]

At the Mombasa clinic, couples who wish to undergo the procedure are informed about various aspects of IVF before entry into the program.[189] (This is usually done by the doctor and

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[185] J. Tesarik, 'Oocyte Activation after Intracystoplamic Injection of Mature and Immature Sperm Cells' (1998) Human Reprod. April 13 Suppl. (1): 117-27. Also see A. Obruca, 'Fertilization and Pregnancies following intracytoplasmic injection of testicular spermatozoa' (1995) J. Assist Reprod Genet 9 627. See also R. Bernabeu, 'Successful Pregnancy after Spermatid Injection' (1998) Human Reprod 13 (7) 1898.

[186] Bernabeu, Id at 1899.

[187] 'Too Old to Have a Baby?' (1993) 6 Lancet 345. See also J. Menken, and U. Larsen, 'Fertility Rates and Aging' in L. Mastroianni, Jr. and C.A. Paulsen, eds., Aging, Reproduction, and the Climacteric (New York: Plenum Publishing Corp., 1986).

[188] See Appendix A.

[189] It must be noted that in Kenya, the practice of medicine is highly paternalistic and doctor is expected to do

nurse) The couple are thereafter given time to think over the issues involved and they are encouraged to ask appropriate questions regarding the procedure.[190] According to Dr. Dave of the clinic, the couples are told what the odds of conception in the first attempt are, that is, there is only a 10% chance that implantation will actually occur in each IVF cycle.[191]

Thereafter, the couple signs a consent form which usually contains a statement that the risks of the procedures have been explained, that success is not guaranteed, that the possibility of fetal malformation exists and that fetal diagnostic tests which aim to detect fetal malformation are available.[192] At the clinic in Mombasa, this consent form acts more like a waiver of liability on the part of the doctor and it is structured to provide legal protection for the doctor and clinic against both tortious and criminal negligence, rather than to ensure that the patient has understood the risks associated with the procedure.[193]

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use his own judgement for the benefit of the patient. Another factor that affects decision-making is the limited knowledge about reproductive technologies available to the general public. Due to this fact, it is likely that many patients will not be able to fully appreciate the complexities of the procedure and thus will not be able to give an informed choice. See C. Mullei, An Examination of the Legal Issues in Kenya's Health Care Delivery (Nairobi: Mimeo, IPAR, 1998).

[190] See Appendix A.

[191] Id. There are various reports that record various rates of success, however according to the American Society for Reproductive Medicine, a 1993 study carried out in the US and Canada found that out of 31,900 IVF cycles, only 6,321 resulted in pregnancies with only 5,103 deliveries. Out of 4, 992 GIFT (Gamete Intrafallopian Transfer) cycles, there were (1),472 pregnancies with (1),472 deliveries and out of (1),792 ZIFT (Zygote Intrafallopian Transfers) there were only 466 pregnancies with 380 deliveries. See American Society for Reproductive Medicine/Society for Assisted Reproductive Technology Registry, 64 Fertility and Sterility No. (1), 13 (July, 1995)

[192] See Appendix A.

[193] Id. It bears mention that the consent forms and information sheets are in a bundle made up of about 150 pages of highly technical language which a layman would find very difficult to read, let alone comprehend.

### B. The Procedure:

Due to the very nature of the procedure, experience, skill and strict quality control of all laboratories procedures are necessary factors for successful IVF.[194] The timing of the egg collection is critical and aims to obtain a mature egg from one of the ovaries immediately before its expulsion from the ovary.[195] Stimulation of egg production using fertility drugs increases the chances of obtaining one or more eggs and this increases the possibility of having more than one embryo for implanting.[196] The chances of achieving pregnancy are increased when more than one embryo is placed in the uterus at the same time.[197]

In very basic terms, once the viable eggs have been retrieved through laparascopy,[198] they are cultured for five to six hours in the laboratory to allow them to complete their maturation process before they are inseminated.[199] Meanwhile fresh or thawed semen, which has been washed and centrifuged twice with culture medium resulting in a final concentration of 100,000

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[194] At the Mombasa clinic, Dr. Dave who is an obstetrician by training has underwent a six-month training on in vitro technology at Koln Germany and thereafter has spent time at an assisted conception clinic in Britain. His clinic has been carrying out in vitro procedures for the last five years. See Appendix A.

[195] Steinberg, supra note 176 at 79. See also A.O. Trounson, J. F. Leeton, C. Wood, J. Webb and J. Wood, 'Pregnancies in Humans by Fertilization In Vitro and Embryo Transfer in the Controlled Ovulatory Cycle' (1982) 212 Science 681-2.

[196] Id. The dangers of super-ovulation are the resulting over-stimulation and enlargement of the woman's ovaries with potential rupture, cysts and cancer. See M. Seibel, 'A New Era in Reproductive Technology: In Vitro Fertilization, Gamete Intrafallopian transfer and Donated Gametes and Embryos (1988) 318 New Eng J. Med. 829.

[197] Id.

[198] In this procedure, eggs are collected under ultrasound control by inserting a needle through the vaginal and into the ovary where follicles are present. The contents of the follicles are extracted and examined under the microscope to see if an egg is present.

[199] Steinberg, supra note 176 at 25.

to 800,000 motile sperm, is put in the tube ready for insemination.[200] The sperm and the egg are then fertilized in the petri-dish containing culture medium in a process that is detectable microscopically twelve to twenty-three hours after insemination.[201]

After this process, embryo transfer takes place. It is important to note that pregnancies have developed following the transfer of one-cell to sixteen-cell human embryos.[202] Older embryos are not used because they do not develop beyond sixteen cells in the fallopian tube under normal circumstances.[203]

The normal embryo is then transferred into the uterine cavity by a narrow transparent teflon catheter passed through the neck of the uterus.[204] This route has the advantage of being simple, safe, and painless and requiring no anesthesia.[205]At the Assisted Conception Clinic in Mombasa, the husband is encouraged to be present with his wife during this procedure.[206] The embryo is placed in a minute volume of culture fluid in the catheter, which is then passed

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[200] G. Killian, Biotechnological Advances in Bioethics and the Beginning of Life 81 (J. Roman, Miller & B.H. Burbaker eds., 1990) See also Walters and Singer, Test-Tube Babies: A Guide to Moral Questions, Present Techniques and Future Possibilities (London: Oxford University Press, 1982) 3.

[201] Id at 7.

[202] P. McShane, In Vitro Fertilization, GIFT and Related Technologies – Hope in a Test Tube, in (Elaine H. Baruch et al. eds) Embryos, Ethics and Women's Rights: Exploring the New Reproductive Technologies (New York: Haworth Press, 1988) 31-7.

[203] Id.

[204] K. D. Alpern, The Ethics of Reproductive Technology (New York: Oxford University Press, 1992) 25

[205] Id.

[206] See Appendix A.

slowly and gently through the neck of the uterus to the top of the uterine cavity[207]. The fluid containing the embryo is injected into the uterus from the catheter by a syringe after which the catheter is slowly withdrawn.[208] The wife then usually rests in hospital for twenty-four hours and afterwards at home she limits her activities for several days, but no special precautions are taken or restrictions advised.[209]

In summary therefore, IVF is a relatively new technique that can be used for diagnostic as well as therapeutic purposes. The risks in IVF vary from nausea to death.[210] In Kenya, aside from that fact that there is a quoted 10% success rate for IVF procedures,[211] issues like quality control, psychological preparation of the parties involved and the handling of stored gametes and embryos have not undergone significant scrutiny. There is also no interference from established medical authorities, such as the Kenya Medical Association and Kenya Medical Practitioner and Dentists Board.

### *(v) Surrogacy*

#### A. Introduction

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[207] Killian supra note 200 at 81.

[208] Id.

[209] Id.

[210] I. Martin, 'Ethics and Uncertainty: In Vitro Fertilization and Risks to Women's Health' (1998) 9 Risk: Health Safety & Environment 201 at 212.

[211] See Appendix A for available statistics on the success rate of IVF in Kenya.

The word 'surrogate' means no more than 'substitute'. [212] As seen in chapter one, surrogacy is not an entirely new concept in Kenya. The traditional practices of sororate unions or woman-to-woman marriages reinforced the belief that third parties could bear a child or children for infertile couples and that this inclusion of another person into the sexual equation was not repugnant to traditional African culture.[213] Surrogate motherhood as seen above, was also embraced during Biblical times and was illustrated in the story of Abraham, Sarah and Hagar.[214]

With the advent of technologies such as Artificial Insemination and IVF, the traditional African concept of surrogacy has been brought to a more sophisticated and complex level and it is thus important to examine how this technology differs from traditional surrogacy.

A surrogate mother is a substitute mother; she is a person who for financial,[215] compassionate

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[212] Surrogacy is an issue where the basic terms one employs may affect one's analysis. Some people object to the word 'surrogate' as implying the person is not the 'real mother'. The phrase 'birth mother' however is also conclusive, suggesting the person is the real mother. See Johnson v Calvert 19 Cal. 2d 494 (1993) at 371.

[213] For a further discussion of sororate unions and woman-woman marriages, see A. R. Radcliffe-Brown, and D. Forde, African Systems of Kinship and Marriage (London: Oxford University Press, 1967) 43-54.

[214] Genesis 16: 1-16 states 'And still Abram's wife Sarai bore him no children. But she had an Egyptian maid-servant, called Agar; and now she said to her husband, The Lord, as thou seest, denies me motherhood; Betake thyself to this maid of mine, in the hope that I may at least have children through her means.'

[215] A surrogacy contract is an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband; she is to conceive a child, carry the child to term and after the birth, assign her parental rights to the birth father and his wife. The intent of the contract is that the child's birth mother will thereafter be forever separated from her child. The wife is to adopt the child, and she and the birth father are to be regarded as the child's parents for all purposes. Such contracts have been held illegal and invalid where a woman agrees to act as a surrogate for payment of money with a binding agreement to assign her parental rights to her child. See Matter of Baby M, 109 NJ 396, 537 A.2d 1227, 1234-35.

or other reasons, agrees to bear a child for someone else.[216] A couple could conceivably enlist the services of a surrogate mother because the female partner is unable or unwilling either to become pregnant or to carry a pregnancy to term.[217] Surrogacy can also be used to circumvent the transmission of a genetic disease and the procedure also helps to facilitate the creation of non-traditional families such as single-parent families or gay couples.[218]

### B. The Procedure

Surrogacy in it's broadest definition is the practice where a woman carries a child, conceived from an ovum, sperm or zygote provided by a donor, with the intention of surrendering the child after birth.[219] Technically, surrogacy can occur in different ways. First, the surrogate mother may receive the egg and sperm from the couple set to take over the child after its birth. In this instance, there is no genetic tie between the surrogate and the child she is carrying. This is referred to as 'gestational surrogacy' because the surrogate is used for gestation purposes only.[220]

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[216] See J.R. Guichon, 'Surrogate Motherhood: Legal and Ethical Analysis' in Research Volumes of the Royal Commission on New Reproductive Technologies 1993. See supra note 10.

[217] Klein, 'Taking the Egg from One and the Uterus from Another' (1984) Development of Seeds of Change.

[218] The pool of prospective parents now includes many persons traditionally excluded from parenthood, such as gays and lesbians. Gay men and lesbians through adoption, artificial insemination, and surrogate motherhood, are creating their own families in large numbers; in fact, at least one commentator refers to the 1980s as the 'baby boom among lesbians'. See Griffin J, 'The Gay Baby Boom: Homosexual Couples Challenge Tradition as They Create New Families' Chi.Trib., Sept 2, 1992.

[219] M. M. Boumil, Law, Ethics And Reproductive Choice (Littleton, Colorado: Fred B Rothman & Co, 1994) 45.

[220] Krim T, 'Beyond Baby M: International Perspectives On Gestational Surrogacy And The Demise of The Unitary Biological Mother' (1996) 5 Annals Health L. 193. The landmark case that provides legal interpretation of gestational surrogacy contracts is Johnson v Calvert. 851 p.2d 776 (Cal.1993) Briefly that facts of that case sere that Chrispina Calvert was unable to gestate a child. She and her husband Mark entered into an agreement with Anna Johnson, a co-worker of Chrispina, according to which Johnson was to gestate the child for the Calverts in exchange for ten thousand dollars. After the implantation, the relationship between the parties deteriorated and Johnson demanded immediate payment of the balance that was to become due to her. She

Secondly, the surrogate mother may receive sperm from the husband who is intending to be the father, but supplies the egg herself.[221] This option may occur in cases where it is impossible to retrieve ova or healthy ova from the husband's wife or even in cases where the wife has a genetic disease and does not want to risk passing it down to her offspring.[222] In this procedure, the surrogate is artificially inseminated with sperm from the husband. This inevitably avoids the 'adultery aspect' while still satisfying the desires of the couple who wish to have a child who is at least partially, biologically their own.[223]

Another possible arrangement would be where the surrogate mother receives the egg and sperm from anonymous donors and the resultant child has no genetic ties with the couple or the surrogate. This is also a form of gestational surrogacy.[224] It must be noted that that in all the above 'social arrangements' where the surrogate only lends her 'womb' and has no genetic ties with the baby she is carrying, the technologies of in vitro fertilization and embryo transfer must

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threatened to refuse to surrender the child if her conditions were not met. The Calverts sued, seeking a declaration that they were the legal parents of the child. The trial court held that the Calverts were the child's genetic, biological and natural parents, that Johnson had not parental rights to the child and that the surrogacy contract was legal and enforceable. The Court of Appeal affirmed this decision and equated the genetic contribution with natural and therefore legal motherhood. The Supreme Court of California affirmed this decision and reasoned that the intentions of the parties at the time they entered into the contract determined which woman was the legal mother. Id at 780-800. This decision has received wide criticism as it contributes little to the resolution of whether the genetic or the gestational mother should be considered the legal mother. See George Annas, 'Using Genes to Define Motherhood' supra note infra note 255. See also Canada: Royal Commission on New Reproductive Technologies, Proceed With Care: Final Report of The Royal Commission on New Reproductive Technologies (Ottawa: Ministry of Government Services, Canada, 1993) 662.

[221] Krim, supra note 220 at 193-4.

[222] Id.

[223] Id.

[224] Id.

be applied to effect pregnancy.

Therefore as discussed above, surrogate motherhood requires the active co-operation of third parties into the otherwise intimate processes of pregnancy and birth. In Western nations, surrogacy has also introduced a completely new element into family relations; that of buying and selling services which have traditionally been in the domain of private individuals.[225] In Kenya, because the procedures of artificial insemination and in vitro fertilization are already being carried out, it is not impossible to imagine that the practice of surrogacy will gain popularity as a method of treatment especially where the wife is wholly infertile. The question that must then be posed, is whether Kenyan lawmakers and the general public should shy away from embracing surrogacy as a legally acceptable option for treating infertility in addition to the existing traditional practices. Further, one must also question whether this practice is so alien to the African experience so that it cannot in any way be considered analogous to the present devices that deal with infertility.

A noted author states that 'a society can safely leave important and potentially dangerous interventions without legal regulations only if there is a sufficient degree of moral consensus so

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[225] Many countries have enacted criminal laws that prohibit commercial surrogacy. In the United Kingdom, see the Surrogacy Arrangements Act (U.K.)1985. In the US, since 1987, nearly half of the states have enacted legislation addressing surrogate parenting agreements. (Krim, supra note 220 at 210).Other countries that specifically ban commercial surrogate agreements are Germany, Sweden, France and Australia. Id. According to a report made to the Royal Commission on New Reproductive Technologies of Canada by the Canadian Research Institute for the Advancement of Women,

'Commercial surrogacy contracts constitute a form of baby-selling; if the mother were merely providing the service of gestation, the mother and father would have equal rights to the child once the gestation was over and the child was born. The fact that many contracts stipulate that a reduced fee be paid to the mother if the product [her child] is 'defective' makes it clear that gestation is merely a means to the end of a healthy baby.'

that individuals can be expected to act morally without regulation'.[226] He further adds that legal regulation may be necessary in areas of human conduct where liberty is often abused and important moral values are in jeopardy.[227] Given the conflicting interests, cultures and motives of the various people involved, the challenge in Kenya would be to try and achieve some sort of moral consensus. Rights to privacy provide the key to the problem of developing a moral consensus with regard to the use of human reproductive technology[228] however the resulting quasi-bureaucratic nature of the business and the legal, social and ethical issues provoked by these technologies in Kenya would in my view, require appropriate legislation and/or regulations to impose quality control standards and to ascertain accurate record keeping and clarification of liability.[229]

The next section of this study will examine the possible consequences or conflicts arising in the practice of in vitro fertilization and surrogacy in specific provisions of Kenya's statutory law as well as traditional culture as embodied in customary law.

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See Proceed With Care, Vol. 1, supra note 11 at 672.

[226] C. Weldon, Moral Consensus and the Law, in The Concept of Moral Consensus Kurt Bayertz ed., (Boston: Kluwer Academic Publishers, 1994) 109-110.

[227] Id.

[228] H. Tristram Engelhardt Jr., Consensus: How Much Can We Hope For? in The Concept of Moral Consensus, supra note 226 at 19.

[229] Attempting to achieve a moral consensus on issues of reproductive technologies, which are personal by nature, is a difficult task. However there several methods that may be employed in trying to do so; such as education in a culturally sensitive manner and dissemination of objective information to the public and thereafter asking them to respond by voicing their various opinions on the issues. Once this is done, the data collected could be put in a suitable form such as recommendations or a bill for parliament's reaction.

## Chapter Three

### *(i) Is there room for reproductive technologies in Kenya's legal order*

As discussed in chapter two, there are two main legal regimes in Kenya, namely, *statutory law* (the majority of which have their roots in English law) and *customary law*. Both of these legal orders are equally recognized in Kenyan courts. Other legal regimes in Kenya are Islamic law and Hindu law, however their application is limited to family law matters such as marriage, divorce and succession.[230]

In order to understand why customary law is applied in formal courts, it must be emphasized that customary law is an integral part of indigenous social life in Kenya. As stated by Lord Atkin of customary law, 'It is the assent of the indigenous communities that gives it is it's validity, for without their recognition of it as an obligatory rule of conduct it would not be properly regarded as a customary law.'[231]

Since law, in a real sense, is a reflection of the way in which people live, and since the African way of life is changing, it is only to be expected that the traditional laws must change too. It is

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[230] Kenya's Constitution stipulates in section 22(1) 'Every person in Kenya enjoys freedom of religion, which includes the right: both in public and private to manifest and propagate his religion or belief in worship, teaching, practice and observance' Marriage and Succession laws in Kenya attempt to echo this provision in the constitution to give legal recognition to Kenyans of different religious persuasion.

[231] Eshugbayi Eleko v Officer Administering the Government of Nigeria & Another [1931] AC 662 at 673.

not the case that customary law in Kenya derives all its dynamism to change wholly from the European presence on the continent, for indigenous communities, far from respecting all the time immemorial customs, are occasionally disposed to make departures, even in fundamental rules, where these are considered to be in the social interest.[232]

Customary law therefore has to be adaptable in one form or another to meet changing socio-economic conditions if it is to continue surviving as an integral part of the social life of Kenyans.[233] It is thus unwritten and as explained in chapter two, differs from one ethnic community to another. Today, customary law is usually invoked in family and civil law matters only.[234]Courts in Kenya have tried to excise from the customary legal order, such rules as they consider to be repugnant to natural justice or equity and good conscience.[235]

For our present discussion, we shall examine both customary law and statutory law instruments that are in conflict either with the consequences or with the very nature of the two reproductive technologies described above.[236] We shall specifically examine laws on matrimony, adoption

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[232] However customary law has been criticized for not being progressive enough especially with regard to the rights of women. See Mathangani, supra note 78 at 288-289.

[233] A. Allott, 'What is to be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa From 1950', (1984) 28 J. Afr. L. 56, 64.

[234] See E. Cotran, Restatement of African Law, Kenya, Volume 1: The Law of Marriage and Divorce (London: Sweet and Maxwell, 1968). Some customary law offences were integrated into the Penal Code of Kenya (Chapter 63 of the Laws of Kenya) such as cattle rustling and adultery. See Hone, 'The Native of Uganda and the Criminal Law', (1938) 6 Uganda Journal 7.

[235] This is in accordance with section 3 of the Judicature Act, which provides that customary law shall be applicable in so far as it is not repugnant to morality and justice.

[236] Other countries in the world such as the United States, Canada, Britain and Australia are also currently grappling with new legal issues that continue to arise as a result of the advancement of reproductive medicine. See generally A. Schiff, 'Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal

and custody of children, inheritance and succession laws in both legal regimes.

### *(ii) Matrimony, Adoption and Custody of Children*

As stated in an earlier section of this chapter, Kenya has four legal regimes that govern family law and these rules are embodied in these five forms of marriage in Kenya namely;

- Christian marriages under the Marriage Act[237] and the African Christian Marriages and Divorce Act[238] The latter Act is applicable to marriages of Kenyan Africans when either or both profess the Christian faith.
- Civil Marriages under the Marriage Act
- Hindu Marriages under the Hindu Marriage and Divorce Act [239]
- Islamic Marriages which are recognized under the Mohammedan Marriage, Divorce and Succession Act, which are potentially polygamous except among the Shia Imami Ismailis.[240]
- African Customary Marriages, which are recognized by customary, law and are potentially polygamous.

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Maternity' (1995) 80 Iowa L. Rev. 265; D. Roberts, 'The Genetic Tie' (1995) 62 U. Chi. L. Rev. 209; A. King, 'Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction' (1995) 5 UCLA Women's L.J. 329; K. Katz, 'Ghost Mothers: Human Egg Donation and the Legacy of the Past' (1994) 57 Alb. L. Rev. 733; J. Dolgin, 'The Family in Transition: From Griswold v Eisenstadt and Beyond' (1994) 82 Geo. L. J. 1519; R. Kandel, 'Which Came First: The Mother of the Egg? A Kinship Solution for Gestational Surrogacy' (1994) 47 Rutgers L. Rev. 165; S. Rae, 'Parental Rights and the Definition of Motherhood in Surrogate Motherhood', (1994) 3 S. Cal. Rev. L. & Women's Stud. 219.

[237] Chapter 150 of the Laws of Kenya.

[238] Chapter 151 of the Laws of Kenya.

[239] Chapter 157 of the Laws of Kenya.

[240] Chapter 151 of the Laws of Kenya.

On the 6th of April 1967, the then President of Kenya, the late Jomo Kenyatta appointed a commission ' to consider the existing laws relating to marriage, divorce and matters relating thereto and to make recommendations for a new law providing a comprehensive and, so afar as may be practicable, uniform law of marriage and divorce applicable to all persons in Kenya...' [241]

While this commission's work culminated into a bill known as the Law of Matrimony Act of 1966, it was never passed.[242] The bill nevertheless remains the only work in Kenya that captures the essential elements of all five forms of marriage in the different regimes and attempts to harmonize or streamline their provisions into one hybrid legal system applicable to all persons in Kenya, regardless of creed or culture.[243] For purposes of this discussion, we will refer to specific provisions of this Bill, which embody many of the current legal provisions in other regimes and we shall also refer to present Kenyan laws and provisions that are applicable to the issues.

### A. Illegitimacy and Legal Parentage:

First and foremost, the Matrimony Bill proposed an Act to declare and amend the law relating to the domicil of origin of persons. Section 3 of this Act states that 'Every person shall acquire

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[241] See the Report of the Commission on the Law and Marriage and Divorce, supra note 97.

[242] Other countries in Africa have also attempted to integrate their family law into one single applicable Act. Examples are Tanzania, Botswana and Namibia, Swaziland and Lesotho. See Berat, supra note 143 at 7-9.

[243] The Family Law Task Force of Kenya, which is currently revising Kenya's family law under the chairmanship of Court of Appeal Judge, Justice Effie Owuor, is using this Bill as a blueprint for reform. It is expected that a similar integrated bill will be introduced to Parliament in 1999. Infra note 312. The 1966 Law of Matrimony Bill thus remains very important with regard to legal reform in the area of family law in Kenya.

at the date of his birth-

(a) if he is born legitimate or deemed to be legitimate, the domicil of his father, or if he is born posthumously, the domicil which his father had at the date of his death;

(b) if he is born illegitimate, the domicil of his mother.[244]

In Kenya a child is considered illegitimate if s/he is born of parents who are not legally married to each other at the time of the birth of the child.[245] The above section will therefore be challenged by the advent of reproductive technologies especially with regard to legal parentage.[246] Due to the process of in vitro fertilization, it is possible for a child to have two fathers, one genetic and the other, social.[247] It is also possible to have three mothers in surrogacy arrangements where apart from the commissioning mother, there is an ovum donor as well as the surrogate whose only role is to provide a receptive womb.[248]

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[244] Supra note 97 at 141.

[245] Guardianship of Infants Act, Chapter 144, Laws of Kenya section (1).

[246] Questions of parenthood in the past have focused on the question, 'who is the father?' Historically there has never been the occasion when the 'natural' mother was not unquestionably also the same woman who bore the child. The times when maternity has been at issue have been rare indeed. Johnson v Calvert, supra note 220 at 371.

[247] See generally J. Hill, 'What Does it Mean to be a Parent? The Claims of Biology as the Basis for Parental Rights' (1991) 66 N.Y.U. L. Rev. 353, 362. See also J.L. Harris, 'Reconsidering the Criteria for Legal Fatherhood' (1996) Utah L. Rev. 461, 461. K. Roosevelt III, 'The Newest Property: Reproductive Technologies And The Concept of Parenthood.' (1998) 39 Santa Clara L. Rev. 79.

[248] Krim T, supra note 220 at 194-5.See the case of Johnson v Calvert supra note 220. See also Gallagher, 'Womb to Let' (1987) Nat'l Rev., 27 at 27; Goodwin, 'Determination of Legal Parentage in Egg Donation, Embryo Transplantation and Gestational Arrangement, (1992) 26 FAM. L.Q. 275. M. Field, Surrogate Motherhood: The Legal And Human Issues 155-69 (1990). E. Brody, Biomedical Technology and Human Rights (US: Dartmouth Publishing Co., 1993) 63-96; J.Vance, 'Womb For Rent' (1994) 21 Hastings Const. L.Q. 827, 831. See G. Annas, ' Pregnant Women as Fetal Containers' (1986) 16 Hastings Center Rep. 14; S. Bhimji, 'Womb for Rent--Ethical Aspects of Surrogate Motherhood' (1987) 137 Canadian Med. Assn. J. 1132; M. Griffin, 'Womb for Rent' (1981) Stud. La. 29; D.H. Smith, 'Wombs for Rent, Selves for Sale?' (1988) 4 J. Contemp. Health L. & Pol'y 23, 24. A bizarre circumstance arose in one such case, In re Marriage of Buzzanca, 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (1998), in which a husband and wife contracted to have a child,

If the domicil of origin is different for all the players in the reproductive arrangement, it is not clear what domicil the unborn child will acquire upon birth. Section 3(b) specifically addresses illegitimate children, within which category, babies born using donor gametes would fall. The section declares that illegitimate children must acquire the domicil of the mother. This however does not solve the immediate problem. As stated, there may be as many as three mothers involved, all of who play a part in the life of the child. Who then is the mother?[249]

Unlike Quebec which has clearly stipulated in its laws which party would be declared 'legal mother' in the above situation, that is, the surrogate,[250] Kenya's statutory law does not have any provisions dealing with definitions of parentage.[251] This is largely due to the assumption that

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Jaycee, through implantation of a genetically unrelated embryo in the womb of a surrogate mother. After Jaycee's birth, the couple separated, and the husband claimed in the dissolution proceeding that he had no paternal duties to Jaycee. The trial court reached an extraordinary conclusion: "Jaycee had no lawful parents," reasoning that neither the gamete donors, the surrogate, nor the divorcing couple had all the incidents of parentage. Id. The Court of Appeal reversed this decision holding that the divorcing couple was Jaycee's parents because Jaycee would never have been born had they not initiated the surrogacy process. See Id. at 1428, 72 Cal. Rptr. at 293.

[249] In the Re: Baby M 537 A. 2d 1227 (N.J. 1988), this was the same question that was raised for the court to determine. In this case, William Stern and Mary Beth Whitehead entered into a surrogacy contract. The contract provided that Mrs. Whitehead was to be artificially inseminated with Mr. Stern's sperm, become pregnant, carry the child to term, bear it, deliver it to Mr. Stern and his wife Elizabeth, and thereafter 'do what was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child'. Mrs. Whitehead subsequently changed her mind and wanted to keep the child. The Stern's brought a suit seeking to enforce the contract, to compel surrender of the child, and to terminate Mrs. Whitehead's parental rights to allow adoption of the child by Mrs. Stern. The Supreme Court of New Jersey refused to enforce the surrogacy contract and held that the contract conflicted with several New Jersey laws prohibiting the use of money in connection with adoption, and a law requiring proof of parental unfitness or abandonment before termination of parental rights. The Court further held that the best interests of the child justified awarding custody to Mr. and Mrs. Stern, but that Mrs. Whitehead was entitled to visitation rights. Id. at 1263. See also R. Rao, 'Assisted Reproductive Technology and the Threat to the Traditional Family' (1996) 47 Hastings L. J. 951 at 960-2.

[250] s.538 of the Civil Code of Quebec.

[251] The reason for this is that common law, from which Kenya derives the majority of its laws presumes that the birth mother is the legal mother. This can also be seen Evidence Act which states: 'The parent and child

biological motherhood cannot belong to more than one person.[252] In absence of such law, the court would be faced with the problem of deciding who the legal mother of the child would be.[253] However, to what extent could the child be said to be the biological product of one woman rather than the other?[254]

The genetic mother would no doubt point out that the child's genetic blueprint is immutably fixed at the time of fertilization.[255] She may argue that any effect that the surrogate mother has on the developing foetus must therefore be considered minimal.[256] In this respect, her argument would be enhanced by the fact that because the foetus has a different blood system from that of the surrogate mother it would not be affected directly by the presence or absence of particular antibodies in the blood system of the surrogate mother.[257]

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relationship between a child and ...the natural mother, may be established by proof of her having given birth to the child' Chapter 80 Laws of Kenya.

[252] Kenyan customary law is more flexible in this regard only in so far as it allows for the legal recognition non-biological mothers.

[253] This was precisely the same problem that the court faced in the US case of Johnson v Calvert, supra note 220. This case clearly illustrated the US Judiciary's struggle to redefine old assumptions about children and parentage. For a discussion, see J. Dolgin ' Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies' (1996) 28 Ariz. St. L.J. 473

[254] Several authors have grappled with this issue. See for example, M. Coleman, 'Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction' (1996) 17 Cardozo L. Rev. 497 (examining whether legal motherhood should be based on the preconception intentions of the two women who contribute a reproduction function, on genetic contributors, or on gestation). See also E. Hessenthaler, 'Gestational Surrogacy: Legal Implications of Reproductive Technology', (1995) 21 N.C. Cent. L.J. 169, 169-70.

[255] Coleman, supra note 254 at 503-505. See also G. Annas, 'Using Genes to Define Motherhood—The California Solution (1996) 326 New Eng. J. Med. 417 at 419. See also Belsito V Clark 644 N.E. 2d 760 (Ohio Ct. C. P. Div. 1994) [where the court applied the genetic test in a gestational surrogacy dispute]

[256] Coleman, Id at 514-5.

[257] Id.

On the other hand, it can be argued that the surrogate mother is certainly more than an incubator or oven.[258] The growing fetus will depend on her for nutrition and the removal of waste products.[259] If the surrogate mother is malnourished, the foetus is likely to suffer adversely. The very existence and health of the foetus is dependent on the surrogate mother.[260]

Therefore, it is quite clear that both the genetic and surrogate mother would be able to point to cogent evidence indicating that each is the child's biological mother.[261] Ipso facto, neither would succeed in establishing that the other was not the biological mother. It must be noted too that the social or commissioning mother might argue that because she would be responsible for the child's care, education and medical care until the child became an adult, she would also

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[258] According to some feminist writers, surrogacy is a form of slavery or prostitution in which the surrogate is exploited through the enticements of money, the social expectation of self-sacrifice or both. See A. Allen, 'Surrogacy, Slavery, and the Ownership of Life' (1990) 13 Harv. J. L. & Pub. Pol'y139, 147-8 (arguing against the proposition that surrogacy is a source of female liberation); G. Corea, 'The Reproductive Brothel' in Man-Made Women 38, 39 (speaking about the brothel model of reproduction introduced by Andrea Dworkin, Right-Wing Woman (New York: Free Press, 1983) 177; S. O'Brien, 'Commercial Conception: A Breeding Ground for Surrogacy' (1986) 65 N.C. Rev. 127, 144, 152 (arguing that not only does commercial surrogacy induce a financially needy woman to become a surrogate, but that the practice of surrogacy is akin to slavery). It must be emphasized however that it is impossible to identify one unified feminist perspective on surrogacy because feminists are as varied in their views as they are in their identities. Other feminists believe that surrogacy is one of the many reproductive choices that women should be free to make. See L.B. Andrews, 'Surrogate Motherhood: The Challenge for Feminists' in Surrogate Motherhood, 167, 168 Larry Gostin ed., (Bloomington: Indiana University Press, 1990) (arguing that reproductive developments add up to the freedom to be a surrogate)

[259] Coleman supra note 254 at 515.

[260] Id.

[261] There are strong arguments on both sides of the debate; many commentators argue that legal motherhood should continue to be determined by gestation and there have been several arguments advanced to support that result, including the bonding between the mother and the child before the child's birth, the effect on the birth mother if forced to relinquish the child and the exploitation of poor women as surrogates. See M. Ashe, 'Law – Language of Maternity: Discourse Holding Nature in Contempt' (1988) 22 New Eng. L. Rev. 521 at 549. See also J.L. Hill 'Exploitation' (1994) 79 Cornell. L. Rev. 631 at 637-644.

be entitled to be regarded as the legitimate mother.[262] The present statutory laws, are clearly inadequate to deal with these possibilities. This is also true in other countries like the United States and Canada.[263]

Under customary law however, the law in force is somewhat different. The domicil of a child may not be dependant on the mother and further the fact that a child is born into lawful wedlock is in most cases immaterial in determining his or her domicil.[264] Under customary law, an 'illegitimate' child can be legitimized by the mere acknowledgement of paternity by the father without the necessity of marriage between the parents.[265] This legitimization would only be necessary for purposes of succession.[266]

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[262] See generally F. S. Schultz, 'Surrogacy Arrangements: Who are the "Parents" of a Child Born Through Artificial Reproductive Techniques?' (1995) 22 Ohio N.U. L. Rev. 273, 274. See also A. Goodwin, 'Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements' (1992) 26 Fam. L.Q. 275, 276.

[263] See the following cases; Johnson v Calvert, supra note 220, Davis v Davis 842, 2d 588 (Tenn. 1992), Jaycee B. v. Superior Ct., 49 Cal. Rptr. 2d 694, 696 (Ct. App. 1996) (involving a child support order served on the intended father by the intended mother in a gestational surrogacy case involving anonymous gamete donors),

[264] See D. Eckrow, The Effect of Marriage on the Status of Children in Ghana in S. Roberts ed., Law and the Family in Africa (Netherlands: Moulton Publishers, 1977) 159-168

[265] See the case of Re Sapara [1911] Ren 605 at 606 (Nigeria) where the presiding Judge, Osborne C.J (as he then was) stated as follows:

'...Again in English law, marriage is necessary to legitimize offspring of two persons, such offspring, if illegitimate, have no right to inheritance; but under native law a child's right of succession to his father's property can be legalized by his mere acknowledgment of paternity, without the necessity of any form of marriage between the parents. Consequently, the legal importance of the marriage ceremony is not nearly so great under native law as it is under the law of England...'

[266] Once a father has legitimized a child, he is legally entitled to inherit his father's property. Legitimization may be done in a variety of ways such as the paying of all maternity expenses, the naming of the child by the natural father, provision by the natural father of all the child's expenses including education. See the case of Phillip v Phillip (1946) 18 N.L.R. 102.Once legitimated, which can be done at any time in the life of the child, the child has the same succession rights in his father's estate as his legitimate children.

In as far as domicil is concerned, a child's residence in customary law depends on the family lineage. If the child is born into a matrilineal society, in the event of a dispute touching on his/her domicil, custom will dictate that he/she belongs to the mothers' clan and must take up her clan's domicil.[267] If on the other hand the child is born into a patrilineal society, he or she will automatically be deemed to belong to the father's clan.[268] Therefore unlike statutory law, where the individual parent's own domicil is relevant in deciding the domicil of the child, in customary law, the child's clan determines the child's legal residence. A child's status within his family is accorded more recognition than his or her status as a child of the marriage[269]

Under statutory law, this provision is important for example on this very question of registration because every child born in Kenya has to be entered into a national register.[270] In the scenario laid out above where there is more than one 'mother,' in the absence of legislative guidance, which woman ought be registered as the birth mother of the child?[271]

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[267] A matrilineal society comprises all person's male and female who are lineally descended from a common female ancestor. See S. Roberts, supra note 264 at 165-7.

[268] A patrilineal society consists of all those persons male and female who are considered to have descended in the direct male line from a common ancestor. See Id.

[269] The notion of illegitimacy is controversial among writers on customary law. There is considerable debate as to whether there is any place in African law for the notion at all. As argued in the text, in certain communities, no child is considered illegitimate since its birth in or out of wedlock is irrelevant to its status in the community or its legal rights and duties. Such matters are determined by the acceptance of a child as a member of a family and as shown, the only question arising is which family it adheres to. In certain communities like the Sukuma, children born in wedlock belong to their father and children born out of wedlock belong to the mother. See H. Cory, Sukuma Law and Custom (London: Oxford University Press, 1953) 89-93.

[270] The Births and Death Registration Act, Chapter 149 of the Laws of Kenya.

[271] In the case of donor sperm, registration of the father on the birth certificate is also a problematic issue and is being experienced in other countries like the United States. In some states in the US, the mere placement of the father's name on the child's birth certificate by others without the father's accompanying signature is insufficient to prove legal acknowledgment. See In re Wildeboer, 406 So. 2d 687, 691 (La. Ct. App. 1981); In re Succession of Brown, 522 So. 2d 1382, 1385 (La. Ct. App. 1988); see also La. Civ. Code Ann. art. 203 (West 1993) (defining legal acknowledgement).See Gilbert A. Holmes, The Tie that Binds: The Constitutional Right of

Whereas lawmakers obviously could not foresee the different definitions of parenthood that come into play as a result of new reproductive technologies, when the provision was passed, now that they are being practiced in Kenya, perhaps this is a provision that needs to be reflected upon by legislators because it defines the very citizenship of the unborn child. If a new bill is to be drafted specifically on reproductive technologies, legal parentage is an area that needs to be addressed.

### B. Artificial Insemination and Consent

Section 115 (2) of the Law of Matrimony Act 1966[272] states as follows;

'...the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree:-

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Children to Maintain Relationships with Parent-Like Individuals, 53 Md. L. Rev. 358, 393 (1994). Holmes suggests a two-part test for identifying parent-like figures where a parent-like individual is:

(1) an individual who has (a) participated in the act or decision to create a family unit that included the child; or (b) executed a written acknowledgment of the child or had his or her name placed on the birth certificate of the child; or (c) executed an irrevocable written provision for the child's future and, (2) who has (a) lived with the child while assuming daily child-rearing responsibilities for a significant period of time; or (b) provided significant, regular support for and attempted to maintain consistent contact with the child when continued cohabitation with the child was prevented by the legal custodian. Id. This is just an example of one possible way of identifying parent-like figures. This article does not suggest an adoption of rigid tests to determine whether certain people should be recognized as part of a child's life. Indeed, the contributions that this article refers to are very diverse both in their nature, as between an anonymous donor and a surrogate mother. For example, they could be recognized through including an annual photograph to regular contact where each satisfies different needs. In the case of Jordan C. v. Mary K, 179 Cal.App.3d 386, 224 Cal. Rptr. 530 (1986), a woman artificially inseminated herself with a known donor's sperm and sought to become a co-parent with a female friend. The donor was listed as the father on the resulting child's birth certificate, and he thus filed an action to be named the legal father. The court granted the donor's request and noted that the donor had been permitted to develop a paternal relationship with the child.

[272] This was a Bill for an Act of Parliament to regulate the law relating to marriage, personal and property rights as between husband and wife, separation and divorce and other matrimonial relief and other matters connected therewith.

(a) adultery committed by the respondent, particularly when more than one act of adultery has been committed or when an adulterous association is continued despite protest...'

The strict judicial interpretation of the above section is hinged on the 'adulterous association' rather than the result of such association, however, for the purposes of this discussion will examine stretch the interpretation of section 115 and examine the legal effects of artificial insemination on marriage hence its resultant effect on legal parentage.

Does artificial insemination of a woman without her husband's knowledge or consent, amount to adultery under Kenyan law?[273] In Kenya, if a woman seeks artificial insemination from donor semen without her husband's consent and as a result thereof gets pregnant, according to the section 8 of the Matrimonial Causes Act, [274] her action would amount to a ground for divorce for the reason of adultery. The reason for this is that according to the present Kenyan statutory law, if a child is born within the course of the marriage, and it is proved that the child does not belong to the male spouse, then this fact becomes an irrefutable ground for adultery in divorce proceedings. The child is also declared illegitimate and does not enjoy the same rights accorded to children born of the parents' genetic materials. Is there any legal recourse for the wife in this

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[273] See the Uniform Parentage Act of California (Cal. Evid.) Code ss 621 (West 1966). In the US, this fact was settled in the Johnson v Calvert decision, supra note 220. Certain states in America have laws that make it clear that where the husband consents to artificial insemination by donor as a treatment option for his wife, he is regarded as the legal father of the child. In such cases, the natural father is excluded from playing any role at all. See the case of Lehr v Robertson 463 US 248 (1983) an the Canadian case of Re British Columbia Birth Registration No. 86-09-038808 (1990). 26 R.F.L. (3d) 203 (B.C.S.C.). It must be noted however that even before amendments were made to the law regarding legal parentage, courts refused to allow such claims. The courts reinterpreted the statutes to incorporate and reflect changes in social norms. This was a good example of the convergence of state law and custom.

[274] Chapter 152 of the Laws of Kenya.

instance because this is not a case of adultery as envisaged by the current law? Does one legally require the consent of one's husband before undergoing artificial insemination or other procedures that involve third parties? At present, statutory law does not give any direction on this issue. If a dispute arose, it is likely that courts would follow the trend in other commonwealth countries and require that the male spouse agrees to the insemination in writing. However, perhaps before doing this, courts ought to look at Kenya's own traditional law and see if any parallels can be drawn and that would be applicable.

Customary law however has within its structures, mechanisms that would be able to absorb such action on the wife's part without the statutory law repercussions especially with regard to the legal parentage of the child. Third party involvement in reproductive arrangements within customary law is not uncommon.[275] These transactions are usually undertaken with the full consent and knowledge of the both parties to the marriage.[276] In order to make an analogy to the issue at hand, the question that would first arise is; what is the effect or consequence of non-disclosure of such third party arrangements by one spouse to the other? Would such action raise ground for divorce under customary law?

Under Luo customary law, all children born during the subsistence of marriage belong to the

[275] See discussion on the various forms of extra-marital unions in customary law, that is levirate and sororates unions in chapter one.

[276] See Chapter Two.

husband even if other men father them.[277] What this implies is that under Luo customary law, the possibility that not all of the children of the marriage will belong to the husband, is envisaged by Luo tradition. Given this possibility and the fact that the father assumes paternal responsibilities for such child, in the context of new reproductive technologies, the introduction of the sperm donor as a third party to the marriage contract, even if done without the consent of the husband may not be looked upon as a ground for divorce as would be the case under statutory law.[278] Under customary law, 'frequent adultery by a wife' as opposed to just adultery was a ground for divorce under customary law.[279]

This fact shows clearly that in certain communities, adultery on the part of wives was in a sense 'almost accepted' and it only became an issue when done frequently and in an open manner.[280]

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[277] This was judicially noted in the case of Odhiambo Okeno v Otewa Owich [High Court of Kenya at Kisii, November 25, 1977] Civil Appeal No. 2 of 1977. Briefly the plaintiff's claim was that he married Sprina, wife in 1967 under customary law. He lived with her until 1967 when she returned to her father pregnant by him. The child was born and that shortly thereafter, a divorce was arranged and part of the dowry returned to him. He stated further that thereafter he committed an offence (manslaughter) and was sentenced to imprisonment for five years. He was released in 1973 and brought his action in 1975 for custody of his son. Meanwhile, the defendant's evidence was to the effect that he married Sprina in 1965 and that at the time, she had no child and that the boy born in 1967 was definitely his. The court of first instance found that because Sprina gave birth to the child a few days after she had left the plaintiff the child was to be placed in the plaintiff's custody as he was the legitimate father. On appeal, the higher court agreed with the lower court finding and stated that according to Luo custom, all children born during the existence of marriage belong to the husband even if other men father them. Upon appeal to the High Court, the court looked at the case from the 'best welfare of the child' angle and returned custody of the child to the appellant and his wife with whom the child had been living with since he was born.

[278] Under present statutory law as seen, the introduction of a third party into the reproductive life of the couple by one party without mutual consent would certainly be seen as a breach of the marriage contract and would then qualify under section 8 (1) (a) of the Matrimonial Causes Act as a ground for divorce.

[279] In many traditional societies, adultery was condoned in certain cases; for example where the husband had to go on long journeys or was terminally ill. See E. Cotran, Casebook on Kenya Customary Law (Nairobi: Professional Books Limited, 1987)121.

[280] See the case of Joseph Makanji v Sebenzia Yisicho d/o Atondola [Resident Magistrate Court's Case at Kakamega] 1969 Divorce Case No. 6 of 1967. In this case the court granted a divorce under customary law due to the respondents continuos adultery and cohabiting with other men.

Non-disclosure of artificial insemination by donor on the part of the wife may thus not necessarily be considered as a ground for divorce under customary law and as long as such child was born within the marriage, then s/he would be regarded as the belonging to the husband.[281] From this discussion, it can be argued that customary law would perhaps be a more flexible legal regime on the issue of consent of the husband, in artificial insemination procedures, because there are structures in place that would be able to be used when dealing with such situations in a traditional law context.

In the United Kingdom, under the provision of the Family Law Reform Act of 1987[282], where a child is born in England and Wales after the commencement of the Act as a result of artificial insemination of a woman, who at the time of the insemination is legally married, and the sperm used to inseminate such woman is from a third party other than her husband, then unless it is proven to the satisfaction of any court by which the matter falls to be determined that the husband did not consent to the insemination, the child in question must be treated in law as the child of the parties to that marriage.[283] Such child is therefore not to be treated as the child of any person other than the parties to that marriage.[284] This provision does not apply to women carrying children as a result of artificial insemination on or after 1st August 1991.[285]

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[281] The father however in certain communities has the right to renounce the child and refuse the legitimize him or her. See Cotran supra note 18 at 121.

[282] s. 27 of the Act.

[283] Id.

[284] Id.

[285] This was due to the commencement of the Human Fertilization and Embryology Act (U.K.) 1990 which made specific provisions on the issue to similar effect.

This is an example of the way British legislators chose to deal with this problem at the time, but the above provision still does not explain the likely consequences of insemination of the wife without her husband's consent. It does however make it clear that within a legally recognized marriage, for the husband to be declared the legal father of a child born by artificial insemination using donated sperm, his consent to the procedure must be unequivocal. Where the consent of the husband is not given, what is the likely legal outcome? In such a scenario and applying the spirit behind the British law, Kenyan courts would most likely refuse assign any legal duties and rights to the husbandr with regard to the child.

In the United States, at least half the states have enacted statutory presumptions in favor of parenting goals of married couples resorting to anonymous donor insemination.[286] These statutes conclusively presume that a man consenting to the insemination of his wife with donor sperm is the legal father of any subsequently born child.[287] Under such statutes, the donor is barred from claiming paternity or asserting any parental rights.[288] Most of these statutes reflect the provisions of section 5 of the Uniform Parentage Act (U.P.A.) which exempts the donor from any legal relationship to the child of the married woman.[289]

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[286] J. Hollinger, 'From Coitus for Commerce: Legal and Social Consequences of Non-Coital Reproduction' (1985) 18 U. Mich. L. J. 865 at 897.

[287] Id.

[288] Id.

[289] Uniform Parentage Act s 5, 9A U.L.A. 592 (1979). People v Sorensen 437 P. 2d 495 (Cal. 1968). In this case, the court ruled that the term 'father' is not limited to a biologic or natural father; the determinative factor I whether the legal relationship of father and child exists. Id. The court further reasoned that a person who consents to the production of a child couldn't create a temporary relation to be assumed and disclaimed at will,

If it is decided that statutory law should be the governing law on new reproductive technologies in Kenya, a similar provision might be necessary, albeit suited to the Kenyan context, in order to clearly define the status of artificial insemination within a legally recognized marriage.

### C. Custody and Maintenance of Children

The problem of determining who the legal parents of children born from reproductive technologies are becomes more evident in issues of custody and maintenance of children. Section 134 of the Law of Matrimony Act 1966[290] states as follows:

134(1) The court may, at any time, by order, place an infant in the custody of his or her father or his or her mother or where there are exceptional circumstances making it undesirable that the infant be entrusted to either parent, of any other relative of the infant or of any association the objects of which include child welfare.

(2) In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant and subject to this, the court shall have regard -

a) to the wishes of the parents of the infant; and

b) to the wishes of the infant where he or she is of an age to express an independent opinion; and

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but the arrangement had to be of such character as to impose an obligation of supporting those for whose existence he was responsible. Id.

[290] Supra note 97.

c) to the customs of the community to which the parties belong.[291]

The above provision and the current statutory law endorses the 'Best Welfare of the Child' criteria in custodial conflicts.[292] This criterion is highly problematic in the context of new reproductive technologies. As mentioned above, a child born of reproductive technologies could have a number of 'parents'.[293] In the case of the mother, the issue of whether it matters if she is the genetic mother or the wife of the biological father and has the same intent to raise the child has not been resolved in Kenya.[294] Further, if a genetic father has a claim to the child, so does a genetic mother, but what about the gestational mother who isn't a genetic mother?[295] Kenyan courts are likely in such a dilemma to look to British or common wealth law, however,

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[291] Id.

[292] Section 17 of the Guardianship of Infants Act (Chapter 144 of the Laws of Kenya) reads as follows:

'Where in any proceeding before any court, the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.' see the case of Wambwa v Okumu [High Court of Kenya at Eldoret 16th April and 19th December 1969] and Civil Appeal No. 3 of 1968 [1970] E.A. 578

[293] Competing claims to parenthood can arise in any situation where a third, fourth or fifth party collaborates with a biologically or socially infertile couple seeking a child to rear. Thus the number of people available to fill the traditional role of parent has increased for children born though reproductive techniques. See generally, A. King, 'Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction, supra note 172.

[294] In the United States, three tests have emerged for determining legal motherhood in the context of gestational surrogacy: tests based on intent, on genetic contribution and on gestation. See M. Coleman, Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction, supra note 254.

[295] See the famous US case of Johnson v Calvert 19 Cal. 2d 494 (1993) where a gestational surrogate (a woman of color) sued for a declaration that she, as the woman who carried and delivered the baby, was the legal mother of the child. The court held that the genetic parents were the legal parents, but it did not do so simply on the basis of genetics. It did so on the basis that the genetic parents were the 'intended' parents and the entire transaction was guided by the intention of all the parties. For a discussion of this case, see George Annas, 'Crazy Making: Embryos and Gestational Mothers' (1991) 21 Hastings Center Rep. 35.

this may not be appropriate and again customary law may be invoked. (It must be emphasized from the outset that this is not to say that customary law is a superior source of law, however, it ought to be used to make useful analogies especially in the field of reproductive technologies vis-à-vis family law issues. For the majority of Kenyans, customary law governs their domestic relations and they may not necessarily be averse to the application of some traditional principles in these modern dilemmas).

Even where the gestational mother is also the genetic mother, it is not simply the contribution of her egg that creates her interest, because if that were the case, she could waive her rights to the child before birth, just as sperm donors presumably do. But if it is admitted that there is something special about gestation,[296] are we saying that there is a difference between men and women that the law cannot ignore?[297] That there are ways in which men and women are not and can never be equal?[298]

According to present Kenyan laws, there is a rebuttable presumption that it is for the good of

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[296] The common law assumes that the birth mother is the legal mother of the child and unless that rule is modified by statute, the presumption would resolve disputes between the genetic mother and gestational mother. The common law rule reflects the fact that the genetic contributions are traditionally linked and that birth thus demonstrates both aspects of legal motherhood. Moreover it reflects the significant contribution of gestation to a child's existence. See M. Ashe supra note 261 at 549 and M. Coleman, supra note 254 at 524.

[297] It has been however argued that the emphasis on genetic contribution also may reflect a problematic, male paradigm of parenthood—one, which devalues the contribution of gestation. This paradigm ignores that fact that women alone contribute another essential function special to reproduction; gestation. See K. Politt, 'Checkbook Maternity: When is a Mother not a Mother? The Nation, Dec. 31, 1990 at 825, 843.

[298] See generally L. Gostin, Surrogate Motherhood: Politics and Privacy (Bloomington and Indianapolis: Indiana University Press 1990)

an infant below the age of seven years to be with his or her mother.[299] The assumption made is that women form a bond with the child during gestation and childbirth, that a father cannot possibly form and that the mother is thus best placed to take care of the infant unless evidence can be adduced to rebut this presumption.[300] In the case of surrogate motherhood however, the surrogate mother may have no intentions of keeping the child, hence being awarded the child on the basis that she is the birth mother and that she formed a bond with the child, may not be in the best interests of the child.[301] It would be interesting to see how Kenyan courts would respond to this dilemma given the fact that the best welfare of the child criteria, is the guiding law and the intention of the parties might not necessarily be taken into consideration. Having said that, it would appear that given the greater social acceptability of traditional surrogacy, chances of courts favoring intended parents are extremely high. The Kenyan courts might reason, as was the case in Johnson v Calvert,[302] that legislation was not applicable simply because it did not contemplate surrogacy.

Under customary law however, child custody disputes have been decided in court between

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[299] The Matrimonial Causes Act Chapter 152 Laws of Kenya. This is also the view held by many customary laws in Kenya. In the customary law case of Mary Khavere Kefa v Peter Walusimbi [Court of Appeal at Nairobi, May 16, 1982] Civil Application No. 33 of 1981, the judge explained that children of tender age should remain in their mother's custody unless the mother is disqualified by reason of exceptional circumstances. See also the case of Karanu v Karanu Civil Appeal 60 of 1974, [1975] E.A. 18 and Wambwa v Okumu [1970] E.A. 578 where this rule was affirmed.

[300] The case of Halima Rashidi v Amon Peter High Court Civil Appeal No. 34 of 1993 provides a good illustration of this fact. In this case it was decided in a custody dispute that the mother was the better placed to take care of the children due to the bond she had formed with the children as a result of gestation and childbirth.

[301] See the case of Baby M, supra note 249, where the court ruled that it was not in the child's best interest to stay with the birth mother.

[302] Johnson v Calvert, supra note 220.

mothers who engaged in woman-to-woman marriages.[303] An examination of such cases might shed some light on how customary law would try to settle a custody dispute between 'mothers' in a surrogacy arrangement. In the case of Esther Chepkuaui v Chepngeno Kobot Chebet and Johanah Kipsang[304] the woman to woman marriage between the petitioner and first respondent had been dissolved and the first respondent then married the second respondent. The issue that remained to be resolved was the custody of the children born during the subsistence of the woman to woman marriage. The natural father of the children was not recognized because of the nature of the marriage. He was thus removed from the entire dispute.[305] The court held that the children were better off in a stable family and the first respondent was able to provide such an environment with her husband. The court thus gave custody of the children to the first respondent.[306]

The court however went on to state that when it was time for the children to get married, the petitioner was entitled to her share of the bride price for the children.[307] The court further recognized that whereas this practice was repugnant to natural justice, in the sense that the 'wife' in the marriage did not choose who would be the father of her children and further, a man was imposed upon her by her 'wife', it was a practice that was believed in and practiced among

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[303] For an explanation of woman-woman marriages see chapter two.

[304] [Resident Magistrate's Court at Kapsabet (Chesbol, D.M.)., April 22, 1981] Divorce Cause No. 16 of 1980.

[305] This is analogous to the position of an anonymous sperm donor in reproductive arrangement.

[306] Esther Chepkuaui v Chepngeno Kobot Chebet and Johanah Kipsang, supra note 304 at 5.

[307] Id.

the Nandi community and therefore had to be recognized by law.[308]

The court thus used the principle of the 'best interest of the child'. It is uncertain whether this is the same decision that a council of elders in the community of the parties to the suit would have reached. As explained in chapter two, many indigenous courts operated much like courts applying English law. The fact that the court declared that the practice was an abuse to natural justice reflects on the fact that court found that the custom did not fit in with modern developments.

In the case of Maria Gisese w/o Angoi v Marcella Nyomenda [309] the court made a similar judgment in a custody dispute between two women whose marriage had been dissolved. Because the respondent had married the natural father of the children and had borne him two more children, the court found that this was a better environment for the children of the woman to woman marriage to be brought up.[310] The court further refused to recognize the woman to woman marriage and stated that the petitioner had no legal rights over the children because she did not bear them even though she arranged for their conception.[311]

In my view, this decision was inconsistent with tradition embodied in customary law because

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[308] This is yet another example of how customary law impedes on the reproductive roles of women in Kenya with the result that women are not able to protect and ensure their reproductive autonomy and their rights to choose partners. See Adjetey, supra note 55 at 1352.

[309] [High Court of Kenya at Kisii, May 24, 1982] Civil Appeal No.1 of 1981.

[310] Id at 34.

[311] Id at 36.

under this law, both mothers were for all intent and purposes considered the parents of the children. The failure to recognize the contribution of the non-genetic mother in this case was an example of how western values have influenced courts applying customary law and non-western family set ups are considered 'bad environments' for child upbringing. Under customary law, because both mothers were seen as the legal parents of children born during the subsistence of the marriage, each of them had certain rights over the children of the marriage.[312] The court in this case refused to recognize these rights despite the fact that the idea of two women raising a child in that particular community, was not considered repugnant among the people living within that society.

Customary law in a sense is able to conceptualize the possibility of a child being raised by more than one mother, even though one mother takes up the role of 'father'.[313] In the event of a dispute between the two mothers over the custody of the child, customary law would treat the case exactly the same as a dispute between a heterosexual couple upon divorce. In such cases, the 'contracting mother' due to her greater financial ability and age would be considered the 'father' of the child, and save for exceptional circumstances, she and her family would gain

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[312] The Family Law Task Force of Kenya has recently made recommendations to abolish all forms of same sex marriages in Kenya including woman-to-woman marriages. According to the task force, women so 'married' as 'wives' are subject to mistreatment by the 'husband' without any avenue for re-dress as in the case of normal marriages. Family Law Task Force 1999, 'Draft Proposal: Gender Issues Linked To The Family And The Legal Process' (unpublished, on file with author)

[313] This is largely due to the fact that under customary law, there is no such thing as the nuclear family as explained in chapter one. There is now literature in North America that supports the contention that it is necessary to redefine the family in the context of new reproductive technologies in order to take into account the other non-traditional players in reproductive arrangements. See M.A. Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies (New York: Routledge, 1995), M. Minow, 'Redefining Families: Who's in and Who's out?' (1991) 62 U. Col. L. Rev. 269 and K.T. Bartlett, 'Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed'

custody of the child in question.[314]

In the case of surrogate motherhood, even though there is really no marriage between the mothers, there is a contract made between the two women and I believe that customary law would be able to appreciate the distinct roles that the different 'mothers' would play in the life of the child/ren based on such agreement.

Section 30 of the Matrimonial Causes Act states, 'except where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any person, either by providing them with accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the costs thereof.'[315]

This is yet another section of the law that can be misused or misinterpreted in the context of reproductive technologies.[316] The first question that comes to mind on this issue is whether a sperm donor be sued under statutory law for maintenance of his infant child simply on the basis that he is the child's biological father?[317] Kenyan statutory law does not allow for more than

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(1984) 70 Va. L. Rev. 879.

[314] Radcliffe-Brown, supra note 37 at 184-5.

[315] Chapter 152, Laws of Kenya. See also the Law of Matrimony Bill section 138.

[316] According the said present law, maintenance of children extends only to children born within wedlock

[317] This issue is well settled in many jurisdictions where the law states that when a man consents to insemination of his wife with a donors sperm, he is presumed to be the legal father of the child and the donor is barred from claiming paternity or asserting any parental rights. See A. King, supra note 172 at 349.

one 'father' and this is usually genetic father (although in certain cases the adoptive father or guardian is given the same rights as the biological father). When a maintenance dispute is brought before the court under the Matrimonial Causes Act[318] or Guardianship of Infants Act[319] the genetic father is usually held responsible for maintaining his children unless it can be shown to the satisfaction of the court that the adoptive father is willing and better able to maintain such child.[320]

A more problematic scenario would be where an unmarried woman sues the sperm donor for maintenance of the child. It must stated at the outset that Kenya has not passed any affiliation statutes which would allow single mothers to secure nominal maintenance from the fathers of their children.[321] The law considers such children as illegitimate and courts do not have the power to grant any maintenance orders against the genetic fathers of these children, which would include sperm donors.[322]

In a woman-to-woman marriage, even though a man provides the genetic material for the child in such an arrangement, he is not and cannot be compelled in law to take care of the child he

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[318] Chapter 152, Laws of Kenya, section 30.

[319] Chapter 144, Laws of Kenya, section 17.

[320] Under the present law, the father is recognized as the natural guardian of his children because it is presumed he has the resources to raise them.

[321] Other African countries like Tanzania and South Africa have Affiliation Acts, however, in Kenya, whereas this Bill has been brought to Parliament, it has never been passed. This issue is of pressing concern to women rights movements in Kenya like the Federation of Kenya Women Lawyers and Maendeleo ya Wanawake in Nairobi, Kenya. See Nyamu C et al., 'The Role of Pressure Groups in the Promotion and Preservation of Democracy in Kenya: The Case of the Women's Movement' (1994) 1 U. Nairobi L.J. 62 at 66.

[322] See the Legitimacy Act Chapter 145, Laws of Kenya. See also Nyamu, supra note 321 at 63.

has fathered.[323] His role is usurped by one of the parties in the woman to woman marriage.[324] A sperm donor may therefore have no obligations to his genetic child under customary law and under no circumstances would he be sued for maintenance of the child because he is understood to be clearly removed from the arrangement, much like the sperm provider in the woman to woman marriage.[325]

In cases where the father of a child refuses to take up responsibility for the illegitimate child as envisaged by the above statutory law, such child would not be denied the necessities of life. Due to the notion of the extended family, the mothers' family would embrace and raise him and he would have certain rights of inheritance.[326] The entire community as opposed to just his/her parents would bring up such child.[327] Under customary law therefore, the issue of maintenance of child rarely comes up in court because of the structures already in place that ensure that every child born into the home will be catered for by the paternal or maternal extended family.[328]

In the United Kingdom, the assumption prior to the advent of new reproductive technologies

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[323] See the discussion on the subject in chapter two.

[324] Radcliffe-Brown, supra note 37 at 186.

[325] See the case of Violet Ishengoman Kahangwa v Admiral General Court of Appeal, Civil Appeal No 17 of 1989 where it was stated that the knowledge of paternity does not remove the illegitimate status of the child.

[326] See Chapter Two.

[327] Id.

[328] Even in urban areas, it is not uncommon to find a person who is in difficulty calling upon his clan members and other relatives for help, for example to clear large hospital bills or he may even send his children to another family member to take care of while he sorts out his problems. Clan and family members are obliged to help each other out in times of need.

was that a child's parents were those who provided the genetic material, that is to say, the egg and sperm which resulted in the child's conception and birth.[329] This was the assumption that laid basis for the UK's Family Law Reform Act[330] which permitted the court, in any civil proceedings in which the paternity of a person is in issue, to direct the taking of blood samples from the child, the mother and the alleged father (or from any of those parties), for the purpose of determining whether the party alleged to be the father is excluded from being the father.[331]

Due to the developing practices of assisted reproduction, this basic assumption has been put into a state of uncertainty[332] thus necessitating the enactment of statutory provisions for the determination of parentage.[333] In response to this lacuna in law, the U.K. Human Fertilization and Embryology Act of 1990 sought to redefine parentage in light of the technologies. According to this Act, the term 'mother' refers to 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.[334] This definition does not however apply to any child to the extent that the child is treated by virtue of adoption as not being the child of any

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[329] See M. Warnock, A Question of Life: The Warnock Report on Human Fertilization and Embryology. (Oxford: Basil Blackwell, 1985). There are exceptions to this rule, for example in adoption, the social father had the same rights and responsibilities as the genetic father.

[330] See the Family Reform Act (U.K.) 1969 s. 20 (i)

[331] Id.

[332] Id. See generally the Report of the Committee of Inquiry into Human Fertilization and Embryology (Warnock Report) 84; Cmnd 9314).

[333] The Human Fertilization and Embryology Act (U.K.) 1990. S. 27. [hereinafter HFEA]

[334] See section 27 (i) (This is also the law in Quebec where only the surrogate is deemed as the legal mother.(s. 538 of the Civil Code of Quebec)

person other than the adopter/s.[335]

The Act also defines a father as follows: if a child is being or has been carried by a woman as a result of the placing in her of an embryo or of a sperm and eggs or her artificial insemination, and at the same time of the placing or insemination, the woman was a party to a marriage, the other party is treated as the father of the child, unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination as the case may be.[336]

The Act however protects sperm donors from legal parenthood and states that a man is not to be treated as the father of the child where he has given consent to the use of his gametes for treatment services and his sperm is used for the purpose for which such consent was required.[337]

The above sections in the Human Fertilization and Embryology Act[338] of the United Kingdom have served to clear up some of the ambiguities presented by the new reproductive procedures[339] and perhaps it can be argued this is the direction that Kenyan statutory laws should take in redefining the legal family.

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[335] Section 27 (3) of the HFEA

[336] section 28 (2) of the HFEA.

[337] Id. Section 26 (6).

[338] Supra note 333.

[339] Other jurisdictions have also passed laws touching on the new definitions of legal parentage as a result of reproductive technologies. Examples include Germany, Spain, France and Sweden. See N. Lenoir, 'French

Customary family law is perhaps a more receptive and flexible legal regime in as far as some of the consequences of the new reproductive technologies are concerned.[340] Due to the kinship system of life as explained in chapter one, the notion of legitimacy is questionable in issues of upbringing and custody. No child is considered illegitimate since it's birth in or out of wedlock is irrelevant to its social status in the community.[341] The question that arises in customary law is **which** family it adheres to and this is primarily for inheritance purposes.

As a general rule, all the children living in a particular community receive the same treatment from adults in the community as they are perceived to belong, not to individuals but to the entire village.[342] No discrimination is made between illegitimate and legitimate children[343] and

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European, and International Legislation on Bioethics' (1993) 27 Suffolk U.L. Rev. 1249.

[340] However one would still have to contend with issues related to gender discrimination, repugnancy to justice and morality, all of which customary law has been critiqued for. Customary law can therefore help to inform law makers involved in reproductive technologies because it provides close analogies to some reproductive issues.

[341] E. Cotran, Readings in African Law (London: Frank Cass & Co. Ltd., 1970) 45.

[342] Id.

[343] The question of legitimacy in other countries such as the United States becomes relevant in issues like distribution of a parent's death benefits, welfare benefits and inheritance. (See M.T. Zingo & K.E .Early, 'Nameless Persons: Legal Discrimination Against Non-Marital Children in the United States' 3 (1994). Some United States Supreme Court cases indicate that any additional requirement mandated from nonmarital children that is not also demanded of marital children fails intermediate scrutiny. Trimble v. Gordon, 430 U.S. 762, 776 (1977) (striking Illinois statute that allowed non-marital children to inherit by intestate succession only from their mothers while marital children were permitted to inherit by intestate succession from both parents); Weber v. Aetna Cas. & Sur. Co 406 U.S. 164, 165 (1972) (finding a violation of the Equal Protection Clause in Louisiana's denial of workmen's compensation death benefits to dependent, unacknowledged nonmarital children when marital and acknowledged non-marital children also survived). However, other cases limit this broad-sweeping approach. For example, the United States Supreme Court has upheld distinctions that do not impose "an insurmountable barrier" on nonmarital children. See Labine v. Vincent, 401 U.S. 532, 539 (1971) (upholding Louisiana law that bars an acknowledged, non-marital child from sharing equally with marital children in the intestacy inheritance of their father because the father could have provided for the child in a will or by legitimizing her through a subsequent marriage or by a statement in an acknowledgment). Moreover, the Court has upheld classifications that further the administrative convenience of the state. See Matthews v. Lucas,

this attitude is understandable if one considers that an illegitimate child may become legitimate by a declaration from his/her father and vice versa.[344] Should a father neglect his child, his kinsmen or the child's maternal relatives would strongly object.[345]

If a dispute were to arise in a surrogacy arrangement and customary law was invoked as the governing law, the issue of sole custody of the child to just one party would most likely not arise. Customary law recognizes the various roles that other individuals play in the life of the child.[346] What would most likely happen is that an arrangement would be reached where each party would be allowed to take part in the upbringing of the child.[347] It must be made clear that legitimacy of children has two aspects. The first concerns the question of paternal rights and duties, which as stated above, refers to issues of custody of the child, the duty to sustain and protect it, the right to receive marriage compensation for a daughter, the duty to provide a wife for a son and the duty to accept responsibility for the child's actions.[348] The second aspect concerns the child's membership of the patrilineage and his right to succeed to the name and

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427 U.S. 495, 509 (1976) (upholding Social Security Act's disallowance of a statutory presumption of dependence to nonmarital children while allowing the presumption for marital children because the distinction permitted Congress "to avoid the burden and expense of specific case-by-case determination.

[344] See the discussion on legitimacy, supra note 269.

[345] Id.

[346] For a discussion of the importance of the various roles played by the different members in a traditional community, see Thomas Weisner, Candice Bradley & Phillip Kilbride., African Families and the Crisis of Social Change (London: Bergen and Garvey, 1977) 20-44.

[347] There is now literature in North America challenging the paradigm of the nuclear model family and pressing for the need to include other parties in reproductive arrangements in the upbringing of the child. See A. King, 'Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction' (1995) 5 UCLA Women's L.J. 329; A. Harvison-Young, 'Reconceiving the Family: Challenging the Paradigm of the Exclusive Family' (1998) 6 Am. U. J. Gender & L. 505.

[348] See A. Schapera, A Handbook of Tswana Law and Custom, (London: Oxford University Press, 1938) 175-184.

dignity of his father and other paternal ascendants.[349] The latter aspect will be relevant in the discussion on inheritance.

Under customary law, the paternity of a child is rarely queried when a woman has committed adultery during the subsistence of the marriage.[350] This reinforces the belief that in customary law, infidelity on the part of the wife is not uncommon.[351] Adultery only becomes an issue when she conceives either before normal conjugal relations have been established, or during her husbands' absence.[352] In such cases, the normal procedure would be for the husband to seek compensation for unlawful impregnation from the offender.[353] If the husband does not want to keep the child, it may be handed over to the offender's family to raise.[354]

This discussion illustrates that under customary law, there are mechanisms in place to deal with procreative arrangements involving third parties and there are ways to appease each party while still maintaining the best interests of the child.[355] Where the child is neither recognized by the

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[349] Id.

[350] Radcliffe-Brown, supra note 37 at 50.

[351] Id.

[352] See T. O Elias, Nigeria: The Development of it's laws and Constitution (London: Stevens 1967) 95-109.

[353] If the girl was unmarried or divorced, the pregnancy compensation would be paid to her father. See the case of Eliud Mamati v Milia Makaya d/o Daruna [High Court of Kenya at Kisumu, December 5, 1977] Civil Appeal No. 47 of 1976 where the court awarded the father of the pregnant girl two heifers by way of compensation.

[354] Id. This fact suggests that men have proprietary interest in their wives and this view is of great concern among some feminist writers in North America who also contend that 'males have had a desire to possess women's procreative power.' See G. Corea, supra note 258 at 283-88.

[355] A major critique of this customary law is that whereas the husband is appeased for the actual act of adultery between the offender and his wife, the husband retains responsibility for the child's upbringing and if he completely refuses to take care of the child, the burden of raising such child falls on the maternal grandparents. The offender goes practically scot-free and has no responsibilities towards the child unless he chooses to assist

natural father (gene provider) or the wife's husband (social father), such child falls under the control of, and is invariably brought up by its maternal grandparents who assume full responsibility of the child.[356]

When the natural father of the child is not traceable, the child may be given the clan and sub-clan names of the mother, but such child is never regarded as a full member of his mother's patrilineage and cannot therefore succeed to the name of his mother's father.[357] By analogy, under customary law, where a child is born of donor sperm and the genetic father is untraceable or anonymous, and the wife's husband does not want to take responsibility for him/her and does not want such child to live in the matrimonial home, the child would most likely be sent to the maternal grandparents home.[358] The issue of the child's custody would therefore be taken care of by the already existing structures.

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where the husband refuses to bring up the child. See Kilbride and Kilbride supra note 6 at 89-91.

[356] This phenomenon is still very common in modern Kenya where grandparents play a major role in raising illegitimate children who are not wanted by their parents. Id. For a further discussion, see J.F. Holleman, Shona Customary Law (Cape Town: Oxford University Press, 1952) 242-259.

[357] Kilbride and Kilbride, supra note 6 at 91.

[358] Under customary law, if the wife wanted to keep an illegitimate child against her husband's wishes, would have to seek a divorce from her husband first as her intentions to raise the child in her husbands household would be tantamount to insubordination. Many women would rather opt to send the child to his or her maternal grandparents where the child would be raised in the absence of her husband. Kilbride and Kilbride supra note 6.This is another demonstration of the patriarchal nature of customary law. In western countries such as the US, courts have dealt with the issue of artificial insemination by donor, of a married woman without her husband's express consent. In the US case of Anonymous v Anonymous 1991 WL 57753 (N.Y. Sup. Ct. Jan. 18, 1991) a New York Court concluded that a child born of artificial insemination by donor sperm, but without written consent of the husband, did not come within the New York statute which provides that a child born to a married woman by AI 'shall be deemed the legitimate, natural child of the husband and his wife for all purposes'. Although the court could not find the child legitimate, and the court held that the husband was bound by a written agreement to support the child, which the court would enforce because of the strong public policy of ensuring support for the children. Id at 17-18.

Customary adoption laws are also relevant to this discussion. Among the Gikuyu of Kenya, genuine adoption was rare and took place only in carefully defined circumstances where the principle of collective responsibility by the natural father's clan could not be invoked.[359] The usual case in which an outsider could adopt and take an orphaned child as his own, was upon the death in childbirth of an unmarried woman.[360] The infant was then claimed by a foster parent who did not need to have any kinship affinity with the child's natural mother or father.[361] The father would then recognize such child as his completely as if he were the child's natural father. An adopted child would take the family name of the foster father and assume the full rights and duties of membership of his foster-father's family and clan.[362]

A form of semi-adoption also exists in customary law to provide for the rearing of a child whose married natural mother had died in childbirth or shortly after.[363] The father would seek out the services of a relatively older woman who was prepared to rear the child on his behalf and this woman would be entitled to a set recompense (usually ten goats and a ram) for her services. She could successfully sue for this set amount in default of payment.[364]

Upon attaining maturity, a male child who had been brought up in this manner would be able to

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[359] Simmance, 'Adoption of Children among the Kikuyu of Kiambu District' (1938) 3 Journal of African Law 33-38.

[360] Id.

[361] Id.

[362] Id.

[363] Id.

[364] Id. at 33

choose whether he wanted to return to his father or to stay with his surrogate mother.[365] Normally and principally because of his prospective inheritance rights, he would elect to do the former, but would nonetheless be bound to assist the woman who had cared for him if she needed his support.[366] There is no easy term with which to describe her position; she was and is something more than a nurse and something less than a true foster mother.

The above situation is analogous to surrogacy, albeit surrogacy after the birth of the child because a woman without any kinship ties would be paid by the natural father to rear (as opposed to bear) the child for a fee.[367] This arrangement was recognized by customary law and either party could sue for breach of the terms of the contract.[368]

Traditional Kenyan societies were thus no strangers to commercial arrangements within the family set-up and in instances such as the one described, payment would be expected in return for personal services. This section illustrates that in customary law, there are presently structures from which certain responses may be derived, to solve some of the possible custodial conflicts that may arise in reproductive technologies.

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[365] Id.

[366] Id.

[367] It is also analogous to foster parenthood.

[368] Simmance, infra note 503 at 33.

### *(iii) Inheritance and Succession*

New reproductive technologies pose a challenge in the area of inheritance rights or the law of will and estates.[369] These technologies particularly affect testate and intestate succession because laws governing succession are based on traditional relationships.[370]

The preservation of sperm and embryos by freezing, greatly increases the length of time during which posthumous children may be born and this further increases the difficulty of probating wills.[371] Cryopreservation of embryos make it possible for embryos to be born more than a hundred years after conception,[372] hence the inheritance rights of children born years after the probate and distribution of their parents' estate, could be quite difficult to determine.

Under statutory law, if a person does not leave a will, laws of intestacy determine how his property will be distributed.[373] In Kenya, as in most countries, laws of intestacy are founded upon blood relationships.[374] Under Kenya's statutory laws of intestacy, no right of inheritance

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[369] See generally J. Robertson, 'Posthumous Reproduction' (1994) 69 Ind. L.J. 1027

[370] M. Minnow , 'Redefining Families: Who's In and Who's Out?' (1991) 62 U. Colo. L. Rev. 269 at 28-5. See also R.C. Black, 'Legal Problems of Surrogate Motherhood' (1981) 16 New England L.R. 373.

[371] R. Kerekes, 'My Child...But Not My Heir: Technology, the Law, And Post-Mortem Conception' (1996) 31 Real Prop. Prob. & Tr. J. 213 at 214.

[372] Shapiro & Sonnenblick, 'The Widow and the Sperm: The Law of Post-Mortem Insemination' (1987) J.L.& Health 229 at 243. Also see Proceed with Care, supra note 11 at 596.

[373] The Succession Act Chapter 160, Laws of Kenya. It has been argued that laws of intestacy should implement the following four community goals; (1) protection of the financially dependent family (2) avoidance of complicating property titles and excessive subdivision (3) promotion of the nuclear family (4) encouragement of the accumulation of property by individuals. See Lomenzo C, 'A Goal Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses' (1995) 46 Hastings L.J. 941 at 947.

[374] Intestacy statutes typically favor first the decedent's nuclear family, descending and ascending blood lines, and then follow the decedent's collateral blood lines. In enacting intestacy statutes, the state must determine its

accrues to any person other than to children or lineal descendants of the intestate, and they must be in being and capable of 'taking' as heirs at the time of the death of the intestate.[375] This then brings on the controversial question of whether children of new reproductive technologies can inherit at all.[376]

Since most bioreproductive methods involve the contribution of a third party, the legitimacy of the resultant child is questionable.[377] Under both statutory and customary law, the notion of 'legitimacy' is very important in succession issues.[378] Under the Succession Act,[379] an illegitimate child is not entitled to inherit his father's property.[380] As discussed earlier in this

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goals when deciding to whom a decedent's property will go and how much each beneficiary will take. See The Law of Succession Act s. 35-41; D. Cuisine, Legal Issues in Human Reproduction' in Legal Issues in Human Reproduction 17, 17 (Sheila Mclean ed., 1989).

[375] Succession Act supra note 373 at s. 39.

[376] Although inheritance by a posthumous child has traditionally arisen with regard to a child conceived before the father's death, with cryopreservation, the issue can also arise with regard to a deceased woman if the recipient of her gametes or embryos either gametes or embryos either gestates the child or uses a surrogate to do so. However because eggs are usually fertilized before they are frozen, far fewer women will leave frozen eggs with a storage facility than will deposit frozen pre-embryos. See Shapo H, 'Matters of Life and Death: Inheritance Consequences of Reproductive Technologies' (1997) 25 Hofstra L. Rev. 1091 at 1140.

[377] The general rule under customary law is that an illegitimate child cannot inherit his mother's husband's property. See the case of Violet Ishengoma Kahangwa v Admiral General, supra note 325.

[378] Legitimacy is also an issue in other countries where reproductive technologies are practiced. For example, in the US, the Uniform Parentage Act section 4 (a) (1), 9B U.L.A. 298 (1987) provides that posthumous children of a deceased married man are treated as 'in being' and are able to inherit if the child is born alive within either 280 or 300 days after the father's death and it is thus to the child's advantage to be treated as 'in being' from the time of conception. The 280-300 day period in utero presumes that the child is the legitimate child of a married decedent. A child born after being cryopreserved as a preembryo falls within the first part of the definition of a posthumous child because the child would have been conceived before the progenitor's death. However the embryo may not have been implanted and born until years after the progenitor died. This holds true even if it is the mother who dies, because a surrogate could gestate the embryo. However if the decedent left frozen gametes, rather than embryos in storage, a child born from the gametes would be conceived after the decedent's death, and thus, could not satisfy any part of the current definition of a posthumous child. Shapo supra note 376 at 1154.

[379] Id. at s.39 of the Act.

[380] In Kenya, the law has determined legal fatherhood in different ways. For a child born of a married woman,

chapter, under statutory law, a child born out of lawful wedlock is considered illegitimate and is thus cut out entirely from inheriting his father's property.[381] Under customary law, even though an illegitimate child may be taken care of by either family, on question of succession, unless such child has been legitimized by the his father, he cannot inherit from his father or paternal family. [382] Such child is however entitled to a share in his maternal grandfather's estate.[383]

Reproductive technologies pose fresh challenges in succession because under the present laws, for all intents and purposes, children born using third party genetic material are considered illegitimate and accordingly, they would not be able to inherit at all under statutory law unless they were specifically provided for in a valid will.[384] Further, once such children become adults and acquire property, it is possible that in some cases they will predecease their parents and the parents' right to the estate of the child may be in question because they may not be genetically related to the child/ren. It would be interesting to see how Kenyan courts seized with jurisdiction of the matter would react, especially due to the possibility that the genetic parents

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fatherhood is determined by marital status, that is, a man's marriage to the child's mother. If a married woman bore a child out of the marriage, the common law of England presumed that the child was legitimate and that her husband, although not the biological father, was the child's legal father. The father could rebut this presumption only if he were 'out of kingdom' for more than the nine months prior to the birth. Although this presumption arose at a time when non-marital children were severely disadvantaged legally and socially, it still exists but it is now rebuttable in nearly every state by parties other than the presumed father. Evidence to rebut the presumption now includes medical evidence that the husband is sterile or impotent, or a blood test to show that the child could not be his. The Succession Act supra note 373 at s. 40-41 and the Evidence Act.

[381] The Succession Act supra note 373.

[382] H. Cory, Sukuma Law and Custom (London: Oxford University Press 1953) 89-93.

[383] Id. at 45.

[384] This will would have to be in accordance with the provisions in the African Wills Act, Chapter 169 of the laws of Kenya.

of the child may not be known or traceable.[385] Rather than simply resorting to British law as is usually the case, perhaps courts ought to look to customary law in an attempt to fill in the gaps.

Under customary law, intestate succession is the only form of inheritance in most ethnic communities and the idea of a person determining the distribution of his property after death was and still is foreign to many traditional African cultures.[386] Thus when the founder of a family dies, the eldest surviving son automatically succeeds to the headship of the family with all that it implies, including residence and the giving of orders in his father's house or compound.[387]

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[385] Currently under the Adoption Act of Kenya (Chapter 143 of the laws of Kenya) an adopted child cannot claim any inheritance rights on the property of his or her genetic parents unless one of his or her present parents is genetically related to him or her. Once a child has been given up for adoption, the genetic relinquishes his or her rights towards the child and vice versa. In reproductive technologies, since there are no laws that provide for the rights and duties of sperm, ova or embryo donors, courts cannot simply use the present adoption laws and need to rethink what makes a legal father or mother. The current adoption laws place a child into the adopting family for all purposes and replace the child's birth parents with the adopting parents for all purposes including inheritance. The Adoption Act therefore furthers he policy of integrating adopted children into their adopting families. See J.A. Rein, 'Relatives by Blood, Adoption and Association: Who Should Get What and Why (The impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts) (1984) 37 Vand. L. Rev. 711 at 717.

[386] Testamentary disposition of property in customary law is not popular. One of the roles of customary laws of succession is to keep the family together. It is true that disputes among the successors of a person who dies intestate may bring about disunity in the family, a traditional African father would not like to sow seeds of dispute in his family after death. He would be deemed as doing so if he gave directions as to the distribution of his property after his death, for in doing so, he would be preferring some successors to others. Another reason for the few instances of testate succession in African customary law is the fact that most people do not like to face up to the fact that they will die some day. It is feared that testamentary disposition of property may attract death. See Okoro Nwakamma, The Customary Laws of Succession in Eastern Nigeria (London: Sweet and Maxwell, 1966) 64-91.

[387] The eldest son is entitled to the property by virtue of his special position. He is entitled to reside in his father's dwelling house and he enjoys the property to the exclusion of others during his lifetime. He however may allow his younger siblings to live in their deceased father's property. See University of Ife - Institute of African studies: Integration of Customary and Modern Legal Systems in Africa - A Conference held at Ibadan on 24-29th August 1964. (Nigeria: Africana Publishing Corporation, 1964) 242.

Upon the death of the eldest surviving son, if there is going to be any important dealing with family property, all branches of the family must be consulted, and representation on the family council is also per stirpes. [388] Other rules that must be observed under customary law are that the deceased's property must be divided into equal shares between the respective branches, regard being given to any property already received by any of the founder's children during his lifetime.[389] The deceased's grandchildren only succeed to such rights as their immediate parents had in the family property.[390]

Succession in most traditional Kenyan societies is thus patrilineal and only blood relations can inherit.[391] Because genetic relationships are very important in customary laws of inheritance, children born of reproductive technologies may not be able to inherit from their social parents under customary law. If for example, the eldest son in a family was born through donor embryo transfer and thus bore no blood relationship with his 'parents', upon the death of his father, legal rights of the father's property would by-pass him and go to the next eldest surviving son, or if there was no such son, the clan would take up administration of the property.[392]

Under statutory law, if parents want a child who is not genetically related to them to inherit, they have to specifically name the child as a beneficiary in a will so that that the child will be

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[388] Id.

[389] Id.

[390] Id.

[391] See E. Cotran, 'The Law of Succession Act' (1968) 1 Kenya Law Society Review, 2-11.

[392] This situation may prove even more complex because if the wife is the gestational mother, the child is genetically not her child either and may not be entitled to inherit from the maternal side either. It is not clear if

protected and taken into consideration by the courts.[393] This provision discourages relatives from attempting to defraud the child of his inheritance.[394]

Under customary law however, the situation is somewhat different since the concept of 'wills' is alien to traditional culture.[395] A child born through the new reproductive technologies and governed by customary law may not be able to legally inherit from his father and may thus be left without remedy.[396] The problem is further compounded if the reproductive arrangement involves a surrogate mother and donor sperm. The resultant child, governed by customary law may not be able to inherit from his father due to the reasons discussed above, and because of the fact that he technically has two mothers, there may be a conflict as to which maternal family

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customary law will consider the birth mother as the true mother due to the question of gestation.

[393] This has to be according to the provisions laid out in the African Wills Act (Chapter 169 of the Laws of Kenya)

[394] This is a very common practice in Kenya where relatives who adhere to customary law lay claims on the deceased's property especially if he dies intestate.

[395] In some communities however, a man could express his wish that say, a particular son should be the heir or that one of his children should get a piece of property but he may could not thereby upset the balance of fair distribution according to custom. The family or clan, upon his death would pay attention to the wishes he had expressed in his will but they would not carry out any part of it which they considered contrary to customary law. He would also through his will disinherit a member of his family, but in order for such disinheritance to be effective, he would have make his reasons for this decision clear (for example, a gross disobedience infringing native custom on the part of the son). Traditionally, such wills are oral statements made publicly in the presence of the testator's family. This fact was judicially noted in the case of Peterson Ndigirigi Wahome and Simon Githinji v Dickson Miricho [Senior Resident Magistrate' Court at Nyeri, March 19, 1981], Civil Appeal no. 30 of 1980.

[396] This situation is analogous to the common law regime where the non-marital child was considered the child of no one and did not inherit form or through the mother or father. In the United States, most states held that the non-marital child was an intestate heir of the mother but not of the father, unless the parents married and the father acknowledged paternity. See Shapo supra note 376 at 1099. Today, many states permit a child to inherit if the man's paternity was established during his lifetime by judicial decree or by his written acknowledgment of the child as his. Some states permit the child to prove paternity after the father's death, even if it entails exhuming his body for DNA testing. Id.

he owes allegiance for purposes of succession.[397] Although both mothers and their families may bring him up, when it comes to issues of inheritance, he must belong to only one maternal family and this would have to be settled from the outset.[398]

Under Kenyan statutory law, whenever a class gift in a will is made to 'children of heirs' this class does not include any illegitimate child.[399] Children who are the result of procedures involving a donated womb, egg, sperm or embryo require a third party's contribution to their origin and therefore for inheritance purposes, the child may be considered illegitimate and may not inherit under intestate succession provisions.[400]

Similarly, under statutory law, a child who is not genetically related to his parents may be excluded from a class gift made by collateral relatives of his parents where the testator was not

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[397] There exist some obstacles in statutory inheritance law to recognizing more than two parents. A child who is the heir of a biological father and a gestational mother may be thought of as entitled to inherit in the sense of potentially receiving an inheritance from two mothers. A child who is the heir of a sperm donor may theoretically inherit from two fathers. To add the 'intended parents' who commissioned the child's conception and birth to that list may create dual or triple inheritance. There is however precedence in US intestacy law against dual inheritance, illustrated in the situation of inheritance by an adopted child. See the case of Billings v Head 111 N.E. 177, 177 (Ind. 1916) where a grandparent had adopted a grandchild whose parent was deceased. At the grandparent's death, the adopted child could claim one share of the estate as the adopted child and a second share as a representative of the deceased parent. Courts were divided as to whether the adopted child could take these two shares. In the case of gestational surrogacy, the Uniform Probate Code now permits only a single inheritance based on the relationship what would entitle the individual to the larger share. Shapo, supra note 376 at 1205.

[398] Although customary law rules vary from one community to another, even in cases such as a woman-to-woman marriage where there are two women raising the child, when it comes to issues of succession, only the commissioning mother (the older wealthy woman who contracts the younger woman) is recognised for inheritance purposes and consequently, the child can only inherit from her clan. It is not possible to inherit land from both parents under customary law. See Radcliffe-Brown, supra note 37 at 195-200.

[399] The Law of Succession Act s. 29. (supra note 373).

[400] See J. Grad, 'Legislative Guidelines to the New Biology - Limits and Possibilities' (1968) 15 UCLA L.R. 480.

aware of the child's true origins. It is therefore of paramount importance that in this age of reproductive procedures that parties involved in these arrangements receive proper legal guidance when writing wills involving their children so that such wills are drafted in precise language to ensure that the testators true intent is accomplished or so that the law recognize such children as capable of intestate succession.[401]

Another provision of Kenyan law that may be in direct conflict with certain implications of cryopreservation is contained in the Perpetuities and Accumulations Act.[402] An Australian case that illustrates the conflict that arises in the realm of perpetuities, is the Rio's case[403] The facts of this case were that on September 4th, 1984, two embryos whose very wealthy parents had been killed in a plane crash remained frozen in storage in Australia.[404] The embryos were the product of eggs removed from the mother, Elsa Rio's, and the sperm from an anonymous donor.[405] Because the Rio's did not anticipate predeceasing the embryos, they left no instructions for their disposition in that event.[406] A scholarly committee made up of scientists, philosophers, theologians and legal experts deliberated on the matter recommended that the embryos be destroyed.[407] Other groups especially those opposed to abortion demanded that the embryos be thawed and implanted into surrogate mothers. Government officials reacting to

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[401] R.C. Black, 'Legal Problems of Surrogate motherhood' (1981) 16 New England L.R. 373.

[402] Chapter 161 of the Laws of Kenya.

[403] G.P. Smith, 'Australia's Frozen "Orphan" Embryos: A Medical, Legal and Ethical Dilemma' (1985-6) 24 J.Fam. L. 27 at 31.

[404] Id.

[405] Id.

[406] Id.

strong opposition, determined that they should not be destroyed and in the end, the embryos were implanted on surrogate mothers.[408]

The key question arising from the above case is, what are the legal consequences of posthumous implantation in terms of inheritance. In Canada, it was stated in the case of Allard v Monette[409] that if an heir is not born alive and viable, then the succession passed not to his fetus heir, but to the other heirs of the deceased.[410] The long standing rule in common law has been that children may inherit if they are born en ventre sa mere at the time of death of the testator.[411] Conception alone without birth would hence not count. The child had to be born, not only alive, but viable too.[412] The question that then arises, especially in the Kenyan context is whether this rule should be changed to include embryos en ventre sa frigidaire, that is, embryos that are not considered alive by law, when the decedent leaves no will or makes grants to 'heirs' generally and the embryos are still frozen at the time of the testators death?[413]

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[407] Id at 32.

[408] Id at 33.

[409] (1927) 66 C.S. 291

[410] Id.

[411] Shapo, supra note 376 at 1154.

[412] See the US case of Hart v Chater (In re Hart) (Social Security Administrative Hearing) (March 27, 1995) (Torres, A.L.J.) which poignantly illustrated the inequities of current law concerning the status of a posthumously conceived child. (in this case the child born using her deceased father's sperm, was considered illegitimate under Louisiana law as no filiation proceedings were brought forth by the mother of the child within the specified period).

[413] See J.A. Robertson Children of Choice: Freedom and the New Reproductive Technologies (Princeton, NJ: Princeton University Press, 1994).

In Kenya, the governing law is the Perpetuities and Accumulations Act[414] and section five of this Act enables (but does not compel) a period not exceeding eighty (80) years to be fixed as the relevant period by a person in any instrument by which any disposition is made to him. Alternatively the Act provides that the perpetuity period;

(i) shall be a specific life or specified lives in being and eighteen years thereafter; which failing,

(ii) shall be eighteen years[415]

The Act further states that a will takes effect upon the death of the testator.[416] Hence the devise or bequest will be void if it cannot possible vest within any of the periods specified in the Act. For the purposes of this rule, a child en ventre sa mere, who is subsequently born, is considered as a life in being at the testator's death.[417]

The Rule against Perpetuities in Kenya therefore states that no interest is good unless it must vest, if at all, not later than eighteen years after some life in being at the creation of the interest.[418] The rule invalidates an interest that might vest, if it vests at all, at a remote time. A contingent future interest that might vest, if it vests at all, is said to be 'bad' or 'void' or 'invalid' under the rule.[419]

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[414] The Perpetuities and Accumulations Act, Chapter 161 of the Laws of Kenya.

[415] Id at Part II.

[416] Id.

[417] Id.

[418] Leach, 'Perpetuities in a Nutshell ' (1938) 51 Harvard Law Review 638.

[419] See generally Lynn Robert, The Modern Rule Against Perpetuities (Indianapolis: The Bobbs-Merrill Company, Inc, 1966). In the United States, the 1990 Uniform Probate Code was changed to read 'An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth. (Unif. Probate Code ss 2-108, 8 U.L.A. (Supp. 1996). The UPC thus excludes a child born of the decedent's embryo implanted after the decedent's death because the cryopreserved embryo is not then in

The Rule against Perpetuities is thus a rule against the remoteness of vesting.[420] The rule is not concerned with the duration of interests, that is, the length of time that they endure, nor is it against the suspension of the power of alienation, nor a rule against restraints on alienation.[421] The rule is satisfied if all contingent future interests are so created that they must vest, if they vest at all, within the perpetuities period.[422]

The Rule against Perpetuities is one of a family of related rules that regulate the devolution of wealth from generation to generation.[423] The chief objectives of the rule are to curtail the dead-hand control of wealth and to facilitate the marketability of property.[424] It helps to strike a balance between the desires of the living with respect to the use of wealth.[425]

Before this Act was passed in Kenya, it had always to be assumed in the application of this rule that a woman, no matter how old, was capable of child bearing. The Act however now specifically provides in section 7(1):

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gestation. The Uniform Status of Children of Assisted Conception Act (USCACA) 9B, U.L.A. 161 (Supp. 1996) also completely excludes posthumously implanted embryos from inheritance. Under the Act, the child would not inherit from the deceased parent because 'an individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child'. See the case of Hecht v Superior Court 20 Cal. Rptr. 2d 275 (Ct. App. 1993)

[420] See Leach B, 'Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent' (1962) 48 A.B.A.J. 942 at 944.

[421] Id.

[422] Id.

[423] Another such rule is The Rule Against Restraints on Alienation. Id.

[424] See Maudsley, R., The Modern Law of Perpetuities (London: Butterworths, 1979).

[425] Simes, 'Is the Rule against Perpetuities Doomed?' (1953) 52 Mich. L. Rev. 179.

Where in any proceedings there arises under section 6 questions which turns on the ability of a person to have a child at some future time, then -

(a) subject to paragraph (b), it shall be presumed that a male can have a child at the age of fourteen years and over, but not under that age, and that a female can have a child at the age of twelve years or over, but not under that age of over the age of fifty-five years.

(b) in the case of a living person evidence may be given to show that he or she will not be able to have a child at the time in question.[426]

From the above section, it must be presumed in any perpetuities proceedings that a male can beget a child when he is fourteen years or over and that a female can bear a child when she is aged twelve or over and that she cannot do so after she has reached the age of fifty five. Due to technologies such as in vitro fertilization and embryo transfer, it is now easily possible for a woman to bear a child after the age of fifty-five.[427] Technology allows a person to preserve his/her sperm or egg cell or the embryo for use at a later time.[428] Pre-embryos can be preserved for many years, with estimates ranging from two years to six hundred years[429]

The classic case of the 'fertile octogenarian'[430] though hypothetical and fantastical in its time,

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[426] The Perpetuities and Accumulations Act of Kenya, s.7(1).

[427] Kerekes, supra note 371 at 216-7.

[428] Id.

[429] See generally Garcia S.A 'Reproductive technology for Procreation, Experimenting and Profit: Protecting Rights and Setting Limits. (1990) 11 J. Legal Med. 1.

[430] Lynn, supra note 419 at 61.

clearly illustrates this dilemma.[431] It is no longer so fantastic that a woman over the age of eighty might be able to bear a child due to the now common practice of freezing embryos for later implantation into surrogate mothers.[432]

A testamentary gift to an embryo may thus be defeated on the grounds that it violates the rule against perpetuities where a testator leaves frozen gametes or embryos, hence producing posthumous children long after both the testators' death and the passing of the traditional gestation period.[433] Thus a bequest made by such testator, 'to all of my children who reach the age of twenty-one'[434] may in essence violate the rule against perpetuities because the indefinitely viable embryo creates the possibility that the gift might vest beyond the perpetuity period.[435]

In the United States, legislative reformers have tried to solve this problem through the Uniform Probate Code[436] by extending the period within which the interest must vest to ninety years, thus in determining whether a non-vested property interest or power of appointment is valid under the Rule against Perpetuities, the possibility that a child will be born to an individual after

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[431] Leach, supra note 418 at 639-45.

[432] Id.

[433] For a detailed discussion regarding the Rule Against Perpetuities and its relation to posthumous reproduction, see R. Brashier, 'Children and Inheritance in the Nontraditional Family' (1996) Utah L. Tev. 93 at 214-218; Chester, infra note 441 at 982-983; C. Sappideen, 'Life After Death—Sperm Banks, Wills and Perpetuities' (1979) 53 Austl. L. J. 311, 318-319.

[434] See Simes, supra note 227.

[435] Id.

[436] The Uniform Probate Code Ss 2-1008 1991 [hereinafter U.P.C.]

the individual's death is disregarded.[437] Thus the gift would be presumptively valid, unless it does not meet the U.P.C's second requirement that it vest or terminate within ninety years after its creation.[438]

Should Kenyan legislators follow suit and amend the law of inheritance to include children born within ninety years or more after the creation of an interest? As illustrated herein, the present provision in law is made obsolete by the new concepts brought on by reproductive technologies and perhaps in view of the likely consequences that may be faced, for example that a child of the testator may be entirely left out in the distribution of the deceased's estate, this Act needs to be revised in a fashion similar to the US legislation.

The Doctrine of Pretermission is also relevant in this context. This is a common law doctrine that basically provides for children born after a testator's last valid will is executed.[439] Under this common law doctrine, the omission of those children born after execution of the last valid will, is presumed to be unintentional.[440] The idea behind the pretermitted heir doctrine has a long history.[441] Under Roman law, a person's children were entitled to a certain portion of their parents' estate called a legitime.[442] In order to defeat the rights of children in his estate, a

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[437] U.P.C. Ss 2-901 (d)

[438] Id. at Ss 2-901 (a) (2)

[439] See generally Wills, 'The Pretermitted Heir in Missouri' (1976) 41 Missouri Law Review 143-7.

[440] Id.

[441] See R. Chester, 'Freezing the Heir Apparent: A Dialogue in Postmortem Conception, Parental Responsibility, and Inheritance' (1996) 33 Hous. L. Rev. 967.

[442] Id.

testator was required to declare his intention expressly and name or designate clearly the one to be disinherited.[443]

The law would not permit the intention to disinherit to be inferred from silence.[444] A child left out could bring an action called querela inofficiosi testamenti, claiming unjust inheritance, to have the will set aside.[445] Under modern civil law, a system of forced heirs still restrains one's freedom of testation.[446] Certain heirs, generally the testators, parents and descendants, cannot be deprived of their allotted share of the testator's estate, except for certain defined reasons which must be set out expressly in the will, along with the name(s) of the party (parties) to be disinherited.[447] The question that then arises is whether freeze-thaw posthumous children fall into the category of after-born children under the doctrine.

In the United States, if the parent testator had other children alive at the time of the will execution, the after-born child may be entitled to an intestate share of the decedent's estate, taken proportionally from the shares of the will's beneficiaries.[448] If the parent testator had no living child at the time of will execution and makes no mention of possible future children, the after-born child's existence makes the will null and void.[449]

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[443] Justinian's Institutes, Lib. 2, Tit. 13.

[444] Id.

[445] Wills, supra note 236.

[446] Id.

[447] See the case of Walet v Darby 167 La. 1095, 120 So. 869 (1929)

[448] See Wills, Supra note 236.

[449] Id.

The pretermitted heir is protected even against bona fide purchases of the estate property. The only requirement for the after-born child is that he survives the testator by one year.[450] A frozen embryo may be born years after the distribution of the deceased parent's estate and may thus not be able to receive any property from the deceased's estate due to the time limit imposed.[451] According to Texas law for example, all the beneficiaries who took property under the will become liable to the after-born for what they received and all the real property from the estate becomes encumbered with a cloud upon the title.[452] This is only in the event that the after-born is born alive and viable within a year of the testators' death.[453]

If posthumously conceived children are to be assimilated to children conceived by coitus, for purposes of taking from a testate procreators estate, they should be considered pretermitted heirs if they are not mentioned in the will, or as members of a class of the decedent's children, issue heirs or similar terms.[454] What steps should Kenyan policy makers and legislators take to ensure if at all, that such children born more than a year after the death of the testator receive their rightful inheritance?

It has been suggested that a solution to the problem of the late-in time after-borns' is to prohibit

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[450] Id.

[451] Id.

[452] See The Texas Probate Code s.67.

[453] Id.

[454] Shapo, supra note 376 at 1156.

the use of frozen gametes and embryos after their parent's death.[455] This course of action however may not be considered constitutional in view of the surviving parent's 'right to procreate'.[456]

Imposing a ban on producing posthumous children will also not aid those cases where such children have already been born or are in gestation. A possible solution that Kenyan legislators may want to consider would be to place a time limit for the pretermitted child to lay his claim.[457] This would put a reasonable limit on the practical un-alienability of estate property. This proposal may again not be very viable because it may deny due process because the child born after the specified period would have no chance of having his case heard.[458] The proposal would also serve to deny any equal protection by treating freeze-thaw children differently merely because of their date of birth.[459]

Another possibility might be to do away with after-born laws entirely. In this case, a testator would not be totally responsible for revising his will or planning for the possibility of after-born

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[455] Neffe, 'Embryo Research, West German Rules Proposed' (1985) 1 Nature 318.

[456] For a discussion of the 'right to procreate' see generally L. Shanner, 'The Right to Procreate: When Rights Claims Have Gone Wrong' (1995) 40 McGill L.J. 823.

[457] One mischief of this situation is that some pretermitted heir statutes apply to a decedent's grandchildren as well as children. Thus, all parents' estates may have to be kept open awaiting the birth of their children's postmortem children. Therefore the application of the pretermitted heir statutes may have to be limited to a decedent's own children. Another consequence of a rule recognizing the child as a pretermitted heir is that every testator who has stored frozen gametes or embryos, would probably be advised to include a statement of intent as to a possible postmortem child's inheritance or disinheritance in order to avoid the possibility of a postmortem pretermitted heir. See Leach, supra note 420 at 944 and Chester, supra note 441 at 995 (arguing that a testator should not be able to omit postmortem children).

[458] Shapo, supra note 376 at 1156.

[459] Id.

children.[460] It would thus be left up to the after-born to assert his rights upon the deceased's estate or the after-born would automatically be entitled to a portion of the estate, regardless of when s/he was born.[461] This course of action will inevitably be very problematic especially in cases where estates have long been distributed and ownership has changed hands. It is however important for Kenyan law makers to consider this doctrine vis-a-vis the new reproductive technologies when deciding whether to legislate on the technologies.

The provisions examined in this chapter are some of the important areas in both statutory and customary laws that need to be reflected upon by legislators and scholars in the context of reproductive technologies. It must be noted that that this examination is by no means exhaustive of the laws that would be affected by the technologies. They are however a cross-section of areas of immediate concern to legislators and policy makers. It has been made clear that the current laws ipso facto are clearly inadequate and cannot deal with some of the legal, ethical and cultural scenarios created by new reproductive technologies, yet in the absence of specific provisions, the examined sections and principles would be invoked in legal disputes arising from the use of these technologies.

What direction should Kenya take in view of the above? The final chapter of this thesis will examine whether there can be any form of reconciliation between the technologies, customary law and positive law. Should Kenya ape what western countries have done or should it adopt a

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[460] William H.E 'Legislative Guidelines to Govern in vitro fertilization and Embryo Transfer' (1986) 26 Santa Clara Law Review 2.

[461] Id.

different approach in term of regulating or controlling the procedures? chapter four address these very questions.

# Chapter Four

## *(i) The Challenge to Law and Society*

Reproductive technologies represent a major advance in the realm of infertility.[462] In this revolutionary age of rising expectations, there is the promise that scientists can and will indeed develop technologies to overcome every deficiency in the human condition.[463] Reproductive technologies are already being carried out in Kenya without due consideration of their possible legal, moral, cultural and ethical consequences.[464] Having witnessed all the problems faced by western countries struggling to regulate or have some sort of acceptable control over the technologies, the question we must ask ourselves is what approach should African countries such as Kenya, adopt in trying to come to terms with the problems these technologies bring?

I argue in this chapter that education and public awareness strategies are the first steps that need to be taken when dealing with new reproductive technologies in Kenya. I also believe that there ought to be a specific Act enacted to expressly clarify some of the family law issues that arise as a result of these technologies. Other structures that ought to play an active role in the new reproductive technologies debate are the Kenya Medical Practitioners and Dentists Board, which agency is charged with the responsibility of licensing medical doctors, as well as existing legal structures like the law of contract and torts.

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[462] See generally Kirby, 'Medical Technology and the New Frontiers of Family Law' in Legal Issues in Human Reproduction 3, S. Mclean ed. (Brookfield VT, USA: Gower, 1989) 5.

[463] Id.

[464] See Appendix A.

### *(ii) Education and Public Debate*

Whereas new reproductive technologies are currently accessible to a small population in Kenya largely due to their high cost and confinement to urban areas, it is only a matter of time before cheaper applications like artificial insemination, gain popularity among the greater public .

In preparation for this eventuality, there is need to educate Kenyans about the possible consequences of these technologies and they will be affected by them. The very nature of reproductive technologies entails public participation in any decision-making on the ethical and moral aspects arising from the technologies.[465] Issues such as the new options and potential benefits reproductive procedures bring, the possible altering of definitions of parentage and family and the latent effect of the procedures on the manner in which women and children, (born and unborn) are regarded are some of the issues that require public debate.[466]

The importance of health education in Kenya cannot be over emphasized.[467] In the family-

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[465] Countries such as Canada and the United Kingdom set up national commissions to encourage participation of the public on issues arising from reproductive technologies. See the Warnock Commission supra note 11 and The Royal Commission on Reproductive Technologies in Canada, supra note 11.

[466] The Kenyan government has in the past set up public commissions to elicit view from the public in various issues that affect them. Examples include the Education Commission, which is charged with the responsibility of evaluating the current education system with a view to making recommendations for reform. Others are the Family Law Task Force, The Kenya Ferry Disaster Commission and the Judiciary Committee. A similar albeit smaller, committee could be set up, if the Government is of the opinion that the consequences of reproductive technologies warrant public debate, to seek views from ordinary Kenyans.

[467] Kenya's health system has historically over-emphasized curative care rather than preventive care. However when it was discovered that the major causes of morbidity and mortality are malaria, skin disease, intestinal worms, diarrhea and respiratory tract disease, all of which could be avoided through enhanced primary and

planning sector for example, the use of culturally sensitive education strategies has been very successful in lowering Kenya's fertility rate.[468] Open sex education is generally taboo in many societies and the concept of artificial contraception was not well received in many part of the country.[469] New communication strategies have however proved to be very useful in educating Kenya's people about the importance of planning their families in the sense that they have generated public support for family planning policies and have neutralized political opposition. These strategies have also been used to inform the people about important threats to health such as AIDS and other sexually transmitted diseases.[470]

In practical terms this form of education is carried out through the use of field workers, counselors and community based workers.[471] Field workers are usually persons well known and respected in the community.[472] Seminars on the use of contraceptives are carried out in specific traditional groups, for example, in a gathering of older men, a trained elderly male leader will address the men on the use and advantages of using family planning methods and

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preventive health care promotion and education, the government embarked on a strong health education campaign which has began to produce the desired results. For example, from independence to 1993, the crude death rate dropped from 20 per 1000 to 9 per 1000 and infant mortality dropped from 120 per 1000 live births to 60 per 1000 live births. See Institute of Economic Affairs, Our Problems, Our Solutions: An Economic and Public Policy Agenda for Kenya (Nairobi: IEA, 1998) chapter 4.

[468] See Farid Cochrane, supra note 4. Non-Governmental organizations such as International Planned Parenthood Federation, Family Services International and PATH have been instrumental in achieving this objective through education campaigns in collaboration with the Ministry of Health. Institute of Economic Affairs, supra note 467.

[469] M. Were, Organization and Management of Community-Based Health care – National Pilot Project of Kenya Ministry of Health/Unicef (Nairobi: Project Management Health and Consultancy Services Ltd, 1982) 57.

[470] International Conference on Better Health for Women and Children through Family Planning, supra note 85 at 21-22.

[471] M. Were, supra note 469 at 57.

[472] Id.

among women, an older respected woman usually heads the meeting.[473]

Certain channels of communications are particularly well suited for reaching specific audiences. Radio, which is found in almost every village, is an important medium for communicating with potential clients.[474] In contrast, television, limited largely to cities, is particularly appropriate for communicating with leadership groups.[475] Newspapers can reach a substantial audience although this target group has to be literate and there must be proper distribution arrangements. Traditional theatre has been an innovative way of transmitting messages to rural areas in Kenya.[476]

These are the same strategies used by the Government and private sector in educating the public on a number of important activities such as vaccination drives, anti-female circumcision campaigns as well as in disseminating useful public health and environmental conservation information.

It is clear that successful communications campaigns appear to have a number of elements in common; they are carefully planned and comprehensive strategies; the target audience is clearly identified; messages are pre-tested by using focus groups; evaluation is carried out and the finding used to redesign strategies; and mass media messages are linked with distribution of

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[473] Id at 58.

[474] Id.

[475] Id.

[476] Id.

networks.[477] Perhaps this would prove to be an effective means to educate the public on some of the ethical, legal, moral and even cultural issues arising from the use of new reproductive technologies. This would most likely increase the number of people seeking help for infertility related problems and they would be aware, of the options available to them in a language they can understand.

Whereas there is probably no justification for the using of public funds to set up a very large and expensive public commission, similar to the commissions in Canada[478] and the United Kingdom,[479] I argue that there is just cause to set up a smaller scale public forum to discuss the impact of these procedures on society, their effects on cultural values especially with regard to children and women, and finally to discuss the legal, social, economic and health implications of these technologies.

Heath professionals, as stakeholders, ought to organize interdisciplinary seminars and debates to discuss what they are offering the public. These debates would form the groundwork for other professionals and interested parties such as religious groups, lawyers, customary law experts, women groups and philosophers to make their input into the debate and thus guide

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[477] Id.

[478] The Royal Commission in Canada was set up to examine how new reproductive technologies should be handles in Canada. The Commission undertook their task by consulting widely. Canadian views were collected through public hearings countrywide, briefs were submitted, toll-free telephone lines were set up, there were public surveys and more than three hundred researchers conducted projects for the commission. In short, this was a multi-million dollar undertaking on the part of the Canadian Government. See Proceed with Care vol. 1, supra note 11 at xxxi.

[479]The British Government set up a commission similar to the Canadian Commission. Its findings were published in The Report of the Warnock Commission, supra note 11.

legislators and policy makers as they decide what role the law, the government and other bodies should play.

This type of discussion would facilitate Kenyan participation in decision making at both the individual and collective level. Due to the inter-disciplinary nature of reproductive technologies, there is need for a distinct voice or authority to form the framework for responding responsibly to the consequences of the technologies and this authority would be in charge of organizing activities geared towards education and garnering public and professional opinion on these technologies.

Presently there is no guidance in Kenyan society on issues like status, liabilities and responsibilities of parties to reproductive procedures, access to treatment, informed consent, privacy and confidentiality and the boundaries between acceptable and unacceptable practices, procedures and treatments.[480] Widespread availability of these procedures without regulation or restriction could have profound effects on the genetic make up of the population and it can be further argued that a few private individuals should not be allowed to have control over the genetic fabric of society.[481]

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[480] These are the same considerations made by the Canadian Royal Commission on New Reproductive Technologies see Proceed with care, vol.1 supra note 11 at 7.

[481] This fear has been compounded by The Human Genome Project, which is an international collaboration of countries and scientists working together in an effort to map and sequence the entire human genome. It is intended bring together and organize the work produced by hundreds of laboratories in dozens of countries, in order to decode the secrets of the human genome. Among the many goals of this project are to discover more effective ways to treat and prevent disease, increase genetic screening abilities, and of greatest importance, reduce pain and suffering throughout the human species. Theoretically, once a map of human genome is complete, scientists and physicians will be able to screen an embryo for both beneficial and deleterious genetic characteristics. Medically, potential genetic disorders could thus be predicted and prevented and normal genes

The state therefore has a rational basis for its concern about with the general health and safety of patients seeking these treatment and the society at large. These are without question, issues of national concern that must be addressed at the national level in the manner discussed above.

It would be an effort in futility for lawmakers to simply pass laws to control and regulate these procedures before proper ventilation of issues by the people who would be affected by them.[482] Passing criminal prohibitions on some of the practices involved in new reproductive procedures without gaining public consensus that these practices are wrong or require some sort of control, would not be very effective especially where the majority of people would not be able

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identified in order to augment current scientific knowledge. Because of a rekindled belief that genes, rather or at least to a greater extent than environment, determine an individual's intelligence, longevity, health, and other personal characteristics, the project looks to a future of parental selection and control over offspring characteristics and greater screening capabilities, which will in turn lead to an increase in the abortions of fetuses containing genetic disease. See J.R. Harding Jr, 'Beyond Abortion: Human Genetics and the New Eugenics' (1996) 76 B.U. L. Rev. 421, 422. Ralph C. Conte, 'Toward a Theological Construct for the New Biology: An Analysis of Rahner, Fletcher, and Ramsey' (1995)11 J. Contemp. Health L. & Pol'y 429, 435. Many argue that by subordinating procreation to its producers, genetic fashioning will undermine marriage, parenthood, family, and respect for human life. Developments in genetic engineering may push less fortunate individuals to the sidelines of society by elevating the definition of "normal" and "acceptable." As society focuses on improving the human race, compassion for the disabled may decrease to traumatic levels affording less appreciation for differences between individuals. See R. Esfandiary, 'The Changing World of Genetics and Abortion: Why the Women's Movement should Advocate for Limitations on the Right to Choose in the Area of Genetic Technology' (1998) 4 Wm & Mary J. Women and L. 499. The fear of 'genetic discrimination is very real in western nations. Genetic discrimination has been defined as "the denial of rights, privileges or opportunities on the basis of information obtained from genetically-based diagnostic and prognostic tests." See L. Gostin, 'Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers' (1991) 17 AM. J.L. & Med. 109, 110.

[482] A good example is Female Circumcision. Despite the fact that several countries have express laws prohibiting female genital mutilation, the practice still thrives in those countries due to the fact that there is no consensus that the practice is wrong among the population carrying it out. Change of beliefs and attitudes can only come through culturally sensitive education and this is now the strategy being used in several of these countries including Kenya. See Kouba and J. Muasher, 'Female Circumcision in Africa: An Overview' ( 1985) 28 African Studies Review at 95-110. See also R. Steele, 'Silencing the Deadly Ritual: Efforts to End Female Genital Mutilation' (1995) 9 Geo. Immgr. L.J. 105, 123; Karen Hughes, The Criminalization of Female Genital Mutilation in the United States (1995) 4 J.L. & Pol'y 321, 325 & n.17.

to discern what constitutes an offence and what does not, due to the technical nature of the technologies.[483] Even if criminal prohibitions were passed to control certain aspects of the reproductive procedures, the problem of enforcement would inevitably be a problem because of the highly specialized and technical nature of the procedures.[484]

In summary, because intelligent decisions require knowledge, the first course of action in Kenya would be to initiate information campaigns to raise awareness of the capabilities, limitations and implications of the technologies among the public who are the potential parties to such procedures. Other professionals who ought to be included are psychologists and counselors, lawyers and legislators (who would be in charge of drafting laws and setting out policies affecting the use of these technologies), ethicists, philosophers, religious groups, women groups and other interest groups.

### *(iii) The Enactment of a Specific Act*

At present, as illustrated in chapter three, there is no comprehensive law, either customary or statutory in place to deal specifically with the consequences of the new reproductive technologies in Kenya. Existing customary law, family law, commercial law and other related legal provisions apply to new reproductive technologies by inference, if at all and courts would look to these inadequate provisions if disputes arose. This patchwork of laws is not acceptable

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[483] See R. Pound, 'The Limits of Effective Legal Action' (1917) 3 ABAJ at 60.

[484] A. Harvison-Young, 'Laws Limits: Lessons from Yesterday, Strategies for Today' in Governing Medically Assisted Human Reproduction (Lorna Weir ed., 1996) (arguing that criminalization is likely to be ineffective and to exacerbate the very ills it is intended to address)

given the totally new concepts brought on by reproductive technologies.

Presently, a couple seeking treatment for infertility relies solely on the discretion of the physician, who while recommending or effecting treatment for the condition, applies his/her own values and ethics.[485] Given the highly paternalistic nature of the practice of medicine in Kenya, it is highly doubtful whether any of these physicians' decisions are challenged or questioned by the couple.[486] Further due to lack of national policies on issues like the handling and use of fetal tissue and embryonic matter, it is not clear how clinics carrying out these procedures are dealing with excess embryos.[487] The creation of children is in both customary and statutory law, of fundamental social and national interest and such issues cannot be left in the hands of a few professionals who are in most cases driven by the commercial gains to be made by the procedures.[488]

Whereas as stated above, the Government cannot be expected to be directly involved in the day to day delivery of these services to the public, I believe the Government ought to initiate a broad framework for the conducting and development of new reproductive technologies. Such

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[485] See Appendix A.

[486] Id.

[487] Id. At the Assisted Conception Clinic in Mombasa, excess embryos are cryopreserved in the doctor's office in containers on the floor of his consulting room.

[488] Reproductive technologies can be a very lucrative commercial venture. For example the United States is now home to more than three hundred reproductive medicine clinics that create an estimated $350 million a year industry. See R. Zolkos, 'Medical Miracle, Liability Minefield: Exposures, Questions Grow With Reproductive Medicine' Bus. Ins., June 3, 1996 (reporting that the number of reproductive medicine clinics in the U.S. has jumped from 30 to 300 in the past decade, producing over 40,000 assisted conceptions and a $350 million industry each year).

a framework ought to strike a reasonable balance between the state's interest in regulating some of the procedures and the physician's duty to provide health services to the society.

The proposed new law would ideally provide new definitions for parenthood, much like the British Human Fertilization and Embryology Act,[489] and depending on the results of the national deliberation on the issues, have specific sections on issues such as the purchase and sale of gametes, genetic research, commercial surrogacy, issues of consent to the use of genetic material, jurisdictional issues in settling disputes because both customary law and statutory laws would have locus to deal with civil disputes.[490]

Further, criminal sanctions could be imposed on those individuals who either fail to safe-keep embryos or provide IVF in conformity with adopted standards. Although it is true that criminal penalties may not prevent all future IVF scandals, it is very likely that they would have an important deterrent effect. It is reasonable to speculate that the average physician, unlike the average criminal, would be effectively deterred by the realization that criminal sanctions could result from certain prohibited conduct (for example, the loss of embryos through willful misappropriation). Licensing schemes in this regard, could also act as an important compliance device. Regardless of whether any deterrence actually would occur, criminalization of this type of conduct would at least afford society with a means to extract some degree of retribution

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[489] The HFEA (U.K.), 1990.

[490] The Kenyan public has in the past been very enthusiastic to give their view in issues that affect them in family law and given a chance, they would also respond to issues surrounding reproductive technologies. The present Family Law Task Force (1999) received overwhelming responses from the public on issues like diversity in the law of marriage, registration of marriage, the future of customary law marriage and its legal effect, wife inheritance, divorce, legitimacy of children, same sex marriages, custody and maintenance of children and inheritance and succession. Family Law Task Force, Draft Proposal, supra note 312.

from the offending party.

There however must be some sort of agreement among the stakeholders of the technologies that these acts are unethical and should not be carried out under any circumstances in order for any such prohibitions to be effective. Thus, criminal provisions in the proposed Act would merely validate and overtly express the wishes of the majority.

New reproductive technologies is an area where there is great potential for value judgement, prejudices and subjectivity. Inevitably, this mentality extends to judges, who left to their own devices might set dangerous precedents based on their personal interpretations of parenthood, custody and other issues involving the technologies. The proposed Act would give courts faced with disputes involving new reproductive technologies, the necessary direction and guidance towards resolving such cases. The Act would therefore help to establish uniformity in decisions involving reproductive technologies.

Because Kenya has a dual system of law in operation, in order to promote consistency in the field of reproductive technologies, the new Act would be better suited to the needs of Kenyans if it took into account certain relevant customary rules that are not repugnant to morality and justice and that could be incorporated into new the Act rather than simply importing the definitions from other similar Acts.[491] This would result in an integrated hybrid Act which would be informed by the prevailing customs of the people and would take into consideration

[491] Such as the Human Fertilization and Embryology Act (U.K.) 1990

the already posited statutory laws discussed in the previous chapter.[492]

There is already a trend towards the unification of both systems of law in certain legal contexts[493] and I believe this is one such area where both systems can be integrated for the good of the parties involved in reproductive procedures. For example, on the question of re-conceptualizing the family and redefining legal parentage, customary law which allows for a variety of parental arrangements such as sororate unions,[494] and woman to woman marriage,[495] which unions are in a sense similar to some of the new parental arrangements created by surrogacy, can be used to inform the proposed Act.

Because these types of arrangements are not totally alien to Kenyans governed by customary law, some of these customary law rules could be harnessed and incorporated into the new law, as long as they are not repugnant to justice and morality. Kenya has several different ethnic groups and as a result, these customary law definitions would not be exclusive or exhaustive. I would thus propose that secular definitions of 'family' be incorporated into the Act to function

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[492] For example, courts would be allowed to apply customary law rules in custody disputes by granting custody of the child or children of reproductive procedures to a number of players in the arrangement rather than just one or two parties. This would be consistent in customary law, which advocates collaborative family arrangements involving both genetic and non- genetic parties.

[493] As stated elsewhere in this thesis, the Family Law Task Force of Kenya is reconsidering the Law of Matrimony Bill. The theme of this Bill is integration of the various family laws into one uniform law applicable to every Kenyan citizen. According to the task force, the diversity of marriage law with all its advantages in addressing the multi-racial, multi-cultural and multi-religious nature of Kenya, creates a number of practical problems:- Legal limitations in addressing inter-racial and inter-religious marriages, difficulties in ascertaining the existence of marriage due to the diversity of marriage registries, complexities in processing matrimonial disputes and complexity in ascertaining the law applicable in specific cases. Family Law Task Force, 'Draft Report' supra note 312.

[494] See Chapter one.

as a default in the event of conflict or non-applicability of customary law to certain communities. What needs to be understood however, is that before Kenyan legislators simply adopt reproductive laws of western nations, but they ought to re-examine Kenyan culture as embodied in customary law to determine which areas the new law could benefit from the already existing rules of custom.

### *(iv) The Role of the Kenya Medical Practitioners and Dentists Board*

The Kenya Medical Practitioners and Dentists Board is the professional body for health care professionals in Kenya and the Board is charged with the responsibility of issuing practicing licenses to medical practitioners.[496] I believe this agency could play important role in the realm of reproductive medicine, especially with regard to ethical codes and guidelines.

Ethical rules on the manner in which reproductive technologies should be carried out in terms of quality control and professional care, can be easily incorporated into the recognized code of conduct for medical practitioners. Whereas the effectiveness of ethical codes depends largely on the commitment and co-operation of the professionals to whom they apply, the Kenya Medical Practitioners and Dentists Board has the power to withdraw licenses from professionals who undertake unethical practices, hence these codes hold deterrent and disciplinary power.

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[495] Id.

[496] An Act of Parliament called the Medical Practitioners and Dentists Act Chapter 253, Laws of Kenya created this Board. The board consists of a chairman appointed by the Minister of Health, the Director of Medical Services, the deputy Director of Medical Services, four medical practitioners nominated by the Minister, a representative of each of the Universities which have the to grant medical and dental qualifications under the Act and five medical practitioners and two dentists elected by the medical practitioners and dentists. See section 4 of

In Canada, a single unified code of ethical research involving human beings was recently revised in 1996 and this code encompasses various aspects of reproductive technologies.[497] Because major Canadian research sponsors developed this code, failure by researchers to follow the code invariably leads to cutbacks in funding for research. In this way, the ethical code can be effective in encouraging professionals to adhere to the rules set out in the code.

In Kenya it is possible for the medical profession as a whole to act as one measure to check doctors carrying out these technologies. If it can be shown that a doctor carrying out reproductive technologies constantly flouts these rules, then the association would be empowered to take the appropriate disciplinary action.[498] Through the licensing process, states could better monitor the provision of infertility services. By conducting random inspections and audits, fertility clinics would be held more accountable for improper practices, be closely scrutinized for engaging in lax procedures, and potentially punished for misappropriated or missing embryos. To ensure that fertilized embryos do not just "disappear," clinics should be required to follow uniform standards for the storage, handling, and disposition of embryos.[499]

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the Act.

[497] This Code was the result of the Tri-Council Working Group which was made up of the major Canadian research sponsors, namely, the Medical Research Council of Canada, the Natural Sciences and Engineering Research Council and the Social Sciences and Humanities Research Council of Canada.

[498] Disciplinary proceedings are provided in section 20 of the Medical Practitioners and Dentists Act. (Cap 253, Laws of Kenya) Penalties include cancellation or suspension of practice licenses.

[499] This argument is made in K.A. Byers, 'Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry' (1997) 18 J. Legal. Med 265.

Another possible role the board would be able to play would be to set up a body within itself to deal with the issuance of licenses for clinics in Kenya carrying out reproductive technologies. This body would ideally issue licenses to permit the creation of embryos as well as regulate research on surplus embryos.[500] This would ensure that acceptable standards are maintained by clinics offering the procedure. This would at the same time maintain the professional reputation of the doctors, and the standards of their clinics would be kept at acceptable levels. It would also offer an avenue to collect data, for example on success rates among licensed clinics. The Board should therefore be encouraged to take up and play an effective role in the regulation of new reproductive technologies alongside the other measures discussed in this section.

### *(v) Contracts*

As seen in the first chapter, not all traditional Kenyan societies are averse to commercial arrangements within family structures.[501] In woman to woman marriages for example, a woman would be contracted to bear a child and she would be paid for her services.[502] Under

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[500] This body would be similar to the United Kingdom's Human Fertilization and Embryology Authority, which body has the authority to issue three types of licenses, one of which is a research license to permit the creation of zygotes and their use for approved research projects, as well as such use of surplus zygotes. These licenses must be renewed each year. See Proceed With Care, Volume 1 supra note 11 at 652.

[501] One of the major customs in most African marriages was the giving of bridal dowry to the parents of the girl. Whereas this transaction was largely seen as a gift, the negotiations that led to the agreement in price of the dowry was much like a commercial transaction and when a customary law marriage broke down, the dowry had to be returned by the girls father to the estranged husband. In the case of Gertrude Nelima Nalwa v Francis Nalwa [District Magistrate's Court at Nairobi, September 26, 1972] Maintenance Suit No. 7 of 1972, the issue before the court was whether a legal marriage when dowry had not been paid to the family of the girl. The court found that under Luhya customary law, it was clear that no marriage could arise if no bride price was paid and because in the present case no such payment was made, the marriage was null and void ab initio.

[502] See the case of Kibiego Arap Tireito v Jeptarus Tapsiarga [District Magistrate's Court at Kapsabet, August 19, 1981] Divorce Cause No. 11 of 1981, the fact that for a woman-to-woman marriage to subsist, money or its equivalent had to be paid to the 'wife.'

Gikuyu customary law, as seen earlier, in a semi-adoption transaction, for a price, a widower would be able to engage the services of another woman to rear his children on behalf of his wife.[503] This woman's role was more than that of a nurse and when the children attained maturity, they could elect to stay with the father or to go and live with the 'surrogate mother'.[504] The interesting aspect of this relationship was the fact that if the father failed to pay the woman for her services, she was entitled under customary rules to sue for damages.[505] These concepts of contracts within family arrangements under customary law may be borrowed and used effectively in similar instances in contemporary reproductive social arrangements.[506] Under customary law, payments were not made in family arrangements for financial gain, but for compensation purposes.[507] Thus in a marriage contract, the father of the

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[503] Simmance, 'Adoption of Children among the Kikuyu of Kiambu District' (1938) 3 Journal of African Law 33-38.

[504] Id.

[505] Id. Damages in such cases was usually set at ten goats and a ram.

[506] Currently under common law applied in Kenya, contracts for personal services are considered null and void. Standard contract doctrine would not provide specific performance to enforce a contract for personal services. Equity has historically had an aversion to specific performance of contracts for personal services, whether it be the contractual obligation of an opera singer to perform, a butcher to work at the grocery store, or a contractor to build a home. Not only may damages be an inadequate remedy in those cases, but such a judicial order has elements of involuntary servitude and also involves the court in unique problems of enforcement and supervision of the judicial decree. Accordingly, equity will not order a soprano to sing at the opera or a coach to lead a team into the playoffs. Arguably equity might order a party to fulfill a contract to construct a building, for personal services of the same intimate nature as above are not involved. Note, however, that the court might refuse to order the company to perform because the construction might be substandard or deficient, the contract could not be supervised, the other party does not want performance from a reluctant contract breacher, the plaintiff has unclean hands, or similar discretionary factors. However, courts will issue negative injunctions. While a court will not order an opera singer to perform "Madame Butterfly" for the plaintiff opera company, it will bar the singer from performing "Madame Butterfly," or any other opera for that reason, for a competing company while the singer is still contractually bound to the plaintiff. Such a decree does not involve judicial supervision of the contract or have the aura of involuntary servitude. The inability of a court to decree specific performance of a contract does not necessarily bar the court from forbidding conduct that is contrary to the contract. See Restatement Of Contracts § 367 (1991); Farnsworth EA, Contracts § 12.7 at 868 (2d ed. 1990). See also Lumley v. Wagner, 1 De G.M. & G. 604 (1852); Warner Bros. Pictures Inc. v. Nelson, 1 K.B. 207 (1936) (the Bette Davis case). For a more recent case, see Evening Standard Co. v. Henderson, 1987 I.C.R. 588.

[507] See P.Mayer, Bridewealth Law and Custom (Cape Town: Oxford University Press for the Rhodes Livingstone

bride was compensated for the loss of his daughter as she would no longer be able to contribute to her family's labor pool and the more responsibilities she had in her household, the higher her bride-price.[508] Under surrogacy arrangements, perhaps the spirit behind this concept could be encouraged, where, upon formal negotiations, a surrogate would be entitled to an agreed amount of compensation for her services from the commissioning parents.[509]

The use of contract law may thus be useful in establishing a broad policy with respect to surrogacy. It has been argued that if surrogacy contracts are to be unenforceable by the commissioning couple, it may well provide a significant incentive for them to treat the gestational mother very well.[510] It might also create an incentive for parents and involved professionals to screen and match all participants carefully.[511] If these incentives were assimilated into the contractual framework, they might prove to effective in protecting the

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Institute, 1956) 15-16, 26-37 57-64.

[508] Id.

[509] This view has been the subject of criticism because the idea of financial benefit in exchange for surrogacy services is seen in many quarters as constituting and promoting the exploitation of women. It has been argued that commercial surrogacy may be characterised as bay selling, a practice that demeans all of society. It is further contended that surrogacy treats babies as commodities that can be bought or sold for a price and that surrogacy should thus be prohibited for the same reasons that the sale of organs for transplantation is prohibited. According to Shari O'Brien, 'the law deters people from relinquishing non-regenerative parts of themselves for mere money...when an organ or an infant it being marketed the seller experiences pain and substantial risks, the buyer may pay a heft or even an extortionate fee, and the commodity sold is unique and irreplaceable.' S. O'Brien, 'Commercial Conception: A Breeding Ground for Surrogacy' (1986) 65 N.C. Rev. 127 at 142 – 3. (arguing that commercial surrogacy 'induces' a financially needy woman to become a surrogate but that the practice of surrogacy is akin to slavery). Andrea Dworkin argues that in surrogacy, just like in prostitution, women are not free to choose. 'In both prostitution and surrogate motherhood...the state has constructed the social, economic and political situation in which the sale of some sexual or reproductive capacity is necessary to the survival of the woman.' Dworkin A, Right-Wing Woman (1983) at 177. For a further discussion see C. Overall, Ethics And Human Reproduction: A Feminist Analysis (1987) at 116-9. Also see M. Atwood The Handmaid's Tale (Toronto: ECW Press, 1996) presenting a society in which the criminalized of abortion and the banning of women from the workforce led to institutionalized surrogacy as a form of slavery)

[510] A. Harvison-Young, 'New Reproductive Technologies in Canada and the United States: Same Problems, Different Discourses' (1998) 12 Temp. Int'l & Comp. L.J. 43 at 83-4.

gestational mother from exploitation.[512] Martha Fineman argues that legislation could prohibit contract provisions restricting the surrogate mother's choice to undergo an abortion, and could make mandatory a period of time during which the mother would be able to decide to keep the newborn.[513] Contract law could therefore be molded to further social or distributive roles within reproductive technologies.[514]

### *(vi) Torts*

This is yet another legal structure that can be used to play a role in the realm of reproductive technologies. The common law concept of 'duty of care' is an important component of tort law in Kenya.[515] If a plaintiff is to succeed in an action based on a plea of negligence, it is trite law that he must prove that the defendant was under a legally recognized duty; that the legal duty was extended to cover the plaintiff in the particular circumstances; that the defendant breached that legal duty; that as a result of that breach of duty by the defendant, the plaintiff suffered loss or damage or injury and that the loss, damage or injury was the proximate result of the breach

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[511] Id.

[512] Id. Martha Fineman supports putting a legislative framework in place to regulate surrogacy agreements and would agree with the effectiveness of a model that incorporates and relies upon contractual institutions. Id at 84. M.A. Fineman, The Neutered Mother: The Sexual Family and Other Twentieth Century Tragedies (New York: Routledge, 1995) 228-36.

[513] Fineman, supra note 313 at 228.

[514] Harvison-Young, supra note 510 at 84. See also M. Trebilcock et al., 'Testing the Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services' (1994) 32 Osgoode Hall L.J. 613.

[515] See C. B. Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vand. L. Rev. 1 (identifying and analyzing the idea of rights, duties, and relational wrongs in tort law); John C.P. Goldberg & Benjamin C. Zipursky, 'The Moral of MacPherson' (1998) 147 U. Pa. L. Rev. 1733. (offering a broad critique of the Prosserian conception of duty in negligence law and developing the relational model); See also Arthur Ripstein & Benjamin C. Zipursky, Corrective Justice in an Age of Mass Torts, in Philosophy in the U.S. Law of Torts (Gerald Postema ed., forthcoming 1998) (using a relational conception of duty to explain the causation requirement).

of duty by the defendant.[516]

As genetic medicine continues with its meteoric rise, two controversial torts that have developed in countries practicing reproductive technologies are wrongful life and wrongful birth.[517] The questions giving rise to these torts are whether children born with disabilities can bring legal actions against their physicians, whose negligent genetic assurances that would enjoy the fullest of health were the sole reason that these children were born to suffer and endure their debilitating conditions.[518] Conversely, parents have demanded that they should have a right to sue medical practitioners whose negligent counseling led to their giving birth to a perfectly healthy child, but one whom they claim they did not want.[519]

Alternatively situations arise in which parents allege that because their child is born disabled, they should be recompensed not only for an unwanted child, but also for one whose disabilities cause their parents to regard them as double cursed.[520]

The child's action has been termed as one for wrongful life and that of the parents as one for

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[516] These principles of tort have been affirmed in the following East African cases: Sultan Bin Ahmed El-Mugheiri v Ismail Dharamsi 1 Z.L.R. (1868-1918) 140 and Marianne Ingrid Winther v Arbon Langrish and Southern Ltd. [1969] E.A. 292.

[517] A. Jackson, 'Wrongful Life and Wrongful Birth: The English Conception' (1996) 17 L. Legal Med. 349 at 350.

[518] See generally, B. Steinbock and R. McClamrock, 'When is Birth Unfair to the Child' (1994) Hastings Center Report 24. No 6, 15.

[519] Jackson, supra note 517 at 349.

[520] Id.

wrongful birth.[521] In the case of Burton v Islington Health Authority[522] which is recognized by Kenyan courts, it was held that a physician can owe a duty of care to an unborn child and that there are contexts in which the English courts have adopted as part of English law the maxim of the civil law that an unborn child shall be deemed to be born whenever its interests require it.[523]

The tort of wrongful birth is recognized in common law and parents can successfully and seemingly plentifully make claim for wrongful birth[524] however the child has no action for wrongful life.[525] This is the position that would most likely be taken by Kenyan courts if faced

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[521] The distinction between claims for wrongful pregnancy (where the child is born healthy) and those for wrongful birth (where the child is born with disabilities) has not, as yet been used in English cases. Kenya derives her tort laws from British common law therefore any parental claims would come under the general heading of wrongful birth. In the recent English case of Walkin v South Manchester Health Auth., [1995] 4 All E.R. 132, Lord Justice Neill stated with the approval, the majority judgement of the Supreme Court of Minnesota in Sherlock v Stillwater Clinic 260 N.W. 2d 169 at 174 (Minn. 1977), 'While other courts have referred to a negligent case as a 'wrongful birth' action, we believe that this type of case is more properly denominated an action for 'wrongful conception', for it is at the point of conception that the injury claimed by the parents originates. Walkin [1995] 4 All E.R. at 144.

[522] [1992] 3 All E.R. at 838.

[523] In the context of prenatal injuries, the Burton court approved the rationale of the Supreme Court of Canada in Montreal Tramways v Leville [1933] 4 D.L.R. 337. 'To my mind, it is all but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of its mother'

[524] J.K. Mason & M. Smith, Law and Medical Ethics (London: Butterworths, 1994) at 135 states, 'there is not doubt that damages will be awarded in respect of negligent counseling. In other words, a wrongful birth action is available in the United Kingdom and we suspect that most cases are settled out of court'.

[525] There is only one case of wrongful life to have come before the English courts, namely, McKay v Essex Area Health Authority [1982] (1) Q.B. 1166. In this case, the plaintiff had been born disabled after a physician had negligently assured her mother that she had not been infected with German measles during her pregnancy. Mary's mother had consulted the physician precisely because she thought she had come into contact with the disease and she was aware that it could lead to deformities in the child she was carrying. Through a series of negligent acts on the part of the doctor, the plaintiff's mother was advised that she had not contracted German measles and that the plaintiff would not be adversely affected. In fact the opposite was true and the plaintiff was born deaf and suffered 'entry into a life in which her injuries were highly debilitating, and distress, loss and damage. Id at 1174. The Court of Appeal unanimously rejected the plaintiff's claim and stated that the physician

with such as a dispute, due to the recognition and application of common law principles and precedence.[526]

I believe that the tort of 'wrongful life' is one that should be discussed and reflected upon by legislators and policy makers in Kenya in the area of reproductive technologies.[527] Currently there is no consensus on the issue in the various jurisdictions that practice reproductive medicine. In the recent Canadian case of Arndt v Smith[528] the Supreme Court of British Columbia referred extensively to the reasoning of the McKay case.[529] In agreeing with the plaintiff's decision not to pursue a wrongful life claim the court stated, 'By doing so they [the plaintiffs] quite properly accepted the inevitable finding of this court that no such action lies.'[530]

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did not owe any duty to the child 'to terminate its life,' that the plaintiff was complaining that she was allowed to be born at all. Id at 1188-9.

[526] At present there has been no wrongful life claim filed in Kenyan courts. Therefore this discussion is purely hypothetical in anticipation that perhaps one day, such an action will arise in Kenya.

[527] There are strong argument pro-wrongful life suits because there is clearly a negligent act which resulted in their being. In such cases a child suffers and endures disabilities in situations in which there was no reason to do so. For a discussion supporting the tort of wrongful life see A. Shapira, 'Wrongful Life Lawsuit for Faulty Genetic Counseling: Should the Impaired Newborn be Entitled to Sue?' (1998) 24 Journal of Medical Ethics 369-375. See also Slade, 'The Death of Wrongful of Life: A Case for Resuscitation' (1982) 132 New L.J. 874; Stolker, Wrongful Life: The Limits of Liability and Beyond' (1994) 43 Int'l & Comp. L. Q. 521

[528] [1996] 7 Med. L. R. 35

[529] Mckay, supra note 525.

[530] Supra note 528 at 39. See, the US cases of Smith v. Cote, 513 A.2d 341, 351-55 (N.H. 1986); Becker v. Schwartz, 386 N.E.2d 807, 811-12 (N.Y. 1978); Nelson v. Krusen, 678 S.W.2d 918, 924-25 (Tex. 1984) (all refusing to recognize a cause of action for wrongful life because, to assess injury in such an action, the court would be compelled to engage in a subjective calculation of the relative value of the plaintiff's impaired life versus the allegedly higher value of nonexistence). However, the California, Washington, and New Jersey supreme courts have allowed children to recover special, but not general, damages on a claim of wrongful life in situations in which their parents were able to recover both special and general damages for the child's birth. See Turpin v. Sortini, 643 P.2d 954, 959-66 (Cal. 1982); Procanik v. Cillo, 478 A.2d 755, 760-63 (N.J. 1984); Harbeson v. Parke-Davis, 656 P.2d 483, 494-97 (Wash. 1983) (all finding a cause of action based largely on the desire to avoid the anomaly of permitting only the parents, and not the child, to recover for the cost of the child's own medical care). The results in these cases, however, do not show support generally for a tort of wrongful life

Currently, only three US states recognize the right of a child to bring a wrongful life claim.[531]

Due to the nature of reproductive technologies, perhaps tort law ought to be re-examined in order to establish whether a wrongful life claim can fit into the traditional tort categories of duty, breach, causation, injury and damages. If so found, Kenyan courts would be enabled to find in favor of handicapped children both on the lines of established tort principles and logic.

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because they do not allow the child to recover for general damages, which should be awarded if her life is truly wrongful. The cases are best understood as a means to assure that the tortfeasor internalizes the full costs of the tort.

[531] New Jersey, California and Washington have recognized wrongful life. See e.g. Harbeson v. Parke-Davis, 656 P.2d 483 (Wash. 1983); Procanik v. Cillo, 478 A.2d 755 (N.J 1984); Turpin v. Sortini, 643 P.2d 954 (Cal. 1982).

## Conclusion

The purpose of this thesis was to expose the important legal aspects of new reproductive technologies in the context of Kenya's dual system of law and to conceptualize ways in which society can and should indeed respond to the effects and legal consequences of these procedures. Kenya's present laws are clearly inadequate to deal with the legal possibilities created by the technologies and this fact has been illustrated by the detailed examination of the affected customary laws, the Law of Matrimony Bill [532]and current statutory laws governing family relations in Kenya.

I argue that despite the fact that new reproductive technologies have shaken man's understanding of life and in the process created previously inconceivable definitions of parenthood, these changes can be embraced by African society. In the context of reproductive technologies, I believe that precisely because of the difficulties encountered in determining certain concepts such as motherhood under English based law, coupled with the fact that in traditional societies, the conventional nuclear family is non-existent (and as a result many of the traditional family arrangements bear striking similarities in principle to new reproductive technologies) no law or Act should be passed in Kenya without first being informed by the prevailing customary rules.

What this implies is that Kenya should not simply adopt the British Act[533] or any other Act on

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[532] Supra note 97.

[533] The Human Fertilization and Embryology Act (U.K.) 1990.

reproductive technologies, based on the premise that the procedures are so alien to the Kenyan experience so that no rules or concepts can be borrowed from already existing structures, when dealing with the legal consequences of the technologies. Because of the facilities already in place in customary law to deal with third party inclusion in family arrangements, it is likely that customary rules would be able to provide solutions to some of the issues brought out on by the new technologies. This is not to say that customary law is the superior source of law in respect of reproductive technologies, it can however be used to make useful analogies with some of the consequences of reproductive technologies and are therefore worth examining. It is hoped that presently, if a Kenyan court were faced with any one of the legal dilemmas discussed, in the absence of statute law, such court will not simply adopt commonwealth trends, but will also look at issue like public policy, social norms and natural justice when trying to interpret the statutes in light of the new challenges. Judges should therefore not feel bound by formalistic laws that have long outlived their purposes.

Apart from customary law, legislators and policy makers should look at the other judicial and extra-judicial structures such as contract and tort that can be applied simultaneously with the proposed Act. Such structures may prove to be useful especially with regard to regulation, maintenance of standards and quality of the services offered.

Given the present structure of Kenya's health care system, few Kenyans can at present afford the major reproductive technologies. This fact however should not deter policy makers and legislators from seeking early solutions to some of the issues discussed in this thesis. It is only a

matter of time before these procedures, especially the cheaper ones like artificial insemination become readily available. Kenyan society places great importance on matters surrounding procreation, thus, the drafting of relevant laws and the making of policies to govern these technologies is a legitimate and justified concern and should be given due attention in order to avoid a clash of culture, science and law from occurring.

# Bibliography

## Books


A. Huxley, Brave New World (New York: Harper & Row, 1932).

A. Molnos, Cultural Source Materials for Population Planning in East Africa: Beliefs and Practices (Nairobi: East African Publishing House, 1973).

A. Phillips, Survey of African Marriage and Family Life (London: Oxford University Press, 1953).

A. Radcliffe-Brown, African Systems of Kinship and Marriage (London: Oxford University Press, 1967).

A. Schapera, A Handbook of Tswana Law and Custom, (London: Oxford University Press, 1938).

A.N. Allott, Judicial and Legal Systems in Africa (London: Butterworths, 1970).

American Law Institute, Restatement of the law of contracts : as adopted and promulgated by the American Law Institute (Washington, D.C: St. Paul : American Law Institute Publishers, 1932).

Andrea Dworkin, Right-Wing Woman (New York: Free Press, 1983).

B. A. Ogot, Kenya Before 1900 (Nairobi: Longman Publishers, 1976).

B. M. Ahlberg, Women, Sexuality and the Changing Order (Philadelphia: Gordon and Breach, 1991).

B. Mullei, An Examination of the Legal Issues in Kenya's Health Care Delivery (Nairobi: Mimeo, IPAR, 1998).

Baade and Everett eds., African Law, New Law for New Nations (Dobbs Ferry N.Y.: Oceana Publications, 1963).

C. Cagnolo, The Agikuyu: Their Customs, Traditions and Folklore, (Nyeri, Kenya: Mission Printing School, 1933).

C. Overall, Ethics And Human Reproduction: A Feminist Analysis (Boston: Allen & Unwin, 1987).

Canada, Proceed With Care : Final Report of the Royal Commission on New Reproductive Technologies (Canada: Minister of Government Services, 1993).

Canada: Royal Commission on New Reproductive Technologies, Proceed With Care: Final Report of The Royal Commission on New Reproductive Technologies (Ottawa: Ministry of Government Services, Canada, 1993).

Commonwealth Law Series, East Africa Law Today (London: British Institute of International and Comparative Law, 1966).

Cotran and Rubin, Readings in African Law (London: Cass, 1970).

D. Kayongo-Male and P. Onyango, The Sociology of the African Family (New York: Longman Group 1987).

D. Roberts, Killing the Black Body: Race, Reproduction and the Meaning of Liberty (New York, NY: Pantheon Books, 1997).

E. A Farnsworth, Contracts (Boston : Little, Brown, 1982).

E. Brody, Biomedical Technology and Human Rights (US: Dartmouth Publishing Co., 1993).

E. Cotran and N. Rubin, Readings in African Law (London: Frank Cass, 1970).

E. Cotran Casebook on Kenya Customary Law (Nairobi: Professional Books Limited, 1987).

E. Cotran, Restatement of African Law, Kenya (London: Sweet and Maxwell, 1968).

E. Dorendo, Female Genital Mutilation: Proposals for Change (London: Manchester Free Press, 1992).

E. E. Evans-Pritchard, Witchcraft, Oracles and Magic among the Azande (London: Oxford, 1937).

Elaine H. Baruch et al. eds., Embryos, Ethics and Women's Rights: Exploring the New Reproductive Technologies (New York: Haworth Press, 1988).

G. P. Murdock, Africa: It's Peoples and their Culture History (New York and London: McGraw Hill, 1959).

G. Wilson, Luo Customary Law and Marriage Laws and Customs (Nairobi: Government Printer, 1961).

Government of Kenya, Sessional Paper No. 10 on African Socialism and its Applications to Planning in Kenya. (Nairobi: Government Printer, 1965).

Government of Kenya, Strategic Action Plan for Financing Health Care in Kenya (Nairobi: Government Printer 1993).

H. Cory, Sukuma Law and Custom (London: Oxford University Press, 1953).

H. F. Morris, Uganda: The Development of its Laws and Constitution (London: Stevens & Sons, 1966).

H. Lightfoot-Klein, Prisoners of Ritual: An Odyssey into Female Genital Circumcision in Africa (New York: Harrington Press, Inc. 1989).

I. Shapera, Married Life in an African Tribe (Evanston: North Western University Press, 1966).

Institute of Economic Affairs, Our Problems, Our Solutions: An Economic and Public Policy Agenda for Kenya (Nairobi: IEA, 1998).

J. A. Robertson, Children of Choice: Freedom and the New Reproductive Technologies (Princeton, NJ: Princeton University Press, 1994).

J. Barton, L.V. Gibbs, & Merryman, Law in Radically Different Cultures (Minnesota: West Publishing Company, 1983).

J. D. Quick and S.N. Musau, Impact of Cost Sharing in Kenya (Nairobi: Management for Health Sciences and the Ministry of Health, 1993).

J. F. Holleman, Shona Customary Law (Cape Town: Oxford University Press, 1952).

J. K. Mason & M. Smith, Law and Medical Ethics (London: Butterworths, 1994).

J. Kenyatta, Facing Mt Kenya (New York: AMS Press, 1978).

J. Lasker & S. Borg, In Search of Parenthood: Coping with Infertility and High-Tech Conception (Boston: Beacon Press, 1987).

J. Middleton E.H. Winter eds., Witchcraft and Sorcery in East Africa (London: Oxford University Press,1963).

J. Ndisi, A Study in the Economic and Social Life of the Luo (Nairobi: Oxford University Press, 1974).

J. Roman, Miller & B.H. Burbaker eds., Bioethics and the Beginning of Life (Scottdale, Pa. : Herald Press, 1990).

J. S. Mbiti, African Religions & Philosophy (New York: Frederick A Praeger, 1969).

K. D. Alpern, The Ethics of Reproductive Technology (New York: Oxford University Press, 1992).

Kurt Bayertz ed., The Concept of Moral Consensus (Boston: Kluwer Academic Publishers, 1994).

L. Gostin, Surrogate Motherhood: Politics and Privacy (Bloomington and Indianapolis: Indiana University Press 1990).

L. Mastroianni, Jr. and C.A. Paulsen, eds., Aging, Reproduction, and the Climacteric (New York: Plenum Publishing Corp., 1986).

L. P. Kilbride and J.C. Kilbride, Changing Family Life in East Africa (University Park and London: The Pennsylvania State University Press, 1990).

L. Robert, The Modern Rule Against Perpetuities (Indianapolis: The Bobbs-Merrill Company, Inc, 1966).

L. Weir ed., Governing Medically Assisted Human Reproduction (Toronto: Centre of Criminology, University of Toronto, 1996).

M. A. Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies (New York: Routledge, 1995).

M. Atwood, The Handmaid's Tale (Toronto: ECW Press, 1996).

M. Boumil, Law, Ethics And Reproductive Choice (Littleton, Colorado: Fred B Rothman & Co, 1994).

M. Field, Surrogate Motherhood: The Legal And Human Issues (Cambridge, Mass.: Harvard University Press, 1990).

M. Warnock A Question of Life: The Warnock Report on Human Fertilization and Embryology (Oxford: Basil Blackwell, 1985).

M. Were, Organization and Management of Community-Based Health care – National Pilot Project of Kenya Ministry of Health/Unicef (Nairobi: Project Management Health and Consultancy Services Ltd, 1982).

M. Wilson, Rituals of Kinship among the Nyakyusa, (London: Oxford University Press, 1959).

McNeil et al. eds., The New Reproductive Technologies (New York: MacMillan, 1990).

Ministry of Health AIDS in Kenya: Background, Projections and Impact Interventions. (Nairobi: National AIDS Control Program, Ministry of Health and the National Council for Population and Development, 1997).

N. Chazan, R. Mortimer, J. Ravenhill, D. Rothchild, Politics and Society in Contemporary Africa

(Colorado: Lynne Rienner Publishers, 1988).

National Council for Population and Development, Central Bureau of Statistics of the Government of Kenya, Kenya Demographic and Health Survey (Nairobi: Government Printer, 1993).

O. K. Asare, West African Traditional Religion (London: Oxford University Press, 1978).

O. Nwakamma, The Customary Laws of Succession in Eastern Nigeria (London: Sweet and Maxwell, 1966).

P. Berman et al, Kenya: Non-Governmental Health Care Provision. (Boston: Harvard University, AMREF, 1995).

P. Mayer, Bridewealth Law and Custom (Cape Town: Oxford University Press for the Rhodes Livingstone Institute, 1956).

P. S. W. Owino, The Impact of Structural Adjustment on the Production and Availability of Pharmaceutical Products in Kenya. (D.Phil. Thesis, University of Sussex, UK, 1993).

Population Council, Better Health for Women and Children Through Family Planning ( New York: Population Council, 1987).

R. David, and J. Brierly, Major Legal Systems in the World Today (London: Oxford Clarendon Press, 1985).

R. Maudsley, The Modern Law of Perpetuities (London: Butterworths, 1979).

Radcliffe-Brown and Forde, African Systems of Kinship and Marriage (London: Oxford University Press, 1967).

Republic of Kenya, Report of the Commission on the Law of Marriage and Divorce (Nairobi: Government Printer 1967).

S. Mclean ed., Legal Issues in Human Reproduction (Brookfield, Vt., USA: Gower, 1989).

S. Roberts ed., Law and the Family in Africa (Netherlands: Moulton Publishers, 1977).

T. O Elias, Nigeria: The Development of it's Laws and Constitution (London: Stevens 1967).

T. O. Elias, The Nature of Customary Law (Manchester: Manchester University Press, 1956).

T. Weisner, C. Bradley & P. Kilbride., African Families and the Crisis of Social Change (London:

Bergen and Garvey, 1977).

The World Bank, The World Bank Discussion Papers (Washington D.C: The World Bank, 1989).

University of Ife - Institute of African studies, Integration of Customary and Modern Legal Systems in Africa (Nigeria: Africana Publishing Corporation, 1964).

W. R. Ochieng, A History of Kenya (Nairobi: Longman 1985).

Walters and Singer, Test-Tube Babies; A Guide to Moral Questions, Present Techniques and Future Possibilities (London: Oxford University Press, 1982).

World Bank, World Development Report 1993: Investing in Health (New York: World Bank, 1994).

World Health Organization, Kenya: Country Health Profile (Nairobi: WHO Kenya Country Office, 1995).

## Articles

A. Allen, 'Surrogacy, Slavery, and the Ownership of Life' (1990) 13 Harv. J. L. & Pub. Pol'y 139.

A. Goodwin, 'Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements' (1992) 26 Fam. L.Q. 275.

A. Harvison Young & A. Wasunna, 'Wrestling with the Limits of Law: Regulating New Reproductive Technologies' (1998) 6 Health Law Journal 239.

A. Harvison Young, 'New Reproductive Technologies in Canada and the United States: Same Problems, Different Discourses' (1998) 12 Temp. Int'l & Comp. L.J. 43.

A. Harvison Young, 'Reconceiving the Family: Challenging the Paradigm of the Exclusive Family' (1998) 6 Am. U. J. Gender & L. 505.

A. Jackson, 'Wrongful Life and Wrongful Birth: The English Conception' (1996) 17 J. Legal Med. 349.

A. King, 'Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction' (1995) 5 UCLA Women's L.J. 329.

A. M. Coleman, 'Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction' (1996) 17 Cardozo L Rev. 497.

A. N. Allott 'What is to be done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950' (1984) 28 J.AFR.L 56.

A. Obruca, 'Fertilization and Pregnancies following Intracytoplasmic Injection of Testicular Spermatozoa' (1995) 9 J. Assist Reprod. Genet. 627.

A. Schiff, 'Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity' (1995) 80 Iowa L. Rev. 265.

A. Shapira, 'Wrongful Life Lawsuit for Faulty Genetic Counseling: Should the Impaired Newborn be Entitled to Sue?' (1998) 24 Journal of Medical Ethics 369.

A.N. Allott, 'The Unity of African Law' [1960] Essays in African Law 55.

A.O. Trounson, J. F. Leeton, C. Wood, J. Webb and J. Wood, 'Pregnancies in Humans by Fertilization In Vitro and Embryo Transfer in the Controlled Ovulatory Cycle' (1982) 212 Science 681.

B. Leach, 'Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent' (1962) 48 A.B.A.J. 942.

B. Modell, 'The Ethics of Prenatal Diagnosis and Genetic Counseling' (1990) 11 World Health Forum 184.

B. Rwezaura, 'Tanzania: Building a New Family Out of a Plural Legal System' (1995) 33 U. Louisville J. Fam. L. 523.

B. Steinbock and R. McClamrock, 'When is Birth Unfair to the Child' (1994) 24 Hastings Center Report 15.

B. Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vand. L. Rev. 1

Birdsall N, 'Population Growth and Poverty in the Developing World' (1980) 35 Population Bull. 9.

C. Lomenzo, 'A Goal Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses' (1995) 46 Hastings L.J. 941.

C. Mann, 'How Many is too Many?' (1993) The Atlantic 27.

C. Nyamu et al., 'The Role of Pressure Groups in the Promotion and Preservation of Democracy in Kenya: The Case of the Women's Movement' (1994) 1 U. Nairobi L.J. 62.

C. P. John, Goldberg & B.C. Zipursky, 'The Moral of MacPherson' (1998) 147 U. Pa. L. Rev. 1733.

C. Sappideen, 'Life After Death – Sperm Banks, Wills and Perpetuities' (1979) 53 Austl. L. J. 311.

Council of Europe, 'Draft Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine' Strasbourg, June 1996, Strasbourg Directorate of Legal Affairs, Council of Europe, CDBI (96).

D. H. Smith, 'Wombs for Rent, Selves for Sale?' (1988) 4 J. Contemp. Health L. & Pol'y 23.

D. Roberts, 'The Genetic Tie' (1995) 62 U. Chi. L. Rev. 209.

Daily Nation, 'Causes of Infertility in Men and Women in Kenya' Thursday, November 26th 1998.

E. Cotran, 'The Law of Succession Act' (1968) 1 Kenya Law Society Review, 2.

E. Hessenthaler, 'Gestational Surrogacy: Legal Implications of Reproductive Technology', (1995) 21

N.C. Cent. L.J. 169.

F. S. Schultz, 'Surrogacy Arrangements: Who are the "Parents" of a Child Born Through Artificial Reproductive Techniques?' (1995) 22 Ohio N.U. L. Rev. 273.

G. A. Holmes, 'The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals' (1994) 53 Md. L. Rev. 358.

G. Annas, ' Pregnant Women as Fetal Containers' (1986) 16 Hastings Center Rep. 14.

G. Annas, 'Crazy Making: Embryos and Gestational Mothers' (1991) 21 Hastings Center Rep. 35.

G. Annas, 'Using Genes to Define Motherhood—The California Solution' (1996) 326 New Eng. J. Med. 417.

G. P. Smith, 'Australia's Frozen "Orphan" Embryos: A Medical, Legal and Ethical Dilemma' (1985-6) 24 J. Fam. L. 27.

Gallagher, 'Womb to Let' (1987) Nat'l Rev. 27.

Goodwin, 'Determination of Legal Parentage in Egg Donation, Embryo Transplantation and Gestational Arrangements' (1992) 26 FAM. L.Q. 275.

H. Shapo, 'Matters of Life and Death: Inheritance Consequences of Reproductive Technologies' (1997) 25 Hofstra L. Rev 1091.

H.E. William 'Legislative Guidelines to Govern In Vitro Fertilization and Embryo Transfer' (1986) 26 Santa Clara Law Rev. 2.

Hone, 'The Native of Uganda and the Criminal Law', (1938) 6 Uganda Journal 7.

I. Martin, 'Ethics and Uncertainty: In Vitro Fertilization and Risks to Women's Health' (1998) 9 Risk: Health Safety & Environment 201.

J. A. Rein, 'Relatives by Blood, Adoption and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)' (1984) 37 Vand. L. Rev. 711.

J. Botkin, 'Ethical issues and Practical Problems in Preimplantation Genetic Diagnosis' (1998) 26 J. L. Med & Ethics 17.

J. Brooke, 'A Nigerian Shame: The Agony of the Child Bride' NY Times, July 17, 1987, A4.

J. Dolgin 'Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies' (1996) 28 Ariz. St. L.J. 473.

J. Dolgin, 'The Family in Transition: From Griswold v Eisenstadt and Beyond' (1994) 82 Geo. L. J. 1519.

J. Grad, 'Legislative Guidelines to the New Biology - Limits and Possibilities' (1968) 15 UCLA L.R. 480.

J. Griffin, 'The Gay Baby Boom: Homosexual Couples Challenge Tradition as They Create New Families' CHI.TRIB. Sept 2, 1992.

J. Hill 'Exploitation' (1994) 79 Cornell. L. Rev. 631.

J. Hill, 'What Does it Mean to be a Parent? The Claims of Biology as the Basis for Parental Rights' (1991) 66 N.Y.U. L. Rev. 353.

J. Hollinger, 'From Coitus to Commerce: Legal and Social Consequences of Non-coital Reproduction' (1985) 18 U. Mich. J. L 870.

J. L. Harris, 'Reconsidering the Criteria for Legal Fatherhood' (1996) Utah L. Rev. 461.

J. R. Harding Jr, 'Beyond Abortion: Human Genetics and the New Eugenics' (1996) 76 B.U. L. Rev. 421.

J. Robertson, 'Families and Procreative Liberty: The Legal Structure of the New Reproduction' (1986) 59 Cal L. Rev. 942.

J. Robertson, 'Posthumous Reproduction' (1994) 69 Ind. L.J. 1027.

J. Tesarik, 'Oocyte Activation after Intracystoplamic Injection of Mature and Immature Sperm Cells' (1998) 1 Human Reprod. 117.

J. Vance, 'Womb For Rent' (1994) 21 Hastings Const. L.Q. 827.

J.C. Caldwell, 'Is the Asia Family Planning Program Model suited to Africa?' (1988) 19 Studies in Family Planning 19.

K. A. Byers, 'Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation

of the In Vitro Fertilization Industry' (1997) 18 J. Legal. Med 265.

K. Hughes, 'The Criminalization of Female Genital Mutilation in the United States' (1995) 4 J.L. & Pol'y 321.

K. Katz, 'Ghost Mothers: Human Egg Donation and the Legacy of the Past' (1994) 57 Alb. L. Rev. 733.

K. Nobles, 'Birthright or Life Sentence: Controlling the Threat of Genetic Testing', (1992) 65 S. Cal. L. Rev. 2081.

K. Politt, 'Checkbook Maternity: When is a Mother not a Mother?' The Nation, Dec. 31, 1990, 825.

K. Roosevelt III, 'The Newest Property: Reproductive Technologies And The Concept of Parenthood.' (1998) 39 Santa Clara L. Rev. 79.

K. T. Bartlett, 'Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed' (1984) 70 Va. L. Rev. 879.

Kenya Family Law Task Force 1999, 'Draft Proposal: Gender Issues Linked To The Family And The Legal Process' (unpublished, on file with author)

Kouba and J. Muasher, 'Female Circumcision in Africa: An Overview' ( 1985) 28 African Studies Review 95.

L. Berat, 'The Future of Customary Law in Namibia: A Call for an Integration Model' (1991) 15 Hastings Int'l & Comp. L. Rev. 6.

L. Gostin, 'Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers' (1991) 17 AM. J.L. & Med. 109.

L. Shanner, 'The Right to Procreate: When Rights Claims Have Gone Wrong' (1995) 40 McGill L.J. 823.

L. Uzych, 'The Mother of All Questions: How to Govern Surrogacy' (1993) 2 Pa. L. J. 2.

L. Uzych, 'The Mother of All Questions: How to Govern Surrogacy' (1993) Pa. L. J. 2.
Leach, 'Perpetuities in a Nutshell ' (1938) 51 Harvard Law Review 638.

M. Ashe, 'Law – Language of Maternity: Discourse Holding Nature in Contempt' (1988) 22 New Eng. L. Rev. 521.

M. Griffin, 'Womb for Rent' (1981) Stud. La. 29.

M. Malinowski, 'Coming into Being: Law, Ethics, and the Practice of Prenatal Genetic Screening' (1994) 45 Hastings L.J. 1435.

M. Mathangani, 'The Triple Battle: Gender, Class, and Democracy in Kenya' (1997) 39 How. L.J. 287.

M. Minnow, 'Redefining Families: Who's In and Who's Out?' (1991) 62 U. Colo. L. Rev. 269.

M. Seibel, 'A New Era in Reproductive Technology: In Vitro Fertilization, Gamete Intrafallopian Transfer and Donated Gametes and Embryos' (1988) 318 New Eng J. Med. 829.

M. Trebilcock et al., 'Testing the Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services' (1994) 32 Osgoode Hall L.J. 613.

N. F. Adjetey, 'Reclaiming The African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy And African Society and Culture' (1995) 44 Am. U. L. Rev 1351.

N. Lenoir, 'French European, and International Legislation on Bioethics' (1993) 27 Suffolk U.L. Rev. 1249.

N. Wimborne, 'Customs and Taboos Hinder Progress of Women in Modern Africa' Reuters News Service, Dec. 11, 1989.

Neffe, 'Embryo Research, West German Rules Proposed' (1985) 1 Nature 318.

Note, 'What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision' (1993) 106 Harv. L. Rev. 1944.

O. Saleem, 'Be Fruitful and Multiply, And Replenish The Earth, And Subdue It: Third World Population Growth And The Environment' (1995) 8 Geo. Int'l Envtl. L. Rev. 3.

R. Bernabeu, 'Successful Pregnancy after Spermatid Injection' (1998) 13 Human Reprod. 1898.

R. Brashier, 'Children and Inheritance in the Nontraditional Family' (1996) 93 Utah L. Rev. 214.

R. Chester, 'Freezing the Heir Apparent: A Dialogue in Postmortem Conception, Parental Responsibility, and Inheritance' (1996) 33 Hous. L. Rev. 967.

R. David, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African

Countries' (1962) Tul. L. Rev 187.

R. Esfandiary, 'The Changing World of Genetics and Abortion: Why the Women's Movement should Advocate for Limitations on the Right to Choose in the Area of Genetic Technology' (1998) 4 Wm & Mary J. Women and L. 499.

R. Kandel, 'Which Came First: The Mother of the Egg? A Kinship Solution for Gestational Surrogacy' (1994) 47 Rutgers L. Rev. 165.

R. Kerekes, 'My Child...But Not My Heir: Technology, the Law, And Post-Mortem Conception' (1996) 31 Real Prop. Prob. & Tr. J. 213.

R. Pound, 'The Limits of Effective Legal Action' (1917) 3 ABAJ 60.

R. Rao, 'Assisted Reproductive Technology and the Threat to the Traditional Family' (1996) 47 Hastings L. J. 951.

R. Steele, 'Silencing the Deadly Ritual: Efforts to End Female Genital Mutilation' (1995) 9 Geo. Immgr. L.J. 105.

R. Tasca, M. Mclure, 'The Emerging Technology and Application of Preimplantation Genetic Diagnosis' (1998) 26 J. L. Med & Ethics 7.

R. Zolkos, 'Medical Miracle, Liability Minefield: Exposures, Questions Grow With Reproductive Medicine' (1996) Bus. Ins., June 3.

R.C. Black., 'Legal Problems of Surrogate motherhood' (1981) 16 New England L.R. 373.

Ralph C. Conte, 'Toward a Theological Construct for the New Biology: An Analysis of Rahner, Fletcher, and Ramsey' (1995) 11 J. Contemp. Health L. & Pol'y 429.

S. Bhimji, 'Womb for Rent--Ethical Aspects of Surrogate Motherhood' (1987) 137 Canadian Med. Assn. J. 1132.

S. O'Brien, 'Commercial Conception: A Breeding Ground for Surrogacy' (1986) 65 N.C. Rev. 127.

S. Rae, 'Parental Rights and the Definition of Motherhood in Surrogate Motherhood', (1994) 3 S. Cal. Rev. L. & Women's Stud. 219.

S.A. Garcia 'Reproductive Technology for Procreation, Experimenting and Profit: Protecting Rights and Setting Limits' (1990) 11 J. Legal Med. 1.

Shapiro & Sonnenblick, 'The Widow and the Sperm: The Law of Post-Mortem Insemination' (1987) J.L.& Health 229.

Simes, 'Is the Rule against Perpetuities Doomed?' (1953) 52 Mich. L. Rev. 179.

Simmance, 'Adoption of Children among the Kikuyu of Kiambu District' (1938) 3 Journal of African Law 33.

Slade, 'The Death of Wrongful of Life: A Case for Resuscitation' (1982) 132 New L.J. 874.

Stolker, Wrongful Life: The Limits of Liability and Beyond' (1994) 43 Int'l & Comp. L. Q. 521.

T. Krim, 'Beyond Baby M: International Perspectives On Gestational Surrogacy and the Demise of The Unitary Biological Mother' (1996) 5 Annals Health L. 193.

UNESCO, 'The Problem of Indigenous Populations' (1971) E.S.C.Res. 1589, UNESCO, 50th Sess. Supp. (1) at 16, U.N. Doc. E/5044.

V. Norton, 'Comment, Unnatural Selection: Non-therapeutic Preimplantation Genetic Screening and Proposed Regulation' (1994) 41 UCLA L Rev. 158.

Wills, 'The Pretermitted Heir in Missouri' (1976) 41 Missouri Law Review 143.

## World Wide Web Sites

The Council of Europe Convention on Human Rights and Biomedicine (visited March 21, 1999) <http://www.coe.fr/cp/97/190a(97). html>

## APPENDIX A

THE ASSISTED CONCEPTION & IN VITRO FERTILIZATION CLINIC AT THE MOMBASA HOSPITAL, MOMBASA, KENYA.

1ST – 12TH DECEMBER 1998.

### EXCERPTS OF THE AUTHOR'S INTERVIEW WITH DR. DAVE OF THE ABOVE FERTILITY CLINIC

Q: **Dr Dave what services does your clinic offer the public?**
A: Our main business is in vitro fertilization and embryo transfer, however we also offer Artificial insemination and intracytoplasmic sperm injection.

Q: **Do you apply the in vitro fertilization technique to surrogacy?**
A: Yes we do, but only in exceptional circumstances and we do not encourage such arrangements outside the extended family unit.

Q: **How many staff do you have and could you comment on the training received by your staff in respect of the technologies you offer?**
A: My clinic has a nurse practitioner who assists me counseling staff and preparing them psychologically for the procedures. I also have a technicia who knows how my equipment works and he is familiar with the basic workings of most of the tools I use. I also have a receptionist who does th first screening, for example, she takes down information. I am an obstetrician by training and I have also undertaken short courses in assiste conception technologies in the United Kingdom and Germany.

Q: **How long has your clinic been in operation?**
A: At least five years and I have not had any legal problems, negligence or malpractice.

Q: **What population does your clinic mainly cater for?**
A: Well, at the moment, for in vitro fertilization, my clinic mainly sees Kenyan Asians and Europeans and a few Kenyan Africans. I carry ou approximately five in vitro procedures a month. Many of the couples make at least two attempts at IVF.

Q: **Is this mainly due to the cost?**
A: That is part of the main reason; each in vitro attempt costs approximately $5,000. This sum is not covered by any present health insurance plan.

Q: **What is the success rate for each attempt?**
A: Approximately 10%. I make this fact very clear to couples before they agree to undergo the procedure.

Q: **What do you do with excess gametes or embryos?**
A: (Making a gesture to the back of his office) They are stored in that freeze container at the corner of my office.

Q: **Do the gamete providers have any say in the storage of the embryos?**
A: No, but if they want them implanted, I will abide by their wishes. I however will not destroy them. I do not perform in vitro procedures on wome who have attained menopause. I try to make the process as natural as possible.

Q: **Is there any licensing body either here that provides guidance on some of the issues we have discussed?**
A: In Kenya no, but I am affiliated to one in the United Kingdom where I am also licensed to practice and They give me a lot of material and training support, which help me keep abreast of recent developments.

Q: **Is the Kenya Medical Practitioners and Dentist Board aware of your activities?**
A: Yes they are but they do not issue any special licenses other than my certificate to practice as an obstetrician.

Q: **What about issues like informed consent? Do you require written consent from the parties?**
A: Yes, (Shows me a bulky document that reads more like a waiver of liability than information on the actual procedures).

Q: **Do your patients read through this entire document? It is very technical and detailed. Do you not have any other simpler pamphlet?**
A: No, many of my patients, if in doubt, ask their lawyers for advice. My lawyers drafted this consent form. I am also very open to questions and encourage my patients to ask me anything about the procedure. I also encourage husbands to be with their wives during the procedure.