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A human rights-based approach to assisted reproductive technologies in Kenya

**Mini dissertation submitted in partial fulfilment of the requirement for the degree
of Master's of Law in Human Rights, Sexual and Reproductive Rights in Africa to
the Centre for Human Rights, Faculty of Law, University of Pretoria**

BY

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Declaration


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Last but not least, a special thanks to me, for not giving up! This journey has been a testament to personal growth and perseverance. Here is to surviving and thriving!

List of abbreviations

ART	Assisted Reproductive Technologies
ASRM	American Society for Reproductive Medicine
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ESHRE	European Society of Human Reproduction and Embryology
FCSRCA	The Fertility Clinic Success Rate and Certificate Act 1992
HPCSA	Health Professionals Council of South Africa
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IVF	In Vitro Fertilisation
IUI	Intrauterine Insemination
KMPDC	Kenya Medical Practitioners and Dentists Council
LGBTQ+	Lesbians Gay Bisexual Transgender Queer
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
NAMAR	National Authority for Medically Assisted Reproduction
PGD	Preimplantation Genetic Diagnosis
SALRC	South African Law Commission
SASREG	South African Society of Reproductive Medicine and Gynaecologist Endoscopy
SAMRC	South African Medical Research Council
SART	Society for Assisted Reproductive Technology
Universal Declaration	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational Scientific and Cultural Organisation
USA	United States of America
WHO	World Health Organisation

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Chapter 1: Introduction

1.1 Background

The Kenyan Constitution describes the family as a fundamental unit of society, and this social unit is seen as a crucial influence on social order and the posterity of society.¹ Most governments have had one reproductive healthcare policy or another in a bid to decrease the infant mortality rate.² As a result, it has grown increasingly important to ensure that adequate services are available to support and streamline reproductive healthcare to enhance the growth and formation of families.³

Increasingly, assisted reproductive technologies (ART) are innovations in reproductive healthcare that are supporting individuals and families to meet their reproductive goals. This is especially for those struggling with infertility or who may wish to separate heterosexual sex from the reproductive process.⁴ This means that groups such as same-sex couples or single women, among others, can start their own families outside of mainstream definitions and formations of reproduction.

However, in many conservative societies, like in Kenya, such groups are not considered when designing reproduction laws and technologies.⁵ Despite the known benefits of ART, its use is curtailed due to limited definitions of family, family planning and reproduction. Authorities and decision makers simply do not recognise access to reproduction technologies as both a human right and a health right.⁶

ART represents a profound advancement in medical science, offering hope and increased options to individuals and couples facing reproductive challenges.⁷ The value of ART extends far beyond its technical capabilities, encompassing emotional, social,

¹ C Murray 'Kenya's 2010 Constitution' (2013) 61 *Neue Folge Band Jahrbuch des öffentlichen Rechts* 747.

² R Radhika 'Reconceiving privacy: Relationships and reproductive technology.' (1998) 45 *University of California Law Review* 1077.

³ Radhika (n 2) 1077.

⁴ JP Toner & others 'Society for Assisted Reproductive Technology and assisted reproductive technology in the United States: a 2016 update' (2016) 106 *Fertility and sterility* 541.

⁵ Shevell-Tracy-Malone-Vidaver & others 'Assisted reproductive technology and pregnancy outcome' (2005) 106 *Obstetrics & Gynecology* 1039.

⁶ SA Voss 'The Right to Privacy & Assisted Reproductive Technologies: A Comparative Study of the Law of Germany and the US' (2001) 21 *New York Law School Journal of International & Comparative Law* 229.

⁷ R Brown & J Harper 'The clinical benefit and state of current and future assisted reproductive technology' (2012) 25 *Reproductive Biomedicine Online* 108.

and ethical dimensions that profoundly impact individuals and society as a whole, in a number of ways.⁸

For instance, ART provides a pathway to parenthood for individuals and couples who may be unable to conceive naturally. Infertility affects approximately 10-15% of couples worldwide, and for many, ART offers the opportunity to fulfil their desire for a child and experience the joys of parenthood.⁹ Whether through in vitro fertilisation (IVF), intrauterine insemination (IUI) or other techniques, ART empowers individuals to overcome biological barriers and build the families they envision.

ART has also revolutionised family-building options, particularly for lesbians, gay, bisexual, transgender, queer (LGBTQ+) individuals and single parents.¹⁰ Technologies such as donor sperm, donor eggs, and gestational surrogacy enable individuals and couples of diverse sexual orientations and relationship statuses to pursue parenthood on their terms.¹¹ ART promotes inclusivity and recognises the diverse paths to family formation, challenging traditional norms and stereotypes surrounding parenthood.¹²

Beyond its impact within families, ART contributes to broader social and demographic trends.¹³ As people delay childbearing for various reasons, including career pursuits and educational aspirations, ART offers a means to extend the window of fertility and support family planning decisions.¹⁴ Additionally, ART has implications for population dynamics, contributing to discussions about fertility rates, aging populations, and reproductive health policies.¹⁵

⁸ F Jennifer & B Slater 'Privacy and assisted human reproduction: a discussion paper' (2002) 11 *Health Law Review* 56.

⁹ L Barnes 'Reproductive justice for the invisible infertile: A critical examination of reproductive surveillance and stratification' (2020) 14 *Sociology Compass* 12745.

¹⁰ M Riley 'Lesbian infertility: Queering assisted reproductive technology and examining policy impacts on the LGBTQ community' unpublished Undergraduate thesis, University of Washington State, 2019.

¹¹ P-Madelyn M 'Assisted reproductive technologies and equity of access issues' (2005) 31 *Journal of Medical Ethics* 280.

¹² Madelyn (n 11) 283.

¹³ GD Adamson 'Global cultural and socioeconomic factors that influence access to assisted reproductive technologies' (2009) 5 *Women's Health* 351.

¹⁴ Barnes (n 9) 14.

¹⁵ GM Chambers & others 'The economic impact of assisted reproductive technology: a review of selected developed countries.' (2006) 91 *Fertility and sterility* 2281.

1.2 Problem statement

Despite advancements in ART globally, access and regulation in Kenya remain fraught with challenges, raising significant human rights concerns. There is a lack of comprehensive legal frameworks to protect the rights of individuals seeking ART, leading to issues such as unequal access, exploitation, and potential health risks.¹⁶ This gap disproportionately affects vulnerable groups, including women and low-income individuals, who face barriers due to socio-economic disparities and cultural stigmas.¹⁷

The absence of standardised guidelines and ethical oversight further exacerbates the risk of malpractice and exploitation.¹⁸ The best attempt towards resolving the dearth of regulatory guidelines is the Assisted Reproductive Technology Bill of Kenya 2022 (ART Bill of 2022). However, despite its first introduction to the National Assembly of Kenya in 2014 – ten years ago - the ART Bill has yet to be passed.¹⁹ As it stands, the ART Bill does not solve problems with access to ART in Kenya because it is yet to be signed into law. The sufficiency of this ART Bill in regulating assistive reproductive technologies shall be analysed in later chapters.

Currently, access to ART in Kenya is limited to a select few due to various factors, including low penetration of ART clinics, lack of a proper regulatory framework and prevailing myths and misconceptions on ART that lead to stigma.²⁰ Another impediment is the cost of ARTs in Kenya with fertility treatment is costly, with screening tests being as high as 138 United States dollars (USD).²¹ The cost of a standard round of IVF in Kenya ranges between 2,800-5,600 USD. Costs for surrogacy are even higher due to the risks associated with surrogacy, and there are no laws that address surrogacy

¹⁶ E Opondo 'The legal challenges of new reproductive technologies in Kenya' unpublished PhD dissertation University of Nairobi, Kenya, 2010.

¹⁷ Opondo (n 16) 56.

¹⁸ J Oburu 'Legal Parentage in Surrogacy Arrangements: An Immediate Concern in Kenya' PhD dissertation, University of Nairobi, 2016.

¹⁹ HJ Olobo-Lalobo 'Surrogacy Legislation and Kenya's ART Bill 2019: Reproductive Uhuru (Freedom) A Myth or a Reality for Infertile Citizens?' (2022) 30 *African Journal of International and Comparative Law* 99.

²⁰ Chambers & others (n 15) 2281.

²¹ Opondo (n 16) 56.

arrangements in the country, which contributes to the inflated costs.²² Based on these high costs, ART can only be accessed by the upper middle class in the country.

Another factor that affects access to ART is the insufficiency in facilities.²³ While there is no centralised registry documenting the number of facilities in the country, there is some information that speaks to the inaccessibility of these facilities, most of which are located in Mombasa and Nairobi.²⁴ This means that populations living in rural areas lack access to and even awareness of these services, let alone the ability to afford them.²⁵

The accessibility and affordability barriers to ART in Kenya have profound implications for healthcare equity as it exacerbates existing health disparities especially between the wealthy and less wealthier classes. This is as infertility can have significant psychological, social, and economic impacts on affected individuals and couples.²⁶ Those unable to afford ART may experience prolonged emotional distress, social isolation, and marital strain.²⁷ Furthermore, the lack of access to fertility treatments can lead to unequal reproductive outcomes, reinforcing cycles of poverty and limiting opportunities for family building.²⁸ Addressing these disparities is crucial for ensuring that all individuals, regardless of their economic status or geographic location, can pursue their reproductive goals and achieve equitable health outcomes.

Based on the above, this research investigates the current state of ART in Kenya, identifying the legal, social, and ethical issues that hinder equitable access and safe practices. By adopting a human rights-based approach, this research proposes policy recommendations and frameworks that ensure ART services are accessible, ethical, and respectful of human rights, ultimately contributing to more just and equitable reproductive healthcare in Kenya.

²² Opondo (n 16) 56.

²³ Chambers & others (n 15) 83.

²⁴ <https://www.oraro.co.ke/assisted-reproductive-technology-bill> (accessed 5 August, 2024).

²⁵ P Archary and others 'Assisted reproductive technologies in Africa: the African Network and Registry for ART, 2018 and 2019.' (2023) 5 *Reproductive BioMedicine Online* 835

²⁶ Barnes (n 9) 1288.

²⁷ Opondo (n 16) 72.

²⁸ Chambers & others (n 15) 2287.

1.3 Research aims and objectives

The research aims to investigate the current state of ART in Kenya, identifying the legal, social, and ethical issues that hinder equitable access and safe practices. The specific objectives are to:

1. Explore the current legal provision on access to ART in Kenya.
2. Investigate Kenya's domestic, regional and global obligations concerning access to ART in Kenya as a human right.
3. Determine the legal and administrative gaps that need resolution to guarantee the right to access ART.
4. Make recommendations on legal and administrative measures to improve the recognition and realisation of ART as a human right.

1.4 Research questions

The overarching research question concerns how a human rights approach to the laws and policies on ARTs will ensure a better realisation of women's reproductive rights in Kenya? The sub-questions are:

- a. What is Kenya's regional and global obligations regarding access to and availability of ART as a human right?
- b. What are the challenges in ensuring the availability of ART in Kenya?
- c. How have other jurisdictions overcome the challenges in ensuring access to and availability of ART as a right?
- d. How can Kenya ensure the recognition and realisation of ART as a human right?

1.5 Proposed research method

This research used a desk-based research method or literature review, comprising reviewing relevant case law, statutes, government policies, international and regional instruments, published books, and peer-reviewed articles. Literature published on the research topic was found using key search terms and combinations of the words assisted reproductive technologies as a human right, sexual and reproductive health.

The primary databases used for this research are the University of Pretoria Library, Google Scholar, Kenya Law and PubMed as verified sources of scholarly resources that will contribute to this research.

The desk-based method is ideal for this mini-dissertation due to its affordability as the method does not require any field work. Data is readily available in the literature and has been extracted from authentic sources that do not require further validation.²⁹ One of the risks that may arise from using the desk-based method is the risk of publication bias, which arises from the possibility that researchers only publish research based on whether or not the research is aligned with other findings in the field.³⁰ To minimise this risk, the researcher utilised a wide range of studies from a variety of databases to guarantee a diversity of sources. There is also a risk of lack of control over data quality (accuracy and reliability).³¹ As this research largely relied on secondary sources, which may affect the credibility of the findings, this research mitigated this by primarily relying on peer-reviewed sources from credible journals and databases.

This research shall also undertake a comparative study, analysing the regulatory framework for ART procedures and practices in South Africa, Greece and the United States of America. These three jurisdictions have been chosen as they feature relatively well-developed legal frameworks that regulate both ART procedures and the healthcare professionals. In so doing, the study of these three countries will help in crafting recommendations for how Kenya can craft its own legal framework for ART procedures.

1.6 Definition of terms

1.6.1 Assisted reproductive technology

‘ART’ is defined as treatment and procedures that include in vitro handling of human oocytes and sperm or embryos to establish a pregnancy.³² ART covers ‘in vitro

²⁹ G Benoit & others ‘Desk based research and literature review’ *Evaluating interventions that prevent or counter violent extremism* (2018) 63 Rand Europe.

³⁰ B Bassot *Doing qualitative desk based research: A practical guide to writing an excellent dissertation* (2022) Policy Press.

³¹ Bassot (n 30) 32.

³² Opondo (n 16) 57.

fertilisation, zygote intra-fallopian transfer, tubal embryo transfer, intra-fallopian transfer, gestational surrogacy, embryo donation proxy donation, and gamete and embryo cryopreservation'.³³ According to the Kenyan ART Bill of 2022, ART means fertilisation that is conducted in a 'laboratory dish or test tube of sperm with eggs'.³⁴ 'This means 'having been obtained from an ovary whether or not the process of fertilisation is completed in the laboratory dish or test tube'.³⁵

1.6.2 In vitro fertilisation

IVF refers to ART where an ovum and sperm are combined outside the body, hence the term 'in vitro', and then transferred to the uterus.³⁶ The gamete can then be implanted into the woman's fallopian tubes. IVF can be achieved in two ways: by fertilising outside the body and transferring the product through gamete intra-fallopian transfer or zygote intra-fallopian transfer.³⁷ There is also in vivo fertilisation, where fertilisation will happen in the body through assisted reproduction.

1.6.3 Homologous and heterologous fertilisation

Homologous and heterologous fertilisation refers to fertilisation methods whose main difference is where the child's genes come from.³⁸ In homologous fertilisation, genetics come from the parents of the child, whereas in heterologous fertilisation, a third party donates ovum, sperm, or even both to the parents of the child.

1.7 Limitations of this research

This research explores ART from a human rights perspective in Kenya. To do this, it assesses the provisions of the law and evaluates how well laws and policies match up to the country's human rights obligations. The method for this research was a desktop review, which is limiting in that it leaves out the perspectives and lived experiences of

³³ J de Mouzon 'International Committee for Monitoring Assisted Reproductive Technologies world report: assisted reproductive technology' (2020) 35 *Human Reproduction* 1906.

³⁴ Assisted Reproductive Technology Bill, 2022 Article 2.

³⁵ (N 34) above.

³⁶ Y Sjunnesson 'In vitro fertilisation in domestic mammals—a brief overview' (2020) 125 *Upsala Journal of Medical Sciences* 72.

³⁷ Sjunnesson (n 36) 77.

³⁸ A Cordiano 'Post mortem homologous fertilisation: parental patterns in the dialectical comparison between the constraints of biology and rules on consent.' (2020) 6 *Italian Law Journal* 341.

human rights and reproductive justice practitioners, as well as those who have used or cannot access ART in Kenya, who would give more insight into the topic from different perspectives. To overcome this limitation, this research relied extensively on the work of researchers and authors on human rights and ART in the country who included these perspectives in their research.

Furthermore, this research's findings are only representative of Kenya. This means that they should cautiously be extrapolated to other countries or regions with similar legal and policy frameworks. Lastly, due to time and resource limitations, this research only reflected the Kenyan perspective.

This research undertakes a limited comparative study to better identify the gaps in Kenya and thus form the basis for recommendations drawing on lessons learnt from similar contexts.

1.8 Significance of this research

Kenya is a signatory to various global and regional instruments and has adopted national laws that call for equality and non-discrimination in access to services and respect for privacy for all its citizens.³⁹ One of the areas where these obligations will apply is the access to reproductive rights, including to ART. This research evaluates ART in Kenya through a human rights lens to determine how best the country can meet these human rights obligations.

This study poses significant benefit to various sectors within the Kenyan society. For legislators, this study will outline the key gaps within the Kenyan legal system that may hinder the adoption of Assisted Reproductive Technologies within the country. With the government being a core stakeholder in terms of the delivery and oversight of healthcare services, this research endeavour sheds light on key aspects of Assisted Reproductive Technology in the context of equality and healthcare as a right, and key action areas for the government.

³⁹ They include the Universal Declaration on Human Rights, International covenant on civil and political rights, international covenant on Economic, social and cultural rights, the convention on the Elimination of all forms of discrimination against women and the Protocol to the African charter on Human and People's rights on the rights of women in Africa.

Further, this study will help illuminate the important aspects of regulation that ought to be established for responsible ART procedures to be possible. This includes setting up the regulatory bodies themselves with sufficient mandate to regulate ART practices and to continuously provide guidance on the improvement and safety of these practices. The study will also help outline the various obligations and relationships that ought to exist to ensure safe and responsible practice of ART procedures.

Most importantly, this study outlines gaps in research that can be further developed in academia to enhance literature on Assisted Reproductive Technology rights in Kenya. A key stakeholder in terms of assisted reproductive technologies is healthcare practitioners that render these services. For these practitioners, this study outlines measures on credentialing and regulation, ensuring that practitioners offering ART services offer the highest quality and standard of health.

The study is also important as it highlights areas of ethical concerns that require proper regulation. These include issues such as commercialisation of ART practices such as surrogacy which require proper regulation to avoid these ART practices from devolving into commercial exploitation especially of vulnerable groups. It will also elaborate how the parental responsibilities between the various actors in an ART procedure ought to be defined to ensure adequate protection of children, subject of these procedures.

Overall therefore, this study expounds on the importance of ART procedures, and it attempts, while also reviewing the proposed ART Bill, 2022, to elaborate on proper regulatory practices that ought to be adopted for ART procedures.

1.9 Literature review

This section explores and synthesises various literature on ART through a human rights lens. This entails exploring the concept of ART and understanding the underlying factors that reinforce the need to recognise access to ART as a human right. Some of the gaps that the research assesses include emerging technological and future challenges, ethical considerations and human rights, equity and accessibility, and the legal and regulatory framework.

1.9.1 Gendered suffering

One of the key factors that motivate the need for ART is infertility and its associated issues. Most countries, Kenya included, are pronatalist.⁴⁰ This means that not only are children strongly desired, but parenthood becomes almost mandatory in terms of societal expectations. Lack of pregnancy or the inability to sire children can come with extensive social disruption, and unfortunately, it is women who are typically blamed for failures in reproduction.⁴¹ In such societies, women experience infertility and its implications in a different way than their male counterparts. Often, this results in divorce, separation, and even ostracisation from the community.⁴²

Moreover, childless women are also more likely to face various forms of abuse, as well as the denial of marital property rights upon the dissolution of marriage.⁴³ These social issues imply that there are disparities in the gendered experiences of infertility, and the lack of protection in legislation for families and women who have children through ART would be tantamount to discrimination. This social approach to understanding human rights and the legal approach to ARTs is instrumental and is further guided by the theoretical framework.

Many African countries, Kenya included, are characterised by patriarchal systems.⁴⁴ Patriarchal systems are systems where men would predominantly hold power over women. The patriarchal nature of such societies adversely affects laws and policies, which in turn negatively affect women and girls, including their reproductive health and access to supportive services.⁴⁵ This further compounds the concept of gendered suffering where, as discussed earlier, the duty of procreation lies mostly on the woman,

⁴⁰ D Hodgson 'How problematic will liberal abortion policies be for pro-natalist countries?' (2013) 71 *Critical Issues in Reproductive Health*.

⁴¹ Hodgson (n 40) 32.

⁴² M Gedvilaitė-Kordušienė & others 'Women's feelings about childlessness in two pro-natalist countries' (2020) *Polish sociological review* 230.

⁴³ F Sharifi & others 'Domestic violence against infertile women: A systematic review and meta-analysis' (2002) *Sultan Qaboos University Medical Journal* 14.

⁴⁴ MA Machira. 'The experience of patriarchy by Kenyan women in the pursuit of higher education.' Unpublished PhD dissertation, Walden University, 2013.

⁴⁵ L Akhirome-Omonfuegbe 'A critical appraisal of women's reproductive rights in Nigeria' (2019) 2 *Journal of Sustainable Development Law and Policy* 257.

and therefore, when they are unable to meet these obligations and they are barred from assistive technologies such as ART, they experience adverse stigma and discrimination.

This study addresses this gap by evaluating other jurisdictions and their provisions on ART and developing recommendations that will allow Kenya to develop a human rights perspective on ART. Specifically, this research shall analyse South Africa, the United States of America and Greece in its comparative study.

1.9.2 Value of assisted reproductive technology

It is essential to acknowledge the complexities and ethical considerations surrounding ART, including concerns about access, affordability, and the commodification of human reproduction. Nonetheless, when practised ethically and responsibly, ART represents a valuable tool for promoting reproductive autonomy, supporting family diversity, and enriching the lives of individuals and communities worldwide.⁴⁶ In essence, the value of ART lies in its ability to realise the fundamental human desire for parenthood, advance scientific knowledge, and foster inclusivity in family-building endeavours.⁴⁷

Gender and sexual minorities are also greatly affected by laws and policies on ART. ART holds significant value for the LGBTQ+ community, offering a transformative pathway to parenthood and challenging traditional notions of family formation.⁴⁸

One of the primary benefits of ART for the LGBTQ+ community is the ability to overcome biological barriers to conception.⁴⁹ Techniques such as donor sperm insemination, IVF with donor eggs or sperm, and gestational surrogacy enable same-sex couples and individuals to conceive biologically-related children, thus affirming their parental identities and connections to their offspring.⁵⁰

⁴⁶ Peterson-Madelyn (n 11) 285.

⁴⁷ R Feasey 'Infertility and Non-Traditional Family Building' (2019).'

⁴⁸ JL Sycz & others 'Unique Experiences of Family Building and Perinatal Loss Using Assisted Reproductive Technologies with Heterosexual and LGBTQ+ People: Perinatal Bereavement Rituals and Practices Among US Cultural Groups (2024) 245.

⁴⁹ G Veka & others 'Advances and controversies in assisted reproductive technology' (2009) 76 *Mount Sinai Journal of Medicine: A Journal of Translational and Personalized Medicine: A Journal of Translational and Personalised Medicine* 506.

⁵⁰ Veka (n 49) 511.

Moreover, ART fosters inclusivity and recognition of diverse family structures within society. By providing access to reproductive technologies, ART supports LGBTQ+ individuals and couples in navigating the complexities of family-building and parenthood, irrespective of sexual orientation or gender identity. This promotes social acceptance and validation, challenges discriminatory norms, and fosters a culture of inclusivity and support for LGBTQ+ families.⁵¹

Currently, the LGBTQ+ community, specifically same-sex couples, as well as intersex and transgender individuals are impeded from progressing their families due to the lack of a framework that will give them access to services such as surrogacy, sperm and ovum donation, among others including adoption.⁵² The outcome of this study will lead to the generation of recommendations on how to improve access to assisted reproductive technologies specifically for special interest communities such as the LGBTQ+ community.

1.9.3 Access and equity to assisted reproductive technology in Africa

Access and equity to ART in Africa are affected by complex challenges influenced by cultural, socioeconomic, and infrastructure factors. While ART offers solutions for individuals and couples experiencing infertility, access to these technologies remains limited for many Africans.⁵³ Financial constraints are a significant barrier, as the cost of ART, including IVF and other treatments, can be prohibitively expensive for the average African household.⁵⁴ In many countries, lack of insurance coverage for infertility treatments exacerbates the financial burden.⁵⁵ In Kenya, these economic barriers are more profound. Not only are some of these services costly, but insurance companies

⁵¹ J Lindsay 'Unique Experiences of Family Building and Perinatal Loss Using Assisted Reproductive Technologies with Heterosexual and LGBTQ+ People' (eds) *Perinatal Bereavement Rituals and Practices Among US Cultural Groups* (2024) 245.

⁵² MW Tam 'Queering reproductive access: Reproductive justice in assisted reproductive technologies' (Year, Volume & Journal?) 167.

⁵³ GM Chambers & others 'International Committee for Monitoring Assisted Reproductive Technologies world report: assisted reproductive technology, 2014' (2021) *Human Reproduction* 2927.

⁵⁴ Chambers (n 53) 2927.

⁵⁵ MP Connolly & others 'The costs and consequences of assisted reproductive technology: an economic perspective' (2010) *Human reproduction update* 606.

often include exclusion clauses on services such as infertility.⁵⁶ This further limit access to services for economically disadvantaged populations, which can be compounded by limited availability of specialised clinics and medical professionals trained in ART, especially in rural areas.⁵⁷

Cultural and societal attitudes towards infertility can also impact access to ART on the continent.⁵⁸ Infertility is often stigmatised, leading to social isolation and discrimination, particularly against women. These cultural barriers can deter individuals from seeking ART services or discussing fertility challenges openly.⁵⁹ Additionally, traditional beliefs about reproduction and family structure may conflict with the use of ART, posing further obstacles to acceptance and utilisation of these technologies.⁶⁰ Addressing these cultural issues requires a sensitive and respectful approach to educating communities about ART and its potential benefits.⁶¹ In addition to navigating traditional cultural and social attitudes, some radical and progressive social opinions actively advocate against ART based on the argument that as opposed to giving a right to reproduce through ART, it is also instrumental to give life by focusing more on protecting existing living beings.⁶² For instance, as opposed to using resources to guarantee access and rights to ART, it may be instrumental to instead afford more rights and resources to people currently alive, such as taking them out of poverty. These views question the relevance of according and investing rights and access to ART.

Regarding the issue of cultural norms, it is important to acknowledge the role of religion, which can significantly impact the uptake and acceptance of ART in many societies. In

⁵⁶ P Njagi & others 'Financial costs of assisted reproductive technology for patients in low-and middle-income countries: A systematic review' (2023) *Human reproduction open* 7.

⁵⁷ MWH Boss & others 'Fertility problems and fertility care in sub-Saharan Africa: The case of Kenya' (eds) *Pathways and Barriers to Parenthood: Existential Concerns Regarding Fertility, Pregnancy, and Early Parenthood* (2019) 59.

⁵⁸ MC Inhorn, 'Right to assisted reproductive technology: Overcoming infertility in low-resource countries' (2009) 6 *International Journal of Gynaecology & Obstetrics* 172.

⁵⁹ YY Liu & others 'The effect of donor and recipient race on outcomes of assisted reproduction' (2021) *American journal of obstetrics and gynaecology* 374.

⁶⁰ A Mackay & others 'Inequity of access: Scoping the barriers to assisted reproductive technologies' (2023) *Pharmacy* 17.

⁶¹ OK Fayokun 'Need for Regulation of Assisted Reproductive Techniques in Africa.' (2010) 1 *Journal of Science and Sustainable Development* 3.

⁶² LJ Van Bogaert 'The right to procreate-freedom and necessity: Personal view: SAMJ forum' (2005) 95 *South African Medical Journal* 34.

both traditional African religion and some factions of Christianity, ART may be frowned upon.⁶³ For instance, traditional African religion and cultural beliefs prioritise natural conception and the use of herbs and herbalists to support natural conception.⁶⁴ In a few traditional African systems, types of ART, such as surrogacy, are acceptable. For example, female husbands in the Kamba community in Kenya allow an infertile woman to ‘marry’ a ‘wife’ to get pregnant for her through the infertile woman’s husband. However, the concept of artificial insemination or IVF is largely frowned upon, and these cases of ART are an exception to the norm where conception is between a man and woman.⁶⁵

Such practices intended to allow women to have children are not rare in traditional African societies. In Nigeria, as early as 1976, disputes were being litigated over property and inheritance rights accruing to a child born from a chief’s ‘wife’s wife’.⁶⁶ This means that a proper regulatory framework ought to not just the complexities of ART practices in themselves, but how such practices and resultant children impact familial and other societal relations. This study intends to discuss how such relations are affected by ART practices and how best they can be addressed in Kenya’s regulatory framework.

Equally, some conventional western religions frown upon ART procedures. The Catholic faith for instance, do not support ART procedures based on the belief that reproduction is a function of marital sex, and further on the belief that life is sacred and ought not to be artificially created.⁶⁷ Moreover, some procedures, inherently linked to ART practices such as cryonically freezing fertilised embryo has been interpreted by the Catholic church as offending the sanctity of life the embryo has once fertilised.⁶⁸ In this case, considering the influence of both religion and culture, ART is bound to be looked upon

⁶³ Fayokun (n 61) 4.

⁶⁴ Fayokun (n 61) 4.

⁶⁵ I Amadiume ‘*Male daughters, female husbands: Gender and sex in an African society*’ (2015).

⁶⁶ Eugene Meribe v Joshua C Egwu (1976) LLJR-SC.

⁶⁷ JM Haas ‘Begotten Not Made: A Catholic View of Reproductive Technology’ *United States Conference of Catholic Bishops*.

⁶⁸ JM Haas & James McTavish ‘Why the Church Says “Yes” to Life and “No” to IVF’ *National Health Service, Linacre Quarterly*.

negatively by African communities,⁶⁹ especially factoring that upto 20% of Kenyan population identifies as catholic.⁷⁰

The Anglican church on the other hand approved ART practices in its 1982 General Convention.⁷¹ However, this was a qualified acceptance that still frowned upon using reproductive cells from someone other than those of a husband and wife.⁷² Nevertheless, it goes to show that religious views play a key role in influencing perspectives on ART practices, and as such, addressing these views is necessary for the promotion of ART practices in general, in society.

Equity in ART access in Africa can be improved through targeted initiatives and policies. Governments and international organisations can play a role in subsidising ART treatments and providing insurance coverage to reduce financial barriers.⁷³ Additionally, increasing the number of trained professionals and clinics, particularly in undeserved regions, can enhance access. Efforts to raise awareness and reduce stigma around infertility and ART through community education and advocacy can foster a more supportive environment.⁷⁴ By addressing these challenges, access and equity to ART in Africa can be improved, offering more individuals and couples the opportunity to pursue parenthood through these technologies.

In Kenya, access to ART is similarly marked by significant disparities due to socio-economic and geographical factors.⁷⁵ While urban centres such as Nairobi and Mombasa have medical facilities that offer a range of ART services, these treatments remain largely inaccessible to much of the population, particularly those in rural areas.⁷⁶ High costs associated with treatments such as in IVF and limited insurance coverage for fertility treatments exacerbate the inequity. For many Kenyans, the expenses are

⁶⁹ CO Igbolekwu & others 'Religious and cultural interpretations of artificial insemination in South-West Nigeria' (2023) 3 *AJOG Global Reports* 100.

⁷⁰ Kenya: 2019 National Housing Census, Kenya Bureau of Statistics.

⁷¹ D Abbott, P Nelson 'The Episcopal Tradition: Religious Beliefs and Healthcare Decisions' 2002

⁷² Abbot-Nelson (n 70).

⁷³ EA Adewumi 'Infertility treatment financing in Nigeria' (2017) 17 *Nigerian Journal of Health Sciences* 38.

⁷⁴ S Dyer & others 'Assisted reproductive technology in Africa: A 5-year trend analysis from the African Network and Registry for ART' (2020) 41 *Reproductive BioMedicine Online* 611.

⁷⁵ A Murage & others 'Assisted reproduction services provision in a developing country: Time to act?' (2011) 96 *Fertility and sterility* 966.

⁷⁶ SM Gacii 'Information and Decision Making on Assisted Reproductive Technologies Among Families Experiencing Infertility in Kenya' (2019) PhD dissertation University of Nairobi 77.

prohibitive, and this financial barrier is a significant deterrent, especially for lower-income individuals and couples.

The lack of comprehensive regulation and standardised protocols for ART in Kenya also presents challenges for equitable access. Currently, but for the Access to reproductive Technologies Bill, 2022 which is under debate in the National Assembly, there is an absence of national guidelines for ART, thus practices can vary significantly across clinics. This inconsistency can lead to disparities in the quality of care and outcomes.⁷⁷ To improve access and equity to ART in Kenya, policymakers must work towards establishing clear regulations, promoting affordable and subsidised services, and raising awareness to reduce stigma and empower individuals and couples to make informed decisions about their reproductive health. This study points out existing gaps in the law that impede access to assisted reproductive technologies in line with the right to the highest attainable standards of health and how partners such as the government and other independent bodies can contribute to enhancing these services.⁷⁸

1.10 Theoretical framework

This section investigates the theoretical framework through which the research questions are analysed. This research draws on reproductive justice theory.

Reproductive justice theory is a framework that advocates for the complete autonomy and agency of individuals in making decisions regarding their reproductive lives.⁷⁹ It emerged in response to the limitations of the reproductive rights movement, which primarily focused on legal access to contraception and abortion.⁸⁰ Reproductive justice expands the conversation to encompass broader social, economic, and political factors that affect reproductive choices.⁸¹ At its core, reproductive justice recognises the intersectionality of various systems of oppression, including racism, sexism, classism,

⁷⁷ FO Agutu & others 'Willingness to pay for assisted reproductive technologies by pastoral herd owners in southern Rangelands of Kenya' (2021).

⁷⁸ Constitution of Kenya Art. 43 (1) (a)

⁷⁹ L Ross 'Feminist Theory Reader' *Understanding reproductive justice* (2020) 290.

⁸⁰ LJ Ross 'Reproductive justice as intersectional feminist activism' (2017) 9 *Souls*.

⁸¹ L Rubin & A Phillips 'Infertility and assisted reproductive technologies: Matters of reproductive justice' (2012) *Reproductive justice: A global concern* 173.

ableism, and more.⁸² It emphasises that individuals must have the resources, support, and freedom from discrimination to make informed decisions about their reproductive health. Key principles of reproductive justice include the right to have children, the right to not have children, and the right to parent children in safe and supportive environments.⁸³ It advocates for policies and practices that address systemic inequalities, such as access to healthcare, education, economic opportunities, and environmental justice.

Reproductive justice centres marginalised communities, prioritising the voices and experiences of people of colour, low-income individuals, LGBTQ+ individuals, and people with disabilities.⁸⁴ By addressing intersecting oppression, reproductive justice aims to create a society where all individuals can exercise true autonomy and achieve reproductive wellbeing.

Reproductive justice theory provides a valuable lens through which to examine the ethical, social, and policy implications of ART.⁸⁵ While ART offers opportunities for individuals and couples to conceive and build families, it also raises complex questions regarding access, equity, and autonomy. In applying a reproductive justice lens to ART, it is essential to address disparities in accessing these technologies. High costs, lack of insurance coverage, and legal restrictions can limit access for marginalised communities, perpetuating inequalities.⁸⁶ Reproductive justice calls for policies that ensure equitable access to ART regardless of socio-economic status, race, or other factors.

Moreover, reproductive justice emphasises informed decision-making and consent.⁸⁷ In the context of ART, this means providing comprehensive information about procedures, risks, and alternatives to enable individuals to make choices that align with their values

⁸² M Daniel 'The social movement for reproductive justice: Emergence, intersectional strategies, and theory building' (2021) 15 *Sociology Compass* 12907.

⁸³ J Liu & EY Adashi 'Selective justice: State mandates for assisted reproductive technology and reproductive justice' (2013) *Am J Clin Exp Obstet Gynecol* 57.

⁸⁴ T Morison 'Reproductive justice: A radical framework for researching sexual and reproductive issues in psychology' (2021) 15 *Social and Personality Psychology Compass* 12605.

⁸⁵ MW Tam 'Queering reproductive access: Reproductive justice in assisted reproductive technologies' (2021) 18 *Reproductive Health* 164.

⁸⁶ Opondo (n 16) 68.

⁸⁷ Morison (n 84) 32.

and circumstances. It entails safeguarding against coercion and exploitation, particularly in cases where financial incentives may influence decisions. Additionally, reproductive justice advocates for reproductive self-determination, recognising diverse family structures and reproductive choices.⁸⁸ This includes supporting LGBTQ+ individuals, single parents, and those using donor gametes or surrogacy to create families without stigma or discrimination. By applying reproductive justice principles to ART, policymakers, healthcare providers, and advocates can work towards ensuring that these technologies promote autonomy, equity, and wellbeing for all individuals seeking to build families. This approach acknowledges the complexities of reproductive decision-making and strives to create inclusive and supportive systems that respect the rights and dignity of every individual.

One of the biggest impediments towards realising reproductive justice is gaps in the law.⁸⁹ This occurs specifically when the law does not recognise reproductive rights as human rights. As a result, it becomes increasingly difficult to implement policies such as those on assisted reproductive technologies. Addressing gaps in the law, specifically by ensuring that the law takes on a human rights approach will enhance the realisation of reproductive justice and eliminate any barriers that will impede access to reproductive rights by all members of society.

1.11 Chapter outline

Chapter one introduces the study topic by providing background, outlining the problem statement, the research aims and objectives, and research questions to investigate the topic. It provides a comprehensive literature review of the topic and the theoretical framework used by the study to frame the discussions in subsequent chapters.

Chapter two evaluates human rights principles relevant to ART. It provides a thorough and detailed analysis of international human rights laws and conventions related to reproductive health. It explores Kenya's commitment to international human rights treaties influencing ART, and assesses the realisation of the right to health, including

⁸⁸ Liu (n 83) 63.

⁸⁹ Opondo (n 16) 79.

reproductive health, as outlined by the Constitution of Kenya and how this right applies to ART.

Chapter three examines the current laws, policies, and regulations that apply to ART in Kenya. This analysis goes insight into the gaps within the ART laws and policies in Kenya, as well as the shortcoming of the country's regulatory framework aligned with ART.

Chapter four explores ART practices provision and regulation in other countries. The chapter primarily focusses on countries with better legal and institutional structures. The specific countries explored are South Africa, Greece, Denmark and the United States of America. This comparative analysis allows for the exploration of the various mechanisms that can be employed in Kenya to enhance provision and regulation of ART practices.

Chapter five provides comprehensive recommendations for policymakers, legal reformers, and healthcare providers to improve ART services within a human rights framework. Furthermore, the chapter proposes strategies to raise awareness and educate the public on ART and associated human rights issues, while also outlining suggestions for further research which will ensure that there is on-going improvement of ART services from a human rights perspective.

Chapter 2: Kenya's obligations to provide assisted reproductive technologies as a right

2.1 Introduction

Assisted reproductive technologies have become a pivotal component of addressing infertility and enabling individuals and couples to conceive.⁹⁰ International legal instruments have sought to regulate these technologies to ensure ethical standards, protect the rights of all parties involved, and harmonise practices across borders.

Despite there being no human rights treaty at the United Nations level that specifically protects assisted reproduction rights; other international law covers various aspects of reproductive rights through multiple declarations. The first is the human right to found and form a family without discrimination, coercion, violence or discrimination.⁹¹ To understand the need to approach ART as a human right, it is essential first to appreciate the human right to found a family and have children. This right was first introduced in the Universal Declaration of Human Rights (Universal Declaration) and eventually reinforced in other international instruments such as the International Covenant on Civil and Political Rights (ICCPR).⁹² The right to privacy and founding a family supports the idea that every individual, regardless of their physical or other limitations, has the right to do what is necessary to found a family, including having children.⁹³ Recognition of the right to found a family, which includes having children, opens up reproduction as a right.

A core aspect of reproductive health rights is the reproductive health of women specifically.⁹⁴ Good reproductive health is instrumental in contributing to the attainment of physical, physiological, mental and psychosocial health, especially for girls and

⁹⁰ S Dyer & others 'Assisted reproductive technology in Africa: A 5-year trend analysis from the African Network and Registry for ART' (2020) 41 *Reproductive Bio-Medicine Online* 604.

⁹¹ United Nations Fourth World Conference on Women *Beijing Declaration and Platform for Action, 1975* 21.

⁹² Dyer & others (n 90) 607.

⁹³ (N 92)above.

⁹⁴ JR Cook 'International human rights and women's reproductive health' (2020) *Women, Medicine, Ethics and the Law* 37.

women.⁹⁵ Therefore, when a woman is rendered incapable of fully realising all that pertains to her reproductive health, which may include conception, carrying a child to term and delivering that child, then her right to all other aspects of health is affected. This research has focused on women due to the concept of gendered suffering as highlighted in the literature review. Therefore, reproductive health rights are human rights in the sense that they are key towards girls and women attaining the highest standard of physical, physiological, psychosocial and mental health.⁹⁶

Further enhancing the perspective that reproductive rights are human rights is the appreciation of the right to access healthcare services, including services associated with family planning, as enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁹⁷ When read alongside the obligation to protect the right to access the highest attainable standard of health as outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), these provisions indicate that states should bridge any gaps that families may face when it comes to founding and forming a family. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) recognises the role of state parties to 'ensure that the right to health for women, and this is inclusive of the right to sexual and reproductive health is promoted and respected'. 'This includes one's right to control their fertility as well as the right to decide whether to have children, the spacing of and the number of children they need to have'.⁹⁸

This chapter explores the global, regional and domestic obligations to provide ART as stipulated by instruments ratified by Kenya who prides itself on being a progressive and right-based nation, with a constitution that prioritises human rights.⁹⁹ This is evident in its provisions on equality and freedom from discrimination, protection of the right to the highest attainable standards of health and even the right to affordable housing in the Constitution. Based on this legal foundation and its ratification of several global and

⁹⁵ SJ Etuk 'Keynote Address-Reproductive health: Global infertility trend' (2009) 24 *Nigerian Journal of Physiological Sciences*.

⁹⁶ Opondo (n 16) 72.

⁹⁷ CEDAW Article 12.1.

⁹⁸ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), Article 14.

⁹⁹ Opondo (n 16) 72.

regional instruments that speak to reproductive health rights, Kenya has a responsibility to ensure that ART is recognised as a right and can be accessed equally and without discrimination by its citizenry.

The need to recognise ART as a right extends beyond the scope of international law because it also brings gendered experiences within the law to light, as discussed in the next section.

2.2 International obligations

The government of Kenya ratified the Universal Declaration on 31 July 1990, a treaty that includes several obligations pertaining to reproductive rights.¹⁰⁰ The right to life, as enshrined in Article 3 of the Universal Declaration, holds significant implications for the ethical and legal dimensions of ART. This right is foundational, affirming that every individual has the inherent right to life, liberty, and security of person. The right to life necessitates careful consideration of the conditions under which embryos are created, stored, and potentially discarded.¹⁰¹ This has led to diverse regulatory approaches worldwide, reflecting varying interpretations of when life begins and the moral status of embryos.¹⁰² Some jurisdictions implement stringent controls on the use and destruction of embryos to align with the right to life, ensuring that any decisions made respect the potential for human life. In Germany for instance, any individual that disposes or acquires embryos and uses them for a purpose not aligned to its preservation will be punished for a period of up to three years, or pay a fine.¹⁰³ Conversely, other regions adopt more liberal stances, balancing the right to life with the reproductive rights of individuals and couples, as well as the advancements in scientific research that ART represents.¹⁰⁴ The Universal Declaration's emphasis on human dignity and the right to life compels policymakers and practitioners to navigate these ethical waters with caution, striving to protect both the potential life represented by embryos and the rights and

¹⁰⁰ Kenya law 'Universal Declaration'.

¹⁰¹ BP Lauren 'Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law' (2013) 22 *Journal of Gender, Social Policy and the Law* 781.

¹⁰² Lauren (n 101) 781.

¹⁰³ H Schickl '2 PN cell donation in Germany. How the German Embryo Protection (Act) undermines itself' (2019) 33 *Bioethics* 644.

¹⁰⁴ BM Knoppers 'Reproductive technology and international mechanisms of protection of the human person.' (1986) 32 *McGill Law Journal* 336.

desires of those seeking to use ART to conceive. Thus, the right to life under the Universal Declaration plays a crucial role in shaping the ethical framework and legal regulations governing ART, promoting a balance between safeguarding potential human life and advancing reproductive and scientific freedoms.

The CEDAW provides a robust framework for addressing issues of discrimination, including in the context of ART in Article 16.¹⁰⁵ The Kenyan government ratified the treaty in 1984.¹⁰⁶ The CEDAW mandates that state parties take all appropriate measures to eliminate discrimination against women in all areas, including healthcare and family planning.¹⁰⁷ This has been interpreted to extend to ensuring equal access to ART for women, without discrimination based on marital status, age, sexual orientation, or socio-economic status.¹⁰⁸ Article 12 of the CEDAW specifically addresses women's right to access healthcare services, including family planning. This implies that women must have equal access to ART services, ensuring that barriers preventing single women, lesbian couples, or older women from using these technologies are dismantled.¹⁰⁹

Discriminatory practices that limit access to ART based on these factors violate the principles of CEDAW, which aims to guarantee women's rights to make autonomous decisions about their reproductive health.¹¹⁰ Furthermore, the CEDAW encourages states to eliminate stereotypes and prejudices that may influence policies and practices around ART.¹¹¹ This includes challenging societal norms that stigmatise women seeking ART or that privilege certain family structures over others. By addressing these issues, the CEDAW promotes a more inclusive approach to reproductive health services, ensuring that all women, regardless of their background or personal circumstances, can

¹⁰⁵ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

¹⁰⁶ Kenya National Commission on Human Rights 'Advisory on The Removal of Kenya's Reservation on Article 14(2)(C) of the Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa.'

¹⁰⁷ CEDAW (n 105) Article 10(h).

¹⁰⁸ B Stark 'The women's convention, reproductive rights, and the reproduction of gender' (2010) 18 *Duke Journal of Gender Law & Policy* 261.

¹⁰⁹ KNHCR (n 106).

¹¹⁰ CEDAW (n 105) Article 16(1)(e).

¹¹¹ GT Kolawole-Amao 'Reproductive Health Rights and the Regulation of Assisted Reproductive Technologies (Art) Services in Nigeria.' (eds) *Reproductive Health and Assisted Reproductive Technologies in Sub-Saharan Africa: Issues and Challenges* (2023) 159.

access ART without facing discrimination.¹¹² This is by ensuring that not only is there a human rights and gender perspective in the planning, implementation and monitoring of health programs and policies. The general comments also recommend the removal of barriers when it comes to accessing health services education and information. This directly touches on ART because one of the key barriers to ART identified in this study is the lack of information and adequate knowledge of ART services. Therefore, it is instrumental to enhance access to these services in order to ensure that they are accessible to all parties.

The United Nations (UN), through its agencies like the World Health Organisation (WHO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO), has also been instrumental in shaping the global discourse on ART. The WHO provides guidelines to ensure the safety and effectiveness of ART procedures, emphasising the need for high standards of care and the importance of monitoring outcomes.¹¹³ UNESCO's Universal Declaration on Bioethics and Human Rights (2005) underscores the importance of respecting human dignity and individual rights in all biomedical practices, including ART.¹¹⁴ This Declaration encourages member states to adopt laws that protect the rights of children born through ART, the donors, and the recipients of these technologies. Despite these efforts, international consensus on ART practices remains challenging due to cultural, religious, and ethical differences.¹¹⁵ Consequently, while international legal instruments provide a guiding framework, national regulations often reflect local values and societal norms, resulting in a patchwork of laws governing ART worldwide.

2.3 Regional obligations

ART rights in Africa are addressed within a broader framework of reproductive health and human rights, but specific regional instruments dedicated solely to ART are scarce. However, several key documents and agreements emphasise the importance of reproductive rights and encompass ART. The Maputo Protocol is a landmark treaty that

¹¹² CEDAW General Recommendation 24, Article 31(a)(b)(e).

¹¹³ E Vayena & others 'Assisted reproductive technology in developing countries: Why should we care?' (2002) 78 *Fertility and sterility* 13.

¹¹⁴ Universal Declaration on Bioethics and Human Rights (2005).

¹¹⁵ Dyer & others (n 90) 609.

provides robust protections for women's reproductive rights. Article 14 of the Maputo Protocol explicitly guarantees the right to reproductive health and family planning services, which can be interpreted to include access to ART.¹¹⁶ The Maputo Protocol underscores the importance of eliminating discrimination against women in reproductive health, ensuring their right to control fertility, and providing the necessary medical and psychological support.¹¹⁷ By promoting these rights, the Maputo Protocol implicitly supports the inclusion of ART within the scope of reproductive health services, although it does not explicitly address ART procedures.¹¹⁸

The Maputo Protocol also provides other human rights that indirectly bear on the question of ensuring women have access to the best ART practices. These include the right to dignity which is protected as an integral factor in the development of women¹¹⁹ and the freedom from discrimination from those practices that may harm or endanger the health of women.¹²⁰

In addition to the Maputo Protocol, the African Union (AU) and its member states have shown growing recognition of the importance of addressing infertility as part of reproductive health. The AU's Agenda 2063, a strategic framework for the socio-economic transformation of the continent, underscores the need for improving health systems and achieving universal health coverage, which could encompass ART services.¹²¹ Furthermore, the Abuja Declaration on HIV/AIDS, Tuberculosis, and Other Related Infectious Diseases emphasises the importance of strengthening health systems, which can indirectly support ART by enhancing overall healthcare infrastructure and accessibility.¹²² The African Commission of Human Rights further

¹¹⁶ Maputo Protocol (n 98); PNG Mwenelupembe. 'Approaching Reproductive Rights through a Positive Cultural Context: The Interdependence of 14 And 17 of the Maputo Protocol.' Unpublished Master's thesis, University of Pretoria, 2019.

¹¹⁷ J Gebhard & D Trimiño 'Reproductive rights, international regulation' (2012) *Max Planck Encyclopedia of Public International Law*, *Max Planck Institute for Comparative Public Law and International Law*.

¹¹⁸ Maputo Protocol (n 98) Article 14(a)(b) provides that women have the right to control their fertility and to decide whether to have children and the number children and the number of spacing of the children. The protocol establishes this as a right and puts the obligation on the state to ensure that these rights are respected and promoted.

¹¹⁹ Maputo Protocol (n 98) Article 3.

¹²⁰ Maputo Protocol (n 98) Article 2.

¹²¹ V Ndizera & H Muzee 'A critical review of Agenda 2063: Business as usual?' (2018) 12 *African Journal of Political Science and International Relations* 142.

¹²² Para 2.

reinforces the duties of State Parties. According to General Comment 2 on Article 14.1 the commission reminds state parties of their obligation to ensure the ‘availability, accessibility, and acceptability of procedures and technologies’ for sexual and reproductive health.¹²³ This should extend to the obligation to provide ART as ART is an instrumental aspect of access to reproductive services. Despite these frameworks, there remains a lack of specific regional instruments that directly address ART rights. This gap highlights the need for more targeted policies and agreements that explicitly include ART as a critical component of reproductive health. Such instruments could set standards for ART practices, ensure equitable access across different socio-economic groups, and address ethical considerations unique to ART. By developing specific regional guidelines and protocols, African nations can better support individuals and couples facing infertility, fostering a more inclusive approach to reproductive health rights.

2.4 Domestic obligations

The Constitution, promulgated in 2010, enshrines several principles and rights related to reproductive health, reflecting Kenya's obligations under international human rights law.¹²⁴ Kenya is a party to various international treaties and conventions that address reproductive rights, including the ICESCR, the CEDAW, and the Maputo Protocol.

Article 43 of the Constitution of Kenya recognises the right to the highest attainable standard of health, including reproductive health.¹²⁵ This provision aligns with Kenya's obligations under international human rights law, particularly article 12 of the ICESCR, which recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.¹²⁶ Furthermore, the Constitution of Kenya prohibits discrimination on various grounds, including sex, which is particularly relevant in the context of reproductive health and ART. Article 27 of the Constitution prohibits discrimination based on sex, among other grounds, and guarantees equal protection

¹²³ African Commission on Human and Peoples’ Rights ‘General Comment 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights.

¹²⁴ These include the right to human dignity (Article 28), and the right to the best attainable standard of healthcare (Article 43) the right to equality and non-discrimination (Article 27).

¹²⁵ Constitution of Kenya, 2010.

¹²⁶ H Potts ‘Accountability and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ (eds) *Governance of HIV/AIDS* (2009) 75.

and benefit of the law to all individuals.¹²⁷ This provision is consistent with the principles of non-discrimination enshrined in CEDAW, which prohibits discrimination against women in the field of healthcare, including reproductive health services. Kenya's commitment to eliminating discrimination in all its forms underscores the importance of ensuring equitable access to ART for all individuals, regardless of gender.

In addition to its constitutional obligations, Kenya has taken steps to regulate ART through legislation and policy frameworks that align with international human rights standards. In 2014, Kenyan legislators first introduced the Assisted Reproductive Technology Bill, which aimed to regulate ART practices in the country. The bill failed and was replaced with the current assisted reproductive bill of 2022. The Bill seeks to provide a comprehensive legal framework for the practice of ART, addressing issues such as consent, confidentiality, parentage, and the rights of children born through ART procedures.¹²⁸

The Assisted Reproductive Technology Bill 2022 seeks to regulate ART practices in Kenya and ensure the protection of the rights and interests of individuals involved in ART procedures.¹²⁹ The Bill aims to promote access to safe and regulated ART services while addressing ethical, legal, and social implications. By regulating ART practices, Kenya seeks to uphold the principles of autonomy, dignity, and non-discrimination in reproductive healthcare, in line with its international human rights obligations.

While it is yet to be passed into law, the ART Bill 2022 has many provisions that further the recognition and regulation of ART practices in Kenya. These ranges from: establishing an ART Directorate under the ministry of health to regulate ART practices;¹³⁰ mandating the 'National Government' to put in place measures, resources and policies that ensure all Kenyans have reasonable access to assisted reproductive

¹²⁷ Constitution of Kenya, 2010.

¹²⁸ Assisted Reproductive Technologies Bill, 2022.

¹²⁹ Olobo-Lalobo (n 19) 127.

¹³⁰ ART Bill 2022, Clause 3.

health services;¹³¹ requiring informed consent prior to the use of ART practices;¹³² licensing of ART practitioners¹³³ amongst many more clauses.

This bill also outlines standards for licensing, accreditation of fertility clinics, and the professional conduct of practitioners. Additionally, the proposed establishment of a National Advisory Committee on ART is a significant step towards creating a dedicated regulatory body to oversee ART services, ensure compliance with ethical standards, and address legal issues related to surrogacy, gamete donation, and the welfare of children born through ART.

In Kenya, ART is governed by a combination of laws, policies, and regulations aimed at ensuring the ethical, safe, and effective practice of ART procedures while protecting the rights and interests of individuals involved. The legal framework surrounding ART in Kenya is still evolving, with recent legislative efforts aimed at regulating ART practices and addressing emerging ethical and social considerations.

Enacted in 2017, the Health Act provides a regulatory framework for healthcare services in Kenya. While the Act does not specifically address ART, it establishes the legal basis for regulating healthcare facilities and services, which indirectly impacts the practice of ART.¹³⁴ The Health Act empowers regulatory bodies such as the Kenya Medical Practitioners and Dentists Council (KMPDC) to oversee and regulate medical practices, including those related to reproductive health and ART.

Kenya has developed a reproductive healthcare policy that address issues related to ART and infertility. For instance, the Kenya National Reproductive Health Policy 2022-2032¹³⁵ outlines the government's commitment to providing comprehensive reproductive healthcare services, including infertility diagnosis and treatment. While not specifically focused on ART, this policy framework provides a broader context for addressing reproductive health issues, including those related to infertility and assisted

¹³¹ ART Bill 2022, clause 7.

¹³² ART Bill 2022, clause 12.

¹³³ ART Bill 2022, Clause 13.

¹³⁴ Olobo-Lalobo (n 19) 127.

¹³⁵ National reproductive health policy, 2022-2032.

reproduction.¹³⁶ Regulatory oversight of ART practices in Kenya is primarily carried out by the KMPDC and other relevant regulatory bodies. These bodies are responsible for licensing ART clinics and practitioners, monitoring compliance with ethical and professional standards, and investigating complaints or violations of regulations related to ART. Regulatory oversight ensures that ART practices adhere to established guidelines and standards, safeguarding the rights and interests of individuals involved.

2.5 Conclusion

By considering access to ART as a human right, and by upholding its commitments to its obligations and by implementing comprehensive legal and policy frameworks, Kenya can advance the realisation of reproductive rights and ensure the dignity and wellbeing of all its citizens.

Gaps in legal and policy frameworks may impact the effective regulation and oversight of ART practices, raising concerns about the protection of individuals' rights and interests. Addressing these challenges requires sustained efforts to strengthen healthcare systems, enhance awareness and education on reproductive health and rights, and promote inclusive policies that ensure equitable access to ART services for all individuals in Kenya.

Moving forward, there is a need for continued legislative and policy reforms, strengthened regulatory oversight, and increased public awareness and education to address these challenges and promote the ethical and responsible practice of ART in Kenya.

¹³⁶ Abuya & others 'A policy analysis of the implementation of a reproductive health vouchers program in Kenya' (2012) 12 *BMC Public Health* 1.

Chapter 3: Challenges to realising ART as a human right in Kenya

3.1 Introduction

Despite Kenya's commitment to international human rights treaties and its efforts to regulate ART, challenges remain in the realisation of reproductive rights, including access to ART services.

To develop comprehensive recommendations on the use of ART in Kenya, it is instrumental to extensively analyse the laws and policies of Kenya. These will give insight into the gaps within these laws and policies, therefore shedding light on the main areas that need to be addressed. This chapter therefore explores the various gaps in the protection of ART procedures as a right. These gaps include legal gaps, social and cultural barriers, education and research barriers and access and affordability gaps. These gaps are instrumental in the development of resolutions and recommendations for ART in Kenya.

3.2 Legal gaps

Primarily, the absence of comprehensive legislation on provision of ART services means there are no standardised protocols or guidelines governing its practice. This regulatory vacuum leaves ART services operating in a grey area, where there is little oversight or accountability.¹³⁷ Consequently, the quality and safety of ART services can vary widely, with some clinics possibly engaging in unethical or unsafe practices. The lack of legal protection also extends to patients, who may have limited recourse in cases of malpractice or failed treatments.¹³⁸ Furthermore, the legal status of embryos, donor anonymity, and the rights of children born through ART remain unclear and unaddressed, creating additional legal uncertainties for individuals seeking ART.

¹³⁷ Olobo-Lalobo (n 19) 127.

¹³⁸ R Fatuma 'The Legal and Regulatory Framework of Surrogacy in Kenya: Theory and Practice' unpublished PhD dissertation, University of Nairobi, 2018.

Regulatory barriers result in systemic issues, exacerbated by the lack of a regulatory body specifically dedicated to overseeing ART services.¹³⁹ This regulatory gap can lead to inconsistencies in service provision, with some facilities lacking the necessary equipment or expertise to provide effective ART. Additionally, the high costs associated with setting up and maintaining ART facilities, coupled with stringent import regulations for medical equipment and supplies, further restrict the availability of ART services in Kenya.

In Kenya, these legal gaps result in issues as elaborated hereunder.

3.2.1 Lack of comprehensive legislation

One of the most significant gaps in ART policy in Kenya is the absence of comprehensive legislation that addresses all aspects of ART practices. While the ART Bill has been proposed, it has not yet been enacted into law. This legislative vacuum leaves ART practices largely unregulated, with no standardised guidelines for clinics and practitioners. As a result, there is a lack of consistency in the quality and safety of ART services across different providers. The absence of clear legal standards also complicates issues such as the accreditation of fertility clinics, the qualifications and conduct of medical practitioners, and the protection of patient rights.

On the positive side, the ART Bill attempts to address some key concerns around ART practices. It recognises the need for a regulatory authority and propose the establishment of the Assisted Reproductive Technology Directorate as an advisory and regulatory body under the Cabinet Secretary for Health.¹⁴⁰ The ART Directorate is tasked with among other things: developing standards, regulations and guidelines on assisted reproductive technology; promoting research on ART practices; raising awareness on ART practices; prescribing minimum infrastructure for ART facilities and inspecting these facilities when in operation; and licensing and maintaining a register of ART practitioners.¹⁴¹ Altogether, the ART Directorate is empowered with wide regulatory powers over key aspects of ART.

¹³⁹ LR Ayieta 'Towards a Kenyan legal and Ethical Framework on Surrogacy' Dissertation *University of the Witwatersrand, 2015.*

¹⁴⁰ ART Bill 2022 Clause 5.

¹⁴¹ ART Bill 2022 Clause 5.

However, the ART Directorate equally has too many roles to play, some of which may be delegated to other specialised agencies. For instance, the licensing and regulation of ART practitioners is a task better suited to the Kenya Medical Practitioners and Dentist Council. This then means that in practice, the capacity of the ART Directorate to properly regulate all these functions is questionable.

Another positive in the ART Bill 2022 is the delimitation of roles between the National and county Governments. Clause 7 and 8 of the bill respectively address this, having the National government handle largely regulatory and financing roles; while the county governments handle the actual provision of equipment, personnel and medical supplies, and community sensitisation over the existence and benefits of these practices. However, the framing of the National Government's obligation to provide ART services at the 'highest attainable standard and quality' effectively allows the government to plead progressive realisation¹⁴² and thus any level of provision would be excusable, even below what is the bare minimum.

Interestingly, the ART Bill not only codifies ART practices as a right,¹⁴³ it also extends the same treatment to intersex persons and obliges the National Government to ensure their access to these services nationally.¹⁴⁴

3.2.2 Accreditation and qualifications of practitioners

The absence of a legislative framework also complicates the accreditation process for fertility clinics and the qualifications required for medical practitioners involved in ART. Accreditation ensures that clinics meet specific standards of care, including the necessary infrastructure, equipment, and trained personnel to perform ART procedures safely and effectively.¹⁴⁵ Without mandatory accreditation, clinics may operate without meeting these critical standards, compromising patient safety. Similarly, the qualifications and conduct of medical practitioners are not uniformly regulated, which

¹⁴² L Latif & A Waris, 'Financing the Progressive Realisation of Socio-Economic Rights in Kenya' (SSRN, 2015).

¹⁴³ ART Bill 2022 Clause 21.

¹⁴⁴ ART Bill 2022 Clause 22.

¹⁴⁵ E Smith & others 'Reproductive tourism in Argentina: Clinic accreditation and its implications for consumers, health professionals and policy makers' (2010) 10 *Developing World Bioethics* 59.

means that practitioners with varying levels of expertise and training can perform ART procedures.¹⁴⁶ This inconsistency can lead to varying success rates and increase the risk of medical errors, further undermining patient trust in ART services. Comprehensive legislation would establish clear criteria for both clinic accreditation and practitioner qualifications, ensuring a higher standard of care.

The ART Bill has some good proposals on regulation of practitioners. It requires licensing of practitioners which licenses may be varied or revoked¹⁴⁷. It further requires the ART Directorate to physically inspect, prior to grant of a license, the physical premise where the ART procedures are to be conducted.¹⁴⁸

This provision could however be strengthened by requiring periodic renewal of these licenses to ensure standards are upheld by these practitioners. Further, there is a need to require practitioners to keep proper records of all medical procedures they undertake, and to regularly undertake inspections to identify potential safety risks and concerns to the practice. Moreover, by allowing ART practices to be undertaken under supervision of a licensed practitioner,¹⁴⁹ it waters down the professionalism of these procedures which may end up being mismanaged to the detriment of the health of the surrogate.

3.2.3 Protection of patient rights

In the current unregulated environment, patients may lack clear recourse in the event of malpractice or unethical practices by ART providers. Legal standards are necessary to outline the rights and responsibilities of all parties involved in ART, including patients, donors, and surrogates. This includes informed consent, confidentiality, and the right to receive accurate information about treatment options and success rates.¹⁵⁰ Additionally, legislation would provide mechanisms for addressing grievances and disputes, offering patients legal protection and assurance. The absence of such protections can deter

¹⁴⁶ A Wasuna 'Averting a clash between culture, law and science: An examination of the effects of new reproductive technologies in Kenya' The University of Nairobi, 1999.

¹⁴⁷ ART Bill 2022 Clause 39 & 40.

¹⁴⁸ ART Bill 2022 Clause 41.

¹⁴⁹ ART Bill 2022 Clause 45.

¹⁵⁰ Omokanye & others 'Assisted reproduction technology in Nigeria: Challenges and the way forward' (2018) 3 *African Journal of Reproduction and Gynaecological Endoscopy* 2.

individuals from seeking ART services, fearing legal ambiguities and potential exploitation. Therefore, enacting comprehensive ART legislation is crucial for safeguarding patient rights and ensuring ethical practices within the fertility industry.

Other than providing for surrogacy agreements to protect the surrogate mother, the ART Bill has a few provisions to further secure the surrogate mother's rights. These include: prohibition from implanting non-human embryo's;¹⁵¹ It also prohibits harvesting reproductive material when a surrogate mother is undergoing treatment without her consent.¹⁵²

For the child, other than being granted all rights of a normally born child, they also get certain safeguards in the ART Bill. One important one is that it requires ART practitioners to maintain relevant information on the procedure including physical and medical characteristics of all parties involved.¹⁵³ It then grants the minor the right to request this information from the ART directorate.¹⁵⁴ However, it unreasonably limits the age of the minor to above 21 before they can request this information.

It also does not explain how the ART Directorate will have this information in the first place given the obligation to store information is on the ART Practitioner themselves.¹⁵⁵ This also amounts to a massive risk for data privacy breaches at the ART Directorate more-so considering that this unnecessarily breaches doctor-patient confidentiality.

3.2.4 Ethical and legal ambiguities

The ethical and legal ambiguities surrounding ART in Kenya present another critical gap. Issues such as the legal status of embryos, the rights and responsibilities of donors and surrogates, and the parentage of children born through ART are not clearly defined. For instance, even though there are fertility clinics that offer surrogacy in Kenya,¹⁵⁶ there is no legal framework to govern the practice of surrogacy, leaving surrogate mothers and

¹⁵¹ ART Bill 2022 clause 16.

¹⁵² ART Bill 2022 clause 19.

¹⁵³ ART Bill 2022 clause 24.

¹⁵⁴ ART Bill 2022 clause 34.

¹⁵⁵ ART Bill 2022 clause 24 and 34.

¹⁵⁶ Ayieta (n 139) 65-66.

intended parents vulnerable to exploitation and legal disputes. Similarly, the rights of gamete donors, including anonymity and compensation, are not adequately protected. These ambiguities, which are discussed in more detail in the next sections, can lead to ethical dilemmas and legal battles, undermining the trust and confidence of individuals seeking ART services.¹⁵⁷ Due to the lack of a framework, there are very limited options of surrogacy.

The ART Bill attempts to limit the risks identified above. For instance, it regulates surrogacy and recognises surrogacy agreements.¹⁵⁸ Importantly, it provides for the obligations of each party especially providing financially for surrogate mothers undertaking ART practices for other people.¹⁵⁹

The ART Bill prohibits certain practices both on ethical and moral considerations. It requires: full informed consent to use someone's reproductive material;¹⁶⁰ it prohibits posthumous use of an individual's reproductive material;¹⁶¹ it prohibits the use of reproductive material that is not human;¹⁶² and it also prohibits using reproductive material obtained from a minor.¹⁶³ These prohibitions serve an apparent role and thus this is a positive in the ART Bill.

However, the ART Bill equally prohibits practices that in turn, limit the extent which ART practices can be used. For instance: it prohibits storing reproductive material which some people may use as a means of delaying pregnancy.¹⁶⁴

3.2.5 Legal status of embryos

One of the most pressing ethical and legal ambiguities in ART is the unclear legal status of embryos. In many jurisdictions, the status and rights of embryos are well-defined,

¹⁵⁷ Omokanye & others (n 150) 2-5.

¹⁵⁸ ART Bill 2022 Clause 27 & 28.

¹⁵⁹ ART Bill 2022 Clause 28.

¹⁶⁰ ART Bill 2022 Clause 12.

¹⁶¹ ART Bill 2022 Clause 13.

¹⁶² ART Bill 2022 Clause 16.

¹⁶³ ART Bill 2022 Clause 17.

¹⁶⁴ ART Bill 2022 Clause 19.

determining their use, storage, and disposal.¹⁶⁵ However, in Kenya, there is no clear legislation that specifies whether embryos are considered potential life with rights or property that can be owned and managed by the individuals or entities involved.¹⁶⁶ This lack of clarity creates a legal grey area, particularly in cases of embryo donation, research, or disputes between parties over the use of stored embryos. Without clear legal definitions, fertility clinics and patients are left to navigate these complex issues on their own, leading to inconsistent practices and potential ethical conflicts.

The ART Bill attempts to limit this by prohibiting storing embryos. However, this increases the operational complexity of these ART procedures while limiting the benefits that such procedures can have for people who simply wish to delay pregnancy and require embryos stored for later.

3.2.6 Rights and responsibilities of donors and surrogates

The rights and responsibilities of gamete donors and surrogates are also inadequately addressed within Kenya's current legal framework. Donors often face ambiguities regarding their anonymity and the extent of their rights once their gametes have been used.¹⁶⁷ For instance, there is no clear policy on whether donors can remain anonymous or if they have any claim to the children born from their donations. Similarly, surrogacy practices are fraught with legal uncertainties. There is no formal legal structure to outline the surrogate's rights or the intended parents' responsibilities, making all parties susceptible to exploitation.¹⁶⁸ This situation leaves surrogate mothers particularly vulnerable, as they may not have guaranteed legal protection or fair compensation, and can face significant emotional and financial risks without legal recourse.¹⁶⁹

As earlier indicated, by providing for surrogacy agreements and obligations of the commissioning parents, the ART Bill limits the risk to the surrogate especially on

¹⁶⁵ These countries include the United States of America, Germany and Denmark.

¹⁶⁶ Inhorn (n 58) 172-174.

¹⁶⁷ SW Kariuki 'Role of Communication in the Surrogacy Industry in Kenya-the Case of Nairobi in-vitro Fertility Centre, Nairobi' unpublished PhD dissertation, University of Nairobi, 2023.

¹⁶⁸ Oburu (n 18) 12.

¹⁶⁹ MJ Kyei & others 'Challenges experienced by clients undergoing assisted reproductive technology in Ghana: An exploratory descriptive study' (2020) 149 *International Journal of Gynecology & Obstetrics* 326.

account of health concerns and their ability to earn during pregnancy. While it provides for termination of surrogacy agreements,¹⁷⁰ it fails to address how such agreements can be terminated after pregnancy has been initiated, and the attending parental responsibility of raising the child.

3.2.7 Parentage of children born through ART

The determination of legal parentage for children born through ART is another area with significant legal ambiguity. In cases where ART involves donors or surrogates, the biological, legal, and intended parentage can be complex. For instance, without explicit legal provisions, intended parents may face challenges in being recognised as the legal parents of children born through surrogacy or donor gametes.¹⁷¹ This uncertainty can result in lengthy legal battles to establish parental rights, impacting the welfare of the children involved. Moreover, the lack of clear guidelines on birth registration for children born through ART can further complicate their legal and social identity, leading to potential stigmatisation and difficulties in accessing social services.¹⁷²

The ART Bill attempt to limit these risks to the minor by granting equal constitutional and statutory protection to children born through ART procedures, as provided for children born through normal procedure.¹⁷³ However, as earlier indicated, by failing to address termination of surrogacy agreements after pregnancy has been initiated, it leaves the child at risk of parental limbo where he/she would effectively be an orphan as parents figure out the parental responsibility in Court.

In conclusion, the legal, regulatory, and policy barriers to accessing ART in Kenya are significant and multifaceted. Addressing these challenges requires a coordinated effort to develop comprehensive legislation, establish effective regulatory oversight, and integrate ART into national health policies. Currently, the ART Bill 2022 attempts to regulate some of these issues, but having not proceeded beyond gazettment, there is

¹⁷⁰ ART Bill 2022 clause 29.

¹⁷¹ Olobo-Lalobo (n 19).

¹⁷² HJ Alexandra ‘Surrogacy, Identity, Parentage and Children’s Rights—Through the Eyes of a Child’ (2021) 51 *Family Court Review* 121.

¹⁷³ ART Bill 2022 Clause 26.

need to revise the discussion of the Bill and to address its shortcomings as a regulatory framework for ART procedures.

3.3 Ethical dilemmas and trust in ART Services

These legal ambiguities contribute to broader ethical dilemmas and undermine public trust in ART services. Patients and practitioners alike face moral uncertainties regarding the rights of all parties involved in ART, from embryos to donors to children.¹⁷⁴ This can lead to ethical conflicts, particularly when individuals' personal beliefs and societal norms clash with the practices involved in ART.¹⁷⁵ The absence of a clear legal framework exacerbates these issues, as there is no standardised set of ethical guidelines to follow. This uncertainty can discourage individuals from seeking ART services due to fears of legal repercussions or ethical breaches. For ART to be a trusted and viable option for addressing infertility in Kenya, it is essential to establish clear, comprehensive, and ethically sound legislation that protects all stakeholders and provides clear guidelines for practice.

The ethical and social dimensions of ART in Kenya present unique challenges that have influenced policy development. Issues such as the rights of donors and recipients, the legal status of children born through ART, and the ethical implications of practices like surrogacy have sparked considerable debate.¹⁷⁶ Cultural perceptions of infertility and the stigmatisation of individuals seeking ART further complicate the policy landscape.¹⁷⁷

Policymakers have had to balance these ethical concerns with the need to provide accessible and safe fertility treatments.¹⁷⁸ Engaging with religious and community leaders has been crucial in fostering a supportive environment for ART policy implementation. Furthermore, public education campaigns are essential to demystify ART and address misconceptions, thereby promoting informed decision-making among prospective parents.

¹⁷⁴ Li Zheng 'Reviewing the Ethical Dilemma of Surrogacy' (eds) *3rd International Symposium on Social Science* (2017) 286.

¹⁷⁵ RA Lumbasyo. 'Towards a Kenyan legal and Ethical Framework on Surrogacy.' *University of Witwatersrand, Johannesburg* (2015).

¹⁷⁶ Wasuna (n 146).

¹⁷⁷ Wasuna (n 146).

¹⁷⁸ Wasuna (n 146).

3.4 Cultural and social barriers

Cultural and social barriers play a significant role in shaping the acceptance and implementation of ART policies in Kenya. This stigma can lead to social ostracism and psychological distress for those affected, particularly women, who are frequently blamed for reproductive issues.¹⁷⁹ Limited awareness and understanding of ART further exacerbate these challenges, as many individuals may not be aware that medical solutions exist for infertility.¹⁸⁰ These cultural attitudes not only discourage individuals from seeking ART services due to fear of judgment and discrimination but also impede the development and implementation of supportive policies. When infertility is viewed through a lens of stigma and misinformation, it becomes difficult for policymakers to garner the necessary public and political support to enact comprehensive and inclusive ART legislation.¹⁸¹

Practices such as gamete donation and surrogacy can be particularly contentious, as they may conflict with traditional views on family, parenthood, and procreation. In many Kenyan cultures, the concept of lineage and biological connection is deeply ingrained, making the acceptance of donor gametes or surrogate mothers problematic.¹⁸²

Access to ART in Kenya is influenced by various social barriers. Cultural beliefs play a significant role. Traditional views on fertility and reproduction often favour natural conception, and there is a stigma associated with infertility. Many communities perceive ART as unnatural, leading to reluctance to seek these services.¹⁸³ In these communities, families and especially women who seek ART services may be viewed as 'less than'. In certain cases, their spouses will be encouraged to marry a second wife who will conceive 'naturally'. The stigma associated with the use of ART is bound to dissuade most families from the adoption of ART.

¹⁷⁹ HNW Bos & others 'Fertility problems and fertility care in sub-Saharan Africa: The case of Kenya' (2019) *Pathways and Barriers to Parenthood: Existential Concerns Regarding Fertility, Pregnancy, and Early Parenthood* 59.

¹⁸⁰ Gacii (n 76) 77.

¹⁸¹ S Forsythe 'Social stigma and the medicalisation of infertility' (2009) 28 *Journal of the Manitoba Anthropology Students' Association* 22.

¹⁸² Oburu (n 18) 35.

¹⁸³ Olobo-Lalobo (n 19) 27.

Another core barrier to access to ART is gender dynamics. In many Kenyan societies, women are primarily blamed for infertility, regardless of the underlying cause.¹⁸⁴ This gender bias can deter women from seeking ART due to fear of social ostracism or domestic conflict. Additionally, men might be reluctant to participate in ART procedures, further complicating access. This is aligned with the concept of gendered suffering because in these communities, when a family is unable to conceive naturally, the woman is often blamed and when they opt to use ART, the women are similarly negatively perceived.¹⁸⁵ Therefore, the women and communities at large may be reluctant to use these services.

Additionally, the absence of supportive social networks affects access to ART. Individuals or couples seeking these treatments often require emotional and psychological support. For instance, IVF is an emotionally and financially daunting procedure.¹⁸⁶ Not only is there a high chance of failure even after extensive rounds of hormone injections and the related costs, but the emotional implication on the couple is high, calling for a strong support system. In a society where discussing infertility can be taboo, finding such support is challenging. The lack of open communication and easily available information about reproductive issues can isolate those in need of ART.

Cultural barriers play a significant role in limiting access to ART in Kenya. Deep-seated cultural beliefs and traditional views on fertility and reproduction often create significant obstacles. In many Kenyan communities, traditional beliefs often hold women solely responsible for infertility, regardless of the underlying medical causes.¹⁸⁷ This cultural stigma can lead to social ostracism, emotional distress, and reluctance to seek medical intervention for fertility issues. Women may avoid pursuing ART due to fear of being judged or labelled as 'barren' by their communities.¹⁸⁸

Additionally, cultural norms and practices surrounding family and kinship structures further complicate access to ART. In many Kenyan communities, the extended family

¹⁸⁴ Opondo (n 16) 56.

¹⁸⁵ Gacii (n 76) 77.

¹⁸⁶ (N 105) above.

¹⁸⁷ W Andrea & others 'Access to assisted reproductive technologies in sub-Saharan Africa: Fertility professionals' views' (2014) 32 *Sexual and Reproductive Health Matters*.

¹⁸⁸ Andrea & others (n 187) 13.

plays a crucial role in decision-making processes related to health and reproduction.¹⁸⁹ The involvement of in-laws and elders in these decisions can influence a couple's willingness and ability to pursue ART.¹⁹⁰ Traditional expectations regarding lineage and inheritance often prioritise natural conception within the family unit, viewing ART as an unnatural or inappropriate intervention. Moreover, cultural misconceptions about ART, such as fears of genetic manipulation or concerns about the legitimacy of children conceived through these methods, can deter individuals from seeking these treatments.¹⁹¹ These cultural attitudes are reinforced by a lack of comprehensive education and awareness about ART, perpetuating myths and misunderstandings. Addressing these cultural barriers requires a multifaceted approach, including community education initiatives to dispel myths, promote understanding of ART, and support for individuals and couples facing infertility. Collaborative efforts involving healthcare providers, community leaders, and policymakers are essential to shift cultural perceptions and make ART more acceptable and accessible within Kenyan society.

3.5 Religious barriers

Religious doctrines also play a crucial role, with some faith-based perspectives opposing ART methods that they perceive as unnatural or ethically problematic.¹⁹² Policymakers are thus tasked with the complex challenge of balancing these cultural and religious sensibilities with the need to provide accessible, ethical, and effective reproductive health services.¹⁹³ To overcome these barriers, it is essential to engage in robust public education campaigns that inform communities about the medical and scientific aspects of ART.

Many religious doctrines, particularly those of dominant faiths like Christianity and Islam, view ART with scepticism or outright opposition, seeing it as interfering with natural

¹⁸⁹ Gacii (n 76) 77.

¹⁹⁰ Gacii (n 76) 77.

¹⁹¹ (N 190) above.

¹⁹² GP Smith 'The Christian religion and biotechnology: A search for principled decision-making' (2005) 25 *Springer Science & Business Media*.

¹⁹³ A Afferri & others 'Barriers and facilitators for the inclusion of fertility care in reproductive health policies in Africa: A qualitative evidence synthesis' (2022) 28 *Human reproduction update* 190.

procreation or divine will.¹⁹⁴ Religious leaders, who hold considerable influence over their communities, often discourage the use of ART, leading to a pervasive stigma around these treatments.¹⁹⁵ This discouragement can cause individuals to avoid seeking ART due to fear of moral condemnation or social ostracism. Furthermore, religious institutions may lobby against supportive policies for ART, influencing healthcare policy and funding decisions, which can result in limited availability of ART services. Consequently, the strong religious convictions and the social influence of religious leaders create significant barriers to the acceptance and utilisation of ART in Kenya, hindering its accessibility for those in need.

3.6 Educational barriers

Educational disparities significantly impact access to and availability of ART in Kenya. Individuals with lower educational levels often lack awareness and understanding of ART and infertility treatments, leading to misconceptions and resistance. This knowledge gap hinders informed decision-making, causing many to remain unaware of available ART options.¹⁹⁶ Additionally, lower literacy rates correlate with limited access to health information and services, exacerbating the challenges in seeking ART. In Kenya, the adult literacy rate is 80.8%, which is high for a developing country.¹⁹⁷ However, these literacy rates are limited to basic factors such as reading and arithmetic, while health literacy remains limited. Limited health literacy is central to limiting access to and availability of ART.¹⁹⁸

Educational disparities also influence economic opportunities, as individuals with less education often have lower incomes, making the high costs of ART prohibitively expensive. Furthermore, healthcare providers in regions with low educational attainment may have limited training and resources to offer ART services, reducing availability. The

¹⁹⁴ Agutu (n 77) 27.

¹⁹⁵ (N 194) above.

¹⁹⁶ Inhorn (n 58) 172-174.

¹⁹⁷ O Duncan & others 'technology used to subordinate socially conservative constitutions in Africa? The case of Kenya's proposed legislation on assisted reproductive technology' (2016) 4 *Africa Nazarene University Law Journal* 1.

¹⁹⁸ Many individuals only understand ART to mean surrogacy whilst there very many other forms of assisted reproductive technologies.

combination of these factors creates a significant barrier, preventing a substantial portion of the population from accessing ART.

3.7 Access and affordability issues

Access and affordability issues are significant barriers to accessing ART in Kenya, affecting many individuals and couples who struggle with infertility. The high costs associated with ART procedures, coupled with the limited availability of services, create substantial obstacles for those seeking fertility treatments.¹⁹⁹ These barriers not only prevent many from accessing the medical care they need but also exacerbate social inequalities, as ART remains largely unattainable for lower-income populations.²⁰⁰ This research explores the multifaceted challenges of accessibility and affordability, the impact on healthcare equity, and potential strategies to address these issues.

One of the primary barriers to accessing ART in Kenya is the high cost of procedures such as IVF, which can be prohibitively expensive for many individuals. The cost of a single IVF cycle in Kenya can range from approximately 300,000-600,000 Kenyan Shillings (around 2,800-5,600 USD), well beyond the financial reach of most Kenyans, considering the country's average income levels. These costs include consultations, medications, laboratory fees, and procedural expenses, often requiring multiple cycles for a successful pregnancy.²⁰¹ A key barrier to accessing ART is therefore the high cost of ART procedures. Treatments such as IVF, IUI, and other advanced reproductive technologies require specialised medical expertise, sophisticated equipment, and multiple procedural steps, all of which contribute to their high expense.²⁰²

Moreover, the lack of insurance coverage for ART exacerbates this economic challenge. In Kenya, health insurance schemes, both public and private, often do not cover the costs associated with ART. This lack of coverage places the entire financial burden on individuals and families, making ART accessible only to those who can afford to pay

¹⁹⁹ Murage (n 75) 966.

²⁰⁰ (N 199) above.

²⁰¹ Agutu (n 77) 27.

²⁰² TM Chiware & others 'IVF and other ART in low-and middle-income countries: A systematic landscape analysis' (2021) 27 *Human reproduction updates* 213.

out-of-pocket.²⁰³ For many Kenyans, this is an insurmountable obstacle, as the cost of a single ART cycle can be equivalent to several months or even years of household income. Without financial support from insurance providers, ART remains out of reach for most of the population, effectively limiting its accessibility to a small, affluent segment of society. The lack of insurance coverage for infertility treatments further exacerbates the financial burden, forcing many to either forgo treatment or deplete their savings. This economic barrier disproportionately affects lower and middle-income individuals, limiting access to ART and contributing to unequal health outcomes.

The availability of ART services in Kenya is also a significant issue, with most fertility clinics concentrated in major urban centres like Nairobi and Mombasa.²⁰⁴ This geographic concentration means that individuals living in rural or remote areas face considerable difficulties in accessing ART services. The need to travel long distances to urban centres for consultations and treatments adds additional costs and logistical challenges, such as travel expenses, accommodation, and time off work.²⁰⁵ These barriers make it particularly challenging for those in rural areas to access timely and consistent fertility treatments. The limited number of clinics also leads to longer waiting times and reduced availability of specialised care, further complicating the accessibility of ART services for many Kenyans.

Socio-economic disparities significantly influence who can access ART services in Kenya. Wealthier individuals and those with higher levels of education are more likely to be able to afford ART and be aware of its availability and potential benefits.²⁰⁶ In contrast, individuals from lower socio-economic backgrounds may lack both the financial resources and the information necessary to seek out ART. These disparities are compounded by the overall lack of public awareness about infertility and the available treatments, as well as cultural stigmas that may prevent open discussion

²⁰³ G Obajimi & others 'Expanding access to assisted reproductive technology in a developing country: Getting more for less' (2021) 50 *African Journal of Medicine and Medical Sciences* 171.

²⁰⁴ Agutu (n 77) 27.

²⁰⁵ Agutu (n 77) 27.

²⁰⁶ S Ilinca & others 'Socio-economic inequality and inequity in use of healthcare services in Kenya: evidence from the fourth Kenya household health expenditure and utilisation survey' (2019) 18 *International journal for equity in health* 1.

about reproductive health issues.²⁰⁷ As a result, ART remains an option primarily for the affluent, creating a significant divide in reproductive healthcare access and perpetuating social inequities.

In a country where the majority of the population lives on low or moderate incomes, these costs are prohibitive.²⁰⁸ This economic barrier is particularly pronounced for those living in rural areas or informal settlements where incomes are typically lower, and out-of-pocket health expenditures can be devastatingly high. Consequently, many individuals and couples who could benefit from ART are unable to access these treatments simply due to their cost.

In addition to the high direct costs, there are also significant indirect economic challenges that affect access to ART in Kenya. These include the costs associated with travel, accommodation, and time off work.²⁰⁹ ART services are often concentrated in urban centres and major cities, such as Nairobi and Mombasa, meaning that individuals from rural areas must travel long distances to access these treatments.²¹⁰ This travel incurs additional expenses for transportation and accommodation, which can further strain already limited financial resources. Moreover, ART procedures typically require multiple visits to the clinic for consultations, tests, and treatments, necessitating time off work. For many Kenyans, particularly those in informal employment or with no access to paid leave, taking time off work means losing crucial income, adding another layer of economic difficulty to accessing ART.

Furthermore, these economic challenges are compounded by a lack of public funding and investment in reproductive health services, including ART. Government budgets for health are often limited, and reproductive health services are hardly prioritised in Kenya. Even in the allocation for reproductive health, there are no provisions for ART in the national budgets.²¹¹ This lack of investment results in inadequate infrastructure, limited availability of specialised ART services, and a shortage of trained healthcare

²⁰⁷ VY Fujimoto & others 'Racial and ethnic disparities in assisted reproductive technology outcomes in the United States.' (2010) 93 *Fertility and sterility* 382.

²⁰⁸ Fujimoto (n 207) 382.

²⁰⁹ Obajimi & others (n 203) 175.

²¹⁰ Opondo (n 16) 56.

²¹¹ Opondo (n 16) 57.

professionals. Public healthcare facilities that might offer more affordable ART services are often under-resourced and unable to meet the demand. Consequently, many individuals are forced to seek services from private clinics, where costs are higher.²¹² The absence of substantial government support and funding for ART means that even those who seek help through public health channels may find services inaccessible due to long wait times, limited availability, and out-of-pocket costs.

In conclusion, the economic challenges impeding access to ART in Kenya are multifaceted. High direct costs of ART procedures, lack of insurance coverage, indirect costs associated with accessing urban-based services, and insufficient public funding all contribute to making ART inaccessible for many. Addressing these economic barriers requires comprehensive policy interventions, including subsidising ART costs, expanding insurance coverage, improving public healthcare infrastructure, and increasing public and private investment in reproductive health services. Only through such multifaceted approaches can ART become more accessible and affordable, ensuring that individuals and couples across all socio-economic backgrounds can benefit from these vital reproductive technologies.

In Kenya, healthcare delivery services are largely capitalistic. While healthcare providers will provide healthcare services, it is in their best interest to earn a profit as this is the only way to keep their doors open. Therefore, these facilities are bound to shy away from offering services that the society may frown upon, or where the demand may be low.²¹³ In these cases, healthcare facilities may subsequently lack the incentive to offer these services, due to the fear of being side-lined by prospective consumers within the communities that they serve.

As identified earlier, the ART Bill proposes to address accessibility by requiring the National Government to finance access, and County Governments the actual medicine, premises and personnel.²¹⁴ However, this approach to access fails when considering two primary issues. First, the National Government's obligation to provide resources is

²¹² Opondo (n 16) 57.

²¹³ Vayena EPJ Rowe & HB Peterson. 'Assisted reproductive technology in developing countries: Why should we care?' (2002) 78 *Fertility and sterility* 13-15.

²¹⁴ ART Bill 2022, clause 7 & 8.

only to ‘the highest attainable standard’ which standard allows the progressive realisation of the obligation. This means the National Government has no concrete obligation to actually finance ART Procedures as it can simply claim budget constraints.

Second, as a specialised medical procedure, it is likely that the government cannot sustainably finance ART procedures. In fact, Kenya’s doctor to patient ratio of 19:100,000 is five times higher than the World Health Organisation’s recommended ration of 1: 1000.²¹⁵ Instead, a better approach would be to subsidise the cost of these procedures through tax cuts for medicine and medical equipment, which would improve access to ART procedures without depending on government financing.

3.8 Lack of comprehensive research and data collection

3.8.1 Importance of comprehensive research and data collection

The lack of comprehensive research and data collection on ART practices and outcomes in Kenya represents a significant gap in the ART landscape.²¹⁶ Reliable data is crucial for several reasons. It provides a foundation for informed policy decisions. Policymakers rely on accurate and detailed information to understand the current state of ART practices, identify areas that need regulation or improvement, and allocate resources effectively.²¹⁷ Without robust data, policies may be based on anecdotal evidence or incomplete information, leading to ineffective or misguided regulations.²¹⁸ Additionally, comprehensive research can help identify trends and patterns in ART usage, success rates, and patient demographics, which are essential for tailoring policies to meet the specific needs of the population.

3.8.2 Enhancing clinical practices and monitoring safety

Data collection and research are also vital for improving clinical practices and monitoring the safety and efficacy of ART procedures. By systematically gathering

²¹⁵ Africa Uncensored, ‘Kenya’s Are Dying Due to Lack of Healthcare Even as Plans to Export Health Workers Are Underway’ (March 2024).

²¹⁶ Opondo (n 16) 72.

²¹⁷ MK Rumbidzai ‘The status of assisted reproductive technology in the public health sector in Africa—a multi-country survey’ (2022).

²¹⁸ Rumbidzai (n 217) 34.

information on ART treatments, healthcare providers can assess the success rates of different procedures, identify best practices, and refine their techniques.²¹⁹ This continuous improvement cycle is essential for ensuring high standards of care and maximising the chances of successful pregnancies. Moreover, tracking long-term health outcomes for children born through ART can provide critical insights into any potential risks or complications associated with these technologies. This information is invaluable for both healthcare providers and patients, as it enables them to make informed decisions about ART treatments based on evidence rather than speculation.

The ART Bill fails to properly address this beyond requiring ART practitioners to store certain information about the patients. However, as earlier indicated, there is need to require renewal of licences; continuous professional training and development for ART practitioners; and regular inspections of ART premises and procedures being conducted to reduce the risks to health and safety of both the child and the surrogate mother.

3.9 Conclusion

This chapter set out to examine barriers to the provision of ART services in Kenya as a human right. It sets a case that there are multiple barriers that directly and indirectly affect provision of ART services. These include: legal barriers in the lack of a proper regulatory framework for ART services; cultural barriers associated with the stigma of inability to conceive naturally; educational barriers that prevent many from even knowing of the existence or utility of ART services; religious barriers that undermine artificial conception; and even financial barriers borne of the fact that these services are by and large expensive. In forthcoming chapters, this research will elaborate on how these issues can and ought to be resolved in Kenya to enhance provision and regulation of ART services as a human right.

²¹⁹ Agutu (n 77) 27.

Chapter 4: Lessons learnt from other jurisdictions in ensuring access to and availability of ART as a human right

4.1 Introduction

This chapter undertakes a comparative study of how ART practices are provided for and regulated in other countries with better legal and institutional structures. Here, it explores South Africa, Greece and the United States of America. These three countries have been chosen based on their well-developed legal and institutional frameworks, well defined and properly restricted procedures, on-going reviews through public and private sector institutions that allow for professionalism in the management of ART practices. In doing this comparative study, this research hopes to explore mechanisms that Kenya can employ in providing and regulating ART practices as a right.

4.2 Analysis of ART practices in other jurisdictions

This section analyses ART practices, specifically legal and regulatory frameworks in other jurisdictions to identify and learn from good practices and inform recommendations that can be applied to Kenya. These good practices will help Kenya understand how to overcome its challenges in ensuring access to and availability of ART as a reproductive health right.

4.2.1 South Africa

The legal and regulatory framework governing ART in South Africa is relatively well-developed compared to many other African nations, providing a structured and comprehensive approach to the regulation of ART services.²²⁰ This framework is designed to ensure the safety, efficacy, and ethical practice of ART, protecting both patients and healthcare providers involved in these services. At the heart of South Africa's ART regulation is the National Health Act (Act 61 of 2003), which outlines the

²²⁰ TM Chiware & others 'IVF and other ART in low-and middle-income countries: A systematic landscape analysis.' (2021) 27 *Human reproduction update* 213.

legal parameters within which ART can be practised.²²¹ This Act, alongside with the associated regulations, provides a broad legal foundation for reproductive health services, including ART.²²² The Act mandates that all ART procedures must be performed in facilities that are registered and comply with specific standards set by the Department of Health.²²³ This ensures that clinics offering ART services meet minimum requirements in terms of infrastructure, equipment, and personnel qualifications.

The Human Tissue Act (Act 65 of 1983) also plays a critical role in the legal framework for ART in South Africa. This Act governs the donation, procurement, and use of human tissues, including gametes (sperm and eggs) and embryos used in ART. Under this act, the procurement and use of gametes and embryos are subject to strict regulations to prevent unethical practices, such as the commercialisation of human tissues.²²⁴ The Act ensures that donations are made voluntarily and with informed consent, protecting the rights of donors and recipients alike.²²⁵

South Africa's Children's Act also contains provisions governing certain aspects of ART. It limits parental responsibility for parents whose only contribution was as a donor in artificial insemination.²²⁶ Related to the actual ART practices, it requires that surrogacy be by a written agreement confirmed by the High Court.²²⁷ The High Court is empowered to deny the recognition of surrogacy agreements if good cause is not demonstrated. This is a progressive provision that ensures the process of surrogacy is not undertaken for reasons that may amount to exploiting the situation.

Further, the Children's Act requires that at-least one parent donate their reproductive cells, otherwise the surrogacy agreement would be invalid.²²⁸ This is a double edged sword which, on the one hand, ensures a parent has a stake in the child and is

²²¹ DS Juliane & TF Kruger 'Assisted reproductive technology in South Africa: First results generated from the South African Register of Assisted Reproductive Techniques' (2012) 102 *South African Medical Journal* 167.

²²² Archary & others (n 25) 835.

²²³ (N 232) above.

²²⁴ MN Slabbert 'Are the human embryo and the fetus extra uterum sufficiently protected in terms of South African law.' *JS Afr. L.* (2001): 495.; Section 35 of the Health Act.

²²⁵ Slabbert (n 224); Section 60.

²²⁶The Children's Act of 2005 section 26(2)(b).

²²⁷ Act 35 of 2005 section 293.

²²⁸ Act 35 of 2005 section 294.

therefore less likely to harm the minor say through child trafficking. However conversely, it limits the access to ART practices from partner who do not have the capacity to produce reproductive cells.

Importantly however, the Children's Act requires a number of conditions to be met to further prevent abuse of using ART procedures. It requires that the commissioning parent for the surrogacy be incapable, permanently and irreversibly, from conceiving a child.²²⁹ It also requires the parties to the agreement to not just be competent, but to agree prior to the parental responsibility of the parent.²³⁰ This is important to ensure that any fallout prior to birth cannot leave the child in limbo regarding their parental needs.

With regards to the surrogate mother, the Children's Act requires among other things; that the High Court confirms that the surrogacy is done for altruistic and not monetary terms; that she has a documented history of at least one pregnancy and viable delivery; and that she has a living child of her own.²³¹ These provisions seem to exist to ensure that surrogacy and ART practices in general are not commercialised, which often hurts low-income desperate people in society and incentivises participation for profit.

Finally, and importantly, the Children's Act requires that the High Court confirms the surrogacy agreement adequately and comprehensively addresses the care of the child. This includes care, upbringing, contact, even beyond the death or divorce of the commissioning parent(s).²³² One further interesting safeguard is that surrogacy may not commence prior to confirmation of the agreement by the High Court, or 18 months after confirmation of the agreement. This ensures that at the relevant time period, the High Court will have had a chance to vet the motivations and suitability of the parties to the agreement before it proceeds.²³³

This provision for court supervision solves the problem with the ART Bill optimistically expecting ART procedures will not be commercialised. Instead, these provisions and the fact that the court can deny recognition of a surrogacy agreement ensures these

²²⁹ Act 35 of 2005 section 295(a).

²³⁰ Act 35 of 2005 section 295(b).

²³¹ Act 35 of 2005 section 295(c).

²³² Act 35 of 2005 section 295(d).

²³³ Act 35 of 2005 section 296.

processes are used for altruistic reasons. In turn this secures the minor from potential neglect or exploitation by undeserving parents.

Further, the Children's Act governs the relationship post-birth and provides that the child shall belong to the commissioning parents, and that the surrogate mother has no right, even of contact, with the child.²³⁴ Equally, the child has no right/ claim of succession from the surrogate parent.

Importantly, the Children's Act addresses the issue of termination of the surrogacy agreement after conception but prior to birth of the minor unlike Kenya's ART Bill. To this end, it permits termination: prior to 60 days of the birth of the minor; and with court supervision. When this is done, the Children's Act contemplates it shall be by consent of the surrogate mother, who in turn has no responsibility to the commissioning parents but for refunding any expenses incurred by the commissioning parents in the process.²³⁵ Moreover, should the agreement be terminated after birth, the surrogate maintains all rights to the child and the commissioning parent have no parental claim to the minor.²³⁶

This provision for termination is especially important considering the emotional weight associates with surrogacy that may lead to a Solomonic stand-off between both parents. Coupled with the fact that surrogacy agreements are confirmed in court and all parties have to agree to the terms of confirmation, it prevents potential contentious litigation over who bears what responsibility for the minor.

The Children's Act also provides for termination of the pregnancy by the surrogate mother. In this case, she only needs to inform the commissioning parents who cannot fault her decision or make her incur liability for the same, other than expenses spent on the ART procedures. Finally, the Children's Act prohibits financially paying a surrogate mother just for the birth.

Overall, despite being brief, the children's Act covers key aspects of ART procedures especially around the human relations and potential fall-out during the process. And by involving the High Court from the very start, it ensures parties are adequately informed

²³⁴ Act 35 of 2005 section 297.

²³⁵ Act 35 of 2005 section 298.

²³⁶ Act 35 of 2005. section 299.

over not only what the process will entail, but also their respective rights and responsibilities in the process.

Moreover, the South African Law Reform Commission (SALRC) has been instrumental in shaping the legal landscape of ART. The Commission's work includes on-going reviews and recommendations to ensure that ART regulations remain relevant and up-to-date with advancements in medical technology and societal values.²³⁷ This continuous review process helps to address emerging ethical, legal, and social issues related to ART, such as the rights of children born through ART, surrogate motherhood, and the use of pre-implantation genetic diagnosis (PGD).

Regulatory oversight of ART in South Africa is further strengthened by the Health Professions Council of South Africa (HPCSA) and the South African Society of Reproductive Medicine and Gynaecological Endoscopy (SASREG). The HPCSA is responsible for ensuring that medical professionals involved in ART are appropriately trained and certified.²³⁸ It also enforces ethical guidelines and professional standards to which practitioners must adhere. SASREG, on the other hand, is a professional association that provides additional guidance and support to ART practitioners, promoting best practices and continuous professional development.²³⁹

Ethical guidelines play a significant role in the regulation of ART. The South African Medical Research Council (SAMRC) has published extensive guidelines on the ethical conduct of ART, emphasising the importance of informed consent, the welfare of the child, and the rights of all parties involved.²⁴⁰ These guidelines ensure that ART practices adhere to high ethical standards, protecting patients from potential exploitation or harm.

In conclusion, South Africa's legal and regulatory framework for ART is robust and comprehensive, encompassing a range of laws, regulations, and ethical guidelines

²³⁷ Archary & others (n 25) 835.

²³⁸ A Dhai & others 'The Health Professions Council of South Africa and the medical practitioner' (2006) 24 *Continuing Medical Education: Your South African Journal of Continuing Professional Development* 8.

²³⁹ DW Thaldar & S Bonginkosi 'South Africa's latest medically assisted reproduction draft regulations: Close, but no cigar' (2002) *Tydskrif vir die Suid-Afrikaanse* 1.

²⁴⁰ N Mkhwanazi 'Twenty years of democracy and the politics of reproduction in South Africa' (2014) 12 *African Identities* 326.

designed to ensure the safe and ethical practice of ART. The National Health Act, Human Tissue Act, and the on-going work of the SALRC, HPCSA, and SASREG collectively create an environment where ART can be practised responsibly, with due regard for the rights and welfare of all involved. This framework not only facilitates access to ART but also ensures that these services are provided in a manner that is safe, ethical, and in line with international best practices. It is however important to note that there are still some barriers to the access of ART in South Africa. The main barrier is that the provisions of the health act are limited to private hospitals which are immensely costly. This creates an affordability barrier whereby people from lower socio-economic classes may be impeded from accessing the services.

4.2.2 United States of America

Kenya has extensively borrowed from the legal system of the United States, such as the adoption of a bicameral legislature, as well as devolution. It is therefore instrumental to look at the legal provisions of the United States not only due to similarities in governance but also because the country has one of the most extensive protections on ART rights. The legal and regulatory framework governing ART in the United States of America (USA) is multifaceted, encompassing federal and state laws, as well as guidelines from professional organisations. This framework aims to ensure the safety, efficacy, and ethical practice of ART while striving to guarantee access to these technologies for individuals and couples seeking fertility treatments.

At the federal level, several key statutes and regulations impact the provision of ART. The Fertility Clinic Success Rate and Certification Act of 1992 (FCSRCA) is a pivotal federal law that mandates the Centres for Disease Control and Prevention (CDC) to collect and publish data on ART success rates.²⁴¹ Under this act, fertility clinics must annually report their ART success rates, providing transparency and enabling prospective patients to make informed decisions.²⁴² This law helps ensure that clinics maintain high standards of care and accountability.

²⁴¹ W Lynne 'Federal oversight of assisted reproduction: Public health, consumer protection, and public resources' (1996) 6 *Women's Health Issues* 150.

²⁴² Appendix C of The Fertility Clinic Success Rate and Certification Act of 1992.

State laws further shape the legal landscape for ART in the USA.²⁴³ Each state has its own regulations regarding the practice of ART, which can vary widely. Some states have enacted laws that mandate insurance coverage for infertility treatments, including ART, thereby enhancing access for individuals and couples who might otherwise be unable to afford these services.²⁴⁴ For example, Massachusetts and Illinois require insurers to cover a range of fertility treatments, including IVF.²⁴⁵ However, the scope and extent of coverage can differ significantly from state to state, leading to disparities in access based on geographic location.

Professional organisations, such as the American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART), also play a critical role in regulating ART practices.²⁴⁶ ASRM provides extensive guidelines on the ethical and medical aspects of ART, covering issues such as informed consent, embryo transfer, and the use of donor gametes. SART, which is affiliated with ASRM, maintains a registry of ART outcomes and sets standards for ART clinics. Membership in SART is often seen as a mark of quality, as it requires adherence to rigorous guidelines and participation in continuous quality improvement programmes.

In conclusion, the legal and regulatory framework for ART in the USA is comprehensive yet complex, involving federal and state laws, as well as guidelines from professional organisations. While federal regulations ensure the safety and efficacy of ART, state laws play a crucial role in determining access through insurance coverage mandates. Professional organisations provide ethical and medical guidelines that further standardise ART practices. Despite these efforts, disparities in access persist, highlighting the need for continued advocacy and policy development to ensure equitable access to ART for all individuals and couples seeking fertility treatments.

²⁴³ T Klosowski 'The state of consumer data privacy laws in the US (and why it matters)' *New York Times* (New York) September 2021.

²⁴⁴ Lynne (n 241) 152.

²⁴⁵ Lynne (n 241) 152.

²⁴⁶ EM Abusief & others 'Assessment of United States fertility clinic websites according to the American Society for Reproductive Medicine (ASRM) Society for Assisted Reproductive Technology (SART) guidelines' (2007) 87 *Fertility and sterility* 88.

4.2.3 Greece

The legal and regulatory framework governing ART in Greece is one of the most comprehensive and progressive in Europe, designed to ensure ethical practice, safety, and broad access to ART services. This framework is established through a combination of laws, regulations, and guidelines that address various aspects of ART, from the rights of patients and donors to the operational standards of ART clinics.

The primary piece of legislation regulating ART in Greece is Law 3305/2005, titled 'Application of Medically Assisted Reproduction'. This law provides a detailed framework for the practice of ART, setting out the conditions under which these technologies can be used. It stipulates that ART is available to individuals and couples, including single women, who face infertility issues.²⁴⁷ The law is inclusive, allowing access to ART for a wide range of patients, reflecting Greece's progressive stance on reproductive health.

Law 3305/2005 also establishes the National Authority for Medically Assisted Reproduction (NAMAR), a regulatory body responsible for overseeing the implementation of ART regulations. This authority is tasked with ensuring that ART clinics comply with legal and ethical standards, maintaining a registry of ART procedures, and accrediting clinics that meet the required standards.²⁴⁸ The authority conducts regular inspections and audits of ART facilities to ensure compliance with national and international guidelines.

One of the key features of the Greek ART legislation is the emphasis on informed consent.²⁴⁹ The law requires that all patients and donors provide written informed consent before undergoing any ART procedure. This consent must be based on comprehensive information provided by healthcare professionals, ensuring that patients and donors are fully aware of the risks, benefits, and ethical considerations involved. This emphasis on informed consent underscores the importance of patient autonomy

²⁴⁷ IVI Daskalaki 'Religious aspects of medically assisted reproductive technologies in Greece' *Anthropological and legal challenges of assisted reproduction technologies* 145.

²⁴⁸ Daskalaki (n 247) 145.

²⁴⁹ Art 13 of Law 3305/2005.

and ethical practice in ART.²⁵⁰ The legal framework also addresses the issue of gamete and embryo donation. Under Greek law, both anonymous and non-anonymous donations are permitted, giving donors and recipients the flexibility to choose the arrangement that best suits their needs.²⁵¹ The law ensures that all donations are voluntary and altruistic, prohibiting any form of financial compensation beyond the reimbursement of expenses incurred by the donor. This helps to prevent the commercialisation of human gametes and embryos, maintaining the ethical integrity of the donation process.

In addition to these provisions, Greek ART law includes specific regulations on PGD and surrogacy. PGD is allowed under strict conditions, primarily for preventing serious genetic diseases, and must be approved by the NAMAR. Surrogacy is also permitted, but it requires a court order and is restricted to altruistic arrangements, meaning the surrogate cannot receive payment beyond reasonable expenses.

To further ensure the ethical practice of ART, the Greek regulatory framework incorporates guidelines from prominent international bodies, notably the European Society of Human Reproduction and Embryology (ESHRE). ESHRE is a leading authority in reproductive medicine, providing comprehensive guidelines that cover a wide range of ART practices, including the handling of gametes and embryos, laboratory standards, patient care, and ethical considerations.²⁵² These guidelines are meticulously designed to uphold high standards of safety, efficacy, and ethical responsibility in ART procedures. By integrating ESHRE's standards, Greek regulations ensure that ART clinics adhere to the best practices recognised across Europe and internationally. This alignment with broader norms fosters consistency in the quality of care and ethical standards, making Greek ART services comparable to those in other leading countries. Additionally, adherence to ESHRE guidelines ensures that Greek ART practices are continually updated in response to the latest scientific advancements and ethical debates. This proactive approach allows Greece to remain at the forefront of

²⁵⁰ T Chortara 'Surrogacy: Issues of cross-border medically assisted reproduction between Greece and Italy' (2016) 5 *Culture and Research* 377.

²⁵¹ Greek Civil Law Code, Article 1459.

²⁵² C Wyns & others 'ART in Europe, 2018: Results generated from European registries by ESHRE' 2022 3 *Human reproduction open* 9.

ART innovation while maintaining rigorous ethical oversight. Consequently, the incorporation of ESHRE guidelines not only enhances the credibility and reliability of Greek ART services but also assures patients and donors of the highest levels of care and ethical integrity in their reproductive treatments.

In conclusion, Greece's legal and regulatory framework for ART is robust and inclusive, ensuring that ART services are provided safely, ethically, and accessibly.²⁵³ The comprehensive nature of Law 3305/2005, along with the oversight of the NAMAR, provides a strong foundation for the regulation of ART. This framework not only supports the rights and well-being of patients and donors but also ensures that ART practices in Greece adhere to high ethical and professional standards.

4.2.4 Denmark

Denmark is recognised for its progressive approach to Assisted Reproductive Technology, which is well-regulated under national law to ensure ethical practices and protect individuals involved in the reproductive process. The primary legal framework governing ART in Denmark is the 'Act on Fertility Treatment' which outlines the procedures, eligibility criteria, and ethical guidelines for fertility treatments.

The Act stipulates that fertility treatments, including in vitro fertilisation and artificial insemination, are available to both heterosexual and same-sex couples, as well as single women.²⁵⁴ This inclusive approach reflects Denmark's commitment to ensuring equal access to ART services for diverse family structures.²⁵⁵ The law also mandates that ART services be provided by licensed clinics, which must adhere to strict medical and ethical standards to ensure the safety and well-being of patients.

Under Danish law, there are clear provisions regarding the use of donor gametes. Donors are required to provide informed consent, and their anonymity is protected; however, children born from donor gametes have the right to access non-identifying

²⁵³ M Nikolaos & M Lavreotiki 'The Greek Orthodox position on the ethics of assisted reproduction' (2008) 17 *Reproductive biomedicine online* 5.

²⁵⁴ A Aaen & others 'O-162 Ethnic disparity in the use of treatment with assisted reproductive technologies in Denmark.' (2024) 1 *Human Reproduction* 39, no. Supplement 108.

²⁵⁵ Aaen & others (n 254) 108.

information about their donors once they reach adulthood.²⁵⁶ This balance between donor privacy and the child's right to know their genetic origins is a key feature of Denmark's legal framework, aiming to address ethical concerns while respecting personal privacy.²⁵⁷ The legislation also includes detailed regulations on the storage and use of embryos. For instance, embryos can be stored for a maximum of five years, after which they must be either used or discarded, unless there are exceptional circumstances. This provision is intended to prevent the indefinite storage of embryos and encourage timely decision-making regarding their use.²⁵⁸ Finally, Denmark's ART regulations emphasise the importance of informed consent and patient autonomy. Clinics are required to provide comprehensive information about the risks, benefits, and alternatives to fertility treatments, ensuring that patients can make well-informed decisions. This approach underscores the country's commitment to upholding high ethical standards and protecting the rights of individuals undergoing fertility treatments.

4.3 Practices to enhance and guarantee access and availability of ART in other jurisdictions other than laws and policies

ART encompasses a variety of medical procedures used to address infertility. Different jurisdictions have implemented diverse practices to enhance and guarantee access and availability of ART. This section examines the strategies adopted in South Africa, the USA, and Greece, highlighting their unique approaches and shared objectives, in addition to the legal and policy frameworks in the countries.

In South Africa, the regulation of ART is governed by the National Health Act and the Human Tissue Act, which provide a framework ensuring that ART services are safe, ethical, and accessible. South Africa has a well-established network of fertility clinics, many of which offer subsidised services to make ART more affordable.²⁵⁹ Additionally, public awareness campaigns and educational programs have been launched to inform individuals about the options available for infertility treatment.²⁶⁰ The Government also

²⁵⁶ LR Jolving, & others 'The Danish National Register of assisted reproductive technology: Content and research potentials' (2021) 36 *European journal of epidemiology* 445.

²⁵⁷ Jolving & others (n 256) 447.

²⁵⁸ (N 257) above.

²⁵⁹ Nikolaos & Lavreotiki (n 253) 7.

²⁶⁰ Rozééis 'Assisted Reproductive Technologies in the Global South and North' (2016).

supports research and development in reproductive technologies, ensuring that the latest advancements are incorporated into clinical practice.²⁶¹ This balanced approach between stringent regulation and active promotion of ART ensures that a wide demographic can access these services, regardless of economic status.

Conversely, the USA adopts a market-driven approach to ART, characterised by a diverse range of service providers and advanced medical technologies.²⁶² The absence of a unified national policy on ART means that regulations vary significantly from state to state. However, organisations such as the American Society for Reproductive Medicine (ASRM) play a crucial role in setting ethical standards and guidelines.²⁶³ To enhance access, many employers offer fertility treatment coverage as part of their health insurance plans.²⁶⁴ Moreover, numerous non-profit organisations provide financial assistance to individuals and couples seeking ART services.²⁶⁵ Despite the high costs associated with ART in the USA, these measures help mitigate financial barriers and expand access to a broader population.

Denmark's universal healthcare system provides a robust framework for the provision of ART services such as offering fertility treatments free of charge to residents.²⁶⁶ The Danish model emphasises preventive care, with comprehensive sexual and reproductive health education integrated into the national curriculum.²⁶⁷ Additionally, Denmark has invested significantly in research and innovation in the field of reproductive health, resulting in high success rates for ART procedures.²⁶⁸ The Danish Government also facilitates the training and accreditation of fertility specialists, ensuring

²⁶¹ Rozéeis (n 260)13.

²⁶² (N 261) above.

²⁶³ B Meczekalski & others 'Assisted reproductive technology outcome in United States of America and Australia with New Zealand: Comparison of annual reports 2005–2016' (2020) 11 *Gynecological Endocrinology* 959.

²⁶⁴ K Tierney & C Yong 'Assisted reproductive technology use in the United States: A population assessment' (2019) 112 *Fertility and sterility* 1136.

²⁶⁵ Meczekalski & others (n 263) 1143.

²⁶⁶ Danish Health Act of 2010.

²⁶⁷ OB Duarte-Filho & others 'Assisted Reproductive Technologies in Latin America and Europe: A Comparative Analysis of Reported Databases for 2013' (2019) 41 *Revista Brasileira de Ginecologia e Obstetrícia/RBGO Gynecology and Obstetrics* 493.

²⁶⁸ N Viktoriia & others 'Legal basis for the use of assisted reproductive technologies: A comparative analysis of the legislation of Ukraine and European States' (2021) 74 *Wiadomości Lekarskie* 3021.

a high standard of care. This comprehensive approach demonstrates the effectiveness of integrating ART services within a universal healthcare system.

Greece has positioned itself as a leading destination for medical tourism, particularly in the field of ART.²⁶⁹ The country's liberal regulatory framework, combined with relatively lower costs and high-quality medical services, attracts individuals from around the world. Greek legislation permits a wide range of ART procedures, including those that may be restricted in other countries. To further enhance accessibility, Greece offers specialised packages for international patients, which include accommodation and transportation.²⁷⁰ The Government actively promotes Greece as a fertility destination through targeted marketing campaigns and partnerships with international clinics.²⁷¹ This focus on medical tourism not only boosts the local economy but also ensures that advanced ART services are available to both domestic and international patients.

The practices adopted by South Africa, the USA, and Greece to enhance and guarantee access to ART reflect a range of strategies tailored to their unique healthcare landscapes. South Africa's balanced regulatory framework, the USA's market-driven approach, Denmark's universal healthcare model, and Greece's promotion of medical tourism each offer valuable insights. Common to all these jurisdictions is the emphasis on ensuring ethical standards, promoting research and innovation, and providing financial support to mitigate the high costs of ART. By examining these diverse practices, other countries can develop tailored strategies to improve access and availability of ART, ensuring that individuals and couples worldwide can pursue their dreams of parenthood.

4.4 Conclusion

This chapter has established that it is indeed possible to create a proper regulatory framework for provision of ART services. From lessons learnt from the USA, Greece and South Africa, this process starts with comprehensive laws and policies that provide for regulatory institutions that play a central role in regulating the day to day practice of ART services. These institutions, supported by professional organisations of ART

²⁶⁹ Meczekalski & others (n 263) 957.

²⁷⁰ Nikolaos & Lavreotiki (n 253) 8.

²⁷¹ Nikolaos & Lavreotiki (n 253) 8.

practitioners help to craft and to constantly peer review provision of ART services in a country. Further, a proper legislative and regulatory framework enables all key aspects of ART services such as informed consent, rules on licensing practitioners, informed consent, regulating fertility clinics, requiring insurance financing for ART services, and even public information and awareness campaigns, all work to enhance the provision of ART services. This research draws from this, and in the next chapter, it lays out recommendations to enhance provision of ART services in Kenya.

Chapter 5: Recommendations for Kenya

5.1 Introduction

In earlier chapters, this research has explored both Kenya's domestic and international legal obligations that mandate the protection of ART practices as a right. It has also explored in the comparative study undertaken in chapter four, various ways in which Greece, South Africa and the USA have regulated ART practices.

This chapter outlines comprehensive recommendations to enhance access to ART as a right in Kenya. These recommendations are targeted towards policymakers, the legislature, healthcare providers, civil society, and the general public, with the objective of highlighting how ART services can be accessed within a human rights framework.

5.2 Legislature

Based on the findings of this research, it is instrumental that parliament establishes a solid legislative framework on ART. This legislative framework will inform all legal and ethical aspects regarding access and use of ART services, including opportunities for funding and financing solutions to guarantee that each and every Kenyan, regardless of their social or economic status, can access these services, without discrimination and in accordance with Article 27 of the Constitution of Kenya. The Assisted Reproductive Technology Bill of 2022 has been in parliament since 2022 and has only undergone through the first reading.

A well-defined regulatory framework is essential to ensure the safety, efficacy, and ethical standards of ART services. Such a framework is instrumental in ensuring access to ART by establishing clear guidelines and standards to maintain high-quality care and patient safety. These guidelines should cover aspects such as the qualifications of medical personnel, the operation of fertility clinics, and the use of reproductive materials. A well-established regulatory framework will also facilitate ethical oversight of ART.²⁷² Forming ethics committees to oversee ART practices ensures that procedures are carried out ethically, respecting the rights and dignity of patients. These committees can

²⁷² F Merlet 'Regulatory framework in assisted reproductive technologies, relevance and main issues' (2009) 47 *Folia Histochemica et Cytobiologica*.

address issues such as consent, the use of donor gametes, and the handling of embryos. A regulatory framework will also facilitate the accreditation and licensee of clinics and institutions offering ART. Implementing a system for the accreditation and licensing of fertility clinics and professionals ensures that only qualified providers offer ART services. Regular audits and inspections can maintain high standards of care.

The legislature should also provide financial resources and incentives to encourage widening access to ARTs. The high cost of ART is a significant barrier for many individuals. The first of these financial mechanisms is the expansion of insurance coverage to cover infertility treatment. Mandating insurance coverage for ART treatments can significantly reduce out-of-pocket expenses for patients.²⁷³ Policies can include coverage for diagnostic tests, medications, and procedures like IVF. For countries with national health insurance providers, it is instrumental for the government to take the first step in the provision of these insurance services by ensuring that public health insurance facilities include provisions for ART.

Subsidies and grants can also enhance access to financial support for ART services. Governments can offer subsidies or grants to lower-income individuals and couples to help cover the costs of ART. This financial assistance can make these technologies more accessible to a broader population.²⁷⁴ As was seen in Denmark,²⁷⁵ these subsidies ensure equitable access to ART services regardless of economic background.

It would also be instrumental to make the environment friendly for clinics and facilities that offer ART services. One way to achieve this is to offer tax incentives for clinics and facilities that offer ART treatment, which would encourage more investment into the field. When multiple facilities are providing these services, the demands would be lower on one facility, which creates competition and a potential lowering of the costs of services. Furthermore, providing tax deductions or credits for medical expenses related to ART

²⁷³ MP Connolly & others 'The costs and consequences of assisted reproductive technology: An economic perspective' (2010) 16 *Human reproduction updates* 603.

²⁷⁴ SC Jwa & others 'Social capital and use of assisted reproductive technology in young couples: Ecological study using application information for government subsidies in Japan' (2021) 16 *SSM-Population Health*.

²⁷⁵ Obajimi & others (n 203).

can alleviate the financial burden on patients. This approach encourages individuals to seek necessary treatments without worrying about prohibitive costs.

5.3 Policymakers

The key policymakers on this issue in Kenya are the Ministry of Health. The Ministry has the responsibility to implement key provisions and critical functions related to public health, as well as determine and monitor professional standards in public health. In line with this mandate, the Ministry can put in place authorities and regulatory institutions which will oversee the implementation and regulation of access to ART in Kenya. For the public of Kenya to have equal and safe access to ART, it is instrumental that there is a unique regulatory body that will oversee the delivery of these services, as well as conduct accreditation and appraisal of both facilities and professionals that offer assisted reproductive technologies.

The National Health Insurance Fund is a key policymaker that oversees and implements the national health insurance fund. This is a public insurance fund that guarantees universal access to health, with premiums as low as 5USD per month, for the less privileged.²⁷⁶ According to the findings of this research, one of the key barriers to accessing ART is economic and financial challenges. This goes against the principles of reproductive justice because these populations are impeded from being able to control their reproduction. This research therefore recommends including fertility treatments and ARTs as part of the national health coverage. This ensures that any individual with access to the national health insurance fund can access ART services.

In line with the implementation of public health policies, public education is instrumental. It is important to ensure that all members of the public have access to vital information regarding their health. This research therefore recommends that the Ministry of Health embarks on an initiative to engage and educate the public more about what ARTs are, their value and benefit society while also disabusing the public of any myths and misconceptions regarding ARTs. This education is instrumental because not only will it

²⁷⁶ R Mbau & others 'Examining purchasing reforms towards universal health coverage by the National Hospital Insurance Fund in Kenya' (2020) 19 *International journal for equity in health* 1.

allow more people to understand that these services and solutions actually exist, but also, this will reduce the stigma surrounding ART improving the access thereof.

5.4 Oversight institutions

To guarantee the observance of human rights in Kenya, the Constitution instituted several oversight bodies, key among them being the Kenya National Commission on Human Rights and the National Gender and Equality Commission. The key mandate of these bodies is to provide oversight on government activities on all matters relating to human rights and equality, ensuring that laws, policies, government services are all accessible and they are aligned with the key principle of human rights. In line with the findings of this research, many barriers impede access to and availability of ART, which means that there are inequalities to accessing these services, and these barriers disproportionately affect marginalised individuals, ultimately adversely affecting their reproductive outcomes. Based on these findings, it is recommended that human right and equality commissions in Kenya conduct an audit and related advocacy to ensure that the government is responsive to ensuring equality and human rights when it comes to access and availability of ARTs.

5.5 Healthcare providers

Every person has the human right to access the highest attainable standard of health, and this includes reproductive health services.²⁷⁷ This means that even ART services should be completed by licensed and qualified healthcare facilities and practitioners. One of the key enablers identified through this research was that, in all the jurisdictions explored, there were strong regulatory frameworks that ensured that all healthcare providers were duly qualified and licensed. Kenyan healthcare providers can learn from this and ensure that before offering ART services, they are duly qualified and licensed, by not only getting the required medical degrees, but also ensuring that they constantly improve their competence thus guaranteeing that their patients receive the highest standard of health.

²⁷⁷ Article 12 of the ICESR.

Even with the dearth of a legislative framework governing ART in Kenya, undoubtedly, there may be organisations that still offer ART services, as the service is not criminalised. However, without a proper legislative framework, there are also policy gaps such as Standard Operating Procedures and Patient Charters. The lack of these regulatory frameworks increases the risk of legal and ethical gaps, with consumers of the service having to bear these risks. Therefore, it is instrumental that healthcare providers offering this service develop these regulatory documents which will guide the delivery of services to their clients, and reduce the risks that their clients have to bear, which may dissuade more people from seeking ART services.

To address the current gaps in data and research, there is need for establishing a national registry for ART in Kenya. A national registry would systematically collect and store data on all ART procedures performed in the country, including patient demographics, treatment types, success rates, and health outcomes. This centralised database would serve as a valuable resource for researchers, clinicians, and policymakers. Such research can uncover disparities in access to ART, variations in success rates across different regions or clinics, and patient satisfaction with the care received. By supporting evidence-based policymaking, a national registry and on-going research can enhance the quality and safety of ART services in Kenya, ensuring that they are both effective and equitable for all who need them.

5.6 Civil society organisations

Civil society in Kenya has played an instrumental role in not only providing external oversight of government services, but also standing in the gap where there may be government shortcomings. For instance, civil society organisations (CSOs) have provided funding for certain healthcare services, as well as engaged the government and legislature in the development of laws and policies that are responsive to the needs of the public. This research recommends that civil society work closely with government authorities and human rights commissions, among others, in raising awareness and sensitisation on ART and ART rights within the country. This will enhance public education while also reducing stigma associated with ARTs. Furthermore, CSOs should

also take up the mantle of engaging the Government by providing expertise which will help in the development of human rights informed laws and policies on ART.

Raising public awareness and providing education about ART is essential for ensuring that individuals are informed about their options and the availability of services. One way to do this is through media campaigns. Launching campaigns through various media channels can inform the public about infertility, available treatments, and where to seek help. Highlighting success stories and dispelling myths can also reduce the stigma associated with infertility.

5.7 International bodies

Another significant jurisdictional framework includes the Convention for the Protection of Human Rights and Dignity of the Human Being with regards to the Application of Biology and Medicine (Oviedo Convention) and the United Nations' guidelines on bioethics. The Oviedo Convention, officially known as the Convention on Human Rights and Biomedicine, established by the Council of Europe, is a comprehensive document that addresses the ethical and legal implications of biomedical practices, including ART. It emphasises the protection of human dignity and the rights of individuals undergoing these procedures.²⁷⁸ The Convention restricts certain practices, such as sex selection for non-medical reasons, and insists on the need for informed consent.²⁷⁹ While it sets a robust ethical framework, its implementation varies across member states, leading to a diversity of ART regulations in Europe. If a similar document is adopted by regional bodies such as the AU and there is push to have it ratified, this will promote the use of ART technologies in Kenya through the binding nature of foreign ratified law.

5.8 Educational Institutions

As with any other scientific field, ART is bound to grow and evolve extensively. As a human right, it is instrumental that the services provided are in accordance with the highest standards of research. Therefore, investing in research and development (R&D) is crucial for advancing ART technologies and improving success rates. Allocating

²⁷⁸ A Roberto 'The Oviedo Convention: A European legal framework at the intersection of human rights and health law.' *Journal of International Biotechnology Law* 137.

²⁷⁹ Article 14 of the Oviedo Convention.

government funds for research into infertility and ART can lead to innovative treatments and improved outcomes. Collaborations with universities and research institutions can drive scientific advancements.²⁸⁰

Furthermore, it may be crucial to encourage clinical trials for new ART methods and technologies to ensure that patients have access to cutting-edge treatments. Regulatory frameworks should facilitate the safe and ethical conduct of these trials. As more knowledge is being developed on the topic, it is important to pass on the knowledge to other key parties such as teachers and healthcare professionals. Investing in the education and training of healthcare professionals specialising in reproductive medicine ensures a skilled workforce capable of delivering high-quality ART services.²⁸¹ Continuous professional development programmes keep practitioners updated on the latest advancements in the field.

Enhancing access to ART requires a multifaceted approach that includes robust regulatory frameworks, financial support mechanisms, public awareness initiatives, and investment in R&D. By adopting these recommendations, countries can ensure that ART services are safe, ethical, and accessible to a broad demographic, ultimately supporting individuals and couples in their quest to overcome infertility and achieve their dreams of parenthood.

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²⁸⁰ CJMB Fauser & others 'Beliefs, attitudes and funding of assisted reproductive technology: Public perception of over 6,000 respondents from 6 European countries.' (2019) 1 *Plos one*.

²⁸¹ MP Connolly & others 'The costs and consequences of assisted reproductive technology: An economic perspective' (2010) 16 *Human reproduction updates* 603.

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