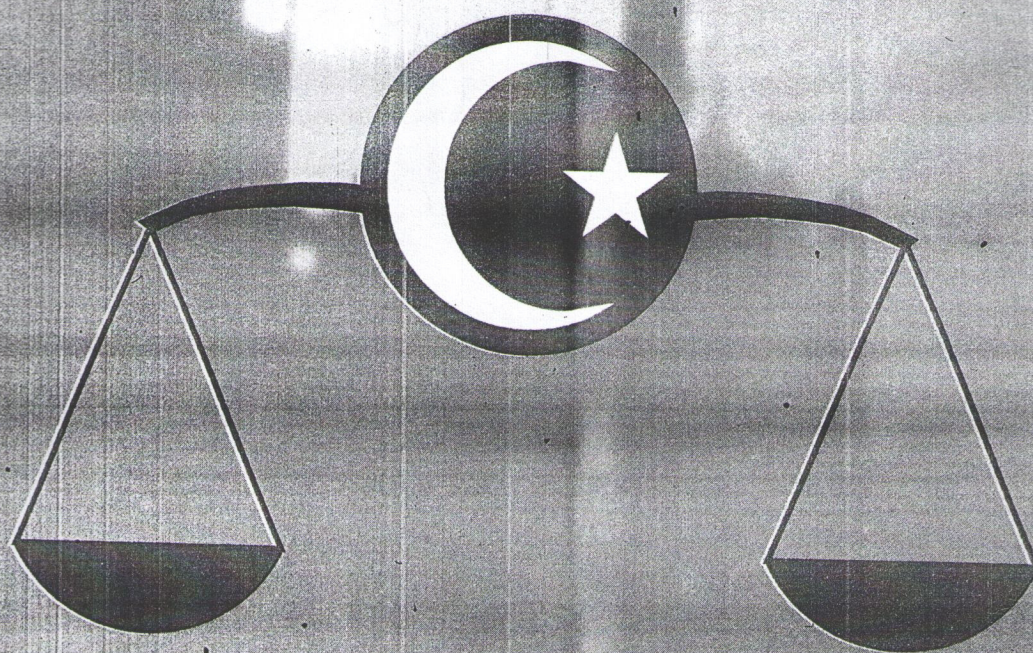




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# EXAMINING THE LEGAL STATUS OF EMBRYO USED IN REPRODUCTIVE TECHNOLOGY (IVF AND ES) IN SOME SELECTED JURISDICTIONS

by

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## INTRODUCTION

*In vitro* fertilisation (IVF) is a laboratory procedure in which sperms are placed with an unfertilised egg in a petri dish to achieve fertilisation.<sup>1</sup> The embryo that came into being after fertilisation is then transferred into the uterus of a woman to be carried to term.<sup>2</sup> Usually, there are surplus embryos from IVF because many are created to give the couple another chances if the first round does not work. These surplus embryos cannot be kept in perpetuity, and therefore may result into a waste (dead). Unused embryo may also be frozen for research purposes.

It should be noted that at the blastocyst<sup>3</sup> stage before implantation, the embryo's inner mass cells contain cells that will become the foetus when implanted in uterus. Embryonic cell-lines are usually extracted from this inner cell mass, and when this occurs, the embryo is automatically destroyed.<sup>4</sup> This is referred to as embryonic stem cell or ES research.<sup>5</sup> Thus the inevitable waste of the frozen embryo in the

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1 See Online medical dictionary <http://www.medterms.com/script/main/art.asp?articlekey=7222> accessed 15 May 2009. IVF may be explained as a form of Assisted Reproductive Technology (ART) involving the joining of a man's sperm and a woman's egg together in a laboratory to produce an embryo resulting in a test tube baby. It is basically used to treat infertility in both males and females and also serves as avenue for the lesbians or single mothers to have babies.

2 The woman carries the embryo in the exact way a natural pregnancy would be carried.

3 Blastocyst is a highly developed embryo that has divided many times to a point where it is nearly ready to implant on the walls of the uterus.

4 I Weissman, "Stem Cells – Scientific, Medical, and Political Issues" (2002) 20 (346) *New England Journal of Medicine* 1577-1578.

5 The embryo may be cryopreserved (frozen) and kept in the scientific laboratory and may be transferred into the woman's womb at any other time to begin another pregnancy. In this way, a woman has opportunity to undergo many trials in case of failure of the initial implantation to develop into a baby. The cryopreserved ones may also be used for the Embryonic or Stem Cell (ES) research. Embryonic stem cells are derived from embryos that develop from eggs that are fertilised *in vitro*.



process of IVF and the destruction that occur during ES research constitute, to some people, the taking of lives or abortion of innocent babies.

This paper therefore concerns itself with legal status of the embryo particularly those conceived outside the natural womb (*in vitro*) before implantation into the women's womb and the protection afforded it by law. To this end, the paper will discuss the (1) brief ethico-moral and religious issues arising from the IVF and ES research (2) the examination of some national laws relating to the personhoods of the embryo *in vitro* or *in vivo*. (3) the ultimate question as to whether the embryo *in vitro* is a human being, or mere property of the couple whose gametes are involved in the fertilisation.

## IVF AND EMBRYONIC OR STEM CELL RESEARCH (ES) – ETHICO-MORAL ISSUES

The first IVF baby was born in England in 1978, and since then IVF has become one of the most successful means for infertile couples to have children.<sup>6</sup> Put simply, *in vitro* fertilisation involves combining male gametes (sperm) with female gametes (eggs) outside of the woman's body to increase the chances of fertilisation. Couples undergo IVF for a number of reasons, though typically after failure of the woman to become pregnant through natural means. Originally, IVF was developed to treat infertility in women who had damaged or blocked oviducts (the tubes that carry the unfertilised egg to the uterus). Today, it is also used for couples when the male partner has a low sperm count or where the woman has had a high-risk pregnancy in the past, or the couple has encountered other obstacles in their attempt to become pregnant.<sup>7</sup>

6 G Scott *et al*, *Bioethics and the New Embryology*, MA: Sinauer Associates, Inc. Sunderland (2005) 65.

7 Gilbert Scot *et al* *ibid*, wrote in their book on "Bioethics and the New Embryology"... that IVF consists of the following four-step process: The first step requires that the woman invests a substantial amount of time and energy to stimulate properly her ovaries to produce a number of mature gametes (instead of one that is normally produced monthly). In the second step, the doctor collects the eggs with an aspiration pipette immediately before they enter the oviducts. From there, the eggs are stored in a sterile container until they can be fertilised in the laboratory.

In the second step, approximately two hours before the woman's eggs are retrieved; the man's sperms are collected. In the event that the man has low sperm count or there is another issue with his semen, his gametes can be collected through more invasive procedures. From here, technicians perform a "sperm washing" in which the most motile sperms are selected for use in fertilising the egg(s). The selected sperms are then immobilised until the egg(s) are ready. In the third step, the female gamete(s) and the selected male gametes are combined in a petri dish and incubated at body temperature to simulate a uterine environment. The success rates for this procedure usually range



IVF technology has raised many ethical,<sup>8</sup> moral, legal, religious, social and cultural concerns. Medical ethicists and religious groups are divided on the morality of pursuing this line of medical research.<sup>9</sup> Emily Singer asserted that there are two views of looking at the technology of assisted conception. At one end of the spectrum are people who feel that this technology allows couples to manipulate nature to produce children and will object to it. At the other end are people who believe that this technology is a triumph of man's ingenuity which can be used to overcome nature's constraints.<sup>10</sup>

In a similar vein, the use of frozen embryo for research purposes (ES) have not been generally accepted by the ethicists and moralists. Although it is said that such research is engaged in to find solutions to many incurable diseases, such as Diabetes, Alzheimer's, and Parkinson's,<sup>11</sup> its practice has been condemned by many people. The former American president, George Bush was one of the strongest opponents of ES research. On August 9 2001, he announced the suspension of federal funding for stem cell research, except for stem cell-lines existing by that date. Bush said that the blastocysts "have at least the potentials for life" and that destroying them would cross "a fundamental moral line."<sup>12</sup> It is interesting however that on March 9 2009, the new United States president reversed and lifted the restrictions on ES research. President Obama was variously quoted as follows:

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from 50 to 70 percent, and, if all goes well, the newly fertilised egg will begin to divide. If, after a few days, the embryo continues to divide, the doctors can then move on to the fourth and final step which is embryo transfer into the woman to carry it to term.

- 8 Three views are held on the moral and legal status of the human embryo. Firstly, that it has full legal status, and is entitled to all the rights and protection like any other human subject. The second view holds that an embryo has no legal status, but it is like any other cell in the human body. The third view is a compromise between the first two. It acknowledges that the developing human embryo is not a person, yet it does have moral importance, so is entitled to special respect and should be legally protected. See generally, E P Amechi, *Regulating Developments in Embryonic Stem Cell Research in Africa: A Third Person's Perspective* (Research report, PhD candidate at the University of the Witwatersrand, Johannesburg 2005)85-106.
- 9 M Saniei and R De Vries, "Embryonic Stem Cell Research in Iran: Status and Ethics" (2008) 4 (4) *Indian Journal of Medical Ethics* 181-184.
- 10 N Cameron and T Stevens, *Opinion: What California Can Learn From Korean Cloning Scandal* San Francisco chronicle (December 13 2005) 1.
- 11 See generally, C Henningson, M Stanislaus, "Embryonic and Adult Stem Cell Therapy" (2003) 28 *Journal of Allergy and Clinical Immunology* 745-753.
- 12 See "The White House President Discusses Stem Cell Research," The Bush Ranch, Crawford, Texas, 9 August (2001) <http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html> accessed March 15 2010.



By doing this, we will ensure America's continued global leadership in scientific discoveries and technological breakthroughs....The restrictions that President Bush has placed on funding of human embryonic stem cell research had handcuffed American scientists and hindered their ability to compete with other nations."<sup>13</sup> "We will lift the ban on federal funding for promising embryonic stem cell research. ... We will also vigorously support scientists who pursue this research. And we will aim for America to lead the world in the discoveries it one day may yield...

The new American federal position has tendency to influence the views and attitudes of many people who were opposed to the practice but may hardly affect the position of the religionists who consider the practice as sinful.

It should be noted that while most African countries do not have any specific regulation or policy on ES research<sup>14</sup> they have been vocal in the international arena in supporting the prohibition on all forms of ES cell research.<sup>15</sup> In the African continent, there is the fear that ES research might give rise to trafficking in human eggs and embryos especially in the developing countries. The Nigerian envoy to the United Nations was reported to have said that Nigeria would support a ban on the research for fear that African women are "most likely to be at risk as easy targets to source the billions of embryos required for scientific experimentation."<sup>16</sup> The former head of Maternal, Child and Women's Health and Nutrition in South Africa expressed similar opinion that it is better to prohibit the research than permit South Africa to become another "petri dish"<sup>17</sup> for greedy Western doctors.<sup>18</sup> This explained

<sup>13</sup> B Feller and L Neergaard, "Pro-family Leader Denounces Stem Cell Policy Change" One News Now, March 07 2009. available at: <http://www.onenewsnow.com>, accessed March 15 2010.

<sup>14</sup> See WHO : Reproductive Cloning of Human Being: Current Situation, *Report of the Regional Director, AFR/RC55/PSC/14* of June 17, 2005; Osagie, "Assisted Reproduction Technology (ART) in Developing Countries With Particular Reference to Sub-Saharan Africa," in WHO: *Current Practice and Controversies in Assisted Reproduction*, Geneva (2002) 22-27.

<sup>15</sup> E P Amechi, *Regulating Developments in Embryonic Stem Cell Research in Africa: A Third Person's Perspective* (Research Report, PhD Candidate at the University of the Witwatersrand, Johannesburg 2005) 96-97.

<sup>16</sup> F Awanbor, Nigerian Envoy to the United Nations, in *U.N. Shelves Cloning Treaty* Wired News (7 November 2003), also available at <http://wired.com/news/medtech/0.1286,61153,00.html> accessed 14 January, 2010.

<sup>17</sup> A petri dish is a flat dish made of plastic or glass with a cover that is primarily used to grow bacteria. However, the petri dish can be used to view seed germination or for viewing small animal observations. And is often used as a platform for viewing any small objects.



the reason why the initial draft of the South African National Health Bill of 2001 sought to prohibit such research.<sup>19</sup>

## RELIGIOUS PERSPECTIVES ON IVF AND ES RESEARCH

From the religious perspectives, Catholics hold the extreme view regarding embryonic or stem cell research, because they believe that the moment of fertilisation is a miracle in as much as it is the time when God imbues the soul, and produces an individual with its own genetic components. For the Vatican, an embryo "is to be respected and treated as a person from the moment of conception; and therefore from that same moment, his rights as a person must be recognised".<sup>20</sup> They hold the opinion and belief that the embryo in its early stages is a human being with full rights; therefore the embryo deserves the dignity granted to it by God. Regarding the use of IVF for conception, the Catholic standpoint is that the only source for procreation must be a fruit of the conjugal act between a woman and a man. The Catholics official position is contained in catechism 2377<sup>21</sup> which provides as follows:

Techniques involving only the married couple (homologous artificial insemination and fertilization) are perhaps less reprehensible, yet remain morally unacceptable. They dissociate the sexual act from the procreative act. The act which brings the child into existence is no longer an act by which two persons give themselves to one another, but one that "entrusts the life and identity of the embryo into the power of doctors and biologists and establishes the domination of technology over the origin and destiny of the human person. Such a

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<sup>18</sup> Amechi, note 20 above, 92.

<sup>19</sup> See L Altenroxel, State, MRC Set for New Clash Over Stem Cells," *The Star* (12 April 2002), cited in Schuklenk and J Lott, "Ethics, Politics and Embryo Stem Cell Research in South Africa," (2002) 92 *South African Medical Journal* 784-785. See also, s 68 (1) of South African Draft National Health Bill 2001. The Bill was later passed into law known as National Health Act No. 61 of 2003. According to Emeka Amechi *supra*, the rationale for this initial policy stance was that ES cell research may represents a window of opportunity for large western corporations to exploit impoverished South African women, mining their bodies for embryos to be developed into stem cell lines and shipped elsewhere for research purposes.

<sup>20</sup> Holcberg and Epstein, *The Anti-Life Opposition to Embryonic Stem Cell Research*, Ayn Rand Institute (29 July 2005), available at < <http://www.americandaily.com/article/8490> >. accessed 18 June 2010.

<sup>21</sup> Catechism refers to an official exposition of the Catholic Church usually pronounced by Pope:



relationship of domination is in itself contrary to the dignity and equality that must be common to parents and children.”<sup>22</sup>

Judaism, on the other hand, agrees to both IVF and stem cell research. Judaists believe that the embryo is only a drop of water, and does not reach the full human form during the first 40 days, so research before the fortieth day is permissible.<sup>23</sup> The Union of Orthodox Jewish Congregations, one of the most important Jewish organisations in America actually circulated a letter in support of the Castle-DeGette Bill (H.R. 810), a legislation that would allow for provision of federal funding for research using embryos created initially for reproductive purposes but left-over in fertility clinics.<sup>24</sup>

In Islamic religion, Muslim scholars do not consider that the fertilised embryo has equal rights with fully formed human beings, but they differ as to when the soul is bestowed, whether it is after 40 or 120 days. The embryo goes through various stages of development in the mother's uterus; these gradual stages of physical development are all referred to in the Quran in the following verses:

We created man of an extraction of clay, then we sent him, a drop in a safe lodging, then We created of the drop a clot, then we created of the clot a tissue, then We created of the tissue bones, then We covered the bones in flesh; thereafter We produced it as another creature.<sup>25</sup>

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22 See *Donum Vitae* II, 4 and II, 5 - Instructions on Respect for Human Life in Its Origin and on the Dignity of Procreation which was issued on February 22, 1987.

23 E Dorff, "Embryonic Stem Cell Research: The Jewish Perspective" (2002) Spring *USCJ Review* 4.

24 The letter read, *inter alia*, thus:

"The Jewish tradition places great value upon human life and its preservation. The Torah commands us to treat and cure the ill and to defeat disease wherever possible; to do this is to be the Creator's partner in safeguarding the created. The traditional Jewish perspective thus emphasises that the potential to save and heal human lives is an integral part of valuing human life. Moreover, the traditional Jewish perspective does not accord an embryo outside of the womb the full status of humanhood and its attendant protections. Thus, stem cell research may be consistent with and serve these moral and noble goals; however, such research must not be pursued indiscriminately."

See Eric Cohen, *Unorthodox Entorsement, Judaism and embryonic stem cell research* National Review online Posted on Tuesday May 24, 2005. Available at [http://www.eppc.org/programs/bioethics/publications/programID.35, pubID.2352/pub\\_detail.asp](http://www.eppc.org/programs/bioethics/publications/programID.35, pubID.2352/pub_detail.asp) accessed 20 May 2010..

25 Holy Quran Ch.23, verse 12-14.



Thus, Islam does not consider the embryo as having full rights with the human being. Islam permits IVF only where the egg and the sperm of the married couple are involved<sup>26</sup> but does not permit IVF involving a third party other than the husband and wife legally married according to Islamic doctrine. Islam however does not also allow ES research since it involved deliberate and inevitable destruction of human embryo. Certain Islamic scholars, however, permit research on the foetus from miscarriage, provided the miscarriage is unintentional.<sup>27</sup>

## LEGAL STATUS OF EMBRYO IN IVF AND ES RESEARCH IN SOME JURISDICTIONS

There is a huge controversy regarding the personhood of embryo either *in vivo* or *in vitro*. The laws relating to legal personality of embryo or foetus are clearly unsettled thus explaining the reason why there are differences in abortion laws of each country since the legal status accorded to the embryo will determine the permissibility of its destruction which inevitably takes place during the termination of pregnancy. It is therefore necessary to take a look at the laws of few countries to see the extent of recognition of legal personhood of embryo.

### 1. South Africa

In order to consider whether the South Africa law has conferred personhood on embryo, this study considers four principal areas of laws; the law of persons, the law of inheritance, the criminal law, and the constitution. First, under the South African law of person, a natural person's legal personality begins when birth is complete.<sup>28</sup> Before birth, the foetus or embryo is not a legal subject but merely forms part of the mother or her internal organs. The legal requirements for the beginning of legal personality are that:

- a) The birth must be fully completed, that is, there must be a complete separation between the body of the mother and the foetus.<sup>29</sup>

<sup>26</sup> Islam does not support IVF where the sperm is donated by any person other than the legal husband of the woman through process called AID (Artificial Insemination by Donor).

<sup>27</sup> UNESCO Office: Final Report of the Expert Meeting on Ethical and Legal Issues of Human Embryo Research, 12-14 February, 2008 held at Cairo, Egypt. 4.

<sup>28</sup> A natural person's legal personality is terminated by death. See also Boberg's *Law of Persons and The Family* Juta & Co. (1999) 28.

<sup>29</sup> See s1 of the Births and Deaths Registration Act No 51 of 1992 which defines "birth" as "in relation to being born alive".



- b) The child must be alive after the separation even if only for a short period. Legal personality is not obtained by a stillborn foetus or a foetus which dies during birth.<sup>30</sup>

In a related case of *Van Heerden v Joubert*<sup>31</sup> the court held that for purposes of the Inquests Act,<sup>32</sup> the word "person" does not include an unborn child. The court further pointed out that serious problems may arise in, for example, the law relating to abortion, murder and culpable homicide if legal personality were to be extended to a foetus.<sup>33</sup>

Second, section 239 (1) of the Criminal Procedure Act,<sup>34</sup> of South Africa also provides as follows:

At criminal proceedings at which an accused is charged with the killing of a newly born child, *such child shall be deemed to have been born alive if the child is proved to have breathed*, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at time of death, entirely separated from the body of its mother. (emphasis mine).

This shows that the child is capable of being killed only if it is born alive and had breathed and it could not amount to homicide where the two factors are absent. An embryo either *in vivo* or *in vitro* is in a developmental stage in the womb or in the laboratory thus do not possess the two characteristics.

The third relevant area of law for consideration regarding the status of the foetus under the South African law is the nasciturus fiction. This fiction is of the Roman-Dutch Law origin which regards a foetus as having been born at the time of conception thereby having legal capacity to inherit or own property whenever it is to his or her advantage. However, for the nasciturus fiction to come into operation, the following three requirements must be met:<sup>35</sup>

- a) The foetus must have been conceived at the time that the benefit would have accrued to him or her.

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30 J Heaton and DSP Cronje, *The South African Law of Person* Butterworth Durban (2003) 9.

31 *Van Heerden v Joubert*, case No 1994 (4) SA 793 (A).

32 The Inquest Act No. 58 of 1959 of South Africa.

33 *Van Heerden v Joubert*, case No 1994 (4) SA 793 (A).

34 The Criminal Procedure Act No 51 of 1977.

35 J Heaton and DSP Cronje, note 35 above, 9.



- b) The benefit must be to the child's advantage.
- c) The child must subsequently be born alive.

It therefore follows that the nasciturus rule will not protect the embryo that is wasted in the process of IVF or killed in embryonic stem cell research since these embryos are destroyed during the two procedures and would not be born alive to fulfil the nasciturus rules.

Finally, the Constitution of South Africa has also been interpreted as not recognising generally the unborn, (foetus or embryo) as a person. In the case of *Christian Lawyers Association of South Africa and Others v Minister of Health and Others*<sup>36</sup> The Plaintiffs<sup>37</sup> challenged the constitutionality of Choice of Termination of Pregnancy Act which allowed abortion of foetus from the age of 12 weeks up to 20 weeks in various circumstances. The Plaintiff prayed the court to set aside the Act on the basis that it infringed on the right to life. They contended that a foetus has a right to life and that irrespective of gestational age, foetus or unborn baby has a claim to protection by the Constitution for its right to life, because it is a person. They based their claim on section 11 of South Africa Constitution, which provides that "everyone has the right to life," arguing that the phrase "everyone" applies to an unborn child.

The court finally interpreted the word "everyone" in the constitution not to include the unborn child.<sup>38</sup> It ruled against the plaintiffs argument that the life of a human being starts at conception and that human beings were from conception persons as contemplated by section 11. The court noted that the status of the foetus under the common law was uncertain and that there is also no express provision in the South African Constitution affording the foetus legal personality or protection.

## 2. Legal Status of Embryo in Nigeria and Ghana

There is no state regulation of IVF and ES research in many African Countries<sup>39</sup> including Nigeria and Ghana. As a result, the position of law regarding IVF practitioners in the two countries often have a voluntary adherence to guidelines set by the American Society of Reproductive Medicine, the British Human Fertilisation

<sup>36</sup> Case No: 16291/97 High Court, Transvaal Provincial Division 1998. Reported in (1998) (4) SA 1113.

<sup>37</sup> The Act was challenged by three different groups under the name of United Christian Action Group, the Christian Lawyers' Association, and Christians for Truth.

<sup>38</sup> Foetus or embryo.

<sup>39</sup> G Osagie, "Assisted Reproductive Technology in Developing Countries with particular reference to sub-sahara Africa," available at <http://www.who.int/reproductive-health/infertility/6.pdf> accessed 21 May 2009. See also Akorede, note 3 above, 93.



and Embryology Authority or the equivalent body in France or Germany.<sup>40</sup> The two countries operate criminalised abortion laws but the laws are silent on the legal status of embryo. However, the criminal laws might provide a useful insight into how the law will view embryo *in vivo* or *in vitro*. In Nigeria for instance, section 309 of the criminal code stipulates that: "*When a child dies in consequence of an act done or omitted to be done by any person before or during its birth, the person who did or omitted to do such act is deemed to have killed the child*".

Section 357 of the same code provides unambiguously that *a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother*.<sup>41</sup>

Thus an embryo *in vitro* that is not capable of being born alive by a person cannot be killed by anybody's action or omission<sup>42</sup> thereby leading to an inevitable conclusion that an embryo *in vitro* cannot be accorded the status of a legal person under the Nigerian law.

In Ghana, the Criminal Code in section 60 contains provisions regarding causing harm to a child at birth by providing that whoever intentionally and unlawfully causes harm to a living child during the time of its birth shall be guilty of second degree felony.<sup>43</sup> Section 61(1) and (2) of the code also provides:

(1) Where harm is caused to a child *during the time of its birth*, or where, upon the discovery of the concealed body of the child, harm is found to have been caused to it, such harm shall be presumed to have been caused to the child before its death. (Italics mine)

(2) The time of birth includes the whole period from the commencement of labour *until the time when the child so becomes a person* that it may be murder or manslaughter to cause its death. (Italics mine)

The above provisions offer legal protection to a child during the time of birth and not before birth. Thus, the Criminal Code seems not to have offered the foetus the

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40 *Ibid.*

41 S 397 of the Criminal Code, Cap 77 Laws of the Federation of Nigeria 1990.

42 Akorede note 3 above, 88.

43 S.60 of the Criminal Code of Ghana, Act 29 of 1960 as amended by the Criminal Code amendment Act 2003 (Act 646).



right of a person; it rather indicates that personhood begins at the time of complete delivery of the foetus from the mother's body.

Section 66 (1) gives a categorical provision regarding foetus or embryo by stating as follows:

In order that a child *may be such a person that it may be murder or manslaughter to cause its death*, it is necessary that, before its death, the child should have been completely brought forth alive from the body of the mother. (Italics mine)

The position of Ghana is therefore similar to Nigeria in that a child is regarded as a person when it has come out of the mother's womb alive and has breathed. Therefore a foetus or embryo *in vitro* is not regarded as a person in the two countries.

### 3. Legal Status of Embryo in United States

Interestingly, United States has never passed any federal law to govern the practice of assisted conception in the country.<sup>44</sup> However, the United States Federal Constitution had been interpreted to the effect that the foetus or embryo *in vivo* is not regarded as a person. The Supreme Court in *Roe v Wade* ruled to the effect that the foetus is not a person under the United States Constitution. The Supreme Court listed all the places where the word person appears in the constitution and concluded:

In nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any prenatal application. All these, together with our observation *supra* ...persuade us that the word "person" as used in the Fourteenth Amendment, does not include the unborn.<sup>45</sup>

While the United States Constitution has settled the legal personhood of the unborn particularly the status of embryo *in vivo*, it is not conclusive that the same position be

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44 (2) M Feinman and G Sher. "Comparing the British and American Approaches to Regulating ART Programmes" (1996) 2 *Human Reproductive Journal* 1366-1367. Federal law prohibits the use of federal funds for the creation of human embryos for research purposes, or for funding research in which embryos are "destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in *utero*. This statute, however, has no effect on privately-funded research, which is not regulated by the federal government.

45 *Roe v Wade*, *supra*, at 158-159.



maintained for embryo *in vitro* as this area of law falls squarely within the jurisdiction of component states in accordance with the United States federal structure. To this extent therefore, few component states have passed their own separate laws<sup>46</sup> and have had judicial pronouncements on the status of the foetus or embryo *in vitro*.

These usually occur in divorce cases where the couples have cryopreserved embryo. In those cases, the questions for the courts have been whether frozen embryos are human beings and if so, how to resolve the legal issues regarding the custody of the "children" and the actions that would be in the best interest of the "children." On the other hand, can frozen embryo be considered as mere properties therefore necessitating the methods for dividing the assets between the two parties? Answers to these questions are not straightforward and therefore, an examination of a few cases judicially considered in few states in the United States would bring into fore the conflicting positions regarding the legal status of the embryo *in vitro*.

**a. *Del Zio v. Columbia Presbyterian Hospital*<sup>47</sup> (New York State)**

The Del Zios sued Columbia-Presbyterian Hospital claiming that their IVF procedure had been unnecessarily halted by the hospital administrator; they therefore sued for emotional distress. The contention was that had the administrator not interrupted the procedure and prevented it from continuing, the result would have produced a baby. The jury agreed that that the Columbia-Presbyterian Hospital had behaved in a way that was "utterly intolerable in a civilized community."<sup>48</sup> The court in this case did not consider the legal status of the frozen embryo but held that it is more than a mere property and cannot be interfered with or halted anyhow. The court ruled further that what was lost in the procedure was more than just "property." The wife was therefore awarded \$50,000 for the emotional distress that the hospital inflicted on her, while her husband was awarded just \$3 for his distress.<sup>49</sup>

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46 It is imperative to state that these few States do not actually represent the position of the United States on the IVF and ES research, nevertheless, their positions are worth noting in view of the fact that the matter involving IVF and ES research falls within the purview of the individual state's law.

47 *Del Zio v. Columbia Presbyterian Hospital*, (1978) US Dist. NY. Suit No. 74-3558.

48 *Ibid.*

49 *Ibid.*



*Davis v Davis* case began in Tennessee in 1989, the case lasted till 1993 when the final judgement was delivered by Supreme Court of Tennessee. This was a divorce case involving the distribution of seven cryopreserved embryo belonging to the couple before they filed for divorce. They were able to divide all their assets without contest, except for the seven embryos that remained frozen in the fertility clinic. Judge Young Dale was faced with the question of whether the embryos were property or human beings.

The wife, Mary Sue Davis wanted the embryo to be implanted into her but the husband Junior Davis did not want them to be implanted into Mary Sue Davis as that would amount to forcing him to become a father against his will. He did not want to have more children. Judge Young Dale concluded that the embryos were human being so he granted Mary Sue Davis the custody of the frozen embryo.<sup>51</sup> Part of his judgement which was handed down on September 21, 1989 and reads, in part: "It serves the best interests of the child or children, *in vitro*, for their Mother, Mrs. Davis, to be permitted the opportunity to bring them to term through implantation."

Junior Davis appealed Young Dale's decision to the Court of Appeals of Tennessee alleging that the judgment of the trial court was a violation of state and federal law in that it forced him to become a parent against his will, rendering him unable to control his reproductive fate. The Tennessee Court of Appeals decided on the status of the embryo, stating that the embryos were joint property and should be equally divided between Mr. and Mrs. Davis.<sup>52</sup> On whether a party could be forced to have children against his or her will, the Court of Appeal ruled that "the decision whether to bear or beget a child is a constitutionally protected choice." It therefore reversed the trial court decision. It stressed that Mr Davis could not be forced to have children against his will.

On further appeal to the Supreme Court of Tennessee, it was decided the embryos were neither legal persons nor a form of property.<sup>53</sup> Instead it held that the embryo *in vitro* deserves respect greater than that accorded to human tissue, but not the

50 *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

51 Judge Dale reasoning was that the frozen embryos were not property, rather they were human being. As a result, his decision focused on the "best interests" of the "children."

52 *Ibid*, 589-590.

53 *Ibid*, 597.



respect accorded to actual persons.<sup>54</sup> The Court finally ruled that the state cannot force a divorced man to become a father." And that ordinarily, the party wishing to avoid procreation should prevail."<sup>55</sup>

The decisions of the three courts were problematic. Going by the decision of the court of first instance, embryo was categorically regarded as children. Even though the two appellate courts disagreed that embryos *in vitro* are children, they noted that allowing the embryos to be implanted would amount to forcing the husband to become a father against his will. This position of the courts could be read to mean that the frozen embryos are considered as potential babies.

c. *Kass v Kass*<sup>56</sup> (New York)

Steven and Maureen Kass were unable to conceive naturally, they decided to go for IVF at John Mather Memorial Hospital. As at the time Maureen Kass filed for divorce, the couple had five frozen zygotes unused. The only issue the two parties were unable to agree upon throughout the settlement was the disposition of the five frozen zygotes. The plaintiff (Maureen Kass) sought to have them implanted. The husband, on the other hand, sought to have the zygotes turned over to the John T. Mather Hospital to be used in embryo research. The case was heard in the Supreme Court of Nassau County of New York.

Justice Roncallo's argument was that "there is no difference between *in vivo* and *in vitro* fertilisations..." In elaborating on this claim he wrote,

From a propositional standpoint it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish. Fertilisation is fertilisation...Biological life exists from that moment forward...The rights of the parties are dependent upon the nature of the zygote not the stage of its development or its location.

He therefore concluded that Maureen Kass (woman) should be granted the exclusive right to the zygotes and the right to determine their future. Thus in this case the court equated the status of embryo *in vitro* with that of *in vivo*. It considered them to be children and found for the woman.

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<sup>54</sup> *ibid.*

<sup>55</sup> *Ibid*, 604.

<sup>56</sup> 673 N.Y.S. 2d 350 (1998).



d. *York v. Jones*<sup>57</sup> (Virginia)

This case took place in Virginia in 1999. Steven York and his wife, Risa began fertility treatments at the Jones Institute in New Jersey. In the course of the treatment, they moved to California. The Yorks wrote a letter to the Jones Institute expressing their interest in having their remaining embryo transferred from Virginia to Los Angeles, California their new abode. The Yorks had made arrangements at the clinic in Los Angeles to have the embryo implanted into Mrs. York's uterus. Dr Jones refused the request for the transfer. The new doctor also wrote for the transfer but Dr Jones refused.

The Yorks therefore brought a suit against Dr. Jones and the College alleging that the defendants' control over the frozen embryo violated the cryopreservation contract they had signed with the College before they relocated to California. Upon review of this case in July 1989, the United States District Court, Eastern Division of Virginia considered the cryopreservation contract which the Yorks signed with the College. The following relevant excerpt was cited and relied on by the court:

We may withdraw our consent and discontinue participation at any time without prejudice and we understand our *pre-zygotes* will be stored only as long as we are active IVF patients at The Howard Jones Institute....or until the end of our normal reproductive years. We have the principal responsibility to decide the disposition of our prezygotes. Our frozen pre-zygotes will not be released from storage for the purpose of intrauterine transfer without the written consents of us both. In the event of divorce, we understand legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction...

The court found that the cryopreservation agreement "created a bailor-bailee relationship between the plaintiffs and the defendants." Judge Clarke went on to argue that aspects of the Agreement, particularly the references to the legal ownership of the "prezygote" in question as "our pre-zygote," reinforces that *the plaintiff's have property rights over the frozen embryo*.<sup>58</sup> The objection of the

<sup>57</sup> *York v. Jones*, 717 F. Supp. 421, 422 (E.D. Va. 1989).

<sup>58</sup> *Italics mine*. In *Litowitz v Litowitz* (48 P.2d 261 (Wash. Sup. Ct. 2002), the Washington Supreme Court also enforced a cryopreservation contract, interpreting it to provide that the embryos were to be destroyed under the terms of the contract since five years had elapsed since the creation of the embryos.



hospital was dismissed and the case was found for the Plaintiffs. The case was however settled out of court.

**e. Doe v Shalala<sup>59</sup> (federal case)**

This case was unique in that the court was faced with the determination of whether frozen embryo could actually have a right of action in court. The plaintiff's termed the frozen embryo as "preborn children in being". Doe and other Plaintiffs which included the Association of Down's syndrome Research and individuals with Down syndrome, all of which claimed to have interest in the action brought the suit against the Department of Health and Human Services (and its Department Secretary Donna Shalala). They allegedly represented 20,000 embryos cryopreserved and stored in IVF clinics around the country. They sought an injunction to prevent the National Institute of Health from continuing its research on embryos. Judge Messitte issued a three-part opinion in the case one of which is that the embryos lacked standing to bring a suit. This case was still in court on appeal till the period of President George Bush when he issued an executive order banning further support for embryonic research.

Summarily, the positions of the courts with respect to the embryo *in vitro* in the United States are as follows:

1. The courts may treat embryo *in vitro* as potential human persons. (*Kass v Kass*)
2. Embryos *in vitro* can be categorised as personal property with all ownership responsibility and obligations attaching to the couple facilitating the creation of the embryos. (*Yorks v Jones*)
3. Embryos *in vitro* can be categorised as neither persons nor property, but rather fall in an interim category entitled to a special respect due to the embryos' potential human life. (*Del Zio v Columbia Hospital* and *Davis v Davis*)
4. However, embryos *in vitro* are not categorised as persons having the full legal status afforded to all human beings. (*Davis v Davis*)
5. The embryo *in vitro* has no juristic personality and has no standing to sue in court. (*Doe v Shalala*)

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<sup>59</sup> *Doe v Shalala*, 862 F. Supp. 1421 (D. Md. 1994) it is a Federal case which ended at the US Appeal Court.



## CONCLUSION

The law of the United States with respect to embryos and fetuses is far from being consistent, representing the deep division in the United States over the issue of abortion.<sup>60</sup> It is beyond doubt that the laws in the other considered jurisdictions have not categorically considered the embryo *in vitro* as legal person. While it is not disputable that such embryos are potential persons, it is necessary that the law considers them so and also the law should protect their interest from unwarranted researches and human manipulations. Each of the countries considered in this paper has done little or nothing to protect the embryo *in vitro* or *in vivo*. The fact that Nigeria and Ghana operate criminalised abortion law is not conclusive that the two countries consider foetus or the embryo as a person. This is clearly indicated in the criminal laws of the two countries discussed above. Similarly, the fact that both South Africa and United States allow unrestricted access to abortion particularly in the first trimester of pregnancy confirms the little respect which the laws of the two countries have for the developing babies in the womb of the mother. This greatly underscores the relative importance and consideration such countries would have for embryo *in vitro*.

It is observed that none of the considered jurisdictions grants the embryo *in vitro* or *in vivo* the status of a legal person. It is however a biological fact that embryo (all things being equal) would grow to become human beings or legal persons. There is no reason why the law should not recognise them as potential human beings who should be given special legal protection? One may safely suggest that embryos *in vitro* deserve "special respect" beyond that given other human tissue. In the words of Robertson,

Although not a person or a rights-bearing entity, the early embryo may still be accorded special respect because it is genetically unique, living human tissue that has the potential to develop into a foetus and newborn.<sup>61</sup>

In line with the above reasoning therefore, we are of the opinion that using human embryo for stem-cell research is wrong because it involves the destruction of potential human beings. Such a research also has tendency to open the way to a slippery slope of dehumanising practices, such as embryo farms, cloned babies, the

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<sup>60</sup> T S. Jost, "Rights of Embryo and Foetus in Private Law" (2002) 50(3) *The American Journal of Comparative Law*, 646.

<sup>61</sup> J Robertson, "In the Beginning: Legal Status of Early Embryos (1990) 76(3) *Virginia Law Review*, 446.



use of foetuses for spare parts, and the commodification of human life.<sup>62</sup> A fertilised egg should be valued as a human life irrespective of age and should be considered human though undergoing developmental stages. Irrespective of the potential gains or medical benefit that the embryonic research may bring, we contend that destroying one human life in the hopes of saving others is not only unethical but also irreligious and immoral.

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62 M. Sandel, Embryo Ethics: The Moral Logic of Stem-Cell Research (2004) 351(3) New England Journal of Medicine, 207

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