PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X
Fountain University Law Journal Vol. 3 No. 5, 2026

NEITHER PERSON NOR PROPERTY: COMPARATIVE LEGAL DISCOURSE ON THE LEGAL STATUS OF THE EMBRYO IN VITRO (USE, STORAGE, RESEARCH) IN NIGERIA

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Abstract

The creation, storage, testing and disposal of human embryos in vitro are now routine features of assisted reproduction in Nigeria, yet Nigerian law has not determined the legal status of the embryo created outside the body. (in vitro) This paper examines that status under Nigeria's plural legal system, focusing on the General law and Islamic law. A doctrinal research methodology and comparative analysis of selected common law jurisdictions and countries that practice Islamic Law was utilized. The paper finds that the constitutional right to life and the criminal prohibition of abortion in Nigeria merely protect the embryo only while it is in the womb, and that as of today, no specific law protects the embryo in vitro. And no law says anything about the legal personhood of embryo in vitro. In a similar vein, Islamic law also fails to give a categorical standpoint on the embryo in vitro. It recognises the dignity of the embryo from conception as islam protects embryo upon ensoulment, and permits the creation and use of embryos only within a subsisting marriage. Drawing on the United Kingdom, Australia, the United States, Saudi Arabia and Malaysia, the paper examines embryo storage and disposal, embryo research and preimplantation genetic testing. This paper argues that the absence of law to protect the embryo created outside the woman's body in Nigeria is an anomaly in that it leaves the practitioners involved in Assisted reproduction to deal with the embryo in vitro the way they like without any legal framework. The absence of a law in this regard operates, in effect, as permission. The paper submits that the embryo in vitro cannot be protected without first resolving the question of its legal personhood. That is to know if it is a person capable of being protected by law or a mere property that can be subjected to any maneuvers. This paper recommends a national statute on assisted reproduction that defines the status of the embryo in vitro, establishes a regulatory body, sets rules on consent, storage, research and genetic testing, while making use of religious guidance within the Nigerian context.

Keywords: **Assisted Reproductive Technology; In Vitro Embryo; Legal Personhood; Islamic Law; Preimplantation Genetic Testing (PGT); Nigeria**

1.0 INTRODUCTION

The rights of embryos is one of the most controversial issues in the discussion of ARTs. The embryo though formed from the fusion of gametes is seen as distinct from the child it will become. It usually raises a lot of ethical and moral questions as to its status, usage if permitted, and its disposal. The law in Nigeria is yet to develop a coherent doctrine of its status and the discussion of the rights of embryos may not be a discussion of rights *per se* but issues that arise from its use or disuse in the ART practise. The conversation in this paper will be derived from constitutional standpoints, professional guidelines and ethics as well as the practise in other common law as well as Islamic law jurisdictions.

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X
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2.0 THE IN VITRO EMBRYO IN NIGERIA'S GENERAL LAW

The Nigerian legislation and courts have not directly made provisions or pronouncements on the legal status of an embryo outside the woman's body also known as *in vitro,* the constitutional guarantee of the Right to Life[1] is usually directed at "Every person" the interpretation of this may mean that the protection can only be extended to human beings as persons and may not cover an embryos outside the body that has not become a person. It is noted that the National Health Act 2014 makes it illegal to use human embryos for cloning or certain other purposes, but this Act does not provide for the status of embryos *in vitro* rather it legislates on its uses.[2] The Assisted Reproductive Technology (Regulation) Bill of 2016[3] (ART 2016 Bill) while not technically a law, merely defines "embryos as a fertilized ovum that has begun cellular division and has continued development up to the blastocyst stage at the end of five days."[4] It does not give answer to the question of what status does the embryo have under Nigerian Law. Therefore, the status of the embryo still remains vague and uncertain.[5]

One may argue further that the concept of Legal personality of embryos in Nigeria is mostly situated from a cultural and religious view point. Christians and Muslims value generally accord a moral weight to an embryo from conception, (in a human body) although the precise moment of personhood of an embryo during its stages of development is not known. Both religions believe that it should be treated as a human being. The constitutional provision in section 33 protecting life may be evoked to give a legal backing to this assertion in the same vein that criminal law provision makes abortion a crime in Nigeria,[6] it makes reference to willful destruction or putting an end to pregnancy. Therefore, it may be interpreted to mean that the legal status of the embryo is recognised and guaranteed while it is in utero (in the womb). Conversely, it may however be argued that this may not apply to embryos that have never been in the womb such as embryos that are *in vitro* or cryopreserved.

2.1 Neither Person nor Property?

Viewpoints about embryos *in vitro* usually centre around whether they have legal personality like human beings and are thus entitled to the same protections; or they belong to their gamete donors as a byproduct of the fertilization of their gametes. Many courts in other Common Law jurisdictions have not placed embryos in any of these categories. Rather Embryos have been given an intermediate status. The effect of this intermediate status is that, embryos are neither considered to be legal persons nor are they regarded as personal property. In the US case of *Davis v Davis*[7] the supreme court of Tennessee described the frozen embryo as in "*an interim category that entitles them to a special respect because of their potential for human life*."[8]. The

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[1] Section 33 Constitution of the Federal Republic of Nigeria (CFRN)1999 (As Altered)
[2] Section 50 National Health Act 2014
[3] The Assisted Reproductive Technology (Regulation) Bill of 2016 is a proposed legislation in Nigeria. It is aimed at regulating, supervising, and setting ethical standards for assisted reproduction technology and connected matters. It was sponsored by Senator Lanre Tejuoso and even after 10 years, it has not yet been passed into law.
[4] Sec 2(h) Assisted Reproductive Technology (Regulation) Bill of 2016
[5] JV Ayeni, et al, 'Cryopreservation of Human Embryos in an In-Vitro Fertilisation Procedure: The Need for a Legal Framework in Nigeria' (2023) 12 F1000 Research 569.
[6] Sec 232 and 236 of Penal Code of Northen Nigeria, Cap 345 LFN 1990; ss 228–230 of Criminal Code of Southern Nigeria, Cap 77 LFN 1990
[7] *Davis v Davis* (1992) 842 S.W.2d 588 (Tenn. 1992).
[8] *Davis v Davis* 842 S.W.2d 588 (Tenn. 1992) The court further held that while unborn children lack the legal rights of a person who was already in existence, they (embryos) warrant more respect under the law than mere

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X

case of *Evans v. Healthcare*[9] adopted a similar position under English Law.[10] The court also held here that *embryos deserve respect however, they are not legal persons whose continued existence is mandated by Law*.[11] This position stands as a middle ground between two extremes of the debate.
The Personhood position is that an embryo is a person from conception, since it is a distinct living organism separate form its owners and with potential to develop into a full human being. While the property-view position is that an embryo is a mere property or a product of the gamete donors and thereby lacks the moral or legal qualities of a person in Law.[12]

The position of both the Personhood view and the Property view arrive at different consequences. For the personhood view, the destruction of the embryos *in vitro* will be likened to abortion, and further ethical issues like the number of fertilized embryos created, their storage and disposal comes to light. The European court of human rights has not outrightly called the embryo a person particularly for the purpose of Article 2 of the European Convention on Human Rights.[13] Rather it has left this decision to be determined by component states.[14]
The property view may have a less complicated implication. While the European courts of Human rights have also refused to treat embryos as possessions because they have a potential to develop into a human being;[15] the English courts were willing to treat stored gametes as property for a limited purpose as seen in the case of *Yearworth v North Bristol NHS Trust*.[16]

It is important to note that even where the courts attaches proprietary value to reproductive material, an embryo is still not treated as mere chattel. It has a special or intermediate status.
The prevailing view of this intermediate position is well articulated in *Davis v Davis.* It however does not provide the elements of this intermediate status, such that the fertilization, preservation, storage and use in research cannot be deduced for this status alone. Hence legislation or regulation particularly in Nigeria where it is non-existent is still needed to address these issues. Islamic Law as a component of the Nigerian legal system has a clearer view of the status of embryos and as such one may deduce how the issues raise above are resolved using Islamic jurisprudence.

property due to their potential to become life. Mary Sue and Junior (the parties) therefore, lacked property interests in the preembryos, but the court concluded that as the providers of the genetic material they had the authority to make decisions about them. < https://embryo.asu.edu/pages/davis-v-davis-1992> accessed 25th April 2026

[9] *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727

[10] *Evans v Amicus Healthcare* was decided mainly on the consent provisions of the Human Fertilisation and Embryology Act 1990

[11] *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727

[12] Robert P George and Christopher Tollefsen, A Defense of Human Life (2nd edn, Witherspoon Institute 2011) 13, 50; cf Diane K Yang, 'What's Mine is Mine, but What's Yours Should Also be Mine' (2002) 10 Journal of Law and Policy 587.

[13] *Evans v United Kingdom* (2008) 46 EHRR 34 (GC).

[14] *Vo v France* (2005) 40 EHRR 12 (GC).

[15] *Parrillo v Italy* App no 46470/11 (ECtHR, 27 August 2015).

[16] *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1. Where the court held that men who had stored sperm before chemotherapy could sue in bailment when it was negligently destroyed. "Bailment was defined as a legal relationship where physical possession of personal property (goods) is transferred from one party (the bailor) to another (the bailee) for a specific purpose, under the agreement that they will be safely kept and eventually returned, without transferring ownership."

Fountain University Law Journal Vol. 3 No. 5, 2026

PRINT ISSN: 0794-0254

ONLINE: E-ISSN: 0794-084X

3.0 THE STATUS OF EMBRYO IN ISLAMIC LAW

3.1 The Place of Islamic Law in the Nigerian Legal system

Islamic law while being a distinct legal system on its own. is one of the components of Nigerian Legal system. It regulates several aspects of private law of its adherents such as marriage, inheritance, family relations and even the status of embryos. The constitution establishes and provides for the jurisdiction of the Sharia Court of Appeal for the Federal capital territory and the possibility of its establishment for every state that desires it.[17] Apart from the fact that some northern states have adopted and enacted sharia penal codes since 1999; in states without it, Islamic law still regulates matters of private law; a lot of Muslims practise the stipulations of Islamic Law as a matter of private conscience.

The influence of Islamic law on the practise of ART in Nigeria particularly among Muslims is of practical implications which largely guides the choice a matter in which ARTs are used. The Nigerian Islamic law landscape is not as developed as countries like Malaysia and Saudi Arabia and therefore do not have National"Fatwa" Authorities that issue rulings and guidelines on ART procedures. Muslims therefore rely on individual clerics who may or may not be knowledgeable about this area; or resort to the rulings of scholars abroad. This paper did not find any fatwa issued by the Nigerian Supreme Council for Islamic Affairs the apex body for the Nigerian Muslims. It may therefore be of interest to look at what the Quran says about embryo inside the womb in general and perhaps such may be extended to decipher the status of embryo *in vitro.*

3.2 Status of the Embryo in Qur'anic Foundations

The Quran which is a primary source of Islamic law, describes the stages of embryonic development. The Quran in chapter 23 verses 12-14 states:

> And certainly, did We create man from an extract of clay. Then We placed him as a sperm-drop (*nutfah*)in a firm lodging. Then We made the sperm-drop into a clinging clot (*alaqah)*, and We made the clot into a lump of flesh (*mudghah)*, and We made [from] the lump, bones, and We covered the bones with flesh; then We developed him into another creation. So blessed is Allah, the best of creators.[18]

By identifying the *nutfah* (sperm-drop), the *alaqah* (clinging clot), the *mudghah* (lump of flesh), and the subsequent formation of bone and flesh, the Quran gives a scientific background to the formation of human life from the embryonic stage, This stages of development is what Islamic jurists have used to formulate the Islamic law's position of embryos. Even though classical Islamic scholars did not witness embryos *in vitro* (outside the human body), the protection and status of the embryo occupies a position of considerable depth in Islamic legal jurisprudence. The advent of ARTs particularly the use of *in vitro* fertilisation, cryopreservation and use of embryos for research has rekindled these classical debates and given them fresh perspectives.

3.3 The Concept of Ensoulment and the Graded Status of the Embryo

Modern day Muslim jurists generally distinguish between biological life, which exists from conception, and human life proper, which commences at the time the soul enters the body which

[17] ss 260–264 and 275–279, CFRN 1999.

[18] The Holy Quran, Sahih International Translation of Meaning of the Quran

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X

is referred to as ensoulment (*nafkh al-ruh*). The dominant view is supported by the *Hadith*[19] of Ibn Mas'ud which states that ensoulment happens at one hundred and twenty days after conception of the embryo,[20] and a minority of scholars of Islam says ensoulment occurs at forty days.[21] The attribution of 40 days ensoulment is actually tied to the observance of human like features in the foetus rather than it receiving the 'Ruh' (breath of God or a Soul).[22] Regardless of the position taken, there is consensus that the embryo possesses dignity (*karamah*) from the moment of conception and is not to be treated as ordinary tissue, even before ensoulment.[23] Therefore, the human embryo carries a sanctity that distinguishes it from other parts of the body thus warrants special protection.[24]

While an embryo may not be saddled with obligations like fully grown persons, its existence and rights particularly the preservation of life is guaranteed. Such that any wilful destruction or harm to it is sanctioned under the Sharia.[25] Exceptions to this will only be to preserve the life of the mother after certification from medical personnel.[26]
Islamic law thus gives a clear road map to when an embryo is given legal status and rights accruing to other "persons". Since this is tied to surviving up to 40 days or 120 days in the womb; an embryo *invitro* does not qualify as a "person" under Islamic Law. However, it is still to be treated ethically as having "Karamah" (Honour).

4.0 VARIOUS USES OF EMBRYO *IN VITRO* AND THE ABSENCE OF LEGAL FRAMEWORK TO REGULATE ITS PROCEDURES IN NIGERIA

The question of the legal personhood of embryo *in vitro* becomes more significant for discussion in view of the various procedures involved in the ART. These procedures invariably involve cryopreservation, storage, disposal, using in research, and of course nursing it to become a baby in an appropriate circumstance. Aside from situations where the embryo is to be allowed to grow into babies any other procedure has great implication on the personhood status of the embryo. There is also ethical, moral and religious implication regarding the handling of those embryos outside the womb of a woman. The following discussions therefore shall center on the uses and handling of such embryos *vis a vis* the Nigerian law and Islamic standpoint.

[19] Sayings and actions of the Prophet Muhammad (Peace be upon him) which is one of the primary sources of Islamic Law.
[20]Sahih al-Bukhari, Book of the Beginning of Creation, Hadith No 3208, narrated by Abdullah ibn Mas'ud, on the stages of foetal formation and the breathing in of the soul.
[21] Majdah Zawawi and Bilal Hussain, 'To Be or Not to Be: Are Cryopreserved Embryos Protected under the Shariah?' (2024) 12 Malaysian Journal of **Syariah** and Law 324 <https://doi.org/10.33102/mjsl.vol12no2.705> accessed 5 June 2026.
[22] 'Rafaqat Rashid, When Does Ensoulment Occur in the Human Foetus? (2022) Journal of the British Medical Association (12) (4)'.
[23]Zawawi and Hussain (n 23).
[24] Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, *Contemporary Bioethics* (Springer International Publishing 2015) <https://doi.org/10.1007/978-3-319-18428-9> accessed 23 March 2026.
[25] Z.O Shittu-Adenuga and A.S Abiola 'Equalizing the Legal Status of Customary and Statutory Marriages in Nigeria: Lessons from Kenya and South Africa' Law and Police Review (Research Africa Online) (2024)15(1) 13-34 available at https://researchafrica.online/2024/11/30/equalizing-the-legal-status-of-customary-and-statutory-marriages-in-nigeria-lessons-from-kenya-and-south-africa-zaynab-omotoyosi-shittu-adenuga-and-adekunle-saheed-abiola/.
[26] 'Resolutions and Recommendations of the International Islamic Fiqh Academy; Organization of Islamic Cooperation (OIC) (3rd Edn 2024)'.

Fountain University Law Journal Vol. 3 No. 5, 2026

PRINT ISSN: 0794-0254

ONLINE: E-ISSN: 0794-084X

4.1 Embryo *in vitro* Storage and Disposal under the Nigeria law

The disposal and the preservation of embryos are one of the issues that usually come up in the ART context. Whether it is for Legal and regulatory reasons or for moral, ethical and religious perspectives. Every IVF clinic will need to have a policy on this or align with the regulations and the Law of their jurisdictions. Unused embryos are usually cryopreserved, donated for research, donated to other couples or destroyed. Whichever option is chosen, brings up a unique set of issues both legal and ethical regarding whether it is a person to be handled humanly with his honour preserved and his rights respected. Therefore, it is only imperative that a clear legal framework and ethico-moral regulations be developed to guide the handling.

Under the Nigerian Law, there are no statutory laws governing this issue. The AFRH/ HEFEMAA guidelines of Lagos state,[27] permits unused embryos to be donated to other couples only on altruistic basis and payment or compensation for such embryos cannot be obtained. It also prohibits the creation of embryos solely for donation and requires the informed consent of the couple who own the embryos. It also provides that clinics should have a clear policy on the posthumous use of embryos and couples must specifically state what happens if a partner dies before implantation.[28]

Furthermore, the ART 2016 Bill[29] proposes a maximum of five years for the storage of embryos with the possibility of donation to a recognised research centre or destruction if cryopreservation fees are not paid or parties consent to it. The Lagos Human ART Bill 2021[30] also addresses the issue of storage and disposition, making it mandatory for the fertility centre to get information and consent from the couple on what to do with it but does not specifically state how long embryos should be stored for. However, these are both bills and are therefore not yet enforceable laws.

There are several models on the issue of preservation and disposal of embryo from other common law jurisdictions. The US generally uses several approaches. For instance, the contractual approach as seen in the case of *Kass v Kass*[31] where the courts enforced the disposition agreement signed by the couple at the time the embryos were to be cryopreserved or used. The *Davis v Davis* case can be said to be the balancing of interest approach as it

[27] The Association for Fertility and Reproductive Health (ARFH) collaborates with the Health Facility Monitoring and Accreditation Agency (HEFAMAA) to regulate Assisted Reproductive Technology (ART) and healthcare centers in Lagos State. These guidelines were developed in 2019. It is required that all fertility clinics in Lagos are set up according to the requirements therein and also comply with its regulations. It is the closest thing we have to a regulation of ARTs in Nigeria. Although it is only limited to Lagos State

[28] AFRH/HEFEMAA guidelines on the Practise of ARTs in Lagos State. Pg 19

[29] Assisted Reproductive Technology (Regulation) Bill 2016

[30] Lagos State Government in 2013 set up a committee of experts to develop recommendations on ART Policy Regulations and Ethics guided by global best practices. With over twenty (20) ART clinics registered with the HEFEMAA, with many more clinics running undocumented and working without clear guidelines and regulations, the Lagos state government set out to bring order, decorum, and professionalism to the practise of ART- See Preamble to the Bill.

[31] *Kass v Kass* 91 NY2d 554, 696 NE2d 174 (NY 1998). The parties, a married couple, underwent IVF, leaving five cryopreserved pre-embryos. They had signed consent forms providing that, if they could not agree on disposition, the pre-embryos would be donated to the IVF programme for research. After filing for divorce, the wife sought custody of the pre-embryos for implantation, and the husband sought enforcement of the agreement. The New York Court of Appeals, per Kaye CJ, held *inter alia* that agreements between gamete providers on disposition should be presumed valid, binding and enforceable, because they promote certainty, minimise litigation and leave such personal decisions to the intending parents rather than to the state or the courts. The agreement was enforced and the pre-embryos were released for research.

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X

emphasized the balancing of the rights of both parties on a case-by-case basis.[32] The supreme court of Tennessee in that matter stated that the reproductive autonomy of the ex-husband and his decision not to have children was greater than the desire of the ex-wife to donate their embryos.

The UK position is provided for by statute rather than by consent forms or contract between both parties. Schedule 3 to the Human Fertilisation and Embryology Act 1990 requires the written consent of both intending parents to the storage and use of an embryo, and allows either party to withdraw that consent at any time before the embryo is used in treatment. This was why in the case of *Evans v Amicus Healthcare Ltd,* the Court of Appeal refused to allow Ms Evans to use embryos created with her former partner once he had withdrawn his consent before they were used.[33]
Again, the Court of Appeal in the case of *R v Human Fertilisation and Embryology Authority, ex p Blood*,[34] held that a widow could not lawfully be treated in the United Kingdom with sperm taken from her husband shortly before his death, because he had not given a written consent before he died. She was however subsequently allowed to export the sperm for treatment elsewhere within the European Community. The statutory route will be a better model for a Nigerian legislation so as to create certainty, reduce the burden of litigation and also tighten any loophole that may be used wrongfully in practise.

4.2 Embryo *in vitro* Storage and Disposal - Comparative Islamic Law Models

Malaysia and Saudi Arabia will serve as comparative models to be used in this paper when it comes to Islamic Law. Saudi represents the classical view of Islamic law, while Malaysia provides an excellent example of a plural legal system where Islamic law has also been codified into its legal system. Baasically, an embryo is to be created and implanted within the bounds of a lawful and existing marriage under Islamic Law. Both Malaysia and Saudi Arabia jurisdictions provide for the issue of embryo storage and disposal using Islamic law principles. Malaysia permits cryopreservation of embryos in IVF treatment for married couples and only limits such preservation to a maximum of 10 years.[35] In the same vein, the Royal Decree No. M/76 (March 2004), which promulgates the Law of Units of Fertilization, Utero-Fetal, and Infertility Treatment in Saudi Arabia as well as 1990 fatwa of the Islamic Jurisprudence Council of Mecca rules that cryopreserved embryos and gametes may be used only while the marriage subsists. It further states that the storage of such embryos is also permitted for an extended period, but the future transfer of the embryo is allowed only if the couple remains within the

[32] The case of *Davis v. Davis* was one of the earliest cases in the United States to address disputes involving cryopreserved preembryos. In its June 1992 decision, the court held that Junior's interest in avoiding unwanted parenthood outweighed Mary Sue's interest in donating the preembryos to another couple. The court reasoned that if another couple gave birth to Junior's genetic child, he could lose both his reproductive autonomy and the opportunity to raise his biological child himself. In contrast, Mary Sue could still pursue genetic parenthood through future IVF procedures, even if the existing preembryos were destroyed.The Tennessee Supreme Court then allowed the Knoxville Fertility Clinic to continue its usual practice of disposing unused preembryos. https://embryo.asu.edu/pages/davis-v-davis-1992 accessed 23 april 2026
[33] *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727, [2005] Fam 1.
[34] *R v Human Fertilisation and Embryology Authority,* ex p Blood [1997] 2 WLR 806 (CA).
[35] Majdah Zawawi, Azizah Mohd and Bilal Hussain, 'Nasab (Filiation) Of Children In Assisted Reproductive Technology (Art) Under The Sharīʿah Discourse' (2024) 32 IIUM Law Journal 27 <https://doi.org/10.31436/iiumlj.v32i1.911> accessed 23 March 2026.

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X

marriage contract.[36] On the death or divorce of spouses, the embryos cannot lawfully be transferred. Therefore, a widow cannot post-humously implant stored embryos to bear her late husband's child even where there is a written consent to that effect, because the contractual basis of the union has terminated and the resulting child would lack a recognised lineage. The Saudi position is doctrinally consistent with the broader Sunni framework on the marital requirement of legitimate procreation.[37] The disposal and use of research is based on the agreement between parties under Saudi laws.

The position in Malaysia is essentially similar as provided for by the Malaysian Medical Council (MMC) Guidelines on Medically Assisted Reproduction. Frozen embryos are viewed as the joint asset of the spouses during the subsistence of the marriage and prohibits their transfer thereafter.[38] Malaysian position upholds the position that the preservation of lineage requires the contractual existence of marriage to be intact at the moment of transfer.[39]
Clinical practice in Malaysia operates under the Ministry of Health Standards, which prescribe detailed requirements for the storage, handling and disposal of cryopreserved material.[40] The Guidelines set an initial storage period of five years. It may be extended to a maximum of ten years upon the application of the couple to the Ministry of Health, and approval received. When that limit is reached, material that has not been utilized by the couple must be destroyed. Upon separation or divorce, neither party may use the stored embryos, and they must be destroyed.
On the death of either spouse, the survivor may not use the deceased's gametes or the couple's embryos, which must also be removed from storage and destroyed. Clinics must obtain the couple's prior written consent to dispose of any embryos or gametes remaining after treatment, and every disposal must be documented and verified. The Malysia Position though hinged upon Islamic law will also have benefits if adopted by Nigeria as it provides benefits as well as prevent the many complications that comes withe the use of ARTs.

4.3 Protection of Embryo *in vitro* from Arbitrary Destruction under Islamic Law

While ART regulation even in Islamic jurisdictions analysed earlier provides for destruction of embryos, one of the protections given to an embryo under Islamic law, is that it has a right to

[36]Royal Decree No. M/76 (March 2004), which promulgates the Law of Units of Fertilization, Utero-Fetal, and Infertility Treatment in Saudi Arabia. See also Hassan S Abduljabbar and Rubina Amin, 'Assisted Reproductive Technology in Saudi Arabia (2009) Saudi Med J ; Vol. 30 (4): 461-464'.

[37]Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, 'Assisted Reproductive Technology: Islamic Perspective' in Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, *Contemporary Bioethics* (Springer International Publishing 2015) <https://doi.org/10.1007/978-3-319-18428-9_11> accessed 23 March 2026.

[38] Mohd Faizal Ahmad and others, 'Oncofertility in Islam: The Malaysian Perspective' (2021) 3 Frontiers in Reproductive Health 694990 <https://doi.org/10.3389/frph.2021.694990> accessed 6 June 2026.

[39]Abdul Halim Ibrahim, Noor Naemah Abdul Rahman and Shaikh Mohd Saifuddeen, 'Maqasid Al-Shariah as a Complementary Framework for Conventional Bioethics: Application in Malaysian Assisted Reproductive Technology (ART) Fatwa' (2018) 24 Science and Engineering Ethics 1493 <https://doi.org/10.1007/s11948-017-9963-6> accessed 10 April 2026..

[40] 'Guideline of the Malysian Medical Council on Medically Assisted Reproduction V2/2025 (2025)<https://Mmc.Gov.My/Wp-Content/Uploads/2025/09/Medically-Assisted-Reproduction.Pdf> Accessed 06 May 2026' <https://mmc.gov.my/wp-content/uploads/2025/09/Medically-Assisted-Reproduction.pdf> accessed 6 June 2026.
See also Standards for assisted Reproductive Technologies lab and Operation theatre 'Text.Pdf' <https://www.moh.gov.my/images/04-penerbitan/penerbitan-klinikal/perkhidmatan-OG-dan-pediatrik/2._Standards_For_Assisted_Reproductive_Tech_Lab_And_Operation_Theatre_.pdf> accessed 6 June 2026.

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X

protection from arbitrary destruction. This also flows from the principle of preservation of life (hifz al-nafs). Classical scholars debated the penalties for inducing miscarriage at various stages of gestation, with most schools requiring the payment of "*ghurrah'*, a prescribed compensation, for the destruction of a foetus.[41] While the ghurrah rule applies mainly to the emryo in the womb, it may be extended to those *in vitro.* Within the ART context therefore, it implies a duty of care towards cryopreserved embryos and as such they cannot be regarded as mere human tissue and certainly cannot be treated as disposable property.

Furthermore, this principle implies that the embryo possesses an interest in continued development that cannot be overridden without serious justification.[42] Hence this imposes a duty of care on clinics and parents to ensure this. Contemporary Scholars particularly from Saudi hold that not more than three embryos be implanted, and where they cannot be implanted, they should be allowed to cease naturally through the cessation of cryopreservation, rather than actively destroyed.

For Nigeria, the absence of legislation defining the legal status of the embryo creates a significant vacuum. The proposed Assisted Reproductive Technology and Related Matters (Regulation) Bill 2016 does not expressly address embryo status, and Muslim couples must rely on the rulings of foreign Islamic countries and local Islamic scholars with no domestically enacted framework that recognises the religious dimensions of embryo protection.[43] The experiences of Saudi Arabia and Malaysia demonstrate that clear regulatory rules grounded in Islamic doctrine are achievable. The absence of equivalent rules in Nigeria leaves embryos vulnerable to commercial practices inconsistent with Islamic principles, and represents a gap that any future Nigerian ART legislation must address.

5.0 EMBRYO RESEARCH - POSITION OF NIGERIAN LAW AND ISLAMIC STANDPOINT

5.1 Nigerian Law and Embryo Research

Subjecting the unused embryos for scientific research also raises legal, ethical and even moral questions. The research may involve the destruction of embryos, the manipulation of genetic material and the use of embryonic stem cells. The outcome of this research may be for therapeutic, diagnostic or scientific benefits. The legal status attached to an embryo (as discussed earlier) and regulations on the limit or otherwise of scientific exploration mostly guide the discussion in this regard.

Sec 34 of the Nigeria Constitution[44] provides for the dignity of the human person and that "*no person shall be subjected to torture or to inhuman or degrading treatment*."[45]This provision interpreted in the wider context will apply to "persons" in the legal sense. However earlier discussion on the Nigerian position is that embryos that are outside the body may not have attained such personhood. However, this constitutional provision may debatably serve as a moral consideration for embryo which can still be given even if they do not attain the status of

[41]Mohammed Ghaly, 'Pre-modern Islamic Medical Ethics and Graeco-Islamic-Jewish Embroyology' (2014) 28 Bioethics 49 <https://doi.org/10.1111/bioe.12038> accessed 6 June 2026.

[42]Gamal I Serour, 'Islamic Perspectives in Human Reproduction' (2008) 17 (Suppl 3) Reproductive Biomedicine Online 34, 36.

[43]Joy Victoria Ayeni, Taiye Joshua Omidoyin and Ifeoluwayimika Bamidele, 'Cryopreservation of Human Embryos in an In-Vitro Fertilisation Procedure: The Need for a Legal Framework in Nigeria' (2023) 12 F1000Research 569; Assisted Reproductive Technology and Related Matters Bill 2016 (Nigeria), not yet enacted.

[44] CRFN 1999 (as altered)

[45] Sec 34, CRFN 1999 (as altered)

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X

a person under the law. Furthermore, Section 50 of the National Health Act[46] expressly prohibits the manipulation of the human embryo and any other human genetic material for the purposes of cloning. it also bans the exportation of importation of genetic materials without the required approval. One could interpret this section as not a total ban on the manipulation of embryos, but it restricts such manipulation to cloning and similar prohibited procedures. The 2016 bill permits the use of embryos for scientific research in the treatment of genetic disorders, provided it gets regulatory approval and ethical oversight. The bill also prohibits the export of embryos for research purposes.

In other climes, particularly common law jurisdictions the use of embryos for research is quite regulated. The UK's Human Fertilization and Embryology Act 1990 provides for the licensing for embryo research. Section 3(3)(a) Act prohibits the HFEA from licensing anyone to keep or use an embryo after the primitive streak which is the first sign of the nervous system has appeared. This is the 14th day after the gametes are mixed, and time in frozen storage does not count. The license so obtained, will permit the use of research that centres on diagnosis of genetic conditions, fertility treatment as well as further understanding of human development. Australia also has robust legislation on the issue of using embryos for research.[47] It requires compulsory licensing and permits the use of excess embryos that are no longer required for ART use. It also prohibits cloning, three person embryos as well as the production of embryos for research purposes. The Australian law after 2006 now permits the use of embryos for specific stem cell research as well as limited therapeutic cloning to cure diseases. In 2022, Maeve's Law [48]legalized in some circumstances, the production of three person embryos; the use of permitted mitochondrial donation techniques in research, training, and clinical applications.
The Nigerian position in the absence of specified legal framework still depends on the provisions of the National Health act, Professional Ethics of the MDCN as well as the AFRH/HEFEMAA guidelines for those in Lagos state.

5.2 Islamic Law and Embryo Research
The Saudi practice relying on the view that ensoulment has not yet occurred during the pre-implantation phase i.e. before 40 or 120 days, has permitted certain forms of embryo research subject to oversight and control although the practical scope of such research has been limited.[49]The Malaysian situation is similar to that of Saudi, and allows pre-ensoulment embryo research. A growing body of contemporary Islamic scholars permit research on pre-ensoulment embryos where the research is necessary, conducted under proper supervision, and likely to advance human welfare in application of the higher principles of Islamic Law.[50] The reasoning is that pre-ensoulment embryos, while possessing biological life and a measure of dignity, do not yet possess the full moral status of a human being.[51] Other scholars maintain that the dignity of the embryo prohibits even pre-ensoulment research that involves its destruction. This

[46] National Health Act 2014
[47] Research involving Human Embryos Act 2002; see also Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006.

[48] The legislation was amended by the Mitochondrial Donation Law Reform (Maeve's Law) Act 2022.
[49]Al-Bar and Chamsi-Pasha (n 4).

[50]Gamal I Serour, 'Islamic Perspectives in Human Reproduction' (2008) 17 (Suppl 3) Reproductive Biomedicine Online 34, 36.

[51] Al-Bar and Chamsi-Pasha (n 49).

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ONLINE: E-ISSN: 0794-084X

internal divergence within Sunni jurisprudence demonstrates the use of the mechanism of *ijtihad* in the face of new scientific developments and demonstrates the adaptive capacity of Islamic law.[52]

Again, for Nigeria, the absence of any statute defining the legal status of the embryo creates uncertainty. The Lagos State Child Rights Law 2007, which represents the most progressive child-protective instrument in any Nigerian state, does not extend its protections to the embryo.[53]

6.0 PREIMPLANTATION GENETIC TESTING AND 'DESIGNER BABIES'

Among the most controversial issues concerning the rights of embryos is whether the embryo should be altered, or selected based on particular traits before implantation. This practise of selecting, modifying or accentuating and even cutting out some ancestral genetic traits in embryos is now loosely referred to as creating designer babies.[54] This is made possible by Preimplantation Genetic testing (PGT) which enables the genetic analysis of an embryo fertilized *in vitro* before transfer into the womb. This technology is not only restricted to Monogenic disorders (PGT-M) and chromososomal aneuploides (PGT-A) it extends to Polygenic risk scoring (PGT-P) for complex traits such as predisposition to diabetes, cardiovascular diseases and even cognitive ability.[55]

6.1 Preimplantation Genetic Testing - Nigerian Law and Comparative Islamic Models

Nigerian constitutional Law guarantees the rights to Life, dignity of the human person as well as private and family life but all these rights have not been conclusively applied to the embryo *in vitro.*[56] The National Health Act[57] prohibits the manipulation of embryos for cloning, but does not provide for preimplantation genetic testing. The ART 2016 Bill[58] if enacted, addresses the handling of embryos and the conditions under which fertility centres may store, destroy or transfer embryos for research but makes no provision regulating PGT or prohibition of any aspects of it.

The AFRH/ HEFEMAA[59] guidelines permit the use of PGT to detect diseases or abnormalities that will reduce the quality of life of the person when born; and its use to select an embryo that may have compatible tissue for subsequent stem cell therapy intended for a parent, sibling or relative. It also permits its use for sex selection in order to avoid gender specific diseases the embryo may be disposed to. A more controversial provision is its permission to use PGT to select gender for social purposes after the consideration of the ethics committee of the fertility clinic.[60] It must be reiterated that these are guidelines given in Lagos state. They do not have

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[52] Cathy Harrison, 'Who Is Your Mother? Who Is Your Father?: Assisted Reproductive Technologies in the Light of Sunni and Shi'a Law' (2014) 7 Journal of Shi'a Islamic Studies 23 <https://doi.org/10.1353/isl.2014.0003> accessed 23 March 2026.

[53] Child's Rights Act 2003 (Nigeria) s 4; Lagos State Child Rights Law 2007 s 8.

[54] S Sanjay and N Hari Prasath, 'Designer Babies: Revealing the Ethical and Social Implications of Genetic Engineering in Human Embryos' (2023) 12 International Journal of Science and Research (IJSR) 688 <https://doi.org/10.21275/SR23710130528> accessed 23 March 2026.

[55] Alon, I., Bussod, I. & Ravitsky, V. Mapping ethical, legal, and social implications (ELSI) of preimplantation genetic testing (PGT). J Assist Reprod Genet 41, 1153–1171 (2024). https://doi.org/10.1007/s10815-024-03076-y

[56] Sections 33, 34, 37 Constitution of the Federal Republic of Nigeria 1999 (as altered)

[57] Sec 50 National Health Act 2014

[58] The Assisted Reproductive Technology (Regulation) Bill 2016

[59] AFRH/HEFEMAA guidelines on the Practise of ARTs in Lagos State

[60] Ibid AFRH/HEFEMAA guidelines on the Practise of ARTs in Lagos State pg 20

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X

the force of law nor do they have nationwide coverage. Therefore, the use of PGT for whatever purpose cannot be said to be prohibited in Nigeria due to the lack of regulation in this regard. The implication of this is already seen in practise. For instance, *Omokanye et al*[61] have observed that sex selection for social reasons is already being practised in Nigeria raising concerns about demographics of the population in long term.

In the United Kingdom, PGT is controlled by the Human Fertilisation and Embryology Authority (HFEA). Embryo testing is only for the identification of specific diseases, or to identify a match for an existing sibling with serious medical condition and for other therapeutic purposes.[62] Sex selection for non-medical reasons is prohibited. In the case of *R (Quintavalle) v Human Fertilisation and Embryology Authority* confirmed that the HFEA may license tissue typing[63] to create a saviour sibling, but only within the statutory limits.[64]

In the United States however, there are no federal statutes regulating the use of PGT. The Food and Drug Administration has control over clinical investigations involving heritable embryo modification. The Dickey-Wicker Amendment denies federal funding for embryo-destructive research, but private clinics are permitted to provide PGT services, including for sex selection.[65] These differences among common law jurisdictions show that each jurisdiction will have to regulate this issue and many others in a manner that aligns with the peculiarities of their people. Nigeria will also benefit from towing ethical lines in this regard, by adopting the Lagos approach of allowing PGT and embryo selection to avoid the genetic diseases and also for therapeutic reasons.

6.2 Islamic Law Standpoints on Preimplantation Genetic Testing and Sex Selection

Generally, Islamic law permits PGT where it is to avoid serious genetic abnormalities or diseases provided that the embryos are created from couples' gametes and thus there is no confusion of lineage. This is justified as being in consonance with the Islamic higher principles of Preservation of Life (Hifz Al-Nafs) and preservation of lineage (Hifz al-Nasl).[66] In Saudi Arabia, an empirical study confirmed that parents at genetic risk for diseases such as sickle-cell disease and thalassaemia view PGD as Islamically acceptable.[67] The use of PGT to select

[61] Lukman Omotayo Omokanye and others, 'Assisted Reproduction Technology in Nigeria: Challenges and the Way Forward' (2018) 3 African Journal for Infertility and Assisted Conception 2 <https://doi.org/10.4103/ajiac.ajiac_1_19> accessed 23 March 2026.

[62] Sch 2, para 1ZA, Human Fertilisation and Embryology Act 1990 (UK), as amended by the Human Fertilisation and Embryology Act 2008.

[63] Tissue typing, also known as human leukocyte antigen (HLA) or histocompatibility testing, is a laboratory test that identifies HLA proteins on the surface of the body's cells. These proteins act as markers that enable the immune system to distinguish the body's own cells from foreign ones. In organ, bone marrow and stem cell transplantation, the donor's and recipient's HLA markers are compared, because a closer match reduces the risk that the recipient's immune system will reject the transplanted tissue. See Encyclopaedia Britannica, 'Tissue Typing' <https://www.britannica.com/science/tissue-typing>. Accessed 5th October 2026

[64] Quintavalle v Human Fertilisation and Embryology Authority [2003] EWCA Civ 667, [2003] 3 WLR 878; affirmed [2005] UKHL 28, [2005] 2 AC 561

[65] FDA regulates clinical investigations of embryo modification; Dickey-Wicker Amendment, Pub L No 104-99, (annually renewed since 1996) (prohibiting federal funding for research that destroys human embryos).

[66] Gamal I Serour, 'Islamic Perspectives in Human Reproduction' (2008) 17 (Suppl 3) *Reproductive BioMedicine Online* 34.

[67] Zeinab Abotalib, 'Preimplantation Genetic Diagnosis in Saudi Arabia'. (2013) 2013 Biomedical Informatics (9)(8)

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X

a saviour sibling is also an issue as it will result in the disposal of healthy embryos, but this may be defended by the same principles under Islamic Law.

Furthermore, the use of PGT for Sex Selection is generally frowned upon and in most situations prohibited. Islamic law treats the sex selection as determined only by God as stated explicitly in Quran 42 verses 49-50.[68] Some Islamic scholars have consistently argued that selecting a child's sex for purely personal or cultural preference constitutes an unjustified interference with divine decree and risks reproducing the pre-Islamic (Jahiliyyah) preference for male children and treating the birth of female children as a displeasure, which Islam has condemned.[69]

The International Islamic Fiqh Academy (IIFA) in Saudi Arabia[70] has prohibited sex selection via PGT except in cases where it is to prevent serious X-linked[71] diseases (such as haemophilia and Duchenne muscular dystrophy), and that each application must be reviewed and approved on a case-by-case basis by a specialised committee. It went on to clarify that general social or cultural reasons are categorically insufficient to permit sex selection of embryos.[72]

Islamic law prohibits the use of PGT for non-medical traits such as appearance or intelligence or physical traits in general. This is viewed as altering God's creation and harming the dignity inherent in every created being. The Saudi fatwa specifically states

> It is prohibited to use genetic engineering to change the genetic setup through what is known as "Enhancement of Human Progeny." Any attempt of genetic tampering with the human character or intervening with the capacity to assume individual responsibility is prohibited[73]

Islamic Law gives a definite criteria on the permissibility or otherwise of the use of PGT and Sex selection of embryos. It bases permissibility strictly on medical necessity and considers any other reason, a deliberate distortion of dignity of the human person and God's plan. The Nigerian society still favours the boy child, viewing families without one as incomplete. It is almost unheard of where the parents of all male children resort to IVF and sex selection in order to have a female child. Hence the term "gender balancing" used in practise is more of preference for male children.

These discussions suggest that the protection of the embryo against arbitrary manipulation is not only an issue of the protectable right of an embryonic, but it is also a question of intergenerational justice and the protection of the prospective child. The Nigerian law framework, as it stands, is not equipped to engage with any of these dimensions. The position

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[68] Qur'an 42:49–50 "To Allah belongs the dominion of the heavens and the earth; He creates what he wills. He gives to whom He wills female [children], and He gives to whom He wills males. Or He makes them [both] males and females, and He renders whom He wills barren. Indeed, He is Knowing and Competent."

[69] Qur'an 16:58–59.

[70] The International Islamic Fiqh Academy (IIFA), is located in Jeddah, Saudi Arabia, is a subsidiary organ of the Organisation of Islamic Cooperation (OIC) and was established in 1981. It brings together Muslim jurists, scholars and thinkers to clarify Shariah rulings on issues of concern to Muslims worldwide, acting independently on the basis of the Qur'an and Sunnah. Through collective ijtihād, it addresses contemporary problems with solutions rooted in the Islamic heritage but open to developments in Islamic thought. < https://iifa-aifi.org/en/history-of-the-academy> accessed 7th August 2026

[71] X is the The female chromosome. Where females have XX and Males have the XY.

[72] Hanan A. Sultan, 'Legalization and Islamic Bioethical Perspectives on Prenatal Diagnosis and Advanced Uses of Pre Implantation Genetic Diagnosis in Saudi Arabia' (2013) 01 Journal of Clinical Research & Bioethics <https://doi.org/10.4172/2155-9627.S1-003> accessed 29 September 2026.

[73] 'Resolutions and Recommendations of the International Islamic Fiqh Academy; Organization of Islamic Cooperation (OIC) (3rd Edn 2024)' (n 28).

PRINT ISSN: 0794-0254
ONLINE: E-ISSN: 0794-084X

appears uncertain, and the dearth of the law operates, in effect, as permission. Until comprehensive legislation is enacted, the rights of the embryo, of the resulting child and of society at large remain inadequately protected against the rapid technical progress of ARTs.

7.0 TOWARDS A NIGERIAN FRAMEWORK: RECOMMENDATIONS

The analysis above suggests that Nigeria desperately needs a federal ART legislation to clearly spell out the status of an embryo rather than merely defining it just as the previous attempts have done. Hence the following recommendations are made.

1. Nigeria should through an Act should specifically address the embryo *in vitro,* it does not need to be a legal person, however it should be treated as having the potential to become human being and therefore cannot be sold or purchased and must only be created, used and disposed in accordance with the provision of the law.
2. There should be established a regulatory body, empowered to license fertility clinics, maintain records and database and set standards from time to time particularly with emerging technologies which laws may not catch up with on time.
3. There should be specific time limit for storage of gametes and embryos and written consent be made as a requirement with specifics on what happens in case of death or divorce and also the withdrawal of consent by either party.
4. Specific Legislation is also needed on the use of embryo for research, donation and creation of embryos specifically for therapeutic purposes.
5. PGT should only be permitted for medical uses only. So as not to create eugenics as well as perpetuate societal preference for male children which is still prevalent in Nigeria. The Body regulating ART should however be empowered to look at case by case basis where it may permit its use for non-medical interventions.
6. Religious convictions must be accommodated where possible within statutes or by having committees within the regulatory body to issue Fatwas or religious guidance for adherents of different faiths.
7. There should be a database to monitor gamete donors as well as the number of embryos created with unique identifying number and records on how it was eventually used. Was it implanted, destroyed, donated to another couple, donated to research e.t.c

8.0 CONCLUSION - LESSONS FROM OTHER JURISDICTIONS ON EMBRYO JURISPRUDENCE

It is important to conclude this paper by highlighting lessons drawn from those countries discussed in the body of the work. The first lesson is that even though the jurisdictions compared earlier have not made full pronouncements on the legal status of embryos, it still did not prevent the protection of embryo *in vitro.* The embryo *in vitro* is given a special status by stating what is permissible and what is not. For instance, Australia and the UK provide protection to the embryo by imposing the need for license, consent of gamete donors, time limit on research and the prohibition for specific scientific practises. Therefore, while a legislation with clear position of the status of the embryo is needed, Nigeria can still offer protection regardless of whether it has granted legal personhood to embryos or not.

Another important lesson is that there is a statutory body responsible for the regulation of Assisted Reproductive Technologies. As technology evolves, these bodies are empowered to make regulations that are timely and also enforce them. Nigeria neither has a regulation nor a body dedicated to enforcing same. While the Medical and Dental Council of Nigeria as well as

PRINT ISSN: 0794-0254

ONLINE: E-ISSN: 0794-084X

HEFEMAA in Lagos state are regulatory bodies of some sort, the lack of a legislation and dedicated body has left a lot of lapses in clinical practise regarding ARTs.

Malaysia and Saudi Arabia have provided valuable lessons on how religious norms can be incorporated into regulation. Saudi Arabia has dedicated legislation based on Islamic law which all fertility clinics must follow. Malaysia on the other hand, does not have a dedicated statute but regulated the practise via national fatwas and ministerial guidelines that guide professional and clinical practise particularly where the parties are Muslims. This lesson can be adapted by Nigeria in two ways. For states where Islamic law has been adapted the regulations of ART and those pertaining to the embryo, can follow the Saudi model. For others, Nigeria can also have National fatwas or other religious councils for instance for Christians, Catholics etc. Where religious rulings on ART procedures and enforceable guidelines for clinics and fertility practitioners to follow depending on the intending parents.

Lastly, the resolution of disputes concerning cryopreserved embryos can be learned from the United States where disputes are resolved in accordance with the contract signed by parties before the embryos were formed together with Judicial intervention. This allows parties to retain their autonomy, while still maintaining the special status of the embryo. It is worthy of note that this consent or contract obtained before the forming of the embryos is a legal requirement. Hence for Nigeria, it will be important to make this as a matter of law in order that parties are protected.