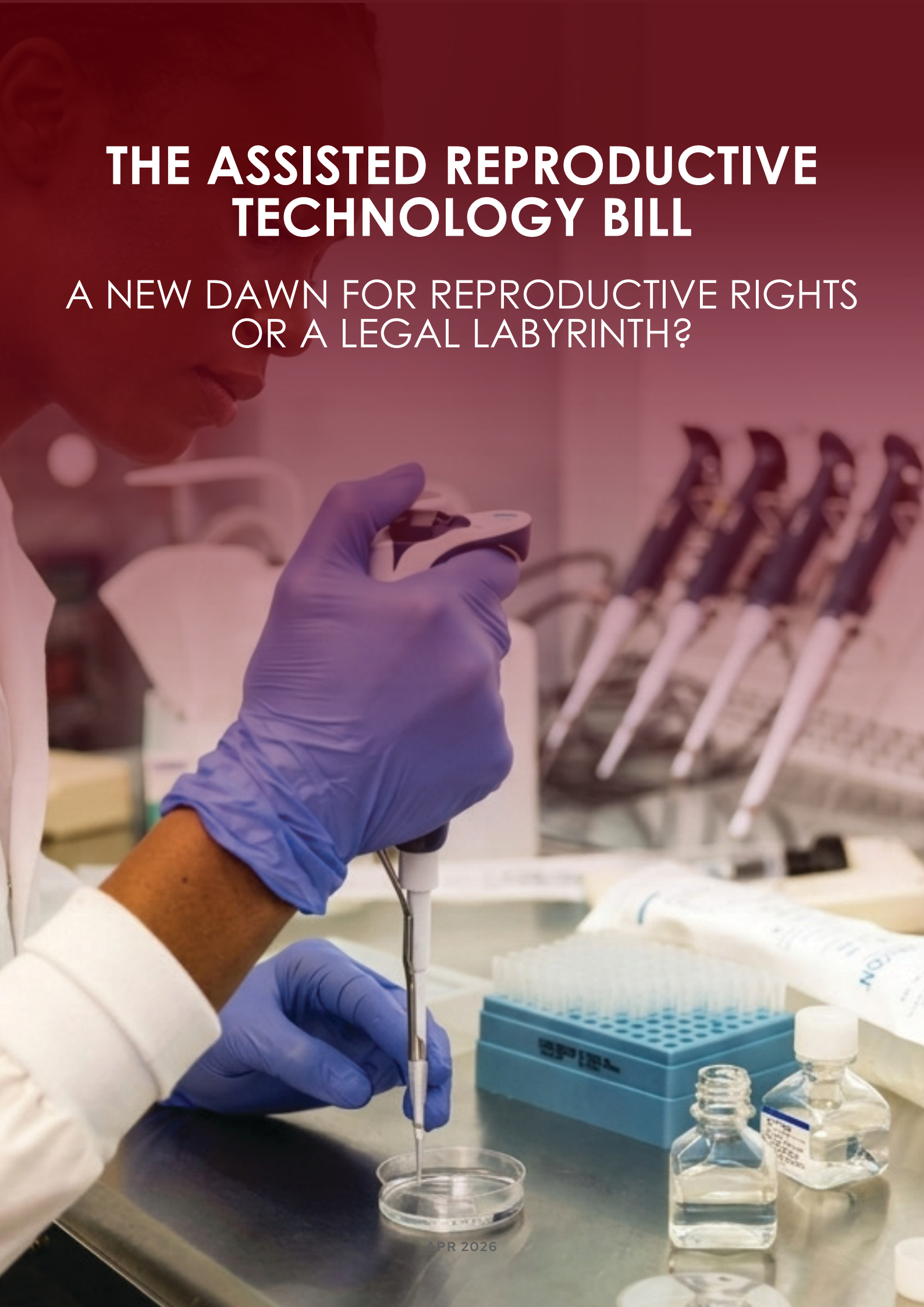


THE ASSISTED REPRODUCTIVE TECHNOLOGY BILL

A NEW DAWN FOR REPRODUCTIVE RIGHTS
OR A LEGAL LABYRINTH?



Kenya stands at the brink of a legislative milestone. The Assisted Reproductive Technology Bill, 2022 (the “ART Bill”) seeks to introduce comprehensive regulation to a field that has long operated in a legal vacuum, that is, assisted reproduction. This includes in-vitro fertilisation (IVF), surrogacy, gamete and embryo donation, cryopreservation, and related medical procedures.

Until now, fertility treatment in Kenya has been guided only by medical ethics, hospital policies and private contracts. The ART Bill aims to fill this gap by codifying the legal parameters governing licensing, consent, parentage, ethical obligations, and children's rights.

Yet, this development raises profound legal and ethical questions:

- Who qualifies to access assisted reproductive technology?
- How should donor anonymity and a child's right to know their genetic origins be balanced?
- What legal protection exists for commissioning parents and surrogate mothers?
- How will posthumous use of gametes or embryos be governed?
- Does the ART Bill align with Kenya's constitutional guarantees on equality, dignity, privacy and health?

GROUND RULES FOR CREATION: THE LEGAL BACKBONE OF THE ART BILL

The ART Bill establishes a Directorate of Assisted Reproductive Technology under **Clauses 5 to 10**, mandated to regulate all assisted reproduction activities in Kenya. Its core functions include developing standards and guidelines, licensing fertility clinics and specialists, maintaining a national ART

register, inspecting facilities, and advising the Cabinet Secretary for Health. This marks Kenya's first attempt at statutory oversight of reproductive technology. However, the Bill's internal definitions raise constitutional and human rights concerns.

It should be noted that this submission is guided by core philosophical and bioethical principles and convergent with Kenya's constitutional values, particularly **human dignity, protection of the family as the basic unit of society and the best interests of the child.**

Under Clause 2, a “couple” is defined as “a male and female who are in an association notwithstanding whether such association may be recognized as a marriage under any law in Kenya.” Similarly, “commissioning parents” are defined as “a man and woman whether a couple or parties to a marriage.”

This gendered framing sits uneasily beside Clause 21(1), which proclaims that “every person has the right to access the highest standard and quality of attainable and cost-effective assisted reproductive technology services.” The result is a legal inconsistency that risks discrimination against single persons, unmarried women and same-sex couples.

Article 27 of the Constitution guarantees equality and freedom from discrimination, while **Article 43(1)(a)** secures the right to the highest attainable standard of health. In **EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) [2019] KEHC 11288 (KLR)**, the High Court recognised reproductive autonomy as part of dignity and health rights. Therefore, if enacted without reform, these restrictive definitions could invite constitutional litigation on grounds of equality and autonomy.

Moreover, Kenya's international obligations under CEDAW and the Maputo Protocol, read with Article 2(6) of the Constitution, require equal access to reproductive healthcare irrespective of marital status or orientation. Alignment with these frameworks would advance inclusivity while retaining ethical oversight.

GUARDRAILS OF TRUST: LICENSING, OVERSIGHT, AND ADMINISTRATIVE FAIRNESS

The licensing regime is detailed under **Clauses 38 to 49 (Part VI)**. The Directorate, in consultation with the Medical Practitioners and Dentists Council, is empowered to issue, vary, suspend, or revoke licences for ART facilities and experts.

Clause 41 requires inspection of premises before licensing, while **Clause 42** sets conditions for licences, including record-keeping, consent compliance, and prohibition of financial gain from gamete supply without approval.

However, **Clause 46** permits revocation of licences where premises are “no longer suitable” or where the licensee is “not a suitable person,” without defining such terms or requiring written reasons. Although **Clauses 47 and 48** provide for internal review to the Cabinet Secretary and appeal to the High Court, no timelines or standards of review are prescribed.

This omission contravenes **Article 47** of the Constitution, which guarantees lawful, reasonable, and procedurally fair administrative action. In **Judicial Service Commission v Mbalu Mutava & another [2015] KECA 741 (KLR)**, the Court held that professional regulatory bodies must act transparently and rationally.

THE POWER TO CHOOSE: CONSENT, DONATION, AND THE RIGHT TO GENETIC IDENTITY

Consent forms the ethical heart of assisted reproduction. **Clauses 12 and 23** require prior informed written consent before any ART procedure, including explicit directions on what should occur in the event of death or incapacity of a party. Consent may be withdrawn at any time before implantation. This consent respects moral agency and bodily integrity.

Clause 24 imposes duties on ART experts to maintain confidentiality, conduct medical screening of donors and ensure all parties understand the rights of the resulting child.

However, the ART Bill is notably silent on whether children conceived through ART can access information about their genetic donors. Disclosure of donor identity is restricted under **Clause 37(3)** which prohibits identifying information except under prescribed regulations. The child's right to identity, including access to genetic origin at maturity, is worth being explored.

This presents a constitutional dilemma. **Article 53(1)(a)** of the Constitution guarantees every child the right to a name and identity. **Article 7** of the UN Convention on the Rights of the Child echoes this. The South African Constitutional Court in **AB v Minister of Social Development (2017) ZACC 34** held that the right to know one's biological origins is integral to dignity.

A balanced approach is therefore needed, protecting donor anonymity while allowing children, upon maturity, regulated access to non-identifying or identifying information. Such measures would harmonize privacy rights under **Article 31** with children's identity rights and the Data Protection Act, 2019, which classifies donor data as sensitive personal information.

WOMBS AND WORDS: THE LAW OF SURROGACY AND LEGAL PARENTAGE

Surrogacy finally receives legislative recognition in **Clauses 27 to 30** (Part IV):

- **Clause 27** permits a woman aged 25 or older, who has previously given birth, to act as a surrogate, provided she understands the rights and obligations arising from the arrangement.
- **Clause 28** mandates a written surrogacy agreement, witnessed by at least two persons from each side and executed before the procedure, with each party represented by independent advocates.
- **Clause 29** allows termination of the agreement before implantation but prohibits termination after transfer of the embryo.
- **Clause 30** declares the commissioning parents to be the legal parents, requires them to be named in the birth certificate and grants the child their citizenship. Further, in the event of multiple pregnancies arising out of the surrogacy agreement, all children born out of the pregnancy shall be children of the commissioning parents.

The surrogate mother relinquishes all parental rights and may only claim reimbursement for medical, insurance or pregnancy-related expenses. **Clause 30(7)** expressly prohibits commercial surrogacy or payment beyond reasonable compensation. However, the ART Bill does not define what allowable expenses entail. We see the need for the inclusion of a statutory schedule of permissible expenses, otherwise there is a great risk of commodification becoming a reality even in altruistic surrogacy.

While this provides long-awaited clarity, the Bill omits a post-birth judicial process for

parental confirmation or parental orders. Without such mechanism, commissioning parents may face administrative hurdles under the Births and Deaths Registration Act (Cap. 149). In *re RN (Baby)* [2020] KEHC 9828 (KLR), the High Court underscored that the best interests of the child must override procedural barriers. Kenya could emulate jurisdictions like the UK, where courts confirm

parentage through regulated parental orders as affirmed in **A.M.N & 2 others v Attorney General & 5 others** [2015] eKLR.

LIFE ON ICE: STORAGE, USE, AND POSTHUMOUS REPRODUCTION

The storage and use of gametes and embryos are governed by Clause 43, which restricts storage to a statutory period not exceeding ten years unless otherwise specified. Embryos not implanted must be prioritised in subsequent procedures.

Posthumous reproduction is addressed under Clause 20, which stipulates that a deceased man is not deemed the father of a child conceived after his death unless the mother was married to him and he had expressly consented to parentage.

While this clarifies paternal recognition, the ART Bill remains silent on ownership and control of embryos or gametes after a donor's death. Comparative jurisprudence, such as **N.M v Minister of Health & Another (South African, 2025)**, has required explicit written consent before posthumous insemination. Similar guidance through regulation or case law would prevent disputes over the use or destruction of stored genetic material.

GUARDING THE LINE: ETHICS, PROHIBITIONS, AND OFFENCES

The ART Bill imposes strict ethical boundaries on assisted reproduction. In particular:

- **Clause 31** prohibits sex selection for non-medical reasons.
- **Clause 32** bans the sale, transfer or use of gametes, zygotes or embryos for commercial purposes.
- **Clause 50** creates offences for contravening the ART Bill, obstructing inspectors, or breaching license conditions, punishable by a fine of up to Kshs. 5 million or imprisonment of up to five years.
- **Clause 51** provides a general penalty of up to KShs. 1 million or two-years' imprisonment for unspecified offences.

These sanctions ensure accountability but risk over-penalisation if applied to administrative lapses. Consistent with the proportionality principle, penalties should align with the gravity of the infraction and safeguard fair trial rights under Article 50.

HIDDEN FILES: ACCESS TO INFORMATION AND PRIVACY PROTECTIONS

Part V (**Clauses 33 to 37**) governs data collection and disclosure. The Directorate must maintain an Assisted Reproductive Technology Register containing information on treatments, gamete donors, and persons conceived through ART. **Clause 34** permits individuals aged 21 or older to request confirmation of whether they were conceived through ART and whether they may be related to a proposed spouse as a safeguard against consanguinity. However, **Clause 35** restricts minors from accessing such information except for medical reasons, and **Clause 37** criminalises unauthorised disclosure

by employees of the Directorate, punishable by up to five years' imprisonment or a KShs. 5 million fine.

These clauses represent Kenya's first legislative attempt to reconcile reproductive data governance with privacy and identity rights. Compliance with the Data Protection Act, 2019 will be essential to secure confidentiality while enabling legitimate access.

FAIR PLAY IN FERTILITY LAW: APPEALS, REVIEW, AND PROCEDURAL JUSTICE

The ART Bill provides an internal and external appeal mechanism under **Clauses 47 and 48**:

- Aggrieved applicants may seek review of licensing or revocation decisions from the Cabinet Secretary within thirty days.
- Thereafter, an appeal lies to the High Court.

However, the ART Bill lacks timelines for determination and fails to specify whether appeals suspend the impugned decision. For administrative clarity, Kenya could adopt best practices from judicial precedents like Republic v Public Procurement Administrative Review Board & another Ex parte Tropical Technology Limited [2020] KEHC 9235 (KLR) which emphasised procedural transparency and predictability.

ANCHORED IN RIGHTS: CONSTITUTIONAL ALIGNMENT AND POLICY IMPLICATIONS

The ART Bill intersects with core constitutional guarantees:

- **Article 26** – Right to life
- **Article 27** – Equality and non discrimination
- **Article 28** – Human dignity
- **Article 43(1)(a)** – Right to health

- **Article 53(1)(a)** – Rights of the child

In **Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae) [2019] KEHC 6928 (KLR)**, the Court affirmed that reproductive health rights are integral to the right to health. Any restriction on ART access based on gender, marital status, or sexual orientation would therefore face serious constitutional scrutiny. Importantly, Clause 26(1) of the ART Bill explicitly provides that a child born through ART “shall have the same legal rights under the Constitution or any other written law as that of a child born through sexual intercourse.” This progressive clause anchors equality of status for all children, regardless of conception method.

THE ROAD AHEAD: BETWEEN REGULATION AND REPRODUCTIVE JUSTICE

The ART Bill marks a transformative moment in Kenya's medical and family law landscape. If enacted with constitutional sensitivity, clear administrative safeguards and respect for privacy and equality, it could expand access to fertility care while ensuring ethical oversight.

However, if restrictive definitions, opaque licensing procedures and donor information silences persist, the ART Bill risks entrenching inequality and inviting constitutional challenges.

Kenya thus faces a delicate legislative balancing act, one that must reconcile science, ethics and human rights.

The central question remains:

Will Kenya’s ART Bill promote inclusive reproductive justice or will it entrench new barriers to family formation?

Written by: **Nicole Onyango & Mupa M’Mbetsa**
Edited by: **Dedan Wachira**

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217 Kyuna Crescent

Address: P. O. Box 49393 – 00100, Nairobi, Kenya

Mobile: 0720 994 511 | 0736-520767

Email: info@omlaw.co.ke

omlaw.co.ke

