

**The Social Stigmatisation of Involuntary Childless Women in Sub-Saharan Africa: The Gender Empowerment and Justice Case for Cheaper Access to Assisted Reproductive Technologies?**

This thesis is submitted in fulfilment of the requirements for the  
Degree of Doctor of Philosophy

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September 2015

## DECLARATION

This work has not been submitted in substance for any other degree or award at this or any other university or place of learning, nor is being submitted concurrently in candidature for any degree or other award.

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## Summary

This thesis considers the social stigmatisation of involuntary childlessness in Sub-Saharan Africa. It explores the socio-legal issues that arise when involuntary childlessness is given a gendered meaning and how this contributes to the social stigmatisation of involuntarily childless women in this developing region.

The social stigmatisation of involuntarily childless women in Sub-Saharan Africa has been widely documented in the social science literature. This body of literature on the gendered meaning of infertility and its impact on involuntary childless women has helped to change attitudes and perspectives on involuntary childlessness in the international public health framework. This has led to calls that infertility should no longer be treated as the 'Cinderella of reproductive health rights in the developing world.' The World Health Organisation (WHO) recently designated infertility as a global public health concern and has canvassed for wider access to assisted reproductive technologies (ARTs) in the developing world. The case for wider access to ARTs in the developing world has been made on a number of grounds, including those of human rights and social justice. International public health policy makers have also canvassed for wider access of affordable ARTS based on the notion of universal access to reproductive health care.

This thesis queries why the law, unlike medicine and other disciplines, has been slow to respond to the gendered social stigmatisation of involuntary childlessness in developing regions of the world such as Sub Saharan Africa. It explores whether the law can facilitate wider access to affordable ARTs based on the notion of universal access to reproductive health care as canvassed by international public health policy makers. It also considers whether law in its regulatory function can be used as an agent of change to combat and curb the social stigmatisation of infertility and involuntary childless women in Sub-Saharan Africa.

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*“For the days are coming when they will say ‘Fortunate indeed are the women who are childless, the wombs that have not borne and the breasts that have never nursed.’”*

To Him alone I dedicate this thesis.

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## ABBREVIATIONS

<b>AARTS</b>	Affordable Assisted Reproductive Technologies (AARTs)
<b>ARTS</b>	Assisted Reproductive Technologies
<b>CEDAW</b>	The Convention on the Elimination of all Forms of Discrimination against Women
<b>CRC</b>	Child Rights Convention
<b>ECHR</b>	European Convention on Human Rights
<b>ESHRE</b>	European Society for Human Reproduction and Embryology
<b>FGM</b>	Female Genital Mutilation (FGM)
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICPD</b>	International Conference on Population and Development
<b>IVF</b>	In Vitro Fertilization
<b>MDGs</b>	Millennium Development Goals
<b>OECD</b>	Organisation for Economic and Cooperation and Development
<b>SRHR</b>	Sexual and Reproductive Health Rights
<b>STDs</b>	Sexually Transmitted Diseases
<b>STIs</b>	Sexually Transmitted Infections
<b>STIWASIM</b>	Social Transformation in Africa, including Women
<b>SDGs</b>	Sustainable Development Goals
<b>WHO</b>	World Health Organisation
<b>WLSA</b>	Women and the Law in Southern Africa
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNCRC</b>	United Nations Convention on the Rights of a Child (aka Child Rights Convention)

**GLOSSARY OF AFRICAN AND OTHER NON-ENGLISH TERMS\***

<b>Term</b>	<b>Language</b>	<b>Meaning</b>
Abiyamo	Yoruba	Birth or motherhood.
Agon <sup>1</sup>	Yoruba	To despise or hold in contempt.
Al-Masalih Mursalih	Arabic	Juristic preference dictated by public welfare or public interests.
Amal ahl al-Madianah	Arabic	Acts of the people of Medinah.
Al Takafol Al Egtma'ey'	Arabic	Harmony, togetherness or accord. (See source for this meaning in bibliography).
Alaafia	Yoruba	Peace or well-being.
Apapo	Yoruba	Gathering.
Chi	Igbo (Ibo)	Personal god (idol).
Dawodu	Yoruba	First or eldest son.
Dibia	Igbo (Ibo)	Traditional or Native Doctor.
Erera	Ijaw (Izon or Ijo)	Mature woman.
Fard	Arabic	Required obligations.
Hadith	Arabic	Literal meaning is 'new thing'. (See source for this meaning in bibliography).
Harambee	Swahili	Pulling together
Humwe	Shona	In this together.
Igwa	Ijaw (Izon or Ijo)	A customary form of marriage that is to be found among the Okrika clan of the Ijaw ethnic group.
Ikunle Abiyamo	Yoruba	The kneeling of the mother in labour.

\* The definitions for most of the terms are common knowledge. However, some definitions have been obtained from academic literature referenced in the bibliography at the end of this thesis.

<b>TERM</b>	<b>LANGUAGE</b>	<b>MEANING</b>
Ijma	Arabic	Consensus or Agreement of the Ummah (Muslim Community).
Inkabi	Zulu	Castrated cow or bull. (See source for this meaning in bibliography).
Inyumba	Zulu	Barren.
Iyawo	Yoruba	Young wife.
Kafalah	Arabic	Guardianship
Kashite sannen konaki wa saru	Japanese	A wife should leave her husband if she fails to bear a child within three years of marriage. (See source for this meaning in bibliography).
Kekonakona	Yakurr	Traditional support group for infertile women. (See source for this meaning in bibliography).
Leboku	Yakurr	Annual yam festival.
Mgbaliga, Nwanyi-iga	Igbo	The sterile or barren woman. (See source for this meaning in bibliography).
Mgumba	Swahili	Sterile woman or man.
Nasab	Arab	Blood lineage
Ndinne	Igbo (Ibo)	Christian mothers
Nneka	Igbo (Ibo)	Mother is Supreme.
Oli-Ekpe	Igbo (Ibo)	Male relative who inherits the property of a deceased relative.
Omoluabi	Yoruba	A person that is held in high regard. It could also be defined as the way of a human being. (See source for this meaning in bibliography).

<b>Term</b>	<b>Language</b>	<b>Meaning</b>
Qiyas	Arabic	Islamic legal presumption or jurisprudence (see source for this meaning in bibliography).
Sunnah or Sunna	Arabic	Second most important source of authority for Muslims.
Tasa or Tassa	Swahili	Barren (Infertile chicken) (See source for this meaning in bibliography).
Tjoekee or Tjoekie	Afrikaans	Failure (see source for this meaning in bibliography).
Ubuntu	Bantu	Personhood, the essence of being human, people are people through other people. (See source for this meaning in bibliography).
Ujaama	Swahili	Cooperation
Ummah	Arabic	The Muslim faithful or Muslim community.
Umazume	Japanese	Stone woman.
Umoja	Swahili	Unity or Togetherness (see source for this meaning in bibliography).
Umuada	Igbo (Ibo)	Daughters of lineage.
Urf	Arabic	Customs and usage

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5. *Cole v Cole* (1898) 1 N.L.R 15
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9. *Meribe v Egwu* [1976] 1 All NLR 266
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12. *Okonkwo v Okagbue* (1994) 9 NWLR Pt 368 p 301
13. *Ologunleko v. Ikueomelo* [1993] 2 NWLR Pt. 273 p 16
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3. *X & Y and Z v United Kingdom* (Application 7229/75) (1977) 12 DR 32 (EComHR)
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- 1966 International Covenant on Civil and Political Rights (ICCPR)
- 1966 International Covenant on Economic, Social and Cultural Rights (ICESR)
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- 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- 1981 African Charter on Human and Peoples' Rights (the Banjul Charter)
- 1989 United Nations Convention on the Rights of the Child (UNCRC)
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- 2000 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)
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Zamfara State of Nigeria Gazette No.1 Vol 1 15<sup>th</sup> of June, 2000, pp A1- A30

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## Chapter One

### Introduction and Framework of the study

#### 1.0 Introduction

This chapter set outs the general framework of this thesis. It provides perspective on why the study has been undertaken and identifies the methodological approaches adopted throughout the thesis. It explains its aims and objectives and undertakes a general literature review of scholarly works that relates to the thesis' objectives. It set outs the outline of the chapters of the thesis and concludes with an explanation of the underlining motivation for the undertaking of the research.

#### 1.1 Statement of the Problem

Infertility and involuntary childlessness are traumatic human conditions. Many couples desire to have biological children of their own and when there is an inability to reproduce, it creates a sense of personal loss and tragedy. The World Health Organisation (WHO) views the medical condition of infertility as a global health problem and accepts that it is more of a critical health problem in the developing world. A 2012 WHO study based on previous data gathered from the Demographic and Health Surveys estimate that one in four couples in developing countries is infertile.<sup>1</sup> Several of these infertile or involuntary childless people are located in what some scholars have described as pro-natal<sup>2</sup> states. Some of these states fall within the Sub-Saharan African region which consists of countries that lie geographically south of the Sahara desert.<sup>3</sup>

Unlike other areas of the world where infertility is viewed as a personal traumatic experience, the condition of being involuntary childless in Sub-Saharan Africa is treated as a public

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<sup>1</sup> Mascarenhas M., et al National, Regional, and Global Trends in Infertility Prevalence since 1990: A Systematic Analysis of 277 Health Surveys (2012) 9(12) PLOS Medicine pp 1-12.

<sup>2</sup> Pennings G., Ethical issues of infertility treatment in developing countries (2012) Facts, Views and Vision in Obstetrics and Gynaecology 17-23.

<sup>3</sup> Middleton J., Encyclopaedia of Africa South of the Sahara (African studies, Yale Univ. Vol 4, 1997).

condition that threatens the continuing existence of the family structure and the community at large. The perceived existentialist threat that involuntary childlessness is meant to cause to the society has led to the social stigmatisation of the condition. There is substantive evidence<sup>4</sup> particularly in the social sciences and medical disciplines that shows that women especially bear the brunt of this social stigmatisation even when male infertility is the cause of the inability to procreate.

The stigmatising social construction of infertility and involuntary childlessness has been found to affect the social status, economic wellbeing and inherent worth of women. Yet only up until recently, public health specialists have treated infertility and involuntary childlessness 'a life choice that has gone awry'<sup>5</sup> and which did not deserve too much attention. This led to some describing infertility as the 'Cinderella of reproductive health.'<sup>6</sup> Malthusian's concerns of over-population particularly in Sub-Saharan Africa and Asia have been raised as key reasons why infertility has been neglected by health bodies involved in reproductive health care.<sup>7</sup> Consequently international reproductive health bodies focused more on reproductive health policies that aided population reduction, rather than those that promoted fertility in regions that are considered as over-populated. Yet the narratives of many involuntarily childless people in Sub-Saharan Africa establish that infertility and involuntary childlessness are matters that deserve attention due to the impact that the social

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<sup>4</sup> See for example Dyer S., The value of children in African countries: insights from studies on infertility (2007) 28 *J Psychosom Obstet Gynaecol* pp 69–77; Dyer SJ., Abrahams N., Hoffman M., Van der Spuy ZM., 'Men leave me as I cannot have children': Women's experiences with involuntary childlessness. (2002a) 17 *Hum Reprod* 1663–1668 and Hollos M., Profiles of infertility in southern Nigeria: Women's voices from Amakiri. (2003) 7 *Afr J Reprod Health* pp 46–56.

<sup>5</sup> McVicker K., *Ordinary Miracles: A Journey through primary and secondary infertility* p 22.

<sup>6</sup> Dyer S., Barrenness among plenty (2007) 13(2) *South African Journal of Obstetrics and Gynaecology* p 32 available at <http://www.sajog.org.za/index.php/SAJOG/article/download/76/52>. (accessed July 29, 2015).

<sup>7</sup> Obono O., Life Histories of Infertile Women in Ugep, Southern Nigeria (2004) 19(2) *African Population Studies* p 63.

stigmatisation of these conditions have on the wellbeing of involuntary childless women in the region.<sup>8</sup>

This thesis therefore explores and considers the reasons why involuntary childlessness should not just be viewed purely from economic and demographical concerns of overpopulation, but from a discourse on tragedy that highlights the devastating impact that the social stigmatisation of infertility has on involuntary childless men and women in Sub-Saharan Africa. The social stigmatisation of involuntary childlessness and infertility can also be viewed from a rights-based discourse particularly within the context of whether the involuntary childless in Sub-Saharan Africa have the right to procreative liberty or autonomy over reproductive matters.<sup>9</sup> Procreative liberty or reproductive autonomy has been effectively utilised as a rights-based mechanism to provide women in both the developed and developing regions of the world with greater access to birth control and abortion services. However, the clamour for reproductive autonomy as the basis for providing infertile people particularly in developing regions such as Sub-Saharan Africa with access to affordable assisted reproductive technologies (ARTs) is rarely championed. This thesis will explore why this is the case. The thesis will also consider whether there is a case for widening access to ARTs for involuntary childless women within this part of the developing world. The argument for the case for wider access to ARTs is undertaken within the framework of the tragic narrative of the social stigmatisation on infertility in the Sub-Saharan African continent.

In developing a case for providing wider access to ARTs in Sub-Saharan Africa, this thesis will also consider the arguments that have been raised against the provisioning of affordable ARTs in this region. As stated earlier, one of the key arguments against the widening of access to ARTS in this region of the world has to do with demographical concern on overpopulation. The other argument is premised on child justice considerations. The key

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<sup>8</sup> See for example Hollos M., Larsen U., Obono O., Whitehouse B., *Suffering infertility: The impact of infertility on women's life experiences in two Nigerian communities.* (2010) 42(6) *J Biosoc Sci.* pp 787–814.

<sup>9</sup> Robertson J., *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press: 1996) 281 pp.



child justice argument against the widening of access to reproductive technologies has to do with concerns surrounding who should bear the social and moral burden of child orphans (and other children who do not have families to take care of them) in Sub-Saharan Africa. Child adoption has therefore been canvassed as a key way of addressing the needs of the involuntary childless in Africa and other parts of the developing world. According to that argument, this constitutes a much better way of managing the needs of the involuntary childless within this region as opposed to providing wider access to expensive Assisted Reproductive Technologies (ARTs). Proponents for the case of utilising child adoption as a tool for meeting the needs of the involuntary childless within the region have also raised health prioritisation concerns such as infant mortality and HIV/AIDS to argue against the case for widening access to ARTs within the region.

While this thesis accepts that these are valid concerns, it will argue that the tragic discourse of infertility in Sub-Saharan Africa raises complex cultural and social concerns that may impact on the parenting decisions of individuals within this region. It will therefore argue that child adoption on its own cannot serve as the sole or key mechanism in managing the needs of the involuntary childless within this region. This in part is due to the pluralistic nature of the law governing family structures within the Sub-Saharan African continent which means that child adoption is not only regulated by Western received law, but also in the customary and religious laws of the African communities. In determining whether child adoption can ever serve as the sole or key option in managing the needs of the involuntary childless, there needs to be some consideration of the customary or religious rules that operate alongside Western received law.

The study therefore seeks to explain from a discourse on tragedy what it means to be infertile or involuntary childless in a pro-natal African community and why there is a human rights case for advocating wider access to ARTs in the Sub-Saharan African community. To provide further perspective on what this thesis sets out to do, the following section outlines its purpose and the research questions that it seeks to address.

## 1.2 Purpose and Query of the Research

The key purpose of this thesis is to explore the social stigmatisation of infertility in Sub-Saharan Africa and how this affects the status of involuntary childless women within this region. It also seeks to investigate what role law can play in widening of access to assisted reproductive technologies (ARTs) and in combating the social stigmatisation of involuntary childlessness and its deleterious effect on involuntary childless women in the region.

In line with this two-pronged objective, this thesis seeks to explore the following questions:

- i. How is infertility perceived in Sub-Saharan Africa and how do public attitudes to infertility affect the status of involuntary childless women in this region of the developing world?
- ii. What is the social meaning of motherhood in Sub-Saharan Africa and how does the social construction of motherhood affect the legal status and identity of involuntary childless women in the region?
- iii. How effective is the current management of infertility and involuntary childlessness in sub-Saharan Africa and how do the demographical concerns of over-population as well as child justice concerns impact on the reproductive health care rights of infertile women in the region?
- iv. Can widening access to Assisted Reproductive Technologies (ARTS) in Sub-Saharan Africa enhance the reproductive making choices of involuntary childless women in the region? If yes, how can widening access to ARTs contribute to the reduction of social stigmatisation of infertility in African communities?

These questions prove critical to evaluating the role that law can play in tackling the social stigmatisation of infertility and involuntary childlessness in Sub-Saharan Africa. They help to inform and interrogate whether the law's role should be limited to the sole regulatory purpose of widening access to ARTs or if it should be deployed to address the wider concerns of tackling social stigmatisation of involuntary childlessness. It is hoped that a consideration of

these queries will provide further legal perspectives on whether the solutions offered to tackle the conditions of infertility and involuntary childlessness are effective in catering for the needs of women within the region.

### **1.3 Theoretical Approach and Methodology**

The key theories employed in this thesis to address these research queries are drawn from works undertaken within the theoretical schools of regulation, socio-legal studies and legal pluralism. This three-pronged theoretical approach has been employed for a number of reasons. First the reason for adopting a socio-legal theoretical approach is that the problem domain of this thesis is polygenic in nature and deserves a wider consideration beyond the black letter of the law. This is because the issues connected with social stigmatisation of infertility extend beyond the field of law to other disciplines, including the social sciences, medicine and humanities. An inter-disciplinary discourse therefore needs to be undertaken to provide further understanding of the tragic nature of involuntary childlessness in Sub-Saharan Africa. This is because the formulation of legislative or regulatory mechanisms requires a proper understanding of the complex socio-cultural environment in which involuntary childless women operate in the Sub-Saharan Africa.

The socio-legal approach is therefore best placed to deal with an exploration of a legal issue that is contextualised in multiple disciplines. As explained by Wheeler and Thomas, socio-legal studies help to provide ‘an interdisciplinary alternative and a challenge to doctrinal studies of law.’<sup>10</sup> ‘Schiff<sup>11</sup> also points out that socio-legal studies focus on the intersection between the analysis of law and the analysis of the social situation to which the law applies. In this sense, as Cotterrell <sup>12</sup> explains, socio-legal studies help to explain why legal study must involve an evaluation of the social conditions that underpin the formulation and the

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<sup>10</sup> Wheeler S., Thomas PA., ‘Socio-Legal Studies’ in DJ Hayton, (ed), *Law’s Future(s)* (Oxford, Hart Publishing, 2002) 271.

<sup>11</sup> Schiff D., *Socio-Legal Theory: Social Structure and Law* (1976) 39(3) *The Modern Law Review* 287.

<sup>12</sup> Cotterrell R., *Law’s Community: Legal Theory in Sociological Perspective*. Oxford: Clarendon Press, 1995; Cotterrell R., *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* Aldershot: Ashgate, 2006.

development of law. Similar arguments have also been offered by Hazel Genn<sup>13</sup> who argues that systems of justice can only be effective when law makers have a fuller understanding of the external dynamics that influence how people resolve disputes or how they perceive the functionality of the law.

Another leading scholar in the socio-legal jurisprudence is Austin Sarat<sup>14</sup> whose works include that on the welfare of the poor and on capital punishment. He explains that law can be ineffective in its application if the law maker fails to look at the social context in which the law should apply. These works follow in the tradition of sociological jurisprudence championed by Roscoe Pound, an eminent American jurist. Pound did not only limit his discourse strictly to a jurisprudential diagnosis of the social context in which the law operates. He also considered how the law could serve as a tool for social reformation. He conceived law as a tool of social engineering that could be utilised to influence, change and shape societal norms and attitudes.<sup>15</sup> This is a matter that will be further considered in chapter seven of this thesis.

It is pertinent to note that the socio-legal approach has also been utilised by other scholars in other jurisdictions of the world to evaluate reproductive issues especially in the area of assisted treatment for infertility. Beinstein<sup>16</sup> for example deployed a socio-legal approach to investigate why medical developments in artificial insemination developed into popular practice despite the uncertainty of the legal framework after the Second World War. Socio-legal theory has also been adopted by works such as Callahan and Roberts<sup>17</sup> to critique the meaning of reproductive autonomy and procreative liberty. This thesis in the same way

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<sup>13</sup> See for example Genn H., *Paths to Justice: What People do and think about going to Law* (Oxford: Hart, Publishing 1999) 382 pp; Genn H., A Paterson., *Paths to Justice Scotland: What Scottish People Do and Think About Going to Law* (Oxford: Hart Publishing 2001) 391 pp.

<sup>14</sup> See for example Sarat A., *The Law Is All Over: Power, Resistance and the Legal Consciousness of the Welfare Poor*, (1990) 2(2) *Article 6 Yale Journal of Law & the Humanities* p 374 at p 379.

<sup>15</sup> Pound R. *1870-1964 Social Control through Law* (Hamden, Connecticut: Archon Books, 1968) 138 pp.

Bernstein G., *The Socio-Legal Acceptance of New Technologies: A Close Look At Artificial Insemination* (2002) 7 *Washington Law Review* 1035.

<sup>17</sup> Callahan J., Roberts D., *A Feminist Social Justice Approach to Reproduction –Assisting Technologies: A Case Study on the Limits of Liberal Theory* (1996). Faculty Scholarship. Paper 1155 available at [http://scholarship.law.upenn.edu/faculty\\_scholarship/1155](http://scholarship.law.upenn.edu/faculty_scholarship/1155) (accessed May 17 2015).

adopts a socio-legal approach to evaluate its problem domain area of the negative feminisation of infertility and the role that law could play in tackling this problem. This is driven by a deep passion for the welfare and equality of involuntary childless women within the Sub-Saharan African region.

In deploying a socio-legal theoretical approach, the thesis is able to consider whether there is a singular or homogeneous approach in promoting women's rights, especially in developing parts of the world like Sub-Saharan Africa. In its discourse of the negative feminisation of infertility and involuntary childlessness in Sub-Saharan Africa, it queries whether there is a social justice case to provide wider access to assisted reproductive technologies (ARTs) to infertile women in the region that would provide real choice for women in reproductive matters and enhance their status in their family structures and community.

In problematizing the negative feminisation of infertility and involuntary childlessness, the utilisation of the socio-legal theoretical approach enables the thesis to investigate the social and cultural norms that influence and shape societal attitudes in Sub-Saharan Africa, the site of investigation. The deployment of the socio-legal theory helps to interrogate the central hypothesis on the role that law can play in tackling the social stigmatisation of infertility and involuntary childlessness.

This thesis also utilises the theory of legal pluralism as part of its wider socio-legal discourse. This is due to the fact that many African countries practice what can be described as a legal pluralist system. Stewart <sup>18</sup> defines legal pluralism as the:

‘recognition of differing legal orders within the nation-state or it can validate open ended concepts of law which do not depend on state recognition.’

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<sup>18</sup> Stewart A., *Entitlements, Pluralism and Gender Justice in Sub-Saharan Africa* (2007) Warwick School of Law Research Paper Series available at SSRN: <http://ssrn.com/abstract=1531167> p 194 at p 203.

The pluralist nature of legal systems in Africa is especially evident in the regulation of family structures. The problem domain of this thesis which focuses on the social stigmatisation of involuntary childlessness and its impact on involuntary childless women is situated within the regulation of family structures. The legal pluralist theory is therefore utilised to explain the difficulties and limitations of adopting a purely Western legal approach to tackling the social tragedy of involuntary childlessness in Africa. This is particularly relevant to the exploration of my fourth research query which explores the demographical and child justice concerns that have been raised by some to limit the access of ARTs in sub-Saharan Africa. While there are many theoretical approaches to legal pluralism, the leading theoretical works in this area include Griffiths<sup>19</sup>, Moore<sup>20</sup> and Vanderliden.<sup>21</sup> Other works that rely on the legal pluralist theoretical approach are Chiba,<sup>22</sup> Menski<sup>23</sup> and Stewart<sup>24</sup> which consider the role that customary law and religious rules play in non-Western jurisdictions.

Finally, although the theoretical framework of this thesis is primarily situated within the socio-legal theoretical framework; there are sections where regulatory theory is deployed. This theoretical approach is discussed extensively in other literature.<sup>25</sup> The aspect of regulatory theory that is relevant to this thesis is the public interest concept of regulation which argues that regulatory intervention is necessary to protect and provide benefit to the public.<sup>26</sup> While

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<sup>19</sup> Griffiths J., What is Legal Pluralism (1986) 24 *Journal of Legal Pluralism* 24.

<sup>20</sup> Moore SF., *Social Facts and Fabrications: Customary Law on Kilimanjaro, 1880-1980* (Cambridge: Cambridge University Press); Moore SF., Moore, Sally Falk. *Law as Process* (New Jersey: Transaction Publishers, 2d ed. 2000).

<sup>21</sup> Vanderlinden J., Return to Legal Pluralism: Twenty Years Later, 28 *J. Legal Pluralism & Unofficial L.* 149 (1989).

<sup>22</sup> Chiba M., *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Tokai University Press, 1989) 236 pp.

<sup>23</sup> Menski W., *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press: 2006).

<sup>24</sup> See for example Stewart (note 18) above.

<sup>25</sup> See for example leading works such as Peltzman S., (1976) Towards a more general theory on regulation 19(2) *Journal of Law and Economics* 245-248; Breyer S., *Regulation and its Reform* (Cambridge, MA: Harvard University Press: 1982); Ogus A., *Regulation: Legal Form and Economic Theory* (Oxford: Clarendon Press: 1994); Lange B., (1998) Understanding Regulatory Law: Empirical versus Systems- Theoretical Approaches 18(3) *Oxford J Legal Studies* 449; Baldwin R., and Cave M., *Understanding Regulation: Theory, Strategy, and Practice*. Oxford: Oxford University Press: 1999).

<sup>26</sup> Hantke-Domas M., (2003) The Public Interest Theory of Regulation: Non- Existence or Misinterpretation 15 *European Journal of Law and Economics* p 165.

not completely discountenancing the role of public interest in economic regulatory theory as expounded by its leading proponents such as Posner;<sup>27</sup> this thesis focuses more on the public interest nature of regulation in the development of the law which Sir Matthew Hale, Chief Justice of the King Bench was said to have 'first articulated'.<sup>28</sup> The deployment of regulatory theory is utilised in chapter seven of this thesis which discusses whether there is need for regulatory intervention to foster wider access to reproductive technologies. The public interest perspectives of regulatory intervention and its development of the law will complement the underlining socio-legal inquiries of this thesis especially with regard to the consideration on whether strict state law situated in the human rights framework can achieve its regulatory objective of eliminating the negative feminisation of infertility and involuntary childlessness in a pluralist environment where other non-state rules and norms hold sway. This thesis will refer to the works of Black<sup>29</sup> on decentred regulation to examine this point.

The nature of this work is theoretical rather than empirical in nature, based essentially on library based desk top research. That work has been necessary in developing a strong theoretical framework surrounding a problem domain which is complex and wide-ranging in the concerns it embraces. This research has involved the expository review and analysis of primary sources of black letter law (legislation and case law where applicable) and secondary sources in the form of academic monographs, edited volumes, peer reviewed articles and other authoritative works comprising of reports and materials from international and other multilateral agencies. Where necessary, I have also explored some grey literature developed by reputable non-governmental organisations<sup>30</sup> that directly work in the field of reproductive health care rights for involuntary childless people in Sub-Saharan Africa. The exploration of the desktop based literature surrounding my problem domain area focuses not

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<sup>27</sup> Posner R., Theories of Economic Regulation (1974) 5 Bell Journal of Economics and Management Sciences pp 337-352.

<sup>28</sup> See further discourse in Matheny R Taxation of Public Utilities (Lexis Nexis, 2014) Release 21 Update at 2.02.

<sup>29</sup> See for example Black J., Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory World. (2001) 54(1) Current Legal Problems pp 103-146

<sup>30</sup> See for example, the Walking Egg Foundation: Global Access to Infertility Care website <http://www.thewalkingegg.com/about> .

just on the black letter concept of what is legal but also on other norms and rules, including customs and beliefs that help to shape how society regulates the management of infertility and involuntary childlessness in Sub-Saharan Africa.

The country case jurisdiction for this investigation is Nigeria. Chapter four of this thesis provides the key reasons why Nigeria has been chosen as the key country case study jurisdiction for this study. Where necessary, a comparative study shall also be undertaken of the legal framework of other Sub-Saharan African countries. This is mainly done in chapter 2 which focuses on public attitudes in Sub-Saharan Africa and in chapter 5 which considers whether child adoption should be considered as the sole infertility management option for resolving the parenting needs of involuntary childless people. Chapter 7 which inter alia focuses on the social engineering role that law can play in combating the social malaise of the social stigmatisation of infertility and involuntary childlessness also contains an element of comparative study of the legal framework of Nigeria and South Africa.

#### **1.4 General Review of the Literature**

This thesis seeks to explore key issues surrounding the social stigmatisation of involuntary childless women in pronatalist developing countries in Sub-Saharan Africa. Based on existing literature, I intend to chart out the social, cultural, economic, religious and legal issues affecting involuntary childless African women and how these issues contribute to their social stigmatisation within their communities. For the purpose of getting a better understanding of the issues surrounding the social stigmatisation of infertile women in Sub-Saharan Africa, I have undertaken an interdisciplinary literature review which examines the available literature on the subject. From the literature reviewed, I discovered that infertility and involuntary childlessness in Africa has been the focus of a number of research studies cutting across disciplines such as law, humanities, medicine, developmental and demographical studies and core social sciences areas such as sociology and anthropology.



There are several broad themes that cut across the extensive research on infertility and involuntary childlessness in different parts of the developing world including Sub-Saharan Africa which is the focus of the investigation of this thesis. Some of the core themes that are of some relevance to the queries set out in this thesis are outlined in this review. The first theme of research considers the socio-cultural meaning of infertility. It explains what means to be infertile. Pearce<sup>31</sup> and Okonofua's<sup>32</sup> works which focus on the social meaning and consequences of infertility in Nigeria point to the level of disenfranchisement that infertile people face in pronatalist societies where procreation is considered as paramount to the continued existence and prosperity of the community. One of the key issues identified by Pearce<sup>33</sup> in her sociological research is the sense of marginalisation that infertile women experience in their community. The same concern is also expressed in Upton's<sup>34</sup> work in Botswana and similar concerns are also raised by Kielman<sup>35</sup> in her research undertaken in Tanzania and as well as in Dyer's<sup>36</sup> research undertaken in South Africa.

These scholarly works within this stream provide insight into the ensuing social stigmatisation that arise from a pronatalist socio-cultural construction of infertility. Of particular interest to this thesis is the fact that the literature within this stream of research shows that the marginalisation and stigmatisation of infertility normally has a gendered effect on women. Writers such as Van Balen<sup>37</sup> develop this theme further through the undertaking of a comparative study on the social impact of infertility in the Sub-Saharan African and Indian Sub-Continents. Both sub-continents point to a high level of the stigmatisation of the

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<sup>31</sup> Pearce T., She will not be listened to in public: Perceptions among the Yoruba of Infertility and Childlessness in women. (1999) 7 (13) *Reproductive Health Matters* pp 69-79.

<sup>32</sup> Okonofua F., Harris D., Odebiyi A., Kane T., Snow R., The social meaning of infertility in Southwest Nigeria (1997) 7 *Health Transition Review* pp 205-220.

<sup>33</sup> Pearce (note 31) above.

<sup>34</sup> Upton R., Infertility makes you invisible: Gender, health and the negotiation of infertility in Northern Botswana (2001) 27(2) *Journal of Southern African Studies* pp 349-362.

<sup>35</sup> Kielman K., Barren ground: Contesting identities of infertile women in Pemba, Tanzania. In M. Lock & P. Kaufert (eds), *Pragmatic Women and Body Politics*. (Cambridge: Cambridge University Press, 1998) pp 127- 163.

<sup>36</sup> Dyer S., Abrahams N., Hoffman M., Van der Spuy Z Men leave me as I cannot have children: women's experiences with involuntary childlessness (2002) 17 (6) *Human Reproduction* pp 1663-8.

<sup>37</sup> Van Balen F, Bos HMW., The social and cultural consequences of being childless in poor resource areas (2009) 1(2) *F, V & V IN OBGYN* from p 106.

medical condition of infertility yet the level of social stigmatisation, family harassment and isolation seemed to be more profound in the Indian continent than in Sub-Saharan Africa. However, as Van-Balen's work shows this does not in any way minimise the debilitating social meaning and effect of infertility in Sub-Saharan Africa especially when due consideration is given to the fact that incidences of divorce and marital conflicts within this sub-continent are attributable to the condition of infertility.<sup>38</sup> This important study also shows that the level of economic insecurity experienced by infertile women in Sub-Saharan Africa is higher than the Indian sub-continent. This first stream of research is therefore important to the underlining concern of this thesis on whether the social stigmatisation of involuntary childlessness provides a case for advocating for the widening of affordable assisted reproductive technologies in Sub-Saharan Africa even if some regions of this sub-continent are poorly resourced.

Within this theme of research there is also scholarship which explores whether there is a difference between the 'biological meaning of infertility' and the 'social construction of involuntary childlessness'.<sup>39</sup> Early works on this point include Matthew and Matthews<sup>40</sup> who distinguish between infertility and involuntary childlessness. While not particularly focused on poor resourced regions in the developing world, these writers provide interesting insights highlighting the importance of that distinction in practice. One of the key issues highlighted in their work and in the later work of Gayle Letherby<sup>41</sup> is the fact that women can be 'involuntary childless' and not necessarily 'medically infertile.' This is a very critical point that will be further investigated in this thesis particularly from the perspective that women in Africa normally bear the brunt of the stigmatisation of involuntary childlessness even when they are not medically diagnosed as infertile. This critical area of scholarly research forms the basis for the reason why this thesis utilises the term involuntary childlessness instead of

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<sup>38</sup> Ibid at p 115.

<sup>39</sup> Matthews, R. and Matthews, A. M. Infertility and involuntary childlessness: the transition to non-parenthood, (1986) 48 *Journal of Marriage and the Family*, pp. 641–649.

<sup>40</sup> Ibid.

<sup>41</sup> Letherby G., Challenging Dominant Discourses: identity and change and the experience of 'infertility' and 'involuntary childlessness (2002) 11(3) *Journal of Gender Studies* p 277 at 278.

confining it to the more narrowly medical defined condition of infertility, particularly when the social stigmatisation is due to shrouded male infertility.

The second stream of research seeks to diagnose from a demographical and as well as an anthropological perspective, the prevalence of infertility in populous areas of the world such as Sub-Saharan Africa. Ulla Larsen,<sup>42</sup> for example has conducted extensive demographical research that provide useful evidence on the extent of the problem of infertility in Africa and its local variants. She has also undertaken empirical research to ascertain if there is still a prevailing 'infertility belt' in Africa. The conclusions of her research confirms that primary and secondary infertility are still prevalent in the central region of the Sub-Saharan African continent and that more needs to be done to tackle the social implications associated with this issue. Similar research has also been undertaken by Marida Hollos and Bruce Whitehouse in West Africa on the social impact that fertility decline has had on involuntary childless women.<sup>43</sup> Similarly, demographical perspectives on the extent of the degree of fertility decline in the North Africa is discussed in Roudi-Fahimi and Mederios Kent's<sup>44</sup> work. Although North Africa is not the focus of this thesis' investigation, Roudi-Fahimi and Mederios Kent's work does provide some interesting findings which are of comparative interest to this research. This is because they show that fertility decline is not necessarily attributable to infertility. Their research showed that other social causes such as the delay in marriage may cause fertility decline.<sup>45</sup> This again confirms why the biological condition of infertility is distinguishable from the social condition of involuntary childlessness.

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<sup>42</sup> Larsen U., 'Sterility in Sub-Saharan Africa' (1994) 48(3) *Population Studies* pp 459-474; Larsen U., *Infertility in Central Africa* (2003) 8(4) *Tropical Medicine and International Health* 354; Primary and secondary infertility in Sun-Saharan Africa (2000) *International Journal of Epidemiology* 285-291 and Larsen U., Primary and secondary infertility in Tanzania (2003) 5 *Journal of Health and Population in Developing Countries* pp 5-15.

<sup>43</sup>Hollos M., Profiles of infertility in Southern Nigeria: Women's voices from Amakiri (2003) 7 *African Journal of Reproductive Health* 46-56; Whitehouse, B. and Hollos, M. (2014), Definitions and the Experience of Fertility Problems: Infertile and Sub-fertile Women, Childless Mothers, and Honorary Mothers in Two Southern Nigerian Communities. (2014) 28 (1) *Medical Anthropology Quarterly* pp 122-139.

<sup>44</sup> Roudi-Fahimi F and Medirous Kent R., Challenges and opportunities--the population of the Middle East and North Africa. (2007) 62(2) *Population Bulletin* pp 1-20.

<sup>45</sup> *Ibid* at p 8.

The third strand of research focuses on the reproductive health care seeking behaviour of infertile people and the social challenges surrounding infertility in Sub-Saharan Africa. Scholars like Silke Dyer<sup>46</sup> have undertaken extensive empirical research on the health care seeking behavioural patterns of infertile people within the region and have provided country specific information on the social challenges of infertility from a public health perspective. Marcia Irhorn and Frank Van Balen in their edited collection also provide further evidence for the growing role that assisted reproductive technologies (ARTs) plays in Africa and other parts of the developing world in tackling infertility.<sup>47</sup>

Works under this theme, particularly those of Dyer, establish that the treatment seeking behaviour of involuntary childless people is not just necessarily confined to conventional medicine, but other forms of alternative treatment. This wide ranging quest for treatments that can achieve procreation confirm that involuntary childless women are prepared to seek other alternative sources if they feel their desired reproductive goal can be achieved through these sources. Marcia Irhorn describes this pursuit as the 'quest for conception'.<sup>48</sup> She also highlights the important point that monotheistic religions such as Islam practised in North Africa and other parts of the African continent do not necessarily prohibit the use of ARTs but rather proactively encourage infertile couples to take steps to find a solution that would help them overcome infertility. This is a very important point in the sense that there are stereotypes about whether involuntary childless people assume a fatalistic attitude to their condition due to their adherence of religious or cultural beliefs. However, works like Irhorn

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<sup>46</sup> See for example Dyer S., Abrahams N., Hoffman M., Van Der Spuy ZM., Infertility in South Africa: Women's Reproductive Health Knowledge and Treatment Seeking Behaviour for Involuntary Childlessness. (2002) 17(6) Human Reproduction pp. 1657–1662. See the unpublished PhD thesis of Bunting L., Help Seeking Behaviour and Risk in the Context of Female Fertility (Cardiff University, 2008) pp 1-375 which discusses generally the help seeking behaviour of couples in their engagement with fertility medical services.

<sup>47</sup> Irhorn M, Van Balen F, Infertility around the globe: new thinking on childlessness, Gender and Reproductive Technologies (California, University of California Press: 2002)

<sup>48</sup> Irhorn M., Quest for Conception: Gender, Infertility and Egyptian Medical Traditions (Pennsylvania: University of Pennsylvania Press) 472 pp. See also the unpublished thesis of De Kok C., Constructing infertility in Malawi: Management of Interpersonal, Normative and Moral Issues in Talk (University of Edinburgh, 2006) 2006 pp 1-273.

establish that this is not necessary the case. It is interesting that the same proactive attitude to do something about infertility or involuntary childlessness is also evident in traditional African cultures<sup>49</sup> where women, in particular, will proactively seek assistance from traditional healers or other alternative methods outside conventional medicine to see how they can achieve conception. Current works like Egede<sup>50</sup> explained how the behaviour seeking treatment to overcome infertility and involuntary childlessness may lead to women being exposed to harm. Building on this stream of research, this thesis will further argue that in light of the fact that involuntary childless people are proactive in seeking for means to reproduce, there is a case for prioritising wider access to affordable medical treatment. This of course will fall into the debate on whether there is a right to reproduce and if there is to what extent states are duty bound to facilitate this right. This is a critical concern of the fourth research stream on infertility and involuntary childlessness identified below. This concern will also be further explored in chapters six and seven of this thesis.

The fourth strand of research on infertility focuses on the prioritisation of health care resources in Africa. The key questions addressed in this strand of research relates to the health economic concerns of resource allocation. Proponents of this school such as Okonofua<sup>51</sup> argue that infertility and involuntary childlessness should be best handled through preventive treatment rather than the utilisation of expensive ARTs which may not yield the desired results. This school of thought posits that the provisioning of ARTs would be too expensive to implement in developing countries and would end up draining scarce resources that could be utilised for more serious health problems such as infant mortality, HIV/AIDS and Malaria.<sup>52</sup>

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<sup>49</sup> Koster-Oyekan, W., Infertility among Yoruba Women: Perceptions on Causes, Treatment and Consequences. (1999) 3(1) African Journal of Reproductive Health 13-26.

<sup>50</sup> Egede H., Shrouded Gender and Reproductive Issues in Child Welfare and Protection Proceedings (2011) 23 Denning Law Journal pp 202-226.

<sup>51</sup> Okonofua F., 'The case against new reproductive technologies in developing countries' (1996) 103 British Journal of Obstetrics and Gynaecology p 957.

<sup>52</sup> Malpani S., 'Inappropriate use of new technology: Impact on women's health' (1997) 58 International Journal of Gynaecology & Obstetrics pp 159 at 161.

This strand of research argues that preventive treatment is more effective than fertility treatment since sexually transmitted diseases (STDs) have been found to be one of the key causes of infertility and involuntary childlessness in the region. A 2001 modelling study undertaken by White, Zaba, Boerma and Blacker<sup>53</sup> provides evidence that demonstrate how the introduction of better STD treatment, including a wider use of antibiotics into the public health system has helped to reduce the number of primary infertility cases in the Sub-Saharan African region. This approach to infertility can be likened to the health economic approach adopted at the early stage of the HIV epidemic in Sub-Saharan Africa where it was recommended that rather than provide expensive Western anti-retroviral drugs to poor Africans; public health resources should focus on preventive measures to reduce further HIV infections.<sup>54</sup> The thematic concern of how the allocation of scarce resources can affect the provisioning of fertility treatment for the infertile and involuntary childless in the region is of key interest in this thesis and is extensively discussed in chapter six of this thesis which addresses the concern on whether there is a binding right to universal reproductive health care and whether state funding should be prioritised to achieve this right.

In contrast to the previous stream of research, the fifth thematic area of research on infertility and involuntary childlessness in developing regions of the world, including Sub-Saharan Africa argues for the widening of access to reproductive health care including ARTs for involuntary childless patients. Key writers within this stream of research are Ombelet and Cooke<sup>55</sup> argue that while preventive treatment is vital in tackling infertility problem in Africa, this should not detract from the right of infertile patients to access the highest attainable reproductive health care, including Assisted Reproductive Technologies (ARTs). Providing

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<sup>53</sup> White RG., Zaba B., Boerma T., Blacker J., Modelling the dramatic decline of primary infertility in Sub-Saharan Africa in Boerma T. and Mgalla Z., (Eds.) *Women and infertility in Sub-Saharan Africa: a multi-disciplinary perspective* (Amsterdam, Netherlands, Royal Tropical Institute, KIT Publishers, 2001). Pp 117-148.

<sup>54</sup> Bertozzi S., Padian NS., Wegbreit J., DeMaria LS., Feldman B., Gayle H., Gold J., Grant R., Isbell MT., HIV/AIDS Prevention and Treatment in Jamison DT., Breman JG., Measham AR., Alleyne M., Claeson DB., Evans DB., Prabhat J., Mills A., Musgrove P., (eds.) *Disease Control Priorities in Developing Countries* (Washington DC: World Bank, 2<sup>nd</sup> edition 2006) Chapter 18.

<sup>55</sup> Ombelet W., Cooke I., Dyer S., Serour G and Devroey P., *Infertility and the provision of infertility medical services in developing countries.* (2008) 14 *Human Reproduction Update* 14: pp 605-621.

the highest attainable reproductive health is enshrined in soft law international instruments such as Programme of Action of the International Conference on Population and Development (ICPD)<sup>56</sup> and the Beijing Platform and Declaration for Action<sup>57</sup>. Proponents within this stream of research advocate that the socio-cultural significance of infertility within these countries and its deleterious consequences on involuntary childless people makes it imperative for infertile people to have wider access to different forms of fertility treatment, including ARTs.<sup>58</sup>

International Health Organisations such as the World Health Organisation (WHO) and the European Society for Human Reproduction and Embryology (ESHRE) have lent their support to this school of thought. In a major research study sponsored by the World Health Organisation (WHO) on current practices and controversies in assisted reproduction, recognition was given to the fact that infertility is a disease and should be treated as a public health issue of global concern.<sup>59</sup> As a follow up from this crucial WHO conference, some international fertility specialists are currently working on a plan of action that would explore the safety and efficacy of introducing low cost or affordable ARTs in Africa and other developing regions of the world<sup>60</sup> Again, their arguments for the need for low cost ARTs is premised on the growing awareness of the scale of the problem of infertility in Africa and the socio-cultural challenges that this reproductive health disease poses for infertile African women. What appears to be lacking in this effort is the deliberate and meaningful engagement between law and the medical field to determine whether there is a binding right to provide reproductive health care to the infertile in the form of fertility treatment. It appears that the clinicians who are currently undertaking ground breaking research in this area are

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<sup>56</sup> Adopted in Cairo, Egypt, September 1994.

<sup>57</sup> Adopted at the Fourth World Conference on Women, Beijing, China, September 1995.

<sup>58</sup> Hamberger L., Janson P., 'Global Importance of Infertility and its Treatment: Role of Fertility Technologies' (1997) 58(1) International Journal of Gynecology & Obstetrics p 149.

<sup>59</sup> Vayena E., et al. eds., Current practices and controversies in assisted reproduction. Geneva, World Health Organization, 2002.

<sup>60</sup> Pilcher H., IVF in Africa: Fertility on a shoestring, (2006) 442 Nature 975; Ombelet W., The Walking Egg Project: Universal access to infertility care – from dream to reality (2013) 5(2) Facts Views Vis Obgyn. 2013; 161–175; Ombelet W., Global access to infertility care: The Walking Egg Project (2014) Facts Views Vis Obgyn pp 1-3.

unclear on this point as to whether there exists a hard law regime that provides for a binding right to access to ARTs.<sup>61</sup> This thesis therefore seeks to address and provide insight on this point from a legal perspective.

This is not to say that there has not been earlier work undertaken on the legal status of ARTs in regions of the world such as Sub-Saharan Africa. Key among these works is that of Yusuff<sup>62</sup> who discusses whether there is a right to reproduce in Sub-Saharan Africa. In conjunction with this query, Yusuff also considers the availability of reasonable access to infertility treatment. However, in his discussions, he appears to ignore the current developments undertaking in the field of public health to make access to ARTs more affordable. This thesis will therefore contribute to the discussions on this point particularly with regard to the argument that ARTs should not be provided on a wider basis to the involuntary childless, due to the fact that it entails expensive curative treatment.

The sixth major strand of research on involuntary childlessness and infertility in Africa focuses on the regulatory framework for fertility treatment in Sub-Saharan Africa. In his recent 2015 work, Yusuff<sup>63</sup> again provides further perspective on why the social issues of infertility in this sub-continent makes the regulation of assisted reproductive technologies (ARTs) imperative especially from an ethical point of view. Some of the key concerns in his work relate to donor gametes and their legal status which extend beyond the focus of this thesis. It is also important to refer to the previous doctoral research work in this area undertaken by TBE Ogiamen which considered the legal implications of providing artificial

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<sup>61</sup> Ombelet, 2013 (note 60) at p 163.

<sup>62</sup> Yusuff A., 'Legal Enhancement of Reasonable Access to Infertility Treatment in Nigeria' (2007) 17(1) *Lesotho Law Journal* p 157; Yusuff A., *Infertility Treatment and the Conceptual Dilemma of Involuntary Childlessness: Is there a right to reproduce?* (2008/9) 1 *Journal of Public Law and Jurisprudence* p 65.

<sup>63</sup> Yusuff A., *Assisted Reproductive Technology in Irehobhude IO., Nwabueze RN., (eds.) Comparative Health Law and Policy: Critical Perspective on Nigerian and Global Health Law* (Farnham, Ashgate, 2015) pp 237-266 and Yusuff A. *Legal Justification for Statutory Control of Access to IVF Services: A Pragmatic Perspective* (2013) 2(1) *Humberside Journal of Social Sciences* pp 32-43.



conception in socially conservative regions of the world as Sub-Saharan Africa.<sup>64</sup> While these studies are important in the sense that they provide interesting discourse on the regulation of ARTs in Sub-Saharan Africa, they do not primarily focus on the issue of whether law and regulation can be utilised to develop a rights regime to confront the negative feminisation of infertility and involuntary childlessness, especially through the widening of access to ARTs. This latter concern is a key area of focus for this thesis and it is hoped that it will make an important contribution to the question as to the regulatory role that law can play in combating the malaise of social stigmatisation of involuntary childlessness in Sub-Saharan Africa as well as facilitating further positive rights to reproductive health care for involuntary childless people within the region.

The seventh strand of research approaches infertility and childlessness from a disability rights perspective. The social construction of infertility and its impact as a disability concern is well established in industrialised parts of the world such as the United States of America. From the literature review, this appears not to be the case in developing regions of the world such as Sub-Saharan Africa, where the construction of infertility as a disability concern is still at its fledgling stage. However, scholars like Irhorn and Bhardwaj<sup>65</sup> have provided useful insights to the debilitating and disabling effect that the social stigmatisation of infertility has on involuntary childless people in regions of the world where social worth is quantified through reproductive capability. They have canvassed that the social construction of infertility, with its associated stigmatising effect on women within developing regions such as Africa and Asia, should be treated and recognised as a disability rights issue.<sup>66</sup> While the disability question is beyond the scope of this thesis, this strand of literature also has some value towards building the case that infertility is not just a private tragedy but one that has deleterious gendered social consequences which to some extent socially disables

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<sup>64</sup> Ogiamen T., 'The Legal aspects and implications of artificial conception in Nigeria' (1989) Ph.D Thesis Essex, pp 40-458.

<sup>65</sup> Irhorn M., Bhardwaj A., *Reproductively Disabled Lives: Infertility, Stigma, and Suffering in Egypt and India*. In Ignstad B., Reynolds S., (eds) *Disability in Local and Global Worlds*, (Berkeley: University of California Press, 2007) 78-106.

<sup>66</sup> *Ibid.*

involuntary childless people and makes them feel inferior to others.<sup>67</sup> There is therefore some basis for arguing from a social justice and human rights perspective for greater reproductive rights for involuntary childless women within the region and especially the right to access affordable ARTs that will enable them to procreate if they so desire. This point will be further explored in chapters six and seven of this thesis.

The final strand of research which is also critical to the research on involuntary childlessness undertaken in this thesis is situated in feminist and gender equality literature. This strand of research includes inter-disciplinary works in the social sciences, humanities and in law. These works focus on the reproductive identity of women and the role that reproductive choice and autonomy can play in gender empowerment and in facilitating greater reproductive rights for women. This thesis engages in chapter three with African feminist works developed within this field especially from the African Motherist perspective as postulated by African feminists as Acholonu.<sup>68</sup> This school of African feminism does not see the quest of motherhood as necessarily detracting from other feminist concerns such as gender equality and women's welfare. Yet it is questionable whether works such as Acholonu that present Motherism as an alternative to Western feminism fully appreciate the impact that the veneration of motherhood has on groups of African women who want to reproduce but are unable to do so due to infertility or involuntary childlessness. As Awua<sup>69</sup> in his critical appraisal of 'woman to woman violence' points out, the exploitation of women is not necessarily confined to acts of male domination but could also arise in the interactions that women have with themselves. No place is this more profound than in family structures where there is an inability to conceive. Awua argues that in such situations the social stigmatisation suffered by involuntary childless women is in many cases instigated by her

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<sup>67</sup> Sifris R., *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (Abington:Routledge, 2014) at 5(a)(i) (online resource).

<sup>68</sup> Acholonu C., *Motherism: An Afrocentric Alternative to Feminism* (Abuja: Afa Publications, 1995).

<sup>69</sup> Awua BI., *Woman to woman violence: A survey of women characters in Mariama Ba's So Long a Letter and Flora Nwapa's Efuru* in Okoli FC., Okoye IK., Okeke V., Ojukwu UG., (eds) *Gender Studies: A Reader* (Nsukka, Great AP Express Publishers Ltd: 2012 ) p 139 at p 143.

fertile counterpart.<sup>70</sup> This fertile counterpart in a polygamous setting could be a second wife or in other structures, the 'mother in law' or 'sister in law.' This thesis develops further on this theme in chapters three and four by arguing that the risk of the social stigmatisation of infertility and involuntary childlessness is further heightened by the Motherist strand of African feminist discourse that defines motherhood as being central to a woman's identity.

The feminist thematic research on reproductive rights particularly research undertaken within the legal discipline, further considers the role that key international human rights instruments such as CEDAW can play in dealing with female issues such as involuntary childlessness. Key among these works is the seminal ground breaking research undertaken by Anne Hellum<sup>71</sup> which explores the weaknesses of treaties such as CEDAW in fostering gender empowerment and female development in post-colonial states in Africa. This literature review discusses Hellum's work quite extensively since it is highly relevant to this thesis' inquiry.

It is important to note that Hellum's work is premised on the grounded theory which applies inductive methods to analyse empirical data on the experience of childless women in a case study African jurisdiction- Zimbabwe. Through this inductive process, Hellum identifies through her field work in Zimbabwe, that childless women and men adopt 'multiple points of identification'<sup>72</sup> in navigating their relationships in pluralist African societies. In assuming these identities, the childless individual may utilise a number of options which may involve recourse to modern methods of infertility management or those rooted in African traditions. Hellum argues that Women's rights instruments particularly those at the international level fail to understand the complex system of norms that govern the lives of women in pluralist

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<sup>70</sup> Ibid.

<sup>71</sup> Hellum, A., Gender and Legal Change in Zimbabwe: Childless Women and Divorce from a Socio-Cultural and Historical Perspective, in Adelman S., and A. Paliwala (eds.), Law and Crisis in the Third World, (London: Hans Zell Publishers. 1993); Hellum A., Stewart, J., A Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe (Zimbabwe: Mond Books, 1999). See also Boerma J., Mgall Z., Women and Infertility in Sub-Saharan Africa: A Multi-Disciplinary Perspective (London, Royal Tropical Institute Press, 2001) 300 pp.

<sup>72</sup> Ibid at p 232.

societies like Africa. This may be put down to the fact that international rights instruments are generally steeped in Western modernisation approach which sets out to hierarchize Western received law above the other rules and values that regulate a pluralist African society. This point will be further taken up in the development of this thesis particularly with regard to how law can be utilised to social stigmatisation of infertility and involuntary childlessness that arises out of socio-cultural norms and values of traditional African societies. It is important to note that Hellum's empirical study on infertility management in Zimbabwe precedes the enactment of the Maputo Protocol to the African Charter on Human and Peoples' Rights of Women in Africa.<sup>73</sup> However, this thesis takes cognisance of further works by Hellum<sup>74</sup> and other writers<sup>75</sup> on the role of the Maputo Protocol which do not necessarily focus on involuntary childlessness, but are still useful sources of information in explaining the development of women's rights in Africa. However, unlike these works, this thesis in its consideration of the Maputo Protocol will focus on the question on whether there are apparent failures in the Maputo Protocol in tackling gendered consequences of infertility and involuntary childlessness in Sub-Saharan Africa. This point will be further taken up in chapter four of this thesis.

Other interesting findings in Hellum's research include the role that class and religion play in infertility management options. However, in discussing the role that class and religion play, Hellum appears to have restricted her discussion on religion to Christian perspectives and indigenous African beliefs on infertility. Understandably, this may be because her field study was confined in to a jurisdiction where Christianity constitutes the majority religion constituting 70% of the population while Islam is a minority religion constituting 2% of the population. Due to the fact that this thesis focuses primarily on Nigeria as its site of

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<sup>73</sup> Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005.

<sup>74</sup> Hellum A., Sinding Aasen H., (eds) *Women's Human Rights*. (Cambridge, Cambridge University Press: 2013) 698 pp; Hellum A., *Human Rights, Plural Legalities, and Gendered Realities: Paths are Made by Walking* (Harare: Weaver Press: 2007) 472 pp.

<sup>75</sup> Derman B, Hellum A, Sandvik (eds) *Worlds of Human Rights: The Ambiguities of Rights Claiming in Africa* (Leiden, Netherlands, Brill: 2013) 352 pp.

investigation; it will focus not only on the role that Christianity and traditional African beliefs play in infertility management but also on the role that Islamic law plays in the legal regulation of family structures in Africa.

Finally, while Helleum's work is deeply rooted in the application of the grounded theory in establishing an empirical analysis on women's rights in Sub-Saharan Africa, this thesis has not found it necessary to undertake any fieldwork investigation or to gather empirical data through interviews and participant interviews to frame its analysis. This is partly due to the fact that unlike the period when this key work of Helleum was undertaken, there are current field studies on infertility and involuntary childlessness in Africa especially for example in Nigeria which is the site of this investigation.<sup>76</sup> Based on the availability of already published data, this thesis, as highlighted in its methodology section, is premised on desktop expository research. In framing its analysis, it has relied on the existing body of literature that provides empirical evidence on the social stigmatisation of infertility and involuntary childlessness which is a primary concern of this thesis.

One of the findings that emerges from this literature review is that since Helleum's ground breaking research, there has been limited research work undertaken within African legal feminism on involuntary childlessness in Sub-Saharan Africa. Further, there appears to be no major work that has been undertaken, on grounds of women's welfare and equality, that advocates for the development of a rights regime that confronts the negative feminisation of infertility in the region, and which provides involuntary childless women with greater reproductive health care that enables them to reproduce if they so desire. This thesis therefore seeks to address these issues and by so doing, it is hoped that it will provide further contributions to the existing legal literature and also from a policy perspective enhance the status and welfare of involuntary childless women within the region.

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<sup>76</sup> See Hollos for example (note 43) above; Sule J., Erigbali P., Eruom L., Prevalence of Infertility in Women in a South Western African Community (2008) 11 African Journal of Biomedical Research pp 225 – 227; Araoye M., Epidemiology of Infertility: Social Problems of Infertile Couples (2003) 22(2) West African Journal of Medicine pp 190-6.

In seeking to contribute to the body of literature in this subject, this thesis will consider whether the challenge of social stigmatisation of infertility and involuntary childlessness can best be addressed through the law facilitating wider access to ARTs. It will also evaluate whether the underlining causes of social stigmatisation can best be resolved through an anti-discriminatory legal framework premised on the tenets of human dignity and respect that protects the inherent worth of involuntary childless women within this continent.

### **1.5 Outline and Structure of the Thesis**

This thesis has eight chapters. The first chapter provides the introduction and framework of the study through a description of the problem domain and the aims and objectives of the research. It also discusses the methodological approaches employed in the research and reviews the existing literature dealing with the domain area of the thesis.

The second chapter explores public attitudes towards infertility and involuntary childlessness and how this contributes to the social stigmatisation of involuntary childlessness. Adopting a socio-legal approach, it explores how public attitudes to infertility and childlessness are shaped and demonstrated in the culture, language and religion of African communities. It seeks to understand the meaning and consequences of involuntary childlessness. It explores how public attitudes towards women revolve round the notion that they are to be socially valued by their procreative contributions to family and society. It explains further that the social meaning of involuntary childlessness in Sub-Saharan Africa encompasses a notion that women, regardless of whether they are diagnosed as medically infertile will always be depicted as the 'public face of involuntary childlessness.' This has been described in the literature as the 'feminisation of infertility'<sup>77</sup> and has contributed enormously to the gendered social stigmatisation of involuntary childlessness.

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<sup>77</sup> Odinga A., I am not Tassa, He is not a Man like other Men: Feminising Infertility and Masculinising Fertility in South Nyanza in Tamele S (eds) African sexualities: A reader (Pambazuka Press, Oxford: UK 2011) p 463.

The third chapter further develops on the social meaning of infertility and involuntary childlessness highlighted in chapters two. It queries why African concepts of feminism have failed to tackle the negative feminisation of infertility. In particular, it considers why key regional instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)<sup>78</sup> fail to fundamentally address the social stigmatisation associated with the negative feminisation of infertility. It concludes by arguing for the reinforcement of the reproductive status and identity of involuntary childless women in African feminism.

The fourth chapter continues with the socio-legal discussion of the reproductive identity of involuntary childless women. This chapter not only informs itself from a socio-legal perspective, it also adopts a legal pluralistic approach to explain how motherhood is conceived within the legal framework of a case study African state. It also explores how traditional African attitudes on the procreative value of motherhood as embodied in indigenous customary law can impact on the self-worth of involuntary childless women in the region.

Having explored the social meaning of involuntarily childlessness and the deleterious effects on women in the Sub-Saharan African region in chapters two to four; the fifth chapter moves on to explore the case for child adoption. This is because child adoption is constantly touted as the primary way of resolving the needs of involuntary childless people in overpopulated regions of the world such as Sub-Saharan Africa. This chapter addresses the demographical concerns of over-population within the African region and the child rights justice argument that requires the infertile and involuntary childless to bear the social burden of providing parentless children with a home and family. Again, deploying a legal pluralistic methodological approach, the chapter highlights the limitations of the child adoption argument in tackling the social stigmatisation of infertility and its discriminatory impact on involuntary childless women in the region. In line with the underlining hypothesis, this

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<sup>78</sup> Adopted by the Assembly of the African Union in Maputo, Mozambique on July 11, 2003.

chapter advocates for a multipronged approach to infertility management which includes not only child adoption, but wider access to assisted reproductive technologies (ARTs).

Building on the discussions in chapter five, the sixth chapter considers other infertility management options apart from child adoption. Specifically it consider the current international public health initiatives to widen access to assisted reproductive technologies (ARTs) in Sub-Saharan Africa It highlights how these international initiatives have evolved out of the social science discourse of the tragedy of infertility and its social impact on involuntary childless women in Sub-Saharan Africa and other developing countries. It considers whether there is a right to universal access to ARTs. It also highlights some of the unintended consequences that may arise from these well intentioned initiatives and sets the basis for the discussion in chapter seven on the role of law and regulation in tackling these concerns.

Following from chapter six, the seventh chapter specifically discusses the role of law in safeguarding the reproductive health care rights of involuntary childless women in Sub-Saharan Africa. The chapter also evaluates the equally vital regulatory role that the law can play in combating the social stigmatisation surrounding infertility and involuntary childlessness highlighted in chapter two of the thesis. The discussion in this chapter is undertaken from the perspective on how law can serve as a tool for social change and empowerment. The recommendations and conclusions of this thesis study are presented in chapter eight of thesis.

## **1.6 Motivation for the Thesis**

In concluding this introductory chapter, I would like to provide a personal note on my motivation for this thesis. My career as a practising lawyer and currently as a legal academic has primarily been situated in the field of commercial law. However, my interest in the research domain of this thesis developed as a result of my personal experience, as an African woman, of infertility and involuntary childlessness. I have also had the privilege of community engagement with other involuntary childless African women both in Africa and in



the African Diaspora in the United Kingdom. This engagement has come about through my continuing role as an ordained minister in one of Africa's largest churches.<sup>79</sup> In this role, I have observed (and also participated) in prayer sessions for the gift of biological children. I have discovered from my own personal experience that a prayer petition for biological children is not only a cry for the fulfilment of a procreative desire, but it also an anguished cry for help to be delivered from the social recrimination and stigmatisation that surrounds infertility and involuntary childlessness, in African communal life, where women engage and interact. This of course is not a new phenomenon, nor is it restricted to Africa alone. The body of literature shows that this stigmatisation of infertility and childlessness is present in other regions of the world such as Asia and the Middle East.<sup>80</sup>

This social recrimination and stigmatisation of infertility and involuntary childlessness in these pro-natal societies has created what some have described as 'the tragic figure of a desperate infertile woman isolated in her tragedy.'<sup>81</sup> This tragedy of infertility is so aptly described in the Biblical narrative of Elizabeth, an elderly priestess who testified that her giving birth to a biological child in her old age had removed her reproach (or social shame) "from among people."<sup>82</sup> One key feature of the discourse on the tragedy of infertility in a jurisdiction like Sub-Saharan Africa is how infertile people handle involuntary childlessness and the stigmatisation surrounding it. The narrative set out in the literature suggests that they embark on desperate quest for treatment to achieve the desired goal of biological parenthood.

This is why this thesis argues that one of the key ways in which actual or perceived social stigmatisation of involuntarily childless women can be best addressed is through the widening of access to affordable assisted reproductive technologies (ARTs) to involuntary

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<sup>79</sup> The Redeemed Christian Church of God, see discussions on the size and influence of this denomination in works such as Adogame A., *Towards a Christian Disney Land? Negotiating Space and Identity in the New African Religious Diaspora* in Kane A., and Leedy TH., (eds) *African Migrations: Patterns and Perspectives* (Indiana University Press, 2013) 173.

<sup>80</sup> See for example Van Balen (note 37 above) and Inhorn (note 65 above).

<sup>81</sup> Throsby K., *Negotiating 'normality' when IVF fails* in Bamberg M., Andrews M., (eds) in *Considering Counter Narrative: Narrating, Resisting and Making Sense* (New York, John Benjamin, 2004) at p 64.

<sup>82</sup> The Gospel according to Saint Luke Chapter 1 verse 25 (The New King James version).

childless women in developing regions such as Sub-Saharan Africa. The development of this hypothesis was predicated on the work undertaken by the World Health Organisation (WHO) and the ESHRE special task force 'Developing Countries and Infertility.'<sup>83</sup> The work of these organisations seeks to positively tackle the stigmatisation of infertility and involuntary childlessness in the developing world by providing wider access to infertility treatment that would hopefully enable infertile couples achieve biological parenthood.

Yet this thesis goes beyond the initial hypothesis on whether widening access to reproductive treatment is the best way of tackling the social stigmatisation of infertility and involuntary childlessness in Sub-Saharan Africa. My personal experience with involuntary childlessness suggests that while this may be a key way of addressing the concern, the tragedy of infertility in Sub-Saharan Africa is more complex than perceived.

As my research progressed, I began to query what role the law could play in tackling the malaise of the social stigmatisation of infertility? In this sense, my hypothesis became more defined in that it queries whether there is a justice case for seeking wider access to ARTs? Yet, in another sense as I embarked on the research for this thesis, the justice case became broader since it is impossible to consider providing access to ARTs without also considering the underlining cause of the stigmatisation of infertility within this jurisdiction. This is because if the justice case is limited only to widening access to ARTs, then it may amount to providing a placebo without a definitive cure as it would not address the key justice concern on why an infertile or involuntary childless woman should be treated by her community as a 'tragic figure' deserving of recrimination and reproach.

In summary, the personal motivation for writing this thesis is to consider how law can help to develop a rights regime that will not only provide wider access to assisted reproduction but that would also enhance the status and identity of involuntary childless women in sub-

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<sup>83</sup> Ombelet W., Van Balen F., Expert meeting on Social Aspects of Accessible Infertility Care in Developing Countries organised by Social Study group of the European Society of Human Reproduction and Embryology (ESHRE) Special Task Force on developing countries and infertility, Genk, Belgium, December 11-12, 2009. F, V & V, *ObGyn* 2010, Monograph pp 66-72.

Saharan Africa. The greatest joy for me would be the day when an involuntary childless woman is not considered by society as a tragic figure of reproach, but as fortunate and empowered woman deserving of the same rights and respect as those who are fertile. It is hoped that this thesis would significantly contribute to the current research on involuntary childlessness in developing regions of the world such as Sub-Saharan Africa. The thesis also embodies elements of social activism in that it is also written in the expectation that it may be used in future by policy makers to shape a rights regime that tackles the stigmatisation of infertility and its discriminatory impact on involuntary childless women in Sub-Saharan Africa.

## Chapter Two

### Public Attitudes and the Negative Feminisation of Infertility and Involuntary Childlessness in Sub-Saharan Africa

#### 2.1 Introduction

Infertility and involuntary childlessness are normally treated as personal reproductive matters in regions such as Europe and North America. In these regions, the management of infertility and involuntary childlessness was handled within the “quasi private realms of medicine, reproductive choice and the market.”<sup>1</sup> The debate has however arisen on whether infertility should be considered within the public realm due to the growing use of assisted reproductive technologies (ARTs). The ongoing deliberations on the role that ARTs play in infertility management has moved this condition from one that can be considered as a personal reproductive concern to one that deserves more public scrutiny.<sup>2</sup> Yet it would appear that the nature of the public societal debate on infertility and involuntary childlessness in the West is predominantly concerned with the ethics of ARTs, stem cell research, the number of embryos to be used and so on. The converse seems to be the case when it comes to Sub-Saharan Africa. In this region of the world, the public debate on infertility and involuntary childlessness appears to focus more on the societal worth of infertile people.<sup>3</sup>

Why is this so? Does this have anything to do with the theory that public opinion within this region is fundamentally shaped by traditional socio-cultural beliefs and values?<sup>4</sup> If this is the case, what are the traditional values that govern and shape public attitudes to infertility? The

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<sup>1</sup> Inhorn M., Van Balen F., *Infertility around the globe: new thinking on childlessness*, Gender and Reproductive Technologies (California, University of California Press: 2002) p 67.

<sup>2</sup> Bickerstaff L., *Technology and Infertility: Assisted Reproduction and Modern Society* (New York: The Rosen Publishing Group, 2009) p 6.

<sup>3</sup> Daar AS., Merali Z., *Infertility and social suffering: the case of ART in developing countries*. In: Vayena E., Rowe PJ., Griffin PD., (eds.) *Current Practices and Controversies in Assisted Reproduction*. Geneva, Switzerland: World Health Organization; 2002; Van Balen F., Bos HMW., *The social and cultural consequences of being childless in poor resource areas*. (2009) 1 *Facts View Vis Obstet Gynaecol* 106–121.

<sup>4</sup> Bratton M., et al *Public Opinion, Democracy and Market Reform in Africa* (Cambridge, Cambridge University Press, 2005).

question also arises if there is one singular set of values that defines public attitudes to infertility and involuntary childlessness? These questions will be further considered in this chapter.

There are several reasons why it is important at the early stage of this thesis to consider the public attitudes surrounding infertility and involuntary childlessness in Sub-Saharan Africa, which is the investigation site for this thesis. First, the existing literature points to the fact that public attitudes to infertility have contributed to the prevailing social stigmatisation of infertility and involuntary childlessness within this region. This evidence is provided by the social science disciplines as well as the public health disciplines.<sup>5</sup> If this is the case, it becomes necessary to scrutinise at this early stage of the thesis how public attitudes contribute to the stigmatisation of a condition that would ordinarily be considered in other regions of the world as a private reproductive tragedy. This early consideration of public attitudes in this thesis sets the context for further discussions in this thesis especially chapter four which focuses on the construction of motherhood and the role it plays in defining the identity and status of adult womanhood.

Second, public opinion is normally considered as central to law making and the justice system. If this is the case, it is critical that law policy makers have an understanding of public attitudes or opinion on a matter before embarking on any legislative programme or reforms.<sup>6</sup>

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<sup>5</sup> See for example Weinger S., 'Infertile' Cameroonian Women: Social Marginalization and Coping Strategies 2009 8(1) *Qualitative Social Work* pp 45-64; Fledderjohann JJ., 'Zero is not good for me: implications of infertility in Ghana' (2012) 27(5) *Human Reproduction* pp 1383-1390; Van Balen F., Bos HMW., 'The social and cultural consequences of being childless in poor resource areas.' (2009) 1 *Facts View Vis Obstet Gynaecol* pp 106–121; Dyer SJ., 'The value of children in African countries: insights from studies on infertility' (2007) 28 *J Psychosom Obstet Gynaecol* pp 69–77.

<sup>6</sup> Calvo E., 'The Responsive Legislature: Public Opinion and Law Making in a highly disciplined legislature' (2007) 37(2) *British Journal of Political Science* pp 263-280 but see opposing views from scholars such as Walter Lippman who argued that public opinion was too ill informed and too biased to be a guide for policies and laws that needed to be both effective and serve the public interest. Discussed in Bond J., Smith S., *The promise and performance of American democracy* (Cengage Learning, 2010) p 297. While accepting that not all public opinion should be taken into account in law making, Dicey's seminal lectures on the relation between law and public opinion in England during the Nineteenth Century, (Indianapolis Liberty Fund 2008) did acknowledge that there was role for "law making public opinion" that "told on the course of legislation." Further discussions available in Mannheim H., *Criminal Law and Penology* in Ginsberg M., *Law and Opinion in England in the 20<sup>th</sup> century* (University of California Press, 1959) p 264.

The necessity of having recourse to public opinion in the place of law making has been debated in the administration of justice. This debate is more pronounced in the criminal justice system where it has been argued that there should be some 'congruence between public opinion and criminal justice arrangements.'<sup>7</sup> Understanding the role that public opinion can play in law making, this chapter undertakes a socio-legal inquiry into public attitudes towards infertility and involuntary childlessness. This is done for the purpose of determining what role law and policy can play in tackling the social stigmatisation of infertility and involuntary childlessness in Sub-Saharan Africa. This will help to ensure the development of sociologically informed legislation that not only provides access to affordable ARTs but will also tackle the underlining issues surrounding the social stigmatisation of infertility and involuntary childlessness.

Although there has been extensive coverage in the literature<sup>8</sup> on the social meaning of infertility and involuntary childlessness in the Sub-Saharan African region and the social-cultural dynamisms that play a role in shaping public attitudes towards infertility within the region, there appears to be limited evidence or research that examines the influence at all that the law can play in shaping or reforming public attitudes towards involuntary childlessness in this sub-continent.<sup>9</sup> The primary work on this point remains the ground-breaking research undertaken by Hellum in the 1990s which considered inter alia the key

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<sup>7</sup> Wood J., Cannon J., *Public Opinion and Justice* (Willan Publishing, 2009) 37.

<sup>8</sup> See for example Okonofua F., Harris D., Odebiyi A., Kane T., Snow R., *The social meaning of infertility in Southwest Nigeria* (1997) 7 *Health Transition Review* 205-220.

<sup>9</sup> The key text which does point to some role of law in infertility management in Africa is Hellum A., *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Zimbabwe: Mond Books, 1999). Apart from this book, I could find very limited scholarly evidence on the question on how law can tackle the specific problem of social stigmatisation of infertility. The other book which is supposed to be of a multidisciplinary nature is Boerma J., Mgal Z., *Women and Infertility in Sub-Saharan Africa: A Multi-Disciplinary Perspective* (London, Royal Tropical Institute Press, 2001) 300 pp. However, it does not provide a complete legal treatise on how law can be used to bolster the rights of women or reduce gender specific stigmatisation. There are general works dealing with the law's role in combating discrimination against women. See for example Okome, Mojbol Olnk. "Domestic, Regional, and International Protection of Nigerian Women against Discrimination: Constraints and Possibilities." (2002) 6(3) *African Studies Quarterly* 6, no. 3: [online] URL: <http://web.africa.ufl.edu/asq/v6/v6i3a2.htm> (accessed January 25 2014); Aniekwu N., *The additional protocol to the African Charter on Human and People's Rights: indications of capacity for African municipal systems* (2009) *Law Democracy and Development* pp 22-35 and Johnson S., *Nigeria, its women and international law: beyond rhetoric* (2004) 4(2) *Human Rights Law Review* pp 229- 255.

constraints that a system of hierarchy of rights<sup>10</sup> particularly rooted in Western received law could face when trying to provide an equality regime for African women of multiple identities.<sup>11</sup> While Hellum does provide some discourse on the procreative beliefs that guide social attitudes to infertility, she does this strictly from the realm of social attitudes premised on indigenous beliefs. Where she discusses the role that religion plays in shaping such beliefs, she focuses again on traditional religious beliefs and Christian beliefs. This is understandable since the context of her research was focused on infertility management in Zimbabwe. This thesis while considering similar indigenous beliefs and the practice of Christian beliefs in another identified case study country- Nigeria, goes further to explore how public attitudes towards infertility is also shaped by Islamic beliefs. In exploring the role that cultural and religious beliefs play in the shaping of public attitudes towards infertility and involuntary childlessness, this thesis argues that crafters of laws must have a clear understanding of these rules if they are to achieve empowerment and equality for women.

The third and final reason for undertaking this socio-legal inquiry on public attitudes on infertility and involuntary childlessness is to investigate whether the current effort in the international public health sector to facilitate wider access to affordable assisted reproductive technologies (ARTs) in Sub-Saharan Africa is the appropriate remedy for tackling the social stigmatisation of infertility and involuntary childlessness within the region. In recent times, there has been an intensified effort to medicalise what would ordinarily be considered as a social construction of involuntary childlessness. Many in the medical field particularly at the international level have premised their efforts to widen access to ARTs on the key concern of minimising the gendered consequences of infertility. These proponents have intensely argued that the impact of the gendered consequences of infertility on women advances a strong social justice cause for widening access to ARTs in developing parts of the world, including Sub-Saharan Africa. It is therefore necessary to get a clearer understanding on the

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<sup>10</sup> Hellum, *Ibid* at p 413.

<sup>11</sup> *Ibid*, discussed in 10.3 from p 179.

magnitude of the gendered consequences that infertility may have on women and, how if at all, these consequences are influenced and triggered by public attitudes to childlessness.

In undertaking this socio-legal inquiry on public attitudes towards infertility and involuntary childlessness in Sub-Saharan Africa, this chapter will first consider the key dynamisms that shape public attitudes within this region. The key dynamisms to be considered are language and identity and the religious beliefs in African societies. This is followed by a consideration of the gender construction of infertility and involuntary childlessness within this region. This chapter will serve as the foundation for the subsequent discourse in chapters three and four that explore the meaning of motherhood in Sub-Saharan Africa, and the possible role that African legal feminism can play in combating the social stigmatisation of involuntary childless women in the Sub-Saharan African region. It will also form the basis for some of the recommendations in the concluding chapter of this thesis on the role that law can play in strengthening the reproductive rights of involuntary childless women in Sub-Saharan Africa.

## **2.2 The Construction of Public Attitudes in Sub-Saharan Africa**

This section of this chapter considers how public attitudes are shaped and formed in sub-Saharan Africa. It is pertinent to note that some works in the body of literature on public attitudes interchangeably use the phrase 'public opinion' in place of 'public attitudes'.<sup>12</sup> Other works treat 'public opinion' as embodying public attitudes, values and related behaviours.<sup>13</sup> This chapter will adopt the latter construction of public opinion as embodying public attitudes and values.

Before any further exploration is made on how public opinion is formed in Africa, cognisance must be taken of the formidable body of sociological and political science literature<sup>14</sup> on the

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<sup>12</sup> See for example Jelen T., *Public attitudes toward Church and State* (M.E Sharpe, 1995).

<sup>13</sup> Peters JD., 'Historical tensions in the concept of public opinion' in Glasser TL., Salmon CT., (eds) *Public Opinion and the Communication of Consent* (New York: Guilford Press:1995) 3 ; Allott AN., *The People as Law-Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England* (1977) 21(1) *Journal of African Law*, pp. 1- 23.

<sup>14</sup> See for example key works including the early works of, Mackinnon WA., *On the Rise, Progress and Present State of Public Opinion in Great Britain, and other Parts of The World* (London: Saunders



formation, shaping and the measurement of public opinion. It is however recognised that most of the scholarly literature on public opinion have 'germinated from Western culture'<sup>15</sup>. Although this chapter would undertake some level of theoretical engagement with the ideas set out in the Western literature on public opinion, it will focus more on indigenous African theoretical and philosophical concepts that shape public opinion within this region of the world. These concepts are the Ubuntu (communitarianism) or Omoluwabi as defined in Nigerian parlance which is the site of investigation for this thesis. It will also explore Peter Ekeh's<sup>16</sup> seminal work on the two publics in post-colonial Africa.

Identifying 'public attitudes' can be a difficult task and this issue has been the subject of extensive discussion. Much of this discussion can be found in political science and sociological literature. It has been said that the focus of political science literature on public opinion relates to the role that public opinion plays in democracy and governance<sup>17</sup> while the sociological literature focuses on public opinion as 'a product of social interaction and communication.'<sup>18</sup> This thesis first turns to the sociological literature before providing a brief outline of the political science literature on public opinion. In arguing that public opinion is a

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and Otley, London; 1928); Lippmann W., *Public Opinion: An Important work on the Theory of public Opinion in relation to Traditional Democratic Theory* (Minnesota MN: Filiquarian Publishing, 1922 reprinted 2007); Jean Jacques Rousseau who is described by some as the first theorist to extensively discuss public opinion in France. He saw public opinion along with mores as akin to a form of law "not engraved on marble or bronze, but in the hearts of citizens; which is the true constitution of the state, see Rousseau J., *The Social Contract* further discussed in Crocker L., (ed.) *The Social Contract and the Discourse on the Origin of Inequality* (New York, Washington Square Press, 1967) p 58; Habermas J., *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, 1989, MIT Press) obtained from Sheehan C, *James Madison and the Spirit of Republican Self- Government* (Cambridge, Cambridge University Press, 2009) at p 64; Zaller J., *The Nature and Origins of Mass Opinion* which considers the ways in which public opinion is formulated and expressed (Cambridge University Press, 1992); Burstein P., *The impact of public opinion on public policy: a review and an agenda* (2003) 56(1) *Political research quarterly* 29-40; Wilson F.G., *A theory of public opinion* (New Jersey :Transaction Publishers, 2013).

<sup>15</sup> Wilson F., *A Theory of Public Opinion* (Transaction Publishers, 2013) p 19.

<sup>16</sup> Ekeh P., *Colonialism and the two Publics in Africa: A Theoretical Statement* (1975) 17(1) *Comparative Studies in Society and History* pp 91-112.

<sup>17</sup> This is why V.O Key describes public opinion as the "opinions held by private persons which governments find it prudent to heed." See Key V.O., Jr *Public Opinion and American Democracy* (1961) Alfred Knopf.

<sup>18</sup> Davison W., *Public Opinion* in *Encyclopaedia Britannica* available from <http://www.britannica.com/EBchecked/topic/482436/public-opinion> accessed January 24 2014.

product of social interaction and communication, scholars like Lazarsfeld and Katz<sup>19</sup> developed the two step flow theory which is premised on the thinking that public opinion is first shaped by opinion leaders who are in turn influenced by the mass media. This raises very interesting considerations from an African perspective when trying to evaluate how public opinion affects women in their family structures and communities. First, it is important to define who the opinion leaders are who shape public opinion.

As Hellum's work extensively shows there are many social actors or third parties that Africans turn to when faced with challenges within their family structures. Key among the parties identified is the traditional healer. This is because as Hellum explains matters to do with health and wellbeing are seen as rewards for complying with the social beliefs of their community.<sup>20</sup> She points to Gelfand's work which explains that traditional healers are considered as:

'...mediators of the moral messages from the ancestral spirits, they are regarded as being of great importance in retaining the ethics and morals of the nation than the mother, the father and the grandparents of a child.'<sup>21</sup>

While it is true that the traditional healers serve as 'moral arbiters' for those who believe in animism and traditional beliefs, the fact cannot be ignored that many parts of Sub-Saharan Africa have been exposed to the influencing impact of two monolithic faiths of Christianity and Islam.<sup>22</sup> As the authoritative 2010 Pew Forum report on Islam and Christianity in Sub-Saharan Africa shows, a vast majority of the population in this sub-continent are religiously

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<sup>19</sup> Katz E., and Lazarsfeld PF., *Personal Influence: the Part Played by People in the Flow of Mass Communications*, 1955.

<sup>20</sup> See Hellum (note 9 above) at p 55.

<sup>21</sup> *Ibid.*

<sup>22</sup> Pew Forum, *Tolerance and Tension: Islam and Christianity in Sub-Saharan Africa* (Washington, Pew Forum on Religion and Public Life, 2010).

affiliated to these two monolithic faiths.<sup>23</sup> It is therefore argued that when it comes to shaping public attitudes on infertility particularly in religious conservative countries like Nigeria (the site of this thesis' investigation), religious clerics in these two faiths such as the priest and the pastor in the case of Christianity and the Imam in the case of Islam also serve as the key opinion makers that people will turn to in their personal and family matters.

The two step wave theory postulated by Lazarsfeld and Katz also points to the role that the mass media can play in influencing public opinion on a matter. The existing literature that discusses the stigmatisation of infertility and involuntary childlessness in Africa is not categorical on what role the formal mass media such as press have played in influencing public attitudes on these issues.<sup>24</sup> While there is still debate on the extent to which the press has contributed to the stigmatisation of infertility and involuntary childlessness in this region, there appears to be some evidence to show that the African film industry particularly the Nollywood (Nigerian) genre does focus considerable attention on the theme of infertility and involuntary childlessness. For example, in 1997, the incumbent executive director of the Nigerian National Film and Video Censors Board<sup>25</sup> placed infertility and childlessness at the top of the common themes that feature in the 'hundreds of films' he had viewed.

In several of these films, the public or social face of infertility or involuntary childlessness is the woman who is portrayed as a 'tragic social figure' who must take all measures to tackle her condition of 'barrenness' so she can find social acceptance among her community. The table beneath show some examples of Nollywood films that depict the woman as the face of

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<sup>23</sup> Ibid.

<sup>24</sup> However, findings from the expert study meeting of the ESHRE social study group did highlight the role that popular mass media such as radio jingles could play in minimising the social stigmatisation of infertility and involuntary childlessness. See Ombelet at p 67 (note 83) in chapter one of this thesis.

<sup>25</sup> Ademola J., 'Producers face challenges of new direction in film content', 1(3) (1997) *The Classifier* pp. 4, 8 cited in Hayes J., *Political Critique in Nigerian Video Films* (2006) 104(421) *African Affairs* p 511.

infertility, even in cases where there is male fertility as is seen in the case of Mother of George<sup>26</sup> in column 3 below.

**Table 1**

**Popular Nollywood Films on Involuntary Childlessness and Infertility<sup>27</sup>**

	<b>Film Genre</b>	<b>Title of Film</b>	<b>Year</b>
1	Nollywood	Blind Choice	2010
2	Nollywood	Soul after Soul	2013
3	Nollywood	Mother of George	2013. Premiered at the 2013 Sundance Film Festival and the Maryland Film Festival <sup>28</sup>
4	Nollywood	Barren Women	2013
5	Nollywood	Childless Widow	2014

Moving from the theories within sociological research on how public attitudes or opinion is shaped and formed, the discipline of political science also provides equally important theories on how public opinion is formed and shaped. They include the classical theory, democratic theory espoused by scholars such as Dahl, the political culture theory propounded in key works like the Civic Culture<sup>29</sup> by Almond and Verba and lastly,

<sup>26</sup> Anderson J., Family Problems with Delicate Solutions: ‘Mother of George’ A Film by Andrew Dosunmu New York Times, August 29, 2013 available at [http://www.nytimes.com/2013/09/01/movies/mother-of-george-a-film-by-andrew-dosunmu.html?\\_r=0](http://www.nytimes.com/2013/09/01/movies/mother-of-george-a-film-by-andrew-dosunmu.html?_r=0) (accessed May 17 2015).

<sup>27</sup> Some of the films referred to above are discussed in Amakwa B., The Problem of Infertility, the Human Life Review March 18, 2013 and from “Nollywood Forever Movie Reviews,” [www.nollywoodforever.com](http://www.nollywoodforever.com).

<sup>28</sup> Anderson (note 26 above).

<sup>29</sup> Almond G., Verba S., The Civic Culture: Political Attitudes in Five Western Democracies (Princeton University Press, 1963).

modernisation theory. The key political theory that this chapter will focus on with regard to public attitudes towards infertility and involuntary childlessness in post-colonial Africa is modernisation theory. Modernisation theory as propounded by Marx, Nietzsche, Lerner and Bell seeks to decentralise or minimise the role that culture and traditional beliefs should play in shaping public attitudes and the development of the political process<sup>30</sup>. Modernisation theorists argue that the growth of modernisation will cause the decline of culture and religious belief in shaping society.

The role of modernisation theory in shaping the law's response to public attitudes towards infertility in post-colonial Africa is an important issue for consideration. This is because as Hellum points out in her work, the development of international treaties such as CEDAW is largely premised on modernisation theory which views the 'underdevelopment and gender inequality' in developing regions of the world as largely attributable to traditional values and social structures.<sup>31</sup> The proponents of modernisation theory will therefore advocate that to reduce stigmatisation of infertility and involuntary childlessness, adherence to traditional values and beliefs should be deemphasized.

This poses some difficulties for pluralist societies in Sub-Saharan Africa. This is because as Hellum again points out, many post-colonial Africans do not live their lives solely through the framework of modernising influences of received Western culture. They also hold dearly to their traditional beliefs and customs. This is supported by empirical research conducted by Inglehart.<sup>32</sup> As a political cultural theorist, Inglehart conducted research to evaluate the impact of modernisation in different parts of the world. Case study examples drawn from different regions, including Sub-Saharan Africa, establish that culture and religion still plays a

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<sup>30</sup> Inglehart R., *Modernisation, Cultural Change and the Persistence of Traditional Values* American Sociological Review, 2000, Vol .65(1), pp.19-51.

<sup>31</sup> Hellum (note 9 above) at p 45.

<sup>32</sup> Inglehart (note 30 above) at pp 20-22 and 49.

dominant role in influencing social and political processes.<sup>33</sup> This does not necessarily imply that states in the developing world would necessarily ignore modernising influences such as economic development and other forces of development like the internet.<sup>34</sup> However, as Ekeh's<sup>35</sup> seminal work shows the pluralistic nature of many post-colonial African states does appear to make it completely impossible for modernisation to completely obliterate the role that traditional beliefs and cultures play in African societies especially their family structures.

The dual allegiance, so to speak, that Africans have towards modernising influences and their traditional cultural beliefs and values is an issue that is extensively addressed in Ekeh's<sup>36</sup> work on the two publics in post-colonial Africa. In his theoretical statement, he argues that despite urbanisation, formal education and the existence of a thriving middle-class, many African still pay strict allegiance to what he describes as the primordial public. He distinguishes this primordial public from the civic public. He describes the primordial public as a moral structure that consists of family (largely extended), kin and ethnic groupings.<sup>37</sup> On the other hand, Ekeh argues that the civic public is:

‘amoral and lacks the generalized moral imperatives operative in the private realm and in the primordial public.’<sup>38</sup>

The amoral nature of the civic public may explain why many post-colonial Africans view this ‘public’ with some suspicion and why they deem the ‘*primordial public*’ as having more of a legitimising and moral framework.<sup>39</sup> Ekeh considers that there is a divergent or conflicting relationship between these two publics as illustrated in figure 2 below.

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<sup>33</sup> Ibid at p 22 above.

<sup>34</sup> Inglehart R., Welzel C., *Modernization, Cultural Change and Democracy: The Human Development Sequence*, Cambridge University Press, 2005 p 280.

<sup>35</sup> Ekeh (note 16 above).

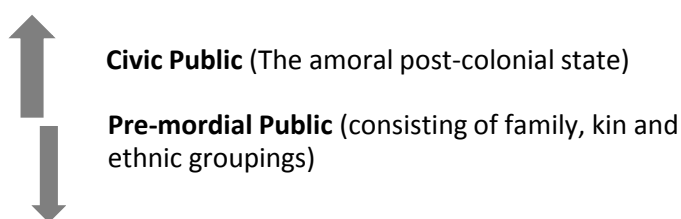
<sup>36</sup> Ibid.

<sup>37</sup> Ibid at p 92.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

**Figure 1: Ekeh's Theory of the Two Publics**



This is typical of the dialectical conflict between modernising influences and traditional rooted beliefs.<sup>40</sup> Ekeh's post-colonial Africa suggests that if there is a choice between which public should take priority, the primordial public will prevail. Yet, in shaping and formulating public attitudes, many within the school of modernisation theory would like to see the amoral civic public and its modernising structures play a greater role than the primordial public rooted in traditional beliefs and cultural values. This is a point that will be considered in subsequent chapters of this thesis particularly in chapter seven which discusses the role that law and regulation can play in tackling the social stigmatisation of infertility and involuntary childlessness. Yet, as we will see in this chapter, the primordial public rooted in African communitarianism still plays a fundamental role in post-colonial Africa particularly in the shaping of public attitudes towards social issues including the social stigmatisation of infertility and involuntary childlessness. This point shall be addressed in the next section of this chapter.

### **2.3 Shaping Public Attitudes by an African Social Ordering Rule: An Appraisal of the Omoluabi or Ubuntu Principle**

This section of this chapter explores further the notion of African communitarianism embodied in the Nigerian principle of Omoluabi (the way of human being) or the South

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<sup>40</sup> Geertz, C., (ed.) *Old Societies and New States: Quest for Modernity in Asia and Africa*. (New York: Free Press of Glencoe, 1963) and Warren, B., *Imperialism: Pioneer of Capitalism*. (London: Verso, 1980) cited and discussed in Hayden G Making Public Sector Management Work for Africa: Back to the Drawing-Board ADB Economic Research Working Paper No 80 (Tunis November 2005) pp 8-9.

African principle of Ubuntu. This is because these primordial communitarian concepts<sup>41</sup> can provide further insightful discourse on how public attitudes are formed and shaped, particularly as it applies to family structures in Africa. It is anticipated that these ontological concepts steeped in the African consciousness of group solidarity and communalism may be able to shed some light on why a private tragedy like infertility and involuntary childlessness has become an issue of the public realm and why it is socially stigmatised in many traditional African societies. Because Nigeria is the case study of this thesis, the term Omoluabi (the way of human being) will be used as an interchangeable term for the more popularly known South African term- Ubuntu.

The interchangeable use of Omoluabi with Ubuntu and vice-versa has academic support. This is because the Ubuntu principle is seen to apply continent wise even if different names are used to describe it. Ramose for example<sup>42</sup> argues that Ubuntu (or Omoluabi) is 'the wellspring flowing from African ontology and epistemology.' He sees the wide applicability of Ubuntu (or Omoluabi) in Africa. He further asserts that this philosophy extends beyond the 'Nubian desert to the Cape of Good Hope'<sup>43</sup> and from 'Senegal to Zanzibar.'<sup>44</sup> He points out that there is a 'philosophical affinity and kinship between the indigenous people of Africa'<sup>45</sup> that encourages the wide application of the Ubuntu (Omoluabi) principle in Africa.

Similarly, Chigara<sup>46</sup> confirms a continent wide application of the Ubuntu principle. He treats the Humwe principle as synonymous to the philosophy of Ubuntu. Humwe (like Ubuntu or Omoluabi) is the Shona word for 'in this together' or for 'us all.' He describes Ubuntu, Omoluabi or Humwe as an 'African social ordering principle' predates colonialism and other

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<sup>41</sup> Shutte, A., *Ubuntu: An Ethic for New South Africa*. (Pietermaritzburg: Cluster, 2001) 228 pp.

<sup>42</sup> See abstracts of Ramose's utilised In *Epistemology and the Tradition in Africa* in Coetzee PH., & Roux APJ., (Eds.), *African Philosophy Reader* (2nd ed.) London: Routledge p 270.

<sup>43</sup> *Ibid* at p 271

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*.

<sup>46</sup> Chigara B., *The Humwe Principle: A Social Ordering Grundnorm for Zimbabwe and Africa* in Home R., (ed.) *Essays in African Land Law* (Pretoria: Pretoria University Law Press, 2011) p 119.



forms of globalisation. Chigara is also of the view that the continent wide social ordering principle of Humwe, Ubuntu or Omoluabi should be utilised more regularly by African governments to order societal issues rather than a reliance on legal principles and rules that are far removed from African social realities. The role that Omoluabi, Ubuntu or Humwe can play as a social ordering rule to address the social stigmatisation of infertility and involuntary childlessness is an issue that this thesis will explore further in chapter seven when it considers how law can be utilised as social engineering tool to initiate change and reform.

In response to the question on whether Omoluabi, Ubuntu or Humwe can actually be characterised as a continent wide principle, Chigara provides a useful table<sup>47</sup> of the equivalent concepts of Ubuntu (Humwe) in a selection of African states. Using Chigara's research as a primary source, this thesis has developed figure 2 below setting out the regional variants of Ubuntu in Sub-Saharan Africa. One key commonality of all the regional variants is the focus that human beings exist for one another and that 'the promotion of individual welfare {is} through communal preservation of the inherent dignity of a community.'<sup>48</sup>

It is important to note that not everyone subscribes to the view that there is a continent wide application of the Omoluabi or Ubuntu principle. Vans Binsbergen who view Ubuntu from a Western perspective has questioned whether there is empirical evidence to show that 'the South African indigenous philosophy of Ubuntu' applies on a continent wide basis as asserted by its proponents.<sup>49</sup>

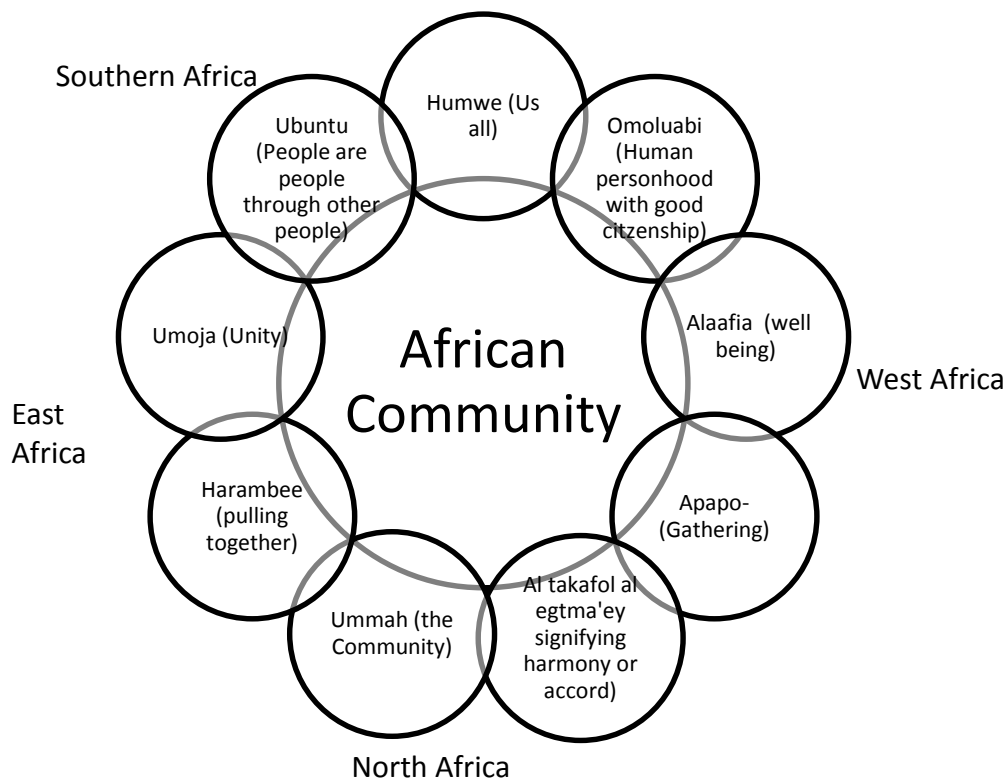
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<sup>47</sup> Ibid at p 118.

<sup>48</sup> Ibid.

<sup>49</sup> Van Binsbergen WMJ., *Intercultural Encounters: African and Anthropological Lessons Towards a Philosophy of Interculturality* (Munster: Lit Verlag 2003) Chapter 14.

**Figure 2: African Regional Variants of the Ubuntu Principle**



While Van Binsbergen is uncertain on whether there is credible evidence to suggest a continent wide application of Ubuntu, the proponents of Ubuntu such as Ramose and Bewaji insist that African communalism as conceptualised in Ubuntu applies continent wide.<sup>50</sup> The political system of African socialism as propounded by Senghor and Nyerere and Nkrumah's concept of Pan-Africanism are provided as cardinal examples of the social ordering principle of Ubuntu, Humwe and Omoluabi. However, other scholarship continues to question whether there is a continent wide ancient African social ordering rule like Ubuntu, Humwe and Omoluabi. For example Simiyu<sup>51</sup> who premises his scholarship on Western centric works

<sup>50</sup> Bewaji JAI., Ramose B., The Bewaji, Van Binsbergen and Ramose debate on Ubuntu (2003) 22 (4) South African Journal of Philosophy pp 378-414.

<sup>51</sup> Simiyu, V. G., The Democratic Myth in the African Traditional Societies, in Oyugi, WO., Gitonga, A., (eds), Democratic Theory and Practice in Africa, (Nairobi: Heinemann, 1987) chapter three.

such as Fortes and Evans- Pritchard<sup>52</sup> questions whether there is true 'African communalism or communitarianism.' His scepticism is premised on the fact the political realities on ground in many African countries does not show an adherence to an idealist Africanist social ordering principle that promotes communalism or a sense of humanness based on the notion of African fraternity.

Yet the recent case law development particularly in the Southern part of Sub-Saharan Africa places some emphasis on the role that an ancient 'African social ordering principle' such as Ubuntu, Humwe or Omoluabi can play in the development of the legal and constitutional framework of a modern African state. One such case law example is the landmark South African constitutional court case of S v. Makwanyane.<sup>53</sup> In this case the South African Constitutional Court deliberated on the competence and validity of the death penalty as set out in s.277 of the Criminal Procedure Act No. 51 of 1977. In invalidating the use of the death penalty as the competent sentence for murder, the Constitutional Court invoked the ontological concept of Ubuntu with its emphasis on the value of human life and dignity. It held that the use of the death penalty could be seen as 'inhumane punishment' which divested the convicted person of 'dignity and treats him or her as an object to be eliminated by the state.' This went tantamount to the principle of Ubuntu which deems human dignity and life as integral to human personhood. In this regard, while 'heinous crimes' such as murder were to be deemed as antithetical to Ubuntu in the same way, the death penalty was also antithetical to Ubuntu since it is cruel, inhuman and degrading.<sup>54</sup> The court further opined that a move away from the retributive objective of the death penalty was in line with the constitutional provision on National Unity and Reconciliation. This provision enjoined all South Africans to move from 'vengeance to appreciation... from retaliation to reparation and

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<sup>52</sup> See discussions of Simiyu's views in Kimmerle H., *Ubuntu and Communalism in African Philosophy and Art* in Van den Heuvel H., et al (eds) *Prophecies and Protests: Ubuntu in Global Management* (Amsterdam: Rozenberg Publishers, 2006) at p 84.

<sup>53</sup> S v. Makwanyane (CCT3/94) [1995] ZACC 3.

<sup>54</sup> *Ibid* at paragraph 225 and 226.

from victimisation to Ubuntu'.<sup>55</sup> The Court went on to affirm the constitutional enforceability of the principle of Ubuntu by stating that:

'The notion of Ubuntu expressly provided for in the epilogue of the Constitution, the underlying idea and its accompanying values are also expressed in the preamble. These values underlie, first and foremost, the whole idea of adopting a Bill of Fundamental Rights and Freedoms in a new legal order. They are central to the coherence of all the rights entrenched in Chapter 3 - where the right to life and the right to respect for and protection of human dignity are embodied in Sections 9 and 10 respectively.'<sup>56</sup>

It is important however to note that while the Constitutional Court upheld the centrality of the role that Ubuntu played in South African democratic and constitutional framework, it did not go as far as to allege that it was a continent wide principle. There are other judicial cases<sup>57</sup> within the South African legal framework where Ubuntu has been copiously applied. Yet it still remains unclear whether there is similar judicial recognition of this principle in other Sub-Saharan African jurisdictions. This does not necessarily imply the absence of the existence of a universal African principle of communalism and humanness, but rather that other African jurisdictions may not have witnessed the same degree of judicial activism in this area as the South African jurisdiction. That said, noted academic scholars<sup>58</sup> continue to maintain that there is a continent wide social ordering principle which goes by many names, including Ubuntu, Omoluabi, Humwe and Alaafia to mention a few.

Again, the Constitutional Court in the Makwanyane's case provides further judicial perspective on the true essence of Ubuntu as a social ordering principle. For instance, Mokgoro J explains Ubuntu as follows:

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<sup>55</sup> Ibid at paragraph 233.

<sup>56</sup> Ibid at paragraph 307.

<sup>57</sup> See for example *Mayelane v Ngwenyama* 2013 4 SA 415 (CC); *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>58</sup> See Shutte (note 41), Ramose (note 42), Chigara (note 46) and Bewaji, Ramose (note 50).

'Metaphorically, [ubuntu] expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities.'<sup>59</sup>

Langa J also further describes Ubuntu as:

'...a culture, which places some emphasis on communality and on the interdependence of the members of a community.'<sup>60</sup>

Madala J viewed

'Ideas of humaneness, social justice and fairness.'<sup>61</sup>

The idea that Ubuntu promotes group interdependence and communal solidarity that is central to the survival of African communities may explain why as Ekeh argues that Africans feel they owe more of a moral obligation to their primordial public than to an amoral civic public. This is why he goes on to argue that 'good citizens of the primordial public' will give to the primordial public and ask for nothing in return.<sup>62</sup> In referencing good citizenship with the obligation to the primordial public, Ekeh without categorically mentioning the concept of Ubuntu or Omoluabi confirms the essence of this social ordering principle that Africans wittingly or unwittingly subscribe to in their daily living.

Yet, some scholars particularly from the modernising school of thought will question the place of the primordial public in modern Sub-Saharan Africa and whether ideals such as Ubuntu, Humwe and Omoluabi should continue to hold sway or influence the attitudes and the way of life of modern Africans. This is because Ekeh's theory of the 'primordial public' was developed in 1975, a period in African history, where fledging democratic post-colonial states were just taking root. However, there is literature to show that the primordial public

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<sup>59</sup> Ibid at paragraph 309.

<sup>60</sup> Ibid at paragraph 224.

<sup>61</sup> Ibid at para 237.

<sup>62</sup> Ekeh (note 16 above) p 108.

continues to have relevance in modern African society.<sup>63</sup> What is however of current concern is whether like Ubuntu, it can be argued that there is one singular primordial public<sup>64</sup> that universally influences public attitudes and opinion on social matters in Africa. In other words, how many primordial publics exist and how many should one individual pay moral allegiance to? Ekeh's<sup>65</sup> work however suggests that the primordial public is a localised concept revolving around family, kinship and ethnic ties.

This appears to be a good position to adopt about the primordial public taking into cognisance the diversity of cultures and ethnic groupings in the African continent. The patrilineal and the matrilineal concepts of lineage are good examples that confirm that localised differences that African have towards approach to community issues.<sup>66</sup> This again may support a middle level approach to the debate on whether there exists a continent wide social ordering principle in the sense that while Africans may be guided by ideals such as group solidarity and commonality as symbolised by Ubuntu or the Omoluabi principle, there are local and regional variants and colourations of this principle that cannot be overlooked or dismissed.

Having debated extensively whether there exists a universal social ordering principle that shapes or govern public attitudes on a continent wide basis in Africa and having come to some conclusion that this principle does exist, but not without some localised or regional variants, the next question for consideration is how this social ordering principle which goes by various names such as Ubuntu, Omoluwabi and Humwe affects the perception of

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<sup>63</sup> Cornwell R., *The Collapse of the African State* in Cilliers J., Mason P., (eds) *Peace, Profit or Plunder? The Privatisation of Security in War Torn African Societies* (Johannesburg, Institute for Security Studies: 1999) chapter four.

<sup>64</sup> See for example Anders G., *Like Chameleons: Civil Servants and Corruption in Blundo G., Lemeur P.Y., (eds.) Governance of Daily Life in Africa: Ethnographic Explorations of Public and Collective Services* (Netherlands: Brill, 2009) at p 134. The author criticises Ekeh's primarily on the basis that he seems to be suggesting that there is one universal primordial public in Africa.

<sup>65</sup> Ekeh (note 16) at p 107.

<sup>66</sup> Oheneba- Sakyi Y., Takyi B., *African Families at the turn of the 21<sup>st</sup> century a* (Greenwood Publishing 2006).

Africans when it comes to infertility and involuntary childlessness in family structures. This point will be further explored in the next section of this chapter.

#### **2.4 Procreation and Child Bearing: An Existentialist Issue for African Communities**

It has been posited in scholarly literature that child bearing is considered as the primary purpose for contracting marriages in traditional Sub-Saharan African countries.<sup>67</sup> Some works go further to explain that since child bearing is so central to African family structures, unresolved childlessness can constitute a ground for divorce and remarriage.<sup>68</sup> Why is procreation so important to the African community? Does it have to do with the Ubuntu notion that individuals owe a moral obligation to contribute to the continuing existence of their community or primordial community? If this is the case, can an individual be considered to be a good citizen (Omoluabi) if he or she fails to provide procreative value to the existential survival of his or her community? Could this be the reason why the infertile or involuntary childless person is perceived as an unfortunate or tragic figure due to societal perceptions that all individuals owe a procreative obligation to their family structures and society at large? These are not easy questions to answer but they will be explored in this section of this chapter and also in chapter four of this thesis that deals with the socio-cultural construction of motherhood in a given African case study jurisdiction.

An exploration of the literature also shows that there is a link between the family structures in Africa and the concept of group solidarity or Ubuntu which sees persons as existing through other persons. There is strong support for the idea that African communalism or Ubuntu revolves around group interdependence and survival and that no individual lives for himself or herself and that all must contribute to the community's survival and continuing existence.

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<sup>67</sup> Tangwa GB., ART and African Sociocultural Practices; Worldview, Belief and Value Systems with Particular Reference to Francophone Africa in Vayena E., Current Practices and Controversies in Assisted Reproduction in the Report of a meeting on Medical, Ethical and Social Aspects of Assisted Reproduction. (Geneva, World Health Organisation, 2001) pp 17–21; Mbiti J., African Religions and Philosophies (Oxford, Heinemann, 1990) p 130.

<sup>68</sup> Araoye M., Epidemiology of Infertility: Social Problems of Infertile Couples (2003) 22(2) West African Journal of Medicine p 193.

As earlier stated, Ubuntu and its emphasis on group interdependence was given judicial recognition in S v Makwanyane earlier cited.<sup>69</sup> Group interdependence in many African countries begins with the family structure which cosmologically is said to consist not only of the current living but also of the unborn and the dead.<sup>70</sup> The principle is embodied in the customary land tenure systems of African countries such as Zimbabwe, Ghana and Nigeria where communal land is held not just for the living but also for the unborn and the dead.<sup>71</sup> If the unborn and the dead are considered to be as important as the living, it may explain why each individual is encouraged to add procreative value to the community. By reproducing, the individual is linking living family members to other unseen members of the family- the unborn and the dead. This is why in some African communities, such as the Yoruba ethnic group based in West Africa, children are highly valued because they are seen as being the reincarnation of venerated ancestors.<sup>72</sup>

Involuntary childless couples are therefore faced with a cosmological dilemma or tragedy when they are unable to reproduce. This is because they are unable to contribute to that vital link between the living, the unborn and the dead. In this sense, they may be considered as failing in providing the group interdependence expected in the social ordering principle of Ubuntu, Omoluabi or Humwe. In this regard, they may be considered as not good citizens of their community and this may explain some reason why they are socially stigmatised. This is because procreation is a group survival issue for the Ubuntu or primordial public and the involuntary childless in not being able to reproduce may be seen to threaten the existential nature of their primordial public or Ubuntu. This may explain why biological parenting is

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<sup>69</sup> See S v Makwanyane (note 53) at para 308.

<sup>70</sup> Cobbah J., African Values and the Human Rights Debate: An African perspective (1987) 9 Human Rights Quarterly p 309.

<sup>71</sup> Oshio P., The indigenous land tenure and nationalisation of land in Nigeria (1990) 10 Boston College Third World Journal at p 46; Gough K., Yankson P., Land markets in African cities: The Case of Peri-Urban Accra, Ghana (2000) 37(13) Urban Studies p 2490; Hansungule M., Who owns land in Zimbabwe? In Africa? (2000) 7 International Journal on Minority and Group Rights at pp 308-9.

<sup>72</sup> Zeitlin M., Megawangi R., Kramer E., Colletta ND., Babatunde ED., Garman D., (1995) Strengthening the family- Implications for international development (United Nations University Press: Tokyo) available at <http://www.unu.edu/unupress/unupbooks/uu13se/uu13se00.htm#Contents> (accessed March 6, 2009).



highly venerated in many African societies. This point will be further considered in chapters three and four of this thesis.

The procreative value that individuals are to contribute to group survival and the preservation of the community may explain why infertility and involuntary childlessness are not considered to be private tragedies but matters of 'public concern.' An output of this perceived threat to the existential continuity of the group may explain why the Ubuntu feels entitled or justified to express some public concern when one of its members is 'barren' 'fruitless' or 'childless'. The use of these words particularly 'barren' or 'fruitless' is to convey the displeasure of the Ubuntu that the involuntary childless have failed to provide or contribute their procreative quota to the community's continuing existence and survival. Procreation is therefore not seen as an individual or private decision but one that displays the communality and interdependence between members of the community.<sup>73</sup>

Ordinarily this interdependence and communality of the group should be positively welcomed and some consideration of this point will be further discussed in the concluding chapter of this thesis where further discussion will be made on the positive role that African community solidarity can play in the advancement of a gender empowerment and justice case for the provisioning of affordable technologies in the Sub-Saharan African continent. However, in this chapter that deals with public attitudes to infertility and involuntary childlessness, it is necessary to highlight the negative effects that the Ubuntu's intervention in private family matters can have on women.

This is because in the case of infertility and involuntary childlessness, the Ubuntu's or group intervention in procreative matters can often result in the censure, stigmatisation or an evocation of pity from the group towards its infertile and involuntary childless members. Sadly, in many cases, where there is group censure or stigmatisation on the inability to

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<sup>73</sup> See Langa's statement in S v Makwanyane (note 60 above) where Ubuntu, Humwe or Omoluwabi is seen as connoting group inter-dependence and communality.

reproduce, it is often against women. This has been described by works like Odinga as the 'feminisation of infertility'<sup>74</sup>. This thesis goes further to describe it as the 'negative feminisation of infertility.' This is because not all issues that are feminised are necessarily detrimental to women.<sup>75</sup> But in the case of the gendered stigmatisation of infertility and involuntary childlessness in Sub-Saharan Africa, the feminisation of this condition can be characterised as negative.

The negative feminisation of infertility can be seen in several facets of traditional African societies; for example in African socio-cultural linguistics and religious beliefs. These two underlying dynamisms of traditional African societies are explored in the next section particularly within the context of how they contribute to the shaping of public attitudes and opinions towards infertile and involuntary childless women.

## **2.5 The Language of Infertility and the Negative Feminisation of Infertility**

Socio-cultural linguistics has been described as:

'The broad interdisciplinary field concerned with the intersection of language, culture and society.'<sup>76</sup>

This recourse to the field of socio-cultural linguistics is undertaken as part of the socio-legal inquiry of this thesis to decipher if there is what has been described as a 'language of infertility'<sup>77</sup> that obtains in Sub-Saharan Africa. An exploration of the socio-cultural linguistics will also consider whether the language of infertility is predominantly directed at women or at men or both. This consideration of the language of infertility in Sub-Saharan Africa will help to test whether there is truly a negative feminisation of infertility in this region as hypothesised in this thesis and in the general corpus of literature on this subject area.

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<sup>74</sup> Odinga A., 'I am not Tassa, he is not a man like other men': feminising infertility and masculinising fertility in South Nyanza, 1945-1960 in Tamale S., (ed.) *African Sexualities: A Reader* (Oxford: Pambazuka Press, 2011) chapter 48.

<sup>75</sup> Strangleman T., *Work and Society: Sociological approaches, Themes and Approaches* (Routledge 2008) p 136.

<sup>76</sup> Llamas C., Watt D., *Language and Identities* (Edinburgh: Edinburgh University Press, 2010) p 18

<sup>77</sup> Diamond R., *Couple Therapy for Infertility* p 6.

As has been debated in language and identity literature, language plays a critical role in determining the social identity of people.<sup>78</sup> An exploration of the corpus of literature on the social stigmatisation of involuntary childlessness in Africa suggests that there is a socio-cultural language of infertility.<sup>79</sup> It also shows that the language of infertility is in most cases disparaging against women.<sup>80</sup> Linguistic narratives cutting across different African societies, establish that involuntarily childless women are socially portrayed in many dialects as having a lower social status<sup>81</sup> than their counterparts who are able to produce.

Before I consider any further the linguistic description of infertility in African languages, it is important to note that the negative symbolisation of infertility is not limited to the Sub-Saharan African region alone. In other regions of the world, 'the language of infertility' has been deployed to symbolise a state to be pitied, shunned or feared.<sup>82</sup> As such infertility has been defined in popular parlance as a state of being barren, unfruitful and fallow while fertility is positively defined as the highly prized state of being fruitful and productive.<sup>83</sup> It may however be argued that this is not necessarily the case today in parts of the world today such as the industrialised West where feminism has made great strides or where there are demographical concerns of overpopulation such as in the case of China.

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<sup>78</sup> See works such as Edwards J., *Language and Identity: An Introduction* (Cambridge University Press, Cambridge 2009) and Joseph J *Language and Identity: National, Ethnic, Religious* (Palgrave-Macmillan, Basingstoke, Hampshire, 2004) at p 13 which argues that language and identity are 'ultimately inseparable' and Barker C., Galasinski D., *Cultural Studies and Discourse Analysis: A Dialogue on Language and Identity* (Sage Publications, London, 2001).

<sup>79</sup> See for example, Pearce T., *She will not be listened to in public: Perceptions among the Yoruba of infertility and childlessness in women.* (1999) 7 (13) *Reprod Health Matter* pp 69–78; See the early text of Abraham RC., *Dictionary of Modern Yoruba* (London: University College Press, 1958) cited in Ember C., Ember M., *Encyclopaedia of Medical Anthropology: Health and Illness in the World Cultures.* (London: Springer, 2004) at p 1038 where infertile Yoruba women are described as Agon which literally means to despise or hold in contempt.

<sup>80</sup> *Ibid.*

<sup>81</sup> Olarinmoye A., *The image of women in Yoruba folktales* (2013) 3(4) *International Journal of Humanities and Social Science* p 138 at p144.

<sup>82</sup> Sifris R., *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (Abington: Routledge, 2014) at 5(a) (i) (online resource) pp 82-86.

<sup>83</sup> *Ibid.*

This however does not mean that fertility and its positive values are not affirmed in these countries.<sup>84</sup> Yet the cultural language of infertility which demeans women has also been deployed from time to time even industrialised nations. A recent example in the public realm was the misogynistic depiction of Julie Gillard (former Australian Prime Minister) as being 'deliberately barren' with her leadership credentials being called into question simply because she had no children.<sup>85</sup> This labelling of Gillard as 'deliberately barren' is a clear case of the gendered construction of involuntarily childlessness as it is highly debatable whether such deplorable language would have been utilised against childless male politicians.

Other high income OECD countries such as Japan also display some level of a negative linguistic depiction of involuntary childlessness. Again the disparaging language of infertility appears to be primarily targeted at childless women. Takeremu<sup>86</sup> argues that Japanese terminology such as 'Umazume' which is literally translated as the 'stone woman' as well as the Japanese phrase 'Kashite sannen konaki wa saru' which is translated as that 'a wife should leave her husband if she fails to bear a child within three years of marriage' also typifies the negative feminisation of infertility.

While there may be some empirical gap in the evidence to fully establish a global language of infertility, the foregoing does show that it is not only in Sub-Saharan Africa where one can point to a language of infertility which denigrates involuntary childless person and treats them as being of a lower social standing than fertile people. This clearly is a human rights concern and deserving of consideration under the current international anti-discrimination framework. This thesis seeks to draw attention on how the language of infertility can affect

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<sup>84</sup> The positive description of fertility and its connection with identity also explains to some extent the thriving fertility industry in North America and why many infertile couples in this region patronise the industry so they can be seen as fitting an American ideal, see Tyler May E., *Barren in the Promised Land: Childless Americans and the Pursuit of Happiness* (Cambridge MA: Harvard University Press, 1997).

<sup>85</sup> Kent J., *The Making of Julie Gillard* (Victoria, Penguin, 2010) p 281.

<sup>86</sup> Takeremu N "Women in the Language and Society of Japan: The Linguistic Roots of Bias (Mcfarland, North Carolina, 2010) p 101.

the status and standing of involuntary childless women in Sub-Saharan Africa and why legal and regulatory interventions are required. It is to this specific context that I now turn.

In many African languages and dialects, infertility and involuntary childlessness are generally characterised as conditions to be despised, scorned, pitied and shunned. Among the Yoruba ethnic group predominantly situated in Nigeria and other parts of West Africa, the term 'agon' which literally means 'to despise or hold in contempt'<sup>87</sup> is used to describe women unable to have children. Among the Igbo, another West African ethnic group, an involuntary childless woman is described as 'Mgbaliga, Nwanyi-iga' which literally can be translated as 'the sterile woman', 'the barren woman' or even in a more disparaging way as 'a sterile monster who has maternal organs for mere decoration'.<sup>88</sup> It is said that the deplorable characterisation of an involuntarily childless woman will lead her to consult a 'Dibia' (the native doctor) who in many instances will only be able to provide psychological relief.<sup>89</sup>

There is evidence to show that the disparaging language of infertility also applies beyond West Africa. In other parts of the Sub-Saharan African continent such as East and Southern Africa, the same negative language of involuntary childlessness also obtains. In the Zulu language prevalently used in South Africa, a married woman who is unable to have children is described as 'Inyumba' (barren or fruitless).<sup>90</sup> In East African countries such as Uganda, the Swahili word 'Mgumba' (the infertile one) is used to describe women who cannot have children.<sup>91</sup> The more humiliating terminology of 'Tassa' (infertile chicken) is used by the Luo indigenous groups in Tanzania and Uganda. This word is used to describe married women who cannot have children.<sup>92</sup>

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<sup>87</sup> See Ember and Ember (note 79) above.

<sup>88</sup> Okereke D., *Africa's Quiet Revolution: Observed from Nigeria* (Northampton: Paragon, 2012) p 294.

<sup>89</sup> Ibid.

<sup>90</sup> Buthelezi T., *Lexical reinforcement and maintenance of gender stereotypes in isiZulu* (2004) 11 (2) *Alternation* 396.

<sup>91</sup> Boerma JT., Mgalla Z., *Women and Infertility in Sub-Saharan Africa: A Multi- Disciplinary Perspective* (Royal Tropical Institute , 2001) p 190.

<sup>92</sup> See Odinga (note 74 above) where the Swahili origin of Tassa is noted and further explanation is provided on how this term has now replaced the Luo word for infertility "lur".

Even linguistic terminologies that are designed to be positive can unwittingly help to reinforce the same message as derogatory terms like Tassa. The Walking Egg Foundation<sup>93</sup> which aims to provide affordable ARTs to developing countries is an example where a linguistic term reinforces the pro-natalist cultural perception that a woman's primary purpose in life is to 'hatch eggs.' This may be due to a failure to understand the symbolic power of the language of infertility and the cultural forces that interpret it. Yet the Foundation claims that the 'Walking Egg' concept is to symbolise the relationship between science and art in explaining human identity and reproduction and that the term is meant to draw attention to infertility in developing regions such as Sub-Saharan Africa.<sup>94</sup> While not dismissing the beneficial gains that can be derived from providing affordable fertility treatment to childless couples in the African region which is the focus of this thesis; as stated above, the use of the 'Walking Egg' may only help to reinforce the socio-cultural notion that a woman's primary purpose is to procreate or 'hatch eggs' or produce the 'fruit of the womb' for her Ubuntu.

There is also the concern that Assisted Reproductive Technologies (ARTs) may not necessarily produce a live birth. It is therefore important that nothing is done to suggest that if involuntarily childless women who are provided with affordable ART treatment fail to do so that would mean that they are less socially valued than those who go on to 'hatch eggs'. This thesis therefore recommends that international bodies who seek to provide the developing world with affordable ARTS treatment should ensure that their programmes are developed in a culturally sensitive manner that would be beneficial to female patients from developing parts of the world such as Sub-Saharan Africa.

While the literature does highlight a negative feminisation of involuntary childlessness in the use of language in African culture, it would be wrong to create the impression that derogatory language is reserved only for involuntarily childless women. To do so will paint an incomplete picture of the socio-cultural linguistic narrative on involuntary childlessness. This

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<sup>93</sup> See the Walking Egg Foundation website available at <http://thewalkingegg.com/>

<sup>94</sup> Ibid see the history and philosophy of the Walking Egg.

is because involuntarily childless men are also socially stigmatised African languages. In a leading South African research study<sup>95</sup>, men who are involuntarily childless are described as 'tjoekee' (failure)<sup>96</sup> or 'incabi' (castrated cows).<sup>97</sup>

The degradation of male infertility in this manner has been given as one of the key reasons why male infertility is shrouded in many African societies. This is because masculinity is typically linked with fertility.<sup>98</sup> A man who is socially perceived as infertile will be viewed by his peers as 'impotent' or 'incabi' (a castrated cow). It has been argued that the characterisation of infertility as synonymous with loss of masculinity is why there is an active and concerted societal effort to mask male infertility and to treat infertility as strictly a female problem.<sup>99</sup>

It is reprehensible that this type of disparaging language is still socially permitted today, particularly in the context of the globalisation of rights where we see a growing trend to prohibit hateful and offensive speech that stigmatises people on the basis of their colour, race, gender, disability, religion, nationality or sexuality. It may be argued that the reason for this has to do with the fact that the prohibitions against hateful speech exist mainly at the national level and that international human rights regimes are not equally as comprehensive in targeting hateful speech outside the Article 20 (2) of the International Covenant on Civil, and Political Rights 1966 (ICCPR) restrictions<sup>100</sup> and those set out in the International Convention on the Elimination of all Forms of Racial Discrimination.<sup>101</sup> The General

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<sup>95</sup> Dyer SJ., Abrahams N., Mokoena NE., Van Der Spuy ZM., You are a man because you have children: Experiences, reproductive health knowledge and treatment-seeking behaviour among men suffering from couple infertility in South Africa (2004) 19(4) Human Reproduction pp 960-7.

<sup>96</sup> Ibid at p 964.

<sup>97</sup> Ibid. The demeaning and dehumanising linguistic depiction of male infertility is one factor why many men choose to mask their infertility in Africa.

<sup>98</sup> See also similar findings by Horbst V., Focusing on Male infertility in Mali: Kinship and impacts on biomedical practice in Bamako in Brockopp J., Eich T., (eds). Muslim Medical Ethics: Theory and practice, (South Carolina, South Carolina University Press, 2008) pp118-37.

<sup>99</sup> Horbst V., Male perspectives on infertility and assisted reproductive technologies (ARTs) in Sub-Saharan contexts (2010) F.V. & V in ObGyn at p 23.

<sup>100</sup> Article 20 prohibits "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

<sup>101</sup> Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19

Comment No. 34 on the ICCPR highlights that there are hate speeches of concern which are not covered under Article 20(2) and that contracting states are only required to provide legal prohibitions for the specific forms of speech set out in article 20 which focus narrowly only on ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.’<sup>102</sup>

Current trends in international law and politics however suggest that although there does not exist a comprehensive international legal regime that prohibits all hate speeches, other measures have been adopted at the international level to censure hateful speech or behaviour that discriminates against certain groups. For example, some Western countries have placed the protection of sexual minorities as an aspect of the conditionality for allocating aid to developing countries, particularly countries in Africa.<sup>103</sup> It is however not difficult to see why the decision to tie up aid with the protection of minorities has been viewed in many parts of Africa as neo-colonialism and paternalism.<sup>104</sup>

Further, there are legitimate queries on why these Western countries appear to be so focused on the rights of one set of minorities in Africa as opposed to others. Why for example have these countries not exhibited a similar resolve in safeguarding the rights of vulnerable involuntarily childless people in regions of the world where stigmatisation abounds because of their inability to reproduce? Are these groups of involuntarily childless people not also deserving of protection? Can involuntarily childless people not also be

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<sup>102</sup> See OHCHR Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred: Work in progress A study prepared for the regional expert meeting on article 20, organised by the Office of the High Commissioner for Human Rights, Vienna, February 8-9 2010.

<sup>103</sup> McVeigh, K., 2011 Gay rights must be criterion for US aid allocation, instructs Obama. *The Guardian*, 7 December 2011.

<sup>104</sup> Kratz A., Is Aid Conditionality an Answer to Antigay Legislation? An Analysis of British and American Foreign Aid Policies designed to Protect Sexual Minorities (2013) 7 *Vienna Journal of International Constitutional Law* p 14 available from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2183810](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2183810) (accessed February 1, 2014); Akanji O, Epprecht M., Nyeck S., Human Rights Challenges in Africa: Sexual Minority Rights and the African Charter on Human and Peoples Rights in Epprecht M., Nyeck SN., (eds.) *Sexual Diversity in Africa: Politics, Theory and Citizenship* (McGill Queens Press, 2013) at p 30.



classified as 'reproductive minorities' for the purpose of fostering a culture of anti-discrimination and respect for human dignity towards a socially stigmatised group?

The characterisation of involuntary childless people as 'reproductive minorities' is particularly apt for Africa where the literature<sup>105</sup> talks about the phenomenal paradox of 'barrenness amid plenty'.<sup>106</sup> Regrettably, it would appear that the politics of demographics and concerns to do with over-population in the African continent<sup>107</sup> have overshadowed the need for a human rights framework that protects the rights of minority groups of involuntary childless people who live in over-populated regions. Notwithstanding these demographical concerns, much more needs to be done to develop a rights framework that expressly safeguards and protects the human dignity of 'reproductive minorities.'

The narrative of the language of infertility has so far focused on disparaging words depicting infertility in African dialects and how these words could have a dehumanising effect on infertile people in the region and place them in lower standing than their fertile counterparts. But it is necessary to point out that there are other words that are used to identify or describe involuntary childless women that are not overtly abusive. Depending on the context, such words may be affectionately used to describe other groups of women who are not infertile or involuntary childless. However, these words when directed at involuntarily childless women can depict a state of inconspicuousness and pity. Pearce<sup>108</sup> discusses one such word in her work dealing with perceptions of infertility and childlessness among the Yorubas (a dominant ethnic group in West Africa). The word is 'lyawo' or 'young wife' is normally affectionately used in the extended African family to describe a woman who has just got married.<sup>109</sup> However, the word can also be derisively used to describe an older involuntary childless woman to buttress the point that she is of a lower social standing than married women who

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<sup>105</sup> Van Balen F., *Involuntary childlessness: a neglected problem in poor resource areas* (2008) 1 *Human Reproduction* pp 25-28.

<sup>106</sup> *Ibid* at p 25.

<sup>107</sup> *Ibid*.

<sup>108</sup> Pearce (note 79) above at p 74.

<sup>109</sup> *Ibid*.

have children.<sup>110</sup> The latter are warmly described as 'Iya ni wura' or 'mother is gold.'<sup>111</sup>The socio-cultural relevance of this distinction will be more extensively discussed in chapter four on the social relevance of motherhood in Africa.

As Pearce<sup>112</sup> further points out, no matter how long a woman has been married, she can be described as 'Iyawo' or a young wife whose views particularly on domestic matters should not be taken seriously in the family structure.<sup>113</sup> This subtle, but denigrating use of the language of infertility promotes a disenfranchisement of involuntary childless women which prevents them from equally participating in the family structure as their reproducing peers. This is why this thesis strongly canvasses for more to be done from an anti-discrimination perspective to address the socio-cultural language of infertility. Having examined the role that the language of infertility plays in shaping public attitudes of involuntary childlessness in the Sub-Saharan Africa continent, the following section considers the inter-connected role that religion plays in the formation of public opinion on this issue.

## **2.6 Religious perceptions of infertility and the Contribution to the Social Stigmatisation of Involuntary Childlessness**

Beyond linguistic characterisations, public attitudes towards infertility in Sub-Saharan Africa can also be discerned through African religious beliefs and practice. A caveat is however raised at the onset of the discussion of the religious characterisation of infertility. This is because there are different expressions of the religious faiths practised in Africa and it would be wrong to generalise or to attribute to any faith one singular religious characterisation of infertility.<sup>114</sup>

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<sup>110</sup> Ibid.

<sup>111</sup> Makinde T., *Motherhood as a Source of Empowerment of Women in Yoruba Culture* (2004) 13(2) *Nordic Journal of African Studies* p 164 at p 165.

<sup>112</sup> Pearce (note 79) above at p 74

<sup>113</sup> Ibid.

<sup>114</sup> See for example Gellar S., *Varieties of Religious Doctrines and Institutions in Africa and their Impact on Democratisation Process*, Paper presented at the International Conference on Religious Ideas and Institutions and Transition to Democracy in Africa, Los Angeles CA, May 18-19, 2007 which highlights the "heterogeneity and pluralism" of Africa's dominant religions namely Christianity, Islam and African traditional Religion.

It must also be emphasized that is not the intention of this thesis to present religious faith in Africa as singularly promoting the negative depiction of infertility especially since the literature shows that religious faith has played some role in reducing social stigmatisation associated with infertility.<sup>115</sup> For instance it has been demonstrated in the body of literature that churches in Africa have and continue to provide tremendous support to involuntarily childless couples.<sup>116</sup> Likewise in the case of the Islamic faith, Irhorn has argued that this faith offers its adherents with a:

‘potent ameliorating force, mitigating the social stigmatisation of infertility in a setting in which this affliction is viewed as quite threatening for all the reasons described.’<sup>117</sup>

Notwithstanding that faith plays a positive role in supporting infertile couples through the traumatic experience of infertility, it does not detract from the fact that there are negative depictions of infertility within the religious practices of African churches and mosques. For instance, some expressions of evangelical Christianity in Africa tend to treat infertility as a female problem when devising support programmes for infertility despite the fact that infertility is depicted as both a male and female problem in Judeo-Christian beliefs.<sup>118</sup> Examples of the feminisation of infertility can be found in many African churches where programmes on infertility are specifically designed ‘waiting mothers’<sup>119</sup> or ‘women seeking the fruit of the womb.’<sup>120</sup> While these terms may not be perceived as ostensibly disparaging or demeaning, they do inadvertently help to perpetuate the idea that infertility and involuntary childlessness are female problems.’

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<sup>115</sup> See Pearce (note 79 above) at pp 76-77.

<sup>116</sup> Ibid.

<sup>117</sup> Irhorn M., *Infertility and Patriarchy: The cultural policies of gender and family life* (University of Pennsylvania, Philadelphia, PA 1996) p 258

<sup>118</sup> See Deuteronomy 7 verse 14.

<sup>119</sup> A term used to describe involuntarily childless women who desperately want to experience motherhood. This term is not just confined to Africa. It is also used for involuntary childless women in other jurisdictions. Moravec M., *Motherhood online* (Cambridge scholars publishing) p 213

<sup>120</sup> Adewale O., *Predilection for African Indigenous Practices in the Pentecostal Tradition of African Indigenous Churches with reference to Christ Apostolic Church Agbala Itura* (2009 18 Cyberjournal for Pentecostal- Charismatic Research) <http://www.pctii.org/cyberj/cyberj18/adewale.html> .

The response to the criticism that the church has contributed to the feminisation of infertility may be explained on the basis that it is mostly women and not men that congregate to churches to solicit prayers regarding involuntary childlessness. This may explain why the church has focused its attention on involuntary childless women and provides support to help them through the traumatic experience of infertility and involuntarily childlessness.<sup>121</sup> But this begs the question on why the church is not doing more to confront the societal taboos that shroud male infertility? It can be argued that there is some place for the church with its considerable influence in many African countries to play an active role in confronting such taboos and in promoting greater openness about male infertility.

It is not only in some expressions of Christianity practised in Africa that infertility is treated as a feminine problem. Islam, Africa's other predominantly practised faith also appears to feminise infertility. Some have argued that this is connected to the high regard that Islam has on the woman's role in procreation. For example, a hadith states:

'Paradise lies at the feet of mothers.'<sup>122</sup>

If a woman is venerated for her role as a mother, it is inevitable that this may lead to gendered consequences for involuntary childless women. Some literature on the treatment of involuntarily childlessness in Muslim majority jurisdictions point to the fact that where the woman is considered to be responsible for the condition or state of involuntary childlessness in her marriage and for bringing 'bad luck or a curse to her family'<sup>123</sup> due to the inability to reproduce. So although it may be argued that Islam provides its adherents with religious convictions to help them through infertility,<sup>124</sup> it is also clear that that it does also have the potential in certain quarters in Sub-Saharan Africa and other regions of the world to foster

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<sup>121</sup> Fledderjohann JJ., Zero is not good for me: implications of infertility in Ghana (2012) Human Reproduction; Egede H., "Shrouded gender and reproductive issues in child welfare and protection proceedings" (2011) 23 Denning Law Journal 202; Nanyu Yebei V., Unmet needs, Beliefs and Treatment Seeking for Infertility among Migrant Ghanaian Women in the Netherlands (2000) 8(16) Reproductive Health Matters pp 134 at p 138.

<sup>122</sup> Cohen- Mor D., Arab women writers: An anthology of short stories (State University of New York Press, New York, 2005) p 13.

<sup>123</sup> Ibid.

<sup>124</sup> See Inhorn (note 117) above.

some measure of social stigmatisation against the childless, particularly the childless woman. In the predominantly Muslim region of Pemba in Tanzania for example, there is relevant literature that shows that a woman who fails to attain the venerated institution of motherhood is viewed as 'a woman who eats without producing fruit'.<sup>125</sup> Even when involuntary childlessness is as a result of male infertility, a woman may still face religious censure for being responsible for couple infertility.

While the focus in this section has been on the religious characterisation of infertility in Christianity and Islam (the two dominant faiths) in Africa, it is also pertinent to discuss the role that African traditional religion, which has been characterised by some as a minority religion, plays in the shaping of public attitudes to infertility and involuntary childlessness in the region.<sup>126</sup> Again, it is important to note that there is no singular religious characterisation of infertility in African traditional religion since it has been pointed out that these 'traditional religions are essentially local and adhered to by specific kinship based societies.'<sup>127</sup> Notwithstanding the localisation of traditional African religious practices, there are some common trends that have been disclosed in the literature which again demonstrate a feminisation of infertility in traditional African beliefs.

To begin with, the treatment seeking behaviour of involuntary childless people demonstrates some reliance on traditional African healing and indigenous medicine to tackle infertility.<sup>128</sup> Again, the literature points to the predominance of the use of traditional African healing among infertile women as compared to their male counterparts.<sup>129</sup> The reason for this is

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<sup>125</sup> Lock M., Kaufert P., *Pragmatic women and body politics* (Cambridge, Cambridge University Press: 1998) at pp 140-1.

<sup>126</sup> Pew Forum on Religion & Public Life / Islam and Christianity in Sub-Saharan Africa [http://www.pewforum.org/uploadedFiles/Topics/Belief\\_and\\_Practices/sub-saharan-africa-chapter-3.pdf](http://www.pewforum.org/uploadedFiles/Topics/Belief_and_Practices/sub-saharan-africa-chapter-3.pdf) .

<sup>127</sup> Gellar (note 114) at p 3.

<sup>128</sup> Obiesesan K., Adeyemo A., *Infertility and other fertility related issues in the practice of traditional healers and Christian religious healers in South Western Nigeria* (1998) 27(1-2) *African Journal Medical Science* pp 51-5.

<sup>129</sup> Rinne E., *Water and Healing- Experiences from the Traditional Healers in Ile- Ife* (2001) 10(1) *Nordic Journal of African Studies* pp 41-65; Koster- Oyekan W., *Infertility among Yoruba women:*

explained in Mbiti's<sup>130</sup> seminal work on African religions and philosophy earlier cited in this chapter.<sup>131</sup> He states that:

'The supreme purpose of marriage is to bear children to build a family, to extend life and to hand down the living torch of existence.'<sup>132</sup>

He further observes that:

'it is a very tragic thing when no children come out of a marriage. Then people do not consider it to be a marriage, and other arrangements are made to obtain children in the family.'<sup>133</sup>

In another work on traditional African beliefs,<sup>134</sup> involuntary childlessness has been described as a serious calamity due to the fact that in some African societies, childless people cannot become ancestors after death.<sup>135</sup> In societies where the veneration of ancestors is so fundamental this may have severe consequences on people who are unable to reproduce. This may explain why as Mbiti argues that 'other arrangements have to be made to obtain children for the family'.<sup>136</sup> These 'other arrangements' include polygamy, traditional surrogacy, traditional healing, divorce and re-marriage.<sup>137</sup> While these arrangements may benefit the family structure, it does come at a price for the involuntary childless woman who even when there is shrouded male infertility is still viewed in the African society as the 'public face of infertility.'

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Perceptions on Causes, Treatment and Consequences (1999) 3(1) African Journal of Reproductive Health pp 13-26.

<sup>130</sup> Mbeti (note 67) p 110.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Opoku K., West African Traditional Religion (F.E.P International, Accra, 1978) p 125 cited and discussed in Nyengele M., African Women's Theology, Gender Relations, and Family Systems Theory: Pastoral Theological Considerations and Guidelines for Care and Counselling (Peter Lang Publishing Inc., New York, NY, 2004) at p 222.

<sup>135</sup> Ibid.

<sup>136</sup> Mbeti (note 67) above.

<sup>137</sup> Tangwa (note 67) above.

If this gendered public face of infertility was sympathetically portrayed by the Ubuntu, then it would not matter. But unfortunately, women who are treated as the public face of infertility in the African communal society are portrayed in very uncomplimentary terms. Mbiti for example in his authoritative work extensively discussed in this chapter describe the childless wife as the:

‘dead end of human life, not only for genealogical level, but also for herself.’<sup>138</sup>

He goes further to state that:

‘the childless wife bears a scar which nothing can erase. She will suffer for this, her own relations will suffer for this; It is an irreparable humiliation for which there is no source of comfort in traditional life.’<sup>139</sup>

Mbiti’s disparaging description of the state of the involuntary childless woman should not be lightly dismissed. This is because he is considered as a leading figure in the field of African traditional religion and philosophies. It could be said that his work merely seeks to highlight a dominant misogynistic traditional African religious ideology and does not necessarily mean that he supports this viewpoint of infertility and involuntary childlessness. Notwithstanding the foregoing, it is important that this degrading depiction of the involuntary childless woman in Mbiti’s work must not remain unchallenged in contemporary Africa. This is particularly critical in light of medical evidence that establishes that several of the cases of involuntarily childlessness in Sub-Saharan Africa can be directly attributed to male infertility.<sup>140</sup> It is therefore untenable to describe an involuntary childless woman as the ‘dead end of life’<sup>141</sup> when there has been failure to reproduce. Such parochial notions must and should be confronted and discredited by educational, policy and legal mechanisms as they only help to

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<sup>138</sup> Mbiti (note 67) pp 107 to 108.

<sup>139</sup> Mbiti (note 67 above) chapter 11 at pp 107-8

<sup>140</sup> Parekattil S., Agarwal A., Male infertility: Contemporary Clinical Approaches, Andrology, ART (Springer, 2012) p 144.

<sup>141</sup> Mbiti (note 67) above at p 107.

perpetuate the gendered social stigmatisation of infertility and involuntary childlessness in Sub-Saharan Africa.

Another reason why these misogynistic traditional religious and philosophical views should be confronted and discredited is the self-harm factor which has in some instances been present in the treatment seeking behaviour of involuntary childless women. There is some evidence in the literature that shows that involuntary childless women will in some cases adopt desperate measures sometimes to the point of self-harm in order to satisfy societal demands of procreation.<sup>142</sup> This is why this thesis strongly advocates for a rights framework that sanctions the misogynistic social constructions of childless women which foster and perpetuate the notion that involuntary childless women have no societal worth or value to African societies until they procreate.

As this chapter nears the conclusion of its exploration of public attitudes towards infertility and involuntary childlessness in Sub-Saharan Africa, it must be stated that there are differing views on the level of social stigmatisation of infertility and involuntary childlessness that exists in the region. Some argue that, unlike what has been depicted in works such as Mbiti, there is no generalised hostility or stigmatisation against infertile people in the larger African society. They argue that in some cases the social stigmatisation is merely perceived, and not an actual reality.<sup>143</sup> This school of thought also maintains that where there is social stigmatisation of infertility, it is to be found among poorer or non-educated involuntary childless people. It is for this reason that education and economic empowerment are seen as vital keys in dealing with social stigmatisation.<sup>144</sup>

But this leads to the vital and critical question that has silently been waiting to be expressed up till this stage. The question is what is meant by social stigmatisation and how can we

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<sup>142</sup> Egede (note 121) above at pp 220-225.

<sup>143</sup> Donkor, E.S. and Sandall, J. (2007). The Impact of Perceived Stigma and Mediating Social Factors on Infertility-Related Stress among Women Seeking Infertility Treatment in Southern Ghana. (2007) 65(8) *Social Science and Medicine* pp 1683–1694.

<sup>144</sup> *Ibid* p 1692.



determine when people are actually stigmatised? It is necessary to consider this question before this chapter draws to a conclusion. This is because it will help to determine whether the negative public attitudes to infertility and involuntary childlessness that has been described so far in this thesis actually amount to a form of social stigmatisation.

To provide some further understanding on this critical issue, it is necessary to turn to the body of literature<sup>145</sup> that addresses social stigmatisation. Social stigma has been described as 'a sign or mark that designates the bearer as defective and therefore meriting less valued treatment than normal people.'<sup>146</sup> Other leading works like Crocker, Major and Steele<sup>147</sup> go further to characterise those who are stigmatised by society as being considered to 'possess some attribute and characteristic that conveys a social identity that is devalued in some social context.'<sup>148</sup>

From the appraisal of public attitudes to infertility and involuntary childlessness so far that has been undertaken in this chapter, it is clear that involuntary childless people especially women are considered by many traditional African communities to bear the marks or characteristics of 'barrenness', 'fruitlessness' and 'unproductivity' which are considered to be unacceptable within the social context that they live in. This is because procreation is seen as being vital to the survival and well-being of the primordial public or the Ubuntu in which they live in. It is little wonder that some like Mbiti most uncharitably describe the involuntary childless as being the 'dead end of human life.'<sup>149</sup> Further, empirical studies<sup>150</sup> conducted in the social sciences also establish a pattern of the social stigmatisation of the conditions of infertility and involuntary childlessness. It is therefore difficult to treat the social stigmatisation

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<sup>145</sup> See for example Heatherton TF., Klerck RF., Hebl MK., Hull JG., *The Social Psychology of Stigma* (New York: The Guildford Press 2003) 450 pp.

<sup>146</sup> Crocker, Major and Steele's work referred to in chapter 4 of Heatherton's book (ibid) at p 88.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Mbiti (note 67 above).

<sup>150</sup> Dyer S., *The value of children in African countries: insights from studies on infertility* (2007) 28 *J Psychosom Obstet Gynaecol* pp 69–77; Dyer SJ., Abrahams N., Hoffman M., Van der Spuy ZM., *Men leave me as I cannot have children: Women's experiences with involuntary childlessness*. (2002a) 17 *Hum Reprod* pp 1663–1668 and Hollos M., *Profiles of infertility in southern Nigeria: Women's voices from Amakiri*. (2003) 7 *Afr J Reprod Health* pp 46–56.

of the conditions of infertility and involuntary childlessness as mere figments of the imagination of involuntary people as some would argue.

Yet, this is not to say that African traditional societies do not attempt to provide some relief or remedy for the social tragedy of these conditions. These mechanisms include social parenting, fostering, adoption and traditional methods of surrogacy and male sperm donation. It is therefore important to further explore whether Mbiti's dire prognosis that there is 'no source of comfort in traditional life'<sup>151</sup> is valid in the light of the evidence that African societies do attempt to provide the involuntary childless with some traditional coping mechanisms and support.<sup>152</sup> The effectiveness of these mechanisms will however be further evaluated in chapters four and five of this thesis which deal with the socio-cultural construction of motherhood and the institution of child adoption in Sub-Saharan Africa respectively.

## **2.7 Conclusion**

This chapter has explored public attitudes<sup>153</sup> to infertility and involuntary childlessness in Sub-Saharan Africa by considering the key theoretical African concepts of the Ubuntu and the primordial public in the shaping of public opinion within the continent. The concept of Ubuntu and the primordial public highlight the role that group solidarity and communalism plays in traditional family structures in Africa. The chapter considered the dynamics of the socio-cultural linguistic narratives and religion in shaping the social response of African communities to infertility and involuntary childlessness.

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<sup>151</sup> Mbiti (note 67) above.

<sup>152</sup> Sundby J., *Infertility in the Gambia: Traditional and Modern Health Care* (1997) 31(1) *Patient Education and Counselling* p 29.

<sup>153</sup> The thesis accepts that public attitudes are always constantly evolving, see Crespi I., *The Public Opinion Process: How People Speak* (New York: Routledge, 1997) p xi. Accordingly, it does not necessarily imply that public attitudes regarding the negative feminisation of infertility as identified in the sources and literature reviewed in this chapter will not evolve or that it necessarily the only sole or dominant way of thinking by all groups in Sub-Saharan Africa.

This chapter concludes on a reflective note which could help to shape further thoughts in this thesis on the appropriate rights' framework that would help to combat the social stigmatisation of infertility and involuntary childlessness in the region. If the whole notion of the humaneness and fairness of African communalism is to be believed, then the African civic amoral state as the protector of family life as set out in Article 18(2) of the African Charter should be involved in the facilitation of a rights framework that will help to ameliorate the plight of childless women within the primordial public. To conclude that there is 'no source of comfort in traditional life' for the childless woman would make a mockery of the notion of Ubuntu and African communalism which is said to be premised on respect and human dignity.

## **Chapter Three**

### **The African Feminist Response to Social Stigmatisation of Infertility and Involuntary Childlessness**

#### **3.1 Introduction**

Chapter two depicted the negative feminisation of infertility in many parts of the Sub-Saharan African continent and explained the deleterious consequences that the gendered stigmatisation of infertility and involuntary childlessness has on women within this region. Developing on this theme, this chapter will consider the African feminist response to the negative feminisation of infertility to provide further focus on how women's issues are problematized and tackled within the local context in which they operate in.

The concern of the present chapter is to consider how feminism has responded to this gendered stigmatisation of feminism in Sub-Saharan Africa. In particular, this chapter is concerned with the position if any that African feminism has adopted on the negative feminisation of infertility and involuntary childlessness. The chapter begins by providing an overview of what African feminism is and also explores its different expressions especially Womanism and Motherism. This of course speaks to schools of thought rather than adopting a homogeneous position in respect of what will promote women's welfare. The chapter will first consider whether these trends of African feminism can actually be described as indigenous to Africa. It will further explore whether Womanism and Motherism as main schools of African feminism help to perpetuate the negative feminisation of infertility or if these schools foster and enhance the social identity of the involuntary childless in Sub-Saharan Africa. Recognising from the onset that the discussion on African feminism is not just situated within legal scholarship, this chapter utilises interdisciplinary literature to explore the role that African feminism can play in charting out a rights regime for the involuntarily childless women.

### 3.2 The Meaning of Feminism from an African Perspective

There have always been questions as to whether African women that seek to advance the welfare of women within their socio-cultural context should characterise themselves as 'feminists'. This is due to the fact that some sections of postcolonial Africa have warily viewed the concept of women's liberation as foreign, unAfrican, anti-family and anti-men.<sup>1</sup> Similarly, many leading African female voices have expressed reservations in identifying with feminist ideas which are perceived to be based on the experiences of western women and not those of African women.<sup>2</sup>

Concerns like these have generated the debate on whether feminism as a discipline exists in Africa or if the African movements or research that promote women's rights are derived from other ideological concepts or theories of female identity outside Western feminism.<sup>3</sup> Although this chapter shall in some sections refer to Western feminist perspectives,<sup>4</sup> its primary objective is to explore the role of African feminism in reconstructing the reproductive identity of an involuntarily childless woman in a way that reinforces her legal personhood in society. There are several schools of thoughts under African feminism. They include African Womanism, STIWANISM, Femalism, Negofeminism, Gynism and African Motherism. These theoretical perspectives have been touted as African alternatives to Western feminism and

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<sup>1</sup> Sunderland J., Language and gender in African Contexts, Proceedings of the BAAL Annual Conference, Newcastle University, 2009; Adichie N., We should all be feminists (London: Fourth Estate, 2006) 64 pp.

<sup>2</sup> Acholonu C., Motherism: the Afrocentric Alternative to Feminism (Afa Publications 1995). Feminist discussions of Acholonu's work can be found in Ekpa A., Beyond Gender Warfare and Western Ideologies in Emenyonu E., (ed.) Goatskin and Wisdom: New critical perspectives of African Literature (New Jersey: African World Press Inc. 2000) p 27.

<sup>3</sup> See generally literature such as Sotunsa M., Feminism: The Quest for an African Variant (2009) 3(1) Journal of Pan- African Studies p 227.

<sup>4</sup> Kingdom K., What is wrong with Rights? Problems for Feminist Politics of Law (Edinburgh University Press, 1991); Fineman M., Tomadsen N., At the Boundaries of Law, Feminism and Legal Theory (Routledge, 1991) ; Bridgeman J., Millns S., Feminist Perspectives on Law: Law Engagement with the female body (Sweet and Maxwell, 1998); Smart C., Feminism and the Power of Law (London: Routledge, 1989).

they are viewed as providing a clearer feminist picture of the African woman's identity and role in society.<sup>5</sup>

A brief summary of what these schools stand for is set out in table 2 below. However, the objective of this chapter is not to provide a descriptive narrative of these theories but rather to critically examine how African feminism views the social stigmatisation of infertility and involuntary childlessness perpetuated through the negative feminisation of infertility. It also considers whether African feminism can develop a rights' regime for involuntarily childless women. The two schools of African feminism that have been identified as relevant to this thesis' investigation are Womanism and Motherism.<sup>6</sup> However, it is important to provide a short summary of the schools of African feminism that have developed particularly in post-colonial Africa and table 2 provides this summary below.

**Table 2: Schools of African Feminism**

<b>Femalism</b>	Femalism focuses on the self-actualisation and self-reclamation' of African women. <sup>7</sup>
<b>Womanism</b>	The African variant of Womanism was developed by Okonjo- Ogunyemi <sup>8</sup> to enable African women engage in feminism in accordance with their cultural environment.
<b>Motherism</b>	There is also a debate on the origins of this theory. Early discussions on Motherism are seen in Western feminist literature in works such as Temma Kaplan. <sup>9</sup> However, Acholonu is viewed as the originator of its African variant.
<b>Stiwanism</b>	The acronym Stiwanism <sup>10</sup> is coined by Ogunjipe-Leslie and stands for social transformation in Africa, including women.
<b>Nego-Feminism</b>	Nnameka in her work conceives the theoretical concept of Negofeminism and focuses on complementarity and collaboration between genders.
<b>Gynism</b>	Gynism focuses on the 'equality of man and woman.' Like Negofeminism, equality is negotiated on the gender complimentarity of the two sexes. <sup>11</sup>

<sup>5</sup> Maduka C., Feminism, Womanism and Motherism in African Literary Discourse, European Conference on African Studies (ECAS 2009), Leipzig, 4-7 June 2009 available at [http://www.aegis-eu.org/archive/ecas2009/panels\\_round\\_tables/73.htm](http://www.aegis-eu.org/archive/ecas2009/panels_round_tables/73.htm) pp 2, 8 -10 (accessed September 11, 2015); Alkali M., Talif R., Wan Yahya W., Jariah Mohd J., Dwelling or Duelling in Possibilities: How (Ir)relevant are African Feminisms? (2013) 13(3) GEMA Online: Journal of Language Studies pp 237-238.

<sup>6</sup> Acholonu C., Motherism: The Afrocentric Alternative to Feminism. (1991) 3 Women in Environmental development Series, pp 209-225 discussed in Saunders B., Foblet M., Changing Genders in Intercultural Perspectives (Leuven: Leuven University Press, 2002 ) p 117.

<sup>7</sup> Nnameka O., The Politics of (M)Othering: Womanhood, Identity and Resistance in African Literature (London: Routledge,1997).

<sup>8</sup> Alkali M., et al (Note 5 above) at p 239.

<sup>9</sup> See for example, Kaplan T., Female Consciousness and Collective Action: The Barcelona Case, 1910-1918 (1981) Signs 3 pp. 545-66.

<sup>10</sup> Maduka (Note 5 above) at p 12.

<sup>11</sup> Maduka (Note 5) p 11.

### 3.2.1 The “indigenoussness” of African feminism

As table 2 above has shown, there is some debate on whether the feminist concepts of Womanism and Motherism can be said to have theoretically developed from indigenous African scholarship. Arguments have been put forward that these theories originated from African-American literature and not purely from African scholarship.<sup>12</sup>

Womanism in its theoretical development has been championed by African American feminists such as Alicia Walker.<sup>13</sup> She describes a womanist as:

‘A black feminist or feminist of color... A woman who loves other women, sexually and /or nonsexually. Appreciates and prefers women’s culture, women’s emotional flexibility (values tears as a natural counterbalance of laughter), and women’s strength. Sometimes loves individual men, sexually and/or non-sexually committed to survival and wholeness of entire people, male and female... Womanist is to Feminist as purple to lavender’<sup>14</sup>

For the most part, Womanism has been embraced by African feminist scholars as it is seen as providing an ‘African centred paradigm for women of African descent.’<sup>15</sup> Yet, some African scholars question whether Womanism as propounded by its African-American proponents can be said to be truly representative of the global black experience since a key concern of Womanism is focused on ‘the historical experiences of African-Americans in their quest for racial emancipation.’<sup>16</sup> Further, Walker’s definition that Womanism consists of women loving other women sexually is also seen as antithetical to traditional African

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<sup>12</sup> Saulnier C., *Feminist theories and social work: approaches and applications* (New York: Haworth Press, 1996) chapter 6.

<sup>13</sup> Walker A., *The Colour Purple* (New York: Harcourt Brace Jovanovich, 1983) 245pp.

<sup>14</sup> Walker A., *In Search of Our Mothers Garden* (New York: Harcourt Brace Jovanovich, 1983) xi.

<sup>15</sup> Hudson Weems C., *Nommo: Self-Naming and Self-Definition*, a revision of *"Self-Naming and Self-Definition: An Agenda for Survival"* in *Sisterhood, Feminisms and Power* (African World Press, 1998) chapter one (not numbered). Available at the author’s website at <http://web.missouri.edu/~hudsonweemsc/> (accessed September 11 2015).

<sup>16</sup> Okojo-Ogunyemi C., *Womanism: The Dynamics of the contemporary Black Female Novel in English* 1983 *Signs* 11(1)1. Autumn, pp 63 - 80.

values.<sup>17</sup> These concerns have led some scholars like Hudson-Weems to canvass for a redefinition of Womanism that reflects African cultural values and traditions.<sup>18</sup> Others like Okonjo-Ogunyemi, while accepting the fundamental differences between African Womanism and African-American Womanism, do not see the need to classify them differently since both variants of Womanism celebrate 'black roots, the ideals of black life while giving a balanced representation of black womanhood.'<sup>19</sup>

African Womanism itself raises an interesting discourse on whether it can be characterised as being representative of the experiences and identities of all African women. If African Womanism depicts black life and womanhood, what is its relevance to other racial groupings such as Asian East Africans, Caucasian South Africans and Arabic North Africans who can also rightly be described as being of African descent?<sup>20</sup> In this regard, African Womanism can be subject to the same criticism levelled against the universality of feminism as it ignores 'the possibility that women will bond politically across ethnic and racial boundaries.'<sup>21</sup>

In response to the concerns on whether African Womanism adequately encapsulates the needs of women in Africa, other ideological concepts such as Motherism have been presented as being more representative of the African female identity and its needs. Some exploration is required to determine if Motherism is an African indigenous feminist theory? As explained in table 2 above, the term Motherism appears not to have been coined in indigenous African scholarship. Some view Temma Kaplan<sup>22</sup>, a Western scholar as the early validator of the feminist movement of Motherism which she described 'as a form of women's collective action spurred on by the fact that they were mothers.'<sup>23</sup> She went further to argue

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<sup>17</sup> Sotunsa (note 3) above at pp 230-1.

<sup>18</sup> Hudson-Weems (note 15) above where she coined the concept of 'Africana Womanism' as an African centred paradigm for women of African descent.

<sup>19</sup> Okonjo- Ogunyemi (note 16) at p 72.

<sup>20</sup> Ogunjipe-Leslie M., *Recreating ourselves: African women and critical transformations* (Trenton, New Jersey: African World Publishing 1994) p 215 and more generally chapter 18.

<sup>21</sup> Hook B., *Feminist Theory: From Margin to Center* (London: Pluto Press, 2000, 2<sup>nd</sup> edition) p 3.

<sup>22</sup> See for example Gasas N *Women in South African History: They Remove Boulders and Cross River* (Cape Town: HSRC Press 2007) p 267.

<sup>23</sup> Gouws A., (Un) thinking Citizenship: Feminist Debates in Contemporary South Africa (UCT Press 2005) p 200.



that Motherism served as a form of consciousness where women could mobilise themselves when they felt there was a threat to their children or to the community. In this sense, Motherism as expressed by collective female mobilisation is practised not only within the African sub- continent, but in other regions of the world such as Latin America and Asia especially in periods of social unrest.

Notwithstanding the arguments on the indigenous nature of African feminism as demonstrated in the discourse on Womanism and Motherism, African scholars such as Acholonu asserts that this concept of feminism is an 'African alternative to feminism focused on the centrality of motherhood in the African female experience.'<sup>24</sup> Other arguments that have been presented on why Motherism and Womanism are considered as representative of African feminist values, is that unlike Western feminism, these schools of feminism are not particularly concerned with gender construction. Consequently these strands of African feminism refuse to accept the notion of a dominant patriarchy governing African traditional societies. Proponents of African feminism contend that neither of the two genders have dominant control over all the spheres of social life in an African society.<sup>25</sup> The reason for this is explained below.

'...Several African societies reflect systems with ranging degrees of dual-sex hierarchies in which men and women exist in parallel and complementary positions and roles within the society.'<sup>26</sup>

Beyond recognising gender complementarity, African Motherism also disassociates itself from Western notions of feminism in that it ardently defends the maternal role and function of women in society. It argues that a woman's maternal role should be seen as positive and not

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<sup>24</sup> Quoted in Sotunsa (note 3) above at p 231.

<sup>25</sup> Nzegwu N., Gender equality in a dual sex system: the case of Onitsha 2001 1(1) JENDA. A journal of Culture and African Women Studies (available online at <http://www.africaknowledgeproject.org/index.php/jenda/article/view/30>) last accessed March 19 2014.

<sup>26</sup> Maduka (note 5) at p 17.

restrictive.<sup>27</sup> Feminists in this school portray motherhood as a form of empowerment for African women.<sup>28</sup> They further argue that motherhood confers on women a level of dominance in African society due to its pre-eminence in African cosmology.<sup>29</sup>

Although this thesis does not necessarily disagree with the objectives of African feminism, which in its different variants seeks to disassociate itself from aspects of Western feminism considered as being inappropriate to the African social context, it questions whether African feminism especially Motherism can serve as a force for good in eradicating the social stigmatisation associated with involuntarily childlessness. This is because Motherism in its veneration of motherhood may unintentionally help to perpetuate the social stigmatisation associated with involuntarily childlessness. But conversely, Motherism in conjunction with Womanism, if deployed purposively, could aid the facilitation of a rights' regime for women particularly in the area of championing the wider availability of ARTs for involuntary childless women. However, before determining the role that these key strands of African feminism can play in developing a rights' regime for the involuntary childless women, it is necessary to further explore how the conditions of infertility and involuntary childlessness are viewed by African feminists. This issue will be further considered below.

### **3.3 Interdisciplinary African Feminist Discourses on Involuntarily Childlessness**

Much of the discourse on Motherism and other variants of African feminism is situated in the fields of humanities and social sciences. This chapter will therefore adopt an interdisciplinary approach to this discourse. This is because African feminism like its Western counterpart cannot be fully explored within the precincts of just one discipline but rather through 'different networks of interdisciplinary conversation.'<sup>30</sup> The theoretical development

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<sup>27</sup> Howe S., The Madres de la Plaza de Mayo: asserting motherhood: rejecting feminism?(2006) 7(3) *Journal of International Women's Studies* p 47.

<sup>28</sup> Makinde T., Motherhood as a Source of Empowerment of Women in Yoruba Culture (2004) 13(2) *Nordic Journal of African Studies* pp 166-167.

<sup>29</sup> Oyewunmi O., Abiyamo: Theorizing African motherhood 2003 4 *JENDA A journal of Culture and African Women Studies* (available online at <http://www.africaknowledgeproject.org/index.php/jenda/article/view/79> ) last accessed March 19 2014.

<sup>30</sup> Osha S., Introduction: African feminisms (2006) XX:5-9 *Quest: An African Journal of Philosophy* 5

of African feminism is situated in the humanities and the social sciences, particularly in African literary works and sociological anthropology.<sup>31</sup> This interdisciplinary discourse begins first with an exploration of the key feminist literary works, particularly the African novel. These works provide some perspective on how African feminism views the condition of infertility and involuntary childlessness. The deployment of literary works in understanding the social and cultural context of law is not new and has been utilised by leading legal academics like Manji.<sup>32</sup> This thesis will therefore explore the Motherist's attitude to the plight of the involuntary childlessness as set out in the African novel and other genres of African literary works.

### **3.3.1 The Involuntary Childless Discourse in African Feminist Literary Works**

Motherism is expressed in many African feminist literary works dealing with infertility and involuntary childlessness. This is because motherhood is viewed as being socially empowering in African feminism. The literary works therefore narrate the tragic circumstances of infertile and involuntary childless women who are unable to attain to this desired role of motherhood. It is said that there is a genre of infertility fiction in African feminist literature.<sup>33</sup> This raises a pertinent question on why infertility and involuntary childlessness resonates so much in African literature. Nwapa, a prominent African novelist explains it this way:

'African women writers have been accused of dwelling too much on barrenness.

They are told by their male critics to write on "more important" themes...the problem

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<sup>31</sup> Makhalisa B., *Baby Snatcher in the Underdog and other Stories* (Gweru:Mambo 1984); Nwapa F., *Efuru* (London, Heinemann 1970); Nwapa F., *One is Enough* (Trenton NJ: African World Press 1992); Okoye I., *Behind the Clouds* (Harlow: Longman, 1982); Vera Y., 'It is hard to live alone' In *Why don't you carve other animals* (Toronto: TSAR 1992).

<sup>32</sup> See for example Manji A., *Law, Literature and Labour in Sembene Ousmane's 'Les Bouts de Bois de Dieu'* (2005) 25(2) *Legal Studies* 320-336, Manji A., *Like a Mask Dancing': Law and Colonialism in Chinua Achebe's 'Arrow of God'* (2000) 27 *Journal of Law and Society* pp 626-642.

<sup>33</sup> Murphy L., *Metaphor and the slave trade in West African literature* (Athens, Ohio: Ohio University Press, 2012) see p149 and chapter five more generally. Murphy provides a list of this genre of infertility literature which include Nwapa's *Efuru* and Idu, Emecheta's *Joy of Motherhood*, Aidoo's *Anowa*, Okoye's *Behind the Cloud*, Makuchi's *the Healer* to mention a few.

that a woman faces in the world is the pain of not being able to bring forth a child from her womb... a wife is more often than not betrayed and abandoned by her husband if she does not have a child. Therefore the desire to be pregnant, to procreate is an overpowering one in the life of the woman. She is ready to do anything to have a child.<sup>34</sup>

This explanation provided by Nwapa shows that the African feminist fully appreciates public attitudes towards infertility and involuntary childlessness. It also provides a good summary on the gendered consequences of involuntary childlessness within Sub-Saharan Africa. Nwapa not only identifies the emotional tragedy of involuntary childlessness but also points to the social and economic disenfranchisement that a woman may experience in her family structure if she is unable to have children.<sup>35</sup>

Since the tragedy of infertility and involuntary childlessness is viewed as such an important theme for African feminist writers as stated above, it is necessary to explore how the African feminist responds to this tragedy in the genre of infertility fiction. One of the key concerns would be to identify the strands of African feminism that dominate the infertility fiction genre. In Emecheta's *Joy of Motherhood*<sup>36</sup> for example, the themes of Motherism and Womanism appear to be the key African feminist schools utilised to tackle the issue of infertility. At the early stage, Nno-Ego, the protagonist of the novel shares the view of her society that social empowerment is to be gained through the achievement of biological motherhood. She therefore embarks on a reproductive autonomous journey to achieve this status. When her first marriage fails to achieve her reproductive goal, she leaves her abusive husband and remarries. It is clear that love or sexual attraction is not the central objective for embarking

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<sup>34</sup> Nwapa F., 'Women and Creative Writing in Africa' in Nnaemeka O., (ed.) *Sisterhood, Feminisms and Power: From Africa to the Diaspora* (Trenton, NJ: Africa World Press, 1998) pp 89-100 discussed in Olaniyan T., & Quayson A., (ed.) *African Literature: An Anthology of Criticism and Theory* (Oxford: Blackwell Publishing, 2007) p 531 and referenced in Ode R., Tse PA., *Articulation of Women and Gender Issues in Drama and Theatre from Classical Greece to Post Independence Nigeria* (2013) 7(1) *Creative Artist: A Journal of Theatre and Media Studies* p 32 at p 49.

<sup>35</sup> See discussions on this in Okonofua F., Harris D., Odebiyi A., Kane T., Snow R., *The social meaning of infertility in Southwest Nigeria* (1997) 7 *Health Transition Review* p 205.

<sup>36</sup> Emecheta B., *The Joy of Motherhood* (Oxford: Heinemann, 1979).

on this marriage but rather a desire to have children. Two key reasons appear to motivate her desire to have children, first the sense of obligation she feels to her natal family, particularly her father. The second is based on a Motherist notion that motherhood is an empowering social status and that a woman is not complete if she remains childless.<sup>37</sup>

In this sense, it would appear that Emecheta in this novel fully supports and adopts a Motherist approach to the dilemma of involuntary childlessness. Through her protagonist, Emecheta appears to encourage childless women to take proactive steps to achieve the empowered status of motherhood.<sup>38</sup> Yet, at the end of the novel, there is the sense of bitter-sweet realisation that the attainment of biological motherhood does not necessarily provide the sense of social achievement that Emecheta's female protagonist so desperately craved for. While Nno-Egu is able to find some acceptability among her community through the realisation of her dream of having her own biological children, there is that appreciation that a woman's lot in life is more than biological motherhood.<sup>39</sup> In addressing this point, Emecheta adopts a Womanist approach which moves beyond treating motherhood as the centrality of an African's woman experience as expounded by Acholonu and other proponents of African Motherism. However, this does not mean that Emecheta completely discards a Motherist approach to infertility and involuntary childlessness. Instead, she adopts a realist approach to the tragedy of involuntary childlessness that portrays the harsh reality that many involuntary childless women would never be satisfied with a childless state, but will do all within their power to achieve biological motherhood.

This Motherist viewpoint is diametrically opposed to the position occupied by Western feminists who abhor the notion that womb power should be seen as a symbol of social empowerment for women as touted in the infertility genre of African feminist fiction.<sup>40</sup> The response to this criticism is that the African feminist does not live in vacuum. She

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<sup>37</sup> Ibid, see chapter 5 captioned 'a failed woman.'

<sup>38</sup> Emecheta (note 36) pp 31-36 (chapter 3), p 62 (chapter 5).

<sup>39</sup> Ibid, see chapter 18 on the Canonised Mother.

<sup>40</sup> For example, see Raymond J., *Women as wombs* (Melbourne: Spinifex Press, 1994).

understands the societal dynamics of the traditional African society where all must contribute procreative value in their family and community at large. Consequently, African feminism does not necessarily seek to reform African traditional views of womb power which it views as an empowering, potent and liberating force.<sup>41</sup> This superiority of womb power may explain why the genre of African feminist fiction presents a narrative where involuntarily childless women refuse to accept their state of involuntary childlessness, particularly when male infertility appears to be the cause.

This proactive decision of the female protagonist to take 'her life in her hands' and her refusal to accept that she is barren when there is shrouded male infertility or impotence is not only discussed in African feminist novels, it is also dramatized by male African writers. For example, Bekederemo, one of African leading playwrights in his play *Song of Goat*<sup>42</sup> depicts the tragedy of male reproductive problems such as impotence<sup>43</sup> and the impact this has on families. Ebiere, the female protagonist in Clark- Bekederemo's work enters into an illicit relationship with her brother in law as a coping mechanism when faced with her husband's impotence. Although this results in a tragic outcome for Ebiere and her lover, Clark-Bekederemo and Emecheta's works show the different ways in which African women in traditional societies confront involuntary childlessness, especially in instances of shrouded male infertility<sup>44</sup> or undiagnosed infertility.

The genre of infertility fiction also explores female infertility, particularly of the secondary type. This is portrayed in Nwapa's *Efuru*<sup>45</sup> where the mechanism of traditional surrogacy is

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<sup>41</sup> Makinde (note 28) and Oyewunmi (note 29) above.

<sup>42</sup> In Clark JP., *Three Plays* (Oxford University Press, 1970).

<sup>43</sup> It is said that male infertility is often shrouded in many African communities because it is often equated with male impotence which is seen as a social stigma. See Parrott F., *At the hospital I learnt the truth: diagnosing male infertility in rural Malawi* (2014) 21(2) *Anthropology and Medicine* pp 174-188.

<sup>44</sup> This practice is so vividly described in Nfah- Abennyi JM., *The Healer in Your Madness, Not Mine: Stories from Cameroon* (Ohio University Press, 1999) see in particular pp 1-11. It is however interesting to note that the female protagonist in this novel refuses to accept a situation where her infertility is resolved through forced insemination by a traditional healer and this sets her on a destructive path which produces tragic consequences for her and her community, see pp 1,2 and 10-11.

<sup>45</sup> Nwapa F., *Efuru* (Oxford: Heinemann, Reissue Waveland Press 2013) 221 pp.

adopted. Efuru contracts a wife for her husband when she finds out that she is unable to have any more children after the death of her only child. This form of marriage is called the woman to woman marriage which will be discussed further in chapter four of this thesis.

However, there are some limitations to the notion that women can pursue their reproductive goals and aspiration at all cost. In particular there are questions on whether the African feminist literary writer offers support to women who fail to achieve biological motherhood despite having embarked on an autonomous reproductive journey to achieve life birth. Since “womb power” is eulogised by African feminism, how are women who remain involuntary childless for the rest of their lives treated? It would appear that it is only in Nwapa’s *Efuru* where there is some allusion to the fact that an African involuntarily childless woman can find social meaning and justification in society through works of social benevolence and religious adherence.<sup>46</sup> Aidoo’s *Anowa*<sup>47</sup> on the other hand paints a sad tragedy of the state of an involuntary childless woman. Despite her quest for vindication that she is not medically infertile or responsible for her involuntary childlessness, Anowa commits suicide after her husband’s shrouded male infertility is brought to light. While it is not fully explained why she takes her life, it may be argued that Anowa’s tragic death could be attributed to the failure of the realisation of reproductive aspirations and the sense of well -being that comes from a fulfilled marriage. However, as Opoku Akyemang rightly surmises, it will seem that the real tragedy here is the:

‘...silence over alternative avenues of growth for the intelligent, independent woman...  
Anowa’s suicide is the ultimate symbolic act of taking complete control over her destiny and thereby making a noble exit of a world of no exit...Ultimately what

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<sup>46</sup> See F Stratton’s discourse on how Efuru overcomes the stigmatisation of involuntary childlessness through self-realisation and adherence to traditional beliefs, F Stratton, *Contemporary African Literature and the Politics of Gender* (Routledge, 1994) at pp 95- 96. Self-realisation and a strong belief in the omniscience of God are also seen as the liberating factors for the infertile female protagonist in A Konadu’s *A Woman in her Prime* (Heinemann, 1967).

<sup>47</sup> Ata Aidoo A., *The Dilemma of a Ghost and Anowa :Two Plays* (Harlow: Longman:1995) 128 pp.

matters is not the death of Anowa; it is the questioning of the unfair traditional props which would render the Anowas of the society deviants.<sup>48</sup>

Opoku-Akyemang's statement above sets out so poignantly the plight of the involuntary childless woman who through 'unfair traditional props' seems to have no status or identity in the traditional African society outside her procreative role. As earlier highlighted, it would seem that the primary avenue for growth that the African feminist novel offers a woman who is involuntarily childless is to embark on an autonomous reproductive journey to achieve biological motherhood, especially when male infertility is responsible for her involuntary childlessness. While this may seem to a liberating alternative, it still does not address the fact that there are some women who will remain childless for life. As stated earlier, it appears that it is only in the novel *Efuru*, where the fictional narrative on childlessness envisions a situation where a childless woman can have social relevance in her traditional community through her role as a traditional priestess. In this sense, we see the application of Womanism (and to some extent Stiwanism) which provides opportunities for a childless woman to realise self-identity beyond motherhood.

### **3.3.2 African Feminism and Involuntary Childlessness in Social Science Literature**

Apart from the African literary field in the humanities, the interdisciplinary feminist conversation on the negative feminisation of infertility can be found in the discipline of the social sciences especially in the subjects of anthropology, population studies and sociology. The key focus of the social science conversation on involuntarily childlessness will be explored in the anthropological and sociological disciplines. This is because these fields have contributed significantly to the literature on the social stigmatisation of involuntary childlessness.<sup>49</sup> It is worth noting that the social stigmatisation of infertility that have been

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<sup>48</sup> Okpoku-Agyemang NJ., A Reading of Ama Ata Aidoo's Anowa In Egejuru PA., Katrak KH., (eds.) Nwanyibu: Womanbeing and African Literature (Asmara: African World Press, 1997) pp 30-31.

<sup>49</sup> See for example, Gerrits T., Social and cultural aspects of infertility in Mozambique (1997) 31(1) Patient Education and Counseling 39–48; Pearce T., She Will Not Be Listened To In Public: Perceptions among the Yoruba of Infertility and Childlessness in women (1999) 7 (13) Reproductive



dramatically portrayed in the social science literature has been deployed by international public health bodies such as the World Health Organisation and the European Society for Human Reproduction and Embryology (ESHRE) to justify the need to provide wider access to affordable reproductive technologies in Sub-Saharan Africa.<sup>50</sup> It therefore is necessary to consider how African feminism in the social sciences have addressed the infertility question in Sub-Saharan Africa.

Feminist anthropology, particularly in the phase of its development in the 1970s is premised on the second wave of feminism and its notions of 'exposing sexism in public and private life.'<sup>51</sup> Like other fields within feminism, feminist anthropology in its early development laid emphasis on the idea of a universal culture of male domination or patriarchy prevalent in many regions of the world.<sup>52</sup> As such, early anthropological research on non-Western cultures portrayed the women of these cultures as either invisible or helpless in a society dominated by men.<sup>53</sup> Ethnic minority anthropologists such as Lourde also agree that male dominion which causes the 'oppression of women knows no ethnic or racial boundaries.'<sup>54</sup> Yet these ethnic minority anthropologists recognise that these experiences of oppression are not necessarily uniform or identical.<sup>55</sup> The realisation that women's experiences while in a sense universal vary from region to region is also evident in the anthropological discourse on

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Health Matters 69-79.; Inhorn MC., Van Balen F., (eds.) *Infertility around the Globe: New Thinking on Childlessness, Gender, and Reproductive Technologies: A View from the Social Sciences* (Berkeley, CA: University of California Press; 2002) 358 pp ; Hollos M., *Profiles of Infertility in Southern Nigeria: Women's Voices from Amakiri* (2003) 7(2) *African Journal of Reproductive Health/La Revue Africaine de la Santé Reproductive* pp 46–56.

<sup>50</sup> Vayena E., Rowe PJ., Griffin PD., *Current Practices and Controversies in Assisted Reproduction. Report of a meeting. World Health Organization, Geneva, Switzerland, 2002, 383–385; Vayena E., Rowe JP, Peterson HB., Assisted Reproductive Technologies in Developing Countries: Why Should We Care?* (2002) 78 *Fertil Steril* pp 13–15.

<sup>51</sup> Di Leonardo M., *Introduction: Gender, Culture and Political Economy: Feminist anthropology in historical perspective in Di Leonardo M., (ed.) Gender at the crossroads of knowledge: Feminist anthropology in the postmodern era* (Berkeley: University of California Press: 1991) pp 1-2.

<sup>52</sup> Rodriguez C., *Anthropology and Womanist theory: Claiming the discourse on gender, race and culture* (1996) 2(1) *Womanist Theory and Research* pp 3-11; Crawley E., *Third World Women and the Inadequacies of Western Feminism* (1991) *Development Review* p 43.

<sup>53</sup> *Ibid.*

<sup>54</sup> Lourde A., *Sister Outsider: Essays and Speeches by Audre Lorde.* (2nd ed. Berkeley: Crossing, 2007) p 70.

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

involuntary childlessness. This is also true in the case of the anthropological discourse on involuntary childlessness in African anthropological literature.

It is pertinent to note that a significant section of the anthropological research on infertility and involuntary childlessness in Africa is situated in Western scholarship. Predominant among these works are the works of Retel-Laurentin,<sup>56</sup> Feldman-Salvellsberg,<sup>57</sup> Larsen,<sup>58</sup> Hollos<sup>59</sup> and Irhorn<sup>60</sup>. Western anthropological works on infertility has its historical origins in the colonial era where it was observed that colonial anthropologists painted a picture of the rise of infertility among indigenous communities within their colonies.<sup>61</sup> Several theories were developed to explain the cause of the rise of infertility within colonially occupied territories, including those situated in Africa. The explanations touted by the colonialists for the rise in infertility amongst indigenous communities included the role of diet, behavioural patterns of promiscuous 'self-aborting women'<sup>62</sup> and the psychological impact of colonialism on indigenous communities.<sup>63</sup> On the psychological impact that colonialism may have had on indigenous communities; scholars such as W.H.R Rivers went as far as to argue that this fostered a sense of melancholy and defeatism that stymied the ability of these communities to reproduce.<sup>64</sup>

This early research on infertility in Africa is seen to be tainted with an imperialist coloration that portrayed local people as debauched or depraved in their behavioural practices or at

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<sup>56</sup> Retel Laurentin A., *Infécondité en Afrique Noire. Maladies Et Consequences Sociales*, (Masson et C.ie Editeurs, 1974) 196 pp.

<sup>57</sup> See for example Feldman- Salvellsberg P., *Plundered Kitchens and Empty Wombs: Fear of Infertility in the Cameroonian Grassfields*. (1994) 39(4) *Social Science* pp 463-474.

<sup>58</sup> See for example Larsen U., *Primary and Secondary Infertility in Sub-Saharan Africa* (2000) 29(2) *Int. J. Epidemiol* pp 285-291.

<sup>59</sup> See for example Hollos M., (note 49 above).

<sup>60</sup> Irhorn M., (see note 49 above); see also Irhorn M., *Missing Motherhood: Infertility, Technology, and Poverty in Egyptian Women's Lives*. In: Ragone H., Twine FW., (eds) *Ideologies and Technologies of Motherhood: Race, Class, Sexuality and Nationalism* (New York: Routledge, 2000) pp 136-168.

<sup>61</sup> Lock M, Nguyen VK., *An Anthropology of Biomedicine* (Sussex: Blackwell Publishing:2010) p 1766

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> River's work is discussed in N Hunt's on *Colonial Medical Anthropology and the Making of the Central African Infertility Belt* in Tilley H., and Gordon RJ., (eds) *Ordering Africa: Anthropology, European Imperialism and the Politics of Knowledge* (Manchester University Press, Manchester, 2007) at pp 252-253.

best emasculated and childlike and unable to carry out the most basic of all adult human endeavour- reproduction.<sup>65</sup> This criticism of the early research led to the undertaking of a combined clinical/ethnographic approach towards the evaluation of the causes of infertility. For example, the medical anthropological research undertaken by Retel-Laurentin identified sexually transmitted infections (STIs) as a primary cause of infertility.<sup>66</sup> The same criticism meted out against earlier colonial works which associated infertility with promiscuous behavioural acts of the indigenous communities could also be applied to Retel-Laurentin due to the identification of STIs as the primary cause of infertility. Yet it can be argued that her work was predicated on ethnographic scientific data and not on stereotypical colonial presuppositions. More fundamentally her work is seen as largely sympathetic to African infertile women since she focused on the human suffering of involuntarily childlessness<sup>67</sup> and canvassed for wider treatment of STIs through the use of penicillin. It is interesting that Retel-Laurentin's findings on the role of STIs as a key cause of infertility is still considered by public health specialists to be the key cause of infertility within the region.<sup>68</sup>

Although medical anthropological research has focused on the clinical and ethnological investigations on the causes of infertility and the resulting infertility belt in Africa, it will be incorrect to state that feminist concerns on the oppression of women through sexual asymmetry and gender inequalities has been completely ignored. For example, Retel-Laurentin's approach to female infertility among her infertile patients was described as feminist and full of empathy for their human plight.<sup>69</sup> In the same way the more current feminist anthropological scholarship illustrated by the works of Irhorn, Hollos and Larsen also highlight the gendered consequences of infertility and its harmful social consequences on African women. Their works investigate how motherhood as a natural role for a woman

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<sup>65</sup> Ibid.

<sup>66</sup> Leonard L., *Problematizing Fertility, Scientific Accounts and Chadian Women Narratives in Inhorn M., Van Balen F., (eds.) Infertility around the Globe: New Thinking on Childlessness, Gender and Reproductive Technologies* (Berkeley: University of California Press: 2002) (note 49) p 145.

<sup>67</sup> Hunt N., (note 64) above at p 267.

<sup>68</sup> WHO, *Infecundity, Infertility and Childlessness in Developing Countries: Demographic and Health Surveys Comparative Reports, No 9* (World Health Organisation, Geneva, 2004).

<sup>69</sup> See Hunt N., (note 64) above at p 267.

impacts on a childless woman. Yet, unlike works on involuntary childlessness situated within the first phase of second wave feminism which were more concerned with 'structural stratification than on acknowledging or alleviating infertility'<sup>70</sup> these anthropologists do not trivialise the traumatic experiences of infertile women within the African sub-continent. Instead, they deploy their research to point to a social problem that can be tackled through public health initiatives such as the widening of access to infertility care.

These empathetic feminist response to involuntarily childlessness is situated in what Thompson describes as the phase two feminist thinking on infertility and the role of reproductive technologies.<sup>71</sup> It must however not be forgotten that the discussion on the feminist anthropological perspective to involuntary childlessness has so far been situated within the context of Western feminism. It is therefore necessary to consider how indigenous African feminist anthropologists discuss infertility.

An in-depth analysis of the literature reveals that feminist anthropological research on infertility has also be undertaken by indigenous African anthropologists.<sup>72</sup> These indigenous African scholarly works focused on the social and cultural meaning of infertility and involuntary childlessness as well as the coping mechanisms that traditional African societies provide to alleviate the social tragedy of involuntary childlessness and infertility. Key among these works are Nzegwu<sup>73</sup> and Amadiume's<sup>74</sup> works.

Like their counterparts in the field of humanities, it would appear that anthropologists and sociologists such as Nzegwu and Amadiume also call for proactivity on the part of involuntary childless women in the effective utilisation of traditional mechanisms that would

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<sup>70</sup> Thompson C., *Fertile ground: Feminists Theorise Infertility in* Irhorn M, Van Balen F (eds) *Infertility around the Globe: New Thinking on Childlessness, Gender and Reproductive technologies* (note 49) p 57.

<sup>71</sup> *Ibid* at p 56.

<sup>72</sup> See for example Nzegwu N., *Family Matters: Feminist Concepts in African Philosophy of Culture* (Albany: State University of New York, 2006) 330 pp; Amadiume I., *Male Daughters, Female Husbands: Gender and Sex in an African Society* (London: Zed Books Ltd, 1987) 248 pp; Oyewunmi (note 29 above), Kimani V., Olenja J., *Infertility: Cultural Dimensions and Impact on Women in Selected Communities in Kenya* (2001) 8(2) *African Anthropologist* p 200.

<sup>73</sup> See for example Nzegwu (note 72 above) and Amadiume (note 72 above.)

<sup>74</sup> Amadiume (note 72) above.

aid them in achieving parenthood, if so desired. These African feminist anthropologists refuse to accept a fatalistic sense of helplessness for the involuntary childless woman. Nzegwu for example emphasizes that it is not the end of the world if women are not able to have their own biological children. She sees this as a metaphysical pact that they have made with their 'Chi' (personal god).<sup>75</sup> Since this is the case, she urges them to play the hand that they have been dealt. She further argues that society has provided involuntary childless women with 'the social space'<sup>76</sup> for empowerment which includes having children by other male partners if involuntary childlessness is as a result of male infertility, or utilising the traditional surrogacy system called the 'woman to woman marriage'.<sup>77</sup> She also points out that they can also utilise the traditional institution of foster parenting. Amadiume also emphasizes the same point when she argues that there are alternative traditional routes outside biological motherhood whereby an involuntary childless woman can find social empowerment. Like Nzegwu, she also points to the 'woman to woman marriages'<sup>78</sup> as one such means of empowerment.

The refusal by these African anthropologists to make biological motherhood the centrality of a woman's status appears to be situated more in the feminist school of Womanism rather than in Motherism. This is depicted in their underlining concern which focuses on the need 'for the development and self-definition of the Black female subject.'<sup>79</sup> The self-definition of the black female is seen in the argument that life for an infertile woman should not begin and end with motherhood. This does not mean however that anthropologists like Nzegwu and

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<sup>75</sup> In Igbo, Chi is described as the "personal life force" or personal god (idol). See Onukawa MC., *The Chi Concept in Igbo Gender naming* (2000) 70(1) *Africa: Journal of the International African Institute* pp107-117.

<sup>76</sup> See Nzegwu (note 72) above at p 175.

<sup>77</sup> Ibid. The woman to woman marriage is also practised in other parts of Africa. There is evidence of its practice among the Nandi of Kenya, see for example Oboler R., *Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya* (1980) 19(1) *Ethnology* pp 69-88. It is however important to note that while this may be an option for some women, it will not be an option for those who strictly believe in the sanctity of monogamous marriages due to their religious beliefs. See Steady F., *Protestant Women Associations in Hafkin N., Bay E., Women in Africa: Studies in Social and Economic Change* (Stanford CA: Stanford University Press 1976) p 230.

<sup>78</sup> Amadiume (note 72) above p 42.

<sup>79</sup> Nadaswaran S., *The Legacy of Buchi Emecheta in Nigerian Women's Fiction* (2012) 2(2) *International Journal of Social Science and Humanity* p 146.

Amadiume completely ignore the cultural value of biological motherhood. Nzegwu for example argues in her other discourses on the African family structure that mothers are considered as wielding significant power in society due to the fact that everyone is seen to have been gestated in a womb.<sup>80</sup> In this sense, it may be said that Nzegwu retreats once more to the school of Motherism by arguing that reproductive power creates autonomy for mothers in the family. This assertion that biological motherhood provides a woman with a superior status over a woman who is not a mother is a theme that this thesis will revisit in chapter four when it considers the different constructions of motherhood in traditional African societies.

African Motherism which celebrates the power of the womb is also seen in works such as Oyewunmi.<sup>81</sup> She evokes the Yoruba terminology “Ikunle Abiyamo” (the kneeling of the mother in labour) to explain the special role that biological motherhood occupies in African societies and cultures. She argues that a woman who achieves the revered status of Ikunle Abiyamo is said to have more superior identity than any other socially constructed identity in the African community because she has been involved in the birthing and the bringing forth of new life necessary for the continuity of the African society. This deification of motherhood or what can be characterised as the ‘cult of motherhood’ helps to promote public attitudes that an African woman’s identity in society is tied up to her ability to conceive. It is questionable why African feminists should participate or promote a cultural concept which disenfranchises women who are not able to fit into the so called revered social construction of Ikunle Abiyamo due to involuntary childlessness. In its bid to distinguish itself from Western concepts of feminism through its eulogy of motherhood; African feminism appears to have inadvertently placed a group of women at a disadvantage. The veneration of the concept of Ikunle Abiyamo leaves the involuntary childless with no other alternative for social

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<sup>80</sup> Nzegwu N., *Family Matters: Feminist concepts in African Philosophy of Culture* (New York: State University of New York Press: 2006) at pp 51- 54.

<sup>81</sup> Oyewunmi (note 29) above.

empowerment or identity than to find ways in which they can attain this social construction of Ikunle Abiyamo.

Yet, paradoxically, the emphasis on Motherism in African feminism may help to serve this thesis' objective in arguing for a case for wider access to affordable reproductive technologies in Sub-Saharan Africa. If Motherism which is one of the dominant trends of African feminism recognises and affirms the centrality of motherhood in the African society, then it could be argued that there is an African feminist case for widening access to reproductive technologies for the infertile or involuntary childless woman. This would enable this group of disenfranchised women gain access to the means to achieve their procreative goals and also enhance their status in their communities.

Yet in arguing for wider access to affordable reproductive technologies, it must be recognised that not all women regardless of whether they have access to affordable reproductive technologies will go on to attain the role of Ikunle Abiyamo (the natal mother). This raises the question on how the rights of these women can best be protected. Should they be dismissed as 'the dead end of human life' as some claim?<sup>82</sup> Surely, African feminism can serve as a rallying force for this group of women beyond advancing a case for widening access to affordable reproductive technologies? The next section of this chapter will consider whether African legal feminism is best placed out of the fields of African feminism to lead the development of a rights regime for involuntary childless women within the region.

### **3.4. African Legal Feminism: Leading the Way in the Development of a Rights Regime for Involuntary Childless Women?**

The preceding sections of this chapter have been concerned with an inter-disciplinary discourse on how African feminism addresses the social stigmatisation of involuntary childless women. The discourse showed that that African feminists in humanities and social

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<sup>82</sup> Mbiti J., *African Religions and Philosophies* (Oxford, Heinemann, 1990) p 107.

sciences celebrate biological or natal motherhood and actively encourage involuntary childless women to pursue their quest for biological motherhood. However, the discussion on how the pursuit for biological motherhood can be actualised through a reproductive rights' regime is not fully considered in these fields of African feminism. As such it is important to consider what role if any that African legal feminism can play in facilitating a clear reproductive rights regime. One key way this can be done is through the concept of reproductive autonomy or procreative liberty.

Some of the key places where documentation on African legal feminism can be found are the African Gender Institute (the Institute), Cape Town and the Women and the Law in Southern Africa (WLSA) research trust. The Institute for example publishes the *Feminist Africa* which to date has nineteen journal issues on African feminism. Issue 15 (2011) of this journal is a special edition which focuses on the role law and judicial reforms have played in feminist struggles in Africa. Unlike the evidence found in the social literature, it is fascinating to see that the gendered stigmatisation of infertility and involuntary childlessness is barely mentioned in this special edition. Rather the focus of this edition appears focus on the 'uncharted areas of gender and sexuality.' This may be understandable considering that sexuality has become a key area of concern in other jurisdictions and African legal feminists may feel impelled to follow suit so they do not lag behind in an area of research that has become important in the field of gender and equality.

Yet, the apparent failure to give the negative feminisation of infertility and involuntary childlessness the same equal attention as other issues dominating African legal feminism is a bit disquieting. It is difficult to understand why African feminist legal scholars have not provided significant contributions to the literature on how a feminist rights' regime can be developed to strengthen the reproductive rights of infertile women. This lack of interest in an important reproductive issue which is associated with gender inequalities is particularly baffling, when consideration is given to the fact that African feminists in the fields of



humanities and social sciences have long been at the forefront of this important debate. Why then have their counterparts in the legal field been reticent about an issue that affects a number of women in the Sub-Saharan African region?

It would be wrong however to create the impression that there is no legal scholarship on this subject. As earlier highlighted in chapter one, Anne Hellum has written extensively on this issue and <sup>83</sup> may be described as a 'Retel- Laurentin'<sup>84</sup> in this field in the sense that she offers a sympathetic European perspective on the plight of African childless women<sup>85</sup>. Her co-authored empirical Zimbabwean research study illustrates how the norms of a legally pluralist society affects infertility management. Yet, it would appear that there are few indigenous African legal feminists that provide the same level of scholarship on this point as they have done for other issues that affect African women such as female genital mutilation (FGM). Rather many indigenous African legal feminists appear to be bemused about the negative feminisation of infertility. Banda for example on her discourse on Hellum's works appears to be mystified at 'the extraordinary length to which infertile women go to have children.'<sup>86</sup> She however recognises that the desperate quest to have children arises from the socio-cultural identity given to motherhood in this jurisdiction and the role that African customary law has played in perpetuating this notion that motherhood is central to a woman's identity.<sup>87</sup> In the same manner, writers such as Adjetey<sup>88</sup> who provides a detailed treatise on the African perspective of reproductive autonomy ignores the plight of infertile and/or involuntary childless women in this discussion. She analyses customary family structures such as the traditional Sororate marriage which is practised when a wife dies or leaves her matrimonial home before giving birth and is replaced by her sister. What is

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<sup>83</sup> Hellum A., Stewart J., *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Zimbabwe: Mond Books, 1999).

<sup>84</sup> Retel-Laurentin (note 56) above.

<sup>85</sup> Hellum (note 83 above) see page 90 where Hellum speaks of the fact that her research is conceived as a woman based project.

<sup>86</sup> Banda F., *Women, Law and Human Rights: An African Perspective* (Abington, Oxford: Hart Publishing, 2005 ) p 92.

<sup>87</sup> *Ibid* at pp 92 and 93.

<sup>88</sup> Adjetey F., *Reclaiming the African woman's individuality: The struggle between women's reproductive autonomy and African society and culture* (1995) 44 (4) *American University Law Review* p 1351.

interesting is her failure to connect this practice to the negative feminisation of involuntary childlessness in Sub-Saharan Africa. She rightly identifies the privileging of male rights in this type of marriage but fails to critique whether this form of marriage fosters the idea that women are only valued for their procreative capability.

It is only in works such as Odinga<sup>89</sup> that we see an indigenous African legal feminist critique of the negative feminisation of infertility. This work provides a case note of judicial cases determined at the customary court level in the predominantly Lou regions in East Africa. In these cases the women defied the socio-cultural norms that shrouded male infertility and treated involuntary childlessness as a woman's problem.<sup>90</sup> It is interesting to note that unlike Adjetey, Odinga in her analysis of one of the cases highlights the disempowering effect that Sororate marriage can have on childless women. In the case of Olum d/o Odingo v Godu Asiyu,<sup>91</sup> the plaintiff, Olum Asiyu was a replacement bride for her older sister who could not have children. Olum Asiyu brought a divorce petition against her husband on grounds of male infertility. She was able to successfully prove that husband's previous marriage to three other women, including her older sister were childless due to his infertility. Odinga is also able to point to the narrative that fertility also plays a central role to male masculinity and sexuality in Africa. This narrative sometimes gets ignored in other feminist literature in the humanities and social sciences where the focus is on the centrality of motherhood for a woman's identity.

While works like Odinga confirm some engagement by indigenous African legal feminists in the debate on the negative feminisation of infertility and involuntary childlessness; there are still unanswered questions on why the key human rights instruments that deal with gender equality and women's rights have failed to provide a distinct and clearly defined legal regime

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<sup>89</sup> Odinga A., I am not Tassa, he is not a man like other men: Feminising infertility and Masculinising Fertility in South Nyanza in Tamele S (eds) African sexualities: A reader (Pambazuka Press, Oxford: UK 2011) p 463

<sup>90</sup> Ibid see pp 465-468.

<sup>91</sup> Case No: 170/58, KNA: AKF/2/201 cited and discussed in Odinga see chapter 47 of Tamale (note 89 above).

to confront the negative feminisation of infertility and childlessness and the discriminatory impact that it has on involuntary childless women. This is a theme that Hellum<sup>92</sup> focuses on in great detail in her research. However, in her empirical 1999 study on infertility management in Zimbabwe, she focuses primarily on the shortcomings of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>93</sup> in addressing the gender issues connected with infertility. This work did not discuss the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)<sup>94</sup> which had not yet been adopted as at the time of her 1999 study.

As discussed in chapter two of this thesis, Hellum in her 1999 study and subsequent works<sup>95</sup> points to the role that modernisation theory has played in the formulation of CEDAW and its inability to understand the social realities that women experience in non-Western societies. She also argues that Westernised law is often based on a hierarchized system of law that fails to understand the importance of the role that non-formal rules and norms play in legally pluralist societies such as Africa.<sup>96</sup> This is a theme that this thesis intends to further consider in chapter seven which explores how law and regulation can shape a rights regime for involuntary childless women. Using the grounded theory approach, Hellum argues that CEDAW and other international instruments are unable to address the legal issues surrounding involuntary childlessness due to the failure to understand the 'complex realities' that women faced in their daily interaction as subjects both of Western received law and non-Western received law.<sup>97</sup>

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<sup>92</sup> Hellum (note 83) above.

<sup>93</sup> Adopted in 1979 by the UN General Assembly.

<sup>94</sup> Adopted by the Assembly of the African Union in Maputo, Mozambique on July 11, 2003.

<sup>95</sup> Hellum A., Legal Pluralistic Perspectives in Scandinavian and African Women's Law in Papendorf K., Machura S., Hellum A., (eds) Eugen Ehrlich's Sociology of Law (Zurich: Lit Verlag, 2014) pp 95-114.

<sup>96</sup> Ibid at pp 108-109.

<sup>97</sup> Ibid at p 103, pp 108-9.

Musembi<sup>98</sup> who contributed to Hellum's 2013 edited work<sup>99</sup> further builds on this theme in her comparative study of CEDAW and the Maputo Protocol. Although this work does not focus strictly on infertility management in Africa, it provides further interesting perspectives on the interaction between formal law and state action and 'so called' non-formal rules and norms situated in custom and religion. This is an important point as has been pointed out in chapter two of this thesis, the negative feminisation of infertility is often perpetuated through the application of rules situated in customary law and religion. Yet as Musembi<sup>100</sup> points out, the national laws, including the constitutional framework of several African states give full recognition to religious and customary rules that perpetuate discriminatory practices against women. Musembi's observation is quite critical as it highlights the point that rules in customary law and religious law in non-Western jurisdictions are not considered to be informal but are afforded the same status as state law and Western received law.

In tackling discrimination against women in general, the Committee on the Elimination of Discrimination against Women (the Committee) has adopted an abolitionist approach that seeks for the total legislative prohibition of such practices, regardless of their recognition within the national legal framework. From an internationalist perspective, this position of the Committee is justified in the sense that, state parties to the Convention are required to transpose into national law, the obligations they freely entered into at the international level. However, scholars like Musembi<sup>101</sup> question the effectiveness of adopting an abolitionist approach to deep rooted cultural practices when such matters are best tackled through 'social education and mobilisation.'<sup>102</sup> While social education and mobilisation both have a place in modifying customs and changing public attitudes, this thesis argues that legislative prohibition does have a key role to play in eliminating discriminatory practices. Again this is a

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<sup>98</sup> Musembi C., Pulling apart? Treatment of pluralism in CEDAW and the Maputo Protocol in A Hellum and A Sinding (eds) *Women's human rights: CEDAW in International, Regional and National Law* (Cambridge University Press, Cambridge, 2013) at p 183.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid* at 186.

<sup>101</sup> *Ibid* at p 189.

<sup>102</sup> *Ibid* at p 189.

point that will be further explored in chapter seven of this thesis when considering the appropriate rights regime for the involuntary childless.

One clear example, where legislative action has been effective in combating a discriminatory and harmful practice against women has to do with the case of the prohibition of female genital mutilation (FGM) which is stridently tackled within the framework of the Maputo Protocol which as Musembi explains addresses the cultural realities of women in Africa.<sup>103</sup> Article 5 of the Protocol requires state parties to take all legislative and other measures to eliminate harmful practices that negatively affect the human rights of women. Article 5(b) identifies FGM as one of the harmful practices that impact the rights of women in this region. States under this sub-article are required to take appropriate measures to prohibit through:

‘legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.’

Apart from the Maputo Protocol, other applicable UN General Assembly resolutions<sup>104</sup> also underscore the need for states to adopt national legislation to end this harmful practice. The United Nations Division on the Advancement of Women and the CEDAW committee have also canvassed for legislative prohibition of FGM at the national level.<sup>105</sup> This abolitionist approach to FGM demonstrates the role of law in effecting social change. Sub-Saharan

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<sup>103</sup> Ibid.

<sup>104</sup> See for example the UN General Resolution on traditional or customary practices affecting the health of women and girls (A/RES/52/99), UN General Resolution on the Traditional or customary practices affecting the health of women and girls (A/RES/54/133) 2000 and 56/128 of 19 December 2001, 58/156 of 22 December 2003 and 60/141 of 16 December 2005, 51/2.

<sup>105</sup> See for example the Background paper for the Expert Group Meeting on good practices in legislation to address harmful practices against women, U.N. Division for the Advancement of Women (EGM/GPLVAW/2009/BP) (10 June 2009) and the CEDAW convention and harmful practices against women: The work of the CEDAW Committee, Dorcas Coker-Appiah (EGM/GPLVAW/2009/EP.05) (11 May 2009).

African countries like Kenya<sup>106</sup> have also adopted this abolitionist approach to FGM by enacting national legislation prohibiting this harmful practice.

This thesis therefore queries why CEDAW and the Maputo Protocol have not been similarly deployed to tackle the wrongs associated with the gendered stigmatisation of infertility and involuntarily childlessness in the Sub-Saharan African region. Unlike the practice of FGM, the negative feminisation of infertility is not distinctly identified under Article 5 of the Maputo Protocol as a harmful practice that affects the rights of women. Two key reasons are considered below as providing some explanation for the dismissiveness of the needs of involuntary childless women in CEDAW and the Maputo Protocol.

First, it may be argued that the gendered consequences of infertility were not fully understood at the time when these instruments were formulated. Accordingly, the negative feminisation of infertility was not seen as a key human rights issue that deserved legal intervention.<sup>107</sup> Second, it would appear that feminism at the time of the development of these rights instruments sought to deemphasize the centrality of a woman's identity as being primarily connected to procreation.<sup>108</sup> Consequently, the prevailing feminist movement during the development of the gender rights framework canvassed for reproductive autonomy that would enable women to choose not to have children or to reduce their family size.<sup>109</sup> Existing scholarship<sup>110</sup> shows that the Western feminism discourse on gender equality was

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<sup>106</sup> See the Prohibition of Female Genital Mutilation Act No 32 of 2011 which came into assent on September 30, 2011 and came into force October 4, 2011.

<sup>107</sup> Madeira J.L., *Woman Scorned: Resurrecting Infertile Women's Decision Making Autonomy* (2012) 71(2/3) *Maryland Law Review* p 343. Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol71/iss2/3> (accessed September 14, 2015).

<sup>108</sup> Smith P., *The Metamorphosis of Motherhood* in Callahan J.C., (eds.) *Reproduction, Ethics and the Law* (Bloomington, Indiana University Press, 1995) pp 118-127, see in particular p 118 where she argues that a woman's identity is no longer limited to a child bearer.

<sup>109</sup> *Ibid* at pp 115 -116.

<sup>110</sup> See for example Ali S., *Women's Rights, CEDAW and Human Rights* in Parpart J., Rai S.M., Staudt K.A., (eds.) *Rethinking Empowerment: Gender and Development in a Global/Local World* (London: Routledge: 2002) chapter 4; *Fourth World Conference on Women, Beijing, China, September 4-15, 1995, Progress Achieved in the Implementation of the Convention on the Elimination of all Forms of Discrimination against Women, 11-12, U.N. Doc. A/CONF.177/7* (June 21, 1995), available at <http://www.un.org/womenwatch/daw/cedaw/history.htm> [hereinafter Beijing Conference].

one of the key institutionalised ideologies that shaped the CEDAW Convention. Sicard for instance argues that<sup>111</sup>:

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW, 1979) was the first international text to reflect the changes of the 1960s and 1970s and the impact of Second Wave Feminism.

The fact that CEDAW was shaped by second wave feminism may explain why its provisions on reproductive autonomy focused more on fertility control, than on the right to procreate.<sup>112</sup> The emphasis on fertility control can be gleaned in the main provisions of the Convention and in the general recommendations of the CEDAW Committee. For instance, Article 16(e) provides women with the rights to:

‘Decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.’

The CEDAW Committee in its General Recommendation 24<sup>113</sup> on Article 12 on the right to health also requires that women be provided with safe and reliable means of contraceptives, sex education that helps women in the spacing of their children and access to safe abortion. Yet this Recommendation makes no mention on the need to provide affordable fertility treatment for the involuntary childless. This thesis accepts that it is important to provide women with greater autonomy over reproductive matters. However, in limiting reproductive autonomy to fertility control, the second wave feminists who helped to shape CEDAW

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<sup>111</sup> Sicard A., UNSCR 1325: Recalling CEDAW and DEVAW. An analysis of the genesis of UN Resolutions on Gender-Based-Violence (British International Studies Association, Aberystwyth, 2014).

<sup>112</sup> McCulley C., *Radical Womanhood: Feminist Faith in a Feminist World* (Boulevard, Chicago: Moody Publishers, 2008) p 132 where she argues that one of the key features of second wave feminism is its ‘unwavering commitment to abortion.’

<sup>113</sup> CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), Adopted at the Twentieth Session of the Committee on the Elimination of Discrimination against Women, in 1999 (Contained in Document A/54/38/Rev.1, chap. I).

missed a salient opportunity to provide infertile and involuntary childless women with wider reproductive choice over the right of family formation. More fundamentally, CEDAW which is the primary international regime that seeks to address all forms of discrimination against women also failed to provide robust anti-discrimination regime to combat gendered stigmatisation of infertility and involuntary childlessness.

It is understandable why international feminist groups that championed CEDAW may have failed to appreciate the socio-cultural implications of involuntary childlessness in Africa and other pro-natalist parts of the world and why this may have contributed to the failure to tackle the social stigmatisation of involuntary childlessness with the same gravity as other discriminatory practices against women. It is however difficult to offer any defence for the similar neglect of the social stigmatisation of infertility in the Maputo Protocol which is considered as the key regional instrument on the rights of women in Africa. Again, to understand why the Maputo Protocol is dismissive of the plight of involuntary childless women, it is necessary to revisit the historical development of the passage of this instrument.

The emergence of the Maputo Protocol is said to have been as a result of the campaigns of 'an increasingly vocal and visible African women's rights movement.'<sup>114</sup> This rights movement campaigned for rights of women which they believed were of particular concern to African women. They also campaigned against the narrow scope of rights afforded to the women in the African Charter on Human Rights and Peoples Rights adopted in 1981. For instance, feminists strongly oppose the emphasis that Article 18(2) of the African Charter on Human Rights has given to state protection of the family as the custodian of morals and traditional values. They feel that articles of this nature could be used to trump the rights of women and subject them to further gender inequalities in a traditional African family structure. Many African feminists pointed to the fact that a lot of the discriminatory and

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<sup>114</sup> Viljoen F., *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2009) 16 Wash. & Lee J.C.R. & Soc. Just p 11 at p 18.



harmful practices that affected women occurred in the family structure.<sup>115</sup> They identified FGM, discriminatory practices against widows and vulnerable elderly women, domestic violence and child marriages as some of the harmful practices that took place in the family.<sup>116</sup> To address these concerns; the women rights campaigners sought for a more gender specific instrument that underscored and protected the rights of African women and granted them more autonomy in family and social life. These campaigns successfully led to the culmination of the Maputo Protocol which specifically prohibited harmful practices against women in Africa such as domestic violence (Articles 3 and 4) female genital mutilation (FGM-article 5), abusive behaviour against widows (Articles 20 and 21) and vulnerable elderly women (Article 22).

A closer reading of the Protocol reveals that missing from this list of harmful practices is the negative feminisation of infertility and involuntary childlessness. Again, the question has to be asked why African legal feminists in their campaign against harmful practices against women failed to lead the way in tackling the gendered stigmatisation of infertility and involuntary childlessness in the region. Could it be like their Western counterparts that they sought to deemphasize the procreative role of women? One clear way of achieving this was to treat reproductive autonomy from the perspective of fertility control rather than use it as a vehicle to promote the reproductive decision to procreate. It is pertinent to note that years before the Protocol came into existence, that feminists like Adjetey<sup>117</sup> had canvassed for an African concept of reproductive autonomy that should be developed along the lines that would enable African women to have more control over their reproductive decisions particularly in the areas of fertility control and family planning.

Interestingly, Article 14 of the Maputo protocol which sets out the legal framework for health and reproductive rights for women places at the vanguard of the regime of rights in Article

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<sup>115</sup> Banda F., *Blazing A Trail: The African Protocol on Women's Rights Comes Into Force* (2006) 50(1) *Journal of African Law* pp 72-84.

<sup>116</sup> *Ibid*, pp 75 – 81.

<sup>117</sup> Adjetey (note 88) above at p 1352.

14(1) (a) the right of women to control fertility. Article 14(2) goes further to require states to take appropriate measures to provide women with wider access to medicalised abortion. Apart from a brief mention in Article 14 (1) (b) that women have the right to decide whether to have children or not, there is no clearly defined reproductive rights regime that provided infertile and/or involuntary childless women with the right to access fertility treatment. Again this shows the glaring failure of African legal feminists to tackle a concern which is treated a feminist issue by other African feminists in the Humanities and Social Sciences.

### **3.5 Conclusion**

As gleaned in the multi-disciplinary discourse on African feminist attitudes to the negative feminisation of infertility, it is clear that Motherism, one of the dominant African schools of feminism views reproductive autonomy as the right not only to control fertility but also to proactively exercise the right to procreate if so desired. It is therefore unclear why African legal feminism has not adopted the Motherist perspective of reproductive autonomy to allow for involuntary childless women to have a wider access to fertility treatment that will enable them to reproduce if so desired.

Understandably, African legal feminists may be concerned that the adoption of the Motherist perspective in binding legal regimes may unwittingly encourage the subordination of women in the family structure and make nonsense of the concept of reproductive autonomy. But thinking of this nature ignores the emergence of the third wave feminism that seeks to listen to the aspirations and concerns of other women outside the West.<sup>118</sup> This wave of feminism understands and accepts the diversity of women's experiences across the world. This recognition of diversity does not in any way signify cultural relativism which encourages the subordination of women. Rather it recognises that while there can be the diversity of female experiences, there still exists a commonality of rights and freedoms to be enjoyed by all women regardless of their background or culture.. Indeed it could be argued that the real

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<sup>118</sup> See works such as Zack N., *Inclusive Feminism: A Third Wave Theory of Women's Commonality* (Lanham MD: Rowman and Littlefield, 2005) pp 2-4.

objective of true feminism, whether derived from Western or non- Western jurisprudence is to advance the welfare and wellbeing of women.<sup>119</sup>

It is on the basis of a third wave feminism that recognises diversity in commonality that it may be possible for African legal feminists to lead the way in the shaping of the rights regime for the infertile and involuntary childless woman. Drawing from other schools of African feminism situated in the humanities and social sciences, African legal feminism can broaden the concept of reproductive autonomy in Africa to include not only the right to fertility control but one that celebrates the reproductive aspirations and choices of African women who want to reproduce. They cannot continue to be dismissive of this group of women when their counterparts in the Humanities and Social Sciences have long been advocates that involuntary childless women should be allowed to pursue their reproductive ambitions of achieving biological motherhood if they so desire. This thesis realises that this is no easy feat as this may entail a radical rethinking by legal feminists on what reproductive autonomy should mean for women in non-Western cultures. But as Hellum<sup>120</sup> argues, it is necessary that those who are involved in advancing gender rights and equality should be conversant and acquainted with the 'complex realities' that women face in the societies they live and interact in. African feminists in the Humanities and Social Sciences have demonstrated that they are painfully aware of what it means to be childless in a typical African community. This thesis argues that African legal feminists must not only come to a fuller understanding of this problem, but they must also seek to offer legislative solutions to tackle this discriminatory practice as they have done with other practices like FGM. To give further perspective on the negative feminisation of infertility and its social stigmatisation, the next chapter of this thesis will focus on the socio-cultural differentiations between biological motherhood and non-biological motherhood and how these differentiations further feed into the narrative of social stigmatisation of infertility.

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<sup>119</sup> Billson JM., Fluehr-Lobban C., *Female Well Being: Towards a Global Theory of Social Change* (London:Zed Book, 2005) p 374.

<sup>120</sup> Hellum (note 95) above at p 108.

## **Chapter Four**

### **Reproductive identity: Constructions of Motherhood and the Status of Infertile**

#### **Women in Sub-Saharan Africa**

##### **4.1 Introduction**

In the previous chapter, the analysis of African feminism, especially its Motherist school of thought, establishes that far from condemning the cultural value that African societies place on the institution of motherhood, African Motherism celebrates this institution. Motherhood for many is seen as central to full womanhood. Since this is the case, it raises the further question on what type of motherhood is considered as symbolising full womanhood. Is biological motherhood the only construction of motherhood that is recognised in African socio-cultural norms or are other types of non-biological motherhood equally as important?

This chapter will consider this issue and further explore how the cultural construction of motherhood plays into the narrative of the negative feminisation of infertility in sub-Saharan Africa. Nigeria, a case study jurisdiction, has been selected for this discourse on the socio-cultural constructions of motherhood. The evidence for this discourse is gathered from existing quantitative and qualitative studies on the case study ethnic groups situated within this country.

Nigeria has been chosen as the investigation site for the discourse of this chapter for a number of reasons. First, it is pro-natal country where motherhood is esteemed and where adult male and females are expected and encouraged to add procreative value to their community.<sup>1</sup> Second, it is also the largest populated country in Africa and will provide a case study on what it means to be infertile in a region when fertility is seen as a *sine qua non*. Third, there are scholarly works that specifically document the constructions of motherhood in Nigeria, which this thesis shall rely on in shaping the discourse of this chapter.<sup>2</sup> Fourth, Nigeria is a country where traditional African religion is practised alongside with the dominant world religions of Christianity and Islam and would therefore provide interesting perspectives on how motherhood is construed. Lastly, Nigeria operates a pluralist legal system and provides a useful illustration of the complex social and religious structures that shape and influence the construction of motherhood in the Sub-Saharan African continent.

The constructions of motherhood is considered, using five ethnic groups in Nigeria as case studies. Three of these ethnic groups namely, the Igbos, Yorubas and Hausa/Fulani are the largest and dominant ethnic groups in Nigeria, while the other two (Izons (Ijaws) and Yakurrs (Ekois) although relatively smaller groups have been the focus of recent anthropological studies on infertility.<sup>3</sup> The research findings from these studies will be fully relied on as they provide empirical evidence on how motherhood is construed and interpreted in these groups.

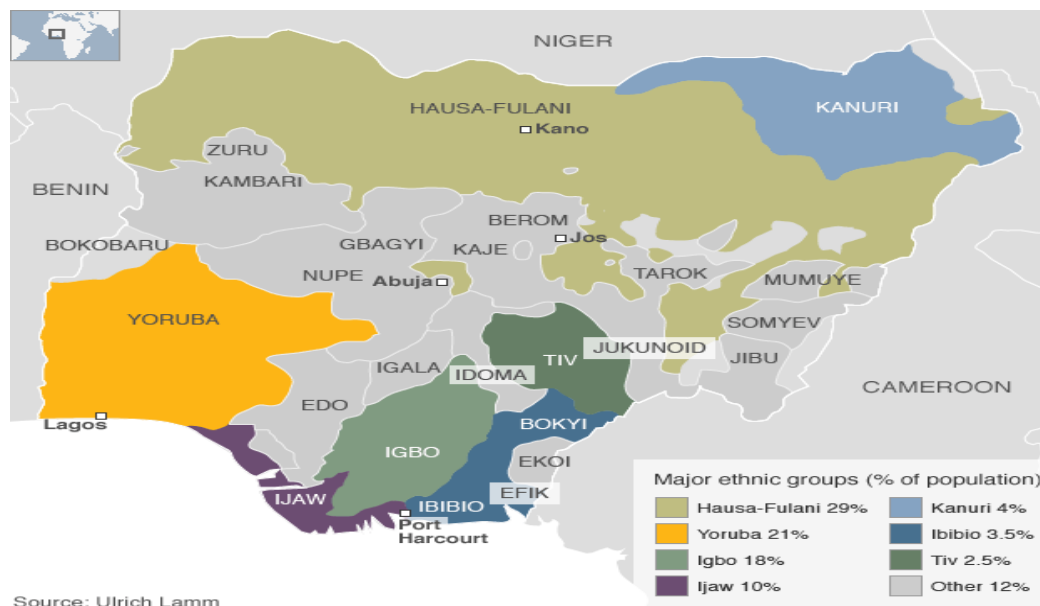
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<sup>1</sup> Dimka R., Dein S., *The Work of a Woman is to give Birth to Children: Cultural Constructions of Infertility in Nigeria* (2013) 17(2) *African Journal of Reproductive Health* pp 107 and 112. The author of this thesis also has first-hand knowledge of the cultural connotations of this issue from her experience as an involuntary childless woman.

<sup>2</sup> See for example, Oyewunmi O., *Abiyamo: Theorizing African Motherhood* 4 *Jenda: A Journal of Culture and African Women Studies*; Akujobi R., *Motherhood in African Literature and Culture* (2011) 13(10) *CLC Web: Comparative Literature and Culture* available at <http://dx.doi.org/10.7771/1481-4374.1706> (accessed July 29 2015).

<sup>3</sup> See for example Hollos M., *Profiles of infertility in Southern Nigeria: Women's Voices from Amakiri*. (2003) 7 (2) *African Journal of Reproductive Health* p 46.

**Figure 3: Map of Ethnic Groups in Nigeria** <sup>4</sup>



The chapter is divided into the following sections. The first section provides a synopsis of the case study indigenous groups in Nigeria that are considered in this chapter. This leads to a brief introduction of the Nigerian pluralistic legal system and its regulation of family structures in Nigeria. This is followed by a discussion on how customary law is framed in Nigeria. A detailed case study analysis is provided about the construction of motherhood under Nigerian customary law. This is based on qualitative evaluation of the customary laws gathered from four case study groups, namely the Yorubas, Igbos, Ijaws and the Yakurrs. The chapter then considers the construction of motherhood under Shariah law as key branch of the Nigerian legal system. The position of Islamic personal law is interpreted using the evidence gathered from the last case study group, the Hausa-Fulanis. The purpose for this detailed study on the customary and religious laws in Nigeria is to consider how motherhood is depicted within a case study African country and to evaluate if the socio-cultural construction of motherhood contributes to the perpetuation of the negative feminisation of infertility that has been discussed in chapter two of this thesis. The chapter concludes by considering what influence if any that State law characterised by the Nigerian constitution,

<sup>4</sup> Map Source: Ulrich Lamm. All the case study groups are included in this map. Yakurr is also known as Ekoi.

national legislation and received English law may have on the contemporary construction of motherhood in Nigeria.

#### **4.2 Background and Context of the Case Study Groups**

Before considering how motherhood is construed in a legally pluralist society like Nigeria, it is necessary, to provide some background and context of the indigenous groups that have been chosen as case studies for the discourse on the constructions of motherhood in Nigeria. The Federal Republic of Nigeria is the largest black African country and is roughly composed of 250 indigenous groups.<sup>5</sup> It is situated in West Africa and borders between Cameroon and Benin. The population of Nigeria as of 2013 is estimated at 173.6 million people. Nigeria emerged as a nation state in 1914, when the British government amalgamated Northern and Southern protectorates and the colony of Lagos which at that time were under its colonial authority. Prior to British colonial rule, the indigenous peoples that constitute Nigeria today existed in what historians have termed as traditional empires and kingdoms with their distinctive indigenous cultures and values.<sup>6</sup> Many of these communities, like their counterparts in other parts of what is known today as West Africa were actively engaged in trading and commercial activities. With these activities, came the inflow of religious beliefs such as Islam and Christianity, which were not considered to be indigenous to Africa.<sup>7</sup>

It is said that Islam was first introduced into the region that is currently known as Nigeria in the 11<sup>th</sup> century.<sup>8</sup> The Kanuri King of Kanem is seen as the first key convert to Islam. The spread of Islam in Northern Nigeria gained more momentum in the 14<sup>th</sup> century due inter alia to the involvement of pre-colonial kingdoms in the Trans-Saharan Africa trade. This provided freedom of movement for traders and travelling missionaries such as the Wangaras who

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<sup>5</sup> Vaidya A., *Globalization: Encyclopaedia of Trade, Labor, and Politics, Volume 1* (Santa Barbara ABC-CLIO Greenwood, 2005) p 557.

<sup>6</sup> Collins R., and Burns J., *A History of Sub-Saharan Africa* (Cambridge: 2008) Chapter six at pp 78-94.

<sup>7</sup> Haynes J., *Religion in Global Politics* (Abingdon, Oxon: Routledge: 2014) at p 105.

<sup>8</sup> Falola T., Hearton M., *A History of Nigeria* (Cambridge: Cambridge University Press, 2008) p 29.

travelled to regions such as Kano and Borgu. These missionaries came not only with their trade, but with their religion.<sup>9</sup> The mid- 14<sup>th</sup> century,<sup>10</sup> witnessed several conversions to Islam in the Hausa ethnic community. Key among these conversions in the ruling oligarchy was the conversion of King Yaji of Kano who was said to have accepted Islam in 1370<sup>11</sup>.

There were also Fulani pastoralists who settled among the Hausa communities in Northern Nigeria by the 15<sup>th</sup> century. Unlike their host Hausa communities who continued to widely practise animist beliefs alongside their adopted Islamic faith, the Fulani pastoralists were deeply devout in their faith. In response to the widespread practice of animism among Hausa Muslim converts, a Jihad (a holy war) was waged in early 19<sup>th</sup> century by Fulani reformists. This jihad came to be known as the Fulani jihad and was spearheaded by a number of Fulani purist, chief among them was Uthman Dan Fodio.<sup>12</sup>

The Islamic reforms brought about by the Fulani Jihad were reflected in the daily lives of the people, including their family structures. The Islamic reformers saw marriage and family life as priority areas for reform. Uthman Dan Fodio, for example, advocated that both men and women should be properly educated in the Islam, including instructions on marriage and family life. His call for women to be educated in the Islamic faith was seen as unprecedented and was received with hostility by some who felt this would go contrary to the Islamic practice of Purdah (cloistering of women).<sup>13</sup> While, Uthman Dan Fodio like other Islamic scholars sanctioned purdah and the veiling of women, he equally believed in Islamic education for women as he believed that this would help them become better wives and mothers. He emphasised the importance of Islamic education for women as he felt it would wean them from the dependence on traditional practices such as *bori* rituals (spirit possession), charms and worship of ancestral spirits which they heavily relied on especially

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<sup>9</sup> Akinwumi O., Raju A., (1990) The Wangarawa factor in the History of Nigerian Islam: The example of Kano and Borgu 29(4) Islamic Studies pp 375.

<sup>10</sup> Insoll T., (2005) Religion, Islam: Growth of: Western Africa in K Shillington, Encyclopaedia of African History (New York: Routledge 2005) p 1264.

<sup>11</sup> Falola and Hearton (note 8) above at p 29.

<sup>12</sup> Insoll (note 10) above at p 1264.

<sup>13</sup> Bivins M., (2007) Telling stories, making histories (Heinemann: Portsmouth) pp 117.



when faced with domestic challenges such as infertility, pregnancy complications, child birth, infant mortality and children's health.<sup>14</sup>

Subsequent British colonisation did not diminish the reforms that the Fulani Jihad brought to bear on the societal fabric of the Hausa-Fulani communities in Northern Nigeria. The British through the political process of indirect rule<sup>15</sup> left local governance largely in the hands of Islamic rulers, intervening only when enforcement of Islamic (Sharia) law went contrary to natural justice, equity, good conscience and public policy. Such matters generally had to do with the criminal aspects of Sharia law and not with Islamic personal law relating to marriage, inheritance and the custody of children. Consequently, Sharia law continues to regulate the private life of Muslims in the Hausa-Fulani communities in Northern Nigeria and recent legislative reforms have reintroduced the criminal elements of Sharia law in several of the states within this region.<sup>16</sup>

Apart from the traditional kingdoms situated in the Sahel region of current Northern Nigeria, there were other notable pre-colonial states and communities living in the rain forest, coastal and Delta regions of what is known today as South West, South East and South-South Nigeria.<sup>17</sup> These forest based communities included the Yorubas, Igbos and Benins. Other communities such as Itsekiris, Ijons (Ijaws), Efiks and Yakurrs lived in the Delta region of the Niger River and coastal area of the South-South region. Beginning with the Yorubas, this background context provides a brief historical synopsis of family life in the five case study communities chosen for this study on the social construction of motherhood in Nigeria.

Historically, Yoruba families were structured according to patrilineal descent. The Yoruba pre-colonial family structures were polygamous, typified by a man living communally in a

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<sup>14</sup> Ibid at p 122.

<sup>15</sup> Haynes (note 7) at pp 110 – 111.

<sup>16</sup> Korieh C., Nwokeji G., Nnameka O., Religion, History, and Politics in Nigeria: Essays in Honor of Ogbu U. Kalu (Maryland: University Press of America, 2005) pp 119-121.

<sup>17</sup> Ofiaja N., Africa: A Basic Text on Land, People, and Culture (New York: Mellen Press) chapter seven which discusses the forest kingdoms and communities of the lower Niger and the Niger Delta River.

compound with his wives, children and other extended kin.<sup>18</sup> The cosmological value of children may have changed since many Yorubas have adopted Islam and Christianity as their religious beliefs. Yet, adoption of these world faiths does not appear to have diminished the view that children as the 'highest good'<sup>19</sup> or the 'wealth' of Yoruba family structures. This historical traditional symbolism of children and their link to the invisible ancestral world helps to explain the high birth rates among the Yorubas today.<sup>20</sup>

In the same way, the Igbo family structure is not greatly dissimilar to the Yoruba family structure. It is also historically structured after patrilineal descent.<sup>21</sup> This however does not mean that there are not a few clans of Igbo descent that practise a matrilineal model.<sup>22</sup> The Igbos also practised polygamy and having many children who are also seen to be vital for economic, social empowerment and preservation of the lineal line. Unlike their Yoruba counterparts, early Islamic conversion was not noticeable among the Igbo community. Historically, the world faith that the Igbos accepted was the Christian faith, with specific focus on Catholicism and Anglicanism. Igbo conversion to Christianity heralded some changes to pre-colonial family structures seen as repugnant to Christian values reflected in colonial legislation and common law principles. This will be discussed in more detail in subsequent sections of this chapter. However, there is general acceptance that like other indigenous groups in modern Nigeria today, many Igbo Christian adherents have retained several of their traditional customs alongside their Christian faith.<sup>23</sup> This is reflected in the Igbo socio-cultural constructions of motherhood to be discussed further in this chapter.

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<sup>18</sup> See an analysis of the Yoruba family structure in Roberts K., *Yoruba family, Gender, and Kinship Roles in New World Slavery* Falola T., Childs M., (Eds.) *The Yoruba Diaspora in the Atlantic World* (Bloomington: Indiana University Press: 2004) pp 248 to 259.

<sup>19</sup> Zeitlin M., Babatunde E., *The Yoruba family: Kinship, socialization, and child development* In Zeitlin M., Megawangi R., Kramer E., Colletta N., Babatunde E., Garman D., (eds) *Strengthening the family - Implications for international development* (Tokyo: United Nations Press, 1995) online text available at <http://archive.unu.edu/unupress/unupbooks/uu13se/uu13se0d.htm> (accessed August 4 2015).

<sup>20</sup> Cadwell J.,(1987) *The cultural context of high fertility in Sub-Saharan Africa*, *Population and Development Review* 409; A Adepoju (1977) *Rationality and Fertility in the traditional Yoruba Society, Southwest Nigeria*

<sup>21</sup> Korieh, Nwokeji and Nnameka (note 16) at pp 15 and 87.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* at p 21.

The Ijaws (Izons or Ijos) live in the creeks of the Niger Delta. Historically, the Ijaws were said to have operated a stateless community structure. This is why some early writings on this ethnic group have labelled them as a “tribe without rulers.”<sup>24</sup> The Ijaws like other coastal communities in the Niger Delta engaged in international trade as far back as the 15<sup>th</sup> century. They provided palm oil and later on slaves to European traders, including the Portuguese and the British. The Ijaw communal relationships are established through kinship ties. The Ijaw communities<sup>25</sup> practise the matrilineal family descent<sup>26</sup> with many Ijaw women maintaining ‘close ties with their maternal lineages.’<sup>27</sup>

Although the Ijaws were among the first to have contact with European traders, they did not readily adopt the Christian faith and many strictly adhered to their traditional forms of worship.<sup>28</sup> Some historians argue that the early Ijaw groups that adopted the Christian faith such as the Brass Ijaws did this for economic advancement. Ayandele for example asserts that the Brass Ijaws adopted a veneer of Christianity when their trading partnership with the Europeans was at its peak, but as fortunes declined they renounced what ‘they stigmatised as the white man’s religion.’<sup>29</sup> Notwithstanding what may seem to some historians as a half-hearted acceptance of Christianity among this community, there are many Ijaws in the contemporary Nigerian society practise the Christian faith.<sup>30</sup> Historians like Minihan link this

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<sup>24</sup> Leis P., Palm Oil, Illicit Gin and the Moral Order of the Ijaw (1964) 66(4) *American Anthropologist* p 829 available online at <http://onlinelibrary.wiley.com/doi/10.1525/aa.1964.66.4.02a00060/pdf> (accessed August 4 2015).

<sup>25</sup> Note a few exceptions to this rule such as the Patanis whose family structure is patrilineal. See Leis N., (1974) *Women in Groups: Ijaw Women Associations* in Rosaldo M., Lamphere L., Bamberger J., (eds) *Woman, Culture and Society* (California: Stanford University Press: 1974) at p 226.

<sup>26</sup> The matrilineal descent is still practised in Ijos (Ijaws) communities to date.

<sup>27</sup> Kritz M., and P Makinwa –Adebusoye P., *Determinants of Women's Decision-Making Authority in Nigeria: The Ethnic Dimension* (1999) 14(3) *Sociological Forum* p 399 at p 404.

<sup>28</sup> See an interesting detailed historical discourse on the intricate relationship between the Brass/Nembe community, the Church Missionary Society (CMS) and the Royal Company in chapter 9 of Ayandele E., *Nigerian Historical Studies* (London: Frank Cass and Company Ltd, 1979) pp 192 to 203.

<sup>29</sup> *Ibid* at p 192.

<sup>30</sup> Shoup J., *Ethnic Groups of Africa and the Middle East: An Encyclopaedia* (Santa Barbara: ABC Clío: 2011) at p 130. Shoup estimates that about 95% of the Ijaw ethnic group are Christians. Notable amongst them is the former Nigerian president, Goodluck Ebele Jonathan.

to the missionary work carried out among the Ijaws in the 19<sup>th</sup> century.<sup>31</sup> Just as we have seen in other ethnic communities, some Ijaw Christians practise their Christian faith alongside indigenous beliefs. This syncretism of beliefs is also reflected in the norms that govern family structures, including the construction of motherhood. Evidence for this is provided in recent anthropological studies carried out Hollos and Larsen<sup>32</sup> in identified Ijaw towns.

The final case study focuses on the Yakurrs who live in the upper Cross River region in ancestral towns known as Umor, Ekoli, Ilomi, Nkoibolokom and Yakurr be Ibe. The common origin of Yakurr communities was 'reinforced by frequent inter-marriages.'<sup>33</sup> Historically, the Yakurrs (and even to date) practise the double unilineal descent which is considered as a rare anthropological system<sup>34</sup> which involves societal recognition of two co-extensive kinship groupings,<sup>35</sup> namely the matrilineal and patrilineal descent. These kinship groupings are said to bestow different benefits, for example marriage payments; inheritance of transferable wealth can be claimed through matrilineal descent while inheritance of land and provision of "cooperative labour" is claimed through patrilineal descent.<sup>36</sup>

Pro-natalism among the Yakurrs also has a historical basis as evinced by Yakurr oral traditions. For example the long-practised customary Leboku festival (annual new Yam harvest celebrations) is historically associated with traditional Yakurr religious beliefs

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<sup>31</sup> Minihan J., (2002) *Encyclopaedia of the Stateless Nations: Ethnic and National Groups Around the World* (Greenwood Publishing Group, 2002) pp 770.

<sup>32</sup> Hollos M, Larsen U, Obono O, Whitehouse B., *The problem of infertility in high fertility populations: Meanings, consequences and coping mechanisms in two Nigerian communities* ((2009) 68(11) *Social Science & Medicine* pp 2061–2068. This article however confirms the fact that while there may be some element of syncretism in belief, several members of the Ijaw community adhered quite strictly to their Christian faith as demonstrated by the refusal of many women to practise a ritualistic dance called Seigbein which is seen as 'UnChristian.'

<sup>33</sup> Obono O., (2001) *Matriclan Priests and Pronatalism among the Yakurr of Southeastern Nigeria* (2001) 16(1) *African Population Studies* pp 15-42.

<sup>34</sup> There are also sub-groups within the Igbo and Ijaw communities where the double unilineal system is also practised. See E Uchendu, *Masculinity and Nigerian Youths* 16(2) *Nordic Journal of African Studies* p 279 at p 280.

<sup>35</sup> *Ibid* at p 4.

<sup>36</sup> Hollos M, Larsen U, Obono O, Whitehouse B., *When Reproduction is not a choice: Infertility in Sub-Saharan Africa*, Unpublished Paper available from <http://uaps2007.princeton.edu/download.aspx?submissionId=70312> .

associated with human and agricultural fertility.<sup>37</sup> Today, the historic cultural link of the Leboku festival with human fertility is not lost on infertile women who find this festival distressing as it serves as a painful reminder of their involuntary childlessness. One infertile woman explains that during the Leboku festival ‘...it is difficult not to notice one’s own unhappiness.’<sup>38</sup> However, it would seem that earlier celebrations of the Leboku festival among the Yakurrs may have provided a support group for infertile women known as the *Kekonakona* which enabled them to participate in Yakurr traditions, including the Leboka festival. They participated in these traditions by seeking help from traditional priests who purportedly invoked prayers for fertility. However it is pertinent to note that the recent study conducted by Hollos, Larsen, Obono and Whitehouse established that with the increasing influence of Christianity in Yakurr community, the *Kekonakona* support group has all but died out as most young women today see it as ‘a quaint reminder of by-gone tradition.’<sup>39</sup>

This extensive background history of these five identified case groups and how family lineage and structures are conceived is given to provide some context for the detailed discussion of the construction of motherhood in the subsequent sections of this chapter. Before this discourse is undertaken, it is necessary to introduce the Nigerian pluralistic legal system and how family structures are regulated under its three primary branches- customary, Islamic, State law and received Common Law. This appraisal of the Nigeria legal system is provided below.

It is necessary to add this caveat that in some instances that it would be difficult to distinguish indigenous customary practice from religious beliefs. This is because many Nigerian indigenous communities practice their local customs and laws alongside with their adopted beliefs of Christianity and Islam. For example, it would be difficult to examine the

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<sup>37</sup> The earliest written historical account of the Leboku (Liboku) festival is documented in Forde D., Integrative Aspects of the Yako First Fruits Rites (1949) 79 (1/2) The Journal of the Royal Anthropological Institute of Great Britain and Ireland available at <http://www.jstor.org/stable/2844498> (accessed August 4 2015).

<sup>38</sup> Obono O., Life Histories of Infertile Women in Ugep, Southern Nigeria (2004) 19(2) African Population Studies p 63 at p 71.

<sup>39</sup> See Hollos, Larsen, Obono and Whitehouse (note 36) above at p 22.

customary practice of groups like the Hausa-Fulanis and Yorubas (to some extent) without considering the place and role that Islam (and Sharia law) plays on their family structures and their construction of motherhood. This is why the discussion of the norms and practices of the Hausa/Fulanis on what it means to be a mother is discussed within the framework of Islamic (Sharia) law rather than under the broad head of customary law. This is not to say that like other indigenous groups, that the Hausa-Fulanis do not practice 'a syncretistic blend of Islam and local cultural features that shape women's lives.'<sup>40</sup> Yet, it is more useful to discuss the regulation of family matters of the Hausa-Fulanis within the regulatory framework of Islamic law. This is because Islamic law is a key governing law in several states in Northern Nigeria where the Hausa and Fulani groups are located.<sup>41</sup> It is however vital to note that Islam like other world religions has its different variants. Consequently, the writer accepts that the constructions of motherhood that will be discussed in later sections of this chapter may not necessary be the experience of all practising Muslims.

### **4.3 Introduction to the Nigerian Pluralistic Legal System and its Role in Regulating Family Structures**

Nigeria is a country which has a pluralistic legal system comprising of customary law based on the indigenous beliefs of its people, Shariah (Islamic law), statutory and received common law. These three broad legal systems provide their own constructions of what constitutes lawful family structures in Nigeria. Further these legal systems regulate, influence and determine who can lawfully and socially be classified as a mother in Nigeria. As notable scholarly works on Nigerian family law establish, the system of law that governs a person's family life is dependent on what type of marriage contracted.<sup>42</sup>

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<sup>40</sup> Cole C., and Mark B., *Women in Twentieth Century Hausa Society* in Cole C., and Mark B., (Eds), *Hausa women in the 20<sup>th</sup> century* (Wisconsin: University of Wisconsin Press 1991) at p 6.

<sup>41</sup> See Ostien P., *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook: Vol. I* (Ibadan: Spectrum Book, 2007) which provides demographic data on the Northern states that practise full Sharia law.

<sup>42</sup> Kasumu A., Salacuse J., *Nigerian Family Law* (Butterworths: 1996) p 1.

If a person marries under customary law, his family life will generally be governed by customary law. The same position applies to marriages contracted under Islamic law or statutory law. But in certain instances, this may be a false dichotomy since there is a symbiotic relationship between the three systems of law, in matters relating to a person's family life. For example the fact that a person marries under customary law does not mean that parental rights and responsibilities would be strictly governed by customary law alone. Under Child Welfare legislation such as the Nigerian Child Rights Act 2003, all Nigerian parents regardless of how marriage has been contracted are obligated to carry out responsibilities to their children in connection with their care, maintenance, upbringing, education, training, socialization, employment and rehabilitation.<sup>43</sup>

Nigerian family law can be classified into four broad areas (1) celebration of marriage, including its validity, matrimonial relief including divorce; (2) nullity and other matrimonial suits; (3) relationship between parent and children covering legitimacy, legitimisation, guardianship, parental rights and obligations; and (4) family and property.<sup>44</sup>

The examination of motherhood can be contextualised with these four broad areas of family law, particularly the third and fourth relating to the relationship between parent and child and family and property. A discussion of motherhood must take into account how these broad areas of family law are interpreted within the Nigerian plural legal system. This discourse first begins by considering how a woman can become a mother under Nigerian customary law before moving on to consider what forms of motherhood are legally recognised under customary law and practice? The potential legal issues these questions raise and what effect they have on involuntarily childless women will be further considered in this chapter. The examination of the customary legal system is premised on the customary norms and practices of the case study ethnic groups chosen for this study. Before this case study

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<sup>43</sup> See s 20, Child Rights Act 2003 CAP 119.

<sup>44</sup> Okonkwo C., (ed) Introduction to Nigerian Law (Sweet & Maxwell: 1980) at p 287.

analysis is undertaken, it will be useful to explain how customary law is framed within the Nigerian legal system.

Nigerian customary law is often native law and custom.<sup>45</sup> Eminent jurists such as Salacuse has described customary law as 'unwritten indigenous law.'<sup>46</sup> Federal legislation does not expressly define what is meant by native law and custom. The Evidence Act 2011 which in sections 68 and 70 allows for the admissibility of opinions of experts versed in native law and custom does not provide a clear definition of what is meant by native law and custom. However it does define a custom as 'a rule which, in a particular district has from long usage obtained the force of law.' By including the words 'particular district' the Evidence Act recognises that the system of Nigerian customary law is not homogenous nor does it apply as a uniform code of law in all parts of the country. This is because Nigeria, probably more than any other African country is made up of diverse ethnic groups and cultures which apply varying localised customary rules and laws. Consequently, what may be considered as customary law and practice in one community may not be recognised as such by other communities.<sup>47</sup> It would therefore be wrong to generalise all concepts of motherhood under Nigerian customary law as the same.

The fact that customary law is to some extent localised raises further questions on whether there is a monolithic Ubuntu (Omoluabi) norm that African communities subscribe to.<sup>48</sup> From a post-colonial perspective, some legal scholars have tried to chart a customary African system of jurisprudence and justice<sup>49</sup> based on social ordering principles such as Ubuntu, Omoluabi (the way of a human being), Humwe and Ujamaa (cooperation). While these

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<sup>45</sup> Uwakah O., *Due Process in the Nigeria's Administrative Law System: History, Current Status and Future* (Maryland: University Press of America, 1997) p 87.

<sup>46</sup> Salacuse J., *A Selective Survey of Nigerian Family Law* (Zaria: Ahmadu Bello University Press: 1965) at pp 2-8 cited in Uwakah O., at p 87 *ibid*.

<sup>47</sup> See further discussion in Okonkwo C., *Introduction to Nigerian Law* (Sweet and Maxwell: 1980) pp 42-43.

<sup>48</sup> The concept of Ubuntu had been earlier discussed in chapter two in the context of the role it played in public attitude towards infertility and other social issues. See chapter two of this thesis at section 2.3.

<sup>49</sup> Oyango P., *African customary law: An introduction* (Nairobi, Law Africa, 2013) chapter 8. See Oba A., *The Future of Customary Law in Africa* in Fenrich J., Galizzi P., Higgins T., (eds) *The Future of African Customary Law* (New York, Cambridge University Press, 2011) chapter three.



African philosophical concepts connote what it means to be human and the importance of communality and inter-dependence of members of society, they do not detract from the fact that African customary law is largely localised.

The notion that there is a monolithic African jurisprudence enshrining the Ubuntu principle is also questionable when consideration is given to fluidity and evolution of customary law. If customary law is capable of evolution and development, it raises the question on whether the normative concept of Ubuntu is immutable. Writers like Himonga<sup>50</sup> dismiss this concern by asserting that Ubuntu while maintaining its immutability, it is still able to evolve and play a vital role in the shaping of customary law and rules. Using the South African legal system as a case study; Himonga points to the transformative role that Ubuntu has played in the development of living customary law as well as other branches of law. He considers a set of South African cases<sup>51</sup> where the courts have utilised the concept of Ubuntu as living customary law to shape formal customary law particularly where the latter no longer represents the norms and values of the people it is meant to regulate.<sup>52</sup> In this way, it is claimed that Ubuntu and other African social ordering principles have the transformational capabilities which continue to remain relevant to the modern African society. This is why Himonga and others view these social ordering principles as necessary ingredients for preserving the transcendental ideals of customary law premised on communality and inter-dependence of society.<sup>53</sup>

This point will be further discussed in chapter seven of this thesis which discusses whether social ordering principles such as Ubuntu and Omoluabi, even if we cannot characterise them as a monolithic African jurisprudence, can still be utilised as tools of social engineering

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<sup>50</sup> See Himonga C., *The Living Customary Law in African Legal Systems in the 21<sup>st</sup> century and beyond with specific reference to South Africa* in Fenrith J., Galizzi P., and Higgens T., (eds.) *The Future of African Customary Law*, Ibid at p 45.

<sup>51</sup> See for example *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

<sup>52</sup> See note 50 at p 34.

<sup>53</sup> Ibid.

to combat the social stigmatisation of infertility and involuntary childlessness in the Sub-Saharan African continent.

The organic and transformational nature of customary law is also recognised by the Nigerian Supreme Court in the case of Oyewunmi v Owoade Ogunesan<sup>54</sup>. Obaseki JSC in the lead judgment of the court stated that:

Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.<sup>55</sup>

The judicial recognition that customary law regulates and imports justice into the lives of those subject to is clearly demonstrated in property disposition. It is said that many Nigerians pattern their personal lives after customary laws and around 80% of property disposition in Nigeria is settled under customary law.<sup>56</sup> This is not just unique to Nigeria alone as the literature points to several other countries within Sub-Saharan Africa where personal and family life is subject to customary law.<sup>57</sup>

Because of the critical role that customary law plays in the lives of ordinary Nigerians, Section 16 of the Nigerian Evidence Act<sup>58</sup> requires that if a custom has not been judicially noticed by a court of superior adjudication, it would have to be established as a fact. The burden of proving the specific rule of customary law lies with the person alleging its existence. Evidence can be adduced to prove that persons or the class of persons

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<sup>54</sup> [1990] 3 NWLR Pt 137 p 182.

<sup>55</sup> Ibid at p 182.

<sup>56</sup> Yekini A., Yekini, Abubakri Olakulehin, Women and Intestate Succession in Islamic Law (May 3, 2008). Islamic Law and Law of the Muslim World Paper No. 08-49. Available at SSRN: <http://ssrn.com/abstract=1278077> or <http://dx.doi.org/10.2139/ssrn.1278077> (accessed August 4 2015).

<sup>57</sup> Ndulo M., African Customary Law, Customs, and Women's Rights (2011). Cornell Law Faculty Publications. Paper 187. <http://scholarship.law.cornell.edu/facpub/187> at p 88.

<sup>58</sup> Evidence Act 2011 which repeals the Evidence Act Chapter 112 Laws of the Federation of Nigeria 1990.

concerned in the particular area regard the alleged custom as binding upon them.<sup>59</sup> The courts can adduce customary law through the opinions of persons having special knowledge of native law and custom, opinions of native chiefs or from any book or manuscript.<sup>60</sup>

A custom may also be judicially noticed by the court, if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it to assume that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.<sup>61</sup> A rule of customary law will not be enforced, if it is contrary to public policy and not in accordance with natural justice, equity and good conscience.<sup>62</sup> This requirement had its historical basis in colonial governance which applied the rule to restrict the practice of native customs considered as repugnant to Western values. While this provision has certainly helped to nullify certain indigenous customs detrimental to the rights of women and children, in some instances, its application has had unintended consequences on the rights of involuntary childless women in Nigeria.<sup>63</sup>

The foregoing discussion on the framing of indigenous customary law sets the basis for a further evaluation of the socio-cultural construction of motherhood in the Nigerian customary law system. The discourse on this point will be primarily centred on the customary rules of four of the case study groups in this chapter, namely, the Yorubas, Ibos, Ijaws and Yakurrs. As stated earlier, the case study groups of the Fulanis and Hausas will be used to discuss the construction of motherhood under Islamic law as practised in a legal pluralist state like Nigeria.

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<sup>59</sup> Section 19 of the Nigerian Evidence Act 2011.

<sup>60</sup> Obilade A., *The Nigerian Legal System* (Spectrum Books: Ibadan 2005) discussing the previous Evidence Act, Chapter 112 Laws of the Federation of Nigeria 1990. The current provisions under the Nigerian Evidence Act of 2011 are sections 68, 70 and 73 of the Act.

<sup>61</sup> Sections 16(1) and 17 of the Nigerian Evidence Act 2011.

<sup>62</sup> Section 18(3) of the Nigerian Evidence Act 2011.

<sup>63</sup> See section 4.4 of this chapter for further discussions on this point.

#### **4.4 The Construction of Motherhood under Nigerian Customary Law**

The discourse on the construction of motherhood under Nigerian Customary law will focus on two key issues. First, it will consider whether motherhood is equal to womanhood in the four case study groups that have been selected for this discussion. Second, and following from the discussion of the first issue, it will evaluate whether biological motherhood can be considered as superior over non- biological motherhood.

##### **4.4.1 Motherhood: The Symbolism of Adult Womanhood in Sub-Saharan Africa**

In other jurisdictions such as the industrialised West, the legal feminist framework of rights for women separates the identity of womanhood from the experience of motherhood.<sup>64</sup> This distinction has in many ways enabled involuntarily childless women within this region to more strongly separate their gender identity from their reproductive identity.<sup>65</sup> The customary laws of the four case study groups reveal a contrasting picture to the Western construction of womanhood. This is based on predominant perspectives of African ontology that subscribe to the notion that full womanhood is symbolised by motherhood.<sup>66</sup> Before examining the legal position set out in customary law, it is necessary to understand the customs and cultures that help to shape customary law regarding the identity of womanhood and motherhood in Africa.

It is said that:

In many African societies, motherhood defines womanhood. Motherhood, then is crucial to a woman's status on African society. To marry and mother a child (a son preferably),

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<sup>64</sup> See Ireland M., *Reconceiving Women: Separating Motherhood from Female Identity* (New York: Guildford Press 1993) 195 pp.

<sup>65</sup> *Ibid* at p 20 where she states that feminism provides a supportive platform for infertile women to '*construct alternative ways of viewing and shaping their lives.*'

<sup>66</sup> See further discussions on this issue in Ewviera M., *Scripting women into the mainstream? : The women of tomorrow in "The angel" and "The sisters" in G Adeoti (Ed.), Muse and mimesis critical: Perspectives on Ahmed Yerima's Drama* (pp 313-320) (Ibadan: Spectrum Books) pp 313-320; See also Banda F., *Women, Law and Human Rights: An African Perspective* (Bloomsbury) p 92.

entitles a woman to more respect from her husband's kinsmen for she can now be addressed as 'mother of...'<sup>67</sup>

In the same way, Stephens<sup>68</sup> asserts that:

Motherhood is widely recognised as an essential aspect of women's lives in Africa, more important than marriage in terms of identity, social status, and political and religious authority.

Tamale,<sup>69</sup> a leading African feminist also makes the following observation about a woman's identity being tied up to her domestic role as wife and mother.

The domestic role of mother, wife and homemaker becomes the key constructions of a woman's identity in Africa.<sup>70</sup>

This trend of thought is also found in the customs and norms of the Yorubas, Igbos (Ibos), Ijons (Ijaws) and Yakurrs; four of the case study groups featured in this study. Opara who examines Igbo customary practices on infertility and childlessness argues that women can be excluded from female community groups on the grounds of infertility or involuntarily childlessness.<sup>71</sup> Exclusion from the Igbo (Ibo) societal life on grounds of childlessness can include prohibition from participating in Igbo (Ibo) female cultural associations such as *Umuada* (daughters of lineage)<sup>72</sup> and *Ndinne* (Christian mothers) on grounds of childlessness. However, some other experts in Igbo customs query whether an infertile or childless Igbo woman can be excluded from her natal *Umuada* (daughters of lineage) group as alleged in Opara's work. This is because membership in the *Umuada* (daughters of

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<sup>67</sup> Ewrierhoma M., *ibid* at p 318.

<sup>68</sup> Stephens R., *History of African Motherhood: the Case of Uganda, 700 to 1900* (Cambridge: Cambridge University Press, 2013) p1.

<sup>69</sup> Tamale S., *Gender Trauma in Africa: Enhancing women's access to resources* (2004) 48 (1) *Journal of African Law* p 50 at p 52.

<sup>70</sup> *Ibid*.

<sup>71</sup> Opara C., 'The barren woman as an outsider in Igbo society of Nigeria' (2006) 29(1) *Curare* p 27.

<sup>72</sup> In Opara's article, they are erroneously described as married daughters. But as other Igbo writers show membership of *Umuada* is open to married and unmarried daughters of lineage. See note 73.

lineage) is based on ancestry and not procreative ability.<sup>73</sup> Yet, Opara's work does show the challenges that involuntary childless women face in several traditional community groups that treat motherhood as the key consideration for determining full womanhood.

Scholarship on the Yoruba customary rules also establishes that motherhood is also depictive of adult womanhood. As we saw in chapter two of this thesis, scholars versed in Yoruba customs and traditions such as Makinde argue that women achieve more social esteem in their society when they become mothers. This is due to the weight that is attached to motherhood in Yoruba cosmology because 'the preservation of humanity depends on the role of mothers in society.'<sup>74</sup>

The social construction that motherhood is synonymous of full womanhood is also held by the Ijaws as evidenced in recent research studies<sup>75</sup> undertaken by Hollos within these communities.<sup>76</sup> This research shows that a woman's social status is enhanced if she has children.<sup>77</sup> An infertile woman who has not experienced biological motherhood is considered an 'unfortunate being.'<sup>78</sup> She is also unable to participate in traditional rites that confirm her passage from adolescence to womanhood.<sup>79</sup> To attained Erera (matured womanhood) in Izon traditional norms, a woman must not only have married but must have also experienced pregnancy.<sup>80</sup> Additional research undertaken among the Yakurrs also shows that motherhood 'represents normative fulfilment of what is considered to be female destiny.'<sup>81</sup>

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<sup>73</sup> Nwapa F., *Priestesses and Power among the Riverine Igbo*, (1997) 810 *Annals*, New York Academy of Sciences at p 420. Nwapa explains that the Umuada comprises of 'all daughters born in a clan or village, married or not wherever they may be.'

<sup>74</sup> Makinde T., 'Motherhood as a source of empowerment of women in Yoruba Culture' (2004) 13(2) *Nordic Journal of African Studies* p 164 at p 167.

<sup>75</sup> Hollos M., *Profiles of Infertility in Southern Nigeria: Women's Voices from Amakiri* (2003) 7(2) *African Journal of Reproductive Health* pp 45-46 available at <http://www.bioline.org.br/request?rh03023> (accessed August 4 2015).

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> Obono (note 38) above at p 2068.

Beyond the academic scholarship on the social construction of motherhood as its association with full womanhood, there is Nigerian case law that establishes that motherhood enhances the legal and social status of women under customary law. This is especially evident in intestate succession where a woman in many instances can only inherit or continue to benefit from spousal property through the agency of her children. The Yorubas and the Igbo are the two key ethnic groups whose customary law on intestate succession has been extensively adjudicated on by the Nigerian courts. With regard to Yoruba customary law, the early case of Lewis v Bankole<sup>82</sup> is viewed by Nigerian family law specialists<sup>83</sup> as the case that sets out the basic rule on Yoruba intestate succession.

This basic rule states that upon the death of his father, the eldest son (the Dawodu) succeeds to the headship of the family. The rule also permits that the children of the deceased regardless of gender can inherit the property of the deceased, to the exclusion of other close relatives such as brothers, uncles, sisters, aunts and cousins. Although female children can inherit property from their father when he dies intestate under Yoruba customary law; the same cannot be said for a wife whose husband dies intestate. This discriminatory restriction on the ability of widows under Yoruba customary law to inherit the property of a deceased spouse is clearly depicted in the case of Akinnubi v Akinnubi<sup>84</sup>, the Nigerian Supreme Court held in this case that:

It is a well settled rule of native law and custom of the Yoruba that a wife could not inherit her husband's property. Indeed, under Yoruba Customary Law, a widow under an intestacy is regarded as a part of the estate of her deceased husband to be administered

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<sup>82</sup> (1908) 1 NLR 80.

<sup>83</sup> See for example Nwogugu E., *Family Law in Nigeria* (Heinemann, Nigeria, 1990 republished by Ibadan: HEBN Publishers, 2014) 2014 edition at p 436.

<sup>84</sup> See for example Akinnubi v Akinnubi (1997) 2 NWLR Part 486 p 144. An academic commentary of this case is provided in Uzodike E., *Nigeria: Developments in Nigerian Family Law 1991-97* in Bainham A., (Ed.) *The International Survey of Family Law* (The Hague, Netherlands: Kluwer: 1999) at p 330.

or inherited by the deceased family, she could neither be entitled to apply for a grant of letters of administration nor appointed as co-administratrix.<sup>85</sup>

In Akinnubi, the widow in question had children, but was deemed as lacking the legal capacity under Yoruba customary law to institute an action for herself or to act as a guardian ad item for her minor children. However, the Supreme Court following its earlier decision in Ologunleko v. Ikueomelo<sup>86</sup> held that the respondent (widow) could sue as the next of friend for her infant children. The position in Ogunleko's case that widows under Yoruba law can act as next friends for their infant children is set out below:

'There being no known provision under Yoruba native law and custom prohibiting a widow from suing as the next friend of the legitimate infant heirs of her deceased husband, therefore I take the firm view that the plaintiff/respondent (widow) has full capacity or standing to sue the appellants as her children's next of friend.'<sup>87</sup>

These two cases illustrate the revered status of motherhood in Yoruba customary law. The widow is treated as a mere chattel or property in intestate succession but will have a level of standing with regard to her husband's estate if she sues as the next of kin for her infant children. Obviously, if her children are of legal age, they can act for themselves and in many cases will ensure that their mother is taken care of. The case of the childless widow is different, she has no children to act as their next of kin. She is merely regarded as a part of the estate of her deceased husband with no recourse to any remedy under Nigerian family law. This is why there is a strong argument particularly within the field of Human Rights law to treat such practices as discriminatory and contrary to provisions of the 1999 Constitution of the Federal Republic of Nigeria.

Yet the Nigerian Supreme Court up until recently has been very slow in treating such customs as discriminatory, repugnant and contrary to natural justice. Works such as

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<sup>85</sup> Ibid.

<sup>86</sup> (1993) 2 NWLR (Pt. 273) 16 at p 62 cited in Nwogugu E., in note 78 above at p 414.

<sup>87</sup> Ibid.



Ssenyejo<sup>88</sup> show that this judicial approach is not peculiar to Nigeria alone. In other African countries such as Zambia and Zimbabwe, women have also been discriminated against in the matter of intestate succession. Ssenyejo points to cases such as the Zimbabwe Supreme Court decision in Magaya v Magaya<sup>89</sup> to illustrate what she and other feminists have described as the tendency of African courts to 'give more weight to cultural practices that support patriarchy and discrimination than they do to the rights of women.'<sup>90</sup>

Moving back to the discussion on customary rules of the case study groups selected for the study of the social construction of motherhood; up until recently, Igbo customary law did not permit female children to inherit from their father's estate if he died intestate. In addition the Igbo widow just like her Yoruba counterpart was not generally permitted to inherit directly from her husband's property if he died intestate. Even when she acted as the next of friend for infant children, she had to have male children for them to have standing in law to benefit from the estate of the deceased. There are several Nigerian Supreme Court cases that up until recently affirmed this to be the settled position of Igbo customary law on intestate property succession.

The first case under consideration is the Nigerian Supreme Court case of Nzekwu v Nzekwu.<sup>91</sup> The widow and her daughters (the appellants) contested the validity of an Igbo customary law that prevented them from inheriting or dealing with property in intestate succession. The Supreme Court upheld the customary position that prohibited the widow of disposing the property of her deceased spouse. It also affirmed the position that female children could not inherit property under Igbo customary law. It however held as repugnant and contrary to the natural justice the custom that required that she be evicted from the property of the deceased.

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<sup>88</sup> Ssenyejo M., Human Rights of Women in Africa in Abass A., (ed) Protecting Human Security in Africa (Oxford: Oxford University Press, 2010) at p 199.

<sup>89</sup> [2013] ZWHCC 67.

<sup>90</sup> Ibid.

<sup>91</sup> Nzekwu v Nzekwu [1989] 2 NWLR [Pt. 104] 373.

Another key Nigerian Supreme Court case that demonstrates the difficulties that women face in intestate inheritance is Mojekwu v Mojekwu.<sup>92</sup> To provide some context, it is necessary to refer to the facts of the case. The appellant had sought a declaration in the lower court (Court of Appeal) that as the surviving male relative of the deceased that he was entitled to inherit his property. He relied in particular on the custom of Oli-Ekpe which prohibited females from having any inheritance rights in intestate property. This custom provided that where a man died intestate and without male issue, other male relatives would have the right to inherit his property.

At the Court of Appeal level, the Court found the custom relied upon by the appellant did not apply in this case. Significantly, LJ Tobi (as he then was) went further to hold that the Oli-Ekpe and other customs that discriminated against women were repugnant and contrary to the fundamental rights provided to all Nigerians in the Nigerian Constitution. He also held that Nigeria had treaty obligations under Convention on the Elimination of all forms of Discrimination against Women (CEDAW) to protect women from all forms of discrimination. On further appeal to the Nigerian Supreme Court,<sup>93</sup> the Court upheld the decision of the Court of Appeal by finding that the facts in this case did not allow for Oli-Ekpe custom to apply. It however disapproved the Court of Appeal's position on the discriminatory impact that customs could have on women. Uwaifo J.S.C who gave the lead judgment held that:

'...the learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi "Oli-ekpe custom. But the language used made the pronouncement so general and far-reaching that it seems to cavil about, and is capable of causing strong feelings against, all customs which fail to recognize a role for women. For instance, the custom and tradition of some communities which do not permit women to be natural rulers or family heads.'

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<sup>92</sup> Mojekwu v Mojekwu [1997] 7 NWLR 283.

<sup>93</sup> Mojekwu v Iwuchukwu (2004) 4 S.C (Part II) 1. See the lead judgment of Uwaifo J.S.C.

'The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice in their native communities. It would appear for these reasons, that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest even if it had been made upon an issue joined by the parties, or properly raised and argued. I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly I disapprove of it as unwarranted.'

Academic commentary<sup>94</sup> has strongly criticised the refusal of the Supreme Court to support the Court of Appeal's position that discriminatory customs of this nature should not have any place in modern Nigerian society. This does not mean that the Supreme Court in other instances has not found other customs as being repugnant to natural justice, equity and good conscience and the expectations of a contemporary society. An example is Okonkwo v Okagbue<sup>95</sup> where the Court struck down a custom that permitted a woman to marry a dead man. It held that:

'A conduct that might be acceptable a hundred years ago may be heresy these days and vice versa. The notion of public policy ought to reflect the change. That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgment by the court. But this must objectively relate to contemporary mores, aspirations, expectations and sensitivities of the people of this country...After all, custom is not static.'<sup>96</sup>

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<sup>94</sup> See Nzegwu N., *Family Matters: Feminist Concepts in African Philosophy of Culture* (Albany: State University of New York, 2006) p 117. Although the author gives some kudos to the Court of Appeal's decision, she argues that it does not go as far enough to tackle gender inequality matters against women particularly in intestate succession. Contrast with Oba A., *Broaching the limits of gender equality in Nigeria: Augustine Nwafor Mojekwu v Mrs. Theresa Iwuchukwu* (2007) 47 *Indian Journal of International Law* pp 289-297 where the writer argues that the Supreme Court was justified in 'upholding the notion of cultural pluralism in human rights.'

<sup>95</sup> [1994] 9 NWLR (Part 368) 301.

<sup>96</sup> *Ibid.*

The case above demonstrates the preparedness of the Nigerian Supreme Court to strike down customs that it finds inimical to the aspirations of a modern Nigerian society. This has raised questions on why it has been so reticent to prohibit customs that are specifically detrimental to women especially with regard to intestate succession. It could well be that Nigerian courts like many other patriarchal structured judicial systems in Africa find it difficult to go against the prevailing and entrenched norms that deemed women as inferior to men especially in societies where male primogeniture applies.<sup>97</sup>

The Nigerian Supreme Court has however had the opportunity to revisit its previous decisions on whether female children can inherit from the estate of their father when he dies. In a welcome development, the Nigerian Supreme Court in the recent case of Ukeje v Ukeje<sup>98</sup> struck down a customary rule that prevented female children from inheriting the estate of a deceased father.

In this case, the plaintiff/respondent was a female child born out of wedlock. She filed an action against the deceased's wife and son seeking to be recognised as daughter of the deceased and seeking leave from the court to be included as administrator to his estate. To establish her paternity, she relied on her birth certificate, a guarantor's form, the judgment from her divorce case as well as photographs evincing her relationship with the deceased. The appellants/defendants contended that the documents were not genuine and that her claim to the estate of the deceased was invalid. Both the Trial Court and the Court of Appeal found for the plaintiff that she was the daughter of the deceased. What was significant in both judgments was the findings that the plaintiff could benefit from the estate of her deceased father. On further appeal to the Supreme Court, the decision of the Court of Appeal was upheld. The Supreme Court in its lead judgment delivered by Bode Rhodes-Vivour J.S.C held that regardless of the circumstances surrounding the birth of a female child, such child is entitled to an inheritance from her late father's estate. Consequently, the

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<sup>97</sup>Nzegwu (note 94) above.

<sup>98</sup> Ukeje v Ukeje (2014) LPELR-22724(SC).

Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution.

Ukeje's case is therefore a welcome development in the field of human rights. In refusing to follow Igbo customary rules of male primogeniture in intestate succession, the Nigerian Supreme Court has signified that this case marks a paradigm shift in the way matters relating to women should be dealt with by the judiciary.

However in spite of this positive decision from the Nigerian Supreme Court in permitting female children the right to inherit where there is intestate succession, it still remains to be seen how the Court will deal in future with the controversial issue on whether a widow can inherit the property of her husband under customary law when he dies intestate. Arguably, the precedent set in Ukeje that the customary rule which prevent female children from inheriting from their parents is discriminatory under s.42 of the 1999 Nigerian Constitution should also apply in the case of a widow especially if she is childless. However, until this is properly considered by the Nigerian Supreme Court, it appears that the position set out in

**Table 3: Why Motherhood Matters**

The Widow's status in Customary Intestate Succession Nigerian Supreme Court Cases			
<p><b><u>Akinnubi v Akinnubi</u></b>  <i>It is a well settled rule of native law and custom of the Yoruba that a wife could not inherit her husband's property.</i></p>	<p><b><u>Ologunleko v. Ikueomelo</u></b>  <i>There being no known provision under Yoruba native law and custom prohibiting a widow from suing as the next friend of the legitimate infant heirs of her deceased husband.</i></p>	<p><b><u>Nzekwu v Nzekwu</u></b>            A widow has the right to reside in her matrimonial home and to make use of farmland but she has no right to sell her deceased husband's house and or farmland. The custom that daughters cannot inherit from their fathers is upheld.</p>	<p><b><u>Ukeje v Ukeje</u></b>            This recent Supreme Court case held that customs prohibiting daughters from inheriting in intestate succession is unconstitutional but is silent on the right of widows, particularly those without children.</p>

early cases such as Akinnubi and Nzekwu will continue to apply on this particular point. Again, the refusal of the courts to bolster the rights of widows in intestate succession is not peculiar to Nigeria. The same position obtains in Zambia where a married woman is considered to be 'property because she has been bought, so how can property own property?'<sup>99</sup> This distasteful statement begs the further question 'what has a married woman been bought for?' Literature on African marriage customs show that the bride price or marriage payment is normally structured around fertility.<sup>100</sup> This may explain why a widow can only participate in her husband's property if she has children. Even then as Table 3 above demonstrates, any interest she can claim in spousal property would normally be through the agency of her children.

This connection between motherhood and the right to property under intestate succession provides some perspective as to why motherhood matters in many communities in Sub-Saharan Africa.<sup>101</sup>

The pernicious state of the childless widow highlighted above provides some justification for why many involuntary childless women embark on a relentless quest to achieve biological motherhood. It also explains why African feminists particularly in the Womanist and Motherist schools of feminism do not ignore the social realities of their cultures and why they also view motherhood as a form of social empowerment for women. Yet, it raises the interesting point on whether married women can have an interest in intestate succession through the agency of non-biological motherhood. This issue will be further considered in the next section of this chapter.

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<sup>99</sup> See COHRE, *Bringing Equality home, promoting and protecting the inheritance rights of women: A survey of Law and Practice in Sub-Saharan Africa* (Geneva, Centre on Housing Rights and Eviction: 2004) at p 143.

<sup>100</sup> Comaroff J., (ed.) *The Meaning of Marriage Payments*, *Studies in Anthropology* (London: Academic Press: 1980) p 7.

<sup>101</sup> This explains the major drive for judicial reforms on the rights of women in customary intestate succession throughout the Sub-Saharan African continent. See Hallward-Driemeier M, Tazeen H., *Empowering Women: Legal Rights and Economic Opportunities in Africa* (Washington: World Bank, 2013) chapter 3.

#### 4.4.2 The Superiority of Biological Motherhood over Non-Biological Motherhood

The theme that a woman's power lies in her womb as 'the agency of life'<sup>102</sup> resonates throughout much of the literature on African motherhood. Leading African feminists like Nzegwu,<sup>103</sup> claim that motherhood as an identity is only assumed through the actual delivery of a child.<sup>104</sup> She goes on to argue that in Igbo tradition that:

'The basis of a mother's power is her provision of the critical organ that housed all children during their most vulnerable state of life. She willed them into being and sustained them through the gestational period. She ate for them, breathed for them, expelled their waste, and deployed her blood to work for them, all the while preserving their distinct identity. Regardless of whom they would later become in life (monarch or pauper), everyone travelled through the birth canal and was expelled through a mother's vagina. For this reason, no one could be superior to mothers given that they were born by a mother.'<sup>105</sup>

This viewpoint suggests that biological motherhood is more superior to other constructions of motherhood. Other literature which focus on the Nigerian case study groups showcased in this chapter also appear to subscribe to this position. For example, it is argued that the Yoruba view true motherhood as synonymous with biological motherhood. Motherhood occurs at the point of birth. Makinde goes further to argue that motherhood in Yoruba tradition is symbolised by the two most important human organs which depict the process of childbirth - the breasts and the vagina.<sup>106</sup> This cultural context of motherhood is not peculiar to these large ethnic groups in Nigeria. The anthropological studies conducted by Hollos and

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<sup>102</sup> Oyewunmi O., Abiyamo: Theorizing African motherhood 2003 4 JENDA A journal of Culture and African Women Studies (available online at <http://www.africaknowledgeproject.org/index.php/jenda/article/view/79> ) last accessed March 19 2014.

<sup>103</sup> Nzegwu N., 2004. The Epistemological challenge of motherhood to Patriliney. JENDA: A Journal of Culture and African Women Studies, 5. Available at <http://www.jendajournal.com>.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid at p 15.

<sup>106</sup> See Makinde (note 74) above at p 166.

Whitehouse among the Ijaws and Yakurrs (the other case study groups in this chapter) also confirm that a woman's identity is tied up to her ability to give birth.<sup>107</sup>

There is however other scholarship, including leading Nigerian literary works,<sup>108</sup> which provide an alternative perspective of motherhood that does not necessarily envision gestation. Achebe, who is considered as one of Africa's foremost novelists provides an interesting narrative of the features of African motherhood. Using the Igbos (one of my featured case study groups) as the key community for his epic work *Things Fall Apart*,<sup>109</sup> he presents a definition of motherhood that appears to go beyond biological motherhood. He uses his vast insight on the socio-cultural constructions of Igbo names to explain why motherhood is considered as supreme within the Igbo community. Okonkwo, the protagonist in *Things Fall Apart* inadvertently kills a young man. Igbo tradition requires that he flee his fatherland and take refuge in his maternal homeland for seven years. Initially, Okonkwo finds it difficult to accept banishment from his paternal land and sinks into deep depression. As a way of getting Okonkwo to accept his fate, Uchendu, his maternal uncle asks him why the name Nneka (mother is supreme) is commonly given to female children in Igbo culture.

'Uchendu:

But there is just one question I would like to ask him. Can you tell me, Okonkwo, why it is that one of the commonest names we give our children is Nneka, or "Mother is Supreme?" We all know that a man is the head of the family and his wives do his bidding. A child belongs to its father and his family and not to its mother and her

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<sup>107</sup> See Hollos M., Whitehouse B., Infertility and the Modern Female Life Course In Two Southern Nigerian Communities (2008) 47(1) *Ethnology* pp 23-43 where it is pointed out that before an Ijaw woman can attain *Erera* (full womanhood) or a Yakurr woman obtain full *Sanen* (full womanhood), she must have gone through the process of pregnancy and childbirth.

<sup>108</sup> See below.

<sup>109</sup> Achebe C., (1962) *Things Fall Apart* (Oxford: Heinemann 1996) p 95. See also other works that discuss the principle of Nneka. Traore O., (1997) *Why the Snake Lizard killed his mother: Inscribing and decentering "Nneka" in Things Fall Apart* in Nnameka O., (ed.) *The Politics of Mothering: Womanhood, Identity, and Resistance in African Literature* (Routledge: London) p 52; Kolawole M., *Womanism and African Consciousness* (Trenton: African World Press, 1997) p 63 discussed in Uwasomba C., *A Feminist Reading of Chinua Achebe's Things Fall Apart*, *The African Symposium: An Online Journal of African Educational Research Network* available at <http://www.ncsu.edu/aern/TAS7.2/TAS7.2.pdf#page=19> (accessed March 3, 2009).



family. A man belongs to his fatherland and not to his motherland. And yet we say Nneka—‘Mother is Supreme.’ Why is that?

It’s true that a child belongs to its father. But when a father beats his child, it seeks sympathy in its mother’s hut. A man belongs to his fatherland when things are good and life is sweet. But when there is sorrow and bitterness he finds refuge in his motherland. Your mother is there to protect you... And that is why we say that mother is supreme. Is it right that you, Okonkwo, should bring to your mother a heavy face and refuse to be comforted?’<sup>110</sup>

Achebe, through Uchendu’s response suggests that beyond her procreative role, an Igbo mother is considered to be supreme because she offers care, protection and nurture to her children. This refusal to see motherhood as solely associated with gestational childbirth is also taken up by Nwapa, another leading African novelist whose novel *Efuru*<sup>111</sup> has been discussed in chapter three of this thesis. Wilentz in her discourse on Nwapa’s work <sup>112</sup> explains that the fact that *Efuru* did not have biological children did not prevent her from carrying out a maternal role in her community. Instead, she was regarded as a community mother who served her community by passing on ‘her values and special powers... as a worshipper to interpret Uhamari to those around her, and... the next generation.’<sup>113</sup>

These literary narratives extracted from African leading literary scholarship suggest that biological motherhood need not be considered as the only construction of motherhood. However, the determination of whether there exists an alternative cultural prototype that allows for a woman to assume motherhood outside biological motherhood still requires further verification outside fictional literature. This thesis therefore turns again to case law to determine the legal status of non-biological motherhood under Nigerian customary law. The

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<sup>110</sup> Ibid, Achebe at p 95.

<sup>111</sup> Nwapa F., *Efuru* (Oxford: Heinemann, Reissue Waveland Press 2013) 221 pp.

<sup>112</sup> Wilentz G., *Afracentrism as theory: The discourse of diaspora literature* (2000) 2(1) *Passages* p 37

<sup>113</sup> Ibid at 47.

judicial cases on traditional surrogacy practised in some Nigerian ethnic groups, including our featured case study groups provides some interpretative guidance on this issue and is further considered below.

The Nigerian Supreme Court decision in Meribe v Egwu<sup>114</sup> which deals with the system of traditional surrogacy practised by communities such as the Igbos (a featured case study group) and the Ishans<sup>115</sup> provides us with some insight on whether motherhood under Nigerian customary law is strictly limited to biological or gestational motherhood or whether the customary system of law permits for other constructions of motherhood, especially in the context of intestate succession. In this case, N, an involuntarily childless woman died intestate. Prior to her death she had contracted what is known under Igbo customary law as a ‘woman to woman marriage’. In this family structure, a childless woman is entitled to ‘marry’ another woman who will bear children for her. Children born under this system will be considered for all intent and purposes as the involuntarily childless woman’s issues. The key issue that the Nigerian Supreme Court had to deal with was whether the claimant born through a ‘woman to woman marriage’ could be considered as N’s son for the purpose of succession. The defendant in his defence contended that the institution of woman to woman marriage was illegal and contrary to public policy. The Nigerian Supreme Court in this case held that:

‘Where there is proof that a custom permits marriage of a woman to another woman, such custom must be regarded as repugnant by virtue of the proviso to section 14(1) of the Evidence Act, and ought not to be upheld by the Court.’

It further held:

The facts must, however, be closely examined to find out the true nature of the ‘woman to woman’ marriage. Where, as in this case, a barren wife has procured another woman for

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<sup>114</sup> [1976] 1 All NLR 266

<sup>115</sup> See Uzodike (note 84) above.

husband to marry, such arrangement is not caught by the proviso to section 14(1) of the Act.

Let it be clear that this thesis is not concerned with that potential constructions of sexuality that may be embodied in the concept of 'woman to woman marriage.' However it is necessary to point out that a conservative Supreme Court may have struck down this custom due to underlining concerns that a woman to woman marriage could be viewed as a same-sex marriage which is antithetical to Nigerian cultural values. Otakpor<sup>116</sup> alludes to this concern when he argues that there is a wrongly held belief that 'woman to woman marriages' is a kind of 'primitive lesbianism or that the women involved are people of easy virtue.'<sup>117</sup> He then explains that 'the woman to woman marriage' as envisioned in Igbo customary law is merely a 'practical way of allowing a childless woman to have children.'<sup>118</sup>

Although the Nigerian Supreme Court did disapprove of 'woman to woman marriage' and held the practice to be repugnant and contrary to public policy, it did recognise that there is a place for traditional surrogacy under Nigerian customary law. This is to be gleaned from its statement that an involuntary childless woman can lawfully procure another woman for her husband to marry strictly for the purposes of providing children for their marriage. Arguably, this recognition of traditional surrogacy appears to be one of the 'other arrangements...made to obtain children in the family' that was alluded to by Mbiti in his seminal work earlier discussed in chapter two of this thesis.<sup>119</sup>

It is important to note that the Supreme Court's decision in Meribe v Egwu has been strongly criticised in other works as ignoring the fact that 'woman to woman marriages' can be contracted for other reasons apart from the reason of providing a traditional surrogacy tool

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<sup>116</sup> Otakpor N., A woman who is a husband and a father: An essay in customary law (2008) 2(2) CALS Review of Nigerian Law and Practice.

<sup>117</sup> Ibid at p 71.

<sup>118</sup> Ibid.

<sup>119</sup> Mbiti J., Introduction to African Religion: Second Edition (Long Grove: Waveland Press, 2015 reissue) p 114

for an involuntarily childless couple. For example, Nzegwu<sup>120</sup> points to the fact that woman to woman marriages were also contracted by single or widowed women for the purposes of social empowerment such as political advancement.<sup>121</sup> In such cases, wealthy elderly Igbo women would 'marry' other women so they could take care of them or assist them in their domestic, market or agrarian concerns.<sup>122</sup> These other considerations for contracting this type of marriage appears to have been judicially overlooked in this case.

It is not only the failure of the Nigerian Supreme Court in Meribe v Ugwu to understand 'woman to woman marriage' as practised by the Igbos (Ibos) in South East Nigeria that should be criticised. Questions need to be raised as to why the Nigerian Supreme Court held that traditional surrogacy is designed only for the benefit of men? This concern resonates with Western feminist works such as Raymond<sup>123</sup> who argue that the system of surrogacy privileges men above women. In refusing to recognise the concept of 'woman to woman marriage' and in restricting traditional surrogacy for the purpose of a barren woman providing a child for her husband, the Nigerian Supreme Court appears to have sent a message that a woman's role in marriage is primarily for the purpose of providing her husband with children. This judicial reasoning is similar to the position adopted by the Court in Akinnubi where a widow is considered as part of the property of a man and can only have a say in intestate succession when she is acting as a next of friend for her children below legal age. She is unable to assert any claim to his estate if he dies intestate, except to lend a voice to her children's claim if they have not attained the age of adulthood. It is therefore not surprising why many have argued that a woman's power in traditional family life is tied up to womb

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<sup>120</sup> Nzegwu N., *Family Matters: Feminist Concepts in African Philosophy of Culture* (State University of New York, New York, 2006) pp 49, 195. See also example Nwoko K., *Female Husbands in Igbo Land: South Eastern Nigeria* (2012) 5(1) *Journal of Pan African Studies*, p 69 at pp 73, 74 and 75; Amadiume I., *Male Daughters, Female Husbands: Gender and Sex in an African Society* (London: Zed Books Ltd, 1987) and Amadiume I., *Family and Culture in Africa* in Essed P., Goldberg D., Kobayashi A., (eds) *A Companion to Gender Studies* (Oxford, Wiley, 2009) at p 364

<sup>121</sup> *Ibid.*

<sup>122</sup> Armstrong A., et al *Uncovering reality: excavating women's rights in African family law* (1993) 7 *International Journal of Law and Society* at 317.

<sup>123</sup> Raymond J., *Women as wombs* (Melbourne: Spinifex Press, 1994) pp xxxvii-xxxviii,

power.<sup>124</sup> It is therefore understandable why so many involuntary childless women within this region seek to have children at any cost. This is because they view womb power as a key way of strengthening their status in their family structure and community at large.

Another form of traditional infertility management is what is known as the male helper system. In a sense this can be described as a traditional artificial insemination system or sperm donation. Many ethnic groups recognise this third party arrangement that allows a woman, whose husband is infertile, to experience motherhood through the assistance of a 'male helper'. In this case, a trusted male confidant (preferably a close relative of the husband) is invited to have sexual relations with the woman so she can have a child who will be passed off as her husband's child.<sup>125</sup> The literary work of Clark-Bekederemo, a renowned African playwright and poet<sup>126</sup> also suggests that the male helper is a system also known to the Ijaw (Izon) community. A key question arises on whether this traditional system of assisted reproduction is legally recognised by the Nigerian courts?

We saw in the case of Meribe v Egwu that the Supreme Court recognised the validity of a traditional surrogacy arrangement while striking down the concept of a 'woman to woman marriage'. However, the case of a woman achieving motherhood through third party assistance from a male helper seems to be more uncertain under Nigerian customary law. The case law on this institution is more limited, but the case of Megwalu v. Megwalu<sup>127</sup> does provide some useful insight on how this traditional system of sperm donation is treated by the courts. It was held in Megwalu that 'an admission by a wife in court that her child does not belong to her husband while she named another man as the father in a court document constitutes an admission of adultery.'<sup>128</sup> Megwalu's case therefore shows the uncertainty of

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<sup>124</sup> See for example, Makinde (note 74) above.

<sup>125</sup> Giwa Osagie O., 'Social and Ethical Aspects of Assisted Reproduction in Anglo Sub Saharan Africa'. in Medical, Ethical and Social Aspects of Assisted Reproduction" (WHO: Geneva 2001).

<sup>126</sup> See Clark JP., 'Song of a Goat' in Three Plays (Oxford University Press, 1964).

<sup>127</sup> [1994] 7 NWLR (Pt 359) 718 CA.

<sup>128</sup> See Nwogugu E., Family Law in Nigeria (Ibadan: HEBN Publisher 3<sup>rd</sup> Edition, 2014) p 181 where this case was discussed.

adopting the option of a male helper since this will be considered as an admission of adultery especially if the husband disputes that he gave his consent to this arrangement.

Apart from the traditional third party modes of assisted reproduction, the African traditional structures also provide for the institution of foster parenting. Existing literature<sup>129</sup> establish that foster parenting is practised in the customary law of several ethnic groups in Africa, including Nigeria. Foster parenting (or guardianship) is also practised under Shariah law which will be discussed in subsequent sections of this chapter. In all the case study groups, a clear commonality arises on the legal status of foster parenting and that is that a woman who assumes foster parenting over a child acquires no legal right over it.<sup>130</sup> Under the different local variations of Nigerian customary law, the child retains its family name and status and assumes no legal rights in the home of its foster parent. This is not dissimilar to the rules on fostering applicable under Western received law. Fostering in this case is also seen as a temporary arrangement where children still maintain their genetic links and ties with their biological parents. Due to the limited rights that are obtainable in customary foster parenting and also because of its temporary nature, many women do not find foster parenting a worthwhile parenting option. The social science narratives of involuntarily childless women who have undertaken foster parenting, particularly those from the Ijaw (Izon) and Yakurrs communities lend credence to this view.<sup>131</sup>

An involuntarily childless woman also faces harsher barriers if she decides to explore adoption under Nigerian customary law. This is because customary adoption is completely different from statutory adoption that is developed on the basis of received Western law. There is debate on the status of customary adoption and whether it confers to adopting parents the same rights that they would have enjoyed had they adopted under statutory law. A fuller treatise on the status of child adoption will be provided in chapter five of this thesis which considers why the various types of child adoption may not be the panacea to address

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<sup>129</sup> Uzodike (note 84) above at pp 327 - 332. See also Atajoko-Omoybude O., *Adoption of children in Nigeria: Practice and Procedure* (Bloomington: Authorhouse, 2011) at p 11.

<sup>130</sup> *Ibid.*

<sup>131</sup> Hollos, Larsen, Obono and Whitehouse (note 36) above.

the social stigmatisation of involuntary childlessness and infertility in the Sub-Saharan African region. This of course speaks to schools of thought rather than adopting a homogeneous position in respect of what will promote women's welfare. However, it is useful to consider customary child adoption in this chapter because it provides some further insight on whether non-biological motherhood is equal in status to biological motherhood under Nigerian customary law.

As discussed earlier, there is some debate as to the legal validity of customary child adoption. Some scholars for example argue that customary child adoption is only narrowly applied by a few traditional communities in Nigeria.<sup>132</sup> It is further claimed that customary adoption was unknown to the Igbos (one of the featured case study groups) prior to colonisation in this study.<sup>133</sup> This assertion that customary adoption was completely unknown to the Igbos before colonisation is disputed in other authoritative literature on customary law of Nigeria. In the authoritative text of the Nigerian Institute of Advanced Legal Studies' *Restatement of Customary Law in Nigeria*<sup>134</sup>, it is argued that custom in the South East of Nigeria (where the Igbos are situated) is not unified on the position of customary child adoption. This leading text provides some interesting evidence on the areas of the South Eastern Nigeria that practise customary child adoption and those that do not. This evidence is provided below.

'In the South East, custom is not unified on the recognition of adoption. For instance, communities in Enugu and Ebonyi States do not recognise the practice of adoption. Where it is done, the position in these communities is that such adoption does not make the adopted child a member of the family. It operates only as an assistance to the

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<sup>132</sup> See Nwaoga C., Socio - Religious Implications of Child Adoption in Igboland South Eastern Nigeria (2013) 4(13) Mediterranean Journal of Social Sciences at p 707. The author however accepts that this position has changed due to the impact of the era of colonisation and also the current trends of globalisation. Yet, she still argues that while child adoption is now practised in Igbo land, it has its limitations particularly with regard to inheritance rights.

<sup>133</sup> Ibid. at p 707.

<sup>134</sup> Azinge E., (ed.) *Restatement of Customary Law in Nigeria* (Abuja: Nigerian Institute of Advanced Legal Studies, 2013) pp 315 and 316.

adopted child; in Anambra State, communities such as the Okpunor and Nnewi do not recognise adoption while Amuo Okpara and Akwa communities recognise the practice; in Abia state, Abriba and Umauhia communities do not recognise the practice of adoption while in Ngwa land, **adoption is an ancient tradition** with the adopted child enjoying all the full rights of the biological children of the family; in Imo State, adoption is not recognised by the Nkwere and Owerri communities while Mbaise and Akokwa communities recognise the practice by virtue of the influences of Christianity.<sup>135</sup> (Emphasis mine).

There is also debate on whether customary adoption is also obtainable among the Ijaw ethnic group. The general position that can be gleaned from the Restatement of Nigerian Customary law is that customary adoption is widely unrecognised in this region. The key exception to this rule can be found in the Okrika community of the Ijaw ethnic group where adoption is recognised and adopted children are considered as having the same status of children born in an Igwa marriage. In understanding the status of customary adoption in the Okrika community, it is necessary to explain what an Igwa marriage means in Ijaw customary law.

The Restatement on Customary Law in Nigeria defines an Igwa customary marriage as a marriage which confers:

‘On a man limited rights over the woman. Bride price is paid but the children of the marriage belong to woman’s family. They cannot claim property in their father’s family.’<sup>136</sup>

The fact that adopted children are considered to be the same as children from an Igwa marriage raises some interesting legal issues on the status of non-biological parenting. This is because the most significant barrier to an involuntary childless woman’s desire to adopt under Nigerian customary law is the claim that only male adults are allowed to adopt under

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<sup>135</sup> Ibid.

<sup>136</sup> Ibid at p 274.



this system.<sup>137</sup> Yet, the Okrika customary law that confers on adopted children the same rights as children from an Igwa marriage provides a promising outlook for involuntary childless women. This is because if she chooses to adopt, the child will be considered as belonging to her (and her maternal family). They can inherit from her or from the property of her maternal family. In other parts of Nigeria where adoption is seen as the man's prerogative, an involuntary childless woman may be faced with some difficulty if her husband elects not to adopt. In a polygamous marriage for example, where the man can father children from another wife, there may be no motivation for him to initiate the process of adoption under customary law. This would leave the infertile woman with little or no relief under the customary law system.

It is difficult to see how this position would be tenable under the provisions of the Nigerian constitution which expressly prohibits discrimination, but as we have seen in cases such as Nzekwu,<sup>138</sup> Akinnubi<sup>139</sup> and Mojekwu<sup>140</sup>, the courts have been reluctant to set aside entrenched customs even when they adversely affect the rights of women. Until a test case is brought before the court on this aspect of customary adoption, it is unlikely that, apart from cases such as the Okrika customary adoption, an involuntarily childless woman would be able to adopt under customary law without her husband's active involvement and consent.

The limitations placed on the different types of non-biological types of motherhood discussed above establishes that biological motherhood in many cases will provide stronger rights under Nigerian customary law than non-biological motherhood. This provides some support for the case of widening access to affordable assisted reproductive technologies (ARTs) in regions of the world such as Sub-Saharan African region where social empowerment and enfranchisement is connected with the ability to reproduce. To buttress this further, the next section of this chapter will consider the construction of motherhood under Islamic (Sharia)

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<sup>137</sup> Mwalimu C., *The Nigerian Legal System: Public Law Volume 1* (New York, Peter Lang: 2007) pp 613- 614.

<sup>138</sup> *Nzekwu v Nzekwu* (note 91) above.

<sup>139</sup> *Akinnubi v Akinnubi* Note 84) above.

<sup>140</sup> *Mojekwu v Mojekwu* (note 92) above.

law. This is because Sharia law is a fundamental part of Nigerian law and is widely applied in the family structures of the Hausa-Fulanis - the final case study group under consideration in this chapter.

#### **4.5 The Meaning of Motherhood under Islamic (Shariah) Law**

This section explores how motherhood is interpreted under the Nigerian Shariah legal system, using the Hausa-Fulani, the predominant ethnic group in Northern Nigeria as our case study. As earlier explained, the consideration of Shariah law is necessary as it is another key system that regulates family life within the Nigerian pluralist legal system. This is particularly so in Northern Nigeria, the home of the Hausa-Fulani ethnic groups who are reported to make up 29% of the Nigerian population.<sup>141</sup> The Hausa-Fulani ethnic groups are considered to be a homogenous group in Nigeria due to inter- marriage and socio-religious affinities.<sup>142</sup>

The majority of Hausa-Fulanis are Muslims who practice the Sunni version of Islam. Islamic law in most parts of Northern Nigeria is based on the Maliki code, a major jurisprudential school in Sunni religious law. Prior to the enactment of Islamic statutory laws in different states in Northern Nigeria, the Islamic legal system in Nigeria was viewed as a 'special class of customary law.'<sup>143</sup> This classification of Islamic law has been criticised since Islamic law has clear distinct features from customary law.<sup>144</sup>

First, unlike customary law which in great part is based on oral unwritten customs, Islamic law is derived from written sources. Second, it is clearly systemised and has clearly defined schools of jurisprudential thoughts and lastly unlike indigenous customary law, Islamic law is viewed to have universal application and is not based on the localised customs of a specific

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<sup>141</sup> See 2002 CIA World Factbook data referenced in Philipps D., Nigeria (Chelsea House Publishers, 2004) p 66.

<sup>142</sup> Dudley B.J., Party and Politics in Northern Nigeria (Routledge, London 1968) p 234.

<sup>143</sup> Section 2 of the Native Courts Ordinance 1914 includes Islamic law as part of native law and custom. See Oba A., (2002) Islamic Law as Customary Law: The Changing Perspective in Nigeria (2002) 51 International and Comparative Law Quarterly at p 818.

<sup>144</sup> See Karibi-Whyte AG., (1993) The History and Sources of Nigerian Criminal Law (Spectrum Law Publishing: Ibadan) p 125; Saadu YK.,(1997) Islamic Law is not Customary Law 6 Kwara Law Review pp 136-150 cited in Oba (note 143) above at p 830 and in Grote R., Röder T., *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (New York: Oxford University Press, 2012) p 94.

ethnic group as we see in the case of indigenous customary law. Nigerian Islamic scholars further assert that Shariah law 'transcends national, tribal, racial and language barriers.'<sup>145</sup>

These distinctions are important in understanding the meaning of motherhood in Hausa-Fulani family structures, for unlike the discussion on customary law, the emphasis is not so much on local customs and practice but on how motherhood is construed under a well-defined legal system that for all purposes has wider international and universal application than the other two systems of Nigerian family law. This point was raised obiter by Justice Wali (Justice of the Nigerian Supreme Court) in the case of Alhaji Ila Alkamaa v Alhaji Hassan Bello and Alhaji Malami Yaro where he asserted that Sharia law is not localised like customary law. He also opined that it has more universality than English common law.<sup>146</sup>

It is therefore possible (unlike customary law) to draw widely from other jurisdictions around the world which practise the Maliki Islamic legal system. Admittedly, there would be features of motherhood that reflect the traditional values of the Hausa-Fulanis,<sup>147</sup> but generally these features would not negate the fundamental constructions of motherhood provided under Islamic law, as interpreted by the Maliki jurisprudential system. The Maliki legal system is said to be derived from the key teachings of Malik ibn Anas, an Islamic scholar and its sources are deduced from two fundamental sources, the Qu'ran, and the Sunnah (includes the Hadiths (things prophet Muhammed said) as well as the things he did and refrained from doing).<sup>148</sup> These are supplemented with secondary sources *Ijma* (Consensus),<sup>149</sup> *Qiyas* (analogy), *Istishab* (legal presumption), *al-Masalih Mursalih* (juristic preference dictated by public welfare), *Amal ahl al-Madianah* (acts of the people of Medinah) and *urf* (customs and usage).<sup>150</sup>

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<sup>145</sup> Oba (note 143) at p 832.

<sup>146</sup> [1998] 6 SCNJ 127 at p 136.

<sup>147</sup> Cole (note 40) above.

<sup>148</sup> See Abdal Haq I., *Islamic Law: An overview of its origin and elements in Ramadan H.*, (Ed.) *Understanding Islamic Law: From Classical to Contemporary* (Contemporary Issues in Islam). (Lanham MD: Altamira, 2006) at p 4.

<sup>149</sup> Oba (note 143) at p 820.

<sup>150</sup> *Ibid.*

An examination of some of the Hadiths (a primary source of Maliki legal system) reveals how highly motherhood is regarded in Islam. For example, one specific Hadith states:

O messenger of God, who among the people is the most worthy of my good company? The Prophet (P) said, Your mother. The man said then who else: The Prophet (P) said, Your mother. The man asked, Then who else? Only then did the Prophet (P) say, Your father. (Al-Bukhari and Muslim).<sup>151</sup>

Badawi in his treatise on the status of women<sup>152</sup> points to another Hadith which declares that 'Paradise is at the feet of mothers'.<sup>153</sup> It is interesting to see that just like the imagery of caring nurturers in Achebe's *Things Fall Apart*<sup>154</sup>, mothers in Islam are viewed as deserving respect and honour because they 'confer more benevolence on man than fathers.'<sup>155</sup> Consequently, many Muslim scholars believe that there is no higher role that a woman can aspire to in Islam than the role of a mother. For example, although Badawi acknowledged the economic rights of Muslim women, he still views their primary role as being that of wives and mothers.<sup>156</sup> Mazrui, a renowned African historian points out that marriage and child bearing are also highly rated among African Muslims, including those of the Hausa-Fulani communities in Northern Nigeria.<sup>157</sup> Some feminists will argue that these views of this nature on the role of Muslim women are derived from 'a male centered approach to Islam' and as such do not augur well for gender equality and the equal citizenship between men and women in the Islamic world.<sup>158</sup> What concerns this thesis however is the fact that akin to

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<sup>151</sup> Narrated in *Saheeh Muslim*, #2548, and *Saheeh Al-Bukhari*, #5971 in Ibrahim IA., A brief illustrated guide to understanding Islam. (Houston, Texas: Darussalam Publishing, 1997) p 64.

<sup>152</sup> Badawi, J., 'The Status of Women in Islam' (2002) MWL Journal, Jumad Al-Ula p 1423.

<sup>153</sup> Ibid.

<sup>154</sup> Achebe (note 109) above.

<sup>155</sup> Khan S., Muzzaffer H., Family Life under Islam (Anmol Publications: 2004) p 55.

<sup>156</sup> Badawi (note 152) above.

<sup>157</sup> Mazrui A., Islamic Doctrine and the Politics of Induced Fertility Change: An African Perspective (1994) 20 Population and Development Review p 121.

<sup>158</sup> Von Engeland Nourai A., On the Path to Equal Citizenship and Gender Equality: Political, Judicial and Legal Empowerment of Muslim Women in Maclain L., Grossman J., (eds) Gender Equality: Dimensions of Women's Equal Citizenship (Cambridge: Cambridge University Press, 2009) p 390.

indigenous customary rules, biological motherhood in Islam is seen to be a venerated role that women should aspire to.

Seeing how biological motherhood is eulogized in Islamic traditions, it begs the question on how other forms of motherhood are regarded under Islamic norms. Attention is first given to milk mothering which is practiced in Islam. A milk mother (wet nurse) provides her milk voluntarily or is contracted for a fee when family exigencies necessitate this requirement. There is evidence of the practice of milk mothering among the Hausa-Fulani for example in a situation where a woman dies in childbirth and a lactating relation nurses the baby in her stead.<sup>159</sup> The milk mother is treated with respect in Islam and a man is expressly prohibited from having sexual relationship or contracting a marriage with a woman who has wet nursed him.<sup>160</sup> This is because milk mothering in Islam is seen as creating a bond of kinship akin to that of blood kinship.<sup>161</sup>

This raises interesting questions on the extent of legal rights that are conferred on milk mothers under Islamic norms? Further, are such rights (if any) equivalent and equal to the rights afforded to biological motherhood? These questions go to the very heart of whether forms of non-biological motherhood in Islam are afforded a higher status in Islamic law than under Nigerian indigenous customary law. Yet, it may be argued that this is a moot question since infertile women would not be able to lactate naturally. An examination of Islamic bioethics<sup>162</sup> however shows that these questions are still worth considering due to current medical developments that make it possible to induce lactation in infertile women. Even in medieval times when many of Islamic legal rules on milk mothering were developed, there

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<sup>159</sup> Last M., Health through the Life Cycle: Hausa in Ember C., and Ember M., (Eds) Encyclopaedia of Medical Anthropology: Health and Illnesses in the World's Cultures (New York: Springer: 2004) at p 725.

<sup>160</sup> Shah SS., Fosterage as a ground of marital prohibition in Islam and the status of human milk banks (1994) 9(1) Arab Law Quarterly p 3.

<sup>161</sup> Giladi A., Infants, Parents and Wet Nurses: Medieval Islamic Views on Breastfeeding and their Social Implications (Brill: 1999) pp 13 to 22.

<sup>162</sup> See for example the Bedouin folklore of an infertile woman who served as a milk mother to her husband's child by another woman. This account is narrated in Moran L., Gilad J., From Folklore to Scientific Evidence: Breast Feeding and Wet Nursing (2007) 3 (4) International Journal of Biomedical Science at p 251.

were anecdotal accounts of infertile women who acted as milk mothers, even though they had never been pregnant.<sup>163</sup> These accounts as supported by current medical developments, confirm the need to further explore the system of milk mothering which is recognised in Islam as a form of non-biological parenting.

Before considering further the rights that non-biological mothers may enjoy under Islamic norms, it is necessary to explore the rights and duties that a biological mother has over her children. This will provide a further basis for determining whether milk mothers enjoy full rights of parenting under Islamic law. Some Muslim scholars have argued that women with children enjoy parenting rights under Sharia law as practiced in many Muslim countries in Africa. For example, they argue that a biological mother retains custody over her male children till they attain puberty. Likewise, she also has custody over her female children until they attain puberty or are old enough for marriage.<sup>164</sup> This in theory is what obtains under Maliki law, but these rules are also affected by local Hausa customs<sup>165</sup> where custodianship is normally restricted to the age of seven.<sup>166</sup> Further, in the case of succession, a wife with genetic children would be entitled to a fixed share<sup>167</sup> (*fard*) of the inheritance of her deceased spouse. This is not the case with a milk mother, even though she is considered to have a milk kinship with the child that she nurses. She does not have the right to inheritance and cannot exercise custody rights over the child that she nurses.<sup>168</sup> Furthermore, she is not required to carry out parental responsibilities towards the child such as providing for its upkeep and maintenance, as this role is reserved for its birth parents. However, if she is contractually employed as a wet nurse, she owes a duty of care to a nursing child and must

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<sup>163</sup> Ibid at p 254.

<sup>164</sup> Allah A., Nadim A., West Africa in An-Naim A. (eds.) *Islamic Family Law in a changing world: A global resource book* (London: Zed Books, 2002) pp 177 and 291.

<sup>165</sup> (Maliki law permits custom (Urf) to be taken into account). See Cole at note 40 at page 75.

<sup>166</sup> Ibid.

<sup>167</sup> Normally 1/8<sup>th</sup>. See Lim H., Siat S., *Accidental Islamic feminism* in Lim H., Bottomley A., (Eds) *Feminist Perspectives in Land Law* (Abington, Oxon, Routledge: 2014) at p 250.

<sup>168</sup> See Naef S., *Uterine Kinship in Shia Thought and Practice* in Irhorn M., Remyne S., *Islam and Assisted Reproductive Technologies: Sunni and Shia Perspectives* (New York: Berghahn Books, 2012) p 174. It is worth noting that the discussion on inheritance rights in Naef's work is from a Shia perspective.

avoid any action that will adversely affect the welfare of the child.<sup>169</sup> These limitations on the rights that milk mothers have over the children they nurse confirms that similar to Nigerian customary law, non-biological motherhood is not considered as being on the same footing as biological motherhood in Islamic family structures.

This leads to a consideration of the status of surrogacy under Islamic law. Is this form of non-biological parenting similar to the status of the milk mother? Atigehetchi in her work on *'Islamic Bioethics: Problems and Perspectives'*<sup>170</sup> points to the position adopted by the International Islamic Fiqh Academy in its seven session in Jeddah. This authoritative Sunni body ranks the surrogate mother at a similar level of a milk mother or wet nurse. Alongside with other Sunni scholars, the Fiqh Academy states that a surrogate mother cannot have the same rights as a biological mother who provides the ovum. Yet again, biological motherhood is considered as more superior to non-biological motherhood under Islamic law. Again, feminists view the inferior treatment of surrogate mothers and milk mothers as emanating from patriarchal interpretations of Islam where men control and commodify the bodies of women for their own purposes and objectives.<sup>171</sup> However, it is questionable whether a married woman who is reproductively capable will actually want a surrogate or wet-nurse to share the same rights and privileges that she has over her biological children. In this sense, it can be argued that patriarchy is not necessarily the only underlining factor for the inequalities between biological motherhood and non-biological motherhood.

There are other views in Muslim scholarship, particularly from the Shia school of thought, that consider the surrogate mother to be the real mother of a child'.<sup>172</sup> This is based on a verse in the Quran which states that 'None can be their mother except those who gave them

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<sup>169</sup> Kueny K *Conceiving Identities: Maternity in Medieval Muslim Discourse* (New York: SUNY, 2013) p 140.

<sup>170</sup> Atigehetchi D., *Islamic Bioethics: Problems and Perspectives* (Netherlands: Springer, 2007) p 145.

<sup>171</sup> See Kueny (note 169) above at pp 141 and 142.

<sup>172</sup> Ali Al Bar M., Chamsi-Pasha H *Contemporary Bioethics: Islamic Perspectives* (New York: Springer, 2015) pp 177-178.

birth.’<sup>173</sup> While this school of thought may offer some legal status to a surrogate mother, it is unclear if the infertile or involuntary childless wife is also equally empowered. This is because she will be seen as the ‘rearing mother’ and not the ‘biological mother’ of a child produced through a surrogacy arrangement.<sup>174</sup> Being classified as a ‘rearing or social mother’ may place her in no greater stead than that of an adoptive parent.

This leads to the question on how child adoption is viewed in Islamic law. This is a very critical question that requires further consideration due to the fact that child adoption is always canvassed as the major reason for not widening access to assisted reproductive technologies (ARTs) in the developing regions of the world. This concern shall be dealt with in further detail in the next chapter of this thesis. But it is necessary at this stage to discuss the status of child adoption under Islamic law because of the case study appraisal of how motherhood is construed within the family structures of the Hausa/Fulani Muslim community in Nigeria.

The key question to be considered within this case study is to determine whether the institution of child adoption provides a Hausa/Fulani Muslim involuntary childless woman with the equal standing as a woman who is able to conceive? This appraisal of the status of child adoption under Islamic law will be considered from the perspective of Maliki law which is the dominant school of thought in the practice of Sharia law in Nigeria.<sup>175</sup>

Strictly speaking, Islamic law does not permit formal adoption.<sup>176</sup> It is said that the Quran in Sura XXXIII verses 4-5 and 37 frowns at non-Islamic adoption practices that permit the severance of genetic ties between parents and their children. In so doing, the Quran rejects the practice whereby an adopted child is ‘assimilated in a legal sense into another family.’<sup>177</sup>

This is not to say that Islam completely ignores benefits that may accrue from adoption, but

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<sup>173</sup> Ibid.

<sup>174</sup> Ibid at p 177 where this is discussed.

<sup>175</sup> Nwogugwu E., *Family Law in Nigeria: 3<sup>rd</sup> Edition* (Ibadan: HEBN Publishers, 2014) p 76.

<sup>176</sup> Pearl D., Menski W., *Muslim Family Law* (London: Sweet & Maxwell: 3<sup>rd</sup> edition, 1998) p 408.

<sup>177</sup> Ibid.



rather that it refuses to acknowledge a system that purports to create blood lineage (*Nasab*) between the child and the family adopting it. However, Islamic law does provide a system of guardianship or foster parenting that can provide some limited parenting rights to childless couples.<sup>178</sup> This guardianship system is known as the Kafalah and will be further discussed in the next chapter of this thesis which considers whether child adoption in all its ramifications, serves a better infertility management option to affordable reproductive technologies (ARTs). However, some overview of the Kafalah system is provided in this case study on the construction of motherhood in the family structures of Muslim Hausa/Fulani communities in Nigeria.

The guardianship system known as Kafalah is practised in several Muslim countries around the world, including North African countries such as Algeria, Egypt and Morocco.<sup>179</sup> Nigeria also practises the Kafalah system.<sup>180</sup> This system enables a Muslim guardian to foster a child and provide for its upkeep and protection. Kafalah is acceptable under Islam because it does not involve a child changing his lineage.<sup>181</sup> Kafalah is one of the civil causes that Shariah courts in Northern Nigeria are entitled to adjudicate on.<sup>182</sup> It is treated as a recognised form of foster parenting practised among the Hausa-Fulani Muslim community. A key reason why Kafalah is practised among Hausa-Fulani Muslims is to provide for the care of orphans and less privileged children within the society. It also enables a childless woman to raise a child if she has none. In many cases, foster parenting among the Hausa-Fulanis is normally carried out on a voluntary basis and may involve fertile siblings handing an infant child to an infertile sibling to nurse and to look after. Recent studies<sup>183</sup> undertaken

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<sup>178</sup> Ibid at p 409.

<sup>179</sup> ISS/IRC Kafalah (Fact Sheet 51, 2007) ISS/IRC, Geneva, Switzerland (accessed March 2015).

<sup>180</sup> Termed as Al-Kafalah (guardianship) in Northern Nigerian State laws. See for example Sharia Courts (Administration of Justice and Certain Consequential Changes) Law 1999 Zamfara State of Nigeria Gazette No.1 Vol 1 15<sup>th</sup> of June, 2000, pp A1- A30 set out in chapter seven of Ostein P., Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook (Volume 7: Ulama Institutions).

<sup>181</sup> Bargach J., Orphans of Islam: Family, Abandonment and Secret Adoption in Morocco (Rowman & Littlefield: 2002) p 28.

<sup>182</sup> See for example section 5, Part III Jurisdiction, a law to establish Sharia courts to apply Sharia Law in Sokoto State, Law No 2 of 2000.

<sup>183</sup> Abubaker S., Lawan U., Yasir JN., Knowledge and attitudes towards child adoption and fostering among infertile women in Northern Nigeria (2013) 16(1) Sahel Medical Journal p 19 at p 20.

in Northern Nigeria where the Hausa-Fulanis are situated show that the system of Kafalah or fostering has a wider acceptability than adoption. This may point to the fact that adherents of the Islamic faith in Northern Nigeria understand the spiritual value that their faith attaches to foster parenting and that there is the reward of paradise for those who take care of orphaned children.<sup>184</sup>

Yet, despite its acceptability in the religious and cultural practices of the Hausa –Fulani, only less than 40% of the respondents in the study were actually willing to foster a child under the Kafalah system even though 80% thought it was a good idea.<sup>185</sup> This raises the question as to why fostering (Kafalah) has wide acceptability and yet not many infertile Hausa-Fulani women would actually go ahead to adopt this system as a form of non-biological parenting. The reasons may have to do with the fact that Kafalah confers limited rights on a non-biological parent as compared to a biological parent. For instance, under the Kafalah system, a childless family may care, provide for the maintenance of a child. Yet, they are prohibited from giving the child their family name or providing it with inheritance entitlements that would normally accrue to biological children.<sup>186</sup> These limitations may not provide infertile or involuntary childless couples with a strong incentive to accept Kafalah as a substitute for their desire to achieve full biological parenthood. But the same argument may apply to foster parenting under received Western law. Some may argue that this form of non-biological parenting since it has cultural acceptance should be recommended as an effective way of tackling infertility particularly when consideration is given to the large numbers of orphaned children that need to be cared for. As earlier stated, this concern on whether non-biological parenting such as fostering and adoption can be considered as viable ways of managing infertility instead of the widening of accessibility of ARTs will be further considered in the next chapter.

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<sup>184</sup> Ibid.

<sup>185</sup> Ibid at p 21.

<sup>186</sup> This however does not stop them from bequeathing in their will property to their wards. See Ishaque S., Islamic principles on adoption: examining the impact of illegitimacy and inheritance concerns in context of a child's rights to an identity (2008) 22 International Journal of Law and Policy and the Family p 407.

While there are many benefits that an infertile or involuntary childless woman may enjoy under the Kafalah system and other forms of non-biological parenting, it is impossible to ignore the fact that when it comes to intestate succession, a childless woman may also experience disenfranchisement under Islamic law. This is because a childless widow is entitled to less of her husband's property than would have been the case if she had children for him.<sup>187</sup> The disenfranchisement that a childless widow may experience under Islamic law suggests that biological motherhood under Islamic rules and customs affords a greater status to women than other constructions of motherhood. This again suggests that there is a basis to argue for wider accessibility to ARTs in a pluralist African community. This point will be further considered in chapter six of this thesis which explores whether there is right to universal reproductive health care. Before concluding this chapter's discourse on the construction of motherhood in an identified Sub-Saharan country, it is necessary to briefly outline the impact that Nigerian statutory law and received English law has on the way motherhood is legally construed in Nigeria.

#### **4.6 Motherhood under Nigerian Statutory law and Received English law**

This chapter has primarily been concerned with the construction of motherhood under Nigerian customary law and Islamic law. This is because many Africans, including Nigerians conduct their personal and family matters within the context of these laws. However, the pluralistic nature of African legal systems makes it impossible to ignore the role that statutory law and received Western law play in determining the legal status of womanhood in countries such as Nigeria. It is for this reason that this chapter concludes with a brief consideration of how adult womanhood is construed under Nigerian statutory law and its received English law.

One legacy of Nigeria's colonial experience is that a significant section of its legislation and case law is based on English law. The English law that applies in Nigeria consists of

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<sup>187</sup> See a discussion on this point in Nasir J., *The Islamic Law of Personal Status* (London: Graham & Trotman/Kluwer Publishing: 1990) at p 249 which points to an authoritative ruling stating that a '*childless widow shall receive nothing from the land left by the deceased and shall only take her share of machinery, buildings and trees.*'

common law and doctrines of equity and statutes of general application in force in England on January 1 1900. English law made before 1960 can also apply directly to Nigeria by their own force. Extensive work has already been carried out on the impact of received English law on the Nigerian legal system.<sup>188</sup> The focus of this thesis is not to rehash matters that have already been comprehensively addressed in other literature. Rather this thesis will confine its discourse on received English law on its impact on the construction of motherhood pre and post-independence. A key aspect of English family law in Nigeria was to introduce the monogamous marital institution which entails marriage between one man and one woman to the exclusion of all. This was brought into force in Nigeria by the colonial administration first by the 1863 and 1884 Marriage Ordinances<sup>189</sup> applicable to Lagos, the Marriage Proclamation 1906<sup>190</sup>, the Marriage Ordinance 1908<sup>191</sup> which applied to the protectorate of Southern Nigeria and the Marriage Proclamation 1907<sup>192</sup> applicable to protectorate of Northern Nigeria. These pieces of legislation were subsequently repealed and replaced by the 1914 Marriage Act<sup>193</sup> which applied throughout Nigeria.<sup>194</sup>

To some extent, it can be argued that the legislation offered protection to infertile and involuntary childless women during this historical period. This is due to the requirement that marriages celebrated under the legislation had to be monogamous. An infertile or involuntary childless woman could therefore have some assurance that the law would censure attempts made by her husband to procure children outside a subsisting ordinance marriage.<sup>195</sup> However, the codification of the requirement of monogamy equally meant that she could not avail herself of cultural mechanisms such as male helpers to help her

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<sup>188</sup> See for example Okonkwo (Note 47); Kasumu (Note 42); Obilade (Note 60).

<sup>189</sup> No. 10 of 1863 and No 14 of 1884.

<sup>190</sup> No 10 of 1906.

<sup>191</sup> No 9 of 1908.

<sup>192</sup> No.1 of 1907.

<sup>193</sup> No.18 of 1914.

<sup>194</sup> Nwogugu (note 175) at pp 37-38.

<sup>195</sup> See the cases of Re Sarah Adadevoh (1951) W.A.C.A 304; Cole v Cole (1898) 1 N.L.R 15; Haastrup v Coker (1922) 8N.L.R 68.

conceive, if male infertility was the cause of the childless state of her marriage.<sup>196</sup> Further, nothing in these statutes precluded her husband from divorcing her on grounds of the inability to reproduce.

Nigerian statutory law has since evolved beyond the colonial legacy of English law and post-independence law has further impacted on the construction of motherhood and parental rights within Nigerian family structures. It is pertinent to mention that Nigeria operates a federal system. Consequently, the laws made by the Federal Government apply throughout the country while legislation made by states is localised and applicable only to the legislating state. The current federal legislation that governs the family in Nigeria are the current Matrimonial Causes Act 1990,<sup>197</sup> Wills Act of 1837<sup>198</sup> and the Child Rights Act 2003<sup>199</sup>. Cognisance is also taken of the application of the 1999 Nigerian constitution which is the grundnorm of the Nigerian legal system.<sup>200</sup>

The Matrimonial Causes Act essentially retains the monogamous institution of marriage between one man and one woman. However, unlike the previous Marriage Act 1914, the Matrimonial Causes Act provides a wider definition of which children can be classified as children of a marriage contracted under the Act. Section 69 of the Act sets out the categories of children who will be deemed to be children of a marriage contracted under the Act.

Children of the marriage include:-

- (a) any child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
- (b) any child of the husband and wife born before the marriage, whether legitimated by the marriage or not; and

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<sup>196</sup> This may not necessarily have been much of an issue for practising Christians who subscribe to monogamous marriage since adultery is censured in the Christian faith. See the gospel according to Matthew 19 verses 8-9.

<sup>197</sup> Matrimonial Causes Act Cap. 220 Laws of the Federation of Nigeria 1990. This Act repealed the 1914 Marriage Act.

<sup>198</sup> Retained in Nigerian law as a statute of general application.

<sup>199</sup> CAP 2003 of the Laws of the Federation of Nigeria 2004.

<sup>200</sup> AG Abia State v AG Federation of Nigeria [2004] 6 NWLR 264.

- (c) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife,

This section provides significant parental rights to an infertile woman by statutorily affirming the status of her adopted children. Arguably, section 69(c) may also allow for the legitimisation of children that she may have through the assistance of male donors if the child is considered at the relevant time<sup>201</sup> to be a member of the household of the husband and wife.

The Child's Rights Act 2003 even goes further to provide wider parental rights relating to non-biological parenthood by creating a detailed statutory framework for child adoption. Section 129 of the Act stipulates who can adopt and this includes married couples, single people (provided that the children to be adopted are of the same sex as the prospective adoptive parent). Unlike some localised customs, where a woman cannot adopt without the permission of her spouse, this section of the Child Rights Act allows a woman to autonomously adopt and to assume full parental rights and responsibilities over such child. These include custody, maintenance, supervision and the education of the adopted child.<sup>202</sup>

It therefore can be argued that current Nigerian statutory law bolsters the rights of non-biological mothers especially if their marriages are contracted within the statutory framework. It can be further argued that the 1999 Nigerian Constitution which serves as the grundnorm of Nigerian law also further strengthens the status of non-biological parents. Reference can be made to s.42 (2) of the Constitution which expressly prohibits discrimination on the basis of birth circumstances. This was the constitutional section relied upon by the Nigerian

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<sup>201</sup> The relevant time has been interpreted by the Act to include the time preceding proceedings brought under the Act or the time immediately preceding when husband and wife ceased living together.

<sup>202</sup> Section 141(1)(b) of the Child Rights Act 2003.

Supreme Court in the recent case of Ukeje v Ukeje<sup>203</sup> when it refused to uphold as law a custom that prohibited female children from inheriting from their father's estate if he died intestate.

#### **4.7 Conclusion**

It is commendable that the Nigerian legislative framework particularly through the Child Rights Act has evolved over the year to enhance the status of non-biological parenting. Yet, it remains the position that many Nigerians still conduct their personal affairs under customary law or Shariah law and as such may not bother to avail themselves of the statutory protection afforded under the Child Rights Act or the legislation that governs monogamous marriages. This is the persisting reality of a pluralistic society that is governed by a variety of rules and normative values. However, it can be argued that where there is a conflict between these pluralistic rules, the Nigerian legislative framework particularly the 1999 Nigerian constitution should prevail.<sup>204</sup> Yet it is worrying that states within Northern Nigeria where the Hausa-Fulanis are domiciled have refused to enact into state law the provisions of the Child Rights Act which they opine are contrary to their religious and cultural values. This is a point that will be further explored in the next chapter of this thesis. However, since the Constitution is the supreme law of the Nigerian legal system, there is no reason why religious or customary rules that treat non-biological parenting options such as foster parenting and child adoption as inferior to biological parenting should continue to apply. This is because such laws will be seen as breaching s42 (2) of the 1999 Nigerian Constitution which prohibits discrimination on the basis of the circumstances of one's birth.

Yet the judicial cases that have ensued from the Nigerian Supreme Court such as Meribe v Egwu,<sup>205</sup> Mojekwu v Mojekwu<sup>206</sup> and Akinnubi v Akinnubi<sup>207</sup> establish that the Court's record in striking down laws that are discriminatory to women is far from satisfactory. While the

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<sup>203</sup> Ukeje v Ukeje (note 98) above.

<sup>204</sup> Section 1(3) of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>205</sup> Meribe v Egwu (note 114) above.

<sup>206</sup> Mojekwu v Mojekwu (note 92) above.

<sup>207</sup> Akinnubi v Akinnubi (note 84) above.

Ukeje v Ukeje<sup>208</sup> decision is certainly a positive development in that it allows female children to inherit in customary intestate succession, the Supreme Court has still not gone far enough to tackle the discriminatory norms and practices that stop married women from inheriting under intestate succession. As the Akinnubi case demonstrates, a widow can only sue as next friend for her children. If she is childless, her situation becomes precarious under customary or Islamic intestate succession.

This is why motherhood, particularly biological motherhood will continue to remain an important goal for women to attain in pronatalist Sub-Saharan African countries like Nigeria. While non-biological parenting options will offer some respite, most involuntary childless women will continue to seek ways in which they can achieve biological motherhood since having children of their own would bolster their prospects in family succession matters. This is one of the critical reasons why this thesis will further consider why child adoption, on its own, cannot serve as an effective infertility management option in pluralist African societies that are governed by a variety of laws and norms, including customary and Islamic law which do not take too kindly to the institution of child adoption.

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<sup>208</sup> Ukeje v Ukeje (note 98) above.



## Chapter Five

### The status of child adoption in African pluralistic legal systems– a case for widening access to ARTs in developing countries

#### 5.1 Introduction

Some discussion has been provided in the preceding chapter on the child adoption in a case study African jurisdiction. The discourse was undertaken for the purposes of determining whether non-biological constructions of motherhood could help in bolstering the status of the involuntary childless woman in the Sub-Saharan African continent. This chapter extends that discussion and focuses on whether child adoption should be considered as the primary or sole infertility management option for involuntary childless couples in Africa. This is particularly relevant when consideration is given to the arguments that Africa is over-populated and filled with orphaned or vulnerable children in need of a family life. This has led some to argue that the infertile and involuntary childless should bear the social burdens associated with over-population and children in need of care.<sup>1</sup> While these are valid concerns, this chapter will present a contrary perspective on why child adoption should not be treated as the primary or sole mechanism for infertility management in legally pluralist communities within the Sub-Saharan African region.

As has been stated in earlier chapters in this thesis, it is a known fact that most African countries practise legal pluralism which allows for the co-existence of multiple legal systems.<sup>2</sup> As identified in chapter four of this thesis, two legal systems- Islamic (Shariah) law

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<sup>1</sup> Daar AS., Merali Z., Infertility and social suffering: the case of ART in developing countries In: Vayena E., Rowe PJ., Griffin PD., (eds.) Current Practices and Controversies in Assisted Reproduction. Geneva, Switzerland: World Health Organization; 2002. p 15 at p 19.

<sup>2</sup> See Menski W., Comparative Law in a Global Context: The Legal Systems of Asia and Africa (Cambridge: Cambridge University Press, 2006: 2<sup>nd</sup> ed) 696 pp; Oba A., Islamic Law as Customary Law: The Changing Perspective in Nigeria (2002) 51 (4) International Comparative Law Quarterly p 817; Church J., The Place of Indigenous Law in Mixed Legal System and a Society in Transformation: A South African Experience [2005] ANZLH-E Journal pp 94 and 104.

and customary law which are widely practised in several African countries alongside other legal rules such as English received common law do not recognise child adoption as construed under Western family law. This is not to say that these non-Western norms do not permit quasi-legal kinship relationships such as guardianship and fostering, however they do not recognise the legal kinship and parental rights that formal child adoption creates in Western legal systems. As discussed in chapter four of this thesis, the limited scope of the quasi-legal kinship rights provided in the customary and Islamic legal systems does raise some questions on why some continue to canvass that child adoption should be treated as the primary infertility management option in Sub-Saharan Africa and other parts of the developing world.<sup>3</sup>

It is for this reason that this chapter can be considered as important to the overall thesis which seeks to build a case for widening access to ARTs in Sub-Saharan Africa. This is because it seeks to counter the existing policy arguments raised by leading health activists such as Vekeman on this matter.<sup>4</sup> He argues that there is no need to widen access to ARTs in Sub-Saharan Africa due to over-population and budgetary concerns that poor resourced states face.<sup>5</sup> Toubia,<sup>6</sup> while not accepting Vekeman's view that ARTs should be limited due to overpopulation concerns, accepts that child adoption could be 'a beautiful and rewarding alternative to biological parenting.'<sup>7</sup> She however acknowledges the existence of social and legal barriers that limit the wide applicability of child adoption in many countries.<sup>8</sup> This view is also supported by other policy makers<sup>9</sup> who canvass that there should be community

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<sup>3</sup> Daar, Merali (note 1) above.

<sup>4</sup> Vekemans M., *Infertility treatment: Luxury, Desire or Necessity* (1994) 4 *Reproductive Health Matters* 93 which argues that treatment of infertility is a luxury especially in resource poor countries with over-population concerns.

<sup>5</sup> *Ibid* at p 93.

<sup>6</sup> Toubia N., *Social Pressure is not the only reason why people want children* (1994) 4 *Reproductive Health Matters* p 94. This commentary is a response to Vekeman's article.

<sup>7</sup> *Ibid* at p 95.

<sup>8</sup> *Ibid*.

<sup>9</sup> Oladokun A., *Acceptability of Child Adoption as Management Option for Infertility in Nigeria: Evidence from Focus Group Discussions* (2009) 13(1) *African Journal of Reproductive Health* 79 at 89.

mobilisation and awareness campaigns to bolster wider social acceptability of child adoption in regions such as Sub-Saharan Africa. This thesis however identifies with works such as Daar and Merali,<sup>10</sup> Bharadwaj and <sup>11</sup> Shah<sup>12</sup> that argue that it is inequitable to require the involuntary childless in developing regions to bear the social burden of adopting the growing number of orphans or to tackle, on behalf of the fertile, societal concerns to do with overpopulation.

It important to note that these cited works are primarily situated in medicine and the social sciences; they therefore do not fully explore the legal status of child adoption under non-Western legal systems as practiced in many regions of the developing world nor do they discuss the impact these systems may have on infertile couples who seek to find meaningful parental fulfilment through child adoption. This is not to say that there is an absence of literature within the legal discipline that addresses the status of child adoption in non-Western legal systems. The literature referenced below shows otherwise.<sup>13</sup> However, these legal works appear to focus more on the rights of children as provided by the adoption route and not on the legal impediments that may arise when child adoption is touted as the sole or primary means through which infertility of involuntary childlessness is managed in Sub-Saharan Africa. This chapter therefore attempts to fill a gap in the literature by considering how the status of child adoption in a pluralist (mixed) legal system may make it impractical to adopt this mechanism as the primary mode of infertility management in the region.

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<sup>10</sup> Daar, Merali (note 1) above at pp 15 and 19.

<sup>11</sup> Bharadwaj A., *Why Adoption is not an Option in India: The Visibility of Infertility, the Secrecy of Donor Insemination, and other Cultural Complexities* (2003) 56 *Social Science and Medicine* p 1867

<sup>12</sup> Shah I., *Treatment of Infertility: An Integral Part of Reproductive Health and a Necessity* (1994) 4 *Reproductive Health Matters* 96.

<sup>13</sup> See for example Parts V and VI of O'Halloran K., *The Politics of Adoption: International Perspectives of Law, Policy and Practice* (London: Springer, 2<sup>nd</sup> edition, 2009), Ruppel O., Shipila P., 'Adoption: Statutory and Customary Law aspects from a Namibian perspective' in Ruppel O., (Ed.), *Children's rights in Namibia* (Namibia: Macmillan Education, 2009) pp 189 - 200 and Wengi-Okumu J., *Searching for a Child Centered Adoption Process: The Law and Practice in Uganda* in Ncube W (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Hampshire, Ashgate: 1998) pp 225-248.

It begins by considering the position of child adoption under African pluralism and explores whether it is right for policy makers to place the social burden of adopting less privileged children in Sub-Saharan African countries solely on infertile and involuntary childless couples within the region. It examines these issues against the backdrop on whether current international and regional frameworks on human rights and child adoption provide a fundamental right to adopt for involuntarily childless couples and the larger spectrum of potential adoptive parents outside the traditional confines of the best interest of the child. It concludes with recommendations for the widening of access to low-cost IVFs to provide for greater choice and autonomy for involuntarily childless people as well as the implementation of reforms of the child adoption framework applicable in mixed legal systems to guarantee and strengthen the parenting rights and responsibilities of involuntarily childless people in Sub-Saharan Africa.

## **5.2 Western and Non- Western Perspectives of Child Adoption: Matters Arising**

In a botched adoption process, Iris Botros and her husband, Louis Andros as well as Suzan Haglouf and her Egyptian husband were convicted of child trafficking by an Egyptian Court in 2009.<sup>14</sup> According to the indictment, the couples had adopted new born children from a Coptic Christian orphanage and were arrested when they applied for US visas to travel back to the US with the children. Their defence team argued that the couples were merely trying to adopt children but unknowingly breached Egyptian laws that were based on strict Islamic laws that prohibited child adoption. They further argued that the case was a human rights case which affected the minority Copt community since Egyptian law did not provide legal mechanisms for non-Muslims to adopt in Egypt. Notwithstanding the arguments put forward by the defence, the defendants were found guilty of child trafficking and forgery and

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<sup>14</sup> See Goodwin M., *Baby Market: Money and the New Politics of Creating Families* (Cambridge: Cambridge University Press, 2010) pp xix and xx where this case is discussed.

sentenced to two (2) years imprisonment.<sup>15</sup> From a jurisdictional perspective, this case falls outside the remit of this thesis' site of investigation which is Sub-Saharan Africa. However, as earlier mentioned in chapter four of this thesis, Islamic legal rules have a much wider application than localised customary rules. This mean that cases from other jurisdictions where Islamic law is practised can offer comparative examples of the legal restraints that prevent child adoption from being treated as the primary mechanism for infertility management in many developing countries that practise non-Western legal systems. It is interesting to note that Toubia, a Sudanese women health rights activist also makes this point in her earlier cited article.<sup>16</sup>

As considered in the preceding chapter of this thesis, non-Western legal scholarship or jurisprudence situated within Shariah and indigenous customary law do not provide the same recognition to child adoption as Western legal jurisprudence. By Western jurisprudence, we mean the 'overall attitudes of jurists in the West to questions of justice and law and the patterns of legal theory which have prevailed in Western Europe and the United States of America.'<sup>17</sup> Conversely non-Western jurisprudence has been described as the 'working whole structure of law in non-Western countries individually or collectively.'<sup>18</sup> Non-Western jurisprudence therefore includes religious and customary laws derived from indigenous cultural sources of non-Western societies. This chapter does not intend to provide an extensive treatise on the debate of which system is more universal or superior to the other as there is already extensive literature on this point.<sup>19</sup> Rather it seeks to examine how child adoption is construed under the two systems of legal jurisprudence and how these

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<sup>15</sup> Reuters 'Egypt court jails U.S. couples over illegal adoptions' Reuters News 17 September 2009 available at <http://www.reuters.com/article/2009/09/17/us-egypt-adoption-idUSTRE58G2M720090917?pageNumber=1> accessed March 7 2011.

<sup>16</sup> See Toubia (note 6) above.

<sup>17</sup> Curson L., *Jurisprudence* (Cavendish Publishing: London 2<sup>nd</sup> Edition, 1995) at p 13.

<sup>18</sup> Chiba M., *Legal pluralism in Sri Lankan society: Towards a general theory of non-Western law*, 33 *Journal of Legal Pluralism* 1993 p 197 at p 199.

<sup>19</sup> See for example Menski in note 2 above and Chiba in note 18 above and Chiba M., (ed.) *Asian indigenous law in interaction with received law* (London and New York: KPI, 2006) and Chiba M., *Legal Pluralism: Towards a general theory through Japanese legal culture*. (Tokyo: Tokai University Press: 1989) 236 pp.

constructions may affect the parenting rights and benefits of infertile couples within regions where these legal systems are practiced on equal footing.

Under Western jurisprudence, child adoption involves the transfer of a child from one filial relationship to another, whereby for legal purposes the child ceases to be the child of its natural parents and is regarded as the child of the adopter.<sup>20</sup> This is said to be derived from the parent centred model of child adoption developed by ancient Roman law where adoption existed for the benefit of the parent rather than the child.<sup>21</sup> The incessant clamour from different quarters that child adoption should be considered as a panacea for involuntary childlessness in the developing world is predicated on the faulty notion that Western jurisprudence, and its perspective of kinship and parenting rights, has universal application in all jurisdictions or that it is more superior to other systems of legal rules that are applied in legal pluralistic societies.<sup>22</sup> But as the *Iris Botros* and the *Suzan Hagoulf* cases in Egypt<sup>23</sup> demonstrate, many countries within the developing world, where involuntary childlessness is prevalent, practise non- Western legal systems such as Islamic law and indigenous customary law. While these systems may provide for quasi-adoptive structures (such as guardianship (*Kafalah*) or fostering) it is questionable whether they provide the same legal recognition to child adoption as obtains under Western jurisprudence.

As pointed out in the preceding chapter of this thesis, although different Islamic schools of thoughts may vary, they generally prohibit an institution of child adoption that entails the absolute transfer of parental rights to another and the severance of genealogy.<sup>24</sup> The Islamic

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<sup>20</sup> Nolan L., Wardle L., *Fundamental principles of family law* (Buffalo: William Hein & Co Inc, 2<sup>nd</sup> ed 2006) p 294; See also Bayme S., Rosen G., *The Jewish Family and Jewish Continuity* (New Jersey: KTAV Publishing House, 1994) p 174.

<sup>21</sup> *Ibid.*

<sup>22</sup> Chiba (note 18) above at p 197.

<sup>23</sup> Goodwin (note 14) above.

<sup>24</sup> Welchman L., *Women and Muslim family laws in Arab States: a comparative overview of textual development and advocacy*, Amsterdam University Press, Amsterdam, 2007 at p 148.

position was succinctly expressed by the Bangladesh delegate on the draft article 21 of the United Nations Child Rights Convention (UNCRC) when he stated:

'[Draft article 21] is liable to give difficulties in Muslim countries since the understanding of the Bangladesh is that adoption is not a recognised institution under Muslim law.'<sup>25</sup>

However, this is not to say that some Muslim countries such as Tunisia by a 1958 law and Somalia (through its Family Code prior to its degeneration as a failed state)<sup>26</sup> do not provide statutory models of adoption that are not dissimilar to Western adoption. But scholars argue that the Tunisian and Somalian statutory regimes on child adoption cannot be considered as standard Islamic legislative models, but rather state law that is based on received law.<sup>27</sup> As pointed out in the preceding chapter of this thesis, Islamic law is not the only form of non-Western jurisprudence that refuses to provide full legal recognition to the institution of child adoption. Many indigenous customary (native law) systems in Africa do not subscribe to the Western model of child adoption. In some cultures, adoption which entails the full severance of a legal relationship between a child and its natural parents is equated as being as bad as slavery and no child should be subjected to a situation where it is deprived of its legal kinship with its natural genetic family.<sup>28</sup>

The conventional African customary law position revolves around the position that child adoption, even when permitted should not sever the legal relationship between a child and its biological relationship. This was successfully raised as a conflict of law issue in the UK

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<sup>25</sup> See UN Doc. E/CN.4/1986/39 Annex IV p.2, at Article 11 and also O'Halloran K., *The politics of adoption: International Perspectives on Law, Policy and Practice*, (Springer Science, 2009) at p 381.

<sup>26</sup> See the Somalian Family Code. Law 23 of 11 Jan 1975; See also Pearl D., Menski W., *Muslim Family Law* (London: Sweet & Maxwell: 3<sup>rd</sup> edition, 1998) p 409.

<sup>27</sup> *Ibid*; see also Welchman (note 24) at p 148 where it is argued that the Tunisian model is a clear departure from 'its Muslim Law sources.'

<sup>28</sup> See Re N (a minor) (adoption) [1990] 1 FLR 58 at pp 63 and 68.

case of Re N<sup>29</sup> involving cross-racial adoption. Here a Nigerian father successfully challenged the action brought by white foster parents to adopt his child (who had been placed in their care) partly on the ground that the child adoption was not an 'institution known in Nigeria and smacked of slavery'.<sup>30</sup> The court accepted arguments that there was no concept of adoption<sup>31</sup> in the Nigerian society and that an adoption order would cause shame and distress to the Nigerian birth father as he had an important role to play in the child's life.<sup>32</sup>

Beyond the politics of race in child adoption that this case raises,<sup>33</sup> it is also relevant in providing some insight on the legal status of child adoption under African customary law. However, the case can be faulted on its finding that there was no concept of adoption in the Nigerian society. This is because at the time the action was instituted, child adoption was already statutorily recognised in some parts of Nigeria.<sup>34</sup> Further, as pointed out in the preceding chapter of thesis, Nigerian case law also attests to some acceptance of customary law adoption. For example in the case of Re Estate of Aminatu A.G.V v Tunkwase<sup>35</sup>, the court in determining what choice of law to apply in the disposition of the estate of the deceased who was a Muslim and who died intestate, held in favour of her Ijebu native law and custom which allowed her adopted children to inherit from her estate as compared to strict Islamic law which would have prevented them from participating in the distribution of the estate.

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid at p 68.

<sup>31</sup> Ibid at p 64.

<sup>32</sup> Ibid at p 68.

<sup>33</sup> See for example Bartholet E., Where do black children belong? The politics of race matching in adoption. (1991) 139 U. Pa. L. Rev. 1163; Mears M., Adoption, Bigotry and Race [1990] New Law Journal 564

<sup>34</sup> See for example, pre-existing state legislation on child adoption prior to the enactment of the Nigerian Child Rights Act 2003. Discussed by Larry Chukwu in a paper Adoption of Children in Nigeria under the Child's Rights Act 2003 available from <http://www.law2.byu.edu/isfl/saltlakeconference/papers/isflpdfs/Chukwu.pdf> accessed March 7, 2010.

<sup>35</sup> (1945), 18 N.L.R. 88.



Yet in Re N, the Nigerian father purportedly relying on indigenous customary law rules was able to successfully claim that child adoption was unknown in Nigeria and to further argue that the foster parents who had lovingly raised his child from infancy were merely acting as caregivers<sup>36</sup> and should not be allowed to assume the role as the child's legal parents. It is recommended that should a similar conflict of law issue in relation to child adoption arise in the English courts that Re N on the status of child adoption under Nigerian law should be treated as bad law on the grounds that, at the time this case was heard, child adoption was known under Nigerian statutory law and to some extent under Nigerian customary law and practice.

Notwithstanding the above, the arguments raised on behalf of the father in Re N cannot be completely overlooked. This is because in terms of societal perception, child adoption under African customary law is normally considered in some communities as foster parenting or kinship guardianship. These quasi-adoption structures do not involve the severance of relationships with the biological family. This argument resonates with statements attributed to the Malawian father of David Banda, the first Malawian child, adopted by Madonna when he commented that he was not informed that the adoption process would mean that David would no longer legally be his son and that if he had been told this he would not have allowed for the adoption.<sup>37</sup> Further, his comment that he thought the primary reason for Madonna, 'adopting his son was to educate and take care of the child and that after this had been done that the child will return home,'<sup>38</sup> supports the fact that many Africans conduct their affairs on the strict application of indigenous customary rules. These rules tend not to favour the practice of child adoption that legally severs kinship ties between a child and its biological parents.

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<sup>36</sup> A role actively encouraged in customary law providing it does not create legal rights that sever a child from its birth parents.

<sup>37</sup> BBC Father now backs adoption BBC News Thursday, 26 October 2006 available at <http://news.bbc.co.uk/1/hi/entertainment/6086340.stm>. (accessed February 2, 2010).

<sup>38</sup> Ibid.

It would appear that this important point on the scope of parenting rights that are provided under child adoption is yet to be fully understood by those who advocate this framework as one of the primary key infertility management options for involuntarily childless people in the Sub Saharan Africa. It is therefore questionable whether there is any sustainable ground to continue to restrict access to affordable assisted reproductive technologies (ARTs) primarily on the ground that the infertile should bear the social burden of raising HIV/AIDs orphans or other disadvantaged children without considering how child adoption is viewed under Islamic and customary rules within a pluralistic African legal system.

This is not to say that in all African countries that child adoption is not fully recognised under customary law. South Africa, for example, as evidenced by its case law provides legal recognition of the institution of child adoption under customary law. In the 2001 case of Metiso v Padongelukfonds<sup>39</sup>, it was held that there was a legal duty to maintain minor children who had been adopted under customary law despite the fact that the customary adoption process did not comply with all the statutory requirements set out under South African law. Further in the case of Kewana v Santam Insurance Co Ltd<sup>40</sup>, a case decided by the then Transkei Appellate Division, it was held that an adoption by an unmarried woman under customary law was valid and provided the adopted child with a legally enforceable right to claim against the third party insurance for loss of support arising from the negligent killing of his adoptive mother in a bus accident. The position that child adoption under South African customary law (in this case Xhosa customary law) is valid and creates legally enforceable rights was also upheld in the recent case of Maneli v Maneli.<sup>41</sup> In this case which involved child maintenance issues, the High Court had no difficulties in finding that the minor child had been adopted under Xhosa customary law which resulted in the

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<sup>39</sup> 2001 (3) SA 1142 (T),

<sup>40</sup> 1993 (4) SA 771 (TkA) Compare this with the Nigerian case of Dogbo v. Akinwande (1974) 8 Nig. L.J. 134. where the Western State Court of Appeal refused to uphold the lower court decision that dependants of a deceased aunt who had been in locus parentis to them could be treated as children under customary law who could claim under section 5 of the Torts Law.

<sup>41</sup> Maneli v Maneli (14/3/2-234/05) [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ) (19 April 2010).

establishment of a legal parent/child relationship between the adoptive parents and the adopted child.

It can be argued that the South African position is a progressive construction of the status of child adoption under African customary law. Yet it is still unclear whether the legal enforceable rights accruing from customary child adoption which was affirmed in the Kewane and Maneli cases respectively establish a continent wide recognition of full parenting rights under customary child adoption. As discussed in earlier sections of this thesis, African customary laws are in many instances largely localised<sup>42</sup> and this localisation can result in varying rules, including rules relating to child adoption. Moreover it will seem that in recognising that customary law could create a legal parent/child relationship that the South African courts were more concerned with what was in the best interest of the child under customary law rather than in necessarily upholding the right of infertile people to adopt through this system.

Another interesting point is also raised by Church<sup>43</sup> in her piece on the status of child adoption under indigenous law in a mixed legal system. She points out that in deciding whether child adoption was possible under customary law, the South African court recognised that 'there was a general familial right to support members within the same agnatic group at indigenous law'.<sup>44</sup> This raises an interesting point on whether child adoption under customary law is restricted to situations where an adoptive parent can prove an agnatic (family kinship or clanship relationships) with the child, or whether this would equally apply to other groups of prospective adoptive parents without proof of such agnatic relationship with the child. Further, even when child adoption is permitted under customary law, is the judicial recognition of the familial right to support members within an agnatic group based primarily on the best interest of the child or on the parenting needs of the

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<sup>42</sup> Okonkwo C., Introduction to Nigerian Law (Sweet and Maxwell: 1980) pp 42-43.

<sup>43</sup> Church (note 2) above.

<sup>44</sup> Ibid at p 94 and p 104.

prospective adoptive parent? If this is the case then it would appear, that just like international child right laws on child adoption as embedded in the United Nations Convention on the Rights of the Child (UNCRC)<sup>45</sup> as well as the African Charter on the Rights and Welfare of the State, child adoption when recognised under customary law is primarily a child -centred system of adoption and not one that primarily seeks to meet the parenting needs of the child.

This point is further explored by Ruppel and Shipila in their discussions on the Namibian perspective of customary child adoption<sup>46</sup> where they point out that the familial right of customary child adoption or kinship care is a way of ensuring that in line with Article 30 of the United Nations Child Rights Convention (UNCRC) that a child's interest is best served if it is raised within its community.<sup>47</sup> It therefore will appear that customary child adoption even when recognised in certain African jurisdictions caters more for the benefit of the welfare of the child rather than any altruistic concerns for the parenting needs of infertile people. This is not to say however that the familial right of adoption or kinship care would not have some corollary effect of providing childless couples with some parental fulfilment. However, the concern here is whether customary law actually sets out to provide childless couples with a wide array of parenting rights or benefits or whether it strictly concerned with catering for the needs of younger members of the clan or extended family. These queries are further explored in the next section which considers the functions of child adoption under both Western and non –Western legal systems.

### **5.3 An Appraisal of the Functions of Adoption under Western and non-Western Legal Systems**

So far this thesis has shown that both African customary law and Islamic law recognise the welfare function (or the best interest of the child goal) in the sense that their primary

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<sup>45</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989.

<sup>46</sup> Ruppel, Shipila (note 13) above at pp 195 and 196.

<sup>47</sup> However Ruppel and Shipila do question whether in all cases that kinship care does provide a loving, stable and permanent family environment for the child in line with the best interest principle, *ibid* at pp 196 and 197.

objective is to provide a loving home environment to children deprived of family life.<sup>48</sup> In this sense, the familial right of customary child adoption or kinship care and the Islamic system of sponsorship or guardianship known as Kafalah can be seen as similar to the Western child adoption model as they all focus on the best interest or the welfare of a child.

However, while these systems under non-Western jurisprudence may be similar in function to Western child adoption, the latter (at least in its original form)<sup>49</sup> goes beyond the best interest of the child concept for it also provides full legal recognition of the parenting rights of the adoptive parent. This is done by providing them with legal kinship ties comparable to those that biological parents have with their children. To this extent the Western model of child adoption still retains some strands of Roman adoption law in that child adoption cannot be said to be strictly a child centred model, but one also that provides benefits and rights for the adoptive parents.<sup>50</sup> It is this latter function of the Western model of child adoption that poses some concerns for non-Western legal rules such as Islamic law and customary law which focus on preserving the biological lineage and bloodlines between a child and its biological parents.<sup>51</sup>

It is at this point that any similarity between the quasi-adoptive structures recognised under Islamic and customary law and that of statutory adoption derived from Western jurisprudence ends. While all these systems of child adoption are actively based on child welfare, there is continuing debate on whether the non-Western systems of law bestow full parenting rights similar to those that are operative under the Western model of child adoption. As earlier pointed out, Islamic law in particular forbids a situation where a child is severed from its kinship ties with its biological parents. Consequently, full rights granted to

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<sup>48</sup> O'Hallaran at pp 8 and 73 at note 13 above.

<sup>49</sup> Baymie, Rosen (note 20) above.

<sup>50</sup> Ibid.

<sup>51</sup> Ishaque S., *Islamic Principles on Adoption: Examining The Impact of Illegitimacy and Inheritance Concerns in Context of a Child's Right to an Identity* (2008) 22 *International Journal of Law, Policy and the Family* pp 393 – 420.

adoptive parents will be deemed as completely inconsistent with the whole notion of what Islamic law considers as in the best interest of a child.<sup>52</sup>

The refusal to provide full legal kinship rights to adoptive parents under non-Western rules such as Islamic law creates a major set-back for any infertility management plan that seeks to place child adoption as a primary management goal for tackling involuntary childlessness in the sub-Saharan African region. It is pointless to argue that infertile couples should actively pursue child adoption to resolve the pains of involuntary childlessness or that they should be made to bear the social burden of providing loving homes for less privileged or orphaned children with a home, if these non-Western rules which tend to be the predominant rules, that guide personal status and family life prevent them from exercising full parenting rights over non-biological children under their care. This may explain why there is not wide social acceptability that child adoption should be treated as the primary infertility management mechanism in a region of the world that is religiously and traditionally conservative.

It is also important to point out that the prohibition on adoptive parents from assuming the role of full legal parents is entrenched in the legal rules under Islamic and customary family law rules that deal with issues such as the legal name change, inheritance, succession and property rights.<sup>53</sup> Although the quasi-adoption structures provided under these systems allow for adoptive parents to provide for the maintenance of a child and to care for it just as its birth parents would have; they are excluded from enjoying key parenting rights such as given the child their family name<sup>54</sup> or providing it with inheritance entitlements that normally would accrue to genetic (biological) children. This does not mean that they cannot provide property

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<sup>52</sup> Ibid, Ishaque at p 402 where it is stated that in tribal Arabia for example, a child's interest is protected when there is a recognition of its lineage and kinship.

<sup>53</sup> Ibid, Ishaque at p 401.

<sup>54</sup> Ibid, Ishaque argues that guardians under the Kafalah system are forbidden from giving a child under their care their family name. This is because this will deprive a child of its original identity which is fundamental in Islam.

to children under their guardianship by a bequest in a will, but if they have not actively taken steps to do this and they die intestate, the right of their adopted children could be actively affected by other conflicting rights under customary or Islamic rules of family law.<sup>55</sup>

If it is accepted that non-Western rules of Islamic law and indigenous customary law do not provide adoptive parents with a comprehensive regime of parenting rights such as the right to give a child a family name, bequeath inheritance or to treat an adoptive child at par with a biological child, what is left to consider in this chapter is to examine other rules in an African pluralistic system which operate on equal footing with Islamic and customary rules. These rules fall under statute law and the international treaties that have been ratified and transposed into domestic law by respective African states. The purpose of the examination of these rules is to consider whether these legal regimes provide involuntarily childless people with a more satisfactory model of child adoption that addresses their parenting needs. Some consideration of these rules have already been undertaken in the preceding chapter of this thesis. However, the analysis in the preceding chapter was done from the perspective of whether non-biological motherhood provides an infertile or involuntary childless woman with the same social status as her biological counterpart. The consideration of statutory child adoption in this chapter would be primarily undertaken from the perspective of whether child adoption in a pluralist system should be treated as the primary or sole means of infertility management in the Sub-Saharan African continent. A consideration of this issue begin below with an evaluation of the status of child adoption under International Law.

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<sup>55</sup> Ibid at p 407 where it is stated that Islamic law permits a person during his lifetime to make a gift of one third of his or her assets to anyone related by blood or not but Islamic laws of inheritance is specific in restricting inheritance property to members of one's biological family. See also p 411.

#### 5.4 The Status of Adoptive Parents under International Law: An Examination of International Human Rights Law and International Conventions on Child Adoption

It may be argued that there are relevant International Law rules which can be deployed to ameliorate or relieve involuntarily childless people from any untoward effect that non-Western rules may have on the parenting rights under an African legal pluralistic framework. At the international level, several African states<sup>56</sup>, including those who operate pluralist legal systems are state parties to International Human Rights conventions such as the International Covenant on Civil and Political Rights (ICCPR)<sup>57</sup> and the African Charter on Human and Peoples Rights (Banjul Charter).<sup>58</sup> These international instruments recognise the right to family life<sup>59</sup> and the freedom from discrimination<sup>60</sup> which arguably are two primary rights that are affected by restrictions imposed by indigenous customary and Islamic legal rules that fail to recognise full parenting rights for adoptive parents. But the difficulty in pursuing this line of argument lies with the critical query on the extent to which International Human Rights rules such as the ICCPR or indeed the provisions of the African Charter actually provide for the right to family life?

Even if they do, would the right to family life as construed in Article 18 of the African Charter (as the regional human rights instrument for Africa) allow for the right to found a family through the means of child adoption? This is relevant as it has been argued that other regional human rights regimes such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>61</sup> provide for the right to marry and to

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<sup>56</sup> Further information on the ratification of the principal international and regional Human Rights treaties can be obtained from the United Nations Human Rights, Office of the High Commissioner for Human Rights.

<sup>57</sup> Adopted by the United Nations General Assembly on 16 December 1966.

<sup>58</sup> (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

<sup>59</sup> Article 17 (ICCPR) and Article 18 (African Charter or Banjul Charter).

<sup>60</sup> Article 26 (ICCPR) and Article 28 of the Banjul Charter.

<sup>61</sup> As amended by Protocols No. 11 and No. 14 Rome, 4. XI 1950.



found a family as contained in Article 12, and complemented by Article 8 which sets out the right to respect private and family life? <sup>62</sup> Yet case law from the European Court of Human Rights shows that both articles do not provide individuals with a right to adopt. In several cases such as X and Y v United Kingdom,<sup>63</sup> Frette v France<sup>64</sup> and E.B v France<sup>65</sup> the ECHR refused to provide a favourable interpretation to article 8 that would permit a right to child adoption<sup>66</sup> Further in X and Y v United Kingdom<sup>67</sup>, the Court ruled that article 12 could not be extended to include the right to adopt. It is said that the decision in E.B v France is a welcoming development since the court held that child adoption should not be refused on discriminatory grounds. It however refused to affirm that the ECHR permitted for a right to adopt under article 8. More significantly as it relates to the concern of this thesis, the court of cassation held in Harroudj v France<sup>68</sup> that France's refusal to permit full legal adoption of a child living under Kafalah guardianship was not incompatible with articles 8 and 14 of the ECHR. The Harroudj case is interesting as it shows the growing recognition of the courts of the existence and application of non-Western rules of jurisprudence in a European nation.

What is also interesting to note about this case is its recognition that Kafalah was one of the ways recognised in the United Nations Convention on the Rights of a Child as safeguarding the rights of a child in a way similar to the western concept of child adoption. <sup>69</sup> Again, child adoption is viewed primarily from the perspective of best interest of the child and not necessarily from the perspective of meeting the parenting needs of a prospective adoptive parent. One of these parenting needs is the right to have a filial bond with a child. This in fact

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<sup>62</sup> But see Eljkhart M., The right to found a family as a still born right to procreate (2010) 18 (2) Medical Law Review 127 where it is argued that neither articles 8 or 10 lend themselves to this argument.

<sup>63</sup> (Application 7229/75) (1977) 12 DR 32 (EComHR).

<sup>64</sup> Rejected claims of a single homosexual man by precluding the right to adopt under article 8.

<sup>65</sup> October 2012, Application No.43546/02.

<sup>66</sup> The same applies in the US jurisdiction where the US constitution is seen as not providing a fundamental right to adopt. See Lindley for Lindley v. Sullivan, 889 F.2d 124 (7th Cir. 1989).

<sup>67</sup> See X and Y v United Kingdom (note 63) above.

<sup>68</sup> (Application No. 43631/09).

<sup>69</sup> Human Rights Europe, Court backs French Ban on Islamic 'Kafala' adoption, October 4, 2012 available at <http://www.humanrightseurope.org/2012/10/court-backs-french-ban-on-islamic-%E2%80%98kafala%E2%80%99-adoption/> (accessed March 24, 2015).

was the reason why Mrs. Harroudj sought for the full adoption of the child that she had raised in Kafalah guardianship. Yet, based primarily on the principle of best interest of the child, the ECtHR did not see the need to treat the French national court's refusal to grant full child adoption as incompatible with ECHR rights since the Kafalah system of guardianship protected the welfare of the child.

Harroudj therefore provides further food for thought for international health policy makers who are quick to advocate that child adoption should be treated as a primary mechanism for infertility management. As the Kafalah system of guardianship continues to gain a greater recognition and acceptance in different jurisdictions, including the industrialised West, it raises questions on why the institution of child adoption is still canvassed as the primary or sole mode of infertility management for involuntary childless couples. This is a matter of concern when one considers that many couples will have their family structures governed not only by full child adoption that allows for filial bonding, but by religious and customary rules that forbid such filial bonds between an adoptive parent and the adopted child.

If the ECHR human rights' regime itself does not provide for a fundamental right to adopt, it raises a comparative point of interest on whether the regional human rights framework in Africa as set out in the African Charter on Human and Peoples Rights provides infertile couples within its jurisdiction with the right to adopt? If it does, the question arises as to the extent to which rights within the African Charter on Human and Peoples Rights can negate the restrictions on child adoption as set out indigenous customary law and religious rules. Could it be argued that if the African Charter on Human and Peoples Rights is domesticated into national law, it should prevail over these rules?<sup>70</sup> It is worth noting however that the African Charter itself recognises the role that moral and traditional values play in the African society. For example, Article 18<sup>71</sup> of the African Charter on Human and Peoples Rights

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<sup>70</sup> Evans M., Murray R., *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (Cambridge: Cambridge University Press, 2002, 2008) pp 172 and 173.

<sup>71</sup> Particularly sub-article 2.

affirms that the family is the custodian of moral and traditional values that are recognised by the community. In this regard, the state has a duty to protect and assist the family in its role as the custodian of such values. It therefore can be argued that Article 18 of the African Charter on Human Rights will not exclude the application of religious or customary rules on child adoption since these rules can be said to be derived from the moral and traditional values of the community, which the foresaid article seeks to protect. However, some would contend that the wider provisions of Article 18, particularly its anti-discrimination regime of rights for women, children, the elderly and the disabled as set out under article 18(2) does not permit discriminatory practices in family life. To argue otherwise would amount to what some have argued as a 'cynical misreading of the charter.'<sup>72</sup>

There is however an uncertainty as to whether article 18 or other provisions of the African Charter can be used to canvass the right to adopt. Unlike the ECHR, where extensive case law has evolved to show that the right to adoption is not automatically founded as part of the right to family life under article 8 of the Convention,<sup>73</sup> the same cannot be said for article 18 of the African charter where there is a dearth of case-law on this point on child adoption issues, particularly at the level of the African Court of Human Rights<sup>74</sup>. There are however several decisions from the African Commission on Human and Peoples Rights<sup>75</sup> which provide for an interpretation of Article 18. The authoritative African Human Rights Case Law analyser database<sup>76</sup> provides a list of the Commission's decisions on the interpretation of Article 18 of the African Charter. These decisions are Egyptian Initiative for Personal Rights

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<sup>72</sup> Allison G., Powers S., *Realizing Human Rights: Moving from Inspiration to Impact* (New York: Palgrave Macmillan: 2000) p 147.

<sup>73</sup> See *X and Y v United Kingdom* (note 63) and *Frette v France* (note 66) above.

<sup>74</sup> The Court was established under Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol) adopted by Member States of the Organization of African Unity (OAU- predecessor body of the African Union) in Ouagadougou, Burkina Faso, in June 1998.

<sup>75</sup> Inaugurated on November 2 1987 in Addis Ababa, Ethiopia.

<sup>76</sup> The database is jointly developed by the Institute for Human Rights and Development in Africa (IHRDA) and Human Rights Information and Documentation Systems (HURIDOCs).

& Interights v Egypt<sup>77</sup> and Interights, ASDHO and Maître O. Disu/Democratic Republic of the Congo.<sup>78</sup> Neither of these two cases focused on whether the right to family included the right to adopt. John K. Modise v. Botswana, African Commission on Human and Peoples' Rights<sup>79</sup> which is an earlier decision of the Commission on the right to family life also did not focus on child adoption. Rather the Commission's decision addressed the concern on how the right to family life is impacted by the state in deportation proceedings. The Commission has also provided decisions on the Rights and Welfare of the Child further to the African Charter on the Rights and Welfare of the State. One of its significant decisions on this issue is IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya.<sup>80</sup> This case dealt with the forceful conscription of Nubians in Kenya into the British army and the consequent refusal of the Kenya government to grant Kenyan citizenship to the children of Nubian descent. Again this decision does not address the issue on whether the right to family life includes the right to adopt. Due to the apparent dearth of case law from the African Commission on this matter, it remains unclear whether the right to family life under Article 18 of the African Charter does actually include a binding right to adopt.

The appraisal undertaken above shows that the ECHR and the African Charter on Human Rights do not expressly grant a right to adopt for the sole benefit of the infertile parent. However, unlike strict Islamic and customary African legal rules, this does not necessarily mean that when an application for child adoption is granted under international human rights instruments that the adoptive parents enjoy lesser parenting rights than child's birth parents. An examination of jurisprudence from the European Court of Human Rights for example shows that upon the grant of a child adoption application, full parenting rights are granted to adoptive parents and that the Court would enforce the permanent new family created by the

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<sup>77</sup> 323/06.

<sup>78</sup> 274/03 et 282/03.

<sup>79</sup> Comm. No. 97/93 (2000).

<sup>80</sup> 002/09.

adoption process.<sup>81</sup> As stated above case law on this point under the African Charter is not developed on this point and it is unclear what the position of the African Court of Human Rights<sup>82</sup> would be if a matter on child adoption is referred to it under Article 18 that deals with family life.

Before examining some case study African national legislation on child adoption, this section of this chapter will consider if there are other human rights instruments that address the question on whether infertile couples have a binding right to adopt in order to meet their parenting needs. The principal international instruments to be considered as the United Nations Convention on the Rights of the Child (UNCRC)<sup>83</sup> and the African Charter on the Rights and Welfare of the Child<sup>84</sup>. While the Hague Convention on Protection of Children and Co-operation of Intercountry Adoption<sup>85</sup> is also a crucial international treaty, a discourse of this convention and particularly its focus on inter-country adoption does not form part of the scope of this chapter. This is because inter-country adoption does not form the focus of this chapter which is primarily concerned with whether child adoption is an effective mechanism for dealing with infertility challenges in sub-Saharan Africa.

Both articles 20 and 21 of the UNCRC and article 24 of the African Charter on the Rights and the Welfare of the Child recognise child adoption on the paramount ground that it is in the best interest of the child. Again in focusing solely on the best interest of the child, it is doubtful whether these Conventions can be used to support the early traditional family law position where child adoption was created solely for the benefit of infertile people. It is arguable for example if adoptive parents can rely on Article 24 of the African Charter on the

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<sup>81</sup> See for example *Kuijper v Netherlands* (2005) 41 E.H.R.R. SE 16 a 17; *Söderbäck v Sweden* (2000) 29 EHRR 95.

<sup>82</sup> This court is said to complement the protective mandate of the African Commission on Human and Peoples Rights.

<sup>83</sup> General Assembly Resolution 44/25 of November 1989 entry into force 2 September 1990.

<sup>84</sup> OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>85</sup> Hague Convention of 29 May 1993 on the Protection of Children and Cooperation in Respect of Intercountry Adoption referred to as Hague Convention on Intercountry Adoption.

Rights of the Welfare of the Child which requires state parties to provide parents and legal guardians with the assistance need to carry out child rearing responsibilities as a basis for the right to adopt or enjoy full parenting rights under child adoption. This is because a counter argument could be raised that strict Islamic law in its recognition of the institution of Kafalah or customary child adoption does not prohibit parents from effectively carrying out child rearing responsibilities and as such the state does not need to provide further assistance to infertile couples who employ these quasi-adoptive structures to rear children. This is because the international child rights regime so properly described does not set out to create rights for infertile parents outside its primary objective of protecting the best interest of a child. The rights of infertile persons to found a family is not considered therefore to be as fundamental as the overarching concern of catering for the best interest of a child. In this sense, it can be argued that the rights of infertile people have been subsumed within the broader policy concern of the best interest of the child.

This is clearly demonstrated in the Harroudj<sup>86</sup> case discussed above where the court saw no reason to grant full adoption that would have provided Mrs. Harroudj with the filial link she desired with the child as the court held that the child's best interest was already addressed in the Kafalah guardianship under Islamic law. The review of these international human rights treaties therefore shows that it is impractical to continue to argue that child adoption should serve as the primary infertility management mechanism in developing countries that practise a legally pluralist system of governance. The review of these treaties therefore suggests that the international rights regime is not as concerned as it is for the rights of infertile people as it is concerned with promoting the best interest of a child.

What is left therefore for consideration in this chapter is whether the national statutory framework on child adoption in Sub-Saharan Africa provide adoptive parents with an

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<sup>86</sup> See Harroudj v France (note 68) above.

alternative regime of parenting rights outside the restrictive approach adopted by Islamic law and customary law. The basis of this investigation will be based on the child adoption legislation in Nigeria and South Africa. Judicial cases from these two countries have already formed some basis for the earlier discourse in this chapter. The following section of this chapter focuses on the legislative regimes of child adoption that apply in these countries with a view to determining whether it is right to continue to insist that child adoption should serve as the primary infertility management mechanism in this region of the world.

### **5.5 The Status of Adoptive Parents under National Law: Case study Examples of National Legislation on Child Adoption**

Nigeria and South Africa have been chosen as case example countries to discuss the legislative framework on child adoption in Sub-Saharan Africa and whether this framework is fit for purpose in providing a suitable infertility management regime that caters for the parenting needs of infertile people in this sub- continent. As highlighted in chapter four of this thesis, Nigeria demonstrates the challenges of implementing a statutory regime on child adoption in a country that actively applies legal pluralism due to its diverse ethnic and religious make up. In addition, Nigeria is a country that faces over-population concerns as well as having a high prevalence of infertility. It therefore provides an interesting discourse on whether child adoption should be presented as the key infertility management option for involuntarily childless people within the Sub-Saharan African region.

The legislative framework of South Africa also provides an interesting discourse as its early child adoption legislation were primarily developed during the apartheid regime for the benefit of 'white people wanting to adopt white people'<sup>87</sup> and as such were not applied to the indigenous populations. This however has changed due to the enactment of further national

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<sup>87</sup> Phiri S., Tolfree D., Family and Community Based Care for Children affected by HIV/AIDS: Strengthening the Frontline Response in Foster G., Levine C., Williamson J., (eds.) A generation at risk: the global impact of HIV/AIDS on orphans and vulnerable children (Cambridge: Cambridge University Press, 2005) 29.

legislation which has widened access to statutory child adoption to other non-white communities that constitute the bulk of the South African population.<sup>88</sup> The widening of access to statutory child adoption to these communities offers useful insights on whether child adoption can be made ‘a truly beautiful and rewarding experience’<sup>89</sup> for Sub-Saharan African infertile couples as argued by health specialists who canvass for child adoption to be treated as the primary mechanism for infertility management in the region.

### **5.5.1 The Nigerian Child Rights Act 2003**

The question has been raised on whether there is a national legislative framework for child adoption in Nigeria. The historical development of the statutory framework for child adoption in the post-colonial Nigeria shows that child adoption was the subject of legislation first on a regional basis and thereafter on a state by state basis. The first known regional legislation after independence was the Adoption Law of 1965, of what used to be known, as the Eastern region of Nigeria.<sup>90</sup> A similar enactment was adopted in Lagos State in 1968 with other state legislation following.<sup>91</sup> It is significant to note that states within the Northern region failed to follow suit.<sup>92</sup> The absence of state specific child adoption legislation in this region of Nigeria continues to hold sway, with the exception of Plateau and Nassarawa States. It is important to explain the reason for this lack of legislative effort on child adoption in Northern Nigeria. As earlier highlighted in chapter four of this thesis, the key ethnic groupings within the region of Nigeria are the Hausa-Fulanis who predominantly practice the Islamic faith. In line with their religious beliefs, they will rather practise guardianship structures such as Kafalah and not the full child adoption system conceived under received Western law.

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<sup>88</sup> Ibid.

<sup>89</sup> Toubia (note 6) above.

<sup>90</sup> Atojoko- Omovbude O., *Adoption of Children in Nigeria: Practice and Procedure* (Bloomington, AuthorHouse, 2011) p 25.

<sup>91</sup> Ibid.

<sup>92</sup> Ojelabi O., Osamor P., Owumi B., *Policies and Practices of Child Adoption in Nigeria: A Review Paper* (2015) 6(1)1 *Mediterranean Journal of Social Sciences* p 75 at p 77.



The impact that child adoption practised under received English Law has on the retention of the genetic ties between a child and its biological parents was offered as one of the reasons why law makers from Northern states actively opposed the passage of the Federal statute of the Child Rights Act 2003<sup>93</sup> and the right for it to be applied on a nationwide basis. Notwithstanding these objections, the National Assembly did enact the Child Rights Act 2003 in furtherance of the international obligations that Nigeria had entered into by its ratification of international treaties on children rights such as the UNCRC.<sup>94</sup> However, there is continuing debate on whether this piece of Federal legislation has universal domestic application in all states of the Federation of Nigeria.<sup>95</sup>

This is because there are questions on whether the Federal legislature has the legislative competence to pass an Act of universal applicability on a matter which does not fall under its sole reserve as one of the matters contained in the exclusive list of the Nigerian Constitution.<sup>96</sup> Further, it is argued that because Child rights is not included in the concurrent list which enables the Federal Government to legislate on matters concurrently with the states of the Nigerian Federation, the Child Rights Act is not automatically applicable to all states in Nigeria and each state will have to re-enact it if it is to have applicability within the state.<sup>97</sup> Accordingly, despite the fact that section 273 of the Child Rights Act states that its provisions supersedes all previous laws that regulate child rights issues including child

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<sup>93</sup> Act No 26 of 2003.

<sup>94</sup> See for example Egede E., (2007) Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria 51 Journal of African Law p 249 at p 250 where it is pointed out that Nigeria had earlier ratified these international instruments in 1991 and 2001 respectively. The enactment into law was to comply with section 12 of the 1999 Nigerian Constitution which requires international treaties to be implemented into Nigerian legislation before their provisions can legal effect under the Nigerian legal system.

<sup>95</sup> Ibraheem T., Adoption practice in Nigeria: An overview (2013) 19 Journal of Law, Policy and Globalization p 7 at p 8.

<sup>96</sup> Ibid.

<sup>97</sup> See the unedited version of the Committee on the Rights of the Child *fifty-fourth session* consideration of reports submitted by states parties under article 44 of the Convention CRC/C/NGA/CO/3-4, 11 June 2010 which urges constitutional reforms that will ensure that Child Rights is included within the concurrent list of the Nigerian Constitution.

adoption, it is questionable whether it can be enforced on the states in the Nigerian Federation that have refused to enact it.<sup>98</sup>

However, some Nigerian Public International Law specialists<sup>99</sup> query whether the Child Rights Act needs to be included in the concurrent list for it to have universal application in all parts of the country. This is because the Child Rights Act domesticated the provisions of an international treaty, the UNCRC and as such the Federal Government under section 12 of the 1999 Constitution has the legislative powers to enact the Act. They argue that since the Act transposes the international obligations of the Nigerian State, it would have universal application upon all states in Nigeria.<sup>100</sup> While this argument is certainly tenable, it is pertinent to note that the Committee on the Rights of the Child as recently as June 2010 still called for constitutional reforms to include Child Rights on the concurrent list of the 1999 Nigerian constitution. This shows that there still remains some uncertainty on whether this Act can be considered as having universal application in Nigeria particularly in Northern Muslim states that have refused to re-enact it or if they have re-enacted the Act, they have refused to give full effect to its provision.<sup>101</sup>

Notwithstanding these observations, it is correct to state that the Child Rights Act has domesticated inter alia article 20(2) of the UNCRC which requires state parties to the Convention to provide alternative care for children who are deprived of a family environment or who are in existing family environments not conducive to their best interests. The alternative care requirement set out in article 20 can be the system of child adoption or other guardianship structures such as foster parenting. Since the Nigerian Child Rights Act 2003 was essentially enacted to comply with international obligations under the UNCRC, it has child welfare and the best interest of the child as the epicentre of its legislative objectives.

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<sup>98</sup> Ibid at paragraphs 7 and 52.

<sup>99</sup> See Egede E., above at note 94 at p 250.

<sup>100</sup> Ibid.

<sup>101</sup> See the unedited version of the Committee on the Rights of the Child fifty-fourth session consideration of reports (note 97) above at paragraph 7.

However, a close examination of the Nigerian Act establishes that it also implements other functions of legal adoption which includes providing adoptive parents with full parenting rights and responsibilities and establishing legal kinship between an adopted child and its adoptive parents. For example, section 125 (1)(C) of the Child Rights Act requires that the adoption services established by states and the Federal Government of Nigeria must not only cater for the needs the adopted child and its parents or guardians, but that these services should also cater for the needs of persons 'who have adopted or may adopt a child'.<sup>102</sup>

With regard to the first function that child adoption must cater for the best interest of the child, it can be argued that other systems of law operating under the Nigerian pluralistic system would have no difficulties with this objective since the Islamic system of Kafalah<sup>103</sup> and the customary guardianship under different variants of Nigerian indigenous law also recognize the need to provide a family environment to disadvantaged children.<sup>104</sup> However as identified in earlier sections of this chapter, the difficulty lies with the other functions of child adoption as provided for example in section 141 of the Child Rights Act which vests adoptive parents with full parenting and kinship rights similar to those of biological parents. This as earlier highlighted explains why most of the States in the Northern region with a dominant Muslim population have not enacted state specific legislation related to the Federal Child Rights Act. This may be attributed to the Islamic stance that prohibits such legal kinship particularly those that sever its genetic links with its biological parents, including its right to retain their family name.<sup>105</sup>

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<sup>102</sup> Section 125 (1)(C) of the Child Rights Act 26 of 2003.

<sup>103</sup> Assim UM., Sloth- Neilson J., Islamic Kafalah as an Alternative Care Option for Children deprived of a Family Environment (2014) 14 African Human Rights Law Journal p 322 at p 327.

<sup>104</sup> Isiugo-Abanihe U., Child fosterage in West-Africa (1985) 11(1) Population and Development Review, 11 (1) p 53 at p 57.

<sup>105</sup> See Ibraheem at note 95 above at p 11.

The uncertainty as to the scope of the application of the Child Rights Act and whether it applies in all states of the country poses some significant implications for infertile couples. The key concern relates to couples who want to adopt in states that have not re-enacted the Nigerian Child Rights Act or who do not have provision for child adoption in their existing laws? Should they be content with adopting other guardianship options such foster parenting or the Kafalah system under Shariah law? Alternatively, can they pursue statutory adoption in the other states that allow for such mechanisms of adoption with full parenting rights?<sup>106</sup> This may create a situation of an internal conflict of laws which discussion is beyond the scope of this thesis. Notwithstanding that this issue extends beyond this thesis, it does raise some provide interesting jurisdictional questions on the applicable choice of law and what court will have jurisdiction over the cause of action that may arise as a result of domestic inter -state adoptions.

In conclusion, while it may be said that the introduction of the Nigerian Child Rights Act has made some definite strides in providing infertile people with a legal model of adoption that provides them with rights similar to those enjoyed by their counterparts with biological children, its current limitation lies with the scope of its application especially in states in Northern Nigeria with large Muslim populations. It is therefore unclear whether its provisions would radically alter or reform the restrictions placed in parts of the country where Islamic and customary law rules are applied in personal family life and the restrictions they place on a child adoption regime that supports legal kinship rights between an adoptive parent and an adopted child.

### **5.5.2 The South African Legislative Approach to Child Adoption**

South Africa is a country in Sub-Saharan Africa that practices a mixed legal or pluralist system which provides equal footing of the customary law system of law with its statutory

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<sup>106</sup> It is however a positive development as pointed out by the 54<sup>th</sup> session of the Committee on the Rights of the Child that as of June 2010, 24 states of the Nigerian Federation had so far enacted state specific laws on Child Rights. See Note 97 above at paragraph 3.

law.<sup>107</sup> What makes South Africa an interesting case study example on whether adoption can be a suitable alternative that replaces the desire for infertile couples to have biological children is the high number of orphaned children that the country has due to the HIV/AIDS epidemic.<sup>108</sup> This makes it a discussion site on the appropriateness of placing the social burden of parenting this category of children on involuntarily childless couples? Some have argued<sup>109</sup> that child adoption is a viable model of care for HIV/AIDS child orphans in South Africa. While there may be some social science evidence on this, a pertinent question arises as to whether the legislative framework for child adoption in South Africa provides adequate incentives for involuntarily childless couples to take up parental responsibility of this group of vulnerable children in the care of the state, or who are destitute or in other forms of distress.

The current South African legislative framework on child protection and care is contained in the Child Care Act 1983, the Children's Act 2005 as well as the Constitution of the Republic of South Africa. General regulations<sup>110</sup> regarding children under the Children Act 2005 were enacted in April 2010. The Children's Act 2005 and the general regulations regarding child adoption set out the rights and duties of adoptive parents. Child adoption within the South African framework is recognised as a key model of child welfare, but unfortunately out of the 1.5 estimated orphans and vulnerable children, only 1,913 adoptions were registered in 2007-2008 under the Adoption Register of the Director General in the Department of Social Development.<sup>111</sup>

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<sup>107</sup> Rautenbach C., *The Contribution of the Courts in the Integration of Muslim Law in the Mixed Fabric of South African Law* in Koppel A., Matter M., Palmer V., *Mixed Legal Systems, East and West* (Farnham: Ashgate Publishing, 2014) p 226.

<sup>108</sup> The number of estimated children orphaned or in vulnerable circumstances were as of 2008 estimated at 1.5 million. See the National Action Plan for Orphans and other Children made vulnerable by HIV and AIDS: South Africa 2009-2012 (Johannesburg: The Department of Social Development, 2009) p 3.

<sup>109</sup> Harber M., *Transforming adoption in the 'new' South Africa in response to the HIV/AIDS epidemic* (1999) 23 *Adoption and Fostering* 6.

<sup>110</sup> General Regulations Regarding Children in Terms of the Children's Act, 2005 (Act No. 28 of 2005).

<sup>111</sup> Di Siena D., Jackson J., *Adoption Law in South Africa*, Eversheds, October 27, 2009.

The model of child adoption provided under the Children Act 2005 provides legal recognition of the permanent nature of new parenting ties between the adopted child and its adoptive parents. Section 229 (b) of the Act states that one of the two fold purposes of child adoption is to:

‘Promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.’

Full provision of parenting rights and responsibilities are also envisaged in the model of child adoption under the Children’s Act 2005 as set out in Section 231(2) (a). Accordingly, it may be argued that the legislative framework on child adoption in South Africa provides infertile couples with adequate parental rights, including the right to provide the child with their family name which as discussed in previous sections of this thesis are censured in Islamic law and certain customary rules. If this is the case, then arguably the South African legislative model can be described as progressive regime of statutory rights for infertile people as well as meeting the child welfare objective of placing vulnerable children within nurturing family relationships intended to last for a last time as set out in section 229 (b) of the Children’s Act 2005. However, the constitutional recognition of customary law within the South African Constitution, and the fact that customary law is given the same legal footing as statutory law raises questions on the full extent of the parenting rights that adoptive parents are entitled to under South African Law. Moreover, Section 240(1) of the Children’s Act also requires the court to take into account the religious and cultural background of a child when considering an adoption application.

It therefore can be argued that although South Africa may not face the same complications that Nigeria faces in balancing religious rules with statutory rules; customary law will still play a role in the court’s decision on whether or not to grant an application for child adoption.

However, this may not pose so much concern because as pointed out in chapter four of this thesis, there is considered South African case law such as Maneli v Maneli<sup>112</sup> and Kewena v Santam Insurance<sup>113</sup> that establishes that customary child adoption provides legally enforceable rights under South African law. Notwithstanding the progressive nature of the South African legislative regime on child adoption; the regime like other child adoption regimes is a child centred regime and not a parent centred regime. Accordingly, an application for child adoption will normally be undertaken in the best interest of the child. This means that if the cultural background of the child is taken into consideration, then other forms of parenting such as kinship care which do not necessarily grant full kinship rights to adoptive parents may be seen as still serving the best interest of the child.<sup>114</sup>

The emphasis on a child centred model of adoption may not pose too much of a concern in countries where infertility is not socially stigmatised. But in regions of the world where infertile and other involuntary childless people (particularly women) are social stigmatised, it is questionable whether it is appropriate to treat child adoption as an institution to primarily cater for the best interest of the child and not one that also caters for the needs of the infertile adoptive parents.

This chapter therefore argues that it is time to introduce possible reforms to the legal framework on child adoption at both the international and national levels. It would be helpful if the reforms proposed introduce measures that ensure that the institution of child adoption not only serves the best interest of the child, but also the best interest of socially stigmatised involuntary childless people. Until these reforms are incorporated into the child adoption framework, it will be meaningless to treat child adoption at the primary form of infertility management in Africa or other parts of the developing world where legal pluralism thrives.

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<sup>112</sup> 1993 (4) SA 771(TkA).

<sup>113</sup> 2001 (3) SA 1142 (T).

<sup>114</sup> Martin P., Mbambo B., An exploratory study on the interplay between African customary law and practices and children's protection rights in South Africa (South Africa, Save the Children, 2011).

To do so will place an inequitable social burden on the involuntary childless in the region, especially when the legal system in which they operate does not give them a complete guarantee that they can have full parenting rights over such children in family structures where customary and religious rules also apply.

## **5.6 Conclusion**

The focus of this chapter has been to consider whether child adoption can serve as the primary infertility management mechanism in legally pluralistic systems in developing regions of the world such as Sub-Saharan Africa. In doing so, it explored the status of child adoption under African customary law, as well as under religious legal rules such as Islamic law. In the case of customary law, it argues that, even where there is recognition of child adoption, there is still some uncertainty on the full nature of rights that it creates for the individual adoptive parent or whether the customary law recognition of child adoption in those cases relates more to the agnatic right of the clan to take care of its own? The chapter also considered Shariah law which plays a key role in the personal status and family law in many countries in Sub-Saharan Africa. The appraisal of this system showed that in its purist form, Shariah law does not recognise a system of child adoption that severs the legal kinship between a child and its biological parents. Moreover, Islamic law and to some extent customary law, also restricts both the rights of adopted parents and adopted children in matters of succession and inheritance. While the Kafalah system of taking care of disadvantaged children is a definitive positive as lauded by many scholars, it does not fully address the parenting needs and desires of involuntary childless women, particularly their desire to share their family name with the child under their guardianship

Since this is the case, this chapter queried why there is fixation amongst policy makers for the infertile in Africa to bear the social burden of parenting vulnerable children like children



who have become orphaned as a result of the HIV/AIDS epidemic or war conflicts in the continent? Further, it questioned whether child adoption should be placed at the forefront of infertility management, instead of widening access to fertility treatment, as has been so forcibly argued in some policy quarters.

It recommends that if policy-makers still seek to present child adoption as a key alternative to involuntary childlessness in regions such as Sub-Saharan Africa, then significant legal reforms both at the international and national level will have to be made to the current child adoption regime which it argues is not fit for purpose in meeting the parenting needs of childless adults within the region. The reforms required must address the conflict of rights (or lack of rights) that involuntary childless adults face in a legal pluralistic Sub-Saharan African state. Moreover, the reforms must provide a balancing regime that not only focuses on the best interest of the child but also recognises that in regions, where the infertile are socially stigmatised, more needs to be done to create a parallel system of protection that also focuses on the best interest of a vulnerable infertile adopting parent.

Notwithstanding the reforms suggested to make the child adoption process more attractive to childless adults in Sub-Saharan Africa, there is still no getting away from the fact that until cultural and social attitudes which promote the stigmatisation of infertility are changed, child adoption can never replace the deep rooted need for childless couples to have biological children of their own. Accordingly, the case for widening access to reproductive treatment for such groups of people rather than being diminished becomes more critical in regions, where there is still significant social pressure on the infertile to have children before they are afforded full social status and acceptance in their community. The next chapter will therefore consider if there is a legally recognised right to universal access to reproductive health care and whether this right can be deployed to support the case for widening access to affordable health care for involuntarily childless people within the region.

## Chapter Six

### Universal Access to Reproductive Health Care and the Case for Widening Access to Affordable Reproductive Technologies in Sub-Saharan Africa

#### 6.1 Introduction

This chapter considers whether there is a legally binding right to universal access to reproductive health care. It will also consider whether the right if it exists includes access to affordable fertility treatment in developing regions of the world. It will further explore whether this right is realisable in low resourced and densely populated regions of the world such as sub-Saharan Africa.

Health care providers, until recently did not consider infertility in Africa and other parts of the developing world as a major health issue that required public health expenditure. Where available, infertility treatment, using assisted reproductive technologies (ARTs) was normally offered to patients through the private sector. However, more awareness has been created on the deleterious health and socio-economic effects that infertility has on women within this region. This led to recommendations from the World Health Organisation (WHO) that infertility should be treated as a global public health issue with greater attention being given to widening access to safe and affordable infertility treatment to developing countries.<sup>1</sup> In response to this, the European Society of Human Reproduction and Embryology (ESHRE) inaugurated a special task force<sup>2</sup> on widening access to low cost ARTs in the developing world, including countries in the sub-Saharan African region. Private initiatives, notably the

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<sup>1</sup> Vayena E., et al. eds., Current practices and controversies in assisted reproduction. (Geneva, World Health Organization, 2002) 404 pp.

<sup>2</sup> European Society for Human Reproduction (ESHRE). Task force for infertility in developing countries. Available at: <http://www.eshre.eu/Specialty-groups/Task-Forces/Task-Force-Developing-Countries-and-Infertility.aspx> (accessed on July 15 2015).

Walking Egg Foundation have also been established to facilitate wider access to infertility care in the developing world.<sup>3</sup>

The proponents of these initiatives have underpinned these efforts on Goal 5 of the Millennium Development Goals (MDGs) which provides for universal access to reproductive health care by the year 2015.<sup>4</sup> These infertility specialists argue that Goal 5 of the MDGs should not only cover access to abortions and contraceptives but also the right to fertility treatment for the childless. They however<sup>5</sup> accept that there is little or no mention in the legal literature to confirm whether there is a legally binding right to universal access reproductive health care that encapsulates access to ARTs. In order to facilitate wider access to affordable ARTs, these clinicians have medicalised the social stigmatisation of involuntary childlessness in developing countries and considered infertility in these parts of the world to be treated as a global reproductive health problem.<sup>6</sup> It is therefore necessary to begin this chapter with a discussion on the recent efforts to medicalise the social construction of involuntary childlessness in the developing world.

## **6.2 The Medicalisation of the Social Construction of Involuntary Childlessness**

Infertility is normally said to occur when a couple seeking to have children have had continuous sexual intercourse without contraception for a period of time without achieved the desired pregnancy. Normally the period of time is calculated between twelve months to two years.<sup>7</sup> Other fields outside medicine such as the field of population studies would like to see a longer extension of the baseline as to when people can be considered to be infertile.<sup>8</sup>

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<sup>3</sup> Ombelet W., The Walking Egg Project: Universal access to infertility care – from dream to reality (2013) 5(2) *Facts Views Vis Obygn*. pp 161–175.

<sup>4</sup> *Ibid* at p162.

<sup>5</sup> Ombelet, 2013 (note 3) above at p 163; Ombelet W., Global access to infertility care: The Walking Egg Project (2014) *Facts Views Vis Obygn* pp 1-3.

<sup>6</sup> Ombelet, 2013 (note 3) above at p 162.

<sup>7</sup> DHS Comparative Reports 'Infecundity, Infertility, and Childlessness in Developing Countries' (Geneva: World Health Organisation, 2004) p 3.

<sup>8</sup> See for example Mascarenhas M., Cheung H., Mathers CD., Stevens GA., *Measuring Infertility in Populations: constructing a standard definition for use with demographic and reproductive health surveys* (2012) 10(17) *Population Health Metrics* page 3 where the study sets the measurable baseline for determining primary and secondary infertility at five (5) years.

The desire of population experts to extend the baseline for infertility is to some extent based on Malthusian<sup>9</sup> concerns to do with overpopulation in the developing world. While there may be justifiable policy considerations for setting a base time line as to when a person can be considered as infertile, such definitions should not ignore the fact that women can culturally be defined as 'barren' and 'unproductive' by their families and communities long before the baseline period provided by the clinical and demographics definitions on what constitutes infertility.

In some extreme situations in Nigeria, the site of investigation for thesis, members of the extended family, friends and other members of the community have been known to suggest that there is infertility when there has not been pregnancy within a year of marriage. This issue is so graphically described by Osagie<sup>10</sup> as follows:

'In Nigeria, a wife is supposed to be pregnant even before the wedding day, or at least within the first year of marriage. If she has the misfortune of not being pregnant within this time frame, she is in a whole lot of trouble, especially with her mother-in-law who will complain to whoever will care to listen that her son has married a man like himself.'

In such cases, well-meaning observers will counsel or badger infertile couple to take proactive measures to deal with infertility as quickly as possible. This is largely due to the social cultural construction that the primary goal of marriage is to reproduce and that any delay in achieving this goal should be addressed as quickly as possible. In this sense the approach adopted by population experts to extend the base line for determining when a person can be considered as infertile to five years ignores the socio-cultural context in which these individuals live.

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<sup>9</sup> Obono O., Life Histories of Infertile Women in Ugep, Southern Nigeria (2004) 19(2) African Population Studies p 63.

<sup>10</sup> Osagie C., The Man from Africa: The Cultural Differences Experienced by an African Immigrant Living in the United States (Bloomington, IUUniverse: 2011) p 3.

However as highlighted in preceding sections of this thesis, there is now a growing appreciation in the international public health community of the social construction of involuntary childlessness in Sub-Saharan Africa and what it means to be infertile in this region of the world.<sup>11</sup> This may explain why there has been an increasing drive on the part of public health specialists to medicalise the problem of involuntary childlessness. This drive to medicalise the problem of involuntary childlessness and to treat it as a major health condition is particularly critical to decisions that govern the allocation of state resources. Some argue that due to the social stigmatisation of involuntary childlessness, there is a justifiable case for arguing that state funding should be made available to treat the condition of involuntary childlessness in cash strapped states with limited resources.<sup>12</sup> They further canvass that involuntary childlessness should not just be perceived as the failure to achieve a social desire to procreate but one which is a public health condition requiring medical care.<sup>13</sup>

This is because if involuntary childlessness is merely seen as a social construction and not as a medical condition that is deserving of reproductive health treatment, then cash strapped states may argue that childless couples should adopt rather than the state having to fund their fertility treatment. However while child adoption may provide some parenting relief, as chapter five of this thesis has shown, legal pluralistic societies that practise non-Western rules such as Shariah law and indigenous customary rules makes it difficult for child adoption to be considered as the primary means of infertility management in these jurisdictions. This is because of the reluctance of such norms to allow for a complete legal severance of the genetic ties between a child and its biological parents.<sup>14</sup>

Another aspect of the social construction of involuntary childlessness which may have also contributed to the increasing drive to medicalise infertility and involuntary childlessness in

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<sup>11</sup> See Vayena 2002 (note 1) above of this chapter.

<sup>12</sup> Vayena E., Rowe PJ., Peterson HB., Assisted reproductive technology in developing countries: why should we care? (2002) 78 Fertility and sterility pp 13–15.

<sup>13</sup> Ibid.

<sup>14</sup> See chapter five of this thesis.

the developing world is the African communitarian concept that individuals are meant to provide procreative value to their societies. This is a point that Hellum<sup>15</sup> considers in her work. She argues that in African traditional communities like the one she undertook field work in; marriage is embedded with procreative obligations which arise from the bride price that has been paid by the groom's extended family when a marriage is contracted. In this sense, when individuals particularly women are unable to procreate, they are perceived as having morally failed their families and communities. It is this moral sense of failure to the community that triggers the social stigmatisation of infertility.

Accordingly, owing to a better understanding of the procreative obligation that individuals are presumed to owe to their communities, public health bodies have doubled their efforts to medicalise what arguably could be considered as a socially constructed problem. Some in the World Health Organisation (WHO) have pragmatically pointed out that the social stigma associated with involuntary childlessness requires some intervention by states to provide wider access to ART services.<sup>16</sup> They see this as a way to alleviate the social suffering that involuntary childless people face as a result of their inability to reproduce in pronatalist societies.

### **6.3 Infertility and Involuntary Childlessness as Public Health Conditions**

To provide a better sense on why there is a growing medicalisation of the condition of involuntary childlessness in the developing region of the world, it is necessary to provide some perspectives on the definitions of 'public health' and 'health.' There are several varying definitions on what constitutes public health and its core objectives. The Institute of Medicine

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<sup>15</sup> See Hellum A., Stewart J., Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe (Zimbabwe: Mond Books, 1999). pp 141-144.

<sup>16</sup> Butler P., Assisted Reproduction in Developing Countries: Facing up to the issues (2003) 63 Progress (Geneva, World Health Organisation) p 2.

(IOM) for example in its landmark study the *Future of Public Health*<sup>17</sup> explains that the key objective of public health is:

‘Fulfilling society’s interest in assuring conditions in which people can be healthy.’

What stands out so clearly in the IOM definition is that promoting health is a collective societal responsibility. Further, it suggests that it is in the interest of society to endeavour to provide conditions that assures the health of those who live in it. Yet, it is important to note that the IOM explanation on the objective of public health does not provide a definition for health. For this definition, recourse is made to the preamble of the 1948 constitution of the World Health Organisation (WHO)<sup>18</sup> which defines health as:

‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.’

This definition has been criticised as being too broad and opaque.<sup>19</sup> Further it has been argued that the focus on complete well-being has led to the ‘medicalisation of society.’<sup>20</sup> However the definition is still considered to be valid as it is yet to be amended or replaced by the WHO or a body that is comparable to its authority.<sup>21</sup> It is therefore considered to be the most authoritative definition on health.<sup>22</sup> The utilisation of the WHO definition of health is specifically relevant to this thesis particularly from its well-being perspective. This is because the WHO definition requires the health of the individual to be holistically conceived as embodying the physical, mental and social well-being of the individual.

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<sup>17</sup> IOM, *The Future of Public Health* (Washington, National Academic Press, Winslow, CEA 1988) untitled field of public health.

<sup>18</sup> Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

<sup>19</sup> Callahan D., 'The WHO Definition of Health' (1973) 1(3) *Hastings Center Studies* p 77.

<sup>20</sup> *Ibid.*

<sup>21</sup> Huber M et al How should we define health (2011) *British Medical Journal* 343:d4163

<sup>22</sup> See for example Guidotti T., *Health and Sustainability: An Introduction* (New York, Oxford University Press: 2015) 23.

On grounds of achieving holistic well-being of the individual, it can be argued that there is a health objective of widening access to ARTs in developing regions of the world. This is because the provisioning of such service may not only provide the involuntary childless with more prospects of achieving a desired pregnancy, but would also lessen the mental and social anguish they experience as a result of their inability to conceive. The same broad based concept of health as constituting total well-being is also enshrined in WHO documents that deal with reproductive health and in the International Conference on Population and Development's programme of action.

Reproductive health is defined by the World Health Organisation (WHO) as:

'A state of physical, mental, and social well-being in all matters relating to the reproductive system, at all stages of life'.<sup>23</sup>

Similarly, the International Conference on Population and Development paints a holistic picture of what reproductive health should constitute below.

'People are able to have a satisfying and safe sex life and that they have *the capability to reproduce and the freedom to decide if, when, and how often to do so*. It also includes sexual health, the purpose of which is the enhancement of life and personal relationships, and not merely counselling and care related to reproductive and sexually transmitted diseases.'<sup>24</sup> (Emphasis mine).

Yet, it is important to note that WHO in its clinical definition defines infertility as covering 'diseases of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.'<sup>25</sup> In limiting infertility to

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<sup>23</sup> WHO Interpreting Reproductive Health – ICDP +5 Forum, The Hague, Netherlands, 8-12 February 1999.

<sup>24</sup> International Conference on Population and Development (Cairo, 1994, paragraph 7.2).

<sup>25</sup> Rowe P.J., Comhaire F.H., Hargreave T.B., Mellows H.J., WHO Manual for the Standardized Investigation and Diagnosis of the Infertile Couple. (Cambridge University Press, Cambridge, UK, 1993); Zegers-Hochschild F., Adamson G.D., de Mouzon J., Ishihara O., Mansour R., Nygren K., Sullivan E, van der Poel S: The International Committee for Monitoring Assisted Reproductive



diseases of the reproductive system, this clinical definition provided by WHO appears to have ignored the equally important aspects of its other definition on reproductive health which 'include mental and social well-being in all matters relating to reproductive health.'<sup>26</sup>

This narrow definition of what constitutes infertility has led to the use of involuntary childlessness. As discussed in chapter two of this thesis, unlike infertility in its narrow sense, involuntary childlessness is not confined to a physical disease of the reproductive system. It is a condition that can occur when a person who is reproductively capable is unable to do so due to an underlining condition of a spouse or partner. This is why as pointed out chapter two of this thesis, involuntary childlessness has been utilised to explain the social stigmatisation of the inability to have children. This is because in many cases, shrouded male infertility may be the underlining cause of involuntary childlessness in Sub-Saharan Africa and yet it is the woman who is considered to be infertile and unproductive.

Paradoxically, this point has been raised by radical feminist thinking to argue against the case for widening of reproductive technologies which they view as 'public sanctioned violence against women.'<sup>27</sup> These feminists have argued that it is wrong to subject women who are not medically infertile to invasive fertility treatment when the root cause of their state of childlessness has to do with underlining male infertility. While this thesis shares some of the concerns of this feminists about the negative feminisation of infertility, it does not subscribe to the view that women who autonomously submit to such treatment are necessarily exposed to public sanctioned violence. In this case it could be argued that these women are exercising an autonomous reproductive decision to access ART services which may help them to achieve a desired pregnancy. This aligns with the ICPD definition of reproductive health especially its emphasis on reproductive autonomy. It is therefore inconceivable to treat such autonomous reproductive decisions as state sanctioned violence.

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Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology, 2009. (2009) 24(11) Hum Reprod pp 2683–2687.

<sup>26</sup> See WHO Interpreting Reproductive Health (note 23) above.

<sup>27</sup> Raymond J., *Women as Wombs: Reproductive technologies and the battle over women's freedom.* (Melbourne: Spinifex, 1995) ix.

Instead, the ability to access ART services that could help in achieving a desired pregnancy can be regarded as one of the ways in which women can express reproductive autonomy especially if they have been scapegoated by their community as being responsible for the state of childlessness in their family.

#### **6.4 Involuntary Childlessness and the Allocation of Scarce Resources in Reproductive Health Care**

The importance of making a distinction between the narrow clinical construction of infertility and the broader definition of involuntary childlessness is also important when decisions are to be made on how scarce public resources for reproductive health care should be allocated in developing countries. While there have been positive developments in medicalising the inability to have children, the pertinent question arises on whether public funding for infertility treatment should be restricted to those who have a clear disease of the reproductive disease or whether such funding should be extended to other groups of reproductively capable individuals. For example, some may argue that those who have normal reproductive functions, but choose not to follow the natural process of having children as a result of their sexual orientation should not be allowed to access scarce public resources to achieve their reproductive goals. Yet, in many liberal Western countries, the idea that people can be denied access to fertility treatment on grounds of sexual orientation is increasingly becoming inconceivable due to the development of an equality rights regime that safeguards the rights of sexual minorities.<sup>28</sup>

This is because the equality rights regime in such jurisdictions has made it discriminatory to refuse to provide ARTs on grounds of sexual orientation. Arguments have been raised that sexual minorities should be allowed to access ARTs since they like other individuals have

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<sup>28</sup> De Wert G et al ESHRE Task Force on Ethics and Law 23: Medically Assisted Reproduction in Singles, Lesbian and Gay Couples, and Transsexual People.' (2014) 29(9) Human Reproduction, p 1859 at p1860; Penning G., Ethical issues in fertility treatment (2012) 26 Best Practice & Research Clinical Obstetrics and Gynaecology 853–863.

the right to express their procreative liberty.<sup>29</sup> This is because the expression of procreative liberty is seen as an 'important element of the autonomy of 'individual' persons.'<sup>30</sup> Although this thesis is not focused on the rights of sexual minorities, the use of the equalities regime to facilitate wider rights for this group does offer some useful lessons on how equal citizenship<sup>31</sup> and procreative liberty can be utilised to strengthen the rights of involuntarily childless people in developing parts of the world.

Based on grounds of equal citizenship and procreative liberty, it is questionable why involuntary childless people in the developing world should not be allowed to pursue their procreative goals through the widening of access to affordable reproductive technologies. The concept of equity of health would require that if other groups such as sexual minorities are allowed to access public funding for fertility treatment on grounds of equal citizenship and procreative liberty, the same rights should also apply to involuntary childless people in developing regions of the world. This is particularly critical when consideration is given to the social stigmatisation that they face in such regions of the world. On health equity and social justice grounds, it does seem inequitable to require involuntary childless people in the developing world to rely solely on child adoption or other non-biological parenting needs to meet their parenting needs when there are medical facilities that could enable them achieved a desired pregnancy.

This however presupposes that there are justifiable social justice grounds to canvass for the prioritisation of the health needs of the involuntary childless in the developing world. Social justice has been described as 'the judicious treatment of inequalities of all kinds'.<sup>32</sup> The notion of social justice is inextricably connected to the distribution and allocation of resources, including the provisioning of health care. There are a number of theories that have been canvassed to argue for a social justice case for the provisioning of scarce health

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<sup>29</sup> Ibid, De Wert G., at p 1860.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Brian B., *Why Social Justice Matters* (Cambridge: Polity Press, 2005) pp 7-8.

care resources. Key among these theories are the needs based justice theory advanced by Miller<sup>33</sup> and the Rugers' health capability theory.<sup>34</sup> Millers' needs based justice is premised on the notion of 'each according to his need.'<sup>35</sup> Miller however accepts the difficulty of distributing resources based solely on a needs basis especially in situations of relative scarcity. He also argues that the differences in cultural identities and growing globalisation may also make it difficult to prioritise resources on a needs basis.<sup>36</sup> Despite these concerns, Miller maintains that there is still some place for the needs based justice theory as it does in its own way help to foster consistency in the treatment of individuals and groups.

Similarly, Rugers' health capability theory advocates an 'ethical demand for equity in health'.<sup>37</sup> Her health capability theory seeks to ensure that the right to health as enshrined in international rights instruments is used to obliterate what she considers as 'unconscionable health inequalities'<sup>38</sup> in the world. Although Rugers focuses on the reduction of health morbidity, her health capability theory appears to have been deployed by public health specialists in the field of reproductive health care who seek to reduce what they conceive to be health inequalities in the provisioning of ARTs in the developing world. They argue that infertility and involuntary childlessness should be regarded as a global public health condition.<sup>39</sup> Prioritising these conditions as public health issues is seen as a key way of dealing with the social stigmatisation of infertile and involuntary people in pronatalist regions of the world.

Yet in canvassing for the right to allocate resources to enable individuals achieve a desired pregnancy on social justice and health equity grounds, there are still difficult questions to answer. The most important is whether there is a binding right to reproduce that is supported

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<sup>33</sup> Miller D., *Principles of Social Justice* (Cambridge, Harvard University Press, 1999, 2001) pp 203-206.

<sup>34</sup> Ruger J., *Health Capability: Conceptualization and Operationalization*. (2010) 100(1) *American Journal of Public Health* pp 41-49.

<sup>35</sup> Miller (note 33) at p 203.

<sup>36</sup> *Ibid.*

<sup>37</sup> Ruger J., *Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements* (2006) 18 *Yale Journal of Law and Humanities*. p 273 at 278.

<sup>38</sup> *Ibid.*

<sup>39</sup> See Ombelet (note 5) above.

by the law? Even if the WHO holistic definition of reproductive health suggests a broad based sense of reproductive health and well-being, does this automatically entitle individuals with the positive right to reproduce? In other words, should state or public resources particularly in poor resourced states in developing regions of the world such as Sub-Saharan Africa be allocated to fund a right to reproduce? This concern will be addressed below.

### **6.5 An Appraisal of the Right to Reproduce**

The question on whether there exists a binding right to reproduce has always been a heated topic of debate. Those in the school of procreative liberty like Robertson<sup>40</sup> will suggest that there is a right to reproduce. However, while Robertson is a strong advocate of procreative liberty, it interesting to note that he does not necessarily accept that the right to reproduce is a right that will permit state funding of procreative goals.<sup>41</sup> His arguments that procreative liberty should be funded at the private level and not through scarce state funding or public insurance fund like Medicare has been criticised. Dorothy Roberts for example<sup>42</sup> is particularly critical of Robertson's position especially from a race and class perspective. She queries why procreative liberty and access to ART services as espoused by Robertson should be limited to the rich and middle class who in most cases are from a privileged racial group.<sup>43</sup> On grounds of social and distributive justice, she calls for more efforts to be undertaken to facilitate greater access to ARTs by including them in public funded insurance schemes such as Medicare.<sup>44</sup> It is critical to note that Roberts does not necessarily disapprove of reproductive or procreative liberty or the right to reproduce. Rather what she finds reprehensible is the notion that it should be restricted only to a small group of people from a particular race.

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<sup>40</sup> Robertson J., *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press: 1996) 281 pp.

<sup>41</sup> *Ibid* at p 116 and 117

<sup>42</sup> Roberts D., *Race and the New Reproduction* (1996) 47 *Hastings Law Journal* p 935.

<sup>43</sup> *Ibid* at p 937.

<sup>44</sup> *Ibid* at p 944.

Robertson's explanation for not placing access to IVF on public insurance funding such as Medicare borders on prioritisation of health needs appears to be premised on the prioritisation of scarce resources. He argues that the high rate of infertility among the poor had to do with poverty, poor nutrition and infectious diseases. Consequently, he queries the rationality of treating infertility as a disease requiring public funded treatment when arguably on the scale of prioritisation, it would be better to use these scarce resources to treat other life threatening diseases of the poor.<sup>45</sup> Again Roberts responds to this on social justice grounds that focus on the concern of minimising inequalities between the different classes of society. She does however accept that poor disadvantaged ethnic minorities may be best served by tackling the conditions that led to their infertility in the first place.<sup>46</sup>

The Robertson/Roberts debate on the merits and demerits of procreative liberty raises some interesting issues on widening access of affordable ARTs in developing regions of the world such as Sub-Saharan Africa. On the one hand, there are legitimate concerns that regions of Africa where there is such a high infertility belt will be best served through the allocation of scarce resources towards tackling the causes of infertility such as sexually transmitted diseases (STDs). This is the argument that scholars such as Okonofua<sup>47</sup> have raised against the case for widening access to ARTs in Sub-Saharan Africa. As earlier stated, this is also coupled with Malthusian concerns that widening access to ARTs in the developing world will exacerbate further the demographical concern of over-population.<sup>48</sup> This is a point that is actively discussed by Roberts in her response to Robertson's theory of procreative liberty. She points to the fact that the disadvantaged ethnic minorities in America are stereotyped as

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<sup>45</sup> Robertson (note 40) at p 117.

<sup>46</sup> On this point, she and Robertson appear to be in agreement. See N 42 above at p 948.

<sup>47</sup> Okonofua F., 'The case against new reproductive technologies in developing countries' (1996) 103 *British Journal of Obstetrics and Gynaecology* p 957.

<sup>48</sup> Obono (note 9) above.

contributing to excessive population growth and this may explain why there is a reluctance to provide them with access to ARTs.<sup>49</sup>

From a social justice perspective, Roberts again criticises a situation where the provisioning of ARTs reinforces what she describes as ‘the disparate values placed on members of social groups.’<sup>50</sup> This disparity or divide between the social groups in America is akin to health equity concerns raised against the disparity of the provisioning of ARTs between the industrialised North and the developing South of the global community. Some particularly in the international public health field have argued that there should be the closing of the gap of the disparity between the provisioning of ART facilities in these two broad regions of the world.<sup>51</sup> Yet, this issue has to be discussed within the context of the continuing debate on whether there is a legal right to reproduce.

Chief among the works on this issue is Shanner’s discourse on the right to procreate.<sup>52</sup> She queries whether there is a right a reproduce and opines that:

‘framing procreative decisions in terms of rights claims is a problematic ethical project, which in turn creates difficulties for the articulation and establishment of legal procreative rights.’

This is because human rights law and other specialisms of law make a clear distinction between negative and positive rights. Early works such as Kant<sup>53</sup> characterise negative rights (or liberty rights) focus on the rights of individuals to be free from interference with their activities in a certain area. This could include the right to be free from state or other third party interference in matters to do with procreation. These acts of interference could

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<sup>49</sup> Roberts (note 42) above at p 941. See also Shanley ML., *Infertility, Social Justice and Equal Citizenship* in McClain LC., Grossman JL., *Gender Equality: Dimensions of Women’s Equal Citizenship* (Cambridge: Cambridge University Press, 2009) at p 328.

<sup>50</sup> *Ibid* at p 944.

<sup>51</sup> See Ombelet’s works for example in notes 3 and 5 above.

<sup>52</sup> Shanner L., *The Right to Procreate: When Rights Claims Have Gone Wrong* (1995) 40 *McGill Law Journal*. 823.

<sup>53</sup> See further discussions in works like Fullestad A., Reidar M., *Kantian Theory and Human Rights* (New York, Routledge, 2014) 210 pp.

include forced sterilisation. These liberty rights are recognised as binding and enforceable rights in most national laws and international human rights instruments. However the case cannot be said of positive rights or welfare rights. These rights may 'require others to take action or to provide means or resources, not simply to refrain from interfering.'<sup>54</sup>

In terms of whether individuals should be able to access reproductive health care, Shanner argues that the concept of rights in claims for reproductive health care should only be limited to non-interference rights such as the freedom to free from forced sterilisation and abortion.<sup>55</sup> She however accepts that a woman's claim to abortion is not just limited to a forbearance (negative) right but also consists of some elements of positive rights. She however attempts to provide some justification for why abortion should be funded by state resources as opposed to infertility treatment. She argues that unlike her counterpart who seeks an abortion treatment to restore her forbearance right of not sharing her body with a fetus, the infertile woman who seeks public funding for fertility treatment is primarily seeking for a welfare (positive) right and not for the enforcement or protection of a forbearance (negative) right. On the other hand, the woman who seeks to abort a fetus seeks to be restored back to her forbearance right of not sharing her womb with a third party (the fetus). She therefore concludes that considerations of the prioritisation resources should come into play when considering whether to support a welfare right claim to fertility treatment.

This thesis strongly differs from this viewpoint raised by Shanner for a number of reasons. It subscribes more broadly with the works of Cook<sup>56</sup> and Dillard<sup>57</sup> who adopt a more nuanced approach on whether positive (welfare) rights claims to fertility treatment should be supported in the same way as when a woman seeks for an abortion. Dillard for example

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<sup>54</sup> Lo B., *Resolving Ethical Dilemmas* (Philadelphia: Walter Kluwer, 2013) p 115.

<sup>55</sup> See Shanner (note 52) above from pp 840 -843.

<sup>56</sup> Cook R., *International Human Rights and Women's Reproductive Health* (1993) 24 *Studies in Family Planning* 73, Cook R., 'International Protection of Women's Reproductive Rights' (1992) 24 *N.Y.U. J. Int'l L. & Pol.* 645. Cook's work is discussed in Shanner's article, see for example page 835.

<sup>57</sup> Dillard C., *Rethinking the Procreative Right* (2007) 10(1) *Yale Human Rights and Development Journal* p 1. See also Shanley, (note 49) above at pp 329-330 where she argues on social justice grounds for the right to assistance for family formation.



accepts Robertson's notion of procreative liberty that permits an individual to take steps to reproduce but qualifies it by arguing that any such right to reproduce must always be for the public good.<sup>58</sup> She argues that one of the key determinants on whether the right to reproduce should be permitted on grounds of public good, is the question on whether it is central to human personhood. This particular point of the right to reproduce being central to human personhood is a matter that requires further consideration.

In discussing this point further, recourse is made again to Shanner's article which sets the reasons why welfare rights to fertility treatment should not be encouraged in the same way as the funding of abortion services. Her major argument hinges on the fact that the refusal to publicly fund fertility treatment would not infringe a forbearance or non-interference right in the same way that it would if a woman is denied the right to abort a fetus.<sup>59</sup> The difficulty with Shanner's proposition is that it appears to be premised on a Western understanding of the role that procreation plays in the centrality of human personhood. Her argument appears to be premised on the social realities of the industrialised West where infertility and involuntary childlessness are not necessarily socially stigmatised in the same way as other parts of the world.

The earlier chapters of this thesis have sought to demonstrate through an analysis of the body of literature that the condition of infertility and involuntary childlessness is socially stigmatised in developing parts of the world such as Sub-Saharan Africa. It will therefore be wrong to argue that the denial of fertility treatment to women in pronatalist regions of the world would not impact on a forbearance or negative right. It can be argued that forbearance rights such as the right to human dignity and the right to be free from discrimination and inhumane treatment are infringed when involuntary childless individuals are socially stigmatised or scapegoated by their families or communities for the inability to conceive.

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<sup>58</sup> Ibid at p 63.

<sup>59</sup> See Shanner (note 52) at p 843.

If as Shanner argues that the basis for providing abortion services is to safeguard the forbearance right of bodily integrity, then surely the same argument can be used to canvass for the provisioning of ARTs treatment for involuntary childless women if these services will help them to achieve a desired pregnancy which alleviates their social stigmatisation in their community. To deny them of such treatment when it can be deployed to protect their right to human dignity and to be free from discrimination will go against the feminist objective of protecting women's welfare and empowerment.

This thesis therefore argues that the characterisation of the social stigmatisation of the conditions of infertility and involuntary childlessness in the developing world should be seen as an act of discrimination and inhumane treatment which goes contrary to the inherent right of human dignity. If this is the case then there are human rights, public interest and social justice imperatives for canvassing for the case of the provisioning of affordable ARTs to involuntary childless women in this region of the world. Further consideration does however need to be given to the extent to which states under international, regional and national laws are obligated to provide access to reproductive health care. This matter will be addressed in the following section of this chapter.

## **6.6 The Status of the Right to Reproductive Health Care under International, Regional and National Human Rights Laws**

As stated above, the public health specialists who are currently canvassing for wider access to affordable assisted reproductive technologies (ARTs) are unclear as to whether there actually exists a binding right to reproductive health care.<sup>60</sup> In advocating for wider access to ARTs they point to goal 5 of the Millennium Development Goals (MDGs)<sup>61</sup> which provides for universal access to reproductive health care by the year 2015. However, it is important to point out from the onset of the discussion on the status of the right to reproductive health

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<sup>60</sup> See Ombelet (notes 3 and 5 above.)

<sup>61</sup> Ibid. Note in particular target 5b of goal 5 of the MDGs.

care; that the MDGs and the new Sustainable Development Goals (SDGs)<sup>62</sup> which set out a 2030 agenda for sustainable development are considered as soft law. They therefore do not have binding legal status under international law. The discussions below will therefore turn to existing binding international instruments to determine whether states are obligated to provide universal access to reproductive health care.

### **6.6.1 The Right to Reproductive Health at the International Level**

Developing further on the discussion on whether forbearance or negative rights such as the right to human dignity and freedom from discrimination and inhumane treatment can be deployed to reinforce the case to provide wider access to ARTs in Sub-Saharan Africa, this section will consider whether states are obligated to provide universal access to these reproductive technologies. The first matter to consider is whether the right to health embodies the right to highest attainable standard of reproductive health care.

The concept of the right to health first came to international focus in 1946 through its inclusion in the 1946 WHO constitution. The legal recognition of this right was thereafter recognised in Article 25(1) of the United Nations Declaration of Human Rights.<sup>63</sup> This right to health is enshrined in other human rights treaties such as Articles 11(1) (f), 12 and 14(2) (v) of CEDAW and Articles 25 and 26 of the Convention on the Rights of Disabled peoples<sup>64</sup> also enshrine the right to health. However, Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>65</sup> is seen as the 'cornerstone provision'<sup>66</sup> for the recognition of a binding right to health under International Human Rights Law.

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<sup>62</sup> See Target 3.3 of goal 3 which sets out a target that universal access to sexual and reproductive health care services should be reached by 2030. See the SDGs available at <https://sustainabledevelopment.un.org/topics> .

<sup>63</sup> General Assembly Resolution 217 A (III) 10 December 1948.

<sup>64</sup> The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/Res/61/106) adopted December 13, 2006.

<sup>65</sup> General Assembly Resolution 2200 (XXI) of December 16, 1966 entry into force January 3 1966.

It is generally accepted the Article 12 of the ICESCR provides a binding right to health, like other economic, social and cultural rights, it is seen as a right with 'undertakings of a progressive nature'<sup>67</sup> On the other hand the obligations under the International Covenant on Civil and Political Rights (ICCPR) 1966 are seen immediately realisable.<sup>68</sup> Accordingly, civil and political rights enshrined in the ICCPR may be described as negative (forbearance) rights while the rights enshrined in the ICESCR are deemed as positive (welfare) rights border on a state's capabilities especially in terms of resources.<sup>69</sup>

To provide some clarity on the status of article 12 of the ICESCR, paragraph 8 of the General Recommendation<sup>70</sup> of the ICESCR Committee states that:

'The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.'

The ICESCR Committee's explanation of what the right to health entails suggests that the right to health consists of both negative and positive rights. The negative rights embodied in article 12 will include the right to control one's health and body, including sexual and reproductive freedoms. At the same time, Article 12 contains positive or welfare rights which are progressively reliable. These progressive realisable rights will be contingent on the

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<sup>66</sup> Dettels R., et al., Oxford Textbook on Global Public Health (Oxford: Oxford University Press, 2015) p 278.

<sup>67</sup> Trubeck D., Economic, Social and Cultural Rights in the Third World in Meron T., (ed.) Human Rights in International Law : Legal and Policy Issues.(Oxford: Clarendon Press) 1986, pp 205-271 discussed in Rehman J., International Human Rights Law (Harlow: Pearson Education, 2003) at p 106.

<sup>68</sup> Ibid.

<sup>69</sup> See article 2 of the ICESCR.

<sup>70</sup> ICESCR General Comment 14, The Right to the Highest Attainable Standard of Health (Article 12) General Comment No. 14 (11/08/00) (E/C.12/200/4).

availability of resources to fund a health care system especially developing countries. Yet, it is important to note that the Committee goes further to assert that states do have an obligation on grounds of non-discrimination and equal treatment to ensure that they do not inappropriately allocate resources.<sup>71</sup> The Committee goes further to describe what inappropriate allocation of resources means. This occurs when states:

***'favour expensive curative health services*** which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.<sup>72</sup> (Emphasis mine).

This concern of not allocating resources for expensive curative health care has been used to bolster the case against widening access to reproductive health technologies especially in poor resource countries.<sup>73</sup> Yet, international health specialists who canvass for the widening of access to reproductive technologies will point to ground breaking medical developments that facilitate the production of affordable reproductive technologies (ARTs). They argue that the cost of these treatments can be brought down significantly through new scientific developments. For example, efforts are currently being made to bring down the cost of a single cycle of IVF to \$200.<sup>74</sup> Since the cost of fertility treatment has now been significantly reduced by these ground break developments, why should ARTs still be characterised as expensive curative treatment? Is it not preferable to characterise affordable fertility treatment as falling under basic or primary health care that is deserving of public funding.<sup>75</sup> Yet, it remains debateable whether a \$200 per IVF cycle can be considered as affordable for involuntary childless people in low resourced countries in Sub-Saharan Africa? This is

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<sup>71</sup> Ibid at paragraph 19.

<sup>72</sup> Ibid.

<sup>73</sup> See Okonofua (note 47) at p 957.

<sup>74</sup> Depotter S., (2008) Fertility treatment in developing countries: a cycle of IVF for less than \$200 (ESHRE Public Release, Meerstraat, Belgium).

<sup>75</sup> See Ombelet, 2014 (note 5) above.

because many individuals in poor resource developing countries live on a daily income of \$ 1 to \$2 a day.<sup>76</sup>

Yet the benefits of affordable fertility treatment cannot be overlooked by states as they provide vital reproductive health care to involuntary childless women who otherwise would be stigmatised by their society if they do not get such access to healthcare that can help them reproduce. This argument finds some support in paragraph 21 of the ICESCR General Recommendation<sup>77</sup> set out below.

'To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. **It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights'** (emphasis mine).

In considering paragraph 21 above, a valid argument could be raised that it would be wrong to treat access to ARTs as expensive curative treatment since this treatment can help to protect women from the impact of harmful discriminatory cultural practices arising from the

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<sup>76</sup> African Development Bank Group, Income Inequality in Africa (Briefing Note 5, March 7 2012) p 2. Available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/FINAL%20Briefing%20Note%205%20Income%20Inequality%20in%20Africa.pdf> (accessed May 21 2015).

<sup>77</sup> ICESCR General Comment 14 (note 70) above.

negative feminisation of infertility. This particular argument again provides a good opportunity to revisit Shanner's forbearance rights theory<sup>78</sup> earlier discussed in this chapter. If as Shanner argues, the positive right to access abortion or contraceptives is justifiable on grounds that it protects the forbearance rights of women, a similar argument can be raised that state funding should be provided for ART treatment since such treatment would protect the forbearance rights of women to be free from harmful discriminatory practices associated with the negative feminisation of infertility. But the difficulty still remains on whether state funding of ARTs should become immediately realisable in low resourced regions of the world. A further evaluation of this point is undertaken through an appraisal of the African Charter on Human and Peoples' Rights (otherwise known as the Banjul Charter)<sup>79</sup> which is the regional human rights instruments that applies to sub-Saharan Africa. It is worth noting that other African regional human rights instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (also known as the Maputo Protocol)<sup>80</sup> and the African Charter on Childs' Rights<sup>81</sup> also provide for the right for health.<sup>82</sup> However, this chapter will focus on the Banjul Charter and the Maputo Protocol since these rights instruments have a greater relevance to the question on whether the right of health can be utilised to tackle the negative feminisation of infertility that results in the social stigmatisation of involuntary childless women within the Sub-Saharan African region.

### **6.6.2 Right to Reproductive Health at the African Regional Level**

The difficulties on whether the right to health should be treated as an automatic and binding state obligation is a very critical issue in Sub-Saharan Africa due to the limited availability of state resources to fund the obligations set out in this right and other socio-economic rights.

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<sup>78</sup> Shanner (note 52) above.

<sup>79</sup> Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

<sup>80</sup> Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, *entered into force* Nov. 25, 2005.

<sup>81</sup> OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

<sup>82</sup> See article 14 of the Maputo Protocol and article 14 of the African Charter on Child Rights.

Unlike the ICESCR at the multilateral level and other regional instruments in other jurisdictions, some have argued that the Banjul Charter places economic, social and cultural rights on the same footing as political and civil rights.<sup>83</sup> This is the viewpoint of scholars such as Odinkalu<sup>84</sup> and Ouguergouz<sup>85</sup> who argue that social, economic and cultural rights can be considered as on the same footing as political and civil rights in the sense that they are enforceable and justiciable rights. Odinkalu goes further to argue that most of these rights can be treated as immediately realisable.<sup>86</sup> Yet other scholars such as Mbazira<sup>87</sup> and Jibriel<sup>88</sup> question whether the economic resources of several African states permits for an immediate realisation of such rights. They argue that the very nature of economic, social and cultural rights suggests a progressive realisation of such rights based in line with the social-economic realities of the states concerned. They also point to other comparative African regional treaties such as the Maputo Protocol and the Children's Rights Charter which treat the right to health as a progressive realisable right instead of an immediate realisable right.<sup>89</sup>

Besides the academic debate, it is necessary to refer to the direct works and decisions of the African Commission on Human Rights as the body charged with the responsibility of interpreting the Banjul Charter. The Commission's Principles and Guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Guidelines)<sup>90</sup> provides extensive guidance on what constitutes the right to health. This guidance document is more comprehensive than the General

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<sup>83</sup> See Frans Viljoen, *International Human Rights Law In Africa* (Oxford University Press, Oxford, 2007), at 237 discussed in Jibriel B, *The justiciability and enforcement of the right to health under the African Human Rights System* (2012) 1(2) *Haramaya Law Review* at p 33.

<sup>84</sup> Odinkalu C., *Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights* in Evans M., and Murray R., (Eds.) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (2002) 181.

<sup>85</sup> Ouguergouz F., *The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy* (The Hague: Martins Nijhoff: 2003) pp 764 and 765.

<sup>86</sup> Odinkalu (note 84) above.

<sup>87</sup> Mbazira C., *Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides* 6(2) *African Human Rights* at p 340.

<sup>88</sup> Jibriel B., *The Justiciability and Enforcement of the Right to Health under the African Human Rights System* (2012) 1(2) *Haramaya Law Review* at pp 37-39.

<sup>89</sup> *Ibid.*

<sup>90</sup> Adopted at the 50<sup>th</sup> ordinary session at Banjul, Gambia, October 24 to November 7 2011.



Recommendation on the right to health by the ICESCR Committee. Paragraph 13 of the Guidelines accepts that the nature of social, economic and cultural rights means that these rights are to be progressively realised within the context of available resources of the states. However, paragraph 17 of the guidelines asserts that there are minimum core obligations within the social, economic and cultural rights as set out in the Banjul Charter that can be immediately realised by states. These minimum core obligations apply 'regardless of the availability of resources'<sup>91</sup> and are deemed as 'non-derogable'.<sup>92</sup>

A case that illustrates this point is Purohit and Moore v. The Gambia (2003)<sup>93</sup> where the Commission found that Gambia had breached certain rights in the Banjul Charter, including the right to health. While the Commission accepted that the realisation of social, economic and cultural rights were subject to the economic realities of African states,<sup>94</sup> it found that this did not excuse African states from fulfilling the minimum core responsibilities enshrined in these rights.

Regarding the right to health, the minimum essentials or obligations are set out in paragraph 66 of the Commission Guidelines. They include the 'right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups.' States are obligated to immediately take steps to realise these minimum essential or core obligations by a proper prioritisation of their available resources. Since the 2010 Commission Guidelines does give some basis for immediate realisation of the minimum core essentials of social, economic and cultural rights; it is debateable why writers like Jibriel<sup>95</sup> in her 2012 article still maintains the stand that Commission restricts itself to the progressive realisation of these rights.

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<sup>91</sup> Paragraph 17 above.

<sup>92</sup> Ibid.

<sup>93</sup> See Communication 241/2001, Purohit and Moore v. The Gambia, (2003), AHRLR 96(ACHPR 2003) (16th Activity Report) (Purohit Case), para. 84.

<sup>94</sup> Paragraph 84 of the decision.

<sup>95</sup> See Jibriel (notes 83 and 88 above) at p 39.

### **6.6.2.1 The African Regional Rights System and Core Minimum State Obligations for Vulnerable Groups of People**

Beyond the debate on whether all elements of the rights to health should be treated as progressively realisable, this thesis would like to turn its attention to the other fundamental aspect of paragraph 66 of the Commission Guidelines which requires that the minimum core obligations under the right to health should on a non-discriminatory basis cater for the needs of vulnerable or marginalised groups. This raises an interesting perspective on whether involuntary childless people, especially women should be treated as vulnerable people due to the social stigmatisation of childlessness in pronatalist states? Paragraph 1 of the Guidelines which provides for the interpretation of terms utilised in the guidelines defines vulnerable groups as:

‘Vulnerable and disadvantaged groups are people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights. Vulnerable and disadvantaged groups include, but are not limited to, women, linguistic, racial, religious minorities, children (particularly orphans, young girls, children of low-income groups, children in rural areas, children of immigrants and of migrant workers, children belonging to linguistic, racial, religious or other minorities, and children belonging to indigenous populations/communities), youth, the elderly, people living with, or affected by, HIV/AIDS, and other persons with terminal illnesses, persons with persistent medical problems, child and female-headed households and victims of natural disasters, indigenous populations/communities, persons with disabilities, victims of sexual and economic exploitation, detainees, lesbian, gay, bisexual, transgendered and intersex people, victims of natural disasters and armed conflict, refugees and asylum seekers, internally displaced populations, legal or illegal migrant workers, slum dwellers, landless and nomadic pastoralists, workers in the informal sector of the economy and subsistence

agriculture, persons living in informal settlements and workers in irregular forms of employment such as home-based workers, casual and seasonal workers.’

This broad and encompassing definition of who can be considered as falling under a vulnerable group is arguably broad enough to include involuntary childless women. Indeed women regardless of whether they are fertile or infertile are classified as being part of a vulnerable group under this heading. More fundamentally, it can be argued infertile or involuntary childless women constitute a group within the group of women that have a persistent medical problem that is socially stigmatised due to the negative feminisation of infertility and involuntary childlessness.

Although there is a continuous reference to vulnerable persons throughout the Commission’s Guidelines, there is no reference to vulnerable people in article 17 or other articles of the Banjul Charter itself. The Maputo Protocol also does not appear to refer to vulnerable groups particularly within the context of Article 14 which deals with the reproductive and health rights of women. However, both the Banjul Charter and the Maputo Protocol recognise the needs of the disabled. Article 18(4) of the Banjul Charter for example states that ‘the aged and the disabled would have special measures of protection in keeping with their physical and moral needs’. The Commission on Peoples and Human Rights in its guidelines and principles in paragraph 67 also states that the minimum core obligations on health should include the requirement of providing health care to those who are disabled. It goes on to include persons with psychosocial, intellectual and physical disabilities as deserving of prioritisation in access to specific health services that will enable them to have a full enjoyment of their life.<sup>96</sup> The Maputo Protocol also provides relevant protection for women with disabilities under Article 23 and for women in distress under Article 24. However both the Banjul Charter and Maputo Protocol fail to provide a definition of what constitutes disability.<sup>97</sup> The failure to provide a definitive statement on who is a woman living with

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<sup>96</sup> See paragraph 67 of the Principles and Guidelines.

<sup>97</sup> See for example Article 1 (the interpretation article) for the Maputo Protocol.

disability is also evident in the general comment on the Maputo Protocol.<sup>98</sup> Recourse is therefore made to other human rights instruments that address the rights of disabled people.

The first place to turn is the Convention on the Rights of Peoples with Disabilities and its optional protocol.<sup>99</sup> Article 2 of the Convention which deals with definitions does not specifically define disability but it does provide a definition on what constitutes discrimination on the basis of disability. This is defined as:

‘Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.’

There is also a regional draft protocol in Africa for people with disabilities which is yet to come into force. This is the draft 2014 protocol on the Rights of Persons with Disabilities in Africa.<sup>100</sup> Article 1(c) defines people living with disabilities as:

‘those who have long-term physical, mental, intellectual, developmental or sensory impairments which in interaction with environmental, attitudinal and other barriers hinder their full and effective participation in society on an equal basis with others.’

From these instruments, it is clear that disability is much wider than physical handicap and that it can include other forms of disability, including barriers arising from social attitudes, stigmas and prejudices that impede an individual or groups of individuals from being able to fully participate in society. This is described as the social model of discrimination and

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<sup>98</sup> See the General Comments pertain to Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa adopted by the 52<sup>nd</sup> Ordinary Session, the African Commission on Human and Peoples’ Rights (African Commission).

<sup>99</sup> See The Convention on the Rights of Persons with Disabilities and its Optional Protocol (note 64) above.

<sup>100</sup> Draft II, March 14 2014, Updated from Draft (following meeting of Working Group on Older Person and Persons with Disabilities (WG) held in Banjul, The Gambia, on February 28- March 1 2014.

feminist works such as Irhorn and Bharadwaj have argued that the social stigmatisation of involuntary childlessness in developing regions such as Sub-Saharan Africa and Asia should be characterised as falling within this model of discrimination.<sup>101</sup>

One key reason why these writers advocate that involuntary childlessness should be treated as a disability is that it 'disrupts the ability of individuals to fulfil normative social roles as mothers and fathers.'<sup>102</sup> They also argue that the social stigmatisation of infertility and involuntary childlessness in regions such as Africa can lead to a 'social disablement in the multiple realms of marriage, family, friendship and community life.'<sup>103</sup> They further view the social oppression that involuntary childless women are subjected as presenting another strong ground for treating infertility particularly as a social disability.

This thesis however expresses some reservation on whether it will be expedient to characterise involuntary childless women as disabled for the purposes of trying to prioritise their health needs under international and regional rights instruments. This is because treating infertility or involuntary childlessness as a disability could result in unintended consequences for involuntary childless women. It could lead to a situation where involuntary childlessness is not just viewed under the social construct of disability but rather as a form of physical failure that should be further censured and stigmatised. If treated as the latter, an involuntary childless woman may end up not only being stigmatised for her inability to have children but also scorned for being handicapped and inferior to her fertile counterpart.

This thesis therefore advocates that due to the socio-cultural context prevalent in pronatalist regions of the world, the plight of involuntary childless women should not be solely treated as a disability concern, but as an issue falling under the broader context of the disenfranchisement and discrimination of women in developing countries. The counter

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<sup>101</sup> Inhorn M., Bharadwaj A., *Reproductively Disabled lives: Infertility, stigma, and suffering in Egypt and India* in Ingtad B., Whyte S., (eds.) *Disability in Local and Global Worlds* (Berkeley: Univ. Calif. Press, 2007) pp 78-106.

<sup>102</sup> Ibid

<sup>103</sup> Ibid.

argument can of course be raised that the social construct of disability is wide enough to embrace the disenfranchisement and disempowerment that involuntary childless people face within their communities. Yet the continuing delay in the adoption of the African draft protocol on the rights of disabled persons exemplifies why solely characterising infertility and involuntary childlessness as a socially constructed form of disability may not be the most expedient way of strengthening the reproductive health care rights of this group of women.

Involuntary childless African women may therefore be better served if more work is done in the area of developing a rights regime that prioritises the combating of the social stigmatisation of infertility and involuntary childlessness not only from disability rights perspective but on the wider grounds that their health needs should be prioritised on the key ground of protecting their forbearance rights which include the right to free from discrimination. To what extent this prioritisation of health needs of involuntary childless women can be undertaken particularly at the national level will be considered next.

### **6.6.3 Universal Access to Reproductive Health Care for the Involuntary Childless: An African State Obligation?**

The right to health is also recognised by various states at the national level. The Kinney and Clark's 2004 study<sup>104</sup> also shows that 67.5 of National constitutions<sup>105</sup> have the right to health enshrined in their constitution. The enshrinement of the right to health in several national constitutions poses interesting queries on whether there is a human right to universal access to reproductive health care. Once more, the question arises on whether the right to health enshrined within the national constitutions justiciable or binding rights? This is a contentious debate particularly in the developing world that faces the constraints of resources.

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<sup>104</sup> Ibid at p 279.

<sup>105</sup> Ibid.

Nigeria, as a case study country illustrates this position by placing the right to health in chapter two of the constitution which deals with non-justiciable Fundamental Objectives and Directives Principles of State Policy. The right to health is therefore not included in chapter four of the Nigerian constitution which deals with binding and enforceable human rights. In this way, the framers of the Nigerian Constitution have treated the right to health as an aspirational state goal which cannot be enforced against the Nigerian State. This does not mean that the Nigerian state cannot give binding enforceability to certain aspects of the right to health in its domestic legislation. This position was set out by Nigerian Supreme Court in the case of the Attorney General of Ondo v. Attorney General of the Federation of Nigeria<sup>106</sup> where the court held that the fundamental objectives and directive principles set out in chapter two of the Nigerian Constitution were mere declarations which could not be enforced until they were enacted into law by the Nigerian National Assembly. The Nigerian National Assembly has enacted on the right to health with the most recent legislation being the National Health Act 2014.<sup>107</sup>

S.1 of the Act establishes a national health system which is to:

‘protect promote and fulfil the rights of the people of Nigeria to have access to health care services.’<sup>108</sup>

S. 11 of the Act provides for the establishment of a Basic Health Care Provision fund which is financed by the Federal Government Annual Grant constituting of at least 1% of the Consolidated Revenue funds and also by grants from international donor partners; funds from any other source. Part of the objectives of the fund is to provide for and maintain primary health care facilities and services.

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<sup>106</sup> S.C. 26/2006

<sup>107</sup> In force on December 9 2014.

<sup>108</sup> See s 1 (1) (e) of the Act.

In enacting the National Health Act 2014, it can be said that the Nigerian state has taken steps to carry out its non-justiciable duty set out in section 17(3) (c) (d) of the Nigerian Constitution which states that:

3) The State shall direct its policy towards ensuring that-

(c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;

(d) there are adequate medical and health facilities for all persons.

It has taken Nigeria some considerable time to enact legislation to bring about the realisation of state obligations regarding the right to health set out under Chapter 2 of the Constitution. The length of time in which it has taken the Nigerian State to enact this Act confirms that although many African states may have enshrined the right to health in their national constitutions, this right is a progressive right that is subject to the availability of state resources.<sup>109</sup> This is not the first Act that Nigeria has enacted in its bid to ensure a progressive realisation of the right to health. The country also has a Nigerian National Insurance Health Act (NNHIS) 1999 which focuses on widening health insurance to those who do not have coverage. However, the 2014 National Health Act goes further than the NNHIS in the sense that it seeks to provide universal access to primary health care. But as Nwabueze, a leading scholar in Nigerian health law points out, while the Nigerian constitution and domestic legislation provide laudable black text law on the right to health, the infrastructural realities on ground make it difficult for this right to be fully realised. He paints a dismal picture of public health expenditure in Nigeria which he places per capita at \$8.<sup>110</sup> This meagre allocation of resources in this oil rich resource nation places in doubt the

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<sup>109</sup>. See Nwabueze R., The Legal Protection and Enforcement of Health Rights in Nigeria in Flood C., Gross A (eds.) The Right of Health at the Public/Private Divide: A Global Comparative Study (Cambridge: Cambridge University Press, 2014) p 372.

<sup>110</sup> Ibid at p 376.



state capability or resolve to realise the desired objectives of primary health care as set out in the National Health Act 2014.

While there are concerns on the availability of resources available to fund access to primary health care, it does become necessary to ask the question on the Act means by primary health care. The Act in its interpretation section<sup>111</sup> states that primary health care services means:

‘such health services as may be prescribed by the Minister to be primary health care services.’

This definition of primary health services unfortunately does not explain what services the Minister will deem as primary health care services. Recourse has to be made to earlier rules to provide some explanation on what constitutes primary health care in Nigeria. Nnamuchi and Matiboba<sup>112</sup> refer to the Nigerian National Health Policy and Strategy to achieve Health for all Nigerians (National Health Policy)<sup>113</sup> revised in 2004. They argue that this policy statement underpins the NHIS and National Health Act and other subsidiary legislation in Nigeria.<sup>114</sup> The National Health Policy includes family planning as part of maternal and child health care that falls under primary health care services. Such family planning services include:

‘Services offered to couples to educate them about family life and to encourage them to achieve their wishes with regard to preventing unwanted pregnancies, **securing desired pregnancies**, spacing of pregnancies; and limiting the size of the family in

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<sup>111</sup> S. 64 of the Act.

<sup>112</sup> Nnamuchi O and Matiboba S., Health Care Organisation and Financing in Irehobhude IO., Nwabueze RN., (eds.) Comparative Health Law and Policy: Critical Perspective on Nigerian and Global Health Law (Farnham, Ashgate, 2015) p 16

<sup>113</sup> Revised National Health Policy (Abuja: Federal Ministry of Health, 2004).

<sup>114</sup> Nnamuchi and Matiboba (note 112) above at p 16.

the interest of the family health and socio-economic status. The methods prescribed shall be compatible with their culture and religious beliefs.<sup>115</sup> (Emphasis mine).

It is clear from the wording of the National Health Policy and the National Health Act that the provision of family services which falls under primary health care is meant to include the provisioning of services that would help couples achieve desired pregnancies. Yet, the evidence shows that the provisioning of fertility treatment such as ARTs is not publicly funded in Nigeria.<sup>116</sup> This means that involuntary childless couples who seek to achieve desired pregnancies must privately fund their fertility treatment despite the current legislative framework which seeks to widen access to primary health care in the public health care sector.

Again, this gives credence to the fact that the right to health can only be realised according to the availability of resources especially in the context of what the state considers as its priorities. Indeed, it has been argued by leading health specialists that to fund fertility treatment at the public health level in developing countries such as Nigeria would be inimical as this would be an unnecessary drain of resources that could be allocated to other pressing problems.<sup>117</sup> This of course is not just a developing country concern. Several developed industrialised countries also do not fund ARTs at the public health level. Even when it is available at the public health level as in the case of countries like the United Kingdom, Israel, Netherlands and Germany there are restrictions on how many cycles that would be available to couples to help them achieve desired pregnancies.<sup>118</sup>

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<sup>115</sup> Nigerian National Health Policy, Chapter 3 at paragraph 3.2 which is titled Health System based on Primary Health Care.

<sup>116</sup> Giwa-Osagie O ARTs in Developing Countries with particular reference to Sub-Saharan Africa in Vayena E., Rowe P.J., Griffin P.D., Current Practices and Controversies in Assisted Reproduction. Report of a Meeting (Geneva: World Health Organisation, 2002) at p 23.

<sup>117</sup> Okonofua F., Obi H., "Specialized Versus Conventional Treatment of Infertility in Africa: Time for 3a Pragmatic Approach" (2009) 13(1) African Journal of Reproductive Health pp. 9 – 11.

<sup>118</sup> See Ravitsky V, Dupras-Leduc R., Emerging Issues in Joly Y., Knoppers B.M., Reproductive Technologies in Routledge Handbook of Medical Law and Ethics (Abingdon, Oxon, Routledge: 2015) p 225.

This is because there is no running away from the fact that ARTs are expensive and a single cycle could run into thousands of pounds. How then can it be justifiable or reasonable for African resource strapped states to fund ARTs at the primary health care level, even if, as in the case of Nigeria, their national health policy and legislation provide for such a laudable aspiration? This is the dilemma that countries have to face in determining what health needs to prioritise. However, the underlining argument that has run through this thesis is that the quest of African involuntary childless couples to achieve a desired pregnancy goes beyond a desire or want. It is tied up to the fact that their worth to their families and communities is in many ways tied up to their procreative value.

If this is the case, as the leading studies<sup>119</sup> have shown, then there is a public interest objective in providing public funding for involuntary childless couples to help them achieve a desired pregnancy. As previously argued, state funding to help socially stigmatised in pronatalist countries where social worth is connected to procreative value can be justified on the grounds of protecting forbearance (negative rights). This is akin to the same argument that feminists like Shanner have advanced in arguing for public funding for abortions. There is also some valid ground to argue that desired pregnancy for involuntary childless couples cannot just be characterised as a 'personal desired pregnancy' but as a 'community desired pregnancy'. If as the social ordering principles such as Ubuntu, Humwe and Omoluabi suggest that procreation is a duty owed to safeguard community survival, then civic amoral African states do have some measure of responsibility to help individuals fulfil their procreative obligations. This may explain why countries like Nigeria have included as part of primary health care services, family planning services that would help couples achieve desired pregnancies.

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<sup>119</sup> See for example Dyer SJ., Abraham N, Hoffman M, Van der Spuy ZM Men leave me alone as I cannot have children: women's experiences with involuntary childlessness (2002) 17 Human Reproduction; Denga DL., Childlessness and marital adjustments in Northern Nigeria (1982) 44 J Marr Family 779-802 discussed in Van Balen F. Involuntary Childlessness: a neglected problem in poor resource areas in ESHRE Special Taskforce on 'Developing Countries and Infertility (ESHRE Monographs (Oxford: Oxford University Press: 2008) at p 26.

It is also necessary to point out that Article 18(1) of the Banjul Charter also envisages state responsibility when it comes to the protection of the family particularly if there are existentialist threats to its continuing role as ‘the natural unit and basis of society’.<sup>120</sup> Until the deep ingrained cultural values and beliefs that subscribe to procreation being the bedrock of the family structure in Africa are fundamentally changed, it would be improper for African states to ignore the obligation to safeguard the forbearance rights of individuals to enjoy human dignity and to be free from stigmatisation and discrimination. It would appear that like in the case of safeguarding the forbearance rights of bodily integrity which is touted as a key reason for the state funding of abortions, African states can also safeguard the forbearance rights of the involuntary childless through the state funding of ARTs. This would help such couples achieve desired pregnancies and thereby reduce the social suffering and stigmatisation in their communities.

As earlier highlighted in this chapter, there are positive developments taking place at the international level that suggest that there may come a day when the cost of accessing ARTs would be affordable in developing regions of the world, including Africa.<sup>121</sup> Yet, as stated earlier, there is still concern on whether the projected cost of \$200 per cycle will be widely available to all the involuntary childless when a majority of the population in some of the least developed countries of this sub-continent currently live on an income of \$1 or \$2 a day.<sup>122</sup> But this is where the benefits of group support and inter-dependence as exemplified in the social ordering principles of Ubuntu, Humwe and Omoluabi can be effectively deployed. The literature on the treatment seeking behaviour of involuntary childless couples shows that in some communities, extended family members and other goodhearted members of the community have been known to provide funding support for fertility treatment. Giwa-Osagie succinctly puts it this way:

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<sup>120</sup> See Article 18(1) of the Banjul Charter.

<sup>121</sup> Depotter (note 74) above.

<sup>122</sup> See African Development Bank Group (note 76) above.

'Because of the premium placed on childbearing, it is common to find that members of the extended family and friends contribute to make up the cost of an ART cycle.'<sup>123</sup>

If as Ubuntu puts it 'I exist because you exist'<sup>124</sup> it should come as no surprise that friends and family members will contribute to the cost of an ART cycle in pronatalist societies where children are considered as gold or wealth because of the ontological value they add to the continuing survival of African communities. This point will be further discussed in the next chapter which considers the role that law can play in facilitating a definitive rights regime for involuntary childless women in Sub-Saharan Africa.

## **6.7 Conclusion**

This chapter has been concerned with the debate on whether there exists a universal right to access reproductive health care. An appraisal of the legal framework reveals that the right to reproductive health care fall under the general framework of the right to health which is a progressive realisable right. Canvassing for a right to universal reproductive health care which includes the provisioning of fertility treatment is generally hampered by concerns of scarce resources and the need to prioritise health needs. In this regard, many states will treat the provisioning of fertility care particularly expensive ARTs as a positive right and not a negative right. However, this thesis argues that in pronatalist parts of the world such as Africa where individuals are actively encouraged to contribute procreative value to their communities, the forbearance rights of the right to human dignity and the right to be free from discrimination are directly impacted when people are unable to achieve a pregnancy that is desired not only at a personal level but at the community level. If this is the case, then as feminist and equality activists have argued for the widening of abortion services based on the fact that it helps women to safeguard their forbearance rights of protecting their reproductive integrity not to carry a third party in their womb; a similar argument can be

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<sup>123</sup> See Giwa-Osagie (note 116) above at p 26.

<sup>124</sup> Nabadere D., *Afrikology, Philosophy and Wholeness: An Epistemology* (Pretoria: African Institute of South Africa: 2011) p 18.

raised for the safeguarding of the forbearance rights of involuntary childless women to be free from discrimination and social stigmatisation brought about by their inability to conceive.

The next chapter however recommends a further approach to protecting the forbearance rights of involuntary childless women which include the right to human dignity and the freedom from discrimination and degrading treatment. This approach calls for a legal framework or rights regime that proactively the root causes that contribute to the gendered social stigmatisation of involuntary childlessness in Sub-Saharan Africa.

## **Chapter Seven**

### **Towards the Development of a Rights Regime for Involuntary Childless Women: The Role of Law and Regulation**

#### **7.1 Introduction**

The preceding chapter considered whether there is a binding right to reproduce as well as a right to access reproductive health care to facilitate the ability to reproduce. The chapter found that there is no legally binding right that requires states to mandatorily provide public funding towards universal access for fertility treatment. This finding however does not ignore the fact that international human rights instruments provide for the right to health that includes reproductive health care. However, the framework for the operation of this right is based on the progressive realisation taking into cognisance the availability of state resources.

In line with the overarching query of this thesis which focuses on the social stigmatisation of infertility in Sub-Saharan Africa and how this stigmatisation can affect the status of involuntary childless women within the region, the current chapter will consider what role law and regulation can play in the development of a rights regime for involuntary childless women. Developing further on the preceding chapters of this thesis, it is proposed that the rights regime should adopt a two-pronged approach.

First, the rights regime should seek to facilitate and promote positive or welfare rights such as the right to reproductive health care that will enhance the reproductive capability of those who are involuntary childless. Second, it should also focus its attention on ensuring that the necessary forbearance or negative rights are in fully operational so that involuntary childless people can be protected from social stigmatisation. In continuation with the discussion on the right to health undertaken in the preceding chapter, this chapter will first consider the rights

regime for involuntary childless women from the angle of positive or welfare rights. It will in particular consider how law and regulation can be utilised to provide a package of positive or welfare rights that help to facilitate wider access to ARTs. The latter part of the chapter will then consider what role law and regulation can play in strengthening the negative or forbearance rights that prevent the discrimination and inhumane treatment of involuntary childless people.

## **7.2 The Role of Law and Regulation in Advancing the Positive Right of Access to Affordable ARTs.**

The preceding chapter had explained that the right to health, including reproductive health care is a positive right that is based on progressive realisation and availability of resources. Yet, the same chapter also showed that there are minimum core obligations contained within the right to health as set out in the African Charter on Human and Peoples' Rights 1981 (the Banjul Charter) that states are required to immediately realise through the prioritisation of state resources.<sup>1</sup> Yet, the question that plagues African states that have scarce resources is how best to prioritise resources to achieve core minimum obligations relating to the right to health? For example, the market reality in many African nations show that the provisioning of ARTs is largely privately funded.<sup>2</sup> The provisioning of ARTs through private health care is generally prohibitive and access to such fertility care is only available to a small section of the population in Africa.

Some may suggest that funding ARTS solely through private health care suggests that there is a market failure that requires regulatory intervention by the state. This call for regulatory

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<sup>1</sup> See paragraph 17 of the African Commission on Human Rights in its Principles and Guidelines on the implementation of Economic, Social and Cultural Rights adopted at the 50<sup>th</sup> ordinary session at Banjul, Gambia, October 24 to November 7 2011.

<sup>2</sup> See Giwa-Osagie O., ARTs in Developing Countries with particular reference to Sub-Saharan Africa in Vayena E., Rowe PJ., Griffin PD., Current Practices and Controversies in Assisted Reproduction. Report of a Meeting (Geneva: World Health Organisation, 2002) at p 23.



intervention will be based on the notion that healthcare is not a pure private good, but a public good that everyone should be able to access.<sup>3</sup> However as chapter six has shown, not all aspects of health-care can be said to public goods, especially those that are seen to be expensive curative treatment or non-essential treatment. This is why Coggon<sup>4</sup> argues that there are limits to demarcating healthcare into strict compartments of public and private goods. This is because as he further posits, there is a dual responsibility that the state and the individual should have in the management of health care.<sup>5</sup> If this is the case, to what extent should the state, particularly a poorly resourced state in Africa jointly partner with an involuntary childless individual in facilitating access to ARTS? Should the state prioritise its resources to fund assisted reproductive health care treatment when as we have seen in chapter six, there is no binding obligation for it to do so? More fundamentally, and in addition to these questions, there is a need to examine the extent to which the law in its regulatory role should intervene in ensuring that the funding of ARTS is not treated purely as private good limited only to a privileged few, but one that can be accessed by a wider section of people who are socially stigmatised in their societies due to their condition of involuntary childlessness. These are the questions that this section of this chapter seeks to address. But first it is necessary to further debate whether there is actually a market failure in the provisioning of ARTs in Sub-Saharan Africa. This is a good starting point to consider whether regulatory theory is relevant in facilitating positive or welfare rights for involuntary childless women that will enable them access the fertility treatment they desire.

### **7.2.1 Identifying Key Market Failures in the provisioning of ARTs in Sub-Saharan Africa**

Bator<sup>6</sup> in his seminal treatise on the Anatomy of Market Failure defines market failure as:

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<sup>3</sup> Karsten S., Health Care: Private Good v Public Good (1995) 54(2) American Journal of Economics & Sociology Inc. (1995) pp 129-144.

<sup>4</sup> Coggon J., What makes health public? A critical evaluation of Moral, Legal, and Political Claims in Public Health (Cambridge: Cambridge, 2012) 310 pp.

<sup>5</sup> Ibid at p 40.

<sup>6</sup> Bator F., The anatomy of market failure (1958) 72(3) The Quarterly Journal of Economics p 351.

‘the failure of a more or less idealised system of price model institutions to sustain ‘desirable activities’ or to stop ‘undesirable activities.’<sup>7</sup>

This definition of market failure is predicated on the application of the allocation theory which deals with the ‘efficient deployment and use of resources.’<sup>8</sup> The preceding chapter of this thesis highlighted the difficulty that many African nation states, especially those with scarce resources face in trying to progressively realise the right of health. The application of the allocation theory might suggest that it is an inefficient deployment of resources to fund expensive curative treatment such as fertility treatment when there are other pressing health needs within the economy that require similar funding. If consideration is given to Bator’s definition, could there be some basis to argue that the refusal to allocate public funding for the assisted reproductive health sector in Africa is a market failure since it fails to sustain the desirable activity of reproduction which is seen as adding value to the well-being of many African communities? But this begs the question on whether free markets so properly called should expect public funding. If health is seen purely as a private good, then it should be the responsibility of individuals to fund their health care needs.<sup>9</sup> If this is the case then there is no need for state intervention as the market has not failed despite the fact that some individuals have been priced out due to competitive nature of the market. But as Karsten<sup>10</sup> argues it would be unethical and contrary to social justice goals to treat something as vital as healthcare as strictly a private good that should be controlled purely by market forces? While the utilisation of health insurance in industrialised countries like the United States can be used to explain why health care is treated to some extent as a private good, Karsten argues again that the provisioning of health care because of its vital importance to the

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<sup>7</sup> Ibid p 351.

<sup>8</sup> Gomes L., *The Economics and Ideology of Free Trade: A Historical Review* (Cheltenham, 2003 Edward Elgar).

<sup>9</sup> Karsten (note 3) above at p 138.

<sup>10</sup> Ibid at p 136.

society should not be treated like other private goods.<sup>11</sup> In particular, the principle of exclusion which obtains in the supply of private goods in the free market should not be applied to an essential commodity like health care. This is why some have gone on to argue that health care does have a public characterisation<sup>12</sup> and as such that it should be treated as a public good which should be available to not just a privileged few but to all due to its fundamental importance to the welfare of the society.

Accordingly, from a reproductive health perspective, there is a public benefit ground for state funding for ARTs due to the fact that procreation is seen in many pronatalist communities as central to the survival of the society. There is therefore some justification on public interest grounds to call for regulatory intervention that facilitates the ability of involuntary childless people to achieve desired pregnancies if they so desire. This is because in many cases the social worth and value of women in many African communities is closely connected with their ability to reproduce. This is why some<sup>13</sup> have argued for the public funding of affordable ARTs since it could assist the involuntary childless in achieving a desired pregnancy and help alleviate the social stigmatisation associated with involuntary childlessness. As argued in the previous chapter in this thesis, there is a public interest argument for widening access to ARTs to reduce the social harm and stigmatisation that involuntary childless women are exposed to. This is premised on the protection of forbearance rights which were the key grounds that feminists utilised in the past to advocate for the widening of access to contraceptives and abortion services for women who do not want to reproduce.<sup>14</sup>

Yet, it is accepted that other public interest grounds such as child justice and over-population will continue to be raised against treating assisted reproductive health care as a public good

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<sup>11</sup> Ibid at p 136.

<sup>12</sup> Randall F., Darwin R., *End of Life Choices: Consensus and Controversy* (Oxford University Press: 2010) at p 6.

<sup>13</sup> Vayena E., Rowe PJ., Peterson HB., *Assisted reproductive technology in developing countries: why should we care?* (2002) 78 *Fertility and sterility* pp 13–15.

<sup>14</sup> See Shanner L., *The Right to Procreate: When Rights Claims Have Gone Wrong* (1995) 40 *McGill Law Journal* p 823 at pp 840-843.

which requires state intervention and support. The public interest grounds of child justice and over-population have been effectively used to limit the use of state funding to fund expensive curative treatment for the involuntary childless women. The argument constantly raised against rectifying the market failures connected with the assisted reproductive sector is the fact that the involuntary childless can provide permanent homes through the mechanism of child adoption for the large number of vulnerable children in need of a family life.<sup>15</sup>

However, as chapter five of this thesis has shown, while child adoption does offer some parenting relief for the involuntary childless, its full utilisation in the Sub-Saharan African region is hampered by other norms and rules existing side by side with received Western law. The key rule or law that hampers the full use of child adoption is strict Islamic law particularly that of the Sunni Maliki code which is practised in a number of African countries, including Nigeria, the investigation site of this thesis. It is therefore questionable to continue to deny involuntary childless people of other options of parenting, including achieving desired pregnancies through the use of ARTs.

Since this is the case, this thesis questions whether it is right to leave market forces to determine who should be entitled to ARTs particularly when it has been shown that a service as critical as reproductive health-care cannot simply be treated as a private good, but one that also has the nature and characteristic of a public good. In Sub-Saharan Africa, the thesis' investigation site, reproduction is seen as a desirable activity and applying Bator's concept of market failure, the failure of a health care service to provide the means by which this desired activity can be sustained for the involuntary childless may suggest that a market failure has taken place. Confining the provisioning of ARTs purely to private funding promotes the continuity of undesirable social activity such as the failure to provide

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<sup>15</sup> Toubia N., Social Pressure is not the only reason why people want children (1994) 4 Reproductive Health Matters p 94.

procreative value to the community. This results in other undesired social activities such as the gendered social stigmatisation of infertility and involuntary childlessness.

Limiting the provisioning of ARTs to private funding may also raise other regulatory concerns, the most relevant issue being that of the availability of choice. While it would be correct to argue that within the private health care sector, involuntary childless women would have the choice to decide what ARTs package they seek to utilise to achieve their reproductive goals, the cost of these services still remain out of the reach of many. This may not be a major concern if we accept the view that not everyone needs to reproduce or that there are other parenting options including child adoption that the involuntary childless could consider. But as the earlier chapters of this thesis have shown, in pronatalist societies where there is pressure of a gendered nature to reproduce, there is a public interest ground for arguing for a wider variety of alternatives for the involuntary childless, including the alternative of providing ARTs in the public health sector. The present situation where only a small section of the population can access ARTs is unsatisfactory, bearing in mind the pernicious and harmful nature of the social stigmatisation of involuntary childlessness and its effect on women in this region. While this thesis accepts that the right to health, especially access is a positive or welfare right that creates no binding obligation on states to fulfil, it will argue that there is a public interest why the identified regulatory failures associated with the current provisioning of ARTs in Sub-Saharan Africa need to be addressed through appropriate regulatory mechanisms. The discourse on the public interest ground for regulatory intervention in facilitating what ordinarily would be considered as positive rights or welfare rights will be further explored below.

### **7.3 The Public Interest Regulatory Rationale for Advancing the Welfare Right of the Right to Reproductive Health Care for the Involuntary Childless in Sub-Saharan Africa**

Baldwin<sup>16</sup> points out the difficulty in articulating a single conception or definition on what public interest constitutes. Despite the varying views on what constitutes public interest, it has been said that:

‘Public interest theories attribute to legislators (and others responsible for the design and implementation of regulation) a desire to pursue collective goals with the aim of promoting the general welfare of the community.’<sup>17</sup>

This statement raises some interesting perspectives on how regulatory measures can be introduced to ensure that collective goals that society consider as desired activities are actualised. Turning back to this thesis’ query, if procreation is treated primarily as merely a personal and individual goal, then there will be no grounds to argue for state funding for ARTs on the grounds of public interest. This is because it does not serve collective goal of promoting the general welfare of the community. But as this thesis has argued throughout, the case is different in many pronatalist African communities where procreation is seen as vital to community survival. There is therefore a public interest need to introduce regulatory measures that will allow for realisation of the positive right to reproductive health care. Such health care should include access to affordable ARTs which provide involuntary childless individuals with the chance to achieve desired pregnancies that are not only beneficial to the individuals alone, but to their communities at large.

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<sup>16</sup> Baldwin R., and Cave M., Lodge M., *Understanding regulation; theory, strategy and practice* (Oxford University Press: 2011 2<sup>nd</sup> edition) p 41.

<sup>17</sup> Morgan B., Yeung K., *An Introduction to Law and Regulation: Text and Material* (Cambridge: Cambridge University Press, 2007) p 17.

In having a clearer insight on the public interest ground of regulation, recourse is made to the leading work of Johnson and Peterson.<sup>18</sup> This leading work categorises the public interest ground of regulation in the assisted reproductive sector into three broad classes.

They are:

- (i) pure market regulation which is concerned with ensuring that markets operate properly and promotes consumer choice;
- (ii) values – influenced market regulation with its emphasis on the role that community values and culture play in market based regulation and consumer choice; and
- (iii) values based regulation which is concerned with safeguarding core and shared values of a society as opposed to the safeguard of the individual rights and choice of consumers.<sup>19</sup>

Based on these three sub-heads of the public interest ground, they argue that regulatory intervention is necessary in the assisted reproduction sector to ensure that the market conforms to the shared values and objectives of society. To what extent does this hold true for the facilitation of wider access to ARTs in Sub-Saharan Africa? The thrust of this thesis especially in chapters two to four has been to show that there is shared value and objective of many African states to safeguard group survival through continuing procreation. But as demonstrated in the Nigerian example,<sup>20</sup> many of these states, due to scarce resources, are unable to provide ARTs to the involuntary childless, even if their state health policies or domestic legislation allow for this. The inability to provide public funding has meant that ARTs provisioning has been left to the private sector as a means of achieving allocative efficiency. But the public interest regulatory function suggests that even when the private market holds sway, state regulation is still necessary to ensure that the markets are

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<sup>18</sup> Johnson M., Petersen K., Public Interest or public meddling? Towards an objective framework for the regulation of assisted reproduction technologies (2008) 23(3) Human Reproduction pp 716-728.

<sup>19</sup> Ibid at pp 716-718.

<sup>20</sup> See section 6.6.3 of chapter six of this thesis.

operating properly and that they promote consumer choice to seek a variety of resources that meet their parenting needs.

The recent survey of private sector ART provisioning in Sub-Saharan Africa shows that cost of private funded ART services are already considered as being prohibitive and out of the reach of most of the populace.<sup>21</sup> For example, in Nigeria, which is the country site for this thesis, on investigation into the cost of private funded IVF treatment, it revealed a range between US\$ 1200 and US\$ 4000 per cycle.<sup>22</sup>

This prohibitive cost of ARTs has made fertility treatment inaccessible to a large section of the communities. Yet the pronatalist nature of many primordial African communities requires that involuntary childless individuals should do all they can to procreate and have children. Since this is the case, there is some ground to argue that the civil amoral state should intervene to regulate the market failures that arise when ART provisioning is undertaken solely through the private sector. Yet, as the preceding chapter has shown there are limited state resources and there is a health rationing argument based on the allocation theory for states not to implement what will be classified as a non-binding welfare or positive right. This is why some civic amoral states continue to treat the funding of ARTs as expensive curative treatment that is best left to private sector funding. It is therefore understandable if this is considered strictly from the perspective of allocative efficiency to leave the provisioning of ARTs to market forces. This will enable resource pressed states to focus on the more pressing public interest concerns such as population control, child justice issues and allocative efficiency. If this is the only reasons for regulatory intervention, then the law does not need to address the market failure concerns of limiting the provisioning of ARTs to the private health care sector. Yet as this thesis will argue, the regulatory function of the law can

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<sup>21</sup> Giwa-Osagie O., (2002) ART in developing countries with particular reference to sub-Saharan Africa in: Vayena E., Rowe P., Griffin P., (eds.) (note 2 above) at p 25.

<sup>22</sup> Ibid.



play a much greater role in providing a rights regime for women which extends beyond the narrow concerns of maximising economic efficiency.

This is because as Sunstein<sup>23</sup> points out, regulation plays an important role in promoting and safeguarding the 'common good' or substantive values that societies consider as vital for the proper functioning and well-being of their societies.<sup>24</sup> A similar position is adopted by Johnson and Peterson who also argue that one of the key interests that the public interest of regulation seeks to protect is the public socio-political interest<sup>25</sup>. This is a valued based regulatory basis that extends beyond the correction of economic market failures, but addresses the socio-cultural and political public interests needs of a community.

In advocating for regulatory intervention to facilitate greater access to affordable ARTs in Sub-Saharan on the ground that it serves the socio-public interests of African communities which see reproduction as a means of protecting the continuity and well-being of African communities, there will always be the concern on whether this will promote instances of free riding. In other words, is there a regulatory basis for maintaining some form of health care rationing particularly when it comes to expensive curative treatment like ARTs? Should many involuntary childless couples who may not be able to afford ARTs at the private sector level be allowed to 'free ride' at the expense of others?<sup>26</sup> While this is a valid concern, one possible way in which it could be allayed is to require, as Coggon proposed that the funding of positive rights such as the funding of ARTs,<sup>27</sup> should be seen as the joint responsibility of the individual and the state. Individuals, and their families and community who see procreation as vital to the survival of their primordial public must be ready to contribute in part to the funding of such treatment. These contributions can be made alongside with

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<sup>23</sup> Sunstein C., *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge: Harvard University Press, 1990) p 12.

<sup>24</sup> *Ibid.*

<sup>25</sup> See Johnson, Peterson (note 18) above at pp 717-8.

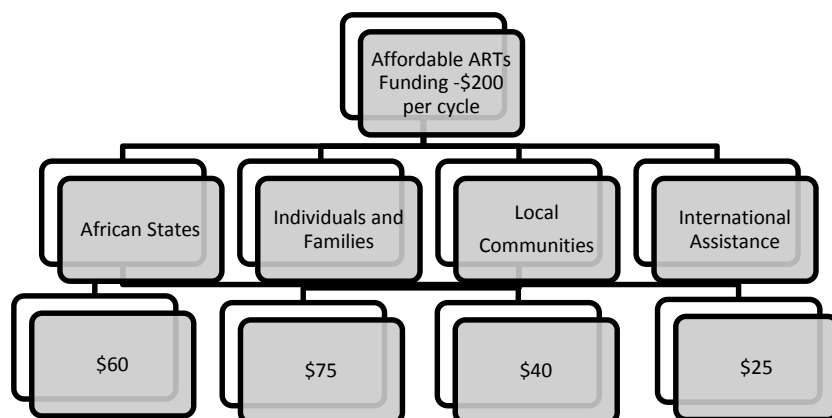
<sup>26</sup> See Sunstein (note 23 above) at p 49.

<sup>27</sup> Coggon (note 4 above) at p 40.

funding from the civic amoral state. While this proposal, as Gebauer<sup>28</sup> points out, may have elements of neo-liberalism, in that it does involve some commodification of health services, it also pragmatically recognises that resource strapped regions will find it difficult to solely fund the provisioning of ARTs.<sup>29</sup> Gebauer however does recognise that there is a place for the joint funding of health services through what he describes as ‘entitlements and joint responsibility.’ Gebauer’s proposal for a jointly funded scheme or fund that will achieve health coverage for all is premised on what he describes as a ‘common solidarity’ based on a ‘fair burden sharing.’

Translating this to the narrow focus of health coverage that this thesis is concerned with and that is the funding of ARTS, the proposed rights regime for the involuntary childless can look to adopting a common solidarity model whereby individuals, the family, extended members of their local communities along side with the state and international donors (figure 4 below) can create a funding system that will allow for wider availability of ARTs in the Sub-Saharan African.

**Figure 4- Funding Model Based on \$200 per cycle of ARTs**



Developing the ARTS joint responsibility scheme (figure 4 above) may not be a ‘Utopian dream’<sup>30</sup> due to current efforts by the WHO, ESHRE and private foundations such as

<sup>28</sup> Gebauer T., Institutionalising Solidarity for Health in Coggon J., Gola S., (eds.) Ethical, Political and Regulatory Challenges (London: Bloomsbury Academic, 2013) p 222.

<sup>29</sup> Ibid at p 227.

<sup>30</sup> See a similar argument canvassed by Gebauer (note 28 above) at p 232.

Walking Egg and the Low Cost IVF foundation to provide a cycle of IVF at \$200. While some may question the proposed sharing formula set out in figure 4 above, it is still a step in the right direction. This is because it requires, that pronatalist African states and communities which view procreation as vital to community survival, should bear some responsibility in supporting the involuntary childless to achieve their desired pregnancies that are seen not only to be beneficial to the individuals concerned, but to their wider communities.

This thesis argues that indigenous social ordering principles such as Ubuntu can serve as the underlining motivator for this notion of common solidarity of providing wider coverage of ARTs in this region. It however accepts that resource allocation will continue to remain an issue particularly when the African continent is faced with other pressing health priorities which are also competing for scarce state resources. This is why this thesis advocates also that any proposed rights regime for the involuntary childless in the Sub-Saharan African continent should not only advance positive rights such as reproductive health care, but it must also focus on the equally important role of protecting the negative or forbearance rights of involuntary childless women in the region. This will likely help in some measure to reduce the social stigmatisation of infertility and involuntary childlessness within the region. However, this quest for a regime that facilitates negative or forbearance rights for the involuntary childless raises the critical question on what legal or regulatory system can best achieve this. Should the proposed rights regime be solely premised on received Western law or the state law of an amoral civil state or can other systems of norms and governance models play a role? This issue shall be further considered below.

#### **7.4 The Decentring of Regulation and the Facilitation of a Negative Rights Regime for Involuntary Childless Women**

One of the key points that can be distilled from the literature is the fact that regulation can act as 'deliberate state influence'<sup>31</sup> to modify and influence behaviour. This may explain why

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<sup>31</sup> Baldwin, 2011 (note 16 above) at p 3.

regulation is closely associated with law, apart from the other roles it plays in the fields of economics and political sciences. While there is still some debate on whether regulation should be seen as a separate field from law,<sup>32</sup> a good starting point for its definition will be found in the leading work of Selznick who describes regulation as the ‘sustained and focused control exercised by a public agency over activities that are valued by a community.’<sup>33</sup>

The final section of this chapter will therefore consider whether law in its regulatory function is best placed to confront the malaise of the social stigmatisation of involuntary childlessness and according protect the forbearance or negative rights of women in the Sub-Saharan Africa. However, in considering how law in its regulatory function can combat the malaise of the social stigmatisation of involuntary childlessness, it is again necessary to determine what type of regulation would be effective in achieving this task in legally pluralist African societies?

This begs the question on whether Selznick’s definition of public agency regulation which has been described as providing the ‘central meaning of regulation’ would be the most effective way of regulating a culturally sensitive issue such as the social stigmatisation of infertility and involuntary childlessness<sup>34</sup> As pointed out in chapters two, four and five of this thesis, the personal lives and family structures of many African are regulated by indigenous customary rules as well as religious laws like Sharia law. This is why it is necessary to explore other definitions of the regulatory role of law other than prescriptive regulation of public agencies of an amoral civic state. This thesis therefore draws from works such as

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<sup>32</sup> This thesis takes note of the continuing debate on whether law and regulation can be considered as one and the same discipline or whether regulation as argued in positivist thinking is just ‘one part of the genus called ‘law.’ See for example Dubber M., *Regulatory and Legal Aspects of Penalty* in Sarat A., Douglas L., Umphrey MM., (eds.) *Law as Punishment/ Law as Regulation* (California, Stanford University Press, 2011) pp 19-49.

<sup>33</sup> Selznick P., *Focusing Organisational Research on Regulation* in Nell R., (ed.) *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985) p 363.

<sup>34</sup> *Ibid.*

Black<sup>35</sup> which have argued that there should be a decentring of regulation which deemphasises the role of state regulation and allows for other governance models and regulatory players to play in a regulatory role in society.

Black's decentred concept of regulation also deemphasises the positivist notion advanced by Austin and others that regulation without some element of prescriptive state control cannot be considered as a binding norm or rule of law. Rather it recognises that in legally pluralist regions like Sub-Saharan Africa that there are a myriad of rules that apply outside prescriptive state regulation. Applying a decentred form of regulation will therefore take into account the cultural and social experiences of women in Africa where the governance of personal and family matters is undertaken at the level of not only prescriptive state law but customary law and religious norms.<sup>36</sup> The recognition of the role that Western and non-Western rules play in the regulation of family structures in Sub-Saharan Africa does not detract from the fact that states must respect the universality of rights over cultural relativity. However, in adopting Black's decentring of regulation, there is some allowance to recognise that the notion of the universality of rights does not necessary mean that there is no recognition for cultural diversity especially in legally pluralist societies. Hllum's early work on infertility management <sup>37</sup> also argues that it is necessary that drafters of international rights instruments that seek to protect the rights of women on a global basis should have a clearer understanding of the multiple identities that women have to assume in relating with their communities and that these identities are not necessarily confined to a Western perspective of what rights constitute.<sup>38</sup>

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<sup>35</sup> Black J., *Critical Reflections on Regulation* (London: London School of Economics and Political Science, 2002) at pp 2- 7.

<sup>36</sup> Moore S., *Law as a Process: An Anthropological Approach* (Hamburg: Lit Verlag, 2000) p 17.

<sup>37</sup> Hllum A., *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Zimbabwe: Mond Books, 1999) 469 pp.

<sup>38</sup> *Ibid* see for example s.13.3.3 from p 228.

If regulatory intervention is to be effective in achieving a rights regime for involuntary childless women in Sub-Saharan Africa, a more nuanced approach to culturally sensitive issues such as the social stigmatisation of involuntary childlessness is required. The decentring of regulation as advocated by Black<sup>39</sup> will allow for the implementation of universal human rights, regulation and law rooted in Western law but at the same time recognising the richness of the cultural diversity that obtains in different jurisdictions of the world. Regulators who operate from the notion of the decentring of regulation are better placed to appreciate that a complex social problem, such as the stigmatisation of involuntary childlessness, can only be tackled when the cultural context of why involuntary childless women suffer from harm is fully understood. By having a clear perspective of the cultural context in which this group of women find themselves, an appropriate regulatory regime can be devised to alleviate their suffering and tackle the harm caused by this stigmatisation.

This is why this thesis at the early stage of its discourse explained in chapter two, what it means to be infertile or involuntary childless in a diverse and pluralistic setting as Sub-Saharan Africa where family life is regulated not only by formalist Western rules, but also by cultural and religious norms which all too often venerates the centrality that procreation plays in the life of a woman. In utilising Black's decentred regulatory model, regulators will therefore be best placed to develop a rights' regime for women which not only promotes the universality of forbearance rights set out in international human rights regimes such as CEDAW, but one that also takes into account the cultural realities in which these women live and operate in. A similar concern has been raised in Hellum's work where she constantly argues on the fallacy of just relying on just one strand of the law to deal with a complex socio-cultural problem like the involuntary childlessness in a pronatalist African society.<sup>40</sup>

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<sup>39</sup> Black (note 35 above) at pp 16-17 where she recognises the diversity of regulation which she sees as being opened to different connotations based on the socio-linguistic meaning given to it by different communities.

<sup>40</sup> See Hellum A., Introduction to Human Rights in a Gendered Relational and Plural Legal Landscape Derma B., Hellum A., Sandvik K., (eds.) World of Human Rights: The Ambiguities of Rights Claiming in Africa (Leiden, Brill, 2013) see chapter six particularly at pp 137-138.

The call to take into account the cultural realities of the subjects of human rights will of course be met with some criticism due to the ongoing debate on the universality of rights as opposed to cultural relativism.<sup>41</sup> However, this thesis is not advocating that universal human rights embodied in instruments like CEDAW and the Maputo Protocol should give way to cultural relativism. Rather it identifies with Black's notion of a decentred application of regulation which allows for the subjects of regulation to benefit from an array of norms and governance models that not only entrench the universality of rights, but also recognise the place of cultural diversity in legally pluralist societies in Sub-Saharan Africa.

Having said this, the question that needs further scrutiny is how law in its regulatory role can act as an agent of change and reformation. This regulatory function of law has been described by the eminent jurist, Roscoe Pound as social engineering.<sup>42</sup> This of course speaks to schools of thought rather than adopting a homogeneous position in respect of what will promote women's welfare. His treatise on social engineering has been the subject of discourse in a wide range of literature.<sup>43</sup> The key area of interest that this thesis focuses on when considering Pound's theory of social engineering is the role that social engineering or law as a tool of social change plays in the 'maintenance and the advancement of civilisation.'<sup>44</sup> Braybrooke<sup>45</sup> explains that the role law plays in maintaining and advancing civilisation was first considered by Kohler<sup>46</sup> and further expounded by Pound. It is therefore

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<sup>41</sup> Ibid.

<sup>42</sup> See for example the Pound R., *Spirit of the Common Law* (Boston, 1921), 195-196. See also the Pound R., *Interpretations of Legal History* (Cambridge, 1923).

<sup>43</sup> See for example McManaman LJ., *Social Engineering: The Legal Philosophy of Roscoe Pound* (2013) 33(1) *St. John's Law Review* pp 1-47 Available at: <http://scholarship.law.stjohns.edu/lawreview/vol33/iss1/1/>; Braybrooke EK., *The Sociological Jurisprudence of Roscoe Pound* (1961) 5 *U.V. AuST. L.R.* 288; Patterson EW., *Pound's Theory of Social Interests in Sayre PL., Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound* (New York: Oxford University Press, 1947) pp 558 – 573.

<sup>44</sup> Hockings W., *The Present Status of the Philosophy of Law and Rights* (New Haven: Yale University Press 1926) at pp 30-35 discussed in Stone J., *Human Law and Human Justice* (California: Stanford University Press: 1965) at p 190.

<sup>45</sup> Braybrooke EK., *The Sociological Jurisprudence of Roscoe Pound* (note 43 above).

<sup>46</sup> Kohler, *Lehrbuch des Bürgerlichen Rechts II* (1906) 37—39 discussed in Braybrooke above.

necessary to further explore what these eminent scholars mean by civilisation. Braybrooke<sup>47</sup> suggests that an answer to the question on what constitutes civilisation is embedded in Kohler and Pound's concept of the 'jural postulates of civilised society'.<sup>48</sup> In this sense civilisation can therefore be described 'as the social development of human powers to their highest possible unfolding'.<sup>49</sup>

It is important to note that Kohler and Pound's understanding of civilisation is centred on Western thinking and may not necessarily be representative of all societies and civilisations. This is a point that is taken up again by Hellum when she criticises the role that the modernisation theory has played in the development of a rights regime which does not necessarily provide a one fit size solution for all cultural realities.<sup>50</sup> This is a view shared by other scholars in the field of law and anthropology. Chief among these scholars is Moore<sup>51</sup> who expresses strong reservations on the utility of applying positivist Western law in the social engineering of Non-Western societies. Moore however appears to ignore the reality that post-colonial Africans are not only citizens of a 'primordial public' where customary rules apply, but they are also citizens of an 'amoral civic public' and as such will have to engage with the positivist nature of law as entrenched in state law and received Western law. Notwithstanding this criticism, Moore is right to argue for a deeper understanding of the place that Non-Western law plays in legally pluralistic developing regions of the world.

Yet, the social engineering impact of Western received law in Africa cannot be ignored as ably demonstrated in Pott's seminal study.<sup>52</sup> This study explored how the National Party in South Africa in the period of apartheid successfully deployed law as a change agent to

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<sup>47</sup> See Braybrooke (note 43) above.

<sup>48</sup> Pound R., *Interpretations of Legal History* (Cambridge, Cambridge University Press, 1923, 2013) p 148.

<sup>49</sup> *Ibid* at p 143.

<sup>50</sup> Hellum (note 37 above) at pp 45-46 and p 413.

<sup>51</sup> Moore (note 36 above) at chapter 2.

<sup>52</sup> Potts LW., *Law as a Tool of Social Engineering: The Case of the Republic of South Africa* (1982) 5(1)(2) *Boston College International and Comparative Law Review* 1.



achieve its goal of establishing apartheid society which was 'characterised by white domination and non-white acquiescence'.<sup>53</sup> While the apartheid ideology has been rightly discredited and denounced as a racist and abhorrent ideology, it does as Pott argues provide some demonstrable evidence on how law can be used as a tool for social change even when this social engineering results in a clash of civilisations or cultures. Again, works such as Moore will question whether it is right to allow for the laws of one civilisation to override the laws of other civilisations. Unfortunately, this is the reality that the Sub-Saharan African continent has experienced through its colonial history.

Yet, post-colonial Africa through the practice of legal pluralism demonstrates that the current role of law as social agent does not necessarily involve the subjugation of one civilisation by another, but rather a situation where there is complementarity of different rules operating almost at par with each other.<sup>54</sup> This is why Black's model of decentred regulation is vital in understanding how law in its regulatory function can shape or engineer a rights regime for involuntary childless women in a legally pluralist society. The decentred notion of regulation will allow for a managed utilisation of norms and rules that are obtainable from received Western law and also from non-Western law. This managed utilisation of a mixed array of norms and rules can help to address the culturally sensitive issues that may arise during the process of social engineering. Toufayan<sup>55</sup> in his treatise on the role that Taslim Elias, the eminent African jurist has played in the formation of the post-colonial African society where indigenous and received English rules could collaboratively operate together in what he describes as 'strategic alliance.'<sup>56</sup>

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<sup>53</sup> Ibid at p 16.

<sup>54</sup> Toufayan M., When British Justice (in African colonies Point two Ways: On Dualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Elias. *Leiden Journal of International Law*, 21, pp 377-410. doi:10.1017/S0922156508004998 in Onazi O., *African Legal Theory and Contemporary Problems: Legal Essays* (New York, Springer, 2014) p 38.

<sup>55</sup> Ibid at p 35.

<sup>56</sup> Ibid.

In recognising such strategic alliances between received Western law and non-Western rules, the decentred concept of regulation addresses the negativities prevalent in the modernisation theory which, as Hellum<sup>57</sup> points out, treats all non-Western norms with hostility and suspicion. At the same time, the decentred concept or model of regulation does not endorse the position of cultural relativists who tend to want to treat local customs as being superior to universal human rights. The decentred notion of regulation will therefore allow for a further consideration on whether the State law of amoral civil states and the indigenous rules of the primordial public can be effectively managed and utilised to provide for forbearance rights that will protect involuntary childless people from social stigmatisation.

Although as Chapter two of this thesis has shown that some cultural practices do assist in fostering the social stigmatisation of infertility and involuntary childlessness, this thesis will not go as far as some modernist theorists to ignore the benefits that may ensue from the application of indigenous norms. This is because there are clear examples where indigenous social ordering rules have been effectively used by the courts to effect radical social engineering in African societies. A clear example is the use of indigenous social ordering principle of Ubuntu alongside the provisions of the South African Constitution to bring about the abolition of the use of capital punishment in the post-Apartheid South African society.<sup>58</sup> This utilisation of Ubuntu alongside received Western law establishes that social engineering effected by the law in its regulatory function does not necessarily mean that one civilisation has to dismantle or subjugate the values of another civilisation. Rather it recognises the existence of universal forbearance rights such as the immutable values of human dignity and worth which are inherent in all societies regardless of their 'socio-cultural linguistic'<sup>59</sup> permutations.

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<sup>57</sup> Hellum (note 37 above) at p 413.

<sup>58</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

<sup>59</sup> Black (Note 35 above).

In considering how law can play a role in shaping a rights regime that helps to combat the social stigmatisation of involuntary childlessness, there is a need to recall to mind the ever-evolving nature of African indigenous law. This is a point that has earlier been considered in this thesis.<sup>60</sup> This point is revisited in this chapter to show that indigenous culture is not static and that it can be socially engineered from within through its indigenous customary norms and rules. The fact that customary law can evolve and obviate stigmatising customs is welcoming because as previously pointed out, African family and personal life is primarily guided by rules of customary law. However, as the recent consolidated set of South African cases of Bhe & Others v Khayelitsha Magistrate and others<sup>61</sup> have demonstrated, there are limits to trying to reform customary international law from within. In Bhe's case, the South African constitutional court accepted that the rule of male primogeniture is so 'fundamental to the law of customary succession' and that the impact of its application on gender rights could not be corrected on a case by case basis by other rules within the customary law system.<sup>62</sup>

Since it was impossible to correct the gender imbalance flaw associated with this customary rule of male primogeniture and more particularly because the rule was seen to be contrary to constitutional obligation of equality, the court in Bhe's declared the rule unconstitutional and invalid. It further held that the matter on succession had to be determined according to the rules of received Western law as set out in the Intestate Succession Act. This case therefore demonstrates that it is not in all instances that indigenous African law and its social ordering principles such as Ubuntu, Humwe and Omoluwabi can be effectively utilised to change a customary rule of law that is antithetical to the values and aspirations of a modern African society. In this sense, it may be said that social engineering of a customary rule that discriminates against women could only be best addressed under received Western law or state law of an amoral civil state.

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<sup>60</sup> See chapter four above.

<sup>61</sup> Bhe and others v The Magistrate, Khayelitsha and others Case CCT 49/03; Shibi v Sithole and others Case CCT 69/03; South African Human Rights Commission and another v President of the Republic of South Africa and another Case CCT 50/03.

<sup>62</sup> *Ibid* at paragraph 111 and 112.

In the context of my central case study country, Nigeria, the national courts have not proactively like its Southern African counterparts utilised the social ordering principles like Omoluwabi (the equivalent of Ubuntu) to social engineer its legal framework. Yet, they have also affirmed that customary law is living law which can be adjusted to ensure that it does not become ossified and irrelevant in modern society. The Supreme Court of Nigeria for example in the case of Kimdey and others v Military Governor of Gongola State and others<sup>63</sup> held that:

‘one of the characteristics of native law and which provides for its resilience is its flexibility and capability for adaptation. It modifies itself to accord with social conditions.’<sup>64</sup>

It is the willingness of courts to treat customary law as adaptable to societal needs that has ensured its continuing relevance in society. However, as pointed out in the earlier chapters of this thesis, the Nigerian courts have utilised the principles of the principles of natural justice, equity and good conscience to determine the continuing validity of a customary rule. The use of the principles of received Western law to determine the validity of customary law has been the subject of criticism.<sup>65</sup> As highlighted in chapter three of this thesis, scholars like Otakpor<sup>66</sup> have questioned the objectivity of applying received English law principles to determine what customary law to retain or to strike down. Otakpor also questions whether value judgments on the validity of a specific customary rule should be left to the good conscience of ‘lawyers and judges trained in laws imposed by the British colonial administration?’<sup>67</sup> He further queries whether it is appropriate to rely on the value judgments

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<sup>63</sup> (1988) 2 NWLR (pt 77).

<sup>64</sup> Ibid p 445 at p 461.

<sup>65</sup> Otakpor N., A woman who is a husband and a father: An essay in customary law (2008) 2(2) CALS Review of Nigerian Law and Practice at p 83.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

of a 'judicial elite ensconced in a judicial ivory tower'<sup>68</sup> completely removed 'from ordinary Nigerians on the other side of the social divide'.<sup>69</sup>

Otakpor's criticism is similar to the Moore's concerns on the appropriateness of the 'civilising effect' of customary law on customary law and other non-Western rules that are obtainable in the Sub-Saharan Africa. While Elias does express similar concerns on this issue, he does accept that there is room for English law to collaborate with customary law. He argues that despite their differences, Western and Non-Western law shared similar civilising concerns based on the 'unity of all human knowledge and experience.'<sup>70</sup> Elias' conciliatory approach to how the two systems of law can complement each other is shared by this thesis. This is because this approach allows for the social engineering and reform of traditions and customs that stigmatise involuntary childlessness and infertility to be undertaken on the basis of the universality of human rights<sup>71</sup>, social justice and equality, while at the same time, not completely discarding the benefits that norms of living customary law have to offer to individual and communities in Africa.

If one accepts the position of jurists like Elias, it can be argued that forbearance or negative rights such as the rights of freedom from discrimination, equality and human dignity as set out in the international instruments such as Universal Declaration of Human Rights<sup>72</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>73</sup> and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>74</sup> are universal to

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Elias T., *The Nature of Customary Law* (Manchester: Manchester University Press, 1956, 1972) at p 6. See also the discussion of Elias's statement in Toufayan (note 54 above) at p 45.

<sup>71</sup> OHCHR, What are Human Rights, Office of the High Commissioner for Human Rights available at <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (accessed June 3, 2015).

<sup>72</sup> The Universal Declaration of Human Rights (UDHR) proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III).

<sup>73</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

<sup>74</sup> Adopted in 1979 by the UN General Assembly.

humanity<sup>75</sup>, and accordingly they can be used to modify, change or obliterate any custom, social attitudes or public opinion that promotes the negative feminisation of involuntary childlessness and infertility in Sub-Saharan Africa.

Yet it is important again to consider the concerns that have been raised by Hellebrandt<sup>76</sup> on whether the rights regime contained in these international human rights treaties can actually address the needs of infertile African women due to the fact that these treaties have been to some extent developed through the tenets of the modernisation theory which treats non-Western rules with some hostility. She also argues that due to the influence of the modernisation theory, international human rights instruments tend to be premised on a system of a hierarchy of rights<sup>77</sup> that prioritises Western based norms over indigenous norms. Hellebrandt<sup>78</sup> further posits that this focus on a hierarchy of rights ignores the pluralist nature of African societies where women assume 'multiple identities' to be able to effectively navigate through the requirements of the Western and indigenous rules that regulate and govern their daily activities.

While Hellebrandt's concerns are valid, Elias<sup>79</sup> does equally provide a valid counter-argument when he argues that no creed or race can claim sole ownership of negative or forbearance rights such as human dignity or the right to be free from discrimination and equality.<sup>79</sup> This thesis further argues that rights such as the right to human dignity enshrined in international human rights law are also evident in the indigenous social principles of Sub-Saharan Africa. This is why the South African Constitutional Court in S v Makwanyane and Another<sup>80</sup> was able to effectively apply the social ordering principle of Ubuntu in post-apartheid South Africa to annul practices such as the death penalty. In the same way, the social principle of Ubuntu

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<sup>75</sup> OHCHR, What are Human Rights, Office of the High Commissioner for Human Rights at note 71 above.

<sup>76</sup> Hellebrandt (note 37 above) at chapter 26.

<sup>77</sup> Ibid at p 418.

<sup>78</sup> Ibid at p 415.

<sup>79</sup> Elias (note 70 above) at p 6.

<sup>80</sup> S v Makwanyane and Another (note 58) above.

(or its other variants- Humwe and Omoluwabi) also recognises the equality of all human beings in its definitional statement which is set out below:

'I am human because I belong to the human community and I view and treat others accordingly.'<sup>81</sup>

As stated above the post-apartheid courts in South Africa have been extremely effective in recognising the shared values that Western received law and African indigenous law have in safeguarding rights such as the right to human dignity. They have demonstrated that it is possible for the modernising universalist regime of international human rights to interact with traditional African cultures to safeguard the rights of human beings. After all the very essence of Ubuntu and other African social ordering principles is the inter-dependence of human beings based on mutual respect and concern. Some would of course question whether the focus of communalism which is the centrality of Ubuntu, Humwe and Omoluwabi can be reconciled with the notion of individuality which is the focus of a Westernised regime of human rights? This appears to be a key barrier when trying to find a common ground for the mutual application of both Western law and indigenous law in Sub-Saharan Africa. Those who value African norms and traditions will argue that the focus should be on collective rights and not individual rights as the individual exists for the community and not the other way.

A superficial reading of the definitional statement of Ubuntu will suggest that it focuses only on communalism and collective rights. But the latter part of its definitional statement which posits that because 'I am human and that I should treat and view others as human' confirms that Ubuntu does not ignore the rights of individuals. On the contrary, it resonates with the Judeo-Christian values which have contributed to the shaping and development of Western

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<sup>81</sup> Text from the South African Ubuntu Foundation 2013 available at <http://saubuntu.co.za/> and discussed in Spalthoff U The Spirit of Ubuntu and the Common Good submitted to the Common Good Forum, Paris 2013.

law.<sup>82</sup> The Biblical statement 'love your neighbour as yourself' which to a large extent underpins the development of the duty in care in Donoghue v Stevenson<sup>83</sup> is equally premised on both collective and individual rights. Yet some<sup>84</sup> would argue that the sole role of Tort Law is to protect the individual's right and has no role in safeguarding collective rights. Yet, torts such as public nuisance confirm that while Tort law is individualistic it does safeguard the collective rights of the public at large. The principle of deterrence in Criminal Law also recognises that there is a collective duty of care not to harm others in the undertaking of individual activities. These examples buttress the point that while Western law does play an active role in safeguarding the rights of individuals, it does not ignore the collective rights and responsibilities owed by the individual to the community.

In the same way, although African customary law does predominantly focus on collective rights, it also does not ignore the rights of individuals. Indeed the definitional statement of the key social ordering principle known as Ubuntu (or Omoluwabi or Humwe) begins with the word 'I am Human.'<sup>85</sup> This confirms that African customary law recognises the human dignity and worth of each individual. This is because it would be almost impossible to realise the collective rights of inter-dependence and group support without recognising the importance and worth of each individual that makes up the larger African community.

It therefore appears that the great divide between collective and individual rights which has acted as a barrier in trying to find common grounds for the mutual application between Western law and indigenous rules is more or less an artificial divide. What matters is how societies can find the right balance in safeguarding both collective rights and the rights of

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<sup>82</sup> Carmen-Smit J, Weisstub D., *The Western Idea of Law* (London: Butterworths, 1982) pp 195 and 242.

<sup>83</sup> [1932] UKHL 100.

<sup>84</sup> See Cochran R., Ackerman M *Law and Community: The Case of Torts* (Maryland: Rowman and Littlefield Publishers, 2004) p 179.

<sup>85</sup> See the text from the South African Ubuntu Foundation 2013 (note 81) above.



individuals. The South African case of S v. Makwanyane<sup>86</sup> provides a thoughtful example of how collective and individual rights can be recognised and safeguarded at the same time. The denouncement of capital punishment because it violated the individual 's right to life and the right to be free from cruel, degrading and inhuman punishment clearly demonstrates the premium that South Africa places on the rights of individuals. Yet the Court at the same time also recognised that the commission of murder went against the collective rights of the community. This crime therefore had to be accordingly sanctioned and punished through the imposition of a substantial custodial sentence which was to serve as both a form of deterrence and rehabilitation which was in line with the notion of group survival and community inter-dependence as exemplified in the social ordering principle of Ubuntu.

The similarities between Western and Non-Western rules in safeguarding individual and collective rights does provide some indicate why it is unsatisfactory to treat international human rights laws and indigenous laws as being completely incompatible and irreconcilable. This is because as Toufayan rightly argues, in his treatise on Elias's works, there are commonalities of rights shared by both systems of law.<sup>87</sup> The table below is therefore provided to illustrate the commonalities between the forbearance and negative rights set out in international human rights instruments premised in Western received law and rules and norms premised in other non-Western laws such as customary law. It demonstrates that contrary to strict cultural relativism, the key fundamental human rights like the rights to human dignity, equality and freedom from discrimination, torture, inhumane, degrading and cruel treatment are not incompatible with indigenous African social ordering principles. Indeed, as the South African jurisprudence<sup>88</sup> on Ubuntu shows, social ordering principles such as Ubuntu have been effectively used alongside with principles of human rights.

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<sup>86</sup> S v. Makwanyane, see note 58 above.

<sup>87</sup> Toufayan (note 54 above) at p 45.

<sup>88</sup> See for example S v Makwanyane and Another (note 58) above.

This is why this thesis argues that the field of human rights can be effectively deployed alongside positive indigenous social rules to shape an explicit rights regime for involuntary childless women particularly in the area of enhancing non-discrimination and gender empowerment for such women. Unfortunately, as discussed in Helleum's work<sup>89</sup>, the current rights regimes on gender equality and the empowerment for women appear to be primarily fashioned on the basis of the modernising theory perspective which treats African norms and cultures as primitive and not deserving of consideration. However as table 4 demonstrates there are commonalities between the rights set out in International Human Rights instruments and the values set out in indigenous African social ordering principles.

**Table 4- Key Human Rights: Commonalities between African Social Ordering Principles and International Human Rights Regime**

<b>Ubuntu</b>	<b>International Human Rights</b>
<b>Personhood of the individual-</b> 'I am human because I belong to the human community' <sup>90</sup> or 'Umuntu Ngumuntu Ngabantu' meaning a 'person is a person by or through other people.' <sup>91</sup>	<b>Personhood of the individual</b> – Article 6 of the Universal Declaration of Human Rights which states that 'Everyone has the right to recognition everywhere as a person before the law.'
<b>Right to Human Dignity and Equality</b> – 'I am human because I belong to the human community and I view and treat others accordingly.' <sup>92</sup>	<b>Right to Human Dignity and Equality-</b> Article 1 of the Universal Declaration of Human Rights which states that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'
<b>Equality and Non-Discrimination</b> –Ubuntu as a sense of equality and solidarity 'I am who I am because of who we all are.' <sup>93</sup>	<b>Equality and Non-Discrimination-</b> Articles 2 and 7 of the Universal Declaration of Human Rights. See for example article 7 which states that 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.'

<sup>89</sup> Helleum (note 37 above) p 413.

<sup>90</sup> Text from the South African Ubuntu Foundation 2013, note 81 above.

<sup>91</sup> Tutu D., Believe: The Words and Inspiration of Desmond Tutu (Colorado: Blue Mountain Arts, 2007) p 3.

<sup>92</sup> Text from the South African Ubuntu Foundation 2013, (note 81) above

<sup>93</sup> Hill B., Heinke M., Graner A., The Official Ubuntu Book (Upper Saddle River:Pearson-Prentice Hall, 2011) Chapter one.

<p><b>Freedom from Torture, Inhumane, Degrading and Cruel Treatment-</b> Ubuntu as humaneness. P. Mabugo More<sup>94</sup> puts it this way in his definition of Ubuntu- 'Ubuntu is a demand for respect for persons no matter what their circumstances may be.'<sup>95</sup></p>	<p><b>Freedom from Torture, Inhumane, Degrading and Cruel Treatment-</b> Article 5 of the Universal Declaration of Human Rights states no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.</p>
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The commonalities that African social ordering principles share with international human rights as illustrated in Table 4 above shows that not all African indigenous norms as canvassed by modernising theorists are necessarily inimical to the welfare of women. If applied with sensitivity and purposiveness, African social ordering principles are ingrained with same attributes of humaneness, fraternity and interdependence which can be utilised alongside with international human rights to confront the social stigmatisation of involuntary childlessness in Sub-Saharan Africa. This issue will be further explored below.

### **7.5 Key Attributes of African Social Ordering Rules: The Secret to Combating the Social Stigmatisation of Involuntary Childlessness in Sub-Saharan Africa?**

The preceding section of this chapter has demonstrated how Black's model of decentred regulation can play a role in recognising the complementarity of Western rules and non-Western rules in achieving universal and immutable rights and concepts like humaneness, fraternity, dignity and equality. There is therefore no reason why living customary law or indigenous social ordering rules cannot serve as a vanguard for the development of a rights' regime that confronts and tackles the social stigmatisation of involuntary childlessness. Due to their strong adherence to the principles of inter-dependence and communitarianism, they have the potential to serve as a means by which society can provide resources to individuals

<sup>94</sup> Mabugo More P., Philosophy in South Africa Under and After Apartheid' in Wiredu K., (ed.) A Companion to African Philosophy (Oxford, Blackwell, 2006) p 149, 156-7.

<sup>95</sup> Ibid.

to help them not only to realise their procreative desires, but to carry out their so-called procreative obligation to their families and communities at large.

If this is the case, can Ubuntu in its spirit of humaneness and interdependence not alleviate the social burden that is placed on individuals due to the social requirement that individuals should provide procreative value to their communities? Can Ubuntu not be utilised to require a corresponding obligation from society based on the principles of humaneness and interdependence that communities also provide the resources that can help individuals carry out their procreative obligations to their families and the community at large? If it is true as the proponents of Ubuntu that it operates on the basis of communitarianism and caring for all parts of the community, then surely this principle can be utilised to facilitate wider access to fertility treatment that helps individuals to fulfil their procreative obligation to their community. Since the procreative value of the individual is seen as conferring some public benefit to the wider community, then is it not necessary to require the community to come to the aid of its vulnerable members who are unable to reproduce without the assistance of ARTs.

These are difficult questions to answer, but Pan-Africanists such as Nyerere<sup>96</sup> who hold so dearly to such social ordering principles like Ubuntu have argued that:

‘within the culture of Ubuntu...caring for the wellbeing of the sick, children, elderly and those with disabilities was a responsibility of each individual member of the society, and of society as whole.’

If this is the case, Ubuntu can be utilised as a social ordering principle to require that the State under its responsibilities to the family under Article 18(2) of the African Charter on Human and Peoples’ Rights should provide resources for the infertile and the involuntary childless so they can fulfil their procreative obligations to the family and the community. But

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<sup>96</sup> Quoted in Chuwa L., *African Indigenous Ethics in Global Bioethics: Interpreting Ubuntu* (New York, Springer, 2014) at p 83.

this is where the social ordering principle of Ubuntu differs from the international human rights regime in that collective rights, including caring for members of the community, are considered to be forbearance rights that states should protect, and not just positive rights where no binding state obligation is owed.

The dilemma this creates is that if collective rights are treated as forbearance rights, then African states will have a binding obligation to help individuals realise these rights. But as has been highlighted in chapter six, there are difficulties in treating such rights as forbearance rights due to the scarcity of resources that are needed to actualise these rights. In this sense, African communities must realise the futility in demanding that individuals provide procreative value to their communities and must stop stigmatising them when they are unable to. To continue with this attitude goes against the grain of Ubuntu communitarianism which argues that 'if one member of the community is suffering, the whole community suffers.' This of course is not peculiar to indigenous African beliefs, it is a belief that is also entrenched in Judeo-Christian beliefs which some have argued form 'the basis of the social and legal normative systems in Western cultures.'<sup>97</sup>

Even if there are difficulties in using Ubuntu as a basis for insisting that states provide resources to help individuals achieve the procreative desires as a form of public good to their communities, this social ordering principle can still be utilised to facilitate a culturally sensitive regime to confront the social stigmatisation of infertility and involuntary childlessness. This is because as we saw in table 4 above, the rights of human dignity, equality, non-discrimination and the freedom to be free from inhumane, cruel and degrading treatment is enshrined in the principle of humaneness which is the *sine non qua* of the Ubuntu principle and other indigenous African social ordering principles.

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<sup>97</sup> Zilney LJ., Zilney LA., *Perverts and Predators: The Making of Sexual Offending Laws* (Maryland, Rowman & Littlefield, 2009) p 3.

Again, Nyerere<sup>98</sup>, the former Tanzania president and Pan Africanist is said to have commented that:

‘In Ubuntu, the people with disabilities, the sick, the orphaned, widows or elderly members of the society are automatically protected, so that they do not feel insecure or inferior to the rest of the members of the society.’<sup>99</sup>

It is unclear why Nyerere did not add the involuntary childless to the groups that deserved automatic protection under Ubuntu. However, those within the disability rights’ regime would argue that this why it is important to treat involuntary childlessness as a socially constructed disability to ensure that it is safeguarded under the human rights regime.<sup>100</sup> This statement by one of African leading political figures suggest that there may be some benefit for treating involuntary childlessness as a socially constructed disability within the indigenous rights regime. Yet, beyond disability considerations, the social stigmatisation of involuntary childlessness and infertility should can also be tackled through the enforcement of the immutable human rights principles of humaneness, human dignity and equality. There is simply no reason why African societies which are ordered on grounds of inter-dependence and communitarianism should treat weaker and vulnerable members of its society as inferior to other members of the society. This is in line with the statement made by P.Mabugo More<sup>101</sup> that Ubuntu is all about ‘respect for persons no matter what their circumstances may be.’

Since this is the case, there is no reason why indigenous social ordering principles such as Ubuntu, Humwe and Omoluabi cannot complement the international human rights framework in advancing a rights regime that protects the involuntary childless from social

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<sup>98</sup> Chuwa (note 96) above at p 83.

<sup>99</sup> Ibid.

<sup>100</sup> Inhorn M., Bharadwaj A., *Reproductively Disabled lives: Infertility, stigma, and suffering in Egypt and India* in Insgard B., Whyte S., (eds.) *Disability in Local and Global Worlds* (Berkeley: Univ. Calif. Press, 2007) pp 78-106.

<sup>101</sup> Mabugo- More (note 94) above.

recrimination and stigmatisation. The utilisation of such principles that are indigenous to the African community may well aid the eradication of negative public attitudes towards the involuntary childlessness. If through the use of Ubuntu, African societies begin to appreciate and value the involuntary childless based on their intrinsic value and not just their procreative value, it may serve as the basis for the utilisation of other parenting mechanisms in infertility management.

However, in encouraging the involuntary childless to consider other forms of non-biological parenting options like child adoption in realising their parenting ambitions, it is vital to recollect the question that was raised in chapter five of this thesis. The question is why should the infertile and the involuntary childless be made to sacrifice their procreative dreams and aspirations and be left with carrying the social burden of taking care of vulnerable children in the society? This is one of the difficult questions that African states and communities would have to grapple with if they are to make some head way in safeguarding the rights of the involuntary childless and infertile within their communities and at the same time taking proactive steps to tackle the child justice issues of providing orphaned and other vulnerable children with loving homes in Africa where they can be nurtured and cared for.

While it is important that the involuntary childless explore a variety of parenting options including child adoption, a fair and just society based on Ubuntu concepts of humaneness and inter-dependence would have to ensure that those who are able to reproduce on their own and those who cannot without some form of assisted reproduction are afforded equal rights and responsibilities in their communities. The involuntary childless should therefore not be seen as the only ones who should shoulder the child justice issue of providing home for children who need one. Those who are capable of reproducing should also share in this responsibility and permit and support the involuntary childless to achieved desired

pregnancies if they so choose. Anything short of this may continue to foster the wrong public perceptions that involuntary childless people are less inferior to those who are reproductively fertile, and that they have failed their family and societies as a result of their inability to reproduce. This goes against the grain of Ubuntu which as discussed above is all about Umoja<sup>102</sup> 'a sense of unity, empathy and togetherness' where members of the community support each other to live meaningful lives that testify to the fact that every human being is valued for who they are based on the immutable principle of their intrinsic human personhood.

It is on this premise, that the principle of Ubuntu can be utilised to develop community schemes which will allow members of the extended family and well-meaning members of the primordial public to contribute towards the funding of affordable ARTs. These schemes can support the involuntary childless and help them achieve desired pregnancies if they so choose. This is in the spirit of Ubuntu which focuses on community inter-dependence and communitarianism especially when the amoral African civic state due to limited resources is unable to fund expensive curative medicine such as ARTs. The idea of communities pulling together to support valued based schemes that the communities holds as sacrosanct is not new. Communities within Kenya for example have in the past developed similar schemes where communities pulled together to fund and support community education. This was premised on the social ordering principle of Harambee (pulling together).<sup>103</sup> Since it is evident from the Harambee example, that Africans do support one another as a means of actualising the aspirations of their communities, this thesis argues that a similar initiative could be developed to help the infertile access affordable fertility treatment which would enable them contribute their procreative value to the continuity and progress of their communities. Such pulling together by the extended family and wider community will go a

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<sup>102</sup> Johnson B., *Gumbo for the Soul: Here is our Child- Where is the Village* (Bloomington: IUUniverse, 2008) p 79.

<sup>103</sup> Swadener B., Kabiru M, Njengo., *Does the village still raise the child: A collaborative study of changing child rearing and early education in Kenya* (New York: Suny Press 2000) pp 25-26.



long way to confirm that there is group interdependence and bonding between all members of the primordial public (or the Ubuntu).

## **7.6 Conclusion**

This chapter has been primarily concerned with two inter-connected issues regarding the regulator role of the law in effecting a rights regime for involuntary childless women. First, as a follow up to the question explored in chapter 6, it considered whether the law on a public interest ground should play a regulatory role in tackling the market failures associated with restricting the provisioning of ARTs to the private sector as is currently the case in Sub-Saharan Africa. Second and more fundamentally, it considered whether the law can be utilised as a social engineering tool to develop a rights regime for involuntary childless and infertile women within this region of the world. In doing so, it considered the ongoing debate of the universality of rights and cultural relativism and how these issues affect the fashioning of a rights regime for people living in legally pluralist societies such as post-colonial African states. It then highlighted the commonality between international human rights and indigenous social ordering principles such as Ubuntu, Humwe and the Omoluwabi principles. It concluded by arguing for the development of a socially cultural sensitive human rights regime that utilises indigenous African social ordering principles to promote the universal acceptability of key fundamental rights like human dignity, equality, non-discrimination and freedom from inhumane, degrading and cruel treatment. It argued that the utilisation of these African social ordering principles would help to alleviate concerns that human rights are imported Western concepts. This is because the principles of humaneness and equality enshrined in Ubuntu and other social ordering principles are not far removed from the goals and objectives of the international human rights regime.

It concludes by accepting that while there is not one singular approach to tackling the social stigmatisation of involuntary childlessness in Africa, the law can play a social engineering

role in the development of a rights regime for involuntary childless people. It suggests that this rights regime should embrace some level of public funding to widen access to fertility treatment on grounds of public interest. This is because the realisation of desired pregnancies would not only enhance the well-being of the individual, but also provide some public benefit to the societies that treat procreation as a sine non qua for group survival. Yet, in arguing for such regulatory intervention by the law in the widening of ARTs treatment, this chapter argues that the wider objective of the law should be to alleviate and ultimately eradicate the social recrimination and stigmatisation of involuntary childlessness in Africa.

## Chapter Eight

### General Conclusion and Recommendations

#### 8.1 Conclusion

This thesis examined the negative feminisation of infertility in Sub-Saharan Africa and the socially stigmatising effect that this has on involuntarily childless women in the region. It further considered how this stigmatising social perception which views, infertility as primarily a female problem, can affect the sense of self and identity of involuntarily childless women in the different levels of their interaction with their communities in Sub-Saharan Africa.

While the deleterious consequences and effect of the social stigmatisation of involuntary childlessness is extensively discussed in the fields of medicine, public health and the core social sciences, legal researchers particularly in the African feminist fields have not been as proactive in championing the cause of involuntary childless women in the region. The research shows that other female issues such as female genital mutilation (FGM), access to safe abortions and contraceptives, maternal health and more recently human sexuality have formed the core concerns for legal feminists and activists in the Sub-Saharan Africa region. Yet the fields of medicine and the public health continue to focus their attention on the social stigmatisation of involuntary childlessness as a public health concern and activists within these fields have recently canvassed for wider access to affordable ARTs in this sub-continent and in other regions of the developing world. Whereas the medical and public health fields continue to actively advocate for wider access to ARTs, some leading voices within the field have expressed some reservations on the scarcity of legal research in this area particularly with regard to whether there is a universally binding right of access to ARTs under the International Human Rights framework. There is also concern on whether the law as it stands has recognised the full extent of the negative feminisation of infertility and involuntary childlessness in the region and the impact that this gendered characterisation of

infertility and involuntary childlessness has on the well-being of women within this region of the world.

This thesis has sought to address these concerns through its overarching query on what the law's role in safeguarding the welfare of women should be with regard to combating the social stigmatisation of involuntary childlessness and infertility in Sub-Saharan Africa. In considering this hypothesis, the following research questions were raised and explored in the body of the thesis. They are:

- i. How is infertility perceived in Sub-Saharan Africa and how do public attitudes to infertility affect the status of involuntary childless women in this region of the developing world?
- ii. What is the social meaning of motherhood in Sub-Saharan Africa and how does the social construction of motherhood affect the legal status and identity of involuntary childless women in the region?
- iii. How effective is the current management of infertility and involuntary childlessness in Sub-Saharan Africa and how do the demographical concerns of over-population as well as child justice concerns impact on the reproductive health care rights of infertile women in the region?
- iv. Can widening access to Assisted Reproductive Technologies (ARTS) in Sub-Saharan Africa enhance the reproductive making choices of involuntary childless women in the region? If yes, how can widening access to ARTs contribute to the reduction of social stigmatisation of infertility in African communities?
- v. How law and its regulatory processes can assist in widening access to affordable fertility treatment in the developing world and strengthen the rights of involuntarily childless women in Sub-Saharan Africa?

In answering these questions, this thesis evaluated how the different strands of multidisciplinary research have problematized the tragedy of the social stigmatisation of infertility and involuntary childlessness in Sub-Saharan Africa. Accordingly, the literature review undertaken in chapter one considered the existing empirical studies in the social science fields that depict the social stigmatisation of infertility and involuntary childlessness in Sub-Saharan Africa. The social sciences particularly the fields of the anthropology and sociology also provided a detailed discourse on the socio-cultural causes for the social stigmatisation of involuntary childlessness and infertility. Social scientific evidence has to a large extent provided the impetus and resolve for public health specialists and clinicians at the international level to advocate for the medicalisation of involuntary childlessness in the region and to call for wider access to its treatment within the region. However apart from ground breaking research undertaken by leading works such as Hellum<sup>1</sup>, chapter one of this thesis points out that no major work has been undertaken with the legal field, especially in African legal feminism to canvass for the development of a legal regime that proactively protects and safeguards the rights of involuntary childless women in the region against the social stigmatisation of involuntary childlessness and infertility. Throughout the body of the thesis, the question is asked why the law has not been as proactive as other fields in problematizing this issue and more particularly in combating its deleterious effects on women in the region.

The concerns of the first research query as to how the conditions of infertility and involuntary childlessness are perceived in Sub-Saharan Africa, are further addressed in chapter two which considered through a socio-legal lens how public attitudes in Sub-Saharan Africa contribute to the social stigmatisation of infertility and involuntary childlessness within the region. It explained how a socio-legal understanding of public opinions and attitudes can assist policy and law makers in the development of suitable legal framework to address social issues and concerns. In grasping how public attitudes and opinions are formed, the

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<sup>1</sup> Hellum A., *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Zimbabwe: Mond Books, 1999) at p 45.

thesis adopted an interdisciplinary theoretical framework through the utilisation of political science and sociological theories on this issue. Key among the theories it considered were the two step wave theory in the field of sociology and more particularly the modernisation theory in the field of political sciences. However, as Hellum<sup>2</sup> points out, modernisation theory in particular has not completely portrayed African norms in a good light. Rather it treats African norms as primitive and antithetical to the safeguard of women's rights in post-colonial states in the developing world.

This thesis however did not ignore the concerns raised by proponents of the modernisation theory that some African norms are incompatible with the current day realities of modern society. Chapter two provides some examples of African customs and norms that contribute to the social stigmatisation of involuntary childless women in the region. This point is further addressed in chapters three and four of the thesis which discussed the importance that African societies attach to the institution of biological motherhood and the impact that the veneration of motherhood has on involuntary childless women. While this thesis accepts that the modernist concerns should not be ignored, it did try to counter-balance its negative characterisation of African norms and traditions with a discourse on the positive role that indigenous social ordering principles like Ubuntu, Omoluwabi and Humwe play in re-shaping public attitudes and opinions in Sub-Saharan Africa. The thesis especially in chapters two and seven points to the example of the Ubuntu principle which has been positively utilised to reshape societal attitudes. It demonstrated this through recent South African case law<sup>3</sup> which has seen the abolition of the death penalty based on the application of the social ordering principle of Ubuntu. However, this is not to say that there are not some concerns to do with the role that these social ordering principles have played in the continuing public perspective that each individual of marriageable age should contribute his or her procreative quota to the continuing existence and survival of their primordial communities.

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<sup>2</sup> Ibid at p 45.

<sup>3</sup> See for example *S v. Makwanyane* (CCT3/94) [1995] ZACC 3.

The inability of individuals to procreate is seen as an existential threat to the continuing survival of primordial public and this may explain why infertility and involuntary childlessness is socially stigmatised in these societies or at the very least treated not just as personal grief but as a communal tragedy. Chapter two of this thesis points to literature<sup>4</sup> that shows that women are often scapegoated when infertility occurs in a family. This public opinion of infertility thrives even when medical evidence establishes the root cause of the infertility to be male related. The reasons for the scapegoating of women has been described as the negative feminisation of infertility.<sup>5</sup>

In addressing this research query, this thesis considered whether this scapegoating of women is known to African feminism. Chapter three of the thesis shows that African feminists in the Humanities and Social Sciences are well acquainted with the negative feminisation of infertility and have offered perspectives on how women can overcome this social scapegoating and stigmatisation. The thesis identified that much of the discourse on this issue has been situated within the schools of African Womanism and African Motherism. Yet, this thesis argued that African Motherism in its veneration of motherhood as the key way in which women are socially empowered may have unintentionally contributed to the social stigmatisation of infertility and involuntary childlessness. It however considered the contrary viewpoint that African Motherism is merely responding to the socio-cultural environment in which it operates in. This may explain why it advocates that involuntary childless women should take all possible steps to overcome the condition of involuntary childlessness in order to enhance their social status within their communities. However, this thesis considered whether this quest to attain the procreative goal of achieving a desired pregnancy necessarily safeguards the welfare of all involuntary childless women. It therefore turned to the legal specialism of African feminism to see if it provided other perspectives in

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<sup>4</sup> See Pearce T., She will not be listened to in public: Perceptions among the Yoruba of infertility and childlessness in women. (1999) 7 (13) *Reproduction Health Matters* pp 69–87.

<sup>5</sup> Odinga A., I am not Tassa, he is not a man like other men': feminising infertility and masculinising fertility in South Nyanza, 1945-1960 in Tamale S., (ed) *African Sexualities: A Reader* (Oxford: Pambazuka Press, 2011) chapter 48.

promoting and enhancing the welfare of involuntary childless women outside those offered by other disciplines of African feminism.

In considering this issue, it appeared that indigenous African legal feminists were not as vocal as to the plight of the involuntary childless women as their counterparts in other specialisms of feminist literature. The thesis investigated why this is the case and why the Maputo Protocol (the regional variant of CEDAW) failed to give much focus to the negative feminisation of infertility and involuntary childlessness as it had done with other issues such as FGM that affected the well-being and welfare of women. Again it considered whether this seemingly neglect of involuntary childlessness by African legal feminists is due to the influencing role that the modernisation theory <sup>6</sup>and other Western influences have played in the shaping of the international human rights framework on gender equality. While the thesis welcomed the positive role that the modernisation theory has played in shaping rights for women on a global level, it identified with Hellum's <sup>7</sup> position that those who seek to promote the well-being and welfare of women should not ignore the socio-cultural environment that women have to engage in.

This is why chapter four of this thesis, and in line with its second research query, provided a critical socio-legal discourse on the socio-cultural construction of motherhood in Africa and how this impacts on the status of involuntary childless women in the region. It critically evaluated why the non-biological construction of motherhood as touted by some in the modernising theoretical school may not necessarily be the most appropriate panacea for tackling the social stigmatisation of infertility and involuntary childlessness in Sub-Saharan Africa. The chapter explained how non-Western constructions of motherhood situated within indigenous African cultures and in Islamic norms affirm the superiority of biological motherhood over non-biological motherhood. Since this is the case, the thesis questioned whether it is right to dismiss infertility and involuntary childlessness as some African legal

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<sup>6</sup> Hellum (note 1 above) p 45.

<sup>7</sup> Ibid at p 108.



feminists have done or to require that the problem of infertility should be resolved primarily through non-biological parenting options such as child adoption.

This point remained a live concern of the fifth chapter of this thesis, which considered the reluctance of policy makers to extend wider access to fertility treatment due to child justice and over-population concerns in the region. In addressing these concerns, the chapter considered the legal framework for child adoption in Sub-Saharan Africa. In consonance with the third query of this thesis, this chapter considered the challenges associated with making child adoption the primary way of tackling infertility and involuntary childlessness in legally pluralist societies in Sub-Saharan Africa where multiple legal rules apply.

It explained that although Islamic law as practiced in many African Muslim communities and some localised indigenous African rules do not ignore child justice issues, such as ensuring that vulnerable children find a loving home where they can grow up in, these rules do not go as far as recognising child adoption as the appropriate mechanism for achieving this objective. The Maliki jurisprudence for example is not adverse to the utilisation of other non-biological parenting options such as the Kafalah system to achieve child justice goals. However this parenting mechanism falls short of providing involuntary childless couples with full parenting rights that child adoption provides under a Western family law framework.<sup>8</sup> Since this is the case, the thesis argues that it is wrong to limit infertility management to non-biological parenting mechanisms such as child adoption.

Recognising the limits of non-biological framework within legally pluralist societies in Sub-Saharan Africa, chapter six of this thesis considered whether there is a legally binding right to provide wider access to affordable ARTs as canvassed by specialists in public health and medicine. This chapter spoke squarely to the fourth research query of this thesis. It approached the query from two primary premises, the first of which was whether there is a

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<sup>8</sup> Ishaque S., *Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Concerns in Context of a Child's Right to an Identity* (2008) 22 *International Journal of Law, Policy and the Family* p- 401-402.

right to reproduce. Its consideration of the literature shows that the right to reproduce is considered to be a positive welfare rights which states are not legally obligated to fund. It however considers whether the social stigmatisation of infertility and involuntary childlessness in pronatalist regions of the world could justify a case for treating the funding of affordable ARTs as a negative or forbearance right. In considering this issue, it relies on earlier feminist works like Shanner<sup>9</sup> that explain how the funding of safe abortions was treated as having some element of a forbearance right due to the fact that offering such services were considered to protect the forbearance rights of women such as the right to bodily integrity. This thesis argues that funding of ARTs in pronatalist societies where women are socially stigmatised for involuntary childlessness should also be treated as a forbearance right since such funding can help to safeguard the forbearance rights of human dignity, the right not to be subject to cruel, inhumane and degrading treatment and the right not to be discriminated against.

The thesis also considered the equally important concern on the extent to which the right to health as set out in the international human rights framework such as the UDHR, ICESCR, the Banjul Charter and the Maputo Protocol respectively could facilitate the right to access affordable ARTs. Central to this question was whether the right to health should allow for state funding of ARTs to help couples achieve desired pregnancies. A live concern was whether this is appropriate or feasible in light of the allocation theory of resources. Nevertheless, in response to the social stigmatisation of involuntary childlessness and on social justice and anti-discrimination grounds; there is strong support for arguing that the state funding of ARTs should be treated as a basic primary health care as opposed to its normal categorisation as expensive curative treatment.

Developing further on this issue and keeping in line with its fifth query, this thesis in chapter seven investigated the law's regulatory and social engineering role in developing a discrete

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<sup>9</sup> Shanner L., *The Right to Procreate: When Rights Claims Have Gone Wrong* (1995) 40 McGill Law Journal. 823.

and specific rights regime for involuntary childless women in Sub-Saharan Africa. Yet as pointed out in chapter six, there are legal limitations that makes it difficult to argue that states are currently legally obligated to provide ARTs to their citizens. This is because the right to reproduce is considered as a positive right which states have no legally binding duty to fund. Further, on the basis of the allocation of resources theory, it will be inappropriate to allocate scarce state resources to the funding of ARTs which many have argued is expensive curative treatment.

However, this thesis argued that there is a public interest ground for the law to play a role in widening access to ARTs in Sub-Saharan Africa. This is because the current way by which involuntary childless women can access ARTs in this region of this world is through the private sector which is extremely expensive and inaccessible to most women due to its prohibitive costs. This raises the concern on whether the right to reproductive health should be seen as a public good that law in its regulatory role should support. In this sense, the call for regulation goes beyond rectifying market failure which is the key concern of the economic version of the regulatory theory. Rather it falls within what Sunstein <sup>10</sup>describes as the substantive political role of regulation which seeks to advance what society consider as 'good'. Applying this to the African context particularly its indigenous social ordering principles where individuals are considering as doing good to their societies when they reproduce, there is a public benefit to argue for requiring wider access to ARTs in the region despite Malthusian's concerns of over-population and child justice considerations.

More fundamentally and in line with the overarching concern of this thesis, the key public interest ground for canvassing for a regulatory interventionist approach by the law, is the gendered social stigmatisation of involuntary childlessness and infertility in the region. How can it be right that women should be socially stigmatised or scapegoated for the inability to reproduce? Surely from a social engineering perspective, there is a current regulatory gap

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<sup>10</sup> Sunstein C., *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge: Harvard University Press, 1990) p 12.

that the law can address in order to protect and safeguard the rights of this group of women. This thesis argues and recommends that this role must go further than enabling the wider access to ARTs as part of the reproductive health care system for this group of women. In addition, the law in its social engineering and reformatory role can be further utilised to combat and tackle the social stigmatisation of infertility and involuntary childlessness. It can do this by strengthening the forbearance rights of this group of women to human dignity, the right to be free from discrimination, cruel, inhumane and degrading treatment.

In canvassing for the social engineering and reformatory role of the law, this thesis recognises that it falls within the realm of universality of rights and cultural relativism debate. It however recognises like Hellum<sup>11</sup>, that the reason why international rights regimes appear to have failed in safeguarding the rights of women in developing regions like Africa is that they fail to recognise the fact women in such regions operate under 'complex legal situations.'<sup>12</sup> This is due to the fact that they are obligated to assume multiple identities in order to effectively engage in the legal pluralist societies that they live in.<sup>13</sup> This thesis however goes further to argue in chapter seven that there are commonality of rights that are universal to all human beings. These rights include the right to human dignity and the right to be free from discrimination. It argues that no single culture can lay claim to the ownership of these rights. This is because as the examination of indigenous social ordering principles such as Ubuntu, Omoluwabi and Humwe has demonstrated, the right to human dignity, the right to free from discrimination and cruel, inhumane and degrading treatment are applicable in these specific indigenous social ordering principles and other such similar variants that exist in African communities. The commonalities between these social ordering principles and the international human rights regime are demonstrated in table four in chapter seven of this thesis.

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<sup>11</sup> Hellum A., *Legal Pluralistic Perspectives in Scandinavian and African Women's Law* in Papendorf K., Machura S., Hellum A., (eds) *Eugen Ehrlich's Sociology of Law* (Zurich: Lit Verlag, 2014) p 103 and p 108-9.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

There is therefore no reason why these rules cannot be utilised side by side with the existing human rights framework to ensure an effective rights regime that protects the forbearance rights of women in this region. While this thesis does not ignore the concerns of modernists that there are some African norms and customs that negatively impact on the well-being of involuntary childless women, it points to current African case law that treats customary law as a living law which is amenable to change if required. It however accepts as demonstrated in the South African jurisprudence, that there are times when the transcendental social ordering principles such as Ubuntu will be ineffective in correcting the anomalies of customary law that is abhorrent or contrary to modern realities and expectations. In this regard the courts may be faced with no other choice but to apply received Western law to strike down the offending custom and to ensure that the rights of individuals are protected and safeguarded.<sup>14</sup>

## **8.2 Recommendations**

It is on this concluding premise that this thesis canvasses for the following reforms. This includes the recommendation that international human rights instruments such as CEDAW and the Maputo Protocol which focus on gender equality and rights of women should be reviewed to clearly incorporate a rights regime for involuntary childless women. This does not mean proposals for new amendments to these instruments. Rather what may be useful at this stage is to canvass that the Committees responsible for the implementation of these instruments become more proactive in working to ensure that the needs of involuntary women are more fundamentally addressed in their working methods and in their general recommendations. This thesis argues that there is considerable scope within the articles set out in these instruments to accommodate the needs of involuntary childless women. For example articles 2 and 12 already provide a framework for addressing the social malaise of

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<sup>14</sup> See for example *Bhe and others v Khayelitsha Magistrate and others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

the stigmatisation of involuntary childlessness and as well as facilitating the rights of women to access infertility treatment. However, as the Chair of the Working Group on Discrimination against Women in Law and in Practice, the Special Rapporteur pointed out, the CEDAW committee is still yet to give proper recognition to the right to the highest standard of physical and mental health in its Post- 2015 Development Agenda especially in the areas of sexual and reproductive health and rights<sup>15</sup>

While the Chair does make a valid point that the right to the highest standard of reproductive health is yet to be fully realised; the issue of the social stigmatisation of involuntary childlessness and the corollary concern of wider access to affordable ARTs are conspicuously absent in the list of positive measures set out in the agenda document. These positive measures are seen as requirements that states need to undertake to ensure 'access to safe and affordable sexual and reproductive services.'<sup>16</sup> Yet the lack of attention to what can be considered a critical female problem confirms again Dyer's statement that infertility is the 'Cinderella of reproduction health.'<sup>17</sup>

This thesis therefore recommends that the issue of the negative feminisation of infertility and involuntary childlessness which is extensively documented in the body of literature in the social sciences, medicine and public health be given more attention than it has been given by the CEDAW committee and other bodies that are involved in the realisation and protection of women's rights. The same recommendation is made to the Special Rapporteur on the Rights of Women in Africa which is the mechanism established by the African Commission on Human and Peoples Rights to give specific attention to the problems of

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<sup>15</sup> See the mandates of the Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Committee on the Elimination of All Forms of Discrimination against Women dated November 3 2014 available at <http://www.ohchr.org/Documents/Issues/Women/WRGS/OpenLetter4Nov2014.pdf> (accessed July 29 2015).

<sup>16</sup> Ibid.

<sup>17</sup> Dyer S., Barrenness among plenty (2007) 13(2) South African Journal of Obstetrics and Gynaecology p 32 available at <http://www.sajog.org.za/index.php/SAJOG/article/download/76/52> (accessed July 29, 2015).

women in Africa.<sup>18</sup> The mechanism of the Special Rapporteur has been actively involved in combating FGM, tackling the disproportionate effect that HIV/AIDS has on women and in preventing and eliminating child and forced marriages.<sup>19</sup> To date it has undertaken in ten (10) fact finding missions around Africa to determine the level to which the rights of women have been actualised in the country.<sup>20</sup> In one mission, the Special Rapporteur, Commissioner Soyata Maiga reported that:

‘Countries must be held accountable to commitments they have made. Progress has been seen in the enactment of family laws, laws banning Female Genital Mutilation (FGM), and others guaranteeing sexual and reproductive health and rights (SRHR).’<sup>21</sup>

Although the Special Rapporteur mentions the guaranteeing of sexual and reproductive health and rights for women, these rights on the overall have been largely confined to the provisioning of safe abortion, contraceptives and maternal health care. It would therefore appear that the Special Rapporteur and other mechanisms responsible for the facilitation of the rights of women in Africa are yet to give proper attention to the social stigmatisation of involuntary childlessness in Sub-Saharan Africa.

This thesis recommends that the advocates and campaigners for gender and women issues under the gender equality framework of CEDAW and Maputo Protocol need to exercise the same will and resolve that has been utilised to tackle for example female genital mutilation (FGM) in Africa and likewise confront the problem of the negative feminisation of infertility in Sub-Saharan Africa. For far too long, human rights instruments that protect the rights of

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<sup>18</sup> See the African Commission on Human and Peoples’ Rights 25th Ordinary Session held in Bujumbura, Burundi, from 26 April to 5 May 1999 which adopted resolution ACHPR/res.38 (XXV) 99 on the appointment of a Special Rapporteur on the Rights of Women in Africa.

<sup>19</sup> See the Intercession Report by Me Soyata Maiga, Commissioner/Special Rapporteur on the Rights of Women in Africa (Banjul, African Commission on Human and Peoples Rights (ACHPR), 2009)

<sup>20</sup> See the mandate and bibliographic notes of the Special Rapporteur on the Rights of Women in Africa available at <http://www.achpr.org/mechanisms/rights-of-women/about/> (accessed July 29 2015).

<sup>21</sup> See SOAWR Breathing Life into the Maputo Protocol (SOAWR Members’ Meeting Report, Addis Ababa, Ethiopia, 24-26 January 2015) at p 12.

women particularly in the area of reproductive rights have focused too much on fertility control to the exclusion and detriment of facilitating wider access to fertility treatment and assistance to alleviate the conditions of infertility and involuntary childlessness. This thesis commends the current efforts to proactively address gender violence and domestic abuse in Sub-Saharan Africa, yet there are concerns that these efforts fail to tackle the negative feminisation of infertility which is a key cause of gender violence in the domestic setting in Sub-Saharan Africa.<sup>22</sup>

To be clear, this thesis is not arguing that it is wrong for activists and organisations involved in the protection of the rights of women in Africa to treat for example the eradication of FGM and gender violence as primary concerns. However, while tackling these discriminatory practices against women, the legal field and women's rights groups should not ignore the abusive and discriminatory practices meted out against involuntary childless women. Medicine<sup>23</sup> and social sciences<sup>24</sup> have been in the forefront of trying to right these wrongs against involuntary childless women, this thesis argues that it is time for the law in its role as a vehicle for social change to follow suit. The failure to do so would mean that the law has missed the opportunity to serve as a tool of social engineering to reform or obliterate practices that are contrary to the norms and expectations of a changing and evolving society.

This thesis however accepts that the law alone cannot solely bring about the reforms that are required in combating the social malaise of the stigmatisation of involuntary

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<sup>22</sup> See the United Nations Economic Commission for Africa African Centre for Gender and Social Development (ACGSD) Violence against Women in Africa: A Situational Analysis, September 2010 available at <http://www1.uneca.org/Portals/awro/Publications/21VAW%20in%20Africa-A%20situational%20analysis.pdf> (accessed July 29 2015). See also empirical studies such as Ameh N., Burden of domestic violence amongst infertile women attending infertility clinics in Nigeria 16(4) (2007) Nigerian Journal of Medicine pp 375-7 that discuss the role that infertility plays in domestic violence in Nigeria which is the primary investigation site for this thesis.

<sup>23</sup> See for example Ombelet W., Global access to infertility care: The Walking Egg Project (2014) Facts Views Vis Obgyn pp 1-3.

<sup>24</sup> Inhorn MC., Van Balen F., (eds.) Infertility around the Globe: New Thinking on Childlessness, Gender, and Reproductive Technologies: A View from the Social Sciences (Berkeley, CA: University of California Press; 2002).



childlessness. Education, particularly in the area that motherhood is not the beginning and the end of womanhood, can also play a role in confronting the negative feminisation of infertility that encourages discriminatory practices in Sub-Saharan Africa. But as earlier recommended, the educational programmes must start with policy and law makers who are involved in the protection of the rights of women in this region of the world. This in part is what this thesis has set out to do by highlighting what it means for a woman to be involuntary childless in Sub-Saharan Africa, and how negative social perception of this condition can contribute to a loss of worth and status of the childless in society. It therefore calls for more proactive action on the part of legal feminists in the region to confront this problem in the same manner that they have tackled other discriminatory practices against women. This would go a long way in empowering and enhancing the status of involuntary childless women in the region.

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