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## **MANAGING INFERTILITY IN CONTEMPORARY AFRICA: FROM STIGMA AND DISCRIMINATION TO CRITICAL SOCIAL PROBLEMS URGING PUBLIC SOLUTIONS**

### **Abstract**

This article raises the question of whether contemporary legal mechanisms in Africa can effectively address infertility issues. In particular, the relationships between international legal norms and their impact on the erosion of customary law and the changing perception of infertility are discussed. It highlights the multifaceted challenges posed by infertility, which have significant social, cultural and health implications, particularly for women. Legal responses to infertility are shaped by deep-rooted traditions and legal pluralism, with increasing influence from international law. However, cultural resistance and traditional norms hinder the effectiveness of legal interventions. Public health policies related to infertility are limited, leading individuals to seek alternative practices such as witchcraft and herbalism due to constrained access to assisted reproductive technology. The article emphasises the need for comprehensive reforms and increased visibility of infertility issues on national and international agendas. It suggests that legal reforms and greater attention to law as a regulatory instrument may facilitate the development of effective strategies to address infertility in Sub-Saharan Africa and combat culturally and traditionally rooted biases and discrimination against women.

**Keywords:** infertility, Sub-Saharan Africa, polygyny, public health, customary law, women rights

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## INTRODUCTION

In our advanced and developed contemporary world, it is widely believed that the law serves as a normative instrument for resolving even the most sophisticated social issues and relations while simultaneously securing the rights of the parties involved. The law also establishes public duties and formulates specific policies aimed at addressing various challenges. This viewpoint reflects the perspective of Western democracies regarding the regulation of social life, particularly since the legitimisation of new governing policies began in the 17th century, following the conclusion of the Thirty Years' War. From this standpoint, assigning functions to entities, including the law itself, provides a benchmark for evaluating their success or failure (Burchardt, 2018, p. 409). Consequently, most contemporary Western societies consider written laws as the foundation for all social relations and public policy instruments to judge their effectiveness or justify their adoption in terms of social utility. However, it is essential to question whether this approach applies to African societies and their internal dynamics. Additionally, there is a need to assess the potential effectiveness of official legal regulations in addressing the issues faced by individuals affected by infertility within African communities.

## INTERPLAY BETWEEN LEGAL SUB-SYSTEMS

The establishment and evolution of patterns regarding family relations in Africa are deeply rooted in the fundamental concepts of maternity and fatherhood. Historically, these patterns have been cultivated within the framework of societal customs. These customs, characterised by traditional social norms, have undergone continual shaping and adaptation alongside the development of society. Furthermore, under the influence of religious frameworks, they offer guidance on familial relationships through mandates and prohibitions. Legal frameworks within societies deeply intertwined with customary and religious traditions often mirror the values and directives derived from these foundational sources of human values. Specifically, norms governing social interactions – including familial ties, the foundational principles of matrimonial unions and the delineation of social roles for mothers, fathers and children – are assimilated into the formal legal systems of such societies. Consequently, these norms are transformed

into enforceable regulations overseen by governmental authorities. Many African societies exemplify adherence to these paradigms, as they integrate customary and religious traditions as cornerstones of their legal frameworks (Ndulo, 2011, p. 87). These traditions frequently designate childbearing as the fundamental aspect of familial structure, a notion that bears significant implications within the legal frameworks governing family, marriage and reproductive matters across numerous African nations (Chijioke, 2021, p. 18).

For many years, these traditional customs clashed with the legal systems and cultural values imposed by the colonial powers that took control of African territories. However, the nature of dominant common law practices facilitated some degree of incorporation of local perspectives into these regulations. Consequently, in contemporary times, traditional societies have started to be influenced by global culture, which has introduced modernist values and approaches and ongoing societal progress. Despite academic literature often overlooking infertility from a legal standpoint, typically addressing it within the contexts of marriage, family dynamics and health policy, this paper aims to illuminate some of these interconnections.

Traditional norms regarding marriage and fertility encompass deeply rooted values, customs and religious or cultural practices passed down through the generations. Legal systems may either include, reject or forbid adherence to these traditions in social interactions and behaviours. The degree to which the law accommodates tradition is closely tied to the social, cultural and economic evolution of societies, influenced by the prevailing governance models – ranging from conservative orientations rooted in traditional values to more liberal and progressive perspectives. Even with the presence of progressive legal solutions, the effectiveness of the law may be questionable due to the weakness of state institutions and the dominance of family-clan structures in the hierarchy of dispute resolution. This hierarchy discourages recourse to non-traditional forms of justice. In many African societies, indigenous laws, grounded in established customs and traditions, hold significant influence over various aspects of people's lives, including marriage, personal legal matters, inheritance and traditional authority structures. These laws, often patriarchal in nature, frequently perpetuate gender discrimination by treating women as subordinate members within their respective social groups, such as clans or tribes, rather than as equals (Ndulo, 2011, p. 89). Marriage is

widely seen as a fundamental institution in human society, with its primary function centred around childbearing, thereby defining the core function of the family unit. Consequently, within this marital framework, women are typically assigned the responsibility of bearing and nurturing children. It is important to note that marriage forms the bedrock of African communities, ensuring their continuity and resilience (Maponya, 2021, p. 82; Dyer, 2007, p. 70). According to Ogoma (2014), the traditional concept of marriage in African cultures is teleological, primarily intended for procreation. A childless marriage, therefore, is seen as incomplete, failing to fulfil its cultural and social role. Maponya (2021, p. 88) lists three fundamental reasons for having children in African communities: a child is expected to carry on the family lineage, honour their parents as living ancestors and provide care for them in old age, which is particularly crucial in the absence of social security and advanced pension systems in Sub-Saharan Africa.

Within this perspective, this societal construct also tends to stigmatise infertility, viewing it as a condition that undermines the essential purpose of marriage.

## DEFINING AND CONCEPTUALISING INFERTILITY AS A SOCIAL PROBLEM

When discussing infertility, one of the most challenging aspects is defining the phenomenon itself. While most definitions lean toward the medical aspect, they can equally be viewed from a broader perspective as a serious social issue. Infertility is commonly described as the inability to achieve a successful pregnancy after twelve months of unprotected sexual intercourse (Küçükkaya & Kılıç, 2022, p. 13), two years in documents from the World Health Organization (Boerma & Mgalla, 1999, p. 184) or even five years (Inhorn & Patrizio, 2015, p. 412). In many African countries, infertility is seen as a human condition distinct from common notions of personal rights. As such, it does not impose obligations on public services and lacks a legal definition. This absence creates obstacles in establishing or accessing fertility support programmes. The literature also distinguishes between primary infertility, affecting couples unable to conceive at all,

and secondary infertility, affecting couples who already have one child but cannot have more (Amakwe, 2013, p. 89). In some African cultures, individuals unable to produce a male offspring, even if they have daughters, are also considered infertile (Temitope, 2022, pp. 49–50). Measuring the extent of infertility presents its own set of challenges. Variations in how infertility is defined, and the limited availability of comprehensive data make accurate assessment difficult. This challenge is compounded by inadequately developed healthcare systems, particularly in Global South countries, and the cultural taboo surrounding infertility. Despite increasing interest from researchers and policymakers in the issue of childlessness, infertility in Sub-Saharan Africa remains relatively understudied (Verkroost & Monden, 2022, p. 320). Nonetheless, it is recognised as a significant problem potentially affecting between 55 and 75 million women in Africa (Temitope, 2022, p. 50). Despite its prevalence and severity, infertility prevention and fertility support programmes are often neglected in public policies across the continent. This disregard results in a lack of legal frameworks that could regulate family support policies or establish rights for those affected by infertility. Many African states struggle with a lack of rule of law in social practices and policies, which leaves numerous social issues without satisfactory solutions, adequate funding and public or international support (Africa Legal, 2022). To explain this indifference, we can consider the analysis of Ombelet (2008, p. 9), who examined reproductive health policies on an international scale. He observed a disparity in approaches to infertility between highly developed countries and those in the Global South, influencing how reproductive health priorities are set and consequently how medical procedures are financed. In the context of the Southern Hemisphere, the international focus is primarily on reducing total fertility rates, with infertility often overlooked (Ombelet, 2008, p. 9; Greil, 2011, p. 4). While it is true that Sub-Saharan Africa is expected to experience a rapid increase in the population aged 15 to 24 in the coming decade, high fertility rates should not overshadow the fact that infertility remains a significant social problem for many couples on the continent (Verkroost & Monden, 2022, p. 320) and requires attention in some form. It is crucial to assess whether international laws and programmes, based on treaties, hinder or support the development of national laws addressing infertility issues, or if they are irrelevant due to the lack of political will to tackle the problem at the national level.

## EVALUATION OF PRACTICED SOLUTIONS FOR INFERTILE COUPLES

The decision to address any problem through legal intervention is often influenced by the social perception of the issue as either universal or isolated, as well as the power balance and dynamics within specific societies. Within African traditions, infertility is frequently attributed to women, although both genders contribute equally to this issue, whether temporarily or permanently impacting their ability to conceive and bear children (Kumar & Singh, 2015, pp. 191, 196). This phenomenon remains rooted in historical contexts and is evidenced through women's narratives concerning their familial roles and experiences. From these accounts, it becomes apparent that women historically relied on men within the household, even though they had important roles in managing and organising various aspects of family life. These responsibilities included tasks such as caring for the house, its expansion and the maintenance of familial businesses (Ngaiza & Koda, 1991). They assumed responsibility for the welfare of family members irrespective of kinship ties, frequently undertaking the upbringing of children from deceased relatives or other spouses. All those rights and obligations were based on strong traditional social bonds not warranted or secured by any legal regulation.

Within these traditional family structures, children were regarded as valuable assets capable of enhancing the family's social position (Kościółek et al., 2024). Barrenness was addressed through mechanisms aimed at expanding the family unit, including the practice of polygyny initiated by the household head. Other solutions included the informal adoption of orphaned children, sometimes, although rarely, obtained from unrelated individuals. In certain South African societies, infertile women were permitted to enter into marital unions with women capable of childbearing, thus preventing divorce proceedings or the formal introduction of additional wives by their husbands (Makoba, 2005, p. 15). These remedies were temporary solutions rather than efforts to remove the stigma around infertility or repeated miscarriages (Ngaiza & Koda, 1991, pp. 29–31). None function as official legal options enforceable by judicial powers.

In cases of infertility, women typically pursued various avenues for resolution, including traditional therapies (Ngaiza & Koda, 1991, p. 67) or resorting to practices associated with witchcraft (Ngaiza & Koda, 1991, p. 179).

This occurred partly due to the strength of local customs and beliefs and partly due to the lack of public fertility support programmes. Nonetheless, these responses underscore the pivotal role and status attributed to children within familial dynamics, as well as the perceived functions of women within both nuclear and extended kinship structures. On the other hand, if someone could not have children or fulfil the traditional role of a mother (“mama” position), whether because of illness, disabilities or other reasons, it often led to divorce (Ngaiza & Koda, 1991, p. 69). This final solution subjected women to adverse social consequences and the obligation to refund the price of becoming a bride. The number of offspring born within the dissolved union frequently determined the degree of such reimbursements. This reflects the prevailing belief among African societies that the significance of children supersedes many other considerations for marriage.

In the event of childlessness within traditional societies, two distinct solutions governed by customary laws were anticipated. Couples could mutually agree to introduce another woman or girl, often from the wife’s familial or tribal connections, to bear children (Kalu, 2005, p. 53) or opt for divorce and the subsequent repayment of the bride price. This was practised and enforceable because childlessness was construed as a violation of the marital covenant and divine will (Mbiti, 1969, p. 104). In a theoretical study examining responses to infertility in Malawi, it was demonstrated that these prescribed practices were perceived as rational and practical resolutions to fertility challenges, well established within societal norms and frequently applied (de Kok, 2009, p. 211). Consequently, respondents in this study normalised these practices and downplayed individual accountability for them. Even though people might have had doubts about their fairness, social pressures forced them to follow these norms in their everyday lives.

## BRIDE PRICE AS AN INSTRUMENT OVERSHADOWING MARRIAGE

The concept of the bride price serves as a noteworthy quasi-legal mechanism closely linked to the capacity for childbirth. The payment of bride price remains a common and valued cultural practice in most African countries. The practice is particularly prevalent in more than 90% of the countries in sub-Saharan Africa (Ngutor, Yendev & Arumun, 2013)

Through the payment of this price, women's reproductive rights are effectively transferred from their natal family to their marital family. This transaction represents compensation provided to the woman's family in exchange for relinquishing control over her current and prospective offspring. Termed "*lobolo*", this remuneration is consistently refunded in cases of divorce prompted by infertility (Makoba, 2005, p. 14). The absence of children is seen as a disadvantage to the family or clan because people believe that having descendants is the most important factor for maintaining the lineage.

The customary practice of arranging financial obligations between the families of future spouses has become a burden for them. In modern times, it has even become an obstacle to getting married, leading to multiple attempts to legally ban this custom, mostly in Christian-dominated countries. However, all the bill proposals raised by governments in Rwanda, Kenya and Nigeria were not passed by the respective parliaments due to their controversial nature and significant interference with well-established traditions (Olufemi, 2022). In Uganda, although bride price was upheld as legal by a decision of the highest court, its return after divorce was banned as an unlawful and discriminatory practice (Bride Price Refund Banned in Uganda, 2015). Gender and human rights activist groups in various African countries are making consistent efforts to challenge customary laws related to the practice of bride price, highlighting its discriminatory and violent nature. However, they have faced little success in their endeavours thus far.

## DIFFERENT SHADES OF MARRIAGE, DIVORCE AND POLYGyny

Another traditional approach to addressing the issue of infertility involves the acceptance of additional women in a marriage, with some attempts made to legalise such polyamorous relationships. Other solutions often involve seeking fertile partners at any cost, leading to divorces, multiple short-term marriages or extramarital relationships (Temitope, 2022, p. 52).

First, we wanted to outline the nature of polygamous unions, their causes and their social consequences. Polygamy has historically been sanctioned within both Christian and Muslim communities. In certain traditional societies, such as Zimbabwe, the prevalence of polygamous unions has been associated with a heightened incidence of violence against women,



including instances of marital homicide, which historically received inadequate attention within criminal legal frameworks (Donkor, 2008, p. 22). This phenomenon can be attributed to the societal marginalisation of childless women, which has, in some cases, justified severe forms of discrimination. It often occurs that the husband's family also pressures the wife to bear children and, usually, if a couple remains childless after some time in marriage, the family becomes concerned. If there are no children or signs of a chance of having children after a while, the family starts to mistreat the wife, often leading to her leaving home or consenting to her husband taking another wife, especially in polygamous communities (Maponya, 2021, p. 87). Some infertile women also experience marginalisation from their close ones. Despite attempts to show solidarity with the infertile woman, family members may exhibit attitudes that contribute to weakening her position in the family (Moussa, 2023, p. 102).

Beyond the issue of polygamy as a mechanism addressing the problem of infertility, it is essential to understand that infertility can be a factor leading to domestic violence and social pressure, primarily on women. The problem of infertility can lead to intimate partner violence, most often directed at the woman (Aiyenigba, Weeks & Rahman, 2019, p. 77). None of these forms of domestic violence are adequately addressed in either family or criminal law, failing to provide sufficient protection to women who are suffering. Customary laws have continued this discrimination by making marriage dependent on property arrangements. In this system, the bride's family gives goods (known as the bride price) in exchange for their daughter's commitment to bear children, which is seen as essential for the marriage to last (Turaki, 1999, p. 106). These deeply rooted beliefs, formalised into legally binding customary practices, have hindered efforts to address infertility through thorough medical assessments. The ongoing tendency to solely blame women for infertility over many years has led to inadequate healthcare services, especially in rural African areas where medical resources are often limited. Religiously motivated oppression has further reinforced the perception of women's primary role within African families as solely reproductive, with childbirth viewed as a panacea for societal and personal challenges within the familial unit (Baloyi, 2017, p. 3). Additionally, childlessness in patriarchal traditional societies is often stigmatised as shameful, sinful, disgraceful and aberrant. Marriage in many African communities extends beyond the relationship between two individuals, becoming a communal institution that affects extended family members,

tribal connections and broader societal networks, including pastoral or rural communities. It is important to remember that while the Western concept of family is biological, the African concept is ideological, aligned with traditional African beliefs. Within this ideology, marriage is not just between two individuals but between two clans. In such a conception, one does not just give birth to a child; one brings forth another generation to continue a particular lineage (Sewpaul, 1999, p. 744).

When discussing further factors that determine the social consequences of infertility, one cannot overlook the problem of early sexual initiation, risky sexual behaviours and child marriages as behaviours aimed at confirming one's own fertility. The fear of infertility often drives individuals to engage in risky behaviours that can worsen the condition they fear. Especially in communities transitioning from traditional to modern norms, young women might choose to get pregnant outside of marriage to demonstrate they can have children and meet societal expectations as future brides and wives. Similarly, males may feel compelled to validate their fertility by impregnating women before or outside of marriage (Baloyi, 2017, p. 4). This has led to young people starting sexual activity earlier, making them more vulnerable to sexually transmitted diseases (STDs), which can lead to infertility. The primary cause of female infertility in Sub-Saharan Africa is complications from sexually transmitted infections. In Gabon, for example, up to 32% of women are infertile, with blocked fallopian tubes being the cause for most, resulting from past gonorrhoea or chlamydia infections (Amakwe, 2013, p. 90). Other causes of female infertility unrelated to harsh living conditions, malnutrition or overall poor health include early sexual initiation, female genital mutilation and post-abortion complications. Early sexual initiation is also inseparably linked to the issue of child marriage, which remains prevalent in many African jurisdictions. Notably, several African countries still permit marriage below internationally recognised legal age limits. For instance, the minimum age for marriage is set at seventeen in Guinea-Bissau, sixteen in Senegal and Mali, fifteen in Tanzania, South Africa, Seychelles, Niger, Gabon and Cameroon, and as low as ten in Sudan (Department of Social Affairs African Union Commission, 2018, p. 10). Despite legal provisions, traditional practices often facilitate marriages below these statutory thresholds. Disturbingly, nearly one-third of girls from Niger, the Central African Republic and Chad experience early marriage before the age of fifteen, and only half of African nations report less than 10% of girls marrying before reaching this age across

global societies. This prevalence is partly attributed to legal exceptions in marriage laws across twenty-seven African countries, which allow for early marriage with parental or guardian consent, or approval from courts and judges. Consequently, child marriage is legalised in thirty-nine African countries, predominantly affecting girls. Exceptional circumstances, rooted in traditions and parental consent, permit the legal contracting of marriage for underage girls in select African nations, including Algeria, Cameroon, the Central African Republic, Djibouti, Eritrea, Gabon, Guinea, Morocco, Namibia, Niger, Nigeria, Senegal, Seychelles, Somalia, Sudan, Tunisia and the Sahrawi Arab Democratic Republic. Early marriage is often linked with “quick fertility” and a rapid series of childbirths; however, it greatly undermines women’s overall reproductive health and well-being. Women who marry at a young age often face family breakdowns and are at higher risk of negative pregnancy outcomes such as miscarriages, abortions or stillbirths (Yaya et al., 2019). Early childbearing also jeopardises women’s future reproductive prospects, potentially resulting in enduring infertility stemming from various infections (Araoye, 2003, p. 191).

In sub-Saharan Africa, traditional factors that affect fertility mainly occur within marriage, taking advantage of the time after childbirth when women are unable to conceive due to extended breastfeeding and post-partum abstinence (Hertrich, 2017, p. 115). Despite the acknowledgment of the harmful consequences linked to early marriage, such as physical damage to reproductive health and higher risks during childbirth, this practice continues. Research conducted in the Gondar and Gojjam regions of Ethiopia illustrates this persistence, revealing that one in every eight girls is married before the age of ten (Tilson & Larsen, 2000, p. 358).

The legal prohibition of child marriage holds significant potential for enhancing women’s health and fertility, among other favourable outcomes. This objective is enshrined in both the African Children’s Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples’ Rights, commonly known as the Maputo Protocol, both of which explicitly forbid child marriage. This serves as a significant example of how international legal norms are being incorporated into the domestic laws of African nations, resulting in tangible outcomes such as a notable decrease in child marriages during the twenty-first century. Conversely, the lack of strong enforcement of official laws by central governments, particularly in rural areas and smaller towns, hampers the progress of these reform efforts.

## DIVORCE VS POLYGAMY – THE VICIOUS CIRCLE OF STIGMA AROUND INFERTILITY?

Traditionally, various remedies were employed to address female infertility, often attributing blame to women for childlessness. In contemporary times, however, legal frameworks have evolved to regulate family relations irrespective of the gender-based origins of infertility. Among traditional solutions, divorce and polygamy were predominant. Polygamous unions and subsequent marriages are more common in West Africa than in East Africa, where the stability of first marriages is more pronounced (Locoh & Thiriat, 1995, p. 62). On the other hand, West African countries have higher fertility rates, which could be linked to the greater occurrence of subsequent unions and partnerships. Barrenness has been identified as a major reason for divorce by both men and women in extensive cohort studies (Tilson & Larsen, 2000, p. 357).

As in numerous African societies, the birth of children often serves as the primary impetus for marriage; consequently, the absence of offspring within a reasonable timeframe following the initiation of the marital union is commonly perceived as a legitimate justification for divorce. Typically, this decision is made by the husband, frequently under the influence of his extended family. Such practices often overlook the underlying causes of infertility, as empirical evidence indicates that many of the women rejected on these grounds remarry and subsequently bear children, while their former husbands remain childless in subsequent unions (Chelegat et al., 2017, p. 43). Furthermore, the process of remarriage has been demonstrated to increase fertility rates in many African countries (Locoh & Thiriat, 1995, p. 61). Births within new partnerships hold particular significance, symbolising the commitment of the couple and the establishment of a shared family. In sub-Saharan Africa, the importance of such births may be amplified because of the role of childbearing in traditional marriage customs, the significance of offspring for maintaining family lineage and the prevailing pronatalist attitudes. Recently, there were, however, opposing voices showing that marital stability brings higher fertility over the lifespan of the individuals (Ben Malinga & Visseho, 2022, p. 228).

Nonetheless, the legal institution of marriage continues to reinforce the oppression and traditional discrimination against women in African societies. Despite not being explicitly stated in codified family laws across the

continent, childlessness is accepted as a reason for ending a marriage. In some traditions, even stricter norms apply. For example, in Uganda, a marriage is not deemed complete until the birth of the first child, which can lead to childless unions being potentially annulled without requiring formal divorce proceedings (Araoye, 2003, p. 192). Due to this cultural pressure, the majority of childless marriages lasting at least five years in such a state ultimately end in divorce (Tilson & Larsen, 2000, p. 355; Locoh & Thiriat, 1995, p. 91).

### SEEKING LEGAL AND SOCIAL PATHS OF EMANCIPATION AGAINST OPPRESSION AND MALE DOMINANCE SURROUNDING INFERTILITY

While these traditions are not universal, exceptions have been noted in specific African societies, providing more opportunities for women to control their futures. For example, among the Wolof, Toucouleur and Mauritanian peoples, subsequent marriages give women the autonomy to choose their future partners and assert their independence. Similarly, among the Anlo Ewe in Ghana and the Bwa in Burkina Faso and Mali, marriages are arranged again before the end of the initial union, often because the wife is dissatisfied. Among the Mkako people in Cameroon, women possess the freedom to transition between relationships and maintain the option to return to their brothers following each divorce. However, remarriage is seen as a crucial duty rather than a personal decision, closely tied to continuing the family lineage. The importance of having children is also emphasised by the reasons women themselves give for divorce, with husbands' failure to support the children and the household being a major factor (Locoh & Thieriat, 1995, p. 67). The high occurrence of multiple marriages in West Africa, where over half of women have been married at least twice, further supports the notion of marriages being primarily focused on procreation in these societies.

The legal framework governing family law exerts only a partial and exceedingly limited influence on the initiation and dissolution of marriages. The majority of such unions are contracted and terminated according to customary norms or religious commands. Consequently, individuals seeking separation seldom, if ever, resort to legal channels to safeguard their rights. The limited use of their legal rights undermines the overall

effectiveness of the law, reducing its main role as a guarantor of rights. This lack of legal recourse affects women more than men, as divorce often leads to a decrease in their socioeconomic status and living conditions. However, there is not enough literature explaining how spousal rights are decided in family courts or how judges arbitrate between individuals and their finances. To better understand this, in-depth field research is needed, including direct access to divorce records stored in family court archives. Most African legal literature accessible to Western researchers relies on glossaries, textbook compilations or theoretical works. There is, however, a lack of studies detailing specific cases, African jurisprudence and prevailing lines of judicial reasoning. This gap applies both to general studies and those focused on the legal systems of individual countries.<sup>3</sup> Further oppression of women is inherent in certain polygamous relationships. Whether polygamy is supported by customs, traditions or laws in a country, it typically involves one man being married to at least two women, with very few exceptions. In these unions, the husband holds a dominant position, and it is customary and legally permissible to marginalise or even expel the wife who has not borne children after another spouse gives birth, as well as to take away any property she received upon marriage. Childless women are frequently excluded from their clan and community, with their only option for economic and social stability being remarriage and attempting to conceive again. They often face societal stigma, which can continue even after death. In some Nigerian cultures, infertile women are buried outside cemeteries and inhabited areas (Araoye, 2003, p. 194). All these customs are severely discriminatory, but they are supported by longstanding cultural traditions. Unfortunately, there are no effective legal remedies to eliminate these customs or protect the rights of women in their relationships. Polygyny has become ingrained in many African societies because of the widespread belief that males are naturally fertile, as illustrated by the Yoruba saying “*Ko si agan okurin*” (Araoye, 2003, p. 193). This widespread belief exerts pressure on males from their social circles and kinship networks to procreate, irrespective of societal or familial circumstances. Polygyny, therefore, is more commonly perceived as a traditional aspect of familial and communal bonds in Africa, rather than a strictly legal matter.

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<sup>3</sup> The authors spent one week at the African Studies Centre in Leiden, the Netherlands, and one week at the Nordic Africa Institute in Uppsala conducting literature research and queries.

## LEGAL BATTLES AROUND POLYGyny

Even in instances where the law does not recognise or occasionally prohibits such unions, as observed in Eritrea or the Ivory Coast, traditional polygamous relationships persist across African nations. Although regulations might impose restrictions, such as requiring the consent of previous wives or mandating specific financial qualifications, enforcement often relies on judicial interpretation in common law jurisdictions. An interesting phenomenon encountered in Kenya and other African countries is the marriage of an infertile woman to another fertile woman. After marriage, the new co-wife engages in intercourse with the man, usually the husband of her co-wife, and any child resulting from this relationship is adopted and recognised as her own by the infertile woman (Chelagat et al., 2017, p. 43). In Chad, there is a practice called "*gonyala mpa*" ("to marry the womb"), where the husband of an infertile woman engages in intercourse with her sister. The child born from such a relationship remains under the care of the infertile woman and her husband (Monye, 2017, pp. 8–9). In many cases, infertile women agree to polygyny, taking part in the upbringing of children born from multiple marriages. This reflects their adherence to traditional principles of balance and fairness among all partners (Tabi, Doster, & Cheney, 2010, p. 123). However, existing research indicates that women in polygynous unions often feel disappointed, distressed and financially strained, regardless of their fertility status. Internal tensions within such unions often escalate, resulting in increased stress, violence and abuse, especially between fertile and infertile co-wives. As the family grows larger, the economic difficulties of infertile women worsen because men usually struggle to provide for all family members and prioritise the needs of the mother and her children (Dierickx et al., 2019, p. 109). Those unable to bear children employ various strategies to avert divorce and advocate for access to reproductive health services (Dierickx et al., 2019, p. 105). The absence of laws prohibiting and criminalising polygyny not only reflects the disadvantaged position of women struggling with infertility in African societies, but also disempowers them in societal and economic relations. None of these customs would be readily accepted in the Western Hemisphere, nor would they receive any legal recognition. In fact, many such practices are criminalised in the West, highlighting a significant difference in how the functions of the family and the importance of procreation are viewed. Still, even in Africa, polygyny remains a relatively understudied

social phenomenon due to the stigma attached to it and the reluctance of participants to take part in studies on the topic.

In addition to the inherent challenges posed by practising polygyny, there is significant social pressure to maintain such unions, stemming from customary and religious beliefs steeped in patriarchy. This pressure compels even educated and financially independent women to accept the possibility of their husbands entering into subsequent marriages, despite emotional hardships. Sustainable efforts to challenge these cultural norms can only be achieved through visible legal interventions that align with international standards, prohibiting and penalising polygamous relationships. While several African countries have made progress in implementing such measures, effective opposition to polygyny remains mainly limited to urban areas. Traditional values continue to hold a strong influence in rural areas, where adherence to statutory law is much lower. In summary, the overarching effects of infertility on relationships in Sub-Saharan Africa include marital discord, domestic violence, infidelity, divorce, disinheritance and polygyny (Fledderjohann, 2012, p. 1384). According to international survey data, divorce is the most common consequence of infertility, with women being disproportionately affected. Rates of divorce due to childlessness are consistently high across Sub-Saharan Africa, ranging from 10% in Cameroon to nearly 30% in Ivory Coast, with many countries reporting rates between 25% and 29% (Rutstein & Shah, 2004, p. 44). Infertile women are less likely to be in stable monogamous relationships, whether they choose remarriage, remain single or enter into polygamous relationships.

## SUBSTITUTE PARENTING IN RESPONSE TO INFERTILITY: ADOPTION, FOSTERING AND SURROGACY

As previously noted, infertile women often resort to various forms of substitute parenting as a means to achieve parenthood. Among these alternatives, fostering, adoption and surrogacy are considered viable avenues.

Adoption is the primary method for overcoming challenges related to infertility. In Africa, like other family matters, adoption can occur through informal or formal means. In rural areas, adoption often occurs through traditional customary arrangements, while in urban areas, it is typically formalised as a legal procedure. Once again, there is limited academic



literature focusing on the legal aspects of foster or secondary parenthood, with most studies concentrating on the psychological and ethnographic aspects of the process. Therefore, to gain a deeper understanding of the issue, field studies are necessary in selected countries to evaluate the phenomenon more comprehensively.

The attitude towards adoption as a way to have children is ambiguous in African societies. For example, in South Africa, it is believed that children will lose their roots through adoption and will lose contact with their ancestors, which will have negative consequences for their future happiness (Buckenberger, 2020, p. 3). Many adoptive couples hide the fact that they have adopted a child from their social environment. Even having a child from a husband's extramarital relationship is less stigmatising than adopting a child (Buckenberger, 2020, p. 4). As emphasised in Sub-Saharan Africa, the importance of having a biological child cannot be overstated, and an adopted child cannot replace a biological one (Adelakun & Ndoni, 2023, p. 4). Especially in African Muslim communities, the approach to adoption is extremely restrictive. Adoption is seen as conflicting with Islamic law regarding kinship. Despite this limitation, various forms of substitute parenting are prevalent in Africa. Importantly, adoption extends beyond infertile couples and is widely practised among all African families, irrespective of fertility status. Notably, in five West African countries, over half of childless couples reside in households with adopted children: Niger (61%), Guinea (59%), Benin (56%), Togo (56%) and Cameroon (53%) (Rutstein & Shah, 2004:51). Despite the prevalence of adoption in Sub-Saharan African countries, the process itself is often less regulated and structured compared to highly developed nations. For instance, Nigeria, the most populous country in West Africa, lacks national guidelines or standardised procedures governing the adoption process, with many caregiving arrangements based on traditional norms or guidelines established by international organisations (Oladokun et al., 2009, p. 81). While adoptions may require validation by state authorities to establish parental, custodial and inheritance rights for the child, rural communities often adhere to more traditional methods of child-rearing, without recourse to formal legal procedures. In the African context, most adoptions involve children from within the extended family or clan, with stranger adoptions being relatively rare. Orphaned children are occasionally adopted internationally by couples from other African nations or Western countries, notably Europe, the United States or Australia. This also includes individuals residing in African diasporas in the West.

In such instances, children of shared heritage are typically favoured for adoption (Wanitzek, 2013, pp. 240–241).

Despite being the most readily available option for raising children in cases of infertility, adoption is frequently disregarded as a solution due to cultural constraints and familial opposition (Oladokun et al., 2009, p. 88; Fehintola et al., 2017, pp. 72–73).

## FOSTERING AS COMPENSATION OF UNMET CHILD DESIRE

Given the strong desire for biological offspring, alternative methods are prevalent in Western African societies, with child fostering being one such alternative. Unlike adoption, fostering does not grant parenthood over the child; instead, it allows the child to be raised within stable familial relationships with caregivers. National census data from various African countries towards the end of the twentieth century revealed a significant proportion of children living under the care of non-biological parents, ranging from 27% in Ghana to as high as 44% in Sierra Leone (Alber et al., 2013, p. 2). While factors such as the impact of devastating conflicts and wars contribute to this phenomenon, cultural beliefs play a significant role, particularly the notion that every child represents an asset and an investment in the family's future.

Given the reluctance in many traditional rural communities to formalise adoption, distinguishing between adoption and fostering can be challenging. The strength of familial bonds is not established by legal statutes but by the intentions of the individuals involved, highlighting the importance of ethnographic studies to understand these nuances. In some contexts, African caregivers treat their biological and foster children equally; similarly, children do not distinguish between their custodians. Thus, the legal constructs of family relations, particularly those inherited from colonial laws, often fail to align with the actual social dynamics within families or the concept of kinship. Fostering, as a prevalent practice, reflects the culmination of various cultural and social factors that characterise African societies, including matrilineal kinship structures, widespread polygyny, divorces and informal conjugal relationships (Alber et al., 2013, p. 8). This frequently results in the tradition of co-mothering within many households, which is deeply rooted in traditional norms and operates independently of legal frameworks. While these practices are customary, they are not officially recognised or regulated by formal legal systems.

In African communities, which are frequently organised around clans descended from shared ancestry and bound by strong familial ties, it is common for infertile women to foster children of their brothers, husbands and other distant relatives (Notermans, 2013, p. 165). In some societies, infertile women may even assert their right to claim children from their maternal family, such as brothers, to balance the number of children in the household, thereby strengthening their position within the conjugal household (Notermans, 2013, p. 172). These rights are exercised by fertile women as well, rooted in customary practices rather than codified legal statutes. As long as children within the same kinship group are fostered by relatives within the country or community, it typically falls under customary law, with legal regulation becoming pertinent only in cases involving migration, such as passport issuance and related activities, as well as the legalisation of such children in destination countries. Statutory law regulating adoptions also becomes relevant in cases of familial conflict, divorce or inheritance disputes. Additionally, international law, such as the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), mandates that national states take responsibility for unaccompanied children and prioritise state laws over customary norms. Nevertheless, despite the adoption of such regulations by most African countries, customary traditions still largely prevail in fostering and child-rearing practices in Africa.

## THE PROBLEM OF SURROGACY

However, the legal framework gains prominence in the context of surrogacy as a response to infertility experienced by couples. Surrogacy can still be intertwined with the concept of co-mothering and practised within traditional communities without legal intervention, particularly in polygynous relationships. In less traditional societies governed more by modern legal systems, infertile couples may opt for official solutions through surrogacy. Although seldom discussed by African academics, cases have been reported, particularly from South Africa.

Surrogacy encompasses various forms, including gestational surrogacy, where the surrogate is not biologically related to the child, partial surrogacy, where the surrogate's ovum is utilised for conception, and commissioned adoption, where the child is entirely unrelated to the prospective

parents. However, the latter case is not permissible in South Africa. Surrogacy offers a faster route to parenthood compared with official adoption, requiring only a nine-month waiting period. South African law outlines restricted options for surrogacy, requiring a genetic connection between the child and commissioning parents and banning compensation for surrogates. This means that surrogacy must be driven solely by altruistic motives. Moreover, surrogates must have previously given birth (Nicholson, 2017, p. 502). Despite advocacy for the legalisation of commercial surrogacy to regulate its practice, the law remains resistant. Contracts offering financial benefits are invalidated, leaving involved parties unprotected – such agreements hold no legal weight. As a result, couples seeking surrogacy must turn to adoption to establish parental rights and obligations for the child born through surrogacy arrangements. Additionally, the ban on payment for surrogacy services may deter potential surrogates, as few women are willing to undertake the process without financial compensation unless they are mothers assisting their infertile daughters or daughters-in-law. An even stricter approach is present in Islamic communities, where surrogacy is strictly prohibited and often equated with promiscuity. As a result, the only forms of medically assisted reproduction generally permitted in most Islamic legal traditions are artificial insemination of the wife with the husband's semen and in vitro fertilisation using the wife's eggs and the husband's semen (Cooper, 2019, p. 293).

## ARE THERE PUBLIC POLICIES SUPPORTING INFERTILITY TREATMENTS?

Surrogacy is closely linked to broader fertility support policies. Infertility treatment programmes represent public legal initiatives aimed at assisting individuals affected by the infertility crisis. Despite numerous efforts from international organisations and UN agencies, infertility interventions remain uncommon in national agendas across African countries. Notably, infertility management is often excluded from family planning activities, highlighting the need for reforms to enhance the visibility of this issue and prioritise infertility interventions within cohesive public health policies (Hounkanrin et al., 2022, p. 17).

Many proposals regarding the content of such programmes emphasise access to modern treatment and reproductive support methods, alongside

labour law rights. Artificial reproduction support methods require strict health regimens to achieve successful conception and maintain pregnancy. Individuals undergoing therapy often need time off work or special workplace accommodations. In South Africa, ongoing efforts aim to address parenting challenges by advocating for family leave rights, irrespective of parental status, whether conventional or unconventional (Fourie, Botes, 2018, p. 911). This could alleviate concerns for individuals participating in fertility assistance programmes.

At the public health service level, intervention models may include providing psychosocial support for couples facing fertility issues, offering assisted reproductive technology (ART) services to assist those trying to conceive and launching advocacy campaigns to increase awareness and demand for such services. However, public interventions in Sub-Saharan Africa predominantly focus on destigmatising infertility through psychosocial counselling and raising awareness of the issue, with few addressing social or structural aspects, particularly within the public health sector. Notably, publicly funded programmes offering medical treatment or artificial conception methods are scarce, and most services are provided by private entities (Infertility in Sub-Saharan Africa. A Literature Review to Inform a SBC Program Approach, 2023, pp. 18–25). Access to publicly funded assisted reproduction centres is limited in Africa, and the absence of insurance coverage for these services creates barriers for couples seeking assistance. Moreover, the generally low quality of medical services in many African countries leads to reduced success rates for insemination methods. Furthermore, there is a lack of medical laws regulating artificial reproduction practices, resulting in unregulated procedures and placing burdens on patients in cases of harm or failure (Oladokun et al., 2009, p. 80; Oluwa-toyin, 2021, pp. 2187–2199).

Beyond academic medicine, solutions are sought through alternative practices such as witchcraft or local herbalist services, which operate without legal regulation. In most rural regions of Africa, cultural and traditional health practices play a significant role in many aspects of reproductive health, including infertility. Studies conducted in Nigeria and Ethiopia clearly indicate that using indigenous healthcare practitioners is not only extremely popular, but also becomes a crucial part of the healthcare system for women, especially in the absence of access to academic medical facilities. Traditional healers are also said to be effective in treating infertility (Baakeleng, 2022, pp. 89–90). In Nigeria, the majority of women (71.7%)

sought help from traditional healers regarding their inability to conceive before turning to medical services (Dattijo et al., 2017). This is likely because infertility is often associated with something supernatural in Africa, connected to spiritual forces, even witchcraft (Moussa, 2023, p. 35). Infertility in women of faith can also be perceived as divine punishment (Dyer et al., 2002, p. 1666) or, among Hindu women in South Africa, as bad karma for improper conduct in past lives (Sewpaul, 1999, p. 747).

Existing public family planning policies primarily focus on fertility management, including STD prevention and the availability of contraception, with infertility management and ART support methods notably absent. Additionally, the lack of clear data on primary and secondary infertility in African countries underscores the need for improved statistical patterns to inform policy development (Shemeikka et al., 2009).

## CONCLUSION

The conversation surrounding infertility in Africa, particularly in Sub-Saharan regions, refers to its societal, cultural and legal dimensions, examining its impact on marriage, family dynamics and public health strategies. Infertility is portrayed as a substantial concern affecting individuals, especially women, and their families, leading to diverse social, economic and emotional ramifications. In Africa, the legal approach to this significant social issue differs markedly from that observed in the Western Hemisphere, where legal standardisation predominates. Instead, Africa is characterised by legal pluralism. The concept of “deep” legal pluralism encompasses both the state legal system and the living law practised by people (Woodman, 1988, p. 2011). Furthermore, international law, particularly in the form of human rights and other treaties, is increasingly relevant in addressing these issues. However, it often overlooks the local context and imposes policies that prioritise the interests and needs of highly developed countries. Consequently, some international instruments may hinder efforts to combat the infertility epidemic by focusing on limiting fertility rates in developing countries. On the other hand, international norms can be beneficial in eradicating practices such as child marriage, genital mutilation, family violence and polygyny, all of which affect female fertility.

These various legal subsystems and their components interact and influence each other, leading to the emergence of new legal content. This

process is often described as legal “syncretisation” (Wanitzek & Woodman, 2004, p. 43ff.). The relevance of any of these laws in a particular case depends on the specific context in which the case arises, including factors such as cultural norms, societal values and individual circumstances. Traditional beliefs and cultural norms often stigmatise infertility, attributing blame to women and impacting their social status within marriages and communities. Practices such as polygamy and divorce are influenced by perceptions of infertility, leading to marital discord and societal pressures. Despite legal frameworks, customary laws often prevail in regulating family relations, including issues of childlessness and divorce. Most researchers focus primarily on the cultural and social aspects of infertility, overlooking the fact that law and the strength of its norms can significantly impact not only the development of preventive programmes for infertility or the reduction of formal relics of discrimination against women in fundamental social institutions, but can also transform and reform these social customs. Consequently, more attention should be devoted to law within the social sciences.

This is particularly important as various coping mechanisms that were observed, including adoption, fostering and surrogacy, albeit influenced by cultural constraints and familial opposition, have obvious legal ground. Creating clear and enforceable frameworks for these mechanisms and their prioritisation in public policies may serve as fair and indiscriminate solutions for the infertile. While fostering and adoption are common, particularly in rural areas, formal legal processes are less prevalent. Surrogacy, where legally permitted in some countries, offers an alternative for infertile couples, but challenges remain regarding regulation and accessibility.

Access to assisted reproductive technology (ART) services, especially within public healthcare systems, is restricted, adding to the challenges faced by individuals seeking treatment. Consequently, people may turn to alternative practices like witchcraft and herbalism, influenced by both limited medical options and cultural beliefs. The discussion highlights the complex interplay between cultural traditions, legal systems and public health concerns when tackling infertility in Sub-Saharan Africa. This emphasises the necessity for comprehensive reforms and increased attention to the issue within national agendas and international discussions.

Although state statutory laws increasingly regulate societal relations, including those related to family planning, their effectiveness is often hindered by deeply ingrained traditions resistant to modernisation. Scholarly

discourse addressing the legal dimensions of infertility in Sub-Saharan Africa is notably scarce. While existing literature predominantly focuses on medical, health and psycho-sociological facets of infertility, comprehensive legal analyses remain limited. To gain a deeper understanding of the complicated procedural frameworks and regulatory mechanisms of infertility, a thorough investigation of applicable laws and judicial practices across various countries within the region is imperative. Such a study would involve careful scrutiny of legal statutes and customary norms, thereby facilitating a more nuanced understanding of how infertility-related issues are navigated within Sub-Saharan African communities. Additionally, alongside these efforts, advocacy campaigns and movements geared towards civilisational progress and the eradication of harmful and discriminatory practices treating women instrumentally could play a crucial role in promoting positive change and ensuring the well-being of individuals and families affected by infertility.

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