Discrimination In Dismissiveness: The Case Of Women With Infertility Disability

Prof. Onyeka W. Igwe*1 & Dr Obraori N. P. Adiela**2
Faculty of Law, Rivers State University, Port Harcourt, Nigeria

ABSTRACT
The argument that women are human and deserve equal treatment as their male counterpart seems to exclude a group of women. These women appear to be marginalised and discriminated by men, even fellow womenfolk and the society at large. This group of women are women with infertility. This article examined whether reproductive disability was also a disability. It discussed the plight of women with reproductive challenge and considered whether such women are entitled to human rights and examined legal remedies for the infringement of their rights. It recommended the enforcement of the rights of such women as they are entitled to human rights.

Keywords: infertility, women, discrimination, human rights

I. INTRODUCTION
Human rights are special rights which apply to all humans. It presupposes that all humans are entitled to enjoy certain rights by virtue of them being associated as part of the human species. All human irrespective of their gender, race, colour, religion or ability or disability are entitled to human rights. The issue of women deserving and being entitled to human rights has been on the front burner for a couple of decades in the past. The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 was birthed to protect women from discrimination and reiterate their entitlement to human rights.

Unfortunately, a group of women – women with infertility challenge are subjected to several forms of human rights abuses in several cultures in Nigeria. Some of these human rights abuses are perpetuated under the guise of culture and tradition. Such human rights abuses range from domestic violence meted out on them by their husband and other family members, to sexual assault as well as psychological and emotional torture they are made to face as a result of their predicament.

Unfortunately, fellow women also join in discriminating against women with infertility. This article considers the plights of women with infertility in Nigeria. It discusses the discrimination, marginalization, oppression and humiliation which these women face by virtue of their reproductive challenge. The article seeks to discover whether women with infertility in Nigeria are aware of their entitlement to human rights and bring to the fore some cultural practices within Nigeria which violate their rights.

II CONCEPTUAL FRAMEWORK
There is need to provide definition to some important terms used in this article. These terms are woman, disability, infertility, human rights, and discrimination. The term woman has been defined as an adult female person; or a distinctive feminine nature. It refers to the female gender and includes a girl, lady, mother, grand-mother, great-grand-mother, sister, daughter, and aunt et cetera. The specie of humans with a womb and capable of procreating is called “woman”. She is seen as that specie of mankind with a womb. Her name is derived from ‘womb’ and ‘man’. Hence, an important role of a woman is her capability and ability to reproduce and nurture a baby.

Although this definition is restrictive as it sees woman as one created by nature to perform a specific function – which is to reproduce. Thus, nature is the source and cause of her gender and role. Where a

*Professor of Human Rights Law, Ph.D (Law).
**LL.B, BL, LLM, Ph.D (Law).
woman suffers delay in carrying out her nature–given role, she is discriminated and suffers abuse from her husband, in-laws, sometimes family, community and the society generally. Disability has been defined as a physical or mental condition that limits a person in one or more major life activities. It is an abnormal condition, deformity or inability to function as normal. Disability includes physical impairment, mental impairment, sensorial impairment and inability to perform biological functions. In medical terms, disability is both a medical and an individual problem that isolates a person (sufferer) from actively participating in the mainstream of society. Section 57 of the Discrimination Against Persons with Disability (Prohibition) Act, 2018 defines disability as including ‘long term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder full and effective participation in society on equal basis with others’. Disability includes physical impairment such as visual, speech, hearing and mobility impairment; mental impairment, intellectual impairment, sensorial impairment and reproductive challenge. Disability is both a medical and an individual problem that isolates a person (sufferer) from actively participating in the mainstream of society.

According to Bickenbach, disability may be viewed as the ‘consequence of an impairment that may be physical, cognitive, mental, sensory, emotional, developmental, or some combination of these that result in restrictions on an individual’s ability to participate in what is considered ‘normal’ in their everyday society’. It may also include the inability to perform biological functions. However, the researcher prefers to define disability as “a physical or visible impairment, mental or invisible impairment which incapacitates a person from functioning normally in everyday activities and which attracts stereotypes from others”. Disability may be caused by congenital and birth defects, accidents, man’s inhumanity to man, negligence of health care providers, poverty or biological factors. Infertility is an impairment which affects the ability of an individual to reproduce or procreate. According to the Royal College of Obstetricians and Gynaecologists United Kingdom, infertility is the ‘failure to conceive after regular or frequent sexual intercourse for two years in couples within the reproductive age or in the absence of any medical reproductive pathology’.

Thus, where a couple live together for a considerable period of time and have unprotected sexual intercourse, without achieving conception, they are said to suffer from infertility. Women with infertility suffer from a type of disability that affects their ability to carry out a critical function assigned to them by nature, which is procreation. Their disability is neither a physical or mental impairment, but is of a biological and psychological nature; one that queries their existence or nature as women. It would appear that in many Nigerian cultures as it is typical of many African societies, a woman is defined on the basis of her ability to reproduce or procreate. This is because she is seen as the human with a womb. Where a woman is unable to reproduce or procreate after living with a man and having unprotected sex for a considerable number of years, she is derided and called derogatory names such as ‘barren’, meaning she is suffering from reproductive disability. Infertility is a fundamental disability as the Nigerian society discriminates against women with such challenge. A woman with reproductive disability is prone to domestic abuse and sexual abuse from her spouse; physical abuse from her in-laws; verbal abuse from persons within her environment and the society at large.

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8. Ibid.
Infertility may be caused by genetic factors, illnesses or accidents. It is erroneously perceived that only a woman can be the cause of infertility between couples, even though in reality, the male or female partner or both partners could be the cause of infertility.

The term, human rights have been severally defined, yet it lacks a universally accepted definition. According to Ajomo, ‘…human rights are inherent in man: they arise from the very nature of man as a social animal. They are those rights which all human beings enjoy by virtue of their humanity, whether black, white, yellow, malay or red’. 11 Again, Ogbu shares this viewpoint when he asserts that: [H]uman rights are…rights which all persons everywhere and at all times equally have by virtue of being moral and rational creatures. They are inherent in any human being simply because of his [or her] humanity – the birth right of all mankind.12

A jurist, Nasir PCA13 shared same view when he lent his voice and thought in providing a definition of the term ‘human right’ when he stated that:

Human rights were derived from and out of the wider concept of natural rights. They are rights which every civilized society must accept as belonging to each person as a human being. These were termed human rights. When the United Nations made a declaration, it was in respect of ‘Human Rights’ as it was envisaged that certain rights belong to all human beings irrespective of citizenship, race, religion and so on.

The above views are in tune with the literal interpretation of the two words used – human and rights. These rights accrue only to humans because they are ‘humans’. Their humanity, and nothing more, qualifies them to enjoy these rights. Thus, human rights are rights which every man or woman on earth is entitled to by virtue of their being humans. They are peculiar to humans and are not earned or negotiated for, but imbedded in human existence as it enhances human dignity. Women irrespective of their ability to conceive and bear children or not are humans, thus, come within those that should be covered by human rights. Thus, deserve the enjoyment of all rights accruing to theme as humans without any form of discrimination.

Discrimination simply means recognising a distinction or making an unjust distinction in the treatment of different categories of people especially on the ground of race, sex, age or disability.14 The Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 defines it as meaning ‘differential treatment’.15 The 1989 United Nations Human Rights Committee’s General Comment with regard to the International Covenant on Civil and Political Rights 1966 defined discrimination to mean:

any distinction, exclusion or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms...

The definitions provided above portray the term discrimination as negative differential treatment of persons based on any ground including disability which hinders the recognition, enjoyment and exercise of their rights on an equal footing with others. Thus, a situation where certain women suffer negative differential treatment by reason of their inability to conceive and birth a baby amounts to discrimination.

It is also important that the meaning of the term right to human dignity is considered. The right to human dignity is contained in the opening clause of the Universal Declaration of Human Rights 1948 thus: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’ The right

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14 (n 1) 410.
15 DAPWDA 2018, S. 57.
to human dignity is the pillar upon which all other rights stand and ‘emanates from the dignity and self-worth of the person.’ According to Hughes,

human rights derive from human dignity, since it is because we are responsibly self-determining, unique and vulnerable beings that we have an inalienable right to those conditions and opportunities that will allow us to freely and fully develop as persons.

Since human dignity is the basis for human rights law, and human rights is the bedrock of any civilized society, it is therefore safe to say that right to human dignity is the cornerstone of every civilized society.

At the regional level, the African Charter on Human and Peoples’ Right 1981 provides that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishments and treatment shall be prohibited.

The above provides for the respect of a person’s right to dignity as it is inherent in an individual by virtue of his humanity. Thus, it prohibits every form of slavery, torture, cruel and inhuman treatment against a person. Considering that human dignity is fundamental to human existence, the Constitution of the Federal Republic of Nigeria 1999 (as amended) makes provision for right to human dignity. It provides that ‘every individual is entitled to respect for the dignity of his person’. Thus, no individual shall be subjected to torture or to inhuman or degrading treatment; or held in slavery or servitude; or be required to perform forced or compulsory labour.

The right to dignity has been connected with the freedom from torture or cruel, inhuman or degrading treatment or punishment. By Nigerian law, torture amounts to violation of the right to human dignity. Torture has been defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating of coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanction.

Article 2 of the United Nations Convention Against Torture provides that any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial for the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

The Court in *Uzochukwu v Ezeonu II* defined torture as: “...etymologically means to put a person to some form of pain which could be extreme. It also means to put a person to some form of anguish or excessive pain...the torture under the subsection could also be physical brutalization of the human person. It could also be mental torture in the sense of mental agony or mental worry. It covers a situation where the person’s mental orientation is very

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18 (n 14) 49.
19 ACHPR 1981 Art. 5.
20 CFRN 1999 (as amended) S. 34.
21 The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984 (also known as United Nations Convention Against Torture 1984).
much disturbed that he cannot think and do things rationally, as the rational human being he is.\textsuperscript{23}

The court in \textit{Uzochukwu v Ezeonu II}\textsuperscript{24} defined inhuman or degrading treatment as acts which are ‘barbarous, uncouth and cruel treatment, a treatment which has no human feeling on the part of the person inflicting the barbarity or cruelty’.\textsuperscript{25} Degrading treatment was defined as the element of lowering the societal status, character, value or position of a person and makes the victim have some form of complex, which is not dignifying.\textsuperscript{26} In the case of \textit{Alaboh v Boyles},\textsuperscript{27} where the applicant was beaten up and his head submerged in a pool of water, the court held the acts as inhuman and degrading treatment.

In the same vein, in \textit{Kekere-Omo v Lagos State Government},\textsuperscript{28} the court held that forcing a woman to shave her hair under Customary Law as symbol of bereavement for her husband is a violation of the right to human dignity. Again, in Helen Ugochukwu v Stephen Ugochukwu,\textsuperscript{29} the court held that the act of locking a widow out of her matrimonial home constituted inhuman and degrading treatment as well as discriminatory practice. Furthermore, in the case of \textit{Theresa Onwo v Nwafor & 12 Others},\textsuperscript{30} the court held customary practices which compelled the appellant, a widow, to shave her hair and be locked up and deprived of her properties as violating her right to human dignity and thus discriminatory against the appellant.

III THEORETICAL FRAMEWORK

This paper builds its suppositions on three main theories – natural law theory, positivist theory of law and sociological law theory. Natural Law Theory has been affected by the postulations of several proponents\textsuperscript{31} such as Aristotle, Thomas Aquinas, John Finnis, Socrates, and others. This school of law holds that law has a divine or supernatural origin; the effect that there are laws of nature or laws of God which are above and beyond positive law which are laid down by man.\textsuperscript{32} It believes that for human laws to be valid, such must be based on objective moral principles which are hinged on reasoning. Aristotle argued that human laws are considered subordinate to natural laws and can only stand on the basis of natural law.\textsuperscript{33} Human rights, for example are founded on moral principles which are hinged on reason. Human rights are seen as inherent in human, the endowment of all humans by virtue of their humanity. It emanates from reasoning and is based on moral principles.

The positivist theory has its proponents as John Austin, Thomas Hobbes, Jeremy Bentham, and Bodin. This school of law drew a distinction between physical laws and normative laws. Physical laws could be tested scientifically while the other could not. Natural laws were seen as normative laws which derived their validity from rules of morality.\textsuperscript{34} Thus, law was viewed as it is, and not as it ought to be. This school of law defined law as not necessarily based on reasoning, but as a command from a political sovereign to his subjects, which is backed by sanction.\textsuperscript{35} Human rights of women with infertility challenge fit this description as they are same rights for all women and humans in general. These rights are codified, not hanging merely on reasoning. It is submitted that all written laws which emphasis the respect of human dignity should be enforced to the latter.

The Sociological theory of law developed as a ‘fall out’ from natural law and legal positivism.\textsuperscript{36} It is concerned with the development of law in the society by assigning to law-makers the responsibility of assessing and continuously adjusting and improving legislations. Its proponents include Jeremy Bentham, Rudolf von Jhering, Justice Oliver Wendel Holmes and Roscoe Pound who accentuated its

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\textsuperscript{23} \textit{Ibid}, 764.
\textsuperscript{24} \textit{Ibid}, 708.
\textsuperscript{25} \textit{(n 20)} 724.
\textsuperscript{26} \textit{Ibid}, 778.
\textsuperscript{27} \textit{[1984]} 3 NCLR 830.
\textsuperscript{28} \textit{[1995]} 6 NWLR (pt 404) 760.
\textsuperscript{29} \textit{[2006]} CHR 344, 351.
\textsuperscript{30} \textit{[1996]} 6 NWLR (pt 456) 584.
\textsuperscript{34} \textit{(n 29)} 12.
\textsuperscript{35} \textit{Ibid}, 52.
\textsuperscript{36} F Adaramola, \textit{Adaramola Jurisprudence} (4\textsuperscript{th} Edn, LexisNexis: 2008) 253.
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formulations till it reached its zenith in the early 1930’s.\(^{37}\) Since humans and their society could be studied scientifically, the sociological school of law developed to further understand the essence of law. Dean Roscoe Pound invented the term ‘social engineering’. He viewed society as a machine and defined law as ‘a social institution to satisfy social wants – the claims and demands involved in the existence of civilized society – by giving effect to as much as we may with the least sacrifice’.\(^{38}\) He therefore argued that the examination of the function of law is imperative. Thus, this would entail studying and understanding of the effect of legal rules on society which is possible through the conduct of research. This article sets out to determine whether women with infertility enjoy the rights provided by law in Nigeria. The empirical research carried out in this article revealed that despite the existence of several legislations, women with infertility still face discrimination and suffer human rights abuses which these laws were meant to curb.

Discrimination of Women with Infertility in Nigeria

A mixed research method of quantitative and qualititative research was carried out between July to October 2018. The quantitative aspect comprised 50 women with infertility within four Local Government Areas in Rivers State namely, Port Harcourt, Obio / Akpor, Eleme and Oyigbo Local Government Areas. An interview was conducted with a woman with infertility to further collaborate the results gotten from the survey and elucidate more on their plights. The research was aimed at discovering whether these women suffer human rights abuses or and face discrimination. The research showed that a grand average of 82% of the participants with infertility agreed that they suffer human rights abuses. 76% agreed that they have been or were almost sexually abused by religious leaders. 80% of the women acknowledged that they have been financially exploited by religious leaders in their bid to overcome infertility. 82% noted that women with infertility suffer rejection, 84% said that they are often neglected, 88% agreed that they suffer isolation. 80% of them pointed out that the rights of women with infertility are often denied, 90% of them indicated that they face verbal abuse, 86% said they face sexual abuse, and 88% noted that they put up with physical abuse. 86% of the respondents informed that they are called derogatory names even by family members. 82% said they experience emotional abuse, while 84% revealed that they face insults daily. 74% indicated that it was common for women with infertility to be mocked and 70% of the respondents admitted that they are threatened repeatedly.

It further revealed that the grand mean of 74% of the respondents indicated that there are cultural practices that violate or support the violation of their rights. 86% of the women admitted that they had been accused of eating up the babies in their wombs. 88% admitted that women with infertility are viewed as a curse from God. 76% agreed that there is a perception that women with infertility are punishment from God, while 72% believed they are bad omen. 64% of the women noted that there is a cultural belief that women with infertility are sub-humans, while 60% pointed out that they are denied the right to family resources such as inheritance of land and properties. 70% revealed that their rights are not provided and protected culturally. The interviewed participant explained that women with infertility are discriminated against, beaten by their husbands and in-laws, driven out of the matrimonial homes, and marginalized because of their challenge. She narrated how they are sometimes perceived or referred to as evil or witches because of their infertility challenge. It was pointed out that it was the cultural practice in Ogba, for the corpses of women with infertility to be desecrated by the piercing of their wombs amidst lamentations, curses and incantations before committing to earth.

Rights of Women with Infertility

Human rights ‘…are inherent in man: they arise from the very nature of man as a social animal. They are those rights which all human beings enjoy by virtue of their humanity, whether black, white, yellow, malay or red’.\(^{39}\) The Universal Declaration of Human Rights which was adopted and proclaimed on the 10\(^{th}\) of December, 1948 describes human rights as equal and inalienable rights of all members of the human family. It declares that ‘all human beings are born free and equal in dignity

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37 Ibid 254.
38 (n 34) 268.
and rights’. It further provides that ‘[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. The Universal Declaration of Human Rights provides for the right to life, liberty and security of all, prohibits torture or cruel, inhuman or degrading treatment or punishment on an individual.

Furthermore, Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides for the rights of all Nigerian citizens. These rights include right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and the press, right to peaceful assembly and association, right to freedom of movement, right to freedom from discrimination, and right to acquire and own immovable property anywhere in Nigeria.

These rights apply to all citizens of Nigeria irrespective of sex, ability, disability, religion or other social status.

Article 19 of the African Charter also clearly states that ‘all peoples shall be equal; they shall enjoy the same respect and shall have the same rights…’ These international instruments are recognized as forming part of our laws. By these provisions, women with infertility ought to be treated equally as every other citizen and not as less or as second-class citizens.

Article 16 of the ACHPR provides that ‘every individual shall have the right to enjoy the best attainable state of physical and mental health.’ This therefore entitles the women under review to the right to humane, physical and psychological environment without abuse or violence and devoid of human and degrading treatment.

The court defined inhuman treatment as any act which is ‘barbarous, uncouth and cruel treatment, a treatment which has no human feeling on the part of the person inflicting the barbarity or cruelty.’

IV RECOMMENDATIONS

It is recommended that the judiciary embarks on judicial activism in the protection on the rights of women with infertility. The judiciary is constitutionally saddled with the responsibility of interpreting the laws. The function of the judiciary involves the investigation of facts and the expansion of the law. They adjudicate on matters concerning the infringement or likely infringement of the rights of citizens. ‘It is the duty of the court to grant redress to any person who has successfully proved that any of his fundamental rights has been, is being, or is likely to be contravened or infringed.’ They have a role to play in the protection of the rights of women with infertility and indeed every other citizen of Nigeria.

Judicial activism is a tool that the courts could employ in the protection of the rights of women with infertility. Granted that the Constitution of the Federal Republic of Nigeria 1999 (as amended) does not expressly include infertility as a ground for discrimination under section 42, the court could however, make pronouncements extending ‘other status’ to include infertility. In fact, there is the need for judicial pronouncement clearly including infertility as a type of disability.

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40 UDHR 1948, Art. 1.
41 Ibid, Art.2.
42 Ibid, Art.3.
43 Ibid, Art.5.
44 CFRN, 1999 (as amended) s. 33.
45 Ibid s. 34.
46 Ibid s. 35.
47 Ibid s. 36.
48 Ibid s. 37.
49 Ibid s. 38.
50 Ibid s. 39.
51 Ibid s. 40.
52 Ibid s. 41.
53 Ibid s. 42.
54 Ibid s. 43.
55 (n 11) 724.
57 Igwe v Ézeanochie [2010] 7 NWLR (pt 1192) 61, 94.
activism in the protection of the fundamental rights of citizen, therefore, cannot be over emphasized as it is important for the recognition and protection of human rights.

Again, it is suggested that civil society organisations should embark on campaigns emphasising the rights of these women. CSOs are formed to provide a platform to agitate and pressure the government into providing reliefs, or upholding the law, or speaking up for the voiceless in the society. Non-Governmental organisations should also persist in the forefront of conducting studies, researches and gathering statistics about women with infertility. Considering the indigenous and accessible nature of NGOs and CSOs to the relevant communities and peoples, it is also suggested that NGOs and CSOs should take up the challenge to raise awareness for women with infertility as persons with disabilities, having and deserving rights. Furthermore, NGOs should include in their awareness programmes, steps to seek redress where the rights of women with infertility are violated. Such awareness creation will lead to a shift in the cultural perception about these women. It will culminate in the abrogation of negative cultural practices that are carried out against these women.

Furthermore, the media should be incorporated in creating and raising awareness on the humanness and dehumanizing plight of women with infertility. The Nigerian media should also engage in investigative journalism to bring to limelight the plight of these women. The entertainment media could depict sympathetic roles and highlight the humanness of women with infertility in their plays and movies.

In addition, it is recommended that free health care services be provided for women with infertility. Considering that fertility treatment is expensive, it is suggested that subsidized health care services be provided for women with infertility. Just as contraceptives and family planning services are subsidized for fertile women, so should fertility treatment and services be subsidized for women with infertility. This will provide women with infertility the decent opportunity of experiencing motherhood under safe and professional experts rather than jeopardize their lives in the hands of quacks or wait indefinitely for luck or divine providence. Meanwhile, such prolonged delays expose them to untold human rights abuses from family members and society at large.

V CONCLUSION

Women with infertility also face discrimination. They are blamed by members of their family and society as the only cause of the infertility between them and their partners. Consequently, women with infertility face harassments, quarrels and often times physical abuse from their husbands and in-laws. They even suffer domestic violence as a result of their reproductive challenge. They are also prone to be kicked out of their matrimonial homes because of infertility. They suffer humiliation and are called derogatory names aimed at degrading and damaging their emotional well-being, thus violating their right to human dignity. The humiliation and discrimination they face prevent them from living normal lives.

It was revealed that women with infertility suffer human rights abuses. It is submitted that the violation of the rights of these women is not hinged on the absence of law, nor on their ignorance of the law, but on the cultural perception of both the victims and the violators of their rights. Society has a negative perception in which women with such challenges are viewed.

It was revealed in the course of the study that there are cultural practices that violate and support the violation of the rights of women with infertility. These categories of women are perceived as not entitled to be accorded the same respect and equal treatment as other women within the society. Rather, they are despised, marginalized, discriminated, isolated, neglected and called derogatory names which violate their right to human dignity and deflate their pride as women and as humans.

It is submitted that these women are humans, thus deserving of all human rights including right to human dignity and freedom from discrimination. The courts should embark on judicial activism to promote and protect the rights of these vulnerable women. CSOs, NGOs and the media also have roles to play in raising awareness on the plights and rights of women with infertility.

Finally, government should subsidise the treatment of infertility as it is presently very expensive and out of reach of the common woman with infertility challenge. Such intervention will reduce incidents of harassments which these women are exposed to in the hands of their spouses, in-laws and society, while they await divine intervention or chance.