Rethinking the Right to Procreate: An African Imperative

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I argue in this Article that our right to procreate should be balanced against the survival rights of the procreated children and against the right not to suffer an undue burden of those, whether near or far, who share the world with us. I observe that the African environment with its strong cultural values promotes the rapid rate of procreation on the continent and I find in the "best interests of the child principle" the most acceptable means of challenging the status quo with minimum controversy. It is my conclusion that a right to procreate carries with it an inherent duty to act responsibly, and that this should be the basis of a legal framework to regulate procreation and maintain a balance between the right to procreate and the rights of potential children and/or third parties.

Introduction

In this Article I present an argument for making the best interests of the child the primary consideration in the decision to procreate. The argument is motivated by the evident suffering of African children due to the high levels of poverty that characterize much of the continent. The assumption is that smaller families are essential for lifting Africa out of its poverty and ensuring that children enjoy a higher standard of living.[1] Since it is imperative to move to smaller families very quickly, I believe the process should be

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1 Y'air Ronen, *An Introductory Note on Law's Responsiveness to the Child's Suffering and the Construction of a New Agenda for Children*, *in* The Case for the Child: Towards a New Agenda 39 (Y'air Ronen & Charles W. Greenbaum eds., 2008).

pursued with the support of the law tempered by a human rights perspective towards procreation.

The reasoning behind my proposition is that the potential problem of failure to provide a child with an adequate standard of living can be preempted and prevented from arising. Whilst positing potential children as problems may be abhorrent to some people, I believe that it is even more abhorrent to give "life," only to bestow deprivation and misery. In my view it amounts to irresponsible childbearing and should be condemned as such. Consequently, in addition to popular advocacy aimed at improving the lot of today's children, I believe we should have a voice that advocates the preemption of procreation by encouraging men and women to exercise the right to conceive a child primarily with the best interests of the potential child in mind.

Two points worried me as I attempted to craft a credible legal argument around my position. The first was whether the argument had an inherent class bias in that only persons commanding a certain amount of resources would be able to ensure their children the requisite standard and quality of life and thereby meet the threshold of procreating responsibly. A human rights-based approach provides the answer. Application of the principle of equality entails the provision of social security programs that compensate the poor. Thus the poor can still exercise the right to procreation with the help of state support. Admittedly formal social security is inadequate in many African countries,[2] despite the fact that they are party to the International Covenant on Economic, Social and Cultural Rights and recognize the need to strengthen social security protection.[3] Rather than diminish the argument for responsible procreation, the lack of social security strengthens it because of the seriousness of the consequences for children born into poverty. The reader is therefore expected to understand the arguments presented in this Article (where relevant) from that standpoint.

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2 Most Africans are dependent on informal social security defined by Dekker as kinship, family, community or informal workplace based support, *see* A.H. Dekker & M.P. Olivier, *Informal Social Security*, *in* Social Security: A Legal Analysis 559, 560 (M.P. Olivier ed., 2003).

3 M.P. Olivier & E.R. Kalula, *Regional Social Security*, *in* Social Security: A Legal Analysis, *supra* note 2, at 655, 656 (observing that a few countries have well developed social security systems, and some such as South Africa and Namibia are moving towards strengthening their systems as "social security schemes in the region focus on those people who are employed in the formal sector. Coverage of targeted populations tends to be narrow, benefits paid by many schemes are inadequate to meet basic needs, a heavy reliance on general tax revenues strains government financing. . . .").

The second issue is related to how blame for procreating irresponsibly should be apportioned, taking into account patriarchal factors and the lived reality of African women, who must be placed at the center of strategies to regulate fertility. The question was whether reproductive autonomy was gendered enough to warrant a desegregation of blame. Whilst I do believe that patriarchy is a factor that substantially impacts the extent to which women exercise reproductive autonomy and that the regulatory framework should recognize that fact, I realized that it would be a problem to present my reasoning herein. Presenting an argument that apportions responsibility on the basis of gender would necessitate laying out the relevant theory as well as the empirical data to support it. The limited length of my Article did not lend itself easily to such meandering. After much debate I decided that in order to ensure the simplicity and clarity of the argument I should not pursue the point in this Article; more so as I had to some degree interrogated the issue in earlier papers.[4]

I write this Article from a child and third-party perspective and give due regard to the freedom that all human beings have to procreate. At the same time I recognize the corresponding responsibility to promote the core human rights principle that each person's rights end where another's begin. In short, there is no right to irresponsible procreation. I interrogate the right to procreate from a contextual, legal and political point of view. In my opinion, our right to procreate should be balanced against the survival rights of the children and against the rights of third parties not to suffer an undue burden. Since the African culture with its strong values drives the pace of procreation, only a legitimate challenge such as the "best interests of the child principle" can effectively impact the status quo.

I argue in this Article that it is necessary to recognize the fact that parental responsibility as a duty to maintain should begin before a child is conceived. Hence the Article grapples with the conceptual dilemma whether to focus on the rights of the potential child or on the responsibility held by the potential parent. The fact that legal rights are founded on the existence of a legal subject necessitated choosing the latter in order to make a legally tenable argument.

I begin in Part I by elaborating on the problems arising from unplanned births in Africa. In presenting this contextual background I turn to the Population

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4 *See* Mulela Margaret Munalula, *Essential Motherhood: Implications for Law and Population Policy*, *in* Body Politics and Women Citizens: African Experiences 70 (Ann Schlyter ed., 2009); Mulela Margaret Munalula, *Kith, Kin and Keep: Law and Changing Perceptions of Gender and Generational Contracts in Zambia*, *in* Gender, Generations and Urban Living Conditions in Southern Africa 171 (Faustin Kalabamu, Matselitso Mapetla & Ann Schlyter eds., 2005).

Policy of Zambia (my home country), which is seeking a legitimate route to a rational and sustainable population growth rate. By examining developments in Western thinking about procreation, I take note of the complexity of the state's role in procreation and the need for such a role to be justified. Part II examines the right to procreate and the best interests of the child principle in a bid to justify the state's role in procreation decisions. In Part III I grapple with conflicting interests, theoretical dilemmas and practical considerations which eventually lead me to conclude that the right to procreate carries a duty to do so responsibly. I therefore attempt in Part IV to construct a legal principle that articulates my argument as a form of parental responsibility due both within and outside the nuclear family. In my Conclusion, I contend that the interpretation of procreation rights in the African context cannot but support the promotion of smaller families.

I. Background and Context: Large Families and Poverty in Africa

Africa is a continent that favors large families. Large families are often the result of a lack of interest in, or access to, family planning and sustained use of contraceptives. However, they are also attributable to a popular need to procreate regardless of the intense poverty that typifies many large families. The need to procreate emanates from a combination of factors including patriarchal norms, customary law and religious prescriptions,[5] extended family values and, ironically, poverty itself, being the cause of high child mortality rates. Many African people see in reproduction an opportunity to prove their masculinity or femininity and assure their posterity. Large numbers of children also represent a new resource base which may, through the principle of reciprocity, enable the entire extended family to survive. Thus, although many people no longer live the way they did prior to the widespread urbanization that now typifies much of Africa, social reproduction of the conditions that sustain the traditional social system continues.[6]

Since Africa is also the poorest continent, it is reasonable to assume a correlation between large family size and the continuing prevalence of poverty. Many people in Africa live below the poverty datum line. Only a minority are

5 In many African countries the practice of religion is still premised on the conservative fundamentalist approach to procreation.

6 Sara Mvududu & Patricia McFadden, *The Intersection Between Family Law, Rights and Resources*, *in* Reconceptualizing the Family in a Changing Southern African Environment 160, 162 (Sara Mvududu & Patricia McFadden eds., 2001).

in formal employment and subject to taxation, thus state coffers are generally empty and provide little or no social security. Informal social security is the norm rather than the exception.[7] Poverty levels are so high that infant mortality is excessive and many surviving children suffer from chronic malnutrition, lack adequate shelter, and are unable to access the education they need to break out of the cycle of poverty. Many children will continue to be denied their basic human rights because it is unlikely that their basic needs will ever be met. It is therefore not unreasonable to wonder whether they should have been conceived at all.

For many states in Africa, what is at stake is not encouraging procreation but discouraging it because of the burden that it places on limited state resources and other members of society. However, state policy has to contend with customary laws, beliefs and practices that favor large families. Dispensations of democratic governance also entail a healthy respect for principles of privacy and liberty. Many states therefore avoid policies that set limitations on procreation, but hope that society will eventually evolve in that direction. The "evolutionary" approach is problematic because such evolution — even if and when it does come — will be too late for the children who continue to be born while we wait. I believe that sometimes change has to be actively cultivated through a prescriptive legal framework, and it seems to me this is a situation that calls for such initiative on the part of African governments.

For a government to effectively deliver on the best interests of the child principle requires the investment of substantial resources by the state and society since the future of a country rests on the potential that lies in its children. Children's interests must underpin all policy considerations and this is increasingly recognized in many jurisdictions. The object of the South African Children's Act, for instance, is distinctly stated as to give effect to children's constitutional rights to family care, social services and protection and to prioritize or give paramount importance to the "best interests of the child" principle.[8] Ghana's 1992 Constitution provides guarantees for a full range of social, economic and cultural rights, particularly the rights of

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7 Although there is no statistical data to support the phenomenon Zambians generally are part of the extended family system which characterizes our way of life and is the basis of the informal social security system of mutual support. As far as I know transfer of resources within the extended family is treated like household labor and is therefore unvalued or quantified for purposes of reflection in the country's GDP.

8 Hester Bosman-Sadie & Lesley A. Corrie, Practical Approach to the Children's Act 14 (2010).

children.[9] Zambia has imported the best interests of the child principle into its Affiliation and Maintenance Provisions Act.[10] Deserting, neglecting and failing to provide for children is penalized in the Penal Code.[11] Recognition of the importance of children's rights and interests, however, has not been linked to the issue of procreation in many countries where the culture encourages large families.

A brief review of the case of Zambia serves to illustrate the difficulty of implementing the best interests of the child principle in the prevailing environment. Unlike the situation in many Western countries where the decline in childbirth and an ageing population is creating a renewed interest in the introduction of incentives to procreate,[12] Zambia suffers from the opposite phenomenon. According to UNICEF statistics, Zambia had a population of over twelve million by 2008, three times the population size at the time of independence, just forty-four years earlier. Over 6,600,000 Zambians were below the age of eighteen. Although the fertility rate had dropped to 5.8% compared to 7.4% in 1970, and the population growth rate was down to 2.3% as compared to 3.2% over the period 1970-1990, the young age of the population guaranteed an inbuilt momentum for continued rapid growth. The forecast is that the population will double in twenty-nine years.[13]

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9 AfriMAP, The Open Soc'y Initiative for S. Africa & The Inst. for Dem. Governance, Ghana: Justice Sector and the Rule of Law (A Discussion Paper) 5 (2007), *available at* http://afrimap.org/english/images/report/AfriMAP_Ghana%20JusticeDD.pdf.

10 Affiliation and Maintenance Provisions Act of 1995, Cap. 64, 5 Laws of Rep. of Zambia (rev. ed. 1995) §§ 11(2)(a), 15(2).

11 Penal Code Act of 1931, Cap. 87, 7 Laws of Rep. of Zambia (rev. ed. 1995) § 211 ("It is the duty of every person who, as head of a family, has charge of a child under the age of fourteen years, being a member of his household, to provide for the necessaries of life for such child; and he shall be deemed to have caused any consequences which adversely affect the life or health of the child by reason of any omission to perform that duty whether the child is helpless or not").

12 France has a birth rate of 1.9, which is higher that the European average of 1.5, but it is offering incentives for its citizens to have a third child, *see* Caroline Wyatt, *France Boosts Family Incentives*, BBC News (Sept. 23, 2005), http://news.bbc.co.uk/2/hi/europe/4274200.stm. Portugal is tying tax rates for pensions to the number of children and Russia is offering a bonus to women having a second child after its birth rate dropped to 1.4, *see* Daniel Gross, *Children for Sale*, Slate, http://www.slate.com/id/2142366/ (last visited Sep. 28, 2011).

13 Ministry of Finance and National Planning, National Population Policy (2007) (Zam.).

This growth far outstrips any economic growth that the country can hope to realize within the same period, thus guaranteeing the country's continuing representation among the poorest countries in the world. The ramifications of the high fertility rate are serious. As much as sixty-four percent of the population is living below the international poverty threshold of $1.25 per day. Infant mortality rates due to AIDS, malnutrition and other childhood diseases are high. The HIV prevalence rate in the 15-49 age group is 15.2%.[14] Zambia is one of the many African countries that have caused the African Union to express deep concern at the number of African children under five suffering from persistent malnutrition.[15]

The comparatively high poverty levels in Zambia make the best interests of the child principle difficult to attain as long as population growth is not attuned to the GDP through a suitable population policy. Zambia's Population Policy identifies a number of reasons for the high fertility rate[16]: high levels of infant and child mortality; the perception that having a large number of children will ensure future economic benefits and provide security in old age for the parents; the young age of first-time parents, especially mothers; and the low level of education and generally low socioeconomic status of women. The Policy seeks to promote a small family size of no more than two children, using a human rights approach to reproduction. Given the number and pervasiveness of the factors that militate against reduced family size, urgent measures are required to support the Policy.

As noted above, Western governments do not face the same difficulty. The social pressure to have children is generally less so among non-African societies due to a change in perceptions of procreation. Even the Church, which historically was one of the main proponents of large families, has gradually changed its thinking. Under the influence of Pauline theology, it viewed "reproduction as the principal justification for marriage as an institution that can harness the irrational force of sex to some rational purpose."[17] John Meyendorff explains why childbirth and the raising of children were viewed as a great joy and God's blessing in the Christian marriage.[18] Without children, the marriage was seen as one founded upon a defective, egoistic and fleshly form of love because of the failure to imitate God's creative act and the consequent

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14 *Id.*

15 Rachel Murray, Human Rights in Africa: From OAU to the African Union 177 (2004).

16 Ministry of Finance and National Planning, *supra* note 13.

17 Eileen H. Richardson & Bryan S. Turner, *Bodies as Property: From Slavery to DNA Map*, *in* Body, Lore and Laws 29, 36 (Andrew Bainham et al. eds., 2002).

18 John Meyendorff, Marriage: An Orthodox Perspective 59 (3d rev. ed. 1984).

rejection of the Creator and distortion of one's humanity.[19] According to St. Augustine's teaching, which used to dominate Western thought on marriage, childbirth was the only way in which to justify sex even in the setting of a lawful marriage.[20]

More contemporary thought in the Church is less rigid, recognizing the necessity for family planning and proposing that questions of birth should be left to individual couples because

> for the "life" given by parents to their children . . . to be a fully human life, it cannot involve only physical existence, but also parental care, education and decent living. When they beget children, parents must be ready to fulfill all these responsibilities. There obviously are economic, social or psychological situations where no guarantees can be given in this respect. And there is sometimes even a near certainty that the newly born children will live in hunger and psychological misery. In those situations various forms of family planning, as old as humanity itself, have always been known to men and women . . . .[21]

Western philosophy proclaims that the human right to procreate is based on natural law and human flourishing. Essential to the issue of reproduction is the concept of reproductive autonomy or procreative liberty.[22] Often this is seen as the freedom to have children, but it may also be seen as the freedom not to have children. In other words, "[n]one of us has a moral or legal duty to reproduce, to have a child . . . ."[23] At the same time, "it might be argued that collectively we have a duty to reproduce so as to avoid the extinction of humanity . . . ."[24] How, then, do we determine that we are faced with a situation of irresponsible procreation, and who or what is the source of the decision to procreate for purposes of assigning responsibility for delivering on the best interests of the child that is conceived? The answer will depend on the context in which the child is born.

Clearly, the role of the state may amount to limiting procreation in one era or place and to encouraging it in another. State and society thus have a legitimate interest in matters of procreation and may both invest resources in and impose limitations on how it occurs. The law, morality and religion may

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19 *Id.*

20 *Id.* at 60.

21 *Id.* at 61.

22 Rosamund Scott, Choosing Between Possible Lives: Law and Ethics of Prenatal and Pre-Implantation Genetic Diagnosis 13 (2007).

23 *Id.*

24 *Id.*

all concern themselves with the process of procreation through the concept of "reproductive citizenship."[25] In the United Kingdom, for instance, where population growth has since the 1980s been increasingly dependent on net migration,[26] the "privileged position that is given to heterosexuality is a function of the manner in which public policies seek to normalize reproduction as the desired outcome of marriage. . . ."[27] Reduced procreation due to women's higher education levels and their entry into the labor market, among other factors, has raised concern from both state and religious institutions. The state therefore promotes the desirability of fertility as a foundation for social participation, even as it recognizes that the exercise of the choice to have smaller families or to avoid having children altogether is a more individual matter even for women.

Reproductive citizenship in the African context on the other hand has been much more about the state abdicating its role in issues of procreation. The state thereby cedes its powers to non-state actors that are unaware of or unresponsive to the socioeconomic implications of population growth at both the micro and macro levels. These non-state actors, such as extended family members, religious leaders and social peers, use culture, religion and traditionalism to encourage large families. Their role is thus to justify and legitimate the right to procreate with seemingly little consideration for the children that are born following the exercise of that right.

II. THE RIGHT TO PROCREATE AND BEST INTERESTS OF THE CHILD PRINCIPLE

The right to procreate should be regarded as a right to autonomy that has to be exercised responsibly by taking into account three crucial interests, namely the interests of the life that is being created; the interests of the state; and the interests of the extended family and community. Whilst a utilitarian, religious or moral right to reproduce may be asserted, it must be kept in mind that "satisfying the urge to reproduce may increase the suffering caused by overpopulation, contribute to the failure to meet the needs of existing children . . . and bring to existence children who are more likely than average to lead miserable lives."[28] Exercising a legal right to reproduce can be morally

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25 Richardson & Turner, *supra* note 17.

26 *Id.*

27 *Id.*

28 Laura M. Purdy, *Loving Future People*, *in* REPRODUCTION, ETHICS AND THE LAW: FEMINIST PERSPECTIVES 302 (Joan C. Callahan ed., 1995).

wrong because of the failure to provide every child so created "with at least a normal opportunity for a good life."[29] And "since we do not harm possible people if we prevent them from existing, we ought to try to prevent the birth of those with a significant risk of living worse than normal lives . . . ."[30] Since the potential child does not exist prior to conception, it has no capacity to and therefore does not choose to be given life regardless of how that life will turn out. Assuming that if the child could choose it would, like most normal human beings, prefer to enjoy, in due course, an adequate standard of living or better, then the best interests of the child principle can only be achieved by giving it the preferred life. I am fortified in this view by child rights theory generally and the best interests of the child principle in particular.

In his substantial work, Michael Freeman questions whether the desire to found a family can be constrained by the fate of the children who will constitute that family, so that recognition is given to an irreducible minimum content to a child's wellbeing that must be met by a parent. By having the child regardless of its fate, has the parent committed a wrong against the child and does the child's right not to be born outweigh the parent's entitlement to have a child? [31] Freeman concludes that the question of whether or not to have a child should be determined by the exercise of parental responsibility. In his view (and I subscribe to it fully) a child has a right to responsible parenting: "It is not an exercise of parental responsibility to bring a child into the world when that child will be cruelly deprived of all or most of the basic goods of human flourishing."[32] Thus the child's right not to be born is supported by the more tangible corresponding duty of a parent not to procreate.[33]

Once children have been given life which does not meet the minimum expectations of an acceptable life on earth, it is reasonable to assume that the deprivation they suffer will result in their suffering some injury. So in a sense some harm has been perpetrated and is suffered by the children at the hands of the very entities nature mandated to procreate and protect them. Parents harm their potential children by focusing on fulfilling their own right to procreate without taking into account the corresponding responsibility to protect the best interests of the potential child. In other words, by claiming a right the parent may not only act irresponsibly, but violate the rights of his or her child.

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29 *Id.* at 313.

30 *Id.* at 313-17.

31 Michael Freeman, The Moral Status of Children: Essays on the Rights of the Child 165-84 (1997).

32 *Id.* at 183.

33 *Id.* at 184.

The state and society have a legitimate interest in effectively limiting the autonomy to procreate. Clearly this interest stems from the fact that the state provides many social services that are shared by society as a whole and that are funded by taxes raised mostly from the more affluent members of society. Members of society have a legitimate interest in ensuring that resources are not spread so thin that the state is unable to deliver on basic social services. They also have a legitimate interest in ensuring that the enjoyment of their own lives is not eroded by the presence of real suffering on the part of others around them, particularly children. For some members of society this is a burden that is not confined only to feelings of discomfort or empathy. They have an actual responsibility to ease the suffering of both adults and children around them because they are subject to customary laws prescribing that members of the extended family provide care to other kin, particularly to children of other kin who are less privileged. Thus a comparably better off adult has a reciprocal duty to his/her relatives, which ranges, for instance, from occasional financial gifts to regularly paying school fees, and quite often to providing permanent shelter and regular maintenance.

Not all those regulated by these customary principles wish to be so bound, but being bound does give them a stake in the decision to procreate, which they ought to use more wisely in their own interests or in the interests of the children involved. Consequently I believe it is incumbent upon the extended family, and upon the state and society generally, to ensure that potential parents recognize the best interests of the child before conception by promoting the use of contraceptives during sexual intercourse unless a considered decision has been taken to conceive a child.

According to international instruments protecting the interests of children, the responsibility to provide children with an adequate standard of living rests primarily on the parent, with the state taking on a secondary or supporting role. Because the right to maintenance and an adequate standard of living is necessary to sustain life, I see it as a component of survival rights which are the basis of other rights.[34]

For ease of discussion I have chosen to encapsulate all these rights in the right to maintenance, thereby minimizing the need to elaborate on the content of the various rights. I rely on the fact that there is little controversy about the existing child's rights. It is generally accepted that maintenance is a duty owed by every parent to their child. Very few people can argue against the claim that this "original obligation" is recognized in all societies as an obligation to

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34 Lawrence J. Le Blanc, The Convention on the Rights of the Child: United Nations Law Making on Human Rights 65 (1984).

provide maintenance, protection and education to a child.[35] It is the failure by a parent to provide maintenance in the face of severe poverty that led Ellen Key (one of the earliest advocates of children's rights) to postulate the right of a child to choose its own parents, a concept which I feel supports a right not to be born or a claim of wrongful life.[36] According to Key, a child's first right is the right to choose its parents wisely, thus formulating the basis for modern day family planning policies.[37]

Article 3 of the United Nations Convention on the Rights of the Child (CRC[38]) is the primary source of the "best interests of the child" principle. The signing of the CRC by a state creates primary and secondary responsibilities, with immediate responsibility for the child falling upon the parents.[39] The standard for determining when the state is to intervene in order to protect the interests of children is whether the child has access to adequate food, clothing and shelter. By adequate is meant sufficient to prevent substantial impairment of bodily function.[40]

The best interests of the child principle is also found in other instruments closer to home, such as article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC[41]). Among the other pertinent articles of the ACRWC (to my argument) are article 3 on nondiscrimination;[42] article 5 on

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35 Samuel L. Davis & Mortimer D. Schultz, Children's Rights and the Law 7 (1987).

36 Extracted from a synopsis of Ellen Key's work in Philip E. Veerman, The Rights of the Child and the Changing Image of Childhood 75, 78-79 (1992).

37 *Id.* at 77.

38 The United Nations Convention on the Rights of the Child, G.A. Res. 44/25, art. 3 (Nov. 20, 1989) ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration").

39 Hans van Crombrugge, *The Upbringing Pledge as a Framework for the Parent-Child Relationship*, *in* Shared Pedagogical Responsibility 5, 5-9 (Hans van Crombrugge, Wouter Vandenhole & Jan C.M. Willem eds., 2008).

40 Lawrence D. Houlgate, The Child and the State: A Normative Theory of Juvenile Rights 135 (1980).

41 African Charter on the Rights and Welfare of the Child, Nov. 29, 1999, art. 4(1) [hereinafter ACRWC] ("In all actions concerning the child undertaken by any person or authority, the best interest of the child shall be the primary consideration." This is one of the most widely ratified and domesticated instruments of the African Union.).

42 *Id.* art. 3 ("Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his or her parents' . . . fortune . . . or other status").

the right to life and to survival, protection and development;[43] article 18 on protection of the family;[44] article 19 on parental care and protection;[45] and article 20 on parental responsibilities.[46]

The ACRWC is an offshoot of the African Charter on Human and People's Rights (ACHPR), which places heavy emphasis on the concept of duties.[47] The Preamble to the ACHPR takes into consideration the values of African civilization, thereby setting the tone for the rest of the document and for the other documents that it has spawned. Chapter II of the document is entitled "Duties" and the very first article, article 27, spells out the duties of the individual:

> Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community . . . . The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.[48]

This provision sends a clear message that each individual's right to procreate is subject to the interests of others and there is a duty incumbent on each individual not to procreate irresponsibly.

In Africa, duties are an important aspect of rights and many human rights theorists have discussed the import of this extensively. Kirsten Hastrup, for instance, compares the European concept of law based on the rights of the individual to customary law applied in many Third World countries, which is based on collective duties.[49] She observes that, in the Universal

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43 *Id.* art. 5(2) ("State parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child").

44 *Id.* art. 18(1) ("The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the state for its establishment and development").

45 *Id.* art. 19(1) ("Every child shall be entitled to the enjoyment of parental care and protection").

46 *Id.* art. 20 ("Parents . . . shall have the primary responsibility for the upbringing and development of the child . . . and shall have the duty . . . (b) to secure within their abilities and financial capacities, conditions of living necessary to the child's development").

47 African Charter of Human and People's Rights, Oct. 21, 1986 [hereinafter ACHPR].

48 *Id.* art. 27.

49 Kirsten Hastrup, *Universal Human Rights: Between the Local and the Global*, *in* Human Rights on Common Grounds: The Quest for Universality 75, 76-78 (Kirsten Hastrup ed., 2001).

Declaration of Human Rights (UDHR) under article 29,[50] the private right norm serves to protect the individual from the state even as rights protect the individual's right to be part of the community.[51] Rights are thus a way of delineating a private and personal sphere, yet the integrity and value of that sphere remains dependent on the society. Jessica Almqvist discusses the tension between the right to enjoy one's culture and its depiction as hampering, debilitating and perhaps violating the enjoyment of human rights.[52] She argues that the international human rights agenda on culture must consider the critical importance of the cultural infrastructure that organizes and informs ordinary life issues. Thus the right to enjoy one's culture is seen as primarily motivated by community-oriented interests and concerns so that culture is seen as advancing respect for human rights.[53] My concern in this Article is that African culture tends to favor large families (regardless of the individual's means). Consequently it promotes broad-based rights and responsibilities in the care and maintenance of the vulnerable members of society and blurs individual duties and accountabilities. The child's specific interests are easily obscured in the process.

III. From Political Statement to Legal Proposition

I now return to the thorny problem of how the duty to procreate responsibly can be captured under domestic law. I begin by laying bare a truth that we tend to avoid, namely that what we set out to achieve biologically by preventing pregnancy from occurring during sexual intercourse may be put across crudely as advocating the nonexistence of a person. It is usually done to avoid the conception of an unwanted child and it is something which human beings have been doing since time immemorial. And yet theorizing and articulating it as a legal concept does raise unpalatable notions of invasion of privacy and liberty, discrimination and even genocide.

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50 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/Res/217(III) (Dec. 10, 1948), art. 29 ("(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.").

51 Hastrup, *supra* note 49.

52 Jessica Almqvist, Human Rights, Culture and the Rule of Law 217-18 (2005).

53 *Id.* at 220.

As I struggled with the formulation of an argument supporting the regulation of procreation whilst retaining its altruistic intent of protecting the best interests of the child, I had to resolve the preliminary issue of how to move the argument from a political statement to a legally tenable and popular proposition. Initially I was attracted by an approach that captured the best interests of the potential child from a child's viewpoint. In other words, I was enticed by a focus on prioritizing the potential child's interests over those of the potential parent or other interested parties by giving it "rights" that could be held in abeyance and crystallized after conception and, in due course, birth. Two paths presented themselves: The first lies in the variety of tortious liability claims termed "wrongful birth." The second is found in family law; in the common law doctrine intended to protect the economic interests of an unborn child, such as the right to inherit or to maintenance.

The extension of the wrongful birth torts which enable the child to claim for injuries sustained prior to or during birth due to the negligence of a third party is a very exciting notion. Essentially wrongful birth means claiming that the potential child is injured by the parent's negligence even before it is conceived, and when extended it could mean the interpretation of wrongful life suits to include "disability" occasioned by deprivation of core rights or the basic essentials of life.

In a wrongful life suit the plaintiff is alleging "that he or she is alive and suffering as a result of another's negligence . . . ."[54] However, the idea of an action based on negligence prior to conception is problematic for the courts because of the difficulty of assessing damages by comparing life with injury to nonexistence.[55] One concern in this regard is who is perceived as the source of the injury, an issue which becomes of substantial importance in view of the many parties in the extended African family that may participate in the decision to have the child. Other reasons include the difficulties of defining negligence and injury. Until a child exists and is capable of conscious thought and has the capacity for autonomy, it cannot take an interest in its welfare or in not being born in certain circumstances.[56] Nonexistence at the start of life is no state at all and therefore a nonexistent child cannot experience anything to enable it to determine that the life it may have is so bad that it would have been better not to be born at all.[57]

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54 John Kenyon Mason, The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction 189 (2007).

55 *Id.*

56 Scott, *supra* note 22, at 34-35.

57 *Id.*

The wrongful life claim in the case of a potential child is an assertion that the child would have preferred nonexistence to a life of deprivation. Potentially this necessitates giving a nonexistent child legal rights to a claim of wrongful life in the event that it is conceived and subjected to deprivation whilst in the womb, then subsequently born and subjected to a deprived childhood. As observed, such a position is fraught with a plethora of potentially insurmountable legal complexities. The complexities boil down to the fact that they are based on the potential child's inexistence and consequential lack of legal subjectivity. It would mean sustaining an argument based on not just a legal fiction, but a fiction in all senses of the term. Since the simple fact of the matter is that the child does not exist biologically or by law until it is conceived and in some jurisdictions born, I had to concede that it is legal nonsense to attempt to assign an entitlement to a nonentity that has never been and might never be.

The family law argument is based not on the injury suffered, but on the entitlement to maintenance. Under the common law, a child is a person only when it is born alive and separated from its mother by the cutting of the umbilical cord. The unborn child has no rights and the concept of a potential fetus having any rights is legally untenable. However, in recognition of the fact that the child's entitlements may be jeopardized by intervening events or lost altogether, particularly where they arise before the child has a separate existence from its mother, the law does take into account the fact that a child that is not yet born may be entitled to certain benefits that are claimable if certain conditions are met. This common law doctrine, based on the maxim *foetus in utero habeteur pro jam nato ubi agitur de ejus commodo* (he who is in the womb is considered as already born as far as his benefit is considered),[58] secures the benefits of the unborn child: It secures a benefit that a child would have been entitled to had it been born at the time the benefit arose, provided it is subsequently born alive.[59]

Having explored the content of the two options, I realized the importance of presenting a simple argument in order to secure popular consensus on a legal framework that would promote my objective. To make my argument

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58 A similar concept of a nasciturus fiction is found in Roman Dutch law. According to the nasciturus fiction, a child's rights to inherit and to maintenance may accrue before birth.

59 Chuma Himonga, *Zambia: Family and Succession Law*, *in* International Encyclopaedia for Family and Succession Law 73 (Roger Blanpain ed., Suppl. 2008) (referring to the doctrine under which a child still in the womb at the relevant date and who is subsequently born alive is regarded as born for purposes of securing a particular benefit).

legally tenable, I needed to contend with the general view that the right to maintenance can accrue to a child only in the event that the child exists and thereby enjoys legal subjectivity. The practical objectives that I sought to achieve made it imperative that I pursue a less theoretical and more legally grounded, if somewhat simpler, solution to the problem. Thus I kept in mind the fact that although a legal action cannot be sustained on the part of the potential child, that does not preclude the possibility of the potential child's interests being the basis of a moral principle. Better still, neither does it preclude the framing of the problem from the perspective of a recognized legal subject with clear rights and responsibilities. In other words, I could focus on the duty to procreate to fulfill the best interests of the child: My chosen approach is to firmly ground in the domestic law the duty of responsible procreation.

IV. Parental Responsibility

The most legally tenable option in my attempt to protect well in advance a child's right to an adequate standard of life is to focus on the corresponding duty or responsibility arising from parental power or responsibility.[60] Parental responsibility is aimed at fulfilling the best interests of the child. It is enshrined in an already recognized legal subject, and it gives him or her certain attendant responsibilities. With a legal subject in place, it becomes possible to establish my case for responsibility prior to conception by simply postulating it as the beginning of a continuum extending into the post-conception and post-birth periods.

To the question "how is the right to procreation to be interpreted," my answer is "with a healthy dose of responsibility." The logic of the proposal is simple: Maintenance is consequential to having a child since a child by the nature of its immaturity cannot provide for itself. The availability of such resources cannot be left to providence. In fairness to the child, who is powerless at that stage to choose between whether or not to exist, the availability of such resources must be guaranteed prior to its conception. In order to ensure that maintenance is available at the time when it is needed, the requisite resources must be accumulated in advance or at the very least the means to their accumulation established. The need to make preparation within a formal legal framework that is supportive is all too evident from the precarious nature of the circumstances in which we live; even more so in

60 June Sinclair, *From Parents Rights to Children's Rights*, *in* Children's Rights in a Transitional Society 64 (C.J. Davel ed., 1999).

the African context. African governments have been largely absent from the parenting arena, with the extended family playing a more substantive role. Thus a right in the African context is largely operational at the horizontal rather than the vertical level.[61] And yet there must be a formal framework within which children's best interests can be infused into parenthood. Non-state as well as state actors not only need to be clear as to their duty, but should also be enabled to act on it.

The remedy proposed is to incorporate in the legal framework "responsibility defined as a limitation" in order to avoid the detrimental effects upon the attendant interests of other individuals, communities and the state.[62] The effect would then be to construe rights with due regard to their context.[63] In the scenario I present, a right is subject to internal limitations when it requires a right-holder to assume obligations by virtue of holding a right. Thus, in the case of reproductive rights both the external limits attributable to the rights of other right-holders and state powers, i.e., contractual obligations or public policy considerations, as well as the internal limits acquired by virtue of holding a right would be taken into account.[64] Thus the right to procreate would be limited by both the right of a child to responsible parenting as well the right of the state and society not to be overburdened by an individual's choice to reproduce. It would be subject to the best interests of existing children, of any potential children, and of other legitimately interested parties.

I recognize that a rigid interpretation of this principle could result in discrimination against the poor, and I propose a compromise. The proviso is that everyone regardless of social status has a right to have no more than a limited number of children and, in the case of the very poor, the state and society must step in to meet the maintenance responsibility for the said children in order to ensure that no child suffers deprivation of the most essential needs.

I am fortified in my approach by the work of Glenn Cohen. Cohen attempts to avoid what he terms "the non-identity problem" by focusing on harm done by procreation to third parties who already exist.[65] Creating new life is a cost we all bear whether we are as closely related as the siblings of

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61 The more common conceptualization of human rights is that they are claimable from the state. In the African context, where the government is somewhat removed from the majority of the population who live their lives in the informal sector, rights are claimable between private entities and individuals — hence the term "horizontal."

62 Leon Trakman & Sean Gatien, Rights and Responsibilities 4 (1999).

63 *Id.*

64 *Id.* at 151-52.

65 Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 Hastings L.J. 347, 363-64 (2008).

the potential child or as distantly placed as aid donors halfway across the world. Cohen argues that although we value reproductive autonomy despite the cost it imposes on others, its regulation in instances such as intentional diminishment of the quality of life of the child is not necessarily a violation of the freedom to procreate.[66] Although in his case Cohen was referring to intentional diminishment in the sense of disability, the principle is easily applicable to my situation. The basis of such regulation in fact already exists in many laws that protect children's rights to maintenance.[67]

Conclusion

This Article provides a rationalization for supporting a population policy that favors limiting the number of children one procreates. It proposes exercising responsible choice and self-regulation. It explains why this proposal, which at first sight may appear to be a violation of the rights to liberty and privacy, is in fact an actualization of human rights principles in context, specifically the African context. The human rights approach is retained, but with the emphasis on duty that is reflected in the African Charter within the tradition of a sustained criticism, emanating out of Africa, of liberal rights.

Into the analysis, this Article has woven the impact of African cultural values, illustrating how the same values that presently promote irresponsible procreation can be harnessed otherwise. Thus it demonstrates the way in which rights competing against each other are limited of necessity by the context in which they can be reasonably realized and enjoyed. Thus what may appear to be in contradiction to the realization of reproductive autonomy or procreative liberty is, in fact, in my view the best way in which to deliver this particular right. The Article recommends instituting a legal framework that ensures that the right to procreate cannot and should not be allowed to supersede

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66 *Id.*

67 *See, e.g.*, Penal Code Act of 1931, Cap. 87, 7 Laws of rep. of Zambia (ed. rev. 1995) § 168 ("Any person who, being the parent or guardian or other person having lawful care or charge of a child under the age of sixteen years, and being able to maintain such child, willfully and without lawful or reasonable cause deserts the child and leaves it without means of support, is guilty of a misdemeanor"); *see also id.* § 169 ("Any person who, being the parent or guardian or other person having lawful care or charge of any child of tender years and unable to provide for itself, refuses or neglects to provide (being able to do so) sufficient food, clothes, bedding and other necessaries for such child, so as to thereby injure the health of such child, is guilty of a misdemeanor").

the child's need not to be conceived and born unless it can be guaranteed a reasonable quality of life.

I believe that cultural elements that advocate large families should be subjugated to universal principles recognizing survival rights. The emphasis on the application of African values to concepts of human rights need not detract from, but rather render responsible procreation necessary in order to protect the interests of the child, the extended family and the community who must share in the duty to maintain a child. Treating a child as a subject rather than an object of procreation is therefore consequential to the application of African values in the interpretation of rights. In other words, they are two sides of the same coin. Instead of using African values to promote large families, I believe the same values can be used to promote smaller families if they are interpreted from the point of view of the best interests of the child.