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# The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal

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Today the assertion that polygamy is a human rights issue admits of no demur. Polygamy and other cultural practices are as legitimately subject to criticism within the context and setting of human rights as is any other structural aspect of society. There is a movement that is rapidly gaining momentum to contest the legality and legitimacy of polygamy in a human rights context. In several parts of Africa, polygamy is not only a marriage of choice but a value system that inspires and shapes family relations. As a value system, it has been in constant tension with and is resilient to imported marital ideology of monogamy. However with the discourse of rights, in particular women's rights, inexorably coming to the fore, the practice of polygamy stands seriously challenged and its future is in grave doubt.

**Key words:** Polygamy, human rights, Africa, international law, culture.

## INTRODUCTION

The term polygamy is derived from the Late Greek word *polugamos*, which literally means 'often marrying'. In popular speech, the term 'polygamy' refers to the simultaneous union of a husband to multiple spouses or a practice or custom of having more than one wife at the same time (Oxford Advanced Learners' Dictionary, 2011: 1123). This meaning is technically incorrect. In its correct and wide sense, polygamy refers to a marriage, which includes more than one partner (Koktevdgaard, 2008: 2). Generally, it exists in two forms: polygyny and polyandry. Polygyny is when a man is married to more than one wife, whereas polyandry refers to an arrangement where a woman is married to more than one husbands. Several commentators in the area use the term polygamy in this technical sense, referring to an arrangement wherein a man is married to one or more women at a time. This article adopts this meaning too. Perhaps one of the practical reasons why polygamy came to refer to polygyny is the fact that polygyny is prevalent whereas polyandry only exists notionally (Chapman, 2001: 11). According to Cook (2007) polyandry is an 'ethnological curiosity.' In his research, Murdock (1949) found it to

exist in only 2 societies: the Marquesans of Polynesia and the Todas of India. The rationale advanced for the practice of polyandry is that it is resorted to when the population of man outnumbers that of women in a given society. The argument that has been used to counter this assertion is that today in China, there is a shortage of women on ground of one-child policy and female infanticide, but polyandry is not practiced (Cook, 2007: 236). A more comprehensive definition of polygamy is articulated by the Law Reform Commission of Canada. In its 1985 report on bigamy, it authoritatively defined polygamy as follows:

*. . . polygamy consists in the maintaining of conjugal relations by more than two persons. When the result of such relations is to form a single matrimonial or family entity with the spouses, this is regarded as polygamous marriage (Law Reform Commission of Canada, 1985: 13).*

Polygamy is not a new phenomenon. Several prominent men in the Old Testament were polygamists. Abraham,

Jacob, David, King Solomon, and others all had multiple wives. Biblical learning has it that King Solomon, credited as the wisest ever had 700 hundred wives and 300 hundred concubines! (1 Kings 11: 1-3). The Qur'an encourages polygamy for 'a restorative function' for the protection of orphans and widows in a post-war context when a substantial number of male populations has exterminated or wiped out during warfare (Yusuf, 1983). In this connection, Sura 4, verse 3 of the Qu'ran reads:

*And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three, or four...*

Previous kings in Africa are not unknown to have had large numbers of wives as mark of their exalted positions (Welch and Glick, 1981: 110). Like King Solomon, King Sobhuza II of the Swazi was a generously endowed man. Although, accounts widely differ, it is estimated that he had married anything above 60 wives (Hansungule, 2003: 9) He left scores of children some accounts put at 600 at his death (Hansungule, 2003). Legendary King Shaka of the Zulu in South Africa is believed to have been keeping over hundred concubines and wives (Hansungule, 2003: 10). From the early years, polygamy existed throughout Africa as an integral feature of family life, with culture or religion or both as its basis. Less than two decades ago it was estimated that some 35% of all men in traditional cultures in Africa practiced polygamy (Dorjahn, 1959: 13). Polygamy continues to be the "most distinctive feature of African marriage" (Garenne and van de Walle, 1989: 267). Welch and Glick's account of polygamy in contemporary Africa cites the prevalence of polygamy to be some 20 to 30 polygamists per 100 married men (Welch and Glick, 1981: 110). In fact, it is said that sub-Saharan Africa is the only region in the world where polygamy remains prevalent (Bledsoe and Pison, 1994). Even though polygamy has been traditionally widespread as an ideal, commentators observe that this practice has been on marked decline in recent years (Welch and Glick, 1981: 110). Seeing that its extent has depended on the status and wealth of the husband, perhaps its decline is attributable to the joining of the formal sector of the economy by women in recent years.

### **Objective of the paper**

The objective of this paper is to indicate to the reader that the equivocation of the protocol of African women on the question of the abolition of polygamy has left the fundamental rights of African women unguarded. The article foregrounds the discussion with a truncated socio-legal analysis of the human rights implications of the practice of polygamy on the women folk. Ultimately, this is the overall objective; the paper is intended to play both an informative and advocacy roles for the eventual proscription of polygamy in Africa and beyond.

### **METHODOLOGY**

The paper solely relies on desk-top research, in particular on scholarly works, reports of advocacy groups, judgments of courts and tribunals (both international and municipal) and the author's personal observations. The paper adopts both narrative and analytical approaches. On the narrative aspect, the paper addresses the historical background of the matter under study. On the analytical part, the article engages on an in-depth analysis of the human rights implications of polygamy.

### **RATIONALIZING POLYGAMY**

According to Hansungule (2003: 10), within the context of royalty in ancient times polygamy in Africa helped consolidate families and through them the nation. As the legendary Hansungule teaches, to address the threat of possible conflicts, the King would try to marry from as many families as possible. No doubt, this argument is outmoded. Today there are different means of avoiding or addressing social conflicts at large in contemporary society. But like most customs, polygamy has persisted. In Chavunduka's view, the following account for the continued subsistence of polygamous relationships in Southern Africa (Chavunduka, 1979: 19). Firstly, she points out that it is widely believed that polygamy ensures the stability and continuity of the family and clan. Secondly, she points out that it is believed that polygamy provides economic and social security for women, especially in societies where levirate arrangements are practiced, even to the less wealthy members of society. Thirdly, the learned author states that wives marrying in a polygamous set-up are thought to compete with each other to be economically productive in order to gain the husband's favour. Fourthly, the writer says polygamy is considered to be the most efficient means of producing a large family in a given time period. In Africa, a large family is an economic asset. Wives and children provide the chief labour force and the latter provides social security for the aged (Chavunduka, 1979: 18). Finally, Chavunduka opines that the largeness of clans has associated economic advantage and is also a source of power and prestige in African societies. Therefore, the numerous children produced from a polygamous union can assist in building and strengthening a power base (Chavunduka, 1979: 19).

With the advent of colonialism and Christendom, many African traditional practices such as polygamy were outlawed in some societies as they were considered to be barbaric or uncivilised. As such, practices like bigamy, which is a form of polygamy were criminalised to deter indigenous people in colonial outposts from contracting plural marriages (Ndwapi, 1998: 26). In other societies plural marriages were merely through the Scripture and those who contracted such marriages were ostracized by settler administrations (Vuka, 1992: 47). Notwithstanding the numerous attempts at throttling the continued existence of polygamy, it remains permissible under customary laws of various societies in Africa. With the notion of human rights assiduously gaining credence in societies, polygamy has come under attack as it is seen a violation of rights of the women folk. However another school of thought, perhaps equally drawing support from human rights is that when women contract polygamous marriages, they do so in exercise of their right to free choice, that is choosing for themselves the form of marriage to enter, whether it being monogamous or polygamous. Connected to this argument is the contention that some women consider that marriage enhances their dignity (Nhlapo, 2008: 116). In this regard, the nature of the marriage (whether polygamous or monogamous) counts for nothing. It is said that so comfortable are some women with polygamy that 'when a husband goes for too long without marrying a second wife the first wife goes out and finds another wife for him' (Fall, 1998: 32).

This article associates itself with the view that polygamy, or polygyny to be more precise, despoils women of their fundamental

rights guaranteed under international law and Bills of Rights of municipal laws (where they exist). In the scheme of African human rights law, polygamy is dealt with under article 6(c) of the Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa (henceforth Maputo Protocol or Women's Protocol). This paper interrogates the rendering of the provisions of this article, in particular whether it is in line with the spirit of human rights law. It identifies its weaknesses and proffers recommendations.

## THE GENESIS OF MAPUTO PROTOCOL

The African Charter on Human and Peoples' Rights (African Charter) (reprinted in Heyns and Killander, 2007: 29) was adopted to guarantee rights of all sexes men and women alike. The Maputo Protocol was adopted to supplement the African Charter in the protection of women's rights. The genesis of the idea to come up with the Maputo Protocol can be traced to a meeting organized by Women in Law and Development in Africa (WiLDAF) in March, 1995, in Lomé Togo, which called for the development of a specific protocol to the African Charter on Human and Peoples' Rights on the rights of women. The assembly of the Organisation of African Union mandated the African Commission on Human and Peoples' Rights (ACHPR) to come up with such a Protocol at its 31st Ordinary Session in winter of 1995, in Addis Ababa, Ethiopia. The Protocol was officially adopted by the section summit of the African Union, on July 11, 2003 almost 10 years after protracted negotiations amongst stakeholders (Banderin, 2005: 118; Nsibirwa, 2001: 40).

Whilst this Protocol has been vaunted as a watermark breakthrough for African women, some of the provisions of this Protocol are at best equivocal and contradictory and at worst confusing. As indicated above, this paper will not focus on all provisions of the Protocol but will rather be based solely on article 6(c) of the Protocol, analyzing its content, interpretation and challenges for implementation.

## ARTICLE 6(C) OF THE PROTOCOL

Before delving into analyzing this provision, it is important to reproduce it here for completeness. It states that:

*States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that ... monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.*

This provision represents a compromise born out of highly contested and diametrically opposed viewpoints:

on one hand being those who support polygamy and on the other being those who denounce it. Perhaps, this accounts for its lack of clarity as to whether the Protocol rejects or condones the practice of polygamy. On the face of it, article 6(c) seeks to ensure equality between men and women. This is indubitably a positive development that is long overdue and highly welcome, particularly in Africa where for ages women's rights were subordinated to men's interests. It must be pointed out that cultural practice such as levirate, sororate marriages and polygamy account to a considerable measure of gender inequalities, stereotypes and prejudices. However, Article 6(c) has several problems, not least its violation of the Protocol's mission or 'object and purposes', which is to eradicate gender based discrimination and promote equality between sexes (Banda, 2005: 117). This provision is also in stark contrast to article 8(f) sitting in the same Protocol, which enjoins states to 'reform existing discriminatory laws and practices in order to promote and protect the rights of women.' It is therefore surprising that instead of enjoining states to legislate against polygamy in a clear and unequivocal language, the Protocol only states that 'monogamy is encouraged as the preferred form of marriage.' It is submitted that polygamy militates against gender equality (which the Protocol seeks to guarantee) and must be prohibited in the strongest anatomy of words. Article 6(c) is anti-thetical to the postulates of the entire normative scheme of the African Women's Protocol, especially its equality and non-discrimination tenets (Amollo, 2006: 51). Some commentators have argued that polygamy is not a human rights issue but rather a social issue (Eze, 1984: 49). Given the deleterious consequences of polygamy on women folk, as shall be shown below, it is more imperative that polygamy should be addressed through a rights-based approach to arrest it. Further, the mere fact that a practice has a heavy overlay of a social character cannot by itself remove it from the domain of human rights, particularly when such practice has ramifications that undermine human rights.

## Challenges in implementing section 6(c)

It is clear that the African Union (AU) could not have accepted a document that abolishes polygamy, given that Africa is home to large populations that belong to cultures and religions that permit polygamy and further that in many parts of Africa polygamy is embraced by customary law. It is further submitted that customary law and religion shall continue to be major impediments in the implementation of article 6(c) of the Protocol since customary law and religion continue to be central to the lives of African people. Extensive lobbying will be required from interest groups to sensitize the populace of Africa to cause them to shift from polygamy to embracing monogamy. In addition, there is no political will on the

part of African leaders to commit themselves to the elimination of polygamy. This is explained partly by the fact that some AU heads of state are themselves polygamous or they encourage it. For instance the 'African certified polygamist' King Mswati III is married to thirteen wives, South African President Jacob Zuma is married to three, Yaya Boni of Benin (who is also AU Chairperson) is married to two, Mwai Kibaki of Kenya to two, to mention but a few examples. In the Sudan, the President of that country, Omar Hassan al-Bashir has encouraged polygamy to increase the population of that country. In 2002, the then Liberian President Charles Taylor sparked an outcry among human rights movements when he declared that one of the duties of his then wife Jewel Howard was to look for co-wives to woo them to their marriage. Mr Taylor's conviction was or is that as a traditionalist, he was entitled to marry up to four wives at a time (Revesai, 2011: 10). Implicit in the above is a message that polygamy is intrinsically African and that anything short of it is either alien to Africa or not fully African. In the light of the foregoing, it is well-nigh impossible to conceive how any African head of state could openly rubbish polygamy in AU summits without coming in direct confrontation with his pro-polygamy colleagues who are either polygamists themselves or are just in support of it.

## **POLYGAMY UNDER INTERNATIONAL HUMAN RIGHTS LAW**

The practice of polygamy undermines the self-worth of women. It defies all the basic tenets that the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) stands for. Although human rights instruments do not expressly prohibit polygamy, the CEDAW Committee has urged states to take legislative measures to enforce the prohibition of polygamy within their territories (General Recommendation 24). Sifting through the Concluding Comments of the committee, it becomes clear that a series of practices like polygamy and widowhood rites have been considered to constitute a violation of Article 12 of CEDAW, which guarantees the right to health in that they increase chances of spreading HIV and other venereal diseases (General Recommendation 24). Cook (2007) shares this view too.

In its general recommendation no. 24 on Women and Health, CEDAW noted that:

*... [a]dolescent girls and women in many countries lack adequate access to information and services necessary to ensure sexual health. As a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as ...polygamy... may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases (General Recommendation 24).*

Thus, the UN General Assembly's (2001) declaration of commitment on HIV/AIDS included a goal to ensure by 2005 the:

*implementation of national strategies for women's empowerment, the promotion of women's full enjoyment of all human rights and reduction of their vulnerability to HIV/AIDS through the elimination of all forms of discrimination, as well as all forms of violence against women and girls, including harmful traditional and customary practices [such as polygamy]....(UN Declaration of Commitment on HIV/AIDS, 2001).*

Usually, wives have no legal power or capacity to prevent their husbands from taking a second wife. This is particularly disconcerting given the upsurge of the rate of HIV-AIDS infection amongst African nations. Despite these palpable potential hazards, polygamy continues to be legally permitted in various parts of Africa. Women's ability to control their sexual exposure, especially within marriage, is fundamental to limiting the ongoing spread of HIV-AIDS and other infections. This is undermined where polygamy continues to be legally or *de facto* permitted. According to Sibanda (2000):

*"Understanding the ways in which the African milieu, with its polygamy, extended households, and fosterage, creates a complex web of risk determinants vital to successfully understanding the complexities of the HIV epidemic and to designing culturally sensitive solutions."*

Some observers such as Reniers and Watkins (2010) have mysteriously argued that there is no link between polygamy and the high incidence of HIV. This position overlooks the fact that before anything else, polygamy entails multilateral sexual liaisons. Therefore, the greater the number of sexual partners one has, the greater the chance of one contracting or spreading HIV, hence the clarion call by governments and HIV/AIDS advocacy groups to sexually active persons to stick to a single partner to curb the spread of HIV. It just beats the mind as to how concurrent partnerships could be said to spread HIV and at the same time polygamy, which is a form of concurrent partnership, is said to be insulated from HIV.

In addition, polygamy objectifies woman. It reduces them to a subservient status *vis-à-vis* their male counterparts and perpetually exhibits them as members of an inferior order. In the watershed Botswana case of *Dow v Attorney General* (1991: 245) the High Court of that country (per Martin Horwitz Ag J), after analyzing pertinent international human rights instruments relevantly asserted that:

*I do not think that I would be losing sight of my functions or exceeding them sitting as a judge in the High Court, if I say that the time that women were treated as chattels or were there to obey the whims and wishes of males is*

*long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the grounds of sex..*

CEDAW noted in its general recommendation no. 21 on Equality in Marriage and Family Relations that:

Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitution guarantee equal rights permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention (General Recommendation 21, para 41).

In line with the above sentiments, the Allahabad High Court (India) has observed in *Itwari v Asghari* (1960: para15) that:

*the importing of a second wife into the household ordinarily means a stinging insult to the first...[who is]... automatically degraded by society. All this is likely to prey upon her mind and health if she is compelled to live with her husband under the altered circumstances.*

While the general recommendations of CEDAW do not constitute binding law, they are considered influential and persuasive interpretations (Benedek et al., 2002: 13). In addition, the UN Commission on the Status of Women, which first met in 1947, agreed to work for: freedom of choice, dignity of the wife, monogamy, and equal rights to dissolution of marriage (Harris and Teitelbaum, 2000: 273). The preamble of the Women's Convention expresses a deep-seated conviction that: a change in the traditional role of men as well as the role of women in society and in the family is imperative to realize full equality between sexes.

In its concluding observations on Kenya in 2002, the Human Rights Committee (HRC) observed that the persistence of polygamy is 'an affront to the dignity of the human person and discriminatory under the Covenant' (KenyaUN HRCOR, UN Doc. CCPR/CO/75/YEM, 2002 para. 9). In its general comment no. 28 on the Equality of Rights between Men and Women, the HRC noted that because 'polygamy violates the dignity of women' and is 'an inadmissible discrimination against women... it should be definitely abolished wherever it continues to exist' (General Comment No. 28, 2000 para 24). Further, polygamy can be used as a tool by man to whip woman into toeing their line by threatening their wives that they will marry another wife. In this context polygamy can be used to control and limit women's ability to assert their rights within marriage (Ross, 2002: 24). To this end, it is clear that polygamy constitutes a veritable assault on the intrinsic self-worth of women.

There is a growing preponderance of views to the effect that polygamy violates women's right to be free from all forms of discrimination (Cook and Kelly, 2006: 11). It is contended that where polygamy is permitted, it always operates as a bar precluding women from operating as full citizens and enjoying their civil and political rights (Howland, 1997: 273). It trivializes women as chattels to their male counterparts and condemns them perpetually to second-citizen status. Within the cultural setup where polygamy is practiced, women are socialized into subservient roles that inhibit their full and meaningful participation in family and public life (Cook and Kelly, 2006: 8). Whereas Africans must cherish their Africanness, by protecting their cultural heritage, issues of culture must be handled in the light of human rights standards. Cultural practices that are repugnant to human rights notions must not find room in modern era (Tibatemwa-Ekirikubinza, 2008: 23). Whereas it is important to retain traditional practices and customs for cultural identity purposes, only those customs based on recognition of human dignity and which enhance human welfare, regardless of sex must be encouraged. As Fanon said, culture is not a relic imported from the past and imposed on the present, but that which captures the living aspirations of the people and helps them confront the challenges they face (Fanon, 2004: 211).

Polygamy also constitutes a veritable assault to the women's right to equality. The right to gender equality has been integral to the evolution of post 1945 era international human rights law (Fanon, 2004: 211). Initially, international human rights law instruments cast gender equality in the negative by declaring sex a prohibited ground of discrimination. The 1948 Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) all adopted this approach of deeming sex as a ground for non-discrimination. Within this non-discrimination framework, there are variations that may import positive obligations on States parties (Dorjahn, 1959: 111). Article 23(4) of the ICCPR, for example, requires States parties to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution." The term "ensure" is typically interpreted within the treaty context as imposing a positive duty on States parties to achieve the stated goal. In its General Recommendation no. 25 on temporary special measures, CEDAW noted that the Women's Convention aims to 'eliminate all forms of discrimination against women with a view to achieving women's *de jure* and *de facto* equality with men in the enjoyment of their human rights and fundamental freedoms (CEDAW Committee General Recommendation 25, 2004, para 1).

Article 16 of CEDAW on equality within marriage and family relations enjoins States parties to 'take all appropriate measures to eliminate discrimination against

women in all matters relating to marriage and family relations' in order to ensure 'a basis of equality of men and women.' In doing so, CEDAW not only articulates a commitment to women's rights within the family, but also expresses a transformative sense of equality by outlining the reciprocal marital responsibilities men and women should share (General Recommendation 25). The lapidary language of the Declaration on the Elimination of Discrimination against Women (proclaimed at the General Assembly, 1967) is noteworthy. It states:

'Discrimination against women, denying or limiting as it does their equality of rights with men is fundamentally unjust and constitutes an offence against human dignity.'

There is need to move beyond debates carried out in abstract and get empirical evidence of what stake (if any) society has in maintaining polygamy. This will require us to focus on the real harms caused to women, children and men in polygamous families.

It is a truism that Africa is a poor continent. This means that its people are poor. Marrying an extra wife may put strain on resources that at times are already woefully inadequate for the man and his existing wife or wives.

This was also the view of the CEDAW Committee in the concluding observations with respect to Egypt ([www.bayefsky.com/html/egyptcedaw](http://www.bayefsky.com/html/egyptcedaw)).

## THE FREE CHOICE AND CONSENT ARGUMENT

Before concluding, it appears apposite to address the argument that women exercise their free will and consent to enter polygamous marriages and therefore that no human rights violations arise where there has been consent on their part. This argument is specious; its outward look is very attractive yet it is fundamentally flawed. The first point to be noted here is that social decisions, like the decision to get married, are not made *in vacuo*. It is more often than not made within the context of the value system obtaining in that particular society. If that society, as is the case with several African societies not only accepts but encourages polygamy, this potent societal force will bear upon women to succumb to its pressures and accept polygamy as 'preferable' marriage type. To be gleaned from this argument is the point that what is mistook as women's choice is in fact societal choice unconsciously imposed upon the women folk and portrayed as their choice. Societal forces and dynamics are too overwhelming for a woman's anti-polygamy conviction to withstand them. Consequently a woman's so called consent to a polygamous union is clearly illusory and amounts to no consent at all.

In Africa, there is also a phenomenon of arranged marriages, where parents take it upon themselves to decide who their daughter gets married to and what kind of a marriage she enters. In such a scenario, the daughter's consent is not sought and her views count for nothing. Can she be taken to have consented to

polygamy by reason of acquiescence? Clearly not, she is enslaved by custom and her marriage destiny lies but not in her own hands.

How about a first wife who consents to her husband taking a plural wife? Equally social dictates impress themselves upon her that she has no right to prevent her husband additional wives. Such a first wife is placed between a rock and a hard place, to live with the insult to her dignity arising by reason of her husband marrying another wife or walking out of the marriage institution and attract some divorcee-stigma that she is a failed woman who could sustain marriage. This stigma stems from the fact that under customary law of various African countries, women are not allowed to divorce their husbands. If a woman divorces, such an incident attracts negative implications not only on her but on her family as well, for in Africa marriage involves families of partners as it involves partners themselves. Her family is seen as having failed to groom a girl or woman of marriageable quality. Therefore to preserve the dignity and good name of her family, a married woman must just persevere in marriage even in the face of insurmountable adversity. To this end, it can be profitably argued that women do not voluntarily give consent to enter plural marriages.

## CONCLUSION AND RECOMMENDATIONS

Polygamy is a fossil of a bygone dispensation that has no place in the new era, the era of human rights. There is no doubt that this practice is antithetical to all notions of women's rights stand. It is therefore beyond argument that article 6(c) of Maputo Protocol needs to be amended to abolish polygamy in an unambiguous, chinkless and clear language. Whereas it is conceded that legislation alone cannot succeed in eliminating a deeply entrenched cultural practice like polygamy in a once-off fashion, its criminalization will be a step in the right direction towards its ultimate elimination.

In its present form, article 6(c) is couched in a vague diction that does not seem to create any legal obligation on the part of states. The protocol must enjoin states parties to criminalize this practice within their jurisdictions. This will constitute a positive stride towards women empowerment and elimination of some of the relics of the past that continue to impede the lofty ideal of the realization of equality between sexes. The elimination of polygamy cannot come cheap. It will require extensive lobbying by the civil society and broad-based engagements with policy makers within African countries'.

Despite the mammoth task of eliminating polygamy, benefits following its elimination make the exercise of its removal worthwhile. This practice subjugates women to men. It also has a deleterious effect on children because when a man has more than one wife, he often has a large number within a short period of time. Conflicts often ensue among the families within a polygamous set-up because several rivalrous wives and children are

competing for meager resources (Struensee and Vanessa, 2004: 10). Although international human rights law does not prohibit the practice of polygamy, its continued existence violates fundamental rights such as rights to dignity, equality, health, and equal protection under the law. It also exacerbates women's already lower socio-economic status by forcing women to share already scarce resources with co-wives and their children.

That polygamy must be ridden off is beyond argumentation. However, this practice is still heavily embedded in the psyche of many Africans as an acceptable practice. To dislodge it in the minds of its practitioners and secure a shift of conviction would require the subjection of its supporters to extensive sensitization coupled women empowerment efforts. As Fanon (2004: 230) explains, 'sometimes people hold a core belief that is very strong. When they are presented with evidence that works against that belief, the new evidence cannot be accepted. It would create a feeling that is extremely uncomfortable, called cognitive dissonance. And because it is so important to protect the core belief, they will rationalize it, ignore and even deny anything that does not fit in with the core belief. Despite defences to be put up by its practitioners, the denials and rationalizations that Fanon talks about, the movement against polygamy must not relent until polygamy falls.

## REFERENCES

- Amollo R (2006). A critical reflection on the African Women's Protocol as a means to combat HIV/AIDS among women in Africa, LL.M thesis submitted at the University of Pretoria [Unpublished].
- Banda F (2005). *Women, Law and Human Rights*. Oxford: Oxford University Press p.117.
- Banderin M (2005) Recent Developments in the African Regional Human Rights system. *Hum. Rights Law Rev.* 118:115-130.
- Benedek W, Benedek W, Kissakye M, Oberleitner G (eds) (2002). *Human Rights of Women: International Instruments and African Experiences*. London: Lockwood p.13.
- Bledsoe C, Pison G (1994). In Nuptiality in sub-Saharan Africa: Contemporary anthropological and demographic perspectives. In: Bledsoe C, Pison G (eds), Oxford, England: Clarendon Press. p. 1-24.
- CEDAW Committee General Recommendation 25 (2004) A/59/38 Part I ;CEDAW/C/2004/I/WP.1/Rev.1
- Chapman S (2001). *Polygamy, Bigamy and Human Rights Law*. Berkeley: University of California Press p.11.
- Chavunduka GL (1979). Polygyny Among Urban Shona and Ndebele Christians. *Nada* 12(1):10-20.
- Cook RJ, Kelly LM (2006). Polygyny and Canada's Obligations under International Human Rights law. Ottawa: Department of Justice of Canada 11:9-15.
- Cook CT (2007). Reviewed Polygyny; Did the Africans Get It Right? *J. Black Stud.* 38(2):232-250.
- Dorjahn VR (1959). The factor of polygyny in African Demography, In Continuity and change in African culture. In Bascom WR, Herskovits MJ (eds) Chacago, University of Chicago Press pp.87-112.
- Eze OC (1984). *Human rights in Africa: Some selected essays*. New York State University, New York Press 146:149-150.
- Fall K (1998). On Polygamy. *The Iowa Review* pp.31-32.
- Fanon F (2004). *The Wretched of the Earth* New. York: Grove Press p.211.
- Garenne M, van de Walle E (1989). Polygyny and fertility among the Sereer of Senegal. *Popul. Stud.* 43:267-283.
- General Comment No. 28: Equality of rights between men and women, 2000/03/29, CCPR/C/21/Rev.1/Add.10
- Hansungule M (2003). *The Status Of Women In Contemporary African Society With Special Reference to ZenaMahlangu (Swaziland) And AminaLawa (Nigeria)*: available at:<http://www.rwi.lu.se/pdf/seminar/hansungule.pdf> [accessed 17 May 2012].
- Harris LJ, Teitelbaum LE (2000). *Family Law: Cases and Materials*. Pretoria: Juta and Co. pp.271-279.
- Heyns C, Killander M (eds) (2007). *Compendium of Key Human Rights Documents of the African Union*.Pretoria: University of Pretoria Press p.29.
- Howland C (1997). The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter. *Columbia J. Transnat. Law* 35(273):270-275.
- Koktevdgaard Z M (2008). *Polygamy: a cross cultural analysis*. New York: New York University Press p.2.
- Murdock G P (1949). *Social Structure*. New York: Macmillan Co. p.3
- Ndwapi K (1998). The future of Polygamy in Southern Africa. *J. Afr. Stud.* 26:24-38.
- Nhlapo T (2008). African Family Law under an undecided constitution: In: Eekelaar J, Nhlapo T (eds), *the Challenge for Law Reform in South Africa* pp.110-123.
- Nsibirwa MS (2001). A Brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women. *Afr. Hum. Rights J.* 1(41):41-43.
- Oxford Advanced Learners' Dictionary (2011). p.1123.
- Reniers G, Watkins S (2010). Polygyny and the spread of HIV in sub-Saharan Africa: a case of benign concurrency. *AIDS J.* (24):299-307.
- Revesai M, [www.news.zimbabwe.com/pages/mary24.17379](http://www.news.zimbabwe.com/pages/mary24.17379) (accessed 15 April 2011).
- Ross SD (2002). Polygyny as a Violation of Women's Right to Equality in Marriage: An Historical, Comparative and International Human Rights Overview. *Delhi Law Rev.* 24:22-34.
- Sibanda A (2000). A nation in pain: why the HIV/AIDS epidemic is out of control in Zimbabwe. *Int. J. Health Serv.* 4:717-38.
- Struensee V, Vanessa MG (2004). *The Contribution of Polygamy to Women's Oppression and Impoverishment: An Argument for its Prohibition*. Available at SSRN: <http://ssrn.com/abstract=563282> or <http://dx.doi.org/10.2139/ssrn.563282> [last accessed 20 February 2012].
- Tibatemwa-Ekirikubinza L (2008). Multiple Partnering, Gender Relations and Violence by Women in Uganda. *East Afr. J. Peace Hum. Rights* 4:15.
- Vuka T (1992). Polygamy in past Africa. *J. Contempor. Afr. Issues* 47:45-57.
- Welch CE, Glick PC (1981). The Incidence of Polygamy in Contemporary Africa: A Research Note. *J. marriage Family* pp. 191-193.
- Yusuf AA (1983). *The Holy Qu'ran: Text, Translation and Commentary*" Sura 4, verse 3, as cited in Mashhour A (2005). *Islamic Law and Gender Equality-Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*. *Hum. Rights Q.* 27:562.
- The Holy Bible (1962). 1 Kings 11:1-3.
- The Qu'ranSura (2009). Sura pp. 4-3.
- Convention on the Elimination of all Forms of Discrimination Against Women CEDAW)CEDAW/C/NPL/CO/4-5/ 1979.
- UN General Assembly's (2001) Declaration of Commitment on HIV/AIDS: <http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html>
- Kenya UN HRCOR, UN Doc. CCPR/CO/75/KEN, 2002
- UN General Assembly, Declaration on the Elimination of Discrimination against Women, 7 November 1967, A/RES/2263.
- Universal Declaration of Human Rights (UDHR, GA Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810, 1948).
- International Covenant on Civil and Political Rights (ICCPR, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368)
- International Covenant on Economic, Social and Cultural Rights (ICESCR, GA Res. 2200 (XXI), 21 UN GAOR Supp. (No. 16); I UN Doc.A/6316).
- CEDAW Committee in the Concluding Observations with respect to Egypt, available at: [www.bayefsky.com/html/egyptcedaw](http://www.bayefsky.com/html/egyptcedaw) accessed 8 June 2012.

Law Reform Commission of Canada, *Bigamy*, Working Paper No. 42  
(Ottawa: Law Reform Commission of Canada, 1985) p. 13.  
Dow v Attorney General (1991) BLR p. 233.

Itwari v Asghari (1960) A.I.R. 684, Allahabad, para 15.