Abstract

The traditional practice of polygyny, whereby only a man is allowed to marry more than one wife in a customary marriage, has long been perceived to be an offender of women's rights. Recent family law reforms on the African continent show that the focus has been on promoting and protecting the rights of women as defined in international human rights law, as well as on respecting the practice of polygyny. These legislative reforms in jurisdictions such as Kenya, Mozambique and South Africa show that the approach to regulating polygyny has been either to legalise, abolish, or regulate the practice. In view of the focus in these reforms on both women's rights and respect for the practice of polygyny, this paper examines the different approaches of the selected countries to regulating the practice. In particular, this paper investigates how these countries are striking a balance between polygyny and the protection of women's rights. It will also highlight the difficulties that law reformers face in regulating the practice in such a way as to protect women's rights, as well as the gaps in the law reforms that need to be addressed.

Keywords

Polygyny, Africa, Kenya, South Africa, Mozambique, abolish, legalise, family law, reforms, polygamy.
1 Introduction

Polygyny is a traditional practice whereby only a man is allowed to marry more than one spouse. This practice has long been perceived to be in conflict with the ideals of gender equality, inherently subordinates women, violates the dignity of women, increases women's risk of contracting HIV/AIDS, is emotionally damaging, and is economically oppressive. In addition, polygyny is perceived to be rooted in violations of gender and women's rights, which are protected in the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), and the International Covenant on Civil and Political Rights (ICCPR). These observations, which are in line with the

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1 Emphasis added. Polygamy means the plurality of spouses. Most literature, however, refer to polygamy as plurality of wives. For that reason the term polygamy in this paper refers to polygyny. See eg similarly Obonye 2012 JASD 142-149; Bennett Customary Law 243; Mwambene 2010 AHRLJ 78-93; Luluaki "Customary Polygamy" 395-418; Howland and Koenen 2014 Social Justice 7; Strauss 2012 Ethics 516-544; Kaganas and Murray 1991 Acta Juridica 119.
6 General Recommendation 21 para 14 where it was reaffirmed that "polygamous marriages contravenes a woman's right to equality with men, and can have serious emotional and financial consequences for her and her dependants ..."; and Howland and Koenen 2014 Social Justice 12.
7 Article 23(4) of the International Covenant on Civil and Political Rights (1966) (ICCPR) provides for equality in relation to marriage. See also art 6 of the Protocol of the African Charter on Human and People's Rights on the Rights of Women in
comments of the international human rights monitoring bodies, lead to a call for the regulation or abolition of polygyny.\(^8\)

Most African State Parties to the international women’s rights instruments have embarked on family law reforms, with implications for polygyny.\(^9\) A review of these reforms shows that countries have focused on promoting and protecting the rights of women as defined in international human rights law,\(^10\) while simultaneously respecting the practice of polygyny.\(^11\) Illustrations mainly from Kenya,\(^12\) Mozambique,\(^13\) and South Africa\(^14\) reveal that polygyny is being legalised, abolished or regulated in those jurisdictions. As the reforms focus on women’s rights while simultaneously respecting the practice of polygyny, this paper examines the different approaches of these countries in regulating the practice. In particular, it examines how these countries are attempting to strike a balance between polygyny and the protection of women’s rights. A further aim is to explore the impact of these approaches on the future of polygyny in Africa.

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\(^11\) See for example, General Recommendation 21 para 21; art 6(c) of the African Women’s Protocol; art 23(4) of the ICCPR.

\(^12\) See eg ss 2(3) (4) and 7(6) of the Recognition of Customary Marriages Act 120 of 1998, that recognises polygyny while at the same time s 6 provides for the equal status and capacity of spouses in a customary marriage. Also see Mamashela and Xaba 2003 http://sds.ukzn.ac.za/files/r59.pdf, who observe, among others, that “the Recognition of Customary Marriages Act recognises polygynous customary marriages concluded before and after the enactment of the Act”.

\(^13\) The Marriage Act 14 of 2014.


The paper is divided into six sections. The second section gives a brief overview of the history of polygyny in Africa. The third section outlines the international and regional human rights position on polygyny. The fourth section will explore the manner in which selected African countries have legally approached the issue of polygyny. The focus will be on key aspects of the law reform, including: the marriageable age, the consent to marriage, the equal status of spouses in a marriage, the registration of a marriage, and protection against discrimination in marriage. The fifth part will be a critical analysis of the different law reforms adopted by the selected countries. The last part concludes the discussion by observing that regardless of whether countries legalise, abolish or regulate polygyny, the essence of polygyny in Africa is not going to change.

2 Brief overview of polygyny in Africa

Prior to the arrival of colonists and Christianity in Africa, polygyny existed as an integral part of family law, which was based mostly on cultural beliefs. Traditionally, polygyny performed valuable social and cultural functions. These included the following, among others: it was a remedy to escape divorce due to infertility, because in African communities a marriage without procreation is incomplete; it was a solution to menopause as there was a cultural belief that some women may no longer engage in sexual activities but men will continue to do so; it was a legal response to address the problem of unmarried women snatching away other women’s husbands due to the imbalance in the ratio of women and men; it was a viable solution during pregnancy and nursing because some African cultures forbid sexual relations between a husband and wife during pregnancy; it was a remedy to negative social associations because being single is associated with evil, and a single woman might even be accused of witchcraft; it was a way of taking care of a widow, as both a widow and her children would be taken

16 Muthengi 1995 AJET 58. Mbiti African Religion and Philosophy 133. In the African context, it is generally observed that a marriage without procreation is incomplete. A woman is always presumed to be at fault for her lack of procreation in a marriage. Baloyi 2010 Verbum et Ecclesia 3.
17 As observed by Nyanseor date unknown http://www.theperspective.org/polygyny.html, the social origins of polygyny were the imbalance between women and men, in that the ratio of women to men was 10:1. This imbalance led the social architects to look at polygyny as a solution to enable more women to marry.
19 Phaswana “Counselling Singles” 1.
care of by the deceased husband’s brother; and more importantly, it was "established to address the economic issues which were centred on subsistence agriculture". These social functions arguably served the interests of men.

In the context of this paper, it is important to point out that these social functions have not ceased with time. As observed by Da Silva, during the debate on the Family Law Statute Act in Mozambique, those who defended polygamy raised similar arguments. In Malawi, similar views were expressed for the rejection of section 17 of the Marriage, Divorce and Family Relations Bill of 2006, that prohibited polygyny in all marriages. In Uganda, Parliament has failed twice to pass the Uganda Marriage and Divorce Bill, 2009 in 2009 and 2013 respectively, due to its provisions relative to polygyny, amongst other reasons. In addition, the Chairperson of the Ugandan Law Reform Commission, Prof Joseph Kakooza, observed during the debate that:

polygamy as a custom will remain, not only in Uganda, but also in all African countries and even beyond. What [goes] as a mistress in Europe [is a wife in Africa]. Once the first marriage is customary, you can marry under customary law even 100 or more, provided the custom allows it.

During the colonial period, when Christianity prevailed, polygyny was one of the reasons why customary marriages were not legally recognised. It was viewed as a form of slavery which had to be abolished. In general, Christian colonials were determined to replace it with monogamy. In their attempt to replace polygamy with monogamy, they gave preferential treatment to monogamous men. For example, Muthengi records that some Christian missionaries refused to accept polygamists and their families into

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26 Mugerwa Daily Monitor 1.
27 Ssenyono 2011 NQHR 376.
29 Obonye 2012 JASD 142-149; Bennett Customary Law 189; Herbst and Du Plessis 2008 EJCL 5.
30 Kang’ara 2012 Comp L Rev 2. Also see Henriques 2013 Studia Historiae Ecclesiasticae.
the church.\textsuperscript{31} In some cases, upon conversion to Christianity polygynous husbands were required to choose one customary wife with whom to contract a Christian marriage and abandon the rest, leading to "the discarded wife syndrome" on the continent.\textsuperscript{32}

This situation, however, did not stop the practice of polygyny. Many African countries continued with the practice and it remained permissible under the customary laws of various societies.\textsuperscript{33} In some places, it led to members forming their own independent churches. For example, Muthengi records that Isaiah Shembe, the founder of the Nazarite Baptist church in South Africa, had four wives; Josiah Oshitelu, the founder of the Aladura (the Church of the Lord) had seven wives; and Johane Marange, the founder of the African Apostolic Church in Zambia and Zimbabwe, had sixteen wives.\textsuperscript{34}

In the modern context, although statistics on polygynous marriages suggests that the frequency of polygynous marriages is decreasing\textsuperscript{35} and the general opinion is that they disadvantage women and must be prohibited, polygyny still exists on the continent.\textsuperscript{36} For example, reports indicate that almost 47\% of marriages in Senegal feature more than one wife.\textsuperscript{37} In Tanzania, Howland and Koenen report that a quarter of its women are involved in polygamous marriage.\textsuperscript{38} In Kenya, Akuku Danger is believed to have been married to more than 100 wives.\textsuperscript{39} Furthermore, polygyny has the support of prominent political figures on the continent. For example, Kenyan President Kibaki has two wives; King Mswati III of Swaziland has 14 wives;\textsuperscript{40} the South African President, Jacob Zuma, is married to more than 3 wives; in Sudan, President Omar Hassan al–Bashir has always maintained that polygyny is a viable option to increase the population;\textsuperscript{41} and

\textsuperscript{31} Muthengi 1995 \textit{AJET} 57. Barrett \textit{Schism and Renewal in Africa} 117.
\textsuperscript{32} Kang'ara 2012 \textit{Comp L Rev} 16.
\textsuperscript{33} Bennett \textit{Customary Law} 187, 192.
\textsuperscript{34} Muthengi 1995 \textit{AJET} 55, 57.
\textsuperscript{35} See, for example, the decline in the statistics in Namibia as reported by Ovis 2005 http://www.lac.org.na/news/ithenews/pdf/polygamy.pdf; and in Malawi by Basendal 2004 \textit{Afr Sociol Rev} 17. In South Africa, Bekker 1991 \textit{Acta Juridica} 4 observed that "the situation in South Africa is comparable. In urban areas polygyny has to all intents and purposes disappeared". Also see Mwambene and Kruuse 2015 \textit{IJLPFL} 252; Mwambene 2015 \textit{Speculum Juris} 76.
\textsuperscript{36} See, for example, Fenske 2012 http://www.csae.ox.ac.uk/workingpapers/pdf/csaewps-2012-20.pdf.
\textsuperscript{37} Anon 2015 https://www.polygamy.com/articles/89746509/polygamy-in-africa; Fenske 2012 http://www.csae.ox.ac.uk/workingpapers/pdf/csaewps-2012-20.pdf has observed that "stretching from Senegal to Tanzania, 40\% of women are in polygamous marriages".
\textsuperscript{38} Howland and Koenen 2014 Social Justice 3-38.
\textsuperscript{39} Anon 2015 https://www.polygamy.com/articles/89746509/polygamy-in-africa. Also see Gaffney-Rhys 2011(b) \textit{Women in Society} 1.
\textsuperscript{40} Ssenyonjo 2011 \textit{NQHR} 376.
\textsuperscript{41} Anon 2015 https://www.polygamy.com/articles/89746509/polygamy-in-africa.
in 2014, President Uhuru Kenyatta signed a law that allows men to marry as many wives as they wish without their existing wife’s/wives’ consent.\textsuperscript{42}

Polygyny in urban African areas appears to take on different forms, such as informal marriages, or second or third marriages without the knowledge of the first wife.\textsuperscript{43} For example, the 2000 Demographic Health Survey conducted in Namibia shows that 16\% of women are in informal relationships.\textsuperscript{44} In Malawi, Basendal’s research found that there is a change in marriage patterns from formal to informal polygyny, which is to the advantage of one woman and simultaneously to the disadvantage of the other.\textsuperscript{45} In Botswana, the study by Griffith found that men prefer informal polygyny in order to escape the obligations of plural marriages.\textsuperscript{46} In the large cities of Tanzania, Howland and Koenen reported that traditional polygyny has been replaced to a large extent by informal polygyny.\textsuperscript{47} In addition, Women and Law in Southern Africa (WLSA) report that migrant workers contract marriages with women in the rural areas and then enter into informal unions with women in the cities.\textsuperscript{48}

The continued existence of polygyny can be attributed to the fact that polygyny, as Kuhn observes, is legally permitted in many African countries, such as Chad, Gabon, Niger, Sudan, Tanzania, and Zambia.\textsuperscript{49} The legal recognition of polygyny on the continent has taken different forms. Some African countries such as Kenya have formally recognised polygynous marriages as valid marriages.\textsuperscript{50} Other countries such as Malawi allow polygyny under the unwritten customary laws.\textsuperscript{51} Gaffney-Rhys has observed that there are also countries such as South Africa that have opted to formalise existing customary laws but impose restrictions on the
In addition, some countries continue to formally prohibit polygyny under civil law, but the practice remains lawful under the customary law of the country. In exceptional cases the practice is allowed, but a man is required to obtain the permission of his current wife if he wishes to take another wife.

3 Polygyny under international human rights law

As widely observed, the international human rights instruments, with the exception of the Hague Convention on the Celebration and Recognition of Marriages and the African Women's Protocol, do not expressly consider polygamy. However, they require States Parties to eradicate practices that may lead to discrimination. As noted, polygyny is a system that only allows men to have multiple wives. Most authors therefore agree that non-discriminatory provisions in these international human rights instruments can be used to address discrimination in the context of polygyny. International human rights instruments further contain provisions aimed at ensuring the equality of spouses before, during and after marriage.

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53 For example, in Malawi, polygamy is prohibited under s 17 of the Marriage Divorce and Family Relations Act 5 of 2015 for civil marriages but is allowed for customary and religious marriages. Also see the Recognition of Customary Marriages Act 120 of 1998 in South Africa, which allows for a monogamous customary marriage to be converted into a civil law marriage, but a polygynous customary marriage cannot be converted into a civil marriage (s 10(4)).

54 See the South African case of Mayelane v Ngwenyama 2013 4 SA 415 (CC).

55 Article 11 of the Hague Convention on the Celebration and Recognition of Marriages (1978) mandates a contracting state to refuse to recognise the validity of a polygynous marriage. This instrument, however, does not outlaw polygamy.

56 Article 6 of the African Women's Protocol states that "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including polygamous marital relationships, are promoted and protected". In art 5 of the African Women's Protocol, however, polygyny is not listed as one of the harmful cultural practices to be eliminated.

57 See generally the discussions by Gaffney-Rhys 2011(a) Women in Society 1, 2; Cook 2011 http://www.law.utoronto.ca/utfi_file/count/documents/reprohealth/Polygamy.pdf. See for instance art 16 of CEDAW, that just states that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family [and] are entitled to equal rights as to marriage, during marriage and at its dissolution".


59 See, for example, Gaffney-Rhys 2011(a) Women in Society 1.

60 For example, art 16 of CEDAW, which just states that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family [and] are entitled to equal rights as to marriage, during marriage and at its dissolution". Also see the discussion by Obonye 2012 JASD 147.
example, article 23(4) of the ICCPR, as well as article 6 of the *African Women's Protocol*, specifically provides for equality in relation to marriage.61

In addition, as rightly observed by Gaffney-Rhys, the General Comments by the treaty monitoring bodies endorse the elimination of polygyny because it is discriminatory.62 For example: the Human Rights Committee in *General Comment 28* observes that "equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle and therefore, should be abolished".63 It has also found that polygyny violates article 3 of the ICCPR64 and has therefore urged States Parties to take legislative measures to enforce the prohibition of polygamy within their territories.65 In addition, the CEDAW Committee noted in its *General Recommendation 21* that "polygynous marriages contravene a woman's right to equality with men and must therefore be prohibited".66

In countries where polygyny is still practised, international human rights instruments require States Parties to ensure that women are entitled to the same rights and benefits as they would enjoy in monogamous marriages.67 Article 6 of the *African Women's Protocol* states that: "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including polygamous marital relationship are promoted and protected".68 This is buttressed by the CEDAW Committee's *General Recommendation 29*, which makes it clear that: "with regard to women in existing polygamous marriages, States Parties should take the necessary measures to ensure the protection of their economic rights".69

In addition, international human rights law also mandates States Parties to take all appropriate measures to eliminate harmful cultural practices in order

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61 Article 23(4) of the ICCPR provides that States: "shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution".

62 See, for example, *General Recommendation 21* para 21 and *General Comment 28* para 24, as discussed by Gaffney-Rhys 2011(a) *Women in Society* 10.

63 *General Comment 28* para 24.

64 The Human Rights Committee observed that art 3 of the ICCPR guarantees equal rights for women and men, violates a woman's right to equality in marriage, and has severe financial consequences for her and her children. See *General Comment 28*.

65 CEDAW Committee *General Recommendation 24 on Women and Health* UN GAOR, Doc A/54/38 (1999) (General Recommendation 24).


68 Emphasis added.

69 CEDAW Committee *General Recommendation 29 on Economic Consequences of Marriage, Family Relations and their Dissolution* UN Doc CEDAW/C/GC/29 (2013) (General Recommendation 29).
to ensure equality in marriage.\textsuperscript{70} Further guidance at the international level can be obtained from the CEDAW Committee, which has observed that States Parties whose constitutions guarantee equal rights but permit polygynous marriages in accordance with personal or customary law violate the constitutional rights of women and breach the provisions of article 5(a) of CEDAW.\textsuperscript{71} For example, the 2010 Kenya Constitution guarantees equality between the spouses from the outset of a marriage to its dissolution.\textsuperscript{72} Several African countries, for example Tanzania,\textsuperscript{73} Malawi,\textsuperscript{74} South Africa,\textsuperscript{75} and Mozambique,\textsuperscript{76} have provisions in their constitutions that prohibit discrimination on a number of grounds, including gender.

Related to the above point, a review of the concluding observations made concerning African states' reports buttresses the opinion of CEDAW that nothing short of immediate legislative prohibition will do.\textsuperscript{77} For instance, Hellum and Aasen report that at its 39\textsuperscript{th} Session in 2007 and 48\textsuperscript{th} Session in 2011 the Committee took the view that the Kenya Matrimonial Bill, which provided for the regulation of property in a polygynous customary marriage, facilitates polygyny, and therefore urged the Government to "implement measures aimed at eliminating polygamy as called for in the Committee's General Recommendation 21".\textsuperscript{78}

Furthermore, Hellum and Aasen have observed that Lesotho was similarly reprimanded when it reported before the CEDAW Committee that polygamy "is an acceptable customary practice, which has safeguards against potentially negative consequences for wives and children, ie the requirement that existing spouses must be consulted and by providing separate property to each household".\textsuperscript{79} In response, the CEDAW

\textsuperscript{70} Article 5(a) of CEDAW provides that "States Parties shall take all appropriate measures: To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

\textsuperscript{71} General Recommendation 21 para 41.

\textsuperscript{72} Section 45(3) of the Constitution of the Republic of Kenya, 2010.

\textsuperscript{73} Sections 12, 13 of the Constitution of the Republic of Tanzania, 1977.

\textsuperscript{74} Section 20 of the Constitution of the Republic of Malawi, 1994.

\textsuperscript{75} Section 9(3) of the Constitution of the Republic of South Africa, 1996.


\textsuperscript{78} CEDAW Committee Concluding Observations: Kenya CEDAW/C/KEN/CO/7 (2011) para 17; Hellum and Aasen Women's Human Rights.

\textsuperscript{79} CEDAW Committee Concluding Observations: Lesotho CEDAW/C/LSO/CO/1-4 (2011) para 47; Hellum and Aasen Women's Human Rights.
Committee expressed concern about the persistence of the practice and the Government's limited efforts to address the matter.\textsuperscript{80}

In conclusion, therefore, the international human rights position is that polygyny violates the right to equality in the context of marriage and must therefore be prohibited. In countries where it is still allowed and practised, States Parties must ensure that women are entitled to the same rights and benefits they would have enjoyed in monogamous marriages.

As earlier noted, most African countries are party to the international human rights law on the protection of women’s rights. The following discussion, therefore, examines how selected countries have responded to their international obligations, starting with Kenya.

4 Legal responses to polygyny and women's rights in Africa

4.1 Kenya

The starting point in exploring Kenya’s legal response to polygyny and the protection of women’s rights is article 45(4) of the 2010 Kenyan Constitution. It provides that "Parliament may enact laws to recognise marriage, under any system, to the extent that such marriages or systems of law are consistent with the Constitution". As Byrnes and Freeman rightly observe, this provision requires the state to enact legislation that provides equality between spouses in all marriage systems.\textsuperscript{81} In addition, the Constitution provides that "parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at its dissolution".\textsuperscript{82} Article 45(3) is therefore a "direct" response to article 16(1) of CEDAW, above, that prescribes that husbands and wives have equal rights in marriage.\textsuperscript{83}

In responding to both its constitutional and its international obligations, the Kenya government enacted the\textit{ Marriage Act}, 2014 (hereinafter called the\textit{ Marriage Act}).\textsuperscript{84} The\textit{ Marriage Act} is the main legislation that regulates Christian, civil, customary, Hindu and Islamic marriages.\textsuperscript{85} The proprietary aspects relating to marriage are, however, regulated by the\textit{ Matrimonial
Property Act, 2013. These two pieces of legislation have provisions that speak to the recognition and regulation of polygyny in the following ways.

Firstly, in its recognition of polygyny the Kenya Marriage Act defines it as "the state or practice of a man having more than one wife simultaneously". This definition clearly excludes women from having more than one husband. This provision therefore violates articles 16(1) of CEDAW and article 45(3) of the Kenya Constitution, which prohibits discrimination of any kind in the context of marriage. Secondly, a marriage is defined as "the voluntary union of a man and a woman whether in a monogamous or polygynous union and registered in accordance with the Act". The importance of registration in the protection of women's rights cannot be overemphasised. Registration of a customary marriage can unlock doors leading to equal property rights entitlements among the polygynous wives, particularly after the death of husband. However, this provision, read together with section 44 (to be discussed later), makes the validity of a marriage depend on registration. Due to the well-known challenges that rural communities face to register marriages, such a provision may, however, lead to adverse results in the protection of women's rights, particularly in a polygynous customary marriage system. Thirdly, according to section 6(3), "a marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous." This provision treats women married under customary law and Islamic law differently from women in civil and Hindu marriages. This is a violation of article 45(3) of the Constitution.

In their totality, however, these provisions speak to the legality (the recognition) of polygyny in Kenya.

In its protection and promotion of women's (children's) rights in the context of polygyny, the Marriage Act has several provisions that can be used to address the violations. For example, the marriageable age for all marriages, including customary marriages, is now 18 years. Setting the marriageable age at 18 complies with international children's rights standards, and sends out a strong message that child marriages under any law are not allowed in Kenya. In the context of this discussion, however, we see that prescribing

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86 The Matrimonial Property Act 49 of 2013, which came into force on 16 January 2014.
87 Section 2 of the Marriage Act 4 of 2014.
88 Section 3(1) of the Marriage Act 4 of 2014.
89 See, generally, the discussion by Mwambene and Kruuse 2015 IJLPF 237-259.
90 Section 6(3) of the Marriage Act 4 of 2014.
91 See s 4 as read with s 45(3)(a) of the Marriage Act 4 of 2014. S 4 provides that "a person shall not marry unless that person has attained the age of 18 years".
92 It is generally accepted that child marriages breach art 16(2) of CEDAW; art 21 of the African Charter on the Rights and Welfare of the Child (1990) (African Children's Charter); art 1 of the Convention on Consent to Marriage, the Minimum Age for Marriage and Registration of Marriages (1962); and art 6 of the African Women's
a marriageable age is a departure from traditional customary rules that attach marriage to puberty, and other cultural practices which predispose young girls to polygynous marriages. As observed by Gaffney-Rhys, in the context of polygyny, "the marriageable age is pushed down for females, leading to plural wives often being very young".

Further protection under the Kenya Marriage Act is provided under the registration provisions. A polygynous customary marriage, just like all other marriages recognised in the Kenya Marriage Act, can now be registered. The merits of registration in the protection of children and women's human rights in the context of polygyny cannot be overemphasised. It induces the parties to the marriage to meet the necessary legal requirements, ie marriageable age and consent. More importantly, the process of registration can protect women from entering into informal polygynous marriages without their knowledge. However, as earlier observed, "the status of a marriage" under the Kenya Marriage Act is conferred on a customary marriage only when the parties notify the Registrar of the marriage within 3 months of celebrating the marriage. This position may arguably lead to women's "disfranchisement" due to the fact that many women live in disadvantaged rural communities where access to registration is difficult.

Another important provision that can be used to address women's rights violations in the context of polygyny is section 2 of the Marriage Act. It provides that "parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage". This provision is in line with international human rights law as well as with the constitution on the topic of the equal protection of the spouses in a marriage. It guarantees the right to equality for a woman in a polygynous marriage with her husband. However, read together with the provisions of the Matrimonial Property Act, 2013 (MPA), which regulates

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93 Section 4 of the Marriage Act 4 of 2014 prescribes the marriageable age to be 18.
94 Gaffney-Rhys 2011(b) Women in Society 5.
95 Section 55 of the Marriage Act 4 of 2014.
96 Section 4 of the Marriage Act 4 of 2014.
98 Section 44 of the Marriage Act 4 of 2014.
100 Section 2 of the Marriage Act 4 of 2014.
matrimonial property in the context of polygynous marriages, it seems that in a polygynous marriage a husband has more property rights than each of his wives. This argument is supported by the fact that section 8 of the MPA regulates matrimonial property in the context of polygynous marriages as follows: "where property was equally acquired by the man and his first wife before he took on the other wives, then the property is held equally by the husband and his first wife." Several observations made by Banda in the protection of women’s rights in a polygynous marriage are relevant to this discussion. First, she observes that the MPA provides that "if there are multiple wives when the property is acquired, the property is to be regarded as owned by the man and his wives taking into account any contributions made by the man and each of his wives". Secondly, the MPA makes provision for joint ownership in the context of polygynous marriages, which is made possible where a wife in a polygynous marriage can jointly own property with the husband to the exclusion of other wives. Arguably, in their totality, the husband will still have more shares in the property that he owns together with each of his wives, which defeats the principle of the equal sharing of matrimonial property between a husband and wife.

Furthermore, section 2 of the Marriage Act provides for the equal rights and obligations of spouses in a marriage. In the context of polygynous marriages, it grants a wife rights equal to those of her husband in decisions that will affect her. However, this provision is without legal content, since a husband can marry subsequent wives without her consent. There is a need, therefore, for an enabling provision to allow a woman to give consent when the husband wishes to marry a subsequent wife/wives.

To conclude, therefore, the exploration of Kenya’s legal response in the context of polygyny shows that despite its positive outward appearance of addressing women’s rights violations, the Marriage Act is not comprehensive. It does not cover all aspects of marriage and divorce, particularly the proprietary consequences of polygynous marriages. Moreover, in balancing polygyny and women’s rights, the Marriage Act has

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101 Banda "Changing the Constitution" 255.
102 Section 8(1)(a) of the Matrimonial Property Act 49 of 2013; Banda "Changing the Constitution" 264.
103 Banda "Changing the Constitution" 264.
104 Section 8(2)(b) of the Matrimonial Property Act 49 of 2013.
105 Section 8(2) of the Matrimonial Property Act 49 of 2013.
106 The Marriage Act 4 of 2014 is silent on the matter.
recognised the traditional African way of allowing only a husband to marry as many wives as he wishes without the existing wife's consent.\textsuperscript{107}

\textbf{4.2 Mozambique}

The legal response in the protection of women’s rights in the context of polygyny originates from the principle of equality between men and women embedded in article 36 of the Mozambique Constitution.\textsuperscript{108} This principle of equality is also embedded in the \textit{Family Law Statute}, which is the principal act that regulates religious, statutory and customary marriages in Mozambique.\textsuperscript{109} Arguably, the equality principle in marriage is safeguarded by article 53(c) of the \textit{Family Law Statute}, for instance, which bans marriages which do not have the consent of the parties.\textsuperscript{110}

So, how has the \textit{Family Law Statute} balanced polygyny and women's rights? The starting point in attempt to answer this question is the definition of the marriage. The \textit{Family Law Statute} defines a marriage as "a relationship between two persons of the opposite sex".\textsuperscript{111} This definition clearly prohibits polygamy since only two persons of the opposite sex are allowed to marry.\textsuperscript{112} Commentators have thus welcomed the \textit{Family Law Statute} "as a first step to ensure equality of spouses in marriage".\textsuperscript{113} The definition of marriage therefore complies with the international approach of prohibiting polygyny to address women’s rights violation. However, the fact that polygyny is not implicitly prohibited in the \textit{Family Law Statute} could be problematic. This position, arguably, does not send a clear message on the status of polygyny in Mozambique. It may explain why in 2013 the Human Rights Committee was still concerned that polygyny continues to exist despite the \textit{Family Law Statute} that attempts to address it.\textsuperscript{114}

\textsuperscript{107} Section 2 of the \textit{Marriage Act} 4 of 2014.
\textsuperscript{108} Plan International \textit{In-depth Review} 21. Art 36 provides that "men and women are equal before the law".
\textsuperscript{109} \textit{Family Law Statute} Act 10 of 2004 as cited by Plan International \textit{In-depth Review} 18.
\textsuperscript{110} This provision seems to be supported by arts 63 and 64 of the \textit{Family Law Statute} Act 10 of 2004 which deems marriages without consent not to exist.
\textsuperscript{111} Article 16(2) of the \textit{Family Law Statute} Act 10 of 2004 as cited by Plan International \textit{In-depth Review} 22. This definition is similar to the definition of the English case of \textit{Hyde v Hyde} 1866 LRIP & D13, in which a marriage was defined as "the voluntary union for life of one man and one woman to the exclusion of all others".
\textsuperscript{113} Plan International \textit{In-depth Review} 22 have observed that this provision "protects woman in a society whereby patriarchy favours men to engage in polygamous relations".
Apart from the definition section, several other provisions that regulate different aspects of marriage can be used to address women’s rights violations in the context of polygyny. Firstly, the Family Law Statute provides that the validity of all marriages is subject to compliance with statutory requirements. These requirements include that parties to a marriage must both be over the age of 18 years. Similar observations made in the context of Kenya on the merits of setting a marriageable age at 18 apply mutatis mutandis. The Family Law Statute, therefore, complies with the international and constitutional standards on the marriageable age. However, this protection is threatened with a clawback provision under the Family Law Statute that allows parties who are at the age of 16 to conclude a marriage with the approval of their parents. As rightly observed by Plan International, the dangers inherent in this provision are compounded by the fact that this approval can be granted without providing specific reasons for allowing such marriages. This position, unfortunately, undermines the Family Law Statute’s efforts to address harmful cultural practices such as polygyny that may lead young girls into childhood polygynous unions.

Protection in the context of property is provided in articles 101, 102 and 103 of the Family Law Statute. In their totality, these provisions provide that spouses have equal rights relating to the administration of their assets and the disposal of spousal property. In addition, this protection is also offered to women in de facto marriages. Article 203(2) of the Family Law Statute extends equal protection relating to property acquired during the union to de facto marriages. Plan International has thus applauded the Family Law Statute for the wide scope of the protection it gives to women living in de facto unions. In the context of women found in de facto polygyny, the Family Law Statute does not offer similar protection. This is irrespective of the fact that anecdotal research shows that informal polygyny is very common in Mozambique. While extending legal protection to de facto marriages, the Family Law Statute should have equally provided protection

115 Plan International In-depth Review 18.
116 Article 30(1) of the Family Law Statute 10 of 2004.
118 Article 30(2) of the Family Law Statute 10 of 2004.
119 Plan International In-depth Review 19.
120 See, generally, the observations by Mandate Assessing the Implementation of the Convention on the Rights of the Child.
121 De facto marriages in this context are marriages between a man and a woman for over a period of 1 year (12 months).
122 Plan International In-depth Review 22.
to those women found in informal polygynous marriages. Moreover, as succinctly captured by Plan International:

The advantage of recognising de facto unions are that these unions can serve as the basis for women and girls married traditionally, where such marriages are not registered and which are therefore not recognised in statutory terms.\textsuperscript{124}

This approach would have been in line with the international human rights position that requires States Parties to extend protection where polygyny is still practised.\textsuperscript{125} Moreover, by not extending protection to these informal polygynous marriages, the Family Law Statute is in violation of article 119(2) of the Mozambique Constitution, which arguably requires the state to recognise and protect marriage as the institution that secures the pursuit of family objects.\textsuperscript{126}

In addition, the Family Law Statute, just like the Constitution and the Civil Registrar's Code (that regulates the formalities and processes required for marriage registration) provides that marriages are valid if they are registered.\textsuperscript{127} This position is similar to that taken in the Marriage Act in Kenya. In Mozambique, just as in Kenya, registration is one of the requirements for a valid marriage under the Family Law Statute. Similar arguments on the merits and demerits of registration as a requirement in the protection of women's rights discussed above in the context of Kenya apply equally in this context. Related to this point, the process for the registration of statutory and religious marriages under the Family Law Statute is different from that in customary marriages. For statutory and religious marriages, the Family Law Statute requires that these marriages are preceded by a preliminary process\textsuperscript{128} which provides the opportunity for the Registrar to inquire if the marriage requirements have been met or not.\textsuperscript{129} In contrast, for customary marriages, where polygynous unions are mostly to be found, the parties are not subjected to the same preliminary inquiry. This position unfortunately predisposes women find themselves involved in informal polygynous marriages without their knowledge. Moreover, the 2016 Plan International's study found that the registration infrastructure is generally poor.\textsuperscript{130}

In conclusion, therefore, although the Family Law Statute adopts a prohibitionist approach in balancing polygyny and women's rights, the exploration reveals that more needs to be done to protect women's rights in

\begin{thebibliography}{99}
\bibitem{124} Plan International \textit{In-depth Review} 22.
\bibitem{125} Article 6 of the African Women's Protocol.
\bibitem{126} Plan International \textit{In-depth Review} 22.
\bibitem{127} Article 75 of the Family Law Statute 10 of 2004.
\bibitem{128} Plan International \textit{In-depth Review} 24
\bibitem{129} Plan International \textit{In-depth Review} 24.
\bibitem{130} Plan International \textit{In-depth Review} 24.
\end{thebibliography}
the context of polygyny. For example, there is a need to improve the registration infrastructure. In addition, the continued existence of informal polygyny 10 years after the Family Law Statute came into effect can only be an indication that the practice is nowhere close to dying in Mozambique. Moreover, as Howland and Koenen rightly observe, "although polygyny is invariably discriminatory, one must consider the context in which it takes place before denying its recognition".\(^{131}\)

### 4.3 South Africa

The Recognition of Customary Marriages Act, 1998 (RCMA) in South Africa was enacted to validate customary marriages. These include polygynous marriages.\(^{132}\) The RCMA is different from traditional customary laws, however, in certain respects. It contains provisions for the equal status of spouses in a customary marriage,\(^{133}\) minimum age requirements for customary marriages,\(^{134}\) registration rules,\(^{135}\) and rules applicable in community of property matrimonial regimes.\(^{136}\) These changes are generally seen as milestones in the protection of women’s rights in the context of customary marriages.\(^{137}\)

For the purposes of this discussion, however, the RCMA has provisions that are specifically aimed at the recognition and regulation of polygynous marriages. For example, section 2(3) of the RCMA recognises all polygynous marriages concluded before the commencement of the Act.\(^{138}\) In a similar fashion, section 2(4) provides for the recognition of polygamous marriages concluded after the commencement of the Act.\(^{139}\) In order to

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\(^{131}\) Howland and Koenen 2014 Social Justice 37.

\(^{132}\) This was after a very long history of the non-recognition of customary marriages due to lobolo and polygyny.

\(^{133}\) Section 6 of the Recognition of Customary Marriages Act 120 of 1998 provides that "a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law".

\(^{134}\) Section 3(1)(a)(i) of the Recognition of Customary Marriages Act 120 of 1998 provides that "for a customary marriage entered into after the commencement of this Act to be valid, the prospective spouses must both be above the age of 18 years". Also see Herbst and Du Plessis 2008 EJCL 6.

\(^{135}\) Section 4 of the Recognition of Customary Marriages Act 120 of 1998. Also see Herbst and Du Plessis 2008 EJCL 9.

\(^{136}\) Section 7 of the Recognition of Customary Marriages Act 120 of 1998 as read with Gumede v President of South Africa 2009 3 SA 152 (CC).

\(^{137}\) Ndashe 2011 Women Legal Centre 5, 6.

\(^{138}\) Section 2(3) of the Recognition of Customary Marriages Act 120 of 1998 provides that "if a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages".

\(^{139}\) Section 2(4) of the Recognition of Customary Marriages Act 120 of 1998 provides that "if a person is a spouse in more than one customary marriage, all such marriages
protect women's matrimonial property in a polygynous marriage, the RCMA leaves the regulation of property for marriages recognised under section 2(3) to customary laws, which are patriarchal in nature.140 This is problematic, as customary law grants the power to control property to a husband, and views a wife as a perpetual minor under the guardianship of the husband.141

For polygynous marriages recognised under section 2(4), the matrimonial property is regulated by section 7(6) of the RCMA as follows:

A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.142

Two main observations, however, can be made with regard to section 7(6) of the RCMA. First, this provision accords with the traditional customs, where the matrimonial property system was governed according to customary rules. According to these rules, a husband had the responsibility of distributing property between his wives in a polygynous marriage in such a way that each wife and her children established a separate autonomous house with its own assets allocated by the husband.143

Secondly, as Bennett has rightly observed, section 7(6) does not prescribe the terms of the contract. It has been suggested, however, that the intention seems to have been to establish an "out of community of property" matrimonial system.144 This suggestion arguably resonates with the customary rules, where each wife establishes a separate autonomous house for her children and herself, with its own assets allocated by the husband.145 Moreover, the "out of community of property" quality of the customary rules can be inferred from the fact that once assets have been allocated to a particular house, a husband is not permitted to move assets from one house to another without consulting the wife of the particular house and the eldest son.146 Where assets have been so moved, an inter-house

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140 Section 7(1) of the Recognition of Customary Marriages Act 120 of 1998.
141 See generally discussions by Bennett Customary Law 251 who traces this rule "from antiquated common-law doctrine, which treated women in the same way as children".
142 Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998.
143 Olivier et al Indigenous Law 40. The matrimonial property system under customary law was neither in nor out of community of property. It was governed by patriarchal principles which essentially left the distribution and control of property to males.
144 Bennett Customary Law 247.
145 Olivier et al Indigenous Law 40.
146 Olivier et al Indigenous Law 40.
debts is created between the houses. Moreover, in terms of the customary rules of inheritance, children inherit property from their mothers’ houses.

As in the situation in Kenya and Mozambique (discussed above), the RCMA in South Africa contains provisions for the registration of customary marriages that can protect women from informal polygyny. However, many women married under customary laws are unable to register their marriages for various reasons. The effect of non-registration is that they are denied the right to inherit. This causes stark inequalities, particularly in polygynous marriages. Moreover, registration does not address the fact that many women in South Africa are married in customary law to a man who is already married in terms of civil law without their knowledge. In addition, the RCMA gives primacy to civil marriages over polygynous marriages, which results in many women being deprived of the potential protection offered by the RCMA.

In conclusion, therefore, in balancing polygyny and the protection of women’s rights, the RCMA tilts more towards the protection of polygyny as it was practised in the traditional system.

5 Analysis of legal responses

5.1 Reform or recognition of polygyny?

This exploration of the selected law reforms suggests that they seem to endorse polygyny as practised under traditional customary rules in the following ways. First, the provisions that recognise the practice only allow men to have more than one wife, and not vice versa. This reflects the age-old tradition of polygyny as practised in most African countries. Secondly, in regulating the matrimonial property of the polygynous marriages, these laws champion traditional patriarchal attitudes that leave the control and

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147 Bennett Customary Law 258; Olivier et al Indigenous Law 54.
148 Olivier et al Indigenous Law 149; Bennett Customary Law 259.
149 Section 4 of the Recognition of Customary Marriages Act 120 of 1998. Registration is, however, not a requirement for the validity of a customary marriage under the Act. See eg s 4(9) of the Recognition of Customary Marriages Act 120 of 1998. Also see similar observations by Amien 2013 Acta Juridica 372.
151 See the discussion in Mayelane v Ngwenyama 2013 4 SA 415 (CC).
152 Mwambene and Kruuse 2015 IJLPF 252.
153 Section 10(4) of the Recognition of Customary Marriages Act 120 of 1998.
154 See, for example, s 3 of the Marriage Act 4 of 2014 and ss 2(3) and 2(4) of the Recognition of Customary Marriages Act 120 of 1998. See the similar observation about the Recognition of Customary Marriages Act 120 of 1998 made by Higgins et al as cited in Mwambene 2015 Speculum Juris 72.
distribution of property to the husband.¹⁵⁵ In South Africa, for example, the RCMA provides that the matrimonial property system for polygynous marriages concluded before the Act to continue to be governed by customary laws.¹⁵⁶ In Mozambique the Family Law Statute is silent on this topic. It does not make any provision for the regulation of the property of women living in polygynous unions, including polygynous unions concluded before the inception of the Family Law Statute. One can therefore assume that customary patriarchal rules regulate matrimonial property in the context of informal polygynous marriages (including those that pre-date the Family Law Statute).

Thirdly, all of the laws under discussion recognise the equal status of the parties in polygynous marriages.¹⁵⁷ This is seen as a departure from the past where, according to the official customary rules, a wife in a customary marriage was a perpetual minor under the protection of her husband.¹⁵⁸ These laws therefore address the inequality between a husband and a wife in decision making that left the wife without legal capacity. However, in the context of polygyny, both the RCMA and the Kenya Marriage Act do not require the approval of the first wife when a husband wants to marry a subsequent wife. This is similar to the traditional rules as they were described by expert witnesses in the South African case of Mayelane v Ngwenyama:¹⁵⁹

(a) although not the general practice any longer, VaTsonga men have a choice whether to enter into further customary marriages, (b) when VaTsonga men decide to do so they must inform their first wife of their intention, (c) it is expected of the first wife to agree and assist in the ensuing process leading to a further marriage, (d) if she does so, harmony is promoted between all concerned, (e) if she refuses consent, attempts are made to persuade her otherwise, (f) if that is unsuccessful, the respective families are called to play a role in resolving the problem, (g) this resolution process may result in divorce, and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but children of the second union will not be prejudiced by this as they will still be regarded as legitimate children.

Fourthly, these laws seem to comply with CEDAW’s suggestion that states should register all marriages in order to ensure compliance with the

¹⁵⁵ See for example, s 7 of the Recognition of Customary Marriages Act 120 of 1998.
¹⁵⁶ See s 7(1) of the Recognition of Customary Marriages Act 120 of 1998. According to customary rules regulating matrimonial property, the control of family, house or personal property is vested in the husband. Also see Mwambene and Van Nierkerk 2009 Speculum Juris 94, 95. This position was not changed by Gumede v President of South Africa 2009 3 SA 152 (CC), which affected only the matrimonial property system of monogamous marriages concluded before the Act.
¹⁵⁸ See for example, in South Africa, s 11(3) of the Black Administration Act 38 of 1927. Mayelane v Ngwenyama 2013 4 SA 415 (CC) para 61.
Convention and establish equality between the partners, a minimum age for marriage, the prohibition of bigamy and polygamy, and the protection of the rights of children.\textsuperscript{160} Despite the fact that the legislation contains provisions pertaining to registration, it remains one of the obstacles against the protection of women in the context of polygyny. For example, in South Africa, despite the provision requiring registration, most customary marriages are not registered.\textsuperscript{161} Of course, registration under the RCMA does not validate a customary marriage.\textsuperscript{162} Arguably, the RCMA adopts the traditional views that the registration of a customary marriage is not important since the conclusion of a customary marriage involves many people that would attest to the validity of the same.\textsuperscript{163} In the context of Mozambique, where most people marry according to customary law, evidence shows that few of these marriages are registered.\textsuperscript{164}

I therefore, ask if in their attempts to balance polygyny and women’s rights the selected countries are reforming or recognising the existing practices. Whereas this paper does not attempt to answer that question, the outcomes of the different approaches adopted by Kenya and South Africa in particular would seem to be obvious: they are simply recognising polygyny as practised under the traditional customary rules.

\section*{5.2 Prohibit, regulate or legalise?}

An examination of the law reforms in Kenya, Mozambique and South Africa seem to suggest that law reform that explicitly outlaws polygamy is unlikely to be supported in many African countries.\textsuperscript{165} The process of drafting the RCMA, the Kenya \textit{Marriage Act} and the \textit{Family Law Statute} bears testimony to the challenges of adopting the prohibitionist approach to polygyny in Africa. In South Africa, for example, the Law Commission reasoned that the pressure that leads women into polygynous marriages cannot be legally controlled. Adopting the prohibitionist approach would consequently lead to more informal unions that would leave many women not legally protected.\textsuperscript{166} In Mozambique the approach is not clear, since the word polygyny is not

\begin{itemize}
\item \textsuperscript{160} Article 16 of CEDAW.
\item \textsuperscript{161} See, eg, Ndashe 2011 Women Legal Centre 12; Mwambene and Kruuse 2013 \textit{Acta Juridica} 300.
\item \textsuperscript{162} Section 4(9) of the RCMA.
\item \textsuperscript{163} Herbst and Du Plessis 2008 \textit{EJCL} 9.
\item \textsuperscript{164} See, generally, the observations made by Plan International \textit{In-depth Review}.
\item \textsuperscript{165} Apart from the three countries under study, the failed attempts of Malawi and Uganda to pass prohibitionist legislation would seem to attest to this fact.
\end{itemize}
expressly used in the *Family Law Statute*. In this light, perhaps, law reform should instead of prohibiting the practice adopt a regulatory approach which is preceded by other measures that focus on advancing the socio-economic factors that predispose women to polygyny. Such other measures would include addressing women’s lack of education and empowering them economically, among others.

5.3 Challenges to reforming polygyny in Africa

The exploration of the law reforms in the selected countries has revealed the difficulties inherent in attempting to strike a balance between polygyny and women's rights through legalising polygyny, prohibiting it, or regulating it, chief of which is the sharp growth in the practice of informal polygyny on the African continent. The prevalence of informal polygyny makes it difficult to assess the impact of the different legislative approaches on advancing the rights of women. One can therefore ask if the proliferation of informal polygynous unions indicates that the law reform scrutinised here does not reflect social reality, and if people are deliberately avoiding it. Whereas this question would be the subject of research on another day, existing research informs us that most men and women are ignorant of the new laws and their protective nature. As widely observed, it is therefore important that such reforms are accompanied by education and awareness campaigns.

6 Conclusion

This paper has explored the different approaches taken by three African countries to advancing the rights of women in the context of polygynous customary marriages. The exploration has shown that whether countries legalise, abolish or regulate the practice, the reality is the following: what the law says is not what people do; the provisions pertaining to equality between spouses allow for inequality; polygyny is transforming into unofficial relationships which leave most women without legal protection; and law reform is heavily influenced by customary laws that continue to disadvantage women in these marriages. These observations lead to the conclusion that whether countries legalise, abolish or regulate polygyny, ultimately the essence of polygyny in Africa is not going to change. It is therefore recommended that in order to protect women against the

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167 This is to be contrasted with Rwanda, which expressly prohibited polygamy on the grounds that discrimination is not allowed in its *Constitution of the Republic of Rwanda*, 2003, which was adopted on April 23, 2003 and approved by referendum on May 26, 2003.

168 Howland and Koenen 2014 *Social Justice* 32.

violations of their rights that come with polygyny, the law reform should be accompanied by education and awareness campaigns and by practical policy and enforcement mechanisms.

Bibliography

Literature

Amien 2013 Acta Juridica

Baloyi 2010 Verbum et Ecclesia
Baloyi EM "An African View of Women as Sexual Objects as a Concern for Gender Equality: A Critical Study" 2010 Verbum et Ecclesia 1-6

Banda Women Law and Human Rights

Banda 2006 JAL

Banda "Changing the Constitution"

Barrett Schism and Renewal in Africa
Barrett DB Schism and Renewal in Africa (Oxford University Press Nairobi 1968)

Basendal 2004 Afr Sociol Rev

Bekker 1991 Acta Juridica
Bekker JC "Interaction between Constitutional Reform and Family Law" 1991 Acta Juridica 1-17

Bennett Customary Law
Bennett T Customary Law in South Africa (Juta Cape Town 2004)
De Souza 2013 *Acta Juridica*
De Souza M "When Non-registration Becomes Non-recognition: Examining the Law and Practice of Customary Marriage Registration in South Africa" 2013 *Acta Juridica* 239-291

Gaffney-Rhys 2011(a) *Women in Society*

Gaffney-Rhys 2011(b) *Women in Society*

Griffiths "Gendering Culture"

Hellum and Aasen *Women's Human Rights*

Henriques 2013 *Studia Historiae Ecclesiasticae*
Henriques AC "The Roman Catholic Response to Customary Marriages in South Africa 1948-2012" 2013 *Studia Historiae Ecclesiasticae* 65-87

Herbst and Du Plessis 2008 *EJCL*

Howland and Koenen 2014 *Social Justice*
Howland RJ and Koenen A "Divorce and Polygamy in Tanzania" 2014 *Social Justice* 1-40

Jeffreys *Man's Dominion*

Kaganas and Murray 1991 *Acta Juridica*
Kang'ara 2012 Comp L Rev

Kovacs, Ndashe and Williams 2013 Acta Juridica

Labeodan 2007 JCT

Lehnert 2005 SAJHR
Lehnert G "The Role of Courts in the Conflict between African Customary Law and Human Rights" 2005 SAJHR 241-277

Luluaki "Customary Polygamy"

Mandlate Assessing the Implementation of the Convention on the Rights of the Child

Mbiti African Religion and Philosophy
Mbiti JS African Religion and Philosophy (Heinemann London 1969)

Mugerwa Daily Monitor
Mugerwa Y "Dilemma Sets in as Marriage Bill Returns" Daily Monitor (22 February 2015) 1

Muthengi 1995 AJET
Muthengi JK "Polygamy and the Church in Africa: Biblical, Historical, and Practical Perspectives" 1995 AJET 55-79

Mwambene 2010 AHRLJ
Mwambene L "Marriage under African Customary Laws in the Face of the Bill of Rights and International Human Rights Standards in Malawi" 2010 AHRLJ 78-104
Mwambene 2015 Speculum Juris

Mwambene and Kruuse 2013 Acta Juridica

Mwambene and Kruuse 2015 IJLPF

Mwambene and Van Niekerk 2009 Speculum Juris

Ndashe 2011 Women Legal Centre
Ndashe S "Recognition of Customary Marriages" 2011 Women Legal Centre 1-23

Phaswana "Counselling Singles"
Phaswana DR "Counselling Singles" Unpublished paper delivered at the meeting of the Reformed Minister's Think Tank (2005 Iyani Bible School, Venda)

Plan International In-depth Review
Plan International In-depth Review of the Legal and Regulatory Frameworks on Child Marriages in Mozambique (2016) (copy on file with the author)

Obonye 2012 JASD

Olivier et al Indigenous Law
Olivier NJJ et al Indigenous Law (Butterworths Durban 1995)

Ssenyonjo 2011 NQHR
Ssenyonjo M "Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter" 2011 NQHR 358-397
Strauss 2012 *Ethics*
Strauss G "Is Polygamy Inherently Unequal?" 2012 *Ethics* 516-544

Witte 2015 *Emory LJ*
Witte J "Why Two in One Flesh? The Western Case of Monogamy over Polygamy" 2015 *Emory LJ* 1675-1746

WLSA *Uncovering the Realities*

**Case law**

*Gumede v President of South Africa* 2009 3 SA 152 (CC)

*Hyde v Hyde* 1866 LRIP & D13

*Mayelane v Ngwenyama* 2013 4 SA 415 (CC)

**Legislation**

**Kenya**

*Constitution of the Republic of Kenya*, 2010

*Marriage Act* 14 of 2014

*Matrimonial Property Act* 49 of 2013

**Malawi**

*Constitution of the Republic of Malawi*, 1994

*Marriage, Divorce and Family Relations Bill*, 2006

*Marriage Divorce and Family Relations Act* 5 of 2015

**Mozambique**

*Constitution of the Republic of Mozambique*, 2004

*Family Law Statute Act* 10 of 2004

**South Africa**

*Black Administration Act* 38 of 1927

Recognition of Customary Marriages Act 120 of 1998

Tanzania

Constitution of the Republic of Tanzania, 1977

Rwanda

Constitution of the Republic of Rwanda, 2003

Uganda

Marriage and Divorce Bill, 2009

International instruments


CEDAW Committee Concluding Observations: Kenya
CEDAW/C/KEN/CO/7 (2011)

CEDAW Committee Concluding Observations: Lesotho
CEDAW/C/LSO/CO/1-4 (2011)

CEDAW Committee Concluding Observations: Malawi
CEDAW/C/MW1/CO/6 (2010)

CEDAW Committee General Recommendation 21 on Equality in Marriage and Family Relations UN GAOR, Doc A/49/38 (1994)

CEDAW Committee General Recommendation 24 on Women and Health UN GAOR, Doc A/54/38 (1999)

CEDAW Committee General Recommendation 29 on Economic Consequences of Marriage, Family Relations and their Dissolution UN Doc CEDAW/C/GC/29 (2013)

Convention on Consent to Marriage, the Minimum Age for Marriage and Registration of Marriages (1962)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Human Rights Committee General Comment 28 on Equality of Rights between Men and Women CCPR/C/21/Rev.1/Add.10 (2000)

Human Rights Committee Concluding Observations: Mozambique CCPR/c/moz/co/1 (2013)

International Covenant on Civil and Political Rights (1966)


Universal Declaration of Human Rights (1948)

Internet sources


Al Hammadi 2015 https://www.linkedin.com/pulse/negative-consequences-polygamy-zainab-al-hammadi


Byrnes and Freeman 2012 http://ssrn.com/abstract=2011655

Baines B, Bailey M and Amani B "Expanding Recognition of Foreign Polygamous Marriages: Policy Implication for Canada" in Campbell A et al 2005 Polygamy in Canada: Legal and Social Implications for Women and


Modupe date unknown http://unilorin.edu.ng/publications/abdulraheemnm/LAW_AND_SOCIAL_VALUES.pdf

Nyanseor date unknown http://www.theperspective.org/polygyny.html
Nyanseor S date unknown Polygyny (Polygamy) is already a Practice http://www.theperspective.org/polygyny.html accessed 20 May 2016


Sraman date unknown http://www.academia.edu/3559600/polygamy_and_human_rights


UN Women date unknown http://www.endvawnow.org/en/articles/625-polygamousmarriages.html?next=1678

List of Abbreviations

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<tr>
<td>ACHPR</td>
<td>African Charter on Human and People's Rights</td>
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<td>African Sociological Review</td>
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<td>African Human Rights Law Journal</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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