

CULTURE, HUMAN RIGHTS, AND SOCIAL CHANGE: IN THE CONTEXT OF POLYGAMY

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Prostitution's societal invisibility, the needs of women fleeing prostitution, and a review of current criminal justice approaches to prostitution are all discussed. Prostitution, payment for the exchange of sexual services, is deemed a major social problem in most countries around the world today, with little to no consensus on how to address it. In this Target Article, we unpack what we discern as the two primary positions that undergird academic thinking about the relationship between inequality and prostitution: (1) prostitution is principally an institution of hierarchal gender relations that legitimizes the sexual exploitation of women by men, and (2) prostitution is a form of exploited labor where multiple forms of social inequality (including class, gender, and race) intersect in neoliberal capitalist societies. Our main aims are to (a) examine the key claims and empirical evidence available to support or refute each perspective; (b) outline the policy responses associated with each perspective, and (c) evaluate which responses have been the most effective in reducing social exclusion of sex workers in societal institutions and everyday practices. While the overall trend globally has been to accept the first perspective on the “prostitution problem” and enact repressive policies that aim to protect prostituted women, punish male buyers, and marginalize the sex sector, we argue that the strongest empirical evidence is for the adoption of the second perspective that aims to develop integrative policies that reduce the intersecting social inequalities sex workers face in their struggle to make a living and be included as equals. We conclude with a call for more robust empirical studies that use strategic comparisons of the sex sector within and across regions and between sex work and other precarious occupations.

Keywords: Prostitution-gender inequality, Social inequality, Policy responses, Sex work, Prostitution.

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INTRODUCTION

The family is the building block of human society. Yet, the conception of family and the mechanism for its foundation vary among societies. Polygamy is a widely practiced mechanism for the founding of a family in many societies across the world that is grounded in cultural, religious, and traditional values and systems. The emergence of the modern international human rights system in general and the rights of women, in particular, has brought forward strong criticisms of this practice and a counter-reaction. This brief paper seeks to examine the state of the debate over polygamy within the current discourse on culture, human rights, and social change.

MEANING AND PREVALENCE OF POLYGAMY

In 2008, the following was part of a news report in A South African newspaper “*ANC president Jacob Zuma married his fourth wife, Nompumelelo Ntuli, in a closely guarded, traditional Zulu ceremony in the rural village of Nkandla, in Northern KwaZulu-Natal, yesterday*”. (Naidoo 2008, 2) The ceremony, which was attended by a broad range of personalities representing the South African elite, was lauded as a confirmation of Zuma’s status as a traditionalist and a level of acceptance for polygamy in South Africa. (Andrews 2009, 352) The opposition and criticism were equally strong with one noted South African columnist calling the customary law on polygamy “about as female-friendly as date-rape”. (GLEJ 2013, 7) This one event and the reaction in the media and South African society are but a microcosm of the strong debate on polygamy. But what is polygamy, and how widespread is it? This section seeks to answer these questions as a background to the discussion of the actual debates on the issue.

DEFINITION AND TYPES OF POLYGAMY

The word polygamy comes from a Greek word: “*polygamy*,” which means “plural/many marriages”. Black’s law dictionary (8th ed. 2004) defines polygamy as “*the state or practice of having more than one spouse simultaneously*”. Strictly speaking, polygamy, meaning plural marriage, includes polyandry as well as polygyny. In this context, polygyny is the practice of one man being married to more than one wife at the same time while polyandry is the practice of one woman being married to more than one man at the same time. However, most polygamists in the world engage in “polygyny,” which is usually used interchangeably with the general term polygamy. (Brooks 2009) Polygamy can also be further complicated as it may

also be explained in terms of levirate and sororate unions. Levirate unions occur where a brother, uncle, or nephew inherits the wife of his brother upon the latter's death whereas sororate unions occur where the widower is inherited by a younger sister, cousin, or niece as practiced in some parts of Africa. However, the most prevalent understanding of polygamy refers to situations where a man is permitted to marry more than one wife and contrasts with monogamy.

PREVALENCE OF POLYGAMY

Statistics on the prevalence of polygamous marriages are hard to come by for many countries due partly to the criminalization of the practice in many jurisdictions. However, the available evidence points to two conclusions. First, despite the prominence of the topic in contemporary discourse, polygamy is not a predominant practice across the world. Even where it is practiced, it is generally a marginal practice. (Wichelen 2009, 176)¹ Secondly, the evidence indicates that polygamy is neither exclusively Western nor non-Western as some Hindus, Mormons, Muslims, and other cultural and religious groups have historically engaged in the practice. (Mitsunga 2005). Even in modern times, the evidence suggests that polygamy is a cross-cultural practice that is not exclusive to any given society (Rebecca J. Cook & Lisa M. Kelly 2006).

However, the attention in recent times has been mainly on the prevalence of the practice in non-western societies. (Fenske 2012) In non-western communities like Africa, marriage is a sacred institution with the purpose of procreation. (Kerwen 2005, 149) Therefore, marriage is not an option but an obligation towards the community which is not decided privately. Since children are the reason for marriage and a large number of them are considered a blessing, the popularity of polygyny is not surprising. Besides, the ability to manage a large homestead is seen as a sign of leadership capability (Kerwen 2005, 136).

Recent census data indicate that around eleven percent of married women in Ethiopia are in polygynous unions while five percent of men reported being in a polygamous union. , (Central Statistical Agency 2012, 60,62) Yet, there is an apparent slight decline in the practice. In Ethiopia, as elsewhere in Africa, the practice of polygamy is historically rooted in cultural and

¹ According to DHS statistics (<http://www.measuredhs.com>), the highest levels of polygamy reported in some West African countries (e.g. Mali and Niger) over above 35% while the rate for the rest of Africa is between 10 and 30%. Rates in North Africa and Asia are even lower at between 5 and 10 percent.

religious foundations. While the practice is associated with the lowland Muslim majority communities, it is also practiced to some measure in the central and northern highlands. For instance, one empirical study covering the highland areas where polygamy is expected to be lower found that more than a third of married women were in a polygamous union. (Annabel Erulkar 2009, 32) The Criminal Code of Ethiopia penalizes polygamy. Yet, despite criminalization, instances of polygamy are still observed. (Fenske 2012, 17)

MAJOR ARGUMENTS FOR AND AGAINST POLYGAMY

The relativism-universalism debate has characterized the modern international human rights discourse since its inception. (Howard 1990, 158) This section starts with a brief overview of universalism and relativism as theories of human rights. The positions of scholars ascribing to each of these theories on the issue of polygamy are then presented. The feminist perspective is included in this discussion due mainly to its relevance and contributions to the topic at hand and the diversity of views it represents. The specific positions taken by scholars and decision-makers subscribing to the above perspectives are not clear-cut and watertight. However, some important core elements distinguish most positions as falling within one or the other.

UNIVERSALISM

The basis for the universalism argument is the claim that human beings share the same set of inalienable rights. Since human rights are integral to the human person, universality is considered an essential feature of human rights. (Orend 2002, 15) In the words of one scholar “*I define human rights as rights to which all individuals ought to be entitled merely because they are human, without regard to status or position ... [t]hus human rights ought to be universal.*” (Howard 1992, 1)

The emergence and development of the modern (post-WWII) international human rights system have nurtured opposition to polygamy as a violation of women’s rights. Mainstream human rights literature has been more or less consistently against polygamy as a practice that “*despoils women of their fundamental rights*”. (Jonas 2012, 143-4) The opposition to the practice also points to “*the high risk of contracting and spreading HIV/AIDS and the complications surrounding issues of inheritance after the death of a polygamous husband*”. (Mubangizi 2012)

Since this view of polygamy is based on a claim that polygamy leads to the violation of women's rights, one should consider the texts of the relevant women's rights documents to see if the practice has been prohibited as a violation.

The CEDAW does not explicitly address the issue of polygamy, possibly intentionally to accommodate the views of those of traditional or religious persuasion on the issue. The emphasis of the CEDAW is on the elimination of discrimination against women in matters relating to marriage. In particular, article 16 of the Convention the right to marry, free consent in choice of spouse and decision to enter into marriage, rights, and responsibilities during and at the dissolution of marriage, rights vis-à-vis children, and property rights. However, the United Nations Committee on the Elimination of Discrimination against Women stated, in its general recommendation number 21 on equality in marriage and family life, 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.*" (CEDAW Committee 1994, 14) The cultural basis of polygamy has also been targeted by the CEDAW Committee in its review of reports submitted by the States Parties to the Convention. For instance, the Committee has specifically urged in the case of Kenya² to:

"... view its cultures as dynamic aspects of the country's life and social fabric and as subject, therefore, to change [...] to put in place without delay a comprehensive strategy, including legislation, to modify or eliminate cultural practices and stereotypes that discriminate against women...[and urged Kenya] to address harmful cultural and traditional customs and practices, such as ... polygamy, more vigorously." (CEDAW 2007, 22)

Moreover, the Human Rights Committee has pronounced polygamy to be a violation of the dignity of women and "*an inadmissible discrimination against women*" about article 3 of the International Covenant on Civil and Political Rights (ICCPR). (Human Rights Committee 2000, 24)

² In some regions of Kenya, such as the North Eastern Province, the proportion of women in polygamous marriages is as high as 34 percent and other regions exhibit 20-23 percent in Nyanza, Rift Valley, Western, and Coast provinces, and the lowest rate of 3 percent in the Central Province. *available at* <http://www.measuredhs.com/pubs/pdf/FR151/FR151-KE03.pdf>

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), on the other hand, paints an even more confusing picture. The relevant article of the Protocol, article 6/c reads:

“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.”

On the one hand, the provision recognizes the equality of men and women in marriage – an argument often used to oppose polygamy. Yet, the reference to monogamy as „the preferred form of marriage“ and the extension of protections to polygamous „marital relationships“ appear to have recognized polygamy.

These latter aspects of the Protocol's stipulations have been denounced as standing counter to the goal of eradicating gender-based discrimination and provisions for legal reform to promote women's rights within the same protocol. (Jonas 2012, 144) On the other hand, the rights insensitive provisions of the Protocol could also be seen as resulting from a recognition of the prevalence of polygamy as a fact as well as the need to reach a compromise among States Parties whose views on polygamy range from the unwavering support to the staunches opposition. Even the most critical among human rights scholars admit that African leaders would not have accepted an agreement that abolishes polygamy in its totality. (Jonas 2012)

Generally, consideration of the texts of the CEDAW and the Maputo Protocol does not give us an unequivocal denunciation of polygamy. Yet, the HRC and CEDAW Committee have authoritatively underlined the practice as a violation of women's rights. When we come to the empirical evidence, there are indications that polygamy may create situations aggravating the violation of the rights of women and children. At the outset, polygamy in its most prevalent form accentuates the patriarchal nature of societies. Among the known pre-modern communities on record, *“85% practice either occasional or regular polygyny while 15% are exclusively monogamous and just four practice polyandry”*. (GLEJ 2013) This historical evidence is a testament to the inherently male-centric and unequal nature of polygamy as practiced across societies.

There is also some evidence indicating that various rights of women and children are put at peril in a polygamous relationship. First, polygamy presents a risk of the violation of consent, which is often overlooked, disregarded, or outright denied. Oftentimes, polygamous marriages also involve child marriage and forced or arranged marriage. Similarly, studies have also found that polygamy engenders higher levels of domestic violence against women perpetrated by a husband, as well as violence between co-wives. (UN Division for the Advancement of Women 2009) Another issue is the potential for the violation of the reproductive health rights of women in the context of polygamy. In particular, the risk for HIV infection is heightened by the existence of multiple partners leading to multiple opportunities for infidelity, the limited choice afforded women in sexual relations, and the view of masculinity underlying the polygamous union. Some studies have already found links between polygamy and HIV/AIDS in specific country contexts. (UNDP 2008) In addition to the inherent link between the rights of women and children, studies have identified direct adverse effects of polygamy on children. According to one empirical study covering 28 countries, polygamy reduces child health both in the short and long term. (Riegey 2011, 13)

In general, terms, the practice of polygamy within the Universalist lens focuses on the violation of the rights of women irrespective of the way it is established or the justification given on cultural or religious grounds. Polygamy is viewed as a threat to the equal rights of women within marriage. There is some truth to these claims in the sense that the man will have more control over family affairs vis-à-vis the woman in a polygamous union. Furthermore, polygamy forces women to share the hard-earned matrimonial property with multiple co-wives and children all bound to receive an ever-smaller share of resources. A wife in such a union often sees her contribution to the homestead rewarded by the husband taking on additional wives with whom she must share that hard-earned matrimonial property. Women in polygamous unions are often hard-pressed to prove a valid marriage was concluded under customary law, without which women cannot claim any rights in the marriage or upon divorce.

On the other hand, the view that polygamy is a violation of women's rights poses a two-fold threat to the rights of women. First, this view justifies and even requires the criminalization of polygamy thereby putting the formal justice system and customary rules in a position of conflict. This in turn hampers the implementation of the well-intending laws often making them impossible to implement, a risk inherent in any attempt to use the law as an instrument of social change. Secondly, this approach to polygamy is likely to undermine the very purpose of the

human rights system, i.e., protecting the rights and interests of women. Since the practice of polygamy cannot be legally recognized (as long as it is viewed as a violation), states may miss the possibility of protecting the rights of women already in polygamous unions. This is particularly important in the context of societies where polygamy is still practiced despite criminalization.

CULTURAL RELATIVISM

Cultural relativists understand human rights as a Western concept and question the application of the international human rights system to non-Western societies given the „Western bias“ (Cobbah 1987). In the African context, the basis for relativism is often a claim that „African culture is so different from Western that individual human rights are not appropriate in Africa“ or „the community takes precedence over the individual“. (Howard 1992, 3) In essence, cultural relativism questions the possibility of the universal values and norms on which human rights are based and abhors the use of one set of values to judge an entirely different set. (Nayak 2013, 4) Cultural relativists also argue that societies and cultures should not be judged, and consequently condemned, for human rights violations based on relative Western values that dominated the international human rights framework based on their individualistic ideology (Mayer 1995). This takes the core of the debate on whether the international human rights system reflects the values of the West without due consideration to the values of non-Western cultures (Bunting 1993).

CULTURAL AND RELIGIOUS JUSTIFICATIONS FOR POLYGAMY

The conventional justifications and rationalizations of polygamy take many forms more often than not drawing upon the communal nature of African society. These include: ensuring and maintaining stability and continuity of the family and clan; economic and social security of childless widows; economic completion among wives; and, increasing the size of one's family or clan. (Jonas 2012, 143) The perceived entrenchment of fidelity and reduction in extra-marital relations in polygamous communities is also used to justify polygamy as a preferred form of marriage.

Moreover, there have also been arguments for polygamous marriage as a choice based on human rights considerations. The first of these portrays the choice of a form of marriage, i.e. polygamous or monogamous, as an exercise in freedom by women. (Jonas 2012, 143) Another argument for polygamy (and traditional practices such as FGM) draws upon the protection of

religious freedom and cultural identity as fundamental human rights recognized in the international human rights system. (Kalev 2004) In some contexts, such as South Africa, proponents of polygamy present it as a reflection of openness in a newly democratic society.

(GLEJ 2013, 5)

The cultural justifications for polygamy for the most part reflect the patriarchal organization of society and the subjugation of women in that context. That is, the purpose is to serve the community, the husband, or somebody else; never the women or children in polygamous relationships. In this sense, polygamy serves the purpose of social control over women by “socializing women into prescribed gender roles”. (Mubangizi 2012, 34) The issue of consent is often overlooked (e.g., arranged marriage), secured by social pressure, and/or outright disregarded (e.g., where the practice involves child marriage).

Some of the claims, on the other hand, are difficult to ascertain in the face of contradictory evidence. For instance, there is little evidence to support the claim that polygamous unions as open multi-partner relationships encourage fidelity and prevent the spread of HIV/AIDS. Reports of the contrary, the occurrence of infidelity in polygamous marriages have been widely publicized by President Jacob Zuma’s extramarital affairs and children born out of wedlock.³ (Molele 2010, 4) The potential for HIV infection is also higher in a polygamous marriage since the wives in traditional societies have little or no say in sexual decisions and a single „husband“ or „wife“ contracting the virus would spread it to the whole group. At a more personal level, sexual satisfaction in polygamous marriages is inherently focused on men's satisfaction.

The other side of the cultural relativist justification relates to the religious grounds that also serve as sources of cultural values in many societies. Modern law and religion are essential socio-political aspirations to constitute, or at least frame, human consciousness, and behavior in all spheres of private and public life. Among the so-called world religions, Islam is usually raised within the discussion of polygamy and women’s rights.⁴ Within the justification of the practice of polygamy, some Muslim jurists like Badawi argue that Islam acknowledges various human needs and desires to live in pairs (Badawi 1998, 4,5). And it is based on this condition that Islam allows polygamy to be practiced, which has also been the practice of hereditary

³ Jacob Zuma, who has four wives-three at the time, also fathered a child with SononoKhoza

⁴ Historically, the practice of polygamy is part of the Judeo-Christian value system. However, modern day religious communities generally shun the practice with the exception of isolated communities outside the mainstream.

societies since before the arrival of Islam. To ensure that the practice of polygamy is carried out fairly and to provide harmony to the *ummah*, Islam has laid down certain conditions that restrict the free practice previously and take a more reasonable fair solution. Islamic law stipulates that a man may marry more than one woman but not more than four. However, there are also Islamic feminists like Vanessa who argue for the abolishment of the practice taking it as a violation of Islamic norms (Struensee 2004). These internal contestations provide opportunities for social change from within Islamic societies. Hence, though the idea of human rights could be questioned in light of religious values, bringing in social change should not only from the outside but also by giving room for internal contestations.

LEGAL PLURALISM

During the last week of April 2014, the Kenyan government adopted a law that recognizes indigenous polygamous marriages. This has brought with it a barrage of criticism from various directions. However, from a cultural relativist position, the recognition of polygamy in legal systems should be seen in the context of contemporary discourse on legal pluralism. While Kenya has been an independent country since 1963, this move could best be understood from the perspective of the tension between constitutionalism and the recognition of cultural and religious diversity within the postcolonial context. The premise for this argument is the general notion of polygamy being an accepted form of marital union in pre-colonial (and pre-Christian) African societies. The advent of colonialism led to the prohibition of the practice either through direct criminalization or to the influence of imported religious values. (Jonas 2012, 143)

The recognition of polygamy within a framework of legal pluralism is thus seen as a reversal of the colonial legacy of an African country. The need for the Africanization of the legal system as a pre-requisite to democracy in this setting has also been illustrated in the post-apartheid experience of South Africa⁵. (Andrews 2009, 356) In short, seen from the perspective of legal pluralism, the debate boils down to the place of indigenous and religious laws and institutions in contemporary constitutional frameworks recognizing the principle of gender equality. (Andrews 2009, 360)

The cultural relativist position has the very significant advantage of accepting the realities of the societies in which polygamy is practiced. Whether we like it or not, we live in societies

⁵ The Recognition of Customary Marriages Act no 120 of 1998 extends the state's recognition and regulation of marriage to both monogamous and polygamous customary marriages.

where polygamy is widely practiced. Such a position also affords the chance to better protect the rights and interests of women by recognizing the status of the relationships they are in as legally defined ones and taking a non-confrontational approach to the engagement of dominant social actors. Yet, this also has significant risks in terms of perpetuating and strengthening social structures that subjugate women. The static view of culture underlying this view is also questionable. The value of human rights norms as minimum standards could also be threatened if we take a too relativist view of the issue.

The complications associated with the recognition of customary laws sanctioning polygamy (without legalizing polygamy per se) are evident from the experience of South Africa. A major issue in this respect is the creation of a dual system recognizing polygamous marriages while prohibiting bigamy. *“A situation that is peculiar to South Africa is the legal recognition of polygamous customary marriages for some members of the population while for the rest a bigamous marriage is null and void.”* (South African Law Reform Commission 2003, 7/7/21) This will also make it difficult to discourage the conclusion of new polygamous marriages.

FEMINISM

The expansion of the conception of rights holders (who are subjects of rights) and the range of rights (what constitutes human rights) is a primary concern of feminism vis-à-vis human rights. According to Berms the inclusion of women in the human rights system is a shared aim of „all strands of feminist critique“ (Berms 1997, 141). The incorporation of women’s rights into the international human rights discourse and expansion of human rights to incorporate women’s interests and concerns is at the core of feminism. (Nayak 2013, 85) However, this call for incorporation could take forms ranging from mere inclusion of women’s rights to the redefinition of the international human rights system to reflect the needs and aspirations of women. (Charles worth 1994, 64) Some feminist scholars even question the relevance of the international human rights system to women’s emancipation. (Steans 2007, 20)

The feminist perspective on polygamy is more complicated. In as much as feminism is about addressing the subjugation of women, the universalist perspective could be shared by some feminists falling within a category of feminist universalism (Nayak 2013, 83) This brand of feminism draws attention to stereotypical gender roles and asymmetrical marriage signified by polygamy as an aggravation of the subjugation of women. (May 2012) Mainstream feminists are generally for the criminalization of HTPs including polygamy as violations of women’s

rights. (Kalev 2004, 339) Feminists often view cultural relativism as the continuation of male dominance and women's oppression (Brems 1997, 140). Liberal feminists, on the other hand, have argued that polygamy as such is no worse than monogamy as the patriarchal way of life is maintained both ways.

While they are definitely in the minority, some African feminists have also questioned the move to ban polygamy and criticized international actors working for the empowerment of women without understanding the potent agency of African women. (GLEJ 2013, 9) A more balanced approach is adopted by what has come to be called „cosmopolitan feminism“. This perspective questions the “*Western-centric, falsely universalized, and undemocratic imposition of narrowly defined*” conception of human rights while contesting “*relativist and communitarian claims over individually held human rights when they are used to conceal violations against women in the name of the cultural or religious integrity of the community*”. (Reilly 2007, 181)

Feminism has a definite attraction in terms of focus on women rather than the utility or otherwise of a system of norms (such as human rights) as well as its flexibility and/or diversity. The ongoing debate between universalism and relativism often shifts focus from the actual holders of rights to the systems within which rights are given or recognized. (Benhabib 2004, 16) Feminism, on the other hand, re-directs attention to women and what the systems in question have done to improve or aggravate their situation. It thus gives us a chance to reconsider the whole discourse from a new perspective. To illustrate, the feminist perspective on the role and place of indigenous laws and institutions about gender equality within the context of polygamy is informed by a level of frustration about the failure of the postcolonial state to deliver on promises of gender equality. (Andrews 2009, 358)

Moreover, the diversity of views within the feminist camp provides us with a seemingly endless choice of frameworks among which we can identify elements that are most suited to explaining and accommodating particulars relevant to the realities of women's lives in context. A very interesting discourse that has arisen among scholars in Muslim majority societies of North Africa and the Middle East embodies the diversity of views within the feminist camp. (Lev 1996) In effect, feminism has been used as a framework within which seemingly conflicting concepts of human rights, culture, and religion could be accommodated. (Chamas 2009, 249)

CONCLUSION

Marriage is a social institution. As such, the nature and forms of marriage in any given society will ultimately be determined by the social norms accepted in that society. The proper concern of the human rights activist in this context should thus be to see to it that human rights violations do not occur in marriage as understood in that particular society and address social norms that perpetuate violations or prevent the realization of rights. While this does not mean that polygamy should be endorsed within the human rights framework, addressing these concerns require an unbiased view of polygamy vis-à-vis its implications for the promotion and protection of human rights within the contexts in which the rights-holders and duty-bearers interact. After all, the ultimate goal of any human rights activity is to enhance the realization of human rights and improve the situation of rights holders.

CRIMINALIZATION OF POLYGAMY

Human rights are universal in their very nature. It is thus conceptually impossible to conceive of an international human rights system that would accommodate cultural variations without limit. However, even the most ardent activist would admit that the purpose of the human rights system is ultimately directed at improving the well-being of the human person. An outright prohibition of polygamy is sure to have a serious backlash against human rights in general and the rights of women in particular. For instance, the Maputo Protocol is believed to have secured the consent of many African states by permitting polygamy but discouraging its practice in line with the religious precepts of Islam – a religion practiced across Africa. (Ladan 2007) The lesson here is the need to prioritize the acceptance of human rights norms and standards over confronting entrenched practices.

The criminalization of polygamy is also difficult to justify in terms of the increased vulnerability of women and children in polygamous unions. As discussed above, the criminalization of polygamy in most jurisdictions is based on links with “grave social harms such as the sexual exploitation of—and sexual interference with—minors, the marriage of underage children to adults, and the subjugation and oppression of women”. (Drummond 2009, 320) These are acts that are criminalized per se. The law could easily punish perpetrators of these specific crimes rather than criminalizing polygamy, which in effect amounts to punishing individuals for possible crimes that may be committed in the future. Criminalizing

polygamy on moral grounds could also be difficult to accept in a context where other less morally acceptable practices such as adultery and prostitution are not criminalized per se.⁶

Arguably, polygamy is not in and by itself a violation of the rights of women and children. However, there is no question about the increased possibility of harm to the rights and interests of women and children in a polygamous union. On average, a polygamous family is likely to face more resource constraints, deny children a nurturing family environment and increase the chances of domestic violence. Issues of inheritance and property rights of women are also concerns that need to be addressed. Yet, the proper and effective venue for addressing these concerns is not criminal law, not at least in terms of criminalizing existing polygamous unions. Rather the issues are best addressed through policy and program measures. In this context, polygamy should be discouraged in the form of sanctions on the conclusion of new polygamous unions.

The case of the land registration drive in Ethiopia may be taken as an indication of good practice in addressing gender issues in the context of existing polygamous unions. (World Bank 2012, 93) As executed in the Amhara and Tigray regional states, the land registration drive involved the registration of land possessed by households jointly in the names of husband and wife. In the case of polygamous unions, the husband will receive certification only with the first wife while the remaining „wives“ will have certificates as women-headed households. This has led to a situation where the rights of women in marriage are protected while at the same time discouraging polygamy in the future. This is particularly true in the Amhara National Regional State where more than 85% of certificates name a woman as an individual or joint holder owing to the prevailing practice of registering household holdings in the names of both the husband and wife as well as the existence of holdings by women-headed households. In contrast, the proportion of holdings in the name of a woman was found to be significantly lower figures for Oromia and SNNP due mainly to registration in the name of the husband, prevalence of polygamy, and laws permitting registration of land as personal property of a spouse. (UN-HABITAT 2008, 12) (Holden 2008, 60)

⁶ This ties in with the idea of criminal mischief, i.e. an act should cause harm to be criminalized. Where there is no harm, the law should not criminalize an otherwise harmless act.

RECOGNITION OF POLYGAMY AS A MEASURE OF PROTECTION

The practice of polygamy has been decried from various perspectives associated with the protection of women's rights, moral values associated with modernity, and other issues. This has led to the imposition of measures to discourage and eliminate the practice across jurisdictions. These measures range from criminalization and social policy measures through religious and moral sanctions to awareness and sensitization campaigns. Yet, the fact of the matter is that polygamy persists in communities across the globe. Irrespective of whether one is for or against the practice, decision-makers have to deal with this fact and its ramifications. The UN report on good practices in HTPs-related legislation recommends the banning of polygamy with a provision relating to the need to "*ensure that the rights of women in existing polygamous relationships are protected*". (UN Division for the Advancement of Women 2009)

There are some convincing reasons for the legal recognition of polygamous unions in societies where the practice of polygamy is prevalent. First, the law should recognize the existence of polygamy as a social institution. Failing to do so would merely make the law less relevant to the lives of citizens. Even where the goal is to discourage polygamy, recognition is the most logical first step. Failure to recognize the existence of polygamy where it does exist merely creates an environment of denial and hidden practice. (Zeitzen 2008, 5) Second, the protection of women already in a polygamous union should be an important consideration. By recognizing the legal status of such unions, states can bring protection issues into the private sphere. These women will have little or no protection under the modern human rights system if national laws fail to recognize the status of the union in some form. The recognition of polygamy should not be a problem for the „modern“ legal system since variations of the monogamous model are already given various levels of recognition (irregular union).

Third, the formalization of polygamy in the legal system would bring traditional, customary, and religious values and rules governing the practice into the realm of public discourse. In addition to creating a more harmonious legal system, this would help prevent and respond to rights abuses within polygamous unions more effectively. A case in point is the issue of choice of venue for a spouse in a polygamous marriage. If the union is not recognized as marriage by civil law, all but the first wife cannot use the civil law system to petition for divorce. On the other hand, the recognition of customary laws sanctioning polygamous unions may pose a threat to the protection of the rights of women by perpetuating patriarchal biases underlying the practice. This is particularly true in communities where the subjugation of women is

reflected in discriminatory norms at the conclusion, within, and at the dissolution of marriage. Secondly, such an approach creates a dual system of family law as could be surmised from the situation in countries like South Africa. As put by the South African Law Commission: “A situation that is peculiar to South Africa is the legal recognition of polygamous customary marriages for some members of the population while for the rest a bigamous marriage is null and void”. (South African Law Commission 2003, Section 7.7.21)

TOWARDS A MORE COHERENT VIEW ON CULTURE, HUMAN RIGHTS, AND SOCIAL CHANGE

There is an obvious trend in the text of international human rights documents and corresponding discourse that takes cultural practices as antithetic to the promotion and protection of human rights. This trend is particularly informed by an analysis of traditional practices that affect women such as FGM, virginity testing, marriage by abduction, bride price, polygamy, and primogeniture in inheritance. (Mubangizi 2012, 34)

This is an erroneous view that equates the totality of the knowledge, beliefs, and behaviors of society with particular practices selectively identified as violations of a significantly different system of international human rights. This view also fails to take into account the range of alternatives implied by the complex web of knowledge, beliefs, and behavior and the dynamic nature of cultural practices that can make a difference. Societies that practice these specific behaviors are also bound to incorporate the values that would challenge them such as the dignity of the human person. This perspective points to the potential of culture as a tool for the promotion of human rights. Rather than viewing culture as static and unchanging, one needs to take into account the dynamic nature of human relationships. The cultural change could come about in the process of applying existing values to new situations and understandings as well as drawing upon the experiences of other cultures. Though resistance to new ideas has been usually observed as one pillar for social change, it can be achieved if the necessary cultural sensitivity and conversation are given room within the international human rights discourse than imposing.

The capacity in producing a new culture is universally shared by human beings thus, rather than restricting the human rights discourse from one predominant view (western), creating a more global conversation in producing new culture seems more fruitful. The choice that was ought to be made between culture and individuals does not need to be made if the social change

and the human rights discourse can travel in a parallel manner without one dominating the other. The ideal outcome of a process of mutual support between human rights and culture is a culture of human rights. Such a culture of human rights represents a relationship of congruence and mutual support between human rights and cultural norms, values, and practices. In such a situation, the very basis of polygamy in the patriarchal system will no longer be valid. Thus, polygamy would have long ceased to exist.



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