# **WHAT IS THE FUTURE OF POLYGYNY (POLYGAMY) IN AFRICA?**

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**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 aimed at promoting and protecting the rights of women as defined in international human rights law, as well as respecting the practice of polygyny. These reforms, drawn from mainly recent marriage legislations, namely, Kenya, Mozambique and South Africa, show that the approach to regulate polygyny by these countries have either been to legalise, abolish, or regulate the practice. In view of the reforms’ focus on both women’s rights principles as well as respect for the practice of polygyny, this paper examines the different approaches in which these selected countries are regulating the practice, in particular, how these countries are striking a balance between polygyny and the protection of women’s rights. The paper will also highlight the difficulties that law reformers face in regulating the practice in order to protect women’s rights, as well as the gaps in the law reforms that need to be addressed.

**1 Introduction**

Polygyny is a traditional practice whereby *only* a man is allowed to marry more than one wife (emphasis added).[[2]](#footnote-2) This practice has long been perceived to be in conflict with the ideals of gender equality,[[3]](#footnote-3) inherently subordinates women,[[4]](#footnote-4) violates the dignity of women,[[5]](#footnote-5) and increases women’s risk of contracting HIV/AIDS,[[6]](#footnote-6) is emotionally damaging and economically oppressive.[[7]](#footnote-7) In addition, polygyny is perceived to be rooted in gender and women’s rights violations which are protected in the Universal Declaration of Human Rights, 1948 (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 Convention on Civil and Political Rights (ICCPR).[[8]](#footnote-8) These observations, in line with the international human rights monitoring bodies, lead to the call for the regulation or abolition of polygyny.[[9]](#footnote-9)

Most African States Parties to the international women’s rights instruments have embarked on family law reforms, with implications on polygyny.[[10]](#footnote-10) A review of these reforms show that countries have focused on promoting and protecting the rights of women as defined in international human rights law,[[11]](#footnote-11) while simultaneously respecting the practice of polygyny.[[12]](#footnote-12) Illustrations from mainly Kenya,[[13]](#footnote-13) Mozambique,[[14]](#footnote-14) and South Africa,[[15]](#footnote-15) reveal that polygyny is being legalised, abolished or regulated. In view of the reforms’ focus on women’s rights principles as well as respect for the practice of polygyny, this paper examines the different approaches in which these selected countries are regulating the practice, in particular, how these countries are striking a balance between polygyny and the protection of women’s rights. The aim, however, is to explore the impact of these approaches on the future of polygyny in Africa.

# 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: marriageable age, consent to marriage, equal status of spouses in a marriage, 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 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 colonialists and Christianity in Africa, polygyny existed as an integral part of family law based on mostly cultural beliefs.[[16]](#footnote-16) Traditionally, polygyny existed in order to perform valuable social and cultural functions. Among others, they included: a remedy to escape divorce due to infertility because in African communities, a marriage without procreation is incomplete;[[17]](#footnote-17) a solution to menopause due to the cultural belief that some women may no longer engage in sexual activities but men will continue to do so;[[18]](#footnote-18) a legal response to address the problem of unmarried women snatching away other women’s husbands due to the ratio imbalance between women and men;[[19]](#footnote-19) a viable solution during pregnancy and nursing because some African cultures forbid sexual relations between a husband and wife during pregnancy;[[20]](#footnote-20) a remedy to negative social associations because being single is associated with evil, for example, witchcraft;[[21]](#footnote-21) a way of taking care of the widow in that both the widow and children will be taken care of by the deceased husband’s brother;[[22]](#footnote-22) and more importantly, polygyny was ‘established to address the economic issues which were centred on subsistence agriculture’.[[23]](#footnote-23) These social functions, arguably, existed in order to serve the interests of men.[[24]](#footnote-24)

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 of the Family Family Law Statute Act in Mozambique, those who defended polygamy raised similar arguments.[[25]](#footnote-25) 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 for all marriages.[[26]](#footnote-26) In Uganda, Parliament has failed twice to pass the Uganda Marriage and Divorce Bill, 2009 in 2009 and 2013, respectively, due to, among others, provisions on polygyny.[[27]](#footnote-27) In addition, the Chairperson of the Ugandan Law Reform Commission, Prof Joseph Kakooza, observed during debate that:

‘polygamy as a custom will remain, not only in Uganda, but also in all African countries and even beyond. What [go] as mistress in Europe [is a particularly wife]. Once the first marriage is customary, you can marry under customary law even 100 or more, provided the custom allows it’.[[28]](#footnote-28)

During colonisation and Christianity, polygyny was one of the reasons in which customary marriages were not legally recognised.[[29]](#footnote-29) Polygyny was viewed as a form of slavery which must be abolished.[[30]](#footnote-30) In general, colonialists and Christians were determined to replace it with monogamy.[[31]](#footnote-31) In their attempt to replace polygamy with monogamy, colonialists and Christianity gave preferential treatment to monogamous men. For example, Muthengi records that some Christian Missionaries refused to accept polygamists and their families into church.[[32]](#footnote-32) 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.[[33]](#footnote-33)

This position, however, did not stop the practice of polygyny. Many African countries continued with the practice and it remained permissible under customary laws of various societies.[[34]](#footnote-34) In some places, it led to members forming their own independent churches. For example, Muthengi records independent churches by Isaiah Shembe of the Nazarite Baptist church in South Africa who had four wives; Josiah Oshitelu the founder of the Aladura (church of the Lord) who had seven wives; and Johane Marange founder of the African Apostolic Church in Zambia and Zimbabwe who had sixteen wives.[[35]](#footnote-35)

In the modern context, although statistics are low[[36]](#footnote-36) and the general opinion is that it disadvantages women and must be prohibited, polygyny still exists on the continent.[[37]](#footnote-37) For example, reports indicate that almost 47% of marriages in Senegal feature more than one wife.[[38]](#footnote-38) In Tanzania, Howland and Koenen report that a quarter of its women are involved in polygamous marriage.[[39]](#footnote-39) In Kenya, Akuku Danger is believed to have been married to more than 100 wives.[[40]](#footnote-40) Furthermore, polygyny has the support of political and prominent figures on the continent. For example, Kenyan President Kibaki has two wives; King Mswati III of Swaziland has 14 wives;[[41]](#footnote-41) the South African President, Jacob Zuma, is married to more than 3 wives; in Sudan, President Omar Hassan al–Bashir has always sustained that polygyny is a viable option to increase the population;[[42]](#footnote-42) and in 2014, President Uhuru Kenyatta signed a law that allows men to marry as many wives as they wish without their existing wife/wives consent.[[43]](#footnote-43)

The prevalence of polygyny in urban areas on the continent appears to take on different forms, such as informal marriages.[[44]](#footnote-44) For example, the 2000 Demographic Health Survey conducted in Namibia shows that 16% of women are in informal relationships.[[45]](#footnote-45) 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 a disadvantage of the other.[[46]](#footnote-46) In Botswana, the study by Griffith found that men prefer informal polygyny in order to escape the obligations of plural marriages.[[47]](#footnote-47) In large cities of Tanzania, Howland and Koenen reported that traditional polygyny has been, to a large extent, replaced by informal polygyny.[[48]](#footnote-48) In addition, Women and Law in Southern Africa (WLSA) reported in their findings that migrant workers contract marriages with women in the rural areas and then enter into informal unions with women in the cities.[[49]](#footnote-49)

Furthermore, its persistence 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, among others.[[50]](#footnote-50) The legal recognition of polygyny on the continent has taken different forms. Some African countries, for example, Kenya has formally recognised polygynous marriages as valid marriages.[[51]](#footnote-51) Other countries, such as Malawi allow polygyny under the unwritten customary laws.[[52]](#footnote-52) Gaffney-Rhys has also observed of countries that opted to formalise existing customary laws, for example South Africa, but impose restrictions on the practice.[[53]](#footnote-53) In addition, some countries continue to formally prohibit polygyny under civil law, but the practice remains lawful under the customary law of the country.[[54]](#footnote-54) 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.[[55]](#footnote-55)

**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[[56]](#footnote-56) and African Women’s Protocol,[[57]](#footnote-57) do not expressly consider polygamy.[[58]](#footnote-58) However, they require States Parties to eradicate practices that may lead to discrimination.[[59]](#footnote-59) 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.[[60]](#footnote-60) International human rights instruments further contain provisions aimed at ensuring equality of spouses before, during and after marriage.[[61]](#footnote-61) For 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.[[62]](#footnote-62)

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.[[63]](#footnote-63) For example: the Human Rights Committee in General Comment 28 observed that ‘equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle and therefore, should be abolished’.[[64]](#footnote-64) It has also found that polygyny violates article 3 of the ICCPR[[65]](#footnote-65) and has therefore urged States Parties to take legislative measures to enforce the prohibition of polygamy within their territories.[[66]](#footnote-66) 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’.[[67]](#footnote-67)

In countries where polygyny is still practiced, international human rights instruments require States Parties to ensure that women are entitled to the same rights and benefits enjoyed by monogamous marriages.[[68]](#footnote-68) 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*’ (emphasis added). 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]](#footnote-69)

In addition, international human rights law also mandates States Parties to take all appropriate measures to eliminate harmful cultural practices in order to ensure equality in marriage.[[70]](#footnote-70) Further guidance at the international level can be obtained from the CEDAW Committee that has observed that States Parties whose constitution’s guarantee equal rights but permit polygynous marriages in accordance with personal or customary law, violates the constitutional rights of women, and breaches the provisions of article 5 (a) of CEDAW.[[71]](#footnote-71) For example, the 2010 Kenya Constitution guarantees equality between the spouses from the outset to its dissolution.[[72]](#footnote-72) Several African countries, for example, Tanzania,[[73]](#footnote-73) Malawi,[[74]](#footnote-74) South Africa,[[75]](#footnote-75) and Mozambique[[76]](#footnote-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.[[77]](#footnote-77) For instance, Hellun and Aasen reports that at its 39th Session in 2007 and 48th Session in 2011, the Committee took the view that the Kenya Marriage 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’.[[78]](#footnote-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’.[[79]](#footnote-79) In response, the CEDAW Committee expressed concern about the persistence of the practice and the Government’s limited efforts to address the matter.[[80]](#footnote-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 practiced, States Parties must ensure that women are entitled to the same rights and benefits enjoyed by 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 system of law are consistent with the Constitution’. As Byrnes and Freeman rightly observes, this provision require the state to enact legislation that provides equality between spouses in all marriage systems.[[81]](#footnote-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’.[[82]](#footnote-82) Article 45 (3), is therefore, a ‘direct’ response to article 16(1) of CEDAW as discussed.[[83]](#footnote-83)

In responding to both its constitutional and international obligations, the Kenya government enacted the Marriage Act, 2014 (hereinafter called the ‘Marriage Act’).[[84]](#footnote-84) The Marriage Act is the main legislation that regulates Christian, Civil, Customary, Hindu and Islamic marriages.[[85]](#footnote-85) The proprietary aspects relating to marriage are, however, regulated by the Matrimonial Property Act, 2013.[[86]](#footnote-86) These two legislations 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’.[[87]](#footnote-87) 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 that 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’.[[88]](#footnote-88) The importance of registration in the protection of women’s rights cannot be overemphasised. Registration of a customary marriage can unlock doors of 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 on), 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.[[89]](#footnote-89) Thirdly, according to section 6(3), ‘a marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous’.[[90]](#footnote-90) This provision treat women married under customary law and Islamic law differently from women married under 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 (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.[[91]](#footnote-91) Setting the marriageable age at 18 complies with international children’s rights standards, as well as sending a strong message that child marriages under any law are not allowed in Kenya.[[92]](#footnote-92) In the context of this discussion, however, we see that prescribing a marriageable age is a departure from traditional customary rules that attached a marriageable age to puberty and other cultural ceremonies which predisposed young girls to polygynous marriages.[[93]](#footnote-93) 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’.[[94]](#footnote-94)

Further protection under the Kenya Marriage Act is provided under the registration provisions.[[95]](#footnote-95) A polygynous customary marriage, just like all other marriages recognised in the Kenya Marriage Act, can now be registered.[[96]](#footnote-96) The merits of registration, in the protection of children and women’s human rights in the context of polygyny, cannot be overemphasised. It can safeguard the fact that parties to the marriage 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.[[97]](#footnote-97) However, as earlier observed, ‘the status of a marriage’ under the Kenya Marriage Act is only conferred on a customary marriage when parties notify the Registrar of the marriage within 3 months of celebrating thereof.[[98]](#footnote-98) This position, arguably, may lead to women’s ‘disfranchisement’ due to the fact that many women are in disadvantaged rural set up where access to registration is difficult.[[99]](#footnote-99)

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’.[[100]](#footnote-100) This provision is in line with international human rights law as well as the constitution on the equal protection of spouses in a marriage. It guarantees the right to equality for women with the husband in polygynous marriages. However, read together with provisions of the Matrimonial Property Act, 2013 (MPA) that regulates matrimonial property in the context of polygynous marriages,[[101]](#footnote-101) it seems that in a polygynous marriage, a husband has more property rights than each of his wives. This argument is supported by the following: section 8 of the MPA regulates the 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 property is held equally by the husband and his first wife’.[[102]](#footnote-102)

Several observations made by Banda in the protection of women’s rights in a polygynous marriage are relevant to this discussion.[[103]](#footnote-103) 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’.[[104]](#footnote-104) 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.[[105]](#footnote-105) 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 equal sharing of matrimonial property between a husband and wife principle.

Furthermore, section 2 of the Marriage Act provides for the equal rights and obligations for spouses in a marriage. In the context of polygynous marriages, it empowers a wife with equal rights to 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.[[106]](#footnote-106) There in need, therefore, for an enabling provision to allow a woman to give consent when the husband is marrying subsequent wife/wives.

To conclude therefore, the exploration on 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, particularlyproprietary consequences of polygynous marriages. Moreover, in balancing polygyny and women’s rights, the Marriage Act has recognised the traditional African way of allowing only a husband to marry as many wives as he wishes without the existing wife’s consent.[[107]](#footnote-107)

***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.[[108]](#footnote-108) This principle of equality is also embedded in the Family Law Family Law Statute (hereinafter called the Family Law Statute) which is the principal act that regulates religious, statutory, as well as customary marriages in Mozambique.[[109]](#footnote-109) Arguably, the equality principle in marriage is safeguarded by, for example, article 53 (c) of the Family Law Statute which bans marriages which do not have the consent of the parties.[[110]](#footnote-110)

So, how has the Family Law Statute balanced polygyny and women’s rights? The starting point is the definition of the marriage. The Family Law Statute defines a marriage as ‘a relationship between two persons of the opposite sex’.[[111]](#footnote-111) This definition clearly prohibits polygamy since only two persons of the opposite sex are allowed to marry.[[112]](#footnote-112) Commentators have thus welcomed the Family Law Statute ‘as a first step to ensure equality of spouses in marriage’.[[113]](#footnote-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 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 Family Law Statute that attempts to address it.[[114]](#footnote-114)

Apart from the definition section, several other provisions, that regulate different marriage aspects, 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.[[115]](#footnote-115) These requirements include: that parties to a marriage must both be over the age of 18 years.[[116]](#footnote-116) 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.[[117]](#footnote-117) However, this protection is threatened with a crawback 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.[[118]](#footnote-118) As rightly observed by Plan international, this is compounded with the fact that this approval can be done without providing for specific reasons for allowing such marriages.[[119]](#footnote-119) This position, unfortunately, is contrary to the Family Law Statute’s efforts of addressing harmful cultural practices, such as polygyny, that may lead young girls into child polygynous unions.[[120]](#footnote-120)

Further 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 on the disposal of spousal property. In addition, this protection is also offered to women in *de facto* marriages.[[121]](#footnote-121) 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 Family Law Statute in its wide scope of protection given to women living in de facto unions.[[122]](#footnote-122) In the context of women found in *de facto* polygyny, the Family Law 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.[[123]](#footnote-123) By extending legal protection to *de facto* polygynous marriages, the Family Law Family Law Statute should have equally provided protection to those women found in informal marriages. Moreover, as succinctly captured by Plan International:

The advantage of recognising *de facto* unions are that these unions can serve as basis for women and girls married traditionally, where such marriages are not registered and which are therefore not recognised in statutory terms.[[124]](#footnote-124)

This approach would have been in line with international human rights position that requires states parties extend protection where polygyny is still practiced.[[125]](#footnote-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 that, arguably, requires the state to recognise and protect marriages as the institution that secures the pursuit of family objects.[[126]](#footnote-126)

In addition, the Family Law Statute, just like the Constitution and the Civil Registrar’s Code (that regulates for the formalities and processes required for marriage registration), provides that marriages are valid if they are registered.[[127]](#footnote-127) This position is similar the Marriage Act in Kenya. In Mozambique, just like 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 in the context of Kenya equally apply. Related to this point, the process for the registration of statutory and religious marriages under the Family Law Family Law Statute is different from customary marriages. For statutory and religious marriages, the Family Law Family Law Statute requires that these marriages are preceded by a preliminary process.[[128]](#footnote-128) This preliminary process provides the opportunity for the Registrar to inquire if the marriage requirements have been met or not.[[129]](#footnote-129) In contrast, for customary marriages where polygynous unions are mostly to be found, parties are not subjected to the same preliminary inquiry. This position unfortunately predisposes women to end up in informal polygynous marriages without their knowledge. Moreover, the 2016 Plan International’s study found that there is generally poor registration infrastructure.[[130]](#footnote-130)

In conclusion, therefore, although the Family Law Statute adopted 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 the context of polygyny. For example, there is need to improve registration infrastructures. In addition, the presence of informal polygyny after 10 years since the Family Law 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 observes, ‘although polygyny is invariably discriminatory, one must consider the context in which it takes place before denying its recognition’.[[131]](#footnote-131)

***4.3 South Africa***

The Recognition of Customary Marriages Act, 1998 (RCMA) in South Africa was passed to recognise as valid customary marriages. These include polygynous marriages.[[132]](#footnote-132) The RCMA is, however, different to traditional customary laws in certain respects. It contains provisions for the equal status of spouses in a customary marriage,[[133]](#footnote-133) minimum age requirements for customary marriages,[[134]](#footnote-134) registration rules,[[135]](#footnote-135) and in community of property matrimonial regimes.[[136]](#footnote-136) These changes are generally seen as a milestone in the protection of women’s rights in the context of customary marriages.[[137]](#footnote-137)

For 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]](#footnote-138) In a similar fashion, section 2(4) provides for the recognition of polygamous marriages concluded after the commencement of the Act.[[139]](#footnote-139) In order to 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]](#footnote-140) This is problematic as customary law grants the power to control property in men and views a wife as a perpetual minor under the guardianship of the husband.[[141]](#footnote-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]](#footnote-142)

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

Secondly, as Bennett has rightly observed, section 7(6) does not prescribe the terms of the contract. It has, however, been suggested that the intention seems to have been to establish an ‘out of community of property’ matrimonial system.[[144]](#footnote-144) This suggestion, arguably, resonates with the customary rules where each wife and her children establish a separate autonomous house with its own assets allocated by the husband.[[145]](#footnote-145) Moreover, the ‘out of community of property’ under customary rules can be implied from the fact that once assets have been allocated to a particular house, a husband was not permitted, without consulting the wife of a particular house and the eldest son to move assets from one house to another.[[146]](#footnote-146) Where assets have been so moved, an inter-house debt is created between the houses.[[147]](#footnote-147) Moreover, in terms of the customary rules of inheritance, children inherit property from their respective mother’s house.[[148]](#footnote-148)

In addition, just like Kenya and Mozambique as discussed, the RCMA in South Africa has provisions for the registration of customary marriages that can further protect women from informal polygyny.[[149]](#footnote-149) However, many women married under customary laws are unable to register their marriages due to different factors.[[150]](#footnote-150) The effect of non-registration is that women are denied the right to inherit, causing great inequalities, particularly in polygynous marriages.[[151]](#footnote-151) 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.[[152]](#footnote-152) In addition, the RCMA gives primacy to civil marriages over polygynous marriages which results in many women deprived of the potential protection offered by the RCMA.[[153]](#footnote-153)

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 practiced in the traditional set up.

**5 Analysis of legal responses**

***5 1 Reform or recognition of polygyny?***

An exploration of the selected law reforms seems to endorse polygyny as practiced under traditional customary rules in the following ways. First, provisions that recognises the practice only allows men to have more wives and not vice versa. This is the long practiced tradition of polygyny as practiced in most African countries.[[154]](#footnote-154) Secondly, in regulating the matrimonial property of the polygynous marriages, these laws champion traditional patriarchal attitudes that leave the control and distribution of property to the husband.[[155]](#footnote-155) In South Africa, for example, the RCMA provide that the matrimonial property system for polygynous marriages concluded before the Act to continue to be governed by customary laws.[[156]](#footnote-156) In Mozambique, the Family Law Statute is silent; it does not make any provision for the regulation of property of those women found in subsisting polygynous unions, even those concluded before the Family Law Statute. One can therefore assume that customary patriarchal rules regulate matrimonial property in the context of the informal polygynous (including those that pre-date the Family Law Statute) marriages.

Thirdly, all laws under discussion recognise the equal status of parties in polygynous marriages.[[157]](#footnote-157) This is seen as a departure to 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]](#footnote-158) These laws, therefore, addresses 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 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 traditional rules as expressed by expert witnesses in the South African case of *Mayelane v Ngwenyama*:

(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.[[159]](#footnote-159)

Fourthly, these laws seem to comply with CEDAW's suggestion that states should register all marriages in order to ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.[[160]](#footnote-160) Despite having registration provisions, registration remains one of the obstacles to protect women in the context of polygyny on the continent. For example, in South Africa, despite providing for the requirement of registration, the majority of customary marriages are not registered in South Africa.[[161]](#footnote-161) Of course registration under the RCMA does not validate a customary marriage.[[162]](#footnote-162) Arguably, the RCMA adopts the traditional views that 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.[[163]](#footnote-163) In the context of Mozambique, where most people marry according to customary law, evidence show that few of these marriages are registered.[[164]](#footnote-164)

I therefore, ask: in balancing polygyny and women’s rights, are the selected countries reforming or recognising the existing practices? Whereas this paper does not attempt to answer such potential questions, the results of the different approaches by, particularly Kenya and South Africa are obvious: they are simply recognising polygyny as practiced under traditional customary rules.

***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 pass in many African countries.[[165]](#footnote-165) The process of drafting the RCMA, Kenya Marriage Act and the 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. The prohitionist approach would, consequently, lead to more informal unions that leave many women not legally protected.[[166]](#footnote-166) In Mozambique, the prohibitionist approach is not clear since the word polygyny is not expressly used in the Family Law Statute.[[167]](#footnote-167) In light of this, 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, economic empowerment, among others.[[168]](#footnote-168)

***5 3 Challenges to reforming polygyny in Africa***

The exploration of law reforms in the selected countries has revealed possible challenges of striking a balance between polygyny and women’s using the legalised, prohibition or regulation approaches. This is due to the mushrooming of informal forms of polygyny on the continent.[[169]](#footnote-169) These informal forms of polygyny make it difficult to assess the impact of the different approaches in advancing the rights of women. It can therefore be asked: are informal polygynous unions an indication that law reform does not reflect the social reality and people are deliberately avoiding it? Are informal polygynous unions an indication that law reform begs to buy in from the community? Whereas these questions would be subjects of research for another day, existing research informs us that most men and women are ignorant of the new laws and its protective nature. It is therefore important that such reforms are accompanied by education and awareness campaigns.[[170]](#footnote-170)

**5 Conclusion**

This paper was premised on exploring the different approaches taken by African countries to advance 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 that:

First, what the law says is not what people do;

Second, equality between spouse’s provisions allows for inequality;

Thirdly, polygyny is transforming into unofficial relationships which leave most women out of the legal protection; and

Lastly, law reform is heavily influenced by customary laws that continue to disadvantage women found in these marriages.

Which leads to the conclusion that whether countries legalise, abolish or regulate polygyny, ultimately, the essence of polygyny in Africa is not going to change.

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<http://www.independent.co.uk/news/world/africa/the-big-question-whats-the-history-of-polygamy-and-how-serious-a-problem-is-it-in-africa-1858858.html> accessed 10 June 2016

**LIST OF ABBREVIATIONS**

AHRLJ African Human Rights Law Journal

1. \*Lea Mwambene. Diploma in Nursing, LLB (Hons) (Malawi) LLM LLD (UWC). Associate Professor: Department of Private Law, University of the Western Cape. This work is based on the research supported in part by the National Research Foundation of South Africa, Unique Grant No.99216, and the Senate Research Funds from the University of the Western Cape. Any opinion, finding and conclusion or recommendation expressed in this material is that of the author and the NRF does not accept any liability in this regard. [↑](#footnote-ref-1)
2. 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 means polygyny. See eg similarly Obonye 2012 *Journal of African Studies and Development* 142-149; Bennett *Customary Law* 243; Mwambene 2010 *AHRLJ* 78, 93; Luluaki "Customary polygamy" 395-418; Howland and Koenen 2014 *Social Justice*, 7; Gregg-Strauss 2012 *Ethics* 516-544. [↑](#footnote-ref-2)
3. Banda 2005 *Women Law and Human Rights* 116; Valley 2010 http://www.independent.co.uk/news/world/africa/the-big-question-whats-the-history-of-polygamy-and-how-serious-a-problem-is-it-in-africa-1858858.html; Gaffney-Rhys 2011 *Women in Society* 1; CEDAW Committee *General Recommendation 21* para 14; Women’s Legal Centre *Recognition of Customary Marriages*, 7 *Mediterranean Journal of Social Sciences*, vol 5, 2014. [↑](#footnote-ref-3)
4. See eg Witte 2015 *Emory Law Journal* 1675-1746 and Howland and Koenen 2014 *Social Justice*, 12. [↑](#footnote-ref-4)
5. CEDAW Committee *General Recommendation 21*; Jeffreys *Man's Dominion* 1967. [↑](#footnote-ref-5)
6. See eg UN Women United Nations http://www.endvawnow.org/en/articles/625-polygamousmarriages.html?next=1678; Kuhn http://www.du.edu/korbel/hrhw/researchdigest/africa/UniversalHumanRights.pdf; Women’s Legal Centre *Recognition of Customary Marriages*, 7. [↑](#footnote-ref-6)
7. CEDAW Committee *General Recommendation 21* para 14 and Howland and Koenen 2014 *Social Justice*, 12. [↑](#footnote-ref-7)
8. Art 23(4) of the ICCPR, 1966 provides for equality in relation to marriage. See also article 6 of the Protocol to the African Charter on the Rights of Women, 2003. See discussions by eg Sraman https://www.academia.edu/3559600/Polygamy\_and\_Human\_RIghts?auto=download; Kuhn http://www.du.edu/korbel/hrhw/researchdigest/africa/UniversalHumanRights.pdf; Gregg-Strauss 2012 *Ethics* 518; Obonye 2012 *Journal of African Studies and Development* 147; and Howland and Koenen 2014 *Social Justice*, 12. [↑](#footnote-ref-8)
9. Howland and Koenen 2014 *Social Justice*, 12; Cook and Kelly 2006 http://www.justice.gc.ca/eng/rp-pr/other-autre/poly/index.html; Human Rights Committee *General Comment 28* para 24 in which the Human Rights Committee responsible for the monitoring of the ICCPR confirms that polygamy should be eradicated because it is discriminatory. See also Committee on CEDAW *General Recommendation 21* para 21, and Al Hammadi 2015 https://www.linkedin.com/pulse/negative-consequences-polygamy-Zainab-al-hammad. [↑](#footnote-ref-9)
10. For example, South Africa ratified CEDAW in 1995 and the African Women’s Protocol in 2004; Kenya ratified CEDAW in 1984; Rwanda ratified CEDAW in 1981; Malawi in 1987; Mozambique ratified CEDAW in 1997, CRC in 1994, ICCPR in 1994, ACHPR in 1989 and the African Women’s Protocol in 2005. In addition, CEDAW was ratified by Senegal in 1980, Swaziland in 2004,Congo in 1980, Democratic Republic of Congo in 1986, Tanzania, Nigeria and Zambia in 1985, Zimbabwe in 1991, Uganda in 1984, Namibia in 1992 [↑](#footnote-ref-10)
11. See for example, CEDAW Committee *General Recommendation 21* para 21; art 6(c) of the African Women’s Protocol (2003); art 23(4) of the ICCPR (1966). [↑](#footnote-ref-11)
12. See eg the *Recognition of Customary Marriages Act* 120 of 1998. [↑](#footnote-ref-12)
13. The *Marriage Act* 14 of 2014. [↑](#footnote-ref-13)
14. The *Family Law Family Law Statute Act* 10 of 2004. [↑](#footnote-ref-14)
15. The *Recognition of Customary Marriages Act* 120 of 1998. [↑](#footnote-ref-15)
16. Nyanseor http://www.theperspective.org/polygyny.html; Modupe http://unilorin.edu.ng/publications/abdulraheemnm/LAW\_AND\_SOCIAL\_VALUES.pdf. [↑](#footnote-ref-16)
17. Muthengi 1995 *Africa Journal of Evangelical Theology* 58. Mbiti 1969 *African Religion and Philosophy* 133. In the African context, a marriage without procreation is incomplete. A woman is always presumed to be at fault for lack of procreation in a marriage. [↑](#footnote-ref-17)
18. Baloyi 2010 *Verbum et ecclesia* 3. [↑](#footnote-ref-18)
19. As observed by Nyanseor (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 getting married. [↑](#footnote-ref-19)
20. See also Bailey <http://www.swc-cfc.gc.ca/>; Labeodan 2007 *Journal of Constructive Theology* 46. [↑](#footnote-ref-20)
21. Phaswana 2005 1. [↑](#footnote-ref-21)
22. Okorie 1995 *Africa Journal of Evangelical Theology* 3. [↑](#footnote-ref-22)
23. Nyanseor (<http://www.theperspective.org/polygyny.html>); Muthengi 1995 *Africa Journal of Evangelical Theology* 59. [↑](#footnote-ref-23)
24. See generally, Da Silva 2004 http://www.wlsa.org.mz/article-qhy-polygamy-is-unacceptable-in-family-law-in-the-light-of-Human-rights/. See also similar views by Howland and Koenen 2014 37 [↑](#footnote-ref-24)
25. See generally Da Silva 2004<http://www.wlsa.org.mz/article-qhy-polygamy-is-unacceptable-in-family-law-in-the-light-of-Human-rights/>. See also similar arguments raised in the context of the 2009 and 2013 *Ugandan Marriage and Relations Bill*. [↑](#footnote-ref-25)
26. See Malawi Law Commission’s Report on the Review of Marriage and Divorce, 2005. [↑](#footnote-ref-26)
27. Mugerwa *Daily Monitor* 1. [↑](#footnote-ref-27)
28. Ssenonjo 2011 *Netherlands Quarterly of Human Rights* 376. [↑](#footnote-ref-28)
29. Bennett2004 *Customary Law* 189. Kang’ara 2012 *Comparative Law Review* 5. [↑](#footnote-ref-29)
30. Obonye 2012 *Journal of African Studies and Development* 142-149; Bennett2004 *Customary Law* 189; Herbst and Du Plessis 2008 *EJCL* 5 http://www.ejcl.org [↑](#footnote-ref-30)
31. Kang’ara 2012 *Comparative Law Review* 2. [↑](#footnote-ref-31)
32. Muthengi 1995 *Africa Journal of Evangelical Theology* 57. Barrett 1968 *Schism and Renewal in Africa* 117. [↑](#footnote-ref-32)
33. Kang’ara 2012 *Comparative Law Review* 16. [↑](#footnote-ref-33)
34. Bennett2004 *Customary Law in South Africa* 187, 192. [↑](#footnote-ref-34)
35. Muthengi 1995 *Africa Journal of Evangelical Theology* 55, 57. [↑](#footnote-ref-35)
36. See, for example, the decreased statistics in Namibia as reported by Ovis [www.lac.org.na/news/inthenews/pdf/polygamy.pdf](http://www.lac.org.na/news/inthenews/pdf/polygamy.pdf); and in Malawi by Basendal 2004 *African Sociological Review* 1. [↑](#footnote-ref-36)
37. See, for example, Fenske 2012 [www.csae.ox.ac.uk/workingpapers/pdf/csae-wps-2012-20.pdf](http://www.csae.ox.ac.uk/workingpapers/pdf/csae-wps-2012-20.pdf). Fenske has who observed that ‘stretching from Senegal to Tanzania, 40% of women are polygamous marriages’. [↑](#footnote-ref-37)
38. Author unknown 2015 <https://www.polygamy.com/articles/89746509/polygamy-in-africa>; Fenske 2012 [www.csae.ox.ac.uk/workingpapers/pdf/csae-wps-2012-20.pdf](http://www.csae.ox.ac.uk/workingpapers/pdf/csae-wps-2012-20.pdf). Fenske has observed that ‘stretching from Senegal to Tanzania, 40% of women are polygamous marriages’. [↑](#footnote-ref-38)
39. Howland and Koenen 2014 *Social Justice* 3-38. [↑](#footnote-ref-39)
40. Author unknown 2015 https://www.polygamy.com/articles/89746509/polygamy-in-africa. See also Gaffney-Rhys *Women in Society* 2011 [↑](#footnote-ref-40)
41. Ssenyonjo 2011 *Netherlands Quarterly of Human Rights* 376. [↑](#footnote-ref-41)
42. Author unknown 2015 https://www.polygamy.com/articles/89746509/polygamy-in-africa [↑](#footnote-ref-42)
43. Author Unknown www.nation.co.ke/news.uhuru-assents-to-law-allowing-polygamy-/1056/2297540-uevruk/-index.html. [↑](#footnote-ref-43)
44. WLSA 1992 *Uncovering the Realities: Excavating Women’s Rights in African Family Law* 92; Ovis 2005 [www.lac.org.na/news/inthenews/pdf/polygamy.pdf](http://www.lac.org.na/news/inthenews/pdf/polygamy.pdf). [↑](#footnote-ref-44)
45. Ovis 2005 [www.lac.org.na/news/inthenews/pdf/polygamy.pdf](http://www.lac.org.na/news/inthenews/pdf/polygamy.pdf). [↑](#footnote-ref-45)
46. Basendal 2004 *African Sociological Review* 1. [↑](#footnote-ref-46)
47. Griffiths "Towards a plural perspective on Kwena Women’s Rights" 102-126; Basendal 2004 *African Sociological Review* 1. [↑](#footnote-ref-47)
48. Howland and Koenen 2014 *Social Justice* 11 who observed that ‘in large cities like Dares Salam, traditional polygamy has been largely replaced by private, defacto polygamy, which is considered to be more attuned to Tanzanians’ perceptions of modernity’. In addition, Howland and Koenen, 2014 *Social Justice* on page 11, observe that ‘defacto polygamy is characterised as a relationship in which a man marries one wife and also forms extra-legal domestic and sexual unions with other women’. [↑](#footnote-ref-48)
49. WLSA 1992 *Uncovering the Realities: Excavating Women’s Rights in African Family Law* 25. [↑](#footnote-ref-49)
50. See generally discussion by Gaffney-Rhys 2011 *Women and Society.* See alsoKuhn ‘Universal human rights vs Traditional rights’ Topical Review Digest: Human Rights in Southern Africa, accessed at www.du.edu.horbel/hrhw/researchdigest/africa/UniversalHumanRights.pdf, on 14/06/2016. [↑](#footnote-ref-50)
51. See the *Marriage Act* 14 of 2014. [↑](#footnote-ref-51)
52. The *Malawi Marriage Divorce and Family Relations Act* 5 of 2015 does not formally prohibit polygamy in the context of customary marriages, arguably, it allows the same to continue under the customary laws and practices. [↑](#footnote-ref-52)
53. See, eg, the *Recognition of Customary Marriages Act* 120 of 1998 in South Africa that recognises polygamous marriages [↑](#footnote-ref-53)
54. 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. See also the *Recognition of Customary Marriages Act* 120 of 1998 in South Africa that allows for a monogamous customary marriage to be converted into a civil law marriage, but a polygynous customary marriage cannot be converted to a civil marriage (section 10 (4) ). [↑](#footnote-ref-54)
55. See the South African case of *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC). [↑](#footnote-ref-55)
56. Art 11 of the Hague Convention on the Celebration and Recognition of Marriages (1978) mandates a contracting state to refuse recognizing validity of a polygynous marriage. This instrument, however, does not outlaw polygamy. [↑](#footnote-ref-56)
57. Art 6 of the African Women’s Protocol (2003) 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 (2003), however, polygyny is not listed as one of the harmful cultural practices to be eliminated. [↑](#footnote-ref-57)
58. See generally discussions by Gaffney-Rhys 2011 *Women in Society* and Cook 2011, http://www.law.utoronto.ca/utfl\_file/count/documents/reprohealth/Polygamy.pdf. See for instance, art 16 of CEDAW (1979), 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…are entitled to equal rights as to marriage, during marriage and at its dissolution’. [↑](#footnote-ref-58)
59. Cook 2011 http://www.law.utoronto.ca/utfl\_file/count/documents/reprohealth/Polygamy.pdf. See also Gaffney-Rhys 2011 *Women in Society*. [↑](#footnote-ref-59)
60. Gaffney-Rhys 2011 *Women in Society*. [↑](#footnote-ref-60)
61. For example, art 16 of CEDAW (1979), 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…are entitled to equal rights as to marriage, during marriage and at its dissolution’. See also discussions by Obonye 2012 *Journal of African Studies and Development*. [↑](#footnote-ref-61)
62. Art 23(4) of the ICCPR (1966) 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’. [↑](#footnote-ref-62)
63. See, for example, CEDAW *General Recommendation 21* para 21 and Human Rights Committee *General Comment 28* para 24 as discussed by Gaffney-Rhys 2011 *Women and Society.* [↑](#footnote-ref-63)
64. Human Rights Committee *General Comment 28* para 24. [↑](#footnote-ref-64)
65. The Human Rights Committee observed that art 3 of the ICCPR (1966) guarantee equal rights for women and men, violates a woman’s right to equality in marriage, and has severe financial consequences on her and her children. See Human Rights Committee *General Comment 28*. [↑](#footnote-ref-65)
66. CEDAW Committee *General Recommendation 24.* [↑](#footnote-ref-66)
67. CEDAW Committee *General Recommendation 21* paras 14 and 21. [↑](#footnote-ref-67)
68. See, for example, art 6 of the African Women’s Protocol (2003), and the discussions by Cook 2011 http://www.law.utoronto.ca/utfl\_file/count/documents/reprohealth/Polygamy.pdf. [↑](#footnote-ref-68)
69. Committee on CEDAW General Recommendation 29. [↑](#footnote-ref-69)
70. Art 5(a) of CEDAW (1979) 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.’ [↑](#footnote-ref-70)
71. Committee on CEDAW *General Recommendation 21* para 41. [↑](#footnote-ref-71)
72. S 45(3) of the *Constitution of the Republic of Kenya,* 2010. [↑](#footnote-ref-72)
73. Sections 12 and 13 of the *Constitution of the Republic of Tanzania,* 1977 [↑](#footnote-ref-73)
74. S 20 of the *Constitution of the Republic of Malawi,* 1994. [↑](#footnote-ref-74)
75. S 9(3) of the *Constitution of the Republic of South Africa*,1996. [↑](#footnote-ref-75)
76. Article 36 of the *Mozambique Constitution*, 2004. [↑](#footnote-ref-76)
77. Cook 2011 http://www.law.utoronto.ca/utfl\_file/count/documents/reprohealth/Polygamy.pdf. [↑](#footnote-ref-77)
78. *Committee on CEDAW Concluding Observations: Kenya* para 22; *Committee on CEDAW Concluding Observations: Kenya* para17 as reported by Hellum and Aasen *Women’s Human Rights.* [↑](#footnote-ref-78)
79. Committee on CEDAW *Concluding Observations: Lesotho* para 94 and 95 also as reported by Hellum and Aasen *Women’s Human Rights.* [↑](#footnote-ref-79)
80. Committee on CEDAW *Concluding Observations: Lesotho* para 94 and 95; Hellum and Aasen *Women’s Human Rights.* See also similar observations made with respect to Malawi, CEDAW/C/MW1/CO/6, para 42. [↑](#footnote-ref-80)
81. Byrnes A and Freeman The impact of the CEDAW Convention: Paths to Equality? World Development Report, 2012, accessed SSRN: http://ssrn.com/abstract=2011655. [↑](#footnote-ref-81)
82. Article 45 (3) 2010 Kenya Constitution [↑](#footnote-ref-82)
83. Kenya became party to CEDAW in 1984. [↑](#footnote-ref-83)
84. The *Marriage Act* 4 of 2014 which came into force on 20 May 2014. [↑](#footnote-ref-84)
85. S 6 of the *Marriage Act* 4 of 2014. [↑](#footnote-ref-85)
86. Matrimonial Property Act, 2013 came into force on 16 January 2014. [↑](#footnote-ref-86)
87. S 2 of the *Marriage Act* 4 of 2014. [↑](#footnote-ref-87)
88. S 3(1) of the *Marriage Act* 4 of 2014. [↑](#footnote-ref-88)
89. See, generally discussions by Mwambene and Kruuse 2015 *International Journal of Law, Policy and the Family*, 237-259. [↑](#footnote-ref-89)
90. S 6(3) of the *Marriage Act* 4 of 2014. [↑](#footnote-ref-90)
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." [↑](#footnote-ref-91)
92. It is generally accepted that child marriages breaches art 16(2) of CEDAW (1979); art 21 of the African Children’s Charter (1990); art 1 of the Convention on Consent to Marriage, the Minimum Age for Marriage and Registration of Marriages (1962); art 6 of the Women’s Protocol (2003) that require parties to a marriage provide free and full consent to marriage. In addition, other human rights infringement are committed if young girls are forced to marry, including, the right to education, sexual exploitation, health, life. [↑](#footnote-ref-92)
93. S 4 of the *Marriage Act* 4 of 2014 prescribes the marriageable age to be 18. [↑](#footnote-ref-93)
94. Gaffney-Rhys 2011 *Women in Society* 5. [↑](#footnote-ref-94)
95. S 55 of the *Marriage Act* 4 of 2014. [↑](#footnote-ref-95)
96. S 4 of the *Marriage Act* 4 of 2014 [↑](#footnote-ref-96)
97. Kamau date unknown http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf [↑](#footnote-ref-97)
98. S 44 of the *Marriage Act* 4 of 2014 [↑](#footnote-ref-98)
99. Fareda Banda 2006 *Journal of African Law*, 76. See also discussions by Mwambene and Kruuse 2013 Acta Juridica, 302 on how non-registration of a customary marriages can disadvantage women and children. [↑](#footnote-ref-99)
100. S 2 of the *Marriage Act* 4 of 2014 [↑](#footnote-ref-100)
101. Banda "Changing the Constitution and Changing attitudes: Recent Developments in Kenyan family Law" 255. [↑](#footnote-ref-101)
102. S 8(1)(a) of the *Matrimonial Property Act*49 of 2013; Banda "Changing the Constitution and Changing attitudes: Recent Developments in Kenyan family Law" 264. [↑](#footnote-ref-102)
103. Banda "Changing the Constitution and Changing attitudes: Recent Developments in Kenyan family Law" 264. [↑](#footnote-ref-103)
104. S 8(2)(b) of the *Matrimonial Property Act*49 of 2013. [↑](#footnote-ref-104)
105. S 8(2) of the *Matrimonial Property Act*49 of 2013. [↑](#footnote-ref-105)
106. The Marriage Act is silent on the matter. [↑](#footnote-ref-106)
107. S 2 of the *Marriage Act* 4 of 2014. [↑](#footnote-ref-107)
108. Plan International 2016 *In-depth Review of the Legal and Regulatory Frameworks on Child Marriages in Mozambique* (copy on file with the author) 21. Article 36 provides that ‘men and women are equal before the law’. [↑](#footnote-ref-108)
109. *Family Law Family Law Statute Act* 10 of 2004 as cited by Plan International (2016) ‘In-depth Report of Legal and Regulatory Frameworks on Child marriage in Mozambique’ Plan International 2016 Report (In-depth Report of the Legal and Regulatory Frameworks on Child marriages) Copy on file with author. [↑](#footnote-ref-109)
110. This provision seems to be supported by articles 63 and 64 of the Family Law Family Law Statute which deem marriages without consent non-existent. [↑](#footnote-ref-110)
111. Article 16 (2) of the Family Law Family Law Statute as cited by Plan International 2016. This definition is similar to the definition of the English case of *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’. [↑](#footnote-ref-111)
112. Da Silva 2004 http://www.wlsa.org.mz/article-qhy-polygamy-is-unacceptable-in-family-law-in-the-light-of-Human-rights/. [↑](#footnote-ref-112)
113. Plan International 2016, 22 have observed that this provision ‘protects woman in a society whereby patriarchy favours men to engage in polygamous relations’. [↑](#footnote-ref-113)
114. Human Rights Committee *Concluding Observations: Mozambique.* [↑](#footnote-ref-114)
115. Plan International 2016, 18. [↑](#footnote-ref-115)
116. Art 30(1) of the *Family Law Family Law Statute 10* of 2004. [↑](#footnote-ref-116)
117. Art 6 of the African Women Protocol (2003) and art 21 of the African Children’s Charter (1990) both sets 18 as the marriageable age. [↑](#footnote-ref-117)
118. Art 30 (2) of the *Family Law Family Law Statute 10* of 2004 [↑](#footnote-ref-118)
119. Plan International 2016 [↑](#footnote-ref-119)
120. See, generally, observations by Aquinaldo Mandlate *Assessing the implementation of the Convention on the Rights of the Child in Lusophone Africa (Angola and Mozambique)*, LLD Thesis (Unpublished) Submitted to the University of the Western Cape, 2012. [↑](#footnote-ref-120)
121. *De facto* marriages in this context are marriages between a man and a woman for over a period of 1 year (12 months). [↑](#footnote-ref-121)
122. Plan International 2016, 22. [↑](#footnote-ref-122)
123. WLSA Mozambique has observed as ‘a fact that polygamy remains common, especially in rural areas in Mozambique. [↑](#footnote-ref-123)
124. Plan International 2016 22. [↑](#footnote-ref-124)
125. Article 6 of the African Women’s Protocol. [↑](#footnote-ref-125)
126. Plan International 2016 [↑](#footnote-ref-126)
127. Art 75 of the *Family Law Family Law Statute 10* of 2004. [↑](#footnote-ref-127)
128. Plan International 2016 24 [↑](#footnote-ref-128)
129. Plan International 2016 24. [↑](#footnote-ref-129)
130. Plan International 2016 24. [↑](#footnote-ref-130)
131. Howland and Koenen 2014 *Social Justice* 37. [↑](#footnote-ref-131)
132. This was after a very long history of non-recognition of customary marriages due to *lobolo* and polygyny. [↑](#footnote-ref-132)
133. S 6 of the *Recognition of Customary Marriages Act* 120 of 1998. [↑](#footnote-ref-133)
134. S 3(1)(a) of the *Recognition of Customary Marriages Act* 120 of 1998. [↑](#footnote-ref-134)
135. S 4 of the *Recognition of Customary Marriages Act* 120 of 1998. [↑](#footnote-ref-135)
136. S 7 of the *Recognition of Customary Marriages Act* 120 of 1998 as read with *Gumede v President of South Africa* *and Others* 2009 (3) SA 152 (CC). [↑](#footnote-ref-136)
137. Ndashe *Women Legal Centre* 2011. [↑](#footnote-ref-137)
138. S 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". [↑](#footnote-ref-138)
139. S 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 entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages". [↑](#footnote-ref-139)
140. S 7(1) of the *Recognition of Customary Marriages Act* 120 of 1998. [↑](#footnote-ref-140)
141. See generally discussions by Bennett 2004 *Customary law in South Africa*. [↑](#footnote-ref-141)
142. S 7(6) of the *Recognition of Customary Marriages Act* 120 of 1998. [↑](#footnote-ref-142)
143. Olivier, Bekker & Olivier *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. [↑](#footnote-ref-143)
144. Bennett *Customary Law* 247. [↑](#footnote-ref-144)
145. Olivier, Bekker & Olivier *Indigenous Law* 40. [↑](#footnote-ref-145)
146. Olivier, Bekker & Olivier *Indigenous Law* 40. [↑](#footnote-ref-146)
147. Bennett *Customary Law* 259; Olivier, Bekker & Olivier *Indigenous Law* 54. [↑](#footnote-ref-147)
148. Olivier, Bekker & Olivier *Indigenous Law* 149. [↑](#footnote-ref-148)
149. S 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. [↑](#footnote-ref-149)
150. See generally Mwambene and Kruuse 2013 *Acta Juridica*; Mwambene and Kruuse 2015 *International Journal of Law, Policy and the Family.* [↑](#footnote-ref-150)
151. See discussions in the *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC). [↑](#footnote-ref-151)
152. Mwambene and Kruuse 2015 *International Journal of Law, Policy and the Family.* [↑](#footnote-ref-152)
153. S 10(4) of the *Recognition of Customary Marriages Act* 120 of 1998. [↑](#footnote-ref-153)
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 similar observation about the *Recognition of Customary Marriages Act* 120 of 1998 by Higgins *et al* as cited in Mwambene L 2015 *Speculum Juris.* [↑](#footnote-ref-154)
155. See for example, s 7 of the *Recognition of Customary Marriages Act* 120 of 1998. [↑](#footnote-ref-155)
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. See also Mwambene and Van Nierkerk 2009 *Speculum Juris.* This position was not changed with the *Gumede v President of South Africa and Others 2009 (3) SA 152 (CC)* that only affected the matrimonial property system of monogamous marriages concluded before the Act. [↑](#footnote-ref-156)
157. S 6 of the *Recognition of Customary Marriages Act* 120 of 1998; s 3(2) of the *Marriage Act* 4 of 2014; and the article 36 of the Family Law Family Law Statute. [↑](#footnote-ref-157)
158. See for example, in South Africa, s 11(3) of the *Black Administration Act* 38 of 1927. [↑](#footnote-ref-158)
159. *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) para 61. [↑](#footnote-ref-159)
160. Art 16 of CEDAW. [↑](#footnote-ref-160)
161. See, eg, Women’s Legal Centre 2011; Mwambene v Kruuse 2013 [↑](#footnote-ref-161)
162. S 4(9) of the RCMA. [↑](#footnote-ref-162)
163. Herbst and Du Plessis 2008 [↑](#footnote-ref-163)
164. See, generally, observations made by Plan International 2016. [↑](#footnote-ref-164)
165. Apart from the three countries under study, the experiences of Malawi and Uganda to pass legislation with prohibitionist approach attest to this fact. [↑](#footnote-ref-165)
166. Law Commission’s Special Project Committee on Customary Law, *Report on Customary Marriages.* Howland and Koenen, 32 cautions that ‘the prohibiting polygyny could have the unwanted effect of encouraging informal defacto polygamous relationships that provide no legal protection to women and children. [↑](#footnote-ref-166)
167. This is to be contrasted to Rwanda that expressly prohibits polygamy as one of the grounds upon which discrimination is not allowed in its *Constitution of Republic of Rwanda, 2003* was adopted on April 23, 2003 and approved by referendum on May 26, 2003. [↑](#footnote-ref-167)
168. Howland and Koenen, 32 [↑](#footnote-ref-168)
169. See generally predictions by Vision 2030 in Namibia. [↑](#footnote-ref-169)
170. Mwambene and Kruuse 2013 and 2015 [↑](#footnote-ref-170)