

## Article 6 of the African Women's Rights Protocol: towards the protection of the rights of women in polygamous marriages

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**ABSTRACT:** Article 6 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Rights Protocol) provides that State Parties shall enact legislation to ensure *inter alia* that the rights of women in marriage and family, including in polygamous marital relationships, are promoted and protected. However, the United Nations Human Rights Committee, in its interpretation of article 3 of the International Covenant on Civil and Political Rights (ICCPR), stated that polygamy amounted to a violation of the rights of women and therefore ought to be abolished. This raises an interesting issue since on one hand, the African Women's Rights Protocol provides for the protection of the rights of women in polygamous marriages, but on the other hand, the Human Rights Committee, which is an overseer of the implementation of a global human rights regime, has held that polygamy is an inadmissible violation of the rights of women. Apart from the two issues above, article 6 also raises fundamental questions such as: What are the rights of women in polygamous marriages and why it is critical to protect such rights? This article analyses the above issues and makes the general argument that, in line with article 6 of the African Women's Rights Protocol, pending the outlaw of polygamy (which is also in line with international best practice), African states should legislate to protect women in polygamous marriages.

### TITRE ET RÉSUMÉ EN FRANÇAIS:

#### Article 6 du Protocole relatif aux droits des femmes en Afrique: vers la protection des droits des femmes dans les mariages polygamiques

**RÉSUMÉ:** L'article 6 du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique (Protocole relatif aux droits des femmes en Afrique) stipule que les Etats parties doivent promulguer des lois garantissant, entre autres, la promulgation et la protection des droits des femmes dans le mariage et au sein la famille, y compris dans des relations conjugales polygamiques. Toutefois, dans son interprétation de l'article 3 du Pacte international relatif aux droits civils et politiques (PIDCP), le Comité des droits de l'homme des Nations Unies a déclaré que la polygamie constituait une violation des droits des femmes et devait donc être abolie. Cela soulève un problème intéressant puisque d'une part, le Protocole relatif aux droits des femmes en Afrique prévoit la protection des droits des femmes dans les mariages polygamiques, mais d'autre part, le Comité des droits de l'homme, qui supervise la mise en œuvre du système global des droits de l'homme, a déclaré que la polygamie est une violation inacceptable des droits des femmes. Outre les deux points ci-dessus, l'article 6 soulève également des questions fondamentales telles que: quels sont les droits des femmes dans les mariages polygamiques et pourquoi est-il essentiel de protéger ces droits? Cet article analyse les questions ci-dessus et propose que, conformément à l'article 6 du Protocole relatif aux droits des femmes en Afrique, en attendant l'interdiction de la polygamie (qui est également conforme aux meilleures pratiques internationales), les Etats africains doivent adopter des lois pour protéger les femmes dans des mariages polygamiques.

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**KEY WORDS:** Article 6 of the African Women’s Rights Protocol, polygamy, the rights of women, the right to marriage, polygamous marriages

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## 1 INTRODUCTION

### 1.1 Article 6 of the African Women’s Rights Protocol

The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (African Women’s Rights Protocol) was adopted to supplement the provisions of the African Charter on Human and People’s Rights (African Charter) in accordance with article 66 of the African Charter.<sup>1</sup> It aims ‘to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.’<sup>2</sup> It has been hailed as a valuable addition containing ground-breaking provisions in the field of human rights not only in Africa but also in the world.<sup>3</sup> The African Women’s Rights Protocol has made an invaluable contribution to the continent’s human rights architecture and has since been signed by 49 states and ratified by 38 states.<sup>4</sup>

It contains comprehensive provisions in relation to women’s rights, specifically: the elimination of harmful practices, access to justice, reproductive health, protection of women during war, special protection for women with disabilities, property rights and marriage

<sup>1</sup> See the Preamble of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (African Women’s Rights Protocol).

<sup>2</sup> African Women’s Rights Protocol (n 1 above).

<sup>3</sup> C Purvis ‘Emerging voices: engaging with African human rights law’ <http://opiniojuris.org/2013/07/19/emerging-voices-engaging-with-african-human-rights-law/> (accessed 15 July 2017).

<sup>4</sup> ‘List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa’ African Union [https://au.int/web/sites/default/files/treaties/7783-sl-protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_on\\_the\\_righ.pdf](https://au.int/web/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_righ.pdf) (accessed 11 July 2017).

rights. It places an obligation on states to enact legislation and take measures to ensure the full realisation of the rights enshrined therein.<sup>5</sup> As noted by the Special Rapporteur on the Rights of Women in Africa, since the coming into force of the African Women's Rights Protocol, State Parties have indeed adopted numerous legislation, in compliance with the Protocol, which have led to notable protection and promotion of the rights of women on the continent.<sup>6</sup>

One of the most notable provisions of the African Women's Rights Protocol is article 6, which provides for the right to marriage. Article 6 obligates State Parties to ensure that men and women enjoy equal rights and are recognised as equal partners in marriage. State Parties are also required to enact legislation to ensure that marriage is based on the full and free consent of both parties and that the parties are at least 18 years of age at the time of contraction of the marriage. The right to marriage is provided for in many international and regional human rights instruments including article 23 of the International Covenant on Civil and Political Rights (ICCPR), article 16 of the Universal Declaration on Human Rights (UDHR), and article 12 of the European Convention on Human Rights (ECHR) among others. The African Charter does not provide for the right to marriage, therefore this is one example of an issue where the African Women's Rights Protocol complements the African Charter.

Article 6 further provides for the right of a married woman to: participate in the choice of marital residence, retain her nationality or acquire that of her husband, retain her maiden name or adopt that of her husband, as well as the right to acquire and administer property during the subsistence of the marriage. The article also provides the right of registration of marriages. Unique to the African Women's Rights Protocol, is the provision in article 6(c) that requires states to enact legislation which ensures 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' (emphasis added).

Polygamy, is often discussed in tandem with other women rights issues for example gender equality, violence against women, sexual health rights, economic and social rights of women. For this reason, article 6(c) has been the subject of debate among scholars, human rights activists and practitioners as discussed in detail in part 2 below. This article aims to contribute to this debate by placing article 6(c) within the cultural, political, socio-economic and human rights context of the African continent. This article discusses how legislation made pursuant to article 6 of the African Women's Rights Protocol can contribute to the protection of women in polygamous marriages and why this is necessary pending the outlaw of polygamy in line with international best practice.

<sup>5</sup> Article 6 of the African Women's Rights Protocol.

<sup>6</sup> Status of implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' African Commission on Human and Peoples' Rights (2016) <http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> (accessed 15 July 2017).

## 1.2 Main argument and structure of the article

Many human rights practitioners, activists and scholars argue that polygamy is against the rights of women and therefore, it should be outlawed. I argue in this article that outlawing polygamy without dealing with the cultural, socio-economic and religious factors will not result in the eradication of the practice. In the journey to conforming to international best practice by outlawing polygamy, African States should enact laws that regulate polygamy and protect the rights of women in polygamous marriages.

This argument is premised on the following point: polygamy continues to exist in Africa because of cultural, religious, economic and sociological reasons. Because the practice is so deeply entrenched, laws that were enacted to criminalise polygamy and invalidate polygamous marriages in colonial times failed to eradicate the practice. Instead polygamy continued to exist in practice, while non-existent in law. This discrepancy created a group of disenfranchised women in polygamous marriages who had no recourse to law for protection or fulfilment of their rights. Hence, article 6(c), which extends legal protection to polygamous marriages, has the much-needed effect of remedying this situation.

The article illustrates how the top-down laws that prohibited polygamy disenfranchised women in polygamous marriages since they failed to tackle the relevant socio-economic and cultural factors. It further discusses how this situation is remedied by article 6(c) of the African Women's Rights Protocol. This article relies on two pieces of domestic legislation - the Kenyan Marriage Act and the South African Recognition of Customary Marriages Act – both which contain provisions which protect the rights of women in polygamous marriages, as case studies.

The article is structured as follows: Part one, the current section, contains the introduction. Part two examines the tension between the African regional view and the international view on polygamy. Specifically, it discusses the provision of article 6(c) of the African Women's Rights Protocol in relation to the argument that polygamy is inherently contrary to the rights of women and should therefore be abolished. Part three discusses the socio-economic, cultural and religious factors that feed into polygamy. This section argues that polygamy cannot be adequately tackled without considering and resolving the multi-faceted issues behind it. It illustrates how women in polygamous marriages tend to be particularly vulnerable and are therefore in more need of legal protection. Part four explores the rights of women in marriage which are provided for in article 6 of the African Women's Rights Protocol and article 16 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This part contends that pending the outlaw of polygamy according to international best practice, states parties should legislate to ensure that women in subsisting polygamous marriages enjoy all the substantive rights listed in these articles. Section five discusses the value added to the African human rights regime by article 6 of the African Women's

Rights Protocol by recognising the rights of women in polygamous marriages. It further discusses how legislation can regulate polygamy to protect the rights of women involved. In this regard, the Kenyan Marriage Act of 2014 and the South African Recognition of Customary Marriages Act of 1998 are used as case studies to illustrate how laws passed in accordance with article 6 of the African Women's Rights Protocol can contribute towards the protection of the rights of women in polygamous marriages. The article in its last section, which the concluding remarks.

It is necessary to mention that the term polygamy is used in this article only to refer to the practice where two or more women are simultaneously married to the same man. Admittedly, polygamy is an umbrella term used by most anthropologists to encompass: polygyny, where one man marries two or more women; polyandry, where one woman marries two or more men; and group marriages in which several men marry several women.<sup>7</sup> However, in this article, the term is only used to refer to polygyny and therefore excludes polyandry and group marriages.

## **2 ARTICLE 6 OF THE AFRICAN WOMEN'S RIGHTS PROTOCOL VERSUS THE ARGUMENT FOR THE ABOLITION OF POLYGAMY**

Though international human rights instruments provide for the right to marriage and equality in marriage, none of them expressly mentions polygamy.<sup>8</sup> The interpretation given to these treaties by most scholars and human rights activists is that polygamy is against a woman's right to dignity and equality and should therefore be prohibited. For instance, on 29 March 2000, the Human Rights Committee, the body of independent experts that monitors the implementation of the ICCPR, issued a General Comment on the interpretation of article 3 of the ICCPR - the clause on equality between men and women.<sup>9</sup> The Human Rights Committee stated:

It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.<sup>10</sup>

Furthermore, the Committee on the Elimination of Discrimination Against Women, while interpreting the CEDAW, similarly stated that

<sup>7</sup> MK Zeitzen *Polygamy: a cross-cultural analysis* (2008).

<sup>8</sup> For an analysis of these provisions see R Gaffney-Rhys 'Polygamy: a human right or human rights' violation?' (2011) 2 *Women in Society* 1.

<sup>9</sup> UN Human Rights Committee General Comment 28 (2000) UN Doc CCPR/C/21/Rev.1/Add.10.

<sup>10</sup> UN Human Rights Committee (n 9 above) para 24.

the practice of polygamy is against the rights of women and should be prohibited.<sup>11</sup>

Apart from this, many scholars have encouraged the legal prohibition of polygamy and their arguments may be summarised in two main prongs. First, polygamy violates the internationally recognised rights and the dignity of women; and secondly, polygamy is often associated with many harmful practices such as forced marriages, child marriages, gender-based violence and female genital mutilation.<sup>12</sup> For example two scholars, Cook and Kelly, presented a report to the Canadian Government that discussed these two issues.<sup>13</sup> They argued that polygamy is a violation of three major rights of women. First, polygamy violates the right to family which encompasses: the right to equality within marriage and within the family, the right to private and family life, the right to be free from all forms of stereotyping, and the right to exercise free and full consent in choosing a spouse and entering marriage. Second, polygamy infringes the right to security, which encompasses: the right to be free from all forms of violence, the right to be free from inhuman and degrading treatment, the right to the highest attainable standard of health, the right to be free from slavery and the right to an adequate standard of living. Third, in their view, polygamy violates the right to citizenship, which involves: the right to receive and impart information, the right to education, the right to religious freedom, and the right to enjoy their culture.<sup>14</sup> One of their main arguments is that although different rights may be violated depending on the context of polygamy, 'the right to equality within marriage and the family is violated *per se* by polygamy, regardless of the cultural or religious context in which it is practised.'<sup>15</sup> Cook and Kelly therefore argue for the abolition of polygamy.

On the other hand, the African Women's Rights Protocol seems to be taking a contrary approach to this issue. Article 6 provides that

they [State Parties] 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.

Article 6 of the African Women's Rights Protocol, instead of prohibiting polygamy, states that monogamy is preferred and that the rights of women in polygamous marriages should be promoted and protected.

<sup>11</sup> CEDAW Committee General Recommendation 21 (1994) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recomm21> (accessed 19 November 2016).

<sup>12</sup> See for example J Witte *The Western Case for Monogamy Over Polygamy* (2015); R Gaffney-Rhys (n 8 above); V von Struensee 'The contribution of polygamy to women's impoverishment: an argument for its prohibition' (2005) 2 *Murdoch University Electronic Journal of Law* 1 <http://www.austlii.edu.au/au/journals/MurUEJL/2005/2.html#fn1> (accessed 31 July 2016); N Wadesango *et al* 'Violation of women's rights by harmful traditional practices' (2011) 13 *Anthropologist* 121.

<sup>13</sup> R J Cook & L M Kelly 'Polygyny and Canada's obligations under international human rights law' Department of Justice Canada (2006) <http://www.justice.gc.ca/eng/rp-pr/other-autre/poly/poly.pdf> (accessed 19 November 2016).

<sup>14</sup> Cook & Kelly (n 13 above) 21–43.

<sup>15</sup> Cook & Kelly (n 13 above) 87.

This provision has been criticised by many scholars who consider it as condoning polygamy which, they argue, is against the rights of women and against internationally recognised human rights principles.<sup>16</sup>

It is noteworthy that article 6 of the African Women's Rights Protocol was included as a compromise between, on one hand, the push for the complete abolition of polygamy made by NGOs and most human rights activists, and on the other hand, the refusal by government officials to completely abolish polygamy.<sup>17</sup> The government officials argued that the African Women's Rights Protocol should not prohibit polygamy because it exists in the culture and religion of many Africans, and therefore, prohibition would result in hardships for the women in polygamous marriages.<sup>18</sup>

From the above discussion, it appears that there are two opposing schools of thought on the issue of polygamy and human rights. The first, and the mainstream, argues that polygamy should be abolished in order to protect the rights of women. The second school of thought argues that since polygamy is deeply rooted in culture and religion, prohibition will not bring an immediate end to this practice, but will merely result in increased hardship for the women in polygamous marriages. Before going into the merits and demerits of these arguments, it is necessary to examine polygamy in the African context by discussing the socio-economic, cultural and religious factors which give rise to it.

### **3 POLYGAMY AS A SOCIO-ECONOMIC, CULTURAL AND RELIGIOUS PHENOMENON**

#### **3.1 The socio-economic and cultural reasons that feed into polygamy**

Polygamy has been deeply entrenched in the culture and religion of most communities in Africa since pre-colonial times.<sup>19</sup> During colonialism, polygamy was prohibited by law and the offence of bigamy introduced in most African countries, a policy which was viewed as an important part of bringing 'civilization' to the 'dark' continent.<sup>20</sup> However, this prohibition failed to consider the cultural, political,

<sup>16</sup> See for example J Obonye 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal' (2012) 4 *Journal of African Studies and Development* 147 <http://www.academicjournals.org/jasd/abstracts/abstracts/abstracts2012/July/Obonye.htm> (accessed 6 August 2016).

<sup>17</sup> F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 72.

<sup>18</sup> As above.

<sup>19</sup> A Ibidapo-Obe 'The dilemma of African criminal law: tradition versus modernity' (1992) 19 *Southern University Law Review* 327, 343.

<sup>20</sup> Ibidapo-Obe (n 19 above) 343.

social, religious and economic aspects of polygamy and therefore failed to eradicate the practice.<sup>21</sup>

If polygamy is to be tackled, in line with international best practices, then it must first be understood in the cultural, socio-economic and religious context of African societies which are mostly patriarchal in nature. In this regard, it is important to note first, that men are 'the traditional holders of power over "strategic resources" (namely, land, cattle, women and children)'.<sup>22</sup> Second, marriage in most African societies is traditionally for procreation and survival.<sup>23</sup> Children are therefore at the core of marriage and women are traditionally viewed as child bearing vessels.<sup>24</sup> Third, unlike in western societies where marriage is between the two individuals concerned, in most African societies marriage signifies the coming together of families and kinship.<sup>25</sup> Therefore, the interest of the community supersedes that of the individual and in patriarchal societies such community 'interests are framed in favour of men.'<sup>26</sup> This has to be the starting point in understanding polygamy in the African context.

Polygamy has been said to have many justifications most of which originate from the power, dominance and control that men have over women in a patriarchal society as explained above. First, it is a solution to the problem of infertility in marriage or lack of a male heir.<sup>27</sup> Since children are at the centre of marriage, when a woman is infertile, or the couple has not had male children, the husband is often encouraged by the society, and sometimes by the wife, to marry another woman to bear him (male) children.<sup>28</sup> Polygamy is also considered as a remedy for menopause as well as pregnancy and nursing.<sup>29</sup> The justification here is that traditionally in many African communities, during menopause, pregnancy and nursing, women are prohibited from having sexual intercourse. Therefore, the husband would marry another woman with whom he could continue having sexual relations during this period. In the case of pregnancy and nursing, the prohibition lasts until the baby has been weaned which can take up to three years. In case of menopause, the prohibition is permanent.<sup>30</sup>

<sup>21</sup> T Nhlapo 'African family law under an undecided constitution' in J Eekelaar & T Nhlapo (eds) *The challenge for law reform in South Africa* (2008); Zeitzen (n 7 above) 41-65.

<sup>22</sup> T Nhlapo 'The African family and women's rights: friends or foes' (1991) 1991 *Acta Juridica/ African Customary Law* 135, 136.

<sup>23</sup> G Kimathi *Your marriage and family* (1994) xxx page no.

<sup>24</sup> Kimathi (n 23 above).

<sup>25</sup> Nhlapo (n 22 above).

<sup>26</sup> Nhlapo (n 22 above) 137.

<sup>27</sup> See E M Baloyi 'Critical reflections on polygamy in the African Christian context' (2013) 41 *Missionalia* 164; G L Chavunduka, 'Polygyny among urban Shona and Ndebele Christians: a case study' (1979) 12 *Nada: The Southern Rhodesia Native Affairs Department Annual* 10.

<sup>28</sup> Baloyi (n 27 above).

<sup>29</sup> Baloyi (n 27 above).

<sup>30</sup> Baloyi (n 27 above).



The other justification for polygamy is that it is a remedy for societal exclusion. Since marriage is a fundamental rite of passage in most African communities, unmarried persons, especially women are considered as pariahs, therefore women sometimes end up marrying men who are already married to other wives to fit into the society.<sup>31</sup> Additionally, polygamy is the easiest way to have big families which is important in most African countries, especially in rural areas, because large families provide a huge labour force for economic development and help provide social security for the aged within the family.<sup>32</sup> Furthermore, in some contexts it is a method of taking care of widows, where a man dies and the widow marries the brother, or relative of the dead man to take care of her. According to Chavundika, it is believed that polygamy can improve the social and economic welfare of the woman especially in communities where levirate is prevalent.<sup>33</sup>

In some cases, polygamy continues to exist as a vestige of political structures which no longer exist. For example, Hansungule writes that traditionally, Kings in Africa married many wives for diplomatic and political reasons in order to solve conflicts with neighbouring communities.<sup>34</sup> Although this reason no longer exists, he states that the culture still lives on and kings, chiefs and other wealthy individuals still marry many wives.<sup>35</sup> He further describes the situation in Northern Nigeria and Swaziland where polygamy continues to exist due to religious and cultural norms, respectively. He concludes that: 'Culture in Africa is still very much a reality ... religious beliefs and practices long dispensed with in other parts of the world continue to determine the status of women.'<sup>36</sup>

Apart from the above patriarchal power structure, culture and politics, there are other socio-economic factors which continue to feed into polygamy. These include lower levels of education among women, poverty, laws preventing women from owning land, Female Genital Mutilation (FGM), child marriages, ostracisation of unmarried and childless women, anti-abortion laws, lack of access to reproductive health care and information, rampant teenage pregnancies, as well as the practice of resolving rape cases by marrying off the rape victim to the perpetrator. Also, there are religious practices for example allowing men to terminate a marriage verbally and allowing men to marry up to four wives which encourage polygamy.

Since polygamy is enabled by issues which are often beyond the control of the women involved, some scholars and activists argue that the choice of a woman to be engaged in a polygamous marriage is often

<sup>31</sup> Baloyi (n 27 above).

<sup>32</sup> See TD Thobejane & F Takayindisa 'An exploration of polygamous marriages: a worldview' (2014) 5 *Mediterranean Journal of Social Sciences* 1058 <http://mcser.org/journal/index.php/mjss/article/view/5179> (accessed 14 July 2017).

<sup>33</sup> Chavunduka (n 27 above).

<sup>34</sup> M Hansungule 'The status of women in contemporary African society with special reference to Zena Mahlangu (Swaziland) and Amina Lawa (Nigeria)' <http://www.rwi.lu.se/pdf/seminar/hansungule.pdf> (accessed 14 July 2017).

<sup>35</sup> Hansungule (n 34 above) 9-10.

<sup>36</sup> Hansungule (n 34 above) 25.

not a 'real' choice because it arises from the fact that polygamy is the only suitable or available option.<sup>37</sup> This argument gives rise to difficult questions such as: how much of an individual's choice can be free from societal influence? And, what is the acceptable limit of societal influence on an individual's choice? The above view seems to be based on the presumption that the women who would willingly be involved in polygamy simply do not know any better, an argument which, according to one commentator, is both 'arrogant and intolerant to cultural diversity'.<sup>38</sup> Since polygamy is kept alive by many patriarchal cultural and religious values, as well as socio-economic factors, it is difficult to ascertain whether women continue to engage in polygamy by choice, or whether they are implicitly 'forced', persuaded or convinced by circumstances beyond their control.

What is clear is that because polygamy is so deeply entrenched and the causes are so multi-faceted, a top-down abolition, like that implemented by colonialists cannot bring an end to the practice. In fact, in the words of one scholar 'if the bigamy laws were to be rigorously enforced ninety per cent of Africans might find themselves in jail.'<sup>39</sup> This seems to be an exaggeration because of the existence of contrary data which suggests that polygamy is on the decline on the continent.<sup>40</sup> Be that as it may, one scholar, Obonye, observes that 'this practice is still heavily embedded in the psyche of many Africans as an acceptable practice' therefore 'legislation alone cannot succeed in eliminating a deeply entrenched cultural practice like polygamy'.<sup>41</sup>

For this reason, it is necessary for State Parties to the African Women's Rights Protocol to tackle this issue by dealing with these socio-economic, cultural and religious practices that hinder the empowerment of women. States should endeavour to empower women to prevent situations where they would be involuntarily involved in polygamous marriages. This would be an important step in the fulfilment of their obligations under the African Women's Rights Protocol. However, since this is a long-term goal, this article argues that in the meantime State Parties should legislate to ensure that the rights of women in polygamous marriages are promoted and protected in line with the African Women's Rights Protocol. This point is illustrated with reference to South African and Kenyan statutes.

<sup>37</sup> E A Archampong 'Reconciliation of women's rights and cultural practices: polygamy in Ghana' (2010) 36 *Commonwealth Law Bulletin* 325, 331. See also Obonye (n 16 above).

<sup>38</sup> A Malik 'Case for polygamy in Scotland?' (2013) 2 *Edinburgh Student Law Review* 36, 43.

<sup>39</sup> Ibidapo-Obe (n 19 above) 344.

<sup>40</sup> J Fenske 'African polygamy: past and present' Centre for the Study of African Economies Working Paper 2012 <http://www.economics.ox.ac.uk/materials/papers/12544/csae-wps-2012-20.pdf> (accessed 14 July 2017).

<sup>41</sup> Obonye (n 16 above) 147–148.

### 3.2 The need to legislate to protect the rights of women in polygamous marriages

The socio-economic and cultural factors which give rise to polygamy make women in polygamous marriages more vulnerable to human rights abuses especially because they have no legal protection in most African states. To begin with, it is noteworthy that the colonial laws mentioned above, introduced numerous advantages for monogamous marriages and not for polygamous ones.<sup>42</sup> For example, the fact that polygamous marriages were not recognised by law, meant that women in polygamous marriages could not inherit property upon their husband's death and had no recourse to law if abandoned.<sup>43</sup> This is well illustrated by a famous Kenyan case called *Re Ruenji's Estate*.<sup>44</sup> The facts of this case were as follows: a man contracted a marriage under a statute that disallowed polygamy and only recognised monogamous marriages. However, he subsequently married a second wife, under customary law, with whom he had children. Upon his death intestate, his two wives were engaged in a succession dispute over his property. The judge held as follows:

Women married under customary law by a man who had previously married under statute are not wives and their children are not children for the purpose of succession, and they are therefore not entitled to a share in the estate of the deceased.

This decision, which failed to recognise a polygamous marriage and therefore, disenfranchised the second wife and her children, was relied on by judges in subsequent succession disputes in Kenya.<sup>45</sup> This necessitated parliament to create a special amendment to the Law of Succession Act which was intended to correct the situation and protect the property rights of women in polygamous marriages, regardless of the circumstances of their marriage. The amendment came into force in 1981 and stated as follows:<sup>46</sup>

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

The above case demonstrates how the legal abolition of polygamy resulted in a situation whereby polygamy did not exist in law but

<sup>42</sup> A K Wing 'Polygamy from Southern Africa to Black Britannia to Black America: global critical race feminism as legal reform for the twenty-first century' (2000) 11 *Journal of Contemporary Legal Issues* 811.

<sup>43</sup> P K Mbote 'The law of succession in Kenya: gender perspectives in property management and control' International Environmental Law Research Centre 1995 <http://www.ielrc.org/content/b9501.pdf> (accessed 31 July 2016).

<sup>44</sup> *Re Ruenji's Estate* 1977 (7) Kenya Law Reports 21.

<sup>45</sup> See discussion in H S Arunda 'The mischief of section 3(5) of Kenya Succession Act' <https://harrystephenarunda.wordpress.com/2013/04/30/the-mischief-of-section-35-of-kenya-succession-act/> (accessed 31 July 2016). See also *In Re Estate Of Boaz Harrison Ogola* (Deceased) (1978) eKLR <http://kenyalaw.org/caselaw/cases/view/38197/> (accessed 31 July 2016).

<sup>46</sup> Section 3(5) of the Law of Succession Act cap 160.

continued to exist in practice. This led to the disenfranchising of women in polygamous marriages making them vulnerable without the protection of the law. One women's rights organisation stated in this regard that:

[W]omen in polygamous unions are also 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.<sup>47</sup>

The scenario is not limited to Africa. In fact, the practice of polygamy exists even in Western countries, such as in Britain and the United States of America, where the practice has been illegal for centuries especially among immigrant communities.<sup>48</sup> This often results, just like in the African context, in very unfortunate consequences for women in polygamous marriages as shown, for example, in the famous case of *Bibi v the United Kingdom*.<sup>49</sup> In *Bibi*, the Applicant was a girl whose mother, the first wife of her father, was refused entry into the United Kingdom (UK). The Applicant's father had married the applicant's mother in Bangladesh, and after three weeks he had married a second wife. The man later relocated to the United Kingdom where he became a citizen. After some time, he was joined by his second wife followed by the Applicant. Later, the Applicant's mother sought to join them in the UK but was refused entry on the basis that polygamy was not recognised in the UK. The European Commission of Human Rights accepted that the issue interfered with the family life of the Applicant but held that the UK was justified in its decision to deny entry to the Applicant's mother. The Commission held:

In the circumstances of the case the Commission is of the view that the family life circumstances in the present case do not outweigh the legitimate considerations of an immigration policy which rejects polygamy and is designed to maintain the United Kingdom's cultural identity in this respect.

The above are merely illustrative examples showing that the top-down outlawing of the practice without dealing with the underlying socio-economic and cultural factors, does not end polygamy but instead results in suffering for women in polygamous marriages who are left unprotected.

Therefore, the move to prohibit polygamy, expressed by the Human Rights Committee and the CEDAW Committee with the best intention, might further stigmatise and alienate women engaged in polygamous marriages. As shown above, the prohibition of polygamy in many African countries did not bring an end to this practice. Instead, it led to the denial of the rights of women in polygamous marriages by for example excluding them from inheriting their husband's property upon death. This justifies the conclusion that, despite prohibition, so long as the socio-economic, cultural, and religious factors above continue to exist, there will always be women engaged in polygamous marriages and who need protection. Whatever one's sentiment towards polygamy,

<sup>47</sup> 'Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights' (Federation of Women Lawyers - Kenya (FIDA-Kenya) and the International Women's Human Rights Clinic) <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIDAKenya41.pdf> (accessed 31 July 2016).

<sup>48</sup> Wing (n 42 above) 854-857.

<sup>49</sup> *Bibi v The United Kingdom* (1992) ECHR 19628.

refusing to acknowledge that it continues to exist and the women involved need human rights protection is akin to the proverbial burying one's head in the sand. The African Women's Rights Protocol therefore fulfils the much needed and long overdue role of obligating states to enact legislation to ensure that the rights of women in polygamous unions are promoted and protected.

#### **4 THE RIGHTS OF WOMEN IN MARRIAGES IN THE AFRICAN WOMEN'S RIGHTS PROTOCOL**

Articles 6, 7 and 21 of the African Women's Rights Protocol contain a comprehensive regime of rights to be enjoyed by women in marriage, including polygamous marriages. Most of these rights are also provided for in article 16 of the CEDAW. The underlying principle in both regimes is that of equality of men and women in marriage. Article 6 of the African Women's Rights Protocol provides that: 'State Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.' Similarly, article 16(1) of the CEDAW provides that State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and shall ensure that women enjoy rights on a basis of equality of men and women.

As discussed above, the commentators who argue for the abolition of polygamy claim that the very fact that a woman is engaged in a polygamous marriage, which allows the man to have more than one spouse, but does not permit the same for the woman, essentially means that her right to equality in marriage is violated *per se*. The concept of equality in marriage is an abstract one and is therefore difficult to quantify even with regard to monogamous marriages. The issue raises more questions than answers: how does one measure equality in marriage? What is the determining factor? If a husband, like the wife, is only entitled to marry one spouse does that necessarily mean there is inherent equality in that marriage? What about situations where both men and women were allowed to have more than one spouse, would that make it equal? Considering the cultural, socio-economic and religious factors rallying against women, discussed above, it is difficult to envision a situation where men and women can be equal in marriage, whether monogamous or polygamous, unless these factors are resolved.

This calls to mind the two equality of rights theories: on one hand, nominal equality 'which advocates that men and women be treated alike because the sexes are the same in law',<sup>50</sup> and on the other hand substantive equality which 'focuses on the nature of the impact of particular laws on women's lives'.<sup>51</sup> Without going into this debate, the

<sup>50</sup> Archampong (n 37 above).

<sup>51</sup> Archampong (n 37 above) 328.

views I express in this article are based on the presumption that in the African context, because of political, cultural, and historical factors mentioned above, treating men and women alike may not necessarily lead to equality between the sexes because the playing ground is not level.

It is therefore more important to evaluate polygamy on the impact it has on the lives of the women involved in it. As demonstrated in the next section, the legal abolition of polygamy in Africa in the past has not brought an end to polygamy in practice. This disparity between law and practice has had very negative effects on the rights of women in polygamous marriages, and it is for this reason that I argue that pending the outlaw of polygamy in line with international best practice, State Parties should promote and protect the rights of women in polygamous marriages through legislation.

The underlying argument in this article is that women in subsisting polygamous marriages ought to enjoy all the rights provided for in the African Women's Rights Protocol as well as in article 16 of the CEDAW. This refers to the rights provided in articles 6, 7 and 21 of the African Women's Rights Protocol and article 16(1) of the CEDAW. These rights may be divided into three categories: the rights at the commencement of marriage, the rights during the subsistence of marriage, and the rights upon dissolution and/or death of the husband.

#### **4.1 The rights at the commencement of marriage**

Article 6(a) and (b) of the African Women's Rights Protocol and article 16(1)(a) and (b) of the CEDAW provide for the right to enter marriage, the right to choose a spouse and the right to enter the marriage with free and full consent. The right to give full and free consent to marriage - effectively means the woman should be of legal age and have the cognitive ability to consent to marriage. A provision like this guards against child marriages, because children lack the capacity to consent; and forced marriages since full and free consent is a requirement. However, as discussed in part 3.1 above, the issue of whether women can truly consent to polygamous marriages, or whether their choices are often forced by their circumstances and societal pressure is a delicate and difficult one.

#### **4.2 Rights during the subsistence of marriage**

During the subsistence of a marriage, women in both polygamous and monogamous marriages should enjoy the relevant internationally accepted rights some of which are provided for in article 6 sub-articles (d) to (j) of the African Women's Rights Protocol as well as article 16(1)(d) through (h) of the CEDAW. These are: 'the same rights and responsibilities as parents ... in matters relating to their children'; 'The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights'; 'The same rights and

responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions'; 'The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation' and 'The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'. State Parties should legislate to ensure that women in subsisting polygamous marriages enjoy these rights.

The rights in this category require access to resources, education and sexual reproductive information and services among other things. However, in the African context, where the males are holders of power over 'strategic resources' and most women have lower levels of education, and lack of access to sexual reproductive health and information,<sup>52</sup> it is difficult for women, both in polygamous and monogamous marriages to exercise the rights in this category. State Parties still have a long way to go to ensure compliance with the African Women's Rights Protocol in this regard.

#### **4.3 Rights at the dissolution of marriage and/or upon the death of a spouse**

Article 7 of the African Women's Rights protocol provides for the right of a woman during separation, divorce or annulment of marriage. The Protocol requires State Parties to set up legislation which ensures: that divorce, separation or annulment is effected by judicial order; that women have equal rights to seek divorce, separation or annulment; that men and women have equal rights with regard to children and in case of dispute the weight is placed on the best interest of the children; that women have the right to share equally in the joint property deriving from the marriage.

Upon the death of the spouse article 21 of the African Women's Rights Protocol provides for the right to inheritance of property by widows. The article provides as follows:

A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

Because there are many factors currently playing against the interest of women,<sup>53</sup> women have to be empowered to exercise these rights, through means such as litigation. States could also do away with religious laws which allow for verbal dissolution of marriage.

In this article, I argue that pending the outlaw of polygamy (which is also in line with international best practice), African states should legislate to promote and protect the above-mentioned rights with regard to all women, especially those in polygamous marriages. Admittedly, provisions relating to polygamous marriages might require

<sup>52</sup> See part 3.1 above.

<sup>53</sup> See part 3.1.

special attention in order to provide protection. For example, the provision that a widow is entitled to inherit an equitable share of her husband's property might be more challenging to implement in a polygamous marriage than in a monogamous one. This is the more reason why women in polygamous marriages are in dire need of the protection of the law.

## **5 LAWS THAT PROMOTE AND PROTECT THE RIGHTS OF WOMEN IN POLYGAMOUS MARRIAGES**

The best way to protect the rights of the women in polygamous marriages would be by the enactment of laws which promote and protect their rights as proposed by article 6 of the African Women's Rights Protocol. As mentioned in part 2 above, many have viewed this as condoning polygamy, but this is not necessarily the case. Such a provision is justified by the appreciation of the African reality, discussed in part 3 above, that there are many socio-economic, cultural and religious factors which continue to give life to polygamy and which require long term solutions. Pending the outlaw of polygamy, in line with international best practice, women in polygamous marriages require legal protection. Municipal laws which provide for polygamous marriages, in line with article 6 of the African Women's Rights Protocol, can contribute towards enforcing the rights of women in such marriages. This is demonstrated below with reference to the Kenyan Marriage Act of 2014, which was enacted pursuant to the African Women's Rights Protocol and the South African Recognition of Customary Marriages Act which was enacted in 1998, before the African Women's Rights Protocol.

### **5.1 The Kenyan Marriage Act of 2014**

The Kenyan Marriage Act of 2014 defines polygamy as the state or practice of a man having more than one wife simultaneously. Some of the pertinent provisions of this Act are as follows: Marriage is defined as 'the *voluntary union* of a man and a woman whether monogamous or polygamous'. The minimum age for marriage is 18 years and at the time of contraction, the parties have a choice between a monogamous marriage and a potentially polygamous marriage. Moreover, if the parties so wish, a potentially polygamous marriage may be converted to a monogamous marriage. This can only be done if each spouse voluntarily declares the intent to make such a conversion. However, a polygamous marriage may not be converted to a monogamous marriage unless at the time of the conversion the husband has only one wife.

This Act, which makes express provisions for polygamous marriages, helps promote and protect the rights of women in polygamous marriages more than the previous regime, which prohibited polygamy. First, marriage is defined as a voluntary union



between a man and a woman and by that definition forced marriages are prohibited. Under this Act, a woman cannot therefore be forced into contracting a polygamous marriage. Second, the minimum age of marriage is set at 18 years; therefore, child marriages are prohibited. One of the main arguments of the human rights activists who advocate for the abolition of polygamy is that it is characterised by forced marriages and child marriages.<sup>54</sup> By outlawing these two harmful practices, this law, though permitting polygamy, helps to promote and protect the rights of adult women to marry a partner of their choice.

Third, the Act provides for the recognition of polygamous marriages, which means that women in polygamous marriages have recourse to the law in case their rights are violated. This does away with the harmful effects of the prohibition of polygamy discussed above, for example, where a woman in a polygamous marriage was denied the right to inherit her dead husband's property because polygamy was not recognised by law. Fourth, the Act provides that when contracting a marriage, the spouses can choose to have either a monogamous marriage or a potentially polygamous one. This therefore means that women now have a choice, at the time of contraction, to define their marriages as monogamous or potentially polygamous.

Furthermore, the Act also provides that while a monogamous marriage may be converted into potentially polygamous one by the express consent of both parties, a polygamous marriage cannot be converted to a monogamous one unless the man had only one wife at the time of the conversion. This therefore means that women in polygamous marriages are protected from the instances where a man could unilaterally decide to convert a marriage from polygamous to monogamous, thereby disenfranchising some of his wives as occurred in the *Ruenji's Estate* case discussed above. In this case, the law did not recognise one of the wives because the man had converted a polygamous marriage into a monogamous one without her knowledge or consent. The provisions of this Act, though not perfect, offer better protection for women in polygamous marriages than a blanket prohibition on polygamy which disregards the fact that polygamy continues to exist in practice in Africa.

By recognising polygamous marriages and providing for it in law, the Act makes it possible for women in polygamous marriages, just as their counterparts in monogamous ones, to enjoy the rights provided for in article 6, 7 and 21 of the African Women's Rights Protocol and article 16 of CEDAW which are discussed in part 4 above. The Act also removes the uncertainty associated with polygamous marriages which had not been provided for in law post-independence. It has the effect of reversing the criminalisation of polygamy, which was done by the colonialists through the introduction of the crime of bigamy in Kenya, and all former British colonies in Africa.<sup>55</sup> Finally, because of this Act polygamous marriages are expressly recognised under the law in

<sup>54</sup> Gaffney-Rhys (n 8 above).

<sup>55</sup> See Ibidapo-Obe (n 19 above). He discusses the dilemma of criminalisation of polygamy by introduction of the crime of bigamy by the colonialists in Africa.

Kenya, and can be registered and therefore the women involved are no longer disenfranchised and can enjoy internationally recognised rights of women in marriage. When the Act was enacted, Christine Ochieng the Executive Director of the Federation of Women Lawyers (Kenya), one of the leading organisations in women rights in Kenya, reportedly commented as follows:

We are happy with the law because finally all marriages are being treated equally ... All marriages will be issued with marriage certificates, including customary marriages. Before this, customary marriages were treated as inferior with no marriage certificates. This *opened up suffering for the women because they could not legally prove they were married to a particular man* (my emphasis).<sup>56</sup>

It remains to be seen how the Act's provisions will be implemented or interpreted by the courts but it is definitely a step in the right direction towards the protection of the rights of women in polygamous marriages. Kenya can therefore be said to have partly fulfilled its obligation under article 6 of the African Women's Rights Protocol. The obligation will be wholesomely fulfilled by dealing with the cultural, socio-economic, and religious factors discussed in part 3.1 above which disadvantage women and tend to make women involuntary parties to polygamy.

## 5.2 South African Recognition of Customary Marriages Act

The second example of a statute that regulates polygamy is the South African Recognition of Customary Marriages Act 120 of 1998 (RCMA). The RCMA came into force in November 2000 and aims to:

Make provisions for the existence of customary marriages, to specify the requirements of customary marriages, to provide for equal status and capacity of spouses in customary marriages, to regulate the proprietary consequences of customary marriages and the capacity of spouses for such marriages, to regulate the dissolution of customary marriages ...<sup>57</sup>

The Act does not expressly mention polygamy but it is clear that polygamous marriages fall under the ambit of the Act since South African Customary law recognises polygamy and the Act uses words such as 'if a person is a spouse on more than one customary marriage'.<sup>58</sup>

Like the Kenyan Act discussed above, this Act contains the same provisions aimed at protecting and promoting the rights of women in customary marriages, which include polygamous marriages. Section 2 of the Act recognises all customary marriages as valid, whether contracted before or after the commencement of the Act. The Act also provides for the requirements for the validity of customary marriages which are: consent as a prerequisite of marriage, a minimum age of 18

<sup>56</sup> F Karimi & L Leposo 'New Kenya law legalizes polygamy; women's group applauds' CNN <http://www.cnn.com/2014/05/01/world/africa/kenya-polygamy-law/index.html> (accessed 14 July 2017).

<sup>57</sup> Preamble of the South African Recognition of Customary Marriages Act 120 of 1998 (RCMA).

<sup>58</sup> See for example secs 2 and 7 (4)(b) of the RCMA

years and marriage celebrations according to customary law.<sup>59</sup> Furthermore the Act provides for the registration of customary marriages which either party can apply for after which a certificate of marriage is to be issued.<sup>60</sup> Even if the parties fail to register their marriage, upon proof that a valid customary marriage was conducted, the marriage shall be considered valid in the eyes of the law.<sup>61</sup> More importantly the Act provides for equal status in a marriage and particularly states:

A wife in a customary marriage has, on the basis of equality with her husband full status and capacity including the capacity to acquire assets and dispose of them, to enter into contracts and litigate in addition to other rights and powers she may have under customary law.<sup>62</sup>

This Act goes even further with the inclusion of a section which protects existing wives' property rights when the man decides to take on another wife.<sup>63</sup> In this regard, when a husband to an existing customary marriage wishes to enter another customary marriage with another woman, he must apply to the court to approve a contract which will govern the matrimonial property systems of his marriages.<sup>64</sup> In case the marriage is based on community of property or accrual system, the court would terminate the property system applicable to the marriage or effect a division of property. The aim is to ensure an equitable division of property while taking into account the circumstances of the family groups affected by the division of property.<sup>65</sup> The court would then approve the contract on the basis of any conditions it deems fit, allow amendments to the terms of the contract or refuse the contract on the basis that the interests of any of the parties would not be safeguarded by the provisions thereof.<sup>66</sup> The courts have been keen to implement these provisions as seen for example in the case of *MM v MN* where the court held that a subsequent marriage was invalid because of failure to comply with Section 7 (6) which requires a contract of the property arrangements.<sup>67</sup>

The effect of this Act is that it regulates polygamy and protects the interest of the women in polygamous marriages. The Constitutional Court of South Africa has gone further to hold that, in the Tsonga nation, the consent of an existing wife is required for a subsequent marriage contracted by the husband to be valid. This was held in the case of *Mayelane v Ngwenyama*,<sup>68</sup> where the applicant married her husband (deceased in 1984) under customary law. The marriage was not registered. After the man's death, the applicant learnt that the

<sup>59</sup> Sec 3 of the RCMA.

<sup>60</sup> Sec 4 of the RCMA

<sup>61</sup> Sec 4 of the RCMA.

<sup>62</sup> Sec 6 of the RCMA.

<sup>63</sup> See secs 7(1) - (6) of the RCMA.

<sup>64</sup> Sec 7(6) of the RCMA.

<sup>65</sup> Sec 7(6) of the RCMA.

<sup>66</sup> Sec 7(6) of the RCMA.

<sup>67</sup> *MM v MN* 2010 (4) SA 286 (GNP). See also a detailed discussion of the provision in IP Maithufi 'MM v MN 2010 (4) SA 286 (GNP)' (2012) 45 *De Jure* 405.

<sup>68</sup> *Modjadji Florah Mayelane v Mphophu Maria Ngwenyama* (2013) ZACC 14.

deceased had purported to marry another wife, the first respondent. The applicant petitioned the court to rule that the deceased's marriage to the first respondent was not valid because it was conducted without the consent of the applicant. On appeal, the Constitutional Court held that based on the evidence provided, Tsonga customary law required the consent of an existing wife for a subsequent marriage to be valid. The deceased marriage to the first respondent was therefore not valid.

The Act has the effect of increasing the protection for the women in polygamous marriages. Admittedly, the protection provided by the Act is also not perfect<sup>69</sup> and some women are still 'left in the cold' as one scholar puts it.<sup>70</sup> But the comprehensive provisions of this Act, as well as the interpretation of the courts in the *Mayelane v Ngwenyama and MM v MN* decisions, contribute to the promotion and protection of the rights of women in customary marriages, whether polygamous or monogamous. As with Kenya, a more wholesome protection of women's rights can be reached by implementing changes which will deal with the factors discussed in part 3.1 which sometimes push women into polygamous marriages.

## 6 CONCLUSION

In the debate of whether to abolish polygamy or not, the main aim of human rights activists and practitioners is to protect the rights of women. However, pushing for prohibition of polygamy in law, without focussing on the cultural, social and economic factors which feed into it is an inadequate way to achieve this goal. Polygamy is deeply entrenched in culture and is supported by political, social and economic structures of most African communities, especially in the rural areas. Culture cannot change overnight, and a top-down prohibition of the practice would result in more harm than good for women in polygamous marriages.

Ensuring equality between men and women is a noble endeavour that State Parties should aspire to attain in fulfilment of their obligations under the African Women's Rights Protocol. However, prohibition of polygamy without dealing with its root causes would lead to the violation of the rights of the very women it is meant to protect, as made clear in the *Re Ruenji* and *Bibi* cases above. While endeavouring to comply with international best practice, State Parties should pay attention to women in subsisting polygamous marriages and the women who for one reason or another continue to enter into polygamous marriages. Any action towards ensuring equality between men and women is desirable only if such action results in the improvement of the condition of the women in question.

<sup>69</sup> See for example challenges to implementation in P E Andrews 'Big love-the recognition of customary marriages in South Africa' (2007) 64 *Washington and Lee Law Review* 1483, 1495-1497.

<sup>70</sup> R M Jansen 'The Recognition of Customary Marriages Act: many women still left out in the cold' (2002) 27 *Journal for Juridical Science* 115.

The reality in Africa is that people keep entering polygamous marriages for various complex and diverse reasons. As has been shown above, the mere prohibition of polygamy by law has not succeeded in bringing an end to this practice. The reasons why people engage in polygamy are so varied, complex and deeply entrenched that mere prohibition by the law will not put an end to this practice. The fact that no provision exists in law to protect these women only serves to further alienate them and make them more vulnerable to human rights violations.

Pending the outlaw of polygamy in line with international best practice, in the interim, the best way to protect the rights of women in polygamous marriages is to formulate laws which are informed by the realities on the ground such as the Kenyan Marriage Act and the South African RCMA. The objective of such laws should be to regulate the practice of polygamy, by for example, preconditioning it upon the full, free and express consent of the women and prohibiting child marriages. Such regulations would counter the arguments often given in support of prohibition of polygamy such as the violation of the right to equality of women, forced marriages, child marriages etc. Such regulations would also promote the fundamental right to family and the right of adult women to marry partners of their choice, whether their marriage of choice is polygamous or monogamous.

A right to marry a partner of one's choice is enshrined in all the major international and regional human rights instruments. In a world that is continually welcoming diverse forms of marriage, it would be counterintuitive to prohibit a practice that exists in the culture and religion of many Africans, without dealing with its root causes. Polygamy is simply one of the symptoms of a set of complex and multi-faceted issues explained in part 3.1 above. This underscores the importance of article 6 of the African Women's Rights Protocol in ensuring the promotion and protection of the rights of women in polygamous marriages in Africa.