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The Legal Framework Regulating Polygamy in  
Ethiopia: An assessment In Light of Liberal  
Feminist Legal Theory and International Human  
Rights Law

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## **List of Acronyms**

ACHPR African Charter on Human and People's Rights

CEDAW convention on Elimination of All forms of Discriminations against Women

DHS Demographic Health Survey Ethiopia (2016)

FDRE Federal Democratic Republic of Ethiopia

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic Social and Cultural Rights

IHRL International Human Rights Law

RFC Revised Federal Family Code of Ethiopia

SNNPR Southern Nation Nationalities and People's Regional State of Ethiopia

UDHR Universal Declaration of Human Rights

UN United Nations

UPR Universal periodic Review

US United States of America

HPR House of people's Representatives (Legislative organ of the Federal Government)

## **Abstract**

*This thesis examines the Ethiopian laws governing polygamy in light of international human rights law standards and liberal feminist legal perspective. The international human rights law regime calls for the abolishment of polygamy through general comments/recommendations issued by the CEDAW and ICCPR treaty bodies. The call for abolishment is based on the notions of equality and dignity while pro polygamists invoke cultural relativism, religious freedom and sexual autonomy.*

*The tension between the two opposing stances is mainly exacerbated by the inconclusiveness of the inherence of the harms in polygamy.*

*The thesis does accept this claim of inconclusiveness of the inherence of the harm for the sake of objectivity and considers it a better strategic vantage point to ensure the fulfillment of human rights for women and thus calls for the reforms that monogamy has received through family reform agendas to promote women's rights. It forwards the victimization theory and liberal feminist arguments urging that women are rational beings capable of choosing a good way of life as they see fit and emancipation projects should be geared towards enhancing their capacity in making decisions and ensuring respect for their equality in any legal framework that states promote directly or through the recognition of religious/customary laws. Relinquishing the regulation of marriage in the hands of non state actors (traditional and religious institutions) which is a reflection of the public vs. private should be well addressed not to subjugate women in the name of autonomy.*

*The thesis argues that the recognition of polygamy under the auspices of consent of the individuals in the case of a recognized religious or customary law under the Ethiopian legal framework, although appears to be neutral, falls very short of ensuring the consent women to polygamous unions and leads to the violation of their dignity, health and economic rights among other substantive rights. While the law is cautious in ensuring consent in adjudication of disputes in accordance with religious and customary laws, it overlooks other broader substantive aspects which are further worsened by other legal stances in the private sphere, particularly in relation to marital rape.*

*For as long as religious laws permitting polygamy are endorsed, it should be recognized that the rules of monogamy are not sufficient to regulate its complexity and the interplay of the permission with other laws which results in 'legalized' abuse of women. No matter how minimal it might appear at first, consent of the concerned women should be a legal requirement that religious institutions that bless polygamous marriages must ensure for that is the very initial constitutional pre requisite under the legal system. The feminist methodology of consciousness raising and empowerment should be deployed in the regulation of polygamy.*

## **Preface**

*The family has been and still remains to be the main research domain in relation to women. Taking into account the influence of religion and custom/culture/tradition, there is no doubt that an interdisciplinary research is what offers the best insight and solution.*

*What this thesis offers is a legal analysis of the Ethiopian legal framework, borrowing what is relevant from the other disciplines. It does not claim to offer a panacea but rather shade light on the legal gaps that subordinate women.*

*I will have to say I have found the topic of polygamy as something forcing one to juggle between two extreme opposing thoughts like many other but further complicated by strong claims of religious freedom unlike any other.*

*When one accuses polygamy for subordinating women, the other praises it for the collaboration of co-wives it offers which could finally lead to equality; when one accuses it of spreading HIV/STD, the other proves it as a quarantining mechanism to reduce the spread; when one accuses it of perpetuating poverty, the other presents it as a potential resource pulling mechanism. It goes on and on.*

*The line of the argument in the thesis has thus been re directed from dismantling polygamy from an 'external' stand point to 'internal'. This choice to make the analysis from an 'internal' perspective offers better objectivity in forwarding solutions that protect, promote and fulfil the rights of women. Moreover, the thesis chose to accept the argument that recognition of religious laws in the Ethiopian constitutional arrangement is a parallel recognition. The resort to the 'internal' perspective is not to say the constitutional legal order cannot be changed and religious freedom is absolute and whatever comes under the tag of religion should go unquestioned. It should always be questioned and cautiously examined! But the role of the state and its approach should not divert into writing religion for citizens. Nor should it be absolute endorsement that overlooks the impact on the rights and lives of others (adherents and non adherents of the religion ).*

*The thesis considers consent, dignity, equality and other substantive rights claims to question the interplay between religious laws and the state's recognition thereof. In this regard, the thesis highlights points that the law should consider in its endorsement.*

## **Acknowledgment**

Blessed be the God and Father of our Lord Jesus Christ, who hath blessed us with all spiritual blessings in heavenly places in Christ. - Ephesians 1:3

He is indeed rightly worthy of claiming the first fruits of my gratitude for His never-ending and unwavering support in my life to say the least!

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## **Chapter One - Introduction**

### **1.1 Background of the Study**

Polygamy as an institution of marriage is practiced in different parts of the world although the prevalence rate varies across the globe.

The term polygamy is a generic term for plurality of spouses. It takes different forms depending on the sex of the single spouse and the form of celebration. Even though there is a practice of a woman marrying more than one man (polyandry), the most common form of polygamy is polygyny where one man gets married to two or more women. Such plurality of marriages could happen at one time (on a single wedding celebration) or sequentially. The formation of such sequential marriages or the conclusion of marriage while one is legally married to another in legal lexicon is termed as bigamy;<sup>1</sup> a term usually used in the area of criminal law.

This thesis uses the term polygamy and bigamy interchangeably as contextualized in the laws of the country which is the subject of the study (Ethiopia).<sup>2</sup>

The practice of polygamy is usually backed by religion and custom and it is regulated by different countries differently ranging from absolute prohibition to permission. Similarly, the different feminist legal theories also portray varying stances ranging of from its condemnation as institution of subordination of women to condonation as potential springboard for equality of women or an expression of one's choice. The stringency of the prohibitive stances taken by international human rights instruments (through general comments/recommendations issued by the CEDAW and ICCPR treaty bodies) and regional human rights instruments (Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa) also varies to a significant level.

The regulation of marriage in the case of the Ethiopian legal system essentially falls under four bodies of laws; the constitution, family codes, criminal law and religious/customary laws. The territorial and personal scope of application of these laws varies in degree as a result of the federal state structure and the place of religious and customary laws in the constitutional order and the prerequisites for them to replace 'other state laws'.

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<sup>1</sup> Black's Law Dictionary, 8<sup>th</sup> edition (2004)

<sup>2</sup> See FDRE Criminal Code Proclamation No. 414/2004, Article 650. The definition of bigamy under this provision is similar to the concept of polygamy. See also Article 617 of the predecessor Penal Code's interchangeable use of bigamy with polygamy.



Ethiopia adopted a federal state structure with its 1995 constitution. The constitution, which is the supreme law of the land formed federal and regional governments (9 regional states)<sup>3</sup> whereby all of them are entrusted with legislative, executive and judicial powers.<sup>4</sup>

At the federal level, the House of Peoples' Representatives (HPR) which is the highest authority of the Federal government is entrusted with legislative power over federal matters while the State Council, which is the highest organ of a state, has the legislative power over matters falling under state jurisdictions.<sup>5</sup>

Under the auspices of such division of legislative and judicial powers, the states<sup>6</sup> and the federal government have enacted family laws, each applicable within their respective jurisdictions.

The power to enact criminal code is entrusted to the federal legislative organ<sup>7</sup> while states still retain the power to enact criminal laws on matters that are not specifically covered by the Federal Criminal Code. In such an adoption of federalism, the Constitution also stipulates for the application of customary and religious laws in personal and family matter.<sup>8</sup>

The legal regime also benefits from stare decisis as the interpretations of a law by the Federal Supreme Court Cassation Division are binding on courts of all levels.<sup>9</sup> The regulation of polygamy thus falls under these intertwined bodies of laws.

This thesis examines whether the current stance of the Ethiopian legal regime on polygamy and the regulation thereby is in any way implicated in human rights violation. It particularly explores the implication of the laws on the rights of women in reference to international human rights law. It will

## **1.2 Statement of the Problem**

The constitution of the Federal Democratic Republic of Ethiopia (hereinafter the FDRE constitution), which is the supreme law of the land, enshrines equality of men and women. In order to realize this constitutional guarantee of equality and other human rights principles, various legal reforms regarding marriage have been carried out in both criminal and family laws, changing the legal status and consequences of various practices and rules that infringed the rights of women.

Bigamy has been one of the subjects that were considered under such reforms. The Criminal Code under Article 650 criminalizes bigamy but provides for exceptions in subsequent provision. The

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<sup>3</sup> See Constitution of the Federal Democratic Republic of Ethiopia, 1995, Pro. No. 1, Article 46 and Article 47

<sup>4</sup> Ibid, Article 50(2)

<sup>5</sup> Ibid, Article 50 (5) and Article 50(7)

<sup>6</sup> Not all states have enacted family laws. Somali and Afar Regional States have not enacted Family Codes yet.

<sup>7</sup> FDRE Constitution supra at note 3, Article 55(5)

<sup>8</sup> Ibid, Article 34(5)

<sup>9</sup> Federal Courts Proclamation Re-amendment Proclamation, 2005, Proc. No. 454, Article 2(1)

predecessor Penal Code provided for exception where ‘polygamy is recognized under *civil law* in conformity with tradition or *moral usage*’.<sup>10</sup> The now operative Criminal Code that revised and replaced the Penal Code uses the phrase ‘... in conformity with *religious* or traditional practices *recognized by law*’.<sup>11</sup> The rephrasing in the new Criminal Code is based on the reasoning that the Civil Code (the then civil law including laws on marriage and family)<sup>12</sup> does not actually provide for any permission which in effect nullified the exoneration by the penal code, making bigamy a crime in all cases.<sup>13</sup> The drafters of the Criminal Code further go on to emphasize that, laws other than the Civil Code can grant recognition. It is worth noting how the drafters with such explanations avoided the use of the term ‘civil law’ from the Penal Code’s provision. While this could be taken as resulting from misconstruction of the terms and the term civil law could have been still employed with similar outcomes as intended by the drafters, its avoidance actually does away with ambiguity as well as potential abolitionist argument equating the two terms and leading claims that there is no recognition of polygamy under the Civil Code, ergo, no exoneration for all polygamists whatsoever the ground. The legislators have avoided such potential claims and effectively ensured the exceptions are not toothless. The author of this thesis questions if similarly cautious consciousness can be traced in every aspect with regard to the effect of a permissive stance as it exists now and particularly within a comprehensive interplay between criminal, family, constitutional and other relevant legal frameworks.

While the Criminal Code makes room for polygamy in the aforementioned manner, the permission stems from the Constitution’s accommodation of religious and customary laws areas of personal and family matters.

The regulation of marriage under the different Family Codes of the regional states enacted under the auspices of the constitution is essentially similar in prohibiting bigamy/polygamy but the family code of one of the regional states (Harari Regional State) expressly permits polygamy on religious grounds.<sup>14</sup> However, the practice of polygamy is not limited within this regional state and it is

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<sup>10</sup> See penal code of the Empire of Ethiopia Article 617

<sup>11</sup> Criminal Code, Supra at note 2, see article 650, – Emphasis Added

<sup>12</sup> Note that the section of the Civil Code on family matters is currently replaced by the RFC and other regional family codes. Some of provisions of the code that are not in stark contradiction with the constitution are still applicable in regional states that have not enacted their own family codes.

<sup>13</sup> See Explanatory notes on the Criminal Code of Ethiopia Proclamation no. 414/2004 on article 650 – Available only in Amharic (Emphasis Added)- available on <http://www.abbyssinialaw.com/codes-commentaries-and-explanatory-notes?start=20> የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የተሻሻለው የወንጀል ህግ ሁተታ ዘመክንያት

<sup>14</sup> See Article 11 of Harari Regional State Family Code. The regional State of Oromia had a family code that permitted polygamy initially but amended thereafter prohibiting it for reasons that are not specified( see Jetu at note 16, p. 97)

practiced throughout the country<sup>15</sup> and claims of division of common property from dissolution of polygamous marriages are usually entertained by courts without regard to the criminality.<sup>16</sup>

In the case of the state family code permitting polygamy concluded according to religion, the endorsement of the religious polygamy is not followed by further detailed provisions that address the complexities of such marriages and the rights of the multiple spouses, especially the first wife or any of the other already existing wives when a new one is about to be added.

Polygamy as a social reality in Ethiopia has been a research subject in different disciplines of study. Surveys examining the prevalence and associated demographic factors in such unions and its impact on women and children have been conducted. A study conducted to examine the practice of polygamy and its impact on the rights of women and children in a county ( Gedeo zone) in one of the regional states of Ethiopia, Southern Nations Nationalities and People's Regional State (SNNPR) reveals that it is harmful to women and children, specifically leading to co-wife jealousy, competition, and unequal distribution of economic and emotional resources.<sup>17</sup> The study also discloses that it can generate hostility between co-wives and between their children.<sup>18</sup> It argues that polygamy violates the health and equality rights of women and therefore the family code of the region and the criminal code should be revisited.<sup>19</sup> It further argues that the administration of families should not be left to private institutions or religious and cultural institutions.<sup>20</sup> The legal analysis in the study was based on Ethiopian laws that regulated the field as well as international treaties to which Ethiopia is a state party. The family law that was subject of the analysis was however restricted to the regional family code which is applicable only in the regional state and the Federal Revised Family Code (applicable only under federal jurisdictions), both of which do not permit polygamous unions.

Another research studying the culture of polygamous marriage and women's human rights among a clan in a different regional state (Somali) reveals women in the clan have a duty to take all necessary measures to please their husbands and therefore shall not oppose polygamous unions.<sup>21</sup> The study also discloses that polygamy concluded as desired by men in the clan subjects wives to

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<sup>15</sup> See Demographic Health Survey Ethiopia (2016), p.66

<sup>16</sup> Jetu Edosa. "Bigamous Marriage and the Division of Common Property under the Ethiopian Law: Regulatory Challenges and Options." *Oromia Law Journal* 3, no. 1, 77-133. P. 101

<sup>17</sup> Amare Tesfaye and Gebremeskel Hailu, "The Impact of Polygamy on the Rights of Women and Children: A View from the Perspective of SNNPR State." *Promoting Democracy, Human Rights and Good Governance*, (2015) p. 53

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.,P.54

<sup>20</sup> Ibid

<sup>21</sup> Sofanit Solomon, "The Culture of Polygamous Marriage and Women's Human Rights: the Case of Dir Clan" Masters Thesis, Addis Ababa University, 2016 Unpublished , p.59 URL : <http://hdl.handle.net/123456789/11389> <http://etd.aau.edu.et/bitstream/123456789/11389/1/Sofanit%20Solomon.pdf>

depression, abuse, isolation and inequality.<sup>22</sup> Wives are not treated equally and they suffer psychologically as a result of their marital status.<sup>23</sup> Family relationships among children and their father and step mothers in such unions are also found to be adversarial.<sup>24</sup>

The manner of regulation of the pecuniary aspect (the division of common property during dissolution of marriage in particular) of polygamous marriages in Ethiopia has also been studied. A study examining the legal principles courts apply in the dissolution of such unions calls for the legislature to recognize the social reality of polygamy and enact a legislation that regulates the effect of such marriages.<sup>25</sup> It contends that if the pecuniary aspect of such unions is not regulated, it will result in vulnerabilities and opportunities for exploitative behavior.<sup>26</sup> To this end it argues that the legal principles in Ethiopian Contract law and family law which regulate monogamous unions can be employed to regulate division of common property in polygamous unions so as to avoid the high vulnerabilities of women spouses.<sup>27</sup>

As mentioned above in the background section, there are multiple sources of law governing marriage in the country under a complex pluralist structure. International human rights law does not go into dictating the structures of states and the legal system. However, the obligation of states to fulfill their human rights obligations cannot be diminished on the grounds of structures they adopt domestically and cannot invoke such structure as a justification for non compliance with human rights obligation.

This study aims to assess the comprehensive legal frameworks regulating polygamy and thus broadens its scope through human rights perspectives than the aforementioned studies in selected regions and selected pecuniary aspect during dissolution.

It will examine whether the domestic laws' formulation of 'rules' and 'exceptions' uphold the human rights principles of equality, dignity and non discrimination. This examination will also be made using the lenses of liberal feminist legal perspective, which like international human rights regime has a Universalist perspective.

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<sup>22</sup> Ibid., p. 17

<sup>23</sup> Ibid., p. 59

<sup>24</sup> Ibid., p. 58

<sup>25</sup> Jetu Edosa. "Bigamous Marriage and the Division of Common Property under the Ethiopian Law", *Supra* at note 16 p.133

<sup>26</sup> Ibid., P. 78

<sup>27</sup> Ibid., p. 133

### **1.3 Research Questions**

The main research question the thesis will address is the following.

- Is the regulation of polygamy in Ethiopia in accordance with its treaty obligations under international/regional human rights system and in any manner implicated in the violation of the rights of women?

To answer this question, the thesis will, as mentioned above use liberal feminist legal theory as its theoretical framework and thus questions

- What is liberal feminism's take on polygamy and legal frameworks like Ethiopia's and how can Ethiopia's legal framework be informed from a liberal feminist legal theory's critique

### **1.4 Objectives of the Study**

#### **General Objective**

The main objective of the thesis is examining the Ethiopian laws on polygamy in light of international human rights and liberal feminist legal theory and highlighting the major departures/gaps of non conformity and the way forward.

#### **Specific Objectives**

- Examining the current status of polygamy in IHRL and regional human rights instruments and the justifications thereby;
- Analyzing the Ethiopian legal frameworks regulating polygamy and identifying areas where there is discrepancy with international human rights obligations;
- Analyzing the legal framework through the lenses of liberal feminist legal theory to inform the laws accordingly;
- Exploring the 'Rule Vs Exception' formulation in regulation of polygamy under the Criminal Code and assessing its implication;

### **1.5 Significance of the Study**

This thesis will build upon the aforementioned previous researches that have taken specific realities of polygamy in selected places and challenges associated therewith and examine the overall construction of the legal regime governing polygamy and the implications on rights of individuals in light of Ethiopia's international obligations to abide by treaties it has ratified/signed.

It is an assessment of the legal regime through the lenses of international human rights law and liberal feminism. Its contribution to existing literatures is thus a perspective or findings on how the

formulation of various legislations and rules and exception affect rights of individuals in polygamous marriages.

### **1.6 Scope of the Study**

This thesis is limited to examining the legal frameworks of Ethiopia regulating polygamy in light of the stance of international human rights law and liberal feminist legal theory. It does not examine the institution of polygamy itself and go into the evaluation of the practice as such except for discussing arguments for or against it where they are found to be relevant for the main discussions. The analysis will be from rights perspectives based on the current stand of international human rights framework and Ethiopia's obligations arising therefrom.

### **1.7 Methodology of the Study**

As a doctrinal legal research the methodology employed in conducting this research will be analysis of relevant domestic legislations and international and regional human rights instruments. The stance of the domestic laws and the formulations of rights in the human rights instruments are also evaluated in light of liberal feminist legal theory principles and perspectives. The Universalist and binary perspective the theory provides is best suited to analyze the principles of equality, non discrimination and dignity that arise in discussing polygamy from a human rights angle.

Legislations, books, journal articles, general recommendations and concluding observations of human rights treaty bodies will also be used in the analysis.

The thesis will also look into court decisions (Federal Supreme Court Cassation decisions) to look into how legal lacunas are filled by the judiciary and the precedents set.

### **1.8 Structure of the Thesis**

To make the aforementioned assessments, the thesis is organized into four chapters, the first one being this introductory chapter. This chapter has introduced the problems and main research question along with the methodologies that will be employed to address them. The second chapter will provide background on the notions of polygamy and the different perspectives on the issue along with the theoretical framework that will be used. The third chapter examines the stance of the international and regional human rights system on polygamy. The fourth chapter is devoted to evaluating and analyzing the Ethiopian laws in light of international human rights law to highlight gaps and problems that need to be remedied. In its last section, it forwards conclusions along with recommendations that the analysis indicates to better the situation.

## Chapter Two: Background on Polygamy and Conceptual Frameworks

### 2.1 The Notion of Polygamy

The ordinary meaning of polygamy is the practice or custom of having more than one wife or husband at the same time.<sup>28</sup> The term is generally used to refer to the practice of having more than one spouse at one time. The practice of having more than one wife at one time is termed as polygyny, and the term polyandry refers to the reverse practice of having more than one husband at the same time.

According to Black's Law Dictionary, polygamy is at times a synonym of bigamy, which is defined as the act of marrying one person while legally married or to indicate the simultaneous marriage of two or more spouses.<sup>29</sup> Polygamy can thus be simultaneous (if more than one spouse is simultaneously present) or successive (if spouses are married one after the other).<sup>30</sup>

### 2.2 The Practice of Polygamy

#### Who Practices Polygamy? An Overview

Polygamy is practiced by different religious groups; the notorious ones being Mormons and Muslims.<sup>31</sup> Other religious groups such as evangelical Christians and African Hebrew Israelites of Jerusalem also practice polygamy.<sup>32</sup> A religious sect called Wiccans in Canada also practice polygamy. Polygamous sects of various religions associate their practices with a doctrine that supports it. The practice of polygamy among Muslims for example derives its authority from a verse in the Qur'an which states that a man may marry up to four wives.<sup>33</sup> It is a socially accepted extensive practice among tribes and communities in a number of African countries and continues to be practiced even by heads of states and government officials. Western United States and Canada are also known to have significant population practicing polygamy.<sup>34</sup> With such great level of pervasiveness, polygamy happens in a polygynous form and polyandry is an extremely rare form of

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<sup>28</sup> *Oxford English Dictionary*. 2nd ed. 20 vols. Oxford: Oxford University Press, 2018. Also available at <https://en.oxforddictionaries.com/>

<sup>29</sup> Black's Law Dictionary (8<sup>th</sup> Ed. 2004)

<sup>30</sup> Ibid

<sup>31</sup> Thomas, Buck. "From Big Love To The Big House: Justifying Anti Polygamy Laws In An Age Of Expanding Rights." *Emory International Law Review*, 2012., P. 943

<sup>32</sup> Davis, Adrienne D. "Regulating Polygamy: Intimacy, Default Rules, And Bargaining For Equality." *Columbia Law Review* 110, no. 8 (December 2010). P. 970

<sup>33</sup> Thobejane, Tsoaledi Daniel, and Takayindisa Flora. "An Exploration of Polygamous Marriages: A Worldview." *Mediterranean Journal of Social Sciences* 5, no. 27 (December 2014). P. 1059 Qur'an (4:3)

<sup>34</sup> Ibid., P. 1058

polygamy.<sup>35</sup> African societies, despite the notoriety of polygamy are also not known to practice polyandry.<sup>36</sup>

The practice of polygamy has been met with measures of outlawing in the mid 20<sup>th</sup> century; mainly in Asia.<sup>37</sup> The main exceptions to this global trend were the least secularized Islamic countries of the Middle East and more generally sub-Saharan Africa.<sup>38</sup> However, despite the Quran's tolerance of a man marrying up to four wives, some Islamic countries such as Turkey and Tunisia have formally banned polygamy and others have imposed judicial restrictions on this practice.<sup>39</sup>

The question of who practices polygamy is a very broad one and a long list and categorization can be made on factors other than geography. Looking at its extensiveness in Africa, the question can also be addressed from literacy/ educational level perspective. In this aspect it can be generally said that well educated women in polygamous societies tend to be in monogamous relationships while the reverse is true for men.<sup>40</sup> Educated men in polygamous societies may be expected to take more than one wife once they become financially successful.<sup>41</sup>

## 2.3 Why Polygamy? An Overview

The practice of polygamy stems from the broad realms of religion and custom which sanction the institution in different ways. While they remain the major reasons, societal problems of various kinds also lead to the practice of polygamy.

- **Religion**

The major religions that are forwarded as proponents for polygamy are Islam and Mormonism. Polygamy in Islam is permitted while among Mormons it is mandated.<sup>42</sup> Mormons officially declared polygamy as tenet of the church in 1852 justifying it on the basis that it is necessary to fulfil God's commandment of procreating and filling the earth like sands of the seashore they invoke from their sacred scriptures, the bible.<sup>43</sup> Mormonism further attaches spiritual value to the practice which is very difficult to analyze in a secular epistemology. In this aspect it advocates for polygamy "in order to recognize that the spirit children of God wait for earthly 'noble parentage' who help

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<sup>35</sup>Gaffney-Rhys, Ruth. "A Comparison Of Child Marriage And Polygamy From A Human Rights Perspective: Are The Arguments Equally Cogent?" *Journal Of Social Welfare & Family Law*34, no. 1 (2012).P.50

<sup>36</sup>Cook, Cynthia T. "Polygyny: Did the Africans Get It Right?" *Journal of Black Studies*38, no. 2 (2007): 232-50. P. 236

<sup>37</sup> Thobejane, "An Exploration of Polygamous Marriages", supra at note 27, P. 1058 ( Thailand in 1935, in China in 1953, among the Hindus in India in 1955, and in Nepal in 1963).

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup>Cook, Cynthia T. "Polygyny: Did the Africans Get It Right?" *Journal of Black Studies*38, no. 2 (2007): 232-50. P. 236

<sup>41</sup> Ibid

<sup>42</sup> Buck., "From Big Love To The Big House", supra at note 31, P. 943

<sup>43</sup> Duncan, Emily J. "The Positive Effects of Legalizing Polygamy: Love Is a Many Splendored Thing." *Duke Journal of Gender Law & Policy*15 (2008). P. 317



them ‘usher in the Kingdom of God.’ ”<sup>44</sup> The religion also adopted polygamy in order to reform sexual immorality which it asserts is exacerbated by monogamy.<sup>45</sup>

From the time of establishment of the practice as a tenet by the church in the United States, it encountered strong opposition from the federal government. Mormon polygamy was a huge abomination and was coined by the first republican presidential candidate as ‘twin relics of barbarism’,<sup>46</sup> its other sibling being slavery.

Islamic personal laws on the other hand claim polygamy originally arose in the religion to provide, materially and socially, for women who would otherwise be destitute.<sup>47</sup>

### **Custom and Value systems**

Tradition/custom is the other main source where polygamy finds its roots. Societies that are neither among the Mormon and Muslim religious groups also practice polygamy as a matter of tradition.<sup>48</sup> In Africa, polygamy is a cultural practice that is not dependent on a person’s religion.<sup>49</sup> The driving forces for decisions to be polygamous are sometimes customary outlooks and societal values that are not merely or solely focused on polygamy itself as such. Sometimes, traditional outlooks towards other aspects of life end up encouraging polygamy implicitly. A good instance of such case is the values attached to children and single women. Africans value children, the more children the better; and an unmarried woman is blasphemy.<sup>50</sup> The experience of African American women can speak to this concern as they consciously choose to have children out of wedlock and find themselves as mistresses once they reach their 30s and 40s since they face diminished prospect of finding suitable mate the prospect, therefore forced to consider monogamy dysfunctional.<sup>51</sup> Being the second or third wife and having some legal status may be better than being an unmarried woman or a mistress.<sup>52</sup>

### **Demographic Factors**

Polygamy in traditional African society has been mistakenly, as a result of unfamiliarity, taken to be a mere response to male sexual lust.<sup>53</sup> However, the driving forces of polygamy are complex. It is argued that the cultural practice of polygamy is a result of demographic realities such as high infant and child mortality rates and risky activities exercised by men such as hunting and war which may

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<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> Thobejane, "An Exploration of Polygamous Marriages" ,supra at note 27,P. 1064

<sup>48</sup> Buck., "From Big Love To The Big House" , supra at note 31, P. 943

<sup>49</sup> Cook., "Polygyny: Did the Africans Get It Right?" P. 241

<sup>50</sup> Ibid.,P.234

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Nwove, Augustine. "The Practice of Interventive Polygamy in Two Regions of Africa: Background, Theory and Techniques." *Dialectical Anthropology*31 (2007): 383-421.P. 384

have resulted in shortage of men.<sup>54</sup> Issues raised along with these include higher male mortality and male out-migration resulting in a surplus of women.<sup>55</sup> Male incarceration is also another major factor resulting in distorted sex ratios leading to polygamy. A recent situation in Ghana somehow depicts such dynamics. The news from the city of Assin Fosu, in the centre of Ghana, reported that the women in the city pleaded to their president asking the release of male prisoners so that they could marry them and build a family.<sup>56</sup> They asserted men are more numerous in prison than in their society and the city is dying.<sup>57</sup> The women claimed that they are often obliged to sleep with married men and the competition among them to find a spouse is intense to the extent of forcing the few men living in the region to flee their responsibilities.<sup>58</sup>

This shows that polygamy in some cases stems as a matter of pragmatism. The causes of the sex ratio distortions could vary and sometime it is further strengthened by religion and nationalism. An instance demonstrating this is the highest density of polygamy in the state of Philadelphia in the United States as a result of male incarceration as well as under employment alongside conversion to Islam and currents of racial nationalism.<sup>59</sup>

In addition to these, sociologists, anthropologists, and economists have also considered wealth disparities, economic options, and personal lustful character as some of the factors influencing plurality of marriages.<sup>60</sup>

While these are the main accounts of the facts around polygamy, the main focus of the discussions that will follow are its human rights implications, particularly from the view point of Ethiopia's legal framework regulating it. The human rights perspectives of course do not emerge out of nowhere and are formed based on these accounts of facts, justifications and arguments. The crux of a human rights perspective on marriage in general and polygamy in particular revolves around how the union affects equality between the sexes in endowment of rights and the gendered roles of spouses.<sup>61</sup> These gendered aspects necessitate an assessment of the issue through a feminist legal perspective.

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<sup>54</sup> Cook, "Polygyny", supra at note 49, P. 236

<sup>55</sup> Gibson, Mhairi A., and Ruth Mace. "Polygyny, Reproductive Success And Child Health In Rural Ethiopia: Why Marry A Married Man?" *J.biosoc.Sci*, 39 (2007): 287-300. P.289

<sup>56</sup> <http://www.Atqnews.Com/Ng/Male-Prisoners-Marry-Ghanaian-Women/>

<sup>57</sup> <http://www.Atqnews.Com/Ng/Male-Prisoners-Marry-Ghanaian-Women/>

<sup>58</sup> <http://www.Atqnews.Com/Ng/Male-Prisoners-Marry-Ghanaian-Women/>

<sup>59</sup> Davis, "Regulating Polygamy", Supra at note 32, p. 1972

<sup>60</sup> Ibid., P. 1967

<sup>61</sup> Wilson, Elizabeth. "Marriage." *ENCYCLOPEDIA OF SEX AND GENDER* 3 (2007).p. 948

## 2.4 Brief Overview of Feminist Legal Perspectives

Feminism is a result oriented approach that insists upon epistemological and psychological sophistication in law and proceeds through consciousness raising, which is an inherently transformative method regardless of the difficulty to measure it through traditional methods.<sup>62</sup> Its perspective of the object and subject of law, its caution not to separate the observer from the observed and its emergence from those whose interest it affirms<sup>63</sup> make it an interesting and important framework to analyze laws.

Feminism rejects the idea that a legal system needs to uphold objective and neutral rules in order to function.<sup>64</sup> Nonetheless, it believes that legality should have certain qualities.<sup>65</sup> In fact, it employs legal standards (mainly equality) to make connections among norms and locate dominations.<sup>66</sup> Feminism is committed to finding the moral crux of matters before judicial, administrative or bodies that interpret the standard.<sup>67</sup> In this aspect, it is sometimes claimed that feminism struggles to force law makers and interpreters to pay attention to that which they have been well trained to disregard.<sup>68</sup> Feminism thus can be said to be a quest for a well deserved virtue that has been stifled.

When it comes to polygamy, feminism similarly makes an evaluation of different accounts highlighted in the previous subsection through normative standards; especially, equality. As much as there are feminists that conclude polygamy is harmful to women and thereby inconsistent with international human rights law, there are also feminist perspectives that support the institution with strong state regulation.

In some cases feminist support for polygamy comes as a form of nationalism and a mechanism to maintain group identity through patriarchy.<sup>69</sup> Despite their stands and approaches, the arguments of the feminist perspectives are one way or the other aimed towards a common goal of deconstructing patriarchy and ensuring the equality of women in every spheres of life.<sup>70</sup>

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<sup>62</sup> Weisberg, Kelly D. *Feminist Legal Theory Foundations*. Temple University, 1993. P. 53

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid.p. 54

<sup>67</sup> Ibid

<sup>68</sup> Ibid

<sup>69</sup> See Davis, "Regulating Polygamy", Supra at note 32, p. 70 - Some black feminist groups in the United States advocate for polygamy as a way of preserving the black family and providing black women with committed black husbands and children. Such Black Nationalist argument embraces polygamy as a way to rescue black masculinity and restore patriarchy to the black community. Radical feminists on the other hand advocate for polygamy to create and strengthen sisterhood and collaboration among women which can enhance their autonomy by heads enabling them to outwit their husbands and put an end to patriarchy.

<sup>70</sup> Feminist Theories On International Law And Human Rights p. 37

Its criminalization on the other hand is urged by framing it as a harmful practice contrary to gender equality, and contesting the autonomy of women in polygamous marriages.

The interplay between these various contesting claims of equality and autonomy in relation to polygamy need a discussion in light of the very initial conception of the notions by feminists. The following section will thus forward liberal feminism as a conceptual framework.

## **2.5 Liberal Feminism as a Conceptual Framework**

Feminist legal theories have over the years passed through different stages. Looking at this metamorphosis and branching out, liberal feminists are the first wave of feminist legal theorists. Entrenched in the liberal conception that all men are created equal and endowed with reason and conscience, the theory still serves in furthering the rights of women.

Liberalism as an ideology accords respect and rights to individuals based on the fact that they are humans, independently of membership to any community or class.<sup>71</sup> This fundamental notion that possession of rights depends on rationality, formed the foundation for early feminist thinkers because it meant that women shall not be deprived of their rights since they possessed rationality. Where women are shown to be possessors of rationality, any deprivation of rights thereby becomes morally unacceptable.

In addition to the historical factor of the birth of feminism in a liberal ideology and the crucial common ground of according value to human beings independent of their role in society, the liberalist conception of state as an accountable entity subject to potential change to grant protection to individuals makes liberal ideology an important tool to analyze sexist oppression and subordination of women.<sup>72</sup> Liberalism thus offers so much room for legal reform that feminists strive for and liberal feminist legal perspective aims to make use of this space.

In the struggle for equality, liberal legal feminists were demanding the extending to women, of the opportunities, power and rights available to men. This model of formal equality was accepted and reinforced by court decisions.<sup>73</sup> There was also success the fight against sex stereotypes by showing that rigid sex roles limited opportunities for freedom of choice and restricted personal development of individuals irrespective of their sexes.<sup>74</sup>

As the first born and pioneer of feminist theories, liberal legal feminist theory is of course subjected to criticisms. One of the criticisms in search for more concrete equality is that, in its quest for equality, the theory has impliedly set 'what men possessed' as an unquestioned benchmark for

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<sup>71</sup> Groenhout, Ruth E. "Essentialist Challenges to Liberal Feminism." *Social Theory and Practice* 28, no.1 (2002) .p. 54

<sup>72</sup> Ibid.,p.56

<sup>73</sup> Levit, Nancy. *The Gender Line: Men, Women and the Law*. New York University Press, 1998.p. 190

<sup>74</sup> Ibid

equality.<sup>75</sup> Within the regime of rights, women are either discriminated against by their inability to fit in the male mould, or they are indirectly branded by having to ask for special protection.<sup>76</sup> This is in other words is mainly a criticism of the political theory of liberalism's presumption of the male sex as the public persona that is subject of rights.<sup>77</sup>

But it should be noted that this criticism does not reject formal equality, an essence of liberalism and liberal feminist legal theory. Rather, it is a claim that formal equality is not enough and more needs to be done. Assertions of affirmative action that have developed as a response to the reality of past disadvantage and rejection of a 'male mould equality framework', however 'radical' they appear to be, are even extensions of the same underlying liberal principle.<sup>78</sup>

The liberal moral and political philosophy's conception of autonomy is the other area subject to criticism on the following two points. Autonomy for liberalism is the self-determining individual who has the right to author his or her own life free from the coercive influence of others.<sup>79</sup> However, the critics argue that where much of women's circles of life has been controlled and predetermined for them, the little option left to them should not be attributed as their autonomous choice.<sup>80</sup> This argument has also a lot to do with the notion of the self implied in the notion of autonomy. It is an accusation that liberalist ideology misrepresents the social nature of the self; inaccurately depicting it as fundamentally independent, self-interested, and free of relationships with others who are dependent.<sup>81</sup> A similar line of concern is that the notion of rights presupposes an agent who is free to enjoy them and thus disadvantages those who legally hold rights but cannot exercise them.<sup>82</sup>

However, liberalism accords respect and rights to individuals based on the basis of being a human does not mean liberalism precludes the recognition of social contexts in which individuals live and form their identities.<sup>83</sup> It rather refuses to completely conflate individual identity into group identity and defends the liberty and capacity of individuals to reject social constraints.<sup>84</sup> Its conception of individual liberty should not be taken out of context and a claim should not be made on its account that the condition where people find themselves in is attributable to their liberty and choices in all cases.

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<sup>75</sup> Ibid., p.189 Major critics are the add and stir approach and criticisms against the Aristotelian conception of equality asking who the category of likes are.

<sup>76</sup> Gerson, Gal. "Individuality and Oppositions in Wollstonecraft and Mill." *Political Studies* 50 (2002): 794-810. p. 796

<sup>77</sup> Ibid

<sup>78</sup> Graham, Gordon. "Liberal Vs Radical Feminism Revisited." *Journal of Applied Philosophy* 11, no. 2 (1994). p. 158

<sup>79</sup> Hay, Carol. *Kantianism, Liberalism, and Feminism Resisting Oppression*. Palgrave MacMillan, 2013. p. 15

<sup>80</sup> MacKinnon, Catharine A. *Women's Lives-Men's Laws*. Harvard University Press, 2007. p.450

<sup>81</sup> Hay. *Kantianism, Liberalism, and Feminism*., Supra at note 79, p. 15

<sup>82</sup> Gerson., "Individuality and Oppositions ." , supra at note 76, p. 796

<sup>83</sup> Groenhout, "Essentialist Challenges to Liberal Feminism." . supra at note 71, p. 54

<sup>84</sup> Ibid

Moreover, the liberal picture of human nature, as more than either biologically or socially determined, is a crucial aspect of the feminist analysis of the wrongness of sexist oppression.<sup>85</sup>

### 2.5.1 The Liberal Private Public Divide

The classical liberal theory takes its name from the notion that each individual should have a sphere of liberties that are protected from other individuals and from state encroachment.<sup>86</sup> Individual rights cannot be protected without some form of governmental structures that protect them from both other individuals and governmental structures themselves.<sup>87</sup> The rights being protected are justified on the basis of the individual's capacity to exercise rational judgment, act freely and be held responsible for his or her choices.<sup>88</sup> Which rights need to be protected is of course a contested issue in liberal thought.<sup>89</sup>

It is in the attempt to distinguish this area of protection that the private versus public dichotomy comes into play. Liberalism accepts such a distinction as an ideology and envisions a private realm where state intervention into the lives of individuals is limited but it has not assumed such an ideal as an already existing reality.<sup>90</sup> One of the critics towards liberal feminists as framed by radical feminists is that liberal feminism's focus on formal equality with men ignores the fact that fundamental problem of women's subordination happens in the home.<sup>91</sup> Arguably, the line between the home as private/personal and rest of civil/political society as public as defined by social norms and law is clearly gendered.<sup>92</sup> The construction of home as a private institution, falling outside state control and scrutiny serves to perpetuate oppressive hierarchical order within family relationships.<sup>93</sup> This private sphere is largely regulated by indigenous customs and cultural norms in pluralistic legal systems.<sup>94</sup> However, it is imperative to understand that liberalism as a foundation of liberal feminist legal theory does not contend that inequality in the private sphere should be out of the reach of state intervention.<sup>95</sup> John Stuart Mill's rejection of the marriage exemption from charges of rape is a good example against such claims.<sup>96</sup> Regardless of the truth that much of inequality happens in a private realm, it remains wrong to attribute this to the theory itself.<sup>97</sup> Interestingly enough, no matter how the private sphere is framed as a weak vantage point, the

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<sup>85</sup> Ibid., p. 57

<sup>86</sup> Ibid., p. 54

<sup>87</sup> Ibid., p. 56

<sup>88</sup> Ibid

<sup>89</sup> ibid

<sup>90</sup> Ibid., p. 75

<sup>91</sup> Lerner, Lee K., Brenda Wilmoth Lerner, and Adrienne Wilmoth Lerner. *Gender Issues and Sexuality: Primary Sources*. 2006. p.75

<sup>92</sup> Qureshi, Shazia. "Feminist Analysis of Human Rights Law." *Journal of Political Studies* 19, no. 2 (2012). p.43

<sup>93</sup> Ibid

<sup>94</sup> Ibid

<sup>95</sup> Groenhout, "Essentialist Challenges to Liberal Feminism." *supra* at note 71, p. 75

<sup>96</sup> Ibid

<sup>97</sup> Ibid

withering away of the realm itself is not called for by feminists.<sup>98</sup> Feminist analysis of public versus private divisions is thus a perspective of inclusion or expansion of the spheres in legal arenas and not its abolishment.<sup>99</sup>

## 2.6 Victimization Theory

Victimization theory starts its assertions by claiming that the essentialist way of viewing women through a violence lens has done damage to the rights of women. In the words of the theorists

*“It has portrayed women from the third world as victims of their culture, thereby reinforcing stereotyped and racist representation of that culture and privileging the culture of the west. Such victimization at the end reinforces the depiction of women in the third world as perpetually marginalized, underprivileged and has serious implications for the strategies subsequently adopted to remedy the harms they experience. The portrayal of women as victims ends up in intervention of an imperial kind in the lives of the native presenting them as victims of the uncivilized and backward.”*<sup>100</sup>

This theory accordingly tries to show how feminism can be implicit in ousting the autonomy of women that it strives to bring to equality and how some measures can cripple women.

When it comes to a human rights discourse, victimization theory is very critical of the tag assigned to women all over the world as victims. It is very cautious and critical of viewing the female sex through essentialism. Essentialism is the notion that a unitary ‘essential’ woman’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.<sup>101</sup> Another way of explaining it is through what social scientists criticize as ‘othering’, which is a process whereby one labels whoever is different from him/her in a dehumanizing manner.<sup>102</sup>

Feminist victimization theory however is itself entrenched in essentialist notion of humans; as beings endowed with reason and conscience that have rights and freedoms. In this sense victimization is another side the liberal feminism’s coin.

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<sup>98</sup> Ibid., p. 74

<sup>99</sup> Buss, Doris, and Ambreena Manji. *International Law: Modern Feminist Approaches*. Hart Publishing, 2005. P.96

<sup>100</sup> See Conaghan, Joanne. *Feminist Legal Studies: Critical Concepts in Law*. Routledge, 2009. p. 166 - Kapur, Ratna. "The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics." *Harvard Human Rights Journal* 15 (January 2002). p. 6

<sup>101</sup> MacKinnon., *Women's Lives-Men's Laws*, Supra at note 75, P.86

<sup>102</sup> Baines, Beverley, Daphne Barak, and Tsvi Kahana. *Feminist Constitutionalism: Global Perspectives*. 2012. P. 471

There are feminists who claim that the rejection of essentialism (disguised under the veil of intellectual and political maturity to accommodate diversity) is serving as a pretext for dismissing gender and realities of sexual politics.<sup>103</sup> However, the victimization theory's cry to stop viewing women through an essentialist and particularly violence lens is a cry for restoration of autonomy to women that it saw as diminishing: a hard won achievement of feminism and its starting point.

Despite the complex issues of different conceptions of equality that have formed through the years, I consider the liberal feminists conception as the bare minima and important analytic tool to examine laws as a starting point. Other theories build upon this acknowledgement of equal rights and endowment of dignity that liberalism forwards as its underpinning. The victimization theory is also important in balancing the developments while still maintaining the key liberal legal feminist theory's framework. The different issues in polygamy from a human rights perspective are one way or the other a matter of autonomy and equality. The theories' analysis of these notions will be employed in the following discussions because they are best suited for reasons explained above.

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<sup>103</sup> MacKinnon., *Women's Lives-Men's Laws*,.P.88



## **Chapter Three: Polygamy under International Human rights Law**

### **3.1 The International Human Rights Regime**

The international human rights system is founded on the promotion of the equality of all human beings in rights and dignity as laid out in the UN charter and the UDHR.<sup>104</sup> The UN Charter declares that all human beings are equal in rights and in dignity. This principle of equality of the human race in dignity and rights was echoed in the UDHR which stresses that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The declaration further provides that all human beings are born free and equal in dignity and rights, underlining the inherence of the rights and endowment with reason and conscience with the responsibility to act towards one another in a spirit of brotherhood.

Where equality, dignity and inherent endowment of rights are the cornerstones of the human rights regime, the debate over any issue from a human rights perspective will be processed through these paradigms. The various human rights conventions on different areas are extensions and elaborations of these ideals in the given particular contexts of the conventions.

These ideals have been framed differently over the years and evolved as they are faced with resistance on accounts of how world politics has shaped the international human rights system to mount its current standard as the epitome of virtue.

Regardless of the history of international human rights regime, the inherent endowment of equality and dignity are the bedrocks of humanity. The critiques of the international system, shading light where it is falling short of its promises also do so hinging on these principles. Resistances to the international human rights regime can become acceptable only when it is framed as an alternative framework of promoting dignity and equality than how the existing human right framework is currently doing so.

The world still renews its vows to uphold these notions with new commitments. The SDGs, the most recent universal expressions of commitment to the international human rights order reaffirm this commitment with an even special express emphasis on gender equality, right on from its preamble.<sup>105</sup> The appraisal of a legal system on a particular issue in light of international human rights thus has at the crux of it an evaluation of how the legal system promotes and ensures these principles. The analysis of polygamy through a human rights prism is thus essentially an analysis thorough the frameworks of equality and dignity.

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<sup>104</sup> See preamble of the United Nations, Charter of the United Nations, 24 October 1945 UNTS XVI and UDHR preamble Para 1 and article 1

<sup>105</sup> The preamble of the SDGs provides that it seeks to realize the human rights of all and to achieve gender equality and empowerment of all women and girls

Where there is a norm conflict involving cultural or religious values, it is even summoned that equality and dignity should prevail and diversity should be respected but also trumped with full compliance with these ideals.<sup>106</sup>

### **3.2 Locating Polygamy in the International Human Rights Law Regime: Family, Religion and Culture**

Polygamy as a form of marriage and family can be framed in terms of the right to family life. . Having its source in religion and custom Polygamy can also framed in terms of religious freedom and cultural rights.

As much as IHRL talks of rights and freedoms of individuals in different spheres of life, it is equally protective of family life. Family as a unit on its own and the individual's rights within a family are protected by various human rights instruments.<sup>107</sup> IHRL recognizes the family as a fundamental unit of society and that it exists in different forms and assumes diverse functions among and within countries.<sup>108</sup> The right to found a family is an extension of the right to marry which is recognized under UDHR article 16 framed as having three dimensions, including the right to marry, equal rights within marriage, and consent to marriage.

ICCPR's article 23 on the right to found a family is an extension of this right. The covenant does not define what family is but the meaning of family under article 23 ICCPR is not limited to monogamous families but also other extended family forms in African cultures.<sup>109</sup> ICCPR committee in *Bessert v. France* held that the objectives of the covenant require that the term family be given a broad interpretation so as to include all those comprising the family as understood in the society in question. This opens room for the recognition of culture in defining what family means. The CEDAW committee also acknowledges that families take many forms and underscores the obligation of equality within the family under all systems, "both at law and in private".<sup>110</sup>

With such a broad understanding of the notion of family and how it may take different forms in different cultures, it is not difficult to locate polygamy in 'right to marry and found a family' rights of the IHRL regime. While IHRL still protects family and marriage rights, there is no question that marital formations are not identical in the agency and autonomy they grant to women.<sup>111</sup> But it

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<sup>106</sup> Freeman, Marsha A., Christine Chinkin, and Beate Rudolf. *The UN Convention On The Elimination of All Forms of Discrimination Against Women: A Commentary*. Oxford University, 2012.p 160

<sup>107</sup> See Article 16 UDHR, Article 23 ICCPR, Article 18 ACHPR

<sup>108</sup> Report of the Secretary-General, United Nations General Assembly, A/50/370 'Social Development, Including Questions Relating To The World Social Situation And To Youth, Ageing, Disabled Persons And The Family' Observance of the International Year of the Family, (September 6, 1995), para14

<sup>109</sup> Manfred, Nowak. *UN Covenant on Civil and Political Rights*. 2nd ed. Engel, 2005.p.515

<sup>110</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994,para13

<sup>111</sup> Wilson, Elizabeth. "Marriage." *Encyclopaedia Of Sex And Gender*3 (2007). p. 948

should be analyzed why preference is given to certain forms over others in the legal arena and whether the justifications given are actually promoting the ideals they claim to uphold to the fullest extent.

### 3.3 The Stance on the International Human Rights Regime

The international human rights legal regime's stand not to define what a family means should not be taken as an endorsement of all forms of family as human rights compliant units of society. It seems a strategy to reach out to and accord what are recognized as family rights under the different instruments to all units that are considered as a family in a state party's setting.

Regardless of the respect accorded to forms of family in different cultural settings, IHRL urges restriction on the right to marry and find a family where it deems a type of family union is contrary to the essence of human rights. This is not addressed in core instruments explicitly but finds its expression in the general comments/recommendations of treaty bodies. The debates during the drafting of ICCPR are indicative of the fact that the right to marry and find a family can be restricted by states no matter how personal this right is.<sup>112</sup> Various forms of sexual relations and marital unions like incest and bigamy were in place in many countries and the states did not want to repeal their restrictions on such unions.<sup>113</sup>

Polygamy has also been a point of discussion over the UPR process and only 10 out of 22 recommendations over two review rounds were accepted which can be taken as indicative of the lack of consensus on the issue.<sup>114</sup>

#### 3.3.1 The International Covenant on Civil and Political Rights (ICCPR)

The Human rights committee holds that in light of ICCPR Polygamy is incompatible with the dignity of women, and constitutes an inadmissible discrimination against women and its abolition is asked for in strong terms.<sup>115</sup> ICCPR notes that states could provide permission of religious marriages as a recognition of religious freedom and adds that legal provisions of states should not contradict with other covenant rights.<sup>116</sup> States are particularly required to treat men and women equally in regard to marriage in accordance with article 23. Equality during marriage under the

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<sup>112</sup> Manferd, Nowak. *U.N Covenant on Civil and Political Rights* supra at note 109.p. 529

<sup>113</sup> Ibid

<sup>114</sup> Patel, Gayatri. "How 'Universal' Is the United Nations' Universal Periodic Review Process? An Examination of the Discussions Held on Polygamy." *Human Rights Review* 18, no. 4 (December 2017): 459–83. P.467

<sup>115</sup> UN Human Rights Committee(HRC), *CPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10, para, para 24

<sup>116</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990 para 4

convention means that husband and wife should participate equally in responsibility and authority within the family.<sup>117</sup>

### **3.3.2 The convention on the Elimination of all forms of Discrimination against Women (CEDAW)**

The CEDAW Committee specifically provides that polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.<sup>118</sup> It reaffirms this in a later general comment and provides that state parties should take all measures to abolish polygamous marriages.<sup>119</sup> The stance is taken on the ground that polygamy has grave consequence for women's human rights and economic well-being and those of their children.<sup>120</sup> CEDAW committee holds that the permission of polygamous marriages in accordance with personal and family laws is a breach of the convention's Article 5(a).<sup>121</sup> The committee notes that it continues to be practiced in many countries and states should, for those women who are already in such union, ensure the protection of their economic rights.<sup>122</sup>

At this point it should be mentioned that from an economical point of view, polygamous union offers an economic base for women as a monogamous marriage does. However, it is also shown that in many polygamous marriages women's access to financial resources is limited, not only during the marriage, but also upon divorce or death of the husband.<sup>123</sup>

### **3.4 The Strongholds of Polygamy: Religious Freedom, Cultural Relativism, and Sexual Autonomy**

Where polygamy is admonished on the basis of human rights, it should be noted that pro polygamy arguments come embellished in the language of human rights too. This is not to devalue the notions they invoke but rather to emphasize on the need to pay attention to such claims.

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<sup>117</sup> UN Human Rights Committee(HRC), *CPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10, para 25

<sup>118</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994, para 14

<sup>119</sup> UN Committee on the Elimination of Discrimination Against Women(CEDAW) *General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)* 30 October 2013, CEDAW/C/GC/29, para 28

<sup>120</sup> *Ibid*, para 27

<sup>121</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994 para

<sup>122</sup> UN Committee on the Elimination of Discrimination Against Women(CEDAW) *General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)* 30 October 2013, CEDAW/C/GC/29, para 28

<sup>123</sup> Mubangizi, John C. "An African Perspective on Some Gender-Related Cultural Practices That Violate Human Rights and Perpetuate Women's Poverty." *Journal of Social Sciences* 47, no. 1 (April 2016): 68–78. P. 73

### 3.4.1 Religious Freedom

#### Sharia -The Norm

Religious norms sanctioning polygamy are not limited to Islam but the Sharia is the one religious norm relevant in the context of this thesis.

Sharia is the term for Islamic law emanating from the religion that governs different aspects of life. As opposed to the assumption that it is one logical unified whole, it is a vast body of jurisprudence (which is not a formally enacted legal code) with varying views of the meaning of the Quran (the religion's holy scripture) and the Sunna (the deeds of the religion's prophet, Mohammad) both across and within different schools of thoughts having different legal implications.<sup>124</sup> Diversity of opinion among the jurists evidences no person, group or state can claim a unified monolithic, divine Islamic law over which they have ownership and this diversity of opinions can be used to determine how to best serve demands of justice, equality, human dignity and love which Islam mandates.<sup>125</sup> Sharia governed different spheres of life but since mid-19<sup>th</sup> century its scope of application has diminished only to inheritance and family law both as result of internal and external factors.<sup>126</sup>

The legitimacy of polygamy under sharia is based on the Quranic verse noting "Hand over their property to the orphans and do not exchange the bad for the good, ... Should you apprehend that you will not be able to deal fairly with orphans, then marry of other women as may be agreeable to you, two or three, or four; but if you feel you will not deal justly between them, then marry only one . . . that is the best way for you to obviate injustice."<sup>127</sup> It is argued that while this legitimization of polygamy is condemned as insensitive towards women, when seen in light of the then Arabian custom which subordinated women, the Quran and Sunna were progressive.<sup>128</sup> It is also persuasive to say that, save for exceptional circumstances; the classical sources of the Sharia have forwarded monogamous relationship as an ideal form of association.<sup>129</sup>

The diversity in opinions of interpreting the religious books has also resulted in different approaches to regulating polygamy. Islamic states such as Morocco and Tunisia followed an interpretation that polygamy is prohibited.<sup>130</sup> The same approach adopted by Iraq was however faced with opposition which claimed prohibition was contrary to the Quran and thus resulted in the

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<sup>124</sup>Steiner, Henry J., Philip Aliston, and Ravan Goodman. *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS MORAL*. 3rd ed. Oxford University, 2007.p.533

<sup>125</sup> Zainah Anwar, *WANTED: Equality and Justice in the Muslim Family* (2009) p. 18

<sup>126</sup> Steiner. *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, Supra at note 123.p.532

<sup>127</sup>Rehman, J. "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq." *International Journal of Law, Policy and the Family* 21, no. 1 (March 6, 2007): 108–

27 Ibid, p. 114

<sup>128</sup> Ibid, p. 123

<sup>129</sup> Ibid

<sup>130</sup> Ibid, p. 110

repeal of the prohibition. Another stance is Syria's approach which subjects the right to polygamy to the approval of a family court.<sup>131</sup>

It is important to mention at this point that the factors contributing to the subordination of women vary from one culture to another and these factors are taken to be Islamic or compatible with Islam when they happen in a Muslim community.<sup>132</sup> This demands the isolation of the dictates of Islam regarding the status and rights of women. If religious polygamy is to be maintained, the dictates of the religion should therefore be identified so that the inequality aspects can be distilled and governed specifically. The diversity of schools of thoughts can also be channeled to promote a regulation that best serves the ideals of equality and dignity.

The other dominant religion supporting polygamy is the Mormon religion. Its followers in the US have challenged anti polygamy laws on the ground of religious freedom as the practice was mandated by religion.<sup>133</sup> However, the sect has also framed its argument in the secular ideas of freedom to form intimate sexual relationships/family and freedom from government imposed morality that are ultimately questions of sexual autonomy which have been invoked by LGBT and other sex rights advocates.<sup>134</sup> Religion as a fortress of polygamy invokes the internationally recognized freedom of religion and its manifestation. Additionally the debates in marriage reveal it is not all religious women's desire to exercise their agency in a similar fashion with anti-polygamy feminists' understanding of agency.<sup>135</sup> This strengthens the invocation of religion to justify the union.

Polygamist's invocation of such notions creates a dilemma while contemplating to uphold these freedoms in the face of apparent abuses and patriarchy reflected in such marital unions. But the decision ultimately rests in the stand one takes on whether polygamy is inherently harmful or not. Many feminists contend there is no conclusive evidence implying the inherence of polygamy's harm while acknowledging the harm of women and children in such unions.<sup>136</sup> In the face of the pragmatic solutions it offers and autonomous value system it provides, an automatic rejection of the union as inherently harmful should itself be rejected. However, further investigation is imperative to continue to evaluate the union both in light of its own strongholds and the principles of equality and dignity as the ultimate tests.

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<sup>131</sup> Ibid

<sup>132</sup> Steiner. *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, Supra at note 126..p532

<sup>133</sup> Richards, Jacob. "Autonomy, Imperfect Consent, and Polygamist Sex Rights Claims." *California Law Review* 99 no.197,(2010) p.199

<sup>134</sup> Ibid

<sup>135</sup> Bano, Samia. "In the Name of God? Religion and Feminist Legal Theory," *The Ashgate Research Companion to Feminist Legal Theory*, Routledge (2013)p. 168

<sup>136</sup> Baines, *Feminist Constitutionalism*. Supra at note 102, p. 464

## Dismantling the Religious Fortress in IHRL

Mormon polygamist claims have been suppressed in the US on legal reasoning that a professed doctrine of religious belief cannot be superior to federal law and that distinction must be drawn between religious beliefs and actions (government can enact laws that restrict actions).<sup>137</sup>

A similar ideal can be found in ICCPR under article 18 (3) where the right to manifest one's religion or belief may be subject to limitations as are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

Some also attack the religion fortress contending that there needs to be an examination of religion from an 'internal perspective'.<sup>138</sup> Accordingly, it is argued that the exclusion of women from positions of real power in most religious institutions which inhibits them to influence the content of the religion, is a violation of their right to equality and their right to religion since they are in effect deprived of their freedom of thought and conscience upon the requirement to accept creeds of the religious institution they join impacting not only their lives but also gender equality and the society as a whole.<sup>139</sup> This argument takes religion as non static<sup>140</sup> and appeals to the regulatory authority of states urging them to engage in changing religion towards gender equality through avenues within the religion and outside, through awareness raising, research and education and finally use laws( for example by retraction of religious exemptions to gender equality) to increase pressure when the other avenues have created a certain critical mass who recognize the need for and support gender equality within religion.<sup>141</sup> The argument further goes on to say the liberty that religious institutions enjoy relieves them of the obligation to provide equality and rather empower them with the right to exclude individuals from the association's meaning.<sup>142</sup> The aim of this argument is to influence the content of rights to be non-discriminatory and interpret the right to freedom of religion in light of non-distinction norm.<sup>143</sup>

While this argument correctly recognizes the effects of religious rule can be overarching and affect the society its ultimate strategy and goal is however not only ambitious but also audacious to the sanctity and complexity of religion blurring the line between secular thoughts and religious thought. Of course, what constitutes religion is another question that requires consensus. Freedom of religion

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<sup>137</sup> Richards, Jacob. "Autonomy, Imperfect Consent, and Polygamist Sex Rights Claims." *California Law Review* 19 no.197,(2010) p. 200

<sup>138</sup> See Alison Stuart, "Freedom of religion and Gender Equality: Inclusive or Exclusive?" *Human Rights Law Review* 10 , no. 3 (2010) p. 431: The claim made is that human rights research in the area of gender equality and religion has tended to concentrate on the treatment of women in religious state or under religious personal laws; and a woman's equal right and role within her religion, has not been addressed yet.

<sup>139</sup> Ibid

<sup>140</sup> Ibid, p.447

<sup>141</sup> Ibid, p.459

<sup>142</sup> Ibid

<sup>143</sup> Ibid p. 447

and thought also does not offer protection for the manifestation and where religious freedom is creating a dilemma with other notions, the principle of non-discrimination is what is used to resolve it as a matter of practice.

This has been reflected by CEDAW committee, but it only relates to customary law and there seems to be caution not to expressly mention religion. While the argument underscores the principle of non discrimination, it downplays the notion of religion and actually calls for the state to rewrite religion. The author of the argument based the analysis in the European Convention context and perhaps the success of the LGBTQ movement to set its foot in churches might have encouraged such ideas. The attempt in all the strategies called for (research, internal engagement, and external pressure) may result in shaking the foundation of gender inequality in religions. That remains to be seen in the future. However, I contend that the sanctity of religion seems to have been downplayed a lot. The strategy might succeed where religious groups are minorities and they can easily be pressured or stifled to conform with the 'rewriting agenda'. The target of the state should also be not the institution but the harms in it. Such a call is also difficult in the case of polygamy where the institution has a lot to offer to women adherent to it. Much that the human rights regime should do in my view is protecting those who enter such subjugating institutions of religions beyond an exit right. I argue that what religious institutions can offer as they exist in the least developed countries that treaty bodies identify as not discharging their convention obligations is the right to exit for those who see the religion to be discriminatory. Even exit right is very likely to be followed with ostracizing which might stifle dissent in the first place. What the state should do at least in the case of polygamy is thus not fight the religion or attempt to rewrite it, but check if its own legislative or administrative machineries are exacerbating harms to women. The non-discrimination project should be done there. The non-availability of remedy on account of 'right to exit' and the absolute relinquishment of everything to women's autonomy should be carefully seen because the starting point is patriarchy. An absolute relinquishment to traditions and religions is an endorsement of patriarchy. While the absolute ban is ousting individual autonomy, it should not be denied that these are male dominated institution. The complicating factor is the fact that practices they sanction (Particularly polygamy in this case) are not completely harmful. They offer a lot positive aspects and people have ownership and sentimental attachment to them that they want to abide by them. The state should thus strike a balance and offer protection. The acceptance of women as rational decision makers and enhancers of their choices in their decision to abide by culture and religion and the respect for privacy through liberal feminist perspective does not mean they do not need protection from the state which would normally be available to everyone else outside of such religious and cultural circles to put is roughly. Most significantly, the right to exit argument suggests that an individual woman at the risk from a harmful practice should be the one to abandon



her group membership, her family and community: an assertion which reduces the complex dilemma women face to staying or exiting and burdens them to resolve it on their own while reliving the state which has one way or the other relinquished the issue to tradition, culture and religion.<sup>144</sup>

### 3. 4.2 Cultural Relativism

Normative principles are based necessarily on specific cultural and philosophical assumptions<sup>145</sup> and cultural relativism questions the assumptions of international human rights norms. The main assertion of cultural relativism is that human rights are the reflections of the needs and wishes of the leading western countries in their own language.<sup>146</sup> It holds that one should not judge the customs, beliefs and values of one society in light of another society's understanding but instead examine it having regard to the functions of the values within the particular society.<sup>147</sup> As societies differ, there can be no universal value system that would be functional in all societies.<sup>148</sup> The cultural relativist theory is generally a rejection of cultural hegemony and particularly western hegemony and accuses feminist human rights advocates of imposing the standards of the west in the same way that the feminists reject the imposition of standards that are male oriented.<sup>149</sup> Cultural relativism is mainly and increasingly invoked to constrain the rights of women.<sup>150</sup>

Cultural relativism highlights the difficulty of establishing reasonable and general grounds for making moral judgments about the actions of others and the impact of power dynamics among people in setting their own moral standard as supreme to that of others.<sup>151</sup>

It is appealed that the west was able to impose its philosophy of human rights throughout the world since it had the upper hand at the UN from the beginning.<sup>152</sup>

Notable manifestations of this theory as a concrete reply in political arena whether they expressly refer to the theory or not are the Cairo declaration in human rights in Islam and Universal Islamic

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<sup>144</sup> Katherine O'Donovan and Alison Diduck, *Feminist perspectives on family law*, Routledge, Cavendish, 2006 216

<sup>145</sup> Mutua, Makau. *HUMAN RIGHTS STANDARDS : Hegemony, Law and Politics*. State University of New York Press, 2016. P. 18

<sup>146</sup> Eva Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse", *Human rights Quarterly* (1997), p. 142

<sup>147</sup> Lorraine Bowan "Polygamy and patriarchy : an intimate look at marriage in Ghana through a human rights lens" *Contemporary Journal of African Studies* 1, no. 2 (2013) 45-64 p.50

<sup>148</sup> *ibid*

<sup>149</sup> Steiner, Henry J., Philip Alston, and Ravan Goodman. *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS MORAL*. 3rd ed. Oxford University, 2007.p. 543

<sup>150</sup> UN Special Rapporteur on Violence Against Women (VAW), Report on 'Intersections between culture and violence against women', 17 January 2007, UN Doc. A/HRC/4/34, para. 68.

<sup>151</sup> Moeckli, Daniel, Sangeeta Shah, and David Harris. *INTERNATIONAL HUMAN RIGHTS LAW*. 2nd ed. Oxford University, 2014. P. 63

<sup>152</sup> Mutua, Makau. *HUMAN RIGHTS STANDARDS : Hegemony, Law and Politics*. State University of New York Press, 2016. p.17

Declaration on Human Right<sup>153</sup> and also the Maputo Protocol. So the question that follows is, upon whose idea is polygamy condemned by the international human rights system?

The cultural relativist stance also benefits from arguments that an essentialist claim that monogamy is a good form of marriage and polygamy is bad naturalizes the harmful attributes of monogamy.<sup>154</sup>

One should not also hide that monogamy has gone through different reforms to reach its current acceptable status.<sup>155</sup>

### 3.4.2.1 Legal Pluralism

Legal pluralism is one of the manifestations of cultural relativism as it basically allows for different legal orders to co-exist as recognition of diversity without a need for one normative order or moral value to trump another. Such a legal order can exist as a result of several factors in different settings.<sup>156</sup>

Plural legal orders are notable in the areas of personal and family laws which can lead one to argue that it is also a manifestation of the public\private divide where the state relinquishes its authority to regulate into the hands of society the most. Legal pluralism is mostly the reality of countries with federal state structure or multicultural society. It can also manifest as a minority rights issue in some structures.

The implication of this on the polygamy debate in light of international human rights law is double-sided. Since it is states and not autonomous units within states that have obligations under the human rights system, it pauses the question to what extent states should have a room for diversity and autonomy for distinct polities within them. The Beijing declaration and the Vienna declaration, which emerged from the 1995 world conference on women in Beijing, states that while ‘the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’<sup>157</sup> Where

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<sup>153</sup> See Olayemi, AbdulAzeez Maruf, and AbdulMajeed Hamzah. “Islamic Human Rights Law: A Critical Evaluation of UIDHR & CDHRI In Context Of UDHR,” *Journal of Islam, Law and Judiciary*1,no3 (2015) p. 29 (.... UDHR attempts to establish a universal document on Human Rights and liberty but due to its secular philosophy that culminates in the misrepresentation of the fundamental differences between the people of the world, especially, that of the Muslim world, it fails to achieve this objective.)

<sup>154</sup> Davis, "Regulating Polygamy", *Supra* at note 32, p. 2037

<sup>155</sup> *Ibid*

<sup>156</sup> *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, 2009. International Council on Human Rights Policy. Switzerland, p. 15.colonialism; the state's need for legitimacy; the weakness or irrelevance of the state legal order; conflict and post-conflict reconstruction resolution; respect for diversity, multiculturalism and identity politics; privatization or reduction of public expenditure in the justice sector; and, specific forms of intervention by donor and international development agencies.

<sup>157</sup> Buss, *International law*, *supra* at note 99, p. 63

the international arena is a platform for interaction of states, then the stand taken by the Beijing declaration is no surprise.

What legal pluralism does in the case of polygamy is, legalize it for those members of society who claim the practice to be their culture and/or religion. In practice, however, the constitutionalization of customary rights sometimes results conflict with the constitutional provisions of protecting women's rights and gender equality.<sup>158</sup>

CEDAW committee holds that the subjection of personal status laws to ethnic or religious communities within the state party through its constitutional and other legislative frameworks is discriminatory, in violation of article 2 in conjunction with articles 5, 15 and 16 of the Convention and regardless many state parties continue to maintain such legal orders.<sup>159</sup>

The committee also goes on to state that identity based personal status laws and customs perpetuate discrimination against women and that preservation of multiple legal systems is *in itself* discriminatory against women<sup>160</sup> (Emphasis added). I contend that labeling such pluralism as inherently harmful is illogical and contradictory to the autonomy of individuals<sup>161</sup> in a hegemonic way. Customary and religious laws should not always be taken in the negative and the dichotomy between state law and customary/religious law itself is also delusional at times as the state is comprised of the diverse population which is the adherent of various customary/religious norms of its own in certain cases. The imposition of a uniform law is an indirect call subjugation of certain groups. However, I agree with the subsequent note of the committee that lack of individual choice relating to the application or observance of particular laws and customs exacerbates this discrimination and that a system of personal status law should provide for choice of application of the customary/customary law *at any stage* of the family relationship (emphasis added). The manifestation of the public private divide in the form of legal pluralism should also not lead astray and result in the complete abandonment of the personal sphere to custom and region. States should

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<sup>158</sup> Williams, Susan H. *Constituting Equality: Gender Equality and Comparative Constitutional Law*. Cambridge University, 2009. p. 185

<sup>159</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 29: General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, 2013, CEDAW/C/GC/29, para 10

<sup>160</sup> Ibid, para. 14

<sup>161</sup> CEDAW is said to be very individual centred unlike other 'group oriented conventions but it chooses to depart from its advocacy for independence and individual choice when it comes to religion and custom. Liberalism is not the escape goat to continuation of subordination. The use of liberal political notion by liberal feminists has achieved in showing that women deserve to be treated equally with men. For at the time, women were deprived of their humanity, incapable of participating in public life, incapable of voting etc... it is argued liberalism has restored the humanity of women and liberal feminism is built on this. As much as it advocates for autonomy, it should by no means be construed to give a flawed concept of consent.

still be able to oversee and provide basic safeguards while still upholding choice. For many people, marriage is more important as a religious matter than a civil matter.<sup>162</sup>

Regardless of what state law says there will be groups who would want to abide by their religious laws and an idea of a uniform monopolistic law that governs a society is plainly obsolete.<sup>163</sup> The state will have an avenue to affect change and protect vulnerable parties only through recognizing and respecting alternate norms.<sup>164</sup>

Another stance of CEDAW on legal pluralism is that it calls for the pluralism to be formalized.<sup>165</sup> Such formalization can lock customs in strict legal and institutional structures and also subject them to change through judicial rulings which could be an advantage or disadvantage depending on the value the custom/religion promotes.<sup>166</sup> Static conceptualization of culture makes fruitful dialog about cultural change impossible and thereby benefits men through maintaining the status quo of the culture.<sup>167</sup> One also has to acknowledge that there are obvious contradictions in plural legal orders.

### **Dismantling the Cultural Relativism Fortress**

Feminists note that “to isolate the cultural component from the workings of patriarchy is akin to walking blindfolded along tightrope of cultural traditions.”<sup>168</sup> This claim holds true given the fact that cultural values in Africa are dictated by male elders.<sup>169</sup>

This being the general challenge towards culture as being patriarchal, one of the arguments against relativists is that recognizing that different societies hold different values need not be logically lead to the conclusion that all these different values and practices must be tolerated.<sup>170</sup> The observation that culture produce different moral norms does not say anything about the respective value of these norms. In this regard cultural relativism has been accused of indifference and even said to be a

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<sup>162</sup> Nichols, Joel A. “RELIGION, MARRIAGE, AND PLURALISM.” *EMORY INTERNATIONAL LAW REVIEW* 25 (n.d.): 19. P. 970

<sup>163</sup> Ibid, P. 984

<sup>164</sup> Ibid

<sup>165</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 29*: General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution), 2013, CEDAW/C/GC/29, para 15 calls for states to have written family laws and personal status laws

<sup>166</sup> Estin, Ann Laquer. “FAMILY LAW, PLURALISM, AND HUMAN RIGHTS.” *EMORY INTERNATIONAL LAW REVIEW* 25 (n.d.): 18.p. 826

<sup>167</sup> Holtmaat, Rikki, and Jonneke Naber. *WOMEN'S HUMAN RIGHTS AND CULTURE: from Deadlock to Dialogue*. Intersentia, 2011. P.165

<sup>168</sup> Cook, Rebecca J. *Human Rights of Women : National and International Perspectives*. University of Pennsylvania, 1994.107

<sup>169</sup> Ukhun, Chritopher E., and Nathaniel A. Inegbedion. "Cultural Authoritarianism, Women And Human Rights Issues Among The Esan People Of Nigeria." *African Human Rights Law Journal* 5 (2005). P. 132

<sup>170</sup> Moeckli, *INTERNATIONAL HUMAN RIGHTS LAW*, supra at note 153.p.63

disgrace for being tolerant of harmful practices.<sup>171</sup> It is even argued that a cultural relativist stance privileges the group over the individual and in terms of marriage; the group whose power, status and privilege are perpetuated through polygamy is men.<sup>172</sup> However, I would argue that this last critics as it sees polygamy to be inherently harmful<sup>173</sup> removes the benefit that women get through polygamy out of the equation and it also seems to ignore that individual women make rational decisions to engage in polygamy. In fact the theory has been elastically abused but one should not deny the theory's contribution in fighting hegemony.<sup>174</sup> Cultural relativist usually appeals to group values. The emphasis on group rights is sometimes done at the cost of the individual and a balance needs to be maintained.<sup>175</sup> While this being a weakness of cultural relativism, it still doesn't dismiss the idea of polygamy as a legal institution if it manages not to sacrifice the individual for the benefit of the society. There is no way that culture can be claimed to perpetuate inequality and undignified manner of a living style. But the attempt to dismantle the cultural relativist fortress is a futile effort unless one hastily labels polygamy as inherently harmful. This is not established yet and many feminists see no inherent harm in polygamy. The Maputo protocol's 'positive cultural connotation' also beacons a hope of a safe polygamous union. Since the institution has been out casted by the international regime, there has been no notable international effort and collaboration to infuse equality and dignity into the institution leaving it all to religions and cultures themselves that sanction it.

### 3.4.3 Sexual Autonomy

While polygamy is challenged on grounds of equality and dignity, an argument for the institution on the basis of sexual autonomy is a hot pursuit witnessing the success of the LGBTQ movement. Moreover, sexual autonomy is the most parallel notion to dignity and equality than freedom of religion or culture. It challenges an anti-polygamy stance with all religious and cultural cloaks that the human rights regime is suspicious of removed and dressed in the same language of the anti-polygamists. It is essentially a question of dignity and equality in the sexual sphere in comparison to other spheres: or an appeal to expression of sexual autonomy in a certain form than another. This argument seems cognizant of the reason to challenge the way to resist the deliberate politics of domination pursued under the banner of universal rights is not by trying to delineate an irreducible

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<sup>171</sup> Ibid

<sup>172</sup> Lorraine Bowan "Polygamy and patriarchy : an intimate look at marriage in Ghana through a human rights lens" *Contemporary Journal of African Studies* 1, no. 2 (2013) 45-64 p.50

<sup>173</sup> Ibid, See page 50, '... the final effect of relativists is to compromise the rights of individual women caught up in polygamy's *inherently* discriminatory web....' (emphasis added)

<sup>174</sup> Moeckli, *INTERNATIONAL HUMAN RIGHTS LAW*, supra at note 151, p.63

<sup>175</sup> Mutua, Makau. *HUMAN RIGHTS STANDARDS*, supra at note 152 P. 61

outside to this discourse, but by confronting from the inside this politics with its own proclaimed principles.<sup>176</sup>

Dismantling the sexual autonomy stronghold calls for a close examination of the very notions of equality and dignity which have been generally invoked in case of the first two strongholds. In denouncing polygamy, ICCPR appealed to dignity and equality. CEDAW also invokes equality and dignity and tops it with economical and emotional wellbeing of the women and their dependents.

### 3.5 Equality

The multitude of international human rights conventions and treaties that are enacted under the United Nations were response to the melancholy from the atrocities of the two world wars. The driving spirit of the UN system as set out in the preamble of the charter is reaffirming faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.

The UDHR also reiterates the same principles in many dimensions. The declaration is enacted in recognition that the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The UDHR has been a beacon and a standard from the start with an influence of great depth and width.<sup>177</sup>

Today the world celebrates the date of adoption of this declaration by the UN general assembly as the international human rights day. The Vienna declaration and programme of action also describes the principle of equality as a fundamental rule of international human rights law.<sup>178</sup> The concept of equality is found in all major human rights instruments and it is at times presented as the principle of non-discrimination.<sup>179</sup>

When thinking of equality, the first thought that comes to mind is Aristotelian idea of treating likes alike ... not treating unequal equally. The concept has evolved to include an element of de facto enjoyment of the same rights.

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<sup>176</sup> Cistelecan, Alexandru. "Which Critique of Human Rights? Evaluating the Post-Colonialist and the Post-Althusserian Alternatives," *International Journal of Zizek Studies* 5 no.1, p. 7

<sup>177</sup> The Universal Declaration of Human Rights in the 21<sup>st</sup> Century: A Living Document in a Changing world, A report by the Global Citizenship Commission, Gordon Brown (editor), NYU Global Institute for Advanced Study and Open Book Publishers (2016) p.13

<sup>178</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23,

<sup>179</sup> Article 1 (3) UN Charter, UDHR article 1, 2(1), 7, ICCPR Article 2 Article 3 Article 26. ICESCR Article 2(2) Article 3 ICERD CEDAW CRC Article 2 and article 28 CRPD ICRMW

The human rights set out in the UDHR are infused with the principles of equality and dignity. The most notable express references to the right to equality in the declaration are found under article 1, article 2 and article 3.

Article 1 provides that all human beings are born free and equal in dignity and rights[.... endowed with reason and conscience ....] It is a bedrock principle restraining and reminding states from considering rights as items at their mercy which they might give or hold, especially given the UN treaty system's reservation which could be abused by states. The reaffirmation of endowment with reason and conscience is a restoration of the essence of humanity which social structures of various forms have stripped off from different groups of the human race along history. This is particularly true since women have been constructed as irrational and emotional beings that needed to be kept under the guardianship of men. Oddly enough 70 years from its coming into existence, the pretexts for eroding this bedrock come in the name of human rights themselves. But this is not to mean rights do not come into conflict. It's rather to emphasize that the manner of resolution of any rights conflict should not in any way undermine the principle set out in this provision.

Another provision setting out the right to equality in the declaration is Article 7 '*... all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*'

Equality under this provision is presented with a clarifying concept of non-discrimination. A similar notion of equality is found under Article 2 which again emphasizes on ...non-discrimination as everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [.....]

Regardless of its status as soft law, the UDHR sets forth the core parameters that have been used by other conventions/covenants that are enjoy a better status of enforcement as a result of their form. The declaration is in fact an implicit expression of the interconnections, overlaps, and mutual reinforcement between rights.<sup>180</sup>

This subsection will discuss the various formulations of equality in the human rights regime and the contributions and challenges of each formulation.

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<sup>180</sup> The Universal Declaration of Human Rights in the 21<sup>st</sup> Century: A Living Document in a Changing world, A report by the Global Citizenship Commission , Gordon Brown( editor), NYU Global Institute for Advanced Study and Open Book Publishers (2016) p. p.38

### 3.5.1 Formal Equality

The notion of formal equality has its root in liberal goals of state neutrality and promotion of autonomy.<sup>181</sup> Formal equality is expressed in terms of neutrality, consistent treatment drawn from the Aristotelian thinking of treating likes alike and respect for autonomy of people to freely choose a way of life which they perceive as good.<sup>182</sup> The realization of this equality in terms of neutrality hinges on the absence of state preference over any particular group or conception of life and respect for the individual regardless of group membership.<sup>183</sup> While such type of equality is essential to resolve apparent problems of discrimination, it is criticized on the account that its notion of neutrality is in effect nothing but the dominant culture in disguise and such bias towards a certain social group provides the possibility to perpetuate inequality that are deeply entrenched.<sup>184</sup> Formal equality also suffers from the limitation that the model of treating like person alike wouldn't work where the people involved are not seen as similar.<sup>185</sup> Its insistence on consistency is also criticized for offering the possibility to take away the advantage that one possesses so as to attain the consistency with the disadvantaged party (the leveling down of benefits).<sup>186</sup>

#### ICCPR: Formal Equality – Equal Protection Under the Law – Prohibition of Discrimination

The right to equality under ICCPR is framed both in terms of equality and prohibition of discrimination as in the UDHR. The covenant sets forth equality under article 3, article 4, article 23, article 24, and article 25. ICCPR addresses gender equality with a specific provision devoted to the topic (article 3). The provision has been during its drafting stage considered as redundant to non-discrimination which has already been incorporated in the covenant.<sup>187</sup> This is in fact indicative of how the two ideals of equality and non-discrimination appear as two sides of the same coin. However, ICCPR's gender equality is incorporated as a provision imposing positive obligation on states.<sup>188</sup> It is different from equality in the UDHR in that it aims at explicitly recognizing the equality between a man and a woman. The article initially envisioned ensuring equality between the sexes in relation to the civil and political rights it provided. However, the human rights committee's interpretation of the provision extends it to regulate matters even outside the rights set forth in the

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<sup>181</sup> Fredman, Sandra. "Equality: A New Generation?" *Industrial Law Journal* 30, no. 2 (June 1, 2001): 145–68. P. 154

<sup>182</sup> Ibid

<sup>183</sup> Ibid

<sup>184</sup> Ibid

<sup>185</sup> Williams, Susan H. *Constituting Equality: Gender Equality and Comparative Constitutional Law*. Cambridge University, 2009. p. 56

<sup>186</sup> Fredman, Sandra. "Equality: A New Generation?", supra at note 183, P 155

<sup>187</sup> Manfred, Nowak. *U.N Covenant on Civil and Political Rights*. supra at note 109.p. 77

<sup>188</sup> Ibid The prohibition of gender specific discrimination is strengthened by the requirement that the equal right of men and women also be realized in practice and states are required to take specific measures to ensure action beyond enacting laws.



covenant.<sup>189</sup> The committee's generous application of this right beyond the confines of the covenant rights seems to be grounded in the ideal of interconnectedness of rights. It particularly points out that state parties measures and legislations that are in place to govern affairs not covered by the covenant have the potential to negatively affect the covenant rights.<sup>190</sup> This elasticity of the scope of application to a wide array of issues is an added value to the entire human rights system to narrow gaps of in other instruments.

Formal equality is also expressed under article 26 as the right to equality before the law which is exclusively at the enforcement of a right.<sup>191</sup> Prohibition of discrimination under article 26 is the negative framing of the right to equal protection of the law. It is a prohibition of discrimination in statutes or practices in any area that public authorities regulate and protect.

### **ICESCR : Formal Equality**

Equality under ICESCR embodied under article 2 as prohibition discrimination. and article 3 with specific reference to gender equality. Regardless of the overlap, it was found necessary during the drafting process to reaffirm and constantly emphasize the fundamental principle of equality rights between men and women.<sup>192</sup> However gender equality under article 3 of the ICESCR can be invoked only in relation to the convention rights. However, it is of paramount importance in understanding how gender equality can be put in to use to analyse polygamous marriage especially in relation to the substantive rights provided under the convention. The committee in its elaboration of state obligation under this provision cum. 10 goes to the extent of framing discrimination which inhibits the enjoyment of the convention rights on equal basis as a 'gender based violence'.<sup>193</sup> The provision is used to denounce discriminations in the strongest terms regardless of its status as convention specific safeguard.

In emphasizing equality, the ICESCR committee puts the notion as encompassing two interconnected ideals of formal equality (de jure) and substantive equality (de facto). It interprets direct discrimination beyond the comparator framework where an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground. So

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<sup>189</sup> See General Comment 4/13 of ICCPR para 3

<sup>190</sup> See General Comment 4/13 of ICCPR para 3

<sup>191</sup> Manfred, Nowak. *U.N Covenant on Civil and Political Rights*. supra at note 109.p.606

<sup>192</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para25

<sup>193</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, PARA 27

even where there is no similar comparable situation, a detrimental act or omission on the basis of a prohibited ground can amount to discrimination.<sup>194</sup>

### **CEDAW : Direct Discrimination: De jure Equality: Formal Equality**

The CEDAW is a self-explanatory convention the purpose and object of which is the promotion of this fundamental principles of equality and dignity with special emphasis on eliminating discriminations against women in all forms. . The convention also puts equality at the centre of the growth and prosperity of society.

The appeal to equality in the preamble of the convention is expressed with terms of formal equality with the repeated use of the phrases ‘... on equal terms with men...’ ‘..Promotion of equality between men and women...’ These connotations are extension of the liberal conception of autonomy and freedom of individuals and described by the CEDAW committee as underscoring the concept that all human beings regardless of sex are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.<sup>195</sup> Interestingly, the preamble also coins the term ‘full equality between men and women’.

CEDAW under article 2 sets forth the equal rights of women under the law which is formal equality. Formal equality under the convention can be achieved by adopting gender-neutral laws and policies, which on their face treat women and men equally.<sup>196</sup>

Formal equality under the convention is also provided as prohibition of discrimination under article 1. The preamble of CEDAW provides that discrimination violates the principles of equality of rights and respect for human dignity. The principle of non-discrimination is therefore principles of equality and dignity.

Article 1 of the convention defines discrimination as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field Discrimination against women is defined as a form of discrimination that seriously inhibits women’s ability to enjoy and exercise their human rights and fundamental

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<sup>194</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para 10

<sup>195</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para 22

<sup>196</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW) *General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)* 30 October 2013, CEDAW/C/GC/29, para 8

freedoms on the basis of equality with men.<sup>197</sup> The absence of de jure equality and prevention from equal access to resources and enjoyment of equal status in the family and society violets the principles of justice and equality contained in particular in article 16 and also in articles 2, 5 and 24 of the Convention are being violated.<sup>198</sup> The Prohibition of discrimination in this aspect is a prohibition of discriminatory treatment or direct discrimination. Direct discrimination requires a comparison between the treatment received by the complaint and that which was or would have been received by an actual or hypothetical comparator of a different sex, race etc... when making a comparison between the complainant and another, the relevant circumstances' must be the same or not materially different.<sup>199</sup> So here, where women in the religion cannot marry several men, then there is a direct discrimination by the religion. For the state to recognize this fosters direct discrimination. However, the call is not for the religion to accommodate polyandry. The formulation reveals that the act is in fact discriminatory and needs special attention.

Similar ideals of equality are promoted under several provisions of the convention. For example, article 3 frames equality of women in the exercise and enjoyment of human rights of women in reference to men. In this regard, equality is somehow subjective as it is measured in reference to men. A similar phrasing of equality is found under article 15 which provides '*States Parties shall accord to women equality with men before the law.*' This suffers from the feminist critique that the gender neutral law is the male standard and the 'add and stir' critique that the specific circumstances of women should be taken in to account.

This takes us to the second type of equality, substantive equality.

### 3.5.2 Substantive Equality

The notion of substantive equality was developed as a response to the shortcomings of formal equality<sup>200</sup> and is recognized by different instruments as follows.

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<sup>197</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para 19

<sup>198</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994

<sup>199</sup> Palmer, Camilla, Barbara Cohen, Tess Gill, Karon Monaghan, Gay Moon, and Mary Stacey. *Discrimination Law Handbook*. 2nd ed. Legal Action Group, 2007. p. 112

<sup>200</sup> Williams, Susan H. *Constituting Equality: Gender Equality and Comparative Constitutional Law*. Cambridge University, 2009. p. 58 see also CEDAW General Recommendation No. para 9 where the CEDAW committee acknowledges that the identical treatment of men and women is not sufficient and biological as well as socially and culturally constructed differences between women and men must be taken into account to ensure equality (de facto) and the convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results.

## ICCPR: Substantive Equality

ICCPR promotes substantive equality and the human rights committee notes that the prohibition of discrimination under article 26 does not make all differential treatment discriminatory. A differentiation that is based on a reasonable and objective criteria does not amount to the violation of the equal protection of the law.<sup>201</sup> Positive actions of discrimination are actually necessary (affirmative when certain groups of persons traditionally have been seriously discriminated against in the practice of state parties or when they have been subjected to specific discrimination in the private sphere.<sup>202</sup>

## ICESCR: De facto Equality

Elaborating the notion of non-discrimination, indirect discrimination is related to a disproportionate impact of a seemingly neutral law, policy or practice on the exercise of covenant rights as distinguished by prohibited grounds of discrimination.<sup>203</sup> Ensuring equality is also about.<sup>204</sup> Ensuring that inherent disadvantage of particular groups are alleviated and not perpetuated however, the application of the principle of equality will sometimes require that States parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination.<sup>205</sup> As long as these measures are necessary to redress de facto discrimination and are terminated when de facto equality is achieved, such differentiation is legitimate.<sup>206</sup> The covenant also calls for adoption of temporary special measures to accelerate women's equal enjoyment of their rights, gender audits, and gender-specific allocation of resources<sup>207</sup> CEDAWS affirmative action is similar to the concept of equality under ICESCR in this regard.

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<sup>201</sup> Manfred, Nowak. *U.N Covenant on Civil and Political Rights*.supra at note 109, P. 609 The case of Broeks and Zwaan –De Vries case

<sup>202</sup> Ibid, p.631

<sup>203</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para 10

<sup>204</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para 7

<sup>205</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para 15

<sup>206</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para 15

<sup>207</sup> ICESCR E/C.12/2005/4

## **CEDAW: Substantive: De Facto: Indirect Discrimination**

Convention focuses on discrimination against women, emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women.<sup>208</sup> In this regard it identifies the case of indirect discrimination emanating from practices/ laws/ rules/that are seemingly neutral but produce disproportionate effect on certain groups. Indirect discrimination against women is provided by the CEDAW committee as occurring when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women.<sup>209</sup> It should be seen that polygamy is not gender neutral and no matter how it comes disguised as a religious type of marriage, it is always a relation of a man who can marry many wives and not the vice versa.

It does not reject the importance of formal equality and pursues it but it further looks at the effect or outcome of the law in promoting equality rather than the face value neutrality of laws.<sup>210</sup> It is even summoned that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face.<sup>211</sup> For the case at hand, it simply rejects polyandry first.

Its focus is in generating equal outcomes and eradicating structurally inferior position of oppressed groups in society by examining if the law is attenuating or exacerbating inequality in practical terms.<sup>212</sup> CEDAW also calls states to ensure that any laws, policies or actions that have the effect or result of generating discrimination are abolished.<sup>213</sup> Each State party must be able to justify the appropriateness of the particular means it has chosen and to demonstrate whether it will achieve the intended effect and result.<sup>214</sup> Substantive equality under CEDAW requires redistribution of

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<sup>208</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, para 5

<sup>209</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, para 19

<sup>210</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, para 8

<sup>211</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, Para 5

<sup>212</sup> Williams, Susan H. *Constituting Equality: Gender Equality and Comparative Constitutional Law*. Cambridge University, 2009. p. 158

<sup>213</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para 35

<sup>214</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para 23

resources and power between men and women.<sup>215</sup> It's with in such paradigm of outcomes that affirmative actions can be justified as non-discrimination. Notwithstanding criticism from some scholars that *CEDAW* treats women as a homogeneous group, a number of *CEDAW* provisions acknowledge women's different experiences of discrimination.<sup>216</sup> Moreover, the Committee has begun to elucidate the content and meaning of states parties' obligations concerning intersectional discrimination against women, stipulating, for instance, that states parties should legally prohibit intersectional discrimination and adopt and pursue policies and programmes to eliminate the same.<sup>217</sup>

Polygamy is a power relation. The man decides to marry as many women as he likes but the woman essentially does not get to have a say because, the idea of consent in a marriage is actually between the intending spouses and there is no spousal relation between sister wives. The power imbalance is revealed in this very structure.

Discrimination can occur through the failure of States to take necessary legislative measures to ensure the full realization of women's rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws.<sup>218</sup> Indirect discrimination is a discriminatory outcome.<sup>219</sup> *CEDAW* provides for a de facto equality under article 3, 4 and 24 with the ideal of a temporary special measure for realization of rights. It is important to note that Non- discrimination under *CEDAW* is not limited to sex based discrimination but also gender based as the cumulative reading of the various provisions such as article 1 articles 2 (f) and 5 (a) indicate.<sup>220</sup> The shortcomings of formal equality are actually linked to overlooking gender and emphasizing on sex.

Advocates of substantive equality still have not been able to settle on whether polygamy should be accommodated or not.<sup>221</sup>

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<sup>215</sup> UN Committee on the Elimination of Discrimination Against Women (*CEDAW*), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, para 9 and para 8

<sup>216</sup> Cusack, Simone, and Lisa Pusey. "CEDAW AND THE RIGHTS TO NON- DISCRIMINATION AND EQUALITY." *Melbourne Journal of International Law* 14 (2013).p. 6

<sup>217</sup> Ibid

<sup>218</sup> UN Committee on the Elimination of Discrimination Against Women (*CEDAW*), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28,para 10

<sup>219</sup> Moeckli, Daniel, Sangeeta Shah, and David Harris. *INTERNATIONAL HUMAN RIGHTS LAW*. 2nd ed. Oxford University, 2014.p p. 322

<sup>220</sup> See also UN Committee on the Elimination of Discrimination Against Women (*CEDAW*), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28para 5

<sup>221</sup> Fredman, Sandra. "Substantive Equality Revisited." *International Journal of Constitutional Law* 14, no. 3 (July 2016): 712–38.p. 736

### 3.5.3 Transformative Equality

How CEDAW frames equality is essentially the same as the other predecessor conventions and covenants but as a convention devoted to promoting the equality with special emphasis on women it offers room for introducing new approaches to ensuring equality where the formal equality approaches is criticised for falling short. It particularly calls transformative equality under article 5 which will be discussed below. Transformative equality is based on the idea true equality comes in to existence only when the social structures of superiority and subordination on the basis of sex and gender are.<sup>222</sup> It is important to mention at this point that CEDAW warns against the replacement of equality by any other alternative notion such as equity or fairness.<sup>223</sup> This is very important for tackling discriminations and indifferences to subjugations facilitated by state sympathy for religious and cultural values or economic constraints. It once again establishes the supremacy of the notion of equality

Article 5 calls for the transformation of customary (*and all other emphasis added*) practices that are based on the stereotyped roles of men and women. The provision addresses the abolition of all forms of direct, indirect or structural discrimination that exist as a consequence of gender serotype.<sup>224</sup> Article 5 does not specifically address religion but it is possible to cover it under ‘other practices’. This provision is said to be requiring states to transform trends of discrimination to equality. It is perhaps the most suited formulation of equality and state obligation to analyse polygamy as it is a deeply entrenched practice and if it is to be changed, it is through a process. State obligation under the provision is firstly the transformation of institutions, systems and structures that cause or perpetuate discrimination and inequality and secondly, modification or transformation of harmful norms.<sup>225</sup> The realization of such transformation not only serves in ensuring equality but also full autonomy of all.<sup>226</sup> A similar underpinning is found under the ICESCR committee. The committee provides gender based assumptions and expectations erode equality by precluding division of responsibility between men and women and subjugating women and placing them at disadvantage in regard to substantive realization of their rights and their

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<sup>222</sup> Freeman, Marsha A., Christine Chinkin, and Beate Rudolf. *The UN Convention On The Elimination of All Forms of Discrimination Against Women: A Commentary*. Oxford University, 2012.p. 55

<sup>223</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, 28 para 22: the use of gender equity and fair treatment are rejected as being less liberating to women when it comes to discharging the treaty obligation and the exclusive use of the term gender equality and equality of women and men is used.

<sup>224</sup> Freeman, Marsha A., Christine Chinkin, and Beate Rudolf. *The UN Convention On The Elimination of All Forms of Discrimination Against Women: A Commentary*. Oxford University, 2012.p. 163

<sup>225</sup> Cusack, Simone, and Lisa Pusey. "CEDAW AND THE RIGHTS TO NON- DISCRIMINATION AND EQUALITY." *Melbourne Journal of International Law* 14 (2013). p. 11

<sup>226</sup> Holtmaat, Rikki. *The CEDAW A Holistic Approach*. In A. Hellum & H. Aasen (Eds.), *Women's Human Rights: CEDAW in International, Regional and National Law* Cambridge: Cambridge University Press. 2013 P. 112

freedom to act fully and autonomously.<sup>227</sup> In the quest for transformation under this provision, it should be noted that individuals have different ideas of what they wish to do with their lives and attention must be paid to the impetus of individual autonomy in implementing obligation under article 5 of CEDAW.<sup>228</sup>

It is thus the major type of equality that can move beyond the sameness approach and reify CEDAW's vision of 'equality in full terms see preamble'. It should also be noted that transformation requires dismantling of the public private divide (I would emphasize not to the extent of eradication) and a reconstruction of the public world as inequality within the private sphere of the family undermines women's access to and enjoyment of rights in the public sphere of the workplace and politics.<sup>229</sup> Transformative equality thus requires not only the removal of barriers but also taking positive measures. On the basis of an analysis of the Committee's General Recommendations and Concluding Observations on Article 5, the Commission held that besides addressing individual beliefs and conduct of men and women, this provision calls for eradicating gender differences that have become an intrinsic part of a society's social and legal structures and systems.<sup>230</sup>

This can be related to the respect for autonomy but also ensuring the capabilities of individuals is enhanced.<sup>231</sup>

### 3.5.4 Equality in Family Life

Article 23(4) of ICCPR which ensures equality of rights and responsibilities of spouses in marriages has similarity with article 17 of UDHR that protects interference with private and family life. But it is different in that it is also an institutional guarantee that carries within its positive obligation of the state. This particularly involves the obligation to ensure the right not only in state citizen relationship but also private relationships.<sup>232</sup> The obligation is coined in terms of 'taking appropriate steps' which means it is an obligation of the sort that states have to progressively realize. Equality of the sexes in the law of marriage and the family was so disputed that the draft in the HR comm. expressly exempted this from the direct applicability of the covenant, in contrast to the situation under the social covenant.<sup>233</sup>

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<sup>227</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, 16

<sup>228</sup> Freeman, Marsha A., Christine Chinkin, and Beate Rudolf. *The UN Convention On The Elimination of All Forms of Discrimination Against Women: A Commentary*. Oxford University, 2012. p. 145

<sup>229</sup> Ibid, p.8

<sup>230</sup> Ibid

<sup>231</sup> Ibid . p. 55

<sup>232</sup> Manfred, Nowak. *U.N Covenant on Civil and Political Rights*. Supra at note 109.p.514

<sup>233</sup> Ibid, p. 515



Although autonomy and freedom are most often interpreted in an individualistic way, it must be remembered that human rights protection also includes the protection of family life and national and cultural rights.<sup>234</sup> The individual, in other words, can only become a human person within the context of family, culture and nation.<sup>235</sup> Equality is defined above all by the recognition of the call of the 'other', the call for us to remember those aspects of human life that are marginalized by dominant legal conceptions.<sup>236</sup>

Non-discrimination in relation family rights under CEDAW is framed in terms of 'sameness'. Article 16 of the convention equates equality with the endowment of the same right to women and men provides for a list of rights that should be ensured in same manner. Where the sameness in relation to many of the rights is capable of promoting equality where men possess a privileged status, the significance in relation to polygamy however is questionable. Where polygamy is framed from a rights perspective as the right to marry and the right to religion, Article 16 (1) (a)'s the same right to enter into marriage would call for the right of women to practice polyandry. But however, this is not in the spirit of the equality that CEDAW envisions. It is also absurd to establish a culture that doesn't exist and where it rarely exists is still discriminatory to women. The other possible option is the levelling down approach of taking away the privilege that men possess in entering into multiple marriages. This gets into conflict with the notion of dignity as autonomy and freedom to choose one's way of life as set out in the foregoing subsection and also freedom of religion that serves as the basis for the differential treatment. Regardless of both theoretical and practical challenges, the sameness requirement in family rights under CEDAW bring to spotlight that inequality exists in polygamous unions by the mere fact that women do not have the same right to enter into multiple marriages under the cultures and religions.

### **3.6 Dignity :What It Is And What It Entails For Equality**

The International Human rights law regime does not provide for a definition of dignity or what it comprises of in a direct manner. However, the principle of dignity is integrally associated with human rights.<sup>237</sup> This is clearly evidenced in how international human rights instruments provide that the inherent dignity of the human person is the source of the rights they spell out.<sup>238</sup> Where

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<sup>234</sup> Potential added value of the CEDAW. In A. Hellum & H. Aasen (Eds.), *Women's Human Rights: CEDAW in International, Regional and National Law* (Studies on Human Rights Conventions, pp. 25-214). Cambridge: Cambridge University Press. (2013). P. 98

<sup>235</sup> Ibid

<sup>236</sup> Mullally, Siobhan. *Gender Culture and Human Rights, Reclaiming Universalism*. Hart, 2006.p. 24

<sup>237</sup> The universal Declaration of Human Rights in the 21<sup>st</sup> Century: A Living Document in a Changing world, A report by the Global Citizenship Commission , Gordon Brown( editor), NYU Global Institute for Advanced Study and Open Book Publishers (2016) p. 36

<sup>238</sup> See ICCPR paragraph 2 '...recognizing that these rights derive from the inherent dignity of the human person...' The UN Charter also provides the dignity of the human family as the foundation of freedom, justice and peace in the world.

nations acting in the international arena take different stands on various human rights notions, human dignity is the one fundamental ideal that enjoys a truly universal status and consensus.<sup>239</sup> The pre-eminence of individual dignity and worth as an underpinning for equality is not an ideal that is established by inference from how international conventions provide for rights but it is also expressed in various constitutions.<sup>240</sup>

Dignity as a status inheres in people by the mere fact of their humanity regardless of other accounts and it serves as the foundation from which they can demand respect from fellow human beings.<sup>241</sup> Since it inheres in humanity, it follows that dignity is an equal status, a status that everyone possess equally. This inherence and universality of dignity anchors equality. It particularly helps in dismissing arguments that claims of equality regarding entitlements to certain benefits can be satisfied by taking away the benefits which the disfavoured person is claiming to have been denied while other fellow humans are enjoying since the dignity, worth and autonomy of humans cannot be satisfied by such levelling down (snatching) approach.<sup>242</sup> But achieving equality through leveling down still appears to be appealing cogent to some. It was in April this year the International Association of Athletics Federations, (IAAF) claimed that a study it commissioned shows naturally hyper-androgenic athletes have advantage over the others and they could be banned from taking part in competition for female athletes or undergo a treatment for reduction of their hormone levels.<sup>243</sup> One of such athletes was also required to take testosterone suppressing medicine by the IAAF in order to compete.<sup>244</sup> The argument is a fair female competition needs to be protected and defended<sup>245</sup>. The claim is basically that of leveling down the advantage that one has so that others who do not possess the advantage can be at equal terms with him/her.

It's only when the claim is processed in terms of human dignity, respect for the naturally existing self that such interpretation of equality can be shown to be demeaning.

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<sup>239</sup> The Cairo Declaration adopted by nations that held a "culturalist and religious relativist view" different from the international order accepts equality in dignity but refrains from expressing equality in rights. '*All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations.*' See Article 1(a) Organization of the Islamic Conference (OIC), Cairo Declaration on Human Rights in Islam (1990)

<sup>240</sup> Fredman, Sandra. "Equality: A New Generation?" *Industrial Law Journal* 30, no. 2 (June 1, 2001): 145–68. P.155

<sup>241</sup> The universal Declaration of Human Rights in the 21<sup>st</sup> Century: A Living Document in a Changing world, A report by the Global Citizenship Commission, Gordon Brown (editor), NYU Global Institute for Advanced Study and Open Book Publishers (2016) p. 36

<sup>242</sup> Fredman, Sandra. "Equality: A New Generation?" *Industrial Law Journal* 30, no. 2 (June 1, 2001): 145–68. P.155

<sup>243</sup> <https://www.theguardian.com/sport/2017/jul/03/caster-semenya-could-be-forced-to-undertake-hormone-therapy-for-future-olympics>

<sup>244</sup> <https://www.theguardian.com/sport/2018/apr/25/iaaf-testosterone-rules-caster-semenya>

<sup>245</sup> <https://www.theguardian.com/sport/2017/jul/03/caster-semenya-could-be-forced-to-undertake-hormone-therapy-for-future-olympics>

In utilizing dignity to evaluate discrimination, it should be noted that indignity is not necessary to establish discrimination.<sup>246</sup> Therefore, careful examination of discrimination should be made even where there appears to be no indignity.

An evaluation in light of dignity thus reveals absurdities in measures that otherwise seem to promote equality at face value.

Dignity as a counterpart to the notions of rationality, autonomy, and freedom to choose as per one's perception of a good life also promotes equality in the aspect of equal freedom from state interference.<sup>247</sup>

## **Dismantling the Sexual Autonomy Fortress**

### **Imperfect consent: Patriarchy's Deep Entrenchment**

One of the challenges that a pro polygamy argument grounded in sexual autonomy faces is the notion of 'imperfect consent' which is a case where a person's ability to consent is doubtful because the act is arguably harmful or because social or cultural pressures potentially compromise the person's autonomy.<sup>248</sup> Given the patriarchy's persistence throughout history, such a suspicion is appropriate but how it should be taken forward requires caution. The deployment of imperfect consent to prohibit polygamy can be matched with an equally cogent argument of the victimization theory that human rights must take care not to crippling the women it aims to protect. And it's not in all circumstances that consent is 'vitiating' and women make conscious decisions knowing the potential harms and advantage and calculating the leverage. The obligation of states in case of doubt of consent is not to put a blanket ban on the autonomy but identify the situations that are inhibiting the women's full exercise of their consent, their economic and cultural-religious ideological subordination and focus on empowering them. The enhancement of capabilities and respect for one's perception of a good way of life should not be abandoned.

There are feminists who argue that a woman who claims to have made an autonomous and free choice about polygamous marriage has no sense of the truth as she has been controlled and brainwashed by her environment.<sup>249</sup> But it should be noted that if false consciousness exists, then all women are subject to overriding patriarchal influences that prevent any of us from knowing or seeing 'the truth.'<sup>250</sup>

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<sup>246</sup> MacKinnon, Catharine A. "Substantive Equality Revisited: A Reply to Sandra Fredman." *International Journal of Constitutional Law* 14, no. 3 (July 2016): 739–46. P.742

<sup>247</sup> Fredman, Sandra. "Equality: A New Generation?" *Industrial Law Journal* 30, no. 2 (June 1, 2001): 145–68. P.155

<sup>248</sup> Jacob Richards, 'Autonomy, Imperfect Consent, and Polygamist Sex Rights Claims', 2010 California Law Review p. 200

<sup>249</sup> Baines, Feminist Constitutionalism. Supra at note 101, p.469

<sup>250</sup> Ibid

## **Polygamy's reality: Complicated Effects Equality and Dignity – The Expressions of Autonomy**

Another line of argument can also be drawn which may not necessarily reject polygamy as an idea but denounces it on the basis of how it in reality exists. A religious or cultural polygamy does not offer room for consent of the woman. This is different from the case of an imperfect consent argument where the women are consenting but it's doubtful if it is a genuinely free consent. The harsh reality is that the consent is not a legal requirement. In fact Consent under domestic legal framework that permits polygamy on cultural and religious ground applies only to the man and each woman separately and there is no martial union between the co wives. As the international regime is also limited to marriage in the neutral monogamous form, the requirement of consent is provided as consent of the 'two spouses'.<sup>251</sup>

Where the consent of an existing wife is not a legal requirement and the man retains the sole authority to bring in the second, the third or the fourth wife and be able to retain sexual relation with all of them, the implication on the women is severe.

One of the implications is on the health of the woman. ICESCR under article xxx provides that every human being is entitled to the enjoyment of the highest attainable standard of health. This right is dependent on the realization of other rights contained in the international bill of rights including the right to [... *Human dignity, non-discrimination, equality, Privacy...*].<sup>252</sup> Maintaining legally sanctioned multiple sexual relations where each woman has no say and control over subjects women to Sexually transmitted Diseases (STD) Attention should be paid to this as the polygamy is practiced in undeveloped countries with high risk of exposure to STDs and HIV. Subjection to such risks with no say over the man's choice of partners is not only a violation of the right to health but also a huge blow to the dignity of women.

If dignity is a universal idea and it demands that individuals exercise their will freely, how polygamy is regulated is a blow to dignity. On the one hand it is recognized as a form of family but disregards the autonomy of the women. It is also a subjugation of the substantive right to health of women and violates a state's international obligation to respect, protect and fulfil the right of women.

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<sup>251</sup> See Article 1 of the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law. (Emphasis added).

<sup>252</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para 3

### 3.7 Final Remarks on the IHRL Stance

The only way forward is revolutionizing autonomy and gearing state obligation towards a meaningful respect, protection and fulfillment of women's rights in these regard. As has been shown above, the sexual autonomy fortress as supported by liberal feminisms quest for autonomy, respect for privacy, respect for women as free agents and contemporary theories warning against victimization is almost impossible to dismantle. An absolute rejection of polygamy is not ideal under these frameworks.

Where monogamy has exhibited countless vices and subordinated women, legal reform was the measure taken, not its abolishment and the effect of legal reforms in the area of martial law in revolutionizing gender roles should not be undermined.<sup>253</sup>

At this point I want to draw attention to CEDAW's approach to abolish polygamy through non-discrimination should begin from acknowledging polygamy. In the case of *Muñoz-Vargas y Sainz de Vicuña v Spain* the applicant claimed a male primacy in the order of succession to nobility titles was discriminatory.<sup>254</sup> However, the committee took a stand that the claim was incompatible with CEDAW.<sup>255</sup> The concurring members took the view that the rights to non-discrimination and equality in CEDAW apply only in relation to 'human rights and fundamental freedoms' and as there is no human right to succeed to a title of nobility and the concurring members viewed the title in question to be 'of a purely symbolic and honorific nature, devoid of any legal or material effect', they concluded that the applicant's claim was not compatible with CEDAW.<sup>256</sup> If this line of argument is to be accepted then it follows that where IHRL is confined to monogamy and doesn't acknowledge multiple marriage as a right then it might be implausible to argue that polygamy violates the non-discrimination principle under CEDAW on account of formal equality (because the right doesn't exist in the first place- as IHRL rejects it initially).<sup>257</sup>

So if CEDAW is to address inequality in polygamy, it should start from acknowledging polygamy as a right. It is only after such acknowledgement that the deconstruction of the institution on principle of non-discrimination can be cogent. CEDAW and ICCPR committee rightly identify the inequality and dignity issues in polygamy as practiced in different countries. However, the call for abolishment serves no one other than the patriarchists who 'imperialize' CEDAW and subordinate women in the name of cultural relativism. The pragmatic solutions the institution offers cannot also

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<sup>253</sup> Davis, *Regulating Polygamy: Intimacy, Default Rules, And Bargaining For Equality*, P. 2037

<sup>254</sup> Cusack, Simone, and Lisa Pusey. "CEDAW AND THE RIGHTS TO NON- DISCRIMINATION AND EQUALITY." *Melbourne Journal of International Law* 14 (2013).p. 27

<sup>255</sup> Ibid

<sup>256</sup> Ibid

<sup>257</sup> Ibid

be simply ignored. Patriarchy cannot or should not automatically lead to the call for abolishing polygamy as various institutions suffer from it but are approached differently. The Maputo protocol's obligation of 'discouraging' seems strategic in this sense and offers a better opportunity to do away the injustice in polygamy. IHRL has shown significant dedication to homosexual unions and it might as well take a pause on the repugnance and antipathy and consider a way of revolutionizing it. On a social level, women's experience of plural marriages may be similar to those in monogamous marriages and furthermore, although research indicates that women in polygamous marriages often face sexual, physical, and emotional abuse at the hands of their husbands, such abuse similarly occurs within monogamous heterosexual and LGBTQ, married and unmarried relationships.<sup>258</sup>

Polygamy can also pass the formal equality test as it appears neutral on the face of it and it is formulated as a recognition of religious or cultural right. In reality, it's mostly the right of a man to marry multiple women. But there are also cases where a woman is married to several men no matter how rare. Therefore, formal equality on top of its own limitation cannot capture the polygamy issue and may not as such take one all the way through in the quest for the equality and dignity of women. Liberal feminists appeal to autonomy is what can rescue the polygamous women.

A call for revolutionizing the regulation of polygamy is not an underestimation of its complexity. As it is a private institution, it initially poses all the difficulties of regulating private sphere. Then there is the difficulty of multiplicity and changing dynamics as spouses enter the marriage. The regulation and revolutionizing needs to be devised through feminists approach to gender and sex inequalities through the 'woman question', the 'man question' and the 'other question'.<sup>259</sup> A uniform solution on some common problems can be forwarded but again polygamy is practiced for different reason in different societies and an 'essentialized' solution to every polygamous union may not be offered.

The following chapter will draw attention to the particular circumstances of the Ethiopian case, its legal framework and highlight the issues involved in light of the arguments in the forgoing chapters.

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<sup>258</sup> Jaime M. Gher, "Polygamy and Same Sex Marriage- Allies or Adversaries Within the Same-Sex Marriage Movement", *William & Mary Journal of Women and the Law* 14, No 3(2008) p. 584

<sup>259</sup> Woman question asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? The Man question asks about the gender implications of a law, policy or practice for different groups of men and boys and explores how they accept privilege and patriarchal costs. See Nancy E Dowd, *The Man Question: Male Subordination and Privilege* (New York University Press, 2010) 1, 66–7. See also Nancy E Dowd, 'Asking the Man Question: Masculinities Analysis and Feminist Theory' (2010) 33 *Harvard Journal of Law & Gender* 415, 415 n 1. 837 as cited in Simone Cusack supra at note 255, p. 35. The Other question inquires and serves as countercheck to ensure that any gender analysis of individual communications takes note of intersectionality than essentialist understandings of sex/gende- see Simone Cusack, supra at note 255, p. 37

One way or the other, polygamy ensures self sufficiency as an economic base. There is no need to attack this base in the name of ‘self sufficiency’.

The UN strategy towards achieving gender equality has been based on leveraging, hoping for advancement in one area to promote independence in another.<sup>260</sup> A similar notion of leveraging should be tried in regulating polygamy. An emphasis on consent can have an empowerment effect.

### **3.8 Regional Human Rights System: The African Charter on Human and People’s Rights**

The African Charter on Human and People's Rights (ACHPR) is a comprehensive human rights instrument that has some innovative approaches to human rights, cognizant of the region’s multifaceted dynamics.

It particularly has the concept of people’s right and emphasizes the importance of the family as the basis of society. It places an obligation on states under article 18 to assist and protect the physical and moral health of the family which it describes as the custodian of morals and traditional values which are recognized in African communities.

It incorporates the principle of non-discrimination under article 2 and it actually refers back to the international regime as, under Article 18(3), states have the obligation to ensure the elimination of all discrimination against women and also ensure the protection of the rights of women and children as stipulated in international declarations and conventions. The foregoing notions of equality, therefore, apply to state parties of the charter in the same manner.

Its optional protocol on the rights of Women is a response to CEDAW’s shortcomings in addressing the situation in the continent.<sup>261</sup> Its coverage is similar to that of the CEDAW, but there are distinct ways in which it frames rights within an understanding of the specific socio-cultural context of Africa.<sup>262</sup> It expressly addressed various issues such as violence against women (CEDAW has made up for this by way of two general recommendations on violence)<sup>263</sup>, abortion, exploitation, and abuse in pornography and advertisement which are not explicitly dealt with in other international instruments. However, when it comes to polygamy, it takes a stand that is in stark contrast with the international regime.

Article 6(c) of the Maputo protocol provides that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital

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<sup>260</sup> United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) Strategic Plan 2018-2021, UNW/2017/6/Rev.1 Para 35

<sup>261</sup> Ukhun, Christopher E., and Nathaniel A. Inegbedion. "Cultural Authoritarianism, Women And Human Rights Issues Among The Esan People Of Nigeria." *African Human Rights Law Journal* 5 (2005). P.147

<sup>262</sup> Musembi, Celestine Nyamu. "Pulling Apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol." In *Women's Human Rights*, edited by Anne Hellum and Henriette Sinding Aasen, 183–214. Cambridge: Cambridge University Press, 2013. P. 195

<sup>263</sup> Fareda Banda, and Catharine A. MacKinnon. "SEX, GENDER, AND INTERNATIONAL LAW," Proceedings of the Annual Meeting (American Society of International Law), Vol.100 (MARCH 29-APRIL 1, 2006), pp. 243-248n.d.

relationships are promoted and protected. The draft protocol initially incorporated a provision prohibiting polygamy.<sup>264</sup> It may be the case that it was found to be unrealistic given the circumstances of the society in terms of cultural outlook, belief or economic status of women. At the 1964 United Nations Seminar on Family Law in Togo, many participants agreed on the detriment of polygamy on women's dignity but opined it was unavoidable given the poverty and it can only be changed at more advanced stages of development where women achieve economic independence.<sup>265</sup> But more importantly, the departure from CEDAW lies in the fact that the charter and the protocol view culture with a positive connotation, unlike the CEDAW which refers to it in the negative as an obstacle to equality of women.<sup>266</sup>

And it should also be noted that the protocol does not endorse culture as it is. It makes clear from its preamble that cultural norms are to be put through the filter of democracy, equality, and general human rights norms. It also calls upon states to undertake peace education and social communication aimed at eradicating 'elements in traditional and cultural beliefs, practices, and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women.

The stance of the African human rights system towards polygamy is clearly not that of abolishment as the phrasing of Monogamy as an encouraged form of marriage can not obligate states to outlaw polygamy. An encouragement of monogamy could mean to obligate states to keep the permission in a limited scope of application for polygamy but definitely not its abolishment. One of such instances, as resorted to by the country under study, is the permission of polygamy in cases of culture or religion. The Maputo protocol obviously sees problems in polygamy as it calls for its discouragement, but also sees the reason to maintain it. Its connotation of culture in the positive indicates the stance is taken on the basis of several of the strongholds of polygamy discussed earlier.

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<sup>264</sup> Civil and Political Rights, Including the Question of Religious Intolerance: Study on Freedom of Religion Or Belief And The Status of Women In The Light of Religion And Traditions, UN Special Rapporteur, Economic and Social Council E/CN.4/2002/73/ (24 April 2009) para 84 and 85

<sup>265</sup> Russo, Giusi. "Contested Practices, Human Rights, and Colonial Bodies in Pain: The UN's Gender Politics in Africa, 1940s-1960s: The UN's Gender Politics in Africa, 1940s-1960s." *Gender & History* 30, no. 1 (March 2018): 196– 213. p. 211

<sup>266</sup> See Musembi, Celestine Nyamu. "Pulling Apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol." In *Women's Human Rights*, edited by Anne Hellum and Henriette Sinding Aasen, 183–214. Cambridge: Cambridge University Press, 2013. p. 186



## Chapter 4: The Ethiopian Legal Framework Regulating Polygamy

### 4.1 The Reality on the Ground

Before proceeding with the legal frameworks and the analysis thereof in light of IHRL, it is important to first have a brief overview of what the reality of polygamy is in Ethiopia. The latest Demographic and Health Survey (DHS) (2016) reveals that 11 % of currently married women aged 15-49 reported they have co wives. While the DHS conducted in 2011 revealed the same percentage there however is seen to exist a slight decline (14% in 2000) and (12% in 2005). The survey also revealed that the likelihood of being in a polygamous union varied based on factors such as age, education level and urbanization. Older women, women who live in rural areas and women with no education are more likely to have co-wives. Previous studies have shown infertility, sickness of first wife<sup>267</sup> and male out migration<sup>268</sup> as contributing factors to polygamy in Ethiopia.

In some polygamous societies the first wives may obtain seniority within the household and where they have borne the first main child, they gain greater respect from their husbands and wider community although this may not follow with preferential treatment economically or sexually.<sup>269</sup> The prevalence of polygamy also varies across the different regional state.<sup>270</sup>

### 4.2 The Sources of Law on Polygamy

The regulation of polygamy in Ethiopia essentially falls under two bodies of laws; family law and constitutional law which as the supreme law of the land provides for fundamental rights and general principles of laws. Criminal law is the other major source of law that regulates the matter. The constitution under article 34 (5) also lays the foundation for recognition of religious and customary laws in the areas of personal and family laws. While locating the material source of law can be easily done as the constitution, family codes and criminal codes, the interplay between these laws and more specific laws that emanate (or purportedly) from the constitution's general principles present complexity that need much emphasis.

The constitution under article 50 established a federal state structure with a federal government and 9 states each with legislative, executive and judicial authority within their respective jurisdictions. The division of power under the constitution is based on an arrangement where the federal government has an exhaustive list of powers entrusted to it while the states have jurisdiction over all

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<sup>267</sup> Jetu, "Bigamous Marriage and the Division of Common Property under the Ethiopian Law", Supra at note 16, p. 88

<sup>268</sup> Gibson, "Polygyny, Reproductive Success", Supra at note 49, p. 297

<sup>269</sup> Ibid

<sup>270</sup> DHS 2016 Somali (29%) , benishangul Gumuz (21%), Gambela (21%), Afar(19%), SNNPR (16%), Oromia(14%), DireDawa(6%) ,Harari (5%), Tigray(3%), Addis Ababa(2%), Amhara(1%) *RegionPercentage of currently married women age 15-49 in a polygynous union*

powers that are not expressly given to the federal government.<sup>271</sup> According to such allocation of power, the states have, except for the Somali regional state and the Afar regional state enacted their own family codes applicable within their own jurisdictions. The federal government also has its own family law.

### **4.3 Equality and Dignity: As the Ultimate Caveats**

As discussed in the previous chapters, the issue polygamy raises revolve around the right to find a family, the right to manifest religion and culture and the right to equality and dignity and of course the various substantive rights of individuals enshrined in the constitution and different conventions can also be raised.

#### **The FDRE Constitution**

The FDRE constitution provides for the right to equality as an independent right under article 25 which reads as

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.”

The wordings of this article are very similar to the right provided under article 26 of ICCPR. A difference exists in that the constitution only provides that the law shall guarantee to all equal and effective protection while the ICCPR adds the law shall prohibit any discrimination in addition to guaranteeing equal and effective protection.

On a comparative basis in this regard, the absence of a constitutional obligation to prohibit any discrimination can complicate a case of non discrimination to be made. A prohibition of discrimination as a negative formulation can tackle issues on discrimination easily. However guaranteeing equal and effective protection is not any less protective as it imposes a positive obligation of state to ensure equality.

Equality in relation to family are provided under article 34 and 35 of the constitution which contain formulations of formal equality, substantive equality and transformative equality as well.

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<sup>271</sup> See article 52 of the FDRE constitution cum. 51 and 55

### **4.3.1 Formal Equality in the Constitution**

A neutral formulation of the right to equality as equality between men and men is provided under article 35 (1) which provides that Women shall; in the enjoyment of rights and protections provided for by this Constitution, have equal right with men. Sub article 2 of the same provision provides women have equal rights with men in marriage as prescribed by this Constitution.

Equality as the same entitlement of constitutional rights is also provided under article 7 that ensures the constitution's provisions apply to the male and female gender. This is in fact having regard to confusions resulting from the usage of the male gender as a neutral noun as a matter of linguistics (or as matter of patriarchy?). The expressions of the constitution in the masculine gender thus apply to feminine gender. It is however interesting that the vice versa is not provided for. While this may not be of practical importance it speaks a lot to the feminist arguments that neutrality is the male standard.

### **4.3.2 Substantive Equality- Affirmative Action**

The constitution's guarantee to equality also includes substantive equality. Past discriminations and inequalities of women are expressly acknowledged and a constitutional entitlement to affirmative measures is provided under article 35(3). The aim of such measures as per the provision is enabling women to compete and participate in social, economical and political spheres and public and private institutions on equal basis with men. This is recognition of the shortcomings of formal equality in ensuring the rights of women on the ground.

### **4.3.3 Transformative Equality**

Article 35 (4) of constitution provides an interesting equivalent of what has been interpreted as transformative equality under CEDAW. It stipulates "The state shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited."

The provision is crafted in terms of harm to women including both physical and psychological. Although this might appear to be narrow in scope it is broad in the sense that it targets not just the custom but the influence as well. For example where FGM is the harmful custom, one of its influences is denying the woman a control over her sexuality. The wordings of the provision can therefore be used in the direction of transformative equality.

#### 4.4 Equality in Family Laws

Marriage is a constitutionally recognized institution and article 34(3) provides the family is natural and fundamental unit of society that is entitled to protection by the society and the state. The equal rights of men and women while entering in to marriage, during marriage and at the time of divorce are constitutionally guaranteed rights under article 34(1). The crafting of these provisions is similar to ICCPR's article 23.

The constitution however further provides that legislations recognizing marriage concluded under systems of religious or customary law may be enacted.

Both the federal and state family laws also provide for equality in marriage. They also recognize the conclusion of marriage in accordance with custom or the religion of the spouses. However, this recognition as found under all the family laws is basically recognition of custom or religion in the celebration or conclusion of marriage. The recognitions are all found under the provisions governing the 'forms of marriage' and therefore a legal recognition of marriages that are formed outside of the formal state machinery (municipalities or other equivalent government offices entrusted with the power to pronounce marriage). Religion and custom are not recognized to dictate the substance of the marriage apart from the celebratory aspect except in the case of the Harari family Code which will be discussed below.

#### 4.5 The Case of Polygamy under the Family Laws

The RFC under article 11 provides 'A person shall not conclude marriage as long as he is bound by bonds of a preceding marriage'. A similar stance is taken by the others except one, The Harari Regional state Family Code.

The Harari Family Code under article 11 provides for similar prohibition but adds a sub article providing prohibition does not apply to the conclusion of marriage as permitted by religion. The role of religious law in this regard is thus clearly beyond regulation of forms as in the case of the other family laws.

When the RFC was enacted, there has been a debate on whether bigamy should be recognized or not since the followers of Islam and some customs practiced polygamy.<sup>272</sup> The competing claims of the debate were equality of spouses during marriage and ensuring the safety and interest of children and the family as a unit itself but the deliberation was settled with a decision to uphold the prohibition under the former family law (the civil code of 1960) on account of the 'lex specialis'

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<sup>272</sup> Explanatory notes of the RFC: Article 11- [www.abbyssinialaw.com/codes-commentaries-and-explanatory-notes?limitstart=0](http://www.abbyssinialaw.com/codes-commentaries-and-explanatory-notes?limitstart=0) የተሻሻለው የቤተሰብ ህግ ሀተታ ዘምከንያት ማብራሪያ

principle that polygamy will be governed by specific laws regulating religion and custom which as a special law will prevail over the general laws. But there is no special law enacted to govern the matter as of now.

The Harari family code on the other hand has taken a clear stand in favour of recognition in cases of religion and chosen to settle the dilemma the drafters of the RFC had concerning the practice of polygamy by some Muslims through this recognition within its jurisdictional limits. But apart from granting recognition to polygamous marriages on account of religion, the code does not provide for any specific rules to govern such marriages. Polygamy as and the permitted polygamy is thus a case of one man marrying several women.

The contested claims of polygamy as violation of the right to equality are therefore not accepted by lawmakers. Apart from the recognition of such polygamous union as permitted by religion, the code does not provide for any exceptional provisions regulating such marriages. It is not indicated whether specific rules on the regulation of such marriages are left for future enactment and it seems the legislature assumed the rules monogamous marriages are adequate to govern polygamous unions. While the recognition of polygamy by the family code upholds religious freedom and autonomy at face value, further examination of its implications and the interplay with constitutional rights, the criminal law and ultimate caveats of equality and dignity is necessary.

#### **4.6 The Strongholds of Polygamy under Ethiopian laws: Legal Pluralism, Religion/Culture and the Public Private Divide**

Religious freedom and cultural relativism identified as the strongholds of polygamy in the preceding chapter all find their basis from the legal pluralism under the FDRE constitution.

Legal transplantation that took place in the country during the mid 1990's attempted to displace customary laws.<sup>273</sup> The FDRE constitution enacted afterwards in 1995 however has a positive connotation of custom and religion and chooses to provide an enabling environment for custom and religion to dictate the lives of citizens under preconditions that the religious laws and customary laws are given recognition by the state through a law and individuals concerned have consented to be governed by them. However, the possibility for recognition of religious and customary laws is limited to personal and family laws as provided under article 34 and 78 of the FDRE constitution.

Article 34

“(4) In accordance with provisions to be specified by law, a law giving recognition to *marriage* concluded under systems of religious or customary laws may be enacted.

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<sup>273</sup> See Article 3347 of the Ethiopian Civil code

(5) This Constitution shall not preclude the adjudication of disputes relating to *personal and family laws* in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.” (Emphasis added)

In addition to the recognition of religious and customary laws, the constitution also envisions the establishment and/or recognition of religious and customary courts.<sup>274</sup> Accordingly the constitution has paved the way for the formalization of the Sharia courts which have been adjudicating disputes for over a century before the coming into force of the constitution.<sup>275</sup>

The recognition of religion and custom under article 34 of the constitution can be seen as protection of religious and cultural freedom. Moreover, the demarcation of the public sphere and the private sphere is clearly evident in the constitution’s choice of recognizing religious and customary laws for the regulation of personal and family matters. The issues that fall under personal and family matters are not defined but marriage definitely falls under this category as the constitution itself specifically mentions religious and customary laws on marriage as one potential ‘non state’ laws that can be recognized under the law. Some of the matters that fall under the personal and family law category can also be inferred from the jurisdiction given to the Sharia courts that are established to adjudicate cases as per religious (Islamic law).<sup>276</sup> These courts have jurisdiction over any question concerning gift ( donation) , succession, marriage, divorce, maintenance, guardianship of minors and family relationships; provided that the marriage to which the question relates was concluded, or the parties have consented to be adjudicated in accordance with Islamic law.<sup>277</sup> The requirement of consent to have one’s case entertained by these courts needs to be given expressly in a form that is attached along with the summons. But the failure to appear before the court and confirm either consent or objection once summons have been duly served is taken to be acceptance of the jurisdiction as per article 5(2) of the sharia courts proclamation.

Marriage which the constitution expressly provides could be relinquished to religious and customary laws and the areas over which the sharia courts exercise jurisdiction are rightly what feminists have challenged as being of great significance to women (their respect for dignity, equality and economic empowerment) but labeled as private and lacking adequate state protection resulting in the subordination of women.

From both a liberal feminist legal perspective and the right to manifest religion and culture, the provision of a choice oriented resort to religious /customary laws by individuals is not something to

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<sup>274</sup> See article Article 78(5) of FDRE constitution “Pursuant to sub-Article 5 of Article 34 the House of Peoples’ Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.”

<sup>275</sup> See the preamble of the Federal Courts of Sharia Consolidation Proclamation No. 188/1999

<sup>276</sup> Ibid , Article 6

<sup>277</sup> Federal Courts of Sharia Consolidation Proclamation No. 188/1999, Article 4

be condemned but applauded as a respect for individual autonomy which women have for long been denied and still continue to be denied in some cases. However, it should be asked whether the autonomy granted is adequate enough or is a real autonomy for women particularly.

The first problem lies in the fact that the content of these religious and customary laws is uncertain. The sharia courts will apply Islamic law but there is no consensus on the substance of Islamic law since different schools of thoughts forward different ideas. The question is not about letting the individuals who appear before the court know the content of the religious law they are submitting to but it is rather about what the state is endorsing and legalizing. It is also important to ask the ultimate standard under which these religious and customary laws that are recognized would operate. There is no question that the constitution is the supreme law and according to its supremacy clause under article 9 (1) “Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.” However, the parallel recognition of cultural and religious laws by the constitution appears to pursue a cultural relativist stand and thereby make an exception to upholding the constitutionally guaranteed human rights where individuals have opted to resort to such ‘non state laws’.<sup>278</sup>

The exemption from abiding by constitutional guarantees of equality and resort to a religious interpretation of the notions in scenarios of adjudication can be avoided by individuals by simply objecting to have their cases settled before the religious courts. The extent to which individuals could be selective in the matters over which they would accept the jurisdiction of the religious courts has been debatable until a Federal supreme court cassation judgement set a precedent by adjudicating the case of Keriyat Yahya V. Jihad Oumer<sup>279</sup> that was initially instituted at the sharia court of the Oromia regional state. In this case a pronouncement of divorce between the two parties to the dispute was given by the regional Sharia court to which the applicant (the wife Keriyat) consented. However, she did not want the religious courts to decide on the division of property following the pronouncement of divorce. This can be taken as an indicator that adherents of a religion do not necessarily accept every aspect of the religious authorities and consent should be considered from different perspectives at different stages. While the Sharia court accepted her objection and closed the case, the regular state courts to which she resorted however presented varying stances. The lowest state court rejected her application based on reasoning that the case should be settled by the religious court that pronounced the judgment of divorce. Forced by this

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<sup>278</sup> Mohammed Abdo, “Legal Pluralism, Sharia Courts, And Constitutional Issues In Ethiopia”, *Mizane LawReview*5 No.1 (2011) p.104

<sup>279</sup> See Federal supreme Court of Ethiopia Cassation Decision file no. 72450 (የሰ/መ/ቁ. 72420 ሚያዝያ 22 ቀን 2004 ዓ.ም. አመልካች:- ወ/ሮ ከረያት ያህያ ተጠሪዎች:- ሐጂ ጅሀድ አመር )

decision to have her case settled by the same religious court that pronounced the divorce, the applicant again reinstituted her case before the religious courts but interestingly, the Sharia court refused to entertain the case mentioning the applicant had initially chosen to resort to the state courts which is indicative of the fact that she does not consent to the jurisdiction of the religious court. The Federal Supreme court seized the matter as the applicant complained she has been unable to have the division of property settlement as she wished under the regular courts and her resort to the Sharia courts has also been rejected in effect denying her of any judicial remedy. The Federal Cassation bench settled the case giving an interpretation that even if it is assumed that the court which pronounced divorce would also decide on the division of property following the divorce, consent of the individual to have the division of property aspect by the religious courts is mandatory and the regular state courts are therefore obliged to seize jurisdiction where individuals do not wish to submit to that of the religious courts.

But the impact of the recognition of ‘non state law’ to regulate the non adjudicatory aspect of personal and family matters is not at all close to being simply avoided through consent. If parallel recognition of religious laws means an opt out option for individuals from the constitutional guarantees on the basis of their recognized religious and customary laws , then the regulation of non adjudicatory aspects of such matters and particularly polygamy by religious laws is very problematic.

The problems and the issues of such religious autonomy will be discussed now in relation to the family codes and the criminal code.

#### **4.7 Polygamy in the Criminal Code**

The regulation of polygamy as a crime is similar to the rule and exception formulation in the Harari family law.

The relevant criminal code provision provides as follows:

##### ***Article 650- Bigamy.***

*(1) “Whoever, being tied by the bond of a valid marriage, intentionally contracts another marriage before the first union has been dissolved or annulled, is punishable with simple imprisonment, or, in grave cases, and especially where the criminal has knowingly misled his partner in the second union as to his true state, with rigorous imprisonment not exceeding five years.”*

*(2) “Any unmarried person who marries another he knows to be tied by the bond of an existing marriage is punishable with simple imprisonment.”*



#### ***Article 651- Exception.***

*“The preceding Article shall not apply where bigamy is committed in conformity with religious or traditional practices recognized by law.”*

According to these provisions polygamy is a crime in principle while religious and customary polygamy is not. It is important to note that it's not all religious and customary practices of polygamy that can be invoked for exoneration from criminal liability but only those recognized by law. As of now, there is no recognized customary law and the Harari family code is the only law recognizing religious polygamy.

#### **4.8 Assessment of the Legal framework in Light of Liberal feminist legal theory**

##### **Upholding Religious Freedom And Autonomy: Whose Autonomy?**

The recognition of religious family law permitting polygamy can be seen as respect for the autonomy of the spouses. Seen in light of the victimization theory, the exceptional permission is a respect for the agency of women.

However, one needs to ask whether this respect for agency is adequate or even qualifies as a genuine respect on part of the state. It is also important to note at this point that women who find themselves in polygamous unions could be Muslims who genuinely accept polygamy with all its consequences, Muslims who don't accept polygamy or non Muslims married to Muslim men. Regardless, the state has the obligation protect everyone once it has decided to recognize the institution even though it can not dictate the religion's content. The recognition of the religion is an endorsement of the religious law as part of the state law making the state liable under its human rights obligations (the state would of course be still liable for failing to take action even where it has not given recognition to the religious or customary laws if they are violating the rights of individuals).

My analysis will not focus on the religious law but on how the family code and the criminal code are complicit in subordinating women.

The first attack the religious law would face from equality/ non discrimination perspective is that the right to marry several spouses is a right available to men and not women. However, the state law endorsing the permissive religion would pass the formal equality test at face value since it is only a mere recognition of religious laws without any express reference to the rights of men and women. However, religious polygamy (Islamic polygamy) permits only a man to marry several women and it may be argued that there is no neutrality in such cases. Regardless of the stance taken on whether the formal equality test is fulfilled or not, since the argument that the approach the Ethiopian constitution adopts is making an exception to constitutional guarantees of equality in cases of

religions and customs that are recognized by law and consented to by individuals is the accepted premises, what is left for the state is to ensure the consent of individuals is adequately considered in all areas where it has authorized such non state laws to operate.

### **Religious Laws Beyond Adjudication of Disputes**

As has been discussed above, an express consent of individuals is required to submit to the judicial authority of religious personal and family laws. Verifying consent can also be easily done. However where Islamic law is legalized to permit polygamous marriages it is not clear whether the consent of the already existing first wife is required. Islamic law generally requires a man to have sufficient finance to support all his wives before his decision to take a second, third or fourth wife but there are different schools of thoughts and no conclusive body of law dictating the substance of sharia on the consent of the first wife (or the rest) in this case.

The requirement of consent under the state law is formulated as ‘consent of the intending spouses’. This is impossible to be used to require the consent of the first wife when a polygamous union is about to be formed since there is no marital relationship between the co-wives.

This means, the conclusion of polygamous union legally rests upon the consent of the husband and the second wife as marriage needs to be concluded with the consent of the intending spouses.

So the conclusion of polygamous unions is the decision of the man basically and what the woman is left with is the agency to stay in the marriage or leave as per the existing consent requirement under the family laws.

One may ask, if there is no marital relation between the co wives, what is the need for consent of the first wife in the husband’s exercise of his religious freedom? The simple answer is that the constitutional based relinquishment of the state’s obligation to protect personal and family matters of individuals to religious and customary laws is initially made contingent on consent. The family as a unit and individuals independently are otherwise entitled to the protection of the state. The coming in of a second wife to a marital union has significant implications on the rights of the first wife which the man alone can not decide upon. The constitutional recognition of religious freedom on the basis of consent should not be construed as a right the man can exercise at the expense of the woman.

The problems of the right to exit as discussed in the previous chapter is that women are burdened with various societal pressures that makes the individual decision difficult for them. They may not exercise their right to consent even where it exists and choose to stay for economic or other social factors but the impact of feminist methodology of consciousness raising should not be underestimated. But more importantly, the absence of the requirement of consent by the law puts

them in a more subordinating place and in effect violates their right to equality and dignity as there is no room to hear their choice of way of life initially. The absence of the consent requirement also enables the man to be polygamous without the knowledge of the women who otherwise would have opted divorce. So it is impossible to label the law as recognition of religious freedom or autonomy from the woman's perspective. The Harai family law only recognizes the polygamy but fails to provide detailed rules to govern the peculiar complexities as per the constitutional caveat of consent. Clearly, consent of spouses under the 'regular' family law regime is insufficient to govern the complexities.

The call for consent is not simply for the reason of ensuring the constitutionality of 'polygamy enabling family laws'. The repercussions are significant beyond the constitutional consistency talk. It ultimately rests on dignity and the very existence of women, their right to life.

### **The Sum is Greater, but what About the Parts?**

Although not peculiar to polygamous unions, the inability to invoke rape within marriage also violates the rights of women in polygamous union with higher adversity. This can be related to the health rights of women and also respect for their dignity. A clear scenario of marital rape where the right to health is compromised is where a man can enter into a second marriage and still retains a 'right' to sexual intercourse with his first wife. The first wife can not protect herself from sexually transmitted diseases and she has no backing of the law behind her as the law's refusal to criminalize marital rape is in effect an entitlement to sex for the man. Monogamous women can not also invoke marital rape. The absence of a legal requirement of the woman's consent for a formation of a polygamous union is thus a double sided sword that not abstractly defeats her dignity but that could literally kill her as this could subject her to STDs including HIV infection. It is worth noting that women in polygamous unions suffer from more sexual violence. The 2016 DHS shows spousal violence (physical, sexual and emotional) is most prevalent in Oromia regional state (38%) and second highest in Harari state (37%) while it is the lowest in Somali (9%). While polygamy was at one point legal in Oromia, the Harai state still retains it. The Somali state while the 1<sup>st</sup> in prevalence of polygamy ranks the lowest in violence. This survey cannot lead to a conclusion that there is a correlation between legalization of polygamy and spousal violence as this needs a research of its own it is indicative that the risks of sexual violence women face is not hypothetical. It should also be noted that polygamy is one the factors that can increase the risk of HIV infection.<sup>280</sup>

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<sup>280</sup> See Ashley M. Fox, "Marital Concurrency and HIV Risk in 16 African Countries" *AIDS Behav.* (2014), p. 799 There are wide variability in the prevalence of different types of marital concurrency across different countries in sub-Saharan Africa, but a convergent association across countries that having additional partners in the context of marriage increases risk of HIV infection and living in a place where this behavior is more common further increases risk even for those

Although marital rape is not criminalized in all cases of marriage, the legislature ignores the impact on women and absence of even an interim form of protection in polygamous unions is deplorable as it is the law itself that is upholding the right of the man to be in polygamous union.

I want to draw attention to the following provision from the family code and try to juxtapose legal choices made at the cost of women.

*Article 16 of the RFC provides for a notion of period of widowhood which precludes a woman from remarrying unless 180 days have passed since the dissolution of her previous marriage. A woman is exempted from this rule if she gives birth to a child after the dissolution of her marriage, she is remarrying her former husband and if she medically proves not to be pregnant.* This provision of ‘period of widowhood’ is nothing but a limitation of the right to marry of the woman for the sake of avoiding confusions of paternity. It is a sex based limitation as it solely related to the biological factor that it’s women who conceive. A similar ‘widowhood period’ for men is not to be found in the law. This is by and large a protection for men which relieves them of the responsibility attached to paternity. It is bluntly a request that the woman shall prove that she is not burdening a man with another man’s child as she clearly not required to undergo such ‘widowhood period’ if she’s remarrying her ex husband.

But this makes one wonder, why aren’t women granted a period of time where they can lawfully refuse sex to their husband where he is charged of adultery or where he is contracting a second marriage and prove himself and in case of polygamy prove the newly brought co-wife to be healthy and free from STDS? This is not to say this is the way forward with martial rape but point out how the law chooses to adopt double standards and is oblivious to the subordination of women. The background document of the family code provide, although the provision *seems* to impose undue pressure on the woman, the provision is found necessary to ensure the rights of children to know their parents. While appeal to children’s rights, general public interest, difficulty of regulating private sphere etc... are more often invoked justifications for denying women their substantive rights and equality worldwide and not just in Ethiopia, the above provision shows how attention to the details of a law are missing (*or ignored?*) in the case of substantive equalities of women on matters affecting their very existence.

It should also be noted that dynamics of polygamous marriages may not necessarily involve women who are of similar religion permitting the man to marry more than one wife. Change in religion can also occur after a monogamous union has been concluded. The consent of the women married to such men should therefore be considered from this changing perspective as well.

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who are themselves monogamous. This study contributes to the empirical evidence base regarding the association between partnership structures and HIV transmission in sub-Saharan Africa. And the study included Ethiopia.

## **Equality and non Discrimination**

The right to equality and non-discrimination have been raised as the ultimate tests that the recognition of religious, cultural and sexual autonomy claims in justifying polygamy. While they can be successfully deployed to dismantle most of the claims, the choice of the individuals to relinquish their rights is what they could not dismantle with significant intensity to discredit the theories that support the respect for choice and autonomy (the victimization theory and liberal feminist legal perspectives). The theories are not rejections of equality and non discrimination but rather caution against the misuse of the ideals and backfiring on women's rights. As autonomy and choice to polygamous union finds its expression in religious freedom in the Ethiopian case the discussions of equality and non discrimination should be focused on how religious freedom is equally protected and respected.

While the constitution recognizes the rights of everyone to resort to religious and customary laws as to be determined by specific laws, these specific laws however are discriminatory by the very fact of their failure to regulate the details and empower only men as shown above. As neutral as the recognition appears to be, the impact is the denial of autonomy to women or the opportunity to appropriately use their autonomy to opt out or stay by calculating their leverages.

This is best explained by asking the 'woman', 'man' and 'other' questions that feminists insist should always be asked. While the recognition of religious laws can benefit all those who wish to be governed by it, the recognition of the substantive aspect as it exists now ( recognition only with no detailed rules to govern the matter) enhances the religious freedom of men but violates a meaningful exercise of religious freedom as envisioned by the constitution for women and it also paves the way for the violation of their right to health and ultimately their right to life. It is therefore discriminatory in result despite its neutral appearance.

Where women find polygamy as a better option, it is important that they have the backing of the law which recognizes their marriage and entitles them to the various rights within. But law should ensure their entry or decision to stay in such marriages is fully informed on equal footings with the decision of the man. The requirement is not simply for complying with the constitution's consent caveat but to actually enable them to make informed decision where they can and where they wish to leave but are for various reasons forced to 'choose' to stay, the very recognition of their consent is important in conscientious raising which is one of the feminist methodologies that has been fruitful over a period of time. Such conscientious raising in polygamy could take time to shape the equal decision making power of women but is definitely the way to go forward especially in the direction of transformative equality to shape the harms in polygamy or polygamy itself depending on the course of action over time leads to.

Talking in terms of dignity is crucial here to avoid any arguments that come forward as a substitute for the substantive rights violation. It is through the notion of dignity that the freedom of choice as envisioned by the constitution can be better ensured.

A comparison can be drawn between a woman married to a man who claims to be a follower of a religion that is recognized by law as sanctioning polygamy (note that the religious affiliation can be created after her marriage) and a woman married to a man no such affiliations. The later woman has a right to institute a criminal charge of bigamy and/or adultery as the case may be. The former woman has no such rights. Where the sanctity of the marriage that she chose and envisioned has changed by the sole decision of the man, her choice of a good way of life is being violated by her husband and the law's failure for her consent to be considered ( a consideration of consent does not mean her blessing is need but rather to be informed of the decision of the man as it affects her dignity, economic right and health right at least and decide if she wants to continue to stay in polygamous union or leave).

## 4.9 Conclusion

Polygamy has been a debated issue in the human rights field and feminist quest for gender equality and still continues to be debated given the its positive contribution to society in as much as if not more than its harms. Pro polygamy arguments have mostly followed the footsteps of the developments in the LGBT sex rights claims and appear to be somewhat successful in invoking autonomy in their private lives.

The absence of a conclusive evidence to label polygamy as inherently harmful and the existence of similar abuses and harms in monogamous marriages are raised to argue for the recognition and then reformation of polygamy than its abolishment. Where marriage in a monogamous form has for long has been a domain of subordination for women but successfully (not to a perfect level) been able to have been addressed by laws, it is submitted that similar efforts must be deployed in the polygamous form of marriage. This claim is further strengthened by religious and cultural elements of polygamy and the fact that it has for long coexisted if not preceded monogamy.

The claim for recognition of polygamy however should not underestimate the greater complexity of the issues of equality and non discrimination in such unions than in monogamous unions firstly as a result of plurality of spouses and the form takes as a man's right to marry several women.

Whether the recognition of polygamy finds its backing in the language of religious freedoms, cultural relativism or sexual autonomy, the crux of the matter is whether autonomy of all the concerned individuals is truly respected. While liberal feminist theory and the victimization theory promote the respect for the decision that women make and the recognition of their autonomy and rationality, the theories are not ignorant of the implication of 'respect' in the negative sense of state obligation and absolute relinquishment of the private sphere.

The private public divide ideology has influenced states to relinquish their regulatory authority resulting in the abuse and subjugation of women in marital unions and the family. The regulation of marriage and its subjection to religious and customary laws has also been said to be one of the reasons for the inequality that women face in family. This view has been opposed by different theories advocating for cultural relativism essentially. The international human rights regime, sees polygamous marriages as opposed to the notions of equality and dignity of women and calls for its abolishment. The regional human rights system however is relatively lenient and calls for state parties to encourage monogamy as a preferred form of marriage.

This thesis concludes that polygamy has both harms and benefits in it. Where the debate on the inherence of the harm is not settled and where culture and religion can be positively utilized, the call for its abolishment will easily be disregarded as much of the human rights regime is attacked as being hegemonic and western. As a deeply rooted practice with emotional, cultural and religious

ownership attached to it, the abolishment is further subjected to resistance. A call for abolishment can also be a denial of agency to women. It can also have a backfiring effect on women where the vast majority of women enter in to marriage for economic reasons. Neither the call for abolishment of polygamy nor the nominal recognition of a religious polygamous marriage serve the interest of women as under the current legal regime of Ethiopia. Recognition can enhance the autonomy of women to choose such way of life with in the ambits of religion and custom where the practice finds its roots but recognition alone it is not sufficient.

The complexities of such unions on the lives of women should be regulated with attention to the detail's impact on their lives. The focus of the law should not be protection of the family as a unit but also look at the women in family individually and grant them their substantive rights in every aspect. Where this is not done, the mere recognition as it is in Ethiopia is a shaky foundation that needs much work as it enables a 'legalized violation' of the dignity and worth of women. The bottom line of the Ethiopian legal regime is that there is no such right as forming polygamous union as the recognition for polygamy is only an extension of religious and cultural freedom. In this case, the general prohibitive stance taken is in line with the call by CEDAW and ICCPR committees for polygamy to be abolished.

The exceptional permissions of polygamy under religious and customary laws can lead to forum shopping and this can exacerbated if civic registrations of a person's status and the availability to interested parties is poor in the country.

Care must be taken in the proposal of abolishing/ criminalizing polygamy as the law should not end up in subordinating women in the attempt to liberate them by outlawing polygamy which many find useful for different economic and/or value related reasons. It's time to stop wandering between the thoughts of autonomy being needed, then questioning the autonomy/consent of women is not free. It's true that polygamy is problematic and one would keep juggling between these frameworks. However the hard reality of the existence of the institution should be followed by a regulation and the concerns of imperfect consent should be resolved not through a complete disregard of the consent of women as imperfect but rather by enhancing their capacity to make variety of choices. Otherwise one would go back to square one of the feminist struggle where one needs to prove women are actually capable of making rational decisions. Although it doesn't agree with keeping polygamy, the CEDAW Committee in its general comment 27 recognizes in many countries, the majority of older women live in rural areas where access to services is even more difficult due to their age and poverty levels and denial of their rights to water, food and housing is part of the everyday life of many poor, rural older women. So if the economic worse off situation of women is realized, if they choose to see themselves as better off married to a married man, then the



law should not cripple them especially where the practice as a backing of religion and custom. However, the law cannot also subject them to abuse in the name of recognition.

The African human rights system allows for the positive connotation of culture. However, upholding religion and culture by violating dignity and non discrimination/ equality of women should not be accepted. The Ethiopian laws need amendments in this regard. The applicability of religious and customary laws in the adjudication of dispute son family and personal matters is however in a better track than the substantive aspect. The resolution of disputes regarding property in polygamous unions are however, carefully handled in light with equality and the same should be done by the legislations in other aspects of the marriage.

It should be noted that while consent can be empowering and is definitely a precursor for recognition of the dignity of women, it is not sufficient to do away with discriminations in polygamy. It's been said that indignity is not a precondition for discrimination and much more needs to be done beyond ensuring dignity through consent to eliminate discrimination. State's relinquishment of its authority to regulate the private lives of individuals in to the hands of religious and customary laws is not a sufficient respect of the autonomy of individuals and needs to be backed by positive actions as forwarded by the theorists of the capabilities approach.

The thesis has shown that the bare requirement of consent for the application of religious laws under the constitution is not promoted in the specific legislations that follow from it; particularly in the applicability of the religious laws in the substantive aspect. The framework especially neglects the consent of women subjecting them to abuse. While the autonomy of the man to pursue a life of his choice as per his religion is protected by the state, the consequence of his choice on his wife is not considered. The law has initially chosen to respect and protect the family they have created as an institution entitled to its protection. But the authority to change the dynamics of this protected entity not only rests solely within the hands of the man but also the woman is not granted the legal safeguards to protect herself from the consequences or even appropriately and promptly opt out of his decision to change it. It is therefore impossible to say the consent based recognition of religion and customary laws is actually consent based for the woman in substantive application of such laws. The resort to dignity is important in this case. This is assuming that the woman who has been granted the consent option initially would act upon it on her own. But even in cases where the woman has no option other than consenting, the impact of the recognition right by itself should not be undermined.

#### 4.10 The Way Forward

*“Laws are only effective if enforced; enforcement is only possible with understanding and acceptance; and respect for the law is secured only when people believe in its necessity”.*

This quote speaks very much to the Ethiopian scenario where polygamy is principally criminalized but continues to be practiced even in areas where it is not permitted under the exceptions provided by law. Doing away with the downsides of polygamy through legislations thus initially requires the acceptance of the law by the people which requires much of awareness creation than simply legislating.

Where Ethiopia in the case of polygamy aspires to structure its domestic legal terrain and its international obligations under various human rights instruments through upholding respect for religious and customary laws in personal and family matters under the caveat of consent of the individuals and prior recognition of the religion and custom by law to govern the lives of its people could be able to promote human rights to a greater extent by considering the following points to remedy the gaps.

Legal and institutional frameworks to verify consent of women to be governed by religious and customary laws should be put in place. While verification of consent to have one's case adjudicated by these laws is satisfactorily provided, similar steps to verify consent of women in the non – adjudicatory aspects should be taken particularly in the decision of a husband to take additional wives. Frameworks that will enable women to make informed decision should be strengthened regardless of their actual tendency and capacity to utilize such frameworks as of currently because the very existence of the frameworks will gradually and generationally empower women.

Much of the empowerment of women and respect for their autonomy would result from the feminist method of consciousness raising as it has been successful in many areas across the globe. Accordingly collaboration between governmental and non governmental institutions entrusted with duties to promote human rights, research and academic institutions, law makers, religious institutions that regulate family and personal matters is very much needed.

- Religious institutions should be encouraged, empowered and legally required to ensure the consent an already existing wife when here husband decides to contract a second/third/fourth marriage as the case may be.
- Adequate legal safeguards to their sexual and reproductive health should be provided given the fact of higher sexual violence and HIV infection in polygamous societies. Both the women who opt out or choose to stay should be protected especially considering the absence of a deterrent of criminalization of marital rape. Interim protection and revision of the criminal code provision on Marital rape should be considered

- Registration of civil status should be made mandatory and available to interested parties.
- Given the poor economic and other social standings that most women hold, a mere requirement of consent as a yes and no question needs to be backed by the realization of the rights of women in other fields for them to actually make meaningful decisions

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