

A Multidisciplinary Analysis of Prevalence of Polygamous Marriages in the Gambia

**MINI-DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
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Declaration

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ABSTRACT

Polygamy remains one of the key topics in various societies. It is through cultural practices, beliefs and also on the individuals' choices that people decide to be committed to polygamy lifestyles. In several parts of Africa, polygamy is not only a marriage of choice but a value system that inspires and shapes family relations. With the discourse of rights, in particular women's rights, unstoppable coming to the fore, the practice of polygamy stands seriously challenged and its future is in grave doubt. However, polygamy remains widespread across the world.¹ There are consequences to each type of marriage that certain individuals might adapt to. Women who have entered into polygamous marriages have different experiences that can be enriching to those who practice monogamy. This dissertation will highlight what people in polygamous marriages in the Gambia face on a daily basis. This dissertation will not argue that there are more disadvantages for women who are in polygamous marriages than there are for their counterparts in monogamous relationships. The dissertation will suggest that the patriarchal power structure appears to play a powerful and effective role in polygamous marriages in Gambian society. However, there is also a realization that many people practising polygamy in the Gambia are happier. There is also an exploration of the complexities of polygamous marriages from a worldview with the hope of understanding the nature and evolution of polygamous marriages.

¹ Mediterranean Journal of Social Sciences Vol 5 (2014) An Exploration of Polygamous Marriages: A worldview by Tsoaledi Daniel Thobejane and Takayindisa Flora

ABBREVIATIONS AND ACRONYMS USED

UDHR Universal Declaration of Human Rights

ACHPR African Charter on Human and Peoples' Rights

AU African Union

ICESCR International Convention on Economic, Social and Cultural Rights

CEDAW Convention on the Elimination of all Forms of Discrimination against Women

NPAGW National Policy for the Advancement of Gambian Women

WiLDF Women in Law and Development in Africa

RCMA Recognition of Customary Act

UNGA United Nations General Assembly

HRC Human Rights Committee

PRWA Protocol of the African Charter on Human and Peoples' Rights of Women in Africa

Table of contents

Chapter 1	8
Introduction.....	8
1.1 Background to the research.....	8
1.2 Problem statement.....	12
1.3 research questions	13
1.4 Literature review.....	13
1.5 Methodology.....	16
1.6 Limitation of the mini-dissertation.....	16
1.7 Structure of the mini-dissertation.....	17
Chapter 2	19
Domestic existing legal framework protecting against discrimination in the Gambia	
Introduction.....	19
1. 1997 Constitution of the Gambia.....	20
1.1 Position of international human rights law in terms of the 1997 Constitution.....	21
2 Sha'ria law.....	23
2.1 The history of Islamic law in the Gambia.....	23
2.2 Recognition of Sha'ria in the 1997 Constitution of the Republic of the Gambia.....	24
2.3 Conflict between Sha'ria and Human Rights.....	27
3 Customary law.....	30
3.1 Recognition of customary law in the 1997 Constitution of the Gambia.....	33
3.2 Rationale for registration of polygamy under Recognition of Customary Marriage Act 120 of 1998 of South Africa.....	37
3.3 Position of international human rights law regarding cultural practices that conflict with human rights.....	39
4 Women's Act of the Gambia 2010.....	43
5. Conclusion.....	44
Chapter 3	46
Existing international instruments protecting against discrimination in the Gambia	
Introduction.....	47
1 Universal Declaration of Human Rights.....	47
2 African Charter on Human and Peoples' Rights (African Charter)	47
3 Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa	

(Maputo Protocol).....	53
3.1 Challenges in implementing article (6)	55
4 Convection on the Elimination of All Forms Discrimination Against Women.....	56
5 International Convention on Civil and Political Rights.....	61
6 International Covenant on Economic, Social and Cultural Rights.....	62
6.1 Women in polygamy: social experiences	64
6.2 Women in polygamy: economic experiences.....	65
6.3 Women in polygamy: health experiences	67
<i>Chapter 4</i>	71
1 Concept of Patriarchy.....	71
2 Consent.....	72
3 Conclusion.....	76
<i>Chapter 5</i>	78
Conclusion and recommendations.....	78
Bibliography.....	82

Chapter one

Introduction

1.1 Background to the research

The term polygamy is derived from the Late Greek word polugamos, which literally means “often marrying.” In an accepted speech, the term “polygamy” refers to the simultaneous union of a husband to multiple spouses or a practice or custom of having more than one wife at the same time. This meaning is technically wrong. In its correct and wide sense, polygamy refers to a marriage, which includes more than one partner. Generally, it exists in two forms: polygyny and polyandry. Polygyny is when a man is married to more than one wife, whereas polyandry refers to an arrangement where a woman is married to more than one husbands. A number of critics in the area use the term polygamy in this technical sense, referring to an arrangement wherein a man is married to one or more women at a time.²

Therefore, for the purposes of this mini-dissertation, polygamy will be used instead of polygyny. Because polygamy is more familiar to the larger population and previous research studying polygyny has used the term polygamy more often. However, keep in mind that the Gambian society only practices polygyny and not polyandry. The first wife is often referred to as the elder wife, senior wife or first wife; while subsequent wives are seen as younger wives, junior wives, or second wives.

Gambian society is still largely conservative with regard to the status of women in polygamous marriages. This conservatism limits the human rights activists who are nervous about women’s rights, by providing an alibi and arguing that the population would not accept an acceleration of reform. In addition, the spread of fundamentalist religious movements over the last few years has not helped the development of conditions for women in polygamous marriages in the Gambia

²<http://www.academicjournals.org/journal/JASD/article-full-text-pdf/5FD2CF910395>

Gambia has a tripartite legal system of legislative, customary and Islamic or Sha'ria law.³ The three bodies of law create many discriminatory provisions in all three sources of law, particularly in the area of family and property law. Four types of marriages are legally recognised in the Gambia: Christian, Muslims, Customary and Civil marriages.⁴ There are all legally married in Gambia. Marriage under the civil is monogamous, meaning that a man married under its provisions may not marry another woman, whether under the Ordinance or customary law. Most Gambian marriages are customary still and all customary marriages are potentially polygamous. The 1997 Constitution of the Gambia has recognised all these types of marriages and does not specifically tell whether polygamous or monogamous marriage is allowed. The 1997 Constitution of the Gambia only stated in section 27(2) men and women are free to marry with their own freedom to each other but not same-sex marriage. Section 25(c) which provides: "freedom to practice any religion and to manifest such practice."⁵

So been the case, polygamy is constitutionally and statutorily allowed in the Gambia. Although Polygamy is illegal in many states in the world, meaning it is against the law for one person to have more than one marriage license at the same time.⁶

International human rights instruments protect both rights to culture and religion on the one hand, and gender equality on the other hand. These include the Universal Declaration of Human Rights (UDHR), the African Charter on Human and People's Rights (ACHPR), the International Covenant on Civil and Political Rights (ICCPR),⁷ the International Convention on Economic, Social and Cultural Rights (ICESCR)⁸ and the Convention on the Elimination of all

³Section 7 of the 1997 Constitution of Republic of the Gambia

⁴<http://www1.uneca.org/awro/CountrySpecificInformationGambia.aspx> accessed 23 September 2016

⁵S, 25(c)

⁶ M Yang (2003) "A Qualitative Study Examining the Effects of Polygamy on Hmong Individuals Who Had Been Raised Polygamous Households" available on this website:

<http://www2.uwstout.edu/content/lib/thesis/2003/2003yangm.pdf>

⁷Article 27 of ICCPR provides: "in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

⁸ Article 15(1) (a) of ICESCR provides: "State Parties to the present Covenant recognize the right of every (a) to take part in a cultural life."

Forms of Discrimination Against Women (CEDAW)⁹ and the Maputo Protocol. The Gambia is a signatory to these International instruments, hence it is bound and obligated to act in accordance with the provisions of these human rights instruments. Some of these instruments clearly indicate that state parties must abolish practices associated with customary and religious marriages, like polygamy.¹⁰ For instance, the UN Human Rights Committee expressed the view that: “equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be abolished wherever it continues to exist.”¹¹

The Committee notes with concern that some States parties like Gambia, whose Constitution’s guarantee equal rights permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women and breaches the provisions of article 5(a) of the Convention.¹²

Article 16 of CEDAW, specifically requires states parties to take measures to eradicate various forms of discrimination against women in matters relating to marriage, including polygamy. Committee of CEDAW recommended that polygamy and the payment of bride price should be

⁹ articles 16(1) (a) and (b) of CEDAW28 provide: “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) the same right to enter into marriage; (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent.

¹⁰Article 2 of the United Nations General Assembly’s Landmark Declaration on the Elimination of Violence Against Women, 1993 “Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; . . .

Article 4 of the Declaration provides that States should:

. . . [c]ondemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. (available on this site:<http://www.endvawnow.org/en/articles/583-international-policy-instruments.html?next=584> accessed 11 July2016)

¹¹ United Nations Human Rights Committee General Comment No 28

¹² <http://www.religioustolerance.org/polyprac.htm>

outlawed and that family law rules should be determined by CEDAW rather than customary or religious systems.¹³ This particular article has, however, attracted vitriolic criticism from a number of countries, particular countries with Islamic religion like the Gambia and also those still practicing African traditional cultures.

However, the Constitution is the supreme law of the land, according to chapter 2, and, therefore, all subsequent laws that are found inconsistent with any of the provisions of the 1997 Constitution are to be considered void.¹⁴ Therefore, an international instrument Gambia has ratified has to be consistency with the Constitution of the Gambia for them to effective in the courts of the Gambia.

Elements of customary and religious law, like polygamy, are irrevocably opposed to gender equality and demands for their immediate abolition. This has antagonised many African and Muslim gender activists. In actual fact, the provisions of the Islamic Sha'ria accords women rights equivalent to the rights of their spouses so as to ensure a just balance between them. Such arguments assume that African and Muslim women are in need of help, that customary and religious laws are always opposed to gender equality and that western feminists are qualified to define the problems and solutions facing African and customary and religious systems. Western feminists also assume that their analyses of patriarchy can be transposed unchanged into other contexts.¹⁵ Oyewumi summaries the problem,

“The problem is that in feminist discourse, these questions are rhetorical not because of the demand no answers, but because they have pre-ordained answers, such as monogamy as the only “normal” (read “civilized,” “true”) form of marriage, and polygamy and love as mutually exclusive. For many Western feminists, polygamy is barbaric, it degrades and oppresses women, and it is alien to the civilized societies from which they come. No

¹³ Article 16 of CEDAW

¹⁴ *United Democratic Party v. the Attorney General*, (2008) 1 GLR 326; see also *Jammeh v. the Attorney General* (1997 – 2001) GR 639 4 at 842

¹⁵ T Daniel Tthobejane & T Flora An Exploration of Polygamous Marriage : A Worldview Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy Vol 5 No 27 December 2014 (<http://www.mcser.org/journal/index.php/mjss/article/viewFile/5179/4996> accessed on 7 August 2016)

attention is paid to the feelings and perspective of those who experience it as the only form of marriage and no examination is made of its implications of social organisation.”¹⁶

The same assumption is often made of Gambia Women’s Lawyer Federation that women are uniquely oppressed by the Islamic religion and cultures are in need of rescue by western feminist solutions.¹⁷ Many African Feminists hold a different view to this analysis. However, in Gambia, there are places where the polygamous lifestyle is still practiced and highly respected. Most women report that they are in polygamous unions, and sharing the demands of a husband with other women may prove to be a benefit to wives in polygamous marriages.¹⁸

To this end, generally speaking, the Gambia has not integrated the legislative and most of the legal provisions contained in the Conventions it has ratified into its legislation and as result of that, most of the human rights activist or lawyers are reluctant to challenge the constitutionality regarding discrimination against women based on polygamy. Thus, the notion of equality and in a patriarchal society likes Gambia; it may, in fact, expose women to greater oppression, rather than empower them. This is because polygamy has its own advantages and disadvantages, much as monogamy can be both a negative or positive institution of marriage, depending on how those concerned in it, lives their life on a day by day basis.

1.2 Problem statement

Laws are to ensure the discrimination against women are prohibited and punished those who violated the rights of women guaranteed in treaties. CEDAW, Maputo Protocol, International Covenant on Civil and Political Rights (ICCPR). By ratifying all these instruments that prohibit discrimination against women, the Gambia Government committed herself to the realization of the right to equality between men and women. The commitment to this right (equality before law) is even more evident in the fact that the right to equality is enshrined in the 1997 Constitution of the Gambia.¹⁹ It states that “all marriages shall be women and men governed by

¹⁶ Cit

¹⁷Gambia Women’s Lawyer Federation

¹⁸ E Montgomery “Polygamy in the Gambia” <http://www.smcm.edu/gambia/wp-content/uploads/sites/31/2014/11/98-chapter7.pdf>

¹⁹ S, 27

full capacity and based on the free and full consent of the intended parties except under customary law where the idea of female child betrothal still exists”.²⁰ The 1997 Constitution of the Gambia does not have a specific section prohibiting polygamous marriages, despite this phenomenon is widespread in the Country. The same Constitution that claims its supremacy recognizes two other sources of law: customary and Sha’ria²¹ laws which are obstacle equality between men and women as far as polygamy is concerned. Despite all the international instruments Gambia has ratified, there still is a big gap between what is envisioned and reality on the ground, pertaining to the right of women in the Gambia as far as a right to equality is concerned.

1.3 Research questions

In order to analyse the prevalence of polygamous marriages in the Gambia, therefore the main research question for this mini-dissertation, is that: **Does the institution of polygamous marriage violate Gambia law and international law applicable in the Gambia?**

In The following subsequent questions will help the author in order to digest more on the prevalence of polygamous marriage in the Gambia.

What are the main features and justification still apply in modern-day Gambia?

Is there a morally acceptable ideal of polygamous marriage in the Gambian society?

I will discuss the main research question I mentioned above pertaining to polygamous marriages in the Gambia with reference to the 1997 Constitution of the Gambia and international treaties which Gambia is a state party. To answer the subsequent questions will provide a clear understanding of the reason behind the prevalence of polygamous marriages in the Gambia instead of monogamous marriages.

1.4 Literature review

²⁰ S, 27(1) (2)

²¹ S, 7

The reality on the ground in term of equality of the right between men and women is reflected a number of texts or writings. These texts have analysed the discrimination against women in polygamous marriages. One of the texts written by Sopheie Bessis,²² is an attempt to examine the situation of women in the Gambia to being the light the discrimination against them. She points out with regard to women's right, all some progress can be seen especially in the area of education, the Gambia government does not seem prepared to upset a still very conservative legislation invoking the legitimacy of tradition to justify predicament of women. This is because of these traditional ways of living do hamper the realization of women's right to equality before the law.

Polygamy, according to Anderson (2000), "is more common in Africa than anywhere else in the world today. It is a socially accepted practice among tribes and communities in a number of African countries, particularly those in the western region." Many Africans in plural marriages are Muslim, but some non-Muslim men enter plural marriages for economic, status, or social reasons.²³

Morrison and jutting stated that "polygamy entails inequality between men and women because usually there is a difference of 20 to 30 years between the second (or third) wife and her husband."²⁴

"The practice of polygamy is seen in many different cultures across the world (Al-Krenawi, Graham, & Al-Krenawi, 1997) and frequently occurs in societies which allocate social status based on heredity and inheritance. This particular marriage custom is most prevalent and accepted in Middle Eastern, Asian, African, and Oceanic cultures where "human resources" (Al-Krenawi, Graham & Al-Krenawi, 1997, p. 447) are vital to sustainable living. Large, extended families, including polygynous household, occur most often in societies which have to rely

²² FIDA: Note on the Situation of Women in Gambia" https://www.fidh.org/IMG/pdf/gm_cedaw2005a.pdf (accessed 10 March 2016)

²³ T Danie Thobejane & T Flora (2014) "An Exploration of Polygamous Marriage: A Worldview. Mediterranean Journal of Sciences MCSER Publishing, Rome-Italy Vol 5 No 27
<http://www.mcser.org/journal/index.php/mjss/article/viewFile/5179/4996>

²⁴ Ontario Consultants on Religious Tolerance: "The Practice of and Reasons for Polygamy"
<http://www.religioustolerance.org/polyprac.htm> (accessed on 10 March 2016)

heavily on agriculture to provide subsistence. In agricultural societies, the additional labor supplied from the polygamous household lowers the number of outside employees needed to maintain a living and may further perpetuate the family's wealth (Al-Krenawi, Graham & Al-Krenawi, 1997). Polygamous relationships have always existed in the United States, but they have been frequently categorized as "extramarital affairs" or "illicit relations" (Scott, 1986, page 172), rather than polygamy. In America, polygamy among the black population has grown out of the increasing number of teenage pregnancies and the lack of fathers committing to marry the mother of their children (Scott, 1986)."²⁵

"The practice of polygamy is viewed differently from culture to culture and even within their own cultures (Al-Krenawi, Graham & Al-Krenawi, 1997; Owuamanam, 1984). Some societies have made polygamy acceptable through the use of intense societal pressures (Ware, 1979, as cited in Al-Krenawi&Lightman, 2000). Many societies have given higher status to first wives, often designating them as a "senior wife" (Al-Krenawi, Graham & Al-Krenawi, 1997) or elder wife. Often times, first wives may have more authority over the entire household, including more rights, power, and influence (Al-Krenawi, Graham & Al-Krenawi, 1997 and Gage-Brandon, 1992, as cited in Gwanfogbe, 1997). Broude (1994) reiterated this finding in his study, describing the first wife as an executive, who administered and directed the other wives duties, activities, and resources. Several societies have demonstrated that polygamous wives benefit from the presence of each other by cooperating and working together to handle family, household and economic duties (Al-Krenawi, Graham & Al-Krenawi, 1997 On the other side, research on polygamy among the Bedouin-Arab people has shown that first wives are inferior to subsequent wives, which causes them to suffer adverse effects from the polygyny."²⁶

"In the African context, according to Musumbi Kanyoro, "before marriage, a woman did not have an independent identity. A woman was regarded as the daughter of her father. After marriage, she became the wife of her husband" (Kanyoro 1993). In this case, women are found to be objects even after marriage. They might not have that freedom to be objective. Polygamy

²⁵ M Yang (2003) " A Qualitative Study Examing the Effects of Polygamy on Hmong Individuals Who Had Been Raised in Polygamous Households <http://www2.uwstout.edu/content/lib/thesis/2003/2003yangm.pdf>

²⁶ M Yang 2003 (n 25 above)

is less prevalent where there are higher levels of education and urbanization. While some groups hail the decline in the practice of polygamy, there is a conflict between the desire to protect African cultural traditions and increasing pressure to recognise women's rights (Simmons 1999)."²⁷

Therefore, much have has been written on the topic concerning women in polygamous marriage whether good or bad as far women are concerned. Thus, women human rights have been denied by either culture, customary or Sha'ria law in the Gambia.

1.5 Methodology

The purpose of this mini-dissertation is to undertake a situation analysis and identify the most critical issues affecting the rights of women guaranteed in the National Legislations and international instruments Gambia have ratified by using human right law. Since the nature of the topic concerned calls for the use of multidisciplinary approach, because human right law alone is not enough to deal with the commonness of polygamous marriages in the Gambia, sociological as well as an economic approach will be adopted in order to examine the causes of polygamous marriages confronting women in the Gambia. An anthropological outlook will serve to understand why patriarchal and cultural ideas, which support the polygamous rather than monogamous marriages in the communities in the Gambia. This mini-dissertation will not engage in a debate about whether polygamous marriages are universal or not. The underlying premise is that women's human rights are universal and cannot be denied based on bad cultures, customary or Sha'ria laws respectively, in short, unnecessary laws applicable to the Gambia.

1.6 Limitation of the mini-dissertation

Although many legal and political theorists have written about polygamy, most concentrate on whether the state should ban, punish, recognize polygamy or polygamy can be egalitarian.

²⁷ M Yang 2003 (n 25 above)

To be clear, this is not a comparative study but rather this mini-dissertation will analyse the situation of discrimination against women in the Gambia as far as polygamy is concerned. This mini-dissertation will not focus on the concept of polyandry. This is because polyandry which allows women to have more spouses is prohibited and there is no law in the Gambia that has recognized. So been the case, this mini-dissertation will rather focus on the question: does the institution of polygamous marriage violate Gambian law and international law applicable in the Gambia. The first parts will analysis the gaps in the legislation of the Gambia. It will then identify the challenges that the Gambia is facing in the implementation of their existing obligations under, Universal Declaration of Human Rights (UDHR), Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW), African Charter on Human and Peoples’ Rights (African Charter), Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa(Maputo Protocol), International Covenant on Civil and Political Rights(ICCPR), and the Convention on Economic, Social and Cultural Rights (CESCR). It will finally give recommendations concerning the implementation of laws in relation to unfair discrimination against women in the Gambia.

The Gambia has since 1980 and 1993 developed policies²⁸ to combat violence against women but there are still many challenges to their implementation due to customary or Sha’ria law as obstacles to achieve the implementation of gender equality between men and women in the Gambia.

1.7 Structure of the mini-dissertation

Chapter One: Introduction and background of the topic, literature review, as well as methods of conducting this research.

Chapter Two: Focuses on the framework of national laws protecting women against discrimination.

Chapter Three: international laws protecting women against discrimination in the Gambia.

²⁸ Gender Equality: Government Policy on Gender Issues <http://statehouse.gov.gm/gender-equality-government-policy-on-gender-issues/> (accessed August 2016)

Chapter Four: Analysis of the concept of Patriarchy and the consent. Under this Chapter, the author extrapolates the impacts of patriarchy in the society of the Gambia and whether women voluntarily accept polygamy or not.

Chapter Five: Summarises and concludes the study by providing recommendations that the government can adopt and optimise equality between men and women as far as marriage is concerned.

Chapter two

Domestic existing legal frameworks protecting women against discrimination in the Gambia

Introduction

The Gambia has a tripartite legal system: a common law inherited from colonialism, Sha'ria law, and customary law. The first is made of the following three branches: the executive, the legislature and the judiciary. The second draws from Islamic law and is restricted to issues of marriage, divorce, and inheritance and the last relates to rules observed by certain communities over a long period and has become a binding set of rules applying to the community from which it arises.²⁹

However, the Constitution is the supreme law of the state.³⁰ Section 4 of the Gambia Constitution stipulates that the Constitution is the supreme law any law or provision inconsistent with it is void.³¹

The Gambia also has national policies regarding the protection of women. In 1980 the National Women's Council and Bureau were established with the objective of ensuring the effective integration of Gambian women in the national development and to facilitate the improvement of their socio-economic conditions. Since that law did not adequately address women's rights, the Gambia Government enacted the National Policy for the Advancement of Gambian Women (NPAGW) in 1999.³² This law has as its main objective which is the correction of gender inequalities in the Country and to create harmonized policies to benefit men and women, boys and girls on an equal basis.

In 2010 Women's Act was passed to specifically set an instrument that would respond to the obligations of the Gambia concerning women's rights. It was mainly aimed at the implementing

²⁹ Speech of the Attorney General of the Gambia at the University of Gambia available at <http://gambiaaffairs.com/?p=1734> (accessed 4 May 2016)

³⁰ *United Democratic Party v. the Attorney General*, (2008) 1 GLR 326; see also *Jammeh v. the Attorney General* (1997 – 2001) GR 639 4 at 842

³¹ S, 4

³² Ministry of women's affairs 'The Gambia National Gender Policy 2010-2020' available at <http://www.ilo.org/dyn/travail/docs/1958/Gambia%20national%20gender%20policy.pdf> (accessed 4 May 2016)

the provisions of the NPAGW and the enforcement of the Maputo Protocol and the CEDAW above-mentioned legislation overall represent the legal frameworks put in place by the Gambia state to fulfill and protect the human rights of women in the Gambia. However the Women's Act only designed to empower the women on gender issues but not to address the types of marriages that should be practices in the Gambia, this is because polygamy is socially and legally accepted in the Gambia based on culture and tradition.

1 The 1997 Constitution of the Gambia

A constitution of the Gambia lays the foundation for a country's legal system, on top of which all laws and governmental decisions may be built. In order to understand The Gambia's legal system, therefore, it is necessary to understand its Constitution. Like constitutions from many other countries, the Gambian Constitution provides the framework for the Gambian government and sets boundaries as to the powers of each governmental branch. In addition, it provides certain fundamental rights which must be afforded to all citizens.

The Constitution supersedes all other existing laws.³³ Chapter 17 of the Gambia Constitution has provisions on women's human rights: Section 28(1) of the Constitution provides the full and equal dignity of the person whereas its subsection (2) provides for equal treatment and equal opportunities in political, economic and social activities. Section 33 of the Constitution gives protection from discrimination under the laws based on race, religion, and gender inter alia. Subject to the provisions of subsection 33(5), no law shall make any provision which is discriminatory either of itself or in its effect. Section 33(5) reads: "With respect to adoption, marriage, divorce, and burial, devolution of property on death or matters of personal law."³⁴ Women in the Gambia cannot be discriminated regarding the marriage, inheritance, divorce, adoption based on section 33(5) of the 1997 Constitution of the Gambia. Arguably, this could mean that women, who are often the more marginalized party to these types of matters, may be discriminated against as part of these processes. In addition, customary law is excluded from

³³Jammeh v Attorney-General (2002) AHRLR 72 (Gasc 2001)- Available on this site:
<http://www.chr.up.ac.za/index.php/browse-by-country/the-gambia/307-the-gambia-jammeh-v-attorney-general-2002-ahrlr-72-gasc-2001.html> (accessed 7 September 2016)

³⁴ S, 33(5)

the restraints of this Section.³⁵ This means that a great deal of the legal proceedings in the country, as discussed in of this mini-dissertation, laws that are discriminatory in nature.

To this end, 1997 Constitution of the Gambia mentioned marriage in section 27, which shall be based on free will of the parties intended to marry and make a family. The same Constitution permits polygamous marriages based on culture and religion. This is because women cannot claim discrimination based religion and culture in the Gambia. Thus it can be strongly argued that polygamous marriages are compatible with the laws of the Gambia as far as the 1997 Constitution of the Gambia is concerned.

1.1 Position of international human rights law in terms of the 1997 Constitution

The position of international human rights law in terms of the 1997 Constitution may be looked at the different ways. Firstly, some international human rights norms have been elevated to constitutional status in the Constitution, which renders them justifiable in the Gambia Courts.³⁶ This is through a direct incorporation of certain international law standards in the Constitution.³⁷ For example, the non-discrimination clause, a key principle of the Convention on the Elimination of All Forms of Discrimination Against Women and other fundamental human rights law has been enshrined in the Gambian Constitution.³⁸ The second angle derives from the legal status of international law in Gambia municipal law. According to section 7 of the Constitution, the laws of the Gambia consist of:

- (a) “Acts of the National Assembly made under this Constitution and subsidiary legislation made under such Acts;*
- (b) Any orders, Rules, Regulations or other subsidiary legislation made by a person or authority under a power conferred by this Constitution or any other law;*
- (c) The existing laws including all decrees passed by the Armed Forces Provisional Ruling Council;*
- (d) The common law and principles of equity;*
- (e) Customary law so far as concerns members of the communities to which it applies;*

³⁵ S, 33(d)

³⁶*MomodouJobe v. the Attorney General*, which reiterates that the Constitution is, however, the supreme law of the land and that there is a “generous and purposive construction in the protection of fundamental rights.

³⁷ S,17

³⁸ S, 17

(f) *The sha'ria as regards matters of marriage, divorce, and inheritance among members of the communities to which it applies.*³⁹

The Gambia has set forth clear and distinct rights and freedoms under its Constitution, which is to be prescribed to every Gambian citizen and respected by the Gambian Government. Chapter 4 of the Gambian Constitution, titled Protection of Fundamental Rights and Freedoms is detailed by a number of subsequent Acts of the National Assembly, all of which are essential to assuring human rights are upheld in the country. The purpose of this Chapter is to provide a broad description of the rights and freedoms set forth under both the Constitution and related acts of the National Assembly. According to Section 17, the introduction to Chapter 4 of the Constitution, the fundamental freedoms enshrined therein are to be respected and upheld by all organs of the Executive (and its agencies), the Legislature, and by all natural and legal persons in The Gambia.⁴⁰

Therefore, fundamental freedoms and basic human rights laws are part of laws in the Gambia based on section 17 of the 1997 Constitution but however, international treaties did not form part of laws in the Gambia based on section 7 of the 1997 Constitution unless the Act of Parliament to certain treaty incorporated or domesticated into the laws of the Gambia... This position is relevant with respect to the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, CEDAW, Maputo Protocol, and the African Charter on Human and Peoples' Rights (African Charter). The Gambia is a state party to all these international treaties or agreements and, they can only become part and parcel of laws of the Gambia through the Act of Parliament only.

Generally speaking, the Gambia did not incorporate most of the provisions contained in the Conventions above mentioned it has ratified, and as result of that, most of the human rights activist or lawyers are reluctant challenges the constitutionality regarding discrimination against women in terms of polygamy is concerned.⁴¹

³⁹ S, 7

⁴⁰ S, 17

⁴¹ Amnesty International Annual Report 2015/16 : Gambia
(<https://www.amnesty.org/en/countries/africa/gambia/report-gambia/> (accessed on August 10 2016))

2 Sha'ria law

2.1 The History of Islamic Law in the Gambia

Islam is one of the largest religions in the world. It is said to be founded by Prophet Mohammed S.A.W in Saudi Arabia in the 7th century. After the prophet's demise in AD632, his followers began to expand their influence outside Arabia. Islam came to West Africa, from North Africa, in the 8th century⁴²

Islam as a religion was brought to The Gambia by merchants from Senegal, in the 8th century, through the Trans- Saharan Trade that existed between North Africa and West Africa.⁴³ These merchants who were engaged in trade with their Gambian counterparts were Muslims. Upon arrival in what is now The Gambia, they settled in trading centers and were engaged in trade and, at the same time preaching and spreading their religion, Islam.⁴⁴

The conversion of the traditional rulers marks the introduction of Islamic Law in The Gambia. This is so because Islam is a religion that, once accepted, governs that you are to live your life as the Quran directed and by the teaching and saying of the Prophet (Hadith and Sunnah). Additionally, the aforementioned are to become part of your laws. For example, before the advent of Islam in The Gambia, succession to the throne was governed traditionally. However, the introduction of Islam changed how succession to the throne should be done; i.e. before the coming of Islam, succession to the throne was by matrilineal (i.e. kings were succeeded by their nephews), this was changed to patrilineal (i.e. the oldest son succeeding his father)⁴⁵

The British colonized the Gambia in the 19th century, but by this time Islam was already widely spread in The Gambia and the people were already practicing Islamic law. Once the British colonized The Gambia, they introduced a system of indirect rule in the Gambia; i.e. ruling the people through their own representative,⁴⁶ and then, in 1894, the Protectorate Ordinance was passed. The Ordinance recognized customary law (this includes Islamic law, which had already

⁴² L B. Jah, History of the Gambia Made Simple, page 31.

⁴³ L B Jah, (n 42 above) page 31

⁴⁴ L B Jah (n 42 above) page 31

⁴⁵ L B Jah (n 42 above) page 33

⁴⁶ L B Jah (n 42 above) page 33

become part of the custom of the indigenous populations) and procedure, as long as they are in line with natural justice and were not at variance with the existing laws in the colony

2.2 Recognition of Sha'ria in the 1997 Constitution of the Republic of the Gambia

Section 7(f) of the Gambian Constitution⁴⁷ has recognized Sha'ria law as regards to matters of marriage, divorce, and inheritance among members of the communities to which it applies. As the result of that polygamous marriages is still very high in The Gambia or it is still practiced by a significant number of Gambians both in the rural and urban areas and this continues to affect the integrity of women's rights. In the case of ISATOU SECKA vs. SUSAN, No: 15/2012) the Supreme Court, per Justice Mabel Agyemang, "which held that the purported marriage of the late Ebrima Badjie to Isatou Badjie (Appellant) which was contracted at a time when the same Ebrima Badjie was married to Susan Badjie was void for want of capacity by Ebrima Badjie because he was already married to Susan under the Civil Marriage Act, 1938 CAP.42:01 volume 7 of the Laws of The Gambia. The relevant or material facts are not in dispute. Ebrima and Susan contracted a civil marriage on the 4th day of April 1995 under the Civil Marriage Act, 1938. While the marriage was subsisting Ebrima, on or about the year 2003, contracted a Muslim marriage with Isatou in a mosque at Kanifing under the Muslim Marriage and Divorce Act, 1941 CAP.42:01 volume 7. Ebrima was a Muslim at the time he contracted both marriages."⁴⁸ The Supreme Court acknowledged Ebrima's right as a Muslim male to marry more than one wife when it stated:

".....it was never disputed that at the point when he (Ebrima) contracted the monogamous marriage with the appellant (Susan) he was a Muslim. At that time, therefore, his personal law was Islamic law which entitled him to contract valid polygamous marriages".⁴⁹

"The right of the Muslim male to marry more than one wife under Sha'ria Law is permanent. The Muslim male may decide not to exercise the right but the right remains exercisable. Granted that the 1997 Constitution gives a Muslim male the right to have matters of his

⁴⁷ S, 7

⁴⁸ Isatou Secka and Susan Badjie SC Civil Appeal No: 15/2012 Thursday 13TH November, 2014

⁴⁹ Isatou Secka and Susan Badjie SC Civil Appeal No: 15/2012 Thursday 13TH November, 2014

marriage, divorce, and succession determined in accordance with Islamic Law, insistence on this right would completely nullify the legal effect and consequences of the Civil Marriage Act 1938. This right of Muslim male has long been recognized in the Gambia and that recognition is now evidence in various statutes such as the Muslim Marriage and Divorce Act; Sha'ria Law Recognition Act 1905 CAP.6:04 volume 2 and most importantly by the Constitution 1997.”⁵⁰

“Ebrima Badjie (deceased) at all material time was a Muslim. His personal law at all material times was sha'ria. The right of Muslims to be guided by sha'ria law in respect of marriage, divorce, and inheritance are enshrining in the Constitution section (7), statutes and other laws. There is no statute or law in the Gambia that abrogates a Muslim marriage solemnised under the sha'ria law. In the premises, I hold that the marriage between Ebrima Badjie (deceased) and Isatou Secka was valid.”⁵¹

Marriage in Islam is a sign of God's power and glory. The Quran says:

*“From His signs is that He has created for you spouses from yourselves so that you may get peace (and tranquility) through them, and He placed between you love and mercy. In these are signs for the people who reflect.”*⁵²

In Islam, indeed marriage is monogamous forms of marriage. Limited polygamy is a provision approved by Islam for exceptional circumstance only, and that also with many stringent conditions.

Islam did not invent the system of polygamy. It existed long before Islam came into the scene of the world events. The Bible says that Lamech, the grandson of Adam, “took unto him two wives: the name of the one was Adah and the name of the other Zillah.”⁵³ Many Holy personalities of the Bible had many wives or concubines at the same time. And so let it be known that Islam did not initiate the system of polygamy; it existed from the early dawn of

⁵⁰ Isatou Secka and Susan Badjie SC Civil Appeal No: 15/2012 Thursday 13TH November, 2014

⁵¹ Isatou Secka and Susan Badjie SC Civil Appeal No: 15/2012 Thursday 13TH November, 2014

⁵² Surah ar Room,30:21

⁵³ S Muhammad Rizvi “The Concept of Polygamy and the Prophets Marriages” <https://www.al-islam.org/articles/concept-polygamy-and-prophets-marriages-sayyid-muhammad-rizvi>

human history. When the Islam came on the world scene in the seventh century of the Common Era, it inherited the existing marriage system.⁵⁴

It is to the credit of Islam that it modified and reformed the system in existence at the time. Firstly, of all, Islam put a limit to the number of wives that a person can have at one time maximum of four wives at one time.⁵⁵ Secondly, Islam put stringent conditions on a person who wanted to marry a second wife. He must be able to provide and maintain the family and also deal with both on basis of justice and fairness.⁵⁶ In chapter 4 (surah an-Nissa), verse 3, after following the Muslim men to marry two, three or four wives, the Quran immediately says: “but if you fear that you will not do justice (between them), then (marry) only one”.⁵⁷ Looking at the psychology of humans, only exceptional people have that quality of justice and fairness. The Quran itself, in the same chapter 4, verse 129 says “and you do have the ability to do justice between the wives, even though you may wish (to do so)”⁵⁸

Based on such verses, certain Muslims Governments like Iran and Egypt regulate the provision of polygamy: “the person who intends to marry a second wife has to seek approval from the family court and prove the need for a second wife and the ability to providing for both in an adequate manner.”⁵⁹

Islam is a practical religion; its laws are in line with human nature. It does not deny the natural forces in human; rather it confronts them and provides guidance to control them without disrupting the peace in society. The religiously valid position is therefore for each Muslim to struggle with his/her understanding of Sha’ria and be responsible for it before God, but not before any other human being who must necessarily be in the same position of uncertainty as he/she is. This is because every Muslim is only supposing or guessing how Sha’ria decides any

⁵⁴ S Muhammad Rizvi (n 53 above)

⁵⁵ Surah an-Nissa verse 3

⁵⁶ S Muhammad Rizvi (n 53 above)

⁵⁷ Suraar Room, 30:21

⁵⁸ Surah an-Nissa 4:129 (accessed on 2 May 2016)

⁵⁹ S Muhammad Rizvi (n 53 above)

question; no Muslim has a superior claim to the truth of one view or another, such that that view is binding on all Muslims.⁶⁰

To this end, any state's law and administration of justice should reflect the ethical values, priorities, and interest of the majority, subject to the constitution/ human rights of the minority.⁶¹ This is because of ethical values and the majority of the Gambians are Muslims, the Gambia has recognised Islamic law or Sha'ria as the binding law applicable to communities it applies as mentioned in section 7(e) of the 1997 Constitution. Therefore, women cannot be discriminated based on polygamous marriages in the Gambia because Sha'ria⁶² law which is enshrined in the 1997 constitution as binding on communities applies allowed polygamy.

2.3 Conflict between Sha'ria and Human Rights with regard to right to equality between men and women in line with polygamy

There are many conflicts between Sha'ria and human rights, but this dissertation will be focused the main area which is freedom of equality between men and women towards polygamy as mentioned in declarations and treaties I mentioned somewhere else in this mini-dissertation.

The Islamic Sha'ria-the normative tradition commonly known as Islamic law rests partly on the Qur'an which stands out as its primary source. However, because the Qur'an primary contains general ethical principles, rather than detailed instructions, other normative sources be consulted as well. Next to Qur'an, the most important source is the practice of the Prophet Muhammad. Representing a binding model for Muslims, his sayings and patterns of behaviour have been collected in the "Sunna," which means tradition. In addition to the Qur'an and Sunna, supplementary normative sources include consensus among Islamic scholars, a conclusion based on analogy, customary law, and the principle of common welfare. By drawing

⁶⁰ Emory International Law Review vol.25, No.2 page 801

⁶¹ Emory international Law Review vol 25, No page 805

⁶²While women are accorded protection from gender-based discrimination under the Constitution, exception from prohibition of discrimination on the grounds of gender remains in the areas of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law

upon these various sources, the Sha'ria took shape during the first two or three centuries of Islamic history.⁶³

Due to the timing of its development, it is hardly surprising that the classical Sha'ria differs from the modern idea of Universal Human Rights. Although the Sha'ria puts a great deal of emphasis on the equality of all the faith in God, it traditionally assumes and between Muslims and members of other religious communities. Hence, discrimination against women and against other religious minorities continues to occur. The following paragraphs give a brief over of this conflict.⁶⁴

The legal status of women under Sha'ria, the idea of equal rights regardless of gender is unknown to the traditional Sha'ria. For instance, theoretically, the man is permitted to marry up to four women under certain conditions. Polygamy partly designed to provide for widows and orphans in a pre-modern society certainly mirror the inequality between the sexes. Further, to conclude a marriage contract the woman relies on a male representative who has some authority in shaping the agreement, although the bride's wishes are to be respected; at least she has the right to veto an unwanted husband.⁶⁵

Because the focus of the Sha'ria has always been upon family matters, these Islamic family and inheritance laws continue to hold force in the vast majority of Islamic countries today. Therefore, several Islamic states have entered substantial reservations to the 1979 Convention on the Elimination of All Forms Discrimination Against Women, in particular to article 16 which for men and women in matters of family law and divorce.⁶⁶

Furthermore, restrictions concerning diverse marriages were enforced to protect the ongoing Islamic dominance. Whereas a Muslim man was allowed to marry a woman from the tolerated

⁶³Muslims Voices in the Human Rights Debate: Human Rights Quarterly 17.4 (1995) 587-617 available on this website: https://muse.jhu.edu/journals/human_rights_quarterly/v017.4bielefeldt.htm#FOOT1

⁶⁴ Muslims Voices in the Human Rights Debate (n 63 above)

⁶⁵ Muslims Voices in the Human Rights Debate (n 63 above)

⁶⁶ Muslims Voices in the Human Rights Debate (n 63 above)

minorities, Jewish or Christian males could not marry Muslim women. With the husband as the head of the family, this provision ensured that children of mixed parentage were prohibited. So been the case, since Muslim women are allowed to marry to only Muslim males, the practice of polygamy will be increased. This is a clear violation of article 16 of the Universal Declaration of Human Rights which explicitly recognizes the right to marry “without any limitation due to race, nationality or religion.”⁶⁷

Ahmad Farrag, a journalist from Saudi-Arabia, who unequivocally denies the right to marry without restrictions based on the religious difference, a right that is guaranteed in article 16 of the Universal Declaration of Human Rights. He writes: “As a Muslim, I reject that article.”⁶⁸ In line with the classical Sha’ria, he agrees that a Muslim male marries a Jewish or Christian woman. However, marriages between Muslim women and non-Muslim males as well as all marriages between Muslims and polytheists are considered to be illegitimate. In an attempt to justify this, Farag, argues that a Muslim woman would not receive due respect for her religious beliefs by a non-Muslim husband. Furthermore, he claims that a marriage between persons of completely different faiths, such as Islamic and polytheism would necessarily break down.”⁶⁹

However, Muhammad Abduh, Grand Mufi of late nineteenth century Egypt, advocated restriction on polygamy. His argument, based on the Qur’an, is as follows: “Although the Qur’an allows a man to marry more than one woman, it adds the warning that this may not be done unless the husband is able to treat all his wives with full equal justice. Sura 4:3. In another place, however, the Qur’an states that this requirement can hardly ever be satisfied: “you are never able to be fair and just as between women, even if it is your ardent desire.” Sura 4:129”⁷⁰

Muhammad Abduh and many of his Muslim followers, “therefore, read the Qur’an as forbidding polygamy implicitly. Up until now, however, Tunisia is the only Arab state that has abolished polygamy completely by making reference to this interpretation of the Qur’an.”⁷¹

⁶⁷Article 16 of Universal Declaration of Human Rights

⁶⁸Muslims Voices in the Human Rights Debate (n 63 above)

⁶⁹Muslims Voices in the Human Rights Debate (n 63 above)

⁷⁰Muslims Voices in the Human Rights Debate (n 63 above)

⁷¹ Muslims Voices in the Human Rights Debate (n 63 above)

In conclusion, the Universal Declaration of Human Rights begins by affirming that “all human beings are born free and equal in dignity and rights.”⁷² Both the ICCPR (article 3) and ICESCR (article 3) have specific provisions for the equal rights of women and men to the enjoyment of all rights in the respective Covenants. Thus, it has been insensitive towards women’s rights and that continuation of such practices as polygamy is discriminatory and contrary to modern human rights law.⁷³

3 Customary law

The right to culture is protected by Section 32 of the Constitution, which states that “[e]very person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and to the condition that the rights protected by this section do not impinge on the rights and freedoms of others or the national interest, especially unity.”⁷⁴

The Customary law of the Gambia is not codified. The Gambia, a country of diverse cultures, is in no position to reject cultural relativism. Customary law in the Gambia can be defined as a mixture of customs or habitual practices accepted by members of a particular community as having the force of law as a result of long-established usage.⁷⁵ Section 7 of the Constitution⁷⁶ recognised customary law as part and parcel of laws in the Gambia and is applicable to the communities accepted it as binding law. There is no Customary Marriages Act in the Gambia, but the 1997 Constitution of the Gambia has recognised customary marriages as legally binding marriage between the parties concerned. Most of the customary marriages are still remain unregistered but however, customary marriages are legally valid despite not being registered in

⁷² Article 3 of Universal Declaration of Human Rights

⁷³ Muslims Voices in the Human Rights Debate (n 63 above)

⁷⁴ S, 32

⁷⁵ A Concise Guide to the Gambia Legal System: the West African Law Institute

⁷⁶ S, 7

the Gambia.⁷⁷The terms “customary marriage” does not include religious marriages, such as those entered into in accordance with Hindu, Muslim or other religious rites.⁷⁸

There are several features that distinguish customary marriages from civil marriages. Firstly, in the former, polygamy is permissible, while it is strictly forbidden in civil marriages. Secondly, in a customary marriage, the relationship extends beyond the two individuals and also includes respective families. Thirdly, a customary union develops gradually and does not come into effect immediately with one specific ceremony, as is the case with civil marriages. And finally, marriage under customary law is seen as a family matter that does not require the approval of any religious or civil authority in order to be regarded as valid.⁷⁹ Based on that notion, under the customary marriages in the Gambia, the husband would have no obligation to apply to a court for permission to marry another wife and the court would not be required to assess whether he is willing and able to treat his wife equally as required both custom.⁸⁰

In the Gambia, however, wives whose husbands enter a second or subsequent marriage have the option to divorce, but they have no legal right to receive advance notice regarding the husband’s intentions or to give their approval.⁸¹ However, as a matter of courtesy and/or respect to the wife, the husband notifies the wife about his intention to bring in another wife in the family or matrimonial home. Women also face discrimination in regard to parental authority. The customary law considers husbands to be the natural head of the family; as such, they have sole responsibility for matters concerning the wife or wives and the raising of children.

A man merely entering into a second marriage with the knowledge that one is currently married to another living person under customary law will not be indicted for bigamy in the

⁷⁷Isatou Secka and Susan Badjie SC Civil Appeal No: 15/2012 Thursday 13TH November, 2014 : where Supreme Court of the Gambia has recognized customary marriage without registration of it

⁷⁸ A Claassen & D Smythe Marriage, Land and Custom: Essays on Law and Social Change in South Africa, page 239

⁷⁹ A Claassen & D Smythe (n 78 above) page 274

⁸⁰ A Concise Guide to the Gambia Legal System: West African Law Institute

⁸¹ African Women’s Right Observatory: Country Specific Information-Gambia

<http://www1.uneca.org/awro/CountrySpecificInformationGambia.aspx> accessed September 23 2016

Gambia. This is because the 1997 Constitution of the Gambia allowed the cultural practice, for instance, polygamous marriages.⁸² However, section 16(c) of Civil Marriage Act CAP 41:02 of the Gambia 1938, which provides that a marriage celebrated before a Registrar shall not be valid “if celebrated between people either of whom is already married to some person other than a party to the intended marriage.”⁸³ Meaning Civil Marriage Act carries a consequence that forbids other unions whilst the first marriage by one of the parties to the intended other marriage is already under the Act that marriage is subsisting. Evidence of these is the address the Registrar makes to the parties to be married regarding the commission of an act which will be regarded as bigamy and section 154 of the Criminal Code CAP.10:01 of the Laws of the Gambia, that is, the offense of bigamy. However, my research on this matter has no unveiled any occasion in the Gambia where a person is charged with bigamy before any court in the Gambia. This could be attributed to the fact that majority of the Gambians are Muslims, and their religion allows plural marriages. Importantly, even where a Muslim male opted for civil marriage where plural marriage is criminalized, he cannot be punished for such an act in line with the case of Susan Badjie v IsatouSecka (supra)

Furthermore, customary marriages in the Gambia has similar legal effect with civil or Christian unions and civil or Christian marriage could not supersede the customary marriage in the Gambia because the 1997 Constitution of the Gambia has recognized both these marriages as valid once they are contracted within the territory of the Gambia. The most important thing to be proved is bride price or dowry. Once the man pays the dowry or bride price for a particular woman, she automatically becomes her wife.

In addition, to the African way of thinking, the most important ingredient of a valid marriage is bridewealth, the time-honoured practise that gives the union its distinctively African character. According to feminists, however, bridewealth conduces to the inferior status of women. Bridewealth may have a more concrete effect on individual freedom by binding a wife to an

⁸² S,7 (e)

⁸³Section 16(c) of Civil Marriage Act CAP 41:02 of the Gambia 1938

unwanted marriage: if she seeks a divorce, her family is usually obliged to return bridewealth or dowry, and rather than do so they may force her to put up with an unhappy relationship.⁸⁴

Nevertheless, the practice of giving or paying dowry does not directly involve less favourable treatment for wives than husbands, after all, men have to pay, not a woman.⁸⁵

To this end, under customary marriage law, the validity of a marriage is seldom called into account through failure to fulfill bride price or dowry obligation, because bride price is essential under customary law.⁸⁶ No bride price no marriage will take place according to the uncodified customary law in the Gambia. However, bride price can be livestock such as cows, goats, and sheep or cash in exchange for a bride does have all the makings of the sale of a woman.⁸⁷

3.1 Recognition of customary law in the 1997 Constitution of the Republic of the Gambia

A uniform approach to the recognition of customary law in the Gambia was eventually imposed in 1997 Constitution. Certainly, most courts in the Gambia were given the discretion to apply customary law in legal suits between parties concerned.⁸⁸

The principle reason why international law documents showed little respect for customary law is that it has never been conceived of as right. The state has always assumed that it has complete discretion in deciding whether, and to what extent, the customary law should be recognized.⁸⁹ When the 1997 Constitution and the fundamental freedom of rights came to be drafted, customary law was never ignored. As result of not ignoring the customary law at the time, the drafters of the 1997 Constitution included customs and values of local indigenes. Section 212 (3) of the Constitution states that:

⁸⁴ T W Bennett Human Rights and African Customary Law under South African Constitution(1999) page 118

⁸⁵T W Bennett 1999 (n 84 above) page, 118

⁸⁶ T W Bennett 1999 (n 84 above) page,119

⁸⁷ T W Bennett 1999 (n84 above) page 119/120

⁸⁸ S, 7 (e)

⁸⁹ T W Bennett Human Rights and African Customary Law under the South African Constitution (1999) page 19

“All the people of the Gambia shall be entitled to their ethnic, religious and cultural values which do not disturb the unity or cohesion of the state.”⁹⁰

On the basis of this section, an argument can be made that the Gambia is now obliged to recognise and apply customary law in its courts. The state, as the direct duty-bearer under the Constitution, has two obligations: not to interfere with the individual’s right, and to permit the existence of institutions necessary to sustain the culture concerned.

In addition, the provisions of section 31 of South African Constitution 1996 entail a further aspect of the right to culture: an entitlement inhering in a group of people, which allows them collectively to maintain and assert their special identity. From the beginning of human rights law, it was evident that the humanitarian purpose of protecting individuals inured to the benefit of groups too. Group and individual rights are therefore symbiotic partners: the individual right to pursue a culture of choice presupposes the existence of a cultural community and this community must first be secured if individual rights are to have any substance. Accordingly, it can be argued that a person’s right to have the customary law applied to a dispute rests on membership of a group, which has a prior claim that the state recognises and enforce its law.⁹¹

It should, incidentally, be appreciated that an individual’s right of participation in a culture is not absolute. However, the right to culture is essential for the celebration and protection of human kind’s creativity and traditions, the right of an individual to enjoy culture and to advance culture and traditions without interference from the state is a human right. This is because, under international human rights law, governments also have an obligation to promote and conserve cultural activities. Culture is overwhelmingly applauded as positive in the vast majority of human rights instruments. However, some statutes recognize that certain kinds of cultural and social practices may have a negative impact on an individual’s health and well-being.

Furthermore, the 1997 Constitution has many provisions that directly or indirectly recognise the application and relevance of customary laws in the Gambia.

⁹⁰ S, 212(3)

⁹¹ T W Bennett 1999 (n 89 above) page 24/25

Section 32 of the 1997 Constitution states that:

*“Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and to the condition that the rights protected by this section do not impinge on the rights and freedoms of others or the national interest, especially unity.”*⁹²

Section 218 provides that the Constitution is founded upon the following underlying principles:

*“The state and all the people of the Gambia shall strive to protect, preserve and foster the languages, historic sites, and the cultural, natural and artistic heritage of the Gambia.”*⁹³

Section 33(5) (d) states that:

*“for the application in the case of members of a particular race or tribe of customary law with respect to any matter in the case of a person who, under that law, is subject to that law.”*⁹⁴

The Constitution provides that “every person shall have the right to use the language and to participate in the cultural life of his or her choice.”⁹⁵ Although this section does not make any explicit reference to types of marriages are allowed, it expressly recognises the significance of customary or cultural values to human development, Well-being, and identity. In essence, it guarantees the right of everyone to live according to the legal system applicable to the particular cultural group to which he or she chooses to belong.

Thus, it can be strongly argued, based on this provision, that the Gambian Constitution attaches great importance to customary law and traditional values. These provisions make it obvious that marriages contracted according to customary laws are valid in the Gambia. There is no provision in the Constitution expressly stated that when the right to culture clashes with the right to equality, the latter must take priority.

⁹² S, 32

⁹³ S,218

⁹⁴ S, 35

⁹⁵ S 218

However, section 33(4) of the 1997 Constitution of the Gambia, “in this section, the expression “discrimination” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privilege or advantages which are not accorded to persons of another such description.”⁹⁶ Furthermore, section 33(5) (c) which states that: “with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;”⁹⁷ and 35(5) (d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter in the case of persons who, under that law, are subject to that law.⁹⁸

Based on section 33(5) (c), (d), women cannot claim to be discriminatory based on marriage, because marriage is exempted as far as gender equality is concerned in the Gambia. And there is no provision in the Constitution expressly states that any law that discriminates against women based on polygamy or marital status shall be invalid. But the Constitution also obligates the government to take legislative measures to eliminate bad customs and practices that are repugnant to natural justice and human rights. Many people in the Gambia did not consider polygamy as a practice that should be disregarded or ban and therefore like or favour polygamy.

In addition, there is no proviso also in the Constitution that expressly mentioned whether human rights and fundamental freedom in chapter 17 may be limited by the customary law applicable in the Gambia to the parties concerned as stipulated in section 7(f).

Having said that, it is, however, important to note that in terms of sections 28(1)

“Women shall be accorded full and equal dignity of the person with men.”⁹⁹

⁹⁶ S, 33(4)

⁹⁷ S, 33(5) (c)

⁹⁸ S,33(5) (d)

⁹⁹S,28 (1)

But issues like marriage, divorce, inheritance based on section 33(5) women are not equal to men when such issue arises. The first obstacle that must be met in terms of section 28(1) is that the rights contained may be limited by section 33(5) of the Constitution.

It is, however, important to note that courts will not lightly declare the customary law to be unconstitutional for being inconsistent with any other right, including the right of women to equality, for example. This is so because any legislation that varies alters or abrogates any rule of the customary law must not constitute an unjustifiable infringement on the right to culture. This also means that parliament does not have a free hand to overrule the customary law. It can do so only to the extent that it does not unjustifiably limit the right to culture. Essentially, this means that any legislation that seeks to advance and protect women's rights must strike an appropriate balance between many interests and rights, especially the right of women to equality and the right of individuals and groups of people to culture.

To this end, it can be strongly argued that the practice of polygamy under customary law in the Gambia is justifiable in practice; this is because the Constitution of the Gambia has recognized cultural practices and the values of the community as a whole. Although women usually have the most to lose in respect of property and status by the non-registration and non-recognition of their marriages in the event their husbands die or demise in the law court.

3.2 Rationale for registration of polygamy under Recognition of Customary Marriage Act 1998 of South Africa

In spite of the strong objections to polygamy as a legal form of marriage during the drafting of the Recognition of Customary Marriage Act of South Africa, mostly from women's interest groups, the South African Law Commission recommended that polygamy should not be prohibited outright. Instead, it is suggested that it would be best to allow the gradual process of disuse to take its course and to let the Constitutional Court assess whether polygamy infringes the right to gender equality if and when a challenge to that effect is brought before it. Part of the Commission's reasoning was that a prohibition on polygamous customary marriages would not be taken seriously by many South Africans who live according to customary law, and would

be difficult for the government to enforce.¹⁰⁰ In that context, lacks of state recognition would have prejudiced women in polygamous marriages further.¹⁰¹

The other reason for the Commission for not prohibiting polygamy was that the practice is dying out and, it present, “lingers as a potential rather than a reality, since very few men can now afford more than one wife.”¹⁰² Thus, the position taken was that the practice could enjoy legal recognition with a view to its eventual disappearance altogether provided that protections were put in place for those women who were already in or who still chose to enter into polygamous marriages.¹⁰³

Because one account of the Recognition of Customary Marriage Act (RCMA) drafting and consultation process suggests that its provisions were formulated to “make polygamy expensive (eventually leading to its disappearance) while safeguarding women’s rights to marital property.”¹⁰⁴ The government’s unqualified repetition of this account in a 2010 Report to the Committee on the Elimination of Discrimination against Women suggests that it endorses the view that making polygamy expensive will protect women and put an end to the practice. It also confirms that this was indeed the rationale underlying the special requirement for registering polygamous marriages.¹⁰⁵

To this end, husbands who fail to register their customary marriages as required by the law in South Africa will put women or wives into a more vulnerable position when their husbands decide to end the marriage. This is because RCMA was motivated by specifically providing protection to women in customary marriage in terms of their status, capacity and property interests.¹⁰⁶ Women in customary marriages are afforded a status and capacity equal to that of their husbands in section 6 of the Act;¹⁰⁷ a woman’s consent to her own marriage is a strict requirement for validity and the default property regime for monogamous marriages is a

¹⁰⁰ A Claassen & D Smyths Marriage, Land and Custom: Essays on Law and Social Change in South Africa , page 264

¹⁰¹ A Claassen & D Smyths (n 100 above) page 264

¹⁰² A Claassen & D Smyths (n 100 above) page 264

¹⁰³ A Claassen & D Smyths (n 100 above) Page 264/265

¹⁰⁴ A Claassen & D Smyths (n 100 above) page 265

¹⁰⁵ A Claassen & D Smyths (n 100 above) page 265

¹⁰⁶ A Claassen & D Smyths (n 100 above) page 267

¹⁰⁷ Recognition of Customary Marriage Act of South Africa, Act 120 1998

community of property.¹⁰⁸ Even the special process for post-commencement polygamous marriage registration is meant to allow women an opportunity to ensure that their interests are accounted for in the contract governing their marital property since all existing and future wives must be joined in the application to the court.¹⁰⁹

Unlike in the Gambia where registration for customary marriages is not compulsory or requirement for its validity once the woman can prove that she was married to particular man whether in the mosque or her own compound with a present of a witness during marriage, is valid in the eyes of the law in the Gambia when a dispute arises. However, Ordinance for Muslim Marriages and Divorce Act (1938) of the Gambia, which made such marriages legal and valid and required that they should be registered. This was another positive legislation which today's terms would have conformed to the Protocol of the African Charter on Human and Peoples' Rights of Women in Africa (PRWA) and the Gambia Women's Act, 2010 which required marriages to be registered so as to give social protection and recognition to women.

3.3 Position of international human rights law regarding cultural practices that conflict with human rights

At the international level, it is important to note that many instruments recognise the application and relevance of African customary law. Article 22 of the Universal Declaration of Human Rights (Universal Declaration)¹¹⁰ states that

*"Everyone, as a member of society ... is entitled to the realisation of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."*¹¹¹

Further, article 27(1) provides:

*"Everyone has the right to freely participate in a cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."*¹¹²

¹⁰⁸ A Claassen & D Smyths (n 100 above) 267

¹⁰⁹ A Claassen & D Smyths (n 100 above) page 267

¹¹⁰ The Universal Declaration was adopted by UN General Assembly Resolution on 10 December 1948.

¹¹¹ Article 22 of Universal Declaration of Human Rights

Although, the Universal Declaration is a non-binding instrument that merely states the aspirations of nation states. However, it is submitted that it has become part of binding international law based on ICCPR¹¹³ and ICESCR;¹¹⁴ this is because they took their standards from the principles laid down in the Universal Declaration. Of particular importance in this article,¹¹⁵ however, is whether the protection of cultural rights at the international level constitutes a justifiable reason for violating human rights.

The position at international level is that no international human rights document cites culture as a basis on which protections may be abridged. Rather than protecting culture at the expense of human rights, international documents reveal that culture necessarily must cede to universal standards. Indeed, as the above mandate suggests, cultures are protected so that they may enhance human rights and not lead to their derogation. Such an interpretation finds support in article 1(3) of the United Nations (UN) Charter,¹¹⁶ which seeks to achieve international co-operation in solving international problems of an economic, social, cultural, humanitarian character and in promoting respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

The language of the above provision makes clear two things: Human rights are not dependent on a specific culture, and human rights are to be respected without distinction as to the basic markers that influence different manifestations of cultural life: sex and religion, among others.¹¹⁷

¹¹²Article 27(1) of Universal Declaration of Human Rights 1948

¹¹³Art 27 of ICCPR provides: 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

¹¹⁴ Art 15(1) (a) of ICESCR provides: 'The State Parties to the present Covenant recognize the right of everyone (a) to take part in a cultural life.'

¹¹⁵ Article 27 (1) of ICCPR

¹¹⁶The UN Charter was adopted on 26 June 1945

¹¹⁷ L Mwambene (2010): "Marriage under African customary law in the face of the Bill of Rights and International human rights standards in Malawi" African Human Rights Law Journal

Furthermore, numerous treaties that followed the UN Charter serve as examples of the approach that places the preservation of human rights as a fundamental universal principle, even when human rights protections challenge cultural practices. CEDAW confronts the possibility of misuse of culture as a pretext to violate women's rights in the following way. Article 5 of CEDAW requires state parties to take all appropriate measures to modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women.¹¹⁸

Article 2(f) of CEDAW provides:

State parties ... by all appropriate means and without delay ... undertake:

... (f) To take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

With particular reference to discriminatory customary family practices at the point of contracting a marriage, articles 16(1) (a) and (b) of CEDAW provide:

- 1. "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
- 2. The same right to enter into marriage;*
- 3. The same right freely to choose a spouse and to enter into marriage only with their free and full consent."*

Apart from CEDAW, CRC also deals with discriminatory customary family law practices that affect women, especially young girls. In addition; the Declaration on the Elimination of Violence Against Women of 1994 makes an important statement. Article 4 firmly rejects cultural relativism as it prohibits states from invoking "any custom, tradition or religious consideration

¹¹⁸ L Mwambene 2010 (n 117 above)

to avoid their obligations” in pursuit of a policy of eliminating gender discrimination by all appropriate means and without delay.¹¹⁹

At the regional level, the African Charter on the Rights and Welfare of the Child (African Children’s Charter) deals with discriminatory practices that affect young girls. Furthermore, the regional protection is extended by the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol). The Protocol was promulgated out of the African Union (AU)’s concern that, despite the ratification of the African Charter and other international human rights instruments by member states, women in Africa continue to be victims of discrimination and harmful cultural practices. The Protocol contains provisions relating to the elimination of harmful practices, including the prohibition, through legislative measures backed by sanctions, of all forms of harmful practices that negatively affect the human rights of women and which are contrary to recognised international standards.¹²⁰

To sum up, we see that international human rights standards call for state intervention with regard to cultural practices that violate human rights.¹²¹

According to Treanor’s thesis in concluding:

“The purpose of human rights is above all to protect people – individually or in groups – against the state. But it is also to protect people against other groups, if necessary against their own social group. Individuals are and always will be products and members of their own societies. But the social change in the modern world implies... removal of many individuals from the restrictive social roles of the past. To deny Africans the protection that human rights can provide against both the state and other members of their society, because of fear of the individualism thought to be consequent to the breakdown of the old social order is both to ignore historical and sociological reality and to deny social justice in the modern world.”¹²²

¹¹⁹ L Mwambene 2010 (n 117 above)

¹²⁰ L Mwambene 2010 (n 117 above)

¹²¹ L Mwambene 2010 (n 117 above)

¹²² L Bowan: Contemporary Journal of African Studies (CJAS) vol. 1, no. 2, (2013) 45-64

To this end, it can be strongly argued that the practice of polygamy by Gambian men is a discrimination against women because there is no freedom of equality between men and women as far polygamous marriages are concerned. However, it is noteworthy that in Gambia, a customary law which allowed polygamy is a question of law, not a question of fact. Therefore, the practice of polygamy in the Gambia under customary law is in line with the Constitution of the Gambia, which has recognized customary law as a binding law to the community it is concerned even though international laws or treaties implying considered the practice of polygamy as a discriminatory against women.

4 Women’s Act of the Republic of the Gambia 2010

In 2010 the Women’s Act was passed to specifically set an instrument that would respond to the obligations of the Gambia concerning women’s human rights.¹²³ This Act, while rather short, incorporates a number of provisions of international treaties to which The Gambia is a party, particularly the International Convention on the Elimination of All Forms of Discrimination Against Women. The Women’s Act first sets forth the protection of basic human rights, including the right to dignity; the right to life, integrity, and security; protection against violence; equal access to justice; freedom of expression; prohibition of discrimination; and the right to movable and immovable property, amongst others.¹²⁴

In addition to these general human rights, the Women’s Act also sets forth specific rights of women, pertaining to the following topics: (i) employment;¹²⁵ (ii) education;¹²⁶ (iii) health;¹²⁷ (iv) rural women;¹²⁸ and (v) marriage and the family.¹²⁹ The Act then establishes a National Women’s Council to oversee the protection of women throughout the country and to assure

¹²³ Women’s Act of the Gambia 2010 (<http://www.genderindex.org/sites/default/files/datasheets/GM.pdf> accessed 11 July 2016)

¹²⁴ The Republic of The Gambia, Women’s Act, July 2010
<http://www.genderindex.org/sites/default/files/datasheets/GM.pdf> accessed 11 July 2016)

¹²⁵ Cit at Part V

¹²⁶ Cit at Part VI

¹²⁷ Cit Part VII

¹²⁸ Cit at Part VIII

¹²⁹ Cit at Part IX

that efforts are being made on the part of Government to assure that the rights provided elsewhere in the Act are being enforced and upheld.¹³⁰

However, the Women's Act mentioned marriage and the family but did not specifically mention the types of marriages that should be entertaining as far as the right to equality is concerned between men and women. The Act calls on political parties, the government and the private sector to enact measures to ensure gender equality in education, employment, and health. The Act does not, however, regulate family matters for the Muslims population, and thus issues of marriage, widow inheritance, polygamy, divorce, child custody and women's right to inheritance remain subject to customary and Sha'ria laws.¹³¹

To this end, Since the Women's Act is silence about the polygamous marriage it can be concluded that there is no violation or discrimination against women as far as polygamy is concerned in The Gambia.

5 Conclusion

To conclude chapter two, the Gambia and most of countries in Africa, the practice of polygamy is socially and religiously accepted. The Gambia is an Islamic country and that the majority of its citizens are practicing Muslims. According to Quranic laws, a Muslim man may have up to four wives, provided that he can support them. This is because, under Islamic law, adultery is a very serious offense and may be severely punished in order to avoid that punishment, a Muslim man is permitted to have up to four wives.

In Gambian society, men and women have distinct, well-defined roles that they are expected to fulfill. Men are primarily responsible for providing the major economic support for their families, while women are required to take care of the many domestic duties, including cooking, cleaning and child care. Thus, men are expected to provide money for their family's financial needs because they are the backbone of the family financially.

¹³⁰ Cit at Part XII

¹³¹ S,35

To this end, since many Gambians are Muslims, the state of Gambia enshrined the Islamic laws into the 1997 Constitution, which guaranteed the principles of Islamic teaching. The Constitution clearly stated in section 33(5) reads: “With respect to adoption, marriage, divorce, and burial, devolution of property on death or matters of personal law.” Women in the Gambia cannot be discriminated regarding marriage, inheritance, divorce, adoption based on section 33(5) of the 1997 Constitution of the Gambia.

The Women Act of the Gambia, National Women’s Council and Bureau and the National Policy for the Advancement of Gambian Women- these laws are enacted to reduce inequality between men and women in the Gambia, especially in politics, education and employment opportunities. However, these laws have nothing to do with family issues in the Gambia. For instance, types of marriage that should be practice in the Gambia. This is because the 1997 Constitution which is Supreme law in the Gambia has recognized polygamy as socially and legally binding on the Muslims.

Despite the Constitution did not prohibit the polygamy, the practice appears to be at odds with the growing civil rights movements, particularly feminism and women’s rights, around the world.

Chapter three

Existing international instruments protecting discrimination against women in the Gambia

Introduction

All human rights are universal, indivisible and interdependent and interrelated.¹³² The Gambia must, therefore, treat all human rights in a fair and equal manner especially provisions dealing with equality between men and women mentioned in the most international treaty. Although the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The 1948 Universal Declaration of Human Rights makes no distinction sets of rights, nor does it establish any implicit hierarchy of rights between men and women. The treaties that followed, however, did differentiate some categories of rights but not rights dealing with equality between men and women. ICCP and ESCR, two Covenants do share some common provisions (namely, with regard to self-determination, non-discrimination, and gender equality, as reflected in article 1, 2, and 3).

Yet in practice a significant divide remains between grand categories of human rights: non-discrimination and the gender equality as reflected in international Convention on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and Convention on the Elimination of All Forms Discrimination Against Women (CEDAW), African Charter on Human and Peoples' Rights and the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Therefore, since all human rights are universal, indivisible, interdependent and interrelated, the state of the Gambia must protect all human rights on the same footing, and with the same emphasis.

¹³² The Vienna Declaration

1 Universal Declaration of Human Rights (1948)

Universal Declaration of Human Rights, 1948(UDHR), as a declaration, the Universal Declaration is a non-binding instrument that merely States aspirations of nation states. However, it is submitted that it has become part of the binding international law on States. The reason can be advanced to substantiate this point standard laid down in the Universal Declaration were re-enacted into two Conventions that are binding on states. Secondly, Chapter 17 of 1997 Constitution of the Gambia recognizes UDHR. For example, a right to life, a right to personal liberty, protection from slavery and forced labour, right to marry, rights of women, right to education, right to health and the protection from discrimination. The fundamental human rights and freedoms enshrined in Rights and this Chapter shall be respected and upheld by all organs of Freedom the Executive and its agencies, the Legislature and, where applicable to them, by all natural and legal persons in The Gambia, and shall be enforceable by the Courts in accordance with this Constitution.¹³³

In addition, as far as Universal Declaration is concerned, article 16 did not specifically tell the types of marriage one should practice, therefore, any type of marriage is fit in article 16 whether monogamy or polygamy. Meaning, you are free to marry whomever you wish to marry. This is because article 16 is saying marriage is a free consent with full age. So polygamous marriages practice in the Gambia is in line with the purpose and object of Universal Declaration based on article 16 scope and definition if said polygamous marriage was conducted on the free will of the parties.

To this end, the practice of polygamy by most Gambian men did not violate the Universal Declaration, although polygamy undermines the self-worth of women in the Gambia. The fact that polygamy defies all the basic tenets, the Convention of CEDAW stands for. But Universal Declaration does not expressly prohibit polygamy so to speak. Although all of the Core human rights treaties reflect the general principle adopted by the UDHR that the rights set out in the treaties should be enjoyed without distinction of any kind.

2 African Charter on Human and Peoples' Rights (African Charter)

¹³³ S,17(1)

Most African cultures see the family unit as basic the block of society and far from seeking its obligation, African philosophy aims at preserving and strengthening it. The African Charter on Human and People's Rights provide in article 18 that:¹³⁴

- (1) *"The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.*
- (2) *The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community."*¹³⁵

The significant of article 18 in a document which is intended to lay the foundations for a future human rights system for African lies in the fact that it confirms the role of the family as the unit which is seen as a central feature in African's future. Therefore, African unit may be a polygamous family (consisting of two or more nuclear families affiliated by plural marriages-i.e, by having one married parent in common) or an extended family (consisting of two or more nuclear families affiliated through an extensive of the parent-child relationship rather than of the husband-wife relationship-i.e, by joining the nuclear family of married adult to that of his parents).¹³⁶

The striking feature of the Charter is it features to mention marriage specifically. Article 16 of Universal Declaration of Human Rights stipulates that:

*"Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family. It goes on to recognize that they are entitled to the equal right as to marriage, during the marriage and its dissolution and it makes the full and free consent of the intending spouses a condition of marriage."*¹³⁷

¹³⁴ R T Hnhlapo (1989) International Journal of Law and the Family 3, available on [thishttp://nhlapo.com/data/uploads/publications/international-protection-of-human-rights-and-the-family-african-variations-on-a-common-theme.pdf](http://nhlapo.com/data/uploads/publications/international-protection-of-human-rights-and-the-family-african-variations-on-a-common-theme.pdf) (accessed on September 26 2016)

¹³⁵ R T Hnhlapo 1989 (n 134 above)

¹³⁶ R T Hnhlapo 1989 (n 134 above)

¹³⁷ Article 16 of Universal Declaration of Human Rights

Article 23 of the ICCPR and article 10 of ICESCR grants substantially the same rights as the Universal Declaration of Human Rights.¹³⁸

It is not immediately apparent why the African Charter avoids all reference to marriage. One can surmise that in the interest of obtaining the widest possible acceptance of the document, the drafters decided to leave the issues of marriage law to domestic legislation within each state.¹³⁹ Meaning state in Africa has the power or authority to introduce types of the family system they want in their countries without any hindering from African Charter. So been the case, the practice of polygamy in the Gambia is in line with purpose and object of African Charter.

The cultural differences between African and Western societies are no less important. They have serious implication for human rights even though these implications may be less obvious than the dangers posed by European ideology. Although there may be danger in generalisations, it is beyond dispute that one of the most outstanding features common to all African traditional system is what may be termed the community principle. There are some indeed some striking similarities between African culture and early Greek and Chinese culture. Discussing the latter two, Kamenka observes:

“Men in pre-modern societies...saw man as part of a social organism, a structured community based on a common religious tradition, a hierarchy of power, a network of mutual obligations that made and shaped men, rather than serve them. In traditional African society, too, the individual was not independent or possessed of rights above and prior to society. His place in society was set by a defined role or status in a greater whole, be it family, clan tribe or community. Emphasis was on duties rather than rights, mutual obligations rather than individual advancement.”¹⁴⁰

It is not difficult to see how the community principle in Africa can be manipulated to justify departures from basic Western-oriented human rights doctrine. This is usually done by

¹³⁸ R T Hnhlapo 1989 (n 134 above)

¹³⁹ R T Hnhlapo 1989 (n 134 above)

¹⁴⁰ R T Hnhlapo 1989 (n 134 above)

launching an attack on the individualism implicit in Western human rights thought (characterized as ‘un-African’) coupled with an insistence that ‘our way’ has always been one in which the community comes first.¹⁴¹

Apart from the community principle, African culture differs in other significant ways from Western culture. African leaders are not slow to point out that confrontation, questioning of authority, disobedience to the elders, equality for women, competitiveness and so on, are all ‘foreign’ to African culture. The threat to human rights under such arguments is obvious.¹⁴²

On the closer examination, of course, it is clear that the justifications cannot be sustained. It is true that the UN-sponsored human rights movement is the product of a particular history and philosophy. It is even true that African differs from the West in its history, its political and economic needs and its culture. But all that cannot justify the allegation that human rights have no place in Africa.¹⁴³

First, there is no doubt that traditional African society recognised human-rights norms of many types, some of which coincide squarely with modern ones. One hesitates to draw a list of corresponding rights for fear of confusing the issue because modern terminology may not exactly reflect the norm or the practice as it was known in traditional society. There may be a tendency to try and force a traditional practice into the mould of a modern right as defined in the international documents, which is not only self-defeating but also quite unnecessary. The traditional human rights thinking was as much part of the culture as anything else and served the particular needs of a society at a particular stage of development, and for this reason, a particular norm may have no counterpart in modern terminology, but not necessarily to its disadvantage. For instance, the right to life appears to have been much wider in traditional culture: it included not only a prohibition against killing but also the obligation to assist in providing means of subsistence to needy members of the community. Even the “community versus individual” dichotomy was not nearly as polarised as some present-day leaders claim. Adegbite analyses the situation correctly when he says,

¹⁴¹ R T Hnhlapo 1989 (n 134 above)

¹⁴² R T Hnhlapo 1989 (n 134 above)

¹⁴³ R T Hnhlapo 1989 (n 134 above)

“The problem posed for individual freedoms in traditional Africa was, therefore...to ensure that the community principle was not so applied as to stifle initiative (i.e, affording security without freedom).” This theme was echoed by the Butare Colloquium which concluded: “Traditional society offered a balance between individual and collective rights that perhaps tilted toward the latter...it is essential to maintain a balance rather than to merely expand one set of rights at the expense of other.”¹⁴⁴

The second reason why human rights abuses cannot be justified on the ground of African’s special problems is simply that the trade-off between development and human rights is unwarranted. For one thing, many human rights violations have nothing to do with the economy, or any attempts to save money. There are inspired by the attempts of the ruling group to stay in power at all costs. Clearly, a certain level of development is a pre-requisite for guaranteeing people full employment, legal aid or social welfare. But just as clearly, many human rights which could be guaranteed simply by restraining the government from interfering or by passing legislation to prevent certain acts from occurring require no particular wealth for their implementation. Perhaps even more important is the fact that there is no evidence all to suggest that repression aids development. The claim that autocracies are necessarily more stable than democracies is very dubious.¹⁴⁵

At any rate, the argument that the standard sought to be applied to Africa was a foreign one has finally had the ground cut from under it, with the adoption of the Africa Charter on Human and Peoples’ Rights in 1981. The Charter is an attempt to provide the necessary re-thinking on human rights in an African context and it is to be hoped that, henceforth, attention will be focused not on the alien origins of the human rights systems proposed for Africa in the past but on the question of how well (or how badly) the “homegrown” system solves the problem.¹⁴⁶

In African, the topic of women’s rights is not a popular one. The idea of sex equalities is of comparatively recent origin even in advanced societies and nowhere has it been fully accomplished yet. The necessary link between family law and women’s concerns in the African

¹⁴⁴ R T Hnhlapo 1989 (n 134 above)

¹⁴⁵ R T Hnhlapo 1989 (n 134 above)

¹⁴⁶ R T Hnhlapo 1989 (n 134 above)

situation is well summed up by Adegbite when he observes: “Most of the sex inequalities in traditional society stemmed from the African conception of marriage.” From marriage law flowed not only controversial practices such child-betrothal and “bride-price” but also important status changes with direct bearing on a woman’s personal autonomy, rights to property, rights to her own children, freedom of decision-making in various areas, and sometimes even her own personal dignity. It is beyond the scope of this mini-dissertation to discuss child betrothal.¹⁴⁷

Madhuku cited *Mujawo v Chogugudza*, “in which a widow who had contracted a customary marriage with her deceased husband was denied any interest in his estate, the court favouring the second wife who married the deceased under the civil law. According to Madhuku, once a woman is validly married according to the customary law, which the legal system allows, it is to be unacceptable technically and elitist to describe such a woman as a “mistress.” There can be no justification for preferring one married according to civil rites other than the assertion that she has taken the trouble to register her marriage.”¹⁴⁸

Many people see the practice of polygamy in the Gambia is not repugnant to equity, natural justice, and human rights; because many believe that polygamy is not a human right issue but a social issue. This is because prohibiting polygamy may appear to interfere with the freedom to practice one’s culture or religion; such a ban would fall within over-established limitations on cultures or religious freedom as enshrined in the most international agreement such as African Charter, International Covenant on Economic, Social and Cultural Rights. Restrictions on freedom of religion are echoed by several human rights treaties.

In *Reyonds v the United States*, “the US Supreme Court rejected a challenge to a bigamy conviction predicated on a religious freedom claim.”¹⁴⁹

Polygamy makes it possible in the Gambia for a woman even widow, to find a husband. And since in society like Gambia with an underdeveloped technology and economy, running the

¹⁴⁷R T Hnhlapo 1989 (n 134 above)

¹⁴⁸Dr R G Rhys “Polygamy and the Rights of Women” [ft:www.austlii.edu.au/av/journals/murUEJL/2005/z.htm/](http://www.austlii.edu.au/av/journals/murUEJL/2005/z.htm/)

¹⁴⁹Dr R G Rhys “Polygamy and the Rights of Women” [ft:www.austlii.edu.au/av/journals/murUEJL/2005/z.htm/](http://www.austlii.edu.au/av/journals/murUEJL/2005/z.htm/)

home is a full-time occupation, women do not have the opportunity to take part in public life or leisure pursuits. The educated women in the Gambia, if she chooses not to marry as the second wife, can devote her life to teaching, research, administration, charity or whatever else takes her fancy in the Gambia because nobody can force her to be involved in polygamy lifestyle.

To this end, although article 18(3) of African Charter provides:

*“The State shall ensure the elimination of all discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.”*¹⁵⁰

However, since the Charter is silent about the issue of marriage, it can be strongly argued that practice of polygamy in the Gambia is fair discrimination since most of the women now entering polygamous marriage voluntarily due to the high percentage of unmarried women who are desperately in need of a man as their husband. Adegboté notes that in the polygamous household each wife had greater freedom to go out about her business without persistent demands for attention from her husband.¹⁵¹ Based on the family unit and values, polygamy remains lawful in the Gambia, families that engage in this practice often do so openly and conspicuously because the 1997 Constitution of the Gambia and the Africa Charter did not prohibit it respectively.

3 Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)

Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa hereafter referred to as Maputo Protocol, was adopted to supplement the African Charter in the protection of women’s rights. The genesis of the idea to come up with the Maputo Protocol can be traced to a meeting organised by Women in Law and Development in Africa (WiLDAF) in March, 1995, in Lomé, Togo, which called for the development of a specific protocol to the African Charter on Human and Peoples’ Rights on the rights of women. The assemblies of the

¹⁵⁰Article 18(3) of African Charter on the Human and Peoples’ Rights

¹⁵¹Dr R G Rhys “Polygamy and the Rights of Women” [ft:www.austlii.edu.au/au/journals/murUEJL/2005/z.htm/](http://www.austlii.edu.au/au/journals/murUEJL/2005/z.htm/)

Organisation of African Union mandates the African Commission on Human and Peoples Rights (ACHPR) to come up with such a Protocol of its 31st Ordinary Session in Winter of 1995, in Addis Ababa, Ethiopia. The Protocol was officially adopted by the session summit of the African Union, on July 11, 2003, almost 10 years after protracted negotiations amongst stakeholders.¹⁵²

Whilst this protocol has been vaunted as a watermark breakthrough for African women, some of the provisions of this protocol are at best equivocal and contradictory and at worst confusing. But this dissertation will not focus on all provisions of the Protocol but will rather be based solely on article 6(c) of the protocol, analysing its content, interpretation, and challenges for implementation.¹⁵³

Article 6(c) of the protocol states that:

“States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that.....monogamy is encouraged as the preferred form of marriage and that family, including in polygamous marital relationships are promoted and protected.”¹⁵⁴

The wording of article 6(c) is problematic because it lacks clarity as to whether the Protocol rejects or condones the practice of polygamy. On the face of it, article 6(c) seeks to ensure equality between men and women. This is without a doubt a positive development that is long overdue and highly welcome, particularly in Africa where for ages women’s rights were subordinated to men’s interests. It must be pointed out that cultural practice such as marriages and polygamy account to a considerable measure of gender inequalities, stereotypes, and prejudices.¹⁵⁵

This provision is also in stark contrast to article 8(f) sitting in the same Protocol, which enjoins states to “reform existing discriminatory laws and practices in order to promote and protect the

¹⁵² O Jonas : “The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa”-A Critical Appraisal (http://www.academicjournals.org/article/article1380034821_Obonye.pdf accessed 7 August 2016)

¹⁵³ O Jonas (152 above)

¹⁵⁴ Article 6(c) of Maputo Protocol

¹⁵⁵ O Jonas (n 152 above)

rights of women.”¹⁵⁶ It is, therefore, surprising that instead of enjoining states to legislate against polygamy in a clear and unequivocal language; the Protocol only states that “monogamy is encouraged as the preferred form of marriage.”¹⁵⁷ It is submitted that polygamy militates against gender equality (which the protocol seeks to guarantee) and must be prohibited in the strongest anatomy of words.¹⁵⁸

Article 6(c) is anti-thetical to the postulates of the entire normative scheme of the African Women’s Protocol, especially its equality and non-discrimination tenets.¹⁵⁹

3.1 Challenges in implementing article 6(c)

It is apparent that the African Union (AU) called not has acknowledged a document that abolishes polygamy, given that African is home to large populations that belong to cultures, traditions, and religions that permit polygamy and further that in many parts of Africa polygamy is embraced by customary and Islamic laws. It is further submitted that customary and religion shall continue to be major impediments to the implementation of article 6(c) of the Protocol since customary law and religion continue to be central to the lives of African people.¹⁶⁰

To this end, extensive lobbying will be required from interest groups in the Gambia to sensitise the populace of Gambians to cause them shift from polygamy to embracing monogamy. In addition, there is no political will on the part of Gambia government to commit themselves to the elimination of polygamy in Gambia society so soon. This lack of political will can be explained not on the side of the Gambia government alone, but also there is no political will on the part African leaders to commit themselves to the elimination of polygamy. This is explained partly by the fact some AU heads of State are themselves polygamous or they encourage it. For instance, the African Certified Polygamist King Mswati III is married many wives, South African President Jacob Zuma is married to more than three wives, to mention but a few examples. In Sudan, the president of that country, Omar Hassan Al-Bashir has encouraged polygamy to

¹⁵⁶ Article 8 (f) of Maputo Protocol

¹⁵⁷ Article 6(c) of Maputo Protocol

¹⁵⁸ O Jonas (n 152 above)

¹⁵⁹ O Jonas (n 152 above)

¹⁶⁰ O Jonas (152 above)

increase the population of that country.¹⁶¹ Kenya's President Uhuru Kenyatta has signed into law a controversial marriage bill legalizing polygamy in Kenya. This brings civil law, where a man was only allowed one wife, into line with the customary law, where some cultures allow multiple partners. The women's in Kenya argued that a decision to take another wife would affect the whole family including the financial position of other spouses. Christian leaders also urged the president not sign it into law, signing it undermined Christian principles of marriage and family.¹⁶²

In the light of the foregoing, it is well-nigh impossible to conceive how any African head of state could openly rubbish polygamy in AU Summits without coming in direct confrontation with his pro-polygamy colleagues who either polygamist themselves or are just in support of it.¹⁶³

However, the Maputo Protocol is treaty containing provisions protecting women against all forms discrimination. The state of the Gambia has an obligation to combat and eliminate all forms of discrimination against women; discrimination against women has been defined in article 1 of the Maputo Protocol to mean any distinction, exclusion or restriction or differential treatment based on sex and whose objectives or effect, compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status or human rights and fundamental freedoms in all sphere of life.¹⁶⁴

4 Convention on the Elimination of All Forms Discrimination Against Women

Convention on the Elimination of All Forms Discrimination Against Women hereafter CEDAW builds on the gender equality principle of the Universal Declaration,¹⁶⁵ the ICCPR, and the ICESCR. CEDAW Article 1 defines "discrimination against women" to mean:

"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,

¹⁶¹ O Jonas (152 above)

¹⁶² How Kenyans are reacting to legalized polygamy <http://www.bbc.com/news/world-africa-27939037> (accessed on 6 February 2017)

¹⁶³ O Jonas (152 above)

¹⁶⁴ Article 1(f) of The Maputo Protocol

¹⁶⁵ Universal Declaration Article 2

*irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field”.*¹⁶⁶

Under CEDAW article 2, nations agree to pursue a policy of eliminating discrimination against women “by all appropriate means and without delay.” This obligation is spelled out in a series of more specific commitments, such as making constitutional changes and adopting legislation to prohibit discrimination, as well as acting “to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”¹⁶⁷ Similarly, article 5 (a) requires participating states to take steps to modify “the social and cultural patterns of conduct of men and women” in order to eliminate “prejudices and customary and all other practices”¹⁶⁸ based on the idea that either sex is superior or inferior or on stereotyped roles for men and women. Focusing on family law, article 16(1) requires states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and lists eight particular areas where equality should be ensured.¹⁶⁹

These provisions extend the coverage of Women’s Act of the Gambia 2010 into the realm of marriage and family law, where the legal system of the Gambia still distinguish the rights and responsibility of women and men even though Gambia has ratified CEDAW and the Maputo Protocol with accepting the principles of gender equality between men and women. However, it can be strongly argued that the 1997 Constitution,¹⁷⁰ which is the supreme law, is incompatible with the object and purpose of the Convention of the CEDAW. This is because 1997 Constitution has recognized Islamic and Sha’ria laws, which are obstacles to the realization of women’s human rights guaranteed by the same Constitution that empowers Islamic and customary laws.

¹⁶⁶ CEDAW, article 1

¹⁶⁷ CEDAW article 2(f)

¹⁶⁸ CEDAW article 5(a)

¹⁶⁹ CEDAW article 16 (1) These are the rights to enter into marriage; the right to choose a spouse and inter into marriage with free and full consent; rights and responsibilities during marriage and at its dissolution etc, available at <http://www.un.org/documents/ga/docts/49/plenary/a49-38.htm> (affirming in marriage and family relations)

¹⁷⁰ S,4

The CEDAW Committee's General Recommendation 29 reaffirms the goal of abolishing polygamy and makes clear that, "with regard to women in exercising polygamous marriages, States parties should take the necessary measures to ensure the protection of their economic rights,"¹⁷¹ while prohibiting polygamous marriages is important to promote women's rights guaranteed in CEDAW and the Maputo Protocol. The practice of polygamy undermines the self-worth of women. It defies all the basic tenets that the Convention stands for. Although human rights instruments do not expressly prohibit polygamy, the CEDAW Committee has urged states to talk legislative measures to enforce the prohibition of polygamy within their territories.¹⁷² Sifting through the Concluding Comments of the Committee, it becomes clear that a series of practices like polygamy and widowhood rites have been considered to constitute a violation of article 12 of CEDAW, which guarantees the right to health in that they increase chances of spreading HIV and other venereal diseases.¹⁷³

Cook (2007) shares this view too. In its general recommendation no. 24 on women and health, CEDAW noted that:

*"... [a]dolescent girls and women in many countries lack adequate access to information and services necessary to ensure sexual health. As a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as.....polygamy.....may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases."*¹⁷⁴

Thus, the United Nations General Assembly's (2001) declaration of commitment on HIV and AIDS included a goal to ensure by 2005 the:

"Implementation of national strategies for women's empowerment, the promotion of women's full enjoyment of all human rights and reduction of their vulnerability to HIV/AIDS through the elimination of all forms of discrimination, as well as all forms of violence against

¹⁷¹ The CEDAW Committee's General Recommendation no 29

¹⁷² General Recommendation 24

¹⁷³ General Recommendation 24

¹⁷⁴ General Recommendation 24

women and girls, including harmful traditional and customary practices [such as polygamy].”¹⁷⁵

CEDAW noted in its general recommendation no.21 on equality in marriage and family relations 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. The Committee notes with concern that some States Parties, whose Constitution guarantee equal rights permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provision of article 5(a) of the Convention.”¹⁷⁶

In line with the above sentiments, “the Allahabad High Court (India) has observed in *Itwari v Asghari* (1960: para 15) that: The importing of a second wife into the household ordinarily means a stinging insult to the first..... [Who is].....automatically degraded by society. All this is likely to prey upon her mind and health if she is compelled to live with her husband under the altered circumstances.”¹⁷⁷

While the general is important to know that recommendations of CEDAW do not constitute binding law, they are considered influential and persuasive interpretation. In addition, the UN Commission on the Status of Women, which first met in 1947, agreed to work for: freedom of choice, the dignity of the wife, monogamy, and equal rights to the dissolution of marriage. The preamble of the women’s Convention expresses a deep-seated conviction that: a change in the traditional role of men, as....family, is imperative to realize full equality between sexes.¹⁷⁸

¹⁷⁵ United Nations Declaration of Commitment on HIV /AIDS, 2001

¹⁷⁶ General Recommendation 21, para 41

¹⁷⁷ CEDAW article 16 (1) These are the rights to enter into marriage; the right to choose a spouse and inter into marriage with free and full consent; rights and responsibilities during marriage and at its dissolution etc, available at <http://www.un.org/documents/ga/docts/49/plenary/a49-38.htm> (affirming in marriage and family relations)

¹⁷⁸ CEDAW article 16 (1) These are the rights to enter into marriage; the right to choose a spouse and inter into marriage with free and full consent; rights and responsibilities during marriage and at its dissolution etc, available at <http://www.un.org/documents/ga/docts/49/plenary/a49-38.htm> (affirming in marriage and family relations)

In its concluding observation on Kenya in 2002, the Human Rights Committee (HRC) observed that the persistence of polygamy is “an affront to the dignity of the human person and discriminatory under the Covenant.”¹⁷⁹ In its general comment no. 28 on the Equality of Right between Men and Women, the HRC noted that “because polygamy violates the dignity of women” and is “an inadmissible discrimination against women.....it should be definitely abolished wherever it continues to exist.”¹⁸⁰ Further, polygamy can be used as a tool by man to whip woman into toeing their line by threatening their wives that they will marry another wife. In this context, polygamy can be used to control and limit women’s ability to assert their rights within marriage.¹⁸¹ Thus, it is clear that polygamy constitutes a veritable assault on the intrinsic self-worth of women.¹⁸²

In its General Recommendation no.25 on temporary special measures, CEDAW noted that the Women’s Convention aims to “eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms.”¹⁸³ Article 16 of CEDAW on equality within marriage and family relations enjoins States Parties to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations” in order to ensure “a basis of equality of men and women.”¹⁸⁴

In doing so, CEDAW not only articulates a commitment to women’s rights within the family but also expresses a transformative sense of equality by outlining the reciprocal marital responsibilities men and women should share.¹⁸⁵ The lapidary language of the Declaration on

¹⁷⁹Kenya UN HRCOR, UN Doc CCPR/CO/75/YEM, 2002 para 9

¹⁸⁰ General Comment no.28, 2002 para 24

¹⁸¹CEDAW article 16 (1) These are the rights to enter into marriage; the right to choose a spouse and inter into marriage with free and full consent; rights and responsibilities during marriage and at its dissolution etc, available at <http://www.un.org/documents/ga/docts/49/plenary/a49-38.htm> (affirming in marriage and family relations)

¹⁸² CEDAW article 16 (1) These are the rights to enter into marriage; the right to choose a spouse and inter into marriage with free and full consent; rights and responsibilities during marriage and at its dissolution etc, available at <http://www.un.org/documents/ga/docts/49/plenary/a49-38.htm> (affirming in marriage and family relations)

¹⁸³ CEDAW Committee General Recommendation 25, 2004, para 1

¹⁸⁴ Article (16)of CEDAW

¹⁸⁵ General Recommendation 25

the Elimination of Discrimination against Women (proclaimed at the General Assembly, 1967) is noteworthy. It states:

“Discrimination against women, denying or limiting as it does their equality of rights with men is fundamentally unjust and constitutes an offense against human dignity.”¹⁸⁶

To this end, although CEDAW Convention did not expressly prohibit the practice of polygamy it can be strongly argued that the practice of polygamy by Gambian men is discriminatory against women since women did not have the equal opportunity as men do in the Gambia as far as polygamous marriage is concerned.

5 International Convention on Civil and Political Rights

The right to equality has been integral to the evolution of International Convention on Civil and Political Rights hereafter ICCPR. Initially, international human rights law instruments cast gender equality in the negative by declaring sex a prohibited ground of discrimination. ICCPR adopted this approach of deeming sex as a ground for non-discrimination. Article 23(4) of the ICCPR, requires States parties to “take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during the marriage and as its dissolution.”¹⁸⁷ The term “ensure” is typically interpreted within the treaty context as imposing a positive duty on State parties to achieve stated goal.

The prohibition of discrimination on the ground of sex is, arguably, intended to protect women. By including sex as a ground on which discrimination is not allowed, section 33(4) of the Gambian Constitution leave no doubt that no discrimination based on sex will be tolerated. Moreover, article 3 of ICCPR to which Gambia is a party proscribe discrimination on the basis of sex.

¹⁸⁶ Declaration on the Elimination of Discrimination against Women (proclaimed at the General Assembly, 1967)

¹⁸⁷Article 23(4) of ICCPR

Having said that, it is important to note that, however, that the obligations to ensure that women and men benefit equally from rights and that the rights are exercised without discrimination have an immediate effect. Article 4 of both ICESCR and ICCPR states that:

“The rights in the Covenants may be limited in so far as this is compatible with the nature of the rights and for the purpose of promoting the general welfare in a democratic society.”¹⁸⁸

These articles place constraints on the state extent to which existing rights can be removed by a State party. Thus equality in marriage is referred to specifically in the ICCPR article 23, women’s right has been limited based on customary and the Sha’ria law respectively in the Gambia.

However, the practice of polygamy in the Gambia violates article 3 of the ICCPR,¹⁸⁹ guaranteeing equal rights for women and men, violates a women’s right to equality in marriage, and has severe financial effects on her and children. This is because; men are permitted to marry more than one woman, while a similar rule does not apply to women. This is a clear violation of ICCPR stands for in terms of equality between men and women.

6 International Covenant on Economic, Social and Cultural Rights

With the coming of HIV/AIDS, polygamy puts women’s right to health in jeopardy. Under the article 12 of CESCR, state parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Given the attendant problems associated with polygamy, including compromised rights to sex and to a relationship generally, women are denied their rights in light of the presence of HIV/AIDS in the Gambia, polygamy also affects women’s right to life. This position is supported by Malawi Law Commission’s findings: “Polygamy helps in the spread of HIV /AIDS as wives who may feel lonely and neglected may turn to other men for the satisfaction of their needs. The implication of

¹⁸⁸ Article 4 of ICESCR & ICCPR

¹⁸⁹ Article 3 ICCPR

HIV/AIDS infection in a polygamous family was considered quite serious as large numbers of a family may be wiped out by the pandemic.”¹⁹⁰

Furthermore, the practice of polygamy directly conflicts with section 28 (2) of the Gambian Constitution “women shall have the right to equal treatment with men, including equal opportunities in political, economic and social activities.”¹⁹¹ Working within structural constraints imposed by Sha’ria and customary laws, Gambia women have less degree of autonomy as stipulated or enshrined in section 28(2) of the Constitution.

Polygamy forces women to live in poverty by forcing them to shares resources, although polygamy itself is not prohibited practice under socio-economic rights law; it may breach other fundamental rights such as the right to dignity, right to education, right houses, right to equality within the family and the right equal protection under the law.¹⁹²

Section 216(4) of the Gambian Constitution states that:

*“The States shall endeavour to facilitate equal access to clean and safe water, adequate health and medical services, habitable shelter, supplement food and security to all persons.”*¹⁹³

A similar provision was also in article 11 of ICESCR, States recognize “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living standards.”¹⁹⁴

Financial dependence created from a lack of resources can pressure women into entering polygamous marriages. When a man has more than one wife, he can have large numbers of children in a short period of time and, wives and children will compete for small, finite amount

¹⁹⁰ L Mwambene (2010) African Human Rights Law Journal: Marriage under African Customary in the face of Bill of Rights and international human rights standard in Malawi

¹⁹¹S, 28 (2)

¹⁹² CEDAW article 16 (1) These are the rights to enter into marriage; the right to choose a spouse and inter into marriage with free and full consent; rights and responsibilities during marriage and at its dissolution etc, available at <http://www.un.org/documents/ga/docts/49/plenary/a49-38.htm> (affirming in marriage and family relations)

¹⁹³ S, 216(4)

¹⁹⁴Article 11 of ICESCR

of resources available in their household.¹⁹⁵ Most women in the Gambia are under educated and as result of that their economic situations become even worse in a community to support themselves without the help from men. As result of that many women cannot say no to polygamy if the man can provide their need, they hardly say no to become second or third wives.

According to the terms of the socio-economic Covenant, the state or legislator must seek to it that all individuals or groups of individuals can seek justice if their rights are not respected; this is why it is of crucial importance for States to adopt the appropriate legislative measures. Article (2) (1) as well as channels of the legal resource; thus indicating the true legal nature of economic, social and cultural rights. Consequently, the whole national social and legal system must be underpinned by laws that confirm the economic rights of citizens and provide for recourse when they are deprived of them.¹⁹⁶ Gambia has implicitly or explicitly incorporated some of the rights recognized by the socio-economic rights covenant into its domestic law; as a result, they can be invoked in courts in the Gambia when they are claimed by women in polygamous.

To this end, if the government of the Gambia is encouraging polygamy, they should be ready to support women and their children in the polygamous family, economic, social and cultural rights are real rights. They are not vague ideas or goals whose realization can be delayed or deferred. They are rights that are due in full and whose immediate enforcement or progressive realization constitutes an imperative obligation for Gambia.

6.1 Women in Polygamy: Social Experience

Polygamy is neither entirely “good” nor is it entirely “bad” for women in the Gambia. The social implications of plural marriage are far more intricate than this. On some levels, the social structure of a polygamous family (namely the existence of two or more wives sharing a

¹⁹⁵CEDAW article 16 (1) These are the rights to enter into marriage; the right to choose a spouse and inter into marriage with free and full consent; rights and responsibilities during marriage and at its dissolution etc, available at <http://www.un.org/documents/ga/docts/49/plenary/a49-38.htm> (affirming in marriage and family relations)

¹⁹⁶ CEDAW article 16 (1) These are the rights to enter into marriage; the right to choose a spouse and inter into marriage with free and full consent; rights and responsibilities during marriage and at its dissolution etc, available at <http://www.un.org/documents/ga/docts/49/plenary/a49-38.htm> (affirming in marriage and family relations)

husband and possibly the same household) might forge a sense of support and even “sisterhood” among the wives. At the same time, polygamous women, although possibly collaborative on occasion, are likely to compete with one another in different circumstances. For example, cooking, treating a husband, sex and so on. They might also sense the social strain of subordination vis-à-vis their husbands, given that while women must share one spouse, husbands may have several wives. Jealousy between co-wives can escalate to intolerable levels, resulting in physical injuries sustained by women. Polygamous families in the Gambia often cannot afford multiple residences for each of a husband’s wives and her children. As a result, a polygamous family often lives together in full and overcrowded conditions, creating an environment that aggravates stress and conflict between co-wives and their children.¹⁹⁷

Researchers considering Gambian polygamous communities have also observed that women benefit from the female companionship and friendship that polygamy affords, as well as the sharing of child rearing and household responsibilities. While women might initially feel uncomfortable and envious when a new woman enters the household, these sentiments usually fade as the family and community work to ensure harmonious relationships among the women and the equal treatment of the wives. Women thus often encourage their husbands to marry additional wives especially when they are infertile and their husbands are desperately in need of children.

To this end, many types of research has shown polygamous families to have many of their own distinctive problems often, these problems arise from situational factors specific to polygamous household, such as a higher number of siblings, a higher number of parental figures, the absence of a father or an authoritative father, jealousy and competition of family members over resources and emotional relations with one father and economic resources taxed to the limit due to the higher number of dependants.

6.2 Women in Polygamous: Economic experiences

¹⁹⁷ A Campbell (2005) Polygamy in Canada: Legal and Social Implications for Women and Children- A collection of Policy Research Reports <http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf> accessed August 2016)

It is difficult to predict the economic impacts that might arise from polygamous family life. On one hand, we might assume that because polygamy requires one husband to provide for a plurality of wives and a potentially large number of children, resources within the family would be relatively scarce for each family member. Moreover, if wives in a plural marriage are more likely to be restricted to working in the unpaid domestic sphere, they would have limited sources of independent income. And, even if these women were to seek gainful employment, their earning potential might be limited if they were married and had children at a very young age, and this precluded the ability to pursue their education beyond that point.¹⁹⁸

On the other hand, we might also expect some women in polygamy to thrive economically. For example, we might assume that for a man to marry several wives, he would have to be financially able to afford to support each of them. Thus, if married to a wealthy husband, a wife might lead a life of relative affluence, even if her husband's income was shared with other women. Additionally, a polygamous family structure might foster, rather than prevent, women from pursuing educational and employment opportunities. The fact that other wives might be available to support a woman by assisting with child care and domestic responsibilities could theoretically allow her to take on potentially remunerative tasks. Finally, we might expect women married polygamously to benefit from the fact that they live with, or close to, other female family members with whom they could collaborate in their labour, thereby allowing them all to be more productive.¹⁹⁹

The literature on this issue, when viewed as a whole, indicates that neither hypothesis is entirely accurate or incorrect. A substantial amount of research suggests that polygamy deprives women of economic resources, and of the ability to earn income independently of their husband. For example, a study of polygamous marriages in Ghana indicated that wives in plural marriages were more economically marginalized than their monogamous counterparts.

¹⁹⁸A Campbell 2005(n 197 above)

¹⁹⁹A Campbell 2005(n 197 above)

Polygamous wives were also less likely to be working for themselves, since they most often worked for a family member, usually their husband.²⁰⁰

6.3 Women in Polygamous: Health Experiences

The psychological influences that polygamous life might exert on women have been considered by several researchers. According to Al-Krenawi (2001, 1998: 69):

“Polygamous wives more commonly face family stress and mental health issues than monogamous women.”²⁰¹

The risk of psychiatric illness is particularly acute for first or senior wives in a plural marriage. “In their study of polygamous wives living in Gaza City, Al-Krenawi et al. (2001) noted that senior wives expressed great psychological distress and a sense of mourning or loss when their husbands took second or subsequent wives. More specifically, they experienced feelings of failure and low self-esteem, feelings that were often reinforced by family and community perceptions. Senior wives also experienced other mental health difficulties, such as anxiety and depression, more frequently than junior wives. This research confirms results from an earlier study that examined the experiences of senior wives (Al-Krenawi et al. 1999).”²⁰²

In addition, First wives have a higher risk of depression and a higher number of somatic complaints of aches, insomnia and fatigue, lower self-perceptions. In polygamous households, a wife’s level of life contentment was statistically correlated to her “wife-order”, her satisfaction with her marriage, and her socioeconomic level. Senior wives were significantly less happy and satisfied with their lives than junior wives. This was in large part due to their satisfaction with their marriage and the amount of support received from their husbands, which was minimal compared to those offered to junior wives.²⁰³

However, it would also be a mistake to believe that all polygamous marriages are abusive. These opinions were frequently rationalised by feelings that polygamy creates inequality

²⁰⁰ A Campbell 2005 (n 197 above)

²⁰¹ A Campbell 2005 (n 197 above)

²⁰² A Campbell 2005 (n 197 above)

²⁰³ A Campbell 2005 (n 197 above)

amongst co-wives since the husband cannot care for and cater to the needs of more than one wife and that polygamy gives men unlimited power and authority. Where co-existence amongst the families seems to be prosperous, relationships between co-wives have been found to be especially beneficial to women's economic and political power. While women might initially feel uncomfortable and envious when a new woman enters the household, these sentiments usually fade away to ensure harmonious relationships and the equal treatment of the wives. In a study conducted in the Gambia, a small proportion of women indicated that they would agree to enter into polygamous marriages if given such an option.²⁰⁴ Many women in the Gambia living in polygamy support plural marriage and appear to find happiness and satisfaction within their family structures. Some women even encourage their husbands to marry additional wives when they know that they are aging or unproductive. Certain anecdotes reveal genuine love and companionship among polygamous spouses and within their entire family unit, leaving us to question whether polygamy is intrinsically damaging to the spousal relationship.²⁰⁵

Children, however, can be negatively affected by polygamous marriages. This is because of the rivalry between the co-wives more often than not proving damaging to the children in polygamous families. In addition, the thoughts and beliefs children encounter are controlled, allowing them only to learn polygamist beliefs thus will, therefore, blinding children from the existence of life outside polygamy. Such children tend to believe that the polygamous lifestyle is the only way out and hence they often end up attached to a polygamous lifestyle. Children attached to polygamous lifestyle view polygamy as the only key that can only lead them to the happiness that they aspire to have in life.²⁰⁶

In concluding this chapter regarding the social, economic and health experiences of polygamy, it is hard to draw a single, clear conclusion as to whether life in a polygamous marriage is harmful to women in the Gambia. Whether women suffer or benefit from plural marriage actually seems to be the improper query through which to investigate the consequences of

²⁰⁴ Eric Montgomery "Polygamy in the Gambia" <http://www.smcm.edu/gambia/wp-content/uploads/sites/31/2014/11/98-chapter7.pdf>

²⁰⁵ E Montgomery "Polygamy in the Gambia" <http://www.smcm.edu/gambia/wp-content/uploads/sites/31/2014/11/98-chapter7.pdf>

²⁰⁶ A Campbell 2005 (n 197 above)

polygamy for women, since it is far too general. It implies that women in polygamy share uniform realities, regardless of the communities and cultures in which they live, and regardless of the particular relationships formed within their families. This is in fact not at all the case: an array of factors might give rise to substantial diversity within the experiences of women in polygamy worldwide.

Thus, while some women encounter bitter animosity and rivalry with co-wives, others might enjoy genuine friendship and support from this network of women. While some women might face abject poverty as a plural wife, others might garner economic security and stability. Finally, while some women in polygamy might face a heightened risk of exposure to sexually transmitted disease, others might never have to deal with this concern. In view of this, policy responses to polygamy must be sensitive to the diverse realities that women in polygamy encounter. Of course, caution must be taken in embarking on a culturally sensitive approach to this topic to ensure that such respect for cultural diversity does not compromise equality rights and interests, which should lie at the heart of this analysis.²⁰⁷

7 Conclusion

In conclusion of this chapter, polygamy is a very interesting in the phenomenon Gambia and the Africa at large, not because of its relevance, but because of its possibility. Certainly the license to marry more than one wife has not been prohibited by any international and regional treaties Gambia has signed and ratified.

UDHR (non-binding) declaration clearly stated right to marry in article 16, but did not expressly or specifically mention or described the types of marriage one should practice. So been the case, any form of marriage whether monogamy or polygamy or even polyandry is fit in the meaning of article 16 of UDHR.

The Africa Charter avoids all reference to marriage. Therefore, put state parties to deal with family matters. State parties are free to introduce any form of marriage that would suit their

²⁰⁷ A Campbell 2005 (n 197 above)

respective countries whether polygamy or monogamy. So as the result of that the practice of polygamy is consistency with Africa Charter based on article 18 of African Charter.

The Maputo Protocol preferred the state parties to practice monogamy than polygamy in article 6(c), but however, the Maputo Protocol did not clearly state whether the practice of polygamy should be prohibited or discarded. Therefore, the culture and religion become major impediments to the implementation of article 6(c)

Finally, CEDAW, ICCPR, and ICESCR both recognized marriage between men and women should be conducted through consent with both parties. However, none of these Conventions expressly prohibit the practice of polygamy despite its likely negative effects on the women in the society.

Therefore, since is not clearly establish the practice of polygamy in any of international treaties which Gambia is a contracting party, it can be strongly argued that the practice of polygamy by Gambia men is in line with the treaties mentioned above.

Chapter 4

1 The concept of Patriarchy

The status of African women is dictated by a deeply entrenched tradition of patriarchy. This well-worn term has no precise definition, but it is generally understood to mean the difference due to male, more precisely the control exercised by senior men over the property and lives of women and juniors. The empowerment of men entails a corresponding disempowerment of women, who are deprived of the capacities necessary to deal with the world at large. This is because, legal systems that endorse patriarchy, as the customary law denies women their powers essential to realising their autonomy. In common law terms, these are contractual and proprietary capacity and locus standi in judicio.²⁰⁸

The universal justification for treating women in this way is that they are intellectually immature and so cannot form a proper judgment. Women are therefore assimilated to the status of children and, like children; they are subordinated to the control of senior male ‘guardians.’ It does not follow that customary law regards women as slaves or chattels. To the contrary, if a woman was wrong, her dignity as a human being would be recognized and she would be entitled to claim redress for any damage she suffers. But she would not be allowed to take action directly; in all such case, the woman’s guardian would have to act for her.²⁰⁹

Patriarchy has far-reaching and diverse implications. Because women can occupy no positions of authority, they are not eligible for political office and in courts and public forums they are expected to remain silent and submissive. A woman cannot (directly at least) negotiate her marriage, terminate it, or claim custody of her children. It is true that in domestic contexts a woman’s responsibility for food production and children up bring allows her somewhat greater

²⁰⁸ T W Bennett Human Rights and African Customary Law Under South African Constitution (1999) page 80

²⁰⁹ T W Bennett (1999) page 80

freedom of action, but she must nevertheless be prepared to accept her husband's decision in all matters.²¹⁰

The early colonial authorities were sympathetic to the plight of African women, whom they regarded as living in virtual bondage.²¹¹ Various administrations sought to suppress or discourage the practices they believed responsible, namely bridewealth, polygamy and forced marriage.

To this end, patriarchy is an exceptionally powerful system of beliefs and practices and men cannot be expected willingly to sacrifice the privileges it affords them. Any abrupt change is unlikely to win their co-operation, especially the support of the guardians of customary law: traditional rulers.²¹²

2 Consent

Before general conclusion and the recommendations regarding practice of polygamy which still prevalent in the Gambia due to culture and the religion, it is important to address the argument that whether women in the Gambia do in fact exercise their free will and consent to enter polygamous marriages and therefore that no human rights violations arise where there has been consent on their part. This is because of articles 16(1) (a) and (b) of CEDAW concern the goal of equality at the point of entering marriage. One of the key issues of this provision is consent: Do women have the same degree of freedom to give consent to a marriage as men?

Under the customary family law, consent to a customary marriage by the parents of a woman is strictly adhered to whether the marriage is taking place between minors or not. Traditionally, the consent of the father in patrilineal tribes or the maternal uncle in matrilineal tribes was not a decision of a guardian as an individual. The whole family considered the matter since the issue of marriage concerned the whole family. In some instances, it concerned the whole

²¹⁰ T W Bennett (1999) page 80

²¹¹ T W Bennett (1999) page 81

²¹² T W Bennett (1999) page 81

village. This position, it could be argued, robs a woman of the opportunity for her to enter into marriage autonomously.²¹³

Furthermore, where women, particularly young girls, are forced by their families to marry men who have chosen them, independence is not exercised. In addition to the above, in some cultures, the question arises as to whether the widow is free to refuse to be inherited by a brother of her deceased husband. Polygamy also raises significant questions about equality and choice.²¹⁴

It should, however, be noted that the requirement of consent in respect of customary law marriages has to be contrasted with that for civil marriages where the consent of parents or guardians is only required when one is marrying below the age of 21.²¹⁵ Commenting on this difference, Bennett states:

[W]hile a civil or Christian union is exclusively the concern of the spouses and depends on for its validity on their consent, a customary marriage is an alliance of two families, for which the co-operation of the spouses is desirable, but not essential.

To understand this customary family rule, the definition of customary marriage by Bekker is instructive. A customary marriage is defined as a “relationship that concerns not only the husband and wife but also the family groups to which they belonged before the marriage.”²¹⁶ Thus, the consummation of a customary marriage brings into being reciprocal rights and obligations between the spouses for which their respective family groups are collectively responsible (my emphasis).²¹⁷

On the other hand, section 27(1) of the Gambian Constitution guarantees all men and women the right to marry and found a family.²¹⁸ A similar provision is also to be found in several

²¹³ L Mwambene (2010) African Human Rights Law Journal: Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi <http://www.ahrlj.up.ac.za/mwambene-l>

²¹⁴ L Mwambene 2010 (n 213 above)

²¹⁵ L Mwambene 2010 (n 213 above)

²¹⁶ L Mwambene 2010 (n 213 above)

²¹⁷ L Mwambene 2010 (n 213 above)

²¹⁸ S, 27(1)

international instruments and regional human rights instruments to which Gambia is a party. It is, however, noted that the Government of the Gambia enacted or set restrictions for entry into marriage. The marriageable age in the Gambia is 18 above. Any child marriage is prohibited and is punishable by law.

A similar provision can be found in Malawian Constitution “no person over the age of eighteen years shall be prevented from entering into marriage.”²¹⁹ This means that every person over 18 years is at liberty to marry at his free will without pressure from any third party as the case may be. The opposite is also true of those who are below 18 years. This means that every person under 18 cannot be forced to marry. They lack legal capacity to enter into marriage. On the other hand, section 22(4) of Malawian Constitution is to the effect that for those who are 18 years and above, the marriage shall take place only with their free and full consent. It is, therefore, submitted that the legal requirement of consent by a guardian to a customary marriage conflicts with a number of women’s rights in the following ways:²²⁰

First, if the guardian withholds his consent to a woman who is older than 18 years, this would be in conflict with section 22(3) of the Malawian Constitution which, as noted in the preceding paragraph, grants every person the right to marry. This customary law requirement, therefore, diminishes a woman’s status since it effectively relegates her to a position of a legal minor rather than a mature adult. Furthermore, in view of section 22(4) of the Malawian Constitution, a marriage which requires the consent of the village or a marriage guardian conflicts with the right to enter into marriage with a woman’s free and full consent.²²¹

Secondly, if the guardian gives his consent to a girl who is younger than 18 years, this would be in conflict with section 22(6) that sets the marrying age at 18. Thirdly, this would also be an infringement of her personal freedom as stipulated in Malawian Constitution and international instruments Malawi is state party.

²¹⁹Section 22(6) of the Malawian Constitution

²²⁰ L Mwambene 2010 (n 213 above)

²²¹ L Mwambene 2010 (n 213 above)

The Marriage Ordinance Act (1862) of the Gambia provided that in the case of a person who was under 21 who wished to contract a marriage other than a widow or widower, the consent of the parents or guardians or judge of Supreme Court was necessary. This law was discriminatory in that it did not give women the right to choose a spouse of their choice as now spelled out in article 6 of the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (PRWA):

“Women and men shall enjoy equal rights in marriage.”

From the above, we see that the customary law rule that no marriage can be contracted without the consent of the guardian is at inconsistency with the Bill of Rights and international human rights instruments aimed at protecting women's rights to equality and choice.²²²

Interlinked with consent there is the question of choice of a spouse. In both the matrilineal and patrilineal customary marriage systems, the decision on whom to marry is made primarily by the man concerned or such a man in consultation with his kin. A woman, under customary law, is not expected to make a move and propose marriage. A woman who actively makes such a proposal is considered to have loose morals in most societies in the Gambia. So her choice of whom to marry is squarely dependent on who gets interested in her and makes a proposal. With such a belief system, arguably, the choice of a spouse is severely compromised for a woman.²²³

In addition, In the Gambia and the Africa at large, there is also a phenomenon of arranged marriages, where parents take it upon themselves to decide who their daughter will get married to and what kind of a marriage she will enter. In such a scenario, the daughter's consent is not sought and her views count for nothing. Can she be taken to have consented to polygamy by reason of acquiescence? Clearly not, she is enslaved by custom or region and her marriage destiny lies but not in her own hands.²²⁴

²²² L Mwambene 2010 (n 213 above)

²²³ L Mwambene 2010 (n 213 above)

²²⁴ J Obonye Journal of African Studies and Development Vol. 4(5), pp. 142-149, July 2012

How about a first wife who consents to her husband taking a plural wife? Equally social dictates impress themselves upon her that she has no right to prevent her husband, additional wives. Such a first wife has placed between a rock and hard a place, to live with the insult to her dignity arising by reason of her husband marrying another wife or walking out of the marriage institution and attract some divorcee- a stigma that she is a failed woman who could sustain a marriage. This stigma stems from the fact that under the customary law of various African countries including the Gambia, women are not allowed to divorce their husband. If a woman divorces, such an incident attracts negative implications not only on her but on her family as well, for in African marriage involves families of partners as it involves partners themselves.²²⁵

Therefore to preserve the dignity and good name of her family, a married woman must just persevere in marriage even in the face of insurmountable adversity. Therefore, it can be profitable argued that most women in polygamy do not voluntarily give consent to enter plural marriages as claimed by pro-polygamist.²²⁶

3 Conclusion

To conclude chapter, the society likes Gambia where men believe to be the providers and backbone of the families. The right of their daughters normally did not consider much as far as marriages are concerned. This is because men take care of their families as well as they control their families' affairs. Therefore, the system of patriarchy is very much alive in the gambit due to customs and traditions which are highly valued in the Gambian society

To this end, the cultural practice and Sha'ria that only men are expected to make a spousal choice and not women is a human rights issue on the basis that it is against women's rights and freedoms guaranteed by the Gambian Constitution, as well as against international standards. It does not rhyme well with section 27(1) of the Gambian Constitution, which provides that "all men and women have the right to marry and found a family."²²⁷ It should be noted that this provision does not mention the issue of choice. However, it can be argued that it grants all men

²²⁵ J Obonye 2012 (n 224 above)

²²⁶ J Obonye 2012 (n 224 above)

²²⁷ S,27(1)

and women the right to marry someone of their choice. Moreover, a woman's right to choose whom to marry is guaranteed by international instruments to which Gambia is a party. Article 16(1) (b) of CEDAW states that "women should also enjoy the right to freely choose a spouse and enter into marriage only with their free and full consent."²²⁸

²²⁸ Article 16(1) (b)

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Conclusion and the recommendations

Polygamy is a fossil of bygone dispensation that has no place in the new era, the era of human rights. There is no doubt that the practice is antithetical to all notions of women's rights stand. It is therefore beyond argument that article 6(c) of Maputo Protocol needs to be amended to abolish polygamy in an unambiguous and clear language. Whereas it is conceded that legislation alone cannot succeed in eliminating a deeply entrenched cultural practice like polygamy in a once-off fashion.²²⁹

In its present form, article 6(c) is couched in a vague diction that does not seem to create any legal obligation on the State parties. The Protocol must enjoin States parties to criminalise this practice (polygamy) within their jurisdictions. This will constitute a positive stride towards women empowerment and elimination of some of the relics of the past that continue to impede the lofty idea of the realization of equality between sexes. The elimination of polygamy cannot come cheap. It will require extensive lobbying by the civil society and broad-based engagements with policy within African countries.²³⁰

Despite the massive task of eliminating polygamy, benefits following its elimination make the exercise of its removal worthwhile. This practice subjugates women to men. It also has a deleterious effect on children because when a man has more than one wife, he often has a large number within a short period of time. Conflicts often ensue among the families within a polygamous set-up because several rivals wives and children are competing for meager resources. Although international human rights law does not expressly prohibit the practice of polygamy its continued existence violates fundamental rights such as rights to dignity, equality, health, and equal protection under the law. It also exacerbates women's already lower socio-

²²⁹ O Jonas The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal (http://www.academicjournals.org/article/article1380034821_Obonye.pdf accessed 7 August 2016)

²³⁰ O Jonas (n 229 above)

economic status by forcing women to share already scarce resources with co-wives and their children.²³¹

That polygamy must be ridden off is beyond argumentation. However, this practice is still heavily embedded in the psyche of many Africans as an acceptable practice. To dislodge it in the minds of its practitioners and secure a shift of conviction would require the subjection of its supporters to extensive sensitisation coupled women empowerment efforts.²³²

In addition, for the 1997 Constitution of the Gambia, having laid out the existing system of protection for all forms of discrimination against women in the Gambia, it is now possible to identify the legal gaps. The 1997 Constitution of The Gambia does not have a specific section prohibiting polygamous marriages, despite this phenomenon is widespread in the country. The same Constitution that claims its supremacy recognizes two other sources of law. Section 7 of the Constitution has the following wording:

“In addition to this Constitution, the laws of the Gambia consist of section 7(e) customary law so far as concerns members of the communities to which it applies; (f) the Shari’a law as regards matters of marriage, divorce, and inheritance among members of the communities to which it applies”.²³³

One argues that Constitution is discriminatory in protecting women when it comes to issues of marriage, divorce, and inheritance, which is based on Sha’ria and customary law. Indeed, because of the tripartite of the legal system, there is an inadequate protection for Gambian women in those situations. This usually disadvantages women who do not have civil marriages registered by modern law. Families allowing their children to enter into polygamous marriage are equally not prohibited by the existing legislation in The Gambia; consequently, many children are married off by their parents mostly in rural settings.

From the above observations concerning the gaps in legislation, the issues preventing the implementation of CEDAW and the Maputo Protocol are listed below.

²³¹O Jonas (n 229 above)

²³²O Jonas (n 229 above)

²³³S,(7)

The first issue is that the Gambia lacks specific legislation to combat discrimination against women as far as polygamous marriages are concerned. Secondly, another major underlying issue is tripartite of the Gambia legal system. For instance, under Gambian legislation, four types of marriages are recognized: civil marriage, Muslims marriage, customary marriage and Christian marriages. In the Muslims and customary marriages, there is no legal age prescribed by the laws for marriage and women are not protected when it comes to inheritance under customary law.

Overall, it can be argued that the Gambia lacks a uniform and compatible legal framework to protect women against the different types of discrimination and violence that may occur to them mainly when it concerns marriage, divorce, and issues of inheritance.

To this end, legislation is needed to ensure that conflicts between customary, Sha'ria and formal laws should be resolved in a manner that respects women's human rights and principles of gender equality. Therefore, under current constitutional law, legislative classifications based on gender are subject to an intermediate level of scrutiny, under which the government of the Gambia state must demonstrate that the law is substantially related to the achievement of an important government objectives in line with international standards. The Gambia should codify the customary laws that are applied in district tribunals in order to standardize laws in the Constitution and other legal obligation by the state. However, despite being party to these instruments mentioned above and having obligations under them, there is still a significant lack of implementation. Thus, the constitutional law should be developed in line with the principles of international laws of protecting women against unfair discrimination with a male.

The state has to adopt and implement appropriate measures to prohibit any exploitation or degradation of women as well as measures to ensure the protection of every woman's right to respects for her dignity and the protection of women from all forms of discrimination particularly those in a polygamous marriage.

The Gambia should also adopt such other legislative, administrative, social and economic measures that may be necessary to ensure the prevention, punishment, and eradication of all forms discrimination against women.

It is also imperative Gambia Government to prohibit and condemn all forms of harmful practices particularly polygamous marriage which may negatively affect the human rights of women as far as a right to equality between men and women and which is contrary to the recognised international standards. This is because, polygamy was useful at some point in our history, but now polygamy become a liability and abusive to women in the Gambia.

Bibliography

National laws:

Constitution of the Republic of the Gambia (1997)

Women's Act 2010 of the Gambia

Unmodified Customary law of the Gambia

Islamic Law (Sha'ria)

Civil Marriage Act of the Gambia

Treaties:

African Charter on Human and Peoples' Rights (African Charter)

Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

International Convention on Civil and Political Rights

Convention on the Elimination of All Forms Discrimination Against Women

International Covenant on Economic, Social and Cultural Rights

Declarations:

Universal Declaration of Human Rights

Declaration on the Elimination of Discrimination against Women

The UN Committee on the Elimination of Discrimination Against Women.

Books:

Marriage, Land and Custom: Essays on Law and Social Change in South Africa by Aninka Claassens and Dee Smythe

Compendium of key Human Rights Document of the African union fifth edition (2013) by Heyns and Killander (editors)

Human Rights and African Customary Law under South African Constitution by T W Bennett

The Holy Quran

John Witte (2011) Emory International law Review

Lawrence B.Jah, History of the Gambia Made Simple

Journals:

The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal by Obonye Jonas (http://www.academicjournals.org/article/article1380034821_Obonye.pdf accessed 7 August 2016)

African Human Rights Law Journal (2010): Marriage under African Customary in the face of Bill of Rights and international human rights standard in Malawi by Lea Mwambene

International Journal of Law and the Family 3, (1989) by Ronald ThandabantuHnhlapo available on this <http://nhlapo.com/data/uploads/publications/international-protection-of-human-rights-and-the-family-african-variations-on-a-common-theme.pdf> (accessed on September 26 2016)

Lorraine Bowan: Contemporary Journal of African Studies (CJAS) vol. 1, no. 2, (2013) 45-64

Polygamy in Canada: Legal and Social Implications for Women and Children (A Collection of Policy Research Reports) by Angela Campbell (2005) available on <http://www.crilf.ca/Documents/Polygamy%20in%20Canada%20-%20Nov%202005.pdf#page=7> accessed on 7 August 2016)

A Qualitative Study Examining the Effects of Polygamy on Hmong Individuals Who Had Been Raised Polygamous Households by Manee Yang (2003) (<http://www2.uwstout.edu/content/lib/thesis/2003/2003yangm.pdf> accessed on 8 July 2016)

Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy Vol 5 No 27 December 2014

An Exploration of Polygamous Marriages: A Worldview by Tsoaledi Daniel

Thobejane&Takayindisa Flora

(<http://www.mcser.org/journal/index.php/mjss/article/viewFile/5179/4996> accessed on 7 August 2016)

Muslims Voices in the Human Rights Debate: Human Rights Quarterly 17.4 (1995) 587-

617(https://muse.jhu.edu/journals/human_rights_quarterly/v017.4bielefeldt.htm#FOOT1

accessed 20 september2016)

Mediterranean Journal of Social Science MCSER Publishing, Rome-Italy Vol 5 no 27 December 2014

Website:

https://www.fidh.org/IMG/pdf/gm_cedaw2005a.pdf

<http://www.reliqioustolerance.org/polyprac.htm>

www.al-islam.org

Cases used:

United Democratic Party v. the Attorney General, (2008) 1 GLR 326

Jammeh v. the Attorney General (1997 – 2001) GR 639 4 at 842

Momodou Jobe v. the Attorney General,

Jammeh v Attorney-General (2002) AHRLR 72 (Gasc 2001)- Available on this site:

<http://www.chr.up.ac.za/index.php/browse-by-country/the-gambia/307-the-gambia-jammeh-v-attorney-general-2002-ahrlr-72-gasc-2001.html>

IsatouSecka and Susan Badjie SC Civil Appeal No: 15/2012 Thursday 13TH November, 2014

