

Polygamy- To share or not to share? That is the Question

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A heated debate was sparked recently in the National Assembly when Congress of Democrats' Nora Shimming Chase, on the issue of the President's Pension and other Benefits Fund Bill, asked if the president had more than one wife whether they all would be entitled to a share of the former president's pension upon his death (The Namibian '*Questions of Polygamy, Bigamy Trip up law on Package for Presidents*' October 14, 2004).

Judging by the emotional response, the question seemed to have touched a raw nerve. Opinions ranged from those condoning polygamy to those who vehemently opposed the practice. A trustee of the Political Office Bearers' Pension Fund and Parliamentarian was quoted in the article as saying that in one instance the Fund paid seven wives of a political office bearer. The debate highlighted that the issue of polygamy is intertwined with an equally 'sensitive' issue: the general property and inheritance rights of women and children living under customary law.

Since that debate a bill, which seeks to give full recognition to customary law marriages, has been submitted to the Minister of Justice. The bill proposes to outlaw polygamous marriages. Existing polygamous marriages contracted before the bill becomes law will however enjoy legal protection.

Polygamy is the practice where a person may customarily marry more than one person. The term polygyny is preferred because in practice it is mainly men (and not women) who often are allowed in terms of customary law to marry more than one spouse. Polygamy is further complicated as it may also be explained in terms of levirate and sororate unions. Levirate unions occur where a brother, uncle or nephew inherits the wife of his brother upon the latter's death. Sororate unions occur where the widower is inherited by a younger sister, cousin or niece. Levirate and sororate unions are still practiced in some communities in Namibia. The term union is used, as these forms of unions are strictly speaking not regarded as customary marriages.

There is some debate to which extent polygamy is practiced in Southern Africa, with some arguing that it is common but not widespread. According to a survey conducted by the Ministry of Health and Social Services in 1992, 12,5% of marriages in Namibia are polygamous. A similar survey in 2000 indicated that the percentage of polygamous marriages had dropped by only 0,5%. The women who reported that their husbands had other wives were mainly rural women from the Caprivi, Ohangwena, Kavango and Omusati Regions.

Even if polygamous marriages are declining, there is a rise in informal relationships. According to Vision 2030, 'Polygamous marriages are declining in number, while informal relationships and adultery remain common, and are thought to be rising'. The 2001 census however indicates that since 1991 there has been a decrease, from 12% to 7%, in couples identifying themselves as 'married consensually' (considered themselves married without having formalized the union). On the other hand, 16% of the national sample of women interviewed for the Namibia Demographic and Health Survey 2000 reported that they were "living together" with a partner in an informal marriage. It seems that the informal relationships which may be to some extent replacing polygamy are hard to measure, precisely because of their informality.

Namibia's Constitution formally recognises customary law by providing that the customary law applicable at the date of Independence remains valid, provided it does not conflict with the Constitution or any statutory law. Authority for the retention of customary law is founded in the fact that every person in Namibia is entitled to enjoy, practice, profess, maintain and promote any

culture subject to the condition that the right to do so does not intrude on the rights of others or national interests. Even though a person has an affirmative right to culture this right is not an absolute right, in that constitutional norms (such as the right not to be discriminated against on the basis of sex or the right to equality before the law) take precedence.

The question which arises of course is whether the Constitution condones the practice of polygamy. If the constitution condones polygamy, women in polygamous marriages are entitled to protection under the law. Consequently such wives and their children should be allowed to share in the estate of a deceased husband.

African women, more so than their European counter-parts, continue to suffer human rights abuses and are subjected to customary-orientated stereotypes which regard women as perpetual minors who are subordinate to men. Closely linked with this is the notion that women are economically dependant on men because they fall under the tutelage of men. It can be argued that polygamy not only exacerbates such notions but also endangers the lives of women due to the impact of HIV/AIDS.

In recent times African states have enacted progressive laws to ensure that women's rights are protected. Namibia for one has made its laws subject to a progressive Constitution but has also ratified several international and regional human rights instruments which will assist it in giving effect to its constitutional obligations. These include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Charter on Human and People's Rights.

It can hardly be disputed today that women are entitled to protection under the law in areas of marriage and inheritance and that states have an obligation to improve the status of women by facilitating gender equality and eradicating gender-based discrimination. Whether such protection should be extended to polygamous marriages is an issue that is far from settled in Namibia, as evidenced by the National Assembly debate.

The recently adopted Protocol to the African Charter on Human and People's Rights on the Rights of Women ('the Protocol') has the potential of not only addressing the many abuses African women are subjected to, but also informing and guiding state parties as to the appropriate legislative, institutional and other measures to be taken in the combat against discrimination. The Protocol, a progressive instrument in itself (the first international human rights instrument to explicitly recognize a limited right to abortion), is not yet in force but remains helpful in informing law reformers. Namibia is one of ten countries that have ratified the instrument, showing its commitment to the Protocol.

The Protocol contains important provisions on affirmative action, reproductive rights, women's role in the political decision-making processes, marriage, divorce and inheritance rights-making it one of the most comprehensive human rights instruments guiding state parties in Africa. Article 6(c) of the Protocol enjoins state parties to encourage monogamy as the 'preferred form of marriage', while at the same time protecting the rights of women in polygamous marriages.

There are several countries in Africa, which give legal protection to polygamous marriages. The inheritance laws of Zimbabwe were reviewed in 1997 and resulted in the promulgation of the Administration of Estates Amendment Act. The Act makes the surviving spouse and children the primary beneficiaries of the deceased's estate as opposed to the eldest son. In polygamous marriages the senior wife receives two-thirds of the first third of the estate's liquidated assets, as she is regarded as the biggest contributor to the estate. The remaining wives share equally in the remainder of the first third of the estate. The remaining two thirds of the estate is shared amongst the children of the various marriages. These protections are provided despite the fact that unlike

Namibia, the Constitution of Zimbabwe guarantees gender equality only to the extent that it does not override customary law.

More recently, South Africa, informed by the opinions of women, has also promulgated legislation which recognises the validity of polygamous marriages. The Recognition of Customary Marriages Act recognises polygamous marriages entered into before and after 15 November 2000, when the Act came into operation. Its Constitutional Court in *Bhe v Magistrate, Khayelitsha* ruled that not only should the wife and children be the primary beneficiaries in a deceased estate, but also that the civil law which regulates intestate succession should be modified to make provision for polygamous marriages. As a result, wives in polygamous marriages whose husband's die without leaving a valid will inherit in equal shares.

There are many questions that remain unanswered in the Namibian context. The Communal Land Reform Act provides that upon the death of a holder of a customary land right, the right reverts back to the Chief or Traditional Authority whereupon it has to be re-allocated to the surviving spouse. The Act defines a 'spouse' as a spouse or partner in a customary union irrespective of whether such union has been registered. The definition is unclear as to whether polygamous marriages are included. There is therefore no clear direction how Land Boards should settle disputes where more than one spouse lays claim to a right, which often happens. A man may have concluded a civil marriage with one spouse and a customary marriage with another spouse. There is a tendency in practice, where disputes arise, to give preference to the civil marriages, as they are much easier to prove. Spouses who have contracted a customary marriage are left more vulnerable. Even though such preferences are arguably unconstitutional, disputes over customary land rights highlight the vulnerability of women in polygamous marriages.

Field research done by LAC into inheritance practices in the Otjozondjupa region revealed that the subject is divided along gender lines. Female respondents viewed polygamy as treating women as nothing more than 'domestic servants', whereas male respondents argued that polygamy is justified as women outnumber men. A man's (sexual) 'organ' was also said to be 'stronger' than that of a woman's. In polygamous marriages wives are regarded as a source of wealth and status.

In rural Africa the practice has been seen as an economic necessity, since multiple spouses and their children provide unpaid labour in communities where agrarian lifestyles are maintained. Traditionally the senior wife could choose who the successive brides should be. In recent times polygamous marriages have become stigmatized possibly because of the influence of Christianity and the dominance of Western culture.

Any meaningful debate on whether or not to grant legal protection to polygamous marriages has to be viewed within a socio-economic context. Social need may contribute to more women viewing polygamy as a means of evading poverty. As is the case with levirate unions, women's choices may be dictated by the threat of being left either destitute or in abject poverty. The majority of rural women may still only access resources through men. The question of protection under the law under such circumstances may do more harm than good, particularly in the face of HIV/AIDS and poverty. Recently, South Africa's Deputy Minister of Health, H. Madlala-Routledge, had the following to say on the topic:

'An issue of growing concern for African women is the issue of polygamy within the context of high levels of poverty and communicable diseases. Although women are said to participate willingly in these practices, the question needs to be asked whether they are just seeing it as an escape from poverty.'

On the other hand, there appear to be some arguments in favour of providing legal protection. To outlaw polygamous marriages may prove futile, considering the fact that the practice

may still be common in Namibia. Also, to give protection to monogamous marriages and not polygamous marriages pits women against women. Giving legal protection to polygamous marriages ensures that men assume the responsibility of providing for their wives and children. Encouragement of monogamous marriages by state parties may best be achieved by giving legal protection as opposed to prohibition. Outlawing polygamous marriages may give rise to an increase in informal relationships, leaving vulnerable women and children even more exposed to neglect.

Experiences in communal areas illustrate why the issue of polygamy needs to be debated not only within the sphere of the National Assembly, but on a broader level. Law reformers should be guided ultimately by the women and children who will be most affected by any law seeking to deal with the topic, and with due regard to Namibia's constitutional, international and regional obligations. There can be no better time to do so than now. Namibia is currently reviewing its laws on the recognition of customary marriages as well as its laws on the inheritance rights of widows and children under customary law. If women do not make their voices heard now, we may well end up with paper laws that are meaningless and far removed from the reality under which women and children find themselves.