



**Polygyny and Canada's  
Obligations under  
International Human  
Rights Law**

**Family, Children and Youth Section  
Research Report  
September 2006**





# **Polygyny and Canada's Obligations under International Human Rights Law**

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**Presented to:**

Family, Children and Youth Section

Department of Justice Canada

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## I. INTRODUCTION

The term “polygamy” can refer to the simultaneous union of either a husband or wife to multiple spouses. As a general term, polygamy therefore includes the practices of bigamy, polyandry, and polygyny.

The term “bigamy” is typically used in domestic legislation that prohibits marriage to more than one person simultaneously. While this report will not examine Canada’s domestic legal prohibition of bigamy or polygamy in depth, domestic legislation is useful for clarifying terminology. According to the Criminal Code, bigamy occurs when a person who is already married marries again, marries more than one person simultaneously, or marries someone that he or she already knows to be married.<sup>1</sup> Significantly, the Criminal Code does not provide an express definition of polygamy. The principal difference between bigamy and polygamy, however, as described in the Criminal Code, is the fact that bigamy requires a “form of marriage” as defined in section 214, where polygamy does not.<sup>2</sup> In its 1985 report on bigamy, the Law Reform Commission of Canada also provided its own definition of polygamy:

. . . polygamy consists in the maintaining of conjugal relations by more than two persons. When the result of such relations is to form a single matrimonial or family entity with the spouses, this is regarded as polygamous marriage.<sup>3</sup>

By focusing on the formation of a “single matrimonial or family entity” without requiring the actual legal validity of the form of the multiple marriages (as is usually the case for bigamy), the Law Reform Commission’s definition thus included those polygamous unions where subsequent marriage ceremonies may be solely religious or customary in nature. It is this focus on subsequent *de facto* religious or cultural marriages that is central to the legal prohibition of polygamy. Prohibiting bigamy alone, with its requirement of multiple *de jure* marriages, would fail to address the lived reality of these *de facto* marital unions.

Within the Canadian context, there is no evidence of polyandrous polygamy, wherein a wife is simultaneously married to multiple husbands.<sup>4</sup> In contrast, there is evidence of polygynous unions, wherein a husband has multiple wives. For precision, this report will mainly use the term “polygyny” throughout. Given that polyandrous unions are not permitted in systems governed by Islamic law, Fundamentalist Mormon teachings, nor generally under customary norms, the term “polygyny” more accurately reflects the majority of polygamous unions and the international human rights norms with which they conflict.

In analyzing Canada’s commitments under international human rights law, this report will consider Canada’s obligations to respect freedom of religion as well as guarantee equality between men and women. Although polygyny, as practised in Canada and elsewhere, engages freedom of religion arguments, it is important to note the distinction at law between religious *belief* and religious *practice*. While Canada is not entitled under international law to restrict religious belief, it is entitled and in fact obliged in some circumstances to restrict religious

practices that undermine the rights and freedoms of others. Courts have decided that the right to manifest one's religion can be limited for legitimate purposes including the protection of health,<sup>5</sup> the promotion of secularism and the protection of gender equality.<sup>6</sup> Even within Canada's own constitutional framework, as Lorraine Weinrib has noted, although "Charter interpretation must be consistent with the 'preservation and enhancement of the multicultural heritage of Canadians,' the reading of all Charter guarantees must effectuate their equal guarantee to men and to women."<sup>7</sup>

Amidst this international and domestic law commitment to gender equality, this report will outline how the practice of polygyny violates women's right to equality within marriage and the family, amongst other rights, using the sources of international law identified in Article 38 of the Statute of the International Court of Justice (I.C.J.) as a guiding framework:

Art. 38.1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 5, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Under international human rights law, there is a growing consensus that polygyny violates women's right to be free from all forms of discrimination. Where polygyny is permitted through religious or customary legal norms, it often relies on obedience, modesty, and chastity codes that preclude women from operating as full citizens and enjoying their civil and political rights.<sup>8</sup> Within this framework, women can often be socialized into subservient roles that inhibit their full participation in family and public life. The physical, mental, sexual and reproductive, economic, and citizenship harms associated with the practice violate many of the fundamental human rights recognized in international law. State practice indicates that a complete legal prohibition of polygyny is the norm in most domestic systems including all of the Americas, Europe, countries of the former Soviet Union, Nepal, Vietnam, China, Turkey, Tunisia, and Côte d'Ivoire, amongst others.<sup>9</sup> In addition, there is a marked trend toward restricting the practice elsewhere, particularly through judicial and/or spousal permission requirements. These restrictions reflect not only the socio-economic problems associated with polygyny, but also a growing recognition of women's right to equality.

The right to gender equality has been central to the evolution of post-World War II international human rights law. Initially, human rights declarations and conventions adopted a negative sense of gender equality by deeming sex a prohibited ground of discrimination. The 1948 Universal



Declaration of Human Rights (Universal Declaration),<sup>10</sup> the International Covenant on Civil and Political Rights (the Political Covenant),<sup>11</sup> and the International Covenant on Economic, Social and Cultural Rights (the Economic Covenant),<sup>12</sup> all relied on the norm of sex non-discrimination. Within this non-discrimination framework, there are variations that may import positive obligations on States parties. Article 23(4) of the Political Covenant, for example, requires States parties to “take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution.” The term “ensure” is typically interpreted within the treaty context as imposing a positive duty on States parties to achieve the stated goal.

In addition to these international instruments, various regional human rights treaties also operate under a general non-discrimination framework. The European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention),<sup>13</sup> the American Convention on Human Rights,<sup>14</sup> and the Arab Charter on Human Rights<sup>15</sup> all prohibit discrimination on the ground of sex, but do not extend this to ensure *de facto* equality in family and public life.

In contrast, the object and purpose of the Convention on the Elimination of All Forms of Discrimination against Women (the Women’s Convention)<sup>16</sup> reveals a clear commitment to transformative equality. 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.<sup>17</sup>

In this sense, the Women’s Convention extends beyond a non-discrimination framework that would protect both men and women from sex-based discrimination through its recognition of the particular discrimination women face. Its Article 16 provision on equality within marriage and family relations calls on 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.” In doing so, the Women’s Convention 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.

Amongst regional human rights instruments, the African (Banjul) Charter on Human and Peoples’ Rights<sup>18</sup> and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa<sup>19</sup> both share a similarly transformative approach to equality. The African Charter not only prohibits discrimination on the basis of sex,<sup>20</sup> but also requires States parties to:

ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.<sup>21</sup>

Building on this, the preamble to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa reaffirmed:

the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development.

Thus, both the African Charter and its Protocol express a commitment to eliminating all forms of discrimination against women and ensuring their effective participation in family and public life.

The Convention on the Rights of the Child (the Children's Convention) includes a non-discrimination clause (Article 2) and extends the guiding principle of the best interests of the child. Article 3 states that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

This provision requires that the "best interests of the child" will always be a "primary consideration." In this sense, there is a positive obligation on States parties to give children's best interests primacy beyond simple non-discrimination

In order to achieve these goals, several of the leading international human rights treaties established committees that monitor state compliance with their respective treaty obligations. The Women's Convention established the Committee on the Elimination of Discrimination against Women (CEDAW) to monitor whether states' laws, policies, and practices have been brought into compliance with the Women's Convention. Similarly, the Political Covenant established the Human Rights Committee (HRC), the Economic Covenant established the Committee on Economic, Social and Cultural Rights (CESCR), and the Children's Convention established the Committee on the Rights of the Child (CRC).

These committees, which meet once to three times per year, assess reports from member states on what the states have done to bring their laws, policies, and practices into compliance with their treaty obligations. After considering and discussing country reports with representatives of the reporting states, committees issue Concluding Observations on those reports, which assist countries in discharging their future reporting obligations.

The committees have also developed helpful General Comments or General Recommendations on specific articles that explain the content and meaning of specific rights. Where committees are capable of hearing complaints from individuals or groups from consenting countries (HRC, CEDAW), or undertaking inquiries into alleged violations in consenting states (CEDAW), the opinions that committees form in response also contribute to the content and meaning of rights by showing how a right or a group of rights apply to particular facts.

Several of these treaty bodies including CEDAW,<sup>22</sup> the HRC,<sup>23</sup> the CESCR,<sup>24</sup> and the CRC<sup>25</sup> have expressly stated in their concluding observations that polygyny violates the rights articulated within their respective treaties. In addition, both CEDAW and the HRC have condemned the practice in their General Comments and Recommendations. In its General Comment no. 28 on Equality of Rights between Men and Women, the HRC stated:

It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.<sup>26</sup>

Echoing this statement that polygyny violates women's equality and dignity within marriage, 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 constitutions 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.<sup>27</sup>

While there is a growing consensus that polygyny thus violates women's right to be free from all forms of discrimination, this consensus fractures somewhat at the notion of immediate prohibition given the deleterious effect this may have on existing polygynous marriages and those unions that may have helped poor women and to a lesser extent children of polygynous marriages.

This report will argue that these transitional concerns can be addressed through family law measures providing for mandatory child support and the availability of relief on relationship background regardless of whether there is a legally recognized marriage. In moving to develop consensus around the prohibition of polygyny, it is important to be sensitive to the place of women within their particular context and recognize the importance that religion and culture may have within their individual lives. As with many cultural or religious practices that are harmful to women, the means chosen to abolish polygyny, if they are to be effective, need to be sensitive to the context in which women live. It is important to recognize throughout, however, that a lack of consensus regarding the optimal means of addressing polygyny does not dilute the growing consensus that polygyny is a form of discrimination and therefore a violation of international law.



## II. HARMS OF POLYGYNY

Polygyny is practised in various different ways depending on the religious, customary, cultural and socio-economic context.<sup>28</sup> As a result, the harms associated with the practice often differ according to these contexts. While some of the harms are generally cross-cultural (for example, the economic strain associated with polygynous families), some are more contextually limited. To this extent, this Part II does not mean to be exhaustive nor representative of all polygynous unions, but rather suggestive of some of the harms associated with the practice.

In addressing some of the harms often associated with polygyny, it is important to note that some academic commentators have questioned whether the practice is inherently harmful to women and children or whether the typically associated harms are merely indicative of patriarchal social contexts. Christina Murray and Felicity Kaganas have questioned the supposition that structural inequalities can only be addressed in one-to-one relationships.<sup>29</sup> In particular, they argue that it is not self-evident that a symmetrical relationship provides the sole means for marital equality. For Kaganas and Murray, the question of a husband being able to unilaterally change a family's composition can be addressed through spousal permission requirements.<sup>30</sup> They maintain that questions surrounding wives' capacity to consent (or refuse consent) to subsequent marriages points more toward the patriarchal social context of polygyny rather than the practice itself. Sexual stereotyping, male domination and the treatment of women as property, they argue, are neither limited to polygyny nor inevitable within it.<sup>31</sup>

While Kaganas and Murray are certainly correct in arguing that the sexual stereotyping of women is not limited to polygyny, they seem to underestimate the degree to which the inherent asymmetry of polygyny tends to perpetuate sex-stereotyping. Where polygyny exists, it often stereotypes women into reproductive and service roles. As a result of such stereotypes as well as its inherent structural inequality, women can never be truly equal in polygynous unions.

### A. POLYGYNY AS A FORM OF PATRIARCHY

Although polygyny as currently practised often perpetuates and reinforces patriarchy within the family, its anthropological and religious origins in some contexts reveal that it was designed to serve a protective or remedial function for women and families. Within impoverished societies, for example, polygyny was, and is still by some, thought to serve a protective function for poor women. A Visiting Mission to British Trust Territories in West Africa in 1950 identified polygyny as a form of social security for women within their economic conditions at that time.<sup>32</sup> Similarly, within Talmudic law, a man was believed to have a protective responsibility to his deceased brother's wife. Modern commentators have noted, however, that the practice of *yibum* (levirate marriage of a widow to her deceased husband's brother) was the product of a patriarchal, polygynous society in which male dynasty continuity was central.<sup>33</sup> Today, *yibum* is prohibited according to the Chief Rabbinate of the *Herem DeYerushalayim*.<sup>34</sup>

Polygyny has also historically served a restorative function when a significant percentage of the male population has been killed during warfare. Many reformist interpretations of Islam, for example, view the Qu'ran's allowance of polygyny as inextricably linked to the protection of orphans and widows within a post-war context. Sura 4, verse 3 of the Qu'ran reads:

And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three, or four...<sup>35</sup>

Parvez, a leading reformist commentator on the Qu'ran, has noted that the revelations regarding polygyny came after the Battle of Uhud, in which over ten percent of the Muslim male population was killed, leaving many vulnerable widows and orphans.<sup>36</sup> Likewise, polygyny was occasionally practised with Protestant religious approval following the Thirty Years' War in 1648.<sup>37</sup> Because of the loss of a substantial segment of the male population, theologians permitted men to take second wives during the ten-year period following the war. Similarly to Islamic requirements of fair treatment of wives, Protestant men during this time were instructed to "observe seemly behaviour, to make proper provisions for both wives,... to avoid ill feeling between them."<sup>38</sup>

Unlike these more protective origins, the promotion of polygyny in Mormon teachings was from the outset premised on patriarchal stereotypes of men and women. In his July 12, 1843 revelation that solidified the place of plural marriage within Mormon theology until the 1890s, Joseph Smith noted that:

Under the "law of priesthood" a man "cannot commit adultery with that that belongeth to him and to no one else. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him... If any man have a wife... and he teaches unto her the law of my priesthood, as pertaining to these things, then shall she believe and administer unto him, or she shall be destroyed," saith the Lord your God.<sup>39</sup>

As Altman and Ginat have noted, the implicit stereotype within this revelation and other writings at the time of women as dependent and obedient beings whose proper place was in the domestic sphere raising children helped to reinforce polygyny. Likewise, the characterization of men in Smith's revelation as having strong and "inexhaustible" sexual needs further perpetuated the theology of plural marriages.<sup>40</sup>

Within many modern polygynous contexts, it is this more patriarchal form of polygyny that is now dominant. Thus, although the practice was originally conceived in some contexts as a benign means of protection, it has since taken on oppressive characteristics in many circumstances by encouraging and reinforcing a patriarchal conception of family life. In analyzing this type of patriarchy, Janet Rifkin's definition is a helpful starting point. Rifkin describes patriarchy as:

any kind of group organization in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the

mystical and aesthetic and excluded from the practical and political realms, these realms being regarded as separate and mutually exclusive.<sup>41</sup>

Polygyny tends to reinforce such gender stereotypes by giving husbands the power to interrupt marital unions where they feel that one wife is not adequately fulfilling their reproductive and general-care needs.

As Susan Okin's discussion of gender and culture reveals, many traditional practices that are harmful to women "have as one of their principal aims the control of women by men."<sup>42</sup> Okin points to anecdotal evidence garnered from polygynous husbands as support for the assertion that polygyny serves men's self-interest while at the same time providing a means of controlling women. One French immigrant from Mali stated in an interview that:

when my wife is sick and I don't have another, who will care for me?... [O]ne wife on her own is trouble. When there are several they are forced to be polite and well behaved. If they misbehave, you threaten that you'll take another wife.<sup>43</sup>

Thus, even where polygyny is not actually practised, its mere potential, particularly in contexts where men can exercise unilateral divorce, can be used to control and limit women's ability to assert their rights within marriage.<sup>44</sup> U.N. Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, raised precisely this concern in her 2002 report on cultural practices in the family that are violent towards women. In outlining how customary or cultural norms can contribute to serious gender inequality within marriage, she noted that "several... forms of threat or violence are used to ensure that women stay obedient within a marriage, for example the threat of the husband taking another wife...."<sup>45</sup>

While this level of oppressive patriarchy may not be representative of all polygynous contexts, it nevertheless highlights the degree to which a husband's ability to take on new wives can be used both to demean and control present wives. To this extent, polygyny often reinforces patriarchal familial power structures in which wives are forced to assume primarily reproductive or service roles. Where it stereotypes women into reproductive or service roles, polygyny operates under an assumption of masculine superiority and feminine inferiority. In doing so, it impedes women's autonomy within the family realm and in many cases may completely undermine any freedom of action in what Rifkin refers to as "the practical and political realms."

As a party to the Women's Convention, Canada has an obligation to ensure that it protects women's human rights in the "private" realm, and in doing so acknowledge the connection between private subordination and an inability to fully exercise one's rights publicly. Article 3 of the Convention, which requires States parties to take:

all appropriate measures, including legislation... for the purpose of guaranteeing [women] the exercise of human rights and fundamental freedoms on a basis of equality with men,

imposes a duty on the Canadian State to both enact, where necessary, and most importantly enforce legislation that would protect women and children from polygyny-related human rights

violations. In addition, Article 5 imposes a specific duty on States parties to take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

As Sandra Fredman has argued, Articles 3 and 5 of the Women's Convention do not merely call for formal equality (or treating likes alike) or equality of opportunity, but "equality as transformation."<sup>46</sup> In taking gender into account rather than simply calling for a gender-neutral world, equality as transformation:

requires a dismantling of the private-public divide, and a reconstruction of the public world... to facilitate the full expression of women's capabilities and choices, and the full participation of women in society.<sup>47</sup>

Where patriarchal practices such as polygyny are legally or *de facto* permitted through a lack of enforcement, women's ability to freely and fully participate in society is undermined. The importance of addressing these underlying causes of inequality is articulated in CEDAW General Recommendation no. 25, where the Committee noted:

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.<sup>48</sup>

To this end, it is essential that discriminatory family structures be eliminated. Because the familial, cultural, religious and social contexts in which women live are central to their identity and in turn to their ability to participate in economic, social and political life, it is imperative that patriarchal practices such as polygyny be abolished.

## **B. THE HARM OF NON-EXCLUSIVITY**

At its core, polygyny undermines the principle of exclusivity that serves to strengthen marital and familial bonds. In particular, polygyny denies couples exclusive sexual intimacy and the opportunity to build an exclusive life together. Moreover, it hinders the equal sharing of both material and emotional attention. In turn, it precludes the opportunity of creating something unique with another partner because of the expectation or at least the prospect of another party being introduced into the marital union and interrupting the relationship.

This type of marital interruption is striking in all polygynous contexts, but perhaps most striking in those where subsequent wives reside with their husband and his present wife. Requiring a first wife to accept subsequent wives into her household may be one of the most explicit and deleterious interruptions of one's marital relationship that exists. As the Allahabad High Court of



India noted in *Itwari v. Asghari*,<sup>49</sup> the taking of a second wife into the first wife's original shared domicile often constitutes a:

stinging insult to the first... [and] is likely to prey upon her mind and health if she is compelled to live with her husband under the altered circumstances.<sup>50</sup>

The prospect of having to share their husband's sexual, material and emotional attention with other wives, including in some cases within the one household, thus deprives women of an exclusive connection to their husbands.

While many "monogamous" marriages also do not meet an exclusivity standard, it nevertheless remains an important value within marriage. It is this value of exclusive intimacy, along with the inherent harms of polygyny, that most differentiates polygyny from same-sex unions. As Ling-Cohan J. alluded to in *Hernandez et al. v. Robles*,<sup>51</sup> a recent New York State decision that found the marital exclusion of same-sex couples violated the State's Constitution, the intimate nature of marriage seems bound up with the symmetry between the parties. In her decision, Ling-Cohan J. noted that:

As a society, we recognize that the decision of whether and whom to marry is life-transforming. It is a unique expression of a private bond and profound love between a couple, and a life dream shared by many in our culture. It is also society's most significant public proclamation of commitment to another person for life.<sup>52</sup>

Thus, although *de facto* "serial polygyny" exists within many cultures through adultery, divorce, and re-marriage, it is not something that marital law should promote *de jure*.

### **C. HARMS ARISING FROM COMPETITIVE CO-WIFE RELATIONSHIPS**

The interruption of an exclusive emotional and material relationship is often exacerbated by competitive co-wife relationships. A review of anthropological literature suggests that jealousy, tension, strain, and competitiveness are common among plural wives.<sup>53</sup> While there are many examples of cooperative co-wife relationships, the majority of accounts emphasize negative feelings between wives in polygynous families.<sup>54</sup> Cooperative polygynous relationships are evident, however, among the Masai of Africa where co-wives sometimes have close and supportive relationships.<sup>55</sup> Likewise, the senior wife within polygynous unions among the Mende of Africa may nurture a junior wife in an almost maternal fashion. Polygynous unions within other cultural contexts may also be typified by both collaboration and competition. Among the !Kung of Africa, for example, co-wives may cook together or take turns cooking, share fire and shelter, and even nurse one another's infants. Conflict can nevertheless arise in other aspects of day-to-day life including access to their husbands and resource distribution.<sup>56</sup>

Sangeetha Madhayan's examination of polygyny in the West African context reveals that plural marriages can at times lead to collaborative relationships amongst wives, but can also "pit co-wives" against each other.<sup>57</sup> While Madhayan concedes that much of the scholarship on polygyny portrays it as harmful to women, particularly because of unhealthy competition, she is

right to stress the importance of examining the particular socio-cultural context in which co-wife relationships exist.<sup>58</sup>

Thus, while co-wife cooperation exists within some cultural contexts, the unequal distribution of polygynous husbands' emotional and material attention amongst their wives tends to be a significant cause of fractious co-wife relationships. Even where there is an expectation of equal treatment amongst wives, *de facto* inequalities can nevertheless undermine co-wives' emotional health. For the Bedouin of Israel, for example, there is a social expectation that husbands will provide equal time, material resources, and sexual attention to each of his wives. In practice, however, husbands sometimes favour one wife over the other, particularly a newer wife in the early stages of marriage.<sup>59</sup> Similarly, a survey of Yoruba wives of South-western Nigeria and Benin found that husbands' favouritism of certain wives was a significant source of dissatisfaction among polygynous wives.<sup>60</sup> Significantly, the mistreatment as perceived by wives within developing world contexts often centres on economic and material issues, in addition to the treatment of children. Within Mormon Fundamentalist polygynous settings, on the other hand, perceptions of unfair treatment are often connected to both practical and social-emotional factors.<sup>61</sup>

#### **D. MENTAL HEALTH HARMS ASSOCIATED WITH POLYGyny**

Polygyny has long been associated with family stress and mental illness among women.<sup>62</sup> As mentioned above, the practice can lead to co-wife jealousy, competition, and an unequal distribution of domestic resources—all tending to create acrimony among wives and between children of different wives.<sup>63</sup> These factors are believed to explain the greater prevalence of mental disorders among women in polygynous families in comparison to those in monogamous marriages and relative to the general population.<sup>64</sup> Among psychiatric patients, polygynous marriages tend to be associated with increased depressive disorders, somatization disorders, and anxiety states.<sup>65</sup>

In an outpatient psychiatric clinic study of Bedouin-Arab women, women in polygynous marriages generally reported greater despair than their monogamous counterparts.<sup>66</sup> 58.4% of polygynous women interviewed for the study described feelings of low self-esteem compared to 7.7% of their monogamous counterparts.<sup>67</sup> More polygynous subjects also reported poorer relationships with their husbands than monogamous subjects, often because they were physically, emotionally, sexually and materially neglected.<sup>68</sup> Thus, while 12.8% of women in monogamous unions expressed a sense of loneliness, 64.1% of those in polygynous unions did.

Of particular significance in these findings of low self-esteem and loneliness were the reasons reported by polygynous women for why their husband took a second wife. The four common reasons for Bedouin-Arab remarriage used in the study included:

- 1) an exchange marriage (where two men marry each other's sisters)
- 2) the number of daughters the first wife had

- 3) the age of the first wife (that she was seen as “old”), and
- 4) other factors including situations where husbands were persuaded to marry a woman by his extended family.<sup>69</sup>

Of those subjects with low self-esteem, 71% reported their number of daughters as the reason for their husband’s subsequent marriage. 100% of those subjects who indicated their age as the reason for remarriage reported low self-esteem.<sup>70</sup> Given the social preference within Bedouin-Arab culture and others for younger wives and a higher number of sons, a woman’s social status and self-esteem are doubly assaulted by her husband’s choice to remarry.<sup>71</sup> Most notably, all the polygynous subjects, regardless of the stated reason for their husband’s remarriage, reported somatic distress (physical symptoms), which is a culturally acceptable way for individuals in Bedouin-Arab society to express emotional difficulties.<sup>72</sup>

Within the Bountiful, B.C. Fundamentalist Mormon context, reports indicate a similar sense of emotional and identity-related harm among polygynous wives. In one report, a counsellor who worked with former members of the community noted that individuals within the community lacked or demonstrated a low level of personal identity.<sup>73</sup> Although conversant about their social roles, they were often unable to respond to inquiries about their own identities. To a large extent, they felt that their value to the group was not intrinsic, but rather was based on their current social role and their personal connections to powerful men in the community.<sup>74</sup>

## **E. SEXUAL AND REPRODUCTIVE HEALTH HARMS**

Beyond the mental health harms associated with the practice, polygyny is also linked to sexual and reproductive health harms. In its General Recommendation no. 24 on Women and Health, CEDAW noted that:

... Adolescent 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.<sup>75</sup>

This specific concern about polygyny and the transmission of HIV/AIDS has been at the forefront of legislative debates in Uganda where there is an assumption that all marriages entered into by Muslims are governed by Shari’a law and can therefore be polygynous. Within this system, wives have no legal status to prevent their husbands from taking a second wife.<sup>76</sup> This is particularly alarming given the high rate of HIV-AIDS infection in Uganda, Kenya, and other African nations.<sup>77</sup>

Within Africa, the most common form of HIV-transmission is through heterosexual sex.<sup>78</sup> Thus, where husbands have multiple sex partners, including wives, they increase their own risk of infection as well as their wives.’ The risk of transmission in polygyny is compounded by the fact that neither a husband nor his present wife can verify a prospective wife’s HIV-status or

guarantee her fidelity during marriage, particularly when the husband is away visiting other wives.<sup>79</sup> For although extra-marital sex is socially frowned upon within most African societies, many polygynous wives partake in it to make up for a lack of attention from their husband.<sup>80</sup>

In turn, when wives transmit sexual diseases to their husbands or vice-versa, other co-wives, who cannot refuse their husband's sexual advances, are also exposed.<sup>81</sup> Given the reluctance of many men in the African context to use condoms during intercourse, particularly with their wife, and the inability of wives to insist on condom use, the risk of transmission during marriage is even more heightened.<sup>82</sup> It is for these reasons that one commentator has called the continued legality of polygyny "the equivalent of an official license for men to transmit AIDS to their wives."<sup>83</sup>

In response to such concerns, the Ugandan Parliament proposed limiting polygyny to two wives, and even then only if the first wife was infertile and consented to the second marriage.<sup>84</sup> There was substantial protest against the proposal by elements of the Muslim population who argued that polygyny constitutes part of their religious freedom.<sup>85</sup> As recently as March 2005, hundreds of Muslim men protested in the capital city to oppose the proposed law, which they believe would restrict their ability to marry more than once.<sup>86</sup> One protester, insisting that polygyny is a religious matter that should not be infringed upon, argued that "Islamic law has been there since it was passed on from Allah to the Prophet Muhammad. It cannot be re-written now."<sup>87</sup>

Thus, the U.N. General Assembly's 2001 Declaration of Commitment on HIV/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 women and girls, including harmful traditional and customary practices...<sup>88</sup>

Despite this, practices such as polygyny continue to be legally permitted in various parts of the world. Women's ability to control their sexual exposure, especially within marriage, is fundamental to limiting the ongoing spread of HIV-AIDS and other infections. This is undermined where polygyny continues to be legally or *de facto* permitted.

Within the Canadian context, polygyny as practised by Fundamentalist Mormons may cause other distinct sexual and reproductive harms to women. In particular, the religious "Law of Chastity" teaching that reproduction is essential to marriage and that sexual activity should be limited solely to procreation deprives women of reproductive choice regarding pregnancy.<sup>89</sup> While a high number of pregnancies can pose physiological risks to women of all ages, the harms to girls within Bountiful's polygynous context could be particularly serious, given that some girls reportedly enter unions at as young as fourteen or fifteen years of age.<sup>90</sup> In this way, their age and gender intersect, making them physiologically at risk for early pregnancies and resulting death and disability.

In its 1997 Concluding Observations on Canada, CEDAW noted that one of their principal areas of concern was the “rising teenage pregnancy rate, with its negative impact on health and education and the resulting increase in the poverty and dependency of young women.”<sup>91</sup> While the Committee’s comments were directed toward teenage pregnancies generally, their observations would be clearly applicable to the Bountiful polygynous context.

## **F. ECONOMIC HARMS**

While economic instability and vulnerability clearly impact women in both monogamous and polygynous unions, economic harms to women are especially aggravated by polygyny. Before examining the economic deprivation associated with the practice, however, it is important to consider whether polygyny as practised in some contexts may in fact increase familial wealth. The theory of “wealth increasing polygyny” or “polygyny with autonomous co-wives” (PCWA) advanced by some social science commentators, including D.R. White posits that the residential autonomy of co-wives (a signal of their economic autonomy) should predict a pattern of polygyny in which additional wives would increase the likelihood of the successful acquisition of another.<sup>92</sup> According to White, this would occur because each additional co-wife would augment the family’s wealth, thereby facilitating the acquisition of more wives.

Bretschneider’s recent cross-cultural study of polygyny, however, does not support this supposition. His findings show that the relationship between a female contribution to subsistence and polygyny is only very indirect and for this reason presumably only of limited significance.<sup>93</sup> Bretschneider concludes that culture-specific family developmental cycles and attitudes to competition versus cooperation likely provide a more adequate explanation as to why some polygynists accumulate additional wives more successfully than others.<sup>94</sup>

While the notion that polygyny in some contexts may be wealth-increasing is highly tenuous, it is well-documented cross-culturally that polygyny, particularly when practised according to a “male-head-of-household” paradigm, often results in economic deprivation.<sup>95</sup> The same factors that contribute generally to the feminization of poverty—namely, that women’s domestic work is typically uncompensated and that women on average have less education and so a lower wage-earning capacity—are particularly aggravated by polygyny where it is associated with patriarchy. The economic under-valuing of women’s work will often cause inevitable financial strain within polygynous families where one husband’s earnings may have to support multiple wives and many children.

Within Mormon Fundamentalist polygynous communities in the United States, for example, anecdotal evidence indicates the financial difficulties such families face. Lillian Bowles, a former polygynous wife, noted the difficulty in finding, let alone affording, sufficient housing for families that may include three or four wives and a dozen or more children.<sup>96</sup> Although there are several large polygynous clans with substantial financial resources within U.S. Fundamentalist Mormon communities, women have no independent access to these assets. In addition, many polygynous families lack adequate health care and nutrition despite receiving significant levels

of public assistance.<sup>97</sup> Within the polygynous community of Bountiful, B.C., community leaders have similarly admitted that most people in the community are poor and that about twenty “single mothers” (the “celestial wives” of polygynous husbands) are given financial support as teaching assistants from the community’s education allotment.<sup>98</sup> Media reports indicate that the community-run schools deliberately end at grade 10, affecting education levels and in the end earning potential.<sup>99</sup>

This economic harm of polygyny is cited by many commentators as one of the main factors, along with a growing trend toward recognizing women’s equality, in the restriction of the practice internationally.<sup>100</sup> Bedouin-Arab interview studies indicate that women in polygynous unions report more economic problems than their monogamous counterparts, with one study expressly concluding that “there are economic consequences of polygamy.”<sup>101</sup> Evidence of women’s attitudes toward polygyny in Uganda illustrates a shared experience of economic deprivation. During the 1990s, the Ugandan government solicited the input of its citizens in the process of developing its 1995 Constitution.<sup>102</sup> In cooperation with women’s NGOs and governmental entities, the Ministry of Women in Development conducted a series of seminars. The Ministry reported that:

A majority of the women who participated in the constitutional seminars recommended that a man should have one wife... Women noted that there is a lot of suffering in polygynous homes because the man cannot love his wives equally and usually he does not have enough to provide sufficient support to his wives and numerous children. This leaves a heavy burden on women...<sup>103</sup>

This type of financial strain is central to the decreasing incidence of the practice in the Horn of Africa, where although polygyny is permissible for all Muslims, few men actually practise it because they cannot afford to.<sup>104</sup> In addition, the economic harms of polygyny are particularly serious as societies become increasingly urbanized with urban living conditions typically not amenable to the living space required for multiple families.<sup>105</sup>

Amid this strained economic environment, certain wives may be especially vulnerable depending on the cultural or social context. Within the Bedouin-Arab culture, for example, as in other Arab cultures, second and subsequent wives are often favoured economically and given greater attention and support. This may be explained in part by the fact that first marriages are often arranged or consanguineous (of the same blood or related by birth) or are exchanges (where two men marry each other’s sisters)<sup>106</sup> Subsequent marriages, on the other hand, may be based on greater love because of the husband’s financial independence and his ability to choose his own wife.<sup>107</sup> In contrast, among Fundamentalist Mormon and some Islamic contexts, senior wives may have a greater role in controlling and distributing family resources. Particularly where subsequent wives are very young, older senior wives often retain primary control over a polygynous family’s resources. Thus, while first wives may be relegated to a background position in some instances, in other cases older wives may use their seniority to control subsequent wives.<sup>108</sup> Particularly where an older wife has property and is a relative of her husband, her status within their extended family may ensure continued security and respect.<sup>109</sup>

## G. HARMS TO THE ENJOYMENT OF ONE'S CITIZENSHIP

Beyond causing economic harms, polygyny as practised in many contexts also undermines women's ability to effectively exercise their citizenship.<sup>110</sup> In this sense, familial practices that violate women's equality are not limited to the 'private' sphere. Domestic inequality, as Courtney Howland has noted, represses fundamental political values including freedom of expression, freedom of assembly and association, the right to freedom of thought, belief and opinion, and even the right to vote.<sup>111</sup> In this sense, 'private' harms to women and girls cannot be separated from the public rights that international legal instruments like the Political Covenant were established to protect. The Preamble to the Women's Convention recognized that discrimination against women within any context:

is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries... .

Despite this deconstruction of the public-private dichotomy, fundamentalist religious authorities in the Bountiful, B.C. context and beyond have expressed concern that religious freedom is threatened and portrayed the discourse on women's rights within the family as an intrusion into the 'private' religious realm, openly celebrating the *Canadian Charter of Rights and Freedoms* as protecting their religiously-informed polygynous lifestyle.<sup>112</sup> What such an interpretation fails to acknowledge is the tension between freedom *of* religion and freedom *from* religion. The compartmentalized public-private paradigm assumes that individuals within certain religious communities necessarily *choose* to live according to religious doctrine that deprives them of their basic rights. However, vulnerable individuals, particularly women and children, may well be subject to constraints that do not allow for any degree of freedom *from* religion.

In this sense, as Howland notes, the rights encompassed in the political articles of the Political Covenant envision citizens being able to participate meaningfully in democratic government. Systemic inequalities reinforced by patriarchal familial practices such as polygyny undermine women's ability to exercise their citizenship within the polity by depriving them of full "intellectual, social, political, and moral personalities."<sup>113</sup> Where polygyny is accompanied by religious or culturally informed obedience rules that require wives to submit to the authority of their husbands, women are often unable to express or even identify their own autonomous social and political interests. Within the Bountiful, B.C. context, obedience rules manifest themselves early in girl children's lives as evidenced by the community's motto of "keeping sweet" painted at the school entrance, which requires that children not speak out against religious teachings.<sup>114</sup> It extends to priests' regulation over virtually every aspect of women's lives including who they marry.<sup>115</sup>

In addition, modesty codes that require "feminine modesty" in behaviour and dress also reinforce women's inferiority in both the public and private spheres.<sup>116</sup> Within the Bountiful, B.C. context, for example, men control both women's dress, which tends to be long, loose-fitting dresses, and boys' dress, which tends to be long-sleeved shirts.<sup>117</sup> In examining this element of subordination within the polygynous context, it is important to note that such codes do not merely prohibit

freedom of choice in appearance or behaviour, but actually construct the feminine norm as ideally non-sexual (at least in public settings). To confine debate about such practices and modes of thought to being one about the 'private sphere' is thus to underestimate the degree to which private inequality impinges on citizenship generally and on one's core political rights more specifically. Thus, as Howland argues, the Political Covenant imposes on States parties an affirmative obligation "to ensure that women's political rights are protected from systemic private interferences."<sup>118</sup>

## **H. HARMS TO CHILDREN OF POLYGYNOUS UNIONS**

Beyond the harms to women associated with polygyny, studies also indicate that adolescents from polygynous families have lower levels of socio-economic status, academic achievement, and self-esteem, as well as higher levels of reported family dysfunction than children from monogamous families.<sup>119</sup> In a study by Varghese Cherian, the academic achievement of children in Transkei was measured in relation to their parents' marital status (monogamous or polygynous).<sup>120</sup> The mean achievement score of children from polygynous families (766.11) was significantly lower than those from monogamous families (1035.62). The researchers explained this difference by noting that polygynous families are more prone to jealousy, conflict, tension, emotional stress, opposing motives, insecurity, and anxiety.<sup>121</sup> This type of emotional stress, anxiety, and insecurity can seriously undermine educational progress. In particular, rivalry and jealousy between co-wives can cause significant emotional problems for children. Other studies also note that polygynous respondents have indicated increased stress in the mother-child relationship because of decreased social and economic resources.<sup>122</sup> In addition, the mothers' own low self-esteem regarding their marital context is associated with behavioural problems in their children.

Moreover, as Al-Krenawi has noted, fathers in polygynous households are often unable to give sufficient attention to all their children, thus reducing children's emotional security from close contact between their mother and father.<sup>123</sup> As a report regarding the Bountiful, B.C. polygynous context has shown, children in such contexts are typically deprived of paternal bonding and assistance in helping them to resolve and develop their personal identities.<sup>124</sup> Learning problems can follow from this emotional deprivation.<sup>125</sup> This emotional deprivation and ensuing learning problems clearly violate the best interests of the child as protected by Article 3 of the Convention on the Rights of the Child.

Where such emotional deprivation undermines children's mental health, States parties to the Children's Convention have an obligation to take appropriate measures to abolish polygyny. In addition, where polygynous marriages involve the marriage of adolescent girls, this can harm their physical and mental health as outlined above.<sup>126</sup> In either case, failing to prevent and/or remedy such harms is contrary to States' obligations under the Children's Convention, especially under Article 24 on the right to the enjoyment of the highest attainable standard of health. Article 24(3) provides that:



States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

General Comment 4 on Adolescent Health elaborates the content and meaning of the Children's Convention to explain that:

Adolescent girls should have access to information on the harm that early marriage and early pregnancy can cause, and those who do become pregnant should have access to health services that are sensitive to their rights and particular needs.<sup>127</sup>

This Comment also explains that States Parties are obligated “to adopt legislation to combat practices that either increase adolescents’ risk of infection ... “<sup>128</sup>, which would require them to adopt legislation to eliminate polygyny, or at least prohibit polygynous marriages with adolescent girls. Moreover, in its General Comment on HIV/AIDS and the Rights of the Child, the CRC explains that the Children’s Convention requires that necessary steps be taken to reduce children’s vulnerability to HIV/AIDS, including “making informed choices about decisions, practices and policies affecting them in relation to HIV/AIDS.”<sup>129</sup> Where traditional practices such as polygyny undermine children’s health, including possibly exposing them to sexually-transmitted infections such as HIV/AIDS, international law requires that States take the requisite steps to eliminate them.

In addition to learning or mental health problems, the economic problems associated with polygyny can in some instances deprive children of their basic right to education. Because polygynous unions have the potential for producing large families, this can often undermine parents’ abilities to meet their children’s basic educational needs, particularly within the African context<sup>130</sup> where the African Charter protects the right to education.<sup>131</sup> While the African Charter also emphasizes the importance of African culture, Article 29(7) expressly limits this to “positive African cultural values.” As Tibatemwa-Ekiribukinza argues, a practice that may contribute to familial violence and undermine children’s access to education does not qualify as a “positive value.”<sup>132</sup>

While the Committee on the Rights of the Child has not thoroughly addressed these harms to children, it has expressed concern about the impact of polygyny on children and the need for a review of programs, policies and legislation to discourage the practice.<sup>133</sup>



### III. POLYGYNY AS A VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW

In light of the harms to women and children associated with polygyny, this section will outline the various rights of women and children that the practice violates under international human rights law. While the rights analysis here involves human rights that are by definition universal, it is clear that just as the harms of polygynous unions may differ according to their context, so also may the rights violations. Significantly, however, the right to equality within marriage and the family is violated *per se* by polygyny regardless of the cultural or religious context in which it is practised.

#### A. INTERNATIONAL TREATY AND CONVENTION LAW

In assessing Canada's obligations under the various treaties that protect the rights of women and children, there are four guiding principles in treaty interpretation: the textual principle, the contextual principle, the object and purpose principle, and the dynamic principle.<sup>134</sup>

The textual principle focuses on the ordinary meaning of the text. As Cook notes, for human rights treaties, a textual approach that looks to objective criteria is more appropriate than subjective criteria that try to ascertain only the intent of the Parties.<sup>135</sup> Moving beyond the text itself, the contextual principle requires one to also look at the interrelationship of all components of the text, including the preamble, annexes and subsequent agreements and practice, as mandated by article 31(2) and 31(3) of the Vienna Convention.

The object and purpose principle requires that treaties be interpreted in a manner that gives full effect to their object and purpose while remaining consistent with the ordinary sense of the words and other parts of the text. The clearest articulation of the object and purpose of the Women's Convention is found in CEDAW's General Recommendation no. 25,<sup>136</sup> which explains that:

States parties to the [Women's] Convention are under a legal obligation to respect, protect, promote and fulfill this right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of *de jure* as well as *de facto* equality with men.<sup>137</sup>

Where limitation clauses exist, they are therefore strictly interpreted to leave the widest margin of rights protection available. In determining the more specific object and purpose, the *travaux préparatoires* can be useful in clarifying textual uncertainties, particularly where an interpretation of the textual meaning or object and purpose of the treaty under Article 31 (1) of the *Vienna Convention on the Law of Treaties* "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."<sup>138</sup>

Because the object and purpose of human rights conventions evolve over time, the dynamic principle of interpretation is particularly important. In *Marckx v. Belgium*,<sup>139</sup> the European Court of Human Rights applied the principle to enable an unmarried mother to legitimate her child in

the same way a married woman could, stating that “the Convention must be interpreted in light of present day conditions.”<sup>140</sup> The reporting mechanism under the Woman’s Convention helps to ensure that the Convention maintains “an elastic or dynamic component” as states report their legislative, judicial or administrative progress in eliminating discrimination against women.<sup>141</sup> In applying the dynamic principle, it is thus essential to ascertain what constitutes “present day conditions.” One of the most effective ways to do this is to examine how other judiciaries are analyzing certain types of practices, particularly within the context of a given treaty.

As this report argues throughout, polygyny is a form of discrimination against women that international treaty law requires states to eliminate. The most specific articulation of this is found in CEDAW General Recommendation no. 21 on Equality in Marriage and Family Relations.<sup>142</sup> This is further reflected in the General Comments and Concluding Observations of several treaty bodies including CEDAW, the HRC, the CESCR and the CRC, which have stated that polygyny violates women’s right to equality and the best interests of the child.<sup>143</sup>

## **B. FAMILY LIFE**

### **1. The Right to Equality within Marriage and the Family**

From its inception, modern international human rights law has called for gender equality before the law and in marriage.<sup>144</sup> The preamble to the 1947 United Nations Charter indicates a “determination... to reaffirm faith in fundamental human rights... in the equal rights of men and women...”<sup>145</sup> Article 55 of the Charter states that the U.N. will “promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to... sex...”<sup>146</sup> In addition, the U.N. Commission on the Status of Women, which first met in 1947, agreed to work for:

freedom of choice, dignity of the wife, monogamy, and equal rights to dissolution of marriage.<sup>147</sup>

This mandate was reflected in the Universal Declaration’s Article 16, which states that:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family... [and]... are entitled to equal rights as to marriage, during marriage and at its dissolution.

This commitment to gender non-discrimination is also evident in both the Political and Economic Covenants. Article 2(1) of the Political Covenant requires States parties to ensure the rights articulated in the Political Covenant without distinction of any kind including sex. In a similar vein, Article 3 provides that States parties shall “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.” Significantly, the Political Covenant also includes a strong commitment to marital equality, building on the Universal Declaration’s commitment by adding equal *responsibilities* within marriage beyond just equal rights. Article 23(4) of the Political Covenant requires that ratifying States:

shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution.

The Economic Covenant also contains a general non-discrimination clause on the basis of sex (Article 2). In addition, States parties have a positive obligation under Article 3:

to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

While the Economic Covenant does not expressly guarantee equality within marriage and family life, it is arguable that the positive obligation to ensure the equal enjoyment of the rights articulated therein imposes a duty on States parties to abolish discriminatory practices such as polygyny that undermine women's ability to enjoy their rights.

It is in the Women's Convention, however, that one sees the greatest international commitment to transformative gender and marital equality. The preamble of the Women's Convention expresses a conviction that:

a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.

As CEDAW explains in its General Recommendation no. 25 on Temporary Special Measures:

The position will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.<sup>148</sup>

It is this commitment to a real transformation of institutions, such as polygyny, that provides the greatest protection for women within the family. Where States parties legally encourage, condone, or simply ignore unequal familial practices of polygyny, they perpetuate male paradigms of power, resulting in women's *de facto* and *de jure* inequality.

In striving to achieve this transformation, particularly within the familial realm, Article 16 of the Women's Convention requires States parties:

To take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular [to] 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;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Here, the Women’s Convention established a comprehensive equal rights and responsibilities regime for men and women within the family. It is this equality in rights and responsibilities that asymmetrical marital practices such as polygyny violate. As Susan Deller Ross has noted, when a husband has multiple wives, each wife essentially has only a fraction of a husband. As a result, spousal maintenance and child-care resources are all divided unequally vis-à-vis individual polygynous husbands and their respective wives whether during marriage or at its dissolution.<sup>149</sup> Such husbands are able to share only a fraction of their emotional, sexual, and financial attention with each individual wife, meaning that polygynous wives have fewer *de facto* marital rights and their husbands fewer responsibilities.<sup>150</sup>

It is for these reasons that CEDAW has stated that polygyny violates women’s right to equality within marriage. In its General Recommendation no. 21 on Equality in Marriage and Family Relations, the Committee stated 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 constitutions 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.<sup>151</sup>

While the General Recommendations of CEDAW are not binding interpretations of the Convention, they are considered influential interpretations.<sup>152</sup> In particular, as Byrnes notes, General Recommendations provide useful material from which to form arguments based on the Convention in both political and legal contexts.<sup>153</sup> They have been invoked before national courts and tribunals including in New Zealand,<sup>154</sup> Canada,<sup>155</sup> and India.<sup>156</sup>

In *Vishaka and Others*, the Indian Supreme Court cited CEDAW General Recommendation no. 19 in relation to sexual harassment to fill a lacuna in Indian law that had failed to adequately protect women in the workplace.<sup>157</sup> The Court stressed that India had ratified the Women’s Convention and that the Government had made an official commitment at the Fourth World Conference on Women in Beijing “to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector.”<sup>158</sup> As such, the Court stated that it “had no hesitation in placing reliance on the above [General

Recommendation] for the purpose of construing the nature and ambit of [the] constitutional guarantee of gender equality in our Constitution.”<sup>159</sup>

In addition to the comments above, CEDAW also suggested that states should require the registration of all marriages, whether conducted civilly or according to customary law, in order to:

ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.<sup>160</sup>

Despite CEDAW’s recommendation that states require registration, this remains one of the most significant obstacles to prohibiting polygyny. Evidence from the Ugandan context, where most people marry under customary law, indicates that few of these unions are registered, despite a requirement to do so under the Customary Marriage Registration Decree.<sup>161</sup> Similarly, the majority of polygynous Fundamentalist Mormon unions in Canada and the United States are never civilly registered.<sup>162</sup> To avoid blatantly flouting criminal bigamy prohibitions, most Fundamentalist Mormon polygynous husbands legally marry one wife and have religious marriage ceremonies only with subsequent wives.<sup>163</sup>

## **2. The Right to Private and Family Life**

The right to private and family life, recognized in both the Political Covenant<sup>164</sup> and the European Convention<sup>165</sup> was traditionally applied in cases of state-based violations of privacy including laws that prohibited homosexual activity between consenting adult males.<sup>166</sup> Significantly, the HRC noted in its General Comment no. 16 on Article 17 (Right to Privacy) of the Political Covenant that the right to private and family life imports positive obligations beyond a traditional non-interference interpretation. The HRC stated that:

the obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.<sup>167</sup>

Because States parties are obliged to prohibit interferences with this right by either “State authorities or natural or legal persons,”<sup>168</sup> the right to private and family life can no longer be classified as a purely State-individual concern. Rather, States parties have a duty to prohibit interferences at the individual-individual level as well as to generally protect this right.

Beyond this more positive conception, however, there has been little development as to the actual substantive content of the right to private and family life. For this reason, it is important to articulate some of the interests that may inform this right, namely dignity, security and relational interests in family life.

The dignity element of exclusive marital relationships as well as the legal and economic security interests bound up with it is fundamental to family life. In this sense, the high rates of divorce and re-marriage within monogamous legislative frameworks differ from actually polygynous

contexts because the latter lack the kind of formal structures around ending marriage and re-marrying that protect those security and property interests.

When practised patrilocally (where wives reside together with a husband's kin group or clan), polygyny violates the right to familial privacy and undermines women's security and relational interests by compounding the inherent difficulties of sharing one's husband. One former polygynous wife interviewed in prison while serving a life sentence for killing her husband remarked:

How can I go to sleep knowing that my husband is lying with another woman just next door? Just knowing that one's husband has another woman makes one crazy enough without having to see her every day.<sup>169</sup>

In reaction to these types of familial privacy concerns, Article 27(2) of the Ugandan Constitution now guarantees every person the right to privacy. Under Ugandan law, any man who practises polygyny patrilocally, whether he has the consent of the senior wife or not, interferes with her right to privacy.<sup>170</sup>

In most instances, requiring co-wives to cohabit not only violates their privacy, but also constitutes an attack on their honour, reputation, and dignity.<sup>171</sup> In *Itwari v. Asghari*, the Allahabad High Court noted that the increasing mobility of Muslim women makes the introduction of another wife into their domicile an even greater insult today than it may have been historically.<sup>172</sup> Linking this to wives' emotional well-being, the Court observed 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.<sup>173</sup>

Here, the Court was clear that patrilocal polygyny not only undermines a wife's right to familial privacy, but can also be extremely detrimental to her personal honour. Significantly, the HRC has interpreted Article 17 as imposing a positive obligation on States parties to ensure that "the honour or reputation of individuals is protected by law..."<sup>174</sup> Given the HRC's finding in its 2002 Concluding Observations on Yemen that the persistence of polygamy is "an affront to the dignity of the human person and discriminatory under the Covenant,"<sup>175</sup> the legal allowance or encouragement of the practice, regardless of residency requirements, violates Article 17.

Even so, separate residency requirements may at the least reduce some of the psychological tension associated with shared domiciles. However, as the international non-governmental organization Women Living under Muslim Law (WLUML) has noted, where polygyny is permitted, legislation rarely requires separate dwellings.<sup>176</sup> Moreover, "separate dwellings" can be interpreted as separate residences in separate locations, different homes in the same residential community or compound, or merely separate kitchens or bedrooms with shared facilities.<sup>177</sup> Even where states such as Mali require in principle that each wife have her own household, this is



often violated in practice by husbands who insist on wives living together under husbands' "head of the family" authority.<sup>178</sup>

Even where polygynous families maintain separate households, women's relational and security interests in family life are nevertheless violated. The case of Natakunda, a Ugandan wife who was convicted of conspiring to murder her husband's proposed wife, reveals the extent to which polygyny can undermine women's precarious economic security interests in marriage.<sup>179</sup> Because of an early pregnancy, Natakunda was unable to complete her schooling or attain any professional qualifications. She placed all her economic security in a joint venture business with her husband from which she hoped to eventually assist her own children.<sup>180</sup> When her husband threatened to take a new wife, a school-aged girl he had impregnated, Natakunda saw the proposal as a devastating attack not only on her personal dignity, but also her economic security interests. Without the kind of matrimonial property protections that have been developed in many family law regimes within monogamous systems, Natakunda faced the prospect of losing her only form of economic security. In the words of the prosecutor-state attorney, Natakunda's eventual crime "[was] a case of extreme emotion... loss of hope and despair."<sup>181</sup>

Thus, although Article 18 of the African Charter on Human and Peoples' Rights states that "the family... [as] the natural unit and basis of society... shall be protected by the State which shall take care of its physical health or moral needs," the Charter's tacit acceptance, though discouragement, of polygyny in Article 6 underscores a tension within the document. Given that subsequent marriages disrupt the family unit of the present husband and wife, the Charter duty imposed on states to protect such families seems to require that states restrict and eventually abolish polygyny.

### **3. The Right to be Free from All Forms of Stereotyping**

In addition to interfering with the right to private and family life, polygyny as practised in many cultural contexts also violates women's rights to be free from all forms of stereotyping.

Article 5 of the Women's Convention requires States parties to:

take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Context-specific factors such as religious or cultural teachings that endorse polygyny as a way of maximizing reproduction clearly stereotype women's roles within the family.<sup>182</sup> More generally, polygyny tends to essentialize women's reproductive capacity as being central to marital success. In many cases, polygyny is seen as a solution to a wife's infertility, her "inability" to have enough sons, her post-menopausal state, or simply to maximize reproduction. In all these scenarios, a wife's value within marriage is equated with her reproductive capacity (and

particularly ‘male-child reproductive capacity’). In this way, polygyny and reproductive stereotyping reinforce each other.

States parties have an obligation to address such patriarchal stereotypes within the familial realm as well as the broader legislative and social frameworks that perpetuate them. In outlining the importance of temporary special measures in challenging gender discrimination, CEDAW noted that:

States parties’ obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.<sup>183</sup>

In applying this reasoning to the particular issue of polygyny, CEDAW has consistently articulated the need to eliminate cultural, customary, and legal norms that perpetuate the practice. In its 2001 Concluding Observations on Guinea, the Committee noted:

with concern that, despite prohibitions in statutory law, there is wide social acceptance and lack of sanctions for such practices as ... polygamy and forced marriage including levirate (the practice of marrying the widow of one’s childless brother to maintain his line) and sororate (the custom of marriage of a man to his wife’s sister or sisters, usually after the wife has died or proved sterile)... [The Committee] expresse[d] concern that the civil code contains provisions in family law that discriminate against women and that reinforce discriminatory social practices... [and] ...that the Government uses social practices and customs to justify the non-enforcement of the civil code.<sup>184</sup>

Here, the Committee drew attention to the intersection between discriminatory legislation, non-enforcement of civil laws, and harmful social practices and customs. Harmful and discriminatory practices such as polygyny are often premised on and subsequently reinforce stereotypes of women that are in turn used by governments to justify discriminatory family laws and the non-enforcement of equality provisions.

In combating such stereotypes, the Committee encouraged public-awareness campaigns “to eliminate the gap between statutory law and social customs and practices, especially with regard to family law.”<sup>185</sup> This may be particularly helpful for women in polygynous unions in Bountiful, B.C. and elsewhere in Canada where family practices do not accord with statutory law. In particular, the Committee’s direction that the Government of Guinea ensure “women’s awareness of their rights” is relevant in the Canadian context where some women may be unaware of the legal protections available to them should they wish to leave polygynous unions.

#### **4. The Right to Exercise Free and Full Consent in Choosing a Spouse and Entering into Marriage**

The importance of free and informed consent in marriage is reflected in CEDAW’s General Recommendation no. 21 on Equality in Marriage and Family Relations where it observed that “a woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being.”<sup>186</sup> This is echoed in regional international human rights

treaties. Article 6(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women calls on states to enact "national legislative measures to guarantee that no marriage shall take place without the free and full consent of both parties."<sup>187</sup> Here, the Protocol is clear that free and full consent is a necessary prerequisite to achieving the Article 6 goal of ensuring that women and men enjoy equal rights as equal partners in marriage. Marital equality cannot be achieved where the marriage itself was not freely consented to by both parties.

The essential dignity involved in such consent is obviously violated in cases where women or girl-children are assigned to polygynous marriages without any free choice as to the proposed spouse or the marriage itself. Within the Canadian and U.S. Fundamentalist Mormon polygynous contexts, priests assign marriages for girls sometimes as young as fourteen.<sup>188</sup>

Even where marriages are not assigned by others without the consent of the proposed wife, the informational and educational shortcomings in some polygynous contexts undermine the possibility of free and informed consent. As human rights reports have argued in the United States Fundamentalist Mormon context, women and girl-children who are denied external education and are trained to obey religious teachings within closed polygynous communities may not see any other options outside polygynous unions.<sup>189</sup> In this sense, where women and girl-children are denied the most basic information, there is no real opportunity for them to exercise "free and full consent" to marriage as required under international human rights law.<sup>190</sup>

The importance of access to information in the context of marital choice has long been articulated by the United Nations General Assembly. In 1954, the General Assembly's Resolution 843 (IX) on the Status of Women in Private Law: Customs, Ancient laws and Practices Affecting the Human Dignity of Women noted that some:

women are subject to customs, ancient laws, and practices relating to marriage and the family which are inconsistent with [the] principles [of the United Nations Charter and the Universal Declaration of Human Rights].<sup>191</sup>

In urging states to abolish such practices, the Resolution recognized the importance of "ensuring complete freedom in the choice of a spouse."<sup>192</sup> This notion of "complete freedom" infers a level of informed freedom. Given the deleterious implications of polygyny, one can also extend the human dignity reasoning to include a choice as to the *type* of marital union and whether one will have co-wives.

Where women or girl-children are not sufficiently mature or do not have adequate information about their marital rights and their sexual and reproductive health needs, the possibility for informed and "complete freedom" of choice is severely compromised. In light of this, Resolution 843 (IX) also recommended that

special efforts be made through fundamental education, in both private and public schools, and through various media of communication, to inform public opinion in all areas mentioned in the second paragraph of the preamble above concerning the Universal Declaration of Human Rights and existing decrees and legislation which affect the status of women.<sup>193</sup>

In this sense, free and informed consent, similarly to other rights, is often contingent on one's knowledge that such a right even exists. Countries such as Canada should promote rights awareness campaigns, particularly for women and children within vulnerable contexts such as those living within closed religious communities, recent immigrants, and adolescent girls generally who may be unaware of their domestic or international rights.

## **C. SECURITY**

### **1. The Right to be Free from All Forms of Violence**

Gender-based violence is characterized in CEDAW's General Recommendation no. 19 on violence against women as "violence that is directed against a woman because she is a woman or that affects women disproportionately."<sup>194</sup> Given that General Recommendation no. 19 defines "gender-based violence" as including acts that inflict physical, mental or sexual harm, polygyny as practised in many contexts can be included within this category.

Moreover, like CEDAW, the 1993 General Assembly's Declaration on the Elimination of Violence against Women defined the term "violence against women" as including:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women...<sup>195</sup>

In addition to this robust definition of violence against women, the Declaration's specific attention to traditional practices that are harmful to women is significant in the context of polygyny. In a non-exhaustive list, Article 2(a) notes that violence against women encompasses:

physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape...and other traditional practices harmful to women...<sup>196</sup>

Given the serious physical, sexual and psychological harms often associated with polygyny, it constitutes a "traditional practice harmful to women" and can therefore be considered a form of violence against women as per Article 2(a) of the Declaration.

In addition to the Declaration's classification of violence against women, CEDAW's General Recommendation no. 19 also noted that:

gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.<sup>197</sup>

In this respect, gender-based violence may violate provisions of the Women's Convention that do not expressly refer to violence. Some of the rights and freedoms that gender-based violence can impair or nullify include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.<sup>198</sup>

As a human rights analysis of polygyny indicates, the practice tends to undermine several of these rights, including, but not limited to, the right not to be subjected to cruel, inhuman or degrading treatment, the right to liberty and security of the person, the right to equality in the family, and the right to the highest attainable standard of physical and mental health. Then U.N. Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, characterized polygyny as a form of violence in her 2002 Report on cultural practices in the family that are violent against women. There, she noted that "several... forms of threat or violence are used to ensure that women stay obedient within a marriage, for example the threat of the husband taking another wife..."<sup>199</sup> "In some countries, polygamy", she stated, "is either legal or condoned."<sup>200</sup>

Because it exists within the familial realm, polygyny is an especially serious form of violence. CEDAW has referred to domestic / familial violence as "one of the most insidious forms of violence against women" and in turn a violation of Article 16 of the Women's Convention.<sup>201</sup> Familial violence, as the Committee notes, is "perpetuated by traditional attitudes"<sup>202</sup> These traditional attitudes:

by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse [and] forced marriage... Such prejudices and practices may justify gender-based violence as a form of protection or control of women.<sup>203</sup>

In violation of Articles 2(f), 5 and 10(c) of the Women's Convention, such traditional attitudes tend to reinforce patriarchal family practices such as polygyny that in turn can reinforce attitudes that condone violence against women.

Beyond often constituting a form of violence itself, polygyny can also indirectly catalyze or aggravate domestic violence because of the often acrimonious nature of co-wife or husband-wife relationships. In field research carried out by Law and Advocacy for Women in Uganda, for example, 86.7 % of a focus group in Iganga and 80 % of a focus group in Kampala identified polygyny as a cause of domestic violence.<sup>204</sup> Ruth Mukooyo, a representative of the FIDA Legal AID project, argued:

The constitution talks about equality. Polygamy offends this principle. Most of our population is polygamous. Even when they marry in church they still go and get other pseudo-wives. They had to compromise in the Domestic Relations Bill. Therefore now they require the wife's consent. . . . Polygamy really encourages violence. It is psychological torture for wives which leads to conflict.<sup>205</sup>

This connection between polygynous relationships and domestic violence is also seen within Fundamentalist Mormon communities in Utah, where adult women have reported spousal battering and intimidation.<sup>206</sup>

In addition, the inability of polygynous husbands to devote sufficient resources and attention to their family may also constitute a form of violence. In its General Recommendation no. 19, CEDAW noted that:

the abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.<sup>207</sup>

Accordingly, the type of economic deprivation reported across a variety of polygynous contexts as a result of husbands' inability to adequately or equally support multiple wives and children can itself be considered a form of violence.

In addressing the oft-noted 'private' nature of such familial abuses, CEDAW has expressly stated that:

under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.<sup>208</sup>

In this regard, States parties are required to take appropriate measures to eliminate violence and discrimination against women, whether resulting from the actions of public or private individuals.

The customary or religious nature of such practices does not negate the duty of States parties to condemn polygyny and other forms of violence against women. International human rights law is clear that customary or religious arguments cannot be invoked to justify violence against women. The 1993 Declaration on the Elimination of Violence against Women noted that:

"States... should not invoke any custom, tradition, or religious consideration to avoid their obligations to eliminate violence against women."<sup>209</sup>

To this end, customary, religious, or cultural arguments cannot be used to justify practices such as polygyny that may constitute a form of violence against women under international law.

## 2. Women's Rights to be Free from Inhuman and Degrading Treatment

In addition to the right to be free from violence, international law also provides a more general protection against inhuman and degrading treatment. Article 7 of the Political Covenant states that “no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” While this right was traditionally considered within the context of prisoner abuse and torture, human rights tribunals and courts have recently applied it to ensure that women's dignity is respected, protected and fulfilled.<sup>210</sup> The right has been used to hold States accountable for the rape of women by government officers, for example.<sup>211</sup> Thus, where polygyny is practised in a context that fosters the sexual abuse of women and children, as is alleged within the Bountiful, B.C. and Utah Fundamentalist Mormon contexts,<sup>212</sup> individuals' rights to be free from inhuman and degrading treatment are clearly violated.

The right to be free from inhuman and degrading treatment is also being increasingly utilised to protect human sexuality.<sup>213</sup> In assessing practices such as polygyny that are harmful to women's mental and sexual and reproductive health, particularly because of its interference with spousal intimacy, the right to be free from inhuman treatment is especially relevant. As has been explained, human sexuality serves an important role beyond reproduction in contributing to human bonding, intimacy, affection and fidelity, spousal or partner attraction, and as such is central to human development and security.<sup>214</sup> While sexuality has traditionally been treated by courts through a negative, non-interference right to privacy, it has been argued that because sexual intimacy is inherent to being human, a denial of that sexuality, or by extension a violation of it through harmful sexual practices, denies individuals the right to be fully human.<sup>215</sup>

Indeed, recent work by the Pan American Health Organization has noted that:

sexual health is the experience of the ongoing process of physical, psychological, and socio-cultural well being related to sexuality. Sexual health is evidenced in the free and responsible expressions of sexual capabilities that foster harmonious personal and social wellness, enriching individual and social life. It is not merely the absence of dysfunction, disease and/or infirmity. For sexual health to be maintained it is necessary that the sexual rights of all people be recognized and upheld.<sup>216</sup>

To legitimize through law marital practices that are harmful to women's sexual well-being and contrary to their inherent dignity is therefore a violation of women's right to be free from cruel and inhuman treatment.

Such reasoning was applied in *Itwari v. Asghari* where the Allahabad Court applied a cruelty analysis in denying a Muslim husband restitution for conjugal rights from his first wife.<sup>217</sup> In dismissing the notion that considerations of cruelty could differ according to English, Hindu, or Islamic law, the Court noted that:

the test of cruelty is based on universal and humanitarian standards that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety or health.<sup>218</sup>

In light of current social conditions, the increased mobility of Muslim women, and the deleterious effect of polygyny on women's well-being, the Court reasoned that:

the onus today would be on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the other.<sup>219</sup>

Placing the onus on husbands to prove that taking a subsequent wife is not an act of cruelty to the first wife even within a system where polygyny is legally permissible for Muslims is indicative of the emerging recognition that polygyny often constitutes an act of cruelty.

### **3. The Right to the Highest Attainable Standard of Health**

One of the most important yet elusive rights for women globally is the right to the highest attainable standard of health. Where traditional practices such as polygyny undermine women's mental, physical, and sexual and reproductive health, they not only deprive women of this health right, but also threaten the enjoyment of other human rights, including the right to life, liberty, and security of the person, amongst others.

The right to the highest attainable standard of health has long been recognized as a fundamental human right. The World Health Organization's (WHO) 1946 Constitution stated that:

the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.<sup>220</sup>

This commitment to the right to health has been echoed in subsequent international human rights treaties including the Economic Covenant, the Women's Convention, the Children's Convention, as well as various regional human rights instruments.<sup>221</sup> In fact, according to the WHO, "every country in the world is now party to at least one human rights treaty that addresses health-related rights, including the right to health and a number of rights related to conditions necessary for health."<sup>222</sup>

The Economic Covenant furthered earlier articulations of the right to health by including a positive duty for States parties to recognize it. Article 12 provides that:

States parties to the [Economic] Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Given the association between polygyny and various health harms to women, as well as emotional and behavioural dysfunction in children, "recognition" of the right to the highest attainable standard of health requires that States parties prohibit discriminatory practices that are harmful to the health of women and children. While the provision may not impose the same level of positive State obligation that a duty to "ensure" the highest attainable standard of health would, it nevertheless requires States to tangibly "recognize" the right. In order to be meaningful, recognition in this sense requires States parties to prohibit practices such as polygyny that violate the right to the highest attainable standard of health.



To this end, although the CESCR has been sensitive to the resource constraints many States parties face in providing adequate health care, it has been clear that:

States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.<sup>223</sup>

Accordingly, States parties have a duty to take “concrete and targeted” steps to abolish practices that prevent women from enjoying the right to health. The CESCR has noted that this requirement to take proactive steps toward the full realization of Article 12 includes the shielding of “women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.”<sup>224</sup>

Furthering this general right to the highest attainable standard of health, Article 12 of the Women’s Convention strives to ensure that women receive adequate and non-discriminatory access to health-care. Article 12 calls on States parties to:

take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

This Article has been interpreted by CEDAW in its General Recommendation no. 24 on Women and Health as implying a State obligation to “respect, protect and fulfill women’s rights to health care.”<sup>225</sup> The obligation to *protect* women’s right to health is particularly relevant in the context of polygyny. As CEDAW has noted:

The obligation to *protect rights* relating to women’s health requires States parties, their agents and officials to take action to prevent and impose sanctions for violations of rights by private persons and organizations.<sup>226</sup>

Where polygyny threatens the mental, physical, and sexual and reproductive health of women, States parties are therefore obliged to prevent and subsequently eliminate the practice. Moreover, because polygyny can be considered a form of gender-based violence, it is essential that States parties ensure “gender-sensitive training to enable health care workers to detect and manage the health consequences” of polygynous violence.<sup>227</sup>

Within the last decade, women’s health and the factors that shape it have attracted even greater international attention. As the 1995 Beijing Platform for Action, Fourth World Conference on Women noted:

Women have the right to the enjoyment of the highest attainable standard of physical and mental health. The enjoyment of this right is vital to their life and well-being and their ability to participate in all areas of public and private life. Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Women’s health involves their emotional, social

and physical well-being and is determined by the social, political and economic context of their lives, as well as by biology.<sup>228</sup>

This robust interpretation of women's health is particularly relevant for the elimination of harmful familial practices. Practices such as polygyny can, as the above Harms section has illustrated, impact women's health in a variety of ways—physically, mentally, emotionally, psychologically, and sexually. A holistic approach to women's health illustrates that an interference with any facet of a woman's health negatively impacts her ability to enjoy a requisite level of private and public well-being.

Thus, while the right to health is often examined within the context of access to effective and adequate medical treatment, it has important implications for the elimination of practices that are harmful to women's health. Indeed, there is a growing international recognition of the deleterious health impact of certain traditional practices, particularly with regard to sexual and reproductive health. The 1995 Beijing Platform for Action noted that:

Reproductive health eludes many of the world's people because of such factors as: inadequate levels of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services; the prevalence of high-risk sexual behaviour; discriminatory social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive lives.<sup>229</sup>

In this sense, inadequate education, misinformation, the limited power many women and girls have over their sexual lives, and high-risk sexual practices such as polygyny combine to undermine the health of women and girls.

While the importance of health has recently been recognized in some national constitutions including the 1996 South African Constitution, which protects economic, social, and cultural rights, including the right to health, older constitutions typically focus on the more classical civil and political rights.<sup>230</sup> However, in light of an increasing awareness of the interdependence of rights, courts in states whose constitutions reflect these more traditional rights are beginning to incorporate notions of health into the meaning of those civil and political rights. In some domestic systems, this has meant that State neglect of an individual's health needs has been interpreted as a denial of the right to security of the person.<sup>231</sup>

Within the Canadian context, one can see similar reasoning in the 1988 *Morgentaler* decision wherein the Supreme Court held that criminalizing abortion and therefore requiring a woman to carry a fetus to term violated her right to security of the person.<sup>232</sup> Thus, even where an independent right to health is not guaranteed domestically, an argument can still be made that in increasing women's exposure to sexually transmitted diseases through concurrent sexual networks, polygyny violates women's right to security of the person. Where polygyny is practised to maximize reproduction and is condoned by the State, women's inability to space births in a healthy manner may also be interpreted as a violation of their security of the person rights.

#### **4. Women's Rights to be Free from Slavery**

In examining inequalities within polygynous families, some commentators have noted that polygyny as practised in some contexts may closely resemble slavery where women are unable to refuse assigned service roles.<sup>233</sup> Linkages between the notion of slavery and marriage, as Weisbrod notes, are commonplace in literature and folksong histories.<sup>234</sup> This analogy to slavery is particularly applicable where women and girls within polygynous families are stereotyped into service roles and are essentialized as reproductive beings.

Within the Bountiful, B.C. polygynous context, for example, provincial education inspectors have acknowledged that girls are permitted only to do “preparing, catering and cleaning up after a meal” and “sewing and experiencing other types of handiwork or needlework”<sup>235</sup> in the community's private schools. In requiring girls and women to adopt service roles from a young age, polygyny as practised in this context reifies women's central role as one of servitude.

Moreover, because reproduction is seen as essential to salvation and / or general well-being in many polygynous cultures, women may in a sense become sexual slaves who are unable to control their own reproduction. In the Fundamentalist Mormon context, for example, polygynous unions are governed by the “Law of Chastity” within marriage, which states that sexual intercourse is strictly for reproductive purposes, and thus limited to the time of girls' or women's ovulation.<sup>236</sup> Incumbent in such teachings is the denial of women's access to reproductive choices that would allow them to prevent or space out pregnancies. Within some Islamic and Arab contexts, while the number of children produced within marriage may not be central, the number of boy-children often is.<sup>237</sup> Women, in turn, are stereotyped into reproductive roles that can be harmful to their mental and physical health.

In addition, although child marriages are neither limited to nor indicative of all polygynous contexts, the existence of child marriage in some polygynous contexts nevertheless undermines the girl-child's right to be free from the slavery of early or forced marriage.<sup>238</sup>

#### **5. The Right to an Adequate Standard of Living**

As the economic harms of polygyny indicate, the practice tends to undermine individuals' ability to attain an adequate standard of living. Where polygyny precludes families from attaining an adequate standard of living and places unequal economic and child-bearing strains on multiple wives, it undermines their and their children's ability to attain proper medical care, food, clothing, and even housing.

The right to an adequate standard of living was first recognized in Article 25 of the Universal Declaration, which states that:

everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services... .

This right was bolstered by the Economic Covenant, which places a positive recognition duty on States parties. Article 11 requires:

States parties to the present Covenant [to] 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 conditions.

Although this “recognition” duty does not impose the same sense of obligation on States parties that the term “ensure” would, it nevertheless requires States parties to combat harmful practices such as polygyny that undermine individuals’ right to attain an adequate standard of living.

In addition, Article 13 of the Women’s Convention further requires States parties to:

take all appropriate measures to eliminate discrimination against women in... economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits...

Arguably, this equal right to “family benefits” includes any benefits a family receives through employment, social security, or health care as a matter of public policy. Within polygynous families, wives would not receive the same benefits as their husband if such benefits were intended to be proportionate to two spouses. Thus, if a husband availed himself of half these benefits, with the rest to be shared between his wives, each wife would receive only a fraction in comparison to her husband.

Where harmful family practices like polygyny are recognized or even encouraged through domestic legislation and non-enforcement of criminal provisions, women’s right to be free from economic and social discrimination, particularly with respect to family benefits, is violated.

## **D. CITIZENSHIP**

### **1. The Right to Receive and Impart Information**

Where polygyny is practised within a social context that denies women and children access to information and education about the harms of the practice, alternate marital and reproductive choices, and other more general information, their ability to make informed choices and participate as citizens is undermined. The right to receive and impart information is fundamental to people’s ability to exercise other rights. In recognizing this, Article 19(2) of the Political Covenant states:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The significance of the right to receive information for women’s reproductive well-being is specifically addressed in Article 10(h) of the Women’s Convention, which requires that women

be able to access “specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”

While this right to receive information was traditionally interpreted as a negative right against government interference, some commentators now argue that it imposes a positive responsibility on States to provide necessary information for reproductive health choices.<sup>239</sup> Thus, within the Bountiful, B.C. context, there may be a positive obligation on the Canadian government to ensure that at least basic marital and reproductive information is provided to girls and women. Given that adolescents in general face barriers in accessing accurate reproductive information, this is particularly heightened within a closed community where religious authorities control the educational curriculum.

A former teacher in a Bountiful, B.C. school has noted that students lacked basic information about life outside their community.<sup>240</sup> While some of this ignorance may be explained by geographical isolation, it is also clearly the result of misinformation. There are reports, for example, that students were taught in science class that humans had never been to the moon.<sup>241</sup> It is also reported that a biology final exam in one of Bountiful’s classes required students to state “their personal viewpoints” on “celestial/placement marriage, obedience, [and] raising children...”<sup>242</sup> Where young girls are deprived not only of the most basic health information, but are also required to adhere to religious conceptions of reproduction throughout their education, their ability to delay pregnancy until they reach an age of physical and mental maturity, healthily space pregnancies, and make decisions about the health consequences of sexual and reproductive activity is virtually eliminated. In this sense, the physiological harms to girls and women are reinforced by a knowledge gap that operates to nullify any notion of fully informed consent.

Were the Canadian State to implement compulsory sex education against the wishes of religious leaders or parents to fill this information gap, international human rights law would tend to favour the State. Human rights tribunals have increasingly erred on the side of education when confronted with religious or moral freedom arguments.<sup>243</sup> The European Court of Human Rights, in a case involving mandatory sex education in schools, required sensitivity to parents’ views, but upheld the educational course, stating that:

the curriculum is conveyed in an objective, critical and pluralistic manner [and does not] pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions.<sup>244</sup>

Although Bountiful’s schools are private, human rights standards may thus mandate that the government provide at least basic sex information to girls and women within the education system.

## **2. The Right to Education**

In addition to the right to information, the right to education is well articulated in international human rights law. Article 28 of the Universal Declaration states that:

Everyone has the right to education... Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.

This right was further expanded by the Economic Covenant, which states in Article 13 that:

[States parties] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

In its General Comment 13 on the right to education, the CESCR noted the particular role that education can play in empowering women and children. It explained that:

education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.<sup>245</sup>

Here, the CESCR recognized the role education can play in combating practices that are harmful to women and children. However, in order for education to challenge harmful stereotypes and practices, it is imperative that it be equally accessible to boy and girl children and not be used as a social instrument to reinforce traditional gender roles. To this end, Article 10(a) of the Women's Convention requires States parties to take all appropriate measures to ensure "the same conditions for career and vocational guidance" for men and women. In addition, Article 10(c) calls for "the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education."

Within the Canadian context, however, women and girl-children in the Bountiful, B.C. community are subject to unequal and discriminatory standards in education. Fundamentalist Mormon Prophet Warren Jeffs' sermons, which often centre on the celestial importance of polygyny and assignment marriage, are part of Bountiful's educational curriculum, for example.<sup>246</sup> The British Columbia government's continued funding of a private school system that Ministry of Education inspectors have admitted teaches girls only to do "preparing, catering and cleaning up after a meal" and "sewing and experiencing other types of handiwork or needlework"<sup>247</sup> deprives women and girls of their right to equitable education in violation of Articles 10 and 14(2-d) of the Women's Convention, Articles 13 and 14 of the Economic Covenant, and Article 26 of the Universal Declaration.

### **3. Women's Rights to Religious Freedom**

While religious freedom arguments are often offered in support of polygyny (either within Fundamentalist Mormon or Islamic contexts), it is important to note that women's rights to religious freedom are also undermined by patriarchal religious interpretations that promote unequal and harmful practices. Religious interpretations that permit polygyny are extremely contentious amongst the adherents of both Islam and Mormonism (whose mainstream branch re-interpreted its faith in the 1890s to prohibit the practice).<sup>248</sup> Within the Islamic context, one commentator has referred to polygyny as a "manifestation of how patriarchal interpretation can

prevail and dominate.”<sup>249</sup> In making this argument, Amira Mashhour points to the fact that while unrestricted polygyny was common in pre-Islamic societies, the restriction of the number of wives one could take was a significant step toward limiting the practice and achieving gender equality.<sup>250</sup>

Moreover, the verse in the Qu’ran that permits polygyny is itself open to different interpretations:

And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.<sup>251</sup>

As Mashhour and others have argued, the verse can be interpreted not as enjoining polygyny or making it an absolute right, but as permitting it under limited circumstances and provided that a husband can be just to each of his wives. It is for this reason that some interpret the Qu’ran as granting an exception for polygyny, but holding monogamy as the ideal.<sup>252</sup> This was precisely what motivated Tunisian nationalist leader Habib Bourguiba to prohibit polygyny. Reasoning that the Qu’ranic requirement of equal treatment of wives was impossible, Bourguiba argued that polygyny was dependent on particular conditions at the time of the revelation of the Qu’ran, and thus like slavery, should be prohibited.<sup>253</sup>

As these differing interpretations reveal, there are often alternative belief systems within the same religious faith. Where patriarchal interpretations dominate, however, women may be denied the right to define their own religious beliefs or to reject such religious beliefs outright. In examining the right to religious freedom from this standpoint, it is important to note that although it was subject to great debate at the time, Article 18 of the Universal Declaration was eventually drafted to include the right to change one’s beliefs or religion.<sup>254</sup> While several Islamic countries initially dissented, arguing that the right to change religion conflicted with their interpretation of the Qu’ran, all Muslim member states, with the exception of Saudi Arabia, ultimately voted for the Universal Declaration with full notice of the scope of the right.<sup>255</sup> Thus, the final wording of Article 18 indicates the essential role that choice and consent in religious belief should play:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Within an Article 18 analysis, just as different religious beliefs are considered to be of equal value, so too is the right to nonreligious beliefs.<sup>256</sup> In this sense, the Universal Declaration established a freedom *from* religion that one sees reflected in the identical wording of Article 18(1) of the Political Covenant. In its General Comment on the article, the Human Rights Committee has expressly noted that “Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.”<sup>257</sup>

This freedom *from* religion has been recognized in European Court of Human Rights jurisprudence. In *Kokkinakis v. Greece*, the plaintiff petitioned the European Court of Human Rights to overturn criminal legislation that restricted proselytism.<sup>258</sup> In outlining the general principles underlying the Article 9 guarantee of religious freedom in the European Convention, the Court noted that Article 9 is:

in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>259</sup>

Here, the Court was clear that a robust sense of religious freedom extends to both believers and non-believers. In this sense, freedom of religion within a democratic society cannot be separated from a concomitant freedom from religion. Where patriarchal interpretations are presented as “the” holdings of a particular faith and given governmental protection at the sacrifice of other equally valid interpretations, they may be unduly foisted upon those who, if given the opportunity to make a free and informed decision, would choose not to be governed by them.

While the Court in *Kokkinakis* ultimately held that the impugned legislation unjustifiably violated Article 9 because of its overly broad scope, it preliminarily accepted the Greek government’s argument that such legislation would be justified if limited to “improper proselytism.”<sup>260</sup> In defending the legislation, the Greek government had argued that as a democratic State, it had to “ensure the peaceful enjoyment of all those living on its territory.”<sup>261</sup> To this end, the government insisted that “if it was not vigilant to protect a person’s religious beliefs and dignity from attempts to influence them by immoral and deceitful means,” the “protection of the rights and freedoms of others” exception outlined in Article 9(2) of the European Convention “would in practice be rendered wholly nugatory.”<sup>262</sup> Although the legislation itself was considered unduly broad, the Court found that the government’s stated purpose was “a legitimate aim under Article 9(2) for the protection of the rights and freedoms of others.”<sup>263</sup>

The importance of this freedom *from* religion has been articulated by numerous groups in the recent debate surrounding faith-based arbitration in Ontario. Some commentators have noted that most of the general public “feel that religious law has its place—in the church, synagogue, mosque or temple, but not in the government’s courts.”<sup>264</sup> This echoes the argument that non-theocratic states such as Canada should not be positively enabling particular religious teachings or laws.<sup>265</sup>

Most significantly, the Canadian Council of Muslim Women (CCMW) has noted that while some well-meaning supporters of faith-based arbitration mean to be sensitive to Canadian Muslims in ensuring that their interests are met, “the introduction of a Muslim family law Sharia council may not solve the problem, and in fact may exacerbate the issues for families.”<sup>266</sup> While clearly attuned to the religious concerns of Canadian Muslims, the CCMW believes the same laws should apply to Muslim women as to all other Canadian women. Rather than seeing secular



law as conflicting with Islam, the CCMW asserts “that the values of compassion, social justice and human rights, including equality, are the common basis of Islam and Canadian law.”<sup>267</sup> Thus within the Canadian domestic context, there is a well-articulated desire by the CCMW to be free from the imposition of religious family laws (some interpretations of which would permit polygyny) and to be governed rather by the same equality-driven family laws that govern all Canadians.

In addition to the right to be free *from* religion, the Political Covenant also emphasizes the role of free choice in freedom of thought, conscience, and religion. Article 18(2) states:

No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

This prohibition of coercion is significant for domestic contexts that permit or refuse to prosecute polygyny. Where husbands are legally or *de facto* permitted to take on subsequent wives, this undermines the freedom of belief of women who view polygyny as contrary to their faith interpretation.

Moreover, even where women have been outspoken supporters of polygyny as part of their religious belief system,<sup>268</sup> there may still be questions about coercion as articulated in Article 18(2). As the HRC has noted, Article 18(2) extends beyond traditional means of coercion such as the use or threat of force or penal sanctions in compelling conversion. It also includes:

policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant...<sup>269</sup>

Within the Bountiful context, the indoctrination of religious beliefs through the community’s private school system combined with a lack of basic information raises questions of coercion in religious beliefs. This underscores the vital need for the British Columbia Provincial government to enforce objective informational and educative standards in accordance with their own guidelines and Canada’s international obligations.

#### **4. Women’s Rights to Enjoy Their Culture**

The right to enjoy one’s culture is enshrined in several international human rights treaties including the Political Covenant and the Economic Covenant. Article 27 of the Political Covenant protects minority cultural rights by requiring that linguistic, ethnic, or religious minorities “not be denied the right, in community with the other members of their group, to enjoy their own culture...” This minority right to culture was upheld in *Lovelace v. Canada* where the HRC found that Ms. Lovelace’s right to enjoy her Aboriginal culture had been unjustifiably interfered with.<sup>270</sup> The Committee held that a provision of the Canadian Indian Act that deprived Aboriginal women and their children of Indian status if they married outside their tribe violated their right to culture. The Committee failed, however, to draw direct attention to

the gender-discriminatory nature of the law, which applied only to Aboriginal women, choosing instead to focus their holding only on the violation of the right to enjoy one's culture.<sup>271</sup>

While the Article 27 violation in *Lovelace* involved a positive, legislative interference with the right to culture, the HRC has subsequently interpreted Article 27 as extending beyond a negative, non-interference right to include positive obligations on States parties. In its General Comment no. 23 on the rights of minorities, the HRC noted that States parties have an obligation:

to ensure the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.<sup>272</sup>

In this respect, where practices such as polygyny undermine women's opportunity to freely associate with others, access and disseminate cultural information, and to define the practices that actually constitute "culture," States parties have an obligation to take protective measures against such acts.

The Economic Covenant extends beyond the Political Covenant in providing for a free-standing individual right to culture, regardless of the culture's minority or majority status. Article 15 states that:

States parties to the present [Economic] Covenant recognize the right of everyone: (a) To take part in cultural life... .

As is the case with several of the rights examined above, the ability to take part in cultural life is dependent on the respect of other human rights. The CESCR noted in its eleventh General Comment on plans of action for primary education, for example, that education is vital to the effective exercise of one's economic, cultural, and civil and political rights.<sup>273</sup> In this sense, where polygyny is reinforced through biased or unequal educational opportunities, women and girl-children are denied not only of their right to education, but also their ability to effectively engage in cultural life.

Polygyny undermines the ability of women and girl children to exercise the cultural rights articulated in the Economic Covenant. In the CESCR's 2002 Concluding Observations on Benin, the Committee forcefully stated that it:

deplore[d] the State party's lack of progress in countering practices—in particular, polygamy and the early and forced marriages of girls—which prevent women and girls from exercising the rights which the Covenant accords them.<sup>274</sup>

In assessing women's ability to enjoy their own culture within polygynous families or communities, it is helpful to apply Courtenay Howland's analysis of how 'private' or familial harms undermine women's ability to exercise their core civil and political rights to the cultural context. Just as the capacity to define one's religion can be undermined through patriarchal

religious interpretations that may condone or promote practices that are harmful to women and children, women's ability to enjoy and define their culture can be similarly affected.

In a country such as Canada that has ethnic, religious and linguistic minority groups, the legal encouragement of a practice such as polygyny that deprives women and girl children of their most basic rights undermines their ability to fully enjoy their culture. Where financial strain and disproportionate child-care responsibilities are placed on women within polygynous unions, for example, their ability to freely associate with others as guaranteed by Article 22 of the Political Covenant is undermined. Without the financial and temporal freedom to freely associate with others, the dissemination and enjoyment of culture is severely compromised.



## **IV. ARGUABLE LIMITS ON WOMEN'S RIGHTS**

In addressing polygyny, it may be argued by some that prohibiting the practice may deny men, women and children of the following rights:

### **A. THE RIGHT TO FREEDOM OF RELIGION AND RIGHT TO NON-DISCRIMINATION ON GROUNDS OF RELIGION/ETHNICITY**

One argument consistently raised against prohibiting or restricting polygyny is that such measures violate the right to freedom of religion. Some commentators have argued, for example, that the right to manifest one's religion or belief as protected under the Universal Declaration, the Political Covenant, and the Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief (Declaration on Religious Intolerance)<sup>275</sup> includes the right to observe and apply religious law through religious tribunals in both public and private life.<sup>276</sup> Such arguments are often informed by the fact that some interpretations of a number of belief systems, including Islam, maintain that the observance of religious law is integral to religious practice.<sup>277</sup>

While such arguments are important to consider in the context of polygyny, given that many interpretations of Islamic family law as well as Fundamentalist Mormon teachings permit the practice, there are several reasons why this argument is at best tenuous under international law. Article 18 of the Political Covenant, for example, protects the right to religious freedom, including the freedom:

to have or adopt a religion or belief of his choice, and freedom... to manifest his religion or belief in worship, observance, practice and teachings... .

There is no indication, however, from the text itself or the HRC General Comment on the Article that this includes a right to be governed by religious law in familial matters.<sup>278</sup> That is, the right to religious freedom does not allow personal status or customary law to trump secular law in family matters. Indeed, the Declaration on Religious Intolerance does not include a freedom to be governed by religious law amongst the many protected religious practices it lists.<sup>279</sup>

In addition, the Women's Convention does not provide for any religious or customary law exceptions to its commitment to gender equality. Indeed, the Article 2(f) enforcement provisions of the Convention place a positive obligation on States parties to "modify or abolish existing laws..., customs, and practices which constitute discrimination against women." Moreover, the Article 3 obligation that States parties take "all appropriate measures, including legislation, to ensure the full development and advancement of women" precludes a cultural or religious defence for discriminatory familial practices that hinder this development.

Even if there were a right to be governed by familial religious law, the Political Covenant does not extend its religious freedom protection to those practices that violate the rights of others. Article 18(3) expressly permits legislative limits on freedom of religion where "necessary to

protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” In *Sing Binder v. Canada*, for example, the HRC held that the Article 18 religious freedoms of a Sikh author whose religion obliged him to wear a turban could be justifiably restricted by a law that required federal workers to wear safety headgear (a “hard hat”). Here, the legislative aim was to protect federal workers from injury and thus was “regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.”<sup>280</sup> The health harms associated with polygyny may raise precisely such reasonable purposes for prohibiting its practice.

Even more on point, the HRC, in its General Comment 22, noted that in limiting religious practices:

States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3, and 26.”<sup>281</sup>

Given that the HRC itself has found that polygamy violates these equality guarantees, international law clearly sanctions domestic legislation that prohibits its practice in order to protect the rights, health and safety of women and children.<sup>282</sup>

The Mauritius Supreme Court applied precisely this reasoning in *Bhewa v. Government of Mauritius* where it interpreted the national Constitution’s religious freedom guarantee in conjunction with the Political Covenant’s requirement that women have equal rights within marriage.<sup>283</sup> In doing so, the Court denied a Muslim community the right to apply personal Islamic law governing marriage, divorce, and inheritance. The Court noted the important balance between:

...the duality of religion and state in a secular system. The secular state is not anti-religious but recognizes freedom of religion in the sphere that belongs to it. As between the state and religion each has its own sphere, the former, that of law-making for the public good and the latter that of religious teaching, observance and practice. To the extent that it is sought to give to religious principles and commandments the force and character of law, religion steps out of its own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law...<sup>284</sup>

Given this balancing between the duality of State and religion within a secular system, the Court dismissed the plaintiff’s claim that the freedom to practise their religion required the Mauritian government to impose Islamic rules concerning marriage. In addition, the Court noted that even if one construed religious freedom in the manner argued by the plaintiff, the Mauritius Constitution’s exceptions to religious freedom (the same as those noted above in the Political Covenant Article 18(3)) required the country to prohibit polygyny. As a signatory to the Political Covenant, the Court noted that the Article 23(4) marital equality requirement, in addition to Articles 2(1) and (2), 3, 24, and 26 all obligate Mauritius to ensure:

the maintenance of monogamy, including measures designed to safeguard the family and to ensure the largest measure of non-discrimination against women, whether as wives or daughters...<sup>285</sup>

Within the Canadian context, a similar judicial recognition of the boundary between individual religious freedom and the State within a secular system is evident in *Kaddoura v. Hammoud*.<sup>286</sup> There, the Ontario Court of Justice (General Division) was deciding whether a wife would be able to recover the *mahr* (a gift or contribution promised by a Muslim husband-to-be to his wife-to-be in the event of the dissolution of their marriage) upon her divorce.<sup>287</sup> In rejecting the wife's claim, the Court noted that "the obligation of the Mahr is a religious obligation and should not be viewed as an obligation that is justiciable in the civil courts of Ontario."<sup>288</sup> In this sense, the Court recognized that the State would not act as a positive agent to enforce religiously-based duties. It noted that:

because Mahr is a religious matter, the resolution of any dispute relating to it or the consequences of failing to honour the obligation are also religious in their content and context... They bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law.<sup>289</sup>

This reasoning can similarly be applied to cases where petitioners are seeking to be governed by religious family law that permits polygyny. Secular states should not positively recognize or apply religious laws that permit the practice, particularly when it undermines the rights and freedoms of others.

Moreover, United States' jurisprudence on Mormon polygyny, most notably *Reynolds v. United States*,<sup>290</sup> has clearly recognized that although state law cannot interfere with religious *belief*, it may intervene where religious *practices* undermine the rights of others. In *Reynolds*, the Supreme Court noted that while laws:

cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?<sup>291</sup>

As Deller Ross has noted, the important belief-practice distinction drawn by the United States Supreme Court has resonated in other domestic court decisions on polygyny.<sup>292</sup> In each of the two cases where the Bombay High Court in India upheld local statutes prohibiting Hindu polygyny (before national law prohibited it), for example, it cited the belief-practice distinction drawn by the U.S. Supreme Court.<sup>293</sup>

## **B. THE RIGHT TO ENJOY ONE'S CULTURE**

Beyond religious freedom arguments, some proponents of polygyny also claim that the practice is integral to the right to enjoy one's culture.<sup>294</sup> They may point to the Economic Covenant's preamble, which states that:

in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his ... cultural rights... .

While it is clear that international law recognizes a right to enjoy one's culture, this right does not encompass practices that violate the fundamental rights and freedoms of others. Accordingly, Article 4 of the Economic Covenant observes that the rights proclaimed therein can be legislatively limited by States parties for "the purpose of promoting the general welfare in a democratic society." The elimination of cultural practices that undermine the rights and dignity of women and children is well within this purview of "general welfare." Moreover, Article 3 of the Covenant requires that States parties "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights." Prohibiting cultural practices such as polygyny that undermine women's equality, dignity, health, and economic well-being is part of the important balancing of rights that states must undertake.

In addition to the Economic Covenant, a measured balance between minority cultural freedoms and individual rights protection is also evident in the Political Covenant. Article 27 of the Political Covenant guarantees some cultural rights for minorities by requiring that they "not be denied the right, in community with the other members of their group, to enjoy their own culture..." While this clause would not apply to the cultural norms of the majority group (for example, where polygyny is practised as part of the majority culture),<sup>295</sup> it does on its face provide a negative right for minority groups within a state such as Canada to enjoy their culture. When the provision is read within the context of the remainder of the Covenant, however, it is clear that this right does not include harmful cultural practices such as polygyny. Firstly, Article 23(4) requires States parties to "ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution..." This equal rights and responsibilities mandate cannot be achieved where unequal marital practices such as polygyny are legally permitted or condoned. In addition, Article 2, which guarantees that the rights in the Covenant be recognized "without distinction of any kind, such as... sex...", along with Article 3, which requires states to ensure the "equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant," establish gender equality as fundamental to the Covenant.

To this end, the HRC has stated that the minority cultural rights articulated in Article 27 "do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights."<sup>296</sup> Clearly, as Courtney Howland's analysis indicates, practices that constitute and encourage familial inequality deprive women of some of their core civil and political rights as guaranteed in the Political Covenant and thus are justifiably limited by domestic legislation. Thus, while the HRC accepted a cultural rights argument in *Lovelace*, namely that Ms. Lovelace's right to her Aboriginal culture had been violated by discriminatory marriage provisions in the *Indian Act*, it did so within a context where the right to culture coincided with the right to gender equality. Nothing in the *Lovelace* decision indicates that a free-standing right to culture could trump gender equality norms.



Building on the Economic and Political Covenants, the Women’s Convention not only permits the legislative restriction or elimination of gender-discriminatory cultural practices, but in fact requires it. Article 2(f) obliges States parties to:

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

Given that CEDAW has characterized polygyny as a gender-discriminatory practice, the Women’s Convention not only precludes cultural arguments that justify the practice, but imposes a positive obligation on States parties to abolish it.

Similarly, Article 5(a) calls on States parties to take all appropriate measures:

to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Here, the Women’s Convention strives to ensure that practices such as polygyny that are often based on reproductive stereotypes and the perceived inferiority of women are not legally justified through cultural or customary norms.

Finally, a reliance on cultural arguments to legally justify polygyny fails to account for the positive duty Article 3 of the Women’s Convention places on States parties to “ensure the full development and advancement of women.” To this end, States parties shall:

take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

The “development and advancement of women” cannot be ensured where harmful and discriminatory practices are perpetuated in the name of culture. In fact, Article 3’s reference to “cultural fields” makes clear that far from being immune, the cultural realm is in fact a central part of States parties’ obligations to guarantee women’s equality.

### **C. THE RIGHT TO RESPECT FOR ONE’S PRIVATE AND FAMILY LIFE**

Another argument raised against the prohibition of polygyny, and particularly against immigration policies that prohibit the entry of multiple wives, is that they violate the right to respect for one’s private and family life. Where polygynous unions are unrecognized in the country to which one immigrates,<sup>297</sup> or subsequent wives are prohibited from entering a country,<sup>298</sup> all of the persons involved in that union, including the husband, his wives and their children could argue that their right to family life has been unjustifiably violated.

This right to family life, it has been argued by some commentators, now forms part of an international legal norm against involuntary family separation. Starr and Brilmayer contend that

the individual right to privacy, the right to marry, children's rights, parental rights and provisions that protect the family as an institution cumulatively account for such a norm.<sup>299</sup>

In *Bibi v. The United Kingdom*, the European Commission of Human Rights addressed this issue of involuntary family separation in a case brought by the child of a Bangladeshi polygynous wife.<sup>300</sup> The petitioner claimed that her Article 8(1) right to respect of family life under the European Convention had been violated by United Kingdom immigration legislation that prohibited the entry of more than one spouse per immigrant.<sup>301</sup> In that case, the claimant's father had already brought his second wife to the U.K. along with his children, thus separating them from their mother, who was forced to remain in Bangladesh. While the Commission found that the claimant's Article 8(1) right had been interfered with, it held that the U.K. legislation was justified to preserve a Christian-based monogamous definition of marriage as part of the "protection of morals" exception under Article 8(2) of the Convention.<sup>302</sup>

In reaching this decision, the Commission missed an important opportunity to undertake a rights analysis of polygyny within the immigration context, especially given that one of the exceptions under Article 8(2) is legislation necessary "for the protection of the rights and freedoms of others." In such an analysis, the Commission arguably should have considered the rights violations associated with polygyny and the ensuing public policy basis for excluding such families in an attempt to discourage the practice on the one hand, and the rights violations associated with involuntary family separation on the other. Despite the Court's weak reasoning, the case nevertheless remains significant in highlighting one of the most difficult transitional scenarios that both international and domestic law must consider.

Indeed, the immediate consequence for this applicant and her mother was that they would remain separated (unless the claimant moved to Bangladesh). Particularly where states such as the United Kingdom or Canada prohibit the entry of multiple spouses because of their own domestic prohibition of the practice,<sup>303</sup> there is a concern that husbands will choose to bring their more favoured, often younger second wife, leaving the first wife vulnerable and isolated within her home country.<sup>304</sup> Some commentators, including Prakash A. Shah, argue that exclusionary immigration policies ignore the extreme vulnerability wives that are left in their homeland face.<sup>305</sup> The remaining wife is often left without any legal recourse to ensure support from her husband. Moreover, even if a remaining wife receives a judgement for spousal support in her home country, her ability to enforce this judgement will depend on whether her home country and her husband's new country of domicile reciprocally enforce each other's judgements. Finally, given the economic challenges many polygynous wives face, their poverty may prevent them from being able to access courts to receive or enforce a judgement for spousal support.

The transitional difficulties that such immigration policies raise should be contrasted, however, with the even greater vulnerabilities that an 'open-door' policy to polygynous families can create. This is perhaps most evident in the formerly decades-long French policy of legally recognizing and permitting the immigration of foreign polygynous families provided that the marriages were valid in the original jurisdiction.<sup>306</sup> While polygamous marriages could not be

lawfully performed in France, the recognition and immigration scheme was motivated by a postwar need for immigrant labour. The policy permitted male immigrants to bring multiple wives into the country on long-term spouse visas.<sup>307</sup> With mainly West Africans taking advantage of the policy, and to a lesser extent Algerians and Moroccans,<sup>308</sup> there were by the 1990s more than 200 000 people living in polygynous families in France. These families became concentrated in enclaves and poorer Parisian suburbs, where, as of the early 2000s, they still made up the majority of some communities.<sup>309</sup>

The shortcomings of such a policy became apparent in the 1980s and early 1990s as African women's advocacy groups within France began organizing to challenge the poor living conditions of polygynous wives.<sup>310</sup> Many of the concerns raised echo those outlined in this report, including harmful co-wife competition, spousal neglect, and coercion into marriage at a young age. Moreover, privacy harms were particularly aggravated in the French setting where accommodation expenses meant that separate living arrangements were not economically feasible for the vast majority of polygynous families.<sup>311</sup> Compounding the psychological, emotional and health harms suffered by polygynous wives was the animosity multiple wives and their children often endured as a result of the broader French populace's repugnancy toward the practice.<sup>312</sup> In addition, second and third polygynous wives at times had difficulty accessing public health care and social security benefits despite having proper residence and working papers. As a result of these cumulative harms, some African women's advocacy groups began to lobby the government to discourage the practice by reforming its immigration policy.<sup>313</sup>

The ensuing French legislative response failed, however, to protect those polygynous families already living in France. Rather than addressing the transitional concerns that emerged as France rightfully moved to discourage a harmful practice, the government tried to retroactively eliminate polygyny even though it was responsible for originally permitting and even encouraging the immigration of such families. The *loi Pasqua* (named after the then-Interior Minister Charles Pasqua) passed in 1993 changed immigration policy so that only one spouse per immigrant would be issued working papers and a spousal visa.<sup>314</sup> The deeply troubling aspect of the legislation, however, was its retroactive nature.

Instead of applying the *loi Pasqua* only to new immigrants, the law was applied retroactively to polygynous families already living in France. This meant that unless multiple spouses divorced one another and physically separated their households (which the vast majority could not afford to do), they would lose their residence and working papers, social benefits and be subject to deportation.<sup>315</sup> The severity of the policy was mitigated only by the fact that French law does not permit the deportation of parents whose children are born in France.<sup>316</sup> A circular issued in 2000 further added to the inequity of the legislation by formalizing a policy of not applying the retroactive provisions to the first wife, but only to subsequent wives. This made the position of subsequent wives even more precarious. Given that polygynous families in France and elsewhere are often impoverished, the retroactive denial of social benefits for second wives was particularly devastating.<sup>317</sup> Moreover, despite recent government initiatives to relax the legislation by

lowering the standards for polygynous spouses to obtain work permits, for example, “these measures will not eliminate the damage.”<sup>318</sup>

It is clear, therefore, that the prohibition of polygyny calls for a careful balancing of rights and interests during transitional stages in order to protect vulnerable members of polygynous families. The retroactive nature of French legislation failed to protect spouses by forcing many to submit to living and working illegally (as “*sans-papiers*”).<sup>319</sup> Indeed, a Ministry of the Interior’s April 2000 circular supporting these retroactive provisions cited “consistent” holdings of the Conseil d’État that polygamous families were not covered by the Article 8 European Convention on Human Rights protection of private and family life.<sup>320</sup> These holdings are clearly refuted by the European Commission of Human Rights’ finding in *Bibi* that the claimant’s Article 8 right to family life had indeed been interfered with (although this was ultimately justified).<sup>321</sup> It is clear that European human rights jurisprudence considers polygamous families to have a right to private and family life. Given this, it is incumbent upon states such as France to provide a level of protection to such families where they exist—something that the *loi Pasqua* failed to do.

Yet in arguing that France’s enforcement of the *loi Pasqua* violates international legal norms against involuntary family separation, commentators like Starr and Brilmayer have been careful to focus on the law’s retroactive nature. They are clear that this claim:

should not be understood to mean that French law may not make any distinctions between polygamous and monogamous marriages, nor that France must authorize the performance of polygamous marriages.<sup>322</sup>

Rather, Starr and Brilmayer distinguish between laws that limit certain types of family formation and those that require retroactive family separation. Thus, while international law clearly prohibits states from limiting the formation of certain types of families (inter-racial marriages, for example),<sup>323</sup> it does not require states to allow the formation of polygynous unions. In fact, it calls on them to eliminate the practice. Although there is less international consensus about the most suitable means to achieve this goal, given precisely the type of transitional challenges that France has faced, there is nevertheless considerable agreement that polygyny violates women’s right to be free from all forms of discrimination.

Most states recognize the difference between proactive and retroactive exclusion. In fact the proactive exclusion of multiple spouses even where their marriages were validly performed abroad is the norm among many Western states including now France, the United States, and Canada. While international law prohibits racially-discriminatory immigration policies, commentators have noted that no such prohibition applies with regard to polygynous families.<sup>324</sup>

Significantly, CEDAW has not made any statements as to whether countries should distinguish between monogamous and polygynous unions for immigration purposes. The transitional concerns surrounding involuntary family separation and the particular vulnerability faced by those wives forced to remain in their homeland may explain why consensus around immigration policy is more fractured. Despite the lack of agreement on these difficult transitional issues, this should not blur the strong consensus among treaty bodies, nation states, and international law generally that polygyny is a violation of women's right to be free from all forms of discrimination and thus should not be encouraged by national laws that permit or recognize its performance within their jurisdiction.



## V. STATE PRACTICE AND *OPINIO JURIS*

Customary international law is comprised of two elements: (1) consistent and general international practice by states, and (2) a subjective acceptance of the practice as law by the international community (*opinio juris*).<sup>325</sup> This section of the report will focus on actual state practice. There are several sources one can look to as evidence of *opinio juris*. These include, but are not limited to, diplomatic correspondence, opinions of immigration offices, immigration laws and policies (particularly those within states including Canada that prohibit the entry of polygynous families), advisory opinions from Attorney-General's offices, decisions of immigration tribunals and welfare authorities regarding the support of children and subsequent wives, the degree to which states have prosecuted bigamy, Foreign Office opinions, and judicial decisions. Because polygyny is not yet addressed by most departments of foreign affairs as a pressing diplomatic issue, the types of international statements one can often find regarding other international human rights abuses do not yet exist in the case of polygyny.

This section of the report will focus primarily on decisions of national courts and statutory legislation as evidence of *opinio juris* that states feel obligated to prohibit or at least limit polygyny as part of customary international law. While criminal prohibitions of polygamy in many states including Canada were originally premised on the preservation of a Christian, monogamous definition of marriage,<sup>326</sup> there seems to have been a shift in the rationale for such legislation given the more complete understanding of the harms of polygyny and the nature of patriarchy in recent times.

In proceeding with an international customary law argument, it is now acknowledged by many academic commentators that the general principles of equality and non-discrimination form part of customary law.<sup>327</sup> This conclusion is supported by state practice and *opinio juris*, of which ample evidence exists from the past twenty-five years including State pronouncements by the international community at United Nations conferences, member states espousing their commitment to women's equality in various human rights treaties,<sup>328</sup> as well as national jurisprudence and legislation enforcing gender equality.<sup>329</sup> As Howland notes, the fact that some states continue to discriminate on the basis of sex should be treated as non-compliance with the international norm rather than evidence of a new rule.<sup>330</sup>

Within this customary law framework of non-discrimination, this Part V will show that the dominant international trend in state practice is toward legislatively prohibiting or at least restricting the practice of polygyny. In several instances, even those states that traditionally permitted the practice on religious or customary grounds have introduced spousal and/or judicial permission requirements in conjunction with economic criteria before husbands can take subsequent wives. In addition, Part V will also examine the trend in African jurisprudence toward invalidating customary practices that are harmful to women through either a balancing approach or a repugnancy to natural justice approach.

Finally, while this report relies primarily on treaty and customary international law arguments, it also argues that the equality of all persons regardless of sex, race, religion, or ethnic background has become a “general principle of law.” In determining whether sexual equality, specifically equality within the family, is a “general principle of law”, international law looks to “municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.”<sup>331</sup> Significantly, however, as Lord McNair has noted, the analysis of these various laws for this purpose should not be “by means of importing private law institutions ‘lock, stock and barrel;’ ready-made and fully equipped with a set of rules.”<sup>332</sup> Rather, “what international law can with advantage borrow from these sources must be from the viewpoint of underlying or guiding ‘principles.’”<sup>333</sup>

In the *South-West Africa Cases (Second Phase)*, Tanaka J. reasoned that general principles should not be limited to statutory provisions in national laws, but:

must be extended to the fundamental concepts of each branch of law as well as to law in general so far as these can be considered ‘recognized by civilized nations.’<sup>334</sup>

Thus, Tanaka J. was able to find a general principle of non-discrimination on the basis of race through his observation that “laws against racial discrimination and segregation [exist] in the municipal systems of virtually every State...”<sup>335</sup> Moreover, he reasoned that because human rights are by definition applicable to every person, “there must be no legal vacuum in the protection of human rights.”<sup>336</sup>

Tanaka J.’s reasoning with regard to non-discrimination on the basis of race also translates to a requirement that human rights be protected regardless of sex. While this Part V will note that several states still permit polygyny, although often in a restricted form, this does not detract from a general international law principle of non-discrimination against women. As Tanaka J. noted, Art. 38(1)(c) of the I.C.J. Statute:

... does not require the consent of States as a condition of the recognition of the general principles. States which do not recognize this principle or even deny its validity are nevertheless subject to its rule.<sup>337</sup>

## **A. OUTRIGHT PROHIBITION**

Beyond international human rights treaty law, it is clear that customary international law requires the prohibition or at the least restriction of polygyny. Surveying state practice, it is evident that the majority of states prohibit the practice. Polygyny is banned as the crime of bigamy for all persons in the Americas, Europe, countries of the former Soviet Union, Nepal, Vietnam, China, Turkey, Tunisia, and Côte d’Ivoire, amongst others.<sup>338</sup> While much of the legislation that prohibits polygyny in states including Turkey, Uzbekistan, Fiji, and others has its roots in colonial-Christian prohibitions such as the Napoleonic Code or British common law, it is significant that the ban on polygyny in Tunisia is based on an interpretation of Islamic law,



specifically a recognition that the Qu’ranic requirement that all wives be treated equitably is impossible to achieve in practice.<sup>339</sup>

Indeed, within the Islamic context in particular, there has been protracted debate about polygyny throughout the past century. Controversy regarding the practice within the Islamic world started in the early 20<sup>th</sup> century, as Egypt and the Middle East opened up to Europe.<sup>340</sup> Modern religious reformers, led by Sheikh Muhammad Abdou, who died in 1905, called for restrictions on polygyny, citing it as unjust to women. Other reformers who advocated a complete prohibition pointed to the Qu’ran, verse 129 of *Sura Nisaa*, IV: “Ye shall not be able to deal in fairness and justice between women however much ye wish” as well as Verse 3 “... but if ye fear that ye shall not be able to deal justly then only one [wife].”<sup>341</sup> They argued that because this equal treatment requirement was impossible to achieve in practice, only monogamous marriages should be recognized.

Religious fundamentalists responded by arguing that one must respect the Qu’ran’s allowance of polygyny by distinguishing between the justice required in verse 3 (equality between wives in material conditions) and justice in verse 129, which would refer to inner emotions which no husband could control.<sup>342</sup> For a time, fundamentalists in Egypt were able to stall legal reforms relating to the practice during the 1920s, 40s, and 50s. However, as Jamal Nasir notes, the trend within the Islamic context is now moving toward restricted polygyny if not outright monogamy as in Tunisia and Turkey.<sup>343</sup>

## **1. Australia:**

In its 1992 report “Multiculturalism and the Law”, the Law Reform Commission of Australia considered whether changes should be made to existing legislation regarding polygamy.<sup>344</sup> As the Commission noted, a marriage in Australia is not legally recognized if one of the parties is, at the time of the marriage, already lawfully married to someone else.<sup>345</sup> Similarly to other jurisdictions, it is an offence (bigamy) in Australia for a person who is already married to purport to marry another person.<sup>346</sup>

The Commission’s report was commissioned following the 1989 release of the Australian government’s policy statement on multiculturalism, the National Agenda for a Multicultural Australia.<sup>347</sup> One of the policy objectives that guided the Commission’s reasoning was the promotion of “equality before the law by systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians.”<sup>348</sup> In pursuing this objective, the Commission noted that:

laws and policies based on one view or one set of assumptions about family relationships which do not take into account the diversity of family arrangements in Australian society may impact harshly on communities or individuals whose family relationships are differently defined.<sup>349</sup>

The Commission heard submissions that drew attention to precisely this tension in Australian laws regarding polygamy. The argument was raised that the Commission's very own principles should lead to a recognition of the relationships people choose for themselves within Muslim communities, for example. Particularly given that *de facto* rather than *de jure* marriages may be totally unacceptable in such communities, the Commission was urged to recommend legal recognition.<sup>350</sup>

While the Commission acknowledged that within Muslim communities, polygynous marriages may be acceptable and that legally recognized marriages would be preferable to these groups, it found that "recognising the legal status of polygamy would... offend the principles of gender equality that underlie Australian laws."<sup>351</sup> It went on to note that the majority of submissions it considered did not endorse the legal recognition of polygamy. To this end, the Commission did not recommend legislative reform that would allow polygamous marriages contracted in Australia to be recognized as legally valid marriages.<sup>352</sup>

## **2. Belgium, France, Luxembourg, and Switzerland**

European civil law countries also have provisions prohibiting polygamous unions. In France, Belgium, and Luxembourg, Article 147 of their Civil Codes states "On ne peut contracter un second mariage avant la dissolution du premier." Similarly, according to Article 96 of the Swiss Civil Code: "Toute personne qui veut se remarier doit établir que son précédent mariage a été annulé ou dissous."<sup>353</sup>

In the case of France, as noted above, immigration policy did not always accord with domestic law.<sup>354</sup> Allowing and even encouraging polygynous immigration as a means of securing inexpensive post-war labour from Western Africa, Algeria and Morocco was a short-sighted policy that never ensured adequate social and economic protections for vulnerable wives. While domestic prohibitions of polygyny are a valid means for countries to normatively reject a harmful practice to women, they must be met with domestic legal protections, such as exist in Canadian family law,<sup>355</sup> to protect those already in *de facto* polygynous unions.

## **3. Canada**

In Canada, polygamy is an indictable offence under the *Criminal Code of Canada* with a maximum term of imprisonment of five years upon conviction.<sup>356</sup> Under s. 293(1), every one who:

practises or enters into... any form of polygamy, or any kind of conjugal union with more than one person at the same time... is guilty of the offence.<sup>357</sup>

The inclusion of the clause "any kind of conjugal union" refers to some form of union operating under the pretext of marriage, and thus was not intended to apply to adultery even where one or both of the parties were married to another person at the time they were co-habiting.<sup>358</sup> In addition to parties to polygamous unions, s. 293(1)(b) provides that everyone who "celebrates,

assists or is a party to a rite, ceremony, contract or consent that purports to sanction [polygamy]’ is also guilty of an offence.<sup>359</sup>

#### **4. United Kingdom**

In the United Kingdom, polygamy is also prohibited. Under the *Offences against the Person Act, 1861*, persons convicted of the crime of bigamy may be subject to penal sentences of up to seven years.<sup>360</sup> Section 57 of the Act states that:

Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years....<sup>361</sup>

While the private international law dimensions of British law relating to polygyny in the immigration context have been considered by the European Commission of Human Rights in the *Bibi* decision discussed above,<sup>362</sup> this domestic prohibition of bigamy has also faced increased criticism from Islamic groups within Britain. While there are no official statistics regarding the number of people in polygynous unions in the United Kingdom, media reports in 2000 estimated that there may be hundreds.<sup>363</sup> With the entry into force of the Human Rights Act in the United Kingdom in 2000, the Muslim Parliament announced plans to challenge the domestic prohibition of polygamy under the European Convention’s guarantees of the rights to respect for private and family life, as well as religious freedom.<sup>364</sup> This challenge has not in fact materialized.

#### **5. United States**

Like Canada, the United States has had to balance religious freedom guarantees with limitations of certain religiously-informed marital practices. In Utah, as in other states, polygamy is constitutionally and statutorily prohibited. Article III, Section 1 of Utah’s constitution states that:

Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.<sup>365</sup>

The Utah Criminal Code also provides that:

- (1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.
- (2) Bigamy is a felony of the third degree.<sup>366</sup>

Here, there is clear legislative attempt to address *de facto* polygynous unions, which Canada has done by enacting a separate provision for the crime of “polygamy”, through the language “purports to marry... or cohabits with another person.” In addition to this prohibition of bigamous unions themselves, another Utah statute also establishes criminal penalties for any state clerk who knowingly provides marriage licenses for prohibited marriages.<sup>367</sup>

United States' jurisprudence on Mormon polygyny has recognized that although state law cannot interfere with religious *belief*, it may intervene where religious *practices* undermine the rights of others. In *Reynolds*, the Supreme Court noted that while laws "cannot interfere with mere religious belief and opinions, they may with practices."<sup>368</sup>

This reasoning was recently upheld in *Bronson v. Swensen*, in which the plaintiffs challenged the constitutionality of Utah Code Ann. § 76-7-101, Utah Const. art. III, § 1, and the Utah Enabling Act, ch. 138, § 3, 28, Stat. 107, 108 (1894), all of which prohibit the religious practice of polygamy by outlawing bigamy, polygamy, and plural marriage.<sup>369</sup> The plaintiffs, which included a husband, wife and proposed plural wife, argued that the defendant clerk's refusal to grant a marriage licence (given that the husband was already legally married) violated their constitutional rights to free exercise of their religious beliefs, right of association, and their right to privacy, as protected by the First, Fourteenth, and other Amendments of the United States.<sup>370</sup>

In his decision, Stewart J. made several important findings in ultimately holding Utah's prohibition of polygamy to be constitutional. Firstly, he noted that the state of Utah has "a compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage."<sup>371</sup> In recognizing that marriage is an expression of "bilateral loyalty,"<sup>372</sup> Stewart J. found that the State was justified in enforcing its ban on plural marriage.

Secondly, Stewart J.'s decision echoed prior jurisprudence holding that *Reynolds* is still a binding authority on the issue of polygamy and the free exercise of religion.<sup>373</sup> In addressing whether the Supreme Court's decision in *Lawrence v. Texas* that the State of Texas could not criminalize the petitioner's private homosexual activity<sup>374</sup> should be read as sanctioning polygamous marriage, Stewart J. was careful to highlight the express boundaries of the Court's reasoning in *Lawrence*. Unlike the issue of polygamy, as practised in Utah and elsewhere, the Supreme Court explicitly stated in *Lawrence* that the case did "not involve minors...[or] persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." Moreover, *Lawrence* had not involved "public conduct... [and did] not involve [issues of] whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>375</sup> In highlighting these important distinctions, Stewart J. ultimately found that though the State of Utah could not preclude private sexual contact between the plaintiffs, it could withhold recognition of a proposed plural marriage.<sup>376</sup>

## 6. Tunisia

The Tunisian Code of Personal Status of 1956 not only adopted the Qu'ranic provisions in Sura IV, verse 3 as a legal condition precedent to polygyny, but went further by completely prohibiting the practice. Article 18 of the Code stated that the:

Plurality of wives is prohibited. Any person who, being already married and before the marriage is lawfully dissolved, marries again, shall be liable to imprisonment for one year or for a fine of 240 000 francs, or to both, even if the second marriage is not in violation of any requirements of this law.<sup>377</sup>

To a great extent, the material requirement of equality set out in the Qu'ran was central to the reasoning of Tunisian jurists. In particular, they argued that because it was a practical impossibility in the modern socio-economic context to treat several wives impartially, the essential Islamic condition (of equal treatment of wives) was impossible to fulfill. In 1964, Tunisian legal reforms went further by invalidating polygamous marriages.<sup>378</sup>

## 7. Turkey

In addition to Tunisia, Turkey also prohibits polygyny. It first restricted polygyny in 1917, requiring the consent of the first wife to subsequent marriages. With the adoption of the Turkish Civil Code in 1926, the practice was banned completely.<sup>379</sup> While it is believed that polygyny is still practised intermittently in Turkey, this is generally limited to rural areas or among the urban rich. In such situations, the second wife, the *kuma*, is married in a religious ceremony conducted by an imam and has no legal rights under Turkish civil law.<sup>380</sup>

## B. RESTRICTIONS ON POLYGyny

### 1. Notice Requirements

While regional trends in Africa, the Middle East, and Asia are increasingly toward restricting and even prohibiting polygyny, there are still some domestic legal systems that only minimally regulate the practice, typically through spousal notification requirements. In Jordan, for example, there are no obvious restrictions on polygyny, although wives are able to stipulate in marriage contracts that their husband is not able to take another wife, thus entitling them to sue for a divorce if the condition is not honoured.<sup>381</sup> Similarly to Jordanian law, Moroccan law also makes a contractual allowance for wives. Moreover, marriage to a second wife is not permitted where the proposed wife is not aware that the man is already married.<sup>382</sup> One sees similar notice requirements in Sri Lanka, where a husband is required to give notice of his intention to enter a polygynous marriage to the *Quazi* in the area where he lives, the *Quazi* where his intended wife lives, and the *Quazi* where his present wife lives.<sup>383</sup> The *Quazis* are then expected to provide notice in all Jumma Mosques.

Egypt imposes similar notice requirements by mandating that a Notary Public notify the existing wife/wives of a new marriage by registered mail.<sup>384</sup> In addition, one sees similar “divorce

benefits” for women under Egyptian Act No. 100/1985, which entitles a wife who has not implicitly or expressly consented to her husband’s remarriage to apply for a divorce if she suffers a moral or material injury that makes continued marital life difficult, even if she did not preclude a polygynous union in the original marriage contract.<sup>385</sup> Significantly, however, a wife loses the right to apply for a divorce under these grounds one year after she has knowledge of the subsequent marriage. In addition to the present wife, if the new wife is not given notice that the husband is already married until after the marriage is performed, she can also apply for a divorce.<sup>386</sup>

## **2. Permission Requirements**

As legal systems in Indonesia, Pakistan, Bangladesh, Malaysia, and Singapore, amongst others, have moved to restrict polygyny, husbands are now increasingly required to obtain the permission of a governmental authority, court or quasi-judicial body to contract a polygynous marriage.<sup>387</sup> In Iraq as of 2002, for example, judicial authorization was required before a husband could marry more than one wife. This judicial authorization was contingent on the husband being financially capable of supporting an additional wife as well as the existence of a legitimate interest for the subsequent marriage.<sup>388</sup> The judge also retained the discretion to refuse to permit the subsequent marriage if he believed that the wives would not be treated equitably. Here, if a man contravened the rules, he was subject to a fine of 100 Iraqi dinars or a penalty of one year imprisonment.

While Syrian law is less categorical, there too judges have the power to forbid a married man from taking another wife unless there is legitimate justification and he is financially capable of supporting her.<sup>389</sup> Along similar lines, Yemen’s legislation allows men to have up to four wives (as per Shari’a law) if he can deal with them justly, or else he is limited to one. In order to enter into a subsequent marriage, there must be a lawful benefit, the proposed wife must be aware that the man is already married, the present wife must be notified that her husband intends to take another wife, and the husband must be financially capable of supporting more than one wife.<sup>390</sup>

The “legitimate interest” or “lawful benefit” requirement for remarriage referred to in some of the above legal systems often centres on “defects” in an existing wife. These may include a present wife’s absence from the country, her insanity, her inability to perform “marital duties”, her infertility, or the presence of physical defects or an incurable disease.<sup>391</sup> Many of these “legitimate justifications” for remarriage stereotype women into reproductive or service roles by permitting subsequent unions when present wives are unable to perform these functions. In addition, as WLUML has articulated, systems that permit remarriage on such grounds typically do not allow women to seek a divorce on reciprocal grounds, illustrating the gender-bias often built into permission systems.<sup>392</sup>

Finally, it is important to note that permission-based systems vary. Some systems provide for more robust notice and consent requirements for wives than others. Singapore, for example, requires that both the existing and proposed wives be consulted regarding their views on the

proposed marriage.<sup>393</sup> Muslim personal status law in India allows for a Muslim wife to “stipulate for the power to divorce... in case of the husband availing of his legal right to take another wife.”<sup>394</sup> Other legal systems, such as Indonesia, Malaysia, and Morocco focus more on the conditions the husband must fulfill, for example the financial capacity to maintain multiple wives.<sup>395</sup> As WLUML have argued, however, such material requirements are often based on purely economic indicators and do not take into account women’s sexual and emotional needs.<sup>396</sup> The final significant shortcoming of such permission-based regulatory systems is that the penalties for failing to follow the required procedure are often minimal and in some systems, including Bangladesh, Sri Lanka, Pakistan, and Malaysia, the subsequent marriage nevertheless remains valid.<sup>397</sup>

### 3. Polygyny in Parallel Judicial Systems

In contrast to permission-based systems that apply equally to all persons, some domestic systems, particularly within the African context, operate under parallel judicial systems wherein the legality or recognition of a polygynous union depends upon whether one marries under civil, customary or Islamic law.<sup>398</sup> CEDAW has strongly criticized parallel judicial systems that allow for polygyny. In its 1998 Concluding Observations on Tanzania, it noted with concern:

the fact that the prevailing customary laws and religious laws which sometimes supersede the constitution are discriminatory towards women. In particular, the Committee notes that several groups in the United Republic of Tanzania are entitled to practise polygamy. The Committee points out that customary laws and religious laws continue to govern private life and notes the critical importance of eliminating discrimination against women in the private sphere.<sup>399</sup>

Where states such as Gambia, India and Nigeria, amongst others, recognize secular, religious and customary laws, couples can opt to be governed by any of them, depending on the form of the marriage.<sup>400</sup> While these parallel systems seem to offer women a range of options (monogamy or a legal recognition of their rights as polygynous wives), WLUML has noted that these advantages are typically undermined by women’s inability to determine which law they will be married under and whether or not their marriage will be monogamous.<sup>401</sup> In this sense, men may be able to deliberately use parallel systems to their advantage. In Nigeria, men married under the Marriage Act, which prohibits polygyny, may have previously married or may subsequently marry under Islamic or customary laws with impunity.<sup>402</sup>

The opportunity for men to use parallel legal systems to their advantage is particularly evident with religious laws. In countries including Sri Lanka, Gambia and Malaysia, where polygyny is banned under civil marriage laws or laws applicable to other communities, for example, men have converted to Islam to facilitate a polygynous union.<sup>403</sup> Notably, however, an Indian Court rejected this type of argument in *B. Chandra Manil Kyamma v. B. Sudershan*, wherein a Hindu male converted to Islam to contract a second marriage against the wishes of his first wife.<sup>404</sup> The Court held that because strict interpretations of both Islamic and Hindu tenets indicated that a second marriage while a first wife is still alive is discouraged, the second marriage was invalid and a religious conversion could not be used to justify it.<sup>405</sup>

Beyond possible manipulation, dualist systems also raise the spectre that polygynous wives married under religious or customary law will be left without important civil law protections in their country. In Ethiopia, for example, formal marriage laws typically have little impact on most rural households, which adhere to religious, customary, and traditional practices.<sup>406</sup> While the nation's Civil Code prohibits bigamy, the Ethiopian Constitution recognizes marriages entered into under religious or cultural laws. The wives of polygynous unions are thus left in a vulnerable legal situation because subsequent marriages are invalid under the Civil Code. Unless wives have some legal status under customary laws, they will lack any rights within the marriage.<sup>407</sup>

The problems associated with such legal vulnerability have drawn considerable attention in Kenya where approximately 16% of married women are in polygynous unions sanctioned by customary or Islamic law.<sup>408</sup> Within the Kenyan system, second wives are particularly vulnerable to State discrimination.<sup>409</sup> Payments for national health insurance, for example, are normally taken out of a husband's salary for himself and his first wife. This means that subsequent wives' premiums are not automatically deducted, leaving them without coverage for health services. Moreover, because of their poor knowledge of the insurance system, husbands rarely ask for their second wife's premium to also be deducted.<sup>410</sup> The 2000 Kenyan National Gender and Development Policy expressly recognized that marriage laws often negatively impact the rights of Kenyan women.<sup>411</sup>

Within Anglophone Africa, customary marriages are still pervasive. In Zimbabwe, for example, they account for 82% of marriages.<sup>412</sup> Significantly, however, several countries in Anglophone Africa are increasingly stressing the importance of consent in marriage, have increased their minimum age for marriage, and are moving toward formalizing customary unions.<sup>413</sup>

Recent South African legal reforms are illustrative of efforts to address some of the transitional problems that arise during this formalization process. Unlike other domestic systems that permit customary law to trump statutory guarantees in the familial realm, South African law gives parties to customary marriages full legal status and the same rights and protections given to parties to civil marriages.<sup>414</sup> With its 1998 Recognition of Customary Marriages Act, it moved toward restricting and, in the majority of cases, prohibiting polygyny. The Act states that if the initial marriage was solemnized under the Customary Marriage Act, polygyny is prohibited unless judicial approval is given with guarantees of equitable property distribution and assurances that there will not be "too grave" an impact on the affected family.<sup>415</sup>

Within Francophone Africa, polygynous marriages are recognized in the majority of states. Côte d'Ivoire is an exception in prohibiting polygynous unions. There, polygamy is punishable by a fine of 50 000 to 500 000 CFA francs (US \$79.59 to \$795.54) or between six months and three years imprisonment.<sup>416</sup> This punishment extends to cases of attempted polygamy as well as to the registrar or religious official who performs the marriage. Similarly to South Africa, Côte d'Ivoire has also addressed some of the transitional impediments to prohibiting polygyny by continuing to recognize polygynous marriages entered into before 1964.<sup>417</sup>



For the majority of states in Francophone Africa including Benin, Cameroon, Chad, Mali and Senegal, however, polygyny is automatically permitted unless spouses initially indicate otherwise.<sup>418</sup> In Chad, because there is no Family Code in force, marital rights are governed by several texts.<sup>419</sup> The legislature has made polygyny the norm by requiring that spouses “renounce polygamy” at the time of marriage as per Order 03/INT/61 if their marriage is to be considered monogamous. Where this clause is violated, the marriage can be dissolved unilaterally at the wife’s request without reimbursement of the bride-price.<sup>420</sup> In contrast, the Civil Code allows only monogamous unions by not permitting a second marriage to be contracted without the dissolution of the first.

In addition to recognizing polygynous unions, Benin also recognizes polyandry (the union of a wife to multiple husbands).<sup>421</sup> As noted by the Center for Reproductive Law and Policy (as the Center for Reproductive Rights was then known), negative health consequences are associated with such multiple unions, whether polygynous or polyandrous, given the AIDS pandemic in the African region and the manner in which polygamous unions facilitate the transfer of the virus between multiple spouses.<sup>422</sup> Indeed in its 1998 concluding observations on Nigeria, CEDAW expressed concern about the lack of statistical information on AIDS and sexually transmitted diseases in the country and noted that “polygamy and prostitution [are] serious risk factors in the spread of sexually transmitted diseases.”<sup>423</sup> In this regard, parallel legislative schemes that permit or even default to polygyny perpetuate a practice that threatens the health of all partners involved.



## **VI. MEANS CHOSEN TO PROHIBIT POLYGYNY**

### **A. CHALLENGES OF TRANSITION**

#### **1. Transitional Challenges for States Moving to Prohibit Polygyny**

One of the greatest challenges to prohibiting and eventually eliminating polygyny are the transitional concerns that arise in the process. Beyond the immigration context, the transitional concern that polygynous families will be left outside the scope of spousal protections also emerges when national legal systems that formerly permitted the practice move to prohibit it. Here the concern that polygynous wives will be left in a legal lacuna centres on issues such as spousal maintenance, inheritance, social security and health benefits, as well as child support and custody. These national transitional concerns thus pose a further challenge to the development of international consensus around the elimination of polygyny.

These types of concerns are well documented historically. As Karen Knop's survey of the treatment of polygyny in the British-administered Cameroons in the mid-twentieth century reveals, transitional concerns were at the forefront of the British reticence to immediately prohibit the practice.<sup>424</sup> The case of the Fon of Bikom, a polygynous tribal king in the region, drew significant negative reaction from the St. Joan's Social and Political Alliance, a Catholic women's organization that promoted the equality of women in colonized regions.<sup>425</sup> The British Administration was concerned, however, that suddenly prohibiting the practice would harm the Fon's existing wives as well as those families entitled to have their daughters live in the Fon's compounds.<sup>426</sup> There was also further concern that a sudden prohibition would raise superstitious fears and fervent objection.

The British policy was therefore "to achieve a gradual modification of custom and at the same time ensure that individual hardship [was] prevented."<sup>427</sup> In doing so, the British Administration only pursued polygynous cases involving coercion at the level of child stealing, false imprisonment, and assault, while relying on the ongoing influence of Missionaries and Government officials to further erode the practice.<sup>428</sup> As Knop notes, the British response to polygyny was essentially two-fold. First, the practice was generalized as a problem of culture (that could in turn be dealt with by "civilizing" missionaries and government officials), and secondly "acceptable" polygyny was distinguished from unacceptable polygyny according to the level of coercion.<sup>429</sup>

The history of Visiting Missions to Trust Territories in Western Africa also reveals some of the transitional, as well as culturally relativist, tensions that arise in addressing polygyny.<sup>430</sup> The 1950 Visiting Mission to the Trust Territories in West Africa cautioned against applying Western standards to African culture or customs. The Mission found polygyny to be a form of social security for vulnerable single women within existing economic conditions.<sup>431</sup> In its final analysis, however, the Visiting Mission concluded that "the harmful effects of the practice, and its inability to adapt itself to the needs of a progressive society" outweighed its moral and

customary significance, mandating its progressive, but rapid elimination.<sup>432</sup> It recommended that officials encourage the eradication of polygyny by promoting and publicizing the rights of women and girls to refuse to enter forced marriages as well as to be released from them. In addition, the Visiting Mission stressed the importance of informing women and girls of their right to leave polygynous unions if they no longer wished to remain in them.<sup>433</sup>

Within the modern context, some states have tried to ease the legal vulnerabilities faced by those already in polygynous marriages by recognizing unions entered into before a certain year or before the passage of new family legislation. Côte d'Ivoire, one of the few African states to prohibit the practice, continued to recognize polygynous marriages entered into before 1964, for example.<sup>434</sup> These same transitional concerns may explain the reluctance of the drafters of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa to explicitly prohibit polygyny. Rather, Article 6 states that:

monogamy is encouraged as the preferred form of marriage and [States shall ensure] that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.<sup>435</sup>

Here, one sees an expressed encouragement of monogamy combined with a seeming reluctance to prohibit polygyny lest the rights of some women in marriage and family life are undermined or removed altogether.

## **2. Transitional Challenges for Individuals Leaving Polygynous Unions**

In addition to the challenges that State systems face in moving to prohibit polygyny while still providing protection for those in pre-existing polygynous families, individuals within states that have long prohibited the practice also face substantial obstacles in transitioning out of polygynous unions or communities into broader society.

Within the Fundamentalist Mormon context, for example, a human rights report issued by the New York University Law School Human Rights clinic noted the many obstacles women and girls face in leaving such communities. These include serious economic, psychological and legal obstacles. Such women and girls often lack the social structures necessary for their psychological and economic well-being outside their community.<sup>436</sup>

There are a number of legal concerns regarding women and children who leave such unions including issues relating to spousal maintenance, spousal / child support, and rights of inheritance. Here, as Nicholas Bala has argued, there is no reason to deny legal protections for spouses or children in polygynous unions.<sup>437</sup> Should a dependent spouse in a polygynous union try to make a property claim based on a constructive trust or petition the courts for child or spousal support, judicial protection should be granted.<sup>438</sup>

Significant concerns remain, however, with respect to provincial matrimonial property schemes that limit the automatic equalisation of net family property upon relationship breakdown to

legally married spouses. While Ontario, the Yukon, the North West Territories, and Nunavut include polygamous parties who were married in foreign jurisdictions that permit polygamy in their definition of “spouse” for the purpose of property equalisation,<sup>439</sup> this would not apply to *de facto* polygynous unions formed in Canada. Provincial legislatures that have not specifically extended spousal support and matrimonial property schemes to include *de facto* polygynous spouses,<sup>440</sup> in addition to *de jure* polygynous unions entered into in foreign jurisdictions, within the definition of “spouse” for the purpose of support and property equalisation should do so. Because many polygynous wives will not have property registered in their name throughout their *de facto* marriages, their inability to access matrimonial property division schemes makes them particularly vulnerable at relationship breakdown. This is the case in Bountiful, for example, where women are not permitted to own property.

In systems where polygynous marriages are permitted under parallel religious or customary laws, securing maintenance and/or property remedies on relationship breakdown or the death of a spouse is particularly challenging. An action is currently being brought in South Africa by a claimant seeking recognition of polygynous Muslim marriages for remedial purposes under the Intestate Succession Act and Maintenance of Surviving Spouses Act.<sup>441</sup> The South African Women’s Legal Center is arguing that regulation by the High Court would provide better protection for such wives than the Muslim Judicial Council whose decisions are often unenforceable.<sup>442</sup>

In addition to these legal concerns, religious teachings that state that those who leave polygynous unions or communities will face spiritual damnation can have a severely deleterious psychological impact. Most disturbingly, within the United States there are reports of underage girls fleeing polygynous communities after allegedly being forced into assigned marriages, and subsequently being returned to their families by law enforcement personnel.<sup>443</sup> While it is unclear that this exact scenario has occurred within the Bountiful, B.C. context, the Canadian authorities’ reluctance to prosecute polygyny-related crimes to this point raises the same transitional concern as within the United States—namely, that girls and women will be reluctant to leave their community because they fear their human rights will not be protected by government authorities.

In addressing these transitional concerns, particularly the obstacles that women and girls face in leaving such families and communities, temporary special measures may prove necessary to achieve the kind of *de facto* transformative equality that the Women’s Convention was designed to achieve. Temporary special measures are time-limited, positive measures designed to increase opportunities for disadvantaged groups.<sup>444</sup> The over-arching goal of these measures is to bring members of disadvantaged groups into the mainstream of cultural, economic, and civil society. The historical disadvantages that women and girls within polygynous communities such as Bountiful, B.C. have endured as well as the severe obstacles they face in reintegrating into broader society reveal the need for such temporary special measures.

In outlining when such measures are permitted, Article 4(1) of the Women’s Convention provides that the:

adoption by States parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 4(1) thus distinguishes acceptable temporary special measures that serve to achieve *de facto* gender equality from more permanent measures that may establish discriminatory standards. While the text of Article 4(1) itself does not seem to indicate a positive obligation on States parties to adopt such measures, it can be argued that the overall object and purpose of the Women’s Convention—to eliminate all forms of discrimination against women—imposes positive duties on States in this regard.<sup>445</sup>

Indeed, in its General Recommendation no. 5, CEDAW noted that “there is still a need for action to be taken to implement fully the Convention by introducing measures to promote *de facto* equality between men and women.”<sup>446</sup> To fulfill this purpose, CEDAW recommended:

that States parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women’s integration into education, the economy, politics, and employment.<sup>447</sup>

Building on this need for positive measures to assist women with integration into broader society, CEDAW noted in its General Recommendation no. 25 on Temporary Special Measures that States parties have three central obligations in achieving substantive equality for women:

Firstly, States parties’ obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination—committed by public authorities, the judiciary, organizations, enterprises or private individuals—in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies.

Secondly, States parties’ obligation is to improve the *de facto* position of women through concrete and effective policies and programmes.

Thirdly, States parties’ obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.<sup>448</sup>

Discussions on temporary special measures often focus on employment, political, economic or education-related policies such as “affirmative action” in the United States or “reservation” schemes in India.<sup>449</sup> It is important to note that the nature and function of temporary special measures extends beyond these spheres to include all spheres of life where discrimination exists, including within the family. Article 2(c) of the Women’s Convention calls on States parties to:

establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the *effective protection* of women against any act of discrimination...

Within the context of polygynous transition, there are several temporary measures that the Canadian State should enact to ensure that women and girls leaving polygynous families or communities are effectively protected from ongoing human rights violations and acts of discrimination, and are assisted in fully integrating into broader society.<sup>450</sup> Such measures may include, but would not be limited to:

- an inter-ministerial investigation into polygyny and polygyny-related abuses in Bountiful, B.C. and elsewhere in Canada until such abuses are eliminated (with an emphasis on the Attorney-General's duty to prosecute criminal offences occurring within such communities)
- the development of gender-, religiously-, and culturally-sensitive guidelines for law enforcement officers and social workers investigating cases of polygynous families
- a review and amendment of existing provincial family legislation relating to spousal support and matrimonial property to ensure that women leaving polygynous unions—whether de jure or de facto—can qualify for the automatic consideration of support where needed and equalization of net family property
- training for law enforcement officials, social services authorities, health-care professionals, judges, lawyers, and teachers regarding the characteristics of polygynous families and polygyny-related abuses, until such time as training goals are achieved<sup>451</sup>
- free legal aid for women fleeing polygynous relationships / communities, until polygyny is eliminated
- public education campaigns about polygyny and polygyny-related violations of human rights, until polygyny is eliminated
- a time-limited working group within the Canadian Department of Justice to coordinate governmental policies on and assist with prosecutions of polygyny-related criminal offences
- training for school counsellors about the impact of polygyny on young girls, as long as the practice continues to exist; within the Bountiful, B.C. community, this should involve a counsellor who is not from the community in order that students learn some of the life skills that may be ignored in their regular curriculum<sup>452</sup>

- provide and fund support services for individuals who wish to leave polygynous relationships / communities, until polygyny is eliminated, including, but not limited to:
  - a) safe houses for up to 90 days that are staffed with counsellors with training regarding these types of family circumstances<sup>453</sup>
  - b) assistance with life skills such as managing one's financial and personal affairs
  - c) counselling in sexual abuse / incest issues, grief resolution, and family separation issues

It is clear that the British Columbia government's current investigation is an important first step in determining the scope of reported abuses of women and girls within Bountiful, B.C. In particular, the involvement of the Ministry of Children and Family Development in determining what specialized social services may be required to assist victims of abuse in a community setting will likely better address the needs of women and girls than a purely law enforcement based investigation would.<sup>454</sup> R.C.M.P. involvement should serve, however, to underscore the criminality of coerced adolescent marriages and illegal polygamy within the community, as Palmer's "Life in Bountiful" report suggested.<sup>455</sup> Finally, while the Ministry of Education committed itself in July, 2004 to broadening the scope of its school inspections,<sup>456</sup> it is disconcerting to note that as of December, 2004, annual provincial funding to Bountiful schools was once again renewed.<sup>457</sup>

## **B. BALANCING A RESPECT FOR CULTURAL AND RELIGIOUS CONTEXTS WITH THE PROTECTION OF INDIVIDUAL HUMAN RIGHTS**

In applying the dynamic principle of treaty interpretation in the context of polygyny and international treaty law, it is essential to determine what constitutes modern "present day conditions." One of the most effective ways to ascertain this is to examine how other judiciaries are analyzing certain practices, particularly within the context of a given treaty.

With regard to polygyny, recent African jurisprudence provides useful insights for such a determination. This jurisprudence not only indicates particular regional trends in cases involving discriminatory customary practices, but also reveals more generally some of the means available to legislatures and courts to eliminate discriminatory practices while still being respectful of culture. African jurisprudence is particularly informative because it so often involves balancing cultural values and individual equality rights, a task that is especially challenging where Courts have to address parallel legal systems. For the most part, African judicial trends indicate a desire to ensure constitutional guarantees of equality by giving primacy to statutory law when customary rules conflict with it either through a repugnancy to natural justice analysis<sup>458</sup> or a balancing approach.

The repugnancy to natural justice approach, augmented by international human rights reasoning, can be seen in *David Tchakokam v. Koeu Madeleine*, a Cameroon decision rejecting the applicant's petition for a Court order to return his levirate wife to him as part of his deceased brother's estate.<sup>459</sup> The Court found that the practice of levirate (whereby a widow is expected to marry one of her deceased husband's brothers because the bride price paid to the husband's



family is believed to remain with his family) was contrary to statutory law, contrary to Article 16 of the Women's Convention, and repugnant to natural justice.<sup>460</sup>

While the result in *David Tchakokam* accords with international human rights norms prohibiting harmful and discriminatory practices, there are nevertheless questions concerning the “repugnancy to natural justice” approach. Particularly within the African context, some scholars have argued that the repugnancy doctrine when applied to customary practices serves as an extension of colonial oppression and chauvinism.<sup>461</sup> This doctrine was applied in *Mojekwu v. Mojekwu*, in which a deceased's brother sought to inherit the deceased's estate to the exclusion of the deceased's daughter.<sup>462</sup> In its reasoning, the Court had “no difficulty in holding that the Oli-ekpe custom of Nnewi is repugnant to natural justice, equity and good conscience.”<sup>463</sup> Commentators have raised questions as to why the Court chose to apply the repugnancy doctrine when they had already declared that the custom was unconstitutional.<sup>464</sup> It may be, however, that the Court in *Mojekwu* used a repugnancy to natural justice approach to reinforce the Constitutional prohibition. Within the Canadian framework, there is a similar need to be sensitive to culture and custom, while nevertheless upholding women's human rights.

An alternative approach to the repugnancy doctrine can be seen in the recent South African Constitutional Court decision of *Bhe v. Magistrate, Khayelitsha and others*, wherein the Court rejected the application of customary law regarding male primogeniture (an exclusive right of inheritance belonging to the eldest son) while still being sensitive to the cultural and customary norms that underlay it.<sup>465</sup> Noting that the “majority of Africans have not forsaken their traditional cultures,”<sup>466</sup> the Court went on to undertake a “balancing exercise” in considering both cultural traditions and individual rights.

The respect for our diversity and the right of communities to live and be governed by indigenous law must be balanced against the need to protect the vulnerable members of the family. The overriding consideration must be to do that which is fair, just and equitable. And more importantly, the interests of the minor children and other dependants of the deceased should be paramount.<sup>467</sup>

Through this balancing approach, the Court was able to give consideration to the African traditions that informed customary laws, while nevertheless recognizing that individuals within the family, particularly the most vulnerable members, deserve legal protection from discriminatory inheritance practices.

This type of reasoning could similarly be applied to the practice of polygyny. Legislation or jurisprudence that prohibits the practice should be sensitive to the cultural or religious traditions that have historically permitted it, at least according to some interpretations, while nevertheless recognizing that it subordinates women and violates their right to be free from all forms of discrimination. In addition, it is essential that Courts and legislatures are mindful of the fairness and equality principles within these same cultural or religious traditions that may have been silenced by patriarchal interpretations.



## VII. FOSTERING COMPLIANCE WITH EQUALITY RIGHTS IN MARRIAGE AND THE FAMILY

### A. IMPROVED DIALOGUE

In order to successfully eliminate polygyny within Canada, it is essential that the process be sensitive to the context in which the practice has arisen. To this end, it is valuable to look to the methodology adopted by Women Living under Muslim Laws (WLUML) in their efforts to engage with the Islamic faith where it undermines women's rights rather than reject it outright. As Madhavi Sunder has outlined, WLUML has adopted strategies that challenge fundamentalist conceptions of identity within the private sphere rather than focusing solely on secular strategies to achieve equality in the public sphere.<sup>468</sup> In particular, WLUML's strategy of spreading information about the diversity of Islamic customs and laws in challenging the notion that feminism and human rights are "un-Islamic"<sup>469</sup> may be especially amenable to the Canadian context.

The "Life in Bountiful" report on Fundamentalist Mormon polygyny also alluded to the value of theological dialogue for those whose religious views are being redefined. Within the Bountiful context, the report noted that:

part of the process of coming to be able to deal with society at large entails dealing with the picture of the Mormon church they've accepted. Recognizing the distortions they've accepted in their beliefs about the Mormon church can be an important step in coming to see society at large as a less hostile and dangerous environment."<sup>470</sup>

To achieve this, the report recommended that individuals be able to access counsellors acquainted with Mormon Theology.

Likewise, British Columbia's Attorney-General Geoff Plant has acknowledged the importance that an investigation into the Bountiful, B.C. community be "informed by the history and the culture of the community and be sensitive to that as well as being effective."<sup>471</sup> To this end, as noted in the "Life in Bountiful Report," professionals must be sensitive to the life-long conditioning that may have occurred in the polygynous group culture. Currently available literature concerning adult children of alcoholics, co-dependency, and addictive relationships may help professionals to understand individuals' inability to make independent decisions along with their reluctance to criticize those in the group.<sup>472</sup>

Given that mainstream Mormonism has rejected polygyny, it would be helpful at a social level to encourage networking amongst Fundamentalist Mormon women and their mainstream Mormon counterparts. Indeed the networking Janet Bennion outlined in her scholarship on contemporary Fundamentalist Mormon polygyny<sup>473</sup> signals that this type of social framework is already being utilized by women, albeit *within* polygynous contexts. While this type of networking, as Bennion notes, serves to stimulate companionship, economic stability, social solidarity and spiritual exchange as women cope with their "paradoxical existence" within polygyny,<sup>474</sup> there seems no

reason why it could not be extended to include Mormon women living in monogamous communities. This type of dialogue and engagement with the broader Mormon faith community may allow women within the Fundamentalist Mormon communities to re-define religious doctrine that subordinates them while still being able to embrace faith components that are normatively valuable.

## **B. CANADIAN OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW**

### **1. Presumption of Compliance**

International human rights standards for the elimination of all forms of discrimination against women are essential to Canada's foreign and domestic policy as well as its jurisprudence. The Canadian Department of Foreign Affairs has publicly noted that "the human rights of women remain a central foreign policy priority for Canada, both in bilateral discussions and in multilateral fora."<sup>475</sup> In this sense, when Canada fails to address the domestic human rights violations of women through practices such as polygyny, its foreign policy legitimacy is undermined.

Moreover, the issue of gender equality more generally has been described in a Department of Foreign Affairs statement as:

... not only a human rights issue, but also an essential component of democratic development. True development will only be achieved if women are able to participate as equal partners, decision makers, and beneficiaries of the sustainable development of their societies.<sup>476</sup>

Accordingly, in order to foster democratic development, it is essential that Canadian policy and jurisprudence reflect human rights norms that promote the inclusion and participatory citizenship of women.

Beyond its importance in Canada's foreign policy and democratic commitments, international human rights law, particularly in the form of ratified, though often unimplemented treaties, is central to Canadian jurisprudence. While it is beyond the scope of this report to undertake a thorough analysis of the domestic role of international law, it is essential to note the principle of conformity that informs Canadian courts. This general common law principle, articulated by the Supreme Court of Canada in *Daniels v. White*, holds that:

Parliament is not presumed to legislate in breach of a treaty or in a manner inconsistent with the comity of nations and the established rules of international law.<sup>477</sup>

This is noteworthy because although unimplemented treaties are not binding domestically within Canada's dualist system, the presumption of compliance gives them an important interpretive role in cases of statutory ambiguity.

The Supreme Court of Canada has applied this presumption of compliance in its Charter analysis. In *Slaight Communications v. Davidson*, Dickson J. noted that the Charter is:

presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.<sup>478</sup>

Thus, the right of women and children to be free from the various forms of discrimination that polygyny perpetuates should be given a similar level of protection under Canada's Charter equality and security of the person provisions that it would receive under the Women's and Children's Conventions.

In contrast to treaty law, Canada is generally considered adoptionist with regard to customary international law, meaning that customary norms do not require transformation to have domestic effect.<sup>479</sup> The Supreme Court's holding in *Suresh v. Canada (Minister of Citizenship & Immigration)* further supported this contention that transformation is unnecessary for customary international law to be invoked domestically.<sup>480</sup> To this extent, an argument that the prohibition, or at the very least growing restriction, of polygyny is part of international customary law as evidenced by state practice and *opinio juris* would not require a further transformation analysis to have effect in Canadian law.

In spite of the common law principle of conformity and the internationalist persona promoted by Canada through its Foreign Affairs statements, some academic commentators have criticized the disconnection between international and domestic law in the Canadian system.<sup>481</sup> In light of such criticisms, it is important that Courts play their due role in interpreting and indirectly implementing international law. This judicial role can first occur at the stage of interpreting and applying government-enacted legislation to ensure that it conforms with Canada's international obligations. Secondly, Courts can also play a more direct role in looking to international legal principles and materials as well as foreign judicial decisions as a foundation for their decisions.<sup>482</sup>

As former Justice La Forest has articulated, Canadian courts are increasingly becoming "international courts" in several areas of the law making the adoption of an "international perspective" even more important.<sup>483</sup> If Canada's commitment to international human rights law is to be truly effective, it seems, as Elizabeth Brandon has argued, that "all participants in the litigation [must be able to] 'speak the same language' of international law."<sup>484</sup>

This ability to "speak the language" of international law, particularly in the context of practices or crimes that are harmful to women can be seen in *R. v. Ewanchuk*.<sup>485</sup> In her concurring judgment, L'Heureux-Dubé Mme. J. noted the international human rights context in which Canada's reforms to its sexual assault laws arose. She examined the Women's Convention not as binding in itself, but as informing the Court's Charter analysis. In concluding that "our Charter is the primary vehicle through which international human rights achieve a domestic effect,"<sup>486</sup> L'Heureux-Dubé Mme. J. drew a robust connection between the Charter and parallel protections under international human rights law. In addition, her reference to international law's connection

to “s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) [given that they] embody the notion of respect of human dignity and integrity”,<sup>487</sup> is particularly relevant for polygyny, given the extent to which the practice undermines these rights.

The Supreme Court reiterated the statement of L’Heureux-Dubé Mme J. that the s. 7 Charter protection of life, security, and liberty of the person would be informed by international law in subsequent jurisprudence. In *Suresh*, the Court noted that:

The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada’s international obligations and values as expressed in ‘[t]he various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms.’<sup>488</sup>

This is significant for a security of the person analysis because the international legal norms that recognize polygyny as a violation of women’s right to the highest attainable standard of health could thus be considered under a comparative right to security of the person Charter analysis.

## **2. Values and Principles of a Free and Democratic Society**

In addition to the principle of conformity, it is also clear that Canada looks to international human rights law as a reflection of its principles as a free and democratic society. In *R. v. Keegstra*, the Supreme Court noted that:

Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself.<sup>489</sup>

In many ways this values-based approach was solidified in *Baker v. Canada (Minister of Citizenship and Immigration)*.<sup>490</sup> There, the Court noted that even where an international treaty has not been implemented in Canada (in that case, the Convention on the Rights of the Child), the values of international human rights law may nevertheless inform the contextual approach to statutory interpretation.<sup>491</sup> In what Mayo Moran has referred to as “influential authority,” *Baker* thus:

engages the ratified treaty... at the level of its general values or principles and imposes obligations of justification and respect, rather than conformity or compliance.<sup>492</sup>

While it remains clear that ratified, though unimplemented, treaties are not legally binding domestically, they do appear to now require some judicial consideration at least at a value-normative level.

L’Heureux-Dubé Mme. J.’s emphasis on the fact that the Court was considering an international human rights treaty in *Baker* is particularly relevant for a human rights analysis of polygyny. In examining the Children’s Convention, she noted that:

the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.<sup>493</sup>

The values represented in unimplemented human rights treaties are therefore relevant to a Charter analysis as well as regular statutory interpretation. It is in this regard, as Moran argues, that the “public power must thus, at a minimum, exhibit some kind of fidelity to the values it has expressly adopted.”<sup>494</sup>

Finally, it is important to note that if a criminal or civil law prohibiting or excluding polygamous unions were challenged and a Court were to find a Charter violation, international human rights law would have an important role to play in a subsequent s. 1 analysis. As the Supreme Court noted in *R v. Keegstra*:

international human rights law and Canada’s commitments in that area are of particular significance in assessing the importance of Parliament’s objective under s. 1.<sup>495</sup>

In this sense, the objective of protecting women’s right to be free from all forms of discrimination as well as children’s right to have their best interests given primary consideration would be viewed as particularly important Parliamentary objectives in prohibiting polygynous unions.

## **C. MONITORING OF CANADA’S OBLIGATIONS UNDER THE WOMEN’S CONVENTION**

### **1. Reporting Mechanism under the Women’s Convention**

Article 18 of the Women’s Convention requires that States parties submit country reports on the:

legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect... .

This reporting mechanism is central to the Convention’s international supervisory role. It also provides an important opportunity for non-governmental organizations to focus national attention on specific issues including the government’s progress in fulfilling its treaty obligations.<sup>496</sup> In turn, the reporting procedure helps to ensure that:

- a) States parties review national legislation and administrative practices for compliance with the Convention,
- b) States parties monitor the actual situation of individuals’ enjoyment of their rights,
- c) States parties demonstrate that carefully targeted policies for the implementation of the Convention have been undertaken,
- d) there is effective public scrutiny of government policies as they affect Convention rights,
- e) States parties and CEDAW develop a better understanding of the weaknesses or shortcomings of each State party’s domestic policies, and

- f) the Committee and States parties are better able to exchange information and understand the common problems faced in achieving the goals of the Women's Convention.<sup>497</sup>

Initial reports to the Committee are meant to provide a comprehensive description of the situation of women in their respective countries. Subsequent reports from States parties should identify the progress and changes since the earlier report with a particular focus on the *de facto* rather than simply the *de jure* situation of women.<sup>498</sup>

For a State party such as Canada, it is imperative that it fulfill its reporting obligations by highlighting in its future country reports the continued existence of polygynous families and a polygynous community within Canada, along with any measures it is undertaking to remedy ongoing rights violations. If the government reneges on this reporting duty, the Committee could raise criticisms about Canada's failure to provide it with adequate information to evaluate Canada's progress in achieving the objectives of the Women's Convention.<sup>499</sup> Moreover, while NGOs are not accorded a formal role in the review of state reports, they do serve an important function in providing the Committee with information from national groups that supplement, or in some cases contradict, the official submissions made by States parties.<sup>500</sup> Thus, if Canadian country reports continue to neglect to mention polygyny as an area of concern as well as an ongoing government initiative, NGO shadow reports could provide this information to the Committee.

## **2. Use of the Communications Procedure under the Optional Protocol of the Women's Convention**

The Communications procedure found in Article 2 of the Optional Protocol to the Women's Convention, which Canada acceded to on 18 October, 2002,<sup>501</sup> plays an important role in individual redress where States are in violation of their treaty obligations, as well as more generally serving as an advocacy tool for human rights organizations attempting to "name" and "shame" States parties.<sup>502</sup> To this end, the continual highlighting of government violations of treaty norms in the international arena can be an important catalyst for domestic reform.

Article 2 of the Optional Protocol states that:

Communications may be submitted on behalf of individuals or groups of individuals under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without their consent.<sup>503</sup>

Such claims can include allegations of State violations or failures to honour their treaty obligations.<sup>504</sup> Similarly to the complaints procedure under the Optional Protocol to the Political Covenant, the communications procedure can provide specific redress to individuals whose rights have been violated as well as generally secure more timely and direct enforcement of rights obligations.<sup>505</sup> One significant criterion that must be fulfilled before CEDAW will hear



such complaints is the exhaustion of all domestic remedies. Similarly to other treaty bodies, the Committee:

shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.<sup>506</sup>

Within the Canadian context, the latter qualification of the exhaustion requirement is relevant for women who have suffered ongoing human rights abuses within polygynous marriages, particularly within the Bountiful, B.C. community. For persons such as Deborah Palmer, a well known anti-polygyny advocate and former assigned polygynous wife, domestic remedies for these human rights violations have not only been “unreasonably prolonged,” but may also be currently unavailable domestically. While 2003 media reports indicated that Palmer was trying to launch a class-action lawsuit in B.C. in the hopes of exposing the “sexual, physical, spiritual and psychological abuses” as well as the educational and financial deprivations in Bountiful, there is no indication as to what transpired in this attempted litigation.<sup>507</sup> Moreover, although police recommended in a 1992 investigation that two Bountiful men be charged with polygamy, the Crown never prosecuted, following legal advice from constitutional experts that Canada’s polygamy laws would not withstand a *Charter* challenge based on freedom of religion.<sup>508</sup>

This reluctance to prosecute individuals for the crime of polygamy has also extended to a failure to prosecute various other alleged crimes within the community including sexual assault, human trafficking, under-age marriage, and physical abuse. In contrast, United States officials, while also strongly criticized for not being vigilant enough or providing adequate services to women and children fleeing such unions,<sup>509</sup> have at least successfully prosecuted some Fundamentalist Mormon men for polygamy/bigamy, as well as associated crimes including child rape.<sup>510</sup>

Thus, it seems that Canada’s reluctance to address criminal conduct and human rights violations within the polygynous Bountiful, B.C. context to date would qualify under the Article 2 domestic exhaustion exception. If such a complaint were brought to and heard by CEDAW, the Committee could recommend that Canada take interim measures if it found that the alleged violation could cause “irreparable damage” to the victim(s) of the violation.<sup>511</sup> In the case of polygyny, the above-noted emotional, psychological, and reproductive and sexual health harms would clearly qualify as potentially causing “irreparable damage” to victims. In addition, once the Committee had completed its review of such a communication and heard from all interested parties, it could ask Canada, as the State party, to provide further information as to what measures it had taken in response to the Committee’s recommendations and final views.<sup>512</sup>

### 3. Use of the Inquiry Procedure under the Optional Protocol of the Women's Convention

Beyond the Complaints Procedure, the Inquiry Procedure under the Optional Protocol serves as another important mechanism for ensuring greater conformity by States parties with their obligations under the Women's Convention. Article 8 of the Optional Protocol provides that:

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.
3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.<sup>513</sup>

The Inquiry Procedure gives CEDAW the authority to independently investigate grave or systemic human rights violations, in all cases preferably with the cooperation of the State party involved. These can include widespread violations such as the trafficking of women or more isolated violations such as customary practices that are harmful to women. The fact that a harmful customary or religious practice such as polygyny is illegal in a given state does not alter CEDAW's ability to investigate it if it is still found to exist.<sup>514</sup> The Inquiry Procedure under the Women's Convention is distinct from those of other human rights treaty bodies because it does not limit who can initiate a claim against a State party.<sup>515</sup> It requires only that the initiating party "provide relevant proof of the alleged violation."<sup>516</sup>

Given how well documented human rights abuses in the Bountiful, B.C. context are, it is highly probable that CEDAW would find sufficiently relevant evidence to initiate an inquiry if a claim were brought. It is also likely that if an inquiry into polygyny in Canada were undertaken by CEDAW, its scope would extend beyond the Bountiful context. In Marion Boyd's recent report on faith-based arbitration in Ontario, the former Ontario Attorney-General noted that in the consultation stage:

many participants mentioned that although polygamy and performing polygamous marriages are offences in the *Criminal Code*, police are reluctant to lay charges. The Review received anecdotal evidence from a number of sources that polygamous marriages are being performed in Ontario and concern was raised about the situation of women whose spouses marry more than once.<sup>517</sup>

The presence of polygyny beyond Bountiful, B.C. illustrates the pressing need for the Canadian State to report on and take immediate steps to eliminate the practice.

#### **D. MONITORING OF CANADA’S OBLIGATIONS UNDER THE POLITICAL COVENANT AND THE CHILDREN’S CONVENTION**

While CEDAW may be the optimal international body to possibly investigate, report on and propose remedies for current human rights violations relating to polygyny in Canada, other human rights bodies could also be engaged in this process, particularly during the reporting stages.

##### **1. The Human Rights Committee (HRC)**

The Human Rights Committee (HRC) is the treaty monitoring body for the Political Covenant. Per Article 40 of the Covenant, States parties are required to “submit reports” on measures taken to “give effect” to their treaty obligations and “on the progress made” in the enjoyment of rights articulated in the Covenant.<sup>518</sup> While it may call for an emergency report during a conflict situation, for example, the HRC has requested that reports be received every five years.<sup>519</sup> These reports are then examined by the Committee of experts in public dialogue with the State party. Significantly, like CEDAW, the HRC does not rely only on State submissions in making its Concluding Observations on a given state. It can also access alternative sources including specialized UN agencies, non-governmental organizations, and the press.<sup>520</sup> After this dialogue process, the HRC will then release its Concluding Observations on a State, which speak to the current human rights situation in that State as well as recommendations for improvements and inquiries for specific information in future reporting.

In addition to state-specific reports, the HRC also issues “General Comments” according to its Article 40 jurisdiction. These Comments address thematic issues relating to the Covenant and serve to expand the meaning and interpretation of specific rights.<sup>521</sup> In response to these reports, the Committee then issues “general comments as it may consider appropriate” to these States parties.

In addition to issuing Concluding Observations on reports of States Parties and issuing General Comments, the HRC, like CEDAW, has an Optional Protocol that allows the Committee to hear individual communications from persons claiming to be victims of human rights abuses committed by a member state. Upon considering the merits of such communications, the Committee issues its “views” under Article 5(4) of the Optional Protocol. These decisions have rightly been characterized as being issued “in a judicial spirit.”<sup>522</sup> States parties that fail to redress breaches found by the HRC or to reform laws that have been found to violate the Political Covenant may face strong public condemnation and questions about the veracity of their commitment to human rights. The “naming and shaming” associated with adverse HRC decisions has indeed motivated many states to alter their laws and/or practices to conform with their obligations under the Political Covenant.<sup>523</sup>

Given that the HRC has expressly stated that polygamy violates the equality of men and women guaranteed in the Political Covenant, legally legitimizing polygynous unions within Canada could be challenged by individual petitions.

## **2. The Committee on the Rights of the Child (CRC)**

The Children's Convention entered into force on September 2, 1990. As of 2005, there are 192 States parties, including Canada.<sup>524</sup> The Children's Convention is considered the most comprehensive single human rights treaty.<sup>525</sup> The Committee on the Rights of the Child (CRC) is the independent treaty body that monitors implementation of the Convention on the Rights of the Child by its States parties.

States parties are required to submit regular reports to the Committee outlining how the rights are being implemented. States must report initially within two years after acceding to the Convention. After this, they report every five years. Like the other treaty bodies, the CRC examines each report and addresses its concerns and recommendations to the State party in its concluding observations. States that have acceded to the two Optional Protocols to the Convention also submit additional reports.<sup>526</sup>

As noted by many commentators, one of the drawbacks of the CRC is that, unlike the HRC and CEDAW, it cannot consider individual complaints.<sup>527</sup> This does not preclude the rights of children being raised at other treaty committees that are competent to evaluate individual petitions. Like other treaty bodies, the CRC has also published several General Comments since 2001 that provide guidance on thematic issues and their reporting. In light of media reports that polygynous marriages in Bountiful, B.C. involve minors, Canada is bound in its reporting obligations to the CRC to outline how such early marriages may threaten adolescent health, as noted above,<sup>528</sup> and to indicate what steps it is taking to eliminate the practice.

## VIII. CONCLUSION

1. As international human rights law has evolved from a framework of sex non-discrimination to a more robust sense of transformative equality, a growing consensus has emerged that polygyny violates women's right to be free from all forms of discrimination. Several treaty bodies, including CEDAW, the HRC, the CESCR, and the CRC, have stated in their concluding observations that polygyny violates the rights articulated within their respective treaties. In its General Comment no. 28 on the Equality of Rights 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."<sup>529</sup> Likewise, CEDAW has argued that because polygyny violates gender equality and often has deleterious financial and emotional consequences for women and their dependents, "such marriages ought to be discouraged and prohibited."<sup>530</sup>
2. These statements by treaty bodies reflect the patriarchal discrimination and harms to women and children associated with polygyny. While such harms often differ according to the religious, customary, cultural and socio-economic contexts in which polygyny is practised, the loss of marital exclusivity is common to all such unions. Some of the other deleterious impacts include harms arising from competitive co-wife relationships, mental health harms, sexual and reproductive health harms, economic harms, harms to the enjoyment of one's citizenship, and harms to children of polygynous unions.
3. In light of these harms to women and children, polygyny violates their rights as articulated in international human rights law. Specifically, polygyny undermines the rights of women and children in relation to family life, security, and citizenship. While the discrete human rights contained within these realms are by definition universal, it is nevertheless clear that just as the harms of polygynous unions may differ according to their context, so also may the rights violations. Significantly, however, the right to equality within marriage and the family is violated *per se* by polygyny, regardless of the cultural or religious context in which it is practised.
4. With regard to these rights violations, international law does not provide for religious, cultural, or family life justifications. Although religious, cultural and family life protections exist in various international treaties including the Political and Economic Covenants, they do not extend to practices that violate the rights and freedoms of others. Moreover, the requirement of the Women's Convention that States parties "ensure the full development and advancement of women" forecloses religious, cultural, or family life defences for practices that discriminate against and harm women.
5. This conclusion that polygyny constitutes an unjustifiable violation of the rights of women and children can increasingly be seen as the *opinio juris* driving state practice to prohibit or at least restrict the practice. An outright prohibition of polygyny is the norm in

the majority of states, including all of the Americas, Europe, countries of the former Soviet Union, Nepal, Vietnam, China, Turkey, Tunisia, Uzbekistan, Fiji and Côte d'Ivoire, amongst others. Regional trends in Africa, the Middle East, and Asia are increasingly toward restricting and eventually prohibiting the practice. The presence of this type of prohibitive or restrictive state practice, combined with the *opinio juris* that international law requires this, signals the emergence of an international customary norm that polygyny violates international law.

6. Despite this growing agreement that polygyny violates international human rights law, international consensus fractures somewhat at the point of the actual elimination of polygyny. Because of transitional concerns in immigration and domestic contexts regarding ongoing legal protection for pre-existing polygynous families, some states and regional bodies have been reticent to call for its absolute prohibition. This reticence should not be interpreted, however, as a dilution of the consensus that polygyny violates international human rights law. Accordingly, in addressing polygyny within various national contexts, it is imperative that legal, political, and social systems are sensitive to the religious and cultural contexts with which women and families identify, while still protecting individual human rights.
7. In order to foster compliance with equality rights in marriage and the family, it is essential that the Canadian State encourage greater dialogue between polygynous communities and families and the broader monogamous culture. Moreover, given that Canada has ratified the Women's Convention, the Economic Covenant, the Political Covenant, and the Convention on the Rights of the Child, these respective treaties raise a presumption of compliance within domestic jurisprudence as well as informing the values and principles in a *Charter* analysis. Finally, as a party to the Women's Convention and a signatory to its Optional Protocol, Canada is subject to its reporting mechanism as well as the communications and inquiry procedures. These monitoring provisions seek to ensure that Canada informs CEDAW of challenges it faces with regard to its treaty obligations and the various legal and policy means by which it is addressing these challenges. For these reasons, it is essential that Canada both report on and address the domestic presence of polygynous families in striving to attain the *de facto* elimination of polygyny.

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## ENDNOTES

- <sup>1</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.290.
- <sup>2</sup> *Ibid*, as defined in s. 214, “form of marriage” includes a ceremony of marriage that is recognized as valid (a) by the law of the place where it was celebrated, or (b) by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated.
- <sup>3</sup> Law Reform Commission of Canada, *Bigamy*, Working Paper No. 42 (Ottawa: Law Reform Commission of Canada, 1985) at 13.
- <sup>4</sup> Amy Kaufman, “Polygamous Marriages in Canada” (2005) 21 Can. J. Fam. L. 315 at 316 citing Philip L. Kilbride, *Plural Marriage for Our Times: A Reinvented Option* (Connecticut: Bergin & Garvey, 1994) at 42 “that polyandry exists in less than one percent of the world’s cultures and always in combination with polygyny.”
- <sup>5</sup> See *Pichon and Sajous v. France* (2001), Eur. Ct. H.R. (Third Section) Appl. 49853/99 (limiting the right of conscientious objection for the protection of health); *Singh Bhinder v. Canada*, Communication Nos. 208/1986, U.N. Doc. CCPR/C/37/D/208/1986 (1989) (law requiring all persons to wear safety gear [hard hats] for public health and safety interests is a justified limitation on freedom of religion).
- <sup>6</sup> *Leyla Sahin v. Turkey* (2005), Eur. Ct. H.R., Appl. 44774/98 (limitations on the public use of religious headscarves permitted for the purpose of protecting gender equality and maintaining secularism in official settings / institutions of higher learning).
- <sup>7</sup> Lorraine Weinrib “Charter precludes unequal regimes” *Law Times* (3 October 2005).
- <sup>8</sup> See Courtney Howland, “The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter” (1997) 35 Colum. J. Transnat’l L. 273 [Howland, “Challenge of Religious Fundamentalism”]; and Courtenay Howland, “Safeguarding Women’s Political Freedoms under the International Covenant on Civil and Political Rights in the Face of Religious Fundamentalism” in Courtenay Howland, ed., *Religious Fundamentalism and the Human Rights of Women* (New York: St. Martin’s Press, 1999) [“Safeguarding”] for discussions of the impact of modesty and obedience codes on women’s political rights and freedoms.
- <sup>9</sup> Susan Deller Ross, “Polygyny as a Violation of Women’s Right to Equality in Marriage: An Historical, Comparative and International Human Rights Overview” (2002) 24 Delhi Law Review 22 at 24; Women Living Under Muslim Laws, *Knowing Our Rights: Women, family, laws and customs in the Muslim World* (London: Women Living Under Muslim Laws, 2003) [WLUML, “Knowing Our Rights”].

<sup>10</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71. [*Universal Declaration*].

<sup>11</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*Political Covenant*].

<sup>12</sup> *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200 (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.A/6316 (entered into force 3 January 1976, accession by Canada 19 May 1976) [*Economic Covenant*].

<sup>13</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 at 223, Eur. T.S. 5, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively [*European Convention*].

<sup>14</sup> OAS, *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 114 U.N.T.S. 123 (1969) Organization of American States Treaty Series, 1 (1969) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) [*American Convention*].

<sup>15</sup> Council of the League of Arab States, *Arab Charter on Human Rights*, September 15, 1994, reprinted in 18 Hum. Rts. L.J. 151 (1997) [*Arab Charter*].

<sup>16</sup> UN, *Convention on the Elimination of All Forms of Discrimination against Women* (New York: UN, 1979), 34 UN GAOR Suppl. (No. 21) (A/34/46) at 193, UN Doc. A/Res/34/180 [*Women's Convention*].

<sup>17</sup> *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30<sup>th</sup> Sess., UN Doc. HRI/GEN/1/Rev. 7 (2004) at 282, at para. 4.

<sup>18</sup> *African [Banjul] Charter on Human and Peoples' Rights*, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 [*African Charter*].

<sup>19</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, July 11 - August 13, 2003. [*Protocol to African Charter on Rights of Women*].

<sup>20</sup> Art. 2 reads: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as... sex...."

<sup>21</sup> *African Charter*, *supra* note 18, Art. 18.

<sup>22</sup> CEDAW has condemned polygyny in numerous concluding observations. *See e.g.*, **Burkina Faso**, 31/01/2000, U.N. Doc. A/55/38, paras. 281–282; **Cameroon**, 26/06/2000, U.N. Doc. A/55/38, para. 54; **Democratic Republic of the Congo**, 01/02/2000, U.N. Doc. A/55/38, paras. 215–216; **Egypt**, 02/02/2001, U.N. Doc. A/56/38, paras. 352–353; **Guinea**, 31/07/2001, U.N. Doc. A/56/38, paras. 122–123; **Indonesia**, 14/05/98, U.N. Doc. A/53/38, para. 284( a) ; **Iraq**, 14/06/2000, U.N. Doc. A/55/38, para. 191; **Israel**, 12/08/97, U.N. Doc. A/52/38 Rev.1, Part II, para. 163; **Jordan**, 27/01/2000, U.N. Doc. A/55/38, para. 174–175; **Namibia**, 12/08/97, U.N. Doc. A/52/38/Rev.1, Part II, para. 110; **Nepal**, 01/07/99, U.N. Doc. A/54/38, para. 153; **Nigeria**, 07/07/98, U.N. Doc. A/53/38/Rev.1, para. 153; **Senegal**, 12/04/94, U.N. Doc. A/49/38, para. 721; **United Republic of Tanzania**, 06/07/98, U.N. Doc. A/53/38/Rev.1, para. 229; **Uzbekistan**, 02/02/2001, U.N. Doc. A/56/38, paras. 187–188 (as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, (2002) at 38).

<sup>23</sup> The HRC has recommended that States parties take steps to abolish and prevent the practice in several of its concluding observations. *See e.g.*, **Democratic Republic of the Congo**, 27/03/2000, U.N. Doc. CCPR/C/79/Add.118, para. 11; **Gabon**, 10/11/2000, U.N. Doc. CCPR/CO /70/G AB, para. 9; **Libyan Arab Jamahiriya**, 06/11/98, U.N. Doc. CCPR/C/79/Add.101, para. 17; **Nigeria**, 24/07/96, U.N. Doc. CCPR/C/79/Add.65, A /51/40, para. 291; **Senegal**, 19/11/97, U.N. Doc. CCPR/C/79/Add 82, para. 12. (as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, (2002) at 42).

<sup>24</sup> The CESCR has condemned polygamy as being incompatible with the rights protected under the Economic Covenant. *See e.g.*, **Cameroon**, 08/12/99, U.N. Doc. E/C.12/1/A dd.40, paras. 14, 33; **Kyrgyzstan**, 01/09/2000, U.N. Doc. E/C.12/1/Add.49, paras. 16, 30; **Nepal**, 24/09/2001, U.N. Doc. E/C.12/1/Add.66, paras. 10, 13; **Nigeria**, 13/05/98, U.N. Doc. E/C.12/Add.23, para. 22; **Senegal**, 24/09/2001, U.N. Doc. E/C.12/1/Add.62, paras. 15, 39 (as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, (2002) at 45).

<sup>25</sup> The CRC has expressed concern about the impact of polygyny on children and recommended policy and legislative reforms to discourage the practice. *See Djibouti*, 28/06/2000, U.N. Doc. CRC/C/15/Add.131, para. 34 (as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights* (2002) at 40).

<sup>26</sup> *General Comment No. 28: Equality of rights between men and women (article 3)*, UN HRCOR, 68<sup>th</sup> Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para. 24. For a discussion of the legal trend toward marital equality and the regulation of marriage generally, see Arlette Gautier, “Legal Regulation of Marital Relations: An Historical and Comparative Approach” (2005) 19 *International Journal of Law, Policy and the Family* 47.

<sup>27</sup> *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13<sup>th</sup> Sess., UN Doc. A/47/38, (1994) at para. 14. See also Article 5(a) of the Women’s Convention: “States Parties shall take all appropriate measures:  
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

<sup>28</sup> See Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge: University of Cambridge Press, 1996); Peter Bretschneider, *Polygyny: a Cross-Cultural Study* (Uppsala: Uppsala University, 1995); Laura Betzig, *Le femme de mon mari: etude ethnologique du marie polygamique en Afrique et en France* (New York: Aldine Pub., 1986).

<sup>29</sup> Felicity Kaganas, & Christina Murray, “Law, Women and the Family: The Question of Polygyny in a New South Africa” (1991) *Acta Jur* 116 at 127.

<sup>30</sup> *Ibid.* at 128.

<sup>31</sup> *Ibid.*

<sup>32</sup> Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 339.

<sup>33</sup> Esther Sivan (under the direction of Prof. Hillel Shuval), “Study on the Lack of Equality of Women in Israel In Matters of Personal Status—Marriage and Divorce—With proposals on how to achieve freedom of religion and equal rights for women in Israel” (Joint Project of the Hebrew University of Jerusalem and Hemdat—Council for Freedom of Science, Religion and Culture in Israel: Jerusalem, Israel, 2000) at 13.

<sup>34</sup> *Ibid.*

<sup>35</sup> A. Yusuf Ali, “The Holy Qu’ran: Text, Translation and Commentary” Sura 4, verse 3 (1983) as cited in Amira Mashhour, “Islamic Law and Gender Equality—Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt” (2005) 27 *Human Rights Quarterly* 562.

<sup>36</sup> Urfan Khaliq, “Beyond the Veil?: An Analysis of the Provisions of the Women’s Convention in the Law as Stipulated in Shari’ah” (1995) 2 *Buff. Jour. Int’l L.* 1 at 31.

- <sup>37</sup> Altman & Ginat, *supra* note 28 at 42.
- <sup>38</sup> *Ibid.*
- <sup>39</sup> *Ibid* at 27.
- <sup>40</sup> *Ibid.*
- <sup>41</sup> Janet Rifkin, “Toward a Theory of Law and Patriarchy” (1980) 3 Harv. Women’s L.J. 83 at 83.
- <sup>42</sup> Susan Okin, *Is Multiculturalism Bad for Women?* (Princeton, N.J.: Princeton University Press, 1999) at 13.
- <sup>43</sup> *Ibid* at 15.
- <sup>44</sup> WLUML, “Knowing Our Rights”, *supra* note 9 at 197.
- <sup>45</sup> U.N. Special Rapporteur on Violence Against Women, *Cultural practices in the family that are violent towards women*, UN ESCOR, 2002, 48<sup>th</sup> Sess., UN Doc. E/CN.4/2002/83 (2002) at para. 63.
- <sup>46</sup> Sandra Fredman, “Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights” in Ineke Boerefijn et al., eds., *Temporary Special Measures: Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (New York: Transnational Publishers, 2003) 111 at 115.
- <sup>47</sup> *Ibid.*
- <sup>48</sup> *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30<sup>th</sup> Sess., UN Doc. HRI/GEN/1/Rev. 7, (2004) at 282, at para. 10.
- <sup>49</sup> (1960) A.I.R. 684 (Allahabad) [“*Itwari*”].
- <sup>50</sup> *Ibid.* at para. 15.
- <sup>51</sup> 7 Misc.3d 459, 794 N.Y.S.2d 579 (Sup. Ct., NY County 2005) [“*Hernandez*”].
- <sup>52</sup> *Ibid* at 609 in 794 N.Y.S.2d 579.
- <sup>53</sup> Altman and Ginat, *supra* note 28 at 341.
- <sup>54</sup> *Ibid.*
- <sup>55</sup> *Ibid.*
- <sup>56</sup> *Ibid.* at 343.
- <sup>57</sup> Sangeetha Madhavan, “Best of Friends and Worst of Enemies: Competition and Collaboration in Polygyny” (2002) 41 *Ethnology* 69 at 69.

- <sup>58</sup> *Ibid.*
- <sup>59</sup> Altman and Ginat, *supra* note 28 at 341.
- <sup>60</sup> *Ibid.*
- <sup>61</sup> *Ibid.* at 344.
- <sup>62</sup> Alean Al-Krenawi “Women from Polygamous and Monogamous Marriages in an Out-Patient Psychiatric Clinic” 38 *Transcultural Psychiatry* (2001) 187. [Al-Krenawi, “Women from Polygamous”]
- <sup>63</sup> *Ibid.* at 188.
- <sup>64</sup> A.H. Leighton, T.A. Lembo, C.C. Hughes, D.C. Leighton, J.M. Murphy, & H.B. Macklin, *Psychiatric disorder among the Yoruba*. (Ithaca, NY: Cornell University Press, 1963) as cited in Al-Krenawi, “Women from Polygamous”, *supra* note 62 at 188.
- <sup>65</sup> R. Ghubash, E. Hamdi, & P. Bebbington, “The Dubai community psychiatric survey, I. Prevalence and socio-demographic correlates” (1992) 27 *Social Psychiatry and Psychiatric Epidemiology* 55; M.F. El-Islam, “Clinical bounds neurosis in Qatari women” (1975) 10 *Social Psychiatry* 25 as cited in Al-Krenawi, “Women from Polygamous”, *supra* note 62 at 188.
- <sup>66</sup> The polygynous subjects in Al-Krenawi’s study were all “senior wives” whose husbands had taken another spouse within the past two years.
- <sup>67</sup> Al-Krenawi, “Women from Polygamous”, *supra* note 62 at 192.
- <sup>68</sup> *Ibid.* at 194.
- <sup>69</sup> *Ibid.* at 193.
- <sup>70</sup> *Ibid.*
- <sup>71</sup> *Ibid.* at 195.
- <sup>72</sup> *Ibid.* at 193-194.
- <sup>73</sup> *Life in Bountiful—A report on the lifestyle of a polygamous community*, Prepared for the Committee on Polygamous Issues, funded by the B.C. Ministry of Women’s Equality (April 1993) at 46 [*Life in Bountiful*].
- <sup>74</sup> *Ibid.* at 47.
- <sup>75</sup> *General Recommendation 24, Women and health*, UN CEDAWOR, 20<sup>th</sup> Sess., UN Doc. A/54/38/Rev.1 chapter I (1999) at para. 18.
- <sup>76</sup> For media coverage of legislative debates and women’s vulnerability, see, e.g., “Uganda’s Parliament to re-examine polygamy” *CNN News*, online: <http://www-cgi.cnn.com/WORLD/africa/9804/05/uganda.polygamy/>



- <sup>77</sup> Esther Mayambala, “Changing the Terms of the Debate: Polygamy and the Rights of Women in Kenya and Uganda” (1998) 3 East African Journal of Peace & Human Rights 200 at 213.
- <sup>78</sup> *Ibid.*
- <sup>79</sup> *Ibid.*
- <sup>80</sup> A.S. Jegede & O. Odumosu, “Gender and Health Analysis of Sexual Behaviour in South-Western Nigeria” (2003) 7 African Journal of Reproductive Health 63.
- <sup>81</sup> *Ibid.*
- <sup>82</sup> See Wendy L. Patten and J. Andrew Ward, “Recent Developments: Empowering Women to Stop AIDS in Côte d’Ivoire and Uganda” (1993) 6 Harv. Hum. Rts. J. 210 at 213 at 213-214.
- <sup>83</sup> *Ibid.*
- <sup>84</sup> Abdullahi An-Na’im, ed., *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002) at 49.
- <sup>85</sup> *Ibid.*
- <sup>86</sup> Marc Lacey “Africa: Uganda: Protest Over Polygamy Bill” New York Times (30 March 2005) A7.
- <sup>87</sup> *Ibid.*
- <sup>88</sup> *Declaration of Commitment on HIV/AIDS: United Nations General Assembly Special Session on HIV/AIDS*, UN GAOR, 2001, UN Doc. S-26/2.
- <sup>89</sup> Daniel Woods “Bountiful, B.C.: it’s a remote town in an idyllic valley where polygamy is the norm and the neighbours don’t seem to mind, But are there darker secrets lurking within?” *Saturday Night* (4 August 2001) 26 at 26.
- <sup>90</sup> Sally Armstrong, “Trouble in Paradise” *Chatelaine* (September 2004) 138 at 142 [“Trouble in Paradise”].
- <sup>91</sup> *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Canada*, UN CEDAWOR, 16<sup>th</sup> Sess., UN Doc. A/52/38Rev.1, (1997) at para. 328.
- <sup>92</sup> As cited in Bretschneider, *supra* note 28 at 177.
- <sup>93</sup> Bretschneider, *supra* note 28.
- <sup>94</sup> *Ibid.*
- <sup>95</sup> This is the case in Bountiful, B. C. where women generally do not work and are not allowed to own property. See Daphne Bramham “Polygamous wives, in Canada illegally, seek to stay” *The Vancouver Sun* (11 August 2004).

- <sup>96</sup> Vince Beiser, “The perils of polygamy: An incest case in Utah highlights the controversy over ‘plural marriage’” *Maclean’s* (26 July 1999) 32.
- <sup>97</sup> New York University School of Law International Human Rights Clinic, “Human Rights Campaign to End Abuses Against Women and Girls in Polygamous Fundamentalist Mormon Communities in the United States” unpublished report, at 2.
- <sup>98</sup> Woods, *supra* note 89 at 30.
- <sup>99</sup> See, e.g., Robert Matas “Bishop loses Bountiful school case” *The Globe and Mail* (4 April 2003).
- <sup>100</sup> Adrien Katherine Wing, “Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century” (2001) 11 *J. Contemp. Legal Issues* 811 at 838.
- <sup>101</sup> Al-Krenawi, “Women from Polygamous” *supra* note 62 at 192.
- <sup>102</sup> Deller Ross, *supra* note 9 at 30.
- <sup>103</sup> *Ibid.*
- <sup>104</sup> An-Na’im, *supra* note 84 at 73.
- <sup>105</sup> *Ibid.*
- <sup>106</sup> See A. Al-Krenawi, J.R. Graham, & S. Al-Krenawi, S. “Social work practice with polygamous families” (1997) 14 *Child and Adolescent Social Work Journal* 445 [Al-Krenawi, “Social work practice”]; K. Chaleby, “Women of polygamous marriages in an inpatient psychiatric service in Kuwait” (1987) 173 *Journal of Nervous and Mental Disease*, 56. M.F. El-Islam, “Collaboration with families for rehabilitation of schizophrenic patients and the concept of expressed emotion” (1989) 79 *Acta Psychiatrica Scandinavica* 303.
- <sup>107</sup> Al-Krenawi, “Women from Polygamous” *supra* note 62 at 189; See also A. Al-Krenawi, “Family therapy with a multiparental/multispousal family” (1998) 37 *Family Process* 65.
- <sup>108</sup> WLUML, “Knowing Our Rights”, *supra* note 9 at 198.
- <sup>109</sup> *Ibid.*
- <sup>110</sup> For a discussion of the role of religion and gender in citizenship, see Ayelet Shachar, “Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies” (2005) 50 *McGill Law Journal* 49.
- <sup>111</sup> Howland, “Safeguarding” *supra* note 8 at 93.
- <sup>112</sup> Winston Blackmore, who until recently was the sole leader of the community, displays a framed copy of the Charter in his office. See Mike D’Amour “Polygamists Defend Lifestyle” *The Calgary Sun* (1 August 2004) 11.

- <sup>113</sup> Howland, “Safeguarding” *supra* note 8 at 96.
- <sup>114</sup> Daphne Bramham, “Arrival of sect leader’s bodyguard an ominous sign” *The Vancouver Sun* (14 August 2004) A1.
- <sup>115</sup> Daphne Bramham “Religious tyrants twist tolerance for their own ends” *The Vancouver Sun* (17 July 2004) C7.
- <sup>116</sup> *Ibid.* at 97.
- <sup>117</sup> Armstrong, “Trouble in Paradise” *supra* note 90 at 139.
- <sup>118</sup> Howland, “Safeguarding” *supra* note 8 at 96.
- <sup>119</sup> A. Al-Krenawi, J.R.Graham & V. Slonim-Nevo, “Mental health aspects of Arab-Israeli adolescents from polygamous versus monogamous families” (2002) 142 *Journal of Social Psychology* 446.
- <sup>120</sup> Varghese I. Cherian, “Academic Achievement of Children From Monogamous and Polygynous Families” (1989) 130 *The Journal of Social Psychology* 117.
- <sup>121</sup> *Ibid.* at 117.
- <sup>122</sup> Al-Krenawi, “Women from Polygamous”, *supra* note 62 at 196.
- <sup>123</sup> Cherian, *supra* note 120 at 118.
- <sup>124</sup> *Life in Bountiful*, *supra* note 73 at 50.
- <sup>125</sup> Cherian, *supra* note 120 at 118.
- <sup>126</sup> See *supra* pgs. 15-17 (Section II—D “Mental Health Harms Associated with Polygyny”); Pgs. 17-19 (“Sexual and Reproductive Health Harms”).
- <sup>127</sup> *General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child*, UN CRCOR, 33<sup>rd</sup> Sess., U.N. Doc. CRC/GC/2003/4 (2003) at para. 31.
- <sup>128</sup> *Ibid.* at para. 30.
- <sup>129</sup> *General Comment No. 3, HIV/AIDS and the right of the child*, 33<sup>rd</sup> Sess., U.N. Doc. CRC/GC/2003/3 (2003), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 296 (2003) at para. 30.
- <sup>130</sup> L. Tibatemwa-Ekirikubinza, “Multiple partnering, gender relations and violence by women in Uganda” (1998) 4 *East African Journal of Peace and Human Rights* 15 at 40.
- <sup>131</sup> African Charter, *supra* note 18, Art. 17(1).
- <sup>132</sup> Tibatemwa-Ekirikubinza, *supra* note 130 at 40.

- <sup>133</sup> *Concluding Observations of the Committee on the Rights of the Child: Djibouti*, UN CRCOR, UN Doc. CRC/C/15/Add.131 (2000) at para. 34.
- <sup>134</sup> Rebecca Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women” (1990) 30 Va. J. of Int’l Law 643 at 660 [“Reservations”].
- <sup>135</sup> *Ibid.*
- <sup>136</sup> *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30<sup>th</sup> Sess., UN Doc. HRI/GEN/1/Rev. 7, (2004) at 282, at paras. 5, 7, 8, 10, 12.
- <sup>137</sup> *Ibid.* at para. 4.
- <sup>138</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980).
- <sup>139</sup> (1979), 2 E.H.R.R. 330 (Eur. Ct. H.R.) (reprinted in Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors, *International Women’s Rights Cases* (London: Cavendish, 2005) at 18).
- <sup>140</sup> *Ibid.*
- <sup>141</sup> Cook, “Reservations” *supra* note 134 at 662.
- <sup>142</sup> *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13<sup>th</sup> Sess., UN Doc. A/47/38, (1994), at para.14.
- <sup>143</sup> See General Comments and Concluding Observations, *supra* notes 22-27.
- <sup>144</sup> See Deller Ross, *supra* note 9 at 31.
- <sup>145</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, Preamble.
- <sup>146</sup> *Ibid.* Art. 55.
- <sup>147</sup> Leslie J. Harris & Lee E. Teitelbaum, *Family Law: Cases and Materials*, 2<sup>nd</sup> ed. (Gaithersburg: Aspen Law and Business, 2000) at 271-279 as cited in Deller Ross, *supra* note 9 at 31.
- <sup>148</sup> *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30<sup>th</sup> Sess., UN Doc. HRI/GEN/1/Rev. 7, (2004) at 282, at para. 10.
- <sup>149</sup> Deller Ross, *supra* note 9 at 34.
- <sup>150</sup> *Ibid.*
- <sup>151</sup> *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13<sup>th</sup> Sess., UN Doc. A/47/38, (1994), at para. 14.

<sup>152</sup> Andrew Byrnes, “The Convention on the Elimination of All Forms of Discrimination against Women” in W. Benedek, E. Kisaakye and G. Oberleitner, eds., *Human Rights of Women: International Instruments and African Experiences* (London: Zed Books, 2002) 119-172 at 139.

<sup>153</sup> *Ibid.*

<sup>154</sup> See *Quilter v. Attorney-General* [1998] 1 NZLR 523, at 553, per Thomas J (New Zealand Court of Appeal) (referring to *General Recommendation 21*).

<sup>155</sup> See *R v. Ewanchuk* [1999] 1. S.C.R. 3 (L’Heureux-Dubé Mme J. citing *General Recommendation 19* in relation to violence against women).

<sup>156</sup> See *Vishaka v. State of Rajasthan* AIR 1997 SC 3011, at 3015 (1998) 3 BHRC 261 (Supreme Court of India) (citing *General Recommendation 19* in relation to sexual harassment).

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.* at para. 13.

<sup>159</sup> *Ibid.*

<sup>160</sup> *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13<sup>th</sup> Sess., UN Doc. A/47/38, (1994), at para. 39.

<sup>161</sup> Mayambala, *supra* note 77 at 204.

<sup>162</sup> Maura Strassberg, “Symposium: Lawyering for the Mentally Ill: The Crime of Polygamy” (2003) 12 Temp. Pol. & Civ. Rts. L. Rev. 353 at 369.

<sup>163</sup> *Ibid.* at 369.

<sup>164</sup> Article 17 of the Political Covenant states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

<sup>165</sup> See European Convention on Human Rights, Article 8(1): “Everyone has the right to respect for his private and family life, his home and his correspondence.”

<sup>166</sup> See, e.g. *Dudgeon v. United Kingdom* (1981), 4 E.H.R.R. 149 (European Court of Human Rights); *Norris v. Ireland* (1988) 13 E.H.R.R. 186 (European Court of Human Rights); *Modinos v. Cyprus* (1993) 16 E.H.R.R. 485 (European Court of Human Rights); *Toonen v. Australia* UN GAOR, Human Rights Committee, 15<sup>th</sup> Sess., Case 488/1992, UN Doc. CCPR/C/D/488/1992, Apr. 1994 (UN Human Rights Committee).

<sup>167</sup> *General Comment No. 16: The right to respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)*, UN HRCOR, Sess. No. 23, 1988, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 (2003) at 142 at para. 1.

<sup>168</sup> *Ibid.*

<sup>169</sup> Tibatemwa-Ekirikubinza, *supra* note 130 at 22.

<sup>170</sup> *Ibid.* at 36.

<sup>171</sup> Contrast this with the Human Rights Committee statement that “Article 17 [Right to Privacy] affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end.” (*General Comment No. 16: The right to respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)*), UN HRCOR, Sess. No. 23, 1988, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 (2003) 142 at para. 11.

<sup>172</sup> *Itwari*, *supra* note 49 at para. 15.

<sup>173</sup> *Ibid.*

<sup>174</sup> *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, UN HRCOR, 23<sup>rd</sup> Sess., U.N. Doc. *Equality of rights between men and women (article 3)*, UN HRCOR, 68<sup>th</sup> Sess., U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994) at para. 11.

<sup>175</sup> *Concluding Observations of the Human Rights Committee: Yemen* UN HRCOR, UN Doc. CCPR/CO/75/YEM (2002) at para. 9.

<sup>176</sup> WLUML, “Knowing Our Rights”, *supra* note 9 at 200.

<sup>177</sup> *Ibid.*

<sup>178</sup> Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives—Francophone Africa* (New York, NY: Center for Reproductive Law and Policy, 2003) at 147 [“Women of the World—Francophone Africa”].

<sup>179</sup> Tibatemwa-Ekirikubinza, *supra* note 130 at 23-28.

<sup>180</sup> *Ibid.* at 27.

<sup>181</sup> *Ibid.*, cited at 27.

<sup>182</sup> Within the Bountiful, B.C. polygynous context, religious teachings regarding polygyny negatively stereotype women and girl children into reproductive and subservient roles. As Debbie Palmer, a former polygynous wife has articulated, religious doctrine maintained that she, like all girls and women, had the duty to contribute to the “production” of an abundance of children through polygynous marriage in order for the community to survive the Apocalypse. See Sally Armstrong, “Trouble in Paradise” *supra* note 90 at 140-142. At the centre of this patriarchal, religious dictum lies a belief that women and girls are meant to serve men and should they disobey, “their souls will burn in hell for eternity.” See “Hunting Bountiful: Polygamy in Canada” *The Economist* (10 July 2004) 34.

<sup>183</sup> *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30<sup>th</sup> Sess., UN Doc. HRI/GEN/1/Rev. 7, (2004) at 282, at para. 7.

<sup>184</sup> *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Guinea*, UN CEDAWOR, 25<sup>th</sup> Sess., UN Doc. A/56/38 (paras. 97-144), (2001) at para. 122.

<sup>185</sup> *Ibid.* at para. 123.

<sup>186</sup> *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13<sup>th</sup> Sess., UN Doc. A/47/38, (1994), para. 16.

<sup>187</sup> *Protocol to African Charter on Rights of Women*, *supra* note 19 at Art. 6.

<sup>188</sup> See Daphne Bramham “Religious tyrants twist tolerance for their own ends” *The Vancouver Sun* (17 July 2004) C7; “No more polygamy with girls under 18, B.C. sect says” *CBC News* (20 April 2005), online: <http://www.cbc.ca/story/canada/national/2005/04/20/bountiful-wives050420.html>

<sup>189</sup> New York University School of Law, *supra* note 97.

<sup>190</sup> *Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages*, 521 U.N.T.S. 231 (entered into force 9 December, 1964), Art. 1 states that “no marriage shall be legally entered into without the full and free consent of both parties.”

<sup>191</sup> *Status of Women in Private Law: Customs, Ancient Laws and Practices Affecting the Human Dignity of Women*, GA Res. 843(IX), UN GAOR, 9<sup>th</sup> Sess., (1954).

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> *General Recommendation 19: Violence against Women*, UN CEDAWOR, 11<sup>th</sup> Sess., UN Doc. A/47/38, (1992), at para. 6.

<sup>195</sup> *Declaration on the Elimination of Violence against Women*, GA Res. 48/104, UN GAOR, UN Doc. A/RES/48/104 (1994), Art. 1 [*Declaration on Elimination of Violence*].

- <sup>196</sup> *Ibid.*, Art. 2(a).
- <sup>197</sup> *General Recommendation 19: Violence against Women*, UN CEDAWOR, 11<sup>th</sup> Sess., UN Doc. A/47/38, (1992), at para. 7.
- <sup>198</sup> *Ibid.*
- <sup>199</sup> U.N. Special Rapporteur on Violence Against Women, *supra* note 45 at para. 63.
- <sup>200</sup> *Ibid.*
- <sup>201</sup> *Ibid.* at para. 23.
- <sup>202</sup> *Ibid.*
- <sup>203</sup> *Ibid* at para. 11.
- <sup>204</sup> LAW-U, “Project Report on the Domestic Violence Study,” p. 81. as cited in Human Rights Watch, “Just Die Quietly: Domestic Violence and Women’s Vulnerability to HIV in Uganda” (2003) 15, No. 15(A) at 51.
- <sup>205</sup> Human Rights Watch interview with Ruth Mukooyo, coordinator FIDA Legal Aid Project, Luwero, December 18, 2002 as cited in Human Rights Watch, *Ibid.*
- <sup>206</sup> New York University School of Law, *supra* note 97 at 2.
- <sup>207</sup> *General Recommendation 19: Violence against Women*, UN CEDAWOR, 11<sup>th</sup> Sess., UN Doc. A/47/38, (1992), Para. 23.
- <sup>208</sup> *Ibid.* at para. 9.
- <sup>209</sup> *Declaration on Elimination of Violence*, *supra* note 195, Art. 4.
- <sup>210</sup> Rebecca Cook, Bernard Dickens, & Mahmoud Fathalla, *Reproductive Health and Human Rights* (Oxford: Oxford University Press, 2003) at 170 [Cook et al., *Reproductive Health*].
- <sup>211</sup> See *Ana, Beatriz and Cecilia Gonzalez Perez v. Mexico* (2001), Report No. 53/01, Case 11.565, (Inter-Am. Ct. H.R.), para. 27.
- <sup>212</sup> See Daphne Bramham “Investigators assembled to study alleged sexual abuses in Bountiful” *The Vancouver Sun* (23 July 2004); See Jerald and Sandra Tanner “Mormonism’s Problems with Child Sexual Abuse” *The Salt Lake City Messenger* (Issue No. 91, November, 1996).
- <sup>213</sup> Cook et al., *Reproductive Health*, *supra* note 210 at 173-174.
- <sup>214</sup> *Ibid.*
- <sup>215</sup> *Ibid.* at 174.



<sup>216</sup> Pan American Health Organization and World Health Organization, *Promotion of Sexual Health: Recommendations for Action—Proceedings of a Regional Consultation Convened by PAHO/WHO in Collaboration with the World Association for Sexology, Antigua Guatemala, Guatemala, May 19-22, 2000* (Washington, DC: PAHO, 2001), available in English at <http://www.paho.org/English/HCP/HCA/PromotionSexualHealth.pdf>

<sup>217</sup> *Itwari*, *supra* note 49.

<sup>218</sup> *Ibid.* at para. 12.

<sup>219</sup> *Ibid.* at para. 15.

<sup>220</sup> *Constitution of the World Health Organization*, adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (*Off. Rec. Wld Hlth Org.*, 2, 100), entered into force 7 April, 1948.

<sup>221</sup> Cook et al., *Reproductive Health*, *supra* note 210.

<sup>222</sup> “Health and Human Rights” *The World Health Organization* (<http://www.who.int/hhr/en/>).

<sup>223</sup> *General Comment 14, The right to the highest attainable standard of health*, UN CESCROR, 22<sup>nd</sup> Sess., UN Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003), at para. 30.

<sup>224</sup> *Ibid.* at para. 21.

<sup>225</sup> *General Recommendation 24: Women and health*, UN CEDAWOR, 20<sup>th</sup> Sess., UN Doc. A/54/38/Rev.1 chapter I (1999) at para. 13.

<sup>226</sup> *Ibid.* at para. 15.

<sup>227</sup> *Ibid.*

<sup>228</sup> Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) at para. 91.

<sup>229</sup> *Ibid.* at para. 96.

<sup>230</sup> Cook et al., *Reproductive Health*, *supra* note 210 at 150.

<sup>231</sup> *Ibid.*

<sup>232</sup> [1988] 1 S.C.R. 30.

<sup>233</sup> Carol Weisbrod, “Universals and Particulars: A Comment on Women’s Human Rights and Religious Marriage Contracts” 9 S. Cal. Rev. L. & Women’s Stud. 77 at 95.

<sup>234</sup> The lyrics of the *Wagoner's Lad* resonate with some of the harms women suffer in polygynous contexts:

Oh, hard is the fortune of all womankind,  
She's always controlled, She's always confined,  
Controlled by her parents until she's a wife,  
A slave to her husband the rest of her life.  
(as cited in, Weisbrod, *Ibid*).

<sup>235</sup> See Daphne Bramham, "Religious tyrants twist tolerance for their own ends" *The Vancouver Sun* (17 July 2004) C7.

<sup>236</sup> Woods, *supra* note 89 at 26.

<sup>237</sup> Al-Krenawi, "Women from Polygamous" *supra* note 62 at 195.

<sup>238</sup> For media coverage of child marriage within the Bountiful context, see "No more polygamy with girls under 18, B.C. sect says" *CBC News* (20 April 2005), online: <http://www.cbc.ca/story/canada/national/2005/04/20/bountiful-wives050420.html>;  
See Daphne Bramham "Arrival of sect leader's bodyguard an ominous sign" *The Vancouver Sun* (14 August 2004) A1 noting that marriage assignment within the Fundamentalist Mormon faith is based on the notion that priests or prophets get "a revelation from God about who can marry." For a discussion of child marriage as a form of slavery, see Elizabeth Warner, "Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls" (2004) 12 Am. U.J. Gender Soc. Pol'y & L. 233.

<sup>239</sup> See S. Coliver, "The Right to Information Necessary for Reproductive Health and Choice Under International Law" in S. Coliver (ed.), *The Right to Know: Human Rights and Access to Reproductive Health Information* (London and Philadelphia: Article 19 and University Press, 1995) as cited in Cook et al., *Reproductive Health*, *supra* note 210.

<sup>240</sup> *Life in Bountiful*, *supra* note 73 at 39.

<sup>241</sup> *Ibid*.

<sup>242</sup> Woods, *supra* note 89 at 30.

<sup>243</sup> Cook et al., *Reproductive Health*, *supra* note 210 at 212.

<sup>244</sup> *Kjeldsen v. Denmark* (1976) 1 E.H.R.R. 711, para. 53 (European Ct. of Human Rights).

<sup>245</sup> *General Comment 13, The right to education (Art.13)*, UN CESCROR, 21<sup>st</sup> Sess., UN Doc. E/C.12/1999/10 (1999), at para. 1.

<sup>246</sup> See Daphne Bramham "U.S. officials probe men who run Bountiful school" *The Vancouver Sun* (27 August 2004) A1.

- <sup>247</sup> In 2003, Bountiful schools received \$460,826 in government grants. See Daphne Bramham “Religious tyrants” *supra* note 236.
- <sup>248</sup> See Deller Ross, *supra* note 9 at 38; Altman & Ginat, *supra* note 28 at 36-37.
- <sup>249</sup> Mashhour, *supra* note 35 at 568.
- <sup>250</sup> *Ibid.*
- <sup>251</sup> A. Yusuf Ali, “The Holy Qu’ran: Text, Translation and Commentary” Sura 4, verse 3 (1983) as cited in Mashhour, *supra* note 35 at 568.
- <sup>252</sup> Mashhour notes that according to Imam Mohamad Abdou, a great nineteenth century Egyptian reformer and theologian, “polygamy, although permitted in the Quran, is a concession to necessary social conditions that was given with great reluctance, inasmuch as it is permissible only when the husband is able to take care of all of his wives and to give to each her rights with impartiality and justice. ... [and] with perfect equality...” *supra* note 35 at 568.
- <sup>253</sup> Mashhour, *supra* note 35 at 585.
- <sup>254</sup> Howland, “Challenge of Religious Fundamentalism” *supra* note 8 at 341-342.
- <sup>255</sup> *Ibid.* at 342
- <sup>256</sup> *Ibid.*
- <sup>257</sup> *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, UN HRCOR, 48<sup>th</sup> Sess., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 35 (1994) at para. 2.
- <sup>258</sup> *Kokkinakis v. Greece* (1993), 260A Eur. Ct. H.R. (Ser. A) 18.
- <sup>259</sup> *Ibid.* at para. 31.
- <sup>260</sup> *Ibid.* at para. 48. The Court noted that “improper proselytism” may “take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.”
- <sup>261</sup> *Ibid.* at para. 42.
- <sup>262</sup> *Ibid.*
- <sup>263</sup> *Ibid.* para. 44.
- <sup>264</sup> Sally Armstrong “If there’s a place for Sharia, it’s not Ontario” *The International Herald Tribunal* (11 February, 2005), online: <http://wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-128270>)

<sup>265</sup> Canadian Council of Muslim Women, “Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada” (Revised May 25, 2004), online: [http://www.ccmw.com/Position%20Papers/Position\\_Sharia\\_Law.htm](http://www.ccmw.com/Position%20Papers/Position_Sharia_Law.htm)

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> See “No more polygamy with girls under 18, B.C. sect says” *CBC News* (20 April 2005), online: <http://www.cbc.ca/story/canada/national/2005/04/20/bountiful-wives050420.html>

<sup>269</sup> *Ibid.*

<sup>270</sup> *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981) (reprinted in Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors, *International Women’s Rights Cases* (London: Cavendish, 2005) at 261).

<sup>271</sup> *Ibid.*

<sup>272</sup> *General Comment No. 23: The rights of minorities (Art. 27)*, UN HRCOR, 50<sup>th</sup> Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994) at para. 6.1.

<sup>273</sup> *General Comment 11, Plans of action for primary education*, UN CESCROR, 20<sup>th</sup> Sess., U.N. Doc. E/C.12/1999/4 (1999) (Twentieth session, 1999), U.N. Doc.).

<sup>274</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Benin*, UN CESCROR, 28<sup>th</sup> Sess., U.N. Doc. E/C.12/1/Add.78 (2002), at para. 13. The Committee has similarly condemned polygamy as being incompatible with the rights protected under the Economic Covenant in several other Concluding Observations (Cameroon, 1999; Kyrgystan, 2000; Nepal, 2001; Nigeria, 1998; Senegal, 2001) (see *supra* note 24).

<sup>275</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res. 36/55, UN GAOR, 36<sup>th</sup> Sess., Supp. No. 15, UN Doc. A/36/684 (1981) [*Declaration on All Forms of Intolerance*].

<sup>276</sup> See Donna Sullivan, “Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution” (1992) 24 N.Y.U. J. Int’l L. & Pol. 795 at 836 cited in Natasha Bakht, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* (National Association of Women and the Law: March, 2005) at 44.

<sup>277</sup> Natasha Bakht, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* (National Association of Women and the Law: March, 2005) at 44.

<sup>278</sup> *General Comment No. 22, The right to freedom of thought, conscience, and religion*, UN HRCOR, 48<sup>th</sup> Sess., U.N. Doc. HRI\GEN\1\Rev.1 at 35 (1994) at para. 4 where the HRC lists a broad range of acts included within the freedom to manifest one's religion:

“The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.” Notably, there is no indication that the right includes a right to be governed by religious laws (familial or otherwise) through religious tribunals.

<sup>279</sup> See Deller Ross, *supra* note 9 at 36 for discussion; *Declaration on All Forms of Intolerance*, *supra* note 275.

<sup>280</sup> *Singh Bhinder*, *supra* note 5 at para. 6.2.

<sup>281</sup> *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, UN HRCOR, 48<sup>th</sup> Sess., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 35 (1994) at para. 8.

<sup>282</sup> See, e.g. jurisprudence permitting limitations on the public use of religious headscarves for the purpose of promoting gender equality and maintaining secularism in official settings: *Case of Leyla Sahin v. Turkey* (2005), Eur. Ct. H.R., Appl. 44774/98, *supra* note 6.

<sup>283</sup> Law Reports of the Commonwealth [1991] LRC (Const) as cited in Deller Ross, *supra* note 9 at 37.

<sup>284</sup> *Ibid.* at 308.

<sup>285</sup> *Ibid.* at 309.

<sup>286</sup> [1998] O.J. No. 5054.

<sup>287</sup> *Ibid.* at para. 13.

<sup>288</sup> *Ibid.* at para. 23.

<sup>289</sup> *Ibid.* at para. 25.

<sup>290</sup> (1879) 98 U.S. 145.

<sup>291</sup> *Ibid.*

<sup>292</sup> Deller Ross, *supra* note 9 at 38-39.

<sup>293</sup> *State of Bombay v. Narasu Appa Mali* (1952) A.I.R. 84 Bom.; *Srinivasa v. Saraswati Ammal* (1952) A.I.R. 193 Mad.

<sup>294</sup> See Deller Ross, *supra* note 9 at 39-40 for a discussion of this argument.

<sup>295</sup> *Ibid.* at 39.

<sup>296</sup> *General Comment No. 28: Equality of rights between men and women (article 3)*, UN HRCOR, 68<sup>th</sup> Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para. 32.

<sup>297</sup> In the United Kingdom, marriages in polygynous form are not recognized. See *Ohochuku v. Ohochuku* (1966) W.L.R. 183.

<sup>298</sup> *Bibi v. the United Kingdom*, Appl 19628/92, 29 June 1992 (Eur. Comm. H.R.).

<sup>299</sup> See Sonja Starr & Lea Brilmayer, “Family Separation as a Violation of International Law” (2002) 21 Berkeley J. Int’l L. 213.

<sup>300</sup> See *Bibi*, *supra* note 298.

<sup>301</sup> Article 8 of the European Convention on Human Rights states:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>302</sup> *Bibi*, *supra* note 298.

<sup>303</sup> Canadian immigration policy presently excludes those living in polygamous relationships; see “An ideal candidate for immigration is denied after it is learned he has two wives,” *National Post*, Feb. 1, 2005, p. A7; and *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 154 F.T.R. 285.

<sup>304</sup> See Prakash A. Shah, “Attitudes to Polygamy in English Law” (2003) 52 Int’l Comparative and Law Quarterly 369.

<sup>305</sup> *Ibid.*

<sup>306</sup> Starr and Brilmayer, *supra* note 299 at 245.

<sup>307</sup> *Ibid.*

<sup>308</sup> Judy Scales-Trent, “African Women in France: Immigration, Family, and Work” (1999) 24 Brooklyn J. Int’l L. 705 at 720.

<sup>309</sup> Starr and Brilmayer, *supra* note 300 at 245.

<sup>310</sup> See Marlise Simons “African Women in France Battling Polygamy” *New York Times* (26 January 1996) A1, A6.

<sup>311</sup> Okin, *supra* note 42 at 10.

<sup>312</sup> Starr and Brilmayer, *supra* note 300 at 246.

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.* at 247.

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> Judy Scales-Trent, *supra* note 308 at 721.

<sup>318</sup> Starr and Brilmayer, *supra* note 300 at 249.

<sup>319</sup> *Ibid.* at 248.

<sup>320</sup> *Ibid.* at 249-250.

<sup>321</sup> See *Bibi*, *supra* note 298.

<sup>322</sup> Starr and Brilmayer, *supra* note 300 at 253.

<sup>323</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 (XX), UN GAOR, 21<sup>st</sup> Sess., Supp. No. 14, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 January, 1969), Article 5 prohibits race, ethnicity, and national origin discrimination in “the right to marry and the choice of spouse.”

<sup>324</sup> Starr and Brilmayer, *supra* note 300 at 255.

<sup>325</sup> Hugh Kindred, *International Law, Chiefly as Interpreted and Applied in Canada*, 6<sup>th</sup> ed. (Toronto: Emond Montgomery, 2000) at 130.

<sup>326</sup> See Law Reform Commission of Canada, *supra* note 3.

<sup>327</sup> For relevant jurisprudence, see *Abdulaziz, Cabales and Balkandal v. the United Kingdom*, 15/1983/71/107-109 (ECHR) noting that sex discrimination should receive heightened attention (reprinted in Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors, *International Women’s Rights Cases* (London: Cavendish, 2005) at 618); *Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (1984) 5 Hum. Rts. L.J. 161 (Inter-Amer. Ct.) holding that proposed naturalization amendments

constituted discrimination contrary to the obligation to ensure equality of spouses within the family and equal protection of the law (reprinted in Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors, *International Women's Rights Cases* (London: Cavendish, 2005) at 533); *Petrovic v. Austria* (1998), 33 E.H.R.R. 307 (Eur. Ct. H.R.) regarding parental leave legislation. For relevant academic commentary, see Howland, "Challenge of Religious Fundamentalism" *supra* note 8 at 334. See also Anne F. Bayefsky, "The Principle of Equality or Non-Discrimination in International Law" (1990) 11 Hum. Rts. L.J. 1 at 19 as cited in Howland.

<sup>328</sup> See, e.g., The Women's Convention, The Political Covenant, The Economic Covenant, Declaration on the Elimination of Discrimination against Women (1967), Declaration on the Elimination of Violence against Women (1993).

<sup>329</sup> *Supra* note 328.

<sup>330</sup> Howland, "Challenge of Religious Fundamentalism" *supra* note 8 at 335.

<sup>331</sup> Dissenting Opinion of Tanaka J., *South-West Africa Cases (Second Phase)*, Judgment of 18 July 1966, [1966] I.C.J. Rep. 284 as cited in Ian Brownlie, ed., *Basic Documents on Human Rights*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1981) at 451.

<sup>332</sup> [1950] I.C.J. Rep. 148, as cited by Tanaka J., *ibid* at 451.

<sup>333</sup> Lord McNair, as cited by Tanaka J., *ibid* at 451.

<sup>334</sup> *Ibid.*

<sup>335</sup> *Ibid.* at 454.

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.*

<sup>338</sup> Deller Ross, *supra* note 9 at 24; WLUML, "Knowing Our Rights", *supra* note 9.

<sup>339</sup> WLUML, "Knowing Our Rights", *supra* note 9 at 199.

<sup>340</sup> Nasir, Jamal J. *The Islamic Law of Personal Status*, 3<sup>rd</sup> ed. (The Hague: Kluwer Law International, 2002) at 67.

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.*

<sup>343</sup> *Ibid.*

<sup>344</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, Final Paper - ALRC 57 (Sydney: Australian Law Reform Commission, 1992)

<sup>345</sup> *Marriage Act 1961* (Cth) s. 23(1)(a); s. 23B(1)(a) as cited *Ibid.*

<sup>346</sup> *Marriage Act 1961* (Cth) s. 94 as cited *Ibid.*



<sup>347</sup> As cited in Brenda Cossman and Carol Rogerson “Family Law—Cases and Materials”, Faculty of Law, University of Toronto, 2005-2006 at 174; available online: [http://www.immi.gov.au/multicultural/\\_inc/publications/agenda/agenda89/toc.htm](http://www.immi.gov.au/multicultural/_inc/publications/agenda/agenda89/toc.htm).

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.* at 67.

<sup>350</sup> *Ibid.* at 93.

<sup>351</sup> *Ibid.* at 94.

<sup>352</sup> *Ibid.*

<sup>353</sup> See Université de Sherbrooke, Site International Francophone sur le Droit des Femmes—Lois et règlements, online:

[http://www.usherbrooke.ca/sifdf/base\\_de\\_connaissance/lois\\_et\\_reglements.html](http://www.usherbrooke.ca/sifdf/base_de_connaissance/lois_et_reglements.html).

<sup>354</sup> See discussion *supra* Pgs. 66-69 (Right to Respect for One’s Private and Family Life).

<sup>355</sup> Canadian domestic family law through its recognition of cohabitation relationships for spousal support, child support, and constructive trust property remedies can provide protection for vulnerable *de facto* polygynous wives.

<sup>356</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.293.

<sup>357</sup> *Ibid.*, s. 293(1)(a).

<sup>358</sup> E. Greenspan & M. Rosenberg, *Martin’s Criminal Code, Student Edition* (Toronto: Emond Montgomery, 2004) at 578, See *R. v. Tolhurst, R. v. Wright* (1937), 68 C.C.C. 319, [1937] 3 D.L.R. 808 (Ont. C.A.).

<sup>359</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.293(1)(b).

<sup>360</sup> *Offences Against the Person Act, 1861*, (Eng.), c. 100, s. 57.

<sup>361</sup> *Ibid.*

<sup>362</sup> See discussion *supra* Pgs. 65-66 (Right to Respect for One’s Private and Family Life).

<sup>363</sup> *Ibid.*

<sup>364</sup> See “Polygamy law set for challenge” *BBC News* (18 June 2000), online:

<http://news.bbc.co.uk/1/hi/uk/791263.stm>

<sup>365</sup> Utah Const. art. III, § 1.

<sup>366</sup> Utah Code Ann. § 76-7-101 (2003).

<sup>367</sup> See *id.* § 30-1-16 (1998).

<sup>368</sup> *Ibid.*

369 *Bronson v. Swensen*, 2005 U.S. Dist. LEXIS 2374 (D. Utah 15 February, 2005) [“*Bronson*”].  
370 *Ibid.* at 2.  
371 *Ibid.* at 7.  
372 *Zablocki v. Redhail*, 434 U.S. 374, 384 (U.S. 1978) at 384 as cited in *Ibid.*  
373 *Bronson*, *supra* note 370 at 8-10.  
374 123 S. Ct. 2472 (2003).  
375 As cited in *Bronson*, *supra* note 370 at 12.  
376 *Ibid.* at 13.  
377 David Pearl & Werner Menski, *Muslim Family Law*, 3<sup>rd</sup> ed. (London: Sweet & Maxwell, 1998) at 242.  
378 *Ibid.*  
379 An-Na’im, *supra* note 84.  
380 *Ibid.*  
381 Nasir, *supra* note 341 at 67.  
382 *Ibid* at 68.  
383 WLUML, “Knowing Our Rights”, *supra* note 9 at 201. *Quazi* Courts are staffed by judges (*quazis*) who are appointed by the Judicial Services Commission. Male Muslims of good character and position are eligible for appointment as *Quazis*.  
384 Nasir, *supra* note 341 at 68.  
385 *Ibid.*  
386 *Ibid.*  
387 WLUML, “Knowing Our Rights”, *supra* note 9 at 200-201.  
388 Nasir, *supra* note 341 at 67.  
389 *Ibid.*  
390 *Ibid.*  
391 WLUML, “Knowing Our Rights”, *supra* note 9 at 200.  
392 *Ibid.*  
393 *Ibid.*  
394 *Sheikh Moh v. Badrunnissa Bibee*, 7 Beng LR App 5, *Badarannissa Bibi v. Mafiattala*, 7 Beng LR 442 as cited in *Itwari*, *supra* note 49 at 686.

395 *Ibid.*

396 *Ibid.*

397 *Ibid.*

398 An-Na'im, *supra* note 84 at 47.

399 *Concluding Observations on the Elimination of Discrimination Against Women, Tanzania*, 19<sup>th</sup> Sess., UN Doc. A/53/38/Rev.1, (1998), at para. 229.

400 WLUML, "Knowing Our Rights", *supra* note 9 at 199.

401 *Ibid.*

402 *Ibid* at 200.

403 *Ibid.*

404 (1989) A.P. 1. HLR 183.

405 *Ibid.*

406 Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives - Anglophone Africa, 2001 Progress Report* (New York: Center for Reproductive Law and Policy, 2001) at 25 ["Women of the World—Anglophone Africa"]

407 *Ibid.*

408 *Ibid.* at 61.

409 An-Na'im, *supra* note 84 at 48.

410 *Ibid.*

411 Center for Reproductive Law and Policy, "Women of the World—Anglophone Africa", *supra* note 407 at 61.

412 *Ibid.* at 167.

413 *Ibid.*

414 *Ibid.*

415 *Ibid.*

416 Center for Reproductive Law and Policy "Women of the World - Francophone Africa", *supra* note 178 at 191.

417 *Ibid.*

418 *Ibid.* at 191.

419 *Ibid.*

<sup>420</sup> *Ibid.* at 103.

<sup>421</sup> *Ibid.* at 36.

<sup>422</sup> *Ibid.* at 192.

<sup>423</sup> *Concluding Observations on the Elimination of Discrimination Against Women, Nigeria*, UN CEDAWOR, UN doc A/53/38/Rev.1(1998), at paras. 138-174.

<sup>424</sup> Knop, *supra* note 32 at 332-340.

<sup>425</sup> *Ibid.* at 333-334.

<sup>426</sup> *Ibid.* at 337.

<sup>427</sup> *Ibid.*

<sup>428</sup> *Ibid.*

<sup>429</sup> *Ibid.*

<sup>430</sup> The Visiting Mission's approach was culturally relativist to the extent it sought to apply only local African cultural standards in assessing polygyny.

<sup>431</sup> *Ibid.* at 339.

<sup>432</sup> *Ibid.*

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid.*

<sup>435</sup> *Protocol to African Charter on Rights of Women*, *supra* note 19 at Art. 6 (c).

<sup>436</sup> New York University School of Law, *supra* note 97.

<sup>437</sup> Nicholas Bala, "Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003) 29 *Queen's L.J.* 41 at 87.

<sup>438</sup> Bala cites e.g. *Yew v. British Columbia*, [1924] 1 D.L.R. 1166 (B.C.S.C.), where limited recognition was given to a widow of an actual polygamous marriage, but contrasts this with *Lim v. Lim*, [1948] 2 D.L.R. 353 (B.C.S.C.).

<sup>439</sup> See Ontario Family Law Act, RSO 1990, c.F.3 (s. 1); See Yukon Family Property and Support Act, RSY 1986, c. 63 (s.1); See North West Territories & Nunavut Family Law Act, S.N.W.T. 1997, c. 18, s. 1(2). This reflects the Private International Law concept of upholding marriages entered into in good faith by parties according to the law determining legal capacity to marry of one's domicile. This enables parties to such marriages to claim division of property from their spouse.

<sup>440</sup> Even where provincial legislatures choose not to extend their matrimonial property schemes to include unmarried couples through cohabitation requirements, they should at the least include *de jure* and *de facto* polygamous spouses within the scheme. They could require that parties show some evidence that their union was formed through a rite or ceremony purporting to create a polygamous union, for example.

<sup>441</sup> See description of the *Gabie-Hassam* case available online through “The Women’s Legal Center”, South Africa, who is submitting an amicus brief in the case: <http://www.wlce.co.za/index.html>.

<sup>442</sup> *Ibid.*

<sup>443</sup> New York University School of Law, *supra* note 98.

<sup>444</sup> Rebecca Cook, “Obligations To Adopt Temporary Special Measures Under the Convention on the Elimination of All Forms of Discrimination Against Women” in I. Boerefijn et al eds., *Temporary Special Measures* (Antwerpen: Intersentia, 2003) at 119 [“Temporary Special Measures”].

<sup>445</sup> *Ibid.* at 129 - 131.

<sup>446</sup> *General Recommendation 5: Temporary Special Measures*, UN CEDAWOR, 7<sup>th</sup> Sess., U.N. Doc. A/43/38 at 109 (1988).

<sup>447</sup> *Ibid.*

<sup>448</sup> *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30<sup>th</sup> Sess., UN Doc. HRI/GEN/1/Rev. 7, (2004) at 282, at para. 7.

<sup>449</sup> Cook, “Temporary Special Measures”, *supra* note 443.

<sup>450</sup> Many of these recommendations have been drawn from New York University School of Law, *supra* note 97 and *Life in Bountiful*, *supra* note 73.

<sup>451</sup> As L’Heureux-Dubé Mme. J. noted in *R. v. Ewanchuk*, there is a need to address gendered thinking that may obfuscate harms to women and girls. Her reference to *The Committee on the Elimination of Discrimination against Women’s* 1992 General Recommendation 19 where it suggested that “gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention” is particularly relevant to the Bountiful context.

<sup>452</sup> This was recommended in the *Life in Bountiful* report, *supra* note 73.

<sup>453</sup> As the *Life in Bountiful* report suggests, the recovery process for individuals to build a strong, competent sense of identity is likely not possible in a short-term placement in a shelter. Rather, individuals may need a more extended residential program with skilled, sensitive counselling.

- <sup>454</sup> See Daphne Bramham “Investigators assembled to study alleged sexual abuses in Bountiful” *The Vancouver Sun* (23 July 2004).
- <sup>455</sup> Woods, *supra* note 89 at 27.
- <sup>456</sup> Daphne Bramham “Investigators assembled to study alleged sexual abuses in Bountiful” *The Vancouver Sun* (23 July 2004).
- <sup>457</sup> Daphne Bramham “Bountiful schools get public funds, but government scrutiny is suspect” *The Vancouver Sun* (15 December 2004).
- <sup>458</sup> For a discussion of this approach, see Leon Sheleff, “Human Rights, Western Values and Tribal Traditions: Between Recognition and Repugnancy, Between Monogamy and Polygamy” (1994) 12 *Tel Aviv University Studies in Law* 237.
- <sup>459</sup> Cited in Florence Rita Arrey, “Legislative and Judicial Treatment of Family Relations in Cameroon” 138-144 in *Bringing International Human Rights Law Home: Judicial Colloquium on the Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child* (United Nations, 2000).
- <sup>460</sup> *Ibid.*
- <sup>461</sup> Adetoun Ilumoka, “Legal Imperialism and Chauvinism: Lessons from Africa” (2005) 48 *Publications of the Swiss Institute of Comparative Law* 1 at 11.
- <sup>462</sup> (1991) *NWLR* Pt. 194 at 739 as cited in *Ibid.* at 10.
- <sup>463</sup> *Ibid.*
- <sup>464</sup> Ilumoka, *supra* note 461 at 11.
- <sup>465</sup> *Bhe and Others v. The Magistrate, Khayelitsha and Others* Case CCT 49/03; *Shibi v Sithole and Others* Case CCT 69/03; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* Case CCT 50/03 (2004) (South African Constitutional Court)
- <sup>466</sup> *Ibid.* at para. 131.
- <sup>467</sup> *Ibid.* at para. 238.
- <sup>468</sup> Madhavi Sunder, “Piercing the Veil” (2003) 112 *Yale L.J.* 1436.
- <sup>469</sup> *Ibid.* at 1437—1438.
- <sup>470</sup> *Life in Bountiful*, *supra* note 73 at 46.
- <sup>471</sup> See Daphne Bramham “Investigators assembled to study alleged sexual abuses in Bountiful” *The Vancouver Sun* (23 July 2004).

<sup>472</sup> *Life in Bountiful*, *supra* note 73 at 55.

<sup>473</sup> Janet Bennion, *Women of principle: female networking in contemporary Mormon polygyny* (Oxford: Oxford University Press, 1998).

<sup>474</sup> *Ibid* at 129-130.

<sup>475</sup> Foreign Affairs Canada, “Women’s Human Rights” available online at: [http://www.dfait-maeci.gc.ca/foreign\\_policy/human-rights/Iwe2-rights-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/human-rights/Iwe2-rights-en.asp)

<sup>476</sup> *Ibid*.

<sup>477</sup> *Daniels v. White*, [1968] S.C.R. 517 (S.C.C.) at 541.

<sup>478</sup> [1989] 1 S.C.R. 1038 quoting from *In Reference re Public Service Employee Relations Act* [1987] 1 S.C.R. 313.

<sup>479</sup> Kindred, *supra* note 326 at 166. There is nevertheless some ongoing debate about whether international custom applies directly within Canada. See Anne Warner La Forest, “Domestic Application of International Law in *Charter* Cases: Are We There Yet?” (2004) 37 U.B.C. L. Rev. 157.

<sup>480</sup> 2002 S.C.R. 1; See Elizabeth Brandon, “Does International Law Mean Anything in Canadian Courts?” (2001) 11 *Journal of Environmental Law and Practice* 399 at 402.

<sup>481</sup> S.J. Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” (2001) 80 *Can. Bar Rev.* 534.

<sup>482</sup> Brandon, *supra* note 480 at 400.

<sup>483</sup> Gérard V. La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 *Can. Y.B. Int’l L.* 89 at 100-01 as cited in Elizabeth Brandon.

<sup>484</sup> Brandon, *supra* note 480 at 402.

<sup>485</sup> [1999] 1. S.C.R. 3.

<sup>486</sup> *Ibid.* at para. 73.

<sup>487</sup> *Ibid.*

<sup>488</sup> [2002] 1 S.C.R. 3 at 31.

<sup>489</sup> [1990] 3 S.C.R. 697 at 750.

<sup>490</sup> [1999] 2 S.C.R. 817.

<sup>491</sup> *Ibid.*

<sup>492</sup> Mayo Moran, “Authority, Influence, and Persuasion: Baker, Charter Values and the Puzzle of Method” in David Dyzenhaus, ed. *The Unity of Public Law* (Oxford and Portland Oregon: Hart Publishing, 2004) 389 at 408.

<sup>493</sup> *Baker, supra* note 480 at para. 70.

<sup>494</sup> *Moran, supra* note 492 at 404.

<sup>495</sup> *Keegstra, supra* note 489 at 750.

<sup>496</sup> *Byrnes, supra* note 152 at 131.

<sup>497</sup> *Byrnes, supra* note 152 cites a number of reporting functions that the Committee on Economic, Social, and Cultural Rights has identified and that would similarly apply to the Women's Convention. See 131-132.

<sup>498</sup> *Ibid.* at 133.

<sup>499</sup> *Ibid.* at 136.

<sup>500</sup> *Ibid.* at 137.

<sup>501</sup> See U.N. Division for the Advancement of Women, online:  
<http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>

<sup>502</sup> Rikki Holtmaat, *Towards Different Law and Public Policy: The significance of Article 5a CEDAW for the elimination of structural gender discrimination* (Den Haag: Reed Business Information, 2004) at 78: Where government violations of treaty norms are continuously highlighted in the international arena, this can be an important catalyst for change.

<sup>503</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. A/RES/54/5, 15 October 1999, Art. 2. ["Optional Protocol to Women's Convention"].

<sup>504</sup> Laboni Hoq, "The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights" (2001) 32 *Columbia H.R. L. Rev.* 677 at 694.

<sup>505</sup> *Ibid.* at 694-695.

<sup>506</sup> *Optional Protocol to Women's Convention, supra* note 503, Art. 4.

<sup>507</sup> See Lynne Cohen, "One mother (Debbie Palmer) of eight sues for polygamy (at a polygamist colony in B.C.)" *The Report* (6 January 2003) 33.

<sup>508</sup> "Hunting Bountiful; Polygamy in Canada (A polygamous enclave in British Columbia)" *The Economist* (10 July 2004) 34.

<sup>509</sup> See New York University School of Law, *supra* note 97; "Group Urges More Polygamy Prosecutions" *New York Times* (16 June 2005).

<sup>510</sup> "Utah: Polygamist Convicted Of Rape" *New York Times* (25 June 2002) A-16.

<sup>511</sup> Hoq, *supra* note 504 at 695.

<sup>512</sup> *Ibid.*



<sup>513</sup> *Optional Protocol to Women’s Convention*, *supra* note 503, Art. 8.

<sup>514</sup> Hoq, *supra* note 504 at 430. Hoq provides the example of *sati*, a Hindu practice of wife burning upon her husband’s death as an example of an “isolated violation” that CEDAW could investigate. While the practice is illegal in most countries, it nevertheless remains common in some rural areas.

<sup>515</sup> *Ibid.* Hoq notes that the Race Convention, for example, requires that inquiries be brought by another State at 698.

<sup>516</sup> *Ibid.*

<sup>517</sup> Marion Boyd, “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion” (December, 2004) at 23.

<sup>518</sup> For a discussion on the formal organization of the HRC, see Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2000) at 706-708.

<sup>519</sup> Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford, Oxford University Press, 2000) at 11.

<sup>520</sup> *Ibid.* at 12.

<sup>521</sup> *Ibid.* It also monitors implementation of the two optional protocols to the Convention regarding the involvement of children in armed conflict and on sale of children, and child prostitution and child pornography.

<sup>522</sup> As cited in *Ibid.* at 14.

<sup>523</sup> See, e.g. *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), which led to the enactment of federal legislation providing a remedy and the eventual repeal of the impugned Tasmanian law as cited in Joseph et al., *supra* note 519 at 14.

<sup>524</sup> See Office of the High Commission of Human Rights, “Convention on the Rights of the Child”, available online: <http://www.ohchr.org/english/countries/ratification/11.htm>.

<sup>525</sup> Steiner and Alston, *supra* note 518 at 511.

<sup>526</sup> Office of the High Commission, *supra* note 524.

<sup>527</sup> Joseph et al., *supra* note 519 at 468; For a discussion of U.N. Human Rights Treaty Regimes, see Steiner and Alston, *supra* note 518.

<sup>528</sup> See Part II—H above, “Harms to Children of Polygynous Unions” at 24-26.

<sup>529</sup> *Supra* note 26.

<sup>530</sup> *Supra* note 27.

<sup>531</sup> Declarations, which are typically resolutions of the UN General Assembly, are not treaties, which states can ratify and be legally bound by. Rather, they are nonbinding statements that articulate a common international standard that UN member states should follow. Declarations may provide a basis for the quicker crystallization of international customary norms. See Ian Brownlie, *Principles of International Law*, 6<sup>th</sup> ed. (2003: Oxford, Oxford University Press) at 14-15. For a discussion of the Declaration on the Elimination of Violence against Women in terms of State Responsibility, see Heléne Combrinck, “Positive State Duties to Protect Women from Violence: Recent South African Developments”, (1998) 20 *Human Rights Quarterly* 666 at 674.

<sup>532</sup> Some public international law scholars assert that the concluding statements of a conference of states may be a form of multilateral treaty. Even if interpreted only as an instrument recording decisions that were not unanimously adopted, such declarations may nevertheless provide cogent evidence of the state of customary international law on the subject and emerging international norms. See Brownlie, *supra* note 531 at 14. At a minimum, it does indicate serious international political commitments by states. For a discussion of the Beijing Declaration and Platform of Action in terms of State responsibilities to protect women from violence, see Combrinck, *supra* note 531.