

Children in polygynous marriages from a customary perspective

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Polygyny

In Namibia, polygyny among traditional communities is traced back through the entire known history of the indigenous inhabitants. It is a marriage between one man and several wives, and is an unadulterated form in its own unique right.¹ In the Namibian context, *polygyny* means one man married to more than one wife.

Becker and Hinz² explain that all traditional marriages that take place under customary law in Namibia are potentially polygynous. The authors further state that a customary marriage is conceptualised as a union between two families or kinship groups, rather than between two individuals. However, they also see a growing trend for formal polygynous unions to be replaced by what they call “second house” relationships, where a married man sets up house with another woman without following any civil or customary formalities.³ Such kinds of relationships are not polygynous in the formal, traditional sense of the word, but rather involve adultery. A study carried out by the Centre for Applied Social Sciences⁴ in Caprivi and the *Oshiwambo*-speaking traditional communities indicated that around 62–95% of couples married according to customary law. The study found that polygyny was more commonly practised in patriarchal societies. Data from the southern communities suggests that couples may be reluctant to marry in situations where the men are not able to meet the social and financial demands of marriage.⁵

The following court decisions in the cases discussed below considered polygyny not to be a true or real marriage.

In the case of *Hyde v Hyde & Another*,⁶ a *true marriage* was defined as a voluntary union for life of one man and one woman to the exclusion of all others, which was equally adopted in the case of *Seedat’s Executors v The Master* (Natal).⁷ Moreover, the concept of *true marriage* as accepted in South African law did not include polygyny. This narrow

1 Anyolo (2008:2).

2 Becker & Hinz (1995:89).

3 (ibid.:90).

4 (ibid.:91).

5 (ibid.:100).

6 (1866) LR 1 PD 130 at 133.

7 *Seedat’s Executors v The Master* (1917) AD 302 at 307–308.

definition of *marriage* found its way into the laws of South Africa through the *Hyde* case⁸. In *R v Nalana*,⁹ the judge concluded by saying that, in his opinion, a polygamous¹⁰ marriage was inconsistent with the general principles of civilisation recognised in the civilised world.

Background

In the ordinary African community, life is hard and women have long seen the advantage of having co-wives to help share the burden of child-bearing.¹¹ Having many children in a polygynous marriage means household responsibilities are shared by the women, and more children can help to build and maintain the family home.

This system keeps the large families together and guarantees that children born of polygynous marriages are raised within their fathers' homes. Such children receive a lot of attention from their mothers and the other wives, despite not getting much from their father. Moreover, children born of these relationships are not only their biological parent's responsibility: everyone in the family is responsible for them.¹²

Studies in Ghana,¹³ for example, found that children from polygynous relationships were in better health than those in other family set-ups. Such studies also revealed that the children were taken care of better in terms of food, they were always protected by many elders, and were hardly ever neglected. It was also claimed¹⁴ that, even in instances where children had been abandoned by their fathers, they survived through the help of their multiple mothers and older half-brothers in the family. This is because polygyny has been practised to not only show one's marital status in society, but also to assure the continuation of the family.

The motivation to produce large numbers of children is prevalent in areas where population growth was desired, e.g. in agricultural societies, where many hands are needed to do the necessary work.¹⁵ In this context, a woman in a monogamous relationship found it harder to produce 12 children on her own, for example, compared with four polygynous wives

8 (ibid.).

9 (1907) TS 407.

10 In social anthropology, polygamy is the practice of being married to more than one spouse at the same time. Historically, polygamy has been practised as polygyny, which is one man having more than one wife; in other cultures, it is practised as polyandry, i.e. one woman having more than one husband. Less commonly, polygamy can be practised as group marriage by one person who has many wives as well as many husbands at the same time. Polygyny is practised in a traditional sense in many Middle Eastern and African cultures and countries today, including Namibia; see Ambunda & De Klerk (2008:69).

11 Stone (2006).

12 Mair (1971).

13 Diouf (2004:26).

14 Chigwedere (1989).

15 <http://www.warthog.co.za/dedt/family/polygyny.htm>; last accessed 26 August 2009.

each bearing three children. Polygyny is said to be advantageous to women's health, time, and energy, and was extremely helpful in keeping women's mortality rates within a normal range.¹⁶

This paper addresses the issue of children in polygynous marriages, and brings together the opinions that have been stated by numerous writers on the life of children in such marriages. It is important to state from the outset that Africa's customary marriage system favours polygyny. Bennett defines *customary marriage* as an agreement between two families.¹⁷ Children in a customary union belong to the community, and their upbringing involves the whole family.¹⁸ It should also be understood that raising children within a polygynous set-up is done in line with people's cultural beliefs; it need not conform with the principles of Western civilisation to be 'real' and 'right', because cultural beliefs are the true reflection of traditional communities, and they are true and real in their own right.¹⁹

Children from polygynous background are a special case²⁰ because traditional communities, especially in northern and north-eastern Namibia, still conduct their marriages in a traditional way, and most of Namibia's youth are products of polygynous relationships.

Inheritance

The rights of children born of polygynous marriages were not fully protected during the country's domination as a colony. Indeed, such children were treated as illegitimate. In keeping with colonial law on this topic, children from polygynous marriages were considered as being extramarital children; in terms of common law, therefore, they were unable to inherit from their fathers' estate. Since Namibia's Independence, however, court orders permitting inheritance can be issued, especially in accordance with the current statutory rules, subject to the Children's Status Act.²¹

Customary practices in polygynous marriages

Distribution of labour

Different cultures construct rules about different capacities and aptitudes of women and men and determine gender-differentiated roles and responsibilities accordingly. Ipinge

16 (ibid.).

17 Bennett (2004:178ff.).

18 Bennett (1999:96ff.)

19 Anyolo (2008:87).

20 (ibid.).

21 No. 6 of 2006.

and Williams²² state that cultures also underpin women's and men's differential claims, rights and obligations.

Nevertheless, almost all children born to polygynous marriages are involved in food production, largely by way of agriculture and domestic services. This is not to be seen as child labour. While looking after cattle is seen as a boy's chore, for girls it is preparing food. Food is even served according to one's gender status, meaning that boys and girls eat separately. Apart from looking after cattle, boys are also normally responsible for hunting for meat for family consumption.²³

Some writers have drawn attention to the serious problem of child labour, particularly in instances where teenagers have to give up school to look after their siblings and the family livestock.

Cultural ethics

Cultural ethics in the context of this paper are of special relevance. *Ethics* entails the philosophical analysis of human morality and conduct. Moral principles and their cultural adaptation can differ from one nation and one community to another.

When one gives or passes something on, the customary gesture in all *Oshiwambo*-speaking communities, Kavango, Herero, Damara>Nama (but not Caprivi) is to use the right hand, which is supported by the left at the elbow. To show respect, the manual gesture is accompanied by kneeling if it is a girl child, and nodding of the head in agreement by a boy child.

In *Oshiwambo*-speaking cultures, for example, there are also certain parts of meat like a bull's testicles that are only allowed to be eaten by boys. Apparently, if girls eat the testicles, they could face problems in childbirth.

Finally, in keeping with their gender-defined roles of preparing food, girls brew the traditional beer and cook for boys. However, only boys are permitted to drink the beer or get drunk from it. This tradition, in general terms, applies to all the cultural groups mentioned above.

Sex

As in Kavango culture, children in the *Oshiwambo*-speaking community are not permitted to talk about sex or sexuality with their parents or elders. They usually discover it while playing hide-and-seek games.²⁴

22 Ipinge & Williams (2000:3).

23 Anyolo (2007:22–25).

24 LaFont & Hubbard (2000:42).

Sex without penetration is widely accepted amongst young people in the above cultures. In other words, sexual contact between boys and girls is permitted, but penetrative sex before marriage is strictly prohibited. In fact, if penetration occurs, a girl's virginity is lost and this has to be kept secret; otherwise, no man will propose marriage to her. Moreover, an ox must be paid by the boy's family to the girl's father. Should the girl fall pregnant, it is she who bears the majority of the blame for her condition. In years gone by, unmarried pregnant girls were even at risk of being burnt alive.

In the Kavango and the *Oshiwambo*-speaking cultures, a boy's family would look for a suitable family for their son to marry into. They would often start looking when their son was still young. In the *Oshiwambo* culture, a wife was traditionally always much younger than her husband, and might even have been engaged to him before she was born. In Kavango, a man is allowed to marry a woman older than himself. It was said by the elders that women needed to be mature enough to make their relationships last.

The Damara communities share this sentiment. In Damara culture, a woman is defined as being the foundation of the home: the one whose character and efforts hold everything together. She is referred to as the one who keeps the fire burning, meaning that she is the keeper of all secrets.²⁵ In instances where a girl was engaged to be married before she was born or at an early age, the groom moves into the girl's household and performs domestic chores and supports his future in-laws. They would then be able to see how he behaves, and could make sure that he was the right choice for their daughter.

In Kavango communities, when a girl gets her menses for the first time, she immediately informs her grandmother. She will then be isolated, particularly from men. During this time, a girl will have many discussions with her grandmother, who explains her future duties as a wife and mother to her. She will also explain sex and sexuality to the girl, in terms of what to expect and the importance of obeying her husband. Depending on the culture, additional ceremonies will be performed as well. For example, in the *Oshiwambo*-speaking community, the girl will be given mahangu²⁶ to pound and will cook porridge from the flour. She will give it to the members of the household to demonstrate that she can cook for them and can feed a family.²⁷

To determine the fertility of the groom, the bride is expected to fall pregnant within two to three months of marriage. Regardless of the method used by different communities, the goal is said to be the same, that is, to determine if the husband can produce children. If he fails, the immediate family will send him away and arrange for a brother or uncle from his family to sleep with their daughter. If she falls pregnant, the child is deemed to belong to her husband.

25 Ambunda & De Klerk (2008:5).

26 Pearl millet.

27 Fieldnotes 17 and 19, Anyolo (2008:86ff).

If it is discovered that a wife has had sex with a man other than her husband, that man will have to pay compensation by way of cattle to the wife's husband; her husband is then permitted to divorce her.²⁸ In all polygynous marriages in all indigenous Namibian cultures, it is acceptable for men but not for women to have extramarital affairs. Women can also have extramarital relationships, but only if their husband proved worthless. However, the women have to make sure they are not discovered.

The picture in Caprivi does not differ substantially from the one in the *Oshiwambo*-speaking communities and Kavango. However, when a girl in Caprivi reaches a certain age, her grandmother usually asks her to undress. She points out parts of the girl's body to her, and tells the girl that she needs to prepare herself because she is growing up.²⁹ Unlike the Kavango and *Oshiwambo*-speaking cultures, here, the preparation involved is to pull the clitoris repeatedly. The purpose of the procedure is to reduce the entrance of the vagina to increase the husband's pleasure. Girls will do this in the evenings, either alone or in a peer group. It is said that the girls showed their progress to their grandmothers who decided when they were ready.³⁰

In most cultures in Namibia, boys do not need to go through any sort of initiation or ceremony. However, older boys often give tips to younger boys. In the *Otjiherero* and *Otjihimba* cultures, young children play games that mimic male and female goats, cattle, donkeys and horses engaging in reproductive acts.³¹ This is known as the *ouruwo* game. Playing the game also means 'mating', so there is a possibility of sexual intercourse with vaginal penetration.

This game is also played in other communities: it is known as *mantambo* in Kavango, *omadurini* in the Caprivi area, *iiyugo* in the *Oshiwambo*-speaking communities, and *tchia khoe* in San communities. In all these communities, the game is not considered as real sex.³²

Marriage

In the old days it was strictly forbidden for a girl to become pregnant before marriage. That was why marriages were arranged while girls were young, mostly shortly after their first menses. According to Tuupainen,³³ traditionally, pre-initiation pregnancy – especially among the *Ovawambo* – was considered a disgrace for the girls, their families, and the entire community. The underlying functions of the female initiation ritual³⁴

28 LaFont & Hubbard (2000:43).

29 (ibid.:45–48).

30 (ibid.).

31 (ibid.:63).

32 Ipinge & Williams (2000:9).

33 Tuupainen (1970).

34 Known as *ohango*.

were for the enhancement of female fertility, the recognition of full maturity, and the legitimisation of childbirth.

With particular regard to social contracts, early writers such as Tuupainen³⁵ claimed that girl children had limited capacities compared with their male counterparts. For example, upon marriage and through the whole system of marital affairs, girl children never gave their consent to marriage. This excluded parents consenting on behalf of their daughters, but it included forced marriages between under-age girls to old men.

Becker³⁶ states that only after the female initiation ritual were girls permitted to have a full sexual life and give birth legitimately, whether or not they were officially married.

Age of marriage

Customary laws in Namibia do not have any fixed age of legal majority for either women or men in respect of entering any type of contract, but marriage generally does not take place before puberty or before the attainment of an acceptable level of social maturity. Child betrothals have taken place in times gone by, but marriages were never consummated before puberty.³⁷ Research on polygynous marriages in Ombadja, which summarises marriage customs in various Namibian communities, show custom dictating that only initiated girls are marriageable.³⁸

The age of majority can be determined through a rite of passage such as puberty or childbirth, especially within marriage.³⁹ It is recommended that customary law specifies a fixed minimum age at which prospective spouses might be presumed mature enough to marry. This could supersede the African Charter on Rights and Welfare of the Child, which specifies a minimum age of 18 for both men and women, and which Namibia has ratified.

Consent

In certain cultures, such as the *Oshimbadja*, the parties to the marriage – i.e. the young couple – are to give their consent to the marriage. This is not a well-known cultural practice in many cultures, where families' consent is regarded to be sufficient, in the sense that they are acting in the common interest of their children's marriages.⁴⁰ In such communities the consent of the parties to a marriage is deemed unnecessary.

35 (ibid.:313).

36 Becker (1989).

37 Friesen (1998:40).

38 Anyolo (2008:32).

39 Becker & Hinz (1995:72).

40 See Fieldnote No. 22, Anyolo (2008:52).

Marriage of under-age (i.e. pre-pubescent) children is viewed as normal in most communities.⁴¹ However, Friesen⁴² notes that determining free and full consent might be difficult in the case of customary marriages where family influence may play a stronger role than that of the parties to the marriage. Suggested safeguards against undue influence or forced consent include asking the parties individually if they freely consent to the union, either orally at the marriage ceremony, but also at the time of registration.⁴³ Still, there is no way of ensuring that the parties are being truthful. The only way to check up on forced consent is to create legislation that will regulate customary marriages.

Bride wealth

This is the practice of compensating one's son's future father-in-law by way of cattle for the honour of marrying his daughter. If the wife is regarded by her husband as deficient in any way, the father-in-law is expected to refund some or all of the cattle.⁴⁴

The cattle are used to 'recompense' the father-in-law for his expenses in raising his daughter, and for the loss of her services to his household.⁴⁵

Dekker and Hoogeveen⁴⁶ note that, for cultures in which bride wealth payments are highly valued, they are usually a sine qua non for the customary recognition of the existence of a valid marital relationship between the married parties.

For example, the *Ovaherero* still practice, to some extent, the system of paying bride wealth, in that a man will give a certain amount of cattle or a certain sum of money to the bride's family. Once this is done, the woman is regarded as an extension of his 'property'. According to Abrahams,⁴⁷ all children born of such a marriage belong to the man. Should a woman want a divorce, her family is obliged to repay the bride wealth.

One can, therefore, assume that young *Ovaherero* women are told that they can only prove that they are proper women if they have babies. Conversely, a boy wants a girl to fall pregnant so that he can rest assured that he is a 'real' man.

In terms of all *Oshiwambo* customary systems, although bride wealth in the form of cattle would be given in exchange for a bride, such payments are not a major factor in determining the validity of a customary marriage, because the bride price varies

41 (ibid.:Fieldnote No. 23).

42 Friesen (1998:46).

43 (ibid.).

44 See Fieldnote No. 18, Anyolo (2008:31).

45 (ibid.).

46 Dekker & Hoogeveen (2002:5).

47 LaFont & Hubbard (2000:43).

in form, function and value from community to community.⁴⁸ In Kavango traditional communities, no marriage gift or bride wealth is given. Instead, bride service is expected, whereby the bridegroom will work in the home of the bride's family for a period of time prior to marriage.⁴⁹ Bride service is also reportedly performed in san communities of Namibia.⁵⁰

Custody of children

According to research conducted in 2008 by the University of Namibia's Human Rights and Documentation Centre on women and customs in Namibia,⁵¹ the issue of child custody after death or divorce is done in accordance with the particular community's kinship system. In matrilineal systems, custody is automatically with the mother; whereas in patrilineal systems, custody rests with the father.⁵² In *Oshimbadja* culture, women retain custody of their daughters, while custody of the sons is granted to a married uncle. The same applies in the case of divorce.⁵³

In accordance with Article 15 of the Namibian Constitution, as well as Article 3(1) of the United Nations Convention on the Rights of the Child, the child's best interests should govern all aspects of custody, guardianship and access to children. Because the 'best interests' principle has no specific content, any customary law or practice that professes children have no rights and should be compelled to do things in the name of culture would constitute a prima facie violation of children's rights. Although cultural expectations may be accommodated by any legal arrangement by the state to avoid unfair discrimination against culture, children born of polygynous relationships should be accorded the right to maintain contact with both their parents. The parent without custody statutorily entitled to automatic right of reasonable access to the child, unless a traditional court decides that such access would be contrary to the child's best interests. Safeguard measures should be developed to ensure that this right is not abused.

It is recommended that, as in a divorce case under statutory law, one parent should be made the primary custodian. If the parents cannot agree on who this will be, the court – the customary court in this case – must decide. The guiding principle should always be what is in the best interest of the child.

Inheritance

Every community follows its own customary inheritance practice. Thus, customs regarding the division of property as a result of a divorce vary from community to

48 Bekker et al. (2002).

49 Becker & Hinz (1995:59–62).

50 Malan (1995:107).

51 Ruppel (2008).

52 Ambunda & De Klerk (2008:46–48).

53 Anyolo (2007:56).

community. With regard to the division of property upon a person's death, this is usually negotiated between the surviving spouse and the deceased's relatives, without reference to any court. When property of the deceased husband in a polygynous union is distributed, the in-laws leave some of the livestock to his children.⁵⁴

Brotherhood

In spite of numerous problems among the family members in a polygynous relationship, there are certain benefits which, in principle, are available to the children of such marriages, both during the marriage and upon its dissolution. A telephonic interview conducted with three children from polygynous marriages confirmed this point: all respondents felt that polygyny was a good system because it promoted good morals and values.

Similarly, Becker and Hinz point out that the polygynous system is designed to benefit all parties, including the children, because everybody develops a sense of belonging and brotherhood. No stigmatisation of 'bastard' is attached to children in this type of family relationship.⁵⁵

A 20-year-old girl from the Oshangu village in the Oukwanyama District in the Ohangwena Region said the following during a telephone interview:

[W]e[,] the children of polygynous marriages[,] are not brainwashed, mistreated neither are we defective or dysfunctional, we are normal children just like any other normal born child.

Her elder sister grabbed the phone and said that, across the world, children remained vulnerable to exploitation and abuse, while they – the children of polygynous marriages – enjoyed mass protection. She believed that other children remained vulnerable to abuse, because they became trapped in the cycle of poverty. All this happens at the mercy of individuals who are often at the heart of institutions involved with vulnerable children.

A 15-year-old girl from the Ondonga District in the Oshikoto Region said that, because she came from a family with dozens of children and multiple mothers, she and her siblings were not malnourished, they were well looked after and encouraged to become educated, and they were free to make their own choices about the type of marriage they wished to enter.

A 17-year-old boy from the Ondobe-ye-fidi village in the Okalongo District in the Omusati Region stated that there were 36 children in his family. His siblings in were all free-thinking, independent people. Some had chosen polygyny themselves, while others had branched off to some other religions. He pointed out the underlying fact that they were all happy in their respective marital relationships. He further related that, in their

54 Ambunda & De Klerk (2008:49).

55 Becker & Hinz (1995).

culture, if the husband in a polygynous marriage died, his relatives allocated his house and land to his widows and children.

Recommendations

Legislative provision needs to be made for a minimum set of essential requirements for customary marriages. The main requirement for a valid customary marriage should be the consent of the spouses. In order to ensure that such consent is a duly informed one, a minimum age for marrying should be fixed for all persons in all marriage systems in the country.

Traditional wedding ceremonies and bride wealth should not be followed to the letter, but should instead serve to identify a union as one celebrated according to African rites.

Because customary marriage is uncertain and difficult to prove, the registration of all customary marriages should be made compulsory. To make things easier, traditional authorities should be tasked with functioning as registrars of such marriages. No marriages should be permitted to be terminated by private arrangement, i.e. all divorces in terms of customary law should be terminated by a competent traditional court.

In order to compensate for the lack of rules in customary law on the management of family estates, the common law rule governing a spouse's power to bind the other's estate for household necessities should be extended to customary law. The equitable distribution of the spouses' estates upon divorce should also be considered.

Certain authors on customary law, such as Bennett,⁵⁶ note that the Combating of Immoral Practices Act⁵⁷ in Namibia seems to discriminate against girl children born of polygynous unions. The Act made it a crime to have sexual intercourse with a girl under the age of 16, which does not seem appropriate under customary law.

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56 Bennett (2004).

57 No. 7 of 2000.

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