Silences in Marriage Laws in Southern Africa: Women's Position in Polygynous Customary Marriages

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Abstract

The globalisation of human rights and the phenomenon of marriage under both customary law and state law invite a reassessment of women's legal position in polygynous marriages in sub-Saharan Africa. Many African states are placed in a double bind, compelled on the one hand to protect and affirm customary laws — which may include polygyny — whilst also obliged to uphold women's rights to equality and non-discrimination. Using discourse analysis of legislation in selected members of the Southern African Development Community (SADC), this article argues that marriage laws tend to perpetuate the myth that monogamy is the default position of marriage, thereby obscuring the legal rights of women in polygynous customary marriages. Examples include lexical omissions, gender neutrality, use of binary language, and non-specificity in who constitutes "party" to a customary marriage. The article uses three judicial decisions to show how women are disadvantaged by legislative ambiguity on equality in polygynous marriages. It suggests clearer legislation regulating polygyny, notably expanding the definition of "party" to encompass two or more individuals in a customary-law marriage.

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1 INTRODUCTION

African states are argued to be increasingly "embracing the international human rights movement and its universality."[1] Amongst these are rights to equality and non-discrimination, described as "'the twin pillars' upon which the whole edifice of human rights law is established."[2] However, traditional interpretation of these rights has been critiqued from a feminist perspective as maintaining liberal, gender-neutral conceptions of equality, which fail to account for the discrimination of women within the "private" family domain.[3] Indeed, the notion of equality has developed to encompass "substantive" approaches, which recognise the wider, social environment in which discrimination arises, and the possibility that different legal treatment may at times be appropriate to promote social reform, even when this involves intervening in familial institutions.[4] However, the critique of human rights as overly protective of the private domain is still pertinent when considering the position of women in sub-Saharan African states, which, particularly in former British colonies,[5] are characterised by a multitude of overlapping legal normative orders of the kind espoused by Griffiths.[6] These orders typically consist of state law, based on the received colonial law, customary laws, and religious laws,[7] each of which may have its own system of marriage, with varying standards for the treatment of women.[8] Unlike civil marriages, customary marriages are potentially polygynous, sometimes not statutorily regulated, and bedevilled with problems regarding the proprietary consequences of marriage.[9] In the context of the recent wave of constitutional and legal reforms in Africa,[10] we examine the extent to which women in polygynous customary marriages benefit from the right to equality.

We argue that even revised marriage laws may fail to reconcile polygyny with human rights. Instead, these laws employ discursive mechanisms that render polygyny and — by proxy — women in polygynous marriages, invisible. This argument is grounded in the notion of discourse analysis. The term, discourse refers to a regime of language that "constructs, sustains, and changes institutional and societal structures."[11] In its constructivist sense, discourse analysis regards the language of texts as reflective of social reality. Part 2 of the article expands this argument by explaining our methodology and view of legal interpretation in the context of women's equality rights. Part 3 presents polygyny as a human rights violation. It reveals the balancing act required in the relationship between the right to culture and other constitutional rights. Part 4 argues that post-colonial African states are, in many cases, in a double bind, compelled both by international human rights standards and discourses of cultural protection. Part 5 critically examines the invisibility of women in polygynous customary marriages in African marriage laws, as well as the discursive mechanisms that make this erasure possible. These include lexical omissions, unqualified deference to customary law, gender neutrality, use of binary language, and non-specificity in who constitutes *party* to a marriage. We argue that

1 Ndulo "African Customary Law, Customs, and Women's Rights" 2011 I*ndiana Journal of Global Legal Studies* 91.

2 Ssenyonjo "Culture and the Human Rights of Women in Africa: Between Light and Shadow" 2007 *Journal of African Law* 42.

3 Romany "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" 1993 *Harvard Human Rights Journal* 100.

4 Hunter "Introduction: Feminism and Equality" in *Rethinking Equality Projects in Law: Feminist Challenges* (2008) 1.

5 Hodgson and McCurdy (eds) "Wicked" Women and the Reconfiguration of Gender in Africa (2001); Bradford "Women, Gender and Colonialism: Rethinking the History of the British Cape Colony and its Frontier Zones, c. 1806–70" 1996 *Journal of African History* 351-370; Bond "Culture, Dissent, and the State: The Example of Commonwealth African Marriage Law" 2011 *Yale Human Rights and Development Law Journal* 32.

6 Griffiths "What is Legal Pluralism" 1986 *Journal of Legal Pluralism*.

7 Ndulo *Indiana Journal of Global Legal Studies* 2011 87-88, 95; Nwauche "The Constitutional Challenge of the Integration and Interaction of Customary and Received English Common Law in Nigeria and Ghana" 2010 *Tulane European and Civil Law Forum* 2.

8 Bond Y*ale Human Rights and Dev. LJ* 3.

9 Obiora "Kindling the Domain of Social Reform Through Law: A Case Study" 1995 *Third World Legal Studies* 103-140; Moore and Himonga "Protection of Women's Marital Property Rights upon the Dissolution of a Customary Marriage in South Africa: A View from Inside and Outside the Courts" 2015 *Centre for Social Science Research Working Paper No. 350*.

10 Tripp "Conflicting Agendas? Women's Rights and Customary Law in African Constitutional Reform" in Williams (ed) *Constituting Equality* (2009) 171-174.

11 Chick "Constructing a Multicultural National Identity: South African Classrooms as Sites of Struggle between Competing Discourses" 2002 *Journal of Multilingual and Multicultural Development* 462-463.

these mechanisms both obstruct recognition of polygyny, and construct marriage as an affair between only two people, thereby perpetuating the discourse of monogamy. In part 6, we draw from three court cases to demonstrate how women in polygynous customary marriages are disadvantaged by unclear legislation. We conclude the article in part 7 by urging for a more nuanced understanding of discrimination that recognises the manners in which linguistic practices of "silence" are complicit in denying rights to women in polygynous customary marriages. We also suggest remedial measures.

2 POLYGYNY AND HUMAN RIGHTS

2 1 Scope of Inquiry

To examine whether women in polygynous marriages benefit from law reforms, we apply discourse analysis to the marital laws of Southern African Development Community (SADC) members. These countries are guided by the 2008 Protocol on Gender and Development, which imposes on its members an obligation to adopt legislative measures to ensure gender equality within marriages.[12] Primarily, we focus on Botswana, Lesotho, Malawi, Namibia, Eswatini, South Africa, Tanzania, Zimbabwe and Zambia. Where possible, we emphasise marital laws that were updated or amended during or following the 1990s, a period associated with the proliferation and mainstreaming of women's human rights in Africa.[13] Our limitation to these countries is both theoretical and practical. Firstly, it ensures a measure of regional commensurability, as well as the consciousness that the above-mentioned countries were influenced by British common-law legal systems and the application of "indirect rule", which allowed limited autonomy to customary institutions.[14] Secondly, this restriction enables us to consider legislative texts in English, thereby circumventing discursive issues of translation. We focus on laws related to the recognition, solemnisation and registration of customary marriages, laws governing matrimonial causes, and laws that explicitly attempt to transform marital relations in line with equality.[15] All of the laws examined are, at the time of writing, enacted and in force. They are represented below in Table 1, illustrating the examined laws per country, with an asterisk signifying a law enacted prior to the 1990s.

Table 1: Marriage Laws Examined by Country

Country	Marriage Law
Botswana	Marriage Act 18 of 2001; Abolition of Marital Power Act 34 of 2004
Lesotho	Lesotho Legal Capacity of Married Persons Act 9 of 2006 *Marriage Act of Lesotho 10 of 1974*
Malawi	Marriage, Divorce and Family Relations Act 4 of 2015 Marriage, Divorce and Family Relations Bill 5 of 2015
Namibia	Married Persons Equality Act 1 of 1996 Namibia's Recognition of Certain Marriages Act 18 of 1991
South Africa	Recognition of Customary Marriages Act 120 of 1998 (RCMA)
Eswatini	*The Births, Marriages and Deaths Registration Act 1984
Tanzania	The Law of Marriage Act (LMA) No. 5 of 1971 as amended 1996

12 Article 8.
13 Trip *Constituting Equality* (2009).
14 *Ibid.*
15 Such as Namibia's Married Person's Equality Act or Botswana's Abolition of Marital Power Act 34 of 2004.

Zambia	Marriage Act of Zambia 10 of 1918 amended by Act 13 of 1994 Matrimonial Act 20 of 2007
Zimbabwe	Marriage Act Chapter Acts 81 1964 amended by 23/2004

2 2 Discourse Analysis, Constitutional Values, and Legal Interpretation

Discourse analysis probes social reality through the language of texts. As described by Foucault, discourses are socially embedded products/practices of language and power, which shape knowledge and constrains what can or cannot be said or thought.[16] Given its focus on the constructive power of language, discourse analysis could draw conclusions of patriarchy from a constitution that is couched in masculine terms.[17] Even where a legal text is framed in apparently neutral gender language, discourse analysis could ask whether the text masks certain assumptions about sex and gender in the society in which the text operates.

As an investigative method, discourse analysis involves "detailed and repeated reading" of text, and in particular "against the background of the discourse-analytic perspective."[18] In contrast with deductive methodologies, in which one seeks to confirm or reject a hypothesis in a top-down manner, discourse analysis allows for inductive approaches, whereby one's research question is built "bottom-up," shaped by the available data, which subsequently leads to hypothesis building.[19]

Discourse analysis is not merely a methodological tool for examining data, but entails an epistemological position regarding the meaning and function of language.[20] In contrast to traditional legal approaches, which view language through which law is constituted as only instrumental, (*ie* a neutral tool for decoding texts),[21] discourse analysis views language as a sociocultural activity,[22] both constrained by, and constitutive of the wider social environment.[23] Consequently, the language used to evoke legal principles is seen as a worthy subject of investigation in its own right. Discourse analysis further implies that, despite their "objective and neutral style,"[24] legal texts, being socially produced, may reflect prejudicial, exclusionary, or outdated ideologies. Given their colonial inheritance, African states should, in particular, be mindful of not perpetuating colonial discourses in their laws.

We further draw on a subset of discourse analysis called Critical Discourse Analysis (CDA), which focuses on rigorous analysis of language to render visible stratified social relationships, power, and inequality.[25] In this critical sense, silences or omissions in legislative texts are considered semantically meaningful.[26] Karin van Marle observes, "[w]henever equality is constituted between two parties according to a certain standard of approach, it excludes others."[27] The notion that in defining who is equal, others may be excluded, has significant implications. This is because what is not heard or seen becomes a powerful mechanism for symbolising and interrogating power relations,[28] as well as defining the scope of what constitutes normalcy.[29] To fully understand this argument, we need to unpack the meaning of omissions in legislative texts.

Omission may be defined as withholding information which might otherwise be "relevant to

16 Foucault "Orders of Discourse" 1971 Inaugural lecture delivered at the *College de France* 8.
17 See, for example, ss 26 (2)(a) and 29 (4) (b) of the Constitution of the Federal Republic of Nigeria 1999.
18 Wood and Kroger *Doing Discourse Analysis* (2000) 95.
19 *Ibid* 87; Thomas "A General Inductive Approach for Analyzing Qualitative Evaluation Data" 2006 *American Journal of Evaluation* 238-239.
20 Wood and Kroger *Doing Discourse* xiv-xv, 3-4.
21 Goodrich "Law and Language: An Historical and Critical Introduction"1984 *Journal of Law and Society* 173.
22 On discourse analysis being not merely methodology, but also epistemology, see Wood and Kroger *Doing Discourse* 123.
23 Duranti *Linguistic Anthropology* (1997) 2-3, 9; Wood and Kroger *Doing Discourse* 4-7.
24 Niemi-Kiesiläinen, Hontatukia and Ruuskanen "Legal Texts as Discourses" in *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (2007) 81.
25 Wood and Kroger *Doing Discourse* 205-206; Wodak and Meyer (eds) *Methods of Critical Discourse Analysis* (2009) 10.
26 Wood and Kroger *Doing Discourse* 91.
27 Van Marle "Haunting (In)equalities" in *Rethinking Equality Projects in Law* (2008) 136.
28 Foucault "Orders of Discourse" 12.
29 Niemi-Kiesiläinen *et al Exploiting the Limits of Law* (2007) 81.

the target for making an informed decision."[30] It has been described as a strategy of deception, which functions as a "means of constructing and maintaining a preferable version of reality … aimed at gaining an advantage for the speaker."[31] This conceptualisation relates to the manipulation of information without making inferences on the intentions of the speaker.[32] In the context of this article, omission refers to marked statutory silence pertaining to polygyny, given that it may sit uncomfortably with gender equality. An example of omission in this sense is the silence regarding *lobola* (often called bride wealth) in South Africa's Recognition of Customary Marriages Act (RCMA) 1998. Despite being broadly accepted as a prerequisite for customary marriages,[33] *lobola* is barely discussed in the Act, and is not included as a prerequisite for a customary marriage. This allowed the state to appease feminist lobbyists, who objected to the practice, in that it was compared to purchasing wives, whilst not attempting to abolish the practice because of its widespread cultural legitimacy.[34] Despite appearing neutral, therefore, omissions of equality clauses in marriage legislation allow the state to avoid engagement with potentially sensitive cultural issues,[35] thereby denying women in polygynous marriages their constitutional rights to equality and non-discrimination.

Although discourse analysis may sit uncomfortably with some traditional canons of statutory interpretation such as the literal and plain meaning rule,[36] we argue that it fits legal scholarship generally because of shared commonalities. For example, "both concern reading and interpreting texts, [and] both are preoccupied with the meaning of texts."[37] We argue further that the wording of legal texts cannot be divorced from their social context, in this case the gendered nature of African societies in which disputes emerge. In these societies, advocates and judges rely heavily on the wording of texts to make arguments and formulate decisions respectively. For judges, their undue reliance on the wording of texts is exacerbated by the separation of powers doctrine, which, to put it crudely, requires judges not to legislate from the bench. Accordingly, there is need to ensure a close link between legal texts and social realities. Moreover, discourse analysis in legal interpretation is justified by the rule-minded inclination of African judges,[38] an inclination that has proved problematic in issues relating to customary law and women's rights.[39] Where, for example, the wording of marriage legislation fails to mention polygyny, judges might hesitate to import or *read in* polygyny into the legislation to offer legal protection to a woman in a polygynous marriage.[40]

Finally, in using discourse analysis to examine marriage laws in the SADC region, we lean towards the purposive rule of statutory interpretation. Like discourse analysis, which considers meaning as arising from various sources, including details that are lexical, syntactic, pragmatic, and social,[41] the purposive approach regards legislative text as possessing multiple meanings.[42] Accordingly, it argues that interpretation of legal texts should not only consider the author's intended "goals, interests, and values," but also reflect the wider public interest, and in particular, social values and principles of human rights.[43] Specifically, Barak argues that

30 Galasinski *The Language of Deception: A Discourse Analytical Study* (2000) 22.
31 *Ibid* 7.
32 *Ibid* 18.
33 See Himonga and Moore *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015).
34 Higgins, Fenrich and Tanzer "Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism" 2007 *Fordham International Law* 1669-1670.
35 Andrews "Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa" 2009 *Utah Law Review* 330, 378.
36 Murphy "Old Maxims Never Die: The 'Plain-meaning Rule' and Statutory Interpretation in the 'Modern' Federal Courts" 1975 *Columbia Law Review* 1299.
37 Niemi-Kiesiläinen *et al Exploiting the Limits of Law* 73.
38 Dyzenhaus "The Genealogy of Legal Positivism" 2004 *Oxford Journal of Legal Studies* 39-67; Diala *Judicial Activism in South Africa's Constitutional Court: Minority Protection or Judicial Illegitimacy?* (LLM Dissertation, University of Pretoria, 2007).
39 See generally, Himonga and Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning" 2000 *South African Law Journal* 306-341; Bekker and Maithufi "The Dichotomy between 'Official Customary Law' and 'Non-official Customary Law'" 1992 *Journal for Juridical Science* 47-60.
40 *National Council for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); 2000 1 BCLR 39 (CC) provides an example of a case in which judges were hesitant to interfere with the law adopted by the legislature (see paras 62-76).
41 Wood and Kroger *Doing Discourse* 5-7.
42 Barak *Purposive Interpretation in Law* (2005) xv.
43 *Ibid* xii-xiv.

statutory interpretation should reflect constitutional values.[44] We expand on the relationship between constitutional values of human rights and statutory interpretation in parts 4 and 5 of this article.

3 POLYGYNY AND DISCRIMINATION

The term polygyny denotes simultaneous marriage of one husband to two or more women, and may be contrasted with polyandry, a situation in which a woman marries multiple men.[45] The word polygamy is an umbrella term for polygyny and polyandry. However, given the extreme rarity of polyandry in African societies, polygamy is often used interchangeably with polygyny, an approach adopted in this article.

In traditional, agrarian societies, polygyny was a marker of social status and wealth. Its ability to increase the size of families was further regarded as complimentary to social stability.[46] However, during colonialism, polygyny in African customary law was singled out as an institution offensive to Western morals and decency.[47] This perception, which is deeply disdainful of the cultural roots of polygyny, is largely traceable to prevalent Christian notions of marriage as a unity between a man and a woman.[48] Today, it is widely portrayed as a harmful practice that subordinates women within the family domain.[49] It is also believed to contribute to the objectification of wives, who become seen as "commodities to be bought and sold."[50] Because it is highly gendered (i.e. men can marry multiple wives but women cannot marry multiple husbands), it is said to violate fundamental concepts of equality.[51] It is argued that a woman in a polygynous marriage may not necessarily enjoy equal bargaining power with her husband, resulting in situations where a wife remains in an abusive or disadvantageous relationship.[52] It also follows that a woman in such a marriage is often not in a position to object to her husband marrying subsequent wives, despite it substantially affecting her access to marital property,[53] and obliging her to compete with other wives for matrimonial resources.[54] As an institution argued to be "embedded in patriarchal traditions",[55] polygyny is often discursively associated with practices such as child marriage, domestic abuse, female genital mutilation, and forced marriages.[56] In addition, with the added complication of multiple wives, it has been argued to increase the risk of HIV/AIDS and other sexually transmitted diseases.[57]

44 *Ibid* xv; 88.
45 Zeitzen *Polygamy: A Cross Cultural Analysis* (2008) 10-11.
46 Andrews 2009 *Utah Law Review* 370.
47 *Ibid* 311; Higgins *et al* 2007 *Fordham International Law* 1653; *Mifumi (U) Ltd and Anor vs Attorney General and Anor* 2015 UGSC (13) para 20. See also Bond 2011 *Yale Human Rights and Dev. LJ* 42-43.
48 Lyimo *Polygamy in Sub-Saharan Africa and the Munus Docendi: Canonical Structures in Support of Church Doctrine and Evangelization* (Doctoral dissertation, Université Saint-Paul Canada, 2011).
49 Higgins *et al* 2007 *Fordham International Law* 1694.
50 Wing and Smith cited in Ssenyonjo 2007 *Journal of African Law* 52.
51 Banda "Global Standards: Local Values" 2003 *International Journal of Law, Policy and the Family* 8.
52 *Ibid.*
53 This issue was illustrated in *Mayelane v Ngwenyama* 2013 4 SA 415 (CC); 2013 8 BCLR 918 (CC), where both the applicant and first respondent were married to the same man by customary law, but did not know of the other's existence, and therefore disputed the validity of the other's marriage (para 4).
54 Higgins *et al* 2007 *Fordham International Law* 1681-1682, 1685.
55 *Ibid* 1688; Andrews 2009 *Utah Law Review* 320.
56 Examples include CEDAW General Recommendation 24 (1999) para 18 and CEDAW General Recommendation 31 (2014) ss V and VI.
57 For example, CEDAW General Recommendation 24 (1999) para 18; states that "harmful traditional practices, such as … polygamy … may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases."

However, polygyny is generally acceptable under African customary laws,[58] and in particular Sub-Saharan Africa.[59] It is therefore necessary to examine whether states are proactive in ensuring that women in polygynous customary marriages are not discriminated against in relation to women in monogamous marriages.

4 AFRICAN STATES IN A DOUBLE BIND

As an institution perceived to contravene women's basic human rights, polygyny is a controversial aspect of African customary marriage. On the one hand, there are strong moral and legal imperatives to affirm and recognise the cultures and knowledge systems of peoples previously subjugated by colonialism,[60] namely African customary law. This normative system is widely considered the bedrock of African culture and values.[61] Thus, protecting and affirming African customary law (and by proxy polygyny) serves as a medium through which the post-colonial African state can express its national identity, and be distinguished from its colonial predecessors.[62] Significantly, African states are often highly protective of their customary law,[63] and feminist attempts to abolish aspects of this law are often met with resistance.[64] The legal basis for recognising customary law is directly seen in many African constitutions. For instance, the constitution of Zimbabwe recognises and affirms traditional leadership.[65] The constitutions of Malawi and Namibia affirm the equal validity of customary and common legal systems.[66]

In the constitutions of Botswana, Lesotho and Zambia, customary law is recognised, and shielded from certain constitutional provisions, including application of the constitutional right to non-discrimination.[67] The constitutions of South Africa and Eswatini not only recognise customary law, but further oblige state structures to implement it. For instance section 211(3) of the South African Constitution states that "the Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."[68] The constitution of Eswatini states: "subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland."[69] Furthermore, customary law is, in several cases, indirectly affirmed in African constitutions.

58 Kuenyehia "Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa" 2006 *UC Davis Law Review* 397; Bond 2011 *Yale HRDLJ* 15.

59 Claims such as these are frequently made in literature, but often are not substantiated with figures (e.g. Bond 2011 *Yale HRDLJ* 15). Whilst unable to find recent comparative sources, it appears the extent to which polygamy is practiced differs from country to country. For example, in Eswatini this figure is between 13.1 per cent and 15.7 per cent, according to OECD Development Centre "Swaziland" http://www.genderindex.org/sites/default/files/datasheets/SZ.pdf (accessed 11-11-2016). In Tanzania, an estimated 25 per cent of marriages are believed to be polygynous according to Howland and Koenen "Divorce and Polygamy in Tanzania" *Social Justice* 1, whereas in Lesotho, only an estimated 1.7 per cent of men aged 15-59 are reported to having two or more wives following OECD Development Centre "Lesotho" http://www.genderindex.org/sites/default/files/datasheets/LS.pdf (accessed 12-11-2016). However, these figures should be accorded a margin of error. Many customary marriages are not registered, as argued in Ewelukwa "Post-colonialism, Gender, Customary Injustice: Widows in African Societies" 2002 *Human Rights Quarterly* 480-483 and seen in Himonga and Moore (eds) "Registering a Customary Marriage" in *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) 106-108. For instance, in South Africa it is argued that only 30 per cent of polygynous customary unions are registered (see Hosegood *et al* in Himonga and Moore 133). Hence, the numbers of registered marriage may be underrepresented by official statistics.

60 Banda 2003 I*nternational J L, Policy and the Family* 7; Andrews 2009 *Utah Law Review* 355.

61 Chirwa "Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women's Rights" (2006) 69; Andrews 2009 *Utah Law Review* 361.

62 Hessbruegge "Customary Law and Authority in a State under Construction: The Case of South Sudan" 2012 *African Journal of Legal Studies* 296-297; Bond 2011 *Yale HRDLJ* 33.

63 Bennet "Re-introducing African Customary Law to the South African Legal System" 2009 *American Journal of Comparative Law* 7, 25.

64 Bond 2011 *Yale HRDLJ* 16.

65 Section 280 Constitution of Zimbabwe 2013.

66 Section 10(2) Constitution of Malawi 1995 and art 66 (1) of the Constitution of the Republic of Namibia 1990 amended 2010.

67 Sections 88(2) and 15(d) Constitution of Botswana 1966 amended by S.I. 91 of 2006; s 18(c) Constitution of Lesotho 1993 amended 2001; art 23 (4)(d) Constitution of Zambia amended by Act 18 of 1996.

68 Constitution of South Africa 1996. For more examples, see s 7(d) of the Constitution of Zambia (Amendment) Act No. 2 of 2016; s 10(2) Constitution of Malawi 1995, etc.

69 Section 252 (2) Constitution of the Kingdom of Swaziland Act 2005.

This is evident in the protection of the right to culture,[70] which, in sub-Saharan Africa serves as a proxy for customary laws.[71] In the case of South Africa, the right to culture forms part of the bill of rights. Although it is subjected to the constitution and limitation clauses, arguably, the relationship between the right to culture and other constitutional rights is determined by a balancing act, as opposed to a trumping of one right by another right.[72] If we accept that "customary law is a manifestation of the right to culture,"[73] and accept that both the right to equality and culture enjoy constitutional protection, then the right to equality cannot be said to trump customary law.[74]

On the other hand, there is also incentive for African states to be seen as cooperative towards international standards of human rights. This is partly because the endorsement of human rights is argued to be central in achieving recognition as a modern state within the international community,[75] and may affect the capacity of a state to attract foreign investors or enter into diplomatic relations.[76] As Ssenyonjo notes:

> every state in Africa is a party to at least one international treaty prohibiting discrimination on the basis of sex in the enjoyment of human rights or a party to an international treaty providing for the equal rights of men and women to the enjoyment of all human rights.[77]

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) are two major human rights instruments establishing guidelines for states' treatment of women in polygynous customary marriages. Both instruments call upon state parties to condemn all discrimination against women and ensure that non-discrimination manifests at a constitutional and legislative level.[78] Both also specify that states are required to intervene in ending discrimination, which may entail amending or intervening in customary laws.[79]

Article 16 of CEDAW places an obligation on states to ensure that women and men enjoy "the same right freely to choose a spouse and to enter into marriage only with their free and full consent" and "the same rights and responsibilities during marriage and at its dissolution."[80] These conditions are compromised in polygamous marriages, where only one party has the agency to marry additional women, and where wives are compelled to compete for material resources.[81] Similarly, article 6 of the Maputo Protocol requires state parties to ensure equal rights between men and women in marriage, and that women should be "regarded as equal partners in marriage." Although it specifies that monogamy is "encouraged as the preferred form of marriage," it concedes that "the rights of women in marriage and family, including in polygamous marital relationships are [to be] promoted and protected."[82]

70 Sections 30 and 31 Constitution of South Africa, s 16 Constitution of Zimbabwe.
71 Bond "Constitutional Exclusion and Gender in Commonwealth Africa" 2007 *Fordham Int'l Law Journal*.
72 For a debate on the trumping of the right to culture by the right to equality under the South African Constitution, see Kaganas and Murray "The Contest between Culture and Gender Equality under South Africa's Interim Constitution" 1994 *Journal of Law and Society* 409-433.
73 Nwauche "Protecting Expressions of Folklore within the Right to Culture in Africa" 2011 *Potchefstroom Electronic Law Journal* 50 and 74 [arguing "that customary law is a manifestation of the right to culture"].
74 While not discussed in detail here, the right to culture is further found in core international human rights instruments, such as arts 22 and 27 of the Universal Declaration of Human Rights. However, it has been argued that the right to culture must be subject to "universal standards," which include gender equality and non-discrimination as a fundamental principle. See Mwambene "Reconciling African Customary Law with Women's Rights in Malawi: The Proposed Marriage, Divorce and Family Relations Bill" 2007 *Malawi Law Journal* 82; Howland "Women and Religious Fundamentalism" 1999 *Women and International Human Rights Law* 590.
75 Law "Constitutional Archetypes" 2016 *Legal Studies Research Paper Series Paper no 16-02-01* 11, 17; Harris-Short "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the United Nations Convention on the Rights of the Child" 2003 *Human Rights Quarterly* 165.
76 Law and Versteeg "Sham Constitutionalism" 2013 *California Law Review* 1172-1173.
77 Ssenyonjo 2007 *Journal of African Law* 49.
78 Article 2(a) of CEDAW, and art 1(d) and 2(1) of the Maputo Protocol.
79 Article 2(f) of CEDAW, arts 2 and 4(2)(d) of the Maputo Protocol.
80 *Ibid* art 16(b) and (c).
81 Higgins *et al* 2006 *Fordham International Law* 1681.
82 Article 6(c) of Maputo Protocol.

Indeed, the protection of women's rights to equality and non-discrimination is widely found in the examined constitutions. This is evident, for example, in section 10 of the Constitution of Namibia, which declares that everyone is equal before the law, and that no-one may be discriminated against on demarcated grounds that include sex. Furthermore, many constitutions directly apply these principles to customary law. An example is section 24 (2) of Malawi's Constitution. It states that "any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women," including practices that deprive women of property,[83] argued here to be the case for polygyny. Similarly, section 80(3) of Zimbabwe's 2013 Constitution declares that "all laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement."

African states are therefore potentially placed in a double bind: they are compelled on the one hand to protect and affirm customary laws and cultural rights — which often includes the practice of polygyny — whilst, on the other hand, they are obliged to uphold the human rights of women. Given this context, the next part of this article examines the position of polygyny in written laws governing customary marriages.

5 LEGISLATIVE INVISIBILITY OF POLYGYNY

This section analyses the discursive mechanisms of marriage laws with respect to their engagement with polygyny and the parties to polygynous marriages. We identify two main patterns in this engagement. The first is obstruction — that is to say discursive mechanisms that erase, obscure, impede and avoid references to polygyny. The second is construction, which perpetuates the notion that monogamy is the default condition for customary marriages. These processes are not mutually exclusive and operate simultaneously to negate the existence of women in polygynous customary marriages, thereby marginalising their rights to equality. Mechanisms that obstruct include lexical omissions, gender neutrality, and broad, unqualified deference to customary law. Mechanisms that construct include use of words such as *either*, *both* and the *other*, which subtly portray marriage as inherently between two people only. In analysing the discursive mechanisms of marriage laws, we also examine how the term "party" to a marriage is used obstructively and constructively.

5 1 Avoidance

Abstaining from language that commits to the recognition of polygyny is one of the simplest legislative mechanisms for avoiding potentially competing discourses of African customary law and human rights. We identify two major mechanisms by which this is achieved. Firstly, laws may exclude customary marriages from the scope of the law,[84] with the implied assumption that (unregulated) customary marriages are potentially polygynous. In the cases of Lesotho, Namibia, and Zambia, customary marriages are excluded from the scope of the laws in question.[85] However, despite this exclusion, there is the implication that customary marriages may be polygynous outside of the statute. This is because there is no legal obligation — or even possibility — to register a polygynous marriage. Conversely, there is no express sanction for the non-registration of customary marriages. In the case of Lesotho, there is potential for monogamous customary marriages to be incorporated into the scope of legislation governing civil marriages. For instance, section 4 of Lesotho's Marriage Act states:

> A marriage entered into according to Sesotho custom may be registered at the office of the District Administrator for the district in which such marriage was celebrated, or in the office of the District Administrator for the district in which the parties reside: *Provided that no such marriage shall be registered if either party thereto is at the time legally married to some other person.*[86]

This optional regulation of monogamous customary marriages implies that it is also legally

83 *Ibid* 24(2)(c).

84 See for example Botswana's Abolition of Marital Power Act 34 of 2004 which states in s 3, that the Act "shall not apply to customary and religious marriages."

85 Section 4 Marriage Act of Lesotho; s 2 Namibia's Recognition of Certain Marriages Act; s 34 Marriage Act of Zambia; and ss 3 and 27(1)(b) Zambia's Matrimonial Causes Act.

86 (Emphasis our own).

permissible for non-registered customary marriages to be polygynous. This not only indirectly affirms the legality of polygyny, it also allows the state to extricate itself from obligations of regulating polygynous marriages in line with human rights.

Patterns of linguistic avoidance are particularly strong in Namibia's Recognition of Certain Marriages Act, which, in contrast to every other law examined, avoids direct evocation of customary law, let alone polygynous customary marriages. The title of the Act, the "Recognition of *Certain* Marriages Act,"[87] hints at the existence of forms of marriage not regulated by statute, without going so far as to name customary marriages directly. The Act further makes vague reference to a marriage contracted "by any other law"[88] and describes the possibility for a marriage to undergo a wedding ceremony "in some other form."[89] These are the only phrases that could be construed as incorporating customary marriages, leaving such marriages largely unregulated and the legal status of women in polygynous marriages unresolved. Subsequently, and despite its broad title, the Married Person's Equality Act largely protects only those women married monogamously in civil marriages. For instance, section 2(1)(a) and 3(b) abolish the "common law rule" which positions the husband as the head of the family, thereby excluding customary law. Part 2 of the Act, which provides for the equal power of spouses and the requirement of spousal consent, is further limited to "marriages in community of property."[90] This further excludes women in polygynous marriages, whose matrimonial property systems are regulated by customary and not statutory law. This exclusion is made evident in section 16, which further specifies that the provisions for regulating marriages out of community of property do not apply to customary marriages.[91] Indeed, the only section which may include customary marriages in its scope of application is Part III, which concerns the domicile of married women and their children.[92]

Even laws that apply to customary marriages may obscure the legal position of polygyny by omitting the word polygyny or synonyms thereof. For instance, Malawi's Marriage, Divorce, and Family Relations Act avoids language that openly commits to the legality of polygyny in customary marriages. Monogamy is cited to be an "essential element of marriage"[93] in terms of Part III of the Act. However, section 26, which focuses exclusively on the legal requirements of customary marriages, requires that a customary marriage must meet all "essential elements of marriage" in terms of Part III, with the exception of the provision prohibiting polygyny,[94] which is conveniently omitted. Therefore, polygyny in customary marriages is made effectively legal via a complicated process of cross-referencing, whilst simultaneously erasing any explicit recognition of the parties to a polygynous customary marriage. This directly contrasts with the clarity and candour of the language used to prohibit polygyny in civil marriages. For instance, section 18, entitled "prohibition of polygamy in a civil marriage," states that a "person who contracts a civil marriage shall be married to one spouse only." Because section 18 applies only to civil marriages, the possibility of polygyny in customary marriages is affirmed indirectly, whilst simultaneously rendering the practice legally invisible. A similar situation exists in Zimbabwe, whose Customary Marriages Act and Marriage Act both fail to mention polygyny directly, thereby obscuring the need to regulate polygynous marriages.[95]

5 2 Unqualified Definitions

Broad, unqualified definitions of customary marriage serve as another mechanism by which African states absolve themselves from engaging with the complexity of polygyny. For example, Malawi's Marriage, Divorce, and Family Relations Act defines a customary marriage as "a marriage celebrated in accordance with rites under the customary law of one or both

87 (Emphasis our own).
88 Section 2(2)(b) of Namibia's Recognition of Certain Marriages Act 1991.
89 Section 30 of the SWAPO Family Act of 1977, as contained in the Schedule of Namibia's Recognition of Certain Marriages Act 1991.
90 *Ibid* s 4.
91 *Ibid* s 16(b)
92 *Ibid.*
93 Section 30 of the SWAPO Family Act of 1977 in Namibia's Recognition of Certain Marriages Act part III.
94 *Ibid* s 26: Customary marriages are subject to ss 14 and 15.
95 Indeed, the legality of polygyny in customary marriages (and its illegality in civil marriages) is directly alluded to only in the Criminal Law (Codification and Reform) Act of Malawi. See s 104 Criminal Law (Codification and Reform) Act, Ch9:23.

of the parties to the marriage."[96] South Africa defines a customary marriage as a marriage "concluded in accordance with customary law," which in turn refers to "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples."[97] Even more non-specific is the Zimbabwean Customary Marriages Act's definition of a customary marriage as "a marriage between Africans."[98] These definitions fail to acknowledge that a customary marriage is potentially polygynous. Also, they do not adopt the constitutional approach of subjecting the recognition of customary law to constitutional values of dignity, equality, and non-discrimination.[99] In our view, a legislative definition of a customary-law marriage should contain two elements. Firstly, it should define a customary marriage as a marriage between two or more individuals undertaken in accordance with the customary law of the marriage partners. Secondly, it should add that parties to such a marriage are entitled to dignity, non-discrimination, and equality in proprietary relations, subject to any prenuptial agreement. Two main reasons inform our proposition.

In the context of normative coexistence or legal pluralism, broad or vague definitions of customary marriage result in unrestricted capacity of ancient customs to perpetuate discrimination and inequality between marriage partners, especially where the recognition of polygyny is not openly acknowledged by the law. Without expressly subjecting customary law to constitutional values, it is difficult for rule-minded judges to invoke the legal framework in disputes involving customary-law marriages.[100] Furthermore, particularly in rural areas, litigation is expensive and often unviable.[101] For protection of women's rights therefore, it is necessary for constitutional values to be incorporated into marriage legislation.[102] These values should guide the actions of grassroots government officials tasked with regulating customary marriages, instead of being entrusted only to judges. Ensuring that the laws used in the regulation of customary marriages conform to constitutional values would provide a firm legal threshold for protecting women in polygynous customary marriages and also better empower rights-advocacy bodies.

5 3 Gender Neutrality

Gender neutrality, or the removal of gender signifiers, functions as another mechanism for states to avoid the tension between polygyny and human rights. This is evident in section 2(3) of the RCMA, which states: "[i]f a *person* is a *spouse* in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages."[103] The use of the words "person" and "spouse" conspicuously avoids gendered language, which misleadingly implies that a woman may marry more than one husband. Use of gender-neutral language helps legislators to avoid legitimising gender stereotypes. It may also appear inoffensive by international human rights standards, thereby meeting the requirement of formal equality, which treats different groups of people identically under the law.[104] However, gender neutrality whitewashes people's lived reality, which may, in fact, be structured along highly gendered principles.[105] Excessive use of gender neutrality is therefore a strategy of linguistic avoidance, legitimising the state's failure to address the

96 Section 2 Malawi's Marriage Divorce and Family Relations Act.
97 Section 2 of the RCMA.
98 Section 2 Customary Marriages Act (Ordinance No. 5 of 1917 as amended through Act No. 6 of 1997) (Ch 5:07).
99 See, for example, s 200 of the Constitution of Malawi, which recognises customary laws only so far as they are consistent with the constitution. S 2 of the Constitution of Uganda subjects all laws to constitutional values, further stating that 'if any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void'. See also ss 9 and 30 of South Africa's Constitution, s 26(2) Constitution of Ghana, and s 80(3) Constitution of Zimbabwe.
100 Diala *Judicial Recognition of Living Customary Law in the Context of Matrimonial Property Rights in South-East Nigeria* (PhD Thesis, University of Cape Town, 2016).
101 Maithufi and Bekker "*Baadjies v Matubela* 2002 3 SA 427 (W)" 2003 *Journal of South African Law* 760.
102 A good example of the advocated legislation is s 11 of Kenya's Matrimonial Causes Act, which states that "during the division of matrimonial property, the customary law of the communities in question shall [be] subject to the values and principles of the Constitution."
103 (Emphasis our own).
104 Banda 2003 *International J L, Policy and the Family* 8.
105 Higgins *et al* 2006 *Fordham International Law* 1164; Griffiths "Gendering Culture: Towards a Plural Perspective on Kwena Women's Rights" in Cowan, Dembour and Wilson (eds) *Culture and Rights: Anthropological Perspectives* (2001) 106.

controversial subject of polygyny and human rights under African customary law.

A careful reading of the examined laws offers many linguistic indications that marriages are considered monogamous by default. Consequently, even in instances where the law attempts to regulate marriages according to constitutional values of non-discrimination, women in polygynous marriages may be excluded. This is evident in section 6 of South Africa's RCMA, which states that:

> a wife in a customary marriage has, *on the basis of equality with her husband* … full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.[106]

Specifically, a wife's equality is framed in reference to her husband, thereby failing to clarify its application to polygynous marriages. Similarly, despite its application to customary marriages, Lesotho's Legal Capacity of Married Persons Act attempts to abolish a husband's marital power over his wife,[107] yet contains no linguistic indication of inequality that may arise within a polygynous marriage.

The linguistic erasure of polygyny is further seen in the usage of quantitative adjectives (*ie* adjectives that indicate the quantity of a noun phrase) such as "either" or "both", which constructs marriage as concerning two people. For instance, South Africa's RCMA requires the consent of "both" spouses to contract a customary marriage. Lesotho's Legal Capacity of Married Persons Act similarly stipulates that certain actions related to marital property require the consent of "the other" spouse.[108]

Furthermore, not only does a monogamous construction disempower a woman in a polygynous customary marriage from protesting her husband entering into a subsequent marriage, it also perpetuates the narrative of compulsory monogamy, thus rendering women in polygynous customary marriages invisible. An example of this linguistic construction is the use of the phrase "the other", which conveys the impression that a marriage concerns only two people. This is seen, for example, in part IX of Malawi's Marriage, Divorce, and Family Relations Act, entitled "Rights and Obligations of Parties to a Marriage." It states that "a party to a marriage is entitled to equal rights as *the other* in their right to consortium,"[109] and that "a spouse may severally, or jointly with *the other*, exercise responsibility towards the upbringing, nurturing and maintenance of the children of the marriage."[110] It may be argued that such clauses expressly concern an exclusive relationship between a wife and her husband, and therefore cannot be expected to engage with the nuances of a polygynous marriage such as marital obligations and property division, discussed further in part 6 below. These nuances are seen, for example, in the provision that "a spouse may deny *the other spouse* the right to consummation on reasonable grounds," which clearly concerns the intimate relations between two parties at a time.[111] Thus, monogamous legislative language perpetuates the reality of polygyny as a marginalised, obscure, and arguably invisible practice. According to the memorandum prefacing Malawi's Family Relations Act, the law was formulated "in accordance with Government's policy to promote gender equality and the empowerment of women in all spheres of life in Malawi."[112] The phrase "women in all spheres of life" surely incorporates women in polygynous customary marriages. Accordingly, the erasure of these women from the law, particularly under a subsection that most directly attempts to engender human rights in marital relations, is highly anomalous.

A final observation involves the failure to clarify who constitutes a party to a marriage. According to Mbatha, the term "party" to a marriage should include all wives in polygynous marriages because the existence of a polygynous marriage has proprietary consequences for each wife. Regarding recent developments in South Africa, a polygynous marriage changes the matrimonial regime, making it, by default, a marriage in community of property.[113] Elsewhere,

106 Section 6 RCMA (emphasis our own).
107 Section 3(1) of Legal Capacity of Married Persons Act.
108 *Ibid* s 7.
109 Section 48(1) Malawi's Marriage, Divorce and Family Relations Act (emphasis our own).
110 *Ibid* s 48(5).
111 *Ibid* s 48(7).
112 Marriage, Divorce and Family Relations Bill 2015 Memorandum.
113 *Ramuhovhi v President of the Republic of South Africa* 2018 2 BCLR 217 (CC); 2018 2 SA 1 (CC) (30 November

however, it has been suggested that the term "party" refers to the couple involved in the first customary marriage, therefore excluding a man's other wives. Amongst the examined laws, only Tanzania's LMA attempts to provide such a definition. It defines a party to an intended or purported marriage as "the husband or the wife or the intended or purported husband or wife." A party to a marriage is thus contingent on a wife's position in relation with her husband, thereby ignoring the dynamics of a polygynous relationship and perpetuating the discourse that the default condition of marriage is monogamy. Whilst it may be possible that the singular word spouse or wife is meant to include spouses or wives,[114] following Foucault's theory of discourse,[115] the failure to specify that spouses (plural) are parties to a marriage, constructs and maintains a particular version of marriage, one in which polygyny is whitewashed and monogamy is the default condition for marriages.

Having shown how legislative language obstructs recognition of polygyny and constructs monogamy as the default position of marriage, we argue that these discursive mechanisms are not benign. Rather, they contribute to the marginalisation of women in polygynous customary marriages. In what follows, we discuss how women in polygynous customary marriages could be discriminated against by use of these discursive mechanisms. Our discussion is based on judicial decisions in eastern and southern Africa.

6 CONSEQUENCES OF SILENCE AS DISCURSIVE MECHANISM

The consequences of compulsory monogamy and the need for legislation to be sensitive to the dynamics of polygynous marriages are illustrated in three court cases in South Africa, Tanzania and Zimbabwe respectively. The first is *Mayelane v Ngwenyama and Minister for Home Affairs* (henceforth *Mayelane*), which was decided by the Constitutional Court of South Africa.[116] The second is *Maryam Mbaraka Saleh v Abood Saleh Abood* (henceforth *Saleh)*, decided by the Court of Appeal of Tanzania.[117] Although the latter case concerns a polygynous Islamic marriage,[118] we argue that the fundamental principles in attempting to regulate polygynous relationships apply to customary marriages as well. The third case we analyse is *Mukondiwa v Zimvumi*,[119] which was decided by the High Court of Zimbabwe.

Mayelane concerns the phenomenon whereby a man marries another woman without the consent of his wife or wives. Both the applicant, Ms Mayelane, and the respondent, Ms Ngwenyama, claimed to be married to Mr Moyana under customary law, the former in 1984, and the latter in 2008. Upon Mr Moyana's death, both Mayelane and Ngwenyama sought the registration of their marriages under the RCMA, simultaneously disputing the validity of the other's marriage. Mayelane successfully obtained an order from the High Court validating her marriage and invalidating Ngwenyama's marriage on the grounds that, in violation of the applicable customary law, her consent had not been obtained for her husband's decision to marry Ms Ngwenyama. Ngwenyama later challenged this decision at the Supreme Court of Appeal, which ruled that both marriages were valid. This decision was subsequently overturned at the Constitutional Court, which ruled in favour of Mayelane, thereby nullifying Ngwenyama's marriage.[120]

The majority judgment in the Constitutional Court reasoned that to deny the first wife the opportunity to withhold her consent from her husband's subsequent marriage violated her right to equality and dignity, and furthermore, negatively affected her and her children materially.[121] Whilst noting the importance of the first wife's consent, Himonga and Pope observe that the

2017). See also Himonga and Pope "*Mayelane v Ngwenyama and Minister for Home Affairs*: A Reflection on Wider Implications" 2013 *Acta Juridica* 330.

114 Pelegrin "Statutory Construction: Singular v Plural, Gender and Time" *Colorado LegiSource* (21 August 2014) https://legisource.net/2014/08/21/statutory-construction-singular-v-plural-gender-and-time/>(accessed 23-8-2017).

115 Foucault *Orders of Discourse* (1971).

116 *Mayelane v Ngwenyama and Minister for Home Affairs* 2013 4 SA 415 (CC); 2013 8 BCLR 918 (CC) (30 May 2013).

117 *Maryam Mbaraka Saleh v Abood Saleh Abood* High Ct. Civ., App. I (1992) (Tanz.) cited in Rwezaura "Tanzania: Building a New Family Law out of a Plural Legal System" 1995 *Journal of Family Law* 523-540.

118 Rwezaura 1995 *Journal of Family Law* 530.

119 *Mukondiwa v Zimvumi* (HC 10558/01) [2004] ZWHHC 49 (16 June 2004)

120 *Mayelane* paras 3-12; Himonga and Pope 2013 *Acta Juridica* 319-320, 332.

121 *Ibid* 323; and *Mayelane* paras 71-73, 80

judgment disproportionately favoured the first wife, whilst neglecting to consider the "dignity and equality" of the subsequent wife, who believed herself to be married by customary law to the deceased.[122] They furthermore criticise the court for failing to develop the customary law to protect and balance the rights of both wives,[123] especially since customary marriages are often not registered, and a prospective bride may be unaware of her husband's existing marriage(s). They argue that the fact that women in monogamous customary marriages enjoy more rights than women in polygamous customary marriages cannot be said to fulfil constitutional obligations of equality. In this sense, the court's failure to consider the equality and dignity of the second wife is both "anomalous and unfair."[124]

Himonga and Pope observe that in deciding the case, the courts neglected the requirements of Tsonga customary law, but rather based their judgments on the interpretation of the RCMA.[125] This was done in particular with reference to section 7(6) concerning the regulation of the proprietary consequences of a polygynous marriage, and with reference to section 3, concerning the requirements for a valid customary marriage.[126] Section 3(1)(a) in particular addresses the issue of consent, and stipulates that in order for a customary marriage to be valid, "the prospective spouses must both consent to be married to each other under customary law."[127] Himonga and Pope note that this provision's application to polygynous marriages was not resolved by the Court, given its use of the word "both", which implies only two people (i.e. the groom and the bride).[128]

The *Saleh* case concerns the breakdown of a marriage between the husband-respondent, and the applicant, who was his second wife. Based on Tanzania's Law of Marriage Act (LMA) of 1971, the first wife was awarded forty per cent of the respondent's assets. This judgment, however, failed to consider how this affected the second wife, who later appealed the decision at the Court of Appeal, arguing that it robbed her of matrimonial assets. This attempt to challenge the decision was dismissed on the ground that she did not constitute a party to the divorce proceedings, and hence had no basis to claim unfair discrimination.[129] The LMA was thus interpreted as construing divorce as a matter fundamentally between two parties, thereby excluding any other person.[130] It may be argued that this interpretation disregards the complexities that arise in a polygynous arrangement. Indeed, it has been suggested that the Act was drafted "without consideration of the circumstances of couples who are married polygamously."[131]

Mukondiwa v Zimvumi involves a "double decker" marriage, whereby a man simultaneously contracts a customary marriage and a civil marriage with different parties.[132] In this case, the plaintiff was married to the deceased in terms of the Marriage Act, which prohibits polygyny. She was unaware of the continued validity of her husband's marriage to his first wife, the defendant, in terms of the former African Marriages Act. Following his death, both parties had attempted to receive pension benefits in terms of the Benefit Act, leading to the plaintiff's attempt to get the defendant's marriage invalidated. The court ruled that the mere presence of a civil marriage was enough to invalidate the previously existing customary marriage, thereby denying the defendant access to the deceased's pension benefits. This decision demonstrates legislative and judicial neglect of customary marriages.

Mayelane and *Saleh* explicitly illustrate the extent to which the language of legislation, specifically lack of clarity, use of binary language, and unqualified definitions of parties to a marriage can negatively affect the rights of women in polygynous customary marriages. In *Mayelane*, the relevant legislation, the RCMA, lacked clarity on whether a first wife's consent is necessary for the husband's subsequent marriage.[133] In *Saleh,* there is a similar lack of clarity

122 Himonga and Pope 2013 *Acta Juridica* 332.
123 *Ibid* 335, 338.
124 *Ibid* 333, 335.
125 *Ibid* 320.
126 An example is *Mayelane* paras 5-7 and 29.
127 Section 3(1)(a)(ii) of the RCMA.
128 Himonga and Pope 2013 *Acta Juridica* 330.
129 Rwezaura 1995 *Journal of Family Law* 531.
130 Howland and Koenen *Social Justice* 3-4.
131 Rwezaura 1995 *Journal of Family Law* 532.
132 Olokooba "Analysis of Legal Issues Involved in the Termination of 'Double-decker' Marriage under Nigerian Law" *Nigerian Current Law Review 2007-2010.*
133 Himonga and Pope 2013 *Acta Juridica* 330.

in the LMA regarding the division of assets in polygynous divorce.[134] Rather than containing openly discriminatory language, the relevant legislation in both cases used silence or omission to discriminate against women in polygynous marriages. In other words, they failed to clarify the law with relation to polygynous marriages. In *Mukondiwa v Zimvumi* the court's invalidation of the pre-existing customary marriage illustrates the privileged position of civil marriages over African customary marriages, as well as highlighting the fact that even if a woman was unaware of her husband's subsequent marriage(s), she could be denied legal protection after his death. This issue is exacerbated by the silence of Zimbabwe's marriage laws regarding the position of polygamy.[135]

7 CONCLUSION: TOWARDS A NUANCED UNDERSTANDING OF DISCRIMINATION

This article examined the position of polygyny in the context of certain SADC member states' human rights obligations and the need to protect and affirm customary institutions. Using discourse analysis, we proposed that the marriage laws of these states should sidestep conflict between customary law and the rights of women in polygynous customary marriages to equality, human dignity, and non-discrimination. These laws do so via various discursive strategies such as legislative exclusion of customary marriage, avoidance of the word "polygyny", gender neutrality, vague definitions of customary law, use of binary language, and ambiguous usage of the word "party". We described these legislative strategies in two ways. The first is processes of obstruction, erasure, avoidance, and deflection of polygyny. The second is the construction of marriage as monogamous by default. We suggest that all of the above strategies can be characterised as discourses of silence, since in many cases, there is an absence of recognition, specificity, and clarification, which results in the marginalisation of women in polygynous customary marriages.

We argue further that discourses of silence allow states to avoid resolving their competing human rights obligations, thereby constituting discrimination against women in polygynous marriages. In contrast to women and men in monogamous marriages, women in polygynous marriages face considerable legal uncertainty, and, where the applicable customary law is discriminatory, enjoy fewer legal avenues to protect their marital interests. This is seen in the cases of *Mayelane* and *Saleh*, in which the rights and interests of one wife were side-lined as a consequence of vague legislative language on polygyny.

As a remedial measure, we suggest that African states should attempt to govern customary marriages in line with human rights obligations of equality, dignity, and non-discrimination. Instead of ignoring the complexity of polygynous marriage relationships, lawmakers should clearly define a customary marriage as a union of two or more individuals with equal marital and proprietary rights, subject, of course, to pre-nuptial agreements. Kenya's Matrimonial Property Act is an example of a law that provides explicit guidance for the regulation of polygynous customary marriages, cognisant of the individual contributions and interests of the various wives, whilst directly subjecting the practice of customary law to constitutional values.[136] It is therefore neither inherent nor necessary that southern African marriage laws use discursive mechanisms of "silence" to mediate potentially conflicting obligations of southern African states.

134 Howland and Koenen *Social Justice* 5.

135 Indeed, the prohibition of polygamy in civil marriages is only expressly indicated in s 104(1)(i) of the Criminal Law (Codification and Reform) Act.

136 Section 9 and 11 of the Matrimonial Property Act No. 49 of 2013.