

**Actualizing Women's Rights under CEDAW- A
Case Study of the Practice of Polygamy by the
Kabras Community of Western Kenya
(1984-2006)**

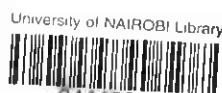
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Declaration

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This Dissertation has been submitted for examination with my approval as
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Signed: *Adams* Date *30/8/07*
Dr. Adams Oloo

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Dedication

This work is dedicated to my beloved and cherished children, Pearl Bella Awinja and Shelmith Jewel Omina who are the inspiration for my daily work. To these dear ones I say: 'The fear of the Lord is the beginning of Wisdom.'

AND

To my late mother, Janet Rebecca Ajiambo- for all that would have been.

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Last but not least, I thank all my classmates with whom I laboured in this interesting but challenging course; may the knowledge we acquired herein positively change the course of our country Kenya and indeed the entire continent of Africa!

To many others, who assisted in the proof reading, page setting, editing, printing of this work and those whose word of encouragement and support in numerous ways was invaluable as I studied for this course; God Bless you all.

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Art.....Article

CEDAW.....Convention on the Elimination of all Forms of Violence against
Women

CEDW..... Committee on the Elimination of Discrimination against Women

COVAW.....Coalition on Violence against Women-Kenya

CRC.....Convention on the Rights of the Child

CSW.....Commission on the Status of Women

DEVAW.....Declaration on the Elimination of Violence against Women

FIDA-Kenya.....Federation of Women Lawyers Kenya

FGD.....Female Genital Mutilation

FGDs..... Focus Group Discussions

ICESCR/ CESC.....The International Covenant on Economic, Social and Cultural
Rights

ICJ..... International Court of Justice

ICCPR.....The International Covenant on Civil and Political Rights

IFRA.....Institute Francais de Recherche en Afrique

KNHRC.....Kenya National Human Rights Commission

NGOs.....Non-Governmental Organizations

UDHR.....Universal Declaration on Human Rights

UN.....United Nations

Operational Definitions

Polygamy – meant in its popular usage, a marriage where one husband has more than one wife at the same time¹.

Polyandry-the opposite of polygamy; where one wife has more than one husband at the same time. The practice has never been prevalent in human societies and is condemned by all major world religions.

Bigamy- act of entering into a marriage with one person while still legally married to another. Bigamy is outlawed in most countries.

Polyfidelity/ Polyamory-all forms of multi-partner relating between adults which are ethical and consensual.

Discrimination – any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights, fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Violence against Women-any act of gender-based violence that results in or is likely to result in physical or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life.²

Equality- the state of men and women being equal; a state of no discrimination between men and women. Gender equality refers to the enjoyment of rights, privileges and life opportunities regardless of whether one is male or female.

¹. Other writers such as Kayongo and Onyango also understand it to comprise two types; polygyny where a man has two or more wives and sororal polygyny where a man marries two or more sisters. (Kayongo Diane and Onyango Philista, *The Sociology of the African Family*. Longman Group Ltd, 1984. p. 16)

². *Convention on the Elimination of All Forms of Discrimination against Women*, Adopted Dec. 18 1979, General Assembly (GA) Res. 34/180, U.N GAOR, 34th Session, Supp No. 46, at 193, Art 2 (a) U.N Doc. A/34/46 (1979) (entered into force Sept. 3 1981)(herein referred to as CEDAW), Article 1

Gender- refers to a social construction of femininity and masculinity that varies over time and place. It is constructed through learned rather than innate behavior.

Gender equity- concerns issues of asset sharing. It seeks to ensure equal access by both men and women, to economic resources including land, credit, science and technology, vocational training, information, communication and markets.³

Gender relations-rules, social relationships in society and cultures which together determine what is considered 'feminine' and 'masculine' and how power is allocated between and used differently by men and women.

Gender awareness/perspective- involves understanding the difference between sex roles and gender roles and understanding that gender roles being socially constructed and historically determined can be changed. A gender perspective and gender awareness based on the principle of equity.

Equity- fairness in access to resources, privileges etc. by both men and women.

Culture- customs, usages, traditions, or habit clusters, but as a set of control mechanisms for the governing of behavior.

³ . Beijing Declaration and the Platform for Action, Fourth World Conference on Women, Beijing, China, Sept. 4-15,1995, UN Doc. DPI/1766/Wom (1996)

CHAPTER ONE

1.0 Actualizing Women's Rights under CEDAW- Studying the Practice of Polygamy by the Kabrás Community of Western Kenya (1984-2006)

1.1 Introduction

Gender inequality and inequity has existed in society since the beginning of the history of mankind. While most communities in Western Europe and North America (hereinafter referred to as the West) have made notable efforts in addressing these imbalances, the rest of the world has not kept at par.

Practices such as polygamy, wife beating, preference for male children, denial of access to education and political offices by women, early and forced marriage, among others foster gender inequality. While it is not the focus of this study to address all issues of gender inequality or practices that result in the abuse of women's rights, this study focuses on what impact the practice of polygamy has had on the human rights of women among the Kabras community of Kenya.

The Judicature Act¹ sets out the sources of Kenyan law and places the Constitution as the supreme law of the land. The Kenyan Constitution however also allows for the application of customary law in matters of a personal nature² such as marriage, divorce, burial, succession and inheritance, adoption and custody of children where women's rights are most affected.

Kenya is also signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which is the International Bill on women's rights³.

¹. Chapter 8 Laws of Kenya

². Section 82 (4) (c) thereof

³. CEDAW

This study seeks to investigate whether subsequent to this ratification, Kenyan women are enjoying their legal rights as provided therein. Further, the study tests several hypotheses among which are that the non-actualization of women's human rights is directly linked to the lack of an appropriate legal framework to govern laws on marriages in Kenya.

The study was carried out in Malava District in Western Kenya which has the highest concentration of members of the Kabras community. The area also consists of both rural and urban settings and is easily accessible by public transport. The desk research herein found that there is a dearth of written and published work regarding polygamy; and especially as on the issue of its impact on the human rights of women. This discovery added to the impetus to conduct this study, as the findings there from will contribute to knowledge on theory building on the said subject.

Information was sourced from both primary and secondary data. Secondary data was sourced from among others, books, articles, journals, thesis, and other material available at the University of Nairobi and the Central Bureau of Statistics (Ministry of Planning and Development of Kenya). Primary data consists mainly of material obtained from interviews and observation of the respondents. Interviews will be both oral and written and shall be conducted through use of a questionnaire. The responses were recorded and the material collected cross-checked with what had been obtained from the secondary data for resolution of any discrepancies. The respondents were selected using stratified random sampling techniques and the researcher used Luhya, Swahili and English languages in which she is proficient in the course of her interviews.

1.2 Statement of the Research Problem

This study focuses on the cultural practice of polygamy among the Kabras, who are part of the wider Abaluhya Community of Western Kenya. I sought to investigate whether polygamy is an abuse of the human rights of women.

A question of concern in the study is that Kenya ratified CEDAW on 9th March 1984, but has not domesticated its provisions. CEDAW provides women with constitutional equality with their male compatriots and other rights such as the right to equal protection with men under legislation in all fields particularly the political, economic, social and cultural⁴. The said convention also provides for the provision by the state of appropriate means for practical realization of this; the undertaking by the state of all appropriate measures to modify social and cultural patterns of men and women with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or superiority of either sexes⁵ together with right to non-discrimination in all its forms⁶. Further, when Kenya acceded to CEDAW, it made a reservation on discrimination in economic, social and cultural life⁷. This article calls on state parties to take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights; in particular with regard to family benefits, the right to bank loans, mortgages and other forms of financial credit, and the right to participate in recreational activities, sports and all other aspects of cultural life. The implication of this reservation is that Kenya is not bound to implement those provisions. This study seeks to inquire into and explain why Kenya has not domesticated CEDAW twenty three years after its ratification.

Most specifically, I use Kabras women who are in polygamous marriages as a case study to examine how this position impacts on the human rights of women.

1.3 Objectives of the Study

1.3.1 Broad objective

This study investigates why Kenya though it ratified CEDAW in 1984 still condones the practice of polygamy that undermines women's rights.

⁴. Article 3

⁵. Article 5

⁶. Article 2

⁷. CEDAW Op. Cit Article 13,

1.3.2 Specific objectives

1. To demonstrate how polygamy among the Kabras Community of Kenya violates the rights of women.
2. To highlight the gendered aspects of Kenyan law in relation to the provisions of CEDAW
3. To contribute to global efforts and actions to recognize that women's rights are human rights through information and knowledge on the practice of polygamy.

1.4 Justification for the Study

In undertaking a study of the impact of polygamy on the human rights of Kabras women for the period 1984 to date, several considerations underpinned the various choices.

Like other cultural practices, polygamy as practiced by the Kabras, is a human rights issue that has had and or continues to have various consequences on the realization of women's rights. The need to conduct a study on this ancient practice cannot be overemphasized as it was long overdue; reasons advanced for this topic whether from an academic standpoint or for policy considerations are enumerated hereunder.

Concerning the Kabras and women, the choice was undertaken upon realization that the Kabras are one of the communities about which much has not been researched or written about. The researcher is also a member of the community and would not be hindered in her work by any cultural or language barriers. Economic considerations were also taken into account in considering the location of study. Malava district, which is home to the Kabras is also easily and conveniently accessible as it has a good road network. The year 1984 marks the time when Kenya ratified CEDAW and from when its provisions should have been availed to Kenyan women.

1.4.1 Academic Justification

In most discourses on cultural practices that impact on the rights of women, emphasis has been laid on female genital mutilation, wife/widow inheritance, as well as bride price, with hardly any mention being made of polygamy. It is the aim of this study to advocate for the inclusion of polygamy into its rightful place in discourses and debates on cultural practices that negatively impact on women's human rights.

The case study undertaken herein also provides a good reference point for future studies and to fill the gap in knowledge on cultural practices that have long been overlooked on the assumption that they are beneficial and or acceptable to women. This study also seeks to change the terms of the debate on polygamy and women's human rights by the inclusion of polygamy as a human rights issue⁸. Indeed it is debatable that the pursuit of human rights is far from complete for most of the world's women despite the fact that the international community has made concerted efforts to guarantee the dignity of women; the challenge still remaining is to re-conceptualize human rights, such that the human rights of women are seen as extending beyond the dictates of equality and non-discrimination to cover concerns that are more particular to women. This contention is intertwined with the challenge of looking at culture, religion and other tenets of group identity as tools for the dignity of the group and also for individuals. This information may lead to the conclusion that the next frontier in the demand for women's rights will be in marriage; with the call to either abolish polygamy or make it universal for all the parties therein!

1.4.2 Policy Justification

This study further seeks to highlight the fact that although Kenya has ratified CEDAW, it has not implemented it and this has led to women in Kabras being undermined through polygamy. The study seeks to find out what impact the practice of polygamy has had or continues to have on the actualization of the human rights of Kabras women who are the

⁸. According to Bunch Charlotte, in *Going Public with our Vision, Feminism in the 1980's-Book II*, Antelope, one of the achievements of the feminism is 'putting issues on the agenda' Publications, Denver, 1983, p.7

for women's human rights under Kenyan statutory law and those under CEDAW. Where inequities and inequalities under polygamous marriages exist which are found to contravene Kenyan law and the government's international obligations under CEDAW, then necessary recommendations have been made for the domestication of CEDAW, and or other policy considerations to create an enabling environment for women to actualize their human rights under 'acceptable' socio-cultural practices such as polygamy.

It is also hoped that information gathered in this study shall be used as an advocacy tool in influencing policy that enhances the legal status of Kenyan women and other vulnerable groups such as children who may be likewise negatively affected by this practice.

The study further assesses the pertinent issue of how far the CEDAW instrument and monitoring mechanisms have gone in influencing positive changes in national laws, policies and practices that affect the lives of women and in particular, the formulation of a family policy.

1.5 Literature Review

Desk research for purposes of collecting secondary data herein was mainly informed by a literature review of available material on the Kabras, the status of Women in the family generally and in particular, women in Customary Marriages; and women studies that touch on culture and the human rights of women. Upon undertaking the relevant review, findings indicated that there is limited literature regarding polygamy in general and especially on its impact on the human rights of women. Most available literature concerns marriage generally and indeed the researcher found that so far no studies have been conducted on the practice of polygamy among the Kabras community. Further, there is a dearth of literature concerning the Kabras community as a whole and the limited literature available on the Kabras is anthropological in nature. This factor placed on the researcher the onus of reviewing literature on women's rights issues from both a legal and sociological aspect.

1.5.1 The Kabras-Origins and Early History

Concerning their origins and early history, Wanjala⁹ found that the original name of the Kabras is Abanyala, named after Nyala, one of their ancestors. The name Kamarasi, given to them by their Nandi neighbors was adulterated by a British traveler in the 19th century to Kabras and thereafter become widely used after it was legalized by the colonial administration. The Abanyala are believed to have migrated from the Sudan to Abyssinia along the White Nile and into Uganda from where they moved to their present home in Western Kenya. They are mixed farmers and practice circumcision of males, an important ceremony which demonstrated bravery and was followed by acceptance of the initiates into society. Wanjala's study is relevant to the instant one as it gives the origins and migration pattern of our unit of study. It however has a gap on information concerning their cultural practices, some of which the researcher seeks to fill.

Simiyu¹⁰ builds on this information by providing further details about this ethnic community. His study contends that the Kabras are one of the seventeen sub-nations that form part of the Abaluhya who inhabit the western part of Kenya. They speak Luluhya language which is mutually comprehensible in all baluyialand with varying degrees of difficulty. He also propounds that the emergence of the Luhya nation still remains unsettled as there are conflicting traditions among the various sub-nations. His findings fit into this study as they illustrate that the cultural practices of the luhya nation conflict and are in certain instances inconsistent with those of other sub-nations ; for example, while the Kabras practice male circumcision, the practice is unknown among the Abanyala of Busia Kenya and Uganda who are part of the Luhya nation, while on the other extreme, there is information that the Bukusu, another sub-nation of the Luhya, practiced both male and female circumcision at one time in their history. This variation in cultural practices is what prompted the researcher not to focus on the Luhya nation as a whole but rather on one of its sub-nations, the Kabras in this study.

⁹ Wanjala and Kimokoti, Some Notes on the History and Culture of the Kabras of Western Province, 1995

¹⁰ Simiyu V.G, 'The Emergence of the Luhya Nation; A Research Agenda', Presented at the Western Province Cultural Symposium, 1995

Cotran¹¹ on the other hand illustrates customary law in Kenya by discussing the court's decisions in some cases which places them within a social and practical context. His main focus is on the socio-legal aspects of customary law and on how such law influences cases of a personal nature in Kenyan courts. As concerns marriage, he highlights the essentials of marriage, matrimonial rights and duties, divorce, return of dowry and the effect of death on marriage. He then makes recommendations among which is the necessity to harmonize the marriage laws in Kenya as a way of providing order in the family institution in the country. His study does not however consider the implications of the application of customary law on the human rights of women, which is one of the issues that concern this study.

1.5.2 Women in Customary Marriages & the Family

The plight of women in their struggle for equality, and the need for legal reform in Kenya is illustrated in the *S.M Otieno Case*¹² which highlighted issues affecting women's rights as emerging from the socio-cultural context, cultural norms and entrenched social beliefs. Significantly, the decision in this case implied that in addition to legal reform in the constitution and customary laws, societal attitude towards women and their place in the community, particularly in the modern context, has to change in order to accommodate and facilitate legal reform that would give the impetus to equality for women.

Stewart and Armstrong¹³ in the *Legal Status of Women in Southern Africa* acknowledge that the customary laws of the various countries allow for the practice of polygamy. However, apart from elucidating on the formalities and requirements for the same, they do not proceed to analyze the nature of the relationship and its impact on the rights of women which makes their study of little value to this one.

¹¹. Cotran Eugene , *Casebook on Customary Law in Kenya*, Nairobi University Press, 1987

¹². Virginia Edith Wamboi Otieno-vs- Joash Ochieng Ougo & Omollo Siranga, Civil Appeal Case No. 31 of 1986, Nairobi

¹³. Stewart Julie and Armstrong Alice, Editors , *Women and Law in Southern Africa* vol 2, University of Zimbabwe Publication, Harare 1990

Thadana¹⁴ on the other hand found that traditionally, the ideal form of marriage among the various tribes of Kenya is polygamy. Marriage is seen as having a collective aspect and in their relations with men; women are expected to be deferential, passive and subordinate. Her findings are greatly influenced by the socio-cultural background of patriarchy that is prevalent in Kenya and make no legal or moral judgments on this status-quo.

At national level, her study conducted in 1984 found that polygamous marriages accounted for one third of all marriages in Kenya and that 30% of all married women had co-wives, with those below age twenty-five accounting for 20 % of this group while those over forty years of age accounted for 40%. The said study further revealed that polygamy declines with educational attainment and that the proportion of polygamous unions by ethnic group were as follows; Luhya 35%, Mijikenda 39%, Meru/Embu 22%, Kalenjin 23%, Luo 43%, Kikuyu 12%, Kisii 33% and Kamba 26%.¹⁵

Kanyongo and Onyango¹⁶ are of the view that although families in the world have similarities, African students, lecturers and scholars find Western books on the family unsuitable for full understanding of the dynamics of African family life. Based on this fact, they argue that there is need for more books and research on African family life from a sociological point of view. Their book emphasizes sociological concepts and processes and deals with black African families south of the Sahara. Their study is an attempt to suggest common features of African families and acknowledge the many variations of African life while calling for more studies to fully record and describe these variations. They further contend that it is only after completion of such a study that a general synthesis, an ideal type or a theory of the African family can be attempted. According to them, in Africa polygamy equals polygyny. And that though outsiders feel that it is the major characteristic of African family life and that all marriages are polygamous, it is not true as studies have found that in Benin, Chad, Congo, Gabon, Kenya Mali, Niger, Senegal, Tanzania, Togo and Zaire,

¹⁴ Thadana Veena, *Women in Nairobi; The Paradox of Urban Progress*, 1978.

¹⁵ Republic of Kenya Fertility Survey 1977-78 pg. 81

¹⁶ Kayongo and Onyango Op Cit.

polygamous unions amount to 20.4-36.4% while in Burundi and Rwanda they only amount to 8.4% of all marriages.¹⁷

These authors call for a study on both traditional and modern variations of the practice of polygamy before making definitive statements about it. They mainly used data collected by anthropologists. *Life in families*¹⁸, gives an interesting interpretation of the family from a sociologists viewpoint. This book surveys many forms of the family and households among mankind. It asserts that the concept of socialization is the process by which a young man acquires and makes his own the values and knowledge of his group apart from learning the societal roles appropriate to his position in it. Of relevance to this study is the book's understanding of polygamy as comprising two types; polygyny where a man has two or more wives and sororal polygyny where a man marries two or more sisters. Polyandry is understood to be where one woman is wife to two or more men and fraternal polyandry where a woman marries two or more brothers.¹⁹

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*Women in Law West Africa*²⁰ conducted a study on gender relations in the family in which it found that the single most important issue that affects the rights of women in society to be the family.²¹ Further, that since the family is the cradle that shapes all activities on the wider scale of society, if it accords the proper respect and dignity to women, then the society will also do the same; the converse also being true. The above mentioned study was an addition to efforts being made to improve the status of women and affirmed that many studies on the family tend to discuss family law issues without questioning their underlying assumptions and implications for women. As a common ground with the proposed research herein is the position that it is important to enforce gender equity that is lacking in the community without jeopardizing the happiness of women with their families.²²

¹⁷. Kayongo Diane and Onyango Philista, Op Cit. p. 8

¹⁸. Hughes MacGill Helen, Editor, *Life in Families- Readings in Sociology Series*, Allyn & Bacon Inc, Boston, 1970

¹⁹. Ibid p. 16

²⁰. A Non-Governmental Organization whose study on Gender Relations in the Family-A West African Perspective, was edited by Akua Kueuywhia, Yemens Printing and Packaging Ltd, Accra, 2003

²¹. Ibid p. 6

²². Ibid

in *Patriarchy and Class*²³, one of the authors discusses the well established view that prevails in patriarchal societies, like the unit of study herein, that the social whole is inevitably more than the sum of its parts or that individual interests must always be subordinated to the social.²⁴ She argues that there are certain situations which call for the need to ask what the individual person's or woman's interests are instead of giving paramount consideration to the social whole.

1.5.3 Feminism, Culture and Women's Rights

Wallace²⁵ guides those who intend to use human rights to determine the current state of international law on vulnerable groups. She draws together a compilation of the international instruments applicable providing a commentary and conclusion on the success of these instruments and their protection measures. According to her, the vulnerable include women, minorities, indigenous people, children, and persons with disabilities, refugees and also migrant workers. Each chapter in her book sets out the relevant international instruments pertaining to the group under study with some additional critical commentary and analysis. She does not however touch on the practice of polygamy and its implication on the rights of women whom she has identified as a vulnerable group.

Ramazanogulu with Holland²⁶ write about the choices and challenges implicit in writing from a feminist standpoint. They argue that when feminists judge gender relations to be unjust and want to change them, they imply that they have knowledge of what social relations between men and women actually are and they are therefore expected to provide acceptable grounds for claiming that others should take their knowledge seriously. Further, these writers contend that the fact that feminists agree on so little, their many critics tend to oversimplify and unify diverse feminist positions; though what they have in common is a concern that

²³. Stichter Sharon and Parpat L. Jane. Editors, *Patriarchy and Class; African Women in the Home and Workforce*, Westview Press, London, 1988

²⁴. Ibid p.178

²⁵. Wallace Rebecca, *International Human Rights, Texts and Materials*, Sweet and Maxwell, London 1997

²⁶. Ramazanogulu Caroline with Janet Holland, *Feminist Methodology, Challenges and Choices*, Sage Publications, London, 2002

different knowledges of gender relations have different political and ethical implications. The writers argue that in feminist theories, any claim that all women are similarly subordinated and so can and should act collectively rubs up against actual experiences of differences between women and different ways of conceptualizing power; and further that feminist notions of social transformation are rooted in varied experiences of gender subordination expressed in varied theories of gender and power and incorporate a range of moral and political judgments on what constitutes injustice. Also, since the subordination of women is seen as injustice, strategies for tackling the injustice therefore imply some general notion of justice. The concept of social transformation through advocating for women's rights from a feminist standpoint will partially inform this study as it seeks to challenge the current status-quo in polygamous marriages.

Scot²⁷ uses patriarchy and biographical mode to gain insight into historical processes. She gives a narrative history by giving biographical sketches which range from the 18th-20th centuries and are composed of different purposes though all her subjects are women. She explains the absence of women in written history by saying that those who wrote the history started by making two assumptions; that a woman's natural place is in the home, and that history takes place on the battlefield and in congress, statehouse, pulpit, market place and the laboratory. Women therefore by definition do not make history and when they turn up in such places, they are simply not perceived. Making invisible women visible is a biographical dictionary issued on the assumption that women have played a vital role in the development of American culture. Her material provided the basis for new and more complex understanding of American females that was supposed to lead to the re-writing of segments of American history. Among her many arguments is one that in the patriarchal south where the dream was to support and idealize the patriarch, women could not consciously or

²⁷. Scot Anne Firor, *Making the Invisible Woman Visible*, University of Illinois Press, Urban and Chicago, 1984

unconsciously undermine the image designed to convince the world that 'feminists are wrong' and as such would threaten no open revolt²⁸.

Feminism is also the basis of Bank's²⁹ study which sets feminism in its historical context from the earliest beginnings of an organized movement through to its various stages of development. The study attempts to see old and new feminism as one single historical process and to assess systemically how one movement developed into another. She carries out a comparative study of feminism just as is intended in the instant study where this research shall also examine and compare the practice of polygamy from its traditional aspects to the current/modern forms. Bank's concept of feminism is also relevant herein as she uses it in the broadest way possible; referring to any groups that have tried to change the position of women and the variety of ways feminism has exerted itself. She also seeks to give understanding of the reasons for the rise of feminism and associates it with liberal Protestantism.

Christine Obbo³⁰ uses an anthropological approach to the question of women and also dwells on their invisibility in any serious study of history and society despite the comparative large number of female anthropologists. She further charges that material from male-centered perspectives should be never taken for granted nor regarded as an insoluble problem. Her study focuses on the social, political strategies of women within certain constraints.³¹

All the above studies deal with the issues of marriage, family and women from different conceptual frameworks and perspectives and have formed the basis of the identification of the conceptual framework for the instant study.

1.6 Conceptual Framework

This study has proceeded from the position that women in polygamous marriages in the Kabras community of Kenya are unable to actualize their human rights due to the fact that

²⁸. Ibid p. 23

²⁹. Banks Olive, *Faces of Feminism, A Study of Feminism as a Social Movement*, Basil Blackwell Ltd, 1981

³⁰. Obbo Christine, *African Women-Their Struggle for Economic Independence*, Zed Press, London, 1980

³¹. Ibid p.5

although Kenya has ratified CEDAW, it has not implemented it. Further, that their position is compounded by the fact that the laws governing marriages in Kenya are not gender neutral and that in their letter and application, these laws work to perpetuate gender inequalities which result in negative consequences for women. This study therefore calls for an appropriate legal framework in which women can fully actualize their rights, starting by domesticating international conventions like CEDAW that are specific to women's rights.

Most of the conceptual approaches to polygamy are influenced by the cultural theory of patriarchy which perceives women as being the weaker sex and therefore need to be protected for their own good. Further, that various cultural practices which seem to restrict women's conduct and access to resources such as lack of capacity to own land are for the good of the community and that it is only when women get married that they acquire belonging and status. Indeed, some scholars propound that polygamy is a reflection of the low level of development in society and of the socio-economic deprivation that leads to women being tied to men through cultural proprietary rights such as land tenure.

Closely aligned to this concept of patriarchy with which I contest is the concept of cultural relativism. Culture has been defined as the 'customary beliefs, social forms, and material traits of a racial or social group.'³² Though anthropologists lack a single, concise, fixed definition of culture,³³ it can best be seen not as customs, usages, traditions, or habit clusters, but as a set of control mechanisms for the governing of behavior. According to cultural relativists, human rights do not operate in a vacuum and have to be realized within a specific cultural context.³⁴ They examine practices that are deemed to be harmful to women by focusing on the cultural value of the material practice as opposed to the way it affects women. To them, if such a practice serves a purpose in uniting the community or maintaining its way of life, then its worthy of protection. Kim³⁵ argues that using culture to examine

³² Webster's Ninth New Collegiate Dictionary 314 (1985)

³³ Nancy Kim, Towards a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism, in Columbia Human Rights Law Review [Vol.25:49] p.88

³⁴ Canadian Human Rights Foundation, Manual of Reading Materials; International Human Rights Training Program-2001, p.4-42

³⁵ Nancy Kim Op Cit p.88

whether a practice preserves a communal identity simply maintains the status quo and impedes efforts to bring about social change. Since this study seeks to highlight the cultural practice of polygamy as oppressive to women, I disagree with the relativist definition of culture as anything that maintains the culture and which ignores several realities, such as the fact that their definition, in being absolutist fails to consider minority viewpoints and beliefs that co-exist with and are subsumed within the dominant 'culture' of the social group. Moreover, when examining whether women's human rights have been violated, the focus should be oppression and not culture. Rather than considering the cultural status-quo, the analysis should focus on whether a particular cultural practice systemically oppresses a class, such as minorities or women. To add on to this, the nature of each society's culture differs from individual to individual, and from sub-group to sub-group within the larger society; one may therefore legitimately say that the culture which relativists speak of is the dominant culture within society- the so-called culture of the society's power elite which excludes rebels, misfits and the disempowered such as women.³⁶ I therefore disagree with the position of cultural relativists espoused above, that human rights actualization must be viewed within the society's cultural context and I instead adopt Kim's position in this study.

Further to the above, relativists ignore the principal of universality of human rights that was inherent in the adoption of the UDHR as a common standard of achievement for all peoples and nations. The freedoms and rights guaranteed therein are of universal validity and application and a demand for a concept of human rights that is sensitive to cultural and religious particularities while undermining women's dignity is a threat to the actualization by women of their human rights. Further, since this study generally seeks to highlight the fact that Kenyan women cannot fully actualize their human rights under the prevailing status-quo, the concepts of universality and indivisibility of human rights are central to the discussion herein. The notion of universality of human rights which connotes that human rights belong to everyone irrespective of their origins and that of indivisibility which means that human

³⁶ Ibid p. 89

rights despite their categorization in terms of civil, political, economic, social and cultural rights are indivisible, is valuable to my study herein as it advocates for equality and non-discrimination of women in all areas of their lives.

Where this study however forms a nexus with culturalists is on cultural liberals focus on the rights of the individual as they pertain to lifestyle and conscience on such issues as sexual freedom, religious freedom and protection from government intrusion into private life.³⁷

Relativists further criticize feminism, another conceptual framework that is relevant to this study as a Western ideology. Feminism covers a diversity of beliefs, practices and politics which overlap and interact with other beliefs, practices and politics. Though the term 'feminism' by end of the 19th century, indicated the advocacy of women's rights ranging from working conditions, health, sexuality, political representation and other localized issues,³⁸ by the end of the 20th century it generally referred to both specific and more general theories of male dominance that took relations between women and men to be political and feminist struggles to be political activity on behalf of women. Feminism therefore entails some concept of power relations which is relevant to this study as it attempts to test as one of its hypothesis the fact that polygamy is a power relation which entails the subjugation of women to men and thereby denies them their human rights. Having said that however, feminism is diverse and entails different positions on common interests of women and there are parts of which may not be in consonant with this study. An example is radical feminism which arose in the early 1960s and advocates for the principle of male exclusion which is the equivalent of male rejection. This principle marks a point of departure with this study whose aim is not to exclude any gender from societal issues but rather to advocate for equality and equitable consideration in the cultural practice of polygamy as a social relationship. However, where radical feminism opposes patriarchy and women's oppression by men, then it becomes useful

³⁷. Gilpin Robert, *The Political, Economic of Interrelationship Contracts*, New Jersey, Princeton 1980, p. 13

³⁸. Ramazanogulu Caroline with Holland Janet, *Feminist Mehtodology, Challenges and Choices*, Sage Publications, London, 2002, p. 5

universality and indivisibility of human rights.

The notion of the universality of human rights connotes that human rights belong to all human beings irrespective of their origins while the idea of indivisibility of human rights connotes that human rights despite their categorization in terms of civil, political, economic and cultural rights are indivisible. According to the principle of indivisibility, there is no hierarchy of rights.

Though both concepts have been subjects of much debate which can be traced to the liberal revolution that swept Europe in the 18th century and the cold war alignments;⁴⁰ apart from the drafting of the two covenants- the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the United Nations (UN)reasserted the universality of human rights at a conference in 1968⁴¹. And the different views expressed on the universality and cultural relativism are best summed up by the assertion of the need to avoid selective application of the principle of the universality of human rights and promote universality on the premise that it respects other cultures without in any way undermining the principle itself.⁴²

As Fishbayn ably puts it, the issue of the relationship between gender equality and the claims of culture has been identified as an important factor in efforts to improve the status of women.⁴³ The conflict between women's human rights and some practices embedded in

³⁹. Banks Olive Op. Cit p. 229

⁴⁰. Several texts on the debates concerning these concepts have been written, for example that found in the Manual of Reading Materials by the Canadian Human Rights Foundation Op Cit. pp.4-33 to 4-52

⁴¹. Nations attending the UN Conference held in Tehran proclaimed that ' since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; and that the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.

⁴². Canadian Human Rights Foundation, Op Cit. p 4-50

⁴³. Fishbayn Lisa Op. Cit. p.33

cultural traditions raise some challenging questions such as whether human rights discourse seeks to impose universal values or culturally relative ones, whether the conflicts over human rights are indicative of an irreconcilable class of civilizations or whether human rights instruments like CEDAW reflect a Western/Liberal/Christian world view that is inconsistent with African/Islamic/Asian/Aborigine values. While it is not within the ambit of this study to answer all these questions, the study seeks to discuss how the claims of international human rights and the claims of women's rights can be reconciled, among other issues.

1.7 Hypotheses of Study

This study tested three hypotheses;

1. Polygamous marriages undermine women's rights in Kenya.
2. The resilience of polygamy in Kenya is a function of the degree to which Kenya has implemented CEDAW.
3. Polygamy as culturally practiced within the Kabras community is being phased out and replaced with new forms of polygamy.

1.8 Research Methodology

The research on the practice of polygamy among the Kabras and its impact on the human rights of women were conducted solely by the researcher herein and sources of information were drawn from both primary and secondary sources. The time spent to collect and analyze data from primary sources was four months and the target population was members of the Kabras ethnic community mainly in polygamous unions and inhabiting Malava district of Western province in Kenya.

Before embarking on the field research, a desk-research was conducted consulting past ethnographies of the Kabras people as well as papers published on the Kabras people from materials found in the University of Nairobi libraries at both the main and parklands campuses, the resource centers at the Coalition on Violence against Women-Kenya

(COVAW)and the Federation of Women Lawyers-Kenya (FIDA-Kenya)offices, the British council library and at Institute Francais de Recherche en Afrique (I.F.R.A). The researcher also ventured into the internet, newspapers, journals and magazines to gather information. This undertaking provided information that enabled the researcher to establish a link between this study and previous investigations. Secondary data was also instrumental in providing an important comparative source of data with the primary data and provided the foundation for the conceptual framework of the study herein. The material gathered from the two sources was then interwoven in the final analysis and interpretation of all findings.

For purposes of primary data collection, the main mode was use of a questionnaire that had been partly informed by the desk research. Some of the questions were to test the hypothesis formulated on the historical development and cultural significance, if any, of the practice of polygamy. The questionnaire was administered at individual interviews, Focus Group Discussions (FGDs) and small meetings. Its questions had been carefully selected and subjected to scrutiny and discussion by the researcher and her supervisor before a pre-test was done in Malava area. Necessary modifications to the questions were made at various stages before the formulation of the final version that was used in the field survey.

Further, the questions were quite straight forward and a deliberate effort was made to couch them in the simplest terms possible while still retaining their legal terminology. These unstructured/open-ended questions gave the respondents complete freedom of response as they were allowed to have the flexibility to use their own words. All responses to the questions were captured and recorded down in notebooks in Kabras, Swahili or English languages; with the former two being translated into English before being included in the final script. In most cases, the researcher administered the questionnaire during interviews with key informants and also at FGDs and meetings as most respondents did not have the ability to easily interpret the questions and/or give the required answers due to the quasi-legal nature of the research. It is however instructive to note that the questionnaire was not used

rigidly as further probing, enquiry and discussion/explanation were utilized where answers need further extrapolation and explanation.

Participant observation also constituted part of the strategies for primary data collection. Being a member of the Kabras ethnic community, the researcher was already conversant with certain aspects of polygamous practice in the community and she also speaks the local dialect; these attributes helped to inspire confidentiality among the respondents.

1.8.1 Sampling

Informants were selected using stratified random sampling technique. For individual interviews, purposive sampling was used with respondents being handpicked from a prior prepared list of members of the community that were considered to be key informants due to their supposed possession of the required information for purposes of the objectives of this study. The main criterion for their selection was age, ethnicity and marital status. Most informants were interviewed individually to provide them with privacy and a chance to freely express themselves, though this in the final analysis translated to more time being spent in the field.

For participation in small meetings and Focus Group Discussions (FGDs), respondents who were representative of the target population were randomly selected and sent invitation letters requesting their attendance. The main criterion used was knowledge of and about polygamy as practiced by the Kabras, while other factors such as age, clan and geographical representation were also taken into account. FGDs and small meetings were conducted in conducive conditions and at times that are convenient to participants with the ratio of females to males interviewed being 1.5:1 (representing one and a half women to one man) in most cases.

Information concerning the historical perspectives on the practice of polygamy among the Kabras was gathered from both male and female elders in the community who were randomly selected on the basis of geographical location within the study area only due to financial and

time constraints. For purposes of this study, an elder was considered to be any person above the age of fifty.

1.9 Project Limitations

The following factors negatively affected this project;

Time and resource constraints; I tried to seek funding for this work to mitigate resource constraints and I also planned the field work to take a maximum of four months. On the part of the respondents, they were interviewed at their convenience to circumvent time constraints.

I was also faced with limited collaboration from some of the respondents due to the sensitive nature of the research as it touched on matters of a private nature. I however advised them on the confidentiality with which the information they gave me would be treated and gave them a choice on whether or not to reveal their true identities. Where a respondent did not want to be identified, I used pseudonyms and except for FGDs and interview meetings, most of the respondents were interviewed in private.

Further, comprehension of the questionnaire and provision of appropriate information by the respondents proved problematic due to the quasi-legal nature of the study. I however made great effort to couch the questionnaire in the simplest terms possible to foster understanding and I also took time to explain the questions to the respondents to ensure that they were well understood.

CHAPTER TWO

2.0 Women and Human Rights

2.1 Introduction

In this chapter, I seek to demonstrate that women's rights are human rights and further, that women are entitled to all the rights provided under all international human rights regimes. A summary discussion of what human rights entail is made to show the universality of human rights and why women's rights are in fact human rights and ought to be considered as such. I further seek to demonstrate that despite the provision of the international regime of human rights to all persons, women have continued to be undermined in the realization of their rights due to several factors such as social customs, societal attitudes and even religion. I also highlight the paradox of the existence of women specific human rights instruments and proceed to rationalize this on the basis that the enactment of any laws in gender neutral terms fails to achieve the desired aim of protecting all persons; and almost invariably leads to the discrimination of the vulnerable, and for purposes of this study, women.

The history behind the adoption of CEDAW and international trends of its domestication are also discussed in this chapter with the intention of providing guidelines on how women's rights can be actualized and enhanced through diverse use of this vital instrument; these are indeed a demonstration of 'best practices' in catering for the women constituency. In effect, the chapter is an analysis of the right of women to equality and non-discrimination as provided for under CEDAW, in other human rights instruments; and also the implication of these rights on the human rights of women as a whole.

2.2 The Position of Women in International Human Rights

"The dogma of women's complete historical subjection to man must be rated as one of the most fantastic myths ever created by the human mind."

Human rights⁴⁴ have been variously described as rights which are fundamental and essential to human existence irrespective of color, gender, age, status and other categorizations. They are entitlements to individuals by virtue of being human beings and it is noteworthy that though the idea of human rights pre-dates the UN, it was however, within the setting of the UN that human rights achieved formal and universal recognition.

The horrors of the Second World War led states to adopt the Universal Declaration of Human Rights (UDHR) as a common standard of achievement for all peoples and nations. The freedoms and rights guaranteed therein were to be of universal validity and application and the concept of universality of human rights has therefore become one of the cornerstones of the international human rights framework. The 1948 UDHR constitutes the first international instrument to detail the rights and freedoms of individuals and contains 30 Articles covering the integrity of the individual, political and civil rights (such as freedom of thought, expressions, religion, association) and economic rights (such as right to employment, education and full participation in society). Echoing the Charter of the UN which encourages respect for human rights and fundamental freedoms for all people 'without distinction as to race, sex, language or religion',⁴⁵ the UDHR proclaims that everyone is entitled to the rights and freedoms it sets forth without distinction of any kind; including that of sex.⁴⁶

Since its adoption, the UN has worked to translate the principles of the UDHR into international treaties that protect specific rights. Today, over 60 treaties address concerns such as slavery, genocide, humanitarian law, human rights, the status of refugees and minorities.⁴⁷ Each of these treaties is grounded in concepts of equality and non-discrimination

⁴⁴. For a detailed definition, please refer to Shaw Malcolm, International Law, 4th Edition, Cambridge University Press from p. 198

⁴⁵. Article 1(3)

⁴⁶. Article 2 thereof

⁴⁷. The Convention Handbook, Op. Cit. p.7

contained in the UDHR, and many explicitly provide that the rights that they establish shall be available to women and men on basis of equality. For example both the ICESCR and the ICCPR adopted in 1966 provide that state parties to each instrument shall undertake to ensure equal rights of men and women to the enjoyment of all the rights set out in those treaties. The Convention on the Rights of the Child (CRC) adopted in 1989 similarly makes it explicit that the rights it contains apply equally to male and female children.⁴⁸

The UN Charter's vision of equality and non-discrimination, and the many international legal provisions which guarantee these values however proved insufficient to ensure women's equal enjoyment of international human rights. Building on the provisions of the UN Charter, which expressly affirms the equal rights of men and women, and the UDHR which proclaims that all human rights and freedoms are to be enjoyed equally by men and women without distinction of any kind; between 1949 and 1962 the UN Commission on the Status of Women (CSW), the body established within the UN system in 1946 to consider and make policy recommendations to improve the status of women, prepared a number of treaties including the Convention on the Political Rights of Women (1952), the Convention on the Rights of Married Women (1957) and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) which protected and promoted the rights of women in areas where the Commission considered these rights were particularly vulnerable.

In 1965, the Commission embarked on the preparation of what was to become in 1967 the Declaration on the Elimination of Violence against Women (DEVAW). Though this Declaration assembled in one single legal instrument the international standards for equal rights of men and women, it was however not a treaty; and therefore had only moral and political force. Such status established no binding obligations for states apart from only expressing concern that despite the progress made in the field of human rights generally, considerable discrimination against women continued to exist.

⁴⁸. Article 2 thereof

In 1972, CSW embarked on preparing a treaty which would give binding force to the Declaration and thus The Convention on the Elimination of all forms of Discrimination against Women (CEDAW), which was adopted by UNGAS in 1979 was a culmination of decades of international efforts to protect and promote the rights of the world's women. The new Convention moved beyond mere guarantees of equality and equal protection before the law in existing legal instruments and set out measures for the achievement of equality between men and women (regardless of their marital status and in all aspects of political, economic, social and cultural life). Under this Convention, State parties have an obligation to eliminate discrimination against women through legal, policy, and programmatic measures; further, this obligation applies to all spheres of life as well as in matters relating to marriage and family relations; and includes obligations to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.

The Preamble to CEDAW re-calls that the Charter of the UN and other international treaties proclaim the elimination of discrimination against women and the promotion of their equality with men as one of the central principles of the UN. It reminds the international community that despite the existence of these instruments, extensive discrimination against women continues to exist and that this violates the principles of equality and respect for human dignity. It also underlines that discrimination against women is an obstacle to women's participation on equal terms in all spheres of the life of their countries in the aforementioned areas and hampers the growth and prosperity of society and the family; apart from standing in the way of the full and complete development of a country, the welfare of the world and the cause of peace.

Each of the principle human rights instruments guarantees women the right to equality and non-discrimination⁴⁹. Article 1 CEDAW takes a broad view of discrimination as *"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of*

⁴⁹. UDHR Art 7; ICCPR Art 2(1); ICESCR Art 3, CEDAW Art 1, Banjul Charter Arts 3, 18 (3)

their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field". This definition encompasses all forms of discrimination, including both deliberate acts and passive omissions and covering actions of both government officials and private parties. While CEDAW was the first instrument to define discrimination this broadly, the prohibition of gender discrimination has had long-standing support in numerous international and regional instruments and conference documents and is a fundamental principle of human rights law⁵⁰.

2.3 CEDAW and Its Provisions – Ideal versus Practice in Select

Countries

The 1969 Vienna Convention on the Law of Treaties provides that every Treaty in force is binding on its parties and must be enforced by them in good faith. It also provides that a party to a Treaty may not invoke the provisions of its internal law as a justification for failure to comply with the Treaty. Becoming a party to CEDAW does not of itself ensure that women's rights are respected within the state party although it constitutes a commitment on the part of that country. State parties to CEDAW are accordingly bound to bring their domestic laws and policies in conformity with its terms. Such commitment is both *de facto* as well as *de jure* compliance and covers the whole range of civil, cultural, economic social and political rights addressed by the Convention.

The following are some of the ways (not exhaustive) in which states can undertake to implement CEDAW at domestic level by putting in place a series of measures to end discrimination against women in all forms and thus enhance their status;

1. Incorporating the principle of equality of men and women in their national constitution and legal systems;
2. Repealing all discriminatory laws and adopting laws that prohibit discrimination against women;

⁵⁰ UDHR

3. Establishing tribunals and other public institutions to ensure the effective protection of women against discrimination;
4. Ensuring elimination of all acts of discrimination against women by all actors be they persons, organizations or enterprises;
5. Reporting in accordance with the Convention to the Committee on the Elimination of Discrimination against Women on the progress it is making in implementing CEDAW.

While ratification of or accession to the Convention imposes duties on state parties in international law, the question of enforceability of its provisions at the national level is also dependant on the place of international law in the domestic legal system of each state party as provided for under their constitution.

In some countries, national constitutions provide that treaties become part of domestic law as a result of ratification or accession (this is referred to as 'automatic incorporation'). In other countries, their constitutions provide that treaties take precedence over national law, and in still others, treaties have the same force as domestic law. Many countries that provide for the automatic incorporation of treaties into domestic law also require their proclamation or publication in official gazette before such treaties can take the requisite force of national law. In such countries however, national implementation of legislation may still be required before an individual is able to invoke the treaty provisions before a domestic court.

Similarly, in those countries where treaty obligations must be incorporated by legislation in order to have domestic effect, an individual will still not be in a position to claim any benefit under the treaty in question unless it has been domesticated especially where its provisions are inconsistent with domestic law.

In Kenya, the constitution vests legislative power in parliament and also requires that international instruments be incorporated into Kenyan law by virtue of a Bill or Motion being passed in parliament thus making it an Act of Parliament.⁵¹ This position means that unless

⁵¹. The Constitution of Kenya Op. Cit. Sections 30 and 46

incorporated into Kenyan law, an international Convention such as CEDAW lacks the force of law in this country whether ratified by the Kenyan government, though paradoxically, the country will be bound by it in International Law. The reality of this position is that Kenyans cannot enjoy any rights accruing from such a Convention and neither can they rely on it in adjudicating their claims.

Despite the legal requirement of these various domestication procedures, Judges in a number of countries including those that require incorporation of international conventions before they become of use to its citizenry have increasingly taken account of CEDAW while making decisions concerning the rights and status of women. For example, in the case of *Dow v Attorney-General of Botswana*, the judges in the Court of Appeal in 1992 relied on international treaties and CEDAW which had then not been ratified by Botswana to uphold a challenge to the provisions of the country's nationality law which did not permit a Botswana woman married to a non-Botswana national to pass on her nationality to the children of the marriage, although a Botswana man married to a non-Botswana woman was able to do so⁵² (as is currently the position in Kenya⁵³).

Other countries have also sought to implement CEDAW by including the principle of equality between men and women in their constitutions and in this way provided the legal basis for the protection of women's rights. Such action is based on the fact the constitution of a country embodies the principles and laws that govern society and constitutes the fundamental law of the land as it serves as a foundation for other legislation. Incorporation of the principles of CEDAW into a country's national constitution takes place in several ways such as undertaking a constitutional review process before incorporating a guarantee of equality on the basis of sex in the constitution, or by proposing and adopting amendments to that effect. Consultations with the people and civil society organizations may be undertaken to gain popular support, raise awareness and more importantly, take into account the needs and concerns of the population before making the necessary amendments in the law.

⁵². Handbook for Parliamentarians Op. Cit. p. 47
⁵³. Constitution of Kenya Op. Cit. section 90

Such was the path taken by Brazil in 1998 when it revised its constitution to include extensive guarantees reflective of the Convention. Its constitution now contains provisions on gender equality, gender-based violence, state responsibility for the prevention of domestic violence, equality of rights within marriage, family planning and equality in government employment. The Brazilian constitution also revoked the principle of husband's leadership (*chefia*) of the family unit and established that 'the rights and duties relating to the conjugal unit be exercised equally by the man and woman'⁵⁴.

Other examples of initiatives to implement CEDAW can be found in Rwanda⁵⁵ where the Forum of Rwandan Women Parliamentarians launched in 2000, consultations amongst women to assess their needs and concerns to ensure that their rights were reflected in the country's new constitution. The results of these consultations were then merged into a document which was submitted to the legal and constitutional committee entrusted with the task of drafting the new constitution, so as to be taken into account in the drafting process.

In contrast but with the same effect was the action undertaken in February 1994 by the Women's National Coalition, a large umbrella of over 90 women's groups in South Africa. This group convened a convention which adopted the 'Women's Charter for Effective Equality' after an extensive participatory research and consultation project on the needs and demands of women. The Charter was then presented by women to the parties that were then engaged in negotiating an end to apartheid with the insistence that every party to the multiparty negotiations must have at least one woman in their delegation. As a result of the coalition's advocacy efforts, the South African constitution currently contains a number of significant provisions guaranteeing women's equality. The new constitution firmly entrenches equality in the country's value system among which are assertions that the democratic state is founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms; non-racialism and non-sexism.

⁵⁴ In line with Article 16 of the Convention
⁵⁵ All the examples extracted from the UN Handbook for Parliamentarian Op. Cit. p.43

The South African constitution also includes a clause which states that 'legislative and other measures' may be taken to 'protect or advance' people who have been disadvantaged (for purposes herein such as women). This is in accordance with CEDAW which provides for such temporary measures⁵⁶ aimed at accelerating *de facto* equality between men and women not being considered as discriminatory.

Legislation is therefore one of the ways in which the principles and objectives of CEDAW may be translated into concrete legal provisions that set out the principles, objectives and priorities for national action to establish equality between men and women. It is also an essential element in ensuring proper implementation of the Convention since such legislation would be meaningless if there are no enforcement measures to ensure respect for laws that address discrimination against women. Incorporation of such measures also points out the willingness to comply or the perception that promoting and respecting gender equality offers some advantage and becomes motivating factors in respecting such law.

An example of a country that undertook such enforcement measures is Japan which after ratifying CEDAW in 1985, enacted a series of laws aimed at bringing existing Japanese legislation into conformity with the principles and obligations set out in the Convention. Amendments made to the Equal Employment Opportunity law in 1985 were significant as they prohibited employment discrimination in the private sector. In 1997 the Law was further amended to strengthen its enforcement provisions by including measures for the disclosure of names of employers who ignored administrative guidance and by improving the mediation system.⁵⁷

⁵⁶. Article 4 of the Convention provides that states parties are allowed to adopt temporary special measures aimed at accelerating *de facto* equality between men and women, such as affirmative action, for as long as inequalities exist. Such measures are considered to be non-discriminatory, but should not lead to the maintenance of unequal or separate standards, and must be discontinued when equality of opportunity and treatment have been achieved. Examples of countries that have introduced affirmative action in politics are Morocco which in 1992 introduced a quota of 30 reserved seats of women in parliament, while France introduced a constitutional amendment in 1999 which requires all political parties to ensure that 50% of their candidates are women and includes financial penalties for non-compliance.

⁵⁷. Ibid p. 46

Other mechanisms for the implementation of CEDAW include the introduction of an equivalent of the Independent Commissioner for Women and setting up an Office of Women's Affairs as was done by Costa Rica; and the mainstreaming of gender perspectives in national policies by ensuring a gender-balanced partnership at all levels of decision-making, promoting safe domestic and workplace environments for women and children, and examining legislation with a view to safeguarding the human rights of women among others as was done by Fiji.

South Africa, the United Republic of Tanzania and Sweden also undertook some pioneering initiatives in domesticating CEDAW by making gender-sensitive budgets. This was in recognition of the fact that a national budget is key to the implementation of all public projects as it combines effective policy with financial means. Budgeting is therefore an essential tool in promoting equality between men and women; and in developing programmes and assistance to that effect.

Another effective measure is by launching awareness-raising campaigns in order to strengthen efforts to pass or amend legislation by informing women about the entitlements which they can claim after the legislation has been effected. The judiciary, administrative and other government officers and employees including police departments would also need to be informed and encouraged to respect these new entitlements in order for the claims to be enforced. This was the approach used by the Ministry of Gender, Labour and Social Development of Uganda which pioneered a paralegal training programme in one district to improve delivery of legal services in the community. Simplified booklets and manuals, including CEDAW, were prepared by the ministry on various laws to make them more accessible to the public. The ministry's efforts were later supplemented by other governmental and NGOs legal education and sensitization programmes in other districts.

The government of the Republic of Korea which also used this approach issued a number of publications on CEDAW in 1990 including a booklet containing the English and Korean versions of the Convention and the government's first two reports to the CSW. In 1995 and

1996, other publications on international Conventions relating to women included information notes on CEDAW and these materials were disseminated to the public and used to sensitize such personnel as public prosecutors, police officers, prison wardens and guards *interalia*.

From the above examples, it is clear that the ideals to respect, protect and promote women's human rights as enshrined in CEDAW are agreed priorities of the international community. Cooperation between and amongst countries is also necessary for the support of international, regional and national programmes to promote and respect women's rights. Such efforts should also help to provide support for the work of the UN specialised agencies, funds and programmes and other international organizations working to defend women's rights and to manage crimes that specifically target women such as trafficking in women which require cooperation amongst countries especially with border control, investigation and prosecution.

2.4 A Case for the Domestication of CEDAW in Kenya

The Convention on the Elimination of all forms of Discrimination against Women, CEDAW, is regarded as the main international instrument that emerged from the decade of women (1975-1985) and is considered a milestone in the gender debate which can be traced to the Declaration on the Elimination of Violence against Women, DEVAW, that was drawn by the Commission on the Status of Women in 1963 and adopted by UNGASS in 1967.

The history of CEDAW shows that it was unanimously adopted in 1979 with the sole purpose of eliminating discriminatory behavior that is adverse to women. The Convention provides that state parties should *'take appropriate measures to modify the social and cultural patterns of the conduct of men and women with a view to achieving the elimination of prejudices, customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'*⁵⁸.

⁵⁸. Article 9

CEDAW is basically the International Bill for women's rights and few causes defended by the UN have generated more intense and widespread support than the campaign to promote and protect the rights of women. The Charter of the UN, having prominently affirmed the equal rights of women and men helped lay the basis for the UN to build a structure of internationally agreed strategies, standards, goals and programmes to advance the status of women worldwide.

The Convention defines discrimination against women broadly (as *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field*) and establishes legal obligations for state parties to end such discrimination⁵⁹. Violence against women is also understood to encompass psychological violence occurring in the family, including traditional practices harmful to women, and violence related to exploitation. Such violence is deemed to be an obstacle towards the achievement of the objectives of equality, development and peace as it violates and impairs or nullifies the enjoyment by women of their fundamental freedoms

As of 6th March 2003, 171 States were party to the Convention⁶⁰ thus pledging to make equality between men and women a reality by providing equal opportunities in all fields, whether political, civil, economic, social or cultural as well as family life. Those states also committed themselves to reporting to the Committee on the Elimination of Discrimination against Women (CEDW) on steps taken at the domestic level to fulfil their obligations. CEDW is an expert body established by the Convention to oversee its implementation and to monitor progress in the status of women made in those countries that are parties to the Convention through the consideration reports.

Article 2 thereof
The Convention on The Elimination of all Forms of Discrimination against Women and its Optional Protocol, Handbook for Parliamentarians, a UN publication, 2003, p.3

On 10th December 1999, the Optional Protocol to the CEDAW was opened for signature, ratification and ascension by states that are party to the Convention. This Protocol provides for women whose rights have been violated and who have exhausted national remedies to seek redress from the CEDW once their government is party to it. It further empowers the committee to enquire of its own volition into grave or systemic violations of the Convention's terms.

Under CEDAW, governments are obliged to respect, protect and fulfil women's human rights. This duty to respect women's rights requires governments to refrain from taking action that directly violates these rights and to remove laws and policies that undermine women's status and violates their rights. It further obligates states to prevent and punish violations of women's rights whether by private actors or organizations. Actions to protect women's rights include taking steps to stop practices that are harmful to women and other social customs that heighten women's chances of being violated. A further requirement of this duty is for governments to take measures and in some cases, make expenditures that enable individuals to realize their rights.

The Convention provides for two procedures for its implementation; one is whereby states have an obligation to submit a report on the implementation of the Convention within one year of entry into force of the Convention for the state concerned and thereafter every four years or when the monitoring body established by the Convention, CEDW requests it.⁶¹ In these reports, states must indicate the measures they have adopted to give effect to the provisions of the Convention. The Committee discusses these reports with representatives of the state party and explores with them areas for further action.

The second procedure is the provision for two or more disputing state parties to refer disputes about the interpretation and implementation of the Convention for arbitration and if the dispute is not settled, to refer it to the International Court of Justice (ICJ). The Convention

⁶¹ Article 18

explicitly entitles State parties to declare on signature, ratification or accession that they are bound by this provision.⁶²

The Optional Protocol to the Convention also provides two further implementation procedures where a state is a party to both the Convention and the Optional Protocol; the individual communications procedure and the inquiry procedure. Under these procedures, the Committee is empowered to receive and consider individual complaints or complaints by groups of individual women from states that have accepted the protocol. The Protocol also enables the Committee to initiate inquiries into situations of grave or systemic violations of the Convention in states that have accepted this procedure.

Also already noted above, gender inequality and inequity has existed in society since the beginning of the history of mankind, but while most communities in Western Europe and North America (hereinafter referred to as the West) have made notable efforts in addressing these imbalances, the rest of the world has not kept at par. Practices such as polygamy, wife beating, preference for male children, denial of access to education and political offices by women, early, arranged and forced marriage, among others, foster gender inequality. Results from this study point out that governmental action that compromise women's rights and the socio-cultural realities that contribute to undermining women's rights require greater government attention and intervention.

A consideration of the provisions of CEDAW shows that considerable benefits would accrue to Kenyan women and the public in general if it were domesticated in this country. While it is arguable that Kenyan women are making considerable strides in claiming their position on the political sphere, women are still concerned about enhancing their economic status as a major step in freeing themselves from economic dependence on men. Economic dependence contributes to ensuring women's personal dignity and life choices. Consequently, the attendant rights of access to property, employment and credit are crucial rights that would be enhanced from the domestication of CEDAW⁶³. Similarly adequate

housing, food, clothing and overall living standards would be legally assured by such action⁶⁴.

Furthermore, since women are interested in working with the State to realize economic, social and cultural rights, it is crucial that they be accorded opportunity for education at all levels. In addition, based on the realization that culture has a direct impact on the rights of women to exercise fundamental rights and freedoms especially in developing countries, women should have a legal right to participate in the definitions of cultural values and content.⁶⁵ It is in light of this fact that CEDAW calls for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human persons. All governments are therefore morally obliged to uphold this Convention as women's rights are human rights and human rights are not only universal but indivisible.

It is interesting to note that many discussions on the applicability or otherwise of the provisions of CEDAW invariably centre on the controversial issue of universality and relativity. While relativists argue that CEDAW is inapplicable in certain cultural contexts, it is my opinion that such arguments ignore the principal of universality of human rights that was inherent in the adoption of the UDHR as a common standard of achievement for all peoples and nations. The freedoms and rights guaranteed therein are of universal validity and application and a demand for a concept of human rights that is sensitive to cultural and religious particularities while undermining women's dignity is a threat to the actualization by women of their human rights. The notion of universality of human rights connotes that human rights belong to everyone irrespective of their origins, while the concept of the indivisibility of human rights propounds that human rights despite their categorization in terms of civil, political, economic, social and cultural rights are indivisible; both these concepts are therefore fundamentally relevant to any efforts to domesticate CEDAW. In addition, it is my contention that it is also pertinent to focus on the rights of the individual as they pertain to lifestyle and conscience on such issues as sexual freedom, religious freedom

⁶⁴. Article 11

⁶⁵. Ibid article 15

and protection from government intrusion into private life when considering the benefits that would accrue to women from the domestication of CEDAW.⁶⁶

Further, it is important to bear in mind in such arguments that universality does not mean homogeneity –this distinction is important in the sense that while universality promotes the principle of equality and inalienability of human rights, homogeneity tends to reinforce *discrimination especially when diverse factors of violations of women's human rights are overlooked in the process.* Remembering that CEDAW is a common standard of achievement for the world's women and the freedoms and rights guaranteed therein are of universal validity and application, the argument of cultural and religious particularities should be ignored as such arguments undermine women's dignity and serve as a threat to the actualization by women of their human rights.

CEDAW's provision for the right to equality and non-discrimination before the law acknowledges women's social status as a significant factor in determining the quality of the life that they lead. Widespread discrimination against women is not only perpetuated by formal laws and policies but also manifests itself in harmful practices aimed at controlling women, particularly in their sexual and reproductive lives as is exemplified by polygamy and female genital mutilation

In acknowledgement of this reality, CEDAW therefore seeks to make governments responsible not only for refraining from acts of discrimination against women but also for modifying social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customary plus all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁶⁷ A domestication of CEDAW would therefore make the government of Kenya accountable, not only for its own direct discrimination(as indicated in its discriminatory legal provisions) but also for failing to intervene in social and cultural practices that marginalize or harm women.

⁶⁶. An argument advocated by cultural liberalists; see Gilpin Robert, *The Political, Economic of Interrelationship Contracts*, New Jersey, Princeton, 1980, p. 13

⁶⁷. CEDAW Op Cit. article 5 (a)

Of specific importance herein is the provision of Article 16 of CEDAW which requires States to *'take all appropriate measure to eliminate discrimination against women in all matters of marriage and family relations...'* This is based on the reality that women suffer from both direct and indirect forms of discrimination in their family life. Forms of direct discrimination include laws and policies that deny women equal right and privileges in marriage as is evidenced in the discussion of polygamy above; while broader and indirect discrimination in the area of marriage occurs when women are denied the same personal rights as their husbands in choosing a family name, profession and occupation. Furthermore, discrimination in the area of the family and marriage cannot be separated from the discrimination faced by women in every sector of society. CEDAW does well in placing on States the duty to modify stereotypical and harmful social and cultural patterns⁶⁸ which in turn places on states the obligation to put an end to customs, practices and socio-cultural norms that perpetuate discrimination against women.⁶⁹ Cultural practices such as polygamy are a form of gender discrimination that devalue women's dignity and grant them second class status in their own communities. In addition, certain groups of women face not only gender discrimination, but discrimination on such bases as economic status, geographical situation, age and marital status. Closely intertwined with women's rights in marriage is the provision by the Convention on the Rights of the Child (CRC) which specifies that *'child marriage and betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory'*.⁷⁰ As noted above, polygamy is also practiced on young girls despite its being illegal.

The domestication of CEDAW would further result in the increased valuation of women as women in Kenya are generally undervalued in the family. They are appreciated primarily for their roles as wives and mothers. Customary law and by extension Kenyan law places on wives a duty of obedience to husbands who in turn owe their wives a duty of protection.

⁶⁸ Article 5

⁶⁹ CEDAW art 2(f),5

⁷⁰ Art 21(2)

Polygamy which is a legally sanctioned practice that is widespread in Kenya, particularly in the rural areas gives only men the right to choose whether a marriage will be monogamous or polygamous thereby entrenching inequality in marriage;⁷¹ and as already discussed above, by application of the law, women's legal capacity may be limited by their marriage contract⁷².

In addition, while it is a well known fact that early pregnancy along with marriage prevents many young women from pursuing higher education which in turn leads to women's under-representation in the paid workforce; it is also clear that women typically work informally and are not paid despite national minimum wages guaranteed under the Employment Act. This situation results in women having few economic resources and which in turn results in the lack of access to credit and thus limits their access to professional training. Further, traditional attitudes about the proper role of women relegate them to the home making women who work outside the house more of the exception rather than the rule.

Further, domestic violence which is also closely tied to women's status in the family contributes to her social vulnerability as violence against women in its various forms is another manifestation of discrimination against women which not only prevents them from enjoying their right to personal dignity but also violates basic human rights norms ensuring gender equality. From the above, it is clear that discrimination against women in Kenya takes several forms all of which are linked to women's vulnerability and their exclusion from policy and decision-making roles that serve to further marginalize them. It is noteworthy that most important decisions about a woman's marriage or life generally are not made by the woman herself but by senior members of her family in contravention of CEDAW⁷³.

At the time of marriage, often the head of the household has to approve the decision to accept or reject a suitor. And once married, the principal decision-maker is usually the woman's husband or her father-in-law. Placed in such circumstances and without her own source of income, the woman is forced to become dependent upon her husbands or family for

⁷¹ The Kenyan Constitution Op. Cit

⁷² . Ref cow case This limitation is exemplified by the famous cow case in Thika whereby a woman

material support and these parties may not appreciate the value of a woman's dignity or sense of self-appreciation. Even at the determination of a marriage, a woman's family may refuse to allow divorce from a broken marriage as this may negatively affect her family's economic circumstances.

The non-actualization of the women's right to information as provided under CEDAW⁷⁴ is also reflected by many families' general distrust about women seeking advice from women networks, or educated women as they are seen to be home breakers. Attitudes such as these are found among many families both in the rural areas as well as cities; the lack of policies to empower women through education and access to relevant information is a general reflection of lack of governmental responsiveness to women's psychological conditions and needs.

The domestication of CEDAW would also enhance the visibility of women in political participation both at the national and local levels especially in Kenya where for example, only 8.1% of parliament is made up of women (after the 2002 elections there are only 18 women out of a total 222 members of parliament).⁷⁵ Such low political participation and representation illustrates the social barriers women continue to confront in both the public and private spheres. The negative gender impact of certain policy decisions that fail to take into account women's needs are usually a reflection of the lack or limited representation of women's interests at policy and decision-making levels.

Interestingly, a number of those interviewed during this study said that women needed to be made aware of the importance/about the laws on marriage in this country and the rights accruing thereto. Many of them were found not even to be aware that such laws exist; and this circumstance coupled with language barriers, non-accessibility and availability of the said laws in either Kiswahili or mother-tongue, puts women's prospects of familiarization with the laws that would enhance their rights in a sorry state. It is instructive that the need for information goes beyond provision of statutes but also includes explaining and empowering women to utilize the laws in their daily lives, plus stressing the message in a way that does

⁷⁴ Art 10

⁷⁵ For more particulars on statistics respecting women's representation in major public offices, please see The Kenya Women's Manifesto, a publication of The League of Kenya Women Voters 2006, p. 7

not alienate them particularly on such sensitive issues as sex which is a taboo topic in many communities and must be brought up with some caution.

Communal/Governmental insensitiveness to women's need for information concerning their rights in marriage has led many to receive contradictory advice. In the absence of solid information on the law and human rights, and effective communication on gender issues, many women continue to share rumours and myths about these issues. An example of such myths is the misconception and belief that women who claim their rights will be rendered themselves ineligible for marriageable/ be divorced which myth serves to prevent women from seeking to empower themselves.

In conclusion, one may say that while it is agreed that discrimination against women takes many forms and is perpetuated by many different actors, its elimination still poses a great challenge to governments in that not only must they review their own laws and policies to ensure non-discrimination but they must also address pervasive forms of discrimination that hinder women's ability to enjoy all their rights, including the right to equality in marriage. This is especially important when taking into account the fact that traditional attitudes, discrimination against women and the lack of legal protection hinder women's economic advancement and reinforce their economic dependence on men. They are thus disempowered from voicing their needs and making independent decisions about their marriages and other areas of their lives generally.

CHAPTER THREE

3.0 The Legal Foundations of Polygamy in Kenya

3.1 Introduction

In traditional society before the advent of marriage, men and women lived in communities and exercised sexual relations among themselves outside what is today known as marriage. The resulting children from these unions were then considered as belonging to the whole community and thus life went on. However, as society developed and social structures consolidated themselves, it became necessary that each man should have his own wife or wives to reduce conflict in the mainly patriarchal societies. This arrangement resulted in the institutionalization of marriage.

Marriages can be grouped into two broad groups; monogamous and polygamous marriages. Monogamous marriages are marriages involving two partners who undertake to marry each other to the exclusion of others; while polygamous marriages are marriages where one husband has more than one wife at the same time⁷⁶. Closely related to this is the situation of Polyfidelity/ Polyamory which entails all forms of ethical and consensual multi-partner relations between adults.

This chapter seeks to highlight the legal foundations of the practice of polygamy in Kenya. It starts with an examination of the provisions of Kenyan law that foster this practice and also discusses their legal implications for women. The aim of this discussion is to demonstrate that women's societal subjugation is not only based on factors such as societal traditions and attitudes but that in Kenya, it is also reinforced by the country's legal

⁷⁶. Other writes such as Kayongo and Onyango also understand it as comprising two types; polygyny where a man has two or more wives and sororal polygny where a man marries two or more sisters.
(See also Diane and Onyango Philista, Op. Cit. p.16)

framework. This section is then followed by a consideration of the gendered aspects of the Kenyan Constitution to show their impact on the legal status of Kenyan women. Herein, the researcher seeks to demonstrate that polygamy violates the women's right to equality and non-discrimination and contends that Kenyan women will continue to be second class citizens unless issues of gender are mainstreamed into the country's legal framework.

3.2 Kenyan Law on Polygamy.

In Kenya, the Judicature Act⁷⁷ lists the sources of law as follows:

1. The Constitution
2. Legislation which consists of:-
 - I. Acts of Parliament
 - II. Specific Acts of the Parliament of the United Kingdom cited in the schedule to the Judicature Act
 - III. English Statutes of general application in force in England on 12th August 1897
3. Subsidiary Legislation which is delegated Legislation made by Local Government Authorities, Statutory Boards and Professional Bodies such as the Medical and Dentists' Practitioners Association.
4. Common Law and Doctrines of Equity of general application in force in England on 12th august 1897
5. African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it 'so far as it is applicable and is not repugnant to justice and morality or inconsistent with written law.'⁷⁸

Further, under The Kadhi's Courts Act, Islamic law is applicable in cases where all parties to the suit profess Islam and only in relation to questions of Islamic law in matters affecting personal status such as marriage, divorce and inheritance.⁷⁹

⁷⁷. Cap 8 Laws of Kenya

⁷⁸. Section 3(2) cap 8 laws of Kenya

⁷⁹. Kadhi's Courts Act (Cap 11) Laws of Kenya

Together with these, Kenya has ratified several international human rights Conventions that deal with the human rights of women such as the United Nations Convention on the Elimination of Discrimination against Women (DEVAW), the United Nations Convention on the Elimination of All Forms of Violence against Women (CEDAW) in 1984 and the Beijing Declaration and Platform for Action of 1995. All these international instruments have however not yet been incorporated into Kenyan municipal law since the Constitution of Kenya vests legislative power in the parliament of Kenya and also requires that such instruments be incorporated into Kenyan law only by virtue of a Bill or Motion being passed in parliament thus making it an Act of Parliament.⁸⁰ This position means that unless incorporated into Kenyan law, an international convention lacks the force of law in this country whether ratified by the Kenyan government, though paradoxically, the country will be bound by it in International Law. The end result is that the citizenry cannot enjoy any rights accruing from such a Convention and neither can they rely on it in adjudicating their claims in a domestic court.

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Further to this pluralistic situation in Kenya's legal regime, Kenyan laws on marriage provide different rights to women depending on the regime of marriage under which their marriage was contracted. There are currently four types of marriages recognized under Statute Law namely Christian marriages, Civil marriages, Hindu marriages and Islamic marriages⁸¹. To add on to these, and not subject to registration, are marriages under the customary laws of the various ethnic communities, together with the recently developed 'Marriage by Co-habitation'. One may therefore safely say that Kenya has six systems of marriage and of these; Islamic marriages and marriages contracted under customary law are either polygamous or deemed to be potentially polygamous.

The Judicature Act⁸² apart from setting out the sources of law in Kenya also places the Constitution as the supreme law of the land. The implication of this is that in the event of any conflict between the constitution and another law whether written or otherwise, the

⁸⁰. The Constitution of Kenya ;Sections 30 and 46

⁸¹. Caps 150,151,155 and 157 of the Laws of Kenya respectively.

⁸². Chapter 8 Laws of Kenya

Constitution shall prevail to the extent of such inconsistency. While the Constitution of any country is supposed to embody all the fundamental principles and values of that country's people and to ensure that these values are given the fullest legal protection and grounding, the Kenyan Constitution also allows for the application of customary law in matters of a personal nature and thus gives way to a pluralistic system of law.⁸³

It is noteworthy that when the Kenyan independence Constitution was negotiated in London, there was only one woman in the delegation; which imbalance is reflected in the fact that the independence constitution ignores women's issues and contains provisions that entrench the discrimination of women in both public and private laws.⁸⁴ Succeeding amendments to the independence constitution have done little to improve the situation of women as can be borne out by the fact that presently, the spouse of a Kenyan woman is not entitled to Kenyan citizenship while the spouse of a man is⁸⁵. In addition, children born abroad to Kenyans become citizens only if the father is Kenyan; meaning that mother's citizenship counts for nothing⁸⁶. These examples serve to demonstrate that although the Bill of Rights in the current Constitution guarantees equal treatment in law, women do not benefit fully from these provisions. Indeed until 1997, it was perfectly legal in Kenya to discriminate on the basis of sex; and even constitutional guarantees of equality to date do not apply in matters of personal or family law under which women generally have subordinate positions and suffer various disabilities as shown by the above examples⁸⁷.

The legal basis of all these inequalities between men and women and the discrimination of women despite section 70 of the Constitution of Kenya which commits the state to ensure non-discrimination in public issues, can be traced to section 82 of the same constitution which points out that there are certain exceptions to the general rule and that gender

⁸³. Section 82 (4) (c) thereof

⁸⁴. Prof Yash Pal Ghai 'Seeking Guarantees of Equality' in Perspectives on Gender Discourse, Gender and Constitution –Making in Kenya, 1/02, Edited by Asegede Ghirmazion & others, Henrich Boll Foundation, 2002, p.7

⁸⁵.Section 82

⁸⁶. Ibid

⁸⁷. See note 83 above.

discrimination is permissible where it takes place with reference to matters of personal nature such as adoption, marriage, divorce, burial or inheritance. Also, discrimination is applicable under customary law in relation to a particular matter to one tribe or race, rather than another. In essence, the net effect of these constitutional provisions is to engender gender inequality in Kenya and as was rightly observed 'Making ... such customs and practices the centre of exceptions to Constitutional guarantees of gender equality, is tantamount to legitimizing the continued practice of gender inequality on a large scale'⁸⁸.

Indeed the legal system of Kenya recognizes both polygamous and monogamous marriages. Monogamous marriages may be contracted under the various statutory laws while polygamous marriages are provided for under the customary laws of the various ethnic communities and under Islamic law⁸⁹. Further, since Islamic law recognizes polygamous marriages, then it may be said that the recognition of these marriages under Kenya's statutory law legitimizes polygamy⁹⁰; and as there is no limitation to the number of wives a man may take under customary law, then the recognition of marriages contracted under customary law (which are also not streamlined or documented and require no registration), has the effect of legitimizing polygamy. It is noteworthy that the Judicature Act of Kenya affirms this position by making application of customary law mandatory where both/ all parties to the suit are Africans provided that the custom being applied is not 'contrary to any written law, or common law, or doctrine of equity nor repugnant to justice and morality'⁹¹. This repugnancy clause has been widely cited in Kenyan courts' decisions as exemplified in the *SM Otieno Case* which upheld the supremacy of customary law in a burial dispute.⁹²

⁸⁸. Task Force Report, p. 24

⁸⁹. The Mohammedan Marriage, Divorce and Succession Act, Cap 156, Laws of Kenya. Government Printer, Nairobi 1962.

⁹⁰. Sections 37 and 49, The Marriage Act, Cap 156, Laws of Kenya. Government Printer, Nairobi 1962

The sections prohibit any person married under the Act from contracting another marriage under customary law during the subsistence of the former marriage and states that save for that provision, nothing in the Act shall affect the validity of marriages contracted under customary law. Further, that's its an offence a person married under customary or Islamic law to contract a civil marriage under statutory law. .

⁹¹. Section 3 thereof.

⁹². Op Cit.

The recognition of both customary and statutory law in Kenya's legal system has created vagueness and ambiguity in the application of law to its citizens as customary law varies according to the requirements of each ethnic group (from tribe to tribe) and even at times between families. For instance, among the Kipsisgis of Kenya, a couple's consent is necessary before marriage can take place while for the Turkana and Pokot, the girl-child is betrothed to a boy from childhood. What is clear from these examples is that when partners are from the same ethnic community, customary marriages are at the surface level not a matter for concern; but when the couple is from different tribes, then the situation changes as the man's traditions are the ones that govern the marriage ceremony. Furthermore, when a dispute occurs and is taken to court, the judgement of the court tends to be based on the customs of the man's tribe that are also usually the ones that were followed to affect the marriage. This situation arises because marriage customs under customary law vary in appreciable ways from tribe to tribe (even within tribes).

What emerges from the above discussion is that while Kenya has unequivocally committed itself to treat men and women in the same way since '...no law shall make any provision that is discriminatory either of itself or in its effect,'⁹³ the prevailing reality is that this legal commitment is often diluted by certain customary practices such as polygamy. What is therefore needed now is concerted action to make both legal and policy guarantees a reality for women in Kenya.

3.3 How Polygamy Undermines the Human Rights of Women

In the premises, it is now befitting to consider how the institution of polygamy fares when compared to the regime of women's human rights highlighted above. The practice of polygamy is one of the earliest forms of marriage known among men and its practice has existed for a long time. While not widely practiced in Western countries as it is in Africa, polygamy is not unknown; though it is regarded in the West mainly as a religious, rather than

⁹³ Section 82 (1) Constitution of Kenya, Revised Edition 2001, Government Printer, Nairobi

as a cultural practice. For example in America and Canada, polygamy is tolerated largely because it is undertaken as a religious practice (and involves issues of religious freedom) and the people involved do not actually marry before the law, which action would expose them to be prosecuted for the offence of bigamy. What happens rather is that a man will marry one woman and "marry additional wives" in what they consider a spiritual sense.

In the United States of America (USA), Members of the church of Jesus Christ of latter – Day Saints brought the practice to Utah State in the 1940s when they settled there and the practice has continued since then. It is indeed their doctrinal teaching that polygamy will be part of life after death. In Western countries, the reason why polygamy is under scrutiny is for various reasons such as it's use to obtain social security benefits, the marriage of under-age girls by some polygamists and in some religious polygamist sects, the fact that women are treated as property and subjected to arranged marriages. A notable example of a religious sect that practices polygamy is the Fundamentalist Church of Jesus Christ of Latter Day Saints where their leader, Warren Jeffs in January 2004, excommunicated a number of men and in the process re-assigned their wives and children to other men.⁹⁴

Further, it is claimed that about 14,000 Christian polygamists exist world wide and most of them are based in Western USA in Utah which is inhabited by many Mormon polygamists.⁹⁵ However, while the Mormon church no longer openly advocates for polygamy and excommunicates those who practice it, various fundamentalist sects of Mormonism still hold onto early Mormon teachings that made polygamy central to it's faith⁹⁶

In Africa, polygamy is mainly a cultural practice and very widespread. While it is also allowed under Islam and other independent African religions, polygamy is mainly sanctioned by the cultural practices of most ethnic communities and is allowed under their various customary laws. Interestingly enough, though polygamy is allowed by the Koran, Moslems are also divided on the interpretation of the relevant teachings on polygamy. While most

⁹⁴ Polygamy offensive not likely, Green Case called an exception. Salt Lake Tribune, May 20 2001

⁹⁵ ibid

⁹⁶ Fletcher Stack Peggy, 'Mormon Scripture Doctrine and Covenants, 132 Polygamy Was Rejected Under the Gun', in The Salt Lake Tribune , March 14, 2004

agree that the practice is allowed, they contend that such allowance is subject to certain rules which some consider to be in fact a discouragement of the practice, with the ultimate intention of abolishing it altogether⁹⁷. Indeed it is noteworthy that most Muslims do not practice polygamy and that those who do so are mainly drawn from socio-cultural backgrounds that permit the practice.

An important factor for consideration in discussions on polygamy is the socio-legal status of women in the affected communities. The persistence of gender inequality in African societies is reflected not only in the statutory laws of most countries but also in the cultural practices of most of their ethnic communities. In addition, the existence of plural legal systems in Africa⁹⁸ that are sometimes in conflict with one another has been noted as often leading to substantial breaches of the principles of equality and non-discrimination. Even where legislative measures have been undertaken to amend or enact laws that address the inequality and discrimination of women, persistent negative societal attitudes continue to undermine such efforts with cultural practices such as polygamy (polygyny), payment of bride wealth or dowry, the father's undisputed right to the custody of children in the event of separation or divorce plus wife beating, *inter alia*, remaining determinant factors in undermining the status of women before the law. The resultant effect is that women do not enjoy the same rights as their male counterparts and end up becoming second class citizens both in their own societies and countries.

The institution of polygamy in Africa, and by extension among the Kabras of Kenya who are the focus of this study assumes mainly two forms. The first is the legally recognized marriage under customary law where all the rites and rituals of the relevant community in solemnizing the marriage are observed; and the second form is *de facto* polygamy or the emerging domestic arrangement known as '*marriage-by-cohabitation*' whereby a married man cohabits as husband and wife with a woman to whom he is not legally married. Such women are sometimes referred to or known as permanent mistresses and their position in

⁹⁷. Sura 4. v 3 Quran

⁹⁸. Where statutory laws that are mainly borrowed from English Common Law and the customary laws of the various communities are also applied in certain instances as seen in the example of Kenya given above.

society is legally precarious as the union/marriage is not recognized by the law. This type of 'polygamy' is practiced by some men who may have already contracted monogamous marriages under the various marriage laws⁹⁹ of Kenya and by traditionalists and Moslems who take up 'additional wives' (mistresses) without observing any recognized ceremony.

From the foregoing, it is apparent that an evaluation of polygamy against the international human rights regime does not fare well. In Kenya for example, under the customary laws of the various ethnic communities, a woman can only marry one man during the subsistence of her marriage; in contrast to a man who may enter into any number of marriages provided that each subsequent marriage is valid according to the customs of the ethnic community¹⁰⁰ from which he marries. A wife does not have any right to protest against the intended marriage that will turn her previously monogamous marriage into a polygamous one (or the addition of another wife where the marriage was already polygamous), and nor does she have any right to be notified about the intended marriage before it takes place or anytime in the course of its subsistence. The husband may choose even never to declare this subsequent marriage to his wife (wives) who or may not have heard or know of it. It is therefore quite apparent that there is no equality of status and or of decision-making, between the man and his wife (wives) in a polygamous marriage¹⁰¹ inspite of this being a basic human right. Furthermore, there is no legal duty to register polygamous marriages (and generally marriages under the customs of the various ethnic communities) in Kenya; a position which contravenes the provisions of CEDAW¹⁰². This situation makes it very difficult for a wife (wives) to establish whether her

⁹⁹. Currently there are four types of marriages recognized under Statute Law namely Christian marriages, Civil marriages, Hindu marriages and Islamic marriages⁹⁹. To add on to these, and not subject to registration, are marriages under the customary laws of the various ethnic communities, together with the recently developed 'Marriage by Co-habitation'. One may therefore safely say that Kenya has six systems of marriage and of these; Islamic marriages and marriages contracted under customary law are either polygamous or deemed to be potentially polygamous.

¹⁰⁰. As has already been noted, the validity or otherwise of an existing marriage is not an impediment to a man's desire to acquire another wife. Where legally untenable, the system can be beaten through marriage by cohabitation or taking up of a mistress.

¹⁰¹. Article 16 of CEDAW provides for equality in all matters relating to marriage and family relations and in particular, the same right to enter a marriage.

¹⁰². Article 16(2)

husband has taken on another mate (s) and therefore denies her an opportunity and right to information that ultimately affects her social and even legal status.

In polygamous marriages, a husband has an exclusive right to sex with each of his wives; while on the other hand, the wife/wives are only permitted to have sex with her/their husband. By guaranteeing the husband an exclusive right to have sex with his wife while denying a similar right to the wife, the law treats women as second class citizens in comparison to men. Interestingly also, under the customary laws of the various ethnic communities in Africa, and by extension Kenya, the husband's sole right to sexual intercourse with his wife/wives, also corresponds with his right to be compensated should there be any interference with this right. In many instances, a single act of extramarital sex by a wife is treated as adultery and therefore a matrimonial offence which attracts serious consequences for the indulgent wife, the adulterer and in some cases, even the woman's father/guardian.¹⁰³ Among the Luhya ethnic community to whom the Kabras belong, a man who commits adultery with a married woman is normally punished to compensate the offended husband with a bull or heifer and one goat. Such a woman's father may also be required to pay another heifer to the said husband and any children begotten out of such a liaison belong to the woman's legal husband. The offended husband even has a right to divorce his adulterous wife should he wish to do so and reclaim the dowry he had paid for her¹⁰⁴.

On the other hand, a woman in a polygamous marriage does not have exclusive rights to sex with her husband. As already noted above, he can have as many sexual partners as he wishes (through marriage of additional wives) and even sex with unmarried women is still considered to be within his natural rights; none of his wife/wives can succeed in any legal claim on the basis of the husband's adultery, and it's not even a ground for divorce¹⁰⁵. In this

¹⁰³. Mayambala N. Esther, Changing the Terms of the Debate: Polygamy and the Rights of Women in Kenya and Uganda, in East African Journal on Peace & Human Rights, Vol 3:2, p.215

¹⁰⁴. Cotran Eugene, Restatement of African law, 1 (1978) pp.55-57

¹⁰⁵. Ibid p. 179 (Most customary laws do not provide wives with the relief of divorce on the ground of a husband's adultery, in any event, polygamy of itself is inherently legalized adultery for the husband. Women who unwittingly and unwillingly find themselves in polygamous marriages are also more disadvantaged than

way, polygamy makes the husband and wife unequal partners in marriage and confers on them differing rights, privileges and obligations. While the wife is subjected to unconditional fidelity to her husband who remains her sole sexual partner until death or dissolution of their marriage, the husband on the other hand is under no such reciprocal duty.

Sex and sexuality are an integral part of a woman's reproductive self-determination and support for the right to reproductive self-determination is found in human rights instruments that ensure autonomy in decision-making about intimate matters. Such provisions include protection of the right to decide freely and responsibly the number and spacing of one's children¹⁰⁶, the right to physical integrity¹⁰⁷, the right to liberty¹⁰⁸ and the right to privacy¹⁰⁹. Women's lack of reproductive self-determination has also been found to have concrete effects on their health. Not only are they prevented from planning their pregnancies, which would allow them to reduce the risks associated with multiple and closely spaced births, but women who are pregnant may be inhibited from seeking the care they need.

Furthermore, society largely perceives women as mothers only; this perception is coupled with the expectation of them to give birth to many children so that they do not lose their husband to another woman or so that they can continue to have his favour. This perception and pressure is one of the underlying grounds for the continued practice of polygamy in many societies. To protect their vulnerable social status, women give birth to more children so that their husbands may not marry another wife, or sometimes they may continue to give birth in competition with a co-wife. Frequent pregnancy, child birth and breastfeeding affect the quality and length of a woman's life and thus directly impact on their right to life.¹¹⁰

their counter-parts married under statutory law which provides for adultery as a ground for divorce by either party in a marriage. The resultant effect of this status quo is that women find themselves having unequal status before the law based on the type of marriage they contracted).

¹⁰⁶ CEDAW Op. Cit. Art 16(1)

¹⁰⁷ UDHR. Art 3

¹⁰⁸ ICCPR, Op. Cit. Art 9(I)

¹⁰⁹ Ibid, Art 17 (I)

¹¹⁰ UDHR Art 3

In addition a new dimension to the reproductive health of women in polygamous unions and others in multiple-partner relations has been brought in present times by the AIDS pandemic. It is a well-known fact that Africa is the leading continent with the number of HIV/AIDS patients and that most of these people acquire the virus through heterosexual sex. Another factor is that persons with many sexual partners increase their chances of contracting the AIDS virus and passing it on to other partners. The implication of this is that a polygamous man has high chances of contracting the AIDS virus and passing it on to his unsuspecting wives as it is difficult for him or any of his wives to determine the HIV status of the other members in this sexual group and/or even guarantee their continued fidelity in view of the intricate sexual patterns that obtain in a polygamous union. The right of such women to reproductive self-determination is further hampered by the fact that generally married women are not in-charge of what happens to their bodies and even where they need to make decisions concerning issues such as the number and spacing of children, there is common practice by doctors to require spousal consent prior to permanent sterilization procedures unless it is necessary to protect the life or health of a woman.

As already detailed at the beginning of this chapter, International legal and policy standards lay the foundation for recognizing the rights to life, information, reproductive self-determination and many others as human rights for women in every country of the world. To this end, the Kenyan government has ratified the relevant international Conventions and has therefore bound itself to these standards on behalf of its citizens.¹¹¹ A violation of these rights and recognition of the many factors contributing to this violation continue to undermine the rights of women. All these rights can be realised by taking actions that lead to the observance of two distinct and fundamental rights; the right to equality and the right to non-discrimination.

The right to non-discrimination is grounded in women's right to equality, the most fundamental of human right guarantees. Several factors that impede women's enjoyment of

¹¹¹. See United Nations High Commissioner for Human Rights (UNHCHR), Status of Ratification of the Principal Human Rights Treaties, available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Feb. 26, 2007)

of cultural self-determination in Kenya begins with societal perceptions of women primarily in relational ways as mothers, wives or daughters instead of as individuals. This position is further reinforced by women's lack of access to economic resources which co-relates with their lack of decision-making power. In addition, the law further undermines women's autonomy by sanctioning for the application of customary law in matters of a personal nature.¹¹² Finally, women's ability to seek redress in the first place is also impeded by their lack of autonomy and decision-making power at family level.

Under international and regional human rights instruments, international consensus documents and national laws, all governments are under a legal obligation to address each of the factors contributing to women's inequality. Binding international legal instruments also identify a responsibility belonging to all members of the international community to work towards realization of these rights to women all over the world.

Indeed it may be said that pervasive discrimination against women contributes to devaluation of women's life and is a measure of societal neglect of women; and that violence against women in its various forms and discrimination against women also violate basic human rights norms that ensure gender equality.

¹¹². The Constitution of Kenya, section 82(4) allows for the application of discriminatory laws with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

CHAPTER FOUR

4.0 Research Findings

4.1 Introduction

This chapter presents the findings from the data collected in the research in Kabras and is divided into two main parts. The first part consists of interviews and case studies which give insight into the current practice of polygamy by the kabras. Findings indicate that though the practice of polygamy is very prevalent among the kabras, most members of the community do not support its existence due to the inherent strife that it seems to portend. The chapter also considers the changing face of polygamy- termed herein as the old and new polygamy and highlights the differences if any, between the two practices, and the reasons for such differences. The term 'old polygamy' is used to apply to polygamy as practised in the period before the 20th century while 'new polygamy' covers the period from 1984 to date. The aim of this discussion is to demonstrate the institution's lack of social and other guidelines which in effect puts the women therein at the mercy of the 'polygamist'. It is the researcher's contention that the inherent ambiguity of the woman's position in a polygamous marriage is what engenders the abuse of her human rights.

The final part of the chapter revisits the debate on polygamy and gives a critique of its relevance or otherwise to society. This serves to demonstrate that polygamy's continued existence largely serves individualistic purposes and has no overall benefit to the larger society.

The sources of information in this chapter are mainly primary data gathered from interviews with members of the Kabras community in the seven areas of Shivanga, Namagara, Namushiya, Makwaboye, Matioli, Duka Moja, Matioli within Malava district of western Kenya. This region was chosen as it has the highest concentration of members of the

Kabras ethnic community and also due to the fact that it combines both urban and rural populations which were convenient for comparative purposes as the researcher believes that there are certain features that are peculiar to either group. The location was also of great advantage in terms of mobility due to time and resource constraints.

The sample strategy used was a combination of stratified and convenience sampling¹¹³ which means that the regions were selected via the criterion of the broadest diversity in order to achieve a balance of data.

The study targeted respondents who were knowledgeable on the subject matter of the research and to get a balanced representation of data, all types of marital status was taken into account. The respondents' profile is provided in Appendix C of this report. Both qualitative and quantitative research methods were employed to collect the data presented herein. Participant observation and tape recording also constituted part of the data collection methodology.

The main research instrument was a questionnaire which was developed, pre-tested and used in all the interviews. Informants were interviewed individually to provide them with the requisite privacy and also the chance to freely express themselves due to the nature of the study. The flip side of this however is that it entailed a lot of time being spent in the field. Further to individual interviews the researcher also conducted four interviews on the historical development and cultural significance, if any, of the practice of polygamy. This was mainly with elders who were randomly selected on the basis of geographical location within the study area. All the information gathered from the respondents was recorded in notebooks in Kabras, Swahili and English languages with the former two languages being later translated into English before being included in the final script.

It is noteworthy that several factors contributed to the success of the research. First and foremost, being a member of the Kabras ethnic community was an added advantage as the researcher possesses good knowledge of the research area which made movement from one

¹¹³ Blaxter L, *How to Research*, Open University Press, Buckingham, 1996, p. 79

area to another much easier. Furthermore, she was already conversant with certain aspects of polygamous practice in the community and her knowledge of Kabras language helped to inspire confidentiality among the respondents. Constant consultation with the supervisor and prompt advice made work easier. Finally and not least in importance was the fact that most respondents were cooperative while discussing issues related to the research and gave honest views and suggestions.

However, inspite of all these numerous facilitating factors, various constraints were also encountered in the course of the research. Getting people to fill and hand in the questionnaire was a challenge as most were semi-literate and could not therefore give the expected answers; at times the researcher had to explain, discuss, translate and even probe further to be get the required information. All these needed a lot of patience and made the whole exercise time consuming. Overall, the net effect was a delay in the analysis and compilation of the draft report.

4.2 Reality vs Hypothesis; Results of the Fact-finding

1. Understanding the terms 'Human rights', 'Discrimination' and 'Gender Discrimination'

A study conducted by the Kenya National Human Rights Commission (KNHRC)¹¹⁴ found that there is a regrettably low level of appreciation of the principles and obligations of human rights among Kenyans. This was mainly due to the fact that there is no access to information which is an important determinant of what actions (if at all) citizens take against the government or non-state actors as far as claiming and protecting their rights. Seeking redress by citizens is therefore highly constrained by this factor which undermines the obligations to respect and protect human rights. These findings by the KNHRC were consistent with our findings in the seven regions of Malava district where the respondents were asked to give an

¹¹⁴ Kenya- The State of Human Rights Report 2003-2004, Deficits, Critiques and Recommendations, KNHRC 2005, Nairobi, p. 2

understanding of the terms 'human rights', 'discrimination' and 'gender discrimination' (illustrated in Table 1 below).

Of those interviewed, 58.82% were found to have a correct understanding of the term human rights, 35.29% had a limited understanding while 5.88% indicated a total lack of understanding of the said term. This is contrary to 94.11% respondents who understood the meaning of the term discrimination and 5.88% who had no idea of what discrimination entails. All the respondents interviewed displayed a correct understanding of gender discrimination. These respondents, comprising men and women with a diversity of marital status (married, widowed and single) ranged from age twenty-two to seventy-six.

It is noteworthy that forty-three years after Kenya's independence and the enactment of the country's constitution which contains a Bill of Rights, many Kenyans still do not know what is a human right.

Table 1: Findings on 'Human rights', 'Discrimination' and 'Gender Discrimination'.

Term	Understand well	Limited understanding	No understanding
Human rights	58.82	35.29	5.88
Discrimination	94.11	0	5.88
Gender discrimination	100	0	0

• Research Findings in Kabras by S.Chivusia

2. Awareness on the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

According to data collected from a research by FIDA-Kenya in four provinces of Kenya (Nyanza, Western, Nairobi and Coast)¹¹⁵ majority of the respondents indicated that they had not heard of CEDAW. The main reason for this was because such documents do not reach them as no efforts are made to disseminate the provisions of the said instrument. The significance of these findings which are similar to those herein is that almost twenty-three years after the ratification of CEDAW by the Kenyan government, much still needs to be

¹¹⁵ Report of a Baseline Survey on the Level of Awareness and Impact of CEDAW on Rural Women in Kenya-FIDA. 2006, p.15

done to educate the populace on the existence and contents of this international bill on women's rights.

With the exception of one respondent, none of the respondents had ever heard of CEDAW or had any knowledge of what it advocates for (Table 2). These findings support the rationale for one of the objectives of this study which was an enquiry on whether the governments' ratification of CEDAW has had any impact on the rights of Kenyan women in general and kabras women in particular.

The findings further illustrate the lack of awareness of the government's activities concerning internationally binding legal instruments. In the premises, the citizenry of this country, who are kept in the dark, do not have an opportunity to utilize such instruments to adjudicate their claims or take any advocacy efforts to pressure the government for their domestication. A case in point is CEDAW which was domesticated over twenty-two years ago and yet much has not been done to educate the citizenry on its contents and provisions. It is therefore not surprising to find that such ignorance of the convention's existence could only lead to a similar ignorance of its contents as evidenced hereunder.

Table 2: Awareness on CEDAW

Item	Findings
Heard of CEDAW	5.88%
Never heard of CEDAW	94.11
Knowledge of what it advocates for	5.88
No knowledge of CEDAW	94.11

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Despite their ignorance of the existence of the foremost instrument which advocates for women's rights, the respondents however displayed a high sense of awareness of areas in which women are most violated. Foremost in the areas given were property ownership rights, especially as regards to ownership of land, access to education and certain professions, and also the non/ limited –involvement of women in decision-making positions.

KNCHR¹¹⁶ found that the right to own and inherit property is cross-cutting and transverses the realm of civil, political, economic, social and cultural rights. Further, that the said right is central to the true empowerment of everyone in society and is a key developmental right. The same study supports the findings herein that emerging and social trends indicate a practice that has largely worked out to the detriment of women in virtually all communities and social classes in Kenya. The Kabras cite examples of males being favored in inheriting property from their parents and in general ownership of property, especially land. Women are also generally not involved in decision-making and most taboos and negative cultural practices are directed at them. For example, kabras tradition dictates that women should not eat certain foods like chicken gizzard and eggs as they were considered to be delicacies and therefore a preserve of males. The afore cited study by KNCHR also found that the power of culture, combined the lack of access to the justice system due to high costs and prohibitive procedures, makes it impossible for the vast majority of women in Kenya to enjoy the right to own and inherit family property. It is instructive that a search at the court registry in Butali Law Courts¹¹⁷ found that no case had been filed in court challenging either polygamy or the denial of women to inherit family property as a human rights violation.

Another study on land and human rights¹¹⁸ supports the above sentiments that gender discrimination, especially in the allocation and transmission of land rights has become a serious impediment to the organization of sustainable livelihoods in a continent in which women and children remain the primary managers of land.

3. Views on Marriage

Respondents in Kabras were also questioned on whether they had contracted their marriages through church/statutory law weddings or under customary law. Interestingly, though most respondents were found to be in polygamous marriages several of them had contracted their

¹¹⁶ From Despair to Hope, Women's Right to Own and Inherit Property; KNCHR Policy Project-Kenya, 2005, p. iv

¹¹⁷ The only court in Kabras area, wherein this research was conducted between March and June 2007

¹¹⁸ Reported in *Nguzo za Haki*, issue no. 5, April 2005, p. 6 (a KNCHR publication)

marriages under multiple and even at times conflicting regimes. For example, almost half of the men were found to have married one wife under customary law and another in church; thus resulting in a conflict of laws since under Kenyan statutory law a person who contracts a marriage in church (under the African Christian and Marriage Act which is a monogamous type of marriage) lacks capacity to contract another marriage while the previous marriage is still subsisting.¹¹⁹ The implication of these findings (illustrated in Table 3) therefore is that either, most of the subsequent marriages contracted under customary law are not recognizable under Kenyan law, or in cases where the first wife was married under customary law and her co-wife in church, then the first wife's marriage is not legally recognized. This scenario, found frequently in most homes, reflects the confusion and ambiguity still subsisting and persisting in Kenyan marriage laws and which calls for urgent resolution as it places women under great disadvantage.

A further interesting outcome of the study is the finding on the most preferred form of marriage among the respondents. While most men interviewed were found to prefer polygamy, most women preferred monogamous marriages, though paradoxically, a combination of the findings suggests that monogamy is the marriage of choice for most respondents!

Arguments were advanced in favor of both polygamy and monogamy by the respondents. Those who support polygamy said that it makes the husband to feel comfortable since he is able to distribute duties to wives for easy accomplishment as the wives assist each other with chores. The rationale for this may be premised on the old adage that many hands make work light as it was also said that polygamy provides more security due to the greater number of children. Further, it was said that polygamy is favorable as many wives stand a better chance of demanding inclusion in decision-making as their combined pressure can lead to the husband acknowledging their strength and therefore giving in to their demands. This would

¹¹⁹ Marriage Act Op. Cit section 37.

be due to the fact that ideas, duties and responsibilities will be shared and the family made to work as a team

Those who preferred monogamous marriages opined that such marriages are better because the idea of discrimination does not arise frequently as is the case in polygamous marriages where discrimination may be rampant due to preferential treatment of one wife/family over the other. It was also said that less conflicts occurred in monogamous marriages as compared to polygamous ones where resources have to be shared among a larger number of persons. It was also advanced in favor of monogamous marriages that wives therein stand higher chances of making decisions as compared to their counterparts in polygamous marriages since such a wife is closer to her husband as she is the sole focus of his marital attention in the home.

Table 3: Findings per Marriage Regime

Type of marriage contracted	Findings
Church	40
Customary	60
Preference for marriage regime	
Polygamy	
Men	66.66
Women	37.5
combined	44
Monogamy	
Men	33.33
Women	62.5
combined	56

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On the issue of equality in marriage, the respondents said that equality would be realized if men were made to share resources/duties equally with wives and if there is equal distribution of resources. Some were of the view that if every member of the family is given a hearing and the husband does not regard himself as the boss but is always willing to consult and seek advice from his wives, then the inequalities in marriage would be reduced. The said respondents did not however give particulars of how these suggestions could be 'implemented' to achieve the desired effect. Other suggestions given were education of people concerning their rights so that none violated or was violated by the other party in marriage. Also that if women are given an opportunity to air their views regarding cultural practices, then most negative ones would be eliminated and this would result in uplifting their status in society.

Most respondents were found not to have heard of any court challenging polygamy and most of the cases that they cited concerned conflicts over resources but not polygamy *per se*. This is consistent with the researcher's findings at Butali law courts¹²⁰.

4. The Changing Face of Polygamy among the Kabras

All respondents were in agreement that the institution of polygamy has undergone some changes from what was known in pre-colonial times, one reason being that the community no longer venerates/considers one as important or wealthy for having many wives. This was mainly due to the attendant greater number of children and wives to provide for more security and labor. Further, due to education, religion, economic restraints and westernization, the practice is on the decline.

The salient features of the practice of polygamy among the Kabras were found to be firstly that the Kabras practice polygamy differently from other communities as co-wives do not share the same house or do anything as a common unit. Further, the man is required to build a house for each of his wives and have his own separate house at the centre of the

home. Such a house is deemed to represent the neutrality and independence of the man of the home. Currently however, it was found not to be uncommon to find a man housing all his wives in the same house. This is however discouraged and frowned upon by most members of society as it is deemed to engender strife and negative competition that seems to be an inherent part of the institution.

Other features of polygamy among the kabras were that a man could not marry the sister to his wife as it was considered an abomination for a man to have sexual relations with women who have blood relations. Due to cultural influence however, this may now occur though it is still very rare, and shunned by the community. Previously and even today, the consent of the first wife was not sought as it is believed that men are the ones to make the decisions; the man is considered to be the head of house and with no duty or obligation to consult on this or any other issue. It was also found that polygamy was previously a common practice among older people but currently even young men are getting increasingly involved due to peer influence.

5. Polygamy and Human Rights

Generally when asked on the impact of polygamy on the human rights of women, 82.35% of the respondents said that it has a negative impact due to such reasons as the unfair/unequal distribution of resources, the inherent favoritism of one wife over the other which leads to lower/lack of self-esteem in those who feel that they are not as loved; the placement of the husband in a superior position compared to his wives as they have to compete for his favor and the resultant treatment of women as objects.

17.64% of the respondents said that *if well practiced*, then polygamy would have no negative impact on the wives' human rights. It is however instructive that these respondents were not able to provide further particulars of what *'if well practiced'* entails. 100% of the respondents said that polygamy has negative effects in society and gave reasons such as it creates conflicts, results in poverty due to the attendant strain on resources and mockery of the neglected wife and children.

4.3 Polygamy; Still Relevant?

Despite the fact that polygamy perpetuates inequality of the sexes and gives rise to various harms, the practice has continued unabated for innumerable generations. This premise then begs the question as to whether polygamy is still relevant in the present age and time as several reasons exist as to why polygamy is both legally and socially undesirable.

It has been severally said that polygamy treats women as second class citizens entitled to fewer rights than men as no consideration is given to the effect that subsequent marriage or marriages have on the wife not only in terms of tangible deprivation of material and sexual satisfaction but also in relation to intangible values such like self esteem. By recognizing and endorsing this practice therefore, society fails to recognize that a wife has been wronged. This failure to recognize the wife's predicament in turn results in failure to provide a remedy for a woman who would want to opt out of a polygamous marriage.

To add onto this, society does not recognize the right of a woman to divorce her husband for marrying another wife or even engaging in extramarital relations with unmarried women; while at the same time it makes provision for the husband by giving him the right to divorce his wife even for a single act of adultery. The effect of this situation is that polygamy allows one spouse to unilaterally and fundamentally change the quality and nature of the couples marriage and family life which power puts the other party(always the woman) at a disadvantage and makes her forever at the mercy of the 'powerful' party(always the man).

The justification that polygamous husbands have the ability to financially cater for extra wife and kids and should therefore marry unabated is also found to be wanting. It is not unknown for even jobless and low income earning men to have multiple wives. This results in the wife having to compete for meagre resources with the subsequent wives. The attendant effects of this is lack of or low quality education for some or all the children of such marriages and invariably leading to a vicious cycle of poverty and insecurity, while poor medicare affects the quality of the life of the unfortunate family.

The unavoidable competition between wives as they try to entrench themselves in the home by giving birth to more children further places more strain in the homestead, a situation which is aggravated by the creation of third party rights in relation to the property created by the first wife and the husband, which has now to be shared by other wives who did not contribute to its acquisition. This aggravated situation especially comes to the fore should the husband die before these wives without making legally enforceable provision for them they are all usually recognized as widows under Succession Act.

4.4. The Question of Polygamy

Despite all the above enumerated negative effects of polygamy, there are still some who argue that polygamy has its benefits. Such arguments propound that polygamy is part of African culture, while monogamy is a Christian/western heritage. This then begs the question as to whether there is preference for polygamy over monogamy by Africans. Such arguments are usually given and understood against the background that most African societies are patriarchal and patrilineal as is evidenced in the payment and return of dowry. This makes women to be valued in monetary terms and the rules of society as formulated by men give women no say in such matters apart from making them subservient to men. The findings above have clearly illustrated and contradicted this supposition by illustrating that most women, and even to a large extent men prefer monogamy¹²¹. Furthermore, the practice of polygamy is not inherent to African culture as majority of Africans are not engaged in this practice and in any event, culture is dynamic and changing. In addition, several other aspects of culture that have been found to be retrogressive such as FGM, certain dress, foods, and religious practices have already been done away with thus watering down the argument that polygamy is inherent to African culture. And moreover, polygamy is not the only way that Africans can express their culture; several choices exist to demonstrate this!

¹²¹ See also women representations at both the commissions of enquiry into marriage and divorce laws favored monogamy Ref; Kenya report note 149, paragraphs 21-23.

The other argument that gender equality is a western concept is also wanting as many gains have been realised by society in granting women equality. The legal recognition of polygamy is infact a disservice to women and is tantamount to legalizing adultery for one party in a marriage while subjecting the other party to negative societal pressure to confirm with a status that continues to dehumanize her. Such a position can never be equated to a wronged party in a marriage who connives at the other's infidelity and yet has options to leave as is the case in monogamous marriages.

Another argument advanced in favour of polygamy that it's a religious practice allowed under Islam¹²² also fails to take into account the fact that polygamy preceded Islam and that many Muslims are not polygamous and some even live under regimes where polygamy is outlawed such as Bangladesh. Indeed the practice or non-practice of polygamy is not a hindrance to exercise of faith and neither is it a tenet of Islam. The provision that one can marry many wives so long as he can treat them equally gives no particulars of what equality of treatment of wives entails and in my opinion serves only to make polygamy impracticable as it is humanly unattainable.

Claiming that polygamy is a choice between consenting adults and that a disgruntled woman is free to leave also fails to make a distinction between the 1st/legal wives and the subsequent ones. The former in most cases does not enter marriage knowing it will be polygamous; she may not be informed of the subsequent marriage or even given a choice. Concerning wives whose entry into a marriage makes it polygamous, while it may be true that some are lied to and only discover the truth when it is too late, there are those who admittedly willingly and knowingly get into polygamous marriages. Their predicament can however be explained against the backdrop of societal pressures to marry which weigh heavily on women. This coupled with socialization patterns that advice women to 'vumilia' (hang on) and other barriers like the return of bride price if she should leave her marriage, the separation from/custody of children and her ambiguous status if she leaves the marriage

¹²². Sura 4. v 3 Quran 'marry women of your choice, two, three or four; but if ye fear that ye shall not be able to deal justly then only one'.

without obtaining a legally recognised divorce hinder most women from walking out of this oppressive regime. Should her father/ guardian be unable to return dowry, then such a woman would have no divorce even if she left the matrimonial home and any children she subsequently begets would be considered to be of her legal husband who can even claim compensation for adultery from any man who has sex with his 'wife'. Her chances of remarriage, the shame of a daughter's grave in the home and financial dependency; all combine to bind a woman and give her no choice to leave a marriage at will.

Some have also said that polygamy is beneficial to women as all get a chance to be married and that it also frees them from certain marital obligations such as sex and household chores when they are not ready. This in my opinion is a naïve perception of the intricacies of polygamy as is evidenced by the word used for polygamy among the kabras '*imbalikha*' which portents strife, jealousy, envy and rivalry. The presupposition that all women must marry or rather want to marry no matter the quality of marriage portrays women as so desperate and willing to accept any marital status which is actually not the position. In any event, the fact that no woman has gone to court to challenge the institution of polygamy is due to the fact that such an action would be defeated since the law allows polygamy; and in any event, many women are not courageous enough to adjudicate publicly on their personal matters and would rather opt to walk out rather than face public ridicule and condemnation. Indeed currently under customary law, there is no written law on matrimonial cause that would arise out of customary marriages.¹²³ The pluralistic legal position whereby both customary and statutory laws are recognized, should however not hinder increasing awareness that some aspects of customary law are untenable since our worldview is shaped not only by our customs, but also by a whole range of other factors such as education and technology that should serve to make us aware of the consequences of our actions in matrimonial arrangements.

¹²³ It is also significant that since customary marriages are not registered, it is difficult to prove the existence of such marriages in world documentary proof is important for certain transactions. Additionally, changing lifestyles make it difficult to determine the rights and obligations that operate under customary law.

From the foregoing therefore, one may safely conclude that the reasons given for continuation of the practice of polygamy are not substantive and that the practice merely exists to benefit male members of society who have no concern for the resultant inequality and injustice it renders to women

4.5 Respondents' Recommendations for Legislative Measures on CEDAW, Polygamy and Equality in Marriages

Kenya's gender policy¹²⁴ provides for the articulation and mainstreaming of gender in development. Further that the challenge in achieving gender equity is the unwillingness of some communities to change entrenched cultural beliefs such as land inheritance by women. To be empowered, women must not only have equal capabilities and equal access to resources and opportunities but must also have the space to use those rights to make choices and decisions provided through leadership opportunities and participation in political institutions. The policy report also reveals that glaring gender gaps exist in access to and control of resources in economic opportunities, power and political voice. Overall, women continue to have less access to social services and productive resources than men and that they remain underrepresented in parliament and local authorities and account for 8.3% of members of parliament. Also, that girls are less likely to attend school than boys and even when there is gender parity at lower classes in primary school; girls drop out often due to unwanted pregnancies and often due to heavy domestic workload¹²⁵.

In consonant with this position, the respondents gave several recommendations concerning the uplifting of the status of women in several sectors;

Firstly, that the government should come up with laws to protect women against discrimination and that this can be done by adopting appropriate legislative measures and other sanctions. Second, that CEDAW should be implemented to avoid male dominance. The

¹²⁴. Achieving millennium development goals in Kenya- A Needs Assessment and Costing Report. prepared by the Government of Kenya (Ministry of Planning and National Development) in collaboration with UNDP- Kenya, 2005, p.39

¹²⁵. Ibid p. 66

government should also ensure that no person, organization or enterprise discriminates against women and that women should enjoy all rights irrespective of their marital status.

A third recommendation given was that such laws should be enforced and that it is incumbent on the government to educate both men and women on their rights as parents, husbands and wives. Also, that both men and women should have equal rights in the upbringing and development of their children. This recommendation is especially important in patriarchal societies such as Kenya where most customary laws and practices give fathers precedence in matters concerning custody of children.

CHAPTER FIVE

5.0 Conclusive Remarks

5.1 Introduction

In this final chapter, I summarize the views on how the international human rights regime should be understood and interpreted so that any justification for the continued violation of women's rights is weeded out. I also comment on Kenya's legal framework and demonstrate that although the Kenyan constitution provides for protection against gender discrimination,¹²⁶ it at the same time provides for the continuation of cultural practices like polygamy which continue to thrive and foster gender inequality. In effect, what the law gives on one hand, it takes away with the other. Based on the findings herein, I conclude that the final solution in the emancipation of women is a review of the country's legal framework so that it can serve the purpose for which all laws are intended- to equally protect equally.

I also argue that the enactment of new legislation alone will not serve any useful purpose as laws in themselves cannot alter women's current status without being backed up with an appropriate enforcement mechanism.

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5.2 A Further Say on Women and Human Rights

While there is widespread acceptance of the importance of human rights in the international structure, there still exists confusion as to their precise nature and role in society. The question of what is a right is also controversial and the subject of intense jurisprudential debate¹²⁷ as it is closely linked with ethics and morality. While it is arguable therefore that the rights that reflect the values of a community will be those with the most chance of successful implementation, it is also noteworthy that not all common values will be enshrined in law or all legal rights reflected in moral concerns.

¹²⁶ Section 82

¹²⁷ Shaw Malcolm Op. Cit p. 198

Furthermore, a common concept and interpretation (misinterpretation?) of human rights which assumes that States are not responsible for violations occurring in what has been referred to as the 'private sphere' (e.g. household) presupposes that states can only be held responsible for violations taking place in the public sphere—a sphere largely defined by and composed of men. This argument is exemplified in the interpretation of the right to be free from torture which has failed to encompass violence in the family (domestic violence) or in the community (female genital mutilation). A further example is the UDHR which doesn't expressly provide for the right of women to be free from violence in the household. The effect of this has been to make power relations in the family /households invisible and to keep major areas where women are oppressed away from public scrutiny;¹²⁸ yet it is well known that when women are denied democracy and human rights in the private, their human rights in the public sphere will also suffer since what occurs in 'private' shapes their ability to participate fully in the public arena.¹²⁹

While some still hold the opinion that international human rights law has not been effectively used to redress violations of women's human rights, it is important to position women's rights within the human rights discourse and to use definitions and perceptions of human rights which take into account their unique position in society as all human rights are possessed by all human beings equally as reflected in most human rights instruments. Further, while there is no explicit reference to women in the UDHR, the (ICCPR) (ICESCR), it is well recognized and accepted that all of these instruments implicitly include women in the equality context.¹³⁰ However, because women have not been perceived as having human rights unique to their gender that are not shared equally with men, any claims to entitlement to protection by women has had to be framed within the 'equality' framework; thus making equality and non-discrimination very key words in actualizing women's rights. This position has further put women in a situation whereby if they have to show that their rights have been

¹²⁸. CEDAW does attempt to challenge these assumptions but it has not been implemented; a quarter of the 100 countries who have signed it have made reservations and many countries do not comply with its reporting mechanisms.

¹²⁹. Bunch Charlotte Op. Cit.p. 14

¹³⁰. Ibid p 4

olated, they are forced to prove that they have been discriminated against in that the law or the practice complained of has failed to provide them with the same protection as men.

Further, the 'unisex' concept of human rights when closely analyzed is found not to be objective since even though women and men share some common aspirations as to fundamental human rights and freedoms, one cannot deny the fact there are significant differences between them which arise from biological differences as well as from the differential roles and vulnerabilities arising out of those biological differences. The said differences also arise from the socialization process and the consequent roles and vulnerabilities associated with those roles.

From the above discussion, it is clear that women do have legitimate claims to human rights and fundamental freedoms due to them as women. And while certain actions and /or omissions impinge on the 'inherent dignity' of women as members of the human family within the context of the UDHR that are not experienced by men, there are no equivalent category of experience for men. Moreover, while it is true that the horrors of the Second World War led states to adopt the UDHR as a common standard of achievement for all peoples and nations, and the freedoms and rights guaranteed therein are to be of universal validity and application the concept of universality of human rights has become one of the cornerstones of the international human rights framework, and this consensus on universality should act as a fetter to states which continue to deny and question the idea of universal human rights when it suits them. Such a position is responsible for the continued demand for a concept of human rights that is sensitive to cultural and religious particularities by governments in the international and national fora who demand cultural and religious hegemony and who also argue that women's dignity is at risk when universal standards are applied in their countries, especially in the arenas of marriage and the family. This is why CEDAW provides a good case study of a human rights Convention with the most reservations; which are not only limited to procedural matters but also substantive provisions which go to the heart of the purposes of the Convention. It is also insightful that some States

entered reservations even on articles that they purport to accept in the context of other human rights Instruments.¹³¹ The question that then remains unanswered is whether cultural and religious or other relativism in human rights theory and practice are in the interests of the protection of human rights and further whether the division of human rights into civil and political rights, economic, social and cultural rights has created an unnecessary hierarchy among human rights which has resulted in considerable implications for the human rights of women.

In addition, while it is true that they have made considerable strides in claiming their position on the political sphere, many women are still concerned about enhancing their economic status as a major step in freeing themselves from economic dependence on men. This in turn contributes to the desire to ensure their own dignity and life choices and consequently access to property, employment and credit are crucial rights¹³². Similarly adequate housing, food, clothing, and overall living standards still need to be assured for the majority of women¹³³. In order therefore for women to work with the state to realize economic, social and cultural rights, it is crucial that they be afforded opportunity for education at all levels; and also, since culture has a direct impact on the rights of women to exercise fundamental rights and freedoms especially in developing countries, it is important that women participate in definitions of cultural values and content.¹³⁴

Indeed it is in light of this contention that CEDAW calls for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human persons. All governments are therefore morally obliged to uphold this convention as women's rights are human rights and human rights are not only universal but indivisible.

Having said that however, its important to add that the controversial issue of universality and relativity which almost always crops up in discussions on the applicability of the

¹³¹. Ibid p 6

¹³². ICESR Articles 6,7

¹³³. Article 11

¹³⁴. Ibid article 15

provisions of CEDAW can be circumvented by an acknowledgement that universality does not necessarily mean homogeneity –this distinction is important in the sense that while universality promotes the principle of equality and inalienability of human rights, homogeneity tends to reinforce discrimination especially when diverse factors of violations of women's human rights are overlooked in the process. CEDAW however extensively defines discrimination¹³⁵ and gives an insight into those areas that need to be dealt with in order for women to be freed from this negative occurrence.

5.3 The Way Forward for Kenya

Although women make up 52% of Kenya's population,¹³⁶ gender inequity is still reflected in formal law as well as social and cultural practices which prevent women from enjoying their rights. Despite the fact that there are over forty ethnic communities¹³⁷ with diverse socio-cultural traditions, norms and practices in this country; women are bound together by certain common features that affect their lives. Firstly, in most communities they have been socialized to be subservient to men to the extent that the roles assigned to men are of a higher status than those given to women. In essence, what this means is that in these communities, men have more rights and privileges than women. It also means that in these communities, women, cannot ascend to positions of leadership. In addition, this asymmetrical pattern of power relations implies that at family level, the ownership and inheritance of basic resources remain solidly the preserve of men.

Given the wide range of issues that can be labelled customary, it becomes necessary to focus on a selection of issues that stand out as roadblocks in efforts aimed at protecting women's rights and empowerment, and which therefore deserve attention. The defining characteristic of these issues is their linkage to existing social structure, values, norms and attitudes. Viewed in isolation, they constitute cultural and social characteristics, roles and

¹³⁵. Article 1 thereof

¹³⁶. According to the last census in...

¹³⁷. Jacqueline Adhiambo Oduol' Do Customary Issues Have a Role to Play in Modern Constitutions?' in Perspectives in Gender Discourse, Op Cit, p.38

responsibilities assigned to a particular sex, female or male by one's culture. Viewed in the context of the modern international, regional and at times national legal norms, they constitute fundamental violations of human rights. In this perspective, the customary issues reflect socially constructed relationships of inequality, where the cultural differences between men and women represent the use of power by one group over the other, and where socializing people into these differences maintain unequal power relationships.

In Kenya, several realities also exist; first is the prevalence of a multitude of traditional laws and practices coupled with statutory laws which make the identification and enforcement of women's rights difficult. In addition, these statutory laws and customary norms are not necessarily compatible as evidenced by the 1981 Law of Succession Act, which has failed to have the desired effect of giving equality in succession matters. Also, despite the fact that the Constitution of Kenya forbids discrimination against women, such discrimination is still prevalent because of the simultaneous existence of different types of laws such as Civil and Statutory law, African Customary law and Islamic law; and in the sphere of power relations, many societies still have societal structures through which men are expected to control women in most aspects of social relations. For this reason, men determine when and to whom a girl or woman will get married, sometimes when and how she will have sexual relations and at other times when and how many children she will have. This type of male power often reinforces community norms that assert that male relatives must assume authority over widows, thus leading to the practice of wife inheritance.¹³⁸

In spite of the above circumstances, it is imperative that cognisance be taken of significant changes in social norms and behaviour patterns in Kenya's post independence period which have partly been influenced by the forces of education, rural to urban migration and technological advancement. Their effect has been to question, modify and even destroy some aspects of traditional practices as part of our development. The findings of this study when analyzed against a human rights framework suggest the need for a number of legal and policy

¹³⁸ Jacqueline Oduol, Op. Cit. p. 40

approaches to be undertaken to ensure women actualize their rights. Further, because discrimination against women takes many forms and is perpetuated by many different actors, its elimination poses certain challenges to governments as not only must they review their own laws, but also their policies to ensure that there is no hindrance to women's ability to enjoy all their rights, including the right to equality in marriage.

In the premises, recommended actions for the government of Kenya include programmatic responses, legal reforms and greater enforcement of existing legal and policy protections. These actions are however given against the background that the country has already undertaken some milestones such as the establishment of the Commission on the Status of Women in 1947 to monitor the status of women and to prepare recommendations and reports on promoting women's rights in the political, economic, social and educational arenas; the convening of the 1975 first world conference on women that had the aim of creating global awareness of women's rights and the adoption of CEDAW by the UNGA in 1979 to which Kenya is signatory.

Customary issues however continue to be an area of concern for women in modern times because of the need to reconcile cultural practices and women's rights in law and in practice. The issue of claw-back clauses which inhibit the achievement of women's rights in most African countries mainly revolve around issues of culture. In Kenya for example, the law is still silent on socially sanctioned matters of personal interest such as wife beating, marital rape and other cases of sexual and domestic violence.

Further to these in most African countries, men enforce the law either through religion or customary provisions in their dealings with women. Both culture and religion are strong male strong-holds in many African countries that have been used as tools of social control of women. Traditional myths and proverbs reinforce women's subordinate position and in a number of ways trivialize women's social standing. It is for this reason that women's rights must be enshrined in constitutions for otherwise given the prevailing attitudes, beliefs and

value systems about women; they shall continue to find themselves imprisoned by cultural and religious laws with no recourse to justice.

It is noteworthy that the government of Kenya does not act alone in these efforts, international and regional organizations and donor agencies also play a crucial role. Several suggestions for future action-mostly drawn from interviews with women in Kabras are offered below;

First, the government should reform and consolidate the laws on marriage and divorce so that the current position whereby different marriage regimes give women different rights in marriage is done away with.

Second, since we live in a free society, polygamy should be entered into by consensus at the inception of marriage. There should be a legal requirement that parties to a marriage should make a declaration to that effect. Such a declaration should be legally binding and any deviation from it should attract legal penalties.

Third, Kenyan law should provide for equality of legal status and rights; reforms should be undertaken to address/remove the inequality between the sexes that currently exists in our laws.

Fourth, respondents were also of the view that since marriage under customary law is not equal to consenting to a polygamous marriage (or potentially polygamous as per frequent court interpretations), the law should take into account that one may want to be married under his/her customs without necessarily being tied to the 'potentially polygamous' clause. One way of providing for this is by providing for the registration of marriages under law customary law. And

Fifth, polygamy should be outlawed except in deserving cases such as where the wife cannot give birth or engage in sex due to ill-health. Similar rights should also be allowed to wife where husband is the one so incapacitated; and both should retain the right to opt out of such a marriage where one so desires. Similarly, both parties should have the right to claim for damages from any party who commits adultery with their

spouse and they should further have the equal rights with respect to entry into marriage, during the course of the marriage, at its dissolution, to claim for any damages, rights over children and concerning matrimonial property.

It is possible that certain sections of society such as cultural nationalists may view the some of the above reforms negatively (particularly when taking into account that customary issues are usually equated with notions of *tradition*, *African culture* and *cultural self-determination*) but it is however important to acknowledge that these notions are necessary especially when taking into account background factors such as that inheritance and marriage rules are currently heavily weighed in favour of men, customary gender norms and values in Kenya have resulted in political, legal educational and economic inequalities that perpetuate women's lack of access to resources , control over decision-making, and participation in public life; and that the lower value assigned to women and girls places them in a subordinate position.

Once a human right has been defined and a set of corresponding governmental duties identified, the question begs of how to measure governmental compliance with these duties. Though some duties cannot be fulfilled overnight and their enforcement requires monitoring over a considerable period of time, cultural rights cannot be fulfilled incrementally and requires mainly change in laws and policies for their realization. Governments are firstly required to end all forms of discrimination that affect women's enjoyment of their rights. This means eliminating laws that deny women access to equality with men and that render discrimination of women a matter of course.

Further, though human rights violations are generally considered the responsibility of the state in whose jurisdiction they occur¹³⁹ the ESR Committee has however emphasized the duty of wealthy nations to promote enjoyment of economic, social and cultural rights internationally. In its General Comment on the Nature of State Parties Obligations, the committee invoked Articles 55 and 56 of the Charter of the United Nations, well established

¹³⁹. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, Jan 22-26, 1997, Para 6 (http://wwwl.umn.edu/humanrts/instate/maasachtructguidelines_.html)

principles of international law and the provisions of the ICESCR to assert that economic, social and cultural rights is an obligation of all states and that it is particularly incumbent upon the states which are in a position to assist others in this regard.¹⁴⁰

Governments acting collectively in international organizations have a duty to comply with international legal standards. Further, the Maastricht Guidelines on Violations of Economic Social and Cultural Rights, gave an authoritative restatement of state' duties under the ICESCR that '*It is particularly important for states to use their influence to ensure that violations do not result from programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international institutions, to correct their practices and policies so that they do not result in deprivation of economic, social and cultural rights.*¹⁴¹

Finally, it may be said that the government of Kenya, like all governments, has a duty not only to refrain from directly violating human right norms but also to intervene in pervasive human rights violations by third parties. Governments are also obliged to help prevent human rights violations not only by reforming their laws and policies but also by committing funds to improve social services so that all citizens –especially the vulnerable like girls and women can enjoy the full range of human rights, including self-determination in /marriage rights.¹⁴²

¹⁴⁰ CESCR, Gen Comment 3, The Nature of State Obligations, paragraph, 9 (1990)

¹⁴¹ Maastricht , para 19

¹⁴² The Center for Reproductive Rights, Claiming our Rights: Surviving Pregnancy and Childbirth in Mali, 2003, New York. P.35

Appendix A: National Context¹⁴³

A. Social and Demographic Context

Kenya is a country on the East African coast lying at 5 degrees north and 5 degrees south latitude, and 24 degrees and 31 degrees east longitude. It is almost bisected in half by the equator and is bordered by Ethiopia and Sudan to the north, Uganda to the West, Tanzania on the southern part and Somalia on the north eastern part while the Indian Ocean is on the southeast. It has a coastline of 536 km with its total land coverage being 582 650 km². Approximately 80% of Kenya's land is either arid or semi-arid with only 20% of it being arable.

Kenya contains most of the world's major climatic conditions and its topography has several features ranging from deserts to snow capped mountains, sandy coastlines to freshwater lakes, savannah grasslands to fertile agricultural plantations, extinct volcanoes to coral reefs.

Natural resources form the foundation of much of the Kenyan economy today. Agriculture in particular is a cornerstone of the country's economy employing over 80 percent of the population. In fact, more than 50 percent of export earnings are attributed to agricultural products with cash crops of coffee, tea, tobacco, cotton, sisal, pyrethrum, and cashew nuts leading the way.

B. General Socio-legal Background

Kenya's population is divided into fifty-two ethnic communities with the population being almost exclusively of African descent, although there are groupings of the minority Asians, Indians and Europeans. The population of Kenya is approximately 32 million with 75-80%

¹⁴³. Most information herein gathered from 'Achieving millennium Development Goals in Kenya'- A Needs Assessment and Costing Report. prepared by the Government of Kenya (Ministry of Planning and National Development) in collaboration with UNDP-Kenya, 2005

and arid land.

50% of Kenya's population are below 15 years; the country's population is characterized by high mortality rates, low and declining life expectancy, slightly increased fertility rates (4.7% in 1995-1998, and 4.8% in 2000-2003), high infant mortality and death rates and declining population growth (this could be attributed to HIV/AIDS).

The population living in absolute poverty as of 2002 was approximately 56.7%. Kenyans speak a variety of languages although English and Kiswahili are the dominant tongue in towns. Language remains the major feature that distinguishes tribal affiliation. For two thirds of all Kenyans, the common language is of Bantu origin. Only three percent of the population is Cushite-speaking Kenyans although they occupy the largest geographic area. The remainder of the population speaks Nilotic languages. Most Kenyans are Christians.

C. Political Background.

Independence became a reality for Kenya on December 12, 1963. The Republic of Kenya is a constitutional multi-party democracy and has had three political regimes since independence. Kenya's parliament, bureaucracy, and judiciary emulate the English model, with one national assembly of 210 elected and 12 nominated members of parliament. The country enjoys a solid tourist industry and its economic outlook is much healthier than many other African nations. More importantly, Kenya has experienced no wars, no civil unrest, and enjoys a strong democratic ethic. No other nation on the African continent has remained as committed to maintaining democratic law and order while prioritizing education and social welfare for all citizens.

Administratively, it is divided into eight provinces of Western, Nyanza, Eastern, North Eastern, Rift Valley, Coast and Central which are further divided into districts and divisions. English is the official language while Kiswahili is the national language.

Appendix B: Interview Questionnaire

ACTUALIZING WOMEN RIGHTS UNDER CEDAW (POLYGAMY & HUMAN RIGHTS)

(To be administered on members of the Kabras Community)

Respondent (FGD) No -----

Date & Place of Interview-----

Personal Data

Name (s) of Respondent (optional) -----

Age---- Sex: ----Marital Status -----Occupation-----Clan---

-----Religion----- Level of Education-----

SECTION A

Preliminaries

5. What is your understanding of the term 'Human rights?
6. What is your understanding of the term 'Discrimination'?
7. What is your understanding of the term 'Gender discrimination'?
8. Have you heard of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)?
9. What does it advocate for?
10. CEDAW calls for state parties to outlaw discrimination against women in all areas of life. In your opinion, what are some of the areas in which most women experience discrimination?
11. What are the legal ways of contracting a marriage under Kenyan law?
12. What are the types of marriage known to you?
13. In your opinion, which is the most advantageous form of marriage for Kenyan women and why?

SECTION B

Polygamy

4. How is polygamy practiced in your community?
5. Is the consent of the wife sought before initiation of a second marriage?

6. Have there been any notable changes in polygamy as practiced by your forefathers and the current practice?
7. In your opinion what impact does polygamy have on the human rights of women?
8. Does polygamy have any negative effect on society?
9. In your opinion, does a woman in a polygamous marriage face the same challenges in marriage as one in a monogamous marriage?
10. What role can the government play in protecting women from discrimination based on cultural practices like polygamy?
11. What would be best way for the government to legislate on polygamy?

SECTION C.

Recommendations/ Way Forward

1. What suggestions do you offer the government to address issues of discrimination against women as provided for under CEDAW?
2. Should polygamous marriages be retained in our legal system? Why?
3. In your opinion, how can equality be realized in marriages?
4. Have you heard of any case challenging polygamy in court? If so, what was the outcome of such a case?

Do you have any other information concerning polygamy and women's rights that you would like to share with us?

Appendix C: Respondents' Profile

Table of Respondents' Profile

Item	Category	Percentage
Age	18-35	41.17
	36-55	29.41
	56-80	11.76
	Not given	11.76
Sex	Female	56
	Male	44
Marital Status	Married	64.70
	Widowed	17.64
	Single	11.76

Appendix D: List of Tables

Table 1: Findings on ‘Human rights’, ‘Discrimination’ and ‘Gender Discrimination’.

Table 2: Awareness on CEDAW

Table 3: Findings per Marriage Regime

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