

**The Constitutional and Statutory Position of the 'Other' Wife: a Comparative Study of Constitutional Rights and Polygamous Customary Marriages in Commonwealth Africa.**

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## Abbreviations

CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
LMA	Tanzania's Law of Marriage Act 5 of 1971
Maputo Protocol	Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa
OECD	Organisation for Economic Co-operation and Development
RCMA	South Africa's Recognition of Customary Marriages Act 120 of 1998
UDHR	Universal Declaration of Human Rights 1948

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# Chapter 1. Introduction

## 1.1 Introduction

From the 1990s, African countries have increasingly adopted constitutions that reflect awareness of human rights, featuring provisions stipulating gender equality and non-discrimination.<sup>1</sup> Some have interpreted this trend as part of a broader ‘globalisation of constitutional law’,<sup>2</sup> seemingly reflecting a wide-scale acceptance of human rights emanating from public international law.<sup>3</sup> The capacity for this global enthusiasm to significantly improve the position of women in marriages, however, is controversial. For example, the discourse of ‘human rights’ has been argued to privilege the ‘public’ domain, concerning the way government interacts with individuals, whilst side-lining the ‘private’ domain, relating to areas typically protected from state interference, such as marital, religious, customary, or familial institutions. It is the latter areas, however, in which women’s rights are especially vulnerable.<sup>4</sup> The capacity of human rights to effect positive changes for women is particularly complex in post-colonial Africa, characterised by a multitude of overlapping legal normative bodies. These consist of

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<sup>1</sup> F Banda *Women Law and Human Rights: An African Perspective* (2005) 34; J Bond ‘Constitutional Exclusion and Gender in Commonwealth Africa’ (2007) 31 *Fordham International Law Journal* 292; D Law & M Versteeg ‘Sham Constitutionalism’ (2013) 101 *California Law Review* 912; M Ndulo ‘African Customary Law, Customs, and Women's Rights’ (2011) 18 *Indiana Journal of Global Legal Studies* 91; and AM Tripp ‘Conflicting Agendas? Women's Rights and Customary Law in African Constitutional Reform’ in Susan H Williams (ed) *Constituting Equality* (2009) 171-174.

<sup>2</sup> D Law & M Versteeg ‘The Evolution and Ideology of Global Constitutionalism’ (2011) 99 (5) *California Law Review* 1166; Tripp *ibid* at 174-175. Also see K Cmiel ‘The Recent History of Human Rights’ (2004) 109 *American Historical Review* 126.

<sup>3</sup> S Harris-Short ‘International human rights law: imperialist, inept and ineffective? Cultural relativism and the United Nations Convention on the Rights of the Child’ (2003) 25 *Human Rights Quarterly* 131.

<sup>4</sup> C Romany ‘Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ (1993) 6 *Harvard Human Rights Journal*.

state law, based on the received colonial law, African customary laws,<sup>5</sup> and religious laws.<sup>6</sup> Each of these normative systems may radically differ in its treatment of women in marriages.<sup>7</sup> For instance, it has been argued that Commonwealth African states typically afford the parties to a statutory marriage a certain standard of protection, whilst applying a *laissez faire*, non-interventionist approach to customary marriages.<sup>8</sup>

This thesis concerns the widespread phenomenon whereby customary marriages—in contrast to civil marriages<sup>9</sup>—are potentially polygynous, and the issues that arise when, despite constitutional recognition of women’s rights, polygyny is not regulated according to the law. This chapter aims to provide contextual information in order to clarify the research questions, and illustrate its broader social significance. It is structured as follows. Section 1.2 provides a definition of polygyny, and outlines its controversial position as a human rights violation. This is followed by the problem statement (section 1.3), which examines the competing discourses simultaneously protecting and condemning polygyny. Section 1.4 comprises the research aims and objectives. The research questions are provided in section 1.5. Finally, section 1.6 argues the significance of this research, and section 1.7 outlines the structure for the remaining chapters.

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<sup>5</sup> J Griffiths 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism*.

<sup>6</sup> M Ndulo *op cit* note 1 at 87-88, 95; E S Nwauche 'The Constitutional Challenge of the Integration and Interaction of Customary and Received English Common Law in Nigeria and Ghana' (2010) 25 *Tulane European and Civil Law Forum* 2.

<sup>7</sup> J Bond 'Culture, Dissent, and the State: The Example of Commonwealth African Marriage Law' (2011) 14 *Yale Human Rights and Development Law Journal* 3.

<sup>8</sup> Bond *ibid* at 3 and 4.

<sup>9</sup> In the context of this thesis, civil marriages refer to the system of state/statutory marriage initially introduced with colonialism.

## 1.2 Polygyny and women's human rights

The term polygyny denotes simultaneous marriage of one husband to two or more wives, and may be contrasted with 'polyandry', in which one wife marries multiple husbands.<sup>10</sup> The word 'polygamy' is an umbrella term for 'polygyny' and 'polyandry'. However, given the rarity of the latter, 'polygamy' is often used interchangeably with 'polygyny', an approach adopted in this thesis.

Since colonial times, polygyny in African customary law has been singled out as an institution offensive to Western morals and decency.<sup>11</sup> Today, polygyny is widely portrayed as a harmful practice that subordinates women within the family domain,<sup>12</sup> and contributes to the objectification of wives, who become seen as 'commodities to be bought and sold'.<sup>13</sup> Because it is highly gendered (ie men can marry multiple wives but women cannot marry multiple husbands), it is said to violate fundamental concepts of equality,<sup>14</sup> and to entrench the low status of women,<sup>15</sup> a position widely supported in the human rights paradigm.<sup>16</sup> It is argued that a woman in a polygynous marriage may not necessarily enjoy equal bargaining power with her husband, resulting in situations where

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<sup>10</sup> MK Zeitzen *Polygamy: A Cross Cultural Analysis* (2008) 10-11.

<sup>11</sup> PE Andrews 'Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa' (2009) 2 (11) *Utah Law Review* 311; TE Higgins, J Fenrich & Z Tanxer 'Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism' (2006) 30 (2) *Fordham International Law* 1653; *Mifumi (U) Ltd & Anor Vs Attorney General & Anor* 2015 UGSC (13) para 20, also Bond op cit note 1 at 16.

<sup>12</sup> MO Oumo in Bond op cit note 7 at 16; Higgons et al. op cit note 11 at 1694.

<sup>13</sup> AL Wing and TK Smith cited in M Ssenyonjo 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) 51 *Journal of African Law* 52.

<sup>14</sup> F Banda 'Global Standards: Local Values' (2003) 17 *International Journal of Law, Policy and the Family* 8. See also Chapter 2 of this thesis.

<sup>15</sup> CAA Packer *Using Human Rights to Change Tradition* (2002) 36, 46; C Himonga and A Pope 'Mayelane v Ngwenyama and Minister for Home Affairs: A reflection on wider implications' (2013) *ACTA Juridica* 324, 333.

<sup>16</sup> Banda op cit note 1 at 116.

a wife remains in an abusive or disadvantageous relationship.<sup>17</sup> It also follows that a woman in such a marriage is often not in a position to object to her husband remarrying subsequent wives, despite it substantially affecting her access to marital property,<sup>18</sup> and obliging her to compete with other wives for her husband's resources.<sup>19</sup> As an institution argued to be 'embedded in patriarchal traditions',<sup>20</sup> polygyny is often discursively associated with practices such as child marriage, domestic abuse, female genital mutilation, and forced marriages.<sup>21</sup> In addition, with the added complication of multiple wives, it has been argued to increase the risk of HIV/AIDS and other sexually transmitted diseases.<sup>22</sup>

There are, however, dissenting opinions which argue that in certain instances, polygyny enhances a woman's dignity, for example, in the context of a society that pathologises and fails to protect unmarried women.<sup>23</sup> It has also been argued that economic vulnerability, which encourages women to enter into polygynous marriages, is a more appropriate object for critique than polygyny itself.<sup>24</sup> Furthermore, categorising polygyny as a fundamentally harmful practice may detract from the agency of women who voluntarily enter polygynous marriages, and who do not believe themselves to be

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid. This issue was also illustrated in *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC), where both the applicant and first respondent were married to the same man by customary law, but did not know of the other's existence, and therefore disputed the validity of the other's marriage (para 4). This case is discussed in more detail in section 2.3.3.

<sup>19</sup> Higgons et al. op cit note 11 at 1681-1682, 1685.

<sup>20</sup> Ibid at 1688; Andrews op cit note 11 at 320.

<sup>21</sup> Examples include CEDAW General Recommendation 24 (1999) para 18 and CEDAW General Recommendation 31 (2014) sections V and VI.

<sup>22</sup> For example, CEDAW General Recommendation 24 (1999) para 18; states that 'harmful traditional practices, such as...polygamy... may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases.'

<sup>23</sup> Banda op cit note 1 at 116-117. Banda in this case is advancing the argument of Nhlapo, who argues that polygyny may enhance a woman's human rights in certain instances.

<sup>24</sup> Ibid; RJ Howland & A Koenen 'Divorce and Polygamy in Tanzania' (n/d) 15 *Social Justice* 7.

disadvantaged by it.<sup>25</sup> Finally, polygyny is argued to form an integral aspect to African institutions of marriage,<sup>26</sup> and to serve as a marker of African identity.<sup>27</sup> Whilst mindful of the arguments against polygyny and its counter arguments, this thesis takes a realist position: irrespective of human rights critiques against it, polygyny remains a widespread practice under African customary laws,<sup>28</sup> especially in Sub-Saharan Africa.<sup>29</sup> It is therefore necessary that states are proactive in ensuring that women in polygynous customary marriages are not discriminated against in relation to women in monogamous marriages.

### 1.3 Problem statement

As an institution perceived to contravene the rights of women to equality and non-discrimination, polygyny is a contentious aspect of African customary marriage. On the

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<sup>25</sup> Beaman 'Response: Who Decides? Harm, Polygamy and Limits on Freedom' (2006) 10 (1) *The Journal of Alternative and Emergent Religions* 43-51; also Higgen et al. op cit note 11 at 1664.

<sup>26</sup> A Phillips & HF Morris *Marriage Laws in Africa* (2011) 5-6.

<sup>27</sup> Bond op cit note 7 at 16.

<sup>28</sup> As well as Islamic personal laws, which allows a man to marry up to four wives. See Bond op cit note 7 at 14, 15-16.

<sup>29</sup> Claims such as these are frequently made in literature, but often are not substantiated with figures (eg Bond op cit note 7 at 15). Whilst unable to find recent comparative sources, it would appear that the extent to which polygamy is practiced differs from country to country. For example, in Swaziland this figure is between 13.1 per cent and 15.7 per cent, according to OECD Development Centre 'Swaziland' (available at <http://www.genderindex.org/sites/default/files/datasheets/SZ.pdf>, online 11 November 2016). In Tanzania, an estimated 25 per cent of marriages in Tanzania are believed to be polygynous according to Howland & Koenen op cit note 24 at 1, whereas in Lesotho, only an estimated 1.7 per cent of men aged 15-59 are reported to having two or more wives following OECD Development Centre 'Lesotho' available at <http://www.genderindex.org/sites/default/files/datasheets/LS.pdf>, online 12 November 2016. However, these figures should be accorded a margin of error. Many customary marriages are not registered, as argued in U Ewelukwa 'Post-colonialism, gender, customary injustice: widows in African societies' (2002) 24 *Human Rights Quarterly* 480-483 and seen in C Himonga & E Moore (eds) 'Registering a Customary Marriage' in *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) 106-108. This may especially apply to polygynous customary marriages. For instance, in South Africa it is argued that only 30 per cent of polygynous customary unions are registered (see Hosegood et al. in Himonga & Moore ibid at 133). Hence, the numbers of registered marriage may be underrepresented by official statistics.

one hand, there are strong moral and legal imperatives to affirm and recognise the cultures and knowledge systems of peoples previously subjugated by colonialism,<sup>30</sup> namely African customary law, which is widely considered the bedrock of African culture and values.<sup>31</sup> Protecting and affirming African customary law (and by proxy polygyny) thus serves as an idiom by which the post-colonial African state can express its national identity, and be distinguished from its colonial predecessors.<sup>32</sup> Subsequently, post-colonial African states are often highly protective towards their customary law,<sup>33</sup> and feminist attempts to abolish the custom are often met with resistance.<sup>34</sup> The legal basis for recognising customary law is seen in many constitutions. Section 211(3) of the South African Constitution notes, for example, that ‘the Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’.<sup>35</sup> In addition, the right to practice one’s culture, is found in core international human rights instruments,<sup>36</sup> and therefore may lend support to arguments in favour of polygyny, albeit this support is not unfettered.<sup>37</sup>

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<sup>30</sup> Banda op cit note 14 at 7; Andrews op cit 11 at 355.

<sup>31</sup> Chirwa ‘Reclaiming (WO)Manity: The Merits and Demerits of the African Protocol On Women’s Rights’ (2006) 69, Andrews op cit note 11 at 361.

<sup>32</sup> JA Hessbruegge ‘Customary Law and Authority in a State under Construction: The Case of South Sudan’ (2012) 5 *African Journal of Legal Studies* 296-297; Bond op cit note 7 at 33.

<sup>33</sup> T.W. Bennet ‘Re-introducing African customary law to the South African legal system’ (2009) *American Journal of Comparative Law* 57, 7, 25.

<sup>34</sup> Bond op cit note 7 at 16.

<sup>35</sup> Constitution of South Africa 1996. For more examples, see s 7(d) of the Constitution of Zambia (Amendment) Act No. 2 of 2016; s 11(2) Constitution of Ghana of 1992; s 3(2) of the Judicature Act of Kenya Cap. 8, revised 2015; s 10(2) Constitution of Malawi 1995, etc.

<sup>36</sup> Andrews op cit note 11 at 359-361. An example is the UDHR predating CEDAW, the latter of which was adopted only in 1979. Arts 22 and 27 of UDHR guarantee cultural rights, which are portrayed as ‘indispensable’ to an individual’s ‘dignity and free development of his personality.’

<sup>37</sup> However, the general position from international human rights law is that the right to culture must be subject to ‘universal standards’, which includes gender equality and non-discrimination as a fundamental principal, see L Mwambene ‘Reconciling African Customary Law with Women’s Rights in Malawi: The Proposed Marriage, Divorce and Family Relations Bill’ (2007) 1 *Malawi Law Journal* at 82. In other words, the rights to non-discrimination and equality are seen as non-derogable, applicable to every individual, and hence supersede the right to culture. See Banda op cit note 1 at 89; CW Howland ‘Women and Religious Fundamentalism’ (1999) 590.

On the other hand, there is also incentive for African states to be seen as cooperative towards international human rights, with respect to equality and non-discrimination of women for example. This is partly because the endorsement of human rights is argued to be central in achieving recognition as a ‘modern state’ from the international community,<sup>38</sup> and may affect the capacity of a state to attract foreign investors or enter into diplomatic relations.<sup>39</sup> However, this incentive also derives from the African state’s international human rights obligations. As Ssenyonjo notes, ‘every state in Africa is a party to at least one international treaty prohibiting discrimination on the basis of sex in the enjoyment of human rights or a party to an international treaty providing for the equal rights of men and women to the enjoyment of all human rights.’<sup>40</sup>

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol) are two major human rights instruments establishing guidelines for states’ treatment of women in polygynous customary marriages. Both instruments call upon state parties to condemn all discrimination against women and ensure that this manifests at a constitutional and legislative level.<sup>41</sup> Both also specify that states are required to intervene in ending discrimination, which may entail amending or intervening in customary laws.<sup>42</sup> Article 16 of CEDAW places obligation on the state to ensure that men and women enjoy ‘the same right freely to choose a spouse and to enter into marriage only with their free and full consent’ and ‘the same

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<sup>38</sup> D Law ‘Constitutional Archetypes’ (2016) *Legal Studies Research Paper Series Paper no 16-02-01* 11, 17; Harris-short op cit note 3 at 165.

<sup>39</sup> Law op cit note 1 at 1172-1173.

<sup>40</sup> Ssenyonjo op cit note 13 at 49.

<sup>41</sup> Art 2(a) of CEDAW, and art 1(d) and 2(1) of the Maputo Protocol.

<sup>42</sup> Art 2(f) of CEDAW, artss 2 and 4(2)(d) of the Maputo Protocol.

rights and responsibilities during marriage and at its dissolution'.<sup>43</sup> These conditions are compromised in polygamous marriages where one party, but not the other, has the agency to marry additional wives, and where wives are obligated to compete for material resources.<sup>44</sup> Similarly, article 6 of the Maputo Protocol requires state parties to ensure equal rights between men and women in marriage, and that women should be 'regarded as equal partners in marriage.' It further specifies that monogamy is 'encouraged as the preferred form of marriage' but concedes that 'the rights of women in marriage and family, including in polygamous marital relationships are [to be] promoted and protected.'<sup>45</sup>

African states are therefore potentially placed in a double bind: compelled on the one hand to protect and affirm customary laws—which may include the practice of polygyny—whilst, on the other hand, obliged to uphold the human rights of women to equality and non-discrimination, argued by many to be fundamentally incompatible with polygyny. Given this context, this thesis examines the constitutional and legislative position of women in polygynous customary marriages and examines whether, and to what extent, the state makes provisions for the human rights of women in polygynous customary marriages, whose right to equality and non-discrimination may not be divorced from their rights to participate in customary institutions of marriage.<sup>46</sup>

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<sup>43</sup> Ibid at art 16(b) and (c).

<sup>44</sup> Higgons et al. op cit note 11 at 1681.

<sup>45</sup> Maputo Protocol at art 6(c).

<sup>46</sup> See A Claassens & S Mnisi 'Rural Women Redefining Land Rights in the Context of Living Customary Law' (2009) 25 *African Journal on Human Rights* 491-492, 514 for a critique against the perceived dichotomy between customary law and women's rights, as well as the agency of women to draw from multiple normative sources. A similar sentiment is expressed by Banda op cit note 1 at 5, who notes that women may contest and transform culture institutions from within.

## 1.4. Research aims and objectives

The object of this thesis is to examine whether the language of a national constitution in Commonwealth Africa matches its domestic marriage laws in terms of how the state relates—or does not relate—equality and non-discrimination to women in (potentially) polygynous customary marriages. It also aims to highlight the dissonance that arises when constitutional commitments to human rights are not reflected in the legislation concerning customary marriages, and how language may obscure the contradiction between strong constitutional protection and weak statutory protection of polygynous wives. Ultimately, it aims to illustrate that in not engaging with the dynamics and complexities that may arise within a polygamous marriage,<sup>47</sup> Commonwealth African states fail to protect women in polygamous customary marriages, despite potentially affirming the rights to equality and non-discrimination at the constitutional level.<sup>48</sup>

## 1.5 Research questions

Broadly, this thesis considers whether constitutions in Commonwealth Africa protect women in polygynous customary marriages, as seen in domestic laws, and if not, how this manifests. To answer this, I explore two sub-questions. These are:

1. To what extent do constitutional rights to equality and non-discrimination apply to women in polygynous customary marriages at a statutory level?
2. How does language obscure contradictions between constitutions and legislation regarding the protection of women in polygynous customary marriages?

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<sup>47</sup> Himonga & Pope op cit 15 at 335.

<sup>48</sup> Eg s 9 of the Constitution of South Africa.

## 1.6 Significance of research

Since most marriages in sub-Saharan Africa are purported to be governed by customary law, and hence are (potentially) polygamous,<sup>49</sup> it is highly pertinent to examine the extent to which post-colonial African states extend constitutional affirmation of equality and non-discrimination to women in polygynous customary marriages at a statutory level. This thesis also challenges the argument that ‘constitutional rights are the best, or even the only avenue for achieving gender equality.’<sup>50</sup> In addition, the proposed research has the capacity to be in conversation with and either reinforces or challenges, Law and Versteeg's claim that Africa has a significant number of ‘sham constitutions,’ referring to the phenomenon whereby constitutions’ human rights promises are not reflected in the state’s behaviours and policies.<sup>51</sup> Furthermore, African countries must be aware of the contradiction that arises when constitutional rights to equality and non-discrimination are withheld (whether tacitly or indirectly) from women in polygynous marriages. This research may highlight problematic discursive mechanisms that effectively distract from constitutional goals and contribute towards a more nuanced discussion around human rights and polygyny.

## 1.7 Arrangement of subsequent chapters

Chapter 2 provides a more focused explanation of the study design, locating this research within a broader academic discourse. It furthermore provides a theoretical framework, and outlines the methodology used in subsequent chapters. Chapter 3 analyses specific African Commonwealth constitutions to examine the extent to which

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<sup>49</sup> A Kuenyehia ‘Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa’ (2006) *UC Davis Law Review* 397.

<sup>50</sup> H Irving ‘More than Rights’ in SH Williams (ed) *Constituting Equality* (2009) 86.

<sup>51</sup> Law & Versteeg op cit note 1.

the state commits to protecting the human rights of women within institutions of customary law (in this case polygynous customary marriages). Chapter 4 analyses legislation for the examined countries of this study. It considers whether the degree of constitutional protection for women established in Chapter 3 manifests at a legislative level from the vantage point of women in polygynous customary marriages. Chapter 5 involves an analysis of the language of the laws where there is a mismatch between constitutional and statutory protection. Particular emphasis is placed on ‘silence’ or ‘omission’ as a discursive mechanism used to obscure the contradiction whereby a woman in a polygynous customary marriage is denied the protection of constitutional rights. Chapter 6 concludes by offering overarching observations and recommendations so as to improve the legal status for such women.

## Chapter 2. Study design

### 2.1 Introduction

This chapter provides a detailed explanation of theoretical and methodological perspectives used in subsequent chapters. Section 2.2 locates this research within its broader scholarly context. This is followed by section 2.3, which provides a theoretical framework. This section will discuss concepts of equality and non-discrimination, from both a legal and discursive perspective. Based on this discussion, I provide case studies illustrating the manner in which women in polygynous customary marriages are being denied their constitutional rights to equality and non-discrimination. This is based on short-sided domestic laws that fail to grapple with polygyny on its own terms, but rather treat it as a deviation from monogamous marriages. Section 2.4 provides an in-depth methodology for subsequent chapters. It details the scope of the study, and explains how constitutions (section 2.4.2) and pieces of legislation (section 2.4.3) will be analysed. Section 2.4.4 outlines the methods used in relation to potential mismatches between levels of constitution and legislative protection.

### 2.2 Literature review

In empirically examining constitutions of African states, this thesis draws from an emerging body of research referred to as ‘comparative constitutional law’.<sup>52</sup> This area of research not only involves comparing the contents of national constitutions, but also considers external factors. These include the manner in which the broader international environment shapes constitutions’ structures, meanings, and positions within national

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<sup>52</sup> T Ginsberg & R Dixon (eds) ‘Introduction’ in *Comparative Constitutional Law* (2011) 1.

legal hierarchies, as well as the relationship between constitutional content and state delivery.<sup>53</sup>

Documenting the degree to which states around the world comply with their own constitutions' human rights provisions, Law and Versteeg argue that, despite the existence of individual 'strong performers',<sup>54</sup> African states generally reflect the highest divergence between what the constitution promises *de jure* and what is actually realized *de facto*.<sup>55</sup> This phenomenon, which they refer to as 'sham constitutionalism', is argued to particularly apply to areas relating to women's 'social rights', which include equality within marriage and freedom from culturally harmful practices.<sup>56</sup> According to Law and Versteeg, only 14 per cent of countries<sup>57</sup> fulfil their constitutional provisions in areas pertaining to gender equality.

Two broad approaches can be identified in the literature for theorising African countries' incomplete protection of the rights of women in customary marriages. The first emphasises competing rights (ie cultural rights in competition with gender rights), while the second approach emphasises noncompliance for other reasons. The former approach is exemplified by Tripp, who argues that the most significant victory for African women's organisations is 'the increasing amount of African constitutions stipulating that in cases of potential conflict between customary law and gender rights, the latter should prevail.'<sup>58</sup> She further approvingly notes that 'twenty-one of forty-five

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<sup>53</sup> Ibid at 4; Law & Versteeg op cit note 2 at 1167-1170.

<sup>54</sup> Ie countries that uphold their constitutional rights, see Law & Versteeg op cit note 1 at 911.

<sup>55</sup> Law & Versteeg op cit note 1 at 864, 871. Table 4 at 899, Table 4 shows that by their metric, Africa performs worse than Asia in terms of violating its constitutional provisions. Based on Law & Versteeg's data on 'sham' (or functionally ineffective) constitutions between 1981 and 2010, 86 per cent of the 'top 10' offenders of their own socio-economic constitutional provisions (which include women's rights) are African countries (Table 11 at 906).

<sup>56</sup> Law & Versteeg op cit note 1 at 890-891 (Table 2), 938 and 914 (Table 15).

<sup>57</sup> The figure 14 per cent applies to all the data, not only the African constitutions, as the authors did not provide individual data for country/region. As the worst overall performer for socio-economic right compliance, it can be inferred that the level of compliance for women's rights in Africa is also low.

<sup>58</sup> Tripp op cit note 1 at 173.

African constitutions have provisions making customary law subordinate to statutory law and the constitution.’ She expresses concern that legitimising cultural rights and traditional authorities obstructs substantive justice for women, and prevents the enactment of legislation protecting women who are subject to customary law.<sup>59</sup> However, this paradigm, as well as the portrayal of rights as something to be ‘balanced’ against one another<sup>60</sup> maintains a conceptual dichotomy between gender and culture, which may not be useful when considering areas in which the two are deeply intertwined, such as the rights of women in polygynous customary marriages, whose lives are structured both by their being female and by their membership to the community.<sup>61</sup>

Regarding the second broad approach, a distinction can be made between states whose commitment to fulfil their constitutional obligations is obstructed only by material constraints (such as a lack of funds or other resources),<sup>62</sup> and states whose commitment to human rights is not entirely literal, but also performative.<sup>63</sup> The latter occurs when a state asserts something about its identity beyond the referential content of its human rights provisions. For example, a state may embellish its constitution in order to perpetuate a particular standing within the international community,<sup>64</sup> to symbolically

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<sup>59</sup> Tripp *ibid* at 185, See also Ndulo *op cit* note 1 at 89-90.

<sup>60</sup> Mwambene *op cit* note 37 at 115.

<sup>61</sup> J Amoah ‘Watch GRACE Grow: South African Customary Law and Constitutional Law in the Equality Garden’ in B Baines, D Barak-Erez & T Kahana (eds) *Feminist Constitutionalism* (2012) 357-361; Banda *op cit* note 14 at 15.

<sup>62</sup> Versteeg *Law op cit* note 1 at 868-869.

<sup>63</sup> The term ‘performative’ evokes the philosophy of JL Austin, who argued that certain verbalisations, rather than merely referencing or describing events, cause real life consequences (for example, saying ‘I do’ in the context of a wedding changes a person’s status from being single to being married). He concludes by observing that all verbalisations effectively ‘do’ something beyond the sum component of the meaning of its words, because they say something about the identity of the speaker. See, JL Austin *How to Do Things with Words* 2 ed (1997).

<sup>64</sup> Versteeg *Law op cit* note 1 at 919; Law & Versteeg *op cit* note 2 at 1179.

affirm its identity as a member of the ‘international community of states’,<sup>65</sup> and/or to secure foreign investment in the context of international capitalism.<sup>66</sup> Thus, rather than being orientated towards setting national agendas and shaping legislation, performative constitutions are intended to manufacture a certain image, directed at institutions, individuals, or groups outside the state.<sup>67</sup> Applying the term ‘performative’ to constitutions diverges from dominant narratives whereby constitutions are ‘static normative documents’ (ie only authoritative texts). Instead, use of this term emphasises the subjectivity of constitutional interpretation, and the contingency of such interpretation on the broader social environment.<sup>68</sup> Furthermore, the term ‘performative’, applied to constitutions, implies that strong constitutional protection does not guarantee the state’s intention to fulfil its constitutional obligations. This is especially problematic for women in polygynous marriages, who, following the critiques against polygyny outlined in Chapter 1, may be vulnerable to discrimination, and therefore particularly require state avenues for guaranteeing their rights.

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<sup>65</sup> Law & Versteeg op cit note 2 at 1179-1181; Harris-short op cit note 3 at 165.

<sup>66</sup> Law & Versteeg ibid at 1172.

<sup>67</sup> Ibid.

<sup>68</sup> M Vargova ‘Dialogue, pluralism, and change: The intertextual constitution of Bakhtin, Kristeva, and Derrida’ (2007) 13 (4) *Res Publica* 418. Vargova further discusses the conception that a constitution’s legitimacy derives in part from its deference to a past historic moment, whereby it came into existence. Applying the constitution therefore becomes an activity in attempting to apply the original authors’ values to contemporary situations (ibid at 419). This is as odds with a ‘transformative’ approach, adopted in post-apartheid South Africa, whereby the constitution’s provisions are continually meant to be in immediate dialogue with the wider social environment for the long-term purpose of transforming society in line with human rights; see M Rapatsa ‘Transformative Constitutionalism in South Africa: 20 Years of Democracy’ (2014) 5 (27) *Mediterranean Journal of Social Sciences* 888-889.

## 2.3 Theoretical framework

### 2.3.1 *Equality and non-discrimination*

Since this thesis considers the extent to which constitutional rights to equality and non-discrimination apply to women in polygynous customary marriages, it is necessary that these concepts first be discussed. The rights to ‘equality’ and ‘non-discrimination’ have been described as “‘the twin pillars’ upon which the whole edifice of human rights law is established.”<sup>69</sup> The distinction between ‘equality’ and ‘non-discrimination’ is often pragmatic, in other words, relating to how they are used within a particular text. For example, non-discrimination often occurs in the context of a list of characteristics and sociological groupings (such as sex, gender, race, etc.) by which one may not be discriminated against,<sup>70</sup> whereas ‘equality’ often relates to an abstract quality,<sup>71</sup> or is used to denote ‘equality before the law.’<sup>72</sup>

The right to equality in particular is often drawn upon in the context of reforming African customary laws in line with mainstream human rights standards.<sup>73</sup> Traditionally, the interpretation of this right involves gender-neutral, equivalent treatment of men and women.<sup>74</sup> This definition of equality, associated with liberal individualism, has been critiqued in that it does not adequately interrogate the ways in which structural inequalities, whether economic, cultural, or social, contribute to women’s unequal status.<sup>75</sup> Subsequently, the concept of equality has expanded to incorporate the distinction between formal and substantive equality.<sup>76</sup> Formal equality refers to equality

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<sup>69</sup> Ssenyonjo op cit note 13 at 42.

<sup>70</sup> Fredman op cit note **Error! Bookmark not defined.** at 2 and 5.

<sup>71</sup> Ibid.

<sup>72</sup> This is based on personal observation.

<sup>73</sup> Banda op cit note 1 at 27.

<sup>74</sup> Banda op cit note 14 at 7-8.

<sup>75</sup> Banda ibid at 8 and 15.

<sup>76</sup> R Hunter ‘Introduction: Feminism and Equality’ in R. Hunter (ed)’s *Rethinking Equality Projects in Law* (2008) 1.

before the law, irrespective of the broader social environment. Substantive equality, however, recognises that different treatment may be appropriate when society is structured along highly unequal lines,<sup>77</sup> and grapples with the broader social matrix in which inequality occurs.<sup>78</sup> Substantive equality is therefore more compatible with the theory of intersectionality, which recognises that individuals' social identities comprise overlapping and interacting affiliations and groups.<sup>79</sup> An intersectional approach to equality should thus consider how membership to various groups affects a woman's capacity to access other rights,<sup>80</sup> without obliging her to abandon one aspect of her identity in favour of another.<sup>81</sup> From an intersectional perspective, vague state commitment to gender equality may not help women in polygynous marriages, unless their cultural identities are similarly affirmed and validated. In addition, an intersectional approach also recognises that women in polygynous marriages are not only vulnerable to discrimination in relation to men, but that they may be discriminated against in relation to other spouses in a polygynous marriage.

When assessing the extent to which women in polygynous customary marriages benefit from constitutional rights to equality and non-discrimination, this thesis adopts an intersectional, substantive approach. This assumes that women in polygynous marriages constitute a group in its own right, and that protecting their human rights requires that the law acknowledge their position as distinct from, for example, women in monogamous marriages. It further argues for a more nuanced understanding of gendered discrimination, recognising that women may be discriminated against, not only in

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<sup>77</sup> Fredman op cit note **Error! Bookmark not defined.** at 13-14.

<sup>78</sup> Fredman ibid at 21.

<sup>79</sup> A Davis 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28 (1) *Harvard Human Rights Journal* 205, 208-209.

<sup>80</sup> Ibid at 207.

<sup>81</sup> See Himonga 'Constitutional Rights of Women in Southern Africa: Dominant Interventions and "Old Pathways"' in B Baines, D Barak-Erez & T Kahana (eds) *Feminist Constitutionalism* (2012) 329-332.

comparison to men, but also in the context of being a polygynous wife in a customary marriage, where there may be different treatment afforded to different parties to the marriage.

### *2.3.2 Equality and discourse*

In my analysis, I also adopt an approach to equality and non-discrimination that incorporates post-structuralist insights about ‘discourse’ and discourse analysis. ‘Discourse’ refers to a regime of language that ‘constructs, sustains, and changes institutional and societal structures.’<sup>82</sup> This was articulated by Michel Foucault, who described discourses as socially embedded products/practices of language and power, which shape knowledge and constrains what can or cannot be said or thought.<sup>83</sup> In contrast to a linear approach to knowledge that sees concepts evolving chronologically towards an ideal state of ‘truth’, a post-structuralist approach argues that knowledge and meaning are neither fixed nor pre-given, but rather ‘in flux’, sensitive to power relations, and contingent on exclusion, ie repressing and silencing competing discourses.<sup>84</sup>

It therefore follows that discourse analysis is not merely a methodological tool for examining data, but entails an epistemological position regarding the meaning and function of language.<sup>85</sup> In contrast to traditional legal approaches that view language through which law is constituted as merely instrumental (ie a tool for unpacking certain objectively discernible legal principles),<sup>86</sup> discourse analysis views language as a

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<sup>82</sup> KJ Chick ‘Constructing a Multicultural National Identity: South African Classrooms as Sites of Struggle between Competing Discourses’ (2002) 26 (6) *Journal of Multilingual and Multicultural Development* 462-463.

<sup>83</sup> M Foucault ‘Orders of Discourse’ (1971) Inaugural lecture delivered at the College de France 8.

<sup>84</sup> Foucault *ibid* 9-11 and 28.

<sup>85</sup> LA Wood & RO Kroger *Doing Discourse Analysis* (2000) xiv-xv, 3-4.

<sup>86</sup> P Goodrich ‘Law and Language: An Historical and Critical Introduction’ (1984) 2 *Journal of Law and Society* 173.

sociocultural activity,<sup>87</sup> both constrained by, and constitutive of the wider social environment.<sup>88</sup> Importantly for subsequent analysis, from the perspective of discourse analysis, absences, or silences are considered semantically meaningful.<sup>89</sup> For instance, Karin Van Marle observes, '[w]henver equality is constituted between two parties according to a certain standard of approach, it excludes others.'<sup>90</sup> The notion that in defining who is equal, others may be excluded, has major implications. Silence, or what is not heard and/or visible, becomes a powerful mechanism for interrogating power relations.<sup>91</sup> Consequently, when assessing whether women in polygynous customary marriages benefit from constitutional rights to equality and non-discrimination, this thesis considers it fundamental to first assess whether the act of polygyny, as well as the parties who constitute a polygynous marriage, are afforded recognition. Where polygyny or the parties to a polygynous marriage are not recognised or addressed by the law, this is considered a negation of the identity of women in polygynous customary marriages and therefore contrary to equality.

### *2.3.3 Case studies of how inequality arises in customary marriages*

The need for a more nuanced, intersectional understanding of human rights issues arising within polygynous marriages is illustrated in two court cases in South Africa and Tanzania respectively. These are *Mayelane v Ngwenyama and Minister for Home*

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<sup>87</sup> On Discourse Analysis being not merely methodology, but also epistemology, see Wood & Kroger op cit note 85.

<sup>88</sup> Duranti op cit note **Error! Bookmark not defined.** at 2-3, 9 and Wood & Kroger ibid at 4-7.

<sup>89</sup> Wood & Kruger op cit note 85 at 91.

<sup>90</sup> K Van Marle 'Haunting (In)Equalities' in R Hunter (ed) *Rethinking Equality Projects in Law* (2008) 136.

<sup>91</sup> Foucault op cit note 83 at 12.

*Affairs*<sup>92</sup> (henceforth *Mayelane*), decided by the Constitutional Court of South Africa, and *Maryam Mbaraka Saleh v. Abood Saleh Abood* (henceforth *Saleh*), decided by the Court of Appeal of Tanzania.<sup>93</sup> While the latter case concerns a polygynous Islamic marriage,<sup>94</sup> it is argued that the fundamental principles regarding the attempt to regulate polygynous relationships by law apply to customary marriages.

In *Mayelane*, a key issue regarding polygynous marriages was whether the first wife's consent was necessary for her husband to marry a second wife under Tsonga customary law.<sup>95</sup> The majority judgment ruled that to deny the first wife the opportunity to withhold her consent from her husband remarrying violated her right to equality and dignity,<sup>96</sup> and furthermore negatively affected her and her children materially.<sup>97</sup> Whilst noting the importance of the first wife's consent,<sup>98</sup> Himonga and Pope rightly observed that the judgment disproportionately favoured the first wife, whilst neglecting to consider the 'dignity and equality' of the subsequent wife who believed herself to be married by customary law to the deceased.<sup>99</sup> They furthermore criticised the court for failing to develop the customary law in line with protecting and balancing the rights of both wives,<sup>100</sup> especially considering that, as customary marriages are often not registered, a prospective bride may have no awareness of her husband's other existing

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<sup>92</sup> *Mayelane v Ngwenyama and Minister for Home Affairs* (CCT 57/12) [2013] ZACC 14, 2013 (4) SA 415 (CC) 2013 (8) BCLR 915 (CC) (30 May 2013).

<sup>93</sup> *Maryam Mbaraka Saleh v. Abood Saleh Abood* High Ct. Civ., App. I (1992) (Tanz.) cited in B Rwezaura 'Tanzania: Building a New Family Law out of a Plural Legal System' (1995) 33 *Journal of Family Law* 523-540. Since, to my knowledge, the original case is not published online, I refer to Rwezaura's analysis of the case.

<sup>94</sup> B Rwezaura 'Tanzania: Building a New Family Law out of a Plural Legal System' (1995) 33 *Journal of Family Law* 530.

<sup>95</sup> *Ibid* para 12 (b); Himonga & Pope op cit note 15 at 332.

<sup>96</sup> Himonga & Pope *ibid* 323; and *Mayelane* at paras 71-73.

<sup>97</sup> *Mayelane* para 80.

<sup>98</sup> Himonga & Pope op cit note 15 p 332.

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid* at 335, 338.

marriages.<sup>101</sup> They observed that the fact that women in monogamous customary marriages enjoy more rights than women in polygamous customary marriages<sup>102</sup> cannot be said to fulfil state obligations of equality,<sup>103</sup> and that the court's failure to consider the equality and dignity of the second wife is both 'anomalous and unfair.'<sup>104</sup>

*Saleh* concerns the breakdown of a marriage between the applicant, who was the second and junior wife to the respondent, who was the first wife. Based on Tanzania's Law of Marriage Act (LMA) of 1971, the applicant was awarded 40 per cent of the respondent's assets. This judgment, however, failed to consider how this affected the first wife, the respondent. The first wife's later attempt to challenge this decision at the Court of Appeal was dismissed, as it was ruled that she did not constitute a party to the divorce proceedings, and hence had no basis to claim she was being discriminated against.<sup>105</sup> The LMA was thus interpreted as construing divorce as a matter fundamentally concerning two parties, thereby excluding any other existing wife.<sup>106</sup> This interpretation disregarded the complexities that arise in a polygynous arrangement. Indeed, it has been suggested that the Act was drafted 'without consideration of the circumstances of couples who are married polygamously.'<sup>107</sup>

Both *Mayelene* and *Saleh* illustrate the extent to which the wording of legislation—including lack of clarity and legislative omissions—can have severe consequences for the rights of women in polygynous customary marriages. In *Mayelene*, this is evident in the lack of explication in the relevant legislation, the Recognition of Customary Marriages Act 120 of 1998 (RCMA), pertaining to whether a first wife's

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<sup>101</sup> Himonga & Pope op cit note 15 at 333.

<sup>102</sup> Ibid at 335.

<sup>103</sup> S 1(1) and (b) of the Constitution of South Africa 1996.

<sup>104</sup> Himonga & Pope op cit 15 at 333.

<sup>105</sup> Rwezaura op cit note 94 at 531.

<sup>106</sup> Howland & Koenen op cit note 24 at 3-4.

<sup>107</sup> Rwezaura op cit note 94 at 532.

consent is necessary for the husband's subsequent polygamous marriages.<sup>108</sup> In *Saleh*, there is a similar lack of clarity in the LMA regarding the division of assets in polygynous divorce.<sup>109</sup> Both these transgressions may be accounted for if one considers an underlying discourse that views marriages—whether customary or civil—as monogamous by default.

*Mayelane* and *Saleh* show the need for an intersectional approach to equality, which considers how inequality may be structured differently for women in polygynous marriages. In other words, attempts to protect certain women in customary marriages may prejudice other existing wives. Foucault's theory of discourse exposes how certain 'truths' are more visible, and therefore easier to protect than others. In the above cases, such a 'truth' resides on the notion that marriage fundamentally affects two people, hence suppressing competing discourses of polygynous marriages. Ultimately, these cases illustrate that in not engaging with the dynamics and complexities within a polygamous marriage,<sup>110</sup> African states may fail to protect wives in polygamous marriages at a legislative level, even if the rights to equality and non-discrimination are affirmed at the constitutional level.<sup>111</sup>

## 2.4 Methodology

### 2.4.1 Scope

This thesis uses a 'desk top' approach, in other words examining already existing material, located from online databases. The areas for analysis are the constitutions and marriage laws for fourteen of the total of eighteen African members of the

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<sup>108</sup> Himonga & Pope op cit 15 at 330.

<sup>109</sup> Howland & Koenen op cit note 24 at 5.

<sup>110</sup> Himonga & Pope op cit 15 at 335.

<sup>111</sup> Eg s 9 of the Constitution of South Africa.

Commonwealth.<sup>112</sup> Two criteria were used for justifying the exclusion of certain African Commonwealth members. Firstly, in the interest of narrowing this project to polygyny in African customary law (and not, for example, Islamic law which is also potentially polygynous), African Commonwealth members that do not contain substantive communities governed by African customary law are excluded, namely Seychelles and Mauritius.<sup>113</sup> Secondly, I exclude countries in which polygyny in any marriage system, including customary marriage, is illegal, ie in Rwanda and Mozambique.<sup>114</sup> This is not to suggest that the latter two countries do not have women in *de facto* polygynous customary marriages needing protection,<sup>115</sup> but rather that the capacity of legislation to attempt to regulate polygynous marriages vis-à-vis constitutional values is highly limited when the existence of such marriages is negated by the state.

#### *2.4.2 Areas of inquiry and related issues*

One area for analysis is the constitutions of the fourteen examined countries. As far as possible, the most recently amended version of the constitution is considered. The 1996 Constitution of Zambia is considered alongside the 2016 Constitution of Zambia (Amendment) Act, as the latter consolidates the former and is to be ‘read as one with the

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<sup>112</sup> See ‘Member Countries’ available at <http://thecommonwealth.org/member-countries>, online 19 August 2017.

<sup>113</sup> For an account of the social dynamic in Mauritius, see Adam Aft & Daniel Sacks. ‘Mauritius: An Example of the Role of Constitutions in Development’ (2014) *University of Miami International and Comparative Law Review*, 110-111. For an account of Seychelles, see Mathilda Twomey, *Legal métissage in a micro jurisdiction: the mixing of Common Law and Civil Law in Seychelles* (PhD) National University of Ireland (2015) 100-116.

<sup>114</sup> Art 26 of the Constitution of Rwanda 2003 recognises only monogamous civil marriages. For Mozambique, see s 7 of Lei de Famillia 25 of 2004.

<sup>115</sup> Indeed, the failure to recognise polygynous unions under customary law increases the vulnerability of women in polygynous unions, see J Bayisenge ‘Does the Law Work in Their Favor? The Complexity of Land Rights of Women Living in Polygamous Relationships in Rwanda’ (2015) *JENdA* 27, 52-74. For the continued *de facto* existence of polygyny in Mozambique, see Save the Children in Mozambique ‘Children and women’s rights to property and inheritance in Mozambique’ (2009) 11.

Constitution of Zambia.’<sup>116</sup> Similarly, the 1992 Constitution of Ghana is read alongside the 1996 Constitution of the Republic of Ghana (Amendment) Act No 527.

The second area of inquiry involves marriage laws, or more specifically laws related to the recognition, solemnisation or registration of customary marriages. In addition, where applicable, I consider Acts whose primary purpose is to govern matrimonial causes. The above excludes laws also relevant to polygynous wives, such as laws that in effect regulate interstate succession, or communal land use. The rationale for focusing exclusively on the above laws is to limit the scope of this study. In addition, such laws are of general and non-specialised application to women in polygynous customary marriages and may provide a framework for subsequent and ancillary legislation.

The laws examined for each country comprises of laws enacted and currently in force. As far as possible, only laws passed or amended post-European independence are considered.<sup>117</sup> In certain cases, it is possible that the examined laws predate the constitution of that country. In such a case, some might argue that a law enacted prior to the constitution should not be subjected to constitutional scrutiny. This argument is rejected in this thesis, following Cook who declared that '[s]tates must be answerable for their acts and omissions... and their maintenance of the *status quo* despite evidence of

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<sup>116</sup> Constitution of Zambia (Amendment) Act, 2016 preamble.

<sup>117</sup> In certain instances, it is possible to locate more than one statute that may strictly be applicable for the solemnisation and recognition of customary marriages. An example is Uganda's Marriage of African Act 1904, and Uganda's Customary Marriage (Registration) Act 1973. Both are, according to Uganda's legal database, in force, however only the latter statute (at least the version available online) has been passed post independence from Britain (1962). Furthermore, the latter is associated with recently passed ancillary legislation, namely the Customary Marriage Registration (Prescription of Forms and Fees) (Amendment) Regulations, 2005, No 52. Focusing on more recently amended acts—or at least those acts passed post independence—helps locate the 'voice' of the African state, which would be expected to better reflect the interests of polygynous wives in customary marriages, as compared to colonial legislation.

pervasive inequality.<sup>118</sup> Therefore, the persisting presence of a discriminatory Act may not be excused merely because it predates the constitution.

There are several challenges, methodological and logistical, in the location of laws for comparison. One issue relates to commensurability, or finding material from different legal systems appropriate for comparison.<sup>119</sup> This relates to the fact that the examined countries have inherited different legal traditions from their European colonisers,<sup>120</sup> which may afford legislation different degrees of influence, or necessitate different levels of detail in legislation. For example, former British colonies<sup>121</sup> often follow common law systems, characterised by wider judicial autonomy, and therefore place less emphasis on written laws. In contrast, African countries whose legal systems were influenced by continental Europe<sup>122</sup> may follow conventions from civil law, including civil codes. Such countries typically place less emphasis on judicial interpretation and prefer more detail in legal texts.<sup>123</sup> However, the distinction between civil and common law, which traditionally has preoccupied comparative legal research, is becoming increasingly blurred, as legal systems interact with similar global discourses and challenges.<sup>124</sup>

A more pertinent challenge involves the location of the relevant laws in their most updated forms. Since this thesis relies exclusively on online legal data bases, it is

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<sup>118</sup> R Cook 'State Responsibility for Violations of Women's Human Rights' (1994) 7 *Harvard Human Rights Journal* 137.

<sup>119</sup> E Örüçü 'Comparability: Theories and Presumptions' in *The Enigma of Comparative Law* (2004) 19-32.

<sup>120</sup> S Joireman 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39 (4) *The Journal of Modern African Studies* 576-577.

<sup>121</sup> This category includes most of the examined Commonwealth Countries, since I am excluding Mauritius, Rwanda, Seychelles, and Mozambique from this study.

<sup>122</sup> Of the examined Commonwealth countries, this includes Cameroon, which is bijural, and South Africa, which although also colonised by Britain, has a 'mixed' jurisdiction, reflecting elements of civil law and common law.

<sup>123</sup> S Mancuso 'The New African Law: Beyond the Difference Between Common Law and Civil Law' (2008) 14 (1) *Annual Survey of International & Comparative Law* 43.

<sup>124</sup> *Ibid* at 43-44.

possible that the laws considered in this thesis have been amended but not published online, or that laws relevant to this subject area are not available online. To address these issues, the following constraints apply to the gathering of research material: firstly, all the examined laws were collected within the period of 1 December 2016 to 12 December 2016. I therefore do not consider amended laws post this period. In addition, I consider laws primarily from either official government websites, or legal resources and assistance centres. Where no relevant laws are available from the above-mentioned sources, I consider databases associated with international human rights bodies and non-governmental organisations (NGOs). Addendum 1 shows a detailed breakdown of the source and date for each of the laws of the examined countries.

### *2.4.3 Methodology used for constitutional analysis*

Almost all Commonwealth African constitutions prohibit discrimination, but also recognise the right to practice customary law and/or to practice one's culture.<sup>125</sup> To categorise the range of approaches by which African constitutions subject customary law to provisions of equality and non-discrimination, Fareda Banda identifies three models, which she refers to as 'strong cultural relativism,' 'weak cultural relativism,' and 'universalist.'<sup>126</sup> 'Strong cultural relativist' constitutions contain clauses that limit the application of human rights (namely equality or non-discrimination) so that they never apply if the discrimination occurs within customary laws, or areas relating to 'adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.'<sup>127</sup> 'Weak cultural relativism' describes constitutions where there is an unresolved relationship between the right to culture and the right to practice one's customary laws

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<sup>125</sup> Bond op cit note 1 at 292.

<sup>126</sup> Banda op cit note 1 at 34.

<sup>127</sup> Banda ibid at 36, s 23 (3) of the Constitution of Zimbabwe.

and prohibitions of gender discrimination. Universalist constitutions subjects customary laws to ‘both... the test of non-discrimination and equality before the law.’<sup>128</sup>

Banda emphasises that these are not ‘fixed’ or ‘scientific’ categories. However, the terms are also useful in that they represent an organising paradigm through which the diversity of African constitutions may be viewed, and hence are used nonetheless in this thesis for purposes of description. However, I prefer to use the terms ‘weak,’ ‘medium,’ and ‘strong’ application<sup>129</sup> to describe the extent to which fundamental human rights apply to customary law, where ‘weak application’ corresponds with ‘strong relativism’ and ‘strong application’ corresponds with ‘universalist positions.’ This is both for reasons of brevity, but also because the terms ‘universalist’ and ‘relativist’ are philosophically loaded, and could controversially be interpreted as relating to the drafters’ intentions and philosophical position regarding the universality of human rights.<sup>130</sup>

Determining whether a constitution’s application of the bill of rights is strong, medium or weak first entails examining whether customary law is recognised in the constitution, and whether the constitution also provides ‘human rights norms in the form of non-sex/gender discrimination provisions and equality.’ Where a constitution commits to both of the above, it is necessary to examine whether the constitution provides guidance on how these rights interact and conflict with each other.<sup>131</sup>

One potential mechanism for determining whether the right to practice customary law may ever justify the infringement of a woman’s right to equality and non-discrimination relates to constitutional limitation clauses. Since constitutional rights and

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<sup>128</sup> Banda *ibid* at 34.

<sup>129</sup> This is based on my own extension of a typology suggested by Chuma Himonga during private correspondence. The correlation between Himonga’s and Banda’s terms are based on my own understanding.

<sup>130</sup> Banda *op cit* note 1 at 34-35.

<sup>131</sup> Banda *op cit* note 1 at 34-37.

freedoms may at times conflict or be at odds with other national values, limitation clauses provide guidance as to which and under what circumstances constitutional rights may be infringed upon.<sup>132</sup> For example, section 36 of South Africa's Constitution states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.<sup>133</sup>

Similar clauses are seen, for example, in the constitutions of Kenya,<sup>134</sup> Malawi,<sup>135</sup> and Namibia,<sup>136</sup> which also state that any limitation be a law of general application. More commonly, the examined constitutions limit the application of fundamental rights so that they do not impinge upon the rights and freedoms of others and/or the public interest.<sup>137</sup>

One issue in using limitation clauses as a means to resolve potentially competing rights relates to the open-ended quality of terms such as 'public interest'. It is therefore not immediately apparent from the limitation clauses alone which constitutional right should trump in the event of a conflict of interests. It has further been argued that one may not determine in the abstract which rights may be limited. Instead, it is for the Court to decide on a case-by-case situation, depending on the particular facts of a given

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<sup>132</sup> I Currie & J de Waal (eds) 'Limitation of Rights' in *The Bill of Rights Handbook* 6 ed (2013) 150-151.

<sup>133</sup> S 36 Constitution of South Africa.

<sup>134</sup> S 24 Constitution of Kenya.

<sup>135</sup> S 44 Constitution of Malawi.

<sup>136</sup> Art 22 Constitution of Namibia.

<sup>137</sup> S 3 Constitution of Botswana; s 4 Constitution of Lesotho; s 45(1) Constitution of Nigeria; s 15 Constitution of Sierra Leone; s 14(3) Constitution of Swaziland; ss 30(1) and (2) Constitution of Tanzania; s 43 Constitution of Uganda; art 11 Constitution of Zambia.

situation.<sup>138</sup> Since this thesis concerns only the texts of constitutions and legislation, and not cases, I therefore exclude limitation clauses from subsequent analyses.

Instead, constitutions are graded on two scales. The first scale involves the extent to which women in polygynous customary marriages benefit from non-discrimination clauses. The second scale considers the extent to which the right to equality applies to polygynous customary marriages. Both scales comprise four levels of protection, ranging from non-application to women in polygynous customary marriages to a more developed protection. A constitution that scores one point signifies non-application to women in polygynous customary marriages; two points suggest weak protection; three points indicates medium protection, and four points signifies strong protection, albeit these levels are relative to one another, and therefore not in themselves objective criteria.

Tables 1 and 2 below show the ‘levels’ and associated scores for both the non-discrimination and equality index. By design, the levels are progressive and recursive. In other words, to reach a certain level, the previous levels must also apply. When the results of these two tests are combined, each constitution gets a score where the maximum is eight. It is further possible to convert these scores into a percentage and divide them into ‘quartiles’ (ie a number between one and four). Constitutions with overall scores in the first quartile (less than 25 per cent) are considered to not protect women in polygynous customary marriages. Constitutions with overall scores in the second quartile (less than 50 per cent) suggest weak protection. Those in the third quartile (less than 75 per cent) indicate medium protection, and those above 75 per cent indicate strong protection. This is summarised below in Table 3.

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<sup>138</sup> Currie & de Waal op cit note 132 at 154 and 164.

*Table 1. Non-Discrimination Index*

<b>Level of Protection</b>	<b>Description</b>	<b>Points</b>
None	Non-discrimination does not apply to customary law.	1
Weak	Discrimination according to sex/gender <sup>139</sup> is forbidden.	2
Medium	Discriminatory practices in customary law are prohibited.	3
Strong	The state can intervene and develop the customary law in line with human rights.	4

*Table 2. Equality Index*

<b>Level of Protection</b>	<b>Description</b>	<b>Points</b>
None	There is an indication that the right to equality does not apply to polygynous wives/there is no right to equality.	1
Weak	The constitution commits to equality before the law/equality in general terms.	2
Medium	The constitution specifies that principle of equality applies within the private domain of marriage.	3
Strong	The protection in level 3 is implicitly or directly extended to customary marriages (minimally by recognizing customary marriages in addition to containing clauses indicating equality within marriage).	4

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<sup>139</sup> Despite the difference between ‘sex’, a biological category, and ‘gender’, which is socially constructed (c.f. Banda op cit note 1 at 4), this thesis uses the terms indistinguishably.

Table 3. Indices Combined into Quartiles

Quartile	%	Level of protection
1	0 to 25	Marginal
2	26 to 50	Weak
3	51 to 75	Medium
4	76 to 100	Strong

#### 2.4.4 Methodology used for analysis of legislation

In considering the extent to which women in polygynous marriages are afforded statutory protection, I first examine whether the law recognises polygyny. Since recognition of polygyny is considered fundamental to a human rights approach towards polygynous marriages, I distinguish between laws where polygyny is implicitly tolerated and those where the recognition is overt. Explicit recognition of polygyny is argued to better protect the rights of women in polygynous customary marriages, as it vindicates and acknowledges the existence of relationships beyond monogamy. As noted by Andrews, ensuring full recognition of customary marriages on the basis of equality with respect to civil marriages protects the rights of women in African customary marriages.<sup>140</sup> For example, prior to 1994 in South Africa, customary marriages were considered subordinate to civil marriages,<sup>141</sup> which in certain instances amounted to non-recognition.<sup>142</sup> This resulted in ‘undue hardship for Black women and their children’, denied state protection.<sup>143</sup> Different legal statuses between civil and customary

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<sup>140</sup> Andrews op cit note 11 at 375.

<sup>141</sup> J De Koker ‘Proving the existence of an African customary marriage’ (2001) 2 *Journal of South African Law* 257.

<sup>142</sup> Ibid at 260, where the author discusses the The Black Administration Act 38 of 1927.

<sup>143</sup> Ibid at 262.

law are further problematic when considering the social phenomenon whereby a man contracts marriages with different women under both civil and customary law.<sup>144</sup> In cases where customary marriages are not equal in validity to civil marriages, for example, as was the case in Tanzania, the discovery of a husband's wife under civil law could invalidate the customary marriage, leaving the wife vulnerable and delegitimizing any children from that marriage.<sup>145</sup> Therefore, the general position of customary marriages in relation to civil marriages is considered an important indicator for assessing the degree to which women in polygynous customary marriages are protected.

Special attention is given to whether there are provisions relating to constitutional rights to equality and non-discrimination, and in particular, whether these provisions encompass wives in polygynous marriages. The criteria by which legislation are examined is shown below in Table 4. Like the indexes discussed above for measuring constitutional protection, low scores represent lower protection and high scores represent higher protection of women in polygynous marriages.

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<sup>144</sup> This is described by Bond op cit note 7, citing Oguli Oumo (footnote 86), who writes about Uganda. It also continued to occur in South Africa, even after the enactment of the RCMA, as argued by M Mamashela & M Carnelley 'The Catch 22 situation of widows from polygamous marriages being discarded under customary law' (2011) 25(1) *Agenda* 114.

<sup>145</sup> Rwezaura op cit note 94 at 524-525. This is also the case in Lesotho, seen in WCM Maqutu 'Lesotho's African Marriage is not a "customary union"' (1983) 16(3) *Comparative and International Law Journal of Southern Africa* 379.

*Table 4. Index for Assessing Degree of Protection in Examined Legislation*

<b>Level of Protection</b>	<b>Description</b>	<b>Points</b>
Not Applicable	The law does not openly recognise polygyny (but polygyny is not explicitly illegal).	1
Weak	The law explicitly recognises polygyny in customary laws.	2
Medium	Polygynous customary marriages are recognised as equally valid to monogamous civil marriages.	3
Strong	The law attempts to regulate polygynous marriages and govern in according to constitutional values.	4

#### *2.4.5 Comparing constitutional and legislative protection*

Ultimately, because both constitutional and legislative protection are compared on a four-point scale, it is possible to compare whether strong constitutional protection correlates with strong legislative protection according to the given indices. Where there is a disjuncture between the degree of protection for polygynous wives at a constitutional and statutory level, I use techniques associated with discourse analysis to interrogate the manner in which language obscures and mediates this contradiction.

Discourse analysis involves a deeper analysis of text. Rather than focusing exclusively on referential content (ie the literal meaning of the text), it considers ‘meaning’ as

arising from various sources, including details that are lexical, syntactic, pragmatic, and social.<sup>146</sup>

In contrast with deductive methodologies, in which one seeks to confirm or reject a hypothesis in a ‘top-down’ manner, discourse analysis allows for inductive approaches, whereby one’s research question is built bottom-up, shaped by the available data, which subsequently leads to hypothesis building.<sup>147</sup> The process of discourse analysis therefore has been defined in terms of ‘detailed and repeated reading’ of text, and in particular ‘against the background of the discourse-analytic perspective’.<sup>148</sup>

I further draw on a subset of discourse analysis called Critical Discourse Analysis (CDA), which focuses on the analysis of language so as to render visible stratified social relationships, power, and inequality.<sup>149</sup> In particular, this is done through the examination of ‘omission’ or ‘silence’ as a discursive strategy. ‘Omission’ may be defined as withholding or controlling information which might otherwise be ‘relevant to the target for making an informed decision.’<sup>150</sup> It has been described as a strategy of deception, which functions as a ‘means of constructing and maintaining a preferable version of reality... aimed at gaining an advantage for the speaker.’<sup>151</sup> This conception relates to the manipulation of information, without making inferences on the intentions of the speaker.<sup>152</sup> In the context of this thesis, omission refers to marked statutory silence pertaining to polygyny, given that it may sit uncomfortably with gender equality. An example of ‘omission’ in this sense is the silence regarding *lobola* (often called ‘bride

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<sup>146</sup> Wood & Kruger op cit note 85 at 5-7.

<sup>147</sup> D Thomas ‘A General Inductive Approach for Analyzing Qualitative Evaluation Data’ (2006) 27 (2) *American Journal of Evaluation* 238-239; Wood & Kruger at 87.

<sup>148</sup> Wood & Kruger op cit note 85 at 95.

<sup>149</sup> Wood & Kruger ibid at 205-206; R Wodak & M Meyer (eds) ‘Critical Discourse Analysis: History, Agenda, Theory and Methodology in *Methods of Critical Discourse Analysis* (2009) 10.

<sup>150</sup> D Galasiński *The Language of Deception: A Discourse Analytical Study* (2000) 22.

<sup>151</sup> Ibid at 7.

<sup>152</sup> Ibid at 18.

wealth’) in South Africa’s Recognition of Customary Marriages Act (RCMA) 1998. Despite being broadly accepted as a prerequisite for customary marriages, *lobola* is barely discussed in the Act, and is not included as a prerequisite for a customary marriage. This allowed the state to appease feminist lobbyists, who objected to the practice in that it was compared to ‘purchasing’ wives, whilst not attempting to abolish the practice.<sup>153</sup> Despite appearing neutral, it is argued here that use of ‘omission’ allows the state to avoid having to engage with potentially sensitive issues<sup>154</sup> and thereby may deny groups of people their constitutional rights.

## 2.5 Conclusion

This chapter first located this research within its academic discourse and provided an overview of the theoretical framework, namely equality and non-discrimination as both legal and discursive concepts. Based on this, it was shown how inequality and discrimination may arise in polygynous marriages where the applicable legislation fails to consider all parties in a polygynous marriage. It later described the methodology, which involves comparing constitutions according to two indices, and legislation according to one index. Where mismatches between constitutions and legislation arise, I use discourse analysis to examine how the deviance is possible and where it manifests. The following chapter examines constitutions according to the above-mentioned methodology.

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<sup>153</sup> Higgins et al. op cit note 11 at 1669-1670.

<sup>154</sup> Andrews op cit note 11 at 330; 378.

## Chapter 3. Constitutional Analysis

### 3.1 Introduction

The chapter aims to assess the extent to which Commonwealth African countries' constitutions enshrine the rights to equality and non-discrimination, and whether this applies to women in polygynous customary marriages. Since the latter is seldom invoked directly at a constitutional level, the position of polygynous customary wives can be assessed with reference to examining the extent to which gender equality provisions apply to customary law (discursively intertwined with the right to culture).<sup>155</sup>

This chapter is organised as follows. Section 3.2 is a broad overview of the presence or absence of the constitutional right to non-discrimination and equality and whether the constitution directly or indirectly recognises customary law.<sup>156</sup> Following Banda,<sup>157</sup> a constitution that affirms both these areas faces a potential contradiction if discriminatory actions occur within customary law. Section 3.3 comprises a detailed analysis of the degree of protection of the rights to equality and non-discrimination for women in customary polygamous marriages, using a framework that assigns numerical values to constitutions, quantifying the extent to which the constitution can be construed as protecting polygynous wives (discussed in section 2.4.2 above). Finally, section 3.3 discusses individual strong and weak constitutional performers, and proposes a simplified scale showing the variation of protection amongst constitutions.

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<sup>155</sup> Banda op cit note 1 at 33.

<sup>156</sup> Ibid at 35.

<sup>157</sup> Banda op cit note 1 at 36.

### 3.2 Broad overview of constitutions

All of the examined constitutions broadly recognize and protect both customary law and, to varying extents, the rights to equality or non-discrimination. Recognition of the former may be direct or indirect. Direct references are seen in the Constitution of Ghana (Amendment) Act that directly names customary law as constituent of the national laws.<sup>158</sup> Other instances of direct recognition are seen in the Constitutions of Botswana,<sup>159</sup> Kenya,<sup>160</sup> Lesotho,<sup>161</sup> Malawi,<sup>162</sup> Namibia,<sup>163</sup> Nigeria,<sup>164</sup> Sierra Leone,<sup>165</sup> South Africa,<sup>166</sup> Swaziland,<sup>167</sup> Uganda,<sup>168</sup> and Zambia.<sup>169</sup> Indirect approaches invoke the right to culture, cultural participation,<sup>170</sup> ‘traditional values’<sup>171</sup> and ‘freedom of consciousness’,<sup>172</sup> which, in sub-Saharan Africa serve as proxies for customary laws.<sup>173</sup> Only two of the examined constitutions, namely that of Cameroon and Tanzania,<sup>174</sup> use exclusively indirect approaches.

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<sup>158</sup> S 11(2) Constitution of Ghana (Amendment) Act 527 of 1996.

<sup>159</sup> S 15(4)(d) Constitution of Botswana 1996.

<sup>160</sup> S 2(4) Constitution of Kenya 2010.

<sup>161</sup> S 18(4)(b) Constitution of Lesotho 1993.

<sup>162</sup> S 10(2) Constitution of Malawi 1994.

<sup>163</sup> Art 66 Constitution of Namibia 1990.

<sup>164</sup> S 267 Constitution of Nigeria 1999.

<sup>165</sup> Ss 170 and 171 of Constitution of Sierra Leone 1991.

<sup>166</sup> S 211 Constitution of South Africa 1996.

<sup>167</sup> S 115 Constitution of Swaziland 2005.

<sup>168</sup> S 246 Constitution of Uganda 1995.

<sup>169</sup> Art 127 Constitution of Zambia 1996.

<sup>170</sup> Eg ss 44(1) and (2) Constitution of Kenya.

<sup>171</sup> S 1(2) Constitution of the Republic of Cameroon 1972, amended 1996 (henceforth Constitution of Cameroon).

<sup>172</sup> S 33 Constitution of Malawi.

<sup>173</sup> Banda op cit note 1 at 34.

<sup>174</sup> See s 19 Constitution of Tanzania 1977.

With regard to the affirmation to the rights to equality and/or non-discrimination, a distinction can be made regarding the extent to which these rights are justiciable. In order for a constitutional right to be justiciable, it must be enforceable in a court of law.<sup>175</sup> Whilst traditionally civil-political rights were considered justiciable whereas socio-economic rights were to be progressively realised,<sup>176</sup> it is also possible to determine whether a constitutional right is justiciable based on its organisation within the constitution. For instance, justiciable rights are commonly grouped as ‘fundamental rights’ or labelled as part of a bill of rights, whereas non-justiciable rights may be called, for example, ‘directive principles’, and merely indicate the aspirations of the state.<sup>177</sup> In all but two of the examined constitutions and with limited variation,<sup>178</sup> the rights to equality and/or non-discrimination are organised in sections labelled bill of rights or fundamental (human) rights, indicating that these rights are intended to be justiciable.<sup>179</sup> Both Nigeria and Cameroon are notable exceptions whose constitutions fail to indicate whether the rights to equality/non-discrimination are justiciable.<sup>180</sup> It is evident that the latter two constitutions are weaker in its protection of women in polygynous customary marriages with regard to the rights to equality and non-discrimination. However, this thesis does not disregard the potential of non-justiciable rights, which should ideally

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<sup>175</sup> AP Blaustein & C Tenney ‘Understanding “rights” and bills of rights’ (1991) 25 University of Richmond Law Review 423.

<sup>176</sup> *Ibid* at 424.

<sup>177</sup> *Ibid* at 425-427.

<sup>178</sup> For instance, in Tanzania’s Constitution the rights to equality and non-discrimination are under a section titled ‘Basic Rights and Duties’.

<sup>179</sup> S 15 Constitution of Botswana; s 17 Constitution of Ghana; s 27 Constitution of Kenya; s 20 Constitution of Malawi; art 10 Constitution of Namibia; s 27 Constitution of Sierra Leone (albeit the right to equality falls under ‘fundamental principles and state policy, section 8(2), and is therefore not justiciable); s 9 of the Constitution of South Africa; s 20 of the Constitution of Swaziland; s 12 and 13 of the Constitution of Tanzania; s 21 of the Constitution of Uganda; and art 23 of the Constitution of Zambia.

<sup>180</sup> In the Constitution of Cameroon, these rights occur in the preamble and under s 1(2) of ‘The State and Sovereignty’, which declares that the state of Cameroon shall ‘ensure the equality of all citizens before the law.’ The right to equality and non-discrimination for Nigeria occurs in ss 15(2) and 17(2)(a), under a section entitled ‘Fundamental Objectives and Directive Principles of State Policy’.

provide normative guidance for subsequent state action,<sup>181</sup> including manifesting at a legislative level, assuming that the state is sincere in its inclusion of such provisions. The following sections discuss in detail how the constitutions relate the rights of equality and non-discrimination to women in polygynous customary marriages, according to the framework outlined in the methodology.

### 3.3 Non-discrimination and equality

#### *3.3.1 Non-discrimination index*

This section analyses constitutions according to the non-discrimination index outlined in the methodology, section 2.4.3 above. Figure 1 below shows that a quarter (25per cent) of the examined constitutions limit the right to non-discrimination by excluding ‘personal’ or customary laws (reflected by a score of ‘1’). Botswana, Lesotho, Sierra Leone, and Zambia provide that ‘no law shall make any provision that is discriminatory either of itself or in its effect’<sup>182</sup> but that this will not apply to any law that makes provision ‘with respect to adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law’,<sup>183</sup> all areas that generally fall under the jurisdiction of customary law. These provisions further stipulate that the right to non-discrimination does not apply when the matter occurs under customary law.<sup>184</sup> Botswana and Lesotho specify that no one may be treated discriminatorily by anyone acting under

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<sup>181</sup> AP Atupare ‘Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria’ (2014) 27 *Harvard Human Rights Journal* 73.

<sup>182</sup> S 11(1) Constitution of Botswana; s 18(1) Constitution of Lesotho; s 27(1) Constitution of Sierra Leone, art 23(1) Constitution of Zambia.

<sup>183</sup> S 11(4)(c) Constitution of Botswana, s 18(4)(b) Constitution of Lesotho; s 27(4)(d) Constitution of Sierra Leone; art 23(4)(c) Constitution of Zambia.

<sup>184</sup> S 11(4)(d) Constitution of Botswana; s 18(4)(c) Constitution of Lesotho; s 27(4)(e) Constitution of Sierra Leone; art 23(4)(d) Constitution of Zambia Constitution.

the ‘written law’<sup>185</sup> and Botswana, Lesotho, Sierra Leone, and Zambia all prohibit discrimination ‘in the performance of the functions of any public office or any public authority’.<sup>186</sup> Since living customary law is often unwritten,<sup>187</sup> the exemption of oral laws to constitutional scrutiny increases women’s vulnerability in polygynous customary marriages. Similarly, the specification that only laws emanating from public offices or authorities are subject to non-discrimination, disregards the widely held opinion that women are most vulnerable to abuse within the ‘private’ or family domains.<sup>188</sup>

Tanzania has the only constitution meeting the requirements outlined in the methodology for ‘weak’ protection. Discrimination according to sex or gender is forbidden in general terms, but there is also no further instruction as to how this articulates in the context of potentially discriminatory customary laws or practices. For example, whilst protecting the right to privacy of family life<sup>189</sup> and freedom of belief<sup>190</sup> (indicative of the traditional separation between the ‘private’ and the ‘public’ domain, the former of which allows for the protection of customary laws)<sup>191</sup> it also forbids ‘any authority’ in the Republic from enacting laws that are ‘discriminatory either of itself or in its effect’<sup>192</sup> and commits to eradication of ‘all forms of discrimination’.<sup>193</sup> In listing the grounds upon which one may not be discriminated against, it does not specify that discrimination on the basis of one’s sex or gender is forbidden. However, the non-discrimination provision applies to people of a particular ‘*station in life* such that *certain*

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<sup>185</sup> S 11(2) Constitution of Botswana, s 18(2) Constitution of Lesotho.

<sup>186</sup> Constitution of Botswana *ibid*; Constitution of Lesotho *ibid*; Constitution of Zambia art 23(2) and the Constitution of Sierra Leone at s 27(2).

<sup>187</sup> Himonga & Moore *op cit* note 29 at 10. However, this concept of living customary law has also been challenged. See AC Diala, ‘The Concept of Living Customary Law: A Critique’ (2017) 49(2) *Journal of Legal Pluralism and Unofficial Law* 1-23.

<sup>188</sup> Banda *op cit* note 1 at 43.

<sup>189</sup> S 16 constitution of Tanzania.

<sup>190</sup> *Ibid* at s 19.

<sup>191</sup> Romany *op cit* note 4.

<sup>192</sup> S13(2) Constitution of Tanzania.

<sup>193</sup> *Ibid* at s 9(h).

*categories of people* who are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications’ (emphasis my own). The wording is open-ended enough to potentially accommodate women, particularly if one compares the phrases ‘certain station of life’ and ‘certain categories of people’ with ‘particular social group’. The latter phrase is found in refugee law, and has been interpreted as including victims of gender-based persecution, who otherwise are not overtly named as being entitled to refugee claims.<sup>194</sup> Therefore, it is argued that the Constitution of Tanzania both indirectly recognises customary law and also indirectly women’s rights to equality and non-discrimination. It thus fulfils (albeit not unambiguously) the second condition in the non-discrimination index.

All other constitutions fulfil to various extents the third condition of the non-discrimination index, in that customary law is curtailed and subject to constitutional human rights. Ghana’s Constitution prohibits ‘all customary practices which dehumanise or are injurious to the physical and mental well-being of a person’,<sup>195</sup> and further requires that the National House of Chiefs evaluate ‘traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful’.<sup>196</sup> A similar provision exists in the Constitution of Malawi, but which specifically prohibits customs or practices discriminatory to women.<sup>197</sup> The Constitutions of Namibia, South Africa, Kenya, and Uganda emphasise that customary

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<sup>194</sup> M Randall ‘Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, The United Kingdom, and the United States’ (2015) 23(4) *Journal of Gender, Social Policy & the Law* 530-534.

<sup>195</sup> S 26 (2) Constitution of Ghana.

<sup>196</sup> S 272(c) Constitution of Ghana (Amendment) Act.

<sup>197</sup> S 24(2) Constitution of Malawi: ‘Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as— - a. sexual abuse, harassment and violence...c. deprivation of property, including property obtained by inheritance.’

law, or the right to practice one's culture, is strictly subject to the authority of the constitution,<sup>198</sup> which includes non-discrimination clauses based on sex or gender.<sup>199</sup> The constitutions of Cameroon and Nigeria, however, apply a more passive approach, by affording recognition to only those cultural values consistent with human rights.<sup>200</sup> While this subjects customary law to human rights-based constitutional values (therefore fulfilling the third condition of the non-discrimination index), it also does not expressly prohibit discrimination, but merely states that discriminatory practices within customary institutions are not afforded state recognition.

Swaziland's constitution prohibits a customary traditional leader from enforcing customs, traditions, practices, or usages that are unjust and discriminatory.<sup>201</sup> Furthermore, customary law is recognised, but subject to the Constitution,<sup>202</sup> and a customary practice may not be 'repugnant to natural justice or morality or general principles of humanity'.<sup>203</sup> It imposes on the State the duty to 'cultivate... respect for fundamental human rights and freedoms... of the human person'<sup>204</sup> and to develop

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<sup>198</sup> S 2(4) Constitution of Kenya: 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid'; art 66(1) Constitution of Namibia: 'Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid *to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law*' (emphasis my own); s 30 Constitution of South Africa: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'; s 2 Constitution of Uganda: 'This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda. If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.'

<sup>199</sup> Art 10(2) Constitution of Namibia; ss 9(3) and (4) Constitution of South Africa; ss 27(4) and (4) Constitution of Kenya; and s 21 Constitution of Uganda.

<sup>200</sup> S 1(2) Constitution of Cameroon: '[The State] shall recognise and protect traditional values that conform to democratic principles, human rights and the law'; s 21 Constitution of Nigeria: 'The State shall (a) protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter'.

<sup>201</sup> S 233(9) Constitution of Swaziland.

<sup>202</sup> Ibid at s 252(2)

<sup>203</sup> Ibid at s 252(3).

<sup>204</sup> S 58(3) Constitution of Swaziland.

‘appropriate customary and cultural values’ to meet the ‘growing needs of the society as a whole’.<sup>205</sup> The qualification that ‘customary and cultural values’ must be appropriate implies that other cultural values are not afforded constitutional protection, and therefore invites comparison with the approaches of Cameroon and Nigeria outlined above. Read together with section 58(3) of Swaziland’s Constitution,<sup>206</sup> it is implied that an appropriate cultural value relates to ‘fundamental human rights and freedoms’. Along with pledging commitment to gender equality, the Constitution states that government, ‘subject to [the] availability of resources’ ‘shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement’.<sup>207</sup>

Despite the Constitution of Swaziland showing commitment towards ensuring non-discrimination towards women in the ambit of customary law, this is either qualified, eg ‘subject to available resources’, or else softened by the use of indirect language. For example, it is neither immediately transparent what is meant by ‘appropriate customary and cultural values’, nor clear what is meant by ‘the growing needs of society as a whole’. In contrast, the constitutions of Ghana, Kenya, Malawi, Namibia, and South Africa apply even stronger protection towards women, and therefore meet the fourth and final condition in the non-discrimination index. They not only curtail customary laws according to the constitution, but also strongly indicate the State’s will/capacity to intervene in areas of customary law that may repress women as well as developing the customary law in line with constitutional values.<sup>208</sup> The

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<sup>205</sup> Ibid at s 60(10).

<sup>206</sup> This section states: ‘the State shall cultivate among all the people of Swaziland through various measures including civic education respect for fundamental human rights and freedoms and the dignity of the human person’.

<sup>207</sup> Ibid at s 28(2).

<sup>208</sup> The Constitution of Uganda arguably falls into this category too. S XXIV for example requires the State to ‘promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans’. In addition, s 21, involving the right to equality and non-discrimination, affords

Constitution of Namibia permits ‘any part of customary law’ to be repealed or modified by legislation.<sup>209</sup> This principle is specifically applied to customary marriages, which are recognised in the constitution but also subject to acts of parliament.<sup>210</sup> The definition of customary law in Ghana’s Constitution incorporates rules determined by the Superior Court of Judicature,<sup>211</sup> indicating that the court may develop customary laws. It is also specified that ‘the existing law [including customary law] be construed with any modifications, adaptations, qualifications, and exceptions necessary to bring it into conformity with the provisions of the Constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by [the] Constitution.’<sup>212</sup> Furthermore, it is specified that Parliament be permitted to enact laws redressing social imbalances in Ghanaian society,<sup>213</sup> as well as ‘matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law’.<sup>214</sup>

The constitutions of Kenya and South Africa bind the bill of rights to both state organs and persons.<sup>215</sup> This not only reinforces the extent to which private parties (including spouses in a polygynous customary marriage) are bound by the principle of non-discrimination, but also provides incentive for the state to develop customary law according to its human rights provisions.<sup>216</sup> The Constitution of Kenya further commits

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parliament the potential to enact laws that are necessary for ‘implementing policies and programmes aimed at redressing social, economic, educational, or other imbalances in society; or making such provision as is required or authorised to be made under this Constitution; or providing for any matter acceptable and demonstrably justified in a free and democratic society.’ Whilst this can be construed as suggesting political will for regulating customary marriages according to the principles of equality and non-discrimination, the wording is less specific and less direct than the other constitutions argued to fall within this category.

<sup>209</sup> Art 66 (2) Constitution of Namibia.

<sup>210</sup> Ibid at art 4.

<sup>211</sup> S 11(2) Constitution of Ghana.

<sup>212</sup> Ibid at s 11(6).

<sup>213</sup> Ibid at s 17 (4)(a).

<sup>214</sup> Ibid at s 17(4)(b).

<sup>215</sup> S 20(1) of the Constitution of Kenya; s 8 of the Constitution of South Africa.

<sup>216</sup> S 20(3) of the Constitution of Kenya; s 39 of the Constitution of South Africa.

to addressing ‘the needs of vulnerable groups within society’, which includes women and members of particular ethnic/cultural communities,<sup>217</sup> including enacting and implementing legislation ‘to fulfil its international obligations in respect of human rights and fundamental freedoms’.<sup>218</sup> In implementing the right to non-discrimination, the State is obliged to ‘take legislative and other measures’ as well as affirmative action programs and policies that redress past discrimination,<sup>219</sup> which could easily be read to include gendered discrimination. Finally, the Constitution of Malawi imposes the obligation on the State to adopt and implement policies and legislation for (1) achieving gender equality ‘in all spheres of Malawian society’, (2) ending gender-based discrimination, and (3) addressing the social and material consequences of gendered discrimination.<sup>220</sup> All of the above is graphically illustrated by Figure 1, which assigns numbers to constitutions based on the degree to which they incorporate customary institutions within provisions of non-discrimination.<sup>221</sup>

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<sup>217</sup> S 21(3) of the Constitution of Kenya.

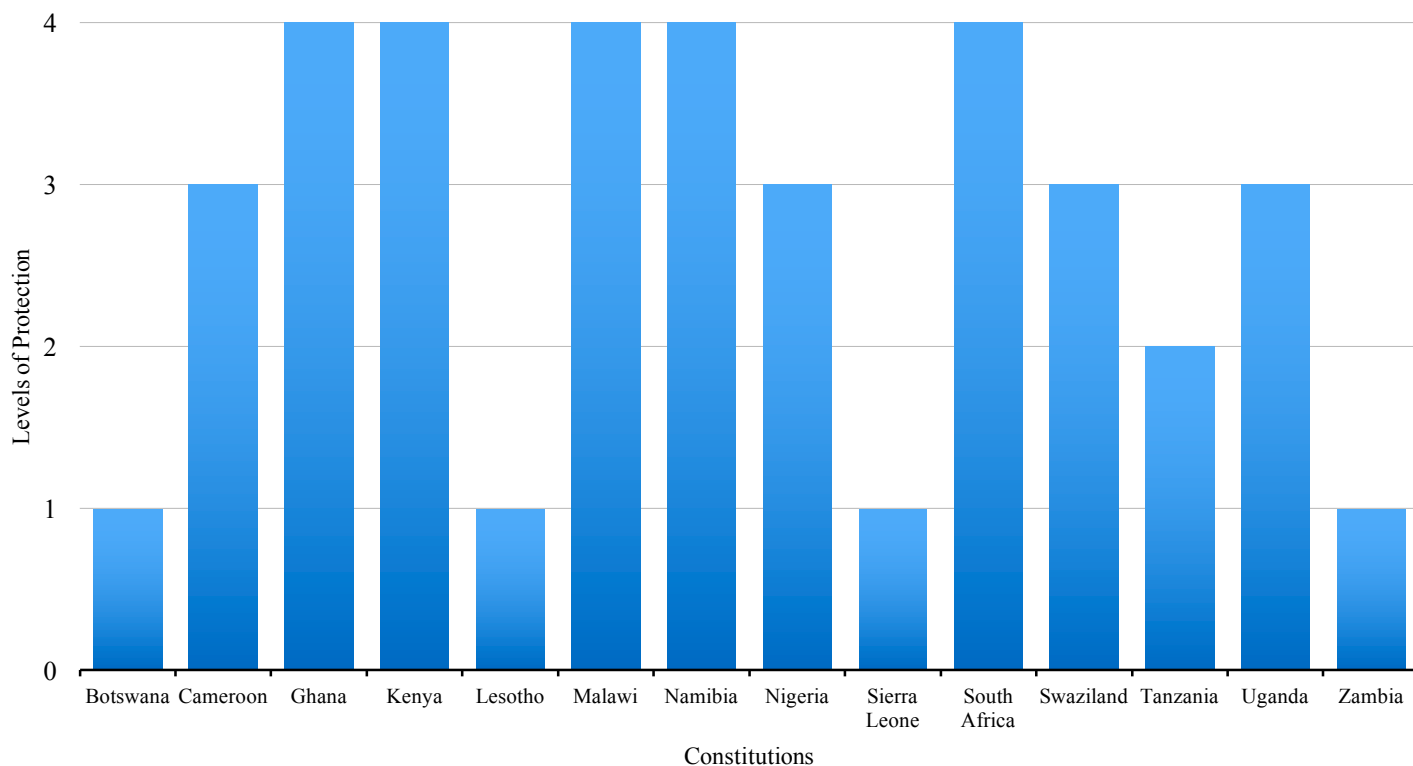
<sup>218</sup> *Ibid* at s 21(4).

<sup>219</sup> S at 27(6).

<sup>220</sup> S 13(a) Constitution of Malawi.

<sup>221</sup> See Table 1 in section 2.4.3 for details on the scoring system.

Figure 1 Performance of African States According to the Non-Discrimination Index\*



\*The numbers on the Y-axis represent the 'non-discrimination index' as outlined in the methodology at 2.4.3. One point suggests that the principle of non-discrimination does not apply to customary law (ie no protection for women in polygynous customary marriages). A constitution with two points affirms non-discrimination based on sex or gender, but gives no additional explication regarding potential conflicts with customary laws ('weak protection'). Three points shows a constitution prohibits discrimination in customary laws/practices, but does not necessarily suggest strong state will to intervene and develop the customary law in line with human rights ('medium protection'). Finally, four points ('strong protection') suggests that the state not only prohibits discrimination, but also shows positive commitment to transforming the customary law in line with gender equality.

### 3.3.2 Equality index

Whilst the above considers the application of non-discrimination to customary law and state commitment to regulating and developing customary laws accordingly, the equality index focuses on equality before the law, and the extent to which this applies to the

traditionally ‘private’ domain of marriage. The following discusses the performance of constitutions according to the metric outlines in section 2.4.3, Table 2 above.

Botswana has the worst performing constitution. There is no provision for a clause stating equality before the law, and therefore it receives one point. All of the other examined constitutions minimally commit to ensuring that every individual is afforded equal protection by the law and/or status before the law,<sup>222</sup> with a slight change in rhetoric in the Constitutions of Nigeria and Sierra Leone, which pledge that every citizen be entitled to ‘equality of rights, obligations and opportunities before the law’.<sup>223</sup>

The constitutions of Ghana, Uganda, and Malawi fulfil the third condition of the equality index, as they provide for equality within marriage. Uganda’s constitution states that men and women ‘are entitled to equal rights in marriage, during marriage and at its dissolution’, and that parliament is obliged to pass laws protecting the rights of succession for widows and widowers.<sup>224</sup> Ghana’s constitution similarly protects the rights of spouses to inherit<sup>225</sup> and states that spouses equally have access to jointly acquired property,<sup>226</sup> which, in the case of divorce, should be ‘distributed equitably’ between the spouses.<sup>227</sup> The constitution of Malawi specifies that, regardless of their marital status, ‘women have the right to full and equal protection by the law’.<sup>228</sup> This includes the right for married and single women ‘to acquire and maintain rights in property, independently, or in association with others’,<sup>229</sup> as well as to ‘acquire and retain custody, guardianship, and care of children and to have an equal right in the

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<sup>222</sup> S 1(2) Constitution of Cameroon, s 17(1) of Constitution of Ghana, s 27(1) of Constitution of Kenya; s 4(o) of Lesotho’s Constitution, s 12 (v) of Malawi’s Constitution; art 10 of Namibia’s Constitution; ss 9(1) and (2) of South Africa’s Constitution, s 14(1)(a) of Swaziland’s Constitution; s 13 (1) of Tanzania’s Constitution; s 21 of Uganda’s Constitution; art 118(2) of Constitution of Zambia (Amendment) Act.

<sup>223</sup> S 17(1) of Constitution of Nigeria, and s 8(2) of Constitution of Sierra Leone.

<sup>224</sup> S 31 Constitution of Uganda.

<sup>225</sup> S 22(1) Constitution of Ghana.

<sup>226</sup> Ibid at s 22(3)(a).

<sup>227</sup> Ibid at s 22(3)(b).

<sup>228</sup> S 24(1) Constitution of Malawi.

<sup>229</sup> Ibid at s 24(1)(a)(ii)

making of decisions that affect their upbringing.’<sup>230</sup> In the event of a divorce, the constitution further entitles women to ‘a fair disposition of property that is held jointly with a husband; and to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.’<sup>231</sup>

Despite applying to the traditionally ‘private’ sphere of marriage, these provisions do not specify that customary marriages are privy to these rights.<sup>232</sup> In the context of Malawi’s constitution, this silence appears marked. For example, section 22 lists rights relating to marriages and families. Subsection 5 states that parties to customary marriages are also entitled to some of these rights, namely the right to ‘marry and found a family’ and to enter into marriage freely.<sup>233</sup> Conspicuously absent, however, is the direct application to customary marriages of subsection 2, which states that ‘each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty, or exploitation’. A strict reading of these provisions suggest that women in polygynous marriages are neither entitled to full and equal respect, nor protected against all forms of neglect, cruelty, or exploitation.<sup>234</sup> In addition, section 24 states:

Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status, which includes the right... to be accorded the same rights as men in *civil law* (emphasis my own).

The specification that civil, but not customary law, requires equality is problematic. It may strip women in polygynous customary marriages from state protection as compared

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<sup>230</sup> Ibid at s 24(1)(a)(iiii).

<sup>231</sup> Ibid at s 24(1)(b).

<sup>232</sup> The Constitution of Nigeria, however, extends the right to inherit to cases of intestate succession in s 22 (1) - which may incorporate customary marriages.

<sup>233</sup> Articulated in ss 24(3) and (4) Constitution of Malawi.

<sup>234</sup> Although this would be contradicted by s 24(2) of the Constitution of Malawi that states, ‘Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women’. The above is merely to show that women in customary marriages are afforded less consideration than those governed by state law.

to women in civil marriages. This ironically contradicts the provision requiring equality before the law.<sup>235</sup>

The constitutions of Kenya, Namibia, and South Africa provide the strongest protection for the right to equality. This is because customary marriages are specifically recognised but bound to constitutional values, which include equality within marriages. For instance, Kenya's Constitution provides that 'parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage'.<sup>236</sup> It further requires Parliament to enact legislation recognising 'marriages concluded under any tradition, or system of religious, personal, or family law',<sup>237</sup> but to the extent that such marriages are consistent with constitutional values.<sup>238</sup> Similarly, the Constitution of Namibia affirms equal rights both within a marriage and its dissolution.<sup>239</sup> It also affirms the principle of 'free and full consent' of the intending spouses to marry<sup>240</sup>—whilst explicitly recognising the legitimacy of customary marriages, subject to the Constitution and acts of Parliament.<sup>241</sup> Article 4(3)(b) of Namibia's Constitution recognises the legitimacy and validity of customary marriages, and openly suggests the possibility that Parliament may pass legislation stipulating the requirements for such a marriage. Article 12(1)(f) further recognises the legitimacy of customary marriages, stating that no partner, including those 'married by a customary law', are obliged to testify against their spouse. This open recognition of customary marriages suggests equal recognition with civil marriages, which is emphasised by the

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<sup>235</sup> Seen, for instance, in ss 4(v) and 20 of the Constitution of Malawi.

<sup>236</sup> S 45(3) Constitution of Kenya.

<sup>237</sup> *Ibid* at s 45(4).

<sup>238</sup> *Ibid*.

<sup>239</sup> Art 14(1) Constitution of Namibia.

<sup>240</sup> *Ibid* at art 14(2).

<sup>241</sup> *Ibid* at art 4(3)(b).

equal treatment of ‘common and customary law’ in section 66, which subjects both civil and customary law equally to the constitution and subsequent legislative acts.<sup>242</sup>

The South African Constitution provides that everyone is equal before the law, and has the right to equal protection and benefit from the law.<sup>243</sup> It further provides that the state may not discriminate directly or indirectly based on (amongst other factors) an individual’s marital status.<sup>244</sup> Because the bill of rights applies horizontally and within ‘private’ domains, it may be argued to support equality of spouses within marriages.<sup>245</sup> The South African Constitution further empowers Parliament to pass legislation recognising ‘marriages concluded under any tradition, or a system of religious, personal or family law’,<sup>246</sup> but that this recognition is subject to the Constitution.<sup>247</sup>

With regard to wives in polygynous customary marriages, it is possible to identify two major human rights benefits for states whose constitutions reflect this highest level of equality. Firstly, this approach is in marked contrast to certain colonial approaches, which rendered customary law subordinate to civil law.<sup>248</sup> It therefore follows that under colonialism, women in customary marriages, in many instances robbed even of state recognition,<sup>249</sup> were not afforded equal protection to those married

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<sup>242</sup> Ibid at art 66, titled Customary and Common Law, which states: ‘(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law. (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.’

<sup>243</sup> S 9 (1) South African Constitution.

<sup>244</sup> Ibid at s 9 (3).

<sup>245</sup> For a related argument see W Lehnert ‘The Role of the Courts in the Conflict between African Customary Law and Human Rights’ (2005) 21(2) *South African Journal on Human Rights* 247.

<sup>246</sup> S 15(3)(a)(i) of the South African Constitution.

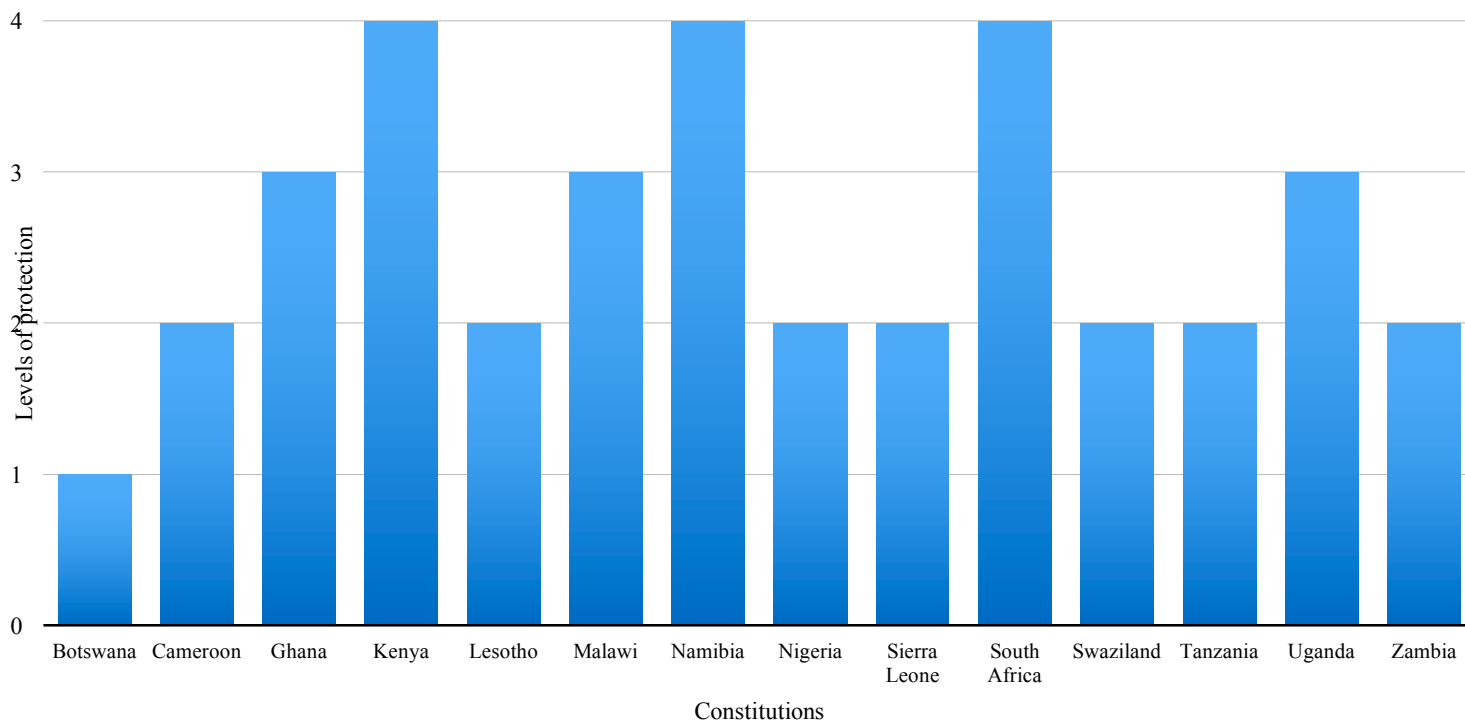
<sup>247</sup> Ibid at s 15(3)(b).

<sup>248</sup> C Himonga & C Bosch ‘The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?’ (2000) 117 *African Law Journal* 308-309; Ndulo op cit note 1 at 95.

<sup>249</sup> M Herbst & D du Plessis ‘Customary Law v Common Law Marriages: A Hybrid Approach in South Africa’ (2008) 12(1) *Electronic Journal of Comparative Law* 5.

according to the state law. Secondly, in the constitutions of Kenya, Namibia, and South Africa, the recognition of customary marriages is always subject to the constitution, and therefore also the rights to equality and non-discrimination. In each of the above case, the state—governed by constitutional principles of equality and non-discrimination—may enact legislation regulating customary marriages. The implication is that because customary marriages are more directly subject to the human rights clauses, women in polygynous marriages are more likely to benefit from equality rights.

Figure 2. Performance of African States According to Equality Index\*



\*The Y-axis represents the degree of protection for women in polygynous customary marriages, where one point means no protection (ie the right to equality does not apply to polygynous wives); two points means weak protection (the constitution commits to equality before the law in general terms); three points means medium protection (the constitution specifies that principle of equality applies within marriages); and four points indicates strong protection.

### 3.4 Combined scores and discussion

It is possible to combine the results for each index, and produce a scale where the maximum is eight points. After being converted into a percentage, they may further be divided into quartiles, where quartile 1 = 1 per cent to 25 per cent; quartile 2 = 26 per cent to 50 per cent, quartile 3 = 51 per cent to 75 per cent and quartile 4 = 76 per cent to 100 per cent. Constitutions in quartile 1 do not significantly protect women in polygynous customary marriages. Those in quartile 2 do so weakly, while quartiles 3 and 4 reflect increasing levels of protection. These scores are represented in Table 5 below.

Table 5. Combined Scores for Constitution\*

	Botswana	Cameroon	Ghana	Kenya	Lesotho	Mali	Namibia	Nigeria	Sierra Leone	South Africa	Swaziland	Tanzania	Uganda	Zambia
<b>Non-Discrimination</b>	1	3	4	4	1	4	4	3	1	4	3	2	3	1
<b>Equality</b>	1	2	3	4	2	3	4	2	2	4	2	2	3	2
<b>Total</b>	2	5	7	8	3	7	8	5	3	8	5	4	6	3
<b>%</b>	25	62.5	87.5	100	37.5	87.5	100	62.5	37.5	100	62.5	50	75	37.5
<b>Quartile</b>	1	3	4	4	2	4	4	3	2	4	3	2	3	2

\*In order to arrive at a percentage, the scores for the non-discrimination index and equality index are combined. This is divided by the total (eight, comprised of a maximum of four points for both equality and non-discrimination index)

and multiplied by 100 to obtain a percentage. Based on this percentage, the quartile is determined, following Table 3 in section 2.4.3.

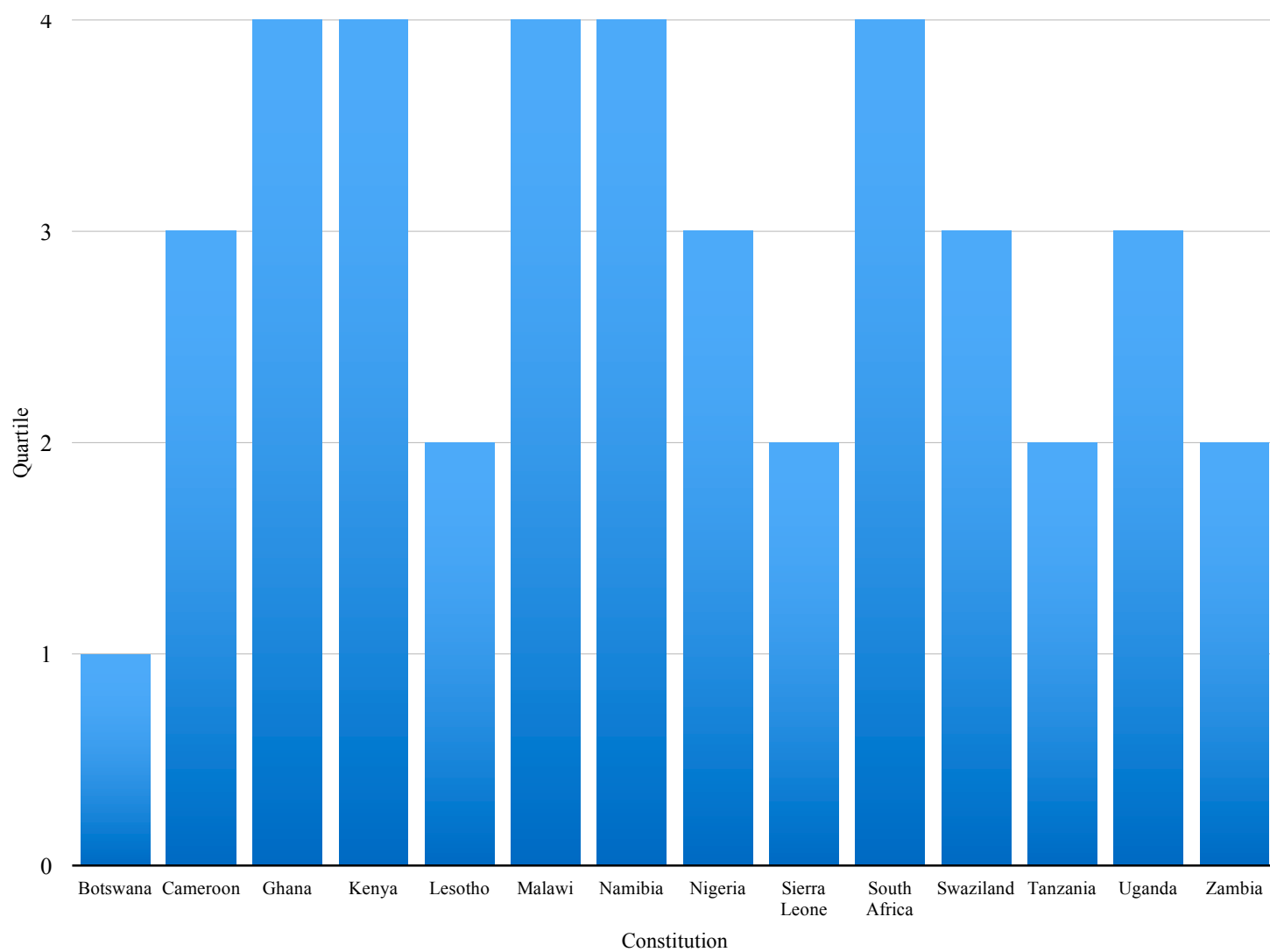
Most constitutions that receive low scores for non-discrimination, namely Botswana, Lesotho, Sierra Leona, and Zambia, also score low on the equality index. Similarly, the constitutions scoring highest on the non-discrimination index also score higher on the equality index.

Figures 3 and 4 below show the combined results of both the non-discrimination and the equality indices by quartile (see Table 3). Overwhelmingly, the scores are in the highest two indices (quartile 3 and 4), suggesting that most constitutions are active in their protection of women in polygynous marriages. Indeed, only one constitution, that of Botswana, falls within the first quartile, associated with no constitutional protection. Botswana's constitution is unique in that it neither explicitly includes provisions for equality before the law nor non-discrimination according to sex or gender. Instead discrimination is defined as 'affording different treatment to different persons, attributable wholly *or* mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed' (emphasis my own).<sup>250</sup> The use of the word '*or*' implies that there exists a closed list of variables in which discrimination may occur, one that conspicuously excludes sex or gender. The pie chart in Figure 4 shows the percentage of countries that belongs to each level of protection, where 7 per cent have no protection, 29 per cent show weak protection, another 29 per cent show medium protection, and 36 per cent show strong protection.<sup>251</sup>

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<sup>250</sup> S 15(3) Constitution of Botswana.

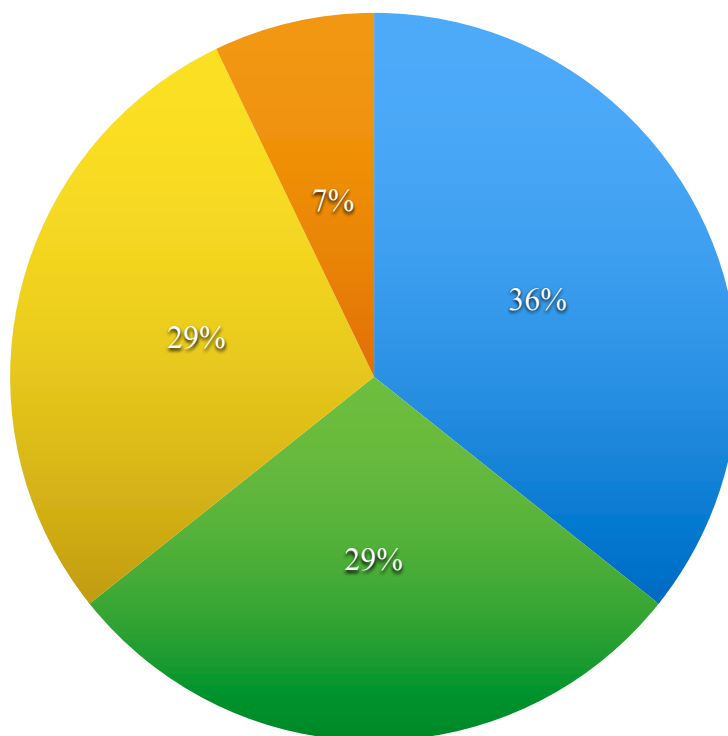
<sup>251</sup> These percentages have been rounded up to the nearest whole number, and therefore add up to 101 instead of 100. This error, however, is negligible, and does not significantly detract from the purpose of the graph.

*Figure 3. Combined Constitutional Score by Quartile\**

\*Quartiles are calculated by combining the scores of the non-discrimination and equality index, converted to a percentage and then divided into four categories (with 0-25 per cent being quartile 1, 26-50 per cent quartile 2; 51-75 per cent quartile 3, and 76-100 per cent quartile 4).

Figure 4. Degree of Protection (According to Quartile)

■ Strong Protection   ■ Medium Protection   ■ Weak Protection   ■ No protection



### 3.5 Conclusion: the significance of strong constitutional protection for women in polygynous customary marriages

Since no constitution directly and unambiguously addresses women in polygynous customary marriages, this chapter used several proxies to assess the extent to which the constitution indirectly affirms the rights of such women. This includes the extent to which non-discrimination is applicable to customary laws, whether states commit to strongly enforcing this principle, as well as whether marriages—and in particular customary marriages—fall under the scope of the right to equality. The primacy of constitutional protection as an indicator of legislative protection cannot be overemphasised. For example, in the South African case, *S v Makwanyane*,<sup>252</sup> Chaskalson P declared that:

A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive, and the courts as well as the fundamental rights of every person, which must be respected in exercising such powers.<sup>253</sup>

The significance of constitutionalism on the African continent is affirmed in the latest legal instrument to be adopted by the African Commission of Human and People's Rights, namely the African Charter on Democracy, Elections, and Governance (adopted 2011). Indeed, one of the Charter's objectives is the promotion of 'the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties'.<sup>254</sup> In light of the above, it should be expected that constitutional commitment to human rights should manifest at a statutory level. The following chapter therefore examines domestic

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<sup>252</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC).

<sup>253</sup> *Ibid* at para 15.

<sup>254</sup> Artss 2(2), 5 and 10 of the African Charter on Democracy, Elections and Governance 2011.

marriage laws from each of the fourteen countries, and examines whether there is a correlation between the level of constitutional and statutory protection of women in polygynous customary marriages.

## Chapter 4. Legislative analysis

### 4.1 Introduction

This chapter considers the extent to which the examined legislation applies to and protects the rights of women in polygynous customary marriages. It is structured as follows: section 4.2 provides an overview of the examined legislation on the extent to which customary marriages are included in its scope. Because this thesis considers recognition of the practice of polygyny, and the individuals within such marriages, to be fundamental to the protection of women in polygynous marriages,<sup>255</sup> section 4.3 discusses the extent to which polygyny is explicitly acknowledged in the examined legislation, and its implications for protecting the rights of polygynous wives. Section 4.4 considers whether, amongst those countries that explicitly recognise polygyny, the legislation indicates that customary marriages are recognised as equally valid compared to civil marriages. Section 4.5 examines whether the legislation attempts to regulate the polygynous relationships with reference to constitutional values of equality and non-discrimination. Section 4.6 provides a summary of the above, and quantifies the legislative protection according to the framework outlined in section 2.4.3. Whether there is continuity between legislative and constitutional levels of protection is discussed in section 4.7, which juxtaposes major findings of Chapters 3 and 4. Finally, section 4.8 concludes by summarising the findings and relating it back to the first research question of this thesis, which questions whether strong constitutional protection of women in polygynous marriages correlates to strong legislative protection.

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<sup>255</sup> This relates to the definition of ‘equality’ used in the theoretical framework of Chapter 2, which includes recognition as a prerequisite for equality. In other words, if there is no statutory recognition of polygyny, this may affect the extent to which women in polygynous customary marriages are able to draw on their constitutional rights to equality and non-discrimination.

## 4.2 Overview of the examined legislation

The examined laws fall into three categories. These are: (1) statutes exclusively concerned with customary marriages;<sup>256</sup> (2) statutes applying generally to all marriages, including customary marriages;<sup>257</sup> and (3) statutes that either exclude customary marriages, or else recognise only a limited subset of customary marriages conforming to the procedures of civil marriage.<sup>258</sup> Despite applying primarily to civil marriages, the laws in this latter category best indicate the statutory position of polygynous wives in customary marriages in the absence of other laws. In addition, these laws acknowledge the existence of customary marriages outside the Act.<sup>259</sup>

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<sup>256</sup> This includes Uganda's Customary Marriage (Registration) Act of 1973; Ghana's Customary Marriage and Divorce (Registration) Law 1985; South Africa's Recognition of Customary Marriages Act 120 of 1998 (henceforth RCMA) and Sierra Leone's Registration of Customary Marriage and Divorce Act 1 of 2009.

<sup>257</sup> This group consists of Botswana's Marriage Act 18 of 2001, Ghana's Marriage Act of 1994-1985; Kenya's Marriage Act 4 of 2014; Malawi's Marriage, Divorce and Family Relations Act 4 of 2015 of Malawi; Tanzania's Law of Marriage Act 5 of 1971 (henceforth LMA), Cameroon's Civil Status Registration Ordinance 81 of 1981; and Swaziland's Births, Marriages and Deaths Registration Act of 1983 (Swaziland's Marriage Act 1964 is not available online). This group also comprises Ghana's Matrimonial Causes Act 367 of 1971; and Kenya's Matrimonial Property Act 49 of 2013.

<sup>258</sup> This group comprises Lesotho's Marriage Act 10 of 1974; Namibia's Recognition of Certain Marriages Act 18 of 1991; Nigeria's Marriage Act of 1914; Zambia's Marriage Act 10 of 1918; Botswana's Matrimonial Causes Act 1 of 1973 (amended by Act 11 of 2008); Nigeria's Matrimonial Causes Act No. 18 of 1970; and Zambia's Matrimonial Act No. 20 of 2007.

<sup>259</sup> S 42 Lesotho's Marriage Act: 'This Act shall apply to all marriages solemnized in Lesotho save and except marriages contracted in accordance with Sesotho law and custom, and nothing herein contained shall be taken as in any manner affecting or casting doubts upon the validity of any such last-mentioned marriages contracted before or after the coming into operation of this Act'. S 35 of Nigeria's Marriage Act and s 34 of Zambia's Marriage Act states that 'nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner apply to marriages so contracted.' In the context of Namibia's Recognition of Certain Marriages Act 1991, this is indirect. Eg s 2(2) states that this Act's recognition of the above marriages does not apply when another marriage was subsequently contracted either in terms of the Family Act or by 'any other law'. The phrase 'any other law' suggests a covert acknowledgement to customary law, which is recognised in Art 66 of the Constitution, as well as in other Acts relating to marriage (see s 16 of Namibia's Married Persons' Equality Act 1996 Act 1 of 1996).

## 4.3 Recognition of polygyny

### 4.3.1 Polygyny explicitly recognised

The legality of polygyny is explicitly recognised in the examined laws of Cameroon, Kenya, South Africa, Sierra Leone, Tanzania, Uganda, and also to a lesser extent, Ghana. The marriage laws of Sierra Leone, Uganda, Kenya, and Tanzania indicate that by definition, customary marriages are polygamous or potentially polygamous.<sup>260</sup> In contrast, certain types of marriages, namely civil, Christian, and certain religious<sup>261</sup> marriages are by default monogamous.<sup>262</sup> According to Cameroon's Civil Status Registration Ordinance, the marriage certificate is required to specify 'the type of marriage chosen: polygamy or monogamy'.<sup>263</sup> It is stated that 'any person who has a legitimate interest may object to the celebration of a marriage, in particular... the wife of a man who is committed by the bonds of an undisclosed previous monogamous marriage.'<sup>264</sup> This suggests that a legal distinction exists between polygamous and monogamous marriages. However, there is very little statutory guidance about when a marriage is considered fundamentally monogamous, and whether this applies strictly to civil marriages, or also to customary marriages.

South Africa's Recognition of Customary Marriages Act (RCMA) recognises the customary marriages of persons who are spouses 'in more than one customary marriage'

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<sup>260</sup> See s 4(1) of Sierra Leone's Registration of Customary Marriage and Divorce Act, read together with s 3(1) which prohibits people married under the Christian Marriage Act, Muslim Marriage Act or Civil Marriage Act from entering into polygamous customary marriages; s 4(2) of Uganda Customary Marriage (Registration) Act 1973; s 6(3) Marriage Act of Kenya; s 10(2)(a) Marriage Act of Tanzania.

<sup>261</sup> Hindu Marriages under Kenya's Marriage Act are monogamous according to s 6 (2), as is Muslim marriages under Sierra Leone's Act according to s 4 (2).

<sup>262</sup> S 4(2) of Sierra Leone's Registration of Customary Marriage and Divorce Act; s 6(2) of the Marriage Act of Kenya; s 10(2)(b) in Tanzania's Marriage Act.

<sup>263</sup> S 49 of Cameroon's Civil Status Registration Ordinance.

<sup>264</sup> Ibid at s 58.

both prior to the commencement of the Act, and following its commencement.<sup>265</sup> Whilst Ghana's Customary Marriage and Divorce Registration Law makes no direct reference to polygamy/polygyny, Part A of its First Schedule asking for the particulars of the husband requires the registrar to note the presence of another 'existing marriage'.<sup>266</sup> That polygyny in customary marriages is legal is more overt in Ghana's Matrimonial Causes Act. Whilst specifying that the Act applies 'to all monogamous marriages'<sup>267</sup> it notes that the Act may be applied 'by a party to a marriage *other than a monogamous marriage*'.<sup>268</sup> The phrase 'other than a monogamous marriage' therefore admits the existence of polygynous marriages, despite avoiding the words 'polygamy' or 'polygyny'.

#### *4.3.2. Legality of polygyny by omission*

In examining laws where polygyny is legal by omission, a distinction can be made between those Acts that do not attempt to regulate polygynous customary marriages, and those that do but avoid language directly evoking polygyny, and further do not paraphrase the concept, as seen above in the case of Ghana and South Africa. The former category comprises the laws of Zambia, Nigeria, Namibia, and Lesotho, which contain provisions excluding polygynous customary marriages from the scope of the Act.<sup>269</sup> However, in so doing there is the implication that customary marriages may be polygynous outside of the Act. This is because there is no legal obligation—or even

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<sup>265</sup> S 2(3) and (4) of the RCMA 1998.

<sup>266</sup> The phrasing here is ambiguous. It merely states 'other existing marriage', followed by a space in which the registrar/husband must complete the question. It is not obvious whether this is meant as a simple 'yes/no' question, or whether the registrar is expected to detail the name and details of the existing wife.

<sup>267</sup> S 41(1) Matrimonial Causes Act of Ghana.

<sup>268</sup> Ibid at s 41(2).

<sup>269</sup> S 4 Marriage Act of Lesotho; s 2 Namibia's Recognition of Certain Marriages Act; s 35 Marriage Act of Nigeria, s 69 Matrimonial Causes Act of Nigeria; s 34 Marriage Act of Zambia; and ss 3 and 27(1)(b) Zambia's Matrimonial Causes Act.

possibility—to register a polygynous marriage under the Act. Conversely, there is no express prohibition on customary marriages not being registered. In the case of Lesotho, there is the potential for monogamous customary marriages to be incorporated into the Act. For instance, section 4 of Lesotho’s Marriage Act states:

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

The above shows that monogamous customary marriages may be governed by statute, but that this is not compulsory. In contrast, there is no attempt to regulate polygynous customary marriages, rendering women in such arrangements more vulnerable than their monogamously married counterparts.<sup>270</sup>

The second category comprises the marriage laws of Malawi, Swaziland and Botswana, which avoid declaring directly or indirectly that polygyny under customary law is legal, and also govern customary marriages. Malawi’s Marriage, Divorce, and Family Relations Act criminalises polygyny only in civil marriages,<sup>271</sup> and is silent on the issue in customary marriages. Its legality is evident however in the memorandum prefacing the Act’s Bill, which states that ‘polygamy is prohibited only with respect to statutory marriages (civil marriages)’.<sup>272</sup> Similarly, Swaziland’s Births, Marriages, and Deaths Registration Act and Botswana’s Marriage Act govern customary marriages,<sup>273</sup> however both are silent with regard to the legality of polygyny under customary laws.

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<sup>270</sup> This is discussed in C Himonga *Family Law in Zambia* (2011) 104.

<sup>271</sup> S 68(3) Ghana’s Marriage Act; s 18 Malawi’s Marriage, Divorce, and Family Relations Bill.

<sup>272</sup> Malawi’s Marriage, Divorce, and Family Relations Bill at iii and iv.

<sup>273</sup> S 2 of Botswana’s Marriage Act and ss 2 and 26 of Swaziland’s Births, Marriages, and Deaths Registration Act.

#### 4.4 Equal recognition of customary marriages with civil marriages

For ‘medium’ protection, a country’s law should both explicitly recognise polygyny and specify the equal validity of customary marriages with civil marriages.<sup>274</sup> This is seen in Kenya’s Marriage Act, which explicitly recognises polygyny,<sup>275</sup> and states that ‘all marriages registered under this Act have the same legal status.’<sup>276</sup> Similarly, South Africa’s RCMA explicitly recognises polygyny,<sup>277</sup> while sections 2(1) and (2) declare that a customary marriage conducted prior and after the commencement as the Act is legally recognised as a valid marriage. The implication of the above is that customary marriages, including polygynous customary marriages, are equal in status and validity to marriages governed by the Marriage Act 25 of 1961. In Tanzania’s LMA, the equal validity of civil and customary marriages is framed as the equal recognition of monogamous and polygamous marriages. It later explains that customary marriages are potentially polygynous.<sup>278</sup> With some qualification, Uganda’s Customary Marriage (Registration) Act fits into this category. Rather than implying equal status between civil and customary marriages, the latter is placed in a position of superiority. For instance, where a person is married under customary and civil law simultaneously, the presence of the former automatically invalidates the latter.<sup>279</sup> While this may disadvantage women married under civil law, it also reduces the risk that a women’s customary marriage will become invalid if a civil marriage is discovered.

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<sup>274</sup> Therefore, countries whose laws appear to recognise customary marriages as equal to civil marriages, but do not openly acknowledge polygyny, are not considered here. Examples of this include s 12(3) and (4) of Malawi’s Marriage, Divorce, and Family Relations Bill and s 2 of Swaziland’s Births, Marriages and Deaths Registration Act.

<sup>275</sup> S 6(3) Marriage Act of Kenya.

<sup>276</sup> S 3(3) of Kenya’s Marriage Act

<sup>277</sup> Ss 2(3) and (4) of RCMA.

<sup>278</sup> S 10 of Tanzania’s LMA.

<sup>279</sup> S 12 of Uganda’s Customary Marriage (Registration) Act.

Given the phenomenon whereby men marry wives under multiple marriage systems (ie civil and customary), ensuring that customary marriages are not seen as inferior to civil marriages protects women in *de facto* polygynous relationships who are married according to customary laws.<sup>280</sup> In addition, the combination of explicitly recognizing polygyny and affording customary marriages equal recognition with civil marriages suggests a movement towards legal conceptualization of customary law ‘in its own terms, and not through the lens of the common law’.<sup>281</sup> This provides a strong framework for states wishing to meaningfully engage with polygyny in order to protect the human rights of the individuals who are polygynously married.

#### 4.5 Equality of spouses and the inclusion of provisions affording special recognition to polygyny

The strongest and most direct mechanism for protecting women in polygynous marriages occurs when the law attempts to regulate polygynous customary marriages according to constitutional principles. This is argued to be the case for the examined laws of Kenya, South Africa, and Tanzania. For instance, in the examined laws of Kenya and South Africa there is an attempt to regulate the matrimonial property of polygynous customary marriages.<sup>282</sup> Both the Acts of Tanzania and South Africa allow for the involvement of a woman married under customary law with regards to her husband’s contracting a subsequent marriage. This is explicit in Tanzania’s LMA, which provides that ‘any of the wives’ in a polygynous or potentially polygynous marriage can object to her husband’s subsequent marriages.<sup>283</sup> In South Africa’s RCMA, this is implied by section 7, which states that where a husband wants to contract a subsequent customary

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<sup>280</sup> Bond op cit note 7 at 16.

<sup>281</sup> *Mayelane* para 24.

<sup>282</sup> Eg s 8 of Kenya’s Matrimonial Causes Act and s 7(4)(b) of South Africa’s RCMA.

<sup>283</sup> S 20 of Tanzania’s LMA.

marriage, he is required to make a written application to the court, which then, by means of approving a contract amongst the parties to the marriage, indirectly regulates the matrimonial property.<sup>284</sup> Importantly, ‘all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse’ are required to be joined to these proceedings.<sup>285</sup> Because polygyny disproportionately empowers men to make decisions,<sup>286</sup> the inclusion of these provisions shows a move towards reducing discrimination towards women in polygynous customary marriages.

The examined laws of Kenya, South Africa, and Tanzania further contain clauses specifying that the principle of equality applies within customary marriages. Tanzania’s LMA provides that not only do husbands and wives have equal legal status,<sup>287</sup> but also ‘where a man has two or more wives they shall as such, enjoy equal rights, be subject to equal liabilities and have equal status in law’.<sup>288</sup> In contrast, South Africa’s RCMA stipulates that a wife in a customary marriage is equal to her husband,<sup>289</sup> but fails to specify that equality applies to all spouses in a polygynous customary marriage. Kenya’s Marriage Act provides for equality between ‘spouses’, but does not specify that this applies also to women in polygynous marriages.<sup>290</sup> However, section 11 of Kenya’s Matrimonial Causes Act concerning the division of matrimonial property ‘between and among spouses’ allows for principles of customary law to be taken into consideration but ‘subject to the values and principles of the Constitution’. This subjects polygynous customary marriages to the constitutional values of equality and non-discrimination, at least with regards to matrimonial property.

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<sup>284</sup> S 7(6) of RCMA.

<sup>285</sup> Ibid at s 7(8).

<sup>286</sup> See section 1.2 in Chapter 1 of this thesis.

<sup>287</sup> S 56 of Tanzania’s LMA.

<sup>288</sup> Ibid at s 57.

<sup>289</sup> S 6 of South Africa’s RCMA.

<sup>290</sup> S 3(2) of Kenya’s Marriage Act.

## 4.6 Comparison of legislation

Figure 5 below illustrates all factors examined thus far relevant to the protection of polygynous wives, including (1) whether polygyny is legal; (2) whether polygyny is explicitly recognised; (3) whether customary marriages are recognised as equally valid to civil marriages; and (4) whether there are attempts to regulate polygynous marriages and apply constitutional values of equality and non-discrimination to all parties in a polygynous marriage. Figure 5 shows a sharp decrease in degrees of inclusion and/or protection for women in polygynous customary marriages. Figure 6 below shows the individual scores per country. The results are overwhelmingly low, with ten out of fourteen countries scoring two or less (ie weak or no protection). Uganda is the only country to receive 'medium' protection (three points). This is because it both explicitly recognises polygyny within customary marriages, and provides for the equality (or in this case superiority) of customary marriages with civil marriages. This might protect women in customary marriages, should it be discovered her husband has contracted a civil marriage with someone else. However, there is no attempt to regulate discrimination, which may arise within a polygynous customary marriage. Only Tanzania, South Africa, and Kenya attempt to regulate polygynous customary marriages and apply constitutional values of equality and non-discrimination to women in polygynous customary marriages. They therefore receive the highest scores (four points, signifying 'strong' protection).

Figure 5. Legislative inclusion/protection of women in polygynous customary marriages

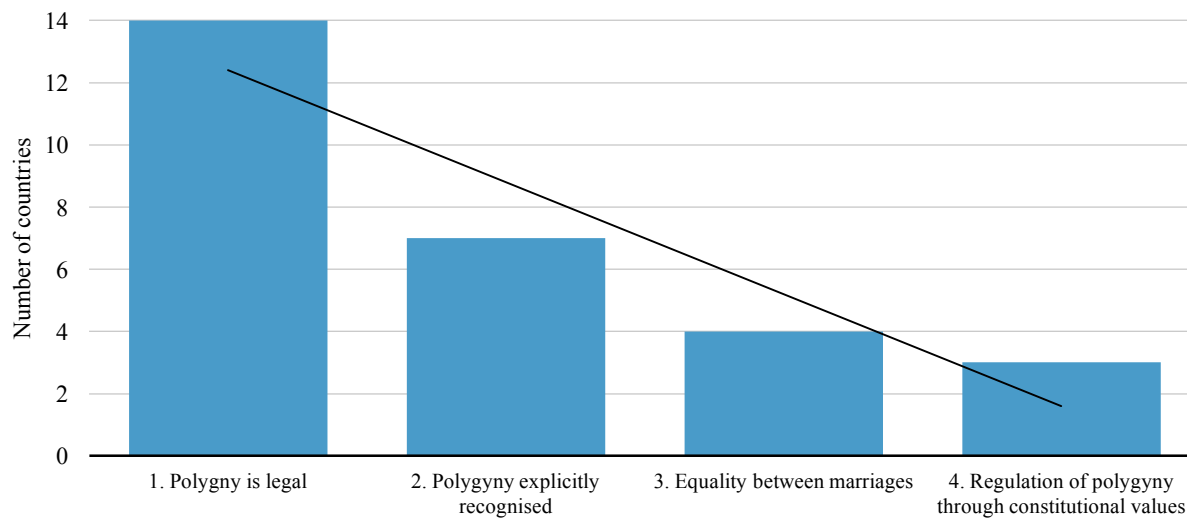
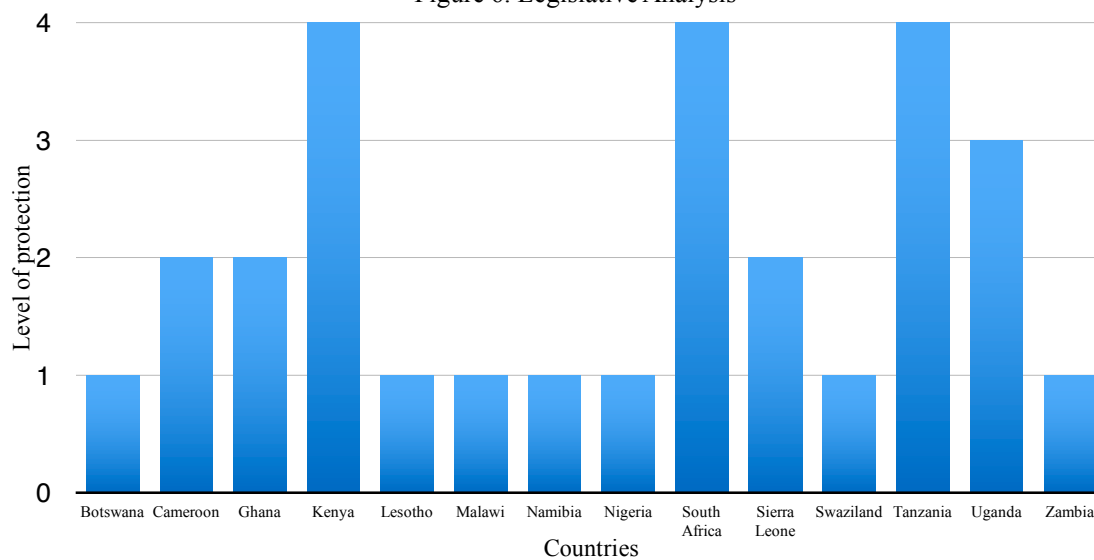


Figure 6. Legislative Analysis

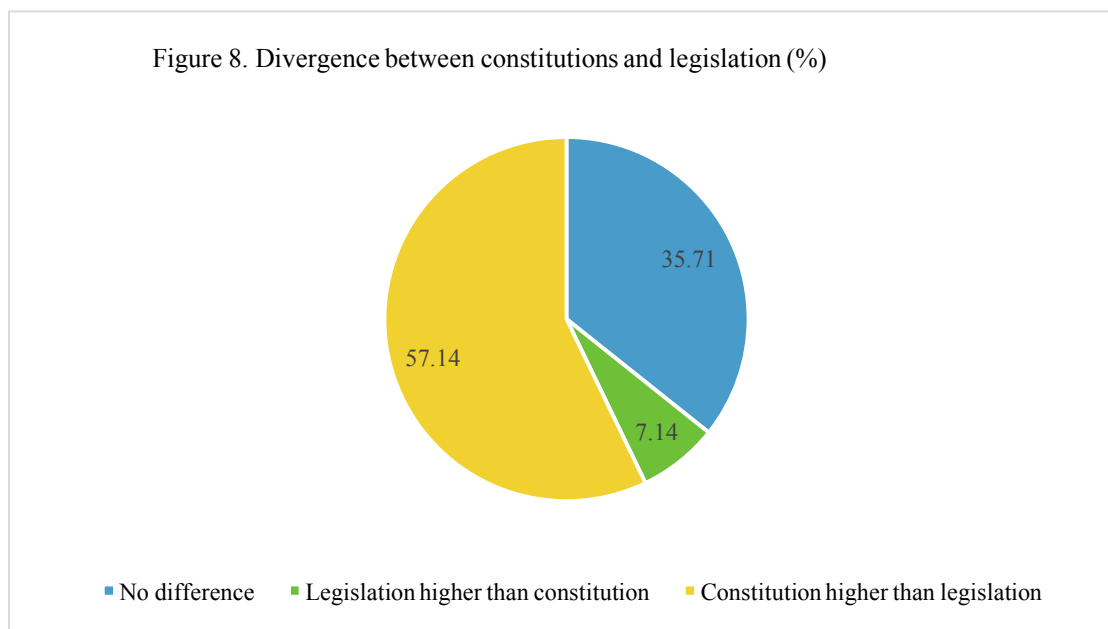
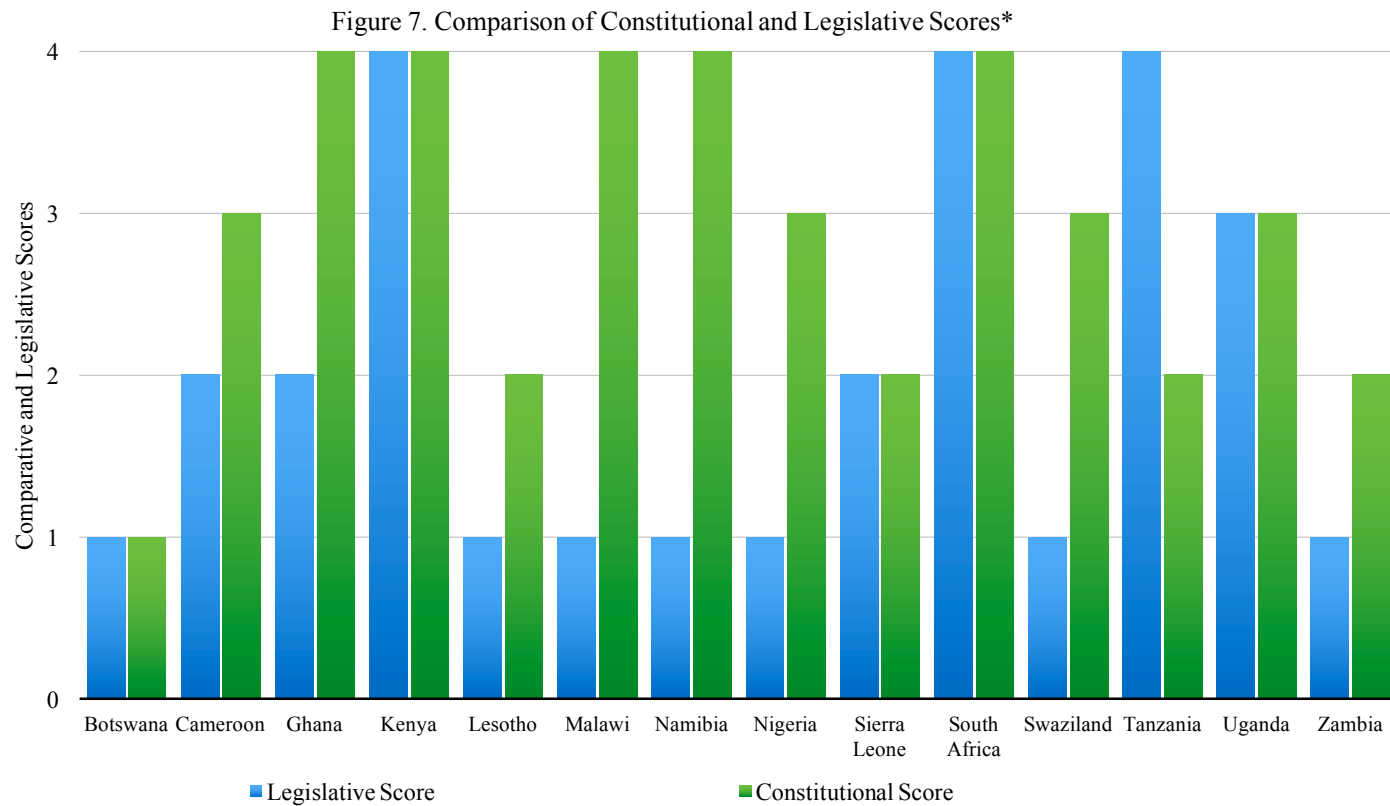


## 4.7 Comparison of legislation with constitutions

Table 6 below juxtaposes each country's constitutional score with its legislative score, and calculates the difference. The smaller the difference, the more congruence arguably exists between constitution and legislation regarding the recognition and protection of women in polygynous customary marriages, at least according to the indices established in Chapter 2. The higher the difference, the more disparity can be argued to exist between constitutional and legislative approaches. For Botswana, Kenya, Sierra Leone, South Africa, and Uganda, the difference is zero, suggesting that the legislation governing polygynous customary marriages follows the constitutional approach. This protection in Botswana is non-existent; Sierra Leone weak; Uganda medium; and South Africa and Kenya high. The highest disparity exists in Malawi and Namibia, followed by Ghana, Nigeria, Swaziland, and Tanzania. Only in the case of Tanzania is the legislative score higher than the constitutional score, suggesting that for many countries, women in polygynous customary marriages do not at a legislative level benefit from constitutional aspirations. This is graphically shown below in figure 7 and 8. Figure 7 juxtaposes each country's constitutional score with its legislative score, while figure 8 below indicates that the majority of countries examined show divergence between constitutional and legislative scoring.

*Table 6. Constitutional and Legislative Scores and the Difference between them*

	<b>Bots wan a</b>	<b>Cam eroo n</b>	<b>Gha na</b>	<b>Ken ya</b>	<b>Leso tho</b>	<b>Mal awi</b>	<b>Nam ibia</b>	<b>Nige ria</b>	<b>Sier ra Leo ne</b>	<b>Sout h Afri ca</b>	<b>Swa zilan d</b>	<b>Tan zani a</b>	<b>Uga nda</b>	<b>Zam bia</b>
<b>Con stitu tion al</b>	1	3	4	4	2	4	4	3	2	4	3	2	3	2
<b>Legi slati ve</b>	1	2	2	4	1	1	1	1	2	4	1	4	3	1
<b>Diff eren ce</b>	0	1	2	0	1	3	3	2	0	0	2	-2	0	1



## 4.8 Conclusion

Polygyny in customary marriages is technically legal in all the examined countries, but that recognition may be either explicit or implied. Half of the examined countries' laws show explicit recognition, namely in Cameroon, Kenya, Sierra Leone, Tanzania, Uganda, South Africa, and Ghana. However, Ghana's recognition is less explicit than the other countries in this group. Of the countries whose laws implicitly recognise polygyny, Lesotho, Namibia, Nigeria, and Zambia exclude polygynous customary marriages from being governed by statute, yet do not deny its existence outside the Acts. The laws of Malawi, Swaziland, and Botswana, however, apply to customary marriages, but avoid any language explicitly identifying polygynous customary marriages as legal or illegal.

Countries with explicit recognition of polygyny are argued to better protect the rights of women in de facto polygynous relationships. Kenya, South Africa, and Tanzania furthermore recognise the equality of customary and civil marriages with regard to the validity of the marriage. Uganda also falls into this category, despite situating customary marriages as superior to civil marriages. It is argued that the strongest protection for women in polygynous customary marriages is seen in the laws of Kenya, South Africa, and Tanzania. Kenya and South Africa attempt to regulate matrimonial property of polygynous marriages. South Africa and Tanzania allow a wife to object to her husband marrying a subsequent wife. Furthermore, all three provide that spouses are equal, however, only Tanzania is explicit that this equality also applies to the multiple wives in a polygynous marriage. Finally, Kenya recognises customary law but subjects it to constitutional values.

This chapter relates to the first research question, which interrogates the extent to which constitutional rights to equality and non-discrimination apply to women in polygynous customary marriages in terms of domestic law. I have argued that there are,

in many cases, mismatches between constitutional and legislative protection. In the majority of cases, constitutional affirmation of state intervention in customary institutions, as well as commitment to ensuring equality in marriages, does not appear to reflect statutory protection of women in polygynous marriages. The trend is for constitutions to score higher than legislation. Exceptions to this are Botswana, Kenya, Sierra Leone, South Africa, and Uganda, all of whose constitutional and legislative scores are the same. Another exception is Tanzania, whose legislation more strongly protects women in polygynous marriages than its constitution. The laws of Namibia and Malawi least reflect their countries' constitutions, which ironically rank amongst the highest performers. Given that there is in many cases disparity between constitutional and legislative protection of women in polygynous customary marriages, the following chapter engages with the second research question, which interrogates how, in terms of its use of language, this discrepancy is possible.

## Chapter 5. Silence as a discursive mechanism

### 5.1 Introduction

The above chapters allude to the fact that women in polygynous customary marriages may be denied their constitutional rights by an act of omission. In other words, they may be discriminated against where they are not afforded explicit recognition and consideration in domestic marriage laws. For instance, the failure to explicitly prohibit polygyny in customary marriages makes it legal by omission. While this may be argued to have some value, particularly if women in de facto polygynous relationships are worse off where polygyny is criminalised, omission, or ‘silence’ acts as a discursive mechanism by which the state is absolved from resolving the complexities that arise within polygynous marriages. Thus, rather than the examined laws containing explicitly discriminatory language, it is the omission of provisions relating to polygynous marriages that are particularly worrying. As suggested earlier, polygyny is not a marginalised practice in Commonwealth Africa, but rather, is often considered the default position of any customary marriage.<sup>291</sup> Therefore, these silences should not be construed as incidental, but rather indicating a major legislative foresight.

This chapter uses the methodology of discourse analysis to critically examine how the mismatch between constitution and legislation is possible, and highlight where in particular the laws are failing women in polygynous customary marriages. Where possible, particular emphasis is placed on the examined laws showing the furthest departure from constitutional values, such as Namibia and Malawi, but countries with lower discrepancy between constitutions and legislation are also critically examined. I

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<sup>291</sup> Egs s 4(1) of Sierra Leone's Registration of Customary Marriage and Divorce Act; s 4(2) of Uganda Customary Marriage (Registration) Act 1973; s 6(3) Marriage Act of Kenya; s 10(2)(a) Marriage Act of Tanzania.

consider the following: lexical omissions, the use of pronouns and binary language, unqualified deference to customary laws, and the failure to specify who counts as a party to a customary marriage. It is argued that these discursive mechanisms contribute to legislation that is not inclusive of women in polygynous customary marriages, and contributes to making the absence of provisions relating to constitutional rights of equality and non-discrimination appear unmarked.

## 5.2 Lexical omissions

Half of the countries examined, including ones whose laws' primary purpose is to reform marriage laws and spousal relations,<sup>292</sup> make no direct mention of polygyny, suggesting a deliberate refusal to engage with the subject. This is particularly the case with Namibia's Recognition of Certain Marriages Act, which is argued to be amongst the countries whose legislation least meets its constitutional approach with regards to women in polygynous customary marriages. The Act not only fails to acknowledge polygyny as a customary practice, but also, in contrast to every other law examined, avoids any direct reference to customary law. Even the title, the 'Recognition of *Certain* Marriages Act' (emphasis my own) suggests awareness of other types of marriages, not regulated by statute, ie customary marriages. In addition, the Act makes vague reference to a marriage contracted 'by any other law'<sup>293</sup> and describes the possibility for a marriage to undergo a wedding ceremony 'in some other form'.<sup>294</sup> These are the only phrases that could be construed as incorporating customary marriages.

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<sup>292</sup> Eg see the Memorandum of Malawi's Marriage, Divorce, and Family Relations Bill 2015.

<sup>293</sup> Section 2(2)(b) of Recognition of Certain Marriages Act 1991.

<sup>294</sup> Section 30 of the SWAPO Family Act of 1977 in Namibia's Recognition of Certain Marriages Act 1991.

In contrast with countries whose laws purposefully bypass customary marriages (namely the marriage Acts of Lesotho, Zambia and Nigeria), Namibia's constitution suggests strong application of non-discrimination and equality to women in polygynous customary marriages. In avoiding not only polygyny, but also direct mention of customary marriages, Namibia's marriage law absolves itself of any legislative responsibility towards women in polygynous customary marriages, and in doing so, fails to meet the suggested promise of its Constitution. This is further emphasized if one considers subsequent legislation. Namibia's Married Persons Equality Act of 1996<sup>295</sup> aims to reform marriage laws so as to abolish a husband's marital power over his wife,<sup>296</sup> but similarly excludes spouses in customary marriages from provisions ensuring equality between spouses.<sup>297</sup>

Lexical omissions are also seen in Ghana's marriage laws. Despite Ghana's Customary Marriage and Divorce Registration Act being directly applicable to customary marriages and divorces, the Act avoids the word 'polygamy', or any synonym thereof. The only acknowledgement of polygyny in this Act occurs as an ancillary detail in the First Schedule Form of Register of Customary Marriages. When filling in the details of the prospective husband and wife, the registrar is asked to note from the husband if there is any other 'existing marriage'. The hesitancy of the Act around using the word polygyny may be contrasted with Ghana's Marriage Act, which, in governing civil marriages, unambiguously criminalises 'bigamy'.<sup>298</sup> A similar phenomenon occurs in Malawi's Marriage, Divorce, and Family Relations Act. Although monogamy is listed

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<sup>295</sup> Namibia's Married Persons Equality Act 1 of 1996.

<sup>296</sup> Ibid at s 2 and s 3(2).

<sup>297</sup> Ibid at s 16 excludes customary marriages from Parts 1, II and IV. It may be assumed that Part III applies, however, since it deals primarily with domicile, women in customary marriages are denied the legal reform afforded women in civil marriages with regards to equality in other areas.

<sup>298</sup> S 68(3) of the Marriage Act of Ghana.

as an ‘essential element of marriage’,<sup>299</sup> section 26, which focuses exclusively on the legal requirements of customary marriages, requires that a customary marriage meet all ‘essential elements of marriage’ in terms of Part III, with the exception of the provision prohibiting polygyny,<sup>300</sup> which is conveniently omitted.

Although the difference between customary and legislative protection for South Africa is not as marked as the examples above, South Africa’s RCMA features a distinct strategy of lexical omission by avoiding direct use of the word ‘polygyny’ or synonyms thereof. Whilst the concept of polygyny is openly recognised, it is paraphrased in gender-neutral language. Thus, without directly mentioning the term ‘polygyny’, reference is made to a person who is a ‘spouse in more than one customary marriage’.<sup>301</sup> This in effect both softens the impact, making polygyny appear less jarring—and less noticeable—to an outside reader, and also (incorrectly) suggests that a woman may also marry more than one husband (ie polyandry). Use of gender-neutral language helps avoid legitimising gender stereotypes. It may also appear inoffensive by international human rights standards, meeting the requirement of formal equality,<sup>302</sup> which treats different groups of people identically under the law. However, it also whitewashes people’s lived reality, which may in fact be structured along highly gendered principles.<sup>303</sup> Excessive use of gender neutrality is therefore also a strategy of linguistic avoidance, because it legitimises a state’s decision to avoid engaging with potentially complicated subject matter.

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<sup>299</sup> Ibid at part III.

<sup>300</sup> Ibid at s 26: Customary marriages are subject to ss 14 and 15.

<sup>301</sup> S 2(3) of the RCMA.

<sup>302</sup> See section 2.3.1 in Chapter 2.

<sup>303</sup> Higgons et al. op cit note 11 at 1164; A Griffiths ‘Gendering culture: towards a plural perspective on Kwena women’ rights’ (2001) in J. K. Cowan, M Dembour and R. A. Wilson (eds) *Culture and Rights: Anthropological Perspectives* 106.

### 5.3 Pronouns and binaries

Another mechanism for detracting attention from polygyny and entrenching the position that monogamy is the default situation for customary marriages, relates to the choice of quantitative pronouns, such as ‘either’ or ‘both’, which suggest that a marriage fundamentally exists between two people. For example, Malawi’s Marriage, Divorce, and Family Relations Bill states that ‘a party to a marriage is entitled to equal rights as *the other* in their right to consortium’ (emphasis my own).<sup>304</sup> Similarly, section 2(1) of Ghana’s Customary Marriage and Divorce Registration Act states that ‘either’ or ‘both’ parties to a customary marriage may apply to register the marriage, again reinforcing the notion that there are only two parties to a marriage. This phenomenon is also seen in South Africa’s RCMA, as illustrated by Himonga and Pope, who drew attention to the fact that the Act requires the consent of ‘both’ spouses to contract a customary marriage, thereby side-lining the possibility that there may exist another interested party to the marriage.<sup>305</sup>

### 5.4. Broad, unqualified definitions of customary marriage

As discussed in Chapter 3, most of the examined constitutions recognise customary laws subject to constitutional values.<sup>306</sup> This ‘qualified’ recognition is not seen in the examined marriage laws. For example, Malawi’s Marriage, Divorce, and Family Relations Act defines a customary marriage as ‘a marriage celebrated in accordance with

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<sup>304</sup> S 48(1) Malawi’s Marriage, Divorce and Family Relations Act.

<sup>305</sup> Himonga & Pope op cit note 15 at 331.

<sup>306</sup> See, for example, art 200 of the Constitution of Malawi, which recognises customary laws only so far as they are consistent with constitution. Art 2 of the Constitution of Uganda subjects all laws to constitutional values, further stating that ‘if any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void’. See also art 30 of South Africa’s Constitution; and Art 26(2) Constitution of Ghana.

rites under the customary law of one or both of the parties to the marriage'.<sup>307</sup> In terms of the necessary requirements of a customary marriage, Ghana's Marriage Act merely requires 'that the conditions essential to the validity of the marriage in accordance with the applicable customary law have been complied with'.<sup>308</sup> South Africa defines a customary marriage as a marriage 'concluded in accordance with customary law', which in turn refers to the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.<sup>309</sup> Uganda similarly defines 'customary marriage' as a marriage 'celebrated according to the rites of an African community' of which one of the parties is a member, or as a marriage celebrated in terms of the sections of the Act pertaining to customary marriages.<sup>310</sup> In all of the above, and in contrast with the approach taken in their respective constitutions, references to customary law are broad and unqualified. With the exception of Kenya's Matrimonial Causes Act,<sup>311</sup> there is no stipulation that customary law should be subject to constitutional values. This results in unrestricted capacity of customary law to determine its own requirements, which may result in discrimination of women in polygynous customary marriages.

## 5.5 Who counts as a "party" to a marriage?

A weakness amongst all the examined laws, including those argued to better protect women in polygynous marriages, relates to the failure to clarify that a party to a marriage comprises all spouses in a polygynous marriage. Only in the Marriage Act of Kenya and in Tanzania's LMA is there an attempt to define a 'party' to a marriage. The

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<sup>307</sup> S 2 Malawi's Marriage Divorce and Family Relations Act.

<sup>308</sup> S 3(6) of Ghana's Marriage Act.

<sup>309</sup> S 2 of the RCMA.

<sup>310</sup> S 2 of Uganda's Customary Marriage (Registration) Act.

<sup>311</sup> S 11 of Kenya's Matrimonial Causes Act.

Kenyan Marriage Act defines a ‘party’ to a marriage, including those ‘intended or purported’ as ‘a spouse in a marriage, or the intended spouse to a marriage or purported spouse in a marriage.’<sup>312</sup> Kenya’s Marriage Act later defines a ‘spouse’ to mean ‘a husband or a wife’.<sup>313</sup> The language is vague, and fails to specify whether all spouses in a polygynous marriage qualify as parties to the marriage, or whether a ‘party’ includes the husband and only a single wife at a time. Similarly, Tanzania’s LMA defines a ‘party’ to an intended or purported marriage as ‘the husband or the wife or the intended or purported husband or wife’. A ‘party’ to a marriage is therefore contingent on a wife’s position in relation with her husband, ignoring the dynamics of a polygynous relationship. Whilst it may be possible that the singular word ‘spouse’ or ‘wife’ is meant to be interpreted to include plural ‘spouses’ or ‘wives’,<sup>314</sup> following theories of discourse analysis based on Foucault’s theory of discourse,<sup>315</sup> the failure to specify that spouses (plural) are parties to a marriage, constructs a particular version of reality, one in which polygyny is whitewashed.

This position of compulsory monogamy in the definition of ‘party’ is further seen in South Africa’s RCMA. It states:

A wife in a customary marriage has, *on the basis of equality with her husband and subject to the matrimonial property system governing the marriage*, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law (emphasis my own).<sup>316</sup>

As seen in the case of Kenya, this provision affirms the equal status of a wife in relation to her husband, but states nothing about equality with the other wives. As discussed in

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<sup>312</sup> S 2 of Marriage Act Kenya.

<sup>313</sup> Ibid.

<sup>314</sup> J Pelegrin ‘Statutory Construction: singular v plural, gender and time’ *Colorado LegiSource* 21 August 2014, available at <https://legisource.net/2014/08/21/statutory-construction-singular-v-plural-gender-and-time/>, accessed 23 August 2017.

<sup>315</sup> See Chapter 2.3.

<sup>316</sup> S 6 of RCMA.

the *Saleh* case, the failure to include a woman in a polygynous marriage as a ‘party’ to a marriage can directly affect her capacity to enjoy her constitutional and legislative human rights. For example, Kenya’s Marriage Act (2014) states that ‘[p]arties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage’.<sup>317</sup> Because ‘party’ is not defined in a manner that explicitly includes all spouses, women in polygynous marriages are potentially discriminated against.

## 5.6 Conclusion

This chapter critically examined the language used in the examined laws, emphasising strategies whereby polygyny, and subsequently women in polygynous marriages, are excluded. This includes omission of lexical items, exemplified by Namibia’s law which not only is silent regarding polygyny but also avoids reference to customary marriages. Additional mechanisms for excluding women in polygynous marriages include the use of binary pronouns, implying that marriages fundamentally concerns only two parties; as well as vague, unqualified evocations of customary laws/marriages. Such evocations, in contrast to the laws’ corresponding constitutions, fail to qualify customary laws as subject to the bill of rights. Finally, the failure to consider polygynous spouses in the definition of a ‘party’ to a marriage was argued to reflect another way in which women in polygynous marriages are potentially exposed to discrimination, as this is argued to entrench a discourse of compulsory monogamy. All of the above are argued to constitute acts of omission, because, rather than overtly discriminating against women in polygynous customary marriages, they indicate a failure to consider such women in light of constitutional promises of equality and non-discrimination.

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<sup>317</sup> Ibid at s 3(2).

## Chapter 6. Conclusion

### 6.1 Strong constitutionalism and weak legislation

Chapters 3 and 4 responded to the first research question, which interrogates the extent to which constitutional rights to equality and non-discrimination apply to women in polygynous customary marriages at a statutory level. Following the indices developed in Chapter 2, it was found that most of the examined countries' constitutions suggest medium or strong protection to women in polygynous customary marriages with regard to the right to equality and non-discrimination. The strongest constitutions were argued to belong to Ghana, Malawi, Kenya, Namibia, and South Africa, while the least protection was seen in the constitution of Botswana, followed by Lesotho, Sierra Leone, Tanzania, and Zambia. However, it was argued that this level of constitutional protection does not necessarily correspond to legislative protection. For instance, while all the examined countries indicate that polygyny in customary marriages is legal, more than half did so by omission, in other words by failing to directly prohibit the practice. Of those marriage laws that directly acknowledge the existence and legality of polygyny, most did not provide for equality and non-discrimination between types of marriages (ie civil and customary) nor for the regulation of polygynous customary marriages according to constitutional principles of equality and non-discrimination.

The highest discrepancy between constitutional and legislative levels of protection was seen in Malawi and Namibia, whose laws failed to overtly recognise women in polygynous marriages, let alone attempt to regulate polygynous marriages, despite having strong constitutions. The lowest discrepancy was seen in Botswana, Kenya, Sierra Leone, South Africa, and Uganda. For Kenya and South Africa, both constitutions and marriage laws strongly protect women in polygynous customary marriages, whereas in Uganda this protection is medium; in Sierra Leone this protection

is weak, and in Botswana there is no substantial protection for women in polygynous customary marriages.<sup>318</sup> Whilst in certain cases, strong constitutional protection correlates with strong legislative protection (as argued for in Kenya and South Africa), this is not necessarily the case, and is therefore not a reliable predictor for the strength of a country's legislation. Tanzania's constitution is argued to be weak, yet at a legislative level, it is amongst the most inclusive of women in polygynous customary marriages, and is also the only law examined that directly provides for equality between and amongst wives in a polygynous marriage. Therefore, in response to the first research question, constitutional rights to equality and non-discrimination do not necessarily translate into legislative protection for women in polygynous customary marriages.

## 6.2 Silence as a catalyst for inequality

The second research question attempted to account for contradictions between strong constitutional and weak statutory protection in terms of discursive strategies, including also critically examining flaws in laws argued to better protect women in polygynous customary marriages. It was argued that, rather than the examined Acts containing explicitly discriminatory provisions, women in polygynous customary marriages are discriminated against by acts of omission. This was partly shown in Chapter 4, which revealed that half of the examined countries do not explicitly recognise the legality of polygyny in customary marriages, but rather render polygyny legal by failing to prohibit it. Furthermore, countries such as Lesotho, Namibia, Nigeria, and Zambia exclude polygynous customary marriages from the scope of their marriage laws, thereby circumventing the requirement for regulating polygynous customary marriages. Chapter 5 provided a more nuanced analysis, focusing on discursive mechanisms within the texts

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<sup>318</sup> Unless one considers the failure to prohibit polygyny as a means of protecting women in polygynous customary marriages.

of laws that allow for women in polygynous customary marriages to be marginalised. I considered lexical omissions (ie avoiding the words ‘polygyny’ or synonyms thereof) and the use of pronouns and binary language, which ultimately portrays marriage as fundamentally monogamous. This inadvertently casts polygynous marriages as outside the norm, thereby justifying the absence of state regulation in polygynous customary marriages.

Lack of specificity was shown to be another strategy by which women in polygynous customary marriages are bypassed regarding constitutional provisions of equality and non-discrimination. For instance, despite most of the examined constitutions qualifying its recognition of customary law so that aspects contrary to constitutional values were not allowed, most of the examined marriage laws provided loose descriptions of customary law, affording unfettered discretion for customary laws to regulate polygynous customary marriages. Finally, it was noted that virtually none of the examined laws include subsequent wives in the definition of a ‘party’ to a marriage, further reinforcing the notion that marriages are by default monogamous, and ignoring the position of women in polygynous marriages. Arguably, the singular words ‘spouse’ or ‘wife’ could be construed as including the plural ‘spouses’ and ‘wives’, hence including all parties of a polygynous marriage.<sup>319</sup> However, from a discursive perspective, the failure to specify that a ‘party’ to a marriage includes all spouses in a polygynous marriage constructs and maintains a discourse that renders polygyny invisible and monogamy the norm. Furthermore, as shown in the *Saleh* case,<sup>320</sup> failure to specify that all women in a polygynous marriage are ‘parties’ to the marriage may result in discrimination upon the dissolution of the marriage.

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<sup>319</sup> Pelegrin op cit note 314.

<sup>320</sup> This is discussed in detail in Chapter 2.3.3, and alluded to briefly in Chapter 5.5.

In summary, use of these discursive mechanisms perpetuate the myth of ‘compulsory monogamy’, ie that monogamy is the default position of a marriage governed by statute, with the underlying assumption that polygyny is a practice located in unmonitored customary marriages, and therefore not the state’s responsibility. This casts women in polygynous customary marriages as outside the norm, and renders them legally invisible. In failing to provide statutory guidance for the complexities that may arise in polygynous marriages, I argue that, despite constitutional commitments to equality and non-discrimination, women in polygynous marriages are therefore discriminated against in relation to women in monogamous marriages.

### 6.3 Recommendations

Firstly, those constitutions that have not yet done so should be amended to resolve potential conflicts between the right to culture and women’s rights, with the latter applying even within customary laws. However, this thesis has argued that a strong constitution alone is insufficient for protecting the rights of women in polygynous marriages, who largely escape legislative notice. Attention should be paid to gaps between constitutions and legislation. Marriage laws should be reformed to reflect the human rights provisions in constitutions but in such a way that unambiguously includes women in polygynous customary marriages. Countries such as Zambia, Nigeria, Lesotho, and Namibia should pass legislation governing polygynous customary marriages, or amend their existing laws to consider people in those marriages. In addition, laws applicable to customary marriages should overtly recognise polygyny, rather than allowing it to be legal by omission.

Despite the arguments against polygyny from a human rights perspective,<sup>321</sup> this thesis has argued that states whose laws explicitly recognise the practice better protect women in polygynous customary marriages. However, the states should also be proactive in ensuring that women who marry polygynously under customary law are not disadvantaged compared to women married monogamously under civil/common law. This thesis strongly endorses Bond's proposal that states establish a 'legislative core of rights', ie a standard of basic rights to which all marriage systems are to be accountable.<sup>322</sup> A starting point for this would be to ensure that where polygyny is openly recognised, customary marriages are recognised as equally valid to civil marriages.

Most importantly, states that have not yet done so should amend their marriage laws to make it explicit that all individuals in a polygynous marriage are equal and are equally recognised as parties to the marriage. Furthermore, marriage laws should make it explicit that polygynous customary marriages are to be governed according to constitutional rights of non-discrimination and equality. This includes the right of individuals in a polygynous marriage to have their matrimonial property regulated according to statute, which is usually only afforded to women in civil marriages and in certain cases, monogamous customary marriages. Such legal reform should also empower women in a customary marriage to be able to object to their husband marrying a subsequent wife. Finally, legislative deference to customary laws should follow the common constitutional approach, whereby customary laws are subject to constitutional human rights.

Given its controversial position as both a human rights violation and important marker of cultural identity, states appear hesitant to attempt to legislate polygynous marriages. However, in doing so, they risk marginalizing the individuals within such

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<sup>321</sup> See Chapter 1.2.

<sup>322</sup> Bond op cit note 7 at 2.

marriages. This thesis argues that states need to be proactive in their engagement with women's rights to equality and non-discrimination within polygynous customary marriages, or potentially face constitutional redundancy.

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## **Addendum 1. Online databases and date accessed of examined legislation**

<b>Country</b>	<b>Source</b>	<b>Date accessed</b>
Botswana	<a href="http://www.elaws.gov.bw/index.php">http://www.elaws.gov.bw/index.php</a>	11-Dec-16
Cameroon	<a href="http://www.cameroonhighcomabuja.com">http://www.cameroonhighcomabuja.com</a>	01-Dec-16
Ghana	<a href="http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&amp;docid=548edc3d17&amp;skip=0&amp;query=marriage&amp;coi=GHA">http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&amp;docid=548edc3d17&amp;skip=0&amp;query=marriage&amp;coi=GHA</a> <a href="http://www.refworld.org">http://www.refworld.org</a>	05-Dec-16
Kenya	<a href="http://www.kenyalaw.org/lex//index.xql#M">http://www.kenyalaw.org/lex//index.xql#M</a>	10-Dec-16
Lesotho	<a href="http://www.lesotholii.org">http://www.lesotholii.org</a>	09-Dec-16
Malawi	Private correspondence	Not applicable
Namibia	<a href="http://www.lac.org.na/laws/namlex.html">http://www.lac.org.na/laws/namlex.html</a> <a href="http://www.lac.org.na/namlex/Marriage.pdf">http://www.lac.org.na/namlex/Marriage.pdf</a>	Dec 3, 2016
Nigeria	<a href="http://lawsofnigeria.placng.org">http://lawsofnigeria.placng.org</a> (Copyright © Policy and Legal Advocacy Centre (PLAC) 2016)	Dec 3, 2016
Sierra Leone	<a href="http://www.sierralii.org">http://www.sierralii.org</a> [ <a href="http://www.sierralii.org/sl/legislation/act/2009/1-0">http://www.sierralii.org/sl/legislation/act/2009/1-0</a> ]	Dec 5, 2016
South Africa	<a href="http://www.saflii.org/za/legis/num_act/rocma1998366.pdf">http://www.saflii.org/za/legis/num_act/rocma1998366.pdf</a>	Dec 5, 2016
Swaziland	<a href="http://www.africanchildforum.org/clr/Pages_EN/Swaziland.html">http://www.africanchildforum.org/clr/Pages_EN/Swaziland.html</a>	Dec 9, 2016
Tanzania	<a href="http://www.rita.go.tz/?lang=en&amp;pg= and">http://www.rita.go.tz/?lang=en&amp;pg= and</a> <a href="http://www.mcdgc.go.tz">http://www.mcdgc.go.tz</a>	2016 Dec 9
Uganda	<a href="http://www.ulii.org/consol_leglist/consolidated_legislation">http://www.ulii.org/consol_leglist/consolidated_legislation</a>	2016 Dec 8
Zambia	<a href="http://www.zambialii.org">http://www.zambialii.org</a>	2016 Dec 7