

LM Kelly

Polygyny and HIV/AIDS: A health and human rights approach*

Summary

Concurrent sexual networks have been identified in empirical studies as significantly amplifying rates of HIV transmission in comparison to sequential monogamy or sporadic sexual encounters. This paper examines how states' legal condonation of discriminatory, high-risk concurrent sexual networks, including polygyny, violates women's human rights and undermines their sexual and reproductive health. Because of its gender asymmetry and aggravation of marital inequality, polygyny places women at a greater risk of HIV infection and restricts their ability to insist on partner fidelity, negotiate condom use and leave high-risk relationships. The continued legal recognition of polygyny at the point of marriage formation by the majority of Southern African states violates women's equality, health, and dignity rights. This paper stresses states' international obligations to cease deferring to parallel legal systems that perpetuate inequality within marriage and family life. In moving to discourage polygyny, this paper posits an engagement approach that would continue to protect women's rights within existing unions while discouraging the practice at the point of marriage formation. Going forward, HIV prevention programmes can provide useful fora to advance social justice and equality within marriage and intimate relationships when they are evidence-based and respond to the diverse realities of women's lived sexual and marital experiences. Programmes that address social constructions of gender and sexuality will likely prove the most effective in discouraging polygyny and advancing transformative gender equality.

Opsomming

Poliginie en MIV/MIGS: 'n Gesondheids- en menseregtebenadering

Daar is in empiriese studies uitgewys dat konkurrente seksuele netwerke die koerse van MIV-oordrag betekenisvol verhoog in vergelyking met voortvloeiende monogamie of sporadiese seksuele ontmoetings. Hierdie referaat ondersoek hoe state se regscondonering van diskriminerende, konkurrente seksuele netwerke van hoë risiko, insluitende poliginie, vroue se menseregte skend en hul seksuele en reprodutiewe gesondheid ondermyn. As gevolg van die geslagsongelykmatigheid daarvan en die verergering van huweliksongelykheid, plaas poliginie vroue voor 'n groter risiko van MIV-infeksie en beperk dit hul vermoë om aan te dring op getrouheid van die lewensmaat, om te onderhandel vir die gebruik van kondome en om hoërisikoverhoudings te laat vaar. Die voortgesette regserkenning van poliginie by die punt van huweliksvorming deur die meerderheid van state in Suider-Afrika, skend vroue se gelykheids-, gesondheids- en waardigheidsregte. Hierdie referaat beklemtoon state se internasionale verpligtinge om op te hou om parallelle regstelsels

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in ag te neem wat ongelykheid binne huwelike en gesinslewe in stand hou. In 'n poging om poliginie te ontmoedig, stel hierdie referaat 'n benadering van betrokkenheid voor waar daar voortgegaan sal word om vroueregte te beskerm binne bestaande verbintenisse, terwyl die praktyk ontmoedig sal word by die punt van huweliksvorming. Om vorentoe te beweeg kan MIV-voorkomingsprogramme bruikbare forums verskaf om sosiale geregtigheid en gelykheid binne die huwelik en intieme verhoudings te bevorder wanneer hul getuienis-gebaseerd is en op die diverse realiteite van vroue se geleefde seksuele en huwelikservaringe reageer. Programme wat sosiale konstruksies van geslag en seksualiteit aanspreek sal waarskynlik bewys dat dit die effektiwste is in die ontmoediging van poliginie en die bevordering van transformerende geslagsgelykheid.

1. Introduction

The disparate impact of HIV/AIDS on women is now well-acknowledged in public discourse. In 2002, U.N. Secretary General Kofi Annan used a phrase that has since become a mantra — “AIDS has a woman’s face.”¹ Though once disproportionately affecting white, gay or bisexual men, today almost half of the 40 million people infected globally are women.² As of 2005, 17.5 million women were living with HIV — an increase of over one million since 2003.³ In Southern Africa, 57% of those living with AIDS are women, with adolescent girls being the most at risk.⁴ Recent figures indicate that approximately 3.2 million people were infected in Africa in 2005, more than any other previous year.⁵ Prevalence rates among pregnant women in South Africa, Swaziland, Zimbabwe, Botswana, Lesotho, and Namibia hover at 20% and higher.⁶ In a 2003 HIV/AIDS surveillance study in Botswana, of those aged 15-19, 15.4% of women and girls were infected in comparison with 1.2% of their male counterparts. In the 20-24 age cohort, 29.7% of women were infected versus 8.4% of men; at 25-29 years of age, 54.1% of women were infected in comparison with 29.7% of men.⁷

These rising rates of infection and their disproportionate impact on women are frequently explained in terms of the social, cultural, and physiological conditions that place women and girls at increased risk. Physiologically, women are at least twice as likely to be infected with HIV during sexual intercourse as men.⁸ However, physiology alone does not explain the extent to which risky sexual behaviour is undermining women’s health. Women’s and men’s sexual and reproductive health and well-being is contingent upon the ability of sexual partners to negotiate and practice safer sexual behaviours.⁹ However, gender subordination and patriarchal constructions of feminine and masculine sexuality continue to

1 Annan 2002.

2 United Nations Population Fund 2005: 37.

3 UNAIDS 2005.

4 UNAIDS 2005.

5 UNAIDS 2005.

6 UNAIDS 2005.

7 Ministry of State President, The National AIDS Coordinating Agency (NACA), Botswana 2003 Second Generation HIV/AIDS Surveillance.

8 UNAIDS 2004.

9 Gruskin 1995.

reinforce risky sexual practices including concurrent, multiple partnering.¹⁰ The role of concurrent sexual networks in contributing to the spread of HIV/AIDS has gained increased attention in public health literature.¹¹ Studies indicate that sexual concurrency significantly amplifies rates of HIV transmission in comparison to sequential monogamy or sporadic sexual encounters.¹²

This paper will argue that states have a duty to challenge and reform legal and social norms that permit and encourage concurrent sexual networking. Focussing on the practice of polygyny, I will argue that laws that permit polygyny send a dysfunctional message to men and women in condoning unsafe and discriminatory concurrent, sexual networks within marriage. A better articulation of the importance of social justice and equality in marriage through the use of human rights norms is essential to improve women's ability to negotiate safer sexual activity. In section II, I will outline how polygyny directly and indirectly undermines women's sexual and reproductive health in contributing to HIV transmission. In addition to direct transmission as a result of multiple, overlapping sexual contacts, polygyny indirectly places women at risk by reinforcing patriarchy and harmful stereotyping within marriage as well as aggravating domestic violence. In turn, this subordination further restricts women's ability to insist on partner fidelity, negotiate condom use and leave high-risk relationships. In section III, I will argue that the continued formal legal recognition of polygyny by the majority of Southern African states violates women's human rights. Tracking the harms discussed in section II, this section will argue that states' legal condonation of polygyny violates women's equality, health, and dignity rights.

Given the importance of discouraging polygyny generally, but particularly because of its deleterious sexual and reproductive health impact in the southern African context, section IV will stress the importance of the means chosen to prohibit the practice. Rather than adopting a strictly abolitionist approach that would likely be ineffective and would place women in existing unions at further risk, this section will argue for an engagement approach. While states are obligated not to formally recognize and condone polygyny at the point of family formation, they also have a duty to protect women's rights within existing unions. This means that legal systems must be structured in a way that discourages polygyny at the point of family formation, but also provides limited recognition for relief purposes. In addition to legislative measures, this section will also highlight states' obligations to adopt measures "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of ... practices which are based on the idea of the inferiority or superiority of the sexes or on stereotyped roles for men and women."¹³ In the case of polygyny, this requires that states engage with harmful social and cultural constructions of masculine and feminine

10 See discussion in Rao Gupta 2000 regarding the harmful impact of social constructions of gender and sexuality.

11 See Morris and Kretschmar 1997; Rosenberg *et al* 1999; Shelton *et al* 2005; Lagarde *et al* 2001; Garnett and Johnson 1997.

12 Morris and Kretschmar 1997; Shelton *et al* 2005.

13 Convention on the Elimination of All Forms of Discrimination against Women (New York: UN, 1979), 34 UN GAOR Suppl. (No. 21) (A/34/46) at 193, UN Doc. A/Res/34/180 [Women's Convention], Art 5(a).

sexuality that encourage male multiple-partnering and feminine sexual passivity. In section V, I will outline why a health and human rights approach offers the best way forward. Here, I will argue that the intersection of gender construction, sexuality, and social justice and equality within marriage needs to be addressed if HIV prevention programmes are to be effective in challenging harmful concurrent, sexual networks.

2. Sexual and reproductive health harms of polygyny

2.1 Direct health harms — multiple sexual contacts and HIV transmission

Polygyny operates to create concurrent sexual networks within marriage between multiple wives and their husband, in addition to any extra-marital sexual contacts the spouses may have.¹⁴ Public health research indicates that concurrent sexual partnerships significantly amplify HIV transmission rates, particularly during the initial phase of an epidemic.¹⁵ Studies reveal that having concurrent sexual partners places individuals at a higher risk of contracting sexually transmitted infections (STIs), independent of the number of partners.¹⁶ Rosenberg *et al* have surmised that the high incidence of concurrency among sexually active adolescents in the United States, for instance, may explain the continued high prevalence of gonorrhea and chlamydia in that age cohort.¹⁷

The primary cause of this amplification of disease spread is the increase in the number of people connected in a network at any one point in time.¹⁸ As Shelton, Cassell and Adetunji noted in their assessment of a 2003-04 HIV/AIDS indicator survey, “networks of longer-term concurrent or overlapping partnerships” may contribute more to infection rates than serial monogamy or sporadic casual sexual encounters.¹⁹ Within such networks, where one person has other concurrent partners, the average number of partners per person may not be particularly high, though the HIV transmission risk is.²⁰ Where an infection is introduced to such a network, it is not trapped within a monogamous unit, but can immediately spread to infect others.²¹ Consequently, concurrent partnerships may play as significant a role as multiple, sequential partners

14 See Garnett and Johnson 1997: 682. Concurrent networks may involve: the solicitation of sex workers while at the same time having a regular, sexual partner; a series of casual, though overlapping sexual contacts; younger girls having multiple older sexual partners (“sugar daddies”) who themselves have other concurrent sexual partners; or concurrent sexual networks within marriage (*de facto* or *de jure* polygyny).

15 Morris and Kretschmar 1997.

16 Rosenberg *et al* 1999.

17 Rosenberg *et al* 1999.

18 Morris and Kretschmar 1997.

19 Shelton *et al* 2005: 1058.

20 Shelton *et al* 2005: 1058.

21 Morris and Kretschmar 1997: 641.

or the existence of other infections²² in amplifying the spread of HIV/AIDS.²³ In Morris and Krestchmar's mathematical modelling study, the results were dramatic with the initial amplification of HIV spread being so large that it would have taken over fifty years for the epidemic to reach the size observed in five years with lower frequencies of concurrency.²⁴

Direct sexual transmission of HIV can occur in polygynous unions where the virus is introduced to the network through a spouse's extra-marital sexual contacts or where a new wife who is already HIV-positive enters the union. Research indicates that infection is more likely to spread where both the infectiousness of a disease and sexual activity with concurrent partners persists.²⁵ Even though the infectiousness of HIV is prolonged, repeated sexual contact is still required for the complete effect of concurrency.²⁶ Polygynous networks tend to create a particularly serious health risk because of the long-term sexual concurrency between spouses.

2.2 Indirect health harms

While epidemiological and public health literature informs us of the direct role that sexual concurrency plays in amplifying exposure, it tells us little about the indirect ways that gender-discriminatory networks such as polygyny undermine women's sexual and reproductive health. To fully understand the role of polygyny in HIV transmission, it is essential to consider the significant role that patriarchy, harmful stereotyping and domestic violence play in undermining women's ability to negotiate safer sexual practices, insist on partner fidelity, and leave high-risk sexual relationships.

2.2.1 Polygyny as a form of patriarchy

The anthropological origins of polygyny indicate that in some contexts the practice was intended to serve a protective or ameliorative function for women and families.²⁷ Within Southern Africa, polygyny was considered important at one time to allow more women to marry and have children. Because there were

22 For a discussion of the role of herpes simplex virus type 2 (HSV-2) in increasing susceptibility to HIV infection, see Freeman and Glynn 2004.

23 Morris and Krestchmar 1997: 641.

24 Morris and Krestchmar 1997: 646. See, however, Lagarde *et al* 2001. In their multi-city study, they found that concurrent sexual networks were no more frequent in high HIV-prevalence cities than in those with relatively low prevalence rates. The authors explained that the absence of a correlation between concurrent networks and STI/HIV infections may have been related to higher condom use among those with overlapping partnerships. In addition, previously infected individuals may have altered their sexual behavior upon learning their status, partly explaining why the researches did not find differences between infected and non-infected people in terms of sexual concurrency.

25 Garnett and Johnson 1997: 682.

26 Garnett and Johnson 1997: 682.

27 This part draws on a report co-written with Professor R Cook, Polygyny and Canada's obligations under international human rights law (forthcoming).

more marriageable women than men given that women and girls tended to marry earlier and live longer, widespread monogamy would have left some women unmarried and without any social security.²⁸ Polygyny was viewed by some as particularly important for poorer women. A Visiting Mission to the British Trust Territories in West Africa in 1950, for instance, identified polygyny as a form of social security for women within the economic conditions of the time.²⁹

While economic vulnerability still contributes to the practice in many contexts, patriarchal conceptions of masculine and feminine sexuality also play a pivotal role in reinforcing polygyny. In analyzing patriarchy and its effect on sexual and reproductive health, Janet Rifkin's definition is a helpful starting point. Rifkin describes patriarchy as:

any kind of group organization in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms, these realms being regarded as separate and mutually exclusive.³⁰

By allowing husbands to engage in high-risk multiple partnering while restricting women to monogamy, states' formal recognition of polygyny reinforces the patriarchal notion that women should passively accept their partners' sexual decision-making. As the Committee on the Elimination of Discrimination against Women (CEDAW) has noted, the entrenchment of patriarchy in national laws undermines women's equality and is contrary to the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention).³¹

In her discussion of the tensions between multiculturalism and women's equality, Susan Okin points to anecdotal evidence from interviews with polygynous husbands that reveal how the practice can function to serve men's self-interest while also controlling women. For example, one French immigrant from Mali posed the question:

when my wife is sick and I don't have another, who will care for me?... [O]ne wife on her own is trouble. When there are several they are forced to be polite and well behaved. If they misbehave, you threaten that you'll take another wife.³²

Even where a marriage is not actually polygynous, the threat of taking additional wives can be used to control and limit women's ability to assert their rights within marriage.³³ Former U.N. Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, raised this concern in her 2002 report on cultural practices in the family that are violent towards women. There she

28 Ndulo 2003: 34.

29 Knop 2002: 339.

30 Rifkin 1980: 83.

31 CEDAW, Concluding Observations on Guatemala, UN Doc. A/49/38 (1994) para 71. See Cook *et al* 2003:200 for discussion of patriarchy.

32 Okin 1999: 13.

33 Women Living Under Muslim Laws 2003: 197.

noted that “several ... forms of threat or violence are used to ensure that women stay obedient within a marriage, for example the threat of the husband taking another wife...”³⁴ As a patriarchal structure, polygyny operates to broaden the scope of masculine sexual freedom and dominance while restricting women’s decision-making. This limits women’s ability to insist on safer sexual practices within marriage and in turn contributes to increased HIV transmission.

2.2.2 Harmful stereotyping

As Sofia Gruskin has noted, many of the societal forces that influence the probability of increased HIV infection are closely tied to women’s reproductive health and capacity because of the high value placed on pregnancy.³⁵ In many countries, reproductive success in terms of child-bearing is central to women’s self-esteem and sense of personal satisfaction. A woman’s fertility or potential fertility can affect her status in her community and family and be central to her economic existence.³⁶

Polygyny tends to essentialize women’s reproductive capacity as being an essential condition for marital success. In many cases, polygyny is seen as a solution to a wife’s infertility, her “inability” to have enough sons, her post-menopausal state, or simply to maximize reproduction. Even in systems that have restricted the practice by requiring husbands to show a “legitimate interest” or “lawful benefit” for remarriage, this analysis often centres on “defects” in an existing wife including her inability to perform “marital duties” or her infertility.³⁷ In all these scenarios, a wife’s value within marriage is equated with her reproductive capacity (and particularly ‘male-child reproductive capacity’).

Such stereotypes become direct threats to women’s sexual and reproductive health where wives are unable or unwilling to forego reproductive opportunities with their polygynous husband even when aware of the health risks associated with his multiple partnering. In fact, maximizing reproduction can become a competitive survival technique where wives are vying for a husband’s material or emotional attention. A study of Malian polygynous families in France, for example, found that childbearing was used strategically in familial disputes in the context of draconian immigration laws that retroactively denied legal status to multiple wives.³⁸ Because France’s 1993 immigration laws required formal divorce and physical separation, an economic and social impossibility for most families, “pregnancy rivalry” emerged as an adaptive strategy for wives trying to remain in France.³⁹ In one case, a senior wife became pregnant after her husband brought a younger, second wife to France, hoping that the pregnancy would convince him to keep her in France. The husband nevertheless sent her

34 U.N. Special Rapporteur on Violence Against Women, Cultural practices in the family that are violent towards women, 48th Sess., UN Doc. E/CN.4/2002/83 (2002) para 63.

35 Gruskin 1995: 1193.

36 Gruskin 1995: 1193.

37 Women Living Under Muslim Laws 2003: 200.

38 Sargent and Cordell 2003: 1961.

39 Sargent and Cordell 2003: 1967.

back to Mali.⁴⁰ Such reproductive survival strategies contribute to women's vulnerability to HIV infection because they necessarily involve women partaking in unprotected intercourse with a husband whom they know has other concurrent sexual partners.

In addition to essentializing women's reproductive capacity, polygyny also reinforces harmful stereotypes of masculine and feminine sexuality that promote multiple partnering by men while requiring monogamy among women.⁴¹ Research from Nigeria and other regions of Southern Africa indicates the prevalence of the belief that men's biological need for sex differs from women's.⁴² Thus, while the practice of polygyny has economic and reproductive roots historically, in terms of maximizing fertility, it is also substantially premised on a belief that men are sexually polygynous by nature.⁴³ As CEDAW has noted, this kind of harmful stereotyping "undermine[s] women's social status and [is] an obstacle to the full implementation of the [Women's] Convention."⁴⁴

2.2.3 Polygyny as a contributing factor to domestic violence

In addition to reinforcing patriarchy and harmful stereotyping, the typically acrimonious nature of polygynous co-wife and husband-wife relationships also contributes to and aggravates domestic violence. Domestic violence can operate to directly undermine women's sexual and reproductive health through HIV transmission in the case of sexual violence or indirectly by restricting women's ability to negotiate safer sexual practices.⁴⁵

Studies from Rwanda, South Africa, and Tanzania indicate that women who have experienced violence face up to three times the risk of HIV infection as those who have not.⁴⁶ A cross-sectional study of women receiving antenatal care in Soweto, South Africa, found that women who experienced partner violence and controlling behaviour were nearly 1.5 times more likely to be HIV-infected than those who did not.⁴⁷ In Tanzania, a Horizons report found that women living with HIV/AIDS were more likely to have had a violent partner at some

40 Sargent and Cordell 2003: 1970.

41 Albertyn 2003: 595.

42 Orubuloye *et al* "The cultural, social and attitudinal context" 1995, Orubuloye *et al* "Perceived male sexual needs" 1997, Orubuloye *et al* "Men's sexual behavior" 1997 all as cited in Mitsunaga *et al* 2005: 479.

43 Mitsunaga *et al* 2005: 479. Ndulo 2003. Where society lacked lasting forms of inheritable wealth, the possession of numerous wives was one way a man could exhibit wealth and enhance his social standing. Traditionally, polygyny allowed for most women to marry and have children because there were more women of marriageable age owing to women's earlier marriages and longer life-span than men.

44 Concluding Observations of CEDAW: Belarus, U.N. Doc. CEDAW/C/2004/I/CRP.3/Add.5/Rev.1. (2004), para 23..

45 Naylor 2005: 52. Violence can also indirectly facilitate HIV transmission through sexual risk-taking, an inability to negotiate condom use, and sexual partnering with riskier, often older men. See WHO 2003.

46 WHO 2003.

47 Dunkle *et al* 2003.

point in their lives, and to have experienced physical or sexual violence with their current partner, than HIV-negative women.⁴⁸

In field research carried out by Law and Advocacy for Women in Uganda, 86.7% of a focus group in Iganga and 80 % of a focus group in Kampala identified polygyny as a cause of domestic violence.⁴⁹ Ruth Mukooyo, a representative of the FIDA Legal AID project, noted that:

[t]he constitution talks about equality. Polygamy offends this principle. Most of our population is polygamous. Even when they marry in church they still go and get other pseudo-wives. ... Polygamy really encourages violence. It is psychological torture for wives which leads to conflict.⁵⁰

The fact that polygyny is still formally recognized in Uganda and elsewhere illustrates how national laws and policies that do not account for women's lived experiences and concerns operate to disadvantage women and undermine their health.⁵¹ Violence, or the threat of violence, deprives women of their bodily integrity and security of the person by eliminating their ability to consent to sex, negotiate safer sexual practices, and decide on the number and spacing of children.⁵²

2.2.4 Polygyny and women's limited ability to negotiate condom use and insist on partner fidelity

When viewed in terms of patriarchy and harmful stereotyping, combined with its aggravation of familial violence, the direct and indirect roles of polygyny in facilitating HIV transmission become apparent. Some culturally relativist scholars have tried, however, to decouple polygyny from the risky sexual behaviours associated with HIV transmission. Quentin Gausset, for example, contends that although polygyny may accelerate rates of infection in some instances, it may not be any riskier than monogamous marriage if all partners are faithful or practice extramarital sex safely.⁵³ For Gausset, it is not monogamy or polygyny that are important, but fidelity or safe extra-marital sexual relationships.⁵⁴

What this analysis fails to consider, however, is how inequality in polygynous relationships undermines women's status in the family and broader society, which in turn restricts their ability to negotiate safer sexual practices. With respect to condom use, for example, women's unequal status within marriage generally, and within polygynous marriages specifically, can undermine their ability to negotiate forms of barrier protection. The patriarchal stereotypes and potential

48 See Horizons, "HIV and partner violence: implications for HIV voluntary counseling and testing programs in Dar es Salaam, Tanzania" as cited in UNAIDS Global Coalition on Women and AIDS, "Stop violence against Women — Fight AIDS": 1.

49 LAW-U, "Project report on the domestic violence study," 81 as cited in HRW 2003:51.

50 Human Rights Watch interview with Ruth Mukooyo, co-ordinator FIDA Legal Aid Project, Luwero, December 18, 2002 as cited in HRW 2003: 51.

51 Naylor 2005: 63.

52 Naylor 2005: 62.

53 Gausset 2001: 512.

54 Gausset 2001: 512.

for familial violence that reinforce polygyny result in women being reluctant and often fearful to raise the issue of condom use, lest it be perceived that they are contravening their expected role as faithful wives. A survey of women in the Kagera Region of Tanzania found that the stigma associated with condoms limited their acceptability in permanent and stable unions.⁵⁵ Studies in other parts of Tanzania and sub-Saharan Africa report similar findings.⁵⁶ In some cases, in addition to accusations of infidelity, women who request that their partner use a condom may suffer physical abuse or abandonment.⁵⁷ As the author of the Kagera Region study concluded, “how people perceive the meaning of sex determines a great deal how they perceive condoms and their use.”⁵⁸ Where practices such as polygyny reinforce male sexual decision-making and female passivity, the perceived meaning of sex and condom use continues to undermine women’s sexual and reproductive health.

This was evident in a Swazi focus group that highlighted how women often lack control in sexual encounters because of discriminatory social norms of feminine and masculine sexuality. There, women expressed that:

[i]f the man is unfaithful, it's difficult for us to say anything. For example, if a man becomes unfaithful and gets an STD, he will accuse the woman of giving him the disease. He blames her for him having extramarital affairs with another woman. We as women can't really say anything.⁵⁹

The fact that women “can’t really say anything” about their husbands’ extramarital sexual activity and the resulting health risks is borne out in the frequency of such activity. In the 2003 Nigerian National HIV/AIDS and Reproductive Health Survey, for example, although staying with one partner was the most frequent response among men and women for preventing HIV infection, over a quarter of men surveyed reported having more than one partner in the previous year.⁶⁰ Reports from Kenya, South Africa, and Uganda have found that approximately 15% of women and 50% of men had casual sex with a non-partner.⁶¹

Although it seems plausible that polygyny would be protective against HIV infection in reducing extramarital sexual relations, studies indicate that this is often not the case. In an Ondo State, Nigeria research programme, more than 50% of monogamous men and approximately a third of polygynous men had extramarital sex in the period of a year.⁶² Other results are more ambiguous with some studies indicating that male monogamists in Nigeria were more likely to have extramarital sexual relations than their polygynous counterparts,

55 Lugalla *et al* 2004: 194.

56 Asimwe-Okiror 1997; Kapiga and Lugalla 2002 as cited in Lugalla *et al* 2004: 194.

57 Buseh *et al* 2002: 181.

58 Buseh *et al* 2002: 179.

59 Buseh *et al* 2002: 179.

60 Mitsunaga *et al* 2005: 478.

61 Bamba 1995: 3.

62 Orubuloye *et al*, “The cultural, social and attitudinal context” as cited in Mitsunaga Mitsunaga *et al* 2005: 479.

whereas the opposite was the case across the men's entire lives.⁶³ Polygynous husbands have been found to have more extramarital sexual contact than their monogamous counterparts during a wife's pregnancy and postpartum period.⁶⁴

Negotiating condom use and insisting on partner fidelity becomes further complicated in polygynous households given that multiple wives are often reliant on one husband for material survival. The economic hardship and lack of emotional attention associated with polygyny can lead women to engage in extramarital sexual relationships.⁶⁵ However, as participants in the Swazi focus group alluded to, extramarital affairs by women in polygynous contexts are treated very differently to men:

If a woman becomes unfaithful to her husband, he could drive her away from his home or send her back to her people. In many cases, he may beat her. You see it's okay for a man to be unfaithful to his wife in our culture but not the woman. If we are sent back to our family, then our family members must pay back this man's *Lobola* [bride price] and that is very difficult to do. As a woman you could also be denied the right to your children.⁶⁶

Here, one sees the way in which discriminatory laws intersect with harmful socio-cultural norms to undermine women's health and security of the person. In such instances, not only are women held to a separate and higher standard of fidelity, discriminatory laws and practices reinforce their existing socio-economic vulnerability upon abandonment. As the excerpt indicates, discriminatory child custody, inheritance, and property laws combined with customary norms requiring the return of a bride-price on marriage dissolution can leave women destitute and looking to new men for material survival. Ultimately, as Sofia Gruskin has noted, without systemic legal and socio-cultural reforms, "women will continue to engage in unsafe sex and to take chances with their health, even if they are fully aware of the dangers of infection, simply because the social, economic and cultural costs of avoiding these risks may be too high."⁶⁷

2.2.5 Women's limited ability to leave high-risk polygynous relationships

Where women are unable to negotiate condom use or insist on partner fidelity within concurrent sexual networks, their inability to leave these high-risk relationships is the factor that often seals their fate with respect to HIV infection. As a nurse in the Swazi focus group noted, many polygynous wives feel trapped in their unhappy and sexually risky familial structures.

Women in polygamous relationships are not happy. It's stressful; they develop a lot of high blood pressure, emotional pain, and a sense of not belonging. They are there in the marriage because they feel that there

63 Isiugo-Abanihe 1994 as cited in Mitsunaga *et al* 2005: 479.

64 Lawoyin and Larsen 2002 as cited in Mitsunaga *et al* 2005: 479.

65 Jegede and Odumosu 2003: 63.

66 Jegede and Odumosu 2003: 63.

67 Gruskin 1995: 1194-1195.

is no way out. Many of them feel trapped. Sometimes you want to get out, but you can't get out because of the children. When you feel like making the decision to get out, you begin to ask yourself, 'Who will take care of my children?'⁶⁸

Here again, economic and material survival, particularly as it relates to children, is central to women's inability to exit harmful relationships. When a husband takes on a subsequent wife, the existing wife(s) is often unable to leave the union because of her underlying economic and social vulnerability. Discriminatory personal law regimes can leave women unprotected and unable to secure maintenance payments, a share of marital property, or even a formal divorce. Customary practices, such as the required repayment of *lobola* or "bride-price" can also make it virtually impossible for women to leave their husbands.⁶⁹

2.2.6 Harms of inter-generational and early marriage

The final individual and population-based sexual and reproductive health harm associated with polygyny involves the often inter-generational nature of these unions. The inter-generational transmission of HIV/AIDS and other STIs within such marriages has significant deleterious health impacts on affected women and girls as well as the broader population.

African epidemiological data indicates that men typically enter into sexual partnerships with women younger than themselves, resulting in increased HIV transmission to younger women and girls.⁷⁰ A study from Guinea-Bissau, for example, found a mean difference in age of nine years between men and women within marriage.⁷¹ Given that one of the significant factors fuelling the HIV-pandemic is sexual inter-mixing among different strata of populations across age, class, or spatial locations (urban-rural),⁷² the often inter-generational nature of concurrent sexual networks raises serious group and individual health concerns.

Where husbands continue to take on new, younger wives throughout a marriage, the inter-generational nature of the marriages will often place wives at risk. Analysis of the incidence of HIV transmission suggests that men, especially older men, are the primary source of HIV infection in stable unions.⁷³ Early marriage also increases women's and girls' risk because of their often decreased ability to negotiate safer sex. A study of early marriages in Kenya and Zambia found that with marriage, the frequency of sexual intercourse increased, condom use decreased, and girls' ability to abstain from sex was virtually eliminated.⁷⁴ Because husbands tend to be older than the sexual partners of single girls, HIV prevalence rates among husbands are usually much higher than among the peer sexual partners of unmarried girls.⁷⁵

68 Buseh *et al* 2002: 179.

69 Van Rensburg *et al* 2002: 29.

70 Anderson *et al* 1991: 583.

71 Anderson *et al* 1991: 583-584.

72 Anderson *et al* 1991: 584.

73 See Kelly *et al* (2003) and Serwadda *et al* (1995) as cited in Clark 2004: 156.

74 Clark 2004: 156.

75 Clark 2004: 156.

Beyond the inter-generational nature of polygynous partnerships, studies also indicate that women and girls in polygynous regions typically marry younger and have earlier sexual debuts than those in non-polygynous regions. Research involving Kenyan women living in areas with high rates of polygyny found that they often married two years earlier, started sexual activity one and a half years earlier, and had their first child a year earlier than women in non-polygynous areas.⁷⁶ Early marriage in turn curtails the socio-economic development of girls, “often limiting their role and opportunities in life to a career of childbearing, and the assumption of parental responsibility before social maturity.”⁷⁷ Because polygyny tends to essentialize reproductive capacity, these young wives will often face great societal pressure to prove their fertility. Adolescent pregnancies among younger wives can have adverse short and long-term health consequences in terms of immediate pregnancy outcome and longer-term mental and physical health.⁷⁸ The interconnectedness of polygyny, essentialized reproduction, and younger marriage operate to subordinate women and girls and undermine their reproductive self-determination.

3. Polygyny as a violation of international human rights law

In view of the sexual and reproductive health harms associated with polygyny, this section will outline how states’ continued legal recognition of polygyny at the point of marriage formation violates international human rights law.⁷⁹ In order to challenge harmful concurrent sexual networks, particularly *de jure* polygynous unions, it is important that their role in HIV infection be addressed not only as a public health issue, but also as human rights violations for which states are accountable.⁸⁰

The value of a human rights approach is that “it provides a tangible route for making the State accountable to its public health obligations in respect of an historically disadvantaged group.”⁸¹ Human rights norms, as Helen Watchirs has noted, can prove essential to promoting HIV prevention, enabling infected and affected persons to better cope with the consequences of infection, and ensuring that communities can respond effectively to the epidemic.⁸² The *International Guidelines on HIV/AIDS and Human Rights* were developed to foster such a human rights approach in the specific context of the HIV/AIDS pandemic.⁸³ In addressing the particular vulnerabilities that women and children face, Guideline 8 provides that:

76 Bamba 1999: 3.

77 Cook *et al* 2003: 277-278.

78 Cook *et al* 2003: 280.

79 For further explanation of polygyny as a violation of women’s human rights, see Cook and Kelly, *Polygyny and Canada’s obligations under international human rights law* (forthcoming).

80 This message was stressed by Jonathan Mann, who as founding director of the WHO’s Global Programme on AIDS, expressly linked health and human rights at a time when few others were doing so. See Mann *et al* 1994.

81 Ngwena 2005: 79.

82 Watchirs 2002: 79.

83 *International Guidelines on HIV/AIDS and Human Rights*, U.N.C.H.R. res. 1997/33, U.N. Doc. E/CN.4/1997/150 (1997).

States, in collaboration with and through the community, should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.⁸⁴

This call to address underlying prejudices is pertinent to an analysis of harmful practices such as polygyny that continue to subordinate women in family life.

3.1 The right to equality in marriage and family life

Marital inequality and gender disparities in sexual decision-making have taken on an ominous and life-threatening dimension in the context of HIV/AIDS. Without equal and shared rights and responsibilities within marriage, women's sexual health needs are subordinated to male preferences. The ability to partake in respectful, consensual sexual activity within marriage is predicated on women's right to equality, including in sexual decision-making. As the discussion of the health harms of polygyny above outlined, discriminatory family structures violate this right and in doing so undermine women's abilities to ensure sexual fidelity, negotiate condom use, and leave high-risk unions.

States parties to the International Covenant on Economic, Social and Cultural Rights (the Economic Covenant), the International Covenant on Civil and Political Rights (the Political Covenant), and the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention) are internationally obligated to ensure women's equality in the familial realm.⁸⁵ Article 23(4) of the Political Covenant requires States parties to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution."⁸⁶ This is echoed in Article 16 of the Women's Convention, which calls on States parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" in order to ensure "a basis of equality of men and women."⁸⁷

These international human rights instruments have defined equality in marriage and family life through an equal rights and responsibilities framework. The Women's Convention goes the furthest in enumerating the areas of family life in which rights and responsibilities should be shared. Article 16 provides that States parties should "ensure, on a basis of equality of men and women:

84 Guideline 8, International Guidelines on HIV/AIDS and Human Rights, U.N.C.H.R. res. 1997/33, U.N. Doc. E/CN.4/1997/150 (1997).

85 The International Covenant on Economic, Social and Cultural Rights, GA Res. 2200 (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.A/6316 (entered into force 3 January 1976) [Economic Covenant] contains a general non-discrimination clause on the basis of sex (Article 2). In addition, States parties have a positive obligation under Article 3 "to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

86 International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, arts 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [Political Covenant], Art 23(4).

87 Women's Convention, Art 16(1).

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.⁸⁸

It is this equality in rights and responsibilities that gender-asymmetrical marital practices such as polygyny violate. As Susan Deller Ross has noted, when a husband has multiple wives, each wife essentially has only a fraction of a husband. As a result, spousal maintenance and child-care resources are all divided unequally *vis-à-vis* individual polygynous husbands and their respective wives during marriage or at its dissolution.⁸⁹ Such husbands are able to share only a fraction of their emotional, sexual, and financial attention with each individual wife, meaning that polygynous wives have fewer *de facto* marital rights and their husbands fewer responsibilities.⁹⁰

For this and broader harm-based reasons, CEDAW,⁹¹ the Human Rights Committee (HRC),⁹² the Committee on Economic, Social and Cultural Rights

88 Women's Convention, Art 16.

89 Deller Ross 2002:34.

90 Deller Ross 2002:34.

91 CEDAW has condemned polygyny in numerous concluding observations. See Burkina Faso, U.N. Doc. A/55/38 (2000) paras. 281–282; Cameroon, U.N. Doc. A/55/38 (2000) para 54; Democratic Republic of the Congo, U.N. Doc. A/55/38 (2000) paras 215–216; Egypt, U.N. Doc. A/56/38 (2001) paras 352–353; Guinea, U.N. Doc. A/56/38 (2001) paras 122–123; Indonesia, U.N. Doc. A/53/38 (1998) para 284(a); Iraq, U.N. Doc. A/55/38 (2000) para 191; Israel, U.N. Doc. A/52/38 Rev.1 (1997) Part II para 163; Jordan, U.N. Doc. A/55/38 (2000) paras 174–175; Namibia, U.N. Doc. A/52/38/ Rev.1 (1997) Part II para 110; Nepal, U.N. Doc. A/54/38 (1999) para 153; Nigeria, U.N. Doc. A/53/38/Rev.1 (1998) para 153; Senegal, U.N. Doc. A/49/38 (1994) para 721; United Republic of Tanzania, U.N. Doc. A/53/38/Rev.1 (1998) para. 229; Uzbekistan, U.N. Doc. A/56/38 (2001) paras 187-188 as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law 2002: 38.

92 The HRC has recommended that States parties take steps to abolish and prevent the practice in several of its concluding observations. See Democratic Republic of the

(CESCR),⁹³ and the Committee on the Rights of the Child (CRC)⁹⁴ have all stated in their concluding observations that polygyny violates the rights articulated in their respective treaties. CEDAW and the HRC have also condemned the practice in their General Comments and Recommendations. In its General Comment no. 28 on Equality of Rights between Men and Women, the HRC stated:

It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.⁹⁵

Echoing this recognition of polygyny as a violation of women's equality and dignity within marriage, CEDAW noted in its General Recommendation no. 21 on Equality in Marriage and Family Relations that:

Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.⁹⁶

Congo, U.N. Doc. CCPR/C/79/Add.118 (2000) para 11; Gabon, U.N. Doc. CCPR/CO/70/G AB (2000) para 9; Libyan Arab Jamahiriya, U.N. Doc. CCPR/C/79/Add.101 (1998) para. 17; Nigeria, U.N. Doc. CCPR/C/79/Add.65, A /51/40 (1996) para 291; Senegal, U.N. Doc. CCPR/C/79/Add 82 (1997) para 12 as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law 2002:42.

93 The CESCR has condemned polygamy as being incompatible with the rights protected under the Economic Covenant. See Cameroon, U.N. Doc. E/C.12/1/Add.40 (1999) paras 14, 33; Kyrgyzstan, U.N. Doc. E/C.12/1/Add.49 (2000), paras 16, 30; Nepal U.N. Doc. E/C.12/1/Add.66 (2000) paras 10, 13; Nigeria, U.N. Doc. E/C.12/Add.23 (1998) para 22; Senegal, U.N. Doc. E/C.12/1/Add.62, paras 15, 39 (2001) as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law 2002: 45.

94 The CRC has expressed concern about the impact of polygyny on children and recommended policy and legislative reforms to discourage the practice. See Djibouti, U.N. Doc. CRC/C/15/Add.131 (2000) para 34 as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law 2002: 40.

95 HRC General Comment No. 28: Equality of rights between men and women (article 3), 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) para 24; for a discussion of the legal trend toward marital equality and the regulation of marriage generally, see Gautier 2005.

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

This international consensus around polygyny as a violation of women's right to equality was reflected in the reasoning of the Mauritius Supreme Court in its 1991 decision in *Bhewa v. Government of Mauritius*.⁹⁷ In *Bhewa*, the Court interpreted the national Constitution's religious freedom guarantee in conjunction with the Political Covenant's requirement that women enjoy equal rights within marriage. In doing so, the Court denied a Muslim community the right to apply personal Islamic law governing marriage, divorce, and inheritance. The Court discussed the important balance between "the duality of religion and state in a secular system." It concluded that:

[t]he secular state is not anti-religious but recognizes freedom of religion in the sphere that belongs to it ... To the extent that it is sought to give to religious principles and commandments the force and character of law, religion steps out of its own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law...⁹⁸

In addition, the Court noted that even if one construed religious freedom in the manner argued by the plaintiff, Mauritian commitments as a party to the Political Covenant required that it guarantee gender equality within marriage. The Court interpreted these obligations as requiring:

the maintenance of monogamy, including measures designed to safeguard the family and to ensure the largest measure of non-discrimination against women, whether as wives or daughters ...⁹⁹

Through this reasoning, the Court gave effect to women's internationally guaranteed equality rights and rejected a discriminatory personal law system that would have undermined women's health and rights within marriage and family life.

In addition to violating this rights-responsibilities framework, where polygyny aggravates domestic violence or is used as a violent threat, it also constitutes a form of discrimination against women. As CEDAW noted in its General Recommendation 19 on Violence against women, "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."¹⁰⁰ In condoning discriminatory family practices that contribute to violence, States parties that permit polygyny are in violation of their obligation to "to take positive measures to eliminate all forms of violence against women."¹⁰¹ Where women continue to be subordinated within marriage through patriarchal and discriminatory multiple-partnering and concomitant violence, their sexual and reproductive health will also continue to suffer. Only where women have an equal place within marriage will they be able to freely and safely determine terms of sexual contact.

97 *Bhewa v. Government of Mauritius* [1991] LRC (Const).

98 *Bhewa v. Government of Mauritius* 308.

99 *Bhewa v. Government of Mauritius* at 309.

100 General Recommendation 19: Violence against Women, 11th Sess., UN Doc. A/47/38, (1992) para 1.

101 General Recommendation 19: Violence against Women, 11th Sess., UN Doc. A/47/38, (1992) para 4.

3.2 The right to be free from all forms of stereotyping

In addition to violating women's right to equality within marriage and family life, polygyny as practised in many cultural contexts in Southern Africa also violates women's rights to be free from all forms of stereotyping. State-sanctioned polygyny operates to create a "sexual hierarchy ... in which different sexual practices, expressions, identities, and communities are ranked, from the most normative and socially approved to the most stigmatized and despised."¹⁰² Within this hierarchy, masculine multiple partnering becomes a status symbol while women's sexuality is relegated to a lower and passive realm. In essentializing women's fertility and reinforcing male sexual networking, laws that permit polygyny ultimately undermine both men's and women's health.

Laws that permit polygyny, or defer to customary norms that do, violate women's right to be free from harmful stereotypes. Article 5 of the Women's Convention requires States parties to:

take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁰³

States parties have an obligation to address patriarchal stereotypes within marriage and family life and reform the broader legislative and social frameworks that perpetuate them. In outlining the importance of temporary special measures in challenging gender discrimination, CEDAW noted that:

States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.¹⁰⁴

Laws that permit polygyny reinforce a patriarchal family structure in which women are constructed as sexually passive, needing only a fraction of a husband. In contrast, men are perceived as hyper-sexualised individuals who can attain greater social status through multiple partnering. Such "deep-rooted" patriarchal stereotypes "serve to perpetuate women's subordination in the family and society and constitute serious obstacles to women's enjoyment of their human rights."¹⁰⁵

102 Rubin 1984 as cited in Miller and Vance 2004: 6-7.

103 Women's Convention, Art. 5(a).

104 CEDAW General Recommendation 25, Article 4, paragraph 1 of the Convention (temporary special measures), UN Doc. HRI/GEN/1/Rev. 7 (2004) para 7.

105 Concluding Observations of the Committee on the Elimination of Discrimination against Women: Angola, UN Doc. CEDAW/C/2004/II/CRP.3/Add.3/Rev.1. (2003), para 23.

3.3 The right to be free from inhuman and degrading treatment

In addition to violating women's right to be free from all forms of stereotyping, states that permit polygyny also violate women's right to be free from inhuman and degrading treatment. In the context of women's sexual and reproductive health, degrading and inhuman treatment operates to undermine women's dignity. In subjugating women within marriage and aggravating domestic violence, states' condonation of polygyny places women at a higher risk of HIV infection and violates their right to be free from inhuman and degrading treatment.

The right to be free from inhuman and degrading treatment is articulated in Article 7 of the Political Covenant, which states that "no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."¹⁰⁶ While this right was traditionally considered within the context of prisoner abuse and torture, human rights tribunals and courts have recently applied it to ensure that women's dignity is respected, protected and fulfilled.¹⁰⁷ The right has been applied to hold States accountable for the rape of women by government officers, for example.¹⁰⁸

The right to be free from inhuman and degrading treatment is also being increasingly utilised to protect human sexuality.¹⁰⁹ In assessing practices such as polygyny that are harmful to women's sexual and reproductive health, particularly as an interference with spousal intimacy, the right to be free from inhuman treatment is especially relevant. Human sexuality serves an important role beyond reproduction in contributing to human bonding, intimacy, affection and fidelity, spousal or partner attraction, and as such is central to human development and security.¹¹⁰ While sexuality has traditionally been addressed by courts through a negative, non-interference right to privacy framework, it is now argued that because sexual intimacy is inherent to being human, a denial of that sexuality, or by extension a violation of it through harmful sexual practices, denies individuals the right to be fully human.¹¹¹

Recent work by the Pan American Health Organization has noted that:

sexual health is the experience of the ongoing process of physical, psychological, and socio-cultural well being related to sexuality. Sexual health is evidenced in the free and responsible expressions of sexual capabilities that foster harmonious personal and social wellness, enriching individual and social life. It is not merely the absence of dysfunction, disease and/or infirmity. For sexual health to be maintained it is necessary that the sexual rights of all people be recognized and upheld.¹¹²

106 Political Covenant, Art 7.

107 Cook *et al* 2003:170.

108 See *Ana, Beatriz and Cecilia Gonzalez Perez v. Mexico* (2001), Report No. 53/01, Case 11.565, (Inter-Am Ct HR) para 27.

109 Cook *et al* 2003: 173-174.

110 Cook *et al* 2003: 173-174.

111 Cook *et al* 2003:1 74.

112 Pan American Health Organization and WHO, as cited in Cook *et al* 2003:12.

The legal legitimisation of a marital practice that is harmful to women's sexual well-being, contrary to their inherent dignity, and a contributor to familial violence is a violation of women's right to be free from cruel and inhuman treatment.¹¹³

3.4 The right to the highest attainable standard of health

Where states condone gender discriminatory and stereotyped sexual and marital practices, they violate women's right to the highest attainable standard of health. Practices such as polygyny that undermine women's and girls' sexual and reproductive health also threaten the enjoyment of other human rights, including the right to life, liberty, and security of the person.¹¹⁴

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

the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.¹¹⁵

Subsequent international human rights instruments including the Economic Covenant, the Women's Convention, and the Children's Convention have also guaranteed this right. Regional human rights instruments, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also enshrine a "right to health, ... including sexual and reproductive health."¹¹⁶ According to the WHO, "every country in the world is now party to at least one human rights treaty that addresses health-related rights, including the right to health and a number of rights related to conditions necessary for health."¹¹⁷

113 See the cruelty analysis of polygyny by the Allahabad Court in *Itwari v. Asghari* (1960) A.I.R. 684 (Allahabad).

114 For discussion, see Kisaakye 2002: 268-285.

115 Constitution of the World Health Organization, adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (Off. Rec. WHO 2, 100), entered into force 7 April, 1948.

116 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, July 11-August 13, 2003. See Article 14: Health and Reproductive Rights – (1) "States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

a) the right to control their fertility; b) the right to decide whether to have children, the number of children and the spacing of children; c) the right to choose any method of contraception; d) the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices; f) the right to have family planning education."

117 WHO, "Health and Human Rights", online: <<http://www.who.int/hhr/en/>>.

The Economic Covenant advanced earlier pronouncements on the right to health by placing a positive recognition duty on States parties. Article 12 provides that:

States parties to the [Economic] Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.¹¹⁸

Given the direct and indirect association between polygyny and HIV infection, “recognition” of the right to the highest attainable standard of health requires that States parties take measures to discourage and eliminate the practice.

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

States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.¹¹⁹

Accordingly, States parties have a duty to take “concrete and targeted” steps to deter polygyny and address the underlying conditions that perpetuate it. As the CESCR articulated in its General Comment 14 on the right to health, States parties have an obligation to “undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.”¹²⁰ Shielding women from the harmful impact of polygyny and sexual concurrency in marriage requires states to legally discourage polygyny at the point of family formation in addition to publicly articulating the health harms associated with the practice.

Further contributing to this international human rights recognition of the patterns of discrimination that deny women their full sexual and reproductive rights, Article 12(1) of the Women’s Convention provides that:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.¹²¹

While the language of the Article speaks more to discrimination against women in accessing health care, CEDAW has interpreted it more broadly in

118 Economic Covenant, Art 12.

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

120 General Comment 14: The right to the highest attainable standard of health, 22nd Sess., UN Doc. E/C.12/2000/4 (2000), para 21.

121 Women’s Convention, Art. 12(1).

its General Recommendation 24 on Women and Health. There, the Committee drew attention to the role of harmful sexual practices in undermining women's and girls' sexual and reproductive health, particularly through increased risk of HIV infection when it said:

The issues of HIV/AIDS and other sexually transmitted disease are central to the rights of women and adolescent girls to sexual health ... As a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as ... polygamy ... may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases.¹²²

As the HIV/AIDS pandemic has made clear, women's sexual and reproductive health remains contingent upon their ability to achieve real equality in marriage and family life.

In addition to these international human rights instruments, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa also provides that States parties shall "ensure the right to health of women, including sexual and reproductive health is respected and promoted."¹²³ Part of this guarantee includes the right to "self protection and to be protected against sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices."¹²⁴ The Protocol, however, does not expressly require that States parties prohibit polygyny. In Article 6(c), it calls on States to:

enact appropriate national legislative measures to guarantee that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.¹²⁵

It is arguable, however, that because the Protocol also requires States to "ensure women and men enjoy equal rights and are regarded as equal partners in marriage"¹²⁶ in addition to the health obligations listed above, it should be read more generally to discourage polygyny. States cannot ensure women's equality within marriage and protect their sexual and reproductive health rights while at the same time legally condoning a discriminatory and unhealthy marital practice. For these reasons, as a human rights instrument, the Protocol should be interpreted as ultimately requiring States to discourage and eliminate the practice.

While health-rights have recently been recognized in some national constitutions including the 1996 South African Constitution,¹²⁷ older constitutions

122 General Recommendation 24: Women and health, 20th Sess., UN Doc. A/54/38/Rev.1 chapter I (1999) para 18.

123 Protocol to the African Charter on Women's Rights, Art. 14(1).

124 Protocol to the African Charter on Women's Rights, Art 14(1)(d).

125 Protocol to the African Charter on Women's Rights, Art 6(c).

126 Protocol to the African Charter on Women's Rights, Art 6.

127 See Constitution of the Republic of South Africa 1996, No. 108 of 1996, section 27.

typically focus on more classical civil and political rights.¹²⁸ In light of an increasing awareness of the interdependence of rights, courts in states whose constitutions reflect these more traditional rights are beginning to incorporate notions of health into the meaning of those civil and political rights. In some domestic systems, this has meant that state neglect of an individual's health needs has been interpreted as a denial of the right to security of the person.¹²⁹ It is possible, therefore, that even where national constitutional systems do not expressly protect equality within marriage or a right to the highest attainable standard of health, these more traditional civil and political protections including the right to security of the person may provide a ground on which to challenge a state's formal recognition of polygyny.

4. Means chosen to prohibit polygyny

While there is a growing consensus that polygyny violates women's right to be free from all forms of discrimination, this consensus fractures somewhat at the notion of immediate prohibition given the deleterious effect this may have on existing polygynous marriages and those unions that may have helped poorer women and to a lesser extent children of polygynous marriages. For this reason, the specific means chosen to prohibit polygyny are essential both in terms of effectively discouraging the practice as well as protecting the rights of women in existing unions.

Although legislative reform alone may not immediately stem the practice of polygyny, it is a necessary normative and pragmatic first step. It is this author's contention that in addition to pragmatically ordering family life, law also plays a constitutive role in defining how people think about family, culture, and equality. The notion of "law as rhetoric" advanced by James Boyd White speaks to the idea of law playing a much greater role than neutrally ordering society and resolving disputes.¹³⁰ For White, law acts rhetorically in establishing, maintaining, and transforming community and culture, something he refers to as "constitutive rhetoric."¹³¹ This view of law as a dynamic force invites individuals to "test the law in part by asking whether [their] own story, or the story of another in whom [they] have an interest is properly told by these speakers and in this language."¹³² In the context of marital equality and sexual and reproductive health, White's perspective leads us to ask whose voices dominate and whose voices are missing in legal regimes that continue to permit polygyny. Legal reform is a necessary first step, then, in rhetorically and pragmatically challenging unhealthy and discriminatory marital practices.

128 Cook *et al* 2003: 150.

129 Cook *et al* 2003:1 50.

130 White 1985: 684.

131 White 1985: 684.

132 White 1985: 697.

4.1 Restricting parallel systems of personal or customary law

As the HIV/AIDS pandemic has brought to the fore, gender discriminatory familial structures directly and indirectly undermine women's sexual and reproductive health. Accordingly, polygyny is considered one of a number of "harmful practices" that states have a duty to eliminate. Article 2(f) of the Women's Convention makes clear that States have an obligation to:

take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women.¹³³

Despite this international obligation, polygyny is still legally permitted in most African states through the operation of parallel personal law systems.¹³⁴ In states that recognize civil, religious and customary personal laws, parties to a marriage can decide which law they will be governed by depending on the form of the marriage.¹³⁵ While parallel systems may appear at first glance to offer women greater marital options (monogamy or legal recognition of their rights as polygynous wives), the non-governmental organization Women Living Under Muslim Laws (WLUML) has argued that these theoretical options are frequently undermined by women's inability to determine which law they will be married under and whether or not their marriage will be monogamous.¹³⁶ In the Kenyan and Ugandan contexts, for example, most marriages are conducted under customary law and are negotiated between a woman's father and future husband.¹³⁷ As Esther Mayambala has noted, in such contexts, it is difficult to determine whether a woman's consent was obtained for the marriage, let alone for the particular form of marriage.¹³⁸

Beyond possible manipulation, deference to dualist systems also means that polygynous wives married under religious or customary law may be left without important civil law protections. In Ethiopia, for example, formal marriage laws typically have little impact on most rural households, which adhere to religious, customary, and traditional practices.¹³⁹ While the nation's Civil Code prohibits bigamy, the Ethiopian Constitution recognizes marriages entered into under religious or cultural laws. The wives of polygynous unions are thus left in a vulnerable legal situation because subsequent marriages are invalid under the Civil Code. Unless wives have some legal status under customary laws, they will lack any domestically cognizable rights within the marriage.¹⁴⁰

Within Anglophone Africa, customary marriages are still pervasive. In Zimbabwe, for example, they account for 82% of marriages.¹⁴¹ Several countries in Anglophone Africa, however, have increasingly stressed the importance of

133 Women's Convention, Art. 2(f).

134 An-Na'im 2002: 47.

135 Women Living Under Muslim Laws 2003: 199.

136 Women Living Under Muslim Laws 2003: 199.

137 Mayambala 1996: 230.

138 Mayambala 1996: 230.

139 Center for Reproductive Law and Policy 2001: 25.

140 Center for Reproductive Law and Policy 2001: 25.

141 Center for Reproductive Law and Policy 2001: 167.

consent in marriage, have increased their minimum age for marriage, and are moving toward formalizing customary unions.¹⁴² Recent South African legal reforms have tried to address some of the transitional problems that arise during this formalization process. Unlike other domestic systems that permit customary law to trump statutory guarantees in the familial realm, South African law gives parties to customary marriages full legal status and the same rights and protections given to parties to civil marriages.¹⁴³ With its *1998 Recognition of Customary Marriages Act*, South Africa moved toward restricting and, in the majority of cases, prohibiting polygyny.¹⁴⁴ The Act states that if the initial marriage was solemnized under the *Customary Marriage Act*, polygyny is prohibited unless judicial approval is given with guarantees of equitable property distribution and assurances that there will not be too grave an impact on the affected family.¹⁴⁵

In Francophone Africa, Côte d'Ivoire is exceptional in prohibiting polygyny. Similarly to South Africa, Côte d'Ivoire has also addressed some of the transitional impediments to prohibiting polygyny by continuing to recognize polygynous marriages entered into before 1964.¹⁴⁶ For the majority of states in Francophone Africa including Benin, Cameroon, Chad, Mali and Senegal, however, polygyny is automatically permitted unless spouses initially indicate otherwise.¹⁴⁷

In its General Recommendation 21 on Equality in marriage and family relations, CEDAW stated that this deference to parallel legal systems that permit polygyny violates women's human rights and is a breach of States parties' responsibilities to discourage and eliminate harmful practices. In the Recommendation, the Committee expressed its concern:

that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of Article 5 (a) of the Convention.¹⁴⁸

Deference to customary or religious personal laws that permit polygyny is a violation of states' obligation to discourage and eliminate harmful practices and ensure women's equal rights within marriage and family life. In its 1998 Concluding Observations on Tanzania, CEDAW specifically addressed this issue of discriminatory parallel legal systems governing family life. There, it noted with concern:

the fact that the prevailing customary laws and religious laws which sometimes supersede the constitution are discriminatory towards women. In particular, the Committee notes that several groups in the United

142 Center for Reproductive Law and Policy 2001: 167.

143 Center for Reproductive Law and Policy 2001: 67.

144 Recognition of Customary Marriages Act 1998, No. 120 of 1998.

145 Recognition of Customary Marriages Act 1998, s7 — Proprietary consequences of customary marriages and contractual capacity of spouses.

146 Center for Reproductive Law and Policy 2001: 167.

147 Center for Reproductive Law and Policy 2001: 191.

148 General Recommendation 21, Equality in Marriage and Family Relations, 13th Sess., UN Doc. A/47/38, (1994) para 14.

Republic of Tanzania are entitled to practise polygamy. The Committee points out that customary laws and religious laws continue to govern private life and notes the critical importance of eliminating discrimination against women in the private sphere.¹⁴⁹

Given that CEDAW has characterized polygyny as a gender-discriminatory practice, the Women's Convention not only precludes cultural arguments that justify the practice, but imposes positive obligations on States parties to discourage and eliminate the practice.

Deference to parallel customary and religious legal systems that permit polygyny violates women's human rights by legally entrenching a gender discriminatory practice. As Celestine Nyamu has noted, national civil laws can operate to reinforce gender hierarchies through this deference to dominant articulations of custom and culture.¹⁵⁰ Governments can, in turn, try to avoid addressing gender inequalities by claiming that they are "powerless to alter social structures in the social sphere."¹⁵¹ In this way, states contribute to the stifling of intra-cultural and religious debate around practices such as polygyny. To guard against this, international human rights scholars and advocates should, as Nyamu challenges, be attuned to the often elitist, masculine nature of "cultural" and "religious" endorsements of gender discriminatory practices.

For these reasons, states have an obligation to cease deferring to discriminatory parallel legal systems that undermine women's right to equality within marriage and family life and further threaten their reproductive and sexual health. As the HIV/AIDS pandemic has made clear, deference to cultural and religious norms that permit discrimination in marriage and family life can have life-threatening consequences for women and their partners.

4.2 Engagement versus a strictly abolitionist approach: Ensuring rights protection for women in existing polygynous unions

While states have an obligation to cease deferring to parallel legal systems that permit polygyny at the point of family formation, this does not detract from their simultaneous obligation to protect women's rights within existing unions. Although international human rights treaty monitoring bodies have urged States parties to discourage and eliminate the practice, they have also drawn attention to the obligation to protect the rights of existing polygynous wives. In its Concluding Observations on Burkina Faso, CEDAW stressed states' obligations to "take measures to protect the human rights of women already in polygamous unions."¹⁵² To this extent, international human rights law rejects a purely abolitionist approach

149 Concluding Observations CEDAW, Tanzania, 19th Sess., UN Doc. A/53/38/Rev.1, (1998) para 229.

150 Nyamu 2000: 401.

151 Nyamu 2000: 401.

152 Concluding observations CEDAW: Burkina Faso, UN Doc. A/55/38 (2000) at para 282.

that might refuse recognition for any purpose including relief on marriage dissolution or the death of a spouse.

In order to effectively protect women's rights in existing polygynous unions, careful legislative consideration needs to be given to recognition issues regarding spousal support, property division, and child support and custody. Protecting the rights of vulnerable individuals in *de facto* or *de jure* polygynous families requires that inheritance, spousal maintenance, and child custody laws be able to functionally recognize polygynous wives for relief purposes during marriage and at relationship breakdown. Where the law fails to provide this type of protection and relief, it becomes dysfunctional in prohibiting a practice on the grounds of gender inequality, while at the same time depriving affected women of legal protection and support.

The problems with a strictly abolitionist approach that would withhold any legal recognition, even for relief purposes, were evident in the facts leading up to the 2004 South African Constitutional Court decision in *Daniels v. Campbell*.¹⁵³ In that case, Ms. Daniels' argued that the *Intestate Succession Act and the Maintenance of Surviving Spouses Act* unconstitutionally excluded persons married according to Muslim rites. This exclusion arose because colonial common law courts and legislative regimes had refused to grant any formal, legal recognition to marriages performed according to Muslim rites because "such marriages [were] potentially polygamous and hence contrary to public policy (whether or not the actual union [was] in fact monogamous)."¹⁵⁴ This left widows in an extremely vulnerable position because they were deprived of any family property if their husband died in testate.¹⁵⁵

Going forward, it is essential that legislatures take into account this need for recognition for relief purposes in a way that colonial, abolitionist approaches did not. As Sachs J. stated in *Daniels*, "the value of non-sexism ... requires a hard look at the reality of the lives that women have been compelled to lead ..."¹⁵⁶ In holding that the exclusion of Muslim marriages from the Acts violated the applicant's equality rights, the Court in *Daniels* was clear that the non-recognition of certain marriages even for relief purposes:

created real disadvantage and violated [the claimant's] dignity and freedom. Its impact on the applicant and on other surviving spouses in her position is most adverse and demeaning. It treats her as undeserving of the legal recognition enjoyed by other religious and civil marriages.¹⁵⁷

Any discussion of polygyny as a contributing factor to the HIV/AIDS pandemic and as a detriment to women's sexual and reproductive health must recognize the extent to which a purely abolitionist approach exposes polygynous wives to even greater vulnerability.

153 *Daniels v Campbell* NO 2004 (5) SA 331 (CC).

154 *Daniels v Campbell*, para 9.

155 *Daniels v Campbell*, para 22.

156 *Daniels v Campbell*.

157 *Daniels v Campbell*, para 106.

4.3 States' duties to modify social and cultural patterns that perpetuate polygyny

In addition to adopting legislative measures to prohibit polygyny at the point of family formation, while still extending recognition for relief purposes, international human rights law requires states to take steps to challenge the social and cultural norms that perpetuate the practice. Addressing the interconnections between sexual and reproductive health and discriminatory polygynous networks in marriage requires legislative reform as a first step. Other more socially engaging measures are clearly necessary, however, to challenge the harmful stereotypes that facilitate the practice.

Article 5(a) of the Women's Convention calls on States parties to take all appropriate measures:

to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁵⁸

Article 5(a) requires States parties to engage with and modify representations of socio-cultural norms that condone harmful masculine multiple partnering in marriage. Premised on stereotypes of masculine hyper-sexuality and feminine sexual passivity, polygyny perpetuates the perceived superiority of men. It undermines women's sexual and reproductive self-determination and interferes with their core health needs and life. States have an obligation to address the underlying social and cultural constructions of masculinity and femininity that underscore polygyny.

As recent political efforts in Uganda have illustrated, however, even where some political will to restrict polygyny is present, strong opposition by affected religious or cultural groups can limit governments' ability to act decisively.¹⁵⁹ Thus, as Corrine Packer has argued, although states are the entities ultimately responsible for protecting human rights, efforts to challenge harmful, traditional practices such as polygyny should "not engage States as the *only* or even *principal* actor, but as the structural framework facilitating and supporting initiatives by other actors with greater influence in making and breaking socio-cultural norms and practices [emphasis in original]."¹⁶⁰ Without engaging local customary and religious norms through public discussion facilitated by non-state actors including media, religious, and cultural representatives, legislation alone will prove limited in mobilizing marital and behavioural change.

To this end, CEDAW has recommended in its Concluding observations that states "embark on a comprehensive public effort, in cooperation with NGOs, directed at both men and women, to change existing attitudes regarding polygamy and particularly to educate women on their rights and how to avail themselves

158 Women's Convention, Art 5(a).

159 Lacey 2005: A7.

160 Packer 2002.

of these rights.”¹⁶¹ In its Concluding Observations to Cameroon, CEDAW urged “the Government to carry out further public-awareness, information and training programmes targeting community leaders and the general public, so as to change ways of thinking and the stereotyped perceptions of the roles and responsibilities of women and men.”¹⁶²

South Africa’s “Love Life” campaign is an example of a government-sponsored public intervention campaign designed to challenge harmful constructions of masculinity.¹⁶³ The campaign portrays itself as a new “lifestyle brand” similar to consumer Nike and Coca-Cola icons and promotes sports as a fashionable alternative expression of masculinity.¹⁶⁴ A similar programme, Masculinity at Play, initiated by the Pan American Health Organization, incorporates lessons on gender equity, adolescent rights and responsibilities, and healthy living into soccer training for boys aged eight to twelve.¹⁶⁵ In Nigeria, the Conscientizing Male Adolescents Project uses structured dialogues lead by male community members to encourage critical thinking among young men aged fourteen to twenty who have shown leadership qualities. Discussion topics include gender-based violence, power dynamics within families, sexual and reproductive health, human rights, and democracy.¹⁶⁶

Such programmes provide important examples of how states can fulfil their obligation to challenge the social and cultural patterns of conduct that perpetuate harmful practices such as polygyny. In addition to challenging harmful constructions of masculinity that encourage multiple partnering within marriage, it is important that government measures include efforts to empower feminine sexual decision-making. Particularly in the context of HIV/AIDS, a better articulation of the importance of social justice and equality in marriage through the use of human rights norms is essential to improve women’s ability to negotiate safer sexual activity.

161 Concluding Observations of the Committee on the Elimination of Discrimination against Women: Burkina Faso, U.N. Doc. A/55/38 (2000), para 282.

162 Concluding Observations of the Committee on the Elimination of Discrimination against Women: Cameroon, U.N. Doc. A/55/38 (2000), para 54.

163 Hunter 2005: 400. Mark Hunter’s examination of the history of multiple-partnering in KwaZulu-Natal is an example of precisely the type of deconstruction of masculine sexuality that is essential in challenging harmful stereotypes of sexual partnering. By tracing the “rise and the fall” of the isoka, a Zulu man with multiple sex partners, Hunter is able to deconstruct static notions of “African masculinity” or “femininity” and show how colonialism, Christianity, industrialisation, and broader socio-economic forces informed sexual behaviour. Multiple-partnering, viewed through a historical lens, suddenly becomes much less a manifestation of “maleness” than a culturally contested practice that has evolved amid various social pressures.

164 Hunter 2005: 400.

165 United Nations Population Fund 2005: 62.

166 United Nations Population Fund 2005: 62.

5. The way forward: a health and human rights approach to polygyny and HIV/AIDS

The prevailing reasons that polygyny, like other harmful traditional practices, continues to exist in many regions in southern Africa are “interwoven with socially constructed concepts of gender and sexuality.”¹⁶⁷ In addressing harmful traditional practices such as polygyny, simply prohibiting the practice will not reduce its incidence overnight. As this section will outline, it is hoped that with a better articulation of the deleterious health implications of polygyny, this process can be quickened. HIV prevention programmes can provide an important and useful way to advance this message where they are evidence-based and effectively address the diverse realities of women’s lived marital and sexual experiences. To effectively engage with polygyny in human rights terms, issues of social justice and equality within marriage and intimate relationships need to be articulated within prevention programmes. Programmes that address harmful constructions of gender and sexuality will likely prove the most effective in discouraging the practice and advancing women’s equality within marriage and other intimate relationships.

Too often, HIV prevention messages have failed to account for the power imbalances that limit women’s sexual and reproductive decision-making within and outside of marriage. They often apply a self-governance model, which, as Brenda Cossman argues, has become part of a public discourse that encourages personal responsibility for the content and outcomes of intimate relationships.¹⁶⁸ Self-governance “is an approach to governance that presupposes the freedom of the governed to make choices.”¹⁶⁹ Messages encouraging abstinence until marriage, part of the ABC campaign to “Abstain, Be Faithful, and Use Condoms”, for example, advance a model of sexual self-governance that assumes individuals have the capacity to make free and informed sexual decisions.¹⁷⁰ Similarly, messages regarding concurrent sexual networking that simply stress “stick to one partner” fail to account for the lived reality of polygynous wives who are often unable to control their husband’s unilateral imposition of a concurrent sexual network.

Such gender-neutral messages, what Geeta Rao Gupta has referred to as “Approaches that Do No Harm”, are “often less than effective because they fail to respond to the gender-specific needs of individuals.”¹⁷¹ To advance women’s sexual and reproductive health and rights in the African context and beyond, prevention programmes must respond to women’s lived reality. It is essential that programmes account for the ways in which masculine and feminine

167 Cook *et al* 2003: 263.

168 See Cossman, forthcoming.

169 Cossman, forthcoming.

170 Such messages also assume, of course, that abstaining until marriage is an effective remedy against HIV transmission. This too ignores the lived reality of many women who are infected within marriage. The UNFPA estimates that 60 to 80 per cent of HIV-positive women in Sub-Saharan Africa have been infected by their husband — their sole partner. See United Nations Population Fund 2005: 38.

171 Rao Gupta 2000: 90.

norms of sexuality impact sexual behaviour. As Joanathan Berger has argued, addressing the diversity of sexual behaviour and discussing sexuality per se is essential if we are to address the gendered stereotypes that continue to make women vulnerable to HIV infection.¹⁷² The harmful health consequences of stereotypes of women as sexually passive and men as hyper-sexualised can only be reversed where underlying issues of sexuality are discussed and re-evaluated.

Unfortunately, many HIV prevention programmes to date have failed to challenge the existing norms of sexuality that underlie masculine multiple-partnering, and in some cases have reinforced them. The “No-grazing” campaign in Uganda involved one of the few efforts specifically targeting concurrent, sexual networks. It was credited in large part for some of that country’s early successes in curbing the pandemic.¹⁷³ The “Zero Grazing” campaign, Ugandan slang meaning “don’t have casual sexual relationships”, was launched in 1986, but was eventually phased out by messages promoting condom use and later faith-based abstinence campaigns.¹⁷⁴ It operated as a “compromise” recognizing that “sexual arrangements [in Africa] are often different from the Western nuclear ideal and serial monogamy.”¹⁷⁵ The essence of the masculine-oriented message was:

Try to stick to one partner, but if you have to keep your long-term mistresses and concubines and extra wives, at least avoid short-term casual encounters with bar girls and prostitutes. Also, you mustn’t casually seduce and exploit young women, who may be susceptible to your charms and wealth.¹⁷⁶

The Zero-Grazing campaign provides two important lessons for a health and human rights approach to formal and informal polygyny. First, the significant early reductions in HIV prevalence in Uganda reveal the essential public health gains that can be made through concurrent partner-reduction strategies. Compared to neighbouring Kenya, Zambia, and Malawi that did not see such reductions in HIV rates, Uganda experienced a decline in national HIV prevalence from 21.1% to under 10% from 1991-1998.¹⁷⁷ The distinguishing factor was the widespread “reduction in non-regular sexual partners and an associated contraction of sexual networks.”¹⁷⁸ Addressing the issue of concurrent multiple partnering in the face of the HIV pandemic should be viewed as an essential public health goal.

More recently, however, the HIV prevalence rate in Uganda has been levelling off and is now on the rise. In response, at least one commentator has opined that “it is a great shame that no American or Ugandan has tried to revive the Zero Grazing campaign, because that program probably contributed greatly

172 Berger 2004: 49.

173 Epstein 2005.

174 Epstein 2005: 6.

175 Epstein 2005: 8.

176 Epstein 2005: 8.

177 Low-Beer and Stoneburner 2003: 9.

178 Low-Beer and Stoneburner 2003: 11.

to the decline in Uganda's HIV rates."¹⁷⁹ Looking at the issue from a short-term public health perspective without assessing the larger backdrop of women's human rights, this view can seem appealing. However on closer examination, it is clear that this view fails to consider the longer-term implications of such messages in reinforcing harmful gender and sexual stereotypes. The fact that HIV prevalence rates are again on the rise in Uganda seems to indicate that the campaign was effective in evoking a short-term positive behavioural response, but did not result in the deeper attitudinal changes that are critical to more long-term health improvements. The "Zero Grazing" message may operate as a "compromise", but it also operates to tacitly reinforce the harmful constructions of masculine and feminine sexuality that are fuelling the HIV/AIDS pandemic. Men are viewed within this paradigm as similar to cattle — women are little more than pastures to be grazed upon. As Rao Gupta has noted with respect to other stereotyped prevention campaigns, "any gains achieved by such efforts in the short-term are unlikely to be sustainable because they erode the very foundation on which AIDS prevention is based — responsible, respectful, consensual, and mutually satisfying sex."¹⁸⁰

A health and human rights approach to sexual concurrency, polygyny in particular, can build on the pragmatic strengths of the Ugandan campaign while advancing a more transformative message. Transformative approaches are those that "seek to transform gender roles and create more gender-equitable relationships."¹⁸¹ Rather than simply responding to facial discrimination, transformative efforts seek to:

eliminate all forms of discrimination against women with a view to achieving women's *de jure* and *de facto* equality with men in the enjoyment of their human rights and fundamental freedoms.¹⁸²

Prevention programmes that address the health harms of polygyny while also adopting a rights-based approach to transformative equality will provide a more effective way to address the harmful constructions of gender and sexuality that are fuelling HIV transmission.

The Men as Partners (MAP project) provides a useful model through its focus on engaging men in the prevention and equality agenda. Initiated by EngenderHealth in South Africa, MAP seeks to reduce HIV transmission through workshops, radio, and Internet discussions between men and women about gender norms and intimate relationships.¹⁸³ The programme has expanded throughout South Africa and is being used in trade unions and the South African Defence Force.¹⁸⁴ The workshops are often facilitated by men motivated to change as a result of their own experience with domestic violence and HIV/AIDS. In addition to important discussions about power dynamics within relationships,

179 Low-Beer and Stoneburner 2003: 7.

180 Rao Gupta 2000: 90.

181 Rao Gupta 2000: 90.

182 CEDAW General Recommendation 25, Art 4, para 1, of the Convention (temporary special measures), 30th Sess., UN Doc. HRI/GEN/1/Rev. 7 (2004), para 4.

183 See United Nations Population Fund 2005:61.

184 See UNAIDS, UNFPA, & UNIFEM 2004: 47.

such programmes can be strengthened through discussions of the sexual hierarchies that construct men's sexuality as inherently different to women's.¹⁸⁵ MAP and other cross-gender discussion fora are an important first social step in challenging the norms of sexuality that underscore masculine multiple-partnering, including polygyny. In the end, such approaches will be most successful when they track rights-respecting legislation that prohibits discriminatory marital practices.

6. Conclusion

1. Polygyny directly and indirectly places women at risk for HIV infection through the creation of concurrent sexual networks within marriage and by undermining women's sexual and reproductive decision-making. Direct infection can occur within the network where the virus is introduced through one of the spouse's extra-marital sexual contacts or when a new, HIV-positive wife enters the union. In addition to this direct sexual exposure through overlapping partnerships, polygyny also undermines women's sexual and reproductive health by reinforcing patriarchy and harmful stereotypes within marriage as well as aggravating domestic violence. These forms of discrimination contribute to the subordination of women, which in turn restricts their ability to insist on partner fidelity, negotiate condom use and leave high-risk relationships. At the individual and population levels, polygyny also perpetuates inter-generational HIV infection and further undermines women's and girls' health through early marriage.
2. The continued formal legal recognition of polygyny by the majority of Southern African states violates women's equality, health, and dignity rights. Tracking the ways in which polygyny directly and indirectly undermines women's sexual and reproductive health, states' condonation of the practice violates women's right to equality within marriage and family life, the right to be free from all forms of stereotyping, the right to be free from inhuman and degrading treatment, and the right to the highest attainable standard of health.
3. Although there is significant international consensus that the legal recognition of polygyny at the point of family formation violates women's right to be free from all forms of discrimination, this consensus fractures somewhat as to the appropriate means to discourage and eliminate the practice. This paper stresses states' international obligations to cease deferring to parallel legal systems that perpetuate inequality within marriage and family life. In moving to discourage polygyny, states can and should adopt an engagement approach that would continue to protect women's rights within existing unions. In addition to legislative measures, states have an obligation to challenge the social and cultural patterns that perpetuate polygyny as a gender-discriminatory practice.
4. Polygyny is perpetuated in the Southern African context and beyond through "socially constructed concepts of gender and sexuality."¹⁸⁶ In addressing

185 See Miller and Vance 2004.

186 Cook *et al* 2003: 263.

harmful traditional practices such as polygyny, simply prohibiting the practice will not immediately reduce its incidence. It is hoped that with a better articulation of the deleterious health implications of polygyny, this process can be quickened. HIV prevention programmes can provide an important and useful way to advance social justice and equality within marriage and intimate relationships when they are evidence-based and respond to the diverse realities of women's lived marital and sexual experiences. Programmes that address social constructions of gender and sexuality will prove the most effective in discouraging polygyny and advancing transformative equality.

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