

2019

# A Case for Legalizing Polygamy in Western Societies: Lessons from the Global South

Follow this and additional works at: <https://scholarship.law.umn.edu/lawineq>

 Part of the [Family Law Commons](#)

---

## Recommended Citation

*A Case for Legalizing Polygamy in Western Societies: Lessons from the Global South*, 37 LAW & INEQ. (2019).

Available at: <https://scholarship.law.umn.edu/lawineq/vol37/iss1/7>

*Law & Inequality: A Journal of Theory and Practice* is published by the  
University of Minnesota Libraries Publishing.

## A Case for Legalizing Polygamy in Western Societies: Lessons from the Global South

John Joseph Wamwara<sup>†</sup>

### Introduction

This Article explores the common positions in support of or against the practice of polygamy. It studies the historical practice and significance of polygamy in African, specifically Kenyan, society. It then juxtaposes the African position to the Western historical attitude and legal opposition to polygamy. It examines the role of Christianity, if any, in the development of the prohibition of polygamy in the Greco-Roman culture that developed into the Western civilization. It then gives a study of Kenya's legalization of polygamy by giving a historical-sociological account of what led to the enactment of the Marriage Act of 2014.<sup>1</sup> The point of reference is colonization. First, because it is the point from which the highly communal Kenyan society began in earnest its interaction with the universalist claims of British morality and law.<sup>2</sup> Second, it began a clash of civilizations which resulted in conflicting notions of marriage and, at first, complete ignorance of African cultural unions, and later the unequal legal protection of civil or Christian marriages on one hand, and cultural marriages on the other.<sup>3</sup>

Finally, this Article relates the Kenyan and global polygamy debates, especially in Western societies where such practice is prohibited. It explores the current justification for prohibiting polygamy in Western societies and whether such prohibition can withstand the realities of the twenty-first century pluralistic society. It then makes a case for rethinking the Western position

---

<sup>†</sup> John Joseph Wamwara (SJD [2019] & LL.M., Emory University, LL.M., University of Geneva, LL.B., University of Nairobi, is an Advocate of the High Court of Kenya and a lecturer in public law for the law schools at Moi University (Eldoret, Kenya) and Catholic University of Eastern Africa (Nairobi, Kenya). He successfully defended his SJD Thesis, *Revisiting the Case for Legalizing Polygamy: The Kenyan Case Study* from the Center for the Study of Law and Religion at Emory University. This paper is a part of the SJD Thesis.

1. The Marriage Act (2014) THE LAWS OF KENYA.  
 2. See Cormac Burke, *Marriage and the Family in Africa: Position Papers*, at 3 (Apr. 1988), <http://www.cormacburke.or.ke/node/288> (last visited Jan. 27, 2019).  
 3. See *infra*, Interview with Dr. Barasa, note 65.

and argues for developing a common law system that would recognize and protect both monogamy and polygamy.

### I. African Notions on Marriage, Love, Children, and Divorce

In African Traditional Society (“ATS”), “marriage [was] just accepted as a normal rhythm of life through which everyone must go.”<sup>4</sup> It was a rite of passage naturally expected of every member of society.<sup>5</sup> This situation remains largely unchanged even in modern African societies.<sup>6</sup> John Mbiti underscored this in 1977 when he stated:

for African peoples, marriage is the focus of existence. . . . Marriage is a drama in which everyone becomes an actor or actress and not just a spectator. . . . Failure to get married under normal circumstances means that the person concerned has rejected society and society rejects him in return.<sup>7</sup>

Marriage was also an important part of society since it was not just “an affair of two individuals alone: it [brought] together families, relatives and friends from each side of the partnership.”<sup>8</sup> Given the communal nature of ATS, the web of kinship could be large, extending to uncles, aunts, cousins, and just about anyone who could identify their place in that web.<sup>9</sup>

Marriage served many purposes. It was the surest way to propagate a society, so people were urged to have as many children as they could support.<sup>10</sup> Marriage was incomplete if it was not blessed with children.<sup>11</sup> The couple had a religious duty to contribute to the hope of immortality as most ATS believed that parents would live on through their children.<sup>12</sup> Some ATS also believed that the living dead were reincarnated in their

4. JOHN S. MBITI, LOVE AND MARRIAGE IN AFRICA 39 (1977).

5. Rada Dyson-Hudson & Dominique Meekers, *The Universality of African Marriage Reconsidered: Evidence from Turkana Males*, 35 ETHNOLOGY 301, 301 (1996). The authors provide a nineteen-year study of Kenya, Senegal, and Ghana that indicates that throughout that period, at the age of fifty years, at least 97% of women had been married at least once. About 96% of men had been married by the same age. These national estimates demonstrate the universality of marriage, even though there may be ethnic variations that are often obscured by such statistics. *Id.* at 302.

6. *Id.* But “the notion that marriage is nearly universal in sub-Saharan Africa is an overgeneralization.” *Id.* at 318.

7. JOHN S. MBITI, AFRICAN RELIGIONS & PHILOSOPHY 133 (1969).

8. MBITI, LOVE AND MARRIAGE, *supra* note 4, at 44.

9. *Id.*

10. *See* MBITI, RELIGIONS & PHILOSOPHY, *supra* note 7, at 133.

11. *Id.*

12. *Id.*

descendants.<sup>13</sup> Therefore, “[a] person who . . . has no descendants in effect quenches the fire of life, and becomes forever dead since his line of physical continuation is blocked if he does not get married and bear children.”<sup>14</sup> It is through marriage and children that time and space, the two important aspects of African traditional societies,<sup>15</sup> make perfect sense. Time and space also helped define who Africans were and properly placed them in the circle of time, space, and the hierarchy of beings. One properly belonged if one could marry and have children. It gave one a connection to the ancestors. It was this connection that the ATS sought to protect by insisting on marriage and procreation.<sup>16</sup> It is therefore proper to conclude that:

[i]f we consider the classical three “goods” of marriage as expounded by St. Augustine—the *bonum prolis* or offspring, the *bonum fidei* or unity, and the *bonum sacramenti* or indissolubility—we can immediately state that the first—the sense of children as a *good*: as a *value* to be desired—is so strong in the traditional African outlook as to make the other two goods totally subordinated to it and indeed over-ridden by it.”<sup>17</sup>

There are three important stages of life in African societies—birth, marriage, and death—that are inescapable.<sup>18</sup> The unborn must be born to find their place and purpose among the living.<sup>19</sup> The living must marry and give birth to children to fulfill life’s purpose.<sup>20</sup> The living must exit the stage through death to create room for the unborn. In death the living become the living dead,<sup>21</sup> protecting their families and acting as intermediaries between the living and the spirits.<sup>22</sup> When the living dead fade from the memory

---

13. *Id.*

14. MBITI, RELIGIONS & PHILOSOPHY, *supra* note 7, at 142.

15. *See id.* at 27 (“Space and time are closely linked, and often the same word is used for both . . . People walk on the graves of their forefathers, and it is feared that anything separating them from these ties will bring disaster to family and community life.”).

16. *Id.* at 133–34.

17. Burke, *supra* note 2, at 2.

18. MBITI, RELIGIONS & PHILOSOPHY, *supra* note 7, at 24. Mbiti identifies, as the rhythm of nature, “birth, puberty, initiation, marriage, procreation, old age, death, entry into the community of the departed and finally entry into the company of spirits.” *Id.*

19. *Id.* at 134 (stating that purpose of children is to remember ancestors after death).

20. *Id.* (“If you don’t get married and have children, who will pour out libation when you die?”).

21. *Id.* at 25 (“The living-dead is a person who is physically dead but alive in the memory of those who knew him in his life as well as being alive in the world of the spirits.”).

22. *Cf. Id.* at 134 (“To lack someone close who keeps the departed in their

of the living, they become spirits often influential in the affairs of the living.<sup>23</sup> Marriage is not just part of this circle, it perpetuates it. That was, and continues to be, the place of marriage in African societies.

## II. Monogamy and Polygamy: African Traditional Attitude

### A. Historical Background for the Practice of Polygamy in Africa

Okot p'Bitek, in the *Song of Malaya*,<sup>24</sup> satirizes the situation resulting from Christian missionaries' insistence on monogamy. He believes this is the genesis of the moral decadence that led to the flourishing prostitution that followed the new "Christian" communities.<sup>25</sup> Although the Christian, Ocol, remains married to the traditional and uneducated Lawino, for missionary Christianity prohibits divorce, their marriage has practically broken down.<sup>26</sup> Ocol therefore seeks the company of prostitutes.<sup>27</sup> Lawino confronts one of the prostitutes.<sup>28</sup> The prostitute pleads that they (prostitutes) should not take the blame for a problem they did not create.<sup>29</sup> The prostitute cannot understand the morality of insisting on monogamous relations for a strong and healthy grown-up man.<sup>30</sup> Unless there was something wrong with the man or unless the doctor had diagnosed that the man had a heart disease and ordered him to sleep with only one woman, then she cannot decipher the logic in Lawino's complaints.<sup>31</sup> This aptly reflects African notions of monogamy or polygamy. The decision to enter into a polygamous arrangement was normal, and in fact determined by individuals, not some sacred prohibitory law.<sup>32</sup> Maybe some background on this would be helpful to understand the paradigm shift:

Three main tensions arose in the confrontation between missionaries and African marriage practices. First,

---

personal immortality is the worst misfortune and punishment that any person could suffer.").

23. Cf. *Id.* at 133 (having no children "quenches the fire of life" rendering the childless person "forever dead" without connections to the affairs of the living).

24. OTOK P'BITEK, *Song of Malaya*, in TWO SONGS 121 (1971).

25. *Id.* at 161-67.

26. *Id.* at 148.

27. *Id.*

28. See *id.* at 147-59 ("And you, My married Sister, You whose beloved I also love dearly, When will you learn To be grateful To me?").

29. See *id.*

30. P'BITEK, *supra* note 24, at 151-52.

31. *Id.*

32. MBITI, RELIGIONS & PHILOSOPHY, *supra* note 7, at 142.

missionaries struggled with establishing the notions of romantic love and individualism in the face of what they perceived as the unromantic, duty-oriented style of African marriage . . . . Second, many missionaries misunderstood African customs of marriage payments, viewing these transactions as the purchase of a bride . . . . Third, most missionaries felt they were in a constant battle to uphold monogamy and eradicate polygyny. Although these three issues are related, the strongest and most enduring point of tension has been the question of polygyny . . . which speaks not only to the history of Christian missions, but also to perceptions of Africa and the identities of African people. Today it remains one of the most heated issues in African congregations.<sup>33</sup>

Missionaries could not understand fundamental aspects of marriage in Africa. Though love was important and often celebrated in African communities, it was not a prerequisite to entering marriage. While gift giving to the bride's parents or guardians was required before parental consent and social acceptance for any marriage,<sup>34</sup> for the missionary, this was a barbarity that was only comparable to slavery and "wife purchase."<sup>35</sup> Finally, while polygamy was essential to the reality of the African continent, using a theology developed from Western tradition, the missionaries

---

33. Douglas J. Falen, *Polygyny and Christian Marriage in Africa: The Case of Benin*, 51 AFR. STUD. REV. 51, 52 (2008).

34. JOHN S. MBITI, INTRODUCTION TO AFRICAN RELIGION 108 (2d. ed. 1991). Mbiti reports that for Africans "marriage gifts were the outward symbols of a serious undertaking by the families concerned . . . . They [were] the symbols of the marriage bond or covenant. They seal[ed] up the sacred relationship established through marriage, a relationship which [would] be worked out over a long period of time. Marriage gifts [were] the legal instruments which authorize[d] the husband and wife to live together and to bear children, and which constantly remind[ed] them that they must continue to live together. If the marriage eventually [broke] down, many of these gifts [were] normally returned, as a sign of the failure." *Id.* That is why, for the African, an attack on this practice was an unacceptable attack on the institution of marriage. *Id.*

35. *But see* D.D. Nsereko, *The Nature and Function of Marriage Gifts in Customary African Marriages*, 23 AM. J. COMP. L. 682, 683–84 (1975). Nsereko refutes this notion when he states, "*Black's Law Dictionary* defines "gift" as a "voluntary transfer of personal property without consideration" or "a parting of owner with property without pecuniary consideration." Yet, in a great many instances the giving of marriage gifts was not and still is not "voluntary"; rather, they must be delivered or promised by the bridegroom in order for the marriage to take place. This, unfortunately, tends to sustain the accusation that a customary African marriage is nothing but a "woman purchase." It is submitted, however, that this accusation is biased and false. Though there may be some elements common to both the African customary marriage contract and a Western commercial transaction, it is erroneous to describe the customary marriage in terms of a commercial purchase. Viewed from the standpoints of the social function of marriage gifts, African traditional theology, and the nature of the family, it will be discovered that the Western notion of "purchase" was and still is absent from the true customary African marriage." *Id.* (footnotes omitted).

condemned polygamy as the height of heathenism unacceptable in Christianity.<sup>36</sup>

Polygamy is a custom found throughout Africa.<sup>37</sup> It serves many useful purposes within the African philosophy on marriage.<sup>38</sup> The more women a man is married to, the more likely he is to have many children; therefore “the stronger the power of ‘immortality’ in that family.”<sup>39</sup> Since children were the glory of the family, having more children equated to greater glory.<sup>40</sup> Polygamy, therefore, raised the social status of the patriarch and of the family.<sup>41</sup> In a world where infant mortality rates was very high—a world where danger lurked at every corner—it made sense to have polygamous marriages with many children. Sons would provide security and carry the name of the family, while daughters would provide opportunities for enlarging the kinship ties that would ensure that different clans maintained cordial relations.<sup>42</sup> While it was normal for a man to enter into a polygamous marriage, there were also many cases where persons entered into polygamous relations in response to a compelling situation:

---

36. *Id.* at 702.

37. MBITI, RELIGIONS & PHILOSOPHY, *supra* note 7, at 142. While polygamy is the state of a man or woman being married to more than one person of the opposite sex, many people use it to refer to a situation where a man is married to more than one wife. This, properly speaking, is polygyny. I will therefore use the terms interchangeably. For a situation where a woman is married to more than one man, I will call it polyandry. Polyandry was not common in Africa, but not completely unthinkable. For example, in Agikuyu legend their community was originally matriarchal and the matriarchs practiced polyandry: “It is said that while holding superior position in the community, the women became domineering and ruthless fighters. They also practised [sic] polyandry. And, through sexual jealousy, many men were put to death for committing adultery or other minor offences. Besides the capital punishment, the men were subjected to all kinds of humiliation and injustice.” JOMO KENYATTA, *FACING MOUNT KENYA: THE TRIAL LIFE OF THE GIKUYU* 6 (AMS Press reprint 1978) (1938).

38. MBITI, RELIGIONS & PHILOSOPHY, *supra* note 7, at 142.

39. *Id.*

40. *Id.*

41. *Id.*

42. African marriages are only acceptable if “children of both sexes issue from the marriage.” Augustine Nwoye, *The Practice of Interventive Polygamy in Two Regions of Africa: Background, Theory and Techniques*, 31 *DIALECTICAL ANTHROPOLOGY* 383, 390 (2007); *see also id.* 405–10 (discussing marriages producing children of only one gender). Male children could be “called up for military services,” while female children could “cultivat[e] the land and look[] after the general welfare of the tribe. . . . Female children [were] looked upon as the connecting-link between one generation and another.” KENYATTA, *supra* note 37, at 175. “After the system of kinship was extended [by polygamy] . . . it was then thought necessary to bring all these groups under one strong bond of kinship, in which they could act in solidarity and regard one another as members of one big family.” KENYATTA, *supra* note 37, at 6.

There are two possible ways of making reference to the phenomenon of polygamy (polygyny) practice in Sub-Saharan Africa. These are affluent polygamy and interventive polygamy. The first is that type of polygamy instigated by affluence, or the type that is motivated by the urge for social prestige and economic ambitions.<sup>43</sup>

A great number of polygamous marriages were also interventive polygamy:

[w]hen an African marriage gets stagnated and thereby distressed, such as happens in conditions of childlessness or sonlessness, a consideration for interventive polygamy is then thrown open. However, emphasis on interventive polygamy in this regard is not seriously contemplated until there is an obvious failure, with the passing of the years, of the tactics of attributing and delegating to time (the future) the task of changing the situation for the better and until it is proved that medical means for correcting the anomaly has become unsuccessful.<sup>44</sup>

This is often a negotiated process that both parties accept as the last resort.<sup>45</sup> It is aimed at healing the distressed marriage relations, not to embarrass the first wife,<sup>46</sup> therefore she often has a say in who becomes the second wife.<sup>47</sup> Among the Luo of Kenya, the wife is asked to bring her relative to be the second wife for her husband.<sup>48</sup> The person could be a sister, cousin, or niece. The aim is to ensure that families are stable and that there is continuity of the lineage.<sup>49</sup> Kinship ties between the first wife (*Mikai*) and the second wife (*Nyachira*) often help to reduce any co-wife (sister-wife) rivalries and hostilities. As the Luo people always say, “*Aoch wat ilore mos,*” or “One is careful when wading through the river of kinship; because of the blood ties, a person would be most careful not to upset kinship ties.”<sup>50</sup>

*B. The Rationalization for Polygamy in African (Kenyan) Society Today.*

“Polygamy is very much alive in Africa. . . . There are, and yet will be, thousands of couples who find, and who will find it a useful

---

43. Nwoye, *supra* note 42, at 383.

44. *Id.* at 391.

45. *Id.*

46. *Id.* at 392.

47. *Id.* at 396–97.

48. DAVID G. MAILLU, *OUR KIND OF MARRIAGE* 108 (1988).

49. E. E. Evans-Pritchard, *Marriage Customs of the Luo of Kenya*, 20 AFR. J. INT'L AFR. INST. 132, 140–141 (1950).

50. ASENATH ODAGA, *LUO PROVERBS AND SAYINGS* 3 (2005).

and moral form of marriage.”<sup>51</sup> This statement was made thirty years ago, but still reverberates throughout Kenyan society. While it is true that the number of polygamous couples has decreased since the coming of Christianity,<sup>52</sup> polygamy is still a reality of Kenyan society that can hardly be ignored.<sup>53</sup> Past attempts in the colonial period to prohibit polygamy failed. The tendency to treat customary polygamous marriages, as inferior in independent Kenya failed and brought untold suffering to many families that were beyond the protection of the law.<sup>54</sup> It is this history of suffering that kept cropping up in the conversations and consultations leading up to the drafting and the enactment of the Marriage Act of 2014.<sup>55</sup>

The law should express the general will of society and reflect the moral aspirations of the society that it governs. While expressing the general will of the majority, the law should also protect the interest of the smallest minorities in society. Just as in other parts of Africa, in Kenya “polygamy remained an honourable form of marriage until the coming of the White missionary armed with his cultural ethnocentrism and a theology that perceived marriage in a Christian view endorsed by the Greco-Roman Law of marriage.”<sup>56</sup> This law recognized monogamous marriage as the only form of marriage.<sup>57</sup> It mattered not that the Africans, into whose land the missionaries came, held a contrary view. After all, was Africa not a dark continent of savages without culture? There was, therefore, hardly any dialogue with the African cultural practices on marriage.<sup>58</sup> The Westerners—administrative officers, settlers, and missionaries alike—employed all their efforts at eradicating these barbaric practices. There could be no virtue in the vice of polygamy;<sup>59</sup> therefore good Christians and participants in the brave

51. MAILLU, *supra* note 48, at 41.

52. *Id.* at 48.

53. MBITI, RELIGIONS & PHILOSOPHY, *supra* note 7, at 142.

54. Although he prefers monogamy over polygamy, John Mbiti is in favor of a “more positive approach . . . accept[ing] people involved in [polygamous] systems and giv[ing] them guidance on how they could make their marriages work better,” rather than a damaging, strictly prohibitive approach. MBITI, LOVE AND MARRIAGE, *supra* note 4, at 191.

55. *Id.* at 81–82.

56. MAILLU, *supra* note 48, at 48.

57. *Id.* at 49.

58. *Id.*

59. *But see* MBITI, LOVE AND MARRIAGE, *supra* note 4, 81–82. “The polygamous institution of marriage is found in almost every African traditional society. . . . [P]olygamy is not only acceptable and workable, but is a great social and economic asset. It also adds to the number of children a person has, which always is a source of pride and joy in village life. Polygamy enhances the traditional concepts concerning the purpose and meaning of marriage. . . . I accept or appreciate

new world the Westerners were creating were urged to immediately stop the practice.<sup>60</sup> Since abolishment of polygamy was a condition to acceptance into Christian communities, and the good books of the colonial administration,<sup>61</sup> many men chose to put away their extra wives. This act upended African social settings, creating a generation of destitute and disenfranchised people whose bitterness against this new way was unassuageable.<sup>62</sup>

What, then, could spur a relatively progressive society like Kenya to legitimize polygamy in the twenty-first century? Having demonstrated its commitment to human rights regimes, how could Kenya pass the Marriage Act of 2014<sup>63</sup> and still keep to its commitment to the protection of human rights and equality between men and women? The Human Rights Committee has declared that polygamy is incompatible with principles of equality between men and women, calling upon its abolition everywhere.<sup>64</sup> It seemed that the practice of polygamy could surely not be compatible with the ideals of liberal democracy, or would they? Engaging those who were involved in the process seems to reveal a different story.

While there are many people who were involved in the drafting and the promotion of the Marriage Bill, three of them stand out. These include (Retired) Honorable Doctor Justice Nancy Barasa, Judy Thongori, and Patricia Nyaundi. I had a chance to sit down with them to understand the process that led to the legitimization of polygamy in the Marriage Act of 2014. Hon. Dr. Justice Nancy Barasa and Ms. Judy Thongori worked on a U.N. Women-funded project to collect public views on the Marriage Act,<sup>65</sup> while Ms.

---

polygamy in the context in which it has evolved and become a normal way of life in our traditional setting.” *Id.* at 81–82.

60. MAILLU, *supra* note 48, at 48–49.

61. *See id.* at 44 (“One of the greatest arguments against polygamy in modern Africa was brought to Africa by White missionaries. . . . To be a Christian, goes their claim, a married man must have only one wife.”).

62. *See infra*, Interview with Dr. Barasa, note 65.

63. The Marriage Act (2014) THE LAWS OF KENYA.

64. Kenya is a party to the International Convention on Civil and Political Rights (ICCPR). “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.” Hum. Rts. Comm., *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, ¶ 24, HRI/GEN/1/Rev.9 (Mar. 29, 2000).

65. Interview with Honorable Doctor Justice Nancy Barasa, Retired Deputy Chief Justice, Kenya, and Senior Lecturer, University of Nairobi School of Law (Aug. 6, 2018) (on file with the author); Interview with Judy Thongori, Proprietor, Judy Thongori & Company Advocates, in Westlands, Nairobi, Kenya (Aug. 6, 2018) (on file

Nyaundi was the Secretary of the Kenya National Commission on Human Rights (KNCHR) during the time of the negotiation and drafting of the Marriage Act.<sup>66</sup>

Dr. Barasa is the immediate former Deputy Chief Justice of Kenya.<sup>67</sup> As a family law expert, she was contracted by a UN Women project to lead a team around the country, engaging the public on the proposal of a unitary marriage law. The team educated the public and sought their input on provisions of a draft bill. Given the outcome of their engagement with the public she is convinced that the Marriage Act's provision on polygamy is a true reflection of the will of the Kenyan public. She has since had the task of representing Kenya before the Human Rights Council and the Committee on the Elimination of Discrimination Against Women, where she has had to defend the Kenyan position on polygamy. Dr. Barasa helped these bodies realize that the standard by which they sought to condemn Kenya's legitimization of polygamy was foreign (Western) and honestly non-representative of the sentiments of the Kenyan people. She is convinced the legalization of polygamy was necessary to reflect the reality of a significant portion of the Kenyan population.

Dr. Barasa further emphasized that while Christianity has had a lasting effect on Kenyan society, it did not reach everyone.

There are many Kenyans who kept their African culture and religion. That culture espouses polygamy and all their marriages are potentially polygamous. It would be an injustice to impose monogamy as a mandatory requirement for legitimacy of marriage. There are also Muslim Kenyans, whose religion allows for polygamy. These are also Kenyans who need protection of the law.

She observed that, for a long time, the law granted an inferior place to African cultural marriages; these are incidentally the most common marriages in Kenya, with some jurisprudence holding that they do not qualify as marriages, "properly" speaking.<sup>68</sup> She went on to explain that marriage is mostly experiential and that therefore norms of marriages change with time. While there has been a marked decrease in the number of polygamous families, the number is still significant. These families, too, need legal protection. Yet, under the previous regimes, these marriages were not registrable. In the Marriage Act of 2014, all forms of marriage,

---

with the author); Interview with Patricia Nyaundi (on file with the author).

66. LINKEDIN, Patricia Nyaundi, <https://www.linkedin.com/in/patricia-nyaundi-87863851/?originalSubdomain=ke> (last visited Oct. 16, 2018).

67. Interview with Dr. Barasa, *supra* note 65.

68. *See Rex v. Amkeyo* (1917) 7 L.R.K. 14 (Kenya).

including polygamy, became registrable. She corrected the notion that the legalization of polygamy is an attack on the monogamous nature of Christian marriages; rather, it is a humane act to legally protect women who find themselves in polygamous marriages but who previously had no such protection. The law provided for a choice that was otherwise a common practice.

I then asked Dr. Barasa about the debate in Parliament that led to the deletion of the spousal consent requirement before a man could seek to marry a subsequent wife. In her view, this was a low point for the Act in that staying true to Kenyan cultural practices on the issue would require spousal consent. In most Kenyan traditional communities, the husband could only marry another wife with the consent of the existing wife or wives.

Finally, I asked Dr. Barasa what she thinks of the effectiveness of the Marriage Act of 2014 and whether it has met societal expectations. She was emphatic in stating that the Act was a big positive for women in Kenya. The fact that all marriages under the Act, whether monogamous or polygamous, are registrable is a big plus, she opined. All women can now be protected against any eventualities. They can assert their rights in the marriage as equal partners. She also observed that the bringing together of all marriage types under one Act has helped ensure all people are treated equally. This, she said, aligns with international standards of equality of men and women. I then pointed out the fact that human rights bodies think otherwise.<sup>69</sup> At that point she told me that the only reason human rights bodies have problems with the Kenyan situation is that they are applying Western standards to African realities. She stated that the Western universalism—optimistic but blind—seeks to impose through human rights bodies is not applicable to Africa, particularly in Kenya. Her final word was that, culture is not static—it is ever fluid. One day, the Western position on polygamy may apply in Africa—just not now, or in the near future. She gave the example of same-sex female marriage common among the Kamba, Kisii, Kikuyu, Kuria, and Nandi communities in Kenya. It is and never was an issue of lesbian relationships, she said; rather, a barren woman would “marry”<sup>70</sup> a

---

69. Hum. Rts. Comm., *supra* note 64.

70. A woman without a child would approach a family with a young girl of marriageable age and propose that her husband marry the girl. If the proposal was accepted, the traditional rituals and ceremonies would be performed. The dowry would be paid, and then the two would set out for the woman's home. There, she would arrange with one male member of her family to have sexual relations with the girl and any resulting offspring would be considered the children of the woman paying the dowry.

girl who would then have a sexual relationship with the woman's male family member. Any resulting children would be considered the children of the woman who paid the dowry. This does not fit the *Hyde v. Hyde* definition of marriage prevalent in Western culture.<sup>71</sup>

The other person I interviewed was Ms. Judy Thongori.<sup>72</sup> She was heavily involved in the making of the Marriage Act of 2014 and the Matrimonial Property Act of 2013.<sup>73</sup> Ms. Thongori was clear that legalizing polygamy and ensuring that conditions under which it is practiced protects women's rights and was the only logical option for Kenyan society. To explain her point, she recalled an experience in Kakamega six years ago while they were collecting views on the Marriage Bill. In Kakamega, two of Dr. Barasa's female friends from the University of Nairobi came to the session obviously happy and holding hands. They were clearly at peace with each other and introduced themselves as co-wives (sister wives). Their husband also happened to have been at the university during their time there. The husband was known to Dr. Barasa as well.<sup>74</sup> Although Ms. Thongori was a little shocked, the two proceeded to explain how they freely chose to marry one man who had been their friend and how they have had happy, fulfilling lives. Their support for polygamy was not out of ignorance, but out of experience and from informed and educated minds. Their experience clearly rebukes the common rhetoric that polygamy is the plight of the uneducated, poor, rural folks who are without any choice.

Ms. Thongori started by reminding me how important the family unit is in any society, including Kenya.<sup>75</sup> A legal system that does not adequately provide protection for the family robs that society of necessary stability. It is within the family that a person is able to reach their social, emotional, financial, and physical potential. Marriage should therefore be the most protected institution in any society.

---

71. *Hyde v. Hyde* (1866) 1 LPR & D 130 (Eng.) (defining marriage as a monogamous union between one man and one woman in England); see Interview with Dr. Nancy Barasa, *supra* note 65.

72. Judy Thongori is an Advocate of the High Court of Kenya and a family law expert. Interview with Judy Thongori, *supra* note 65. See also JUDYT@LAW, <http://www.judythongori.co.ke/> (last visited Aug. 16, 2017).

73. Matrimonial Property Act (2014) LAWS OF KENYA.

74. This story has since been corroborated by Dr. Barasa. Not that I doubted its authenticity, but it was monumental in reframing the correspondents' appreciation of polygamy as practice.

75. She quickly quoted Article 45(1) of the Constitution which states, "[t]he family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State." CONSTITUTION art. 45(1) (2010) (Kenya).

Ms. Thongori then explained the different marriage types before the enactment of the Marriage Act of 2014. There were five marriage types found in five different pieces of legislation. These laws treated marriage differently, leading to conflicting judicial decisions on marriage. There was an urgent need to harmonize the provisions into one act. While customary marriage and marriage by cohabitation were the most prevalent marriages in Kenya, the law treated them as inferior to other types. Ms. Thongori then explained the making of the Marriage Act of 2014 and her involvement in the process. Like Dr. Barasa, she was contracted to go across the nation to collect views on the Marriage Bill of 2007 that had been drafted by Professor Githu Muigai.<sup>76</sup> This process was largely supported by UN Women.

Throughout the public hearings they conducted, people were in overwhelming support of legal protection of polygamy. She reported that at one point they had to discuss polygamy with the UN Women sponsors of the program. If UN Women were to continue supporting a process that would legally recognize polygamy, would it not be in conflict with the United Nations Human Rights body's position? They resolved this by concluding that they would honor the true reflection of the will of the Kenyan people on the proposed Marriage Bill. She continued by saying prohibiting polygamy would reflect the common beliefs of the educated elites, a very small minority of the Kenyan people. She also recalled their sessions with the Christian Church leadership, who were mostly in opposition to the proposed legal protection of polygamy. However, the Christian leadership accepted the draft once they understood that the monogamous nature of Christian marriage would be protected alongside the potentially polygamous nature of Muslim and customary marriages.

Finally, Ms. Thongori stated that the changing nature of society may make certain norms extinct. "There may well be a time when polygamy is no longer practiced in Kenya. When that time comes, polygamy may well be prohibited. That time was not the period during the making of the Marriage Act of 2014. The time is definitely neither now, nor in the near future."

The next person I interviewed was Patricia Nyaundi.<sup>77</sup> Except for a brief time as a state counsel and prosecutor, Ms. Nyaundi has

---

76. During the drafting of the Bill, Prof. Githu Muigai was a Professor of Law at the University of Nairobi and a law practitioner. Prof. Muigai went on to be the Attorney General of the Republic of Kenya from 2011–2018.

77. Interview with Patricia Nyaundi, *supra* note 65. Patricia Nyaundi is a renowned women's rights lawyer and the previous Commission Secretary of the

dedicated most of her professional life to advocating for human, and particularly women's, rights. At the time of the making of the Marriage Act, she was Commission Secretary at the Kenya National Commission on Human Rights. Ms. Nyaundi is also renowned for her staunch Christian faith. She was quick to state that, while as a Christian she does not believe in polygamy, the reality of the Kenyan situation required registration of polygamous marriages. The law before the Marriage Act of 2014 called for women to prove their relationship to men they had lived with for many years as a husband and wife. She stated that these situations were common when it came to registration of property, divorce, intestate deaths, and in succession proceedings. She informed me that a trio of legislation—the Matrimonial Property Act of 2013, the Marriage Act of 2014, and the Protection Against Domestic Violence Act, 2015<sup>78</sup>—was introduced to enhance the protection of women and children in society.

Ms. Nyaundi also observed that one of the reasons for requiring the registration of all marriages was to deal with section 3(5) of the Succession Act, which has always been at odds with the traditional nature of marriage.<sup>79</sup> She observed that at the death of a man, there might be a woman who appeared claiming to be an 'unknown' wife of the deceased. She might appear with children whose resemblance to the deceased would be irrefutable. Registration of every marriage would be the answer to this challenge. However, she expressed her disappointment at the courts that still recognize a presumption of marriage.

### III. Western Notions on Marriage, Love, and Children

Western civilization developed from Greco-Roman cultural foundations. Just like other aspects of Western life, love and

---

Kenya National Commission on Human Rights. She was also the CEO of the Kenya's Truth Justice and Reconciliation Commission (TJRC) and the former Executive Director of Kenya Women Lawyers Association (FIDA-Kenya).

78. See The Protection Against Domestic Violence Act, No. 2 (2015), KENYA GAZETTE SUPP. NO. 60, No. 2 (Pmbl.) ("AN ACT of Parliament to provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependent persons, and to provide for matters connected therewith or incidental thereto.").

79. The Act provides that "[n]otwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act." The Law of Succession Act (2017) Cap. 160 §3(5) (Kenya).

marriage are deeply rooted in Greek mythology and philosophy.<sup>80</sup> “The Western tradition inherited from ancient Greece and Rome the idea that marriage is a union of a single man and single woman who are united for the purposes of mutual love and friendship and mutual procreation and nurture of children.”<sup>81</sup> From Greek mythology, Western civilization inherited the notion of love (*eros*) and found it compelling enough to declare war, kill, and plunder as depicted in the Greek Trojan Wars.<sup>82</sup> For Paris, the love of the most beautiful woman on earth trumped the wisdom, skill, and ability of the greatest warrior far better than political power and imperial dominions.<sup>83</sup> From Greek philosophy, “[a just republic] must arrange marriages, sacramental so far as may be[;] [a]nd the most sacred marriages would be those that were most beneficial.”<sup>84</sup>

Further, according to Aristotle, “[m]ale and female must unite for the reproduction of the species—not from deliberate intention, but from the natural impulse . . . to leave behind them something of the same nature as themselves.”<sup>85</sup> The Roman Stoic Musonius Rufus noted that “husband and wife . . . should come together for the purpose of making a life in common and of procreating children, . . . [and] in marriage there must be above all perfect companionship and mutual love of a husband and wife, both in health and in sickness and under all conditions.”<sup>86</sup> For Musonius sexual intercourse would only be justified in marriage and for the purposes of procreation; however, Musonius was alone in his belief that a wife’s extra-marital sex was adultery, but a husband was free to consort with slaves and prostitutes.<sup>87</sup> Later on, the Roman historian Plutarch crystallized the Western notion on marriage when he declared that the ideal marriage is “a union for life between a man and a woman for the delights of love and the getting of children.”<sup>88</sup> Classical Roman law also defined marriage as “the

---

80. JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 17 (2012).

81. *Id.*

82. *See generally*, ERIC H. CLINE, THE TROJAN WAR: A VERY SHORT INTRODUCTION 9–27 (2013) (noting that the Trojan War was fought over the love of a woman).

83. *See id.* at 14.

84. Plato, *Republic*, bk. V, at 458E in THE COLLECTED DIALOGUES OF PLATO 575, 698 (Edith Hamilton & Huntington Cairns eds., Pantheon Books 1961).

85. ARISTOTLE, THE POLITICS OF ARISTOTLE, bk. I, chap. II, § 2, 3 (Ernest Baker ed., trans., Oxford University Press, 1962).

86. Musonius Rufus, *What Is the Chief End of Marriage?*, in MUSONIUS RUFUS: THE ROMAN SOCRATES 89 (Cora E. Lutz ed., trans. Yale University Press, 1947)

87. WITTE, FROM SACRAMENT, *supra* note 80, at 21.

88. *Id.* at 22 (quoting Plutarch, *Life of Solon* 20.4, in PLUTARCH’S LIVES

union of a man and a woman, a partnership for life involving divine as well as human law.”<sup>89</sup> Children from this union would be legitimate and would inherit the property of the family.<sup>90</sup> However, Roman law also recognized the institution of concubinage. “Concubinage was a quasi-marital relation that was generally reserved for men of ample means who sought a long-standing monogamous relationship with a woman for sex and companionship.”<sup>91</sup>

It is the tradition of monogamous marriage that Christianity embraced when the Christian Church united with Imperial Rome.<sup>92</sup> “[F]or more than 2,500 years, the Western legal tradition has defined marriage as the union of one man and one woman with the fitness, capacity, and freedom to marry each other.”<sup>93</sup> The Christian development of the theology of monogamy is traceable to three North African intellectual giants—Tertullian of Carthage, Clement of Alexandria, and St. Augustine of Hippo. Clement used Greek philosophy to justify the gospel’s position on marriage.<sup>94</sup> He held that marriage was in accordance with the laws of nature, and that the gospel laws on marriage follow and go beyond.<sup>95</sup> He insisted that the gospel demanded a chaste monogamous relationship since polygamy was an unnatural form of marriage and a dangerous species of adultery.<sup>96</sup> Tertullian held that marriage is “‘designed’ as ‘the union of man and woman, blest by God as the seminary of the human race, and devised for replenishment of the earth, and the furnishing of the world’ with people.”<sup>97</sup> Tertullian continued that any such marriage must be singular since. “Adam was the one husband of Eve, and Eve his one wife — one woman, one rib.”<sup>98</sup> Tertullian used the story of Lamech as an analogy<sup>99</sup> to hold that

---

(Bernadotte Perrin trans., William Heinemann, 1928).

89. *Book Twenty-Three*, at 2 THE DIGEST OF JUSTINIAN 656, 658 (Paul Kruger & Theodor Mommsen eds., Alan Watson trans., Univ. of Pa. Press, 1985).

90. WITTE, FROM SACRAMENT, *supra* note 80, at 25–26.

91. *Id.*

92. *See id.* at 28.

93. JOHN WITTE JR., THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY 21 (2015).

94. WITTE, FROM SACRAMENT, *supra* note 80, at 55.

95. *Id.* at 57.

96. *Id.*

97. WITTE, WESTERN CASE, *supra* note 93, at 73 (quoting Tertullian, *To His Wife*, I.2, in ANF 4:39).

98. *Id.* at 73–74 (quoting Tertullian, *To His Wife*, I.2, in ANF 4:39).

99. “Lamech said to his wives: ‘Adah and Zillah, hear my voice; you wives of Lamech, listen to what I say: I have killed a man for wounding me, a young man for striking me. If Cain is avenged sevenfold, truly Lamech seventy-sevenfold.’” *Genesis* 4:23–24 (NRSV).

polygamy is a crime second only to homicide.<sup>100</sup> Lamech was the first polygamous man recorded in the Bible.<sup>101</sup> St. Augustine of Hippo saw polygamy “as an unspiritual relation that undercut the distinctly Christian goods and goals of marriage.”<sup>102</sup> It is mostly the writings of these three through which Western Christianity developed the theology that prohibited polygamy.<sup>103</sup>

With influence from the Christian Church, Roman law prohibited concubinage.<sup>104</sup> While Roman law prohibited polygamy, some exceptions were tolerated in the provinces.<sup>105</sup> Jewish polygyny continued until 393 when Theodosius prohibited it.<sup>106</sup> Emperor Justinian repeated the prohibition in 535, declaring that polygyny was contrary to nature and abominable.<sup>107</sup> In the ninth century, Byzantine Emperor Theophilus declared the practice of polygamy a capital offence.<sup>108</sup> Criminal prohibitions and capital punishment for polygamy stayed on the law books for about 1000 years,<sup>109</sup> with different variations including enslavement and other similarly harsh punishments.<sup>110</sup> Those were practices of the “ancient Greeks and Romans, first millennium Jews and Christians, medieval Catholics and early modern Protestants, modern Enlightenment philosophers and liberals;”<sup>111</sup> in short, the founders of Western society. Author John Witte, Jr. agrees with Western historians who conclude that monogamous marriage, though not perfect, is the best means of bringing “both essential private goods to the married couple and their children and vital public goods to society and the state.”<sup>112</sup> He concludes that Western tradition has in fact treated polygamy as a *malum in se* (bad in itself) offense alongside slavery, sex trafficking, prostitution, indentured servitude, obscenity,

---

100. WITTE, WESTERN CASE, *supra* note 93, at 74.

101. *Id.*

102. *Id.* at 80–81.

103. See WITTE, WESTERN CASE *supra* note 93, at 73–79; WITTE, FROM SACRAMENT, *supra* note 80, at 54–60, 65–75.

104. *But see* WITTE, FROM SACRAMENT, *supra* note 80, at 27–28 (noting that having a wife and a concubine at the same time was prohibited, but not concubinage as described previously).

105. WITTE, WESTERN CASE, *supra* note 93, at 112.

106. *Id.*

107. WITTE, FROM SACRAMENT, *supra* note 80, at 28.

108. WITTE, WESTERN CASE, *supra* note 93, at 112.

109. *Id.* at 21.

110. *Id.* at 113.

111. *Id.* at 21.

112. *Id.*

bestiality, incest, sex with children, self-mutilation, organ-selling, and cannibalism.<sup>113</sup>

The missionaries were therefore being true to their tradition by condemning African polygamy. However, the distinction was not made between demands of Western culture and Christian precepts, since “[i]n nearly all the cases, Christianity was presented to the Africans as the religion and the culture of the Europeans, who at the same time thought of themselves as the perfect and the highest model for the rest of humanity to copy.”<sup>114</sup> The missionaries felt no need to engage African culture for they also thought it their duty “to tell [the Africans], in precise terms, what their inmost concept of being [was,]” and that the Africans would “recognize themselves in [the missionaries’] words and [would] acquiesce.”<sup>115</sup> The missionaries were therefore keen to not only Christianize Africa, but also to ensure inculturation of the African as well.<sup>116</sup> Consequently, the missionaries made European sensibilities and culture on marriage as Christian practices requirements for admission into the Christian faith. War on polygyny and the promotion of compulsory monogamy was part of the inculturation effort. Having detailed the monogamy-polygamy debate in both worlds, let me now make a case for coexistence between monogamy and polygamy.

#### IV. Making a Case for Legalizing Polygamy in Western Societies

To be content with what we at present know, is, for the most part, to shut our ears against conviction; since, from the very gradual character of our education, we must continually forget, and emancipate ourselves from, knowledge previously acquired; we must set aside old notions and embrace fresh ones; and as we learn, we must be daily unlearning something which it has cost us no small labor and anxiety to acquire.<sup>117</sup>

Nothing is more painful, yet as constant, than change. Therefore, a great part of our learning ought to be devoted to the necessity of either confronting or embracing change. Even more desirable is the art of avoiding unnecessary resistance to positive

---

113. WITTE, WESTERN CASE, *supra* note 93, at 21.

114. JESSE N. K. MUGAMBI, CRITIQUES OF CHRISTIANITY IN AFRICAN LITERATURE 20 (1992).

115. PLACIDE TEMPLES, BANTU PHILOSOPHY 36 (Collin King trans., 1959).

116. JESSE N. K. MUGAMBI, CHRISTIAN THEOLOGY & SOCIAL RECONSTRUCTION 4–9 (2003).

117. THEODORE ALOIS BUCKLEY, *Introduction*, THE ILIAD OF HOMER 5 (Alexander Pope trans., Thomas Y. Cromwell & Co., 1890).

change. Theodore Buckley reflected the wisdom of his time when he stated that “[t]he majestic stream of [Homer’s] song, blessing and fertilizing, flows like the Nile, through many lands and nations; and, like the sources of the Nile, its fountains will ever remain concealed.”<sup>118</sup> In 2018, it would be ridiculous to assert that the source of the Nile is unknown. It is venerable to keep tradition. But we must remember that “[t]radition is the living faith of the dead, traditionalism is the dead faith of the living . . . . [I]t is traditionalism that gives tradition such a bad name.”<sup>119</sup> Culture, like change, is fluid, which is why those of us who honor tradition must always ensure that which we seek to protect tradition rather than traditionalism. Tradition explains the present through the mirror of the past and forecasts the future through the hourglass of both the present and the past. As I make this case, I urge the reader to embrace the possibility that both positions might have merit.

Kenyans have had the courage to legalize polygamy to reflect the will of its general population even though it remains practiced by about 10% of its married population.<sup>120</sup> Kenyans have argued, that even though polygamy is less than ideal, the complexities of life make the practice a reality worth legal protection.<sup>121</sup> Kenyan society has held that while it is important to espouse the ideal, it is also important to reflect reality.<sup>122</sup> Polygamy is a Kenyan reality that has survived for thousands of years,<sup>123</sup> and polygamy continues to be an institution that many adults, and even properly educated ones find fulfilling.<sup>124</sup> It therefore made sense that the law should change to protect this group.

There is nothing inherently criminal and strange about polygamy in the Western world. In fact, according to Mark Goldfeder, plural marriages are older than monogamous relationships in the western hemisphere.<sup>125</sup> Particularly in North America, polygamy is older and more native than the paltry 400

---

118. *Id.* at 12 (quoting ARNOLD HERMANN LUDWIG HEEREN, ANCIENT GREECE 96 (1824) (emphasis added)).

119. JAROSLAV PELIKAN, THE VINDICATION OF TRADITION 65 (1984).

120. For total numbers, see KENYAN NATIONAL BUREAU OF STATISTICS, *Marital Status by County and District* (2014), <https://www.knbs.or.ke/marital-status-by-county-and-district/>.

121. See Interview with Judy Thongori, *supra* note 65.

122. LOVE AND MARRIAGE, *supra* note 4, at 190.

123. See MAILLU, *supra* note 48, at 1.

124. See Interview with Judy Thongori, *supra* note 65.

125. See MARK GOLDFEDER, LEGALIZING PLURAL MARRIAGE: THE NEXT FRONTIER IN FAMILY LAW 53–57 (2017).

years of European migration into the American continents.<sup>126</sup> Goldfeder observes that there is a compelling reason not only to decriminalize, but to altogether legalize polygamy in America.<sup>127</sup> There is nothing inherently harmful about the practice of polygamy. In fact, many of the traditional claims have since either been debunked or demonstrated as mitigable.<sup>128</sup> Janet Bennion reports that Phil Kilbride observed that “functional frameworks from plural marriage still exist in traditional African and Islamic nations, where wives and children are granted legitimacy and economic status with socially sanctioned plural marriages.”<sup>129</sup> This option is better than the legal and social non-legitimization of plural marriages. If the Western world were to open itself to engage the issue of polygamy, it could possibly see its merit, and move toward decriminalization and slowly shift the public’s social attitude. Eventually, “we should begin viewing the rights of poly families as every bit as important and intrinsic to human rights of [less traditional], blended, or single-parent families . . . [Then] perhaps the public will begin to accept polygamy as an option.”<sup>130</sup>

Secondly, Western societies are increasingly becoming ethno-culturally pluralistic.<sup>131</sup> North America has always been ethno-culturally pluralistic.<sup>132</sup> In the past, Native Americans’ rights were typically made alien by the laws of European immigrants.<sup>133</sup> Their polygamous cultures were not considered relevant when Europeans promulgated anti-polygamy rules.<sup>134</sup> Should this history continue? Western society’s strongest defense of monogamy has been that it is a carefully developed cultural heritage of Western civilization.<sup>135</sup> But as doors for persons with different cultural heritage continue to open, should the cultural values of these newcomers be at least legally protected? The law is never a strong driver for social change; however, it is final whenever it comes to bear on a matter. Western

---

126. *Id.* at 55.

127. *Id.* at 68–72.

128. *See id.* at 73–96 (discussing, among other ideas, polygamy’s supposed harm to children and women); JANET BENNION, POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM 259–82 (2012) (discussing, among other things, how to deal with perceived harms of polygamy).

129. BENNION, *supra* note 128, at 285.

130. *Id.* at 288.

131. *See* GOLDFEDER, *supra* note 125, at 67 (discussing immigration policies that bring polygamous cultures to the United States).

132. *See id.* at 55.

133. *See id.*

134. *See*, WITTE, WESTERN CASE, *supra* note 93, at 159–60 (discussing the development of the cultural superiority argument of Western Tradition).

135. *See id.* at 21–27.

liberal democracies should be true to their ideal of a marketplace of ideas—lift the legal ban on polygamy, and like every other ideology and practice, expose it to the sifting forces of the market and watch it either die or flourish. These societies have the tools to reasonably address and protect their populations from the most purported harms of polygamy.

Thirdly, before Christianity took over the Western world, plural marriages existed alongside legally-sanctioned, monogamous unions.<sup>136</sup> Even the apostolic church let polygamy coexist alongside monogamy for a time.<sup>137</sup> However, once the Christian opinion and theology on marriage settled on monogamy as the ‘express will’ of God, they united the Church and State to stamp out the practice throughout Western Christendom.<sup>138</sup> The ever-present rivalry between Christians and Jews<sup>139</sup>—and later on, the threat of Islam<sup>140</sup>—helped foster Christian opposition to polygamy,<sup>141</sup> as both Islam and Judaism accepted polygamy.<sup>142</sup> That is why Theodosius became the first emperor to prohibit polygamy in 258 CE,<sup>143</sup> and Byzantine emperor Theophilus (who fought the Muslim incursion into his empire) made polygamy a capital offense in the ninth century.<sup>144</sup> Polygamy was therefore the mark of identity for the Christian household, chaste and upright unlike their competitors.<sup>145</sup> Enlightenment philosophers found natural law arguments—reason, fairness, and utility—to uphold the Christian churches’ position on monogamy and polygamy.<sup>146</sup> Western society has increasingly claimed to be secular, bereft of Christian theological arguments.<sup>147</sup> Therefore, there is nothing compelling about Western society’s continued prohibition of polygamy. It is time to reevaluate that position.

In the past, the most dominant cultures considered themselves superior to the cultures that they displaced resulting in an unfathomable loss of world heritage.<sup>148</sup> The dominant culture

---

136. See WITTE, FROM SACRAMENT, *supra* note 80, at 28.

137. WITTE, WESTERN CASE, *supra* note 93, at 24.

138. See *id.* at 160.

139. See, e.g., *id.* at 66–67.

140. *Id.* at 158.

141. See *id.* at 158–60.

142. GOLDFEDER, *supra* note 125, at 3.

143. *Id.* at 24.

144. *Id.* at 112.

145. *Id.* at 86–87.

146. *Id.* at 24.

147. GOLDFEDER, *supra* note 125, at 2.

148. See, e.g., WITTE, WESTERN CASE, *supra* note 93, at 425–28.

considered others barbaric.<sup>149</sup> Western civilization is the most dominant culture of our time. It permeates every aspect of life, always pushing for not just relevance, but ultimate and sole legitimacy. Western civilization should therefore try to see value in non-Western cultures. For example, the debate on the rights of gays and lesbians has developed to a point where a considerable number of Western States now recognize same sex marriage. In most African and Asian countries, however, public opinion is still set on how “unnatural” same-sex relationships are.<sup>150</sup> If Western societies could openly engage with polygamy with a view to legalizing the practice, this would generate goodwill that may just as much open the African and Asian states’ debate on gay and lesbian rights. Western society’s open willingness to engage with polygamy may just be the catalyst for cross-cultural exchange that will leave our world a more tolerant one.

### Conclusion

Cultures have always borrowed from one another. On the question of polygamy, Western civilization can learn from other cultures, especially African ones. While most African countries continue to have the practice, very few have taken the positive step to reverse the colonial prohibition of polygamy in their law books. In 2014, Kenya enacted just such a law.<sup>151</sup> The law provides that plural marriages are registrable and have equal status to monogamous ones.<sup>152</sup> Human rights leaders in Kenya continue to support that move. There is some merit to legalizing polygamy. It is possible the traditionally-perceived harms of polygamy can be reasonably addressed or mitigated. Western societies should seriously engage in the polygamy debate with a view to legalizing the practice.

---

149. *Id.*

150. See Claire Felner and Danielle Renwick, *Same-Sex Marriage: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (last updated Dec. 8, 2017), <https://www.cfr.org/backgrounder/same-sex-marriage-global-comparisons> (highlighting how “[p]olling by Afrobarometer found that 78% of Africans across thirty-three countries are intolerant of homosexuality” and how “[s]ame-sex relations are illegal in much of South and Central Asia”).

151. The Marriage Act (2014) THE LAWS OF KENYA.

152. *Id.*