



No. S-097767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1986, c. 68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF s. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, c. C-46

**EXPERT REPORT PREPARED FOR THE
ATTORNEY GENERAL OF
CANADA REGARDING:**

**"State Obligations to Eliminate Polygyny
under
International Law"**

by

A handwritten signature in cursive script that reads "Rebecca J. Cook".

Rebecca J. Cook, M.P.A., J.D., J.S.D., F.R.S.C.

Faculty Chair in International Human Rights

Co-Director, International Reproductive and Sexual Health Law Programme

Faculty of Law, University of Toronto
84 Queen's Park Crescent
Toronto, Ontario
M5S 2C5

(416) 978-4446, fax: (416) 978-7899

email: rebecca.cook@utoronto.ca

**State Obligations to Eliminate Polygyny
under
International Law**

I. INTRODUCTION	2
II. SUMMARY	5
III. HARMS OF POLYGYNY: LITERATURE REVIEW	7
A. Inherent Wrongs of Polygyny	8
B. Associated Harms	13
1. Health Harms to Women of Polygynous Unions.....	14
2. Material Harms to Women of Polygynous Unions.....	18
3. Harms to Children of Polygynous Unions.....	19
IV. STATE PRACTICE AND <i>OPINIO JURIS</i>	23
A. Outright Prohibition	26
1. Africa	26
2. Asia	28
3. Australia and Oceania.....	28
4. Europe.....	29
5. North America	32
B. Restrictions on Polygyny	35
1. Notice Requirements.....	35
2. Governmental Authorization Requirements	36
3. Polygyny in Parallel Legal Systems	38
C. Immigration Restrictions regarding Individuals in Polygynous Unions	42
V. CANADA’S OBLIGATIONS TO COMPLY WITH INTERNATIONAL LAW	47
A. Obligations to Take “All Appropriate Measures” to Eliminate Polygyny	47
B. Obligations to Ensure Equality of Women	56
1. Obligations to Eliminate All Forms of Discrimination against Women.....	56
2. Obligations to dismantle stereotyping as a form of discrimination	59
C. Obligations to Ensure Equality in Marriage and Family Life	63
D. Obligations relating to Health and Security of the Person	67
E. Obligations to Ensure Children’s Rights	69
F. Arguable Limitations	70
1. The Right to Privacy and Family Life	70
2. The Right to Freedom of Religion	73
3. The Right to Enjoy One’s Culture	77
VI. CANADA’S OBLIGATIONS UNDER DOMESTIC LAW TO COMPLY WITH INTERNATIONAL LAW	80
A. International Human Rights Treaty Law	80
B. Customary International Law	81
C. International Reporting, Complaint, and Inquiry Procedures	82
VII. CONCLUSIONS	85
VIII. REFERENCES	88

1. I am a Professor of Law and Faculty Chair in International Human Rights Law at the Faculty of Law of the University of Toronto. I hold the degrees of A.B. (Barnard), M.A. (Tufts), and M.P.A. (Harvard). My first law degree (J.D.) was from Georgetown University, and my master's (LL.M.) and doctorate in law (J.S.D.) are from Columbia University. I am a member of the Washington, D.C. Bar, a Canadian citizen and a Fellow of the Royal Society of Canada.
2. For the past 21 years, I have taught International Human Rights Law, International Women's Rights Law, and Reproductive and Sexual Health Law to upper year law students and graduate law students, and supervised Master's and Doctoral theses on such subjects. I am the author, co-author or editor of all of the publications listed in the attached curriculum vitae. Among these, I edited and contributed chapters to *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994); I was the first author of *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (Oxford University Press, 2003); and was the first of two authors of *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010).
3. I am aware that I have undertaken a duty to assist the Court, and that I may not advocate for any party. I have prepared this Report in conformity with my duty to the Court. If I am called upon to give oral or written testimony in relation to this matter, I will give that testimony impartially.
4. The Attorney General of Canada has asked me to address the following issues:
 1. a literature review of the harms of polygamy, especially as viewed through the perspective of international human rights law;
 2. state practice and case law on polygamy in comparative Western democracies, including but not limited to the United Kingdom, Australia, France, and the United States;
 3. the treatment of polygamy in international human rights law; and
 4. Canada's specific obligations with respect to polygamy under international human rights law, including Canada's obligations under various treaties and conventions to which Canada is a signatory.
5. I am the person primarily responsible for the contents of this Report. All the documentation that I have reviewed in forming my opinion is listed in the Reference section at the end of the report.

I. INTRODUCTION

6. This Report will consider the sources of international law recognized by the International Court of Justice. Article 38 of the Statute of the International Court of Justice (I.C.J.) provides:
 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;
 - (b) *international custom*, as evidence of a general practice accepted as law;
 - (c) the *general principles* of law recognized by civilized nations;
 - (d) subject to the provisions of Article 5, judicial decisions and the teachings of the most *highly qualified publicists of the various nations*, as subsidiary means for the determination of rules of law.¹ (emphasis added)
7. This Report will consider states' obligations under international law regarding the practice of polygyny. In particular, it will consider Canada's obligations under relevant international conventions, international customary law, general principles of law, with reference to relevant judicial decisions and the teachings of highly qualified publicists.
8. This Report considers the following international human rights treaties, to which Canada is a state party, and that have the most relevance to the legal treatment of polygyny: the International Covenant on Civil and Political Rights (ICCPR),² the International Covenant on Economic, Social and Cultural Rights (ICESCR),³ the Convention on the Rights of the Child (CRC),⁴ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁵

¹ *Statute of the International Court of Justice*, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945), Article 38(1).

² *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, accession by Canada 19 May 1976) [ICCPR].

³ *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, accession by Canada 19 May 1976) [ICESCR].

⁴ *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol.1577, p.3, (entered into force 2 September 1990, ratified by Canada 13 December, 1991) [CRC].

⁵ *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 (entered into force 3 September 1981, accession by Canada 10 December 1981) [CEDAW].

9. Each of these international human rights treaties has a treaty body that monitors state compliance with the respective treaty obligations. The ICCPR established the Human Rights Committee (HRC), the ICESCR established the Committee on Economic, Social and Cultural Rights (CESCR), the CRC established the Committee on the Rights of the Child (CRC), and the CEDAW established the Committee on the Elimination of Discrimination against Women (the CEDAW Committee).
10. These Committees, which meet once to three times per year, assess reports from states parties to determine what the party has done (or failed to do) to bring its laws, policies, and practices into compliance with its treaty obligations. After considering and discussing country reports with representatives of the reporting states and others, Committees issue Concluding Observations on those reports, which assist countries in discharging their future reporting and compliance obligations.
11. This Report will then consider states' obligations under customary international law. Customary international law is evidenced by consistent and uniform state practice based on an understanding that the practice is required by law (*opinio juris*).⁶ This Report will consider state practice regarding the legal treatment of polygyny in view of emerging general principles of customary international law prohibiting sex discrimination.
12. The final source that this Report draws upon is national and international jurisprudence regarding polygyny and commentary by leading publicists. Some national judicial decisions also provide evidence of state understandings of international law (*opinio juris*).
13. International human rights treaty bodies use the term “polygamy” in their General Comments and Recommendations and Concluding Observations. The term “polygamy” refers to the simultaneous union of either a husband or wife to multiple spouses. As a general term, polygamy therefore includes the practices of polyandry, a wife taking multiple husbands, and polygyny, a husband taking multiple wives. The treaty bodies use the term “polygamy” to refer to the latter, polygyny. Polyandry is only rarely practiced globally and is not formally recognized in any jurisdictions discussed in this report. This report uses the term polygyny throughout for purposes of accuracy.
14. The term polygyny is applied hereafter when referring to *de jure* polygynous unions validly entered into in jurisdictions that permit polygyny, as well as to *de*

⁶ Article 38(1)(b) of the *Statute of the International Court of Justice*, 39 AJIL Supp. 215 (1945) refers to “international custom” as a source of law. International custom is defined “as evidence of a general practice accepted as law.” For discussion of its application in Canada, see Hugh Kindred, *International Law, Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000) at 130.

facto polygynous unions entered into in jurisdictions such as Canada that prohibit them. The purpose of using the same term throughout is to recognize that such unions are typically understood by the parties involved, and their broader religious or customary communities, as marriages with attendant normative rights and obligations.

15. This distinguishes *de jure* and *de facto* polygynous marriages from polyamorous or adulterous relationships. Polyamorous arrangements, for instance, can “vary as to the number of people involved, the sexes of those involved, the sexualities of those involved, the level of commitment of those involved, and the kinds of relationships pursued.”⁷ Such relationships are not structured by normative systems that distribute rights unequally according to sex.⁸ Likewise, adultery, which has never been a criminal offence in Canada, is not premised on a marital form that ascribes different rights and responsibilities according to sex.

⁷ See Maura Strassberg, “The Challenge of Post-Modern Polygamy: Considering Polyamory” (2003) 31 Cap. U.L. Rev. 439 at 440. See also *R. v. Labaye* [2005] S.C.J. No. 83 in which the Supreme Court of Canada ruled that the operation of consensual, adult group sex clubs did not pose a harm to “individuals or society.”

⁸ In *State v. Holm* 2006 UT 31, a case concerning bigamy and sexual contact with a minor, the Utah Supreme Court noted that “the behavior at issue in this case is not confined to personal decisions made about sexual activity, but rather raises important questions about the State’s ability to regulate marital relationships and prevent the formation and propagation of marital forms that the citizens of the State deem harmful.”

II. SUMMARY

16. **Conclusions regarding inherent wrongs and associated harms of polygyny:**

- a. The patriarchal structuring of family life that enables men to marry multiple wives, but not vice versa, offends women's dignity, and thus is inherently wrong.
- b. The asymmetry of polygynous marriages is premised on sex and sex role stereotypes that subordinate women, thus facilitating the unequal distribution of rights and obligations in marriage.
- c. The harms associated with the inherent wrongs of polygyny vary across, and within, different legal and social contexts. They include harms to the health, understood as physical, mental and social well-being of polygynous wives, material harms and deprivations they are liable to suffer, and emotional and material harms to children of polygynous mothers, often with serious consequences for their welfare.

17. **Conclusions regarding state practice and *Opinio Juris* with respect to polygyny:**

- a. The dominant practice now common among states is to prohibit polygyny by criminal or family law provisions. Where polygyny is permitted, there is a growing trend among states to restrict its practice. Historically, prohibitions of polygamy were aimed at protecting a monogamous form of marriage, or preventing fraud against persons or the state. Increasingly, however, state practice now evidences a growing emphasis on prohibiting or restricting polygyny to ensure women's rights to equality in marriage and family life.
- b. Where court challenges to actual or proposed prohibitions or restrictions of polygyny have been brought in the past decade, they have been uniformly defeated, despite claims to religious or cultural freedoms.
- c. Recent prosecutions to enforce criminal prohibition of polygyny have been successful, despite claims that the prohibition violates the freedom of religion.
- d. Where polygyny is permitted in parallel religious or customary legal systems, there is a trend internationally to ensure that women in polygynous marriages are entitled to the same rights and benefits enjoyed by women in monogamous marriages celebrated under civil family law.
- e. Exclusion of multiple spouses is now the norm in the immigrations laws of most western states, in order that persons do not practice polygamy in the destination state. There is an emerging trend to provide that only the first wife

of marriage can be potentially recognized for immigration purposes, and only if there is evidence that subsequent wives have been lawfully divorced.

18. **Conclusions regarding Canada's obligations to comply with international law regarding polygyny:**

a. There is a strong consensus under international human rights treaty law that states are obligated to take all appropriate measures to eliminate polygyny, as one of the many prohibited forms of discrimination against women.

b. States are further obligated to take all appropriate measures to dismantle the prejudices and harmful stereotypes that facilitate polygyny.

c. While states have a margin of discretion in determining what measures are appropriate to eliminate polygyny and the prejudices and harmful stereotypes that facilitate it, the discretion is not absolute. Where polygyny is entrenched, states might well be obligated to use the criminal law as an appropriate measure to eliminate it. As states eliminate polygyny, they are obligated to take appropriate measures to protect the human rights of women already in polygynous unions.

d. States are obligated to take all appropriate measures to discourage and prohibit polygyny to ensure equality in marriage and family law.

e. States are obligated to take all appropriate measures to eliminate polygyny in order to ensure women's rights regarding their health and security of their persons.

f. States are obligated to take all appropriate measures to eliminate polygyny in order to ensure the protection of children and young people.

g. While the right to privacy and family life, the right to freedom of religion and the right to enjoy one's culture are important rights, they can not be successfully invoked under international human rights law to justify the practice of polygyny.

19. **Conclusions regarding Canada's obligations under domestic law to comply with international law regarding polygyny:**

a. International human rights treaty law directly informs *Charter* interpretation.

b. International customary law is incorporated in the historical common law, and evidences an international norm against sex discrimination. This norm can be directly applied by the courts to assess the criminal prohibition of polygamy.

c. Canada is required to report to international human rights monitoring committees on the measures it has taken to eliminate polygamy, in order to comply with the international human rights law to which it is party. As a result of the ratification of the Optional Protocol to CEDAW, Canada is subject to complaint procedures. Individuals or groups of individuals who have exhausted all domestic remedies may bring a complaint where they claim that rights have been violated as a result of Canada's failure to take all appropriate measures to eliminate polygyny. In addition, Canada could be subject to an investigation for grave or systematic violations under the Convention for violations of rights of women and girls in polygynous marriages.

III. HARMS OF POLYGyny: LITERATURE REVIEW

20. Based on my review of various international instruments, case law, relevant literature, and case studies, the weight of authority leads to the conclusion that polygyny has detrimental effects on women, and on society more generally. Polygyny structures the marital relationship unequally on the basis of sex. A core right – the right to take additional spouses – is extended to one spouse (the husband), but not the other (the wife). This asymmetry is premised on sex and sex role stereotypes that ascribe to men and women different attributes and characteristics that ostensibly warrant an unequal distribution of rights and obligations in marriage. In addition to these inherent wrongs of discrimination against women, polygyny is often associated with a number of material and health harms, though these harms vary within and across different social and legal contexts.
21. The treaty bodies enumerated above, the CEDAW Committee, the HRC, the CESCR, and the CRC has stated in their Concluding Observations that polygyny violates the rights articulated in their respective treaties. In addition, both the CEDAW Committee and the HRC have condemned the practice of polygyny 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.*⁹ (emphasis added)

⁹ General Comment No. 28: Equality of rights between men and women (article 3), UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para. 24; For a discussion of the legal trend toward marital equality and the regulation of marriage generally, see Arlette Gautier, "Legal Regulation of Marital

22. Echoing this statement that the practice of polygyny violates women's equality and dignity in marriage, the CEDAW Committee stated in its General Recommendation No. 21, on Equality in Marriage and Family Relations:

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.* The Committee notes with 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.¹⁰ (emphasis added)

23. The international human rights committees have interpreted their respective treaties as requiring states to intervene to eliminate polygyny. They have suggested that states parties take comprehensive measures to eliminate polygamy, including, but not limited to, effective law enforcement and the application of legal and social sanctions where the practice is illegal.¹¹
24. These treaty bodies have also emphasized that states parties have an obligation to provide sufficient legal protection to women in existing *de facto* or *de jure* polygynous unions, including, but not limited to, access to family law relief at dissolution.
25. This section addresses the inherent wrongs and associated harms of polygyny, in turn. Some of the harms associated with polygyny in Africa, Asia or the Middle East may be relevant to Canadian law and policy in the immigration, refugee, and foreign policy contexts.

A. Inherent Wrongs of Polygyny

26. The structuring of family life in patriarchal ways that enable men to marry multiple wives, but not vice versa, violates women's dignity. Women as "wives" are limited to one spousal relationship, whereas men as "husbands" are permitted

Relations: An Historical and Comparative Approach" (2005) 19 International Journal of Law, Policy and the Family 47.

¹⁰ *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess., UN Doc. A/47/38, (1994) at 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."

¹¹ See, e.g., Benin, U.N. Doc. A/59/38 (2004) at para. 148; Tajikistan, U.N. Doc. CEDAW/C/TJK/CO/3 (2007) at paras. 14, 36; Turkmenistan, U.N. Doc. CEDAW/C/TKM/CO/2 (2006) at para. 40.

to take multiple spouses. The sex of parties is understood as the salient factor in the distribution of rights and obligations within marriage. International human rights bodies have emphasized that this violates women's dignity and equality in marriage and family life.¹² As the CEDAW Committee and the HRC have emphasized, polygyny "is a discriminatory practice that undermines women's dignity."¹³ The CESCR has also observed that "la polygamie est une atteinte à la dignité de la femme et constitue une discrimination à son égard."¹⁴

27. Historically, the common law of *couverture* also distributed marital rights and obligations unequally according to sex.¹⁵ Persons of different sex were understood to be different *types* of persons under the laws of marriage. A wife was understood to be subsumed within her husband's legal personality, under his family name; children of a marriage were understood to fall under the near complete custodial rights of their father. Stereotypes of feminine dependence, fragility, and commercial naivety were constructed in opposition to stereotypes of masculine protective breadwinning and financial acumen.¹⁶
28. Canadian family laws regulating marriage and cohabitation have since moved away from this expressly sex-based construction of family relations. Spousal rights and obligations now apply to both parties equally regardless of sex.¹⁷ The legislative adoption of same-sex marriage in 2005 has removed the notion of sex difference as essential to marriage altogether.¹⁸

¹² *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess., U.N. Doc. A/47/38 (1994), at para. 14; *General Comment 28: Equality of Rights Between Men and Women (Art. 3)*, UN HRCOR, 68th Sess., U.N. Doc. A/55/40 vol. I (2000) 133 at para. 24; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Madagascar*, UN ESCOR, 43rd Sess., U.N. Doc. E/C.12/MDG/CO/2 (2009), at para. 16.

¹³ *Concluding Observations of the Human Rights Committee: Chad*, UN HRCOR, 96th Sess., U.N. Doc. CCPR/C/TCD/CO/1 (2009), at para. 16. The Human Rights Committee has also stated that "polygamy violates the dignity of women." *General Comment No. 28, Equality of rights between men and women (article 3)*, UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), at para. 24.

¹⁴ *Third Periodic Report to the Committee on Cultural, Economic, Social and Cultural Rights: Morocco*, UN ESCOR, 36th Sess., U.N. Doc. E/1994/104/Add.29 (2005), at paras. 70 & 71(4); *Concluding Observations of the Committee on Cultural, Economic, Social and Cultural Rights: Morocco*, UN ESCOR, 37th Sess., U.N. Doc. E/C.12/MAR/CO/2 (2006), at para. 15.

¹⁵ William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford 1765-1769), Book 1, Chapter 15, "Of Husband and Wife": "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a *feme-covert* [married woman]; is said to be *covert-baron*, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her *couverture*."

¹⁶ For a discussion of reforms to marital status law, specifically in the area of wives' earnings, see Reva B. Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930" (1993-1994) 82 *Geo. L. J.* 2127.

¹⁷ See, e.g., *Divorce Act*, R.S., 1985, c. 3 (2nd Supp.), s. 2 defining "spouse" as "either of two persons who are married to each other."

¹⁸ *Civil Marriage Act*, S.C. 2005, c. 33.

29. Normative systems that permit polygyny continue to rely on sex as a central axis in the distribution of marital rights and obligations.¹⁹ In doing so, they rely on and perpetuate gender stereotypes hostile to women's equality that have been rejected in Canadian law.²⁰
30. The content of such gender stereotypes varies according to the particular normative system under which polygyny is practiced. In general, however, a dominant sexual and sex role stereotype of women in polygynous unions is as "wife" and "mother." Each of these roles, including the sexual component of "wife", supports and reinforces the other. They mark married women as different *types* of persons from men.
31. The Inter-American Court of Human Rights has defined "gender stereotyping" as "a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women."²¹ Sexual stereotypes concern those "characteristics or qualities that play a role in sexual attraction and desire, sexual initiation and intercourse, sexual intimacy, sexual possession, sexual assault ... sexual objectification and exploitation."²² Sex role stereotypes ascribe to women *roles* that are perceived as culturally appropriate based on prevailing gender ideologies.²³
32. Depending on the relevant customary or religious system, it may be that the role of "wife" implies continuous sexual availability to one's husband, as it once did under Canadian law.²⁴ Also, where a wife is sexually unavailable during pregnancy or post-partum abstinence in some contexts, polygyny can function unilaterally to satisfy a husband's "sexual needs."²⁵
33. It may also be a condition of "wifeness" that one becomes a "mother." The role of "mother" often has a more burdensome construction in the polygynous context than in the monogamous context. Where polygyny is practiced as a means to maximize reproduction by husbands, wives are understood as procreators, and may be limited in their ability to determine the number and spacing of children,

¹⁹ Religious or customary family law systems may be based on reciprocal, sex-differentiated rights and duties, rather than equal rights and responsibilities in marriage. Polygyny is so problematic because it distributes a core right – the right to take additional spouses – unequally.

²⁰ See, for e.g., *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para 82, 87, 94, 95, 97 (L'Heureux-Dubé J. concurring) (challenging gender stereotyping in the sexual assault context)

²¹ *Gonzalez et al v. Mexico*, Judgment of November 16, 2009, (the Cotton Field decision), at para. 401.

²² Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010) at 27.

²³ *Ibid.* at 30.

²⁴ Bill C-127 came into effect on Jan. 4, 1983, replacing the *Criminal Code* provisions regarding rape and indecent assault with a three-tier structure of sexual assault. The amendments made the sexual assault provisions gender neutral and removed spousal immunities.

²⁵ *Combined Initial and Third Periodic Reports to the Committee on the Elimination of Discrimination against Women: Papua New Guinea*, UN CEDAWOR, 46th Sess., U.N. Doc. CEDAW/C/PNG/3 (2010), at S. 5.4.

and so protect their health and lives.²⁶ One state party to CEDAW described the subordinate position of the wife in multiple polygynous contexts as “operating as a passive being for procreation.”²⁷ The inherent wrong of this stereotype is that it denies women reproductive choice to determine the number and spacing of their children. The notion that one might be a spouse, without choosing to be a parent, is foreclosed where polygyny is practiced for the precise purpose of maximizing reproduction.

34. There is evidence that maximizing reproduction is one of the theological principles of polygyny among fundamentalist Mormon groups in Canada and the United States.²⁸ Likewise, the centrality of motherhood (thereby creating fatherhood), is evident in some of the religious and customary norms governing marriage among Islamic and African communities. Infertility of the first wife, or her “inability” to bear a son, is often considered a sufficient reason for a court or previous wives to grant permission to a man to take an additional wife. One state party noted in its report to the CEDAW Committee noted that “childless women are often sneered at for their inability to conceive. If not divorced, lack of reproductive capacity is a justification for polygamy amongst some people...”²⁹ In a study among Bedouin Arab polygynous wives, having too many daughters was one of the four main reasons cited for why a husband took an additional wife.³⁰
35. Where polygynous wives and mothers do not fulfill these prescribed roles, they may be devalued in the family and community. The inherent wrong of this sex role stereotype is that it prohibits women from making or fairly negotiating their

²⁶ Article 16(1) of CEDAW provides that: “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women... (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...”

²⁷ *Combined Initial and Sixth Periodic Reports to the Committee on the Elimination of Discrimination against Women: Guinea-Bissau*, UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/GNB/6 (2009), at para. 84

²⁸ See “Hunting Bountiful: Polygamy in Canada” *The Economist* (10 July 2004) 34; Sally Armstrong, “Trouble in Paradise” *Chatelaine* (September 2004) 138 at 140-142; Angela Campbell, “Bountiful Voices” (2009) 47 *Osgoode Hall Law Journal* 183 at 205 where some interview participants spoke of the negotiation of contraception:

“Q: What about other forms of contraception?

Participant #9: For example?

Q: Condoms?

Participant #9: No. Most, most men would feel like that that was a violation of, like that they would sort of be, denying their faith.

Q: Even by using a rhythm method?

Participant #9: Oh, some may, but it’s more just sort of the act of mating should be reserved for getting pregnant, right?”

²⁹ *Combined Second and Fifth Periodic Reports to the Committee on the Elimination of Discrimination against Women: Malawi*, UN CEDAWOR, 35th Sess., U.N. Doc. CEDAW/C/MWI/2-5 (2006), at S.14.4.2.

³⁰ Alean Al-Krenawi “Women from Polygamous and Monogamous Marriages in an Out-Patient Psychiatric Clinic” (2001) 38 *Transcultural Psychiatry* 187 at 193.

own life plans in ways that are equal to their husband's ability to determine his life course.

36. Whatever form stereotypes of women take, they reflect and gain meaning from their contexts.³¹ There are many contextual factors that explain how stereotypes contribute to the social stratification and subordination of women. In general, they include individual, situational and broader factors.³² Individuals absorb stereotypes by interacting with others, and over time they begin to act in conformity with those stereotypes.³³ The inherent wrong of these prescribed stereotypes is that they may work to diminish women's perception of themselves and of other women.
37. Situational factors extend beyond what operates in the minds of individuals, to demonstrate more widely how individuals adapt to social contexts, in particular the demand of patriarchal family structures.³⁴ Where family structures "are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women",³⁵ they are inherently wrongful, violating individual and communal values of equality of the sexes.
38. In addition to individual and situational factors, there are broader factors, including religious and cultural norms, that may contribute to women's inferiority.³⁶ Sexual and sex role stereotypes, embedded in religious and cultural norms of polygynous communities, are a continuing wrong that is injurious to women and their families, with undesirable effects on community life.

³¹ Cook and Cusack, *Gender Stereotyping*, *supra* note 22 at 32.

³² *Ibid.* at 32-36.

³³ *Ibid.* at 32.

³⁴ *Ibid.* at 32-33.

³⁵ CEDAW, *supra* note 5, Article 5(a).

³⁶ Cook and Cusack, *Gender Stereotyping*, *supra* note 22 at 33-36. The promotion of polygyny in Mormon teachings was from the outset premised on patriarchal stereotypes of men and women. In his July 12, 1843 revelation that solidified the place of plural marriage within Mormon theology until the 1890s, Joseph Smith, the founder of Mormonism, noted that:

Under the "law of priesthood" a man "cannot commit adultery with that that belongeth to him and to no one else. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him... If any man have a wife... and he teaches unto her the law of my priesthood, as pertaining to these things, then shall she believe and administer unto him, or she shall be destroyed," saith the Lord your God. (cited in Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge: University of Cambridge Press, 1996) at 27).

The implicit stereotype within this revelation and other writings at the time of women as dependent and obedient beings whose proper place was in the domestic sphere raising children helped to reinforce polygyny. Likewise, the characterization of men in Smith's revelation as having strong and "inexhaustible" sexual needs further perpetuated the theology of plural marriages.

B. Associated Harms

39. The material and health harms associated with polygyny vary across and within different legal and social contexts.³⁷ Narrative accounts of polygyny in North America indicate the degree to which individual experiences of plural families can differ.³⁸
40. In some contexts, polygyny can undoubtedly serve a beneficial function for some women and children. This is especially the case where there is a shortage of marriageable men, for example following a civil war, and where there is significant income inequality among men.³⁹ In states with only limited or non-existent public welfare benefits, access to a male with resources, including through polygynous marriage, may be one of the only options for material survival for unmarried women. In such contexts, legal, social and economic reforms that would allow women greater access to resources, including property ownership, will be integral to addressing the underlying causes of polygyny. The CEDAW Committee has invited research into the underlying causes of polygyny in order that states can develop more effective remedial responses.⁴⁰
41. In the Canadian context, it appears that polygyny is largely motivated by religious or customary norms, rather than material necessity. In fact, polygyny tends to be a financially precarious family form in market economies.⁴¹
42. The following discussion of harms associated with polygyny is intended to elucidate some of the concerns international human rights treaty bodies have expressed regarding the practice. It is important to stress, however, that the primary reason such international treaty bodies have encouraged the elimination

³⁷ Martha Bailey and Amy Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, CA: Praeger Publishers, 2010) at 134.

³⁸ See Angela Campbell, *supra* note 28; Daphne Bramham, *The Secret Lives of Saints, Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Toronto: Random House, 2008); Carolyn Jessop and Laura Palmer, *Escape* (New York: Broadway Books, 2007); Jon Krakauer, *Under the Banner of Heaven: A Story of Violent Faith* (U.S.A.: Random House, 2005); Elissa Wall with Lisa Pulitzer, *Stolen Innocence: My Story of Growing Up in a Polygamous Sect, Becoming a Teenage Bride, and Breaking Free of Warren Jeffs* (New York: HarperCollins, 2008).

³⁹ *Combined Initial, Second and Third Periodic Reports to the Committee on the Elimination of Discrimination against Women: Tajikistan*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/TJK/1-3 (2007), at para 11.

⁴⁰ *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan*, UN CEDAWOR, 42nd Sess., U.N. Doc. CEDAW/C/KGZ/CO/3 (2008), at para 22.

⁴¹ See Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Tajikistan, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/TJK/CO/3 (2007), at paras. 35-36; Initial and Fifth Periodic Reports to the Committee on the Elimination of Discrimination Against Women: Togo, UN CEDAWOR, 34th Sess., U.N. Doc. CEDAW/C/TGO/1-5 (2004), at p. 46.

of polygyny is its inherent wrong of denying women's dignity and equality in marriage and family life.

1. Health Harms to Women of Polygynous Unions

a. Harms Arising from Competitive Co-Wife Relationships

43. Competition for material and emotional access to a husband can lead to fractious co-wife relationships in polygynous families. A review of anthropological literature suggests that jealousy, tension, strain, and competitiveness are common among co-wives.⁴² The unequal distribution of polygynous husbands' emotional and material attention tends to be a significant cause of fractious, jealous co-wife relationships. Studies of the Bedouin of Israel and among Yoruba wives in Southwestern Nigeria and Benin found that a husband's favouritism toward certain wives, particularly a new wife, was a significant source of dissatisfaction among polygynous wives.⁴³ In a country report to the CEDAW Committee, one state party noted that "... 'first' wives are neglected as husband's time and money are spent with and on other families."⁴⁴ Another state party reported that "polygamy also gives rise to various economic and social consequences, including jealousy between wives, unequal distribution of household goods, inheritance problems and domestic squabbling, which may have a negative impact on children."⁴⁵
44. The extent to which co-wife relationships are experienced as competitive or supportive is context-specific. Studies of polygyny as practiced among the Masai, the Mende, and the !Kung of Africa have documented supportive, collaborative relations among some co-wives.⁴⁶ In the West African context, studies suggest that polygyny can feature collaborative relationships among wives, but can also "pit co-wives" against each other.⁴⁷ Acrimony among co-wives and their husband can also precipitate violence. In field research carried out by Law and Advocacy for Women in Uganda, for example, 86.7 % of a focus group in Iganga and 80 % of a focus group in Kampala identified polygyny as a cause of domestic violence.⁴⁸

⁴² See Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge: University of Cambridge Press, 1996) at 341.

⁴³ *Ibid.*

⁴⁴ *Initial Report to the Committee on the Elimination of Discrimination against Women: Timor-Leste*, UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/TLS/1 (2009), at p. 16.

⁴⁵ *Combined Initial and Fifth Periodic Reports to the Committee on the Elimination of Discrimination against Women: Togo*, UN CEDAWOR, 34th Sess., U.N. Doc. CEDAW/C/TGO/1-5 (2006), at S. 7.1.

⁴⁶ Altman & Ginat, *Polygamous Families*, *supra* note 42 at 343.

⁴⁷ Sangeetha Madhavan, "Best of Friends and Worst of Enemies: Competition and Collaboration in Polygyny" (2002) 41 *Ethnology* 69 at 69.

⁴⁸ LAW-U, "Project Report on the Domestic Violence Study," p. 81 as cited in Human Rights Watch, "Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda" (2003) 15, No. 15(A) at 51.

45. Emerging ethnographic work in Bountiful, British Columbia, suggests that collaboration is common among co-wives, though feelings of competition and jealousy are also present.⁴⁹

b. Mental Health Harms

46. The mental health impacts of polygyny vary according to the marriage and larger community context. Studies have found increased family stress, depressive disorders, low self-esteem and feelings of disempowerment, and increased risk of physical and mental violence among polygynous marriages.
47. Empirical studies of Bedouin-Arab women have found that polygyny is associated with increased family stress and attendant mental health issues when compared to women in monogamous marriages.⁵⁰ As mentioned above, the practice can lead to co-wife jealousy, competition, and an unequal distribution of domestic resources – all tending to create acrimony among wives and between children of different wives.⁵¹ These factors are believed to explain the greater prevalence of mental health problems among Yoruba women in polygynous families in comparison to those in monogamous marriages and relative to the general population.⁵² Among psychiatric patients in Dubai and Qatar, polygynous marriages tend to be associated with increased depressive disorders, somatization disorders, and anxiety states.⁵³
48. The particular reason why a husband takes an additional wife can directly impact on the original wife's emotional response or consent to the union. Common reasons for Bedouin-Arab remarriage cited in the aforementioned studies included: an exchange marriage (where two men marry each other's sister), the number of daughters the first wife had, the age of the first wife (that she was seen as "old"), and other factors including situations where a husband was persuaded to marry a woman by his extended family.⁵⁴
49. Of those Bedouin-Arab research subjects suffering low self-esteem, 71% reported the number of daughters as the reason for their husbands' subsequent marriages. Of those subjects who indicated their advanced age as the reason for remarriage,

⁴⁹ Campbell, "Bountiful Voices", *supra* note 28 at 206-207; 214-218.

⁵⁰ Al-Krenawi "Women from Polygamous", *supra* note 30.

⁵¹ *Ibid.* at 188.

⁵² A.H. Leighton, T.A. Lembo, C.C. Hughes, D.C. Leighton, J.M. Murphy, & H.B. Macklin, *Psychiatric disorder among the Yoruba*. (Ithaca, NY: Cornell University Press, 1963) as cited in Al-Krenawi, "Women from Polygamous", *supra* note 50 at 188.

⁵³ R. Ghubash, E. Hamdi, & P. Bebbington, "The Dubai community psychiatric survey, I. Prevalence and socio-demographic correlates" (1992) 27 *Social Psychiatry and Psychiatric Epidemiology* 55; M.F. El-Islam, "Clinical bounds neurosis in Qatari women" (1975) 10 *Social Psychiatry* 25 as cited in Al-Krenawi, "Women from Polygamous", *supra* note 50 at 188.

⁵⁴ *Ibid.* at 193.

- all reported low self-esteem.⁵⁵ Given the social preference within Bedouin-Arab culture and others for younger wives and a higher number of sons, a woman's social status and self-esteem are doubly assaulted by her husband's choice to remarry in such cases.⁵⁶ Most notably, all the polygynous subjects, regardless of the stated reasons for their husband's remarriage, reported somatic distress (physical symptoms), which is a culturally acceptable way for individuals in Bedouin-Arab society to express emotional difficulties.⁵⁷
50. A study of polygyny and wife abuse amongst American *sunni* Muslim women echoes this theme of disempowerment.⁵⁸ One study found that wives felt disempowered because of their inability to prevent their husbands from taking other wives. The significance of marriage within their Muslim communities and the associated need to keep their family together in turn lead to unhappiness and vulnerability to abuse.⁵⁹ At least one state has reported on the emotional and psychological impact that coercive community norms supporting polygyny can have on women and girls.⁶⁰
 51. At least one court has expressly acknowledged the deleterious impact that subsequent marriage can have on a first wife. In *Itwari v. Asghari*, the Allahabad High Court in India suggested that the taking of a second wife often constitutes a "stinging insult to the first" and may "prey upon her mind and health if she is compelled to live with her husband under the altered circumstance."⁶¹
 52. Even where a husband does not actually take an additional wife, formally or ceremonially, the potentiality of polygyny can be used to control and limit a woman's ability to assert her rights within marriage.⁶² In her 2002 report, "Cultural practices in the family that are violent towards women", the United Nations Special Rapporteur on Violence against Women, Radhika Coomaraswamy, addressed women's exposure to violent practices in the family. She found that "several... forms of threat or violence are used to ensure that

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 195.

⁵⁷ *Ibid.* at 193-194.

⁵⁸ Dena Hassouneh-Phillips, "Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America" (2001) 22 *Health Care for Women International* 735.

⁵⁹ *Ibid.* at 741.

⁶⁰ *Combined Initial and Sixth Periodic Reports to the Committee on the Elimination of Discrimination against Women: Guinea-Bissau*, UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/GNB/6, at para. 189: From the psychological and emotional standpoint, girls, especially in a rural environment, have no means for expressing their aspirations and their feelings and must submit to the customary norms and traditions of their ethnic group with regard to affective options and sex life, accepting, without any objection, their place and role in the polygamous system of relationships and inheritance rights in emotional relations.

⁶¹ (1960) A.I.R. 684 (Allahabad).

⁶² *Women Living under Muslim Laws. Knowing Our Rights: Women, family, laws and customs in the Muslim World* (London: Women Living under Muslim Laws, 2003) at 197.

women stay obedient within a marriage, for example the threat of the husband taking another wife...”⁶³

c. Sexual and Reproductive Health Harms

53. The sexual and reproductive health implications of polygyny vary significantly according to the normative rules that govern its practice, as well as the generalized levels of risk for sexually transmitted infection.
54. The sexual and reproductive health harms of polygyny are especially pronounced in areas with high HIV/AIDS prevalence rates.⁶⁴ Transmission of HIV and other sexually transmitted infection can occur in polygynous unions where a spouse has extra-marital sexual contact, or where a new wife who is already HIV-positive enters the union. Research indicates that sexual infection is more likely to occur where both the infectiousness of a disease and the sexual activity between concurrent partners persists over time.⁶⁵ Sexual concurrency significantly elevates risk of HIV transmission in comparison to sequential monogamy or sporadic sexual encounters.⁶⁶
55. International human rights committees have emphasized these health risks associated with discriminatory practices such as polygyny. In its General Recommendation No. 24 on Women and Health, the CEDAW Committee stated that “harmful traditional practices, such as... polygamy... may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases.”⁶⁷ The U.N. General Assembly stated in its 2001 Declaration of Commitment on HIV/AIDS that states should implement national strategies to reduce vulnerability to HIV/AIDS “through the elimination of all forms of discrimination, as well as all forms of violence against women and girls, including harmful traditional and customary practices...”⁶⁸

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

⁶⁴ See discussion in Lisa M. Kelly, “Polygyny and HIV/AIDS: A Health and Human Rights Approach” (2006) 31 *Journal for Juridical Science* 1.

⁶⁵ G. Garnett and A. Johnson, “Coining a new term in epidemiology: Concurrency and HIV” (1997) 11 *AIDS* 681 at 682.

⁶⁶ M. Morris & M. Kretschmar, “Concurrent partnerships and the spread of HIV” (1997) 11 *AIDS* 641; J. Shelton, M. Cassell, & J. Adetunji, “Is poverty or wealth at the root of HIV?” (2005) 366 *The Lancet* 1057.

⁶⁷ *General Recommendation 24, Women and health*, UN CEDAWOR, 20th Sess., UN Doc. A/54/38/Rev.1 chapter I (1999) at para. 18.

⁶⁸ *Declaration of Commitment on HIV/AIDS: United Nations General Assembly Special Session on HIV/AIDS*, UN GAOR, 2001, UN Doc. S-26/2.

2. Material Harms to Women of Polygynous Unions

56. While economic vulnerability clearly impacts single women and women in monogamous marriages, polygyny can aggravate economic deprivation where resources are inequitably divided or simply insufficient. The economic well-being of spouses will be highly contingent upon the overall wealth of the family, the occupational undertakings of spouses, and resource distribution patterns. Moreover, as child support and spousal support obligations on dissolution are established in more jurisdictions, the practice of polygyny becomes more costly.⁶⁹
57. Some commentators argue that in certain circumstances, polygyny may increase family wealth. They posit that “wealth-increasing polygyny” or “polygyny with autonomous co-wives”, where co-wives maintain their own homes, should predict a pattern of polygyny in which additional wives increase the likelihood of the successful acquisition of another.⁷⁰ According to this theory, each additional co-wife would augment the family’s wealth, thereby motivating and facilitating the acquisition of more wives.
58. Other cross-cultural studies of polygyny, however, discount female contribution to subsistence as an important factor in whether a husband takes additional wives.⁷¹ It has been suggested that culture-specific family developmental cycles and attitudes to competition versus cooperation likely provide a more adequate explanation of why some polygynous husbands accumulate additional wives more successfully than others.⁷² In theory, however, it remains likely that polygyny could be wealth-maximizing where numerous spouses are producing resources within and outside the household, depending on relevant child-rearing costs.
59. Despite this potentiality for wealth-maximization, it is well documented cross-culturally that polygyny, particularly when practiced according to a “male-head-of-household” paradigm, often results in economic deprivation.⁷³ The same factors that contribute generally to the feminization of poverty – namely, that domestic work is typically financially uncompensated and that women on average have less education and so a lower wage-earning capacity – are particularly aggravated where polygyny is associated with patriarchy. The economic under-

⁶⁹ This assumes, of course, that *de facto* or *de jure* polygynous wives can access such relief. In Canada, it is arguable that they can access such relief as functional cohabitants. See Lisa M. Kelly, “Bringing International Human Rights Law Home: An Evaluation of Canada’s Family Law Treatment of Polygamy” (2007) 65 *University of Toronto Faculty of Law Review* 1..

⁷⁰ D.R. White as cited in Peter Bretschneider, *Polygyny: a Cross-Cultural Study* (Uppsala: Uppsala University, 1995) at 177.

⁷¹ Bretschneider, *Ibid.* at 29.

⁷² *Ibid.*

⁷³ This may be the case in Bountiful, B. C. where there are reports that women generally do not work outside the home and may not be allowed to own property. See Daphne Bramham “Polygamous wives, in Canada illegally, seek to stay” *The Vancouver Sun* (11 August 2004). Bedouin-Arab interview studies indicate that women in polygynous unions report more economic problems than their monogamous counterparts. Al-Krenawi, “Women from Polygamous” *supra* note 50 at 192.

valuing of women's work will often cause inevitable financial strain within polygynous families where one husband's earnings may have to support multiple wives and many children. There is at least some anecdotal evidence of such strain among fundamentalist Mormon polygynous families in the United States and Canada.⁷⁴

60. This economic strain is cited by many commentators as one of the main reasons, along with a growing trend toward recognizing women's equality, that polygyny is being restricted globally.⁷⁵ The economic harms of polygyny can be particularly serious as societies become increasingly urbanized, with urban living conditions typically not amenable to the living space required for multiple families.⁷⁶

3. Harms to Children of Polygynous Unions

61. The primary harm to children raised in polygynous families is their exposure to, and potential internalization of, harmful gender stereotypes. The gender stereotypes that perpetuate the unequal distribution of rights between men and women in polygynous marriages are likely to be transmitted to children of that union. As one commentator writes, "gender equality in Fundamentalist communities is linked inextricably to children's rights (both current and future)."⁷⁷ The boy and girl child are raised to take on the gender roles that communities perpetuate.
62. Where polygyny is practiced in a closed or semi-closed community, there is an ongoing need to prepare adolescent girls for entry into plural unions, and boys for their potential expulsion. In closed and semi-closed polygynous communities, there is demographic pressure to maintain an unequal sex ratio (or risk having a significant number of single, adult men). Barring a war or mass migration, marriageable sex ratios can be artificially skewed through the young marriage of adolescent girls or women, the casting out of "excess" boys or men, and the introduction of female converts.⁷⁸ Evidence from Fundamentalist Mormon communities in Canada and the United States supports this theory in terms of the

⁷⁴ Vince Beiser, "The perils of polygamy: An incest case in Utah highlights the controversy over 'plural marriage'" *Maclean's* (26 July 1999) 32.

⁷⁵ *Seventh Periodic Report to the Committee on the Elimination of Discrimination Against Women: Bhutan*, UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/BTN/7 (2009), at para. 78, Bhutan states in its country report: "With socio-economic changes and increasing education, such practices [polygamy and polyandry] are fast declining." See also Adrien Katherine Wing, "Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century" (2001) 11 *J. Contemp. Legal Issues* 811 at 838.

⁷⁶ *Ibid.*

⁷⁷ Eve D'Onofrio, "Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States" (2005) 19 *Int'l J. L. Pol. & Fam.* 373 at 377.

⁷⁸ Shayna M. Sigman, "Everything Lawyers Know About Polygamy is Wrong" (2006-07) 16 *Cornell J. L. and Pub. Pol'y* 101 at 182.

relatively young marriage age of adolescent girls and young women.⁷⁹ Other data of polygynous unions indicate that there tends to be a larger age gap between polygynous spouses than monogamous spouses.⁸⁰

63. Early marriage and pregnancy before adolescent girls have reached sufficient physical or emotional maturity for self-care and child-care have negative health implications.⁸¹ Early marriage can significantly limit the socio-economic development of girls, often restricting their life opportunities to childrearing or low-skilled work outside the home.⁸² Where the practice of polygyny is associated with patriarchal abuse or coercion, adolescents may be especially vulnerable given their inability to freely opt-into or opt-out of the community.⁸³
64. Closed or semi-closed systems of polygyny also necessarily exclude some boys and men from marriage. Unless the community is able to attract sufficient numbers of marriageable female converts, polygyny operates as a zero-sum game among men.⁸⁴ Among fundamentalist Mormon communities in Canada and North America, there is growing public attention to the excommunication of boys, commonly referred to as “lost boys.”⁸⁵ In a lawsuit filed by six “lost boys” against the Fundamentalist Mormon Church in the United States, the complainants alleged:

A central tenet of the church is the practice of polygamy, where selected male members of the church are wedded to multiple wives... To further

⁷⁹ See Catherine Blake, “Study Note, The Sexual Victimization of Teenage Girls in Utah: Polygamous Marriages Versus Internet Sex Predators” (2005) 7 J.L. & Fam. Stud. 289, 289-90 (early age of marriage for females within polygamist groups); see Bramham, *The Secret Lives of Saints*, *supra* note 38; Eve D’Onofrio, “Child Brides”, *supra* note 77 at 378. For a discussion of evolving norms around under-age marriage and the push for girls to have reached adulthood before marriage, see Campbell, “Bountiful Voices”, *supra* note 28 at 22-25.

⁸⁰ See Maura Strassberg, “Symposium: Lawyering for the Mentally Ill: The Crime of Polygamy” (2003) 12 Temp. Pol. & Civ. Rts. L. Rev. 353 at 366-67 (that there is typically age gap of 20 or more years between polygamous men & teenage wives); See Ian M. Timaeus & Angela Reynar, “Polygynists and Their Wives in Sub-Saharan Africa: An Analysis of Five Demographic and Health Surveys” (1998) 52 Population Study 145 at 159 (polygamous marriage systems are “maintained by a large gap between the ages at marriage of men and women and rapid remarriage of divorced and widowed women”).

⁸¹ Rebecca J. Cook, Bernard M. Dickens, and Mahmoud F. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (Oxford University Press: Oxford, 2003) at 182.

⁸² *Id.* at 278.

⁸³ Shayna M. Sigman, “Everything Lawyers Know”, *supra* note 78 at 179. For a discussion of the difficulties of “opting out” of cultural groups, see discussion of the “paradox of multicultural vulnerability” in Ayelet Schachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001). There is some anecdotal evidence that children raised in polygamous fundamentalist Mormon communities in Canada and the United States may be at increased risk of incest, sexual assault, and physical abuse. See *State of Utah v. Green*, 2004 UT 76 (2004); see Richard A. Vasquez, Note, The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence, 5 N.Y.U. J. Legis. & Pub. Pol’y 225 at 239-45 (2001); Kelly Schwab, “Note: Lost Children: The Abuse and Neglect of Minors in Polygamous Communities of North America” (2010) 16 Cardozo J. L. & Gender 315 at 329-336.

⁸⁴ See Shayna M. Sigman, *Ibid.* at 182.

⁸⁵ Bramham, *The Secret Lives of Saints*, *supra* note 38.

foster the illegal activity, the church and its leadership have established the secret, cruel and unlawful practice of systematic excommunication of adolescent and young adult males for trivial reasons or no reason at all, in order to reduce competition for wives.⁸⁶

65. As this complaint makes manifest, marriage competition in communities where a statistically significant number of men practice polygyny can have especially pernicious effects on adolescent boys. Power hierarchies among men determine which men are afforded the opportunity to take multiple wives and which are necessarily excluded.⁸⁷
66. In addition to these gendered implications of polygyny for children, studies from other regions have found that adolescents from polygynous families have lower levels of socio-economic status, reduced academic achievement and self-esteem, as well as higher levels of reported family dysfunction and drug use than children from monogamous families.⁸⁸ Researchers explained these differences by referencing the higher levels of jealousy, conflict, tension, emotional stress, opposing motives, insecurity, and anxiety among polygynous families.⁸⁹ In particular, rivalry and jealousy between co-wives can cause significant emotional problems for children. Other studies also found reports of increased stress in mother-child relationships among polygynous respondents because of decreased social and economic resources.⁹⁰ At least one state party has reported to the CEDAW Committee that the existence of polygamy “deprives many children from getting... much needed parental guidance.”⁹¹

⁸⁶ Complaint at 2, *Ream v. Jeffs*, (UT 3d Dist. 2004), available at: www.courthousenews.com/PDF%20Archive/jeffs2.pdf

⁸⁷ Maura I. Strassberg, “Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage” (1996-97) 75 N.C.L. Rev. 1501 at 1586.

⁸⁸ A. Al-Krenawi, J.R.Graham & V. Slonim-Nevo, “Mental health aspects of Arab-Israeli adolescents from polygamous versus monogamous families” (2002) 142 *Journal of Social Psychology* 446.

⁸⁹ *Ibid.* at 117. See *Third and Fourth Period Report to Committee on the Rights of the Child: Nigeria*, UN CRCOR, 54th Sess., U.N. Doc. CRC/C/NGA/3-4 (2010), at S. 8.6.2: Children and Drug Abuse – Article 33 (a) Studies and Information on the Use of Drugs by Children - ...”Children from polygamous homes had a higher prevalence of drug use than those from monogamous homes. This was true for all the drugs but was significant for volatile solvents, cannabis and sedatives. Use of cannabis had a significant relationship with polygamous family type, loneliness and separation of parents. These factors were also significant for use of volatile solvents.”

⁹⁰ Al-Krenawi, “Women from Polygamous”, *supra* note 50 at 196.

⁹¹ *Second Periodic Report to the Committee on the Rights of the Child: Nepal*, UN CRCOR, 39th Sess., U.N. Doc. CRC/C/65/Add.30 (2005), at para. 136

67. Because fathers in polygynous households are often unable to give sufficient affectionate and disciplinary attention to all their children, this can further reduce children's emotional security.⁹² Several states have reported to international human rights treaty bodies that "children from polygamous families are left neglected or poorly provided for by their fathers" and are vulnerable to abandonment.⁹³

⁹² Varghese I. Cherian, "Academic Achievement of Children from Monogamous and Polygynous Families" (1989) 130 *The Journal of Social Psychology* 117 at 118.

⁹³ *Initial Report to the Committee on the Rights of the Child: Malawi*, UN CRCOR, 50th Sess., U.N. Doc. CRC/C/MWI/2 (2009), at para. 17; *Combined Third and Fourth Periodic Reports to the Committee on the Rights of the Child: Bangladesh*, UN CRCOR, 51st Sess., U.N. Doc. CRC/C/BGD/4 (2008), at para. 188.

IV. STATE PRACTICE AND *OPINIO JURIS*

68. Treaty-based international law is premised on state consent. Its legitimacy is grounded in the will of states to be bound by the obligations articulated in international treaties and conventions.⁹⁴ Customary international law looks instead to common state practice as evidence of binding obligations. Customary international law is evidenced by consistent and uniform state practice based on an understanding that the practice is required by law (*opinio juris*).⁹⁵
69. There are several sources of *opinio juris*. These include, but are not limited to, national laws, diplomatic correspondence, immigration laws and policies, advisory opinions from Attorney-Generals' offices, the degree to which states have prosecuted an offence such as polygamy, and national and international judicial decisions.⁹⁶ Because polygyny is not considered a significant diplomatic issue, international statements of the kind that exist for other human rights issues are not evident in this area.
70. A growing body of international law commentary and human rights jurisprudence suggests that non-discrimination norms are now part of customary law.⁹⁷ International human rights law has contributed significantly to state understandings that non-discrimination is a legal obligation. As Dickson C.J. stated in his majority judgment in *R. v. Keegstra*, “[n]o aspect of international human rights has been given attention greater than that focused upon discrimination. The large emphasis placed upon eradicating discrimination is evident in the fact that all but one of the major international human rights

⁹⁴ See Rhona K. Smith, *Texts and Materials on International Human Rights*, 2nd ed., (New York: Routledge, 2010) at 3-7.

⁹⁵ Article 38(1)(b) of the *Statute of the International Court of Justice*, 39 AJIL Supp. 215 (1945) refers to “international custom” as a source of law. International custom is defined “as evidence of a general practice accepted as law.” For discussion of its application in Canada, see Hugh Kindred, *International Law, Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000) at 130.

⁹⁶ For a discussion of evidence of *opinio juris*, see Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Markham, ON: Butterworths Canada, 1992) at 10-13.

⁹⁷ For relevant jurisprudence, see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 15/1983/71/107-109 (ECHR) (noting that sex discrimination should receive heightened attention) (reprinted in Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors, *International Women's Rights Cases* (London: Cavendish, 2005) at 618); *D.H. and Others v. Czech Republic*, 57325/00, Council of Europe: European Court of Human Rights, 7 February 2006 (the pattern of segregating Roma children into schools for the mentally disabled violated the nondiscrimination protections of the European Convention on Human Rights); *Zarb Adami v. Malta*, no. 17209/02, § 76, ECHR 2006 (that discrimination potentially contrary to the European Convention may result from a *de facto* situation). For relevant academic commentary, see Courtney Howland, “The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter” (1997) 35 Colum. J. Transnat'l L. 273 at 334; Anne F. Bayefsky, “The Principle of Equality or Non-Discrimination in International Law” (1990) 11 Hum. Rts. L.J. 1 at 19.

instruments (the *European Social Charter*) proscribe it in an article of general application...⁹⁸

71. State practice and *opinio juris*, including state pronouncements at United Nations conferences, state commitments to women's equality in human rights treaties,⁹⁹ and national,¹⁰⁰ regional,¹⁰¹ and international¹⁰² jurisprudence and legislation

⁹⁸ *R. v. Keegstra*, [1990] 3 S.C.R. 697.

⁹⁹ See, e.g., CEDAW, *supra* note 5; ICCPR, *supra* note 2; ICESCR, *supra* note 3; CRC, *supra* note 4; UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, UN General Assembly, *Declaration on the Elimination of Discrimination against Women*, 7 November 1967, U.N. Doc. A/RES/2263; UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, U.N. Doc. A/RES/48/104.

¹⁰⁰ *Annun Garg and Others v. Hotel Association of India and Others*, (2008) 3 SCC 1 (India Supreme Court) (holding that women had to be permitted to work in bars); *Alice Miller v. Ministry of Defense*, [1995] IsrSC 49(4) 94, [1995-6] IsrLR 178 (Israel Supreme Court) (decision permitting women to be trained as pilots in Air Force jets); *State v. Filipe Bechu*, [1999] FJMC 3, Criminal Case No 79/94 (1999) (Fiji, First Class Magistrate's Court, Levuka), <http://www.worldlii.org/fj/cases/FJMC/1999/3.html> (accessed July 2, 2010) (stating that where women are stereotyped as a form of property, this enables sexual assault); *Haines v. Leves Haines v. Leves*, (1987) 8 N.S.W.L.R. 442 (Court of Appeal of New South Wales) (affirming a decision of the Equal Opportunity Tribunal that sex-segregated schooling with curricula differences that reflected sex role stereotypes of masculine breadwinning and feminine domesticity was discriminatory); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (U.S., Supreme Court) (holding that automatic benefit entitlements for military wives, but not husbands, reinforced gender stereotypes of masculine breadwinning and feminine dependence and, in turn, perpetuate the inferiority of women); *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (equality and discrimination analysis under the *Charter* must be purposive and contextual)

¹⁰¹ *Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (1984) 5 Hum. Rts. L.J. 161 (Inter-Am. Ct.) (holding that proposed naturalization amendments constituted discrimination contrary to the obligation to ensure equality of spouses within the family and equal protection of the law); *Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001) (Inter-American Commission on Human Rights) (holding that "stereotyped notions of the roles of women and men" in several of the provisions defining spousal roles and responsibilities in marriage in the 1963 Civil Code of the Republic Guatemala discriminated against the complainant as a married woman and deprived wives of autonomy and legal capacities); *Case of Opuz. v. Turkey* (2009) (Eur. Ct. H.R., Application no. 33401/02) (holding that domestic violence is a form of discrimination); *Gonzalez et al v. Mexico*, Judgment of November 16, 2009, (the Cotton Field decision) (Mexico held responsible for failing to investigate the gendered disappearances and murders of three poor, migrant women, two of whom were minors)

¹⁰² *Aumeeruddy-Cziffra et al. v. Mauritius*, Communication No. 35/1978, U.N. Doc. CCPR/C/12/D/35/1978 (Hum. Rts. Comm. 1981) (the HRC finding that the 1977 Immigration and Deportation Act of Mauritius that denied residence status to alien husbands of Mauritian women, but not the alien wives of Mauritian men, violated articles 2(1), 3, and 26 of the Covenant); *F.H. Zwaan-de-Vries v. the Netherlands*, Communication No. 182/1984, U.N. Doc. CCPR/C/29/D/182/1984 (the HRC found the provisions of the Netherlands Unemployment Benefits Act that denied unemployment benefits to married women who were neither breadwinners nor separated from their husbands, but did not deny such benefits to similarly situated men, violated Article 26 of the Covenant); *Ato del Avellanal v. Peru*, HRC, Communication No. 202/1986, UN Doc. CCPR/C/34/D/202/1986 (1988) (Human Rights Committee) (finding that the Peruvian Civil Code article 168 that stated that only a husband could represent matrimonial property before the courts violated the equality provisions of the ICCPR); *A.T. v. Hungary*, CEDAW, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005) (finding that gender-based violence against A.T. was linked to harmful gender stereotyping and finding Hungary in violation of CEDAW for failing to prevent and punish domestic violence).

enforcing sex equality all evidence an emerging customary rule against sex discrimination. In the International Court of Justice *South-West Africa Cases (Second Phase)*, Tanaka J. considered in dissent whether race non-discrimination constituted a “general principle” of international law for the purpose of Article 38(1)(c) of the I.C.J. statute. He found that that article:

... does not require the consent of States as a condition of the recognition of the general principles. States which do not recognize this principle or even deny its validity are nevertheless subject to its rule.¹⁰³ (emphasis added)

72. Tanaka J.’s discussion of a general principle against race discrimination is relevant to sex equality. The fact that some states continue to discriminate on the basis of sex should be treated as non-compliance with the international customary norm, rather than evidence of a new rule.¹⁰⁴
73. In accordance with this customary law rule against sex discrimination, the dominant trend in international state practice is to restrict and in some cases prohibit the practice of polygyny. Monogamy is the legally prescribed form of marriage in North and South America, Central America, Western and Eastern Europe, Australia, New Zealand, and most of Asia. In many African, Middle Eastern, and Asian states where polygamy is still legally permitted, the practice has been limited through spousal and/or judicial consent requirements. This has contributed, in part, to polygamy being more the exception than the norm even where it is permitted.¹⁰⁵

¹⁰³ Dissenting Opinion of Tanaka J., *South-West Africa Cases (Second Phase)*, Judgment of 18 July 1966, [1966] I.C.J. Rep. 284. Tanaka J. found a general principle of race non-discrimination on the basis that “laws against racial discrimination and segregation [exist] in the municipal systems of virtually every State....”.

¹⁰⁴ For discussion of this point, see Howland, “Challenge of Religious Fundamentalism” *supra* note 97 at 335. It could be argued that there is general agreement that sex is a prohibited ground of discrimination, though there is not consensus on the scope of the obligation to eliminate all forms of sex discrimination as evidenced by the number of reservations to CEDAW. For a discussion of reservations to CEDAW, see Rebecca J. Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination against Women” (1990) 30 *Virginia Journal of International Law* 643-716.

¹⁰⁵ See Jamal J. Nasir, *The Status of Women under Islamic Law and under Modern Islamic Legislation* (Boston: Brill, 2009) 25; for an overview of laws in Islamic countries where polygamy is or was historically permitted, see “Islamic Family Law”, <http://www.law.emory.edu/ifl/> (last visited July 2, 2010). See discussion in Bailey and Kaufman, *Polygamy in the Monogamous World*, *supra* note 37 at 21-68. The prevalence rate of polygyny in Africa, especially Western Africa, does remain high, some estimates placing it at 40% of marriages. See Kathleen E. Shedlon, *Historical Dictionary of Women in Sub-Saharan Africa* (Lanham, MD: Scarecrow Press, 2005) at “polygyny.”

A. Outright Prohibition

74. A majority of states in the world prohibit polygyny, either through criminal prohibitions of polygamy or bigamy.¹⁰⁶ Polygyny is prohibited throughout the Americas, Western and Eastern Europe, and large areas of Asia.¹⁰⁷ These prohibitions have traditionally aimed at protecting a monogamous definition of marriage or preventing fraud against persons or the state.¹⁰⁸ Current state practice evidences a growing emphasis on ensuring women's right to equality in marriage and family life and to some extent protecting the interest of children by limiting or prohibiting polygyny.¹⁰⁹ As such, state practice evinces a growing emphasis on polygyny as a violation of women's equality and dignity.

1. Africa

75. Polygyny is prohibited in Benin, Burundi, Côte d'Ivoire, Ethiopia, Rwanda, and Tunisia, amongst others.¹¹⁰ Legislation in Uganda that permits polygynous unions is currently being challenged before the Constitutional Court as a violation

¹⁰⁶ The definitions of "polygamy" and "bigamy" vary somewhat across jurisdictions. See discussion of polygamy and bigamy provisions *infra* Section II, A.

¹⁰⁷ See Susan Deller Ross, "Polygyny as a Violation of Women's Right to Equality in Marriage: An Historical, Comparative and International Human Rights Overview" (2002) 24 *Delhi Law Review* 22 at 22.

¹⁰⁸ In the Canadian context, see Law Reform Commission of Canada, *Bigamy*, Working Paper No. 42 (Ottawa: Law Reform Commission of Canada, 1985) at 13. The original anti-polygamy provision in the 1892 *Criminal Code* referred to Mormon "spiritual or plural marriage", *Criminal Code*, SC 1892, c. 29, ss. 275-278. This reference to Mormons was removed from the *Criminal Code* in 1954, see now *Criminal Code*, RSC 1985, c. C-46, s. 293. In the United States, see, *Potter v. Murray City* 760 F.2d 1065, stating: "Monogamy is inextricably woven into the fabric of our society... In light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship." For concerns about polygamy as fraud against persons or the state, see *State of Utah v. Green* 99 P.3d 820 at 39: "Beyond the State's interest in regulating marriage as an important social unit, or in maintaining its network of laws, Utah's bigamy statute serves additional legitimate government ends. Specifically, prohibiting bigamy implicates the State's interest in preventing the perpetration of marriage fraud, as well as its interest in preventing the misuse of government benefits associated with marital status."

¹⁰⁹ The Slovak Republic in its state report to the CRC noted that "the protection of children under criminal law is provided for under a separate chapter of the Penal Code, dealing with criminal offences committed against family and youth. These include polygamy..." See *Second Periodic Report to the Committee on the Rights of the Child: Slovak Republic*, UN CRCOR, 45th Sess., U.N. Doc. CRC/C/SVK/2 (2007), at para. 361.

¹¹⁰ Deller Ross, "Polygyny as a Violation of Women's Right", *supra* note 107 at 24; Women Living Under Muslim Laws, *Knowing Our Rights*, *supra* note 62; See Claire A. Smearman, "Second Wives' Club: Mapping the Impact of Polygyny in U.S. Immigration Law" (2009) 27 *Berkeley J. of Int'l Law* 382 at 385; See Charles Ngwena, "Sexual Health and Human Rights in the African Region" (Geneva: World Health Organization, forthcoming 2011); *Combined Second, Third and Fourth Reports to the Committee on the Elimination of Discrimination against Women: Burundi*, UN CEDAWOR, 40th Sess., U.N. Doc. CEDAW/C/BDI/4 (2008), at para. 155; *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Benin*, UN CEDAWOR, 33rd Sess., U.N. Doc. CEDAW/C/BEN/CO/1-3 (2005), at paras. 21-22.

- of sex equality.¹¹¹ The Law Commission of Malawi has recommended the enactment of a new Marriage, Divorce and Family Relations Act that would prohibit polygamy, “on account of its discriminatory effect and the negative impact it has on women.”¹¹²
76. Benin prohibited polygamy in 2004 as part of its omnibus family law reform. In the original draft of the Persons and Family Code, polygamy was still going to be permitted and married women would only be able to retain their family name following their husband’s name. Women’s rights groups lobbied for these provisions to be removed.¹¹³ In 2002, a reference was brought before the Constitutional Court of Benin by the President of the Republic and a Member of Parliament to determine the constitutionality of the draft Code. In its *Décision DCC 02-144*, the Constitutional Court of Benin concluded that the provision allowing men to take multiple wives, but requiring monogamy of women, violated the Constitution’s guarantee of equality of men and women.¹¹⁴ In response, the government removed the discriminatory provisions and the 2004 Persons and Family Code was passed with monogamy being the only legally recognized form of marriage.¹¹⁵
77. Tunisia provides an example of an African state that has prohibited polygamy on Islamic legal grounds. The Tunisian Code of Personal Status of 1956 adopted the Qu’ranic provisions in Sura IV, verse 3 requiring equal treatment of wives as a legal condition precedent to polygyny. However, Tunisian jurists reasoned that it was a practical impossibility in the modern socio-economic context to treat several wives impartially. Therefore, polygamy was to be prohibited.¹¹⁶ In 1964, Tunisian legal reforms went further by invalidating all polygamous marriages.¹¹⁷

¹¹¹ See “Human Rights Group Challenges Uganda’s Polygamy Laws”, 17 (2010) Human Rights Brief 44.

¹¹² *Sixth Periodic Report to the Committee on the Elimination of Discrimination against Women: Malawi*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/MWI/6 (2008), at para. 53.

¹¹³ See Geneviève Boko Nadjo, “Persons and Family Code of Benin”, Presentation at the NGO Forum in Addis Ababa, Ethiopia, October 2004. Available online: <www.wildaf-ao.org> (last checked July 10, 2010).

¹¹⁴ *Décision DCC 02-144*, Benin Constitutional Court (23 December 2002). “... aux termes des dispositions de l’article 26 alinéas 1 et 2 de la Constitution: <<L’État assure à tous l’égalité devant la loi sans distinction... de sexe... L’homme et la femme sont égaux en droit...>>. Au regard de l’affirmation de cette règle constitutionnelle, il y a traitement inégal entre l’homme et la femme eu ce que l’option prévue au 5ème tiret de l’article 74 permet à l’homme d’être polygame, alors que la femme ne peut être que monogame...”

¹¹⁵ Boko Nadjo, “Persons and Family Code of Benin”, *supra* note 113.

¹¹⁶ Article 18 of the Code provided, “Plurality of wives is prohibited. Any person who, being already married and before the marriage is lawfully dissolved, marries again, shall be liable to imprisonment for one year or for a fine of 240 000 francs, or to both, even if the second marriage is not in violation of any requirements of this law. See David Pearl & Werner Menski, *Muslim Family Law*, 3rd ed. (London: Sweet & Maxwell, 1998) at 242.

¹¹⁷ *Ibid.*

2. Asia

78. Polygyny is prohibited in China, Lao People's Democratic Republic, Vietnam, and Timor-Leste, among others and in most West Asian states.¹¹⁸
79. Uzbekistan prohibits polygamy and forced marriage under its Criminal Code. It has indicated that these provisions are aimed at guaranteeing “judicial protection of the rights of women both in the case of forced marriage and in the case of polygamy.”¹¹⁹

3. Australia and Oceania

80. Polygamy is prohibited in New Zealand and Australia. In New Zealand, “polygamy, in the form of multiple marriages, civil unions or a combination of the two, is... prohibited.”¹²⁰
81. It is an offence in Australia for a person who is already married to purport to marry another (“bigamy”).¹²¹ A marriage in Australia is not legally recognized if one of the parties is, at the time of the marriage, already lawfully married to another person.¹²² In 1992, the Law Reform Commission of Australia considered whether changes should be made to existing legislation regarding polygamy on the grounds of respecting diverse cultures.¹²³ The Commission's report was commissioned following the release in 1989 of the Australian government's policy statement on multiculturalism (“the National Agenda for a Multicultural

¹¹⁸ See *Fourth Periodic Report to the Committee on the Elimination of Discrimination against Women: Uzbekistan*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/UZB/4 (2010), at para. 660; *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Lao People's Democratic Republic*, UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/LAO/CO/7 (2009), at paras. 48-49; *Initial Report to the Committee on the Elimination of Discrimination against Women: Timor –Leste*, UN CEDAWOR, U.N. Doc. CEDAW/C/TLS/1 (2008), at S.L; *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan*, UN CEDAWOR, 42nd Sess., UN Doc. CEDAW/C/KGZ/CO/3 (2008), at paras. 21-22; *Combined Second and Third Periodic Reports to the Committee on the Elimination of Discrimination against Women: Azerbaijan*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/AZE/2-3 (2005), at p. 8; *Second Periodic Report to the Committee on the Elimination of Discrimination against Women: Kazakhstan*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/KAZ/2 (2007), at p. 56-57.

¹¹⁹ *Fourth Periodic Report to the Committee on the Elimination of Discrimination against Women: Uzbekistan*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/UZB/4 (2010), at para. 660.

¹²⁰ *Fifth Periodic Report to the Human Rights Committee: New Zealand*, UN HRCOR, 98th Sess., U.N. Doc. CCPR/C/NZL/5 (2010), at para. 350.

¹²¹ *Marriage Act 1961* (Cth) s. 94 as cited *Ibid*.

¹²² *Marriage Act 1961* (Cth) s. 23(1)(a); s. 23B(1)(a) as cited *Ibid*.

¹²³ Australian Law Reform Commission, *Multiculturalism and the Law*, Final Paper - ALRC 57 (Sydney: Australian Law Reform Commission, 1992)

Australia”).¹²⁴ One of the Commission’s aims was to ensure “equality before the law by systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians.”¹²⁵ In pursuing this objective, the Commission noted that:

[l]aws and policies based on *one view or one set of assumptions* about family relationships which do not take into account *the diversity of family arrangements* in Australian society *may impact harshly on communities or individuals* whose family relationships are differently defined.¹²⁶ (emphasis added)

82. Some parties argued that the principle of diversity should logically lead to the recognition of polygamy under Australian law. Broader definitions of marriage and family would recognize the relationships people choose for themselves, for example within Muslim communities. Especially given that *de facto* rather than *de jure* marriages may be totally unacceptable in such communities, the Commission was urged to recommend legal recognition.¹²⁷
83. While the Commission acknowledged that within some Muslim communities, polygynous marriages may be acceptable and legal recognition preferable, it found that “recognising the legal status of polygamy would... offend the principles of gender equality that underlie Australian laws.”¹²⁸ It went on to note that the majority of submissions it received did not endorse the legal recognition of polygamy. To this end, the Commission recommended against legislative reform that would allow polygamous marriages contracted in Australia to be recognized as legally valid marriages.¹²⁹

4. Europe

84. European civil law countries also prohibit polygamous unions. In France, Belgium, and Luxembourg, Article 147 of their Civil Codes states “On ne peut contracter un second mariage avant la dissolution du premier.” Similarly, according to Article 96 of the Swiss Civil Code: “Toute personne qui veut se remarier doit établir que son précédent mariage a été annulé ou dissous.”¹³⁰

¹²⁴ Available online: <http://www.immi.gov.au/media/publications/multicultural/agenda/agenda89/toc.htm> (last visited July 14, 2010).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at 67.

¹²⁷ *Ibid.* at 93.

¹²⁸ *Ibid.* at 94.

¹²⁹ *Ibid.*

¹³⁰ See Université de Sherbrooke, Site International Francophone sur le Droit des Femmes – Lois et règlements, online: http://www.usherbrooke.ca/sifdf/base_de_connaissance/lois-nationalite.html (last visited July 14, 2010).

85. There is an emerging emphasis in European law on the gender inequality of polygyny. In its Finance Act of July, 2003, France henceforth prohibited, in its overseas territory of Mayotte, family practices that are incompatible with republican principles, including polygyny and unilateral repudiation (divorce).¹³¹ In its *Décision No. 2003-474*, the French Constitutional Council found that the French Republic's Constitutional guarantees mean that "citizens of the Republic who retain their personal status enjoy the rights and freedoms associated with French citizenship and are subject to the same obligations..."¹³² In other words, persons subject to religious or customary personal law systems in overseas French territories are still guaranteed constitutional rights and obligations. The Court held that the legislature was therefore justified in eliminating exceptional arrangements based on local and customary law, including polygamy and repudiation.¹³³
86. The social and legal response to existing polygynous unions in France, estimated between 16 000 – 20 000 families, have however been inadequate to date.¹³⁴ France adopted an abolitionist approach to polygamy in 1993 that failed to recognize polygynous unions for any purposes. It retroactively applied this non-recognition approach to polygynous families already living in France. This meant that, unless multiple spouses divorced one another and physically separated their households, which the vast majority could not afford to do, they would lose their residence and working papers, social benefits, and their French citizenship, and be subject to deportation.¹³⁵ Domestic prohibitions of polygyny are a valid prospective means to eliminate a discriminatory family practice. However, international human rights law also requires sufficient legal protection for those wives already in *de facto* or *de jure* polygynous unions, including access to family law relief, such as spousal support and child support.¹³⁶

¹³¹ *Sixth Periodic Report to the Committee on the Elimination of Discrimination against Women: France*, UN CEDAWOR, 40th Sess., U.N. Doc. CEDAW/C/FRA/6 (2008), at S.II.A.

¹³² *Fourth Periodic Report to the Human Rights Committee: France*, UN HRCOR, 93rd Sess., U.N. Doc. CCPR/C/FRA/4 (2008), at para. 20.

¹³³ *Fourth Periodic Report to the Human Rights Committee: France*, UN HRCOR, 93rd Sess., U.N. Doc. CCPR/C/FRA/4 (2008), at para. 20.

¹³⁴ See Sonia Imloul, "La Polygamie en France: Une Fatalité?" (Paris: Institut Montaigne, 2009).

¹³⁵ *Ibid.* See Sonja Starr and Lea Brilmayer, "Family Separation as a Violation of International Law" (2003) 21 Berkely Journal of International Law 213.

¹³⁶ In states where polygamy is prohibited, the CEDAW Committee has urged the State party "to review the vulnerable situation of second and subsequent wives in currently existing polygamous unions, with a view to ensuring their economic rights." *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Tajikistan*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/TJK/CO/3 (2007), at para. 35. It has also recommended that State parties "seriously consider the situation of women in *de facto* unions, and of the children resulting from such unions, and ensure that they enjoy adequate legal protection. *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Madagascar*, UN CEDAWOR, 42nd Sess., U.N. Doc. CEDAW/C/MDG/CO/5 (2008), at para. 37. Canadian domestic family law through its recognition of cohabitation relationships for spousal support, child support, and constructive trust property remedies can provide protection for vulnerable *de facto* polygynous wives. For a discussion applying international human rights law to the domestic family law treatment of polygamy, For a discussion applying international human rights law to the domestic family

87. The prospect of deportation of polygynous families was raised in the recent case of Lies Hebbadji, a polygamous man living with four wives in France. The Immigration Minister, Eric Bresson, conceded that under current French law there was no ground for stripping Mr. Hebbadji of his French citizenship and deporting him.¹³⁷
88. In England, polygamy is also prohibited as the crime of bigamy.¹³⁸ In *R. v. Taylor*, the Court of Criminal Appeal made clear that the bigamy provision is intended to cover polygamous unions. Lord Goddard C.J. stated with respect to the bigamy prohibition, “[i]t is clear from that section that what is aimed at there is what I may call polygamy – not merely bigamy, a second marriage, but any number of marriages, because the words are ‘shall marry any person or persons.’”¹³⁹
89. There has been criticism of England’s prohibition of polygamy by some Muslim groups. While there are no official statistics regarding the number of people in polygynous unions in the United Kingdom, media reports in 2000 estimated that there may be hundreds.¹⁴⁰ With the entry into force of the Human Rights Act in the United Kingdom in 2000, the Muslim Parliament announced plans to challenge the domestic prohibition of polygamy under the European Convention’s guarantees of the rights to respect for private and family life, as well as religious freedom.¹⁴¹ No such challenge has been taken as of the date of this report.
90. Finally, Turkey, a predominantly Muslim country, also prohibits polygyny. It first restricted polygyny in 1917, requiring the consent of the first wife to subsequent marriages. With the adoption of the Turkish Civil Code in 1926, the practice was banned completely.¹⁴² While it is believed that polygyny is still practiced informally in some parts of Turkey, it is largely limited to rural areas or among the urban rich. In such situations, the second wife, the *kuma*, is married in a religious ceremony conducted by an imam and has no legal rights under Turkish civil law.¹⁴³

law treatment of polygamy, see Lisa M. Kelly, “Bringing International Human Rights Law Home”, *supra* note 69

¹³⁷ The Economist, “Polygamy in France-Many wives Tales”, The Economist, May 8, 2010, at 55.

¹³⁸ Section 57 of the *Offences Against the Person Act, 1861*, (Eng.), c. 100, s. 57 states:

Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years....

¹³⁹ *R v Taylor* [1950] 2 KB 368, 34 CrApp Rep 138 CCA. For discussion of the English bigamy provision, see Samuel Chapman, *Polygamy, Bigamy and Human Rights Law* (U.S.A.: Xlibris Corp., 2001) at 31-32.

¹⁴⁰ *Ibid.*

¹⁴¹ See “Polygamy law set for challenge” *BBC News* (18 June 2000), online: <http://news.bbc.co.uk/1/hi/uk/791263.stm>

¹⁴² Abdullahi An-Na’im, ed., *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).

¹⁴³ *Ibid.*

5. North America

91. Polygyny is also prohibited throughout North America. Canada has separate *Criminal Code* provisions for bigamy (s. 290) and polygamy (s. 293). Section 290 of the *Criminal Code* provides:

- (1) Every one commits bigamy who
 - (a) in Canada,
 - (i) being married, goes through a form of marriage with another person,
 - (ii) knowing that another person is married, goes through a form of marriage with that person, or
 - (iii) on the same day or simultaneously, goes through a form of marriage with more than one person;...¹⁴⁴

92. Section 293 states:

- (1) Every one who
 - (a) practises or enters into or in any manner agrees or consents to practise or enter into
 - (i) any form of polygamy, or
 - (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or
 - (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii)...

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.¹⁴⁵

93. In the United States, polygamy is not a crime under federal law, nor is it an enumerated offence in most states.¹⁴⁶ Whereas nine states criminalize polygamy in their penal codes,¹⁴⁷ 49 states and the District of Columbia criminally prohibit bigamy. This means that outside the nine states that expressly prohibit polygamy, persons prosecuted for polygyny are charged under bigamy provisions.

¹⁴⁴ *Criminal Code*, RSC 1985, c. C-46, s. 290.

¹⁴⁵ *Criminal Code*, R.S.C. 1985, c. C-46, s.293.

¹⁴⁶ See Smearman, "Second Wives' Club", *supra* note 110 at 429.

¹⁴⁷ Mich. Comp. Laws Ann. § 750.441; Mississippi, Miss. Code Ann. § 97-27-43; Massachusetts, Mass. Gen. Laws ch. 272, § 13; Arizona, Ariz. Const. art. 20 ¶ 2; Utah, Utah Code Ann. 1953 § 76-7-101; Virginia, Va. Code Ann. § 18.2-363; Maine, Me. Rev. Stat. Ann. Tit. 17-A, § 551; New Mexico, N.M. Const. art. 21, § 1; Oklahoma, OK Const. art 1, as cited in Smearman, "Second Wives' Club", *supra* note 110 at 429.

94. In Utah, where there was a long history of Mormon polygamy and persecution by the Federal government, polygamy was constitutionally and statutorily prohibited as a condition to joining the Union.¹⁴⁸ Article III, Section 1 of Utah’s Constitution states that:

Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.¹⁴⁹

95. The Utah Criminal Code provides that:

(1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.

(2) Bigamy is a felony of the third degree.¹⁵⁰

96. The legislature aims to address *de facto* polygynous unions through the language “purports to marry... or cohabits with another person.” Another Utah statute also establishes criminal penalties for any state clerk who knowingly provides marriage licenses for prohibited marriages.¹⁵¹

97. A direct challenge to Utah’s bigamy provision was rejected by the Supreme Court of Utah in *State v. Green*.¹⁵² In that case, Tom Green, who had publicly displayed his polygynous union to multiple wives, was charged with four counts of bigamy, amongst other charges. Green appealed his conviction to the Supreme Court of Utah on the grounds that the bigamy statute violated his federal constitutional right to free exercise of religion and was unconstitutionally vague as applied to Green’s conduct. The Court rejected both arguments. The Court held that the statute was rationally connected to the state interest in regulating marriage according to a monogamous model. The bigamy provision allowed the state to prevent fraud and protect “vulnerable individuals from exploitation and abuse.”¹⁵³ The Court also held that the State’s use of Utah’s unsolemnized marriage statute to establish a legal marriage between Green and one of his polygamous wives was appropriate.¹⁵⁴

¹⁴⁸ When the State of Utah was required to prohibit polygamy in order to join the union, there was a reinterpretation of the Mormon faith to also prohibiting polygamy. For a discussion of this history, see Kelly Elizabeth Phipps, “Note: Marriage and Redemption: Mormon Polygamy in Congressional Imagination, 1862-1887” (2009) 95 Va. L. Rev. 435; Laura Elizabeth Brown, “Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy under the Mann Act” (2008) 39 McGeorge L. Rev. 267.

¹⁴⁹ Utah Const. art. III, § 1.

¹⁵⁰ Utah Code Ann. § 76-7-101 (2003).

¹⁵¹ *See id.* § 30-1-16 (1998).

¹⁵² *State of Utah v. Green*, 2004 UT 76.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

98. This reasoning was recently upheld in *Bronson, Cook & Cook v. Swensen*.¹⁵⁵ In that case, the plaintiffs challenged a Salt Lake City County clerk's refusal to grant the plaintiffs a marriage licence on the basis that the plaintiff, Mr. Cook, was already legally married. The plaintiffs argued that Utah's prohibition of polygamy violated their constitutional rights to free exercise of their religion, right of association, and their right to privacy, as protected by the First, Fourteenth, and other Amendments of the United States Constitution.¹⁵⁶
99. The District Court upheld the constitutionality of Utah's polygamy prohibition. It held that the state of Utah has "a compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage."¹⁵⁷ The District Court also considered whether the United States Supreme Court's decision in *Lawrence v. Texas*,¹⁵⁸ striking down a criminal prohibition of private, same-sex sexual activity, extended to polygamous marriage. The District Court held that it did not. Unlike the issue of polygamy, as practiced in Utah and elsewhere, the Supreme Court expressly stated in *Lawrence* that the case did "not involve minors...[or] persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."¹⁵⁹ Moreover, *Lawrence* had not involved "public conduct... [and did] not involve [the question of] whether the government must give formal recognition to any relationship that homosexual persons seek to enter."¹⁶⁰ The associated harms of polygamy, combined with the public nature of marriage as a legal and social institution, distinguished the case from *Lawrence*. While the State of Utah could not preclude private sexual contact between the plaintiffs, it could withhold recognition of a proposed plural marriage.¹⁶¹ The District Court's ruling was upheld by the Court of Appeal for the Tenth Circuit on the ground that the plaintiffs did not have standing to challenge the constitutionality of the criminal prohibition of polygamy.¹⁶²
100. Most recently in *State of Utah v. Holm*, the Utah Supreme Court upheld Utah's polygamy prohibition against a free exercise of religion challenge.¹⁶³ The Court held that the anti-polygamy provision in the Utah Constitution targets proscribed behavior, not the religious motivation underlying it.¹⁶⁴ The Court also rejected the argument that there was a due process or freedom of association violation in

¹⁵⁵ *Bronson v. Swensen*, 2005 U.S. Dist. LEXIS 2374 (D. Utah 15 February, 2005).

¹⁵⁶ *Ibid.* at 2.

¹⁵⁷ *Ibid.* at 7.

¹⁵⁸ *Lawrence et al. v. Texas*, 539 U.S. 558 (2003).

¹⁵⁹ *Lawrence*, *supra* note 158 at 578.

¹⁶⁰ as cited in *Bronson*, *supra* note 370 at 12.

¹⁶¹ *Ibid.*

¹⁶² *Bronson v. Swenson*, 500 F. 3d 1099 (C.A. 10th Cir. 2007). The plaintiffs were never criminally prosecuted, but were instead refused a marriage licence.

¹⁶³ *Utah v. Holm*, 2006 UT 31, 137 P. 3d 726 (Sup. Ct.)

¹⁶⁴ *Ibid.* at 745.

this case. In contrast to *Lawrence v. Texas*, *Holm* concerned the “public institution of marriage”, not merely private consensual sexual activity.¹⁶⁵

101. United States’ jurisprudence on Mormon polygyny has held that although state law cannot interfere with religious *belief*, it may intervene where religious *practices* undermine the rights of others. In *Reynolds v. United States*, the United States Supreme Court held that while laws “cannot interfere with mere religious belief and opinions, they may with practices.”¹⁶⁶

B. Restrictions on Polygyny

102. The regional trend in Africa, the Middle East, and Asia is to restrict and in some cases prohibit polygyny. Attempts to legislate in the other direction – to permit or loosen restrictions on polygyny – have been met with growing resistance. When legislation was proposed in Iran in 2008 that would allow a husband to take an additional wife without the first wife’s permission, it failed, in part because of strong opposition by women’s equality groups.¹⁶⁷

1. Notice Requirements

103. Some domestic legal systems still only minimally regulate the practice, typically through spousal notification requirements and a requirement of equal treatment of wives as a tenet of Islamic law. As Egypt has emphasized in its state report to CEDAW, “the key condition [in Islam] is absolute fairness in the treatment of multiple wives.”¹⁶⁸

104. Similar notice requirements exist in Sri Lanka, where a husband is required to give notice of his intention to enter a polygynous marriage to the *Quazi* in the area where he lives, the *Quazi* where his intended wife lives, and the *Quazi* where his present wife lives.¹⁶⁹ The *Quazis* are then expected to provide notice in all Jumma Mosques.

¹⁶⁵ *Ibid.* at 742.

¹⁶⁶ *Reynolds v. United States*, 98 US 145 (1879),.

¹⁶⁷ For discussion of the bill, see Elahe Amani, “Widespread Opposition to Iran’s ‘Family Protection Bill’”, Women’s UN Report Network, 15 August 2008, available online: <http://www.wunrn.com/news/2008/08_08/08_11_08/081108_iran.htm> (last checked July 10, 2010).

¹⁶⁸ *Combined Sixth and Seventh Periodic Reports to the Committee on the Elimination of Discrimination Against Women: Egypt*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/EGY/7 further submission A/E (2010), at p. 14 (Remarks 354 and 355). Lebanon also provides that “polygamy is only permitted on the condition of fair and equal treatment of the wives (article 74 of the Code of Family Rights). *Third Periodic Report to the Committee on the Elimination of Discrimination Against Women: Lebanon*, UN CEDAWOR, 40th Sess., U.N. Doc. CEDAW/C/LBN/3 (2008), at para. 347.

¹⁶⁹ Women Living Under Muslim Laws, *Knowing Our Rights*, *supra* note 62 at 201. *Quazi* Courts are staffed by judges (*quazis*) who are appointed by the Judicial Services Commission. Male Muslims of good character and position are eligible for appointment as *Quazis*.

105. Egypt imposes notice requirements by mandating that a Notary Public notify the existing wife/wives of a new marriage by registered mail.¹⁷⁰ In addition, one sees similar “divorce benefits” for women under Egyptian Act No. 100/1985, which entitles a wife who has not implicitly or expressly consented to her husband’s remarriage to apply for a divorce if she suffers a moral or material injury that makes continued marital life difficult, even if she did not preclude a polygynous union in the original marriage contract.¹⁷¹ Significantly, however, a wife loses the right to apply for a divorce under these grounds one year after she has knowledge of the subsequent marriage. In addition to the present wife, if the new wife is not given notice that the husband is already married until after the marriage is performed, she can also apply for a divorce.¹⁷²

2. Governmental Authorization Requirements

106. As legal systems in Indonesia, Pakistan, Bangladesh, Malaysia, Morocco and Singapore, amongst others, have moved to restrict polygyny, husbands are now increasingly required to obtain the permission of a governmental authority, court or quasi-judicial body to contract a polygynous marriage which is often contingent on the wife’s consent.¹⁷³

107. In Jordan, polygyny is governed by the 1976 Law of Personal Status as amended by the 2001 Temporary Amendments (interim) law No. 82.¹⁷⁴ The 1976 Law of Personal Status permits a wife to make a number of stipulations in a marriage contract, including whether she will be forced to move, whether the husband will delegate to her the power to divorce, and whether he may take another wife.¹⁷⁵ These stipulations give the wife significant powers to obtain divorce. The legislative provisions governing polygamy require the *qadi* (religious official) to ascertain the husband’s ability to pay dower and maintenance, and that the subsequent wife is informed of the existing marriage, and to notify the first wife before carrying out the contract for a polygynous marriage.¹⁷⁶

108. It is important to note that permission-based systems vary. Some systems provide for more robust notice and consent requirements for wives than others. Singapore, for instance, requires that both the existing and proposed wives be consulted regarding their views on the proposed marriage.¹⁷⁷ Muslim personal status law in India allows for a Muslim wife to “stipulate for the power to

¹⁷⁰ Nasir, *The Status of Women*, *supra* note 105 at 68.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Women Living Under Muslim Laws, *Knowing Our Rights*, *supra* note 62 at 200-201.

¹⁷⁴ *Combined Third and Fourth Periodic Reports to the Committee on the Elimination of Discrimination Against Women: Jordan*, UN CEDAWOR, 39th Sess., U.N. Doc. CEDAW/C/JOR/3-4, at para. 249; See discussion in Bailey and Kaufman, *Polygamy in the Monogamous World*, *supra* note 37 at 48-50.

¹⁷⁵ As excerpted in Bailey and Kaufman, *Polygamy in the Monogamous World*, *Ibid.* at 49.

¹⁷⁶ *Ibid.*

¹⁷⁷ Women Living Under Muslim Laws, *Knowing Our Rights*, *supra* note 62 at 200.

divorce... in case of the husband availing of his legal right to take another wife.”¹⁷⁸ Other legal systems focus more on the conditions the husband must fulfill, for example the financial capacity to maintain multiple wives.¹⁷⁹ Such material requirements are often based on purely economic indicators and do not take into account women’s sexual and emotional needs.¹⁸⁰ The final significant shortcoming of such permission-based regulatory systems is that the penalties for failing to follow the required procedure are often minimal and in some systems, including Bangladesh, Sri Lanka, Pakistan, and Malaysia, the subsequent marriage still remains valid.¹⁸¹

109. In Iraq, judicial authorization is required before a husband can marry more than one wife. This judicial authorization is contingent on the husband being financially capable of supporting an additional wife, as well on as the existence of a legitimate interest for the subsequent marriage.¹⁸² The judge also retains the discretion to refuse to permit the subsequent marriage if he believes that the wives would not be treated equitably. Here, if a man contravenes the rules, he is subject to a fine of 100 Iraqi dinars or a penalty of one year imprisonment. Of course, with the invasion of Iraq, there has been lesser enforcement. There is some evidence of polygyny being on the increase, in part due to an imbalance in the sex ratio toward lesser adult men.¹⁸³

110. In a recent challenge to judicial and spousal permission requirements in Indonesia, the Constitutional Court of the Republic of Indonesia held that these limits on polygyny were reasonable and constitutional. In particular, it held that “the wife’s consent is required because it is closely related to the wife’s position as an equal partner and as a legal subject in a marriage whose dignity and status must be respected.”¹⁸⁴

111. While Syrian law is less categorical, there too judges have the power to forbid a married man from taking another wife unless there is legitimate justification and he is financially capable of supporting her.¹⁸⁵ Along similar lines, Yemen’s legislation allows men to have up to four wives, as per Shari’a, if he can deal with them justly, or else he is limited to one. In order to enter into a subsequent marriage, there must be a lawful benefit, the proposed wife must be aware that the man is already married, the present wife must be notified that her husband intends

¹⁷⁸ *Sheikh Moh v. Badrunnissa Bibee*, 7 Beng LR App 5, *Badarannissa Bibi v. Mafiattala*, 7 Beng LR 442 as cited in *Itwari*, supra note 61 at 686.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² Article 3 of the Personal Status Law No. 188 of the year 1959: Personal Status Law and Amendments Iraq, as cited in Bailey and Kaufman, *Polygamy in the Monogamous World*, supra note 37 at 46-47; see also Nasir, *The Status of Women*, supra note 105 at 67.

¹⁸³ See Nadjé Al-Ali, “Reconstructing Gender: Iraq: Women Between Dictatorship, War, Sanctions and Occupation” (2005) 26 Third World Quarterly 750.

¹⁸⁴ *M Insa, S.H.*, Decision Number 12/PUU-V/2007, (The Constitutional Court of the Republic of Indonesia) (2007).

¹⁸⁵ *Ibid.*

- to take another wife, and the husband must be financially capable of supporting more than one wife.¹⁸⁶
112. In 2004, Morocco undertook comprehensive reform of its family law code (“Mudawwana”).¹⁸⁷ Among other reforms, the revised Mudawwana placed polygyny and repudiation under judicial control. Article 40 now provides that “polygamy is forbidden when there is the risk of inequity between the wives. It is also forbidden when the wife stipulates in the marriage contract that her husband will not take another wife.”¹⁸⁸ Article 41 further provides that a court will not authorize polygamy if an exceptional justification is not proven and if the husband does not have sufficient resources to support both families, and guarantee maintenance rights, accommodation, and equality in all respects.¹⁸⁹
113. The “legitimate interest” or “lawful benefit” requirement for remarriage referred to in some of the above legal systems often centres on “defects” in an existing wife. These may include a present wife’s absence from the country, her insanity, her inability to perform “marital duties”, her infertility, or the presence of physical defects or an incurable disease.¹⁹⁰ Many of these “legitimate justifications” for remarriage stereotype women into reproductive or service roles by permitting subsequent unions when present wives are unable to perform these functions. In addition, as the NGO “Women Living Under Muslim Laws” has noted, systems that permit remarriage on such grounds typically do not allow women to seek a divorce on reciprocal grounds, illustrating the gender-bias often built into permission systems.¹⁹¹

3. Polygyny in Parallel Legal Systems

114. In contrast to permission-based systems that apply equally to all persons, some domestic systems, particularly within the African context, operate under parallel legal systems. There, the legal validity of a polygynous union will depend on whether one marries under civil, customary or Islamic law.¹⁹² CEDAW has strongly criticized parallel judicial systems that allow for polygyny. In its 1998 Concluding Observations on Tanzania, it noted with concern:

¹⁸⁶ *Ibid.*

¹⁸⁷ See Katie Zoglin, “Morocco’s Family Code: Improving Equality for Women” (2009) 31 Human Rights Quarterly 964, at 972.

¹⁸⁸ *Combined Third and Fourth Periodic Reports to the Convention on the Elimination of Discrimination Against Women: Morocco*, UN CEDAWOR, 40th Sess., U.N. Doc. CEDAW/C/MAR/4 (2008), at para. 368

¹⁸⁹ See Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007), 168. www.hrea.org/moudawan.html

¹⁹⁰ Women Living Under Muslim Laws, *Knowing Our Rights*, *supra* note 62 at 200.

¹⁹¹ *Ibid.*

¹⁹² An-Na’im, *Islamic Family Law*, *supra* note 142 at 47.

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 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*.¹⁹³ (emphasis added)

115. In addressing discriminatory customary or religious laws, the CEDAW Committee has tried to break down the public-private distinction that has often sheltered discrimination against marriage and the family from public scrutiny. Deference to parallel systems can also leave some women in a legal lacuna where a husband dies and not all marriages are recognized under intestate statutes. The CEDAW Committee has encouraged states to “harmonize civil, religious and customary law” in an effort to eliminate discrimination in inheritance.¹⁹⁴

116. Where states such as the Gambia, India and Nigeria, amongst others, recognize secular, religious and customary laws, couples can opt to be governed by any of them, depending on the form of the marriage.¹⁹⁵ While these parallel systems seem to offer women a range of options (monogamy or a legal recognition of their rights as polygynous wives), commentators have noted that these advantages are typically undermined by women’s inability to determine which law they will be married under and whether or not their marriage will be monogamous.¹⁹⁶ In this sense, men may be able to deliberately use parallel systems to their advantage. In Nigeria, men married under the Marriage Act, which prohibits polygyny, may have previously married or may subsequently marry under Islamic or customary laws with impunity.¹⁹⁷

117. The opportunity for men to use parallel legal systems to their advantage is particularly evident with religious laws. In countries including Sri Lanka, the Gambia and Malaysia, where polygyny is banned under civil marriage laws or laws applicable to other communities, for example, men have converted to Islam to facilitate a polygynous union.¹⁹⁸ Notably, however, an Indian Court rejected this type of argument in *B. Chandra Manil Kyamma v. B. Sudershan*, wherein a Hindu male converted to Islam to contract a second marriage against the wishes

¹⁹³ *Concluding Observations on the Elimination of Discrimination Against Women, Tanzania*, 19th Sess., UN Doc. A/53/38/Rev.1, (1998), at para. 229. See also *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Botswana*, UN CEDAWOR, 45th Sess., UN Doc. CEDAW/C/BOT/CO/3 (2010), at para. 48; and, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Malawi*, UN CEDAWOR, 45th Sess., UN Doc. CEDAW/C/MWI/CO/67 (2010), at paras. 42-43

¹⁹⁴ *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Ghana*, UN CEDAWOR, 36th Sess., UN Doc. CEDAW/C/GHA/CO/5 (2006) at paras. 35-36.

¹⁹⁵ Women Living Under Muslim Laws, *Knowing Our Rights*, *supra* note 62 at 199.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid* at 200.

¹⁹⁸ *Ibid.*

- of his first wife.¹⁹⁹ The Court held that because strict interpretations of both Islamic and Hindu tenets indicated that a second marriage while a first wife is still alive is discouraged, the second marriage was invalid and a religious conversion could not be used to justify it.²⁰⁰
118. Beyond possible manipulation, dualist systems also raise the spectre that polygynous wives married under religious or customary law will be left without important civil law protections in their country. In Ethiopia, for example, formal marriage laws typically have little impact on most rural households, which adhere to religious, customary, and traditional practices.²⁰¹ 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 rights within the marriage.²⁰²
119. The South African Constitutional Court recently addressed this issue in *Hassam v. Jacobs*.²⁰³ The Intestate Succession Act differentiated between three classes of widows: i) those married in terms of the civil Marriage Act versus those married in terms of Muslim rights; ii) those married in monogamous Muslim marriages versus those in polygynous Muslim marriages; and iii) widows in polygynous customary marriages versus those in polygynous Muslim marriages. The Court held that this differentiation amounted to discrimination in violation of the equality provision of the South African Constitution. In particular, the Court emphasized South Africa's commitment to "transformative constitutionalism." This approach attempts to give expression to the foundational values of the Constitution, including gender equality, while recognizing prevailing mores of society. The Court held that the Constitution required that "necessary protection [be granted] to those adversely affected by the exclusion under the Act."²⁰⁴ This approach comports with the international human rights approach of extending protection to existing polygynous unions, while still taking all appropriate measures to eliminate the practice.
120. The problems associated with non-recognition under parallel systems have drawn considerable attention in Kenya, where approximately 16% of married women are in polygynous unions sanctioned by customary or Islamic law.²⁰⁵ Within the Kenyan system, second wives are particularly vulnerable to state

¹⁹⁹ (1989) A.P. 1. HLR 183.

²⁰⁰ *Ibid.*

²⁰¹ Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives - Anglophone Africa, 2001 Progress Report* (New York: Center for Reproductive Law and Policy, 2001) at 25.

²⁰² *Ibid.*

²⁰³ Case CCT 83/08 [2009] ZACC 19.

²⁰⁴ *Ibid.* at para. 28.

²⁰⁵ Ctr. For Reproductive Law and Policy, *Women of the World*, *supra* note 201 at 61.

- discrimination.²⁰⁶ Payments for national health insurance, for example, are normally taken out of a husband's salary for himself and his first wife. This means that subsequent wives' premiums are not automatically deducted, often leaving them without coverage for health services. Moreover, because of their poor knowledge of the insurance system, husbands rarely ask for their second wife's premium to also be deducted.²⁰⁷ The 2000 Kenyan National Gender and Development Policy expressly recognized that marriage laws often negatively impact the rights of Kenyan women.²⁰⁸
121. Within Anglophone Africa, customary marriages are still pervasive. In Zimbabwe, for example, they account for 82% of marriages.²⁰⁹ Significantly, however, several countries in Anglophone Africa are increasingly stressing the importance of consent in marriage, have increased their minimum age for marriage, and are moving toward formalizing customary unions.²¹⁰
122. Recent South African legal reforms are illustrative of efforts 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.²¹¹ With its 1998 Recognition of Customary Marriages Act, it moved toward restricting and, in the majority of cases, prohibiting polygyny. 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.²¹²
123. Within Francophone Africa, countries are beginning to outlaw polygyny, including Benin, Côte d'Ivoire, and Rwanda.²¹³ In Côte d'Ivoire, polygamy is punishable by a fine of 50 000 to 500 000 CFA francs (US \$79.59 to \$795.54) or between six months and three years' imprisonment.²¹⁴ This punishment extends to cases of attempted polygamy as well as to the registrar or religious official who performs the marriage. 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 1964.²¹⁵

²⁰⁶ An-Na'im, *Islamic Family Law*, *supra* note 142 at 48.

²⁰⁷ *Ibid.*

²⁰⁸ Ctr. For Reproductive Law and Policy, *Women of the World*, *supra* note 201 at 61.

²⁰⁹ *Ibid.* at 167.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ See Charles Ngweni, "Sexual Health and Human Rights", *supra* note 110.

²¹⁴ Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives—Francophone Africa* (New York, NY: Center for Reproductive Law and Policy, 2003) at 191.

²¹⁵ *Ibid.*

124. For the majority of states in Francophone Africa, including Cameroon, Chad, Mali and Senegal, however, polygyny is automatically permitted unless spouses initially indicate otherwise.²¹⁶ In Chad, because there is no Family Code in force, marital rights are governed by several texts.²¹⁷ The legislature has made polygyny the default presumption by requiring that spouses “renounce polygamy” at the time of marriage, as per Order 03/INT/61, if their marriage is to be considered monogamous. Where the monogamy clause is violated, the marriage can be dissolved unilaterally at the wife’s request without reimbursement of the bride-price.²¹⁸ In contrast, the Civil Code allows only monogamous unions by not permitting a second marriage to be contracted without the dissolution of the first.

125. Negative health consequences are associated with such multiple unions, whether polygynous or polyandrous, given the AIDS pandemic in the African region and the manner in which polygamous unions facilitate the transfer of the virus between multiple spouses.²¹⁹ Indeed in its 1998 Concluding Observations on Nigeria, CEDAW expressed concern about the lack of statistical information on AIDS and sexually transmitted diseases in the country, and noted that “polygamy and prostitution [are] serious risk factors in the spread of sexually transmitted diseases.”²²⁰ In this regard, parallel legislative schemes that permit or even default to polygyny perpetuate a practice that threatens the health of all partners involved.

C. Immigration Restrictions regarding Individuals in Polygynous Unions

126. The trend in immigration laws and policies is to prohibit the entry of polygynous families. In the immigrations laws of Australia,²²¹ Canada,²²² France,²²³ the

²¹⁶ *Ibid.* at 191.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.* at 103.

²¹⁹ *Ibid.* at 192.

²²⁰ *Concluding Observations on the Elimination of Discrimination Against Women, Nigeria*, UN CEDAWOR, UN doc A/53/38/Rev.1(1998), at paras. 138-174.

²²¹ In Australia, “Only the first marriage in polygamous marital situations is capable of being recognised as a valid marriage under migration law, given the exclusion under migration law of s88E of the Marriage Act. It follows that only this “first spouse”, if the current on-going relationship, is capable of satisfying regulation 1.15A(1A)(a) requirements. Regulation 1.15A(1A)(b) requirement must also be met in order for this “first marriage” to be a spouse relationship. In particular, the parties to this first marriage must have a mutual commitment to a shared life to the exclusion of all others, including any concurrent “spouses”. This in effect requires any concurrent “spouses relationships” to have ended, see decision of the Migration Review Tribunal of Australia in the case of Mr. Salim Bhimani, 071367301 [2007] MRTA 575 (24 October 2007), <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/MRTA/2007/575.html?stem=0&synonyms=0&query=polygamous> (last visited, July 14, 2010)

²²² In Canada, Section 13.2 Polygamous Marriages of the Overseas Processing and Operations Manual (Citizenship and Immigration Canada, 2006) states:

“Officers must counsel both parties that polygamy is an offence under the Criminal Code of Canada.

U.K.²²⁴ and the U.S.,²²⁵ polygamy is a bar to immigration. The approaches countries take to ensuring that only monogamous families immigrate varies. Some countries, such as Australia, and Canada provide that only the first marriage may potentially be recognized for immigration purposes. In the U.K., it is the order in which polygamous wives come to the U.K. for settlement, not the order in which they marry the husband, which is the important factor for determining which wife is recognized as the lawful spouse for immigration purposes.²²⁶ Australia²²⁷ and Canada²²⁸ require that the sponsoring spouse provide evidence of lawful divorce of any concurrent wives. U.S. immigration policy “permits the husband in a polygamous marriage to sponsor a first wife without terminating subsequent marriages. A husband may sponsor a second or subsequent wife, provided he

R117(9)(c)(i) states that a spouse or sponsor was already married to another person at the time of the subsequent marriage. This regulation prohibits a second (or third, etc) wife from being recognized as a spouse within the family class and provides that only the first marriage may potentially be recognized for immigration purposes. In order for the first marriage to be recognized as legally valid under Canadian law, the couple must live together in a monogamous marriage in Canada. Common law imparts that a polygamous marriage can be converted into a monogamous marriage provided that the couple live together in a monogamous relationship from the time of arrival in Canada. This conversion is effected by the stated intention of the parties to so convert their marriage, followed by some factual evidence that they have complied usually by divorcing the other spouses and/or by a remarriage in a form that is valid in Canada.

OP 2 Processing Members of the Family Class 2006-11-14 49 states:

“A polygamous second (or third, etc.) marriage cannot be converted to one of monogamy. If a husband wishes to sponsor a wife other than his first as a spouse, he must divorce his other wives and remarry the chosen wife in a form of marriage that is valid in Canada. He and his chosen spouse must sign a declaration to that effect. When a sponsor and applicant have been practicing polygamy and there are children existing from several spouses, officers must caution the sponsor and the spouse being sponsored that other spouses will not be eligible for immigration to Canada even if their respective children are sponsored. Officers must explain that separation of children from their mothers will likely be permanent, and counsel the sponsor and applicant to consider the consequences of that separation on the children. If the children nonetheless are sponsored, and if one of these children subsequently sponsors their respective mother, this mother must be cautioned that she will have no spousal status and related legal protection in Canada and that she will not be eligible for support or other benefits that also flow from marriage under Canadian law. The prohibition against polygamy in the regulations, and the lack of recognition of all spouses except the first, cannot be avoided by processing a second spouse as a common-law partner.”

<http://www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf> (date last visited: July 14, 2010)

²²³ France, Loi Pasqua, 1993.

²²⁴ U.K.: Immigration Directorates’ Instructions Ch 8 Sec 1, Annex C Spouses is designed to prevent the formation of polygamous households in the UK. The order in which polygamous wives come to the UK for settlement is the important factor, not the order in which they marry the husband. If wife # 2 is admitted to the UK on the basis of the marriage before wife # 1, she may prevent wife # 1 from coming.

²²⁵ U.S.: Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Sec 212(a)(10)(A) (current version at 8 U.S.C. Sec 1182(a)(10)(A) (2008)) polygamy is a bar to admission into the US. See generally, Smearman, “Second Wives’ Club”, *supra* note 110 at 387-8, 400-403.

²²⁶ The European Commission on Human Rights in *Bibi v. the United Kingdom*, Appl 19628/92, 29 June 1992 (Eur. Comm. H.R.) children from a first marriage who were resident in the UK with their father and his second wife, and were separated from their mother, the first wife of their father who was living in Bangladesh, claimed that their right to family life was violated. The Commission found that the denial of a visa to the first wife was a violation of the right to family life, but that it was justified as being necessary for the preservation of “monogamous culture”.

²²⁷ *Supra* note 221.

²²⁸ *Supra* note 222.

- terminates all previous marriages and then remarries the beneficiary spouse to satisfy the requirement that the marriage is valid for immigration purposes.”²²⁹
127. Whatever factors are used for determining which wife comes, the practice of states suggests that the continued criminalization of polygamy is necessary to ensure the prohibition on immigration of polygamist families,²³⁰ in part because criminal conduct is a basis for exclusion under most immigration laws.²³¹
128. The evolution of the French immigration policy regarding polygynous families provides insight into how to eliminate polygyny in the host country, and yet at the same time protect the rights of those already living in polygynous unions. In the post-World War II period, the French had a policy of legally recognizing and permitting the immigration of foreign polygynous families, provided that the marriages were valid in the original jurisdiction.²³² While polygamous marriages could not be lawfully performed in France, the recognition and immigration scheme was motivated by the need for postwar immigrant labour. The policy permitted male immigrants to bring multiple wives into the country on long-term spouse visas.²³³ With mainly West Africans taking advantage of the policy, and to a lesser extent Algerians and Moroccans,²³⁴ there were by the 1990s more than 200,000 people living in polygynous families in France. These families became concentrated in enclaves and poorer Parisian suburbs, where, as of the early 2000s, they still made up the majority of some communities.²³⁵
129. The shortcomings of such a policy became apparent in the 1980s and early 1990s as African women’s advocacy groups within France began organizing to challenge the poor living conditions of polygynous wives.²³⁶ Many of the concerns raised echo those outlined in this report,²³⁷ including harmful co-wife competition, spousal neglect, and coercion into marriage at a young age. Moreover, privacy harms were particularly aggravated in the French setting where accommodation expenses meant that separate living arrangements were not

²²⁹ See Smearman, “Second Wives’ Club”, *supra* note 110 at 441; See *Infra* for discussion of how this power imbalance in the immigration context are similar to the powers a husband had under the doctrine of coerture.

²³⁰ Nicholas Bala, “Why Canada’s Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy” (2009) 25 *Canadian Journal of Family Law* 165 at 215-6.

²³¹ For discussion of polygamy and bigamy and crimes of moral turpitude, Smearman, “Second Wives’ Club”, *supra* note 110 at 429-434.

²³² Starr and Brilmayer, “Family Separation”, *supra* note 135 at 245.

²³³ *Ibid.*

²³⁴ Judy Scales-Trent, “African Women in France: Immigration, Family, and Work” (1999) 24 *Brooklyn J. Int’l L.* 705 at 720.

²³⁵ Starr and Brilmayer, “Family Separation”, *supra* note 135 at 245.

²³⁶ See Marlise Simons “African Women in France Battling Polygamy” *New York Times* (26 January 1996) A1, A6; Polygamy in France, *The Economist*, May 8, 2010 at 55 (Interior Minister demanding that a polygamist be stripped of French nationality); Imloul, “La Polygamie en France”, *supra* note 134.

²³⁷ See section I. on Inherent Wrongs and Associated Harms

economically feasible for the vast majority of polygynous families.²³⁸ Compounding the psychological, emotional and health harms suffered by polygynous wives was the animosity multiple wives and their children often endured as a result of the broader French populace's repugnancy toward the practice.²³⁹ In addition, second and third polygynous wives at times had difficulty accessing public health care and social security benefits, despite having proper residence and working papers. As a result of these cumulative harms, some African women's advocacy groups began to lobby the government to discourage the practice by reforming its immigration policy.²⁴⁰

130. The *loi Pasqua* (named after the then-Interior Minister Charles Pasqua), passed in 1993, changed immigration policy so that only one spouse per immigrant would be issued working papers and a spousal visa.²⁴¹ The ensuing French legislative response failed, however, to protect those polygynous families already living in France. Rather than addressing the transitional concerns that emerged as France moved to discourage a harmful practice, the government tried to retroactively eliminate polygyny even though it was responsible for originally permitting and even encouraging the immigration of such families.

131. Instead of applying the *loi Pasqua* to only new immigrants, the law was applied retroactively to polygynous families already living in France. This meant that unless multiple spouses divorced one another and physically separated their households (which the vast majority could not afford to do), they would lose their residence and working papers, social benefits and be subject to deportation.²⁴² The severity of the policy was mitigated only by the fact that French law does not permit the deportation of parents whose children are born in France.²⁴³ A circular issued in 2000 further added to the inequity of the legislation by formalizing a policy of not applying the retroactive provisions to the first wife, but only to subsequent wives. This made the position of subsequent wives even more precarious. Given that polygynous families in France and elsewhere are often impoverished, the retroactive denial of social benefits for second wives was particularly devastating.²⁴⁴ Moreover, despite recent government initiatives to relax the legislation by lowering the standards for polygynous spouses to obtain work permits, for example, it has been observed that "these measures will not eliminate the damage."²⁴⁵

²³⁸ Susan Okin, *Is Multiculturalism Bad for Women?* (Princeton, N.J.: Princeton University Press, 1999) at 10.

²³⁹ Starr and Brilmayer, "Family Separation", *supra* note 135 at 246.

²⁴⁰ *Ibid.*

²⁴¹ *Loi Pasqua*; *Ibid.* at 247.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ Judy Scales-Trent, *supra* note 234 at 721.

²⁴⁵ Starr and Brilmayer, "Family Separation", *supra* note 135 at 249.

132. The retroactive nature of French legislation failed to protect spouses by forcing many to submit to living and working illegally (as “*sans-papiers*”).²⁴⁶ Indeed, a Ministry of the Interior’s April 2000 circular supporting these retroactive provisions cited “consistent” holdings of the Conseil d’Etat that polygamous families were not covered by Article 8 of the European Convention on Human Rights’ protection of private and family life.²⁴⁷ These holdings are refuted by the European Commission on Human Right’s finding in *Bibi*²⁴⁸ that the claimant’s Article 8 right to family life had indeed been violated by the U.K. bar to polygamous wives, although this was ultimately justified.²⁴⁹
133. The practice of states shows there is considerable agreement that prospective immigration restrictions are necessary to protect the rights of women in the country of immigration. Proactive exclusion of multiple spouses is the norm in the immigration laws in most western states, including Australia,²⁵⁰ Canada,²⁵¹ the U.K.,²⁵² and the U.S.²⁵³

²⁴⁶ *Ibid.* at 248.

²⁴⁷ *Ibid.* at 249-250.

²⁴⁸ *Bibi*, *supra* note 226.

²⁴⁹ See *Bibi*, *supra* note 226.

²⁵⁰ *Supra* note 221.

²⁵¹ *Supra* note 222.

²⁵² *Supra* note 224.

²⁵³ U.S. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 at Sec 601(a); See Smearman, “Second Wives’ Club”, *supra* note 110 at 397.

V. CANADA'S OBLIGATIONS TO COMPLY WITH INTERNATIONAL LAW

A. Obligations to Take “All Appropriate Measures” to Eliminate Polygyny

134. Canada's obligations to comply with international law regarding polygyny are both general and specific. As a general matter, Canada, as a state party to CEDAW, ICCPR, ICESCR, and, for instance, CRC, is obligated to take “all appropriate measures” to eliminate discrimination against women. States parties to CEDAW, including Canada, are accordingly obligated to take “all appropriate measures” to eliminate the practice of polygyny. In using the phrase “all appropriate measures”, the Convention drafters realized that situations in different countries may vary, and thus some flexibility is required to enable states to select and design measures that will be most effective in their contexts.²⁵⁴ The specific obligation is to take all appropriate measures to dismantle harmful gender stereotyping that facilitates polygyny, which embodies a form of discrimination against women, and to eliminate polygyny as such.

135. Guidance on what measures are “appropriate” can be found in the treaty bodies' General Comments and their Concluding Observations on reports of states parties. In elaborating why polygyny violates the rights contained in the respective treaties, the treaty bodies provide guidance on what measures might be appropriate. CEDAW explained 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. The Committee notes with 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.²⁵⁵

136. Making the connection between polygamy and the obligation under article 5(a) to eliminate prejudices and practices that are based upon the inferiority of women and on their stereotyped roles, suggests that for measures to be appropriate to eliminate polygyny, they have to address the underlying stereotypes of women and men.

²⁵⁴ Andrew Byrnes, “Article 2 (Obligations)”, in *The United Nations Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: OUP, forthcoming, 2011).

²⁵⁵ *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess., UN Doc. A/47/38, (1994) at para. 14.

137. The HRC has condemned polygamy in its General Comment No. 28, on Equality of Rights between Men and Women, observing that:

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.²⁵⁶

138. In stating that “Polygamy violates the dignity of women” and is “inadmissible discrimination”, this General Comment suggests that in order for measures to be appropriate, they have to address the ways in which polygyny denies women their dignity and equality. This comment builds on the preambular language of the Political Covenant which recognizes the inherent dignity of the human person, which reflects Article 1 of the Universal Declaration of Human Rights, which explains that “all human beings are born free and equal in dignity.”

139. CEDAW,²⁵⁷ and the HRC,²⁵⁸ have built upon their respective General Comments in their Concluding Observations to explain how polygamy practices in different countries offend equality guarantees in the treaties that they monitor. While the CESCR,²⁵⁹ and the CRC,²⁶⁰ have not specifically addressed polygamy in their

²⁵⁶ *General Comment No. 28: Equality of rights between men and women (article 3)*, UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para. 24; for a discussion of the legal trend toward marital equality and the regulation of marriage generally, see Gautier, “Legal Regulation of Marital Relations”, *supra* note 9.

²⁵⁷ CEDAW has condemned polygyny in numerous concluding observations: *see e.g.*, Burkina Faso, 31/01/2000, U.N. Doc. A/55/38, paras. 281–282; Cameroon, 26/06/2000, U.N. Doc. A/55/38, para. 54; Democratic Republic of the Congo, 01/02/2000, U.N. Doc. A/55/38, paras. 215–216; Egypt, 02/02/2001, U.N. Doc. A/56/38, paras. 352–353; Guinea, 31/07/2001, U.N. Doc. A/56/38, paras. 122–123; Indonesia, 14/05/98, U.N. Doc. A/53/38, para. 284(a) ; Iraq, 14/06/2000, U.N. Doc. A/55/38, para. 191; Israel, 12/08/97, U.N. Doc. A/52/38 Rev.1, Part II , para. 163; Jordan, 27/01/2000, U.N. Doc. A/55/38, para. 174–175; Namibia, 12/08/97, U.N. Doc. A/52/38/Rev.1, Part II , para. 110; Nepal, 01/07/99, U.N. Doc. A/54/38, para. 153; Nigeria, 07/07/98, U.N. Doc. A/53/38/Rev.1, para. 153; Senegal, 12/04/94, U.N. Doc. A/49/38, para. 721; United Republic of Tanzania, 06/07/98, U.N. Doc. A/53/38/Rev.1, para. 229; Uzbekistan, 02/02/2001, U.N. Doc. A/56/38, paras. 187–188, as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, (2002) at 38.

²⁵⁸ The HRC has recommended that States parties take steps to abolish and prevent the practice in several of its concluding observations. *See e.g.*, Democratic Republic of the Congo, 27/03/2000, U.N. Doc. CCPR/C/79/Add.118, para. 11; Gabon, 10/11/2000, U.N. Doc. CCPR/CO /70/G AB, para. 9; Libyan Arab Jamahiriya, 06/11/98, U.N. Doc. CCPR/C/79/Add.101, para. 17; Nigeria, 24/07/96, U.N. Doc. CCPR/C/79/Add.65, A /51/40, para. 291; Senegal, 19/11/97, U.N. Doc. CCPR/C/79/Add 82, para. 12, as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, (2002) at 42.

²⁵⁹ The CESCR has condemned polygamy as being incompatible with the rights protected under the Economic Covenant. *See e.g.*, Cameroon, 08/12/99, U.N. Doc. E/C.12/1/A dd.40, paras. 14, 33; Kyrgyzstan, 01/09/2000, U.N. Doc. E/C.12/1/Add.49, paras. 16, 30; Nepal, 24/09/2001, U.N. Doc. E/C.12/1/Add.66, paras. 10, 13; Nigeria, 13/05/98, U.N. Doc. E/C.12/Add.23, para. 22; Senegal, 24/09/2001, U.N. Doc. E/C.12/1/Add.62, paras. 15, 39, as cited in Center for Reproductive Rights and

General Comments, they have explained in Concluding Observations on reports of states parties that polygyny violates the rights protected by their respective treaties. While some themes, such as equality, pervade the Concluding Observations of the four treaty bodies, each Committee emphasizes different themes. For example, in its Concluding Observations, the HRC consistently builds on the theme, articulated in its General Comment No 28, of polygamy violating the dignity of women as a reason to bring laws and practices concerning polygamy into conformance with the Covenant,²⁶¹ to outlaw it,²⁶² and/or to enforce enacted prohibitions.²⁶³

140. In its Concluding Observations on States Parties' reports, CEDAW has consistently called on states to implement measures aimed at eliminating polygamy, in line with its General Recommendation No. 21.²⁶⁴ CEDAW reiterates its concern with states that continue to permit polygamous marriage in

University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, (2002) at 45.

²⁶⁰ The CRC has expressed concern about the impact of polygyny on children and recommended policy and legislative reforms to discourage the practice. See Djibouti, 28/06/2000, U.N. Doc. CRC/C/15/Add.131, para. 34, as cited in Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights* (2002) at 40.

²⁶¹ *Fourth Periodic Report to the Human Rights Committee: Cameroon*, UN HRCOR, 99th Sess., U.N. Doc. CCPR/C/CMR/CO/4 (2010), at rec. 2; *Concluding Observations of the Human Rights Committee: Central African Republic*, UN HRCOR, 87th Sess., U.N. Doc. CCPR/C/CAF/CO/2 (2006), at para. 12

²⁶² *Initial Periodic Report to the Human Rights Committee: Botswana*, UN HRCOR, 92nd Sess., U.N. Doc. CCPR/C/BWA/CO/1 (2008), at para. 11.

²⁶³ *Concluding Observations of the Human Rights Committee: Madagascar*, UN HRCOR, 89th Sess., U.N. Doc. CCPR/C/MDG/CO/3 (2007), at para. 12.

²⁶⁴ See the *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Egypt*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/EGY/CO/7 (2010), at para. 48; *Malawi*, UN CEDAWOR, 45th Sess., UN Doc. CEDAW/C/MWI/CO/67 (2010), at para. 43; *United Arab Emirates*, U.N. Doc. CEDAW/C/ARE/CO/1 (2010), at para. 48; *Uzbekistan*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/UZB/CO/4 (2010), at para. 43; *Bhutan*, UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/BTN/CO/7 (2009), at para. 34; *Guinea-Bissau*, UN CEDAWOR, 44th Sess., UN Doc. CEDAW/C/GNB/CO/6 (2009), at para. 42; *Lao People's Democratic Republic*, UN CEDAWOR, 44th Sess., UN Doc. CEDAW/C/LAO/CO/7 (2009), at para. 49; *Cameroon*, UN CEDAWOR, 43rd Sess., UN Doc. CEDAW/C/CMR/CO/3 (2009), at para. 47; *Bahrain*, UN CEDAWOR, 42nd Sess., UN Doc. CEDAW/C/BHR/CO/2 (2008), at para. 39; *Madagascar*, UN CEDAWOR, 42nd Sess., UN Doc. CEDAW/C/MDG/CO/5 (2008), at para. 37; *Myanmar*, UN CEDAWOR, 42nd Sess., UN Doc. CEDAW/C/MMR/CO/3 (2008), at para. 47; *Yemen*, UN CEDAWOR, 41st Sess., UN Doc. CEDAW/C/YEM/CO/6 (2008), at para. 388; *United Republic of Tanzania*, UN CEDAWOR, 41st Sess., U.N. Doc. CEDAW/C/TZA/CO/6 (2008), at para. 147; *Morocco*, UN CEDAWOR, 40th Sess., U.N. Doc. CEDAW/C/MAR/CO/4 (2008), at para. 37; *Saudi Arabia*, UN CEDAWOR, 40th Sess., U.N. Doc. CEDAW/C/SAU/CO/2 (2008), at para. 36; *Kenya*, UN CEDAWOR, 39th Sess., U.N. Doc. CEDAW/C/KEN/CO/6 (2007), at para. 44; *Mauritania*, UN CEDAWOR, 38th Sess., UN Doc. CEDAW/C/MRT/CO/1 (2007), at para. 44; *Sierre Leone*, UN CEDAWOR, 38th Sess., U.N. Doc. CEDAW/C/SLE/CO/5 (2007), at para. 39; *Greece*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/GRC/CO/6 (2007), at para. 34; *Ghana*, UN CEDAWOR, 36th Sess., UN Doc. CEDAW/C/GHA/CO/5 (2006), at para. 36; *Turkmenistan*, UN CEDAWOR, 35th Sess., UN Doc. CEDAW/C/TKM/CO/2 (2006), at para. 41.

accordance with personal²⁶⁵ or customary law.²⁶⁶ Where polygyny is prohibited by family laws but persists in practice,²⁶⁷ CEDAW calls on states to implement these laws. Where polygyny is prohibited by criminal law, but continues in practice,²⁶⁸ CEDAW consistently calls upon states to eliminate it.

141. Like CEDAW, CESCR considers polygamy to be a harmful traditional practice, which discriminates against women denying them the exercise of their Covenant rights, and encourages states to bring their laws, policies and practices into compliance with the Covenant,²⁶⁹ as elaborated in their General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights.²⁷⁰ CRC has encouraged states to undertake a comprehensive study of the impact of polygamy on the upbringing of children, and where it is found to have negative consequences, calls for awareness-raising campaigns on its adverse effect on children, and to promote monogamy.²⁷¹

142. The use of the term “all” appropriate measures, rather than “any” such measures, requires states to be comprehensive in their approach.²⁷² State practice indicates that, in order for measures to eliminate polygyny to be effective, states feel

²⁶⁵ *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Jordan*, UN CEDAWOR, 39th Sess., U.N. Doc. CEDAW/C/JOR/CO/4 (2007), at paras. 9-10.

²⁶⁶ See *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Malawi*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/MWI/CO/67 (2010), at paras. 42-43; *Cameroon*, UN CEDAWOR, 43rd Sess., U.N. Doc. CEDAW/C/CMR/CO/3 (2009), at paras. 14-15, 46-47; *Kenya*, UN CEDAWOR, 39th Sess., UN Doc. CEDAW/C/KEN/CO/6 (2007), at paras. 22, 43-44.

²⁶⁷ See *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Mozambique*, UN CEDAWOR, 38th Sess., U.N. Doc. CEDAW/C/MOZ/CO/2 (2007), at para. 22; *Benin*, UN CEDAWOR, 33rd Sess., U.N. Doc. CEDAW/C/BEN/CO/1-3 (2005), at paras. 21-22.

²⁶⁸ See *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan*, UN CEDAWOR, 42nd Sess., U.N. Doc. CEDAW/C/KGZ/CO/3 (2008), at paras. 21-22; *Greece*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/GRC/CO/6 (2007), at paras. 33-34; *Tajikistan*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/TJK/CO/3 (2007), at paras. 13-14, 35-36; *Turkmenistan*, UN CEDAWOR, 35th Sess., U.N. Doc. CEDAW/C/TKM/CO/2 (2006), at paras. 40-41.

²⁶⁹ See *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of the Congo*. UN ESCOR, 43rd Sess., U.N. Doc. E/C.12/COD/CO/4 (2009), at para. 1; *Benin*. UN ESCOR, 40th Sess., U.N. Doc. E/C.12/BEN/CO/2 (2008), at para. 4.

²⁷⁰ *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 34th Sess., U.N. Doc. E/C.12/2005/4 (2005).

²⁷¹ See *Concluding Observations of the Committee on the Rights of the Child: Burkina Faso*, UN CRCOR, 53rd Sess., U.N. Doc. CRC/C/BFA/CO/3-4 (2010), at paras. 44-45; *Mauritania*, UN CRCOR, 51st Sess., U.N. Doc. CRC/C/MRT/CO/2 (2009), at paras. 44-45; *Niger*, UN CRCOR, 51st Sess., U.N. Doc. CRC/C/NER/CO/2 (2009), at paras. 1-2; *Djibouti*, UN CRCOR, 49th Sess., U.N. Doc. CRC/C/DJI/CO/2 (2008), at paras. 39-40; *Yemen*, UN CRCOR, 39th Sess., U.N. Doc. CRC/C/15/Add.267 (2005), at para. 48, see Committee on the Elimination of Discrimination against Women, General Recommendation 21: Equality in Marriage and Family Relations, U.N. Doc. A/49/38 (1994), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights, (2008) at 9.

²⁷² Byrnes, “Article 2 (Obligations)”, *supra* note 254 at 9-10.

obligated to use a mix of legal, educational, and social measures. The legal measures include constitutional,²⁷³ civil,²⁷⁴ and criminal²⁷⁵ prohibitions.

143. The challenge is to identify what measures are “appropriate” in what contexts, and why.²⁷⁶ To achieve effectiveness, the nature, types and mix of measures will vary according to context. Where polygyny is deeply entrenched, it might be that

²⁷³ See Utah Constitutional provisions, *supra* note 149; the Tajikistan Constitution (article 33) states: “Being the foundation of society, the family shall be under the protection of the State. Everyone has the right to found a family. Men and women of marriageable age have the right to enter freely into marriage. Spouses have equal rights in family relations and in the dissolution of a marriage. Polygamy is forbidden,” as cited in Combined Initial, Second and Third Periodic Reports to the *Committee on the Elimination of Discrimination against Women: Tajikistan*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/TJK/1-3 (2007), at para. 61.

²⁷⁴ Lithuania: “Article 3.3 of the Civil Code of the Republic of Lithuania states that in the Republic of Lithuania the legal regulation of family relations shall be based on the principle of monogamy. It means that polygamy is prohibited. Marriage is possible only between persons who have not entered into any other marriage relationship or who have not registered any other partnership. This rule also applies in respect of a registered partnership. The laws of the Republic of Lithuania do not provide for any exemptions from this rule,” as cited in *Third Periodic Report to the Committee on the Elimination of Discrimination against Women: Lithuania*, UN CEDAWOR, 41st Sess., U.N. Doc. CEDAW/C/LTU/3 (2008), at para. 369;

Mayotte (France): “The Constitutional Council ruled in a decision of 17 July 2003 that “since (the legislature) did not contest the very existence of local law civil status, it could adopt provisions designed to have its rules evolve with a view to rendering them compatible with constitutionally protected rights and principles.” Based on that decision, the Finance Act for overseas of 21 July 2003 definitively ruled out certain aspects of the status of women which did not appear to be compatible with republican principles. Thus, the following forms of behaviour are henceforth prohibited in Mayotte: ... Polygamy for persons reaching the minimum legal age for marriage by January 1, 2005,” as cited in *Sixth Periodic Report to the Committee on the Elimination of Discrimination against Women: France*, UN CEDAWOR, 40th Sess., U.N. Doc. CEDAW/C/FRA/6 (2008), at S. II. A;

Cape Verde: “Polygamy is not permitted. Marriage is understood as a voluntary union between two persons of the opposite sex with a view to forming a family in order to share their lives fully. Thus, the existence of a previous undissolved marriage may be cause for annulment of the second marriage (art. 1564 (e), Civil Code),” as cited in *Combined Initial, Second, Third, Fourth, Fifth and Sixth Reports to the Committee on the Elimination of Discrimination against Women: Cape Verde*, UN CEDAWOR, 36th Sess., U.N. Doc. CEDAW/C/CPV/1-6 (2006), at para. 447.

²⁷⁵ *Concluding Observations of the Human Rights Committee: Madagascar*. UN HRCOR, 89th Sess., UN Doc. CCPR/C/MDG/CO/3 (2007), at para. 12; In Tajikistan, “under article 170 of the Criminal Code, bigamy or polygamy, i.e. cohabiting with two or more women in a single household, is punishable by a fine of between 1,000 and 2,000 times the minimum wage, punitive deduction of earnings for up to two years, restriction of liberty for up to five years or short-term rigorous imprisonment for between three and six months,” as cited in *Initial Report to the Human Rights Committee: Tajikistan*, UN HRCOR, 84th Sess., U.N. Doc. CCPR/C/TJK/2004/1 (2005), at para. 38;

Cameroon Penal Code, section 359: (1) “Whoever -

(a) Being polygamous contracts a monogamous marriage before the dissolution of all previous marriages; or

(b) Being bound by an undertaking of monogamy contracts any marriage before dissolution of any previous marriage; or

(c) Being married under the codified law contracts any marriage before dissolution of that former marriage: shall be punished with imprisonment for from two months to two years and with fine of from twenty-five thousand to five hundred thousand francs,” as cited in *Fourth Periodic Report to the Human Rights Committee: Cameroon*, UN HRCOR, 99th Sess., U.N. Doc. CCPR/C/CMR/Q/4/Add.1 (2010), at para. 72. See also Utah criminal provision, *supra* note 150.

²⁷⁶ Byrnes, “Article 2 (Obligations)”, *supra* note 254.

criminal law measures are needed to demonstrate the inherent wrongs of polygyny, to punish parties officiating in, facilitating and participating in polygynous unions, and to deter future such practices.²⁷⁷ Where polygyny is prohibited in law, but persists in practice, positive measures might also be required, such as educational measures,²⁷⁸ judicial training programs²⁷⁹ and public awareness campaigns,²⁸⁰ particularly to eliminate traditions and stereotypes of women that facilitate polygyny.²⁸¹

²⁷⁷ *Concluding Observations of the Human Rights Committee: Uzbekistan*. UN HRCOR, 98th Sess., U.N. Doc. CCPR/C/UZB/CO/3 (2010), at para. 21: “The State party should modify its legislation and ensure that all forms of polygamy are prohibited by law and subject to prosecution. More generally, the State party should also engage in systematic awareness-raising campaigns and programmes in order to sensitise society to the matter, change mentalities, and stereotypes, and eradicate polygamy.”

²⁷⁸ *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Mozambique*, UN CEDAWOR, 38th Sess., U.N. Doc. CEDAW/C/MOZ/CO/2 (2007), at para. 23; *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Tajikistan*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/TJK/CO/3 (2007), at para. 14; *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Benin*, UN CEDAWOR, 33rd Sess., U.N. Doc. CEDAW/C/BEN/CO/1-3 (2005), at para. 22.

²⁷⁹ *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Egypt*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/EGY/CO/7 (2010), at para. 48; *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan*, UN CEDAWOR, 42nd Sess., U.N. Doc. CEDAW/C/KGZ/CO/3 (2008), at para. 22; *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Tajikistan*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/TJK/CO/3 (2007), at para. 14.

²⁸⁰ *See, e.g.*, Benin, ¶ 148, U.N. doc. A/60/38 (2005); Cameroon, ¶ 54, U.N. doc. A/55/38 (2000); Kyrgyzstan, ¶ 170, U.N. doc. A/59/38 (2004); Togo, ¶ 13, U.N. doc. CEDAW/C/TGO/CO/5 (2006); Uganda, ¶ 154, U.N. doc. A/57/38 (2002); Zambia, ¶ 253, U.N. doc. A/57/38 (2002), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights, (2008) at 52.

²⁸¹ *See, e.g.*, Bhutan, ¶ 116, U.N. doc. A/59/38 (2004); Burkina Faso, ¶ 342, U.N. doc. A/60/38 (2005); Equatorial Guinea, ¶ 192, U.N. doc. A/59/38 (2004); Guinea, ¶¶ 122–123, U.N. doc. A/56/38 (2001); Iraq, ¶¶ 191–192, U.N. doc. A/55/38 (2000); Israel, ¶ 262, U.N. doc. A/60/38 (2005); Mali, ¶ 12, U.N. doc. CEDAW/C/MLI/CO/5 (2006), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights, (2008) at 50.

144. CEDAW commonly notes that polygyny persists particularly in rural areas,²⁸² and often correlates with illiteracy and lower levels of education.²⁸³ One state party report explained that the persistence in rural areas is due in part to the fact that farming necessitates having many children for agricultural work.²⁸⁴ The persistence of traditional practices in rural areas is generally attributed to the homogeneity of the population, the high intensity of acquaintanceships, and lack of external forces to challenge gendered norms.²⁸⁵ Whether it is low levels of education, predominance of farming or lack of external forces, Article 14 of the CEDAW Convention obligates States Parties to “take into account the particular problems faced by rural women ..., and take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.” In taking account of the gendered norms faced by rural women, CEDAW has recommended rural outreach programs.²⁸⁶

145. While the phrase “all appropriate measures” leaves a margin of discretion to states to determine which measures are effective in their countries to eliminate

²⁸² *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Uzbekistan*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/UZB/CO/4 (2010), at para. 42; *Combined Initial and Sixth Periodic Reports: Liberia*, UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/LBR/6 (2009), at p. 10; *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Timor-Leste*, UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/TLS/CO/1 (2009), at paras. 27-28; *Combined Third and Fourth Periodic Reports to the Committee on the Elimination of Discrimination against Women: Jordan*, UN CEDAWOR, 39th Sess., U.N. Doc. CEDAW/C/JOR/3-4 (2007), at para. 246; *Initial and Second Report to the Committee on the Elimination of Discrimination against Women: Mozambique*, UN CEDAWOR, 38th Sess., U.N. Doc. CEDAW/C/MOZ/1-2 (2007), at p. 63; *Initial Report to the Committee on the Elimination of Discrimination against Women: Syrian Arab Republic*, UN CEDAWOR, 38th Sess., U.N. Doc. CEDAW/C/SYR/1 (2007), at p. 68-89; *Second and Third Periodic Reports to the Committee on the Elimination of Discrimination against Women: Namibia*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/NAM/2-3 (2007), at p. 69; *Initial and Fifth Periodic Reports to the Committee on the Elimination of Discrimination against Women: Togo*, UN CEDAWOR, 34th Sess., U.N. Doc. CEDAW/C/TGO/1-5 (2006), at p.125-126; see also *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Tajikistan*, UN ESCOR, 37th Sess., U.N. Doc. E/C.12/TJK/CO/1 (2006), at para. 18.

²⁸³ *Combined Second and Fifth Periodic Reports to the Committee on the Elimination of Discrimination against Women: Mali*, UN CEDAWOR, 34th Sess., U.N. Doc. CEDAW/C/MLI/2-5 (2006), at p. 23-24.

²⁸⁴ CEDAW, *Combined Third, Fourth and Fifth Periodic Reports of States Parties: Ghana*, U.N. Doc. CEDAW/C/GHA/3-, Apr 18, 2005, as discussed in Lisa R. Pruitt, “Migration, Development, and the Promise of CEDAW for Rural Women” (2009) 30 Michigan J. of Int’l Law 1 at 41.

²⁸⁵ Lisa R. Pruitt, “Gender, Geography and Rural Justice” (2008) 23 Berkeley J. of Gender Law and Justice 338 at 360-362.

²⁸⁶ Committee on the Elimination of Discrimination against Women, General Recommendation 21: Equality in Marriage and Family Relations, ¶ 14, U.N. doc. HRI/GEN/1/Rev.5 (2001), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights, (2008) at 10; CEDAW noted concern about rural women and women heads of household in Haiti who continue to suffer high levels of poverty, so that their access to basic social and cultural rights, in particular education and healthcare, are impeded: *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Haiti*, UN CEDAWOR, 43rd Sess., U.N. Doc. CEDAW/C/HTI/CO/7 (2009), at para 38-39.

polygyny, the discretion has limits.²⁸⁷ Measures selected as appropriate must meet international standards. For example, states must ensure that their appropriate measures govern both state and non-state actors. That is, under Convention Article 2(e), they must “pursue by all appropriate means without delay a policy of eliminating discrimination against women and to this end, undertake ... to eliminate discrimination against women by any person, organization or enterprise.”²⁸⁸ The standard of appropriateness “to eliminate discrimination against women by any person” is at least as high as the due diligence standard that gives rise to state responsibility for failure to prevent, investigate and punish the practice of polygyny.

146. Many states feel obligated to criminalize plural-party marriages, including polygyny, through bigamy and/or polygamy statutes.²⁸⁹ States may provide different definitions of the crimes of bigamy and/ or polygamy.²⁹⁰ Some states draft their bigamy provisions in ways that capture both the performance of bigamous marriage and the fact of living in a polygamous relationship. Moreover, they may make different evidentiary requirements for prosecution.²⁹¹

147. States also vary in how they punish polygamy. For example, s. 293 of the *Criminal Code* of Canada allows for punishment not exceeding five years of imprisonment. Article 170 of the *Criminal Code* of Tajikistan, for instance, makes polygamy punishable by:

- a) a fine between 1,000 – 2,000 times the minimum wage,
- b) deduction of earnings for up to two years, or
- c) restriction of liberty for up to five years.²⁹²

148. Where polygyny persists in practice, despite criminal prohibitions, states have discretion on whether, when, against whom and under what circumstances they will pursue a prosecution. This discretion, however, is not absolute. Where states fail to prosecute, CEDAW has urged State parties “to take all appropriate measures in order to have all cases involving the phenomena recorded, investigated and prosecuted, even in the absence of a formal complaint.”²⁹³

149. Discretion is similarly not absolute when it comes to eliminating polygyny, because there are obligations to protect the human rights of all parties to

²⁸⁷ *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 34th Sess., U.N. Doc. E/C.12/2005/4 (2005), at para. 32.

²⁸⁸ CEDAW, *supra* note 5 at Article 2(e).

²⁸⁹ See section IV A, *supra*.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Initial Report to the Committee on Economic, Social and Cultural Rights: Tajikistan*, UN ESCOR, 37th Sess., U.N. Doc. E/C.12/TJK/1 (2006), at para. 83.

²⁹³ *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan*, UN CEDAWOR, 42nd Sess., U.N. Doc. CEDAW/C/KGZ/CO/3 (2008), at para. 22.

polygynous unions, especially during periods when states are transitioning from permitting polygynous unions to permitting only monogamous marriages. CEDAW has stressed States parties' obligations to "take measures to protect the human rights of women already in polygamous unions."²⁹⁴ These Concluding Observations indicate that international human rights law rejects a purely abolitionist approach, which refuses to recognize polygamy for any purpose. Rather, an international human rights approach requires protection for women both at the point of polygynous marriage formation, by withholding legal recognition to discourage a discriminatory practice, and at the point of polygynous marriage dissolution, by ensuring access to relief.²⁹⁵

150. Canada provides that only the first marriage may potentially be recognized for immigration purposes,²⁹⁶ and requires that sponsoring spouses provide evidence of lawful divorce of subsequent wives in the countries where the subsequent marriages took place.²⁹⁷

151. In contrast, the U.K.²⁹⁸ and U.S.²⁹⁹ allow the husband to determine which wife he will bring. The U.S. immigration policy "permits the husband in a polygamous marriage to sponsor a first wife without terminating subsequent marriages. A husband may sponsor a second or subsequent wife, provided he terminates all previous marriages and then remarries the beneficiary spouse to satisfy the requirement that the marriage is valid for immigration purposes."³⁰⁰ It has been explained that "the operation of U.S. immigration policy for spouse-based categories empowers a husband in a polygamous marriage to choose which wife he will sponsor for immigration status; in contrast, a second or subsequent wife cannot confer or receive status for any family category based on a relationship created solely by the polygamous marriage."³⁰¹

152. The observation that "Much of the gender bias in [U.S.] immigration law is a legacy of the centuries-old doctrine of coverture, under which a woman's legal existence merged with that of her husband upon marriage" might well provide insights into the gendered nature of other states' immigration policies, given the pervasiveness of the English common law. It has been explained that "At common law, a husband had ownership rights over his wife and was legally

²⁹⁴ *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Burkina Faso*, UN CEDAWOR, 22nd Sess., U.N. Doc. A/55/38 (2000), at para. 282

²⁹⁵ Lisa M. Kelly, "Bringing International Human Rights Law Home", *supra* note 136; *General Comment 16, Article 3: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, UN ESCOR, U.N. Doc. A/49/38 (1994) 1, at para. 27; *General Comment 28, Article 3: Equality of Rights Between Men and Women*, UN HRCOR, 68th Sess., U.N. Doc., A/55/40 vol. I (2000) 133, at paras. 23 (equality in marriage and family), 26 (equal inheritance rights), 27 (equal treatment of women in various family forms); *Hassam v. Jacobs*, see paras 34, 37, 38, 39.

²⁹⁶ *Supra* note 222.

²⁹⁷ *Ibid.*

²⁹⁸ *Supra* note 224; *Bibi*, *supra* note 226.

²⁹⁹ *Supra* note 225; See Smearman, "Second Wives' Club", *supra* note 110 at 438-446.

³⁰⁰ Smearman, *Ibid.*

³⁰¹ *Ibid.* at 439.

entitled to control her income and property. ... This headship of the husband in the family permitted him to control where the wife and family resided and all aspects of their existence. ... The very structure of the spouse-based immigration scheme grew out of this doctrine [of coverture]. The first laws establishing the right of a citizen or resident alien to petition on behalf of a spouse were gender-specific – only male citizens and male resident aliens could sponsor their spouses; female citizens or resident aliens enjoyed no reciprocal rights to sponsor their husbands.”³⁰²

B. Obligations to Ensure Equality of Women

1. Obligations to Eliminate All Forms of Discrimination against Women

153. State obligations to ensure equality of women have evolved with growth of an understanding of the different forms of discrimination against them in various contexts. The understanding of equality has evolved from a sex neutral norm whereby the phrase “on the basis of equality” requires the same treatment of men and women, to a norm that may require different treatment of men and women to achieve women’s exercise of “human rights and fundamental freedoms on the basis of equality”. That is, doctrinal development in the understanding of discrimination against women enables moving within a range of different meanings of equality depending on the context. CEDAW has explained that the obligation to eliminate all forms of discrimination against women requires States parties to eliminate:

- direct forms of discrimination on the face of a law or policy to improve the de jure position of women, to ensure formal equality,
- indirect forms of discrimination in the effect of a law or policy to improve the de facto position of women in society, to ensure substantive equality, and
- structural forms of discrimination in family structures and social systems to dismantle the ways in which they subordinate women, to ensure transformative equality.³⁰³

154. In considering the obligation to eliminate all forms of discrimination, CEDAW urges consideration of the Convention’s Article 1 definition of “discrimination against women”. That definition explains that discrimination is:

³⁰² *Ibid.* at 439-440; see also 442.

³⁰³ *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30th Sess., U.N. Doc. HRI/GEN/1/Rev. 7 (2004), at paras. 6 -7.

any *distinction, exclusion or restriction* made on basis of sex which has the *effect or purpose of impairing or nullifying* the recognition, enjoyment or exercise by women ... of [their] human rights and fundamental freedoms....”

155. In its General Comment No. 16, CESCR refers to this definition, and explains that the nature of discrimination on the basis of sex “may be based on the differential treatment of women because of their biology, such as refusal to hire women because they could become pregnant; or stereotypical assumptions, such as tracking women into low-level jobs on the assumption that they are unwilling to commit as much time to their work as men.”³⁰⁴

156. Applying the CEDAW Article 1 definition to the practice of polygyny requires understanding how direct (on the face/purpose), indirect (effect) and structural forms of discrimination make a distinction, exclusion or restriction which impairs or nullifies women’s exercise of their human rights and fundamental freedoms.

157. The elimination of *de jure* or direct discrimination, in order to realize *formal equality* in all spheres of public and private life, requires removing “any distinction, exclusion or restriction made on the basis of sex” in the presented terms of a law, policy or practice that impairs or nullifies women’s exercise of their “... human rights or fundamental freedoms ...” Where the law or practice makes a distinction on the basis of sex, as it does in the case of polygyny by allowing men to take many wives and not vice versa, it impairs women’s exercise of their equality in the family.

158. As the South African Constitutional Court explained in the *Hassam v. Jacobs* decision:

... because the denial of benefits affects only widows in polygynous marriages concluded pursuant to Muslim rites and not widowers (because Muslim personal law does not permit women to have more than one husband), the discrimination has a gendered aspect. The grounds of discrimination can thus be understood to be overlapping on the grounds of, religion, in the sense that the particular religion concerned was in the past not one deemed to be worthy of respect; marital status, because polygynous Muslim marriages are not afforded the protection other marriages receive; and gender, in the sense that it is only the wives in polygynous Muslim marriage that are affect[ed] by the Act’s exclusion.³⁰⁵

159. The elimination of *de facto* discrimination, in order to realize *substantive equality*, includes reforming laws, policies and practices that are sex-neutral, but in practice

³⁰⁴ *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 34th Sess., U.N. Doc. E/C.12/2005/4 (2005), at para. 11.

³⁰⁵ *Hassam v. Jacobs*, Case CCT 83/08 [2009] ZACC 19, para 34.

disproportionately negatively affect women or specific groups of women. CESCR explains that “merely addressing formal discrimination will not ensure substantive equality”.³⁰⁶ Achieving substantive equality in practice “requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.”³⁰⁷ In the context of polygyny, the obligation to realize substantive equality requires states to ensure that polygyny is not actually practiced, even though it might be prohibited by law. CEDAW has noted its concern where the practice is legally prohibited either through criminal codes or marriage law, but it persists in practice, and calls on states to implement legal and social sanctions,³⁰⁸ and develop public awareness campaigns.³⁰⁹

160. The elimination of structural discrimination, in order to realize *transformative equality*, requires states to understand how societal structures and norms subordinate women. Moreover, it requires states to understand how gendered norms are entrenched in the legal, social, economic, political, and, for instance, cultural structures of society, and how each one reinforces the others. CESCR explains that “gender affects the equal right of men and women to the enjoyment of their rights. Gender refers to cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women. Gender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights...”³¹⁰

161. States are, thus, obligated to eliminate the social practices of gender and that “discriminate against women”. As CEDAW Article 3 explains, states are required to:

take in all fields, in particular in the ... social and cultural fields, all appropriate measures ... to ensure the full development and advancement

³⁰⁶ *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 42nd Sess., U.N. Doc. E/C.12/GC/20 (2009), at para. 8(b).

³⁰⁷ *Ibid.*; CEDAW recommended that Slovenia take urgent and concrete measures to address stereotypic attitudes about Roma women in order to accelerate their de facto equality: *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Slovenia*, UN CEDAWOR, 42nd Sess., U.N. Doc. CEDAW/C/SVN/CO/4 (2008), at para. 35-36.

³⁰⁸ See, e.g., Benin, ¶ 148, U.N. doc. A/60/38 (2005); Tajikistan, ¶¶ 14, 36, U.N. doc. CEDAW/C/TJK/CO/3 (2007). Turkmenistan, ¶ 40, U.N. doc. CEDAW/C/TKM/CO/2 (2006), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights, (2008) at 51.

³⁰⁹ See, e.g., Benin, ¶ 148, U.N. doc. A/60/38 (2005); Cameroon, ¶ 54, U.N. doc. A/55/38 (2000); Kyrgyzstan, ¶ 170, U.N. doc. A/59/38 (2004); Togo, ¶ 13, U.N. doc. CEDAW/C/TGO/CO/5 (2006); Uganda, ¶ 154, U.N. doc. A/57/38 (2002); Zambia, ¶ 253, U.N. doc. A/57/38 (2002), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights, (2008) at 52.

³¹⁰ *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 34th Sess., U.N. Doc. E/C.12/2005/4 (2005), at para. 14.

of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

162. Transformative equality may require States to implement temporary special measures,³¹¹ (sometimes referred to as “affirmative action”) such as programs to educate judges about gender biases in the law, until such time as there is an understanding in the judiciary about this phenomenon.³¹²

2. Obligations to dismantle stereotyping as a form of discrimination

163. States are obligated to eliminate harmful stereotypes of women as a form of discrimination against women, and where they inhibit women’s exercise of their other human rights and fundamental freedoms.³¹³ Thus, CEDAW Article 2(f) gives rise to state responsibility where a state fails to take all appropriate measures “to modify customs and practices which constitute discrimination against women”, such as polygyny. Showing that polygyny is a form of discrimination is evidenced by the practice that a man takes many wives, and not vice versa, and by women being confined to specified sex roles, by virtue of the fact that they are wives, and not husbands.

164. In addition to state obligations to address stereotyping as a form of discrimination, states are also obligated under CEDAW Article 5(a) to address “prejudices and customary and all other practices” that are based on stereotypes concerning “the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.”³¹⁴ CEDAW views polygyny as a harmful traditional practice,³¹⁵ and

³¹¹ *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30th Sess., UN Doc. HRI/GEN/1/Rev. 7 (2004), at para. 14; See also *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 34th Sess., U.N. Doc. E/C.12/2005/4 (2005), at para. 35.

³¹² *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Egypt*, UN CEDAWOR, 45th Sess., U.N. Doc. CEDAW/C/EGY/CO/7 (2010), at para. 48; *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan*, UN CEDAWOR, 42nd Sess., U.N. Doc. CEDAW/C/KGZ/CO/3 (2008), at para. 22; *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Tajikistan*, UN CEDAWOR, 37th Sess., U.N. Doc. CEDAW/C/TJK/CO/3 (2007), at para. 14.

³¹³ CEDAW recommended that Canada take measures to sensitize aboriginal, ethnic and minority communities about women’s human rights and to combat patriarchal attitudes and practices and the stereotyping of roles: *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Canada*, UN CEDAWOR, 42nd Sess., U.N. Doc. CEDAW/C/CAN/CO/7 (2008), at paras. 43-44.

³¹⁴ Article 5(a) requires states 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.”³¹⁴

This 5(a) wording is quoted by the CESCR in their *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on*

encourages states to analyze traditions, customs and stereotypes of women's roles in the family that contribute to the perpetuation of its practice.³¹⁶

165. A gender stereotype is a generalized view or preconception of attributes or characteristics possessed by women or men, or the roles that are or should be performed by them as members of the female or male sex.³¹⁷ It has been explained that the “key consideration is that because a particular group is presumed to possess those attributes or characteristics or perform those roles, an individual, simply by virtue of membership in that group, is believed to conform to the generalized view or preconception. All the dimensions of personality that make that individual unique are consequently filtered through the lens of a generalized view or preconception of the group with which the individual is identified.”³¹⁸ The term “gender stereotyping” is ascribing to an individual man or woman certain qualities or roles by reason only of his or her membership in the social group of men or women.

Economic, Social and Cultural Rights), UN ESCOR, 34th Sess., U.N. Doc. E/C.12/2005/4 (2005), at para. 11.

³¹⁵ See Committee on the Elimination of Discrimination against Women, *General Recommendation 21: Equality in Marriage and Family Relations* (13th Sess., 1994), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 222, ¶ 14, U.N. doc. HRI/GEN/1/Rev.5 (2001). The CEDAW Committee has expressed concern and called for prohibition of the practice in numerous concluding observations. See, e.g., Bangladesh, ¶ 245, U.N. doc. A/59/38 (2004); Benin, ¶ 147, U.N. doc. A/60/38 (2005); Burkina Faso, ¶¶ 281–282, U.N. doc. A/55/38 (2000); Burkina Faso, ¶ 340, U.N. doc. A/60/38 (2005); Cameroon, ¶ 54, U.N. doc. A/55/38 (2000); Cape Verde, ¶ 33, U.N. doc. CEDAW/C/CPV/CO/6 (2006); Congo, ¶ 180, U.N. doc. A/58/38 (2003); Democratic Republic of the Congo, ¶¶ 215–216, U.N. doc. A/55/38 (2000); Egypt, ¶¶ 354–355, U.N. doc. A/56/38 (2001); Equatorial Guinea, ¶ 191, U.N. doc. A/59/38 (2004); France, ¶ 265, U.N. doc. A/58/38 (2003); Ghana, ¶ 35, U.N. doc. CEDAW/C/GHA/CO/5 (2006); Guinea, ¶¶ 122–123, U.N. doc. A/56/38(2001); Indonesia, ¶ 284(a), U.N. doc. A/53/38 (1998); Iraq, ¶ 191, U.N. doc. A/55/38 (2000); Israel, ¶ 163, U.N. doc. A/52/38 Rev.1, Part II (1997); Jordan, ¶¶ 174–175, U.N. doc. A/55/38 (2000); Kyrgyzstan, ¶ 169, U.N. doc. A/59/38 (2004); Maldives, ¶ 35, U.N. doc. CEDAW/C/MdV/CO/3 (2007); Mali, ¶ 11, U.N. doc. CEDAW/C/MLI/CO/5 (2006); Namibia, ¶ 110, U.N. doc. A/52/38/Rev.1, Part II (1997); Nepal, ¶ 208, U.N. doc. A/59/38 (2004); Nigeria, ¶ 153, U.N. doc. A/53/38/Rev.1 (1998); Senegal, ¶ 721, U.N. doc. A/49/38 (1994); Tajikistan, ¶¶ 13, 19, 35, U.N. doc. CEDAW/C/TJK/CO/3 (2007); Togo, ¶ 12, U.N. doc. CEDAW/C/TGO/CO/5 (2006); Turkey, ¶ 367, U.N. doc. A/60/38 (2005); Turkmenistan, ¶ 40, U.N. doc. CEDAW/C/TKM/CO/2 (2006); Uganda, ¶ 153, U.N. doc. A/57/38 (2002); United Republic of Tanzania, ¶ 229, U.N. doc. A/53/38/Rev.1 (1998); Uzbekistan, ¶ 31, U.N. doc. CEDAW/C/UZB/CO/3 (2006); Yemen, ¶ 392, U.N. doc. A/57/38 (2002); Zambia, ¶ 252, U.N. doc. A/57/38 (2002), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights, (2008) at 48; Guinea-Bissau, U.N. Doc. CEDAW/C/GNB/CO/6 (2009), at para. 41; Tanzania, U.N. Doc. CEDAW/C/TZA/CO/6 (2008), at paras. 117–118.

³¹⁶ See, e.g., Bhutan, ¶ 116, U.N. doc. A/59/38 (2004); Burkina Faso, ¶ 342, U.N. doc. A/60/38 (2005); Equatorial Guinea, ¶ 192, U.N. doc. A/59/38 (2004); Guinea, ¶¶ 122–123, U.N. doc. A/56/38 (2001); Iraq, ¶¶ 191–192, U.N. doc. A/55/38 (2000); Israel, ¶ 262, U.N. doc. A/60/38 (2005); Mali, ¶ 12, U.N. doc. CEDAW/C/MLI/CO/5 (2006), as cited in Center for Reproductive Rights, *Bringing Rights to Bear: Rights within Marriage and the Family*, New York: Center for Reproductive Rights, (2008) at 50.

³¹⁷ *Gonzalez* (the Cotton Field decision), *supra* note 21 at para. 401.

³¹⁸ Rebecca J. Cook and Simone Cusack, *Gender Stereotyping*, *supra* note 22 at 9 (footnotes omitted), see also 20–24.

166. Context-specific factors, such as religious or cultural norms that endorse polygyny, subordinate women within the family and in wider society.³¹⁹ In addressing the Intestate Succession Act, which excluded widows of polygynous marriages celebrated according to the Muslim faith, the South African Constitutional Court explained that

By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.³²⁰

167. More generally, polygyny tends to essentialize women's reproductive capacity as being central to marital success. In many cases, polygyny is seen as a solution to a wife's infertility, her "inability" to have enough sons, or her post-menopausal state, or simply as a means to maximize reproduction. In all these scenarios, a wife's value within marriage is equated with her reproductive capacity, and particularly 'male-child reproductive capacity'. In this way, polygyny and reproductive stereotyping reinforce each other.

168. States parties to CEDAW have an obligation to address such patriarchal stereotypes within the familial realm as well as within the broader legislative and social frameworks that perpetuate them. CEDAW has 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.³²¹

169. In applying this reasoning to the particular issue of polygyny, CEDAW has consistently articulated the need to eliminate cultural, customary, and legal norms that perpetuate the practice. In its Concluding Observations on the report of one state party, the Committee noted:

³¹⁹ Within the Bountiful, B.C. polygynous context, religious teachings regarding polygyny negatively stereotype women and girl children into reproductive and subservient roles. As Debbie Palmer, a former polygynous wife has articulated, religious doctrine maintained that she, like all girls and women, had the duty to contribute to the "production" of an abundance of children through polygynous marriage in order for the community to survive the Apocalypse. See Sally Armstrong, "Trouble in Paradise" *Chatelaine* (September, 2004) 138 at 140-142. At the centre of this patriarchal, religious dictum lies a belief that women and girls are meant to serve men and should they disobey, "their souls will burn in hell for eternity." See "Hunting Bountiful: Polygamy in Canada" *The Economist* (10 July 2004) 34.

³²⁰ *Hassam v. Jacobs*, Case CCT 83/08 [2009] ZACC 19 para 34 (per Nkabinde J).

³²¹ *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30th Sess., U.N. Doc. HRI/GEN/1/Rev. 7 (2004), at para. 7.

with concern that, despite prohibitions in statutory law, there is wide social acceptance and lack of sanctions for such practices as ... polygamy ... [The Committee] expresse[d] concern that the civil code contains provisions in family law that discriminate against women and that reinforce discriminatory social practices... [and] ...that the Government uses social practices and customs to justify the non-enforcement of the civil code.³²²

170. Here, the Committee drew attention to the intersection between discriminatory legislation, non-enforcement of civil laws, and harmful social practices and customs. Harmful and discriminatory practices such as polygyny are often premised on and subsequently reinforce stereotypes of women that are in turn used by governments to justify discriminatory family laws and the non-enforcement of equality provisions.

171. In another Concluding Observation, CEDAW noted its concern about

the prevalence in the State party of a patriarchal ideology with firmly entrenched stereotypes and the persistence of deeprooted adverse cultural norms, customs and traditions, including forced and early marriage, polygamy ... that discriminate against women, result in limitation to women's educational and employment opportunities and constitute serious obstacles to women's enjoyment of their human rights.³²³

172. In combating such stereotypes, the Committee encouraged public-awareness campaigns "to eliminate the gap between statutory law and social customs and practices, especially with regard to family law."³²⁴ This may be required for women in polygynous unions in states where family practices do not accord with statutory law. In particular, the Committee's direction that states parties have an obligation to ensure "women's awareness of their rights"³²⁵ is relevant to those states where some women may be unaware of the legal protections available to them, should they wish to leave polygynous unions.

³²² *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Guinea*, UN CEDAWOR, 25th Sess., UN Doc. A/56/38 (paras. 97-144), (2001), at para. 122.

³²³ *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Timor-Leste*, UN CEDAWOR, 44th Sess., U.N. Doc. CEDAW/C/TLS/CO/1 (2009), at para. 27; see also *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of the Congo*, UN ESCOR, 43rd Sess., U.N. Doc. E/C.12/COD/CO/4 (2009), at para. 1; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Madagascar*, UN ESCOR, 43rd Sess., U.N. Doc. E/C.12/MDG/CO/2 (2009), at para. 16.

³²⁴ *Ibid.* at para. 123.

³²⁵ *Ibid.* at para. 123; see also *Concluding Observations of the Human Rights Committee: Uzbekistan*, UN HRCOR, 98th Sess., U.N. Doc. CCPR/C/UZB/CO/3 (2010), at para. 21.

C. Obligations to Ensure Equality in Marriage and Family Life

173. States are obligated under international law to ensure equality in marriage and family life. The two foundational sex equality goals of modern human rights law are to secure women's equality before the law, and in marriage.³²⁶ The preamble to the 1945 United Nations Charter espouses a "determination... *to reaffirm faith in fundamental human rights... in the equal rights of men and women...*"³²⁷ (emphasis added) Article 55 of the Charter states that the U.N. will "promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to... sex..."³²⁸

174. The U.N. Commission on the Status of Women, which first met in 1947, worked to secure "freedom of choice, dignity of the wife, monogamy, and equal rights to dissolution of marriage."³²⁹ Monogamy was seen as an important goal insofar as it formally precluded sex-based entitlements to bring additional spouses into a marriage. This commitment to marriage equality was enshrined in Article 16(1) of the Universal Declaration of Human Rights, which states:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family... [and]... *are entitled to equal rights as to marriage, during marriage and at its dissolution.* (emphasis added)

175. Marital practices such as polygyny that unequally distribute rights in marriage contravene this commitment to equality in marriage.

176. Subsequent international human rights treaties, to which Canada is a party, require states parties to secure the rights therein without distinction based on sex. Article 3 of the International Covenant on Civil and Political Rights requires States parties to "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." The Political Covenant also includes a strong commitment to marital equality, building on the Universal Declaration's commitment by adding equal *responsibilities* within marriage in addition to equal rights. Article 23(4) of the Political Covenant explains that:

³²⁶ See Deller Ross, "Polygyny as a Violation of Women's Right", *supra* note 107 at 31.

³²⁷ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, Preamble.

³²⁸ *Ibid.* Art. 55.

³²⁹ Leslie J. Harris & Lee E. Teitelbaum, *Family Law: Cases and Materials*, 2nd ed. (Gaithersburg: Aspen Law and Business, 2000) at 271-279 as cited in Deller Ross, *supra* note 107 at 31.

States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

177. Article 23(4) imposes a positive obligation on states parties to take “appropriate steps” to ensure equality in marriage.

178. The Human Rights Committee, in its General Comment No. 28, on Equality of Rights between Men and Women, makes clear that polygamy violates the principle of equal treatment in marriage. 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.³³⁰ (emphasis added)

179. Marriage equality is of primary importance in international human rights law, in part due to its significant social and legal implications. In most jurisdictions, including Canada, marriage is a mix of contract and status. Although one contracts with another person to marry, the marriage itself is in part a *status* relationship. The state ascribes to married persons certain rights and obligations based on their status as *spouse*. Most customary and religious normative systems likewise understand the marriage relationship as a status relationship with certain rights and obligations. These may differ according to sex. Even for those “marriages” that are not formally recognized by state law, spouses will nevertheless take on a marital status (with attendant rights and obligations) under the normative religious or customary systems governing their unions.³³¹ In systems that permit polygyny, this will include the husband’s right to take on an additional spouse, but not vice versa. Where a husband formally marries his first wife, his additional informal wives will still be understood in the relevant community as a “co-wife.” Children will be legitimate within the community, although outside the community they are considered the children of unmarried mothers, often entitling their mothers to child support.

³³⁰ *General Comment No. 28: Equality of rights between men and women (article 3)*, UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para. 24; For a discussion of the legal trend toward marital equality and the regulation of marriage generally, see Gautier, “Legal Regulation of Marital Relations”, *supra* note 9. .

³³¹ The majority of polygynous Fundamentalist Mormon unions in Canada and the United States are never civilly registered. To avoid blatantly flouting criminal bigamy prohibitions, most Fundamentalist Mormon polygynous husbands legally marry one wife and have only Mormon religious marriage ceremonies with subsequent wives. See Strassberg, “Symposium: Lawyering for the Mentally Ill”, *supra* note 80 at 369. In *State v. Holm* 2006 UT 31, a case concerning bigamy and sexual contact with a minor, the Utah Supreme Court stated: “The crux of marriage in our society, perhaps especially a religious marriage, is not so much the license as the solemnization... by which two individuals commit themselves to undertake a marital relationships.” In that case, the Court found that the defendant had “committed himself to undertake all the obligations of a marital relationship”, even if it was not valid under formal law.

180. This distinguishes polygyny from polyamorous relationships, which typically lack formal or informal dyadic recognition; that is, recognition that two people are paired in an ongoing relationship. Such relationships are not structured by normative systems that distribute rights unequally according to sex.³³² Likewise, adultery, which has never been a criminal offence in Canada, is not premised on a marital form that ascribes different rights and responsibilities according to sex.
181. The International Covenant on Economic, Social and Cultural Rights (ICESCR) also contains a general non-discrimination clause on the basis of sex (Article 2). States parties have a positive obligation under Article 3 to “ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” Some of these rights include the right to health, protected by Article 12, and education, protected by Article 13.
182. CEDAW contains the most comprehensive articulation of women’s right to marital equality. It imposes an obligation on states parties to take all appropriate measures to secure women’s equality in marriage, including by challenging gendered roles in family life. The preamble to the Women’s Convention expresses a conviction that “a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.” Where States parties permit, condone, or ignore discriminatory family practices, they perpetuate male paradigms of power, resulting in women’s *de facto* and *de jure* inequality.
183. Article 16 of CEDAW outlines states’ obligations to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations...” States parties have a positive obligation to (emphasis added):
1. ... ensure on a basis of equality of men and women:
 - (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*;

³³² In *State v. Holm* 2006 UT 31, a case concerning bigamy and sexual contact with a minor, the Utah Supreme Court noted that “the behavior at issue in this case is not confined to personal decisions made about sexual activity, but rather raises important questions about the State’s ability to regulate marital relationships and prevent the formation and propagation of marital forms that the citizens of the State deem harmful.”

- (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.

184. Article 16 articulates the range of rights and responsibilities that are typically engaged in the legal regulation of marriage and family life. It is this commitment to equal rights and responsibilities that asymmetrical marital practices such as polygyny violate. It has been explained that when a husband has multiple wives, each wife essentially has only a fraction of a husband.³³³ As a result, spousal maintenance and child-care resources are all divided unequally vis-à-vis individual polygynous husbands and their respective wives influenced, for instance, by how many dependent children and individual wife has.³³⁴ Polygynous 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 toward them.³³⁵

185. Accordingly, in its General Recommendation No. 21, on Equality in Marriage and Family Relations, CEDAW stated 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

³³³ See Deller Ross, "Polygyny as a Violation of Women's Right", *supra* note 107.

³³⁴ *Ibid.* at 34.

³³⁵ *Ibid.*

prohibited. The Committee notes with 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.³³⁶ (emphasis added)

186. CEDAW has interpreted the Women's Convention as requiring States parties to *discourage and prohibit* polygyny as a discriminatory practice.³³⁷

D. Obligations relating to Health and Security of the Person

187. Much of the recent global advocacy against polygyny has centred on the sexual and reproductive health harms associated with the practice.³³⁸ Particularly in high-HIV prevalence regions where polygyny is practiced, there is significant concern about its contribution to disease spread.³³⁹ This is a relevant concern for Canada in the immigration and international aid contexts.

188. One of the most important, yet elusive, rights of women globally is the right to the highest attainable standard of health. Where discriminatory practices such as polygyny undermine women's mental, physical, sexual and reproductive health, they not only deprive women of this health right, but also threaten the enjoyment of other human rights, including the right to life, liberty, and security of the person, amongst others.

189. States parties to the ICESCR have an obligation under Article 12 to recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The right to enjoy the highest attainable standard of health does not provide a minimum guarantee of a substantive level of health. It is not understood as "a right to be healthy." Rather, it refers to "a system of health protection which provides *equality of opportunity* to enjoy the highest attainable

³³⁶ *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess., U.N. Doc. A/47/38, (1994), at para. 14.

³³⁷ One of the means to achieve this is to require the registration of all marriages, as Canada does. CEDAW has emphasized that registration is required to "ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, a prohibition of bigamy and polygamy and the protection of the rights of children." *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess., UN Doc. A/47/38, (1994), at para. 39.

³³⁸ For a discussion of the health harms of polygynous unions, see *supra* III. B. 1.

³³⁹ See C. Albertyn, "Contesting Democracy: HIV/AIDS and the Achievement of gender equality in South Africa" (2003) 29 *Feminist Studies* 595; Lisa M. Kelly, "Polygyny and HIV/AIDS", *supra* note 64; see also Esther N. Mayambala, "Changing the Terms of the Debate: Polygamy and the Rights of Women in Kenya and Uganda" 3 *East African Journal of Peace & Human Rights* 200 (1997); See Charles Ngwenya, "Sexual Health and Human Rights", *supra* note 110 at 136-137; R. Pearhouse and A. Symington, *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Vol I: Sexual and Domestic Violence; Vol II: Family and Property Issues*, Toronto: Canadian HIV/AIDS Legal Network, 2009).

level of health”³⁴⁰ (emphasis added). This equality of opportunity is not limited to health care. The CESCR has stated that the right to health also extends to a “wide range of socio-economic factors that promote conditions in which people can lead a healthy life.” Where women are subordinated by family structures that entitle husbands to enter into multiple, concurrent sexual networks, they do not have equality in opportunity to enjoy the highest attainable standard of health, which the World Health Organization describes as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”³⁴¹

190. Accordingly, States parties have a duty to take “concrete and targeted” steps to eliminate practices that prevent women from enjoying the right to health. The CESCR has noted that this requirement to take proactive steps toward the full realization of Article 12 includes the shielding of women “from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.”³⁴²

191. Thus, while the right to health is often examined within the context of access to effective and adequate health care services, it has important implications for the elimination of practices that are harmful to women’s “physical, mental and social well-being”. Indeed, there is a growing international recognition of the deleterious health impact of discriminatory practices, particularly with regard to sexual and reproductive health. The 1995 Beijing Platform for Action, developed at the UN Fourth International Conference on Women, noted that:

Reproductive health eludes many of the world's people because of such factors as: inadequate levels of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services; the prevalence of high-risk sexual behaviour; discriminatory social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive lives.³⁴³

192. In this sense, inadequate education, misinformation, the limited power many women and girls’ have over their sexual lives, and high-risk sexual practices such as polygyny combine to undermine the health of women and girls.

³⁴⁰ *General Comment 14, Article 12: The Right to the Highest Attainable Standard of Health*, UN ESCOR, 22nd Sess., U.N. Doc. E/C.12/2000/4 (2000), at para. 4.

³⁴¹ Constitution of the World Health Organization, preambular para 1, 1946, Off. Rec. Wld Hlth Org. 2, 100.

³⁴² *General Comment 14, Article 12: The Right to the Highest Attainable Standard of Health*, UN ESCOR, 22nd Sess., U.N. Doc. E/C.12/2000/4 (2000), at para. 21.

³⁴³ Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), para. 95.

E. Obligations to Ensure Children's Rights

193. States have a duty under international law to ensure the protection of children and young people as necessary for their well-being. Children, particularly female children, raised in polygynous families in closed or semi-closed communities may be subject to demographic pressure to marry at a young age. Boy children may be subject to exclusion in order artificially to sustain an unequal sex ratio. Where polygyny is practiced in a more fluid population, boy and girl children may nevertheless internalize harmful stereotypes based on the unequal rights and authority of their parents.

194. Such discriminatory practices may negatively impact children's physical and mental health. States parties have an obligation under Article 24(3) of the CRC to take "all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." In its General Comment No. 4, on Adolescent Health, the CRC Committee emphasized the importance of education for adolescents concerning early marriage or pregnancy. The Committee stated:

Adolescent girls should have access to information on the harm that early marriage and early pregnancy can cause, and those who do become pregnant should have access to health services that are sensitive to their rights and particular needs.³⁴⁴

195. In this respect, criminal prohibition is not sufficient to address the health harms posed by polygyny in some cases and by early marriage and pregnancy more generally. The state has important educative responsibilities in this regard.

196. Where traditional practices such as polygyny undermine children's health, including possibly exposing them to sexually-transmitted infections such as HIV/AIDS, international law requires that states take the requisite steps to eliminate them. The CRC emphasized in its General Comment no. 4 that States Parties are obligated "to adopt legislation to combat practices that ... increase adolescents' risk of infection..."³⁴⁵ The CRC Committee has urged states in its Concluding Observations "to discourage polygamy by applying legal and administrative measures and conducting awareness-raising campaigns on its adverse effects on children."³⁴⁶

³⁴⁴ *General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child*, UN CRCOR, 33rd Sess., U.N. Doc. CRC/GC/2003/4 (2003) at para. 31

³⁴⁵ *Ibid.* at para. 30.

³⁴⁶ *Concluding observations of the Committee on the Rights of the Child: Burkina Faso*, UN CRCOR, 53rd Sess., U.N. Doc. CRC/C/BFA/CO/3-4 (2010), at paras. 44-45.

F. Arguable Limitations

197. The obligation to eliminate polygyny must be considered in view of contrasting rights, such as the right to private and family life, the right to freedom of religion, and the right to enjoy one's culture. Is the practice of polygyny protected by the right to private and family life? Where polygyny is permitted or even required by one's religion, such as the biblical levirate duty of a man under some circumstances to take his deceased brother's widow as a subsequent wife, does the right to freedom of religion provide a right to be free to practice polygyny? Does one have the right to be governed by religious or customary norms in the area of marriage and family life? Does the right of men to enjoy their culture trump the right of women to be free from all forms of discrimination? The state practice and jurisprudence that have emerged under regional and international human rights treaties have answered these questions in the negative.

1. The Right to Privacy and Family Life

198. The criminal prohibition of polygyny interferes with privacy and family life. It criminalizes a certain form of family life and thereby interferes with the private as well as the public expressions of that form. Article 17 of the Political Covenant protects individuals' right to privacy and family life. It states:

1. No one shall be subjected to *arbitrary or unlawful interference with his privacy, family, home or correspondence*, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks. (emphasis added)

199. The prohibition of polygamy is prescribed by law in many countries³⁴⁷ in the form of criminal law provisions, such as s. 293(1) of the *Criminal Code*. Lawful interference may violate Article 17 when it constitutes an "arbitrary" interference in private and family life. The concept of arbitrariness is intended to ensure that even where interference is provided for by law, it "should be in accordance with the provisions, aims and objectives of the ICCPR and should be, in any event, reasonable in the circumstances."³⁴⁸ Arbitrariness, then, suggests an unreasonable interference that does not comport with the aims and objectives of the ICCPR. The Human Rights Committee has stated that an interference with privacy will be

³⁴⁷ *General Comment No. 28, Equality of rights between men and women (article 3)*, UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), at para 24.

³⁴⁸ *General Comment No. 16, The right to respect of privacy, family, home, and correspondence, and protection of honour and reputation (article 17)*, UN HRCOR, 32nd Sess., U.N. Doc. HRI/GEN/1/Rev.1 (1988), at para. 4.

unreasonable where it is disproportionate to the end sought or unnecessary in the circumstances.³⁴⁹

200. Although particular details of family functioning are protected against state control by the human right to privacy and family life, the institution of marriage itself is public. Anthropologists teach that a couple's marriage is publicly celebrated in order to limit individuals' sexual availability to others, and confirm the legitimacy, including inheritance rights, of subsequently born children.³⁵⁰ Eligibility for marriage is generally governed by law, such as on minimum ages and prohibition of incestuous unions, and divorce law, creating capacity for remarriage, is similarly governed by laws. Only approved officers, such as ministers of recognized religions, judges and governmentally appointed registrars, can conduct marriage ceremonies, which require witnesses. Marriage certificates are official government documents and marriage records are frequently public. Public interest in marriage eligibility has been confirmed in modern times by controversy, litigation and legislation concerning the legal status of same sex marriages.³⁵¹ The public nature of marriage is therefore not subject to privacy protections.

201. Where women are subject to discriminatory family practices, including under parallel normative systems, this directly undermines their right to equality in marriage, contrary to Article 23 of ICCPR, and may indirectly impact other rights. The Human Rights Committee emphasized in its General Comment No. 28, on Equality of Rights between Men and Women, that "equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. It should be definitely abolished wherever it continues to exist."

202. The right to private and family life is also invoked to argue against immigration policies that prohibit the entry of multiple wives of polygynous families. Where polygynous unions are not recognized in the country of immigration,³⁵² there are often restrictions on the number of wives a man can bring to his new country.³⁵³ Such restrictions can affect the exercise of the right to family life of the persons involved in that union, including the husband, his wives and their children.

203. Some commentators argue that this right to family life now forms part of an international legal norm against involuntary family separation.³⁵⁴ These

³⁴⁹ *Toonen v. Australia* (Communication No. 488/1992, Report of the Human Rights Committee, Vol II, GAOR, Forty-ninth Session, Suppl. No. 40 (A/49/40), pp 226-237.

³⁵⁰ C.S. Burne, *Handbook of Folklore*, republished by Kessinger Publishing, Whitefish, Montana: 2003 "Publicity is everywhere the element which distinguishes a recognized marriage from an illicit connection" at 203.

³⁵¹ *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, European Court of Human Rights (states not obliged to allow gay marriage).

³⁵² In the United Kingdom, marriages in polygynous form are not recognized. See *Ohochuku v. Ohochuku* (1966) W.L.R. 183.

³⁵³ *Bibi*, *supra* note 226.

³⁵⁴ Starr and Brilmayer, "Family Separation", *supra* note 135.

commentators contend that the individual right to privacy, the right to marry, children's rights, parental rights and provisions that protect the family as an institution cumulatively account for such a norm.

204. In *Bibi v. The United Kingdom*, the European Commission of Human Rights addressed this issue of involuntary family separation in a case brought by the child of a Bangladeshi polygynous wife.³⁵⁵ The petitioner claimed that her Article 8(1) right to respect of family life under the European Convention had been violated by United Kingdom immigration legislation that prohibited the entry of more than one spouse per immigrant.³⁵⁶ In that case, the claimant's father had already brought his second wife to the U.K. along with his children from his first marriage, thus separating them from their mother, who was forced to remain in Bangladesh. While the Commission found that the claimant's Article 8(1) right had been interfered with, it held that the U.K. legislation was justified to preserve a Christian-based monogamous definition of marriage as part of the "protection of morals" exception under Article 8(2) of the Convention.³⁵⁷

205. In reaching this decision, the Commission missed an opportunity to undertake an analysis of the rights of members of a polygynous household within the immigration context, especially given that one of the exceptions under Article 8(2) is legislation necessary "for the protection of the rights and freedoms of others." In such an analysis, the Commission arguably should have considered the rights violations associated with polygyny and the ensuing public policy basis for excluding such families in an attempt to discourage the practice on the one hand, and the rights violations associated with involuntary family separation on the other. Despite the Court's incomplete reasoning, the case nevertheless remains significant in highlighting one of the most difficult transitional scenarios that both international and domestic law must consider.

206. Indeed, the immediate consequence for this applicant and her mother was that they would remain separated (unless the claimant moved to Bangladesh). Particularly where states such as the United Kingdom and Canada prohibit the entry of multiple spouses because of their own domestic prohibition of the practice,³⁵⁸ there is a concern that husbands will choose to bring their more

³⁵⁵ See *Bibi*, *supra* note 226

³⁵⁶ Article 8 of the European Convention on Human Rights states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

³⁵⁷ *Bibi*, *supra* note 226.

³⁵⁸ Canadian immigration policy presently excludes those living in polygamous relationships; see "An ideal candidate for immigration is denied after it is learned he has two wives," *National Post*, Feb. 1, 2005, p. A7; and *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 154 F.T.R. 285.

favoured, often younger second or subsequent wife, leaving the first wife vulnerable and isolated within her husband's home country.³⁵⁹

207. Some commentators argue that exclusionary immigration policies ignore the extreme vulnerability that wives who are left in their husband's homeland face.³⁶⁰ A remaining wife is often left without any legal recourse to ensure support from her husband. Moreover, even if a remaining wife receives a judgment for spousal support in the home country, her ability to enforce this judgment will depend on whether the home country and her husband's new country of domicile reciprocally enforce each other's judgments. Finally, given the economic challenges many polygynous wives face, their poverty may prevent them from being able to access courts to receive or enforce judgments for spousal support, presupposing that their husbands have the means to pay.

2. The Right to Freedom of Religion

208. Some commentators have argued that the right to manifest one's religion or belief, as protected under the Universal Declaration, the Political Covenant, and the Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief (Declaration on Religious Intolerance),³⁶¹ includes the right to observe and apply religious law in both public and private life.³⁶² This can be characterized as the strong religious freedom claim: formal state laws must yield to and perhaps grant formal recognition to parallel normative systems.³⁶³ A weaker freedom of religion claim would assert that parallel religious or customary laws need not be formally recognized by the state, but they must not be interfered with. Parties should remain free to partake in religious or cultural practices, even where gender discriminatory, free of government interference.

209. There is little support for either the strong or weak religious claims under international law. Religious freedom is most fully protected under the Political Covenant. Article 18 protects individuals' right to freedom of religion. It provides that:

³⁵⁹ See Prakash A. Shah, "Attitudes to Polygamy in English Law" (2003) 52 Int'l Comparative and Law Quarterly 369.

³⁶⁰ *Ibid.*

³⁶¹ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res. 36/55, UN GAOR, 36th Sess., Supp. No. 15, UN Doc. A/36/684 (1981).

³⁶² See Donna Sullivan, "Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution" (1992) 24 N.Y.U. J. Int'l L. & Pol. 795 at 836.

³⁶³ Such arguments are often premised on the fact that some interpretations of various belief systems, including Islam, state that the observance of religious law is integral to religious practice. See Natasha Bakht, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* (National Association of Women and the Law: March, 2005) at 44.

1. Everyone shall have the *right to freedom of thought, conscience and religion*. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either *individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching*.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be *subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents... to ensure the religious and moral education of their children in conformity with their own conviction... (emphasis added)

210. The text of Article 18, and the HRC Comment No. 22, interpreting it, do not suggest that freedom of religion provides any positive right to be governed by religious law in marriage and family life.³⁶⁴ That is, the right to religious freedom does not require formal Canadian state law to yield to and recognize parallel personal status or religious laws governing family relations. The Declaration on Religious Intolerance does not include a freedom to be governed by religious law amongst the many protected religious practices it lists.³⁶⁵

211. The text and Committee interpretations of the Women's Convention also do not provide for any freestanding right to be governed by parallel religious family laws. This is especially the case where such laws permit gender discriminatory practices such as polygyny. Article 2(f) of the Convention expressly requires States parties to "modify or abolish existing laws..., customs, and practices which

³⁶⁴ *General Comment No. 22, The right to freedom of thought, conscience, and religion*, UN HRCOR, 48th Sess., U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994) at para. 4 where the HRC lists a broad range of acts included within the freedom to manifest one's religion:

"The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications." Notably, there is no indication that the right includes a right to be governed by religious laws (familial or otherwise) through religious tribunals.

³⁶⁵ See Deller Ross, "Polygyny as a Violation of Women's Right", *supra* note 107 at 36 for discussion; *Declaration on All Forms of Intolerance*, *supra* note 361.

- constitute discrimination against women.” Article 3, which requires States parties to take “all appropriate measures, including legislation, to ensure the full development and advancement of women” precludes cultural or religious defences for discriminatory familial practices that hinder such development.
212. The CEDAW Committee has observed that where states formally defer to parallel systems that permit polygyny, this violates CEDAW and national constitutional equality protections. In its General Recommendation No. 21 on Equality in Marriage and Family Relations, CEDAW noted with 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...*³⁶⁶ (emphasis added)
213. The strong claim that there is a right under international law to be governed by parallel religious or customary norms does not find purchase in the relevant human rights instruments. The weaker claim that there is a right at least *informally* to practice polygyny also lacks grounding in international law.
214. The ICCPR does not extend religious freedom protection to practices that violate the rights of others, including children who, unlike their mothers, have not chosen membership of polygynous families. Article 18(3) expressly permits legislative limits on freedom of religion where “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” In *Singh Binder v. Canada*, for example, the HRC held that the religious freedoms of a Sikh complainant whose faith obliged him to wear a turban could be justifiably restricted by a law requiring federal workers to wear safety headgear (a “hard hat”). Here, the legislative aim was to protect federal workers from injury. This was “regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.”³⁶⁷
215. The relevant criterion for such limitations is that they have a reasonable aim that is consistent with the objectives and purposes of the Covenant. The HRC has interpreted the ICCPR as precluding states parties from relying on religious freedom to permit gender discriminatory practices. In its General Comment No. 28, Equality of Rights between Men and Women, the Committee stated that “Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion.”³⁶⁸ In its General Comment No. 22, the HRC stated that in limiting religious practices, “States

³⁶⁶ *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess., U.N. Doc. A/49/38 (1994) 1, at para. 14.

³⁶⁷ *Singh Bhinder v. Canada*, Communication Nos. 208/1986, U.N. Doc. CCPR/C/37/D/208/1986 (1989) at para. 6.2.

³⁶⁸ *General Comment No. 28, Equality of rights between men and women (Art. 3)*, UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), at para. 21; see also para. 5.

parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3, and 26.”³⁶⁹ Given that the HRC has found that polygamy violates these equality provisions, it is clear from the perspective of the treaty body that the prohibition of polygyny is a reasonable limit on freedom of religion.³⁷⁰

216. The Mauritius Supreme Court applied this reasoning in *Bhewa v. Government of Mauritius*, where it considered a claim by a Muslim group that they had the right to be governed by Islamic law in marriage, divorce, and inheritance.³⁷¹ The Court interpreted the constitution’s guarantee of religious freedom in accordance with the state’s obligations under the Political Covenant. The Court held that even if one interpreted religious freedom as including a right to be governed by parallel religious laws, Mauritius’ obligations, as a party to the Political Covenant, required that it uphold equality in marriage and family life, according to Articles 2(1) and (2), 3, 18(3), 24, and 26. The Court interpreted these obligations as requiring the prohibition of polygyny. Mauritius’ international obligations required that it ensure

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... .³⁷²

217. Likewise, in the recent case of *M Insa*, the Constitutional Court of the Republic of Indonesia rejected a claim that the requirement in national law to obtain judicial permission before taking a subsequent wife was a violation of religious freedom. The impugned legislation stated that in order to obtain judicial permission, there must be consent from the existing wife/wives, the husband must be capable of guaranteeing the living necessities of the wives and children, and the husband must guarantee to treat the wives and children fairly. After canvassing Islamic laws governing polygyny, the Court held that these were all reasonable and constitutional limits on the practice of polygyny. In particular, it stated that “the wife’s consent is required because it is closely related to the wife’s position as an equal partner and as a legal subject in a marriage whose dignity and status must be respected.”³⁷³

³⁶⁹ *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, UN HRCOR, 48th Sess., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 35 (1994) at para. 8.

³⁷⁰ See, e.g. jurisprudence permitting limitations on the public use of religious headscarves for the purpose of promoting gender equality and maintaining secularism in official settings: *Case of Leyla Sahin v. Turkey* (2005), Eur. Ct. H.R., Appl. 44774/98.

³⁷¹ Law Reports of the Commonwealth [1991] LRC (Const).

³⁷² *Ibid.* at 309.

³⁷³ *M Insa, S.H.*, Decision Number 12/PUU-V/2007, (The Constitutional Court of the Republic of Indonesia) (2007).

218. The weaker claim that one has the right to freely practice polygyny, albeit without formal recognition, also fails to make any distinction between religious belief and practice. It is highly unlikely that belief alone, without any ensuing act, could be legitimately limited by the state under international law. However, where discriminatory beliefs are manifested in practice, states must take appropriate steps to ensure women's equality, including by limiting discriminatory religious practice. Whereas religious *belief* cannot be interfered with by the state, individuals do not have an unfettered right to *practice* discriminatory beliefs under international law.³⁷⁴

3. The Right to Enjoy One's Culture

219. Beyond religious freedom arguments, some proponents of polygyny also claim that the practice is integral to the right to enjoy one's culture.³⁷⁵ International law recognizes a right to enjoy one's culture. The most comprehensive articulation of cultural rights is contained in the International Covenant on Economic, Social and Cultural Rights (1966) ["ICESCR"]. Article 15 recognizes "the right of everyone: (a) to take part in cultural life."

220. Whereas international law recognizes a right to enjoy one's culture, this does not encompass practices that violate the fundamental rights and freedoms of others. Article 3 of the ICESCR expressly requires States Parties to ensure the "equal right of men and women to the enjoyment of all economic, social and cultural rights" of the Covenant. CESCR General comment No. 21 specifically states that "Implementing article 3 of the Covenant, in relation to article 15, paragraph 1(a), requires, inter alia, the elimination of institutional and legal obstacles as well as those based on negative practices, including those attributed to customs and traditions, that prevent women from participating fully in cultural life, science education and scientific research."³⁷⁶

221. States parties, such as Canada, have an obligation to limit cultural practices that undermine women's ability to enjoy their rights. This is well within the

³⁷⁴ See *supra* Section IV.5 at para. 101. The United States jurisprudence on Mormon polygamy, dating from *Reynolds v. Untied States* ((1879) 98 U.S. 145) has held that although state law cannot interfere with religious *belief*, it may intervene where religious *practices* undermine the rights of others. In *Reynolds*, the Supreme Court noted that while laws "cannot interfere with mere religious belief and opinions, they may with practices." Other courts have drawn this same belief-practice distinction in prohibiting polygyny: *State of Bombay v. Narasu Appa Mali* (1952) A.I.R. 84 Bom.; *Srinivasa v. Saraswati Ammal* (1952) A.I.R. 193 Mad., as cited in Deller Ross, "Polygyny as a Violation of Women's Right", *supra* note 107 at 38-39. In each of the two cases where the Bombay High Court in India upheld local statutes prohibiting Hindu polygyny (before national law prohibited it), for example, it cited the belief-practice distinction drawn by the U.S. Supreme Court.

³⁷⁵ See Deller Ross, "Polygyny as a Violation of Women's Right", *supra* note 107 at 39-40 for a discussion of this argument.

³⁷⁶ *General Comment 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 43rd Sess., U.N. Doc. E/C.12/GC/21, para. 25, see also para. 64.

permissible range of limitations Canada can impose on cultural practice. Article 4 of the ICESCR provides that States may “subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” CESCR General comment No. 21 explains that “Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights.”³⁷⁷ Limiting rights to take part in cultural life in ways that are proportionate is consistent with securing women’s rights under the Covenant and promoting the general welfare of a democratic society.

222. A measured balance between cultural freedoms and equality rights protection is also manifest in the ICCPR. Article 27 of the ICCPR guarantees cultural rights for minority groups by requiring that they “not be denied the right, in community with the other members of their group, to enjoy their own culture...” While this clause would not apply to the cultural norms of the majority group (for example, where polygyny is practiced as part of the majority culture), it does on its face provide a right for minority groups within a state such as Canada to be left alone to enjoy their culture, including their polygynous culture.

223. When the provision is read in the context of the ICCPR as a whole, however, it is clear that this right does not include harmful cultural practices, such as polygyny. Firstly, Article 23(4) requires States parties to “ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution...” This equal rights and responsibilities mandate cannot be achieved where unequal marital practices, such as polygyny, are legally permitted or condoned. In addition, Article 2, which guarantees that the rights in the Covenant be recognized “without distinction of any kind, such as... sex...,” along with Article 3, which requires states to ensure the “equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant,” establish gender equality as fundamental to the Covenant. To this end, the HRC has stated that the minority cultural rights articulated in Article 27 “do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights.”³⁷⁸

224. Building on the ICESCR and the ICCPR, the Women’s Convention requires the elimination of gender-discriminatory cultural practices. Article 2(f) obliges States parties to:

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

³⁷⁷ *Ibid.* at para. 19.

³⁷⁸ *General Comment No. 28: Equality of rights between men and women (article 3)*, UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para. 32.

225. Given that the CEDAW Committee has named polygyny as a gender-discriminatory practice, CEDAW not only precludes cultural arguments that justify polygyny, but imposes a positive obligation on States parties to abolish it.

226. Finally, reliance on cultural arguments legally to justify polygyny fails to account for the positive duty Article 3 of the Women's Convention places on States parties to "ensure the full development and advancement of women." To this end, States parties shall:

take in all fields, in particular in the political, social, economic and *cultural fields*, all *appropriate measures, including legislation, to ensure the full development and advancement of women*, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. (emphasis added)

227. The "full development and advancement of women" cannot be ensured where harmful and discriminatory practices, such as polygyny, are perpetuated in the name of culture.

VI. CANADA'S OBLIGATIONS UNDER DOMESTIC LAW TO COMPLY WITH INTERNATIONAL LAW

A. International Human Rights Treaty Law

228. In some legal systems, domestic incorporation automatically follows ratification or accession to an international treaty. These systems are referred to as “monist” jurisdictions because they have one unified body of legal obligations. In contrast, in dualist systems such as Canada’s, international treaties must be expressly transformed into domestic law through implementing legislation.³⁷⁹ Whereas the executive branch of government has the power to bind Canada as a matter of international law, the legislative branch, Parliament, must implement such obligations to make them binding domestically.

229. Canadian courts, the judicial branch of government, have consistently upheld the dualist principle that accession or ratification alone does not change domestic law.³⁸⁰ In the *Labour Conventions* case, the Judicial Committee of the Privy Council stated:

Within the British Empire, there is a well-established rule that *the making of a treaty is an executive act*, while the *performance of its obligations*, if they entail *alteration of the existing domestic law*, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve the alteration of law they have to run the risk of *obtaining the assent of Parliament to the necessary statute or statutes...*³⁸¹ (emphasis added)

230. The strict reading of the *Labour Conventions* case is that international human rights treaties to which Canada is a party are not binding domestically without implementation. There is some domestic legislation that expressly refers to the

³⁷⁹ William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed., (Toronto: Thomson Carswell, 2007) at 54. For a critique of the transformation approach, see Donald J. Fleming and John P. McEvoy, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law: Toronto, 2006) 521.

³⁸⁰ See *Re Arrow River and Tributaries Slide & Boom Co. Limited*, [1932] SCR 495, 39 CRC 161 (sub nom. *Arrow River & Tributaries Slide & Boom Co., Re*) [1932] 2 DLR 250, at 260-261 (DLR); *Francis v. R.*, [1956] SCR 618; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 SCR 141, 81 DLR (3d) 609, 36 CPR (2d) 1, 18 NR 181; and, again recently, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

³⁸¹ *AG Canada v. AG Ontario (Labour Conventions Case)*, [1937] AC 326, [1937] 1 DLR 673, [1937] 1 WWR 299 (Canada P.C.) at 347-348 (AC).

ICCPR, including the *Emergencies Act* (1988) and the *Canadian Multiculturalism Act* (1988).³⁸²

231. Even where parties cannot make direct domestic claims on the state based on its international obligations, awareness of international human rights law remains imperative in the interpretation of domestic law, particularly the *Charter*. Courts presume Parliament to legislate in accordance with its treaty obligations and the rules of international law, unless the legislated language provides explicitly to the contrary. According to the presumption of compliance, sometimes referred to as the principle of conformity, Parliament is presumed to legislate in accordance with its treaty obligations and the rules of international law. This common law principle of statutory interpretation was advanced by the Supreme Court of Canada in *Daniels v. White* (1968):

Parliament is *not presumed to legislate in breach of a treaty* or in a manner inconsistent with the comity of nations and the *established rules of international law*.³⁸³ (emphasis added)

232. The presumption of compliance gives international legal obligations a crucial interpretive role in cases of statutory ambiguity. In addition to the principle of conformity, international human rights treaties to which Canada is a party are relevant to *Charter* interpretation. International human rights law illuminates the values and principles that underlie *Charter* rights, and that justify limitations thereto.³⁸⁴

B. Customary International Law

233. In contrast to treaty law, Canada is generally considered adoptionist with respect to customary international law. Under the adoptionist approach, customary international law is deemed to be part of the common law, and can be applied directly by courts without express domestic incorporation insofar as there is no clear conflict with precedent or a statute.³⁸⁵ British courts have clearly articulated the adoptionist approach in the case of customary international law. Lord Denning affirmed in *Trendtex Trading Corporation v. Central Bank of Nigeria* that customary norms are directly incorporated into the common law to the extent they are not incompatible with a statute.³⁸⁶ Although the Supreme Court of Canada has not made such clear a statement, the cumulative body of Canadian

³⁸² *Emergencies Act*, SC 1988, c. 29; *Canadian Multiculturalism Act*, SC 1988, c. 31.

³⁸³ *Daniels v. White*, [1968] S.C.R. 517 (S.C.C.) at 541.

³⁸⁴ *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 750.

³⁸⁵ William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, (3rd ed.), (Toronto: Thomson Carswell, 2007) at 77.

³⁸⁶ *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 All ER 881 (HL).

jurisprudence supports the view that Canada is adoptionist toward international customary law.³⁸⁷

234. To the extent that the prohibition, or at the very least growing restriction, of polygyny constitutes part of the international customary norm against sex discrimination, this would not require further transformation to have domestic effect in Canadian law.

C. International Reporting, Complaint, and Inquiry Procedures

235. In addition to domestic considerations of international human rights law, Canada is also subject to reporting procedures and complaint mechanisms under international human rights treaty bodies. The international treaties discussed in this report (CEDAW, CRC, ICCPR, ICESCR) each have a treaty body that monitors state party compliance.³⁸⁸ They do this largely through concluding observations on periodic, mandatory country reports submitted by states parties, and voluntary reports by other interested parties, including NGOs. The Committees also each issue General Comments or General Recommendations that address thematic issues relating to their Covenant or Convention and serve to expand the meaning and interpretation of specific rights.

236. Country reports are meant to detail the legislative, judicial, administrative, and other measures states parties have taken to give effect to the treaty.³⁸⁹ Initial reports to the relevant committees are meant to provide a comprehensive description of the economic, social, political and legal conditions in their respective countries. The CEDAW report provides a comprehensive description of the situation of women in their respective countries. Subsequent reports from states parties should identify the progress and changes since the preceding report with a particular focus on the *de facto* rather than simply the *de jure* situation of women.

³⁸⁷ See *Reference Re Powers of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208; *Pan American World Airways Inc. et al. v. R. et al.* [1981] 2 S.C.R. 565; *Re A.U.P.E. et al. v. Alberta* (1981), 120 D.L.R. (3d) 590 (Alta. Q.B.); (1981), 130 D.L.R. (3d) 191 (Alta C.A.) Leave to appeal to the Supreme Court of Canada refused on Dec. 7, 1981: (1981, 130 D.L.R. (3d) 191 (note) (S.C.C.); *R. v. Sunila* (1986), 26 C.C. C. (3d) 177 (N.S. C.A.). See Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Vancouver: Butterworths Canada Ltd., 1992) at 5-10.

³⁸⁸ The Human Rights Committee (HRC) is the treaty monitoring body for the Political Covenant. Per Article 40 of the Covenant, States parties are required to "submit reports" on measures taken to "give effect" to their treaty obligations and "on the progress made" in the enjoyment of rights articulated in the Covenant. For a discussion on the formal organization of the HRC, see Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford: Oxford University Press, 2000) at 706-708.

³⁸⁹ Article 18 of CEDAW requires that States parties submit country reports on the: legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect.

237. The Communications procedure under the Optional Protocol to CEDAW allows individuals and groups claiming a violation of their treaty rights to submit a communication to the CEDAW Committee. Canada acceded to the Optional Protocol on 18 October, 2002.³⁹⁰ Individuals and groups are also permitted to submit communications on behalf of others.³⁹¹ Complainants must have exhausted all domestic remedies before the CEDAW Committee will hear the complaint.³⁹²
238. The ICCPR, like CEDAW, has an Optional Protocol that allows its monitoring Committee to hear individual communications from persons claiming to be victims of human rights abuses committed by a member state. Canada acceded to the Optional Protocol of the ICCPR on 19 October, 1976. An Optional Protocol to the ICESCR opened for states parties in December, 2008 and is not yet in force. The CRC does not have an Optional Protocol to consider individual complaints.³⁹³
239. In addition to the Complaint Procedure, the Inquiry Procedure under the Optional Protocol is another important mechanism for ensuring greater conformity by States parties with their obligations under CEDAW. Where the Committee receives “reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention”, the Committee can initiate an Inquiry. It will consult with the State party and will transmit findings and recommendations to the state party.³⁹⁴ The Inquiry Procedure under CEDAW is distinct from those of other human rights treaty bodies because it does not limit who can initiate a claim of violation against a State party.³⁹⁵ It requires only that the initiating party “provide relevant proof of the alleged violation.”³⁹⁶ The CEDAW Committee recently conducted an Inquiry into the killings of women and girls in the Ciudad-Juarez region of Mexico.³⁹⁷

³⁹⁰ See U.N. Division for the Advancement of Women, online: <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>

³⁹¹ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. A/RES/54/5, 15 October 1999, Art. 2.

³⁹² *Ibid.*, Art. 4. The Committee “shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.”

³⁹³ Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2000) at 468; For a discussion of U.N. Human Rights Treaty Regimes, see Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford: Oxford University Press, 2000).

³⁹⁴ *Optional Protocol to Women’s Convention*, *supra* note 391, Art. 8.

³⁹⁵ *Ibid.* See Laboni Hoq, “The Women’s Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights” (2001) 32 Columbia H.R. L. Rev. 677 at 698 where Hoq notes that the Race Convention, for example, requires that inquiries be brought by another State.

³⁹⁶ *Ibid.*

³⁹⁷ Report on Mexico Produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and the Reply from the Government of Mexico, CEDAW/C/2005/OP. 8/MEXICO (2005).

240. The fact that a harmful customary or religious practice such as polygyny is illegal in a given state does not alter the CEDAW Committee's ability to investigate it if it is still found to exist.³⁹⁸ Other human rights bodies could also be used to address the inherent wrongs and associated harms through their respective reporting, complaints, and inquiry mechanisms.

³⁹⁸ Hoq, *supra* note 395 at 430. Hoq provides the example of *sati*, a Hindu practice of wife burning upon her husband's death as an example of an "isolated violation" that CEDAW could investigate. While the practice is illegal in most countries, it nevertheless persists in some rural areas.

VII. CONCLUSIONS

241. In conclusion and to reiterate my summary at Section II, based on my expertise and research, I conclude the following:

242. **Conclusions regarding inherent wrongs and associated harms of polygyny:**

a. The patriarchal structuring of family life that enables men to marry multiple wives, but not vice versa, offends women's dignity, and thus is inherently wrong.

b. The asymmetry of polygynous marriages is premised on sex and sex role stereotypes that subordinate women, thus facilitating the unequal distribution of rights and obligations in marriage.

c. The harms associated with the inherent wrongs of polygyny vary across, and within, different legal and social contexts. They include harms to the health, understood as physical, mental and social well-being of polygynous wives, material harms and deprivations they are liable to suffer, and emotional and material harms to children of polygynous mothers, often with serious consequences for their welfare.

243. **Conclusions regarding state practice and *Opinio Juris* with respect to polygyny:**

a. The dominant practice now common among states is to prohibit polygyny by criminal or family law provisions. Where polygyny is permitted, there is a growing trend among states to restrict its practice. Historically, prohibitions of polygamy were aimed at protecting a monogamous form of marriage, or preventing fraud against persons or the state. Increasingly, however, state practice now evidences a growing emphasis on prohibiting or restricting polygyny to ensure women's rights to equality in marriage and family life.

b. Where court challenges to actual or proposed prohibitions or restrictions of polygyny have been brought in the past decade, they have been uniformly defeated, despite claims to religious or cultural freedoms.

c. Recent prosecutions to enforce criminal prohibition of polygyny have been successful, despite claims that the prohibition violates the freedom of religion.

d. Where polygyny is permitted in parallel religious or customary legal systems, there is a trend internationally to ensure that women in polygynous marriages are entitled to the same rights and benefits enjoyed by women in monogamous marriages celebrated under civil family law.

e. Exclusion of multiple spouses is now the norm in the immigrations laws of most western states, in order that persons do not practice polygamy in the destination state. There is an emerging trend to provide that only the first wife of marriage can be potentially recognized for immigration purposes, and only if there is evidence that subsequent wives have been lawfully divorced.

244. **Conclusions regarding Canada's obligations to comply with international law regarding polygyny:**

a. There is a strong consensus under international human rights treaty law that states are obligated to take all appropriate measures to eliminate polygyny, as one of the many prohibited forms of discrimination against women.

b. States are further obligated to take all appropriate measures to dismantle the prejudices and harmful stereotypes that facilitate polygyny.

c. While states have a margin of discretion in determining what measures are appropriate to eliminate polygyny and the prejudices and harmful stereotypes that facilitate it, the discretion is not absolute. Where polygyny is entrenched, states might well be obligated to use the criminal law as an appropriate measure to eliminate it. As states eliminate polygyny, they are obligated to take appropriate measures to protect the human rights of women already in polygynous unions.

d. States are obligated to take all appropriate measures to discourage and prohibit polygyny to ensure equality in marriage and family law.

e. States are obligated to take all appropriate measures to eliminate polygyny in order to ensure women's rights regarding their health and security of their persons.

f. States are obligated to take all appropriate measures to eliminate polygyny in order to ensure the protection of children and young people.

g. While the right to privacy and family life, the right to freedom of religion and the right to enjoy one's culture are important rights, they can not be successfully invoked under international human rights law to justify the practice of polygyny.

245. **Conclusions regarding Canada's obligations under domestic law to comply with international law regarding polygyny:**

a. International human rights treaty law directly informs *Charter* interpretation.

b. International customary law is incorporated in the historical common law, and evidences an international norm against sex discrimination. This norm can be directly applied by the courts to assess the criminal prohibition of polygamy.

c. Canada is required to report to international human rights monitoring committees on the measures it has taken to eliminate polygamy, in order to comply with the international human rights law to which it is party. As a result of the ratification of the Optional Protocol to CEDAW, Canada is subject to complaint procedures. Individuals or groups of individuals who have exhausted all domestic remedies may bring a complaint where they claim that rights have been violated as a result of Canada's failure to take all appropriate measures to eliminate polygyny. In addition, Canada could be subject to an investigation for grave or systematic violations under the Convention for violations of rights of women and girls in polygynous marriages.

July 13, 2010

VIII. REFERENCES

REFERENCES

INTERNATIONAL MATERIALS

DECLARATIONS³⁹⁹

Universal Declaration of Human Rights (1948)

Declaration on the Elimination of Discrimination against Women (1967)

Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief (1981)

Declaration on the Elimination of Violence against Women (1993)

Beijing Declaration and Platform for Action (1995)⁴⁰⁰

Declaration of Commitment on HIV/AIDS (2001)

TREATIES

REGIONAL

European Convention for the Protection of Human Rights and Fundamental Freedoms (1953)

American Convention on Human Rights (1969) – Canada not a party (has neither signed nor ratified)

INTERNATIONAL

Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

³⁹⁹ Declarations, which are typically resolutions of the UN General Assembly, are not treaties, which states can ratify and be legally bound by. Rather, they are nonbinding statements that articulate a common international standard that UN member states should follow. Declarations may provide a basis for the quicker crystallization of international customary norms. See Ian Brownlie, *Principles of International Law*, 6th ed. (2003: Oxford, Oxford University Press) at 14-15. For a discussion of the Declaration on the Elimination of Violence against Women in terms of State Responsibility, see Heléne Combrinck, “Positive State Duties to Protect Women from Violence: Recent South African Developments”, (1998) 20 Human Rights Quarterly 666 at 674.

⁴⁰⁰ Some public international law scholars assert that the concluding statements of a conference of states may be a form of multilateral treaty. Even if interpreted only as an instrument recording decisions that were not unanimously adopted, such declarations may nevertheless provide cogent evidence of the state of customary international law on the subject and emerging international norms. See Brownlie, *supra* note 399 at 14. At a minimum, it does indicate serious international political commitments by states. For a discussion of the Beijing Declaration and Platform of Action in terms of State responsibilities to protect women from violence, see Combrinck, *supra* note 399.

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962, 1964) – Canada not a party

International Convention on the Elimination of All Forms of Racial Discrimination (1965, 1969) – Canada: signature 24 August, 1966; ratification 14 Oct., 1970

International Covenant on Civil and Political Rights (1966, 1976) – Canada accession 19 May, 1976

International Covenant on Economic, Social and Cultural Rights (1966, 1976) – Canada accession 19 May, 1976

Vienna Convention on the Law of Treaties (1969, 1980) – Canada accession 14 Oct. 1970

Convention on the Elimination of All Forms of Discrimination against Women (1979, 1981) – Canada: signature 17 July, 1980; ratification 10 December, 1981

Convention on the Rights of the Child (1989, 1990) – Canada: signature 28 May, 1990; ratification 13 December, 1991

COMPARATIVE JURISPRUDENCE

Australia

Haines v. Leves, (1987) 8 N.S.W.L.R. 442 (Court of Appeal of New South Wales) (affirming a decision of the Equal Opportunity Tribunal that sex-segregated schooling with curricula differences that reflected sex role stereotypes of masculine breadwinning and feminine domesticity was discriminatory)

Benin

Décision DCC 02-144, Benin Constitutional Court (23 December 2002) (holding that the draft provision allowing men to take multiple wives, but requiring monogamy of women, violated the Constitution's guarantee of equality of men and women)

Canada

Ali v. Canada (Minister of Citizenship and Immigration) (1998), 154 F.T.R. 285 (Canadian immigration officers can refuse entry to polygamous families)

R v. Ewanchuk [1999] 1. S.C.R. 3 (concurring judgment notes the international human rights context in which Canada's reforms to its sexual assault laws arose)

R v. Keegstra [1990] 3 S.C.R. 697 (contextual factors and values arising from Canada's international agreements should be considered under s.1; international human rights law is of particular significance in assessing the importance of Parliament's objective under s. 1)

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 (equality and discrimination analysis under the *Charter* must be purposive and contextual)

Lim v. Lim, [1948] 2 D.L.R. 353 (B.C.S.C.) (legal recognition of a polygamous union was not granted)

Slaight Communications Inc. v. Davidson [1989] 1 S.C.R. 1038 (Canada's international human rights obligations should inform both the interpretation of the content of *Charter* rights as well as what may constitute a pressing and substantial objective to restrict the right under s.1)

Yew v. British Columbia, [1924] 1 D.L.R. 1166 (B.C.S.C.) (limited recognition was granted to a widow of an actual polygamous marriage for inheritance purposes)

Fiji

State v. Filipe Bechu, [1999] FJMC 3, Criminal Case No 79/94 (1999) (Fiji, First Class Magistrate's Court, Levuka) (stating that where women are stereotyped as a form of property, this enables sexual assault)

India

Annuh Garg and Others v. Hotel Association of India and Others, (2008) 3 SCC 1 (India Supreme Court) (holding that women had to be permitted to work in bars)

B. Chandra Manil Kyamma v. B. Sudershan (1989) A.P. 1. HLR 183 (Court rejected the argument that religious conversion to Islam could justify / validate a polygynous union against the wishes of the first wife)

Itwari v. Asghari, A.I.R. 1960 AI 684 (the High Court of Allahabad acknowledged that Muslim law gave rights of divorce to the first wife against a husband who takes a second wife, and decided that a man's marriage to a second wife "is not a single but a continuing wrong to the first wife.")

Srinivasa v. Saraswati Ammal A.I.R. 1952 Mad. 193 (the Bombay High Court upheld local statutes prohibiting Hindu polygyny)

State of Bombay v. Narasu Appa Mali A.I.R. 1952 Bom. 84 (the Bombay High Court upheld local statutes prohibiting Hindu polygyny)

Vishaka v. State of Rajasthan A.I.R. 1997 SC 3011, at 3015 (1998) 3 BHRC 261 (Supreme Court of India) (citing CEDAW *General Recommendation 19* in relation to sexual harassment)

Indonesia

M Insa, S.H., Decision Number 12/PUU-V/2007, (The Constitutional Court of the Republic of Indonesia) (2007) (holding that judicial and spousal permission requirements for polygyny were reasonable and constitutional limits on freedom of religion)

Israel

Alice Miller v. Ministry of Defense, [1995] IsrSC 49(4) 94, [1995-6] IsrLR 178 (Israel Supreme Court) (decision permitting women to be trained as pilots in Air Force jets)

Mauritius

Bhewa v. Government of Mauritius, [1991] LRC (Const) (religious freedom, as protected by the Mauritius Constitution and the International Covenant on Civil and Political Rights, does not allow the Muslim community to apply its own religious law to deny women equal rights within marriage)

Nigeria

Mojekwu v. Mojekwu (1991) NWLR Pt. 194 at 739 (a deceased's brother sought to inherit the deceased's estate to the exclusion of the deceased's daughter; Court applied the "repugnancy to natural approach" in finding against the customary practice)

South Africa

Bhe and Others v. The Magistrate, Khayelitsha and Others Case CCT 49/03; *Shibi v Sithole and Others* Case CCT 69/03; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* Case CCT 50/03 (2004) (South African Constitutional Court) (decision rejecting the application of customary law of primogeniture, but still sensitive to the importance of custom)

Hassam v. Jacobs NO, Case CCT 83/08 [2009] ZACC 19 (The Intestate Succession Act differentiates between widows married in terms of the civil Marriage Act and those married in terms of Muslim rites, between widows in monogamous Muslim marriages and those in polygynous Muslim marriages, and between widows in polygynous customary marriages and those in polygynous Muslim marriages, and that differentiation amounts to discrimination in violation of the equality provision of the South African Constitution)

United States

Bronson v. Swensen, 2005 U.S. Dist. LEXIS 2374 (D. Utah 15 February, 2005) (decision upholding Utah's prohibition of polygamy against a challenge that the legislation was an unconstitutional violation of the applicants' rights to free exercise of their religious beliefs, right of association, or their right to privacy)

Frontiero v. Richardson, 411 U.S. 677 (1973) (U.S., Supreme Court) (holding that automatic benefit entitlements for military wives, but not husbands, reinforced gender stereotypes of masculine breadwinning and feminine dependence and, in turn, perpetuate the inferiority of women)

Potter v. Murray City, Utah 760 F.2d 1065 (1985) (discharge of a police officer for practicing polygamy affirmed because it did not violate his constitutionally protected right to the free exercise of religion because the state had an overriding interest in protecting a system of domestic relations based exclusively on monogamy)

Reynolds v. United States, 98 US 145 (1879) (Court decided that a Mormon's right to religious freedom did not include the right to an exemption from the federal criminal law prohibiting polygyny)

State of Utah v. Green, 2004 UT 76 (In affirming Green's conviction of criminal nonsupport and for bigamy, the Court held that Utah's bigamy statute did not violate Green's federal constitutional right to free exercise of religion, was not unconstitutionally vague as applied to Green's conduct, and the State's use of Utah's unsolemnized marriage statute to establish a legal marriage between Green and one of his polygamous wives was appropriate)

State of Utah v. Holm 2006 UT 31 (Holm was appropriately convicted for bigamy and unlawful sexual conduct with a minor, and was not shielded by state and federal constitutional provisions on free exercise of religion and conscience, due process, and freedom of association)

REGIONAL AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS

European Commission on Human Rights

Bibi v. The United Kingdom, Appl. 19628/92 9Dec., 29 June 1992 (upheld the UK Immigration Act 1988 providing that a woman would not be entitled to immigrate to the UK, on the basis of a polygamous marriage, if another woman had already been admitted to the UK as the wife of the same husband; Commission found that there was an interference with the applicant's right to respect for her family life, but held that it was justified for the protection of morals and the rights and freedoms of others)

European Court of Human Rights

Abdulaziz, Cabales and Balkandal v. the United Kingdom, 15/1983/71/107-109 (Eur. Ct. H. R.) (reprinted in Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors, *International Women's Rights Cases* (London: Cavendish, 2005) at 618) (noting that sex discrimination should receive heightened attention)

D.H. and Others v. Czech Republic (2006), App. 57325/00 (Eur. Ct. H.R.) (the pattern of segregating Roma children into schools for the mentally disabled violated the nondiscrimination protections of the European Convention on Human Rights)

Kjeldsen v. Denmark (1976) 1 E.H.R.R. 711, (Eur. Ct. H. R.) (for mandatory sex education in schools, sensitivity to parents' views is required, but education course was upheld)

Kokkinakis v. Greece (1993), 260A Eur. Ct. H.R. (Ser. A) 18. (noted the importance of respect for freedom of religion and freedom from religion in considering criminal legislation that restricted proselytism)

Marckx v. Belgium (1979), 2 E. H. R. R. 330 (Eur. Ct. H.R.) (reprinted in Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors, *International Women's Rights Cases* (London: Cavendish, 2005) at 18) (principle of dynamic treaty interpretation applied to enable an unmarried mother to legitimate her child by the same means a married woman could stating that "the [European] Convention must be interpreted in light of present day conditions")

Leyla Sahin v. Turkey (2005), Eur. Ct. H.R., Appl. 44774/98 (limitations on the public use of religious headscarves permitted for the purpose of protecting gender equality and maintaining secularism in official settings / institutions of higher learning)

Schalk and Kopf v. Austria (2010), Eur. Ct. H.R., Appl. 30141/04 (member states not obliged to allow gay marriage)

Zarb Adami v. Malta (2006), Eur. Ct. H.R., Appl. 17209/02 (discrimination potentially contrary to the European Convention may result from a *de facto* situation)

Inter-American Commission on Human Rights

Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001) (Inter-American Commission on Human Rights) (holding that "stereotyped notions of the roles of women and men" in several of the provisions defining spousal roles and responsibilities in marriage in the 1963 Civil Code of the Republic Guatemala discriminated against the complainant as a married woman and deprived wives of autonomy and legal capacities)

Inter-American Court of Human Rights

Gonzalez et al v. Mexico, Judgment of November 16, 2009, (the Cotton Field decision) (Mexico held responsible for failing to investigate the gendered disappearances and murders of three poor, migrant women, two of whom were minors)

Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984) 5 Hum. Rts. L.J. 161 (Inter-Amer. Ct.) (reprinted in Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors, *International Women's Rights Cases* (London: Cavendish, 2005) at 533) (proposed naturalization amendments constituted discrimination contrary to the obligation to ensure equality of spouses within the family and equal protection of the law)

Ana, Beatriz and Cecilia Gonzalez Perez v. Mexico (2001), Report No. 53/01, Case 11.565, (Inter-Am. Ct. H.R.) (applied the right to be free from inhuman and degrading treatment to hold the Mexican State accountable for the rape of women by government officers)

Committee on the Elimination of Discrimination against Women

A.T. v. Hungary, CEDAW, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005) (finding that gender-based violence against A.T. was linked to harmful gender stereotyping and finding Hungary in violation of CEDAW for failing to prevent and punish domestic violence)

Human Rights Committee

Ato del Avellanal v. Peru, HRC, Communication No. 202/1986, UN Doc. CCPR/C/34/D/202/1986 (1988) (Human Rights Committee) (finding that the Peruvian Civil Code article 168 that stated that only a husband could represent matrimonial property before the courts violated the equality provisions of the ICCPR)

Aumeeruddy-Cziffra et al. v. Mauritius, Communication No. 35/1978, U.N. Doc. CCPR/C/12/D/35/1978 (Hum. Rts. Comm. 1981) (the HRC finding that the 1977 Immigration and Deportation Act of Mauritius that denied residence status to alien husbands of Mauritian women, but not the alien wives of Mauritian men, violated articles 2(1), 3, and 26 of the Covenant)

F.H. Zwaan-de-Vries v. the Netherlands, Communication No. 182/1984, U.N. Doc. CCPR/C/29/D/182/1984 (the HRC found the provisions of the Netherlands Unemployment Benefits Act that denied unemployment benefits to married women who

were neither breadwinners nor separated from their husbands, but did not deny such benefits to similarly situated men, violated Article 26 of the Covenant)

Lovelace v. Canada (1981) HRC 36 U.N. GOAR Supp. (no. 40) Annex XVIII; U.N. Doc. A/36/40 (1981) (reprinted in Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors, *International Women's Rights Cases* (London: Cavendish, 2005) at 261) (minority right to culture protected by Article 27 of the Political Covenant was upheld; claimant's right to enjoy her Aboriginal culture had been unjustifiably interfered with by a gender-discriminatory provision in the Indian Act)

Singh Bhinder v. Canada, Communication Nos. 208/1986, U.N. Doc. CCPR/C/37/D/208/1986 (1989) (law requiring all persons to wear safety gear (hard hats) for public health and safety interests is a justified limitation on freedom of religion)

Toonen v. Australia (Communication No. 488/1992, Report of the Human Rights Committee, Vol II, GAOR, Forty-ninth Session, Suppl. No. 40 (A/49/40), pp 226-237 (Toonen's right to private life protected by Article 17 found to have been violated by Tasmanian Criminal Code provisions prohibiting homosexual activity among consenting adults)

SECONDARY MATERIALS: BOOKS AND MONOGRAPHS

Altman, Irwin & Joseph Ginat. *Polygamous Families in Contemporary Society* (Cambridge: University of Cambridge Press, 1996)

An-Na'im, Abdullahi, ed. *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002)

Bailey, Martha & Kaufman Amy. *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, CA: Praeger Publishers, 2010)

Bakht, Natasha. *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* (National Association of Women and the Law: March, 2005)

Bayefsky, Anne. *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Markham, ON: Butterworths Canada, 1992)

Bennion, Janet. *Women of Principle: Female Networking in Contemporary Mormon Polygyny* (Oxford: Oxford University Press, 1998)

Betzig, Laura. *Le femme de mon mari: étude ethnologique du marie polygamique en Afrique et en France* (New York: Aldine Pub., 1986)

- Blackstone, William. *Commentaries on the Laws of England*, 4 vols. (Oxford 1765-1769)
- Bramham, Daphne. *The Secret Lives of Saints, Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Toronto: Random House, 2008)
- Bretschneider, Peter. *Polygyny: a Cross-Cultural Study* (Uppsala: Uppsala University, 1995)
- Center for Reproductive Law and Policy. *Women of the World: Laws and Policies Affecting Their Reproductive Lives – Francophone Africa* (New York: Center for Reproductive Law and Policy, 2000)
- . *Women of the World: Laws and Policies Affecting Their Reproductive Lives – Anglophone Africa, 2001 Progress Report* (New York: Center for Reproductive Law and Policy, 2001)
- Center for Reproductive Rights. *Bringing Rights to Bear: Rights within Marriage and the Family* (New York: Center for Reproductive Rights, 2008)
- Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law. *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights* (2002)
- Chapman, Samuel. *Polygamy, Bigamy and Human Rights Law* (U.S.A.: Xlibris Corp., 2001)
- Cook, Rebecca & Simone Cusack. *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010)
- Cook, Rebecca, Bernard Dickens, & Mahmoud Fathalla. *Reproductive Health and Human Rights* (Oxford: Oxford University Press, 2003)
- Economic and Social Commission for Asians and the Pacific. *Human Rights and Legal Status of Women in the Asian and Pacific Region* (Studies on Development of Women: United Nations, 1997)
- Emerton, Robyn, Kristine Adams, Andrew Byrnes, & Jane Connors. *International Women's Rights Cases* (London: Cavendish, 2005)
- Holtmaat, Rikki. *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination* (Den Haag : Reed Business Information, 2004)
- Jessop, Carolyn & Laura Palmer. *Escape* (New York: Broadway Books, 2007)

- Joseph, Sarah, Jenny Schultz, & Melissa Castan. *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford, Oxford University Press, 2000)
- Kindred, Hugh. *International Law, Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000)
- Krakauer, Jon. *Under the Banner of Heaven: A Story of Violent Faith* (U.S.A.: Random House, 2005)
- Law Reform Commission of Canada. *Bigamy*, Working Paper No. 42 (Ottawa: Law Reform Commission of Canada, 1985)
- Life in Bountiful – A report on the lifestyle of a polygamous community*, (Prepared for the Committee on Polygamous Issues, funded by the B.C. Ministry of Women's Equality, 1993)
- Nasir, Jamal J. *The Status of Women under Islamic Law and Under Modern Islamic Legislation*, 2nd ed. (London: Graham & Trotman, 1994)
- . *The Islamic Law of Personal Status*, 3rd ed. (The Hague: Kluwer Law International, 2002)
- Ngwena, Charles. "Sexual Health and Human Rights in the African Region" (Geneva: World Health Organization, forthcoming 2011)
- Okin, Susan. *Is Multiculturalism Bad for Women?* (Princeton, N.J.: Princeton University Press, 1999)
- Pearhouse, R. & A. Symington. *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Vol I: Sexual and Domestic Violence; Vol II: Family and Property Issues*, Toronto: Canadian HIV/AIDS Legal Network, 2009)
- Pearl, David & Werner Menski. *Muslim Family Law*, 3rd ed. (London: Sweet & Maxwell, 1998)
- Schabas, William A. & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, (3rd ed.), (Toronto: Thomson Carswell, 2007)
- Schachar, Ayelet. *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001)
- Shedlon, Kathleen E. Shedlon. *Historical Dictionary of Women in Sub-Saharan Africa* Lanham, MD: Scarecrow Press, 2005)

- Smith, Rhona K. *Texts and Materials on International Human Rights*, 2nd ed., (New York: Routledge, 2010)
- Steiner, Henry J. & Philip Alston. *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford: Oxford University Press, 2000)
- Wall, Elissa with Lisa Pulitzer. *Stolen Innocence: My Story of Growing Up in a Polygamous Sect, Becoming a Teenage Bride, and Breaking Free of Warren Jeffs* (New York: HarperCollins, 2008).
- Welchman, Lynn. *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007)
- Women Living under Muslim Laws. *Knowing Our Rights: Women, family, laws and customs in the Muslim World* (London: Women Living under Muslim Laws, 2003)

SECONDARY MATERIALS: ARTICLES AND CHAPTERS

- Abrams, Kerry. "Immigration Law and the Regulation of Marriage" (2006-07) 91 Minn. L. Rev. 1625
- . "Polygamy, Prostitution & the Federalization of Immigration Law" (2005) 105 Colum. L. Rev. 641
- Albertyn, C. "Contesting Democracy: HIV/AIDS and the Achievement of gender equality in South Africa" (2003) 29 Feminist Studies 595
- Alexandre, Michele. "Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?" (2007) 18 Hastings Women's L.J. 3
- Al-Ali, Nadjie. "Reconstructing Gender: Iraq: Women Between Dictatorship, War, Sanctions and Occupation" (2005) 26 Third World Quarterly 750
- Al-Krenawi, Alean. "Women from Polygamous and Monogamous Marriages in an Out-Patient Psychiatric Clinic" (2001) 38 Transcultural Psychiatry 187
- Al-Krenawi, A., J.R.Graham & V. Slonim-Nevo, "Mental health aspects of Arab-Israeli adolescents from polygamous versus monogamous families" (2002) 142 Journal of Social Psychology 446
- Altman, Irwin. "Husband and Wives in Contemporary Polygamy" (2006) 8 J.L. & Fam. Stud. 389

- Bailey, Martha. "Dossier: Should Polygamy be Recognized in Canada? Ethical and Legal Considerations" (2007) 2 *Les Ateliers de l'éthique* 18
- Bala, Nicholas. "Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003) 29 *Queen's L.J.* 41
- , "The Debates about Same-Sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution" (2005-06) 20 *B.Y.U. J. Pub. L.* 195
- , "Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Public Policy" (2009) 25 *Can. J. F.L.* 165. (2009)
- Bayefsky, Anne F. "The Principle of Equality or Non-Discrimination in International Law" (1990) 11 *Hum. Rts. L.J.* 1 at 19.
- Berkowitz, Jason D. "Beneath the Veil of Mormonism: Uncovering the Truth about Polygamy in the United States and Canada" (2006-07) 38 *U. Miami Inter-Am. L. Rev.* 615
- Black, "Beyond Child Polygamy: Polyamory, Unique Familial Construction and the Law" (2006) 8 *J.L. & Fam. Stud.* 497
- Blake, Catherine. "Study Note, The Sexual Victimization of Teenage Girls in Utah: Polygamous Marriages Versus Internet Sex Predators" (2005) 7 *J.L. & Fam. Stud.* 289
- Brandon, Elizabeth. "Does International Law Mean Anything in Canadian Courts?" (2001) 11 *Journal of Environmental Law and Practice* 399
- Brown, Laura Elizabeth "Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy under the Mann Act" (2008) 39 *McGeorge L. Rev.* 267
- Byrnes, Andrew. "The Convention on the Elimination of All Forms of Discrimination Against Women" in W. Benedek, E. Kisaakye and G. Oberleitner, eds., *Human Rights of Women: International Instruments and African Experiences* (London: Zed Books, 2002) 119-172
- Byrnes, Andrew. "Article 2 (Obligations)", in *The United Nations Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: OUP, forthcoming, 2011)
- Calhoun, "Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy" (2005) 42 *San Diego L. Rev.* 1023
- Campbell, Angela. "Wives Tales: Reflecting on Research in Bountiful" (2008) 23 *Canadian Journal of Law and Society* 121.

- . “Bountiful Voices” (2009) 47 Osgoode Hall Law Journal 183
- Carroll, Lucy. “Talaq and Polygamy: Some Recent Cases from England and Pakistan” (1985) 5 Islamic & Comp. Law Q. 271
- Chaleby, Kutaiba. “Traditional Arabian marriages and mental health in a group of outpatient Saudis” (1988) 77 Acta Psychiatrica Scandinavica 139
- . “Women of polygamous marriages in outpatient psychiatric services in Kuwait” (1987) 8 International Journal of Family Psychiatry 25
- Cherian, Varghese I. “Academic Achievement of Children from Monogamous and Polygynous Families” (1989) 130 The Journal of Social Psychology 117
- Cook, Rebecca. “Reservations to the Convention on the Elimination of All Forms of Discrimination against Women” (1990) 30 Va. J. of Int’l Law 643
- Deller Ross, Susan. “Polygyny as a Violation of Women’s right to Equality in Marriage: An Historical, Comparative and International Human Rights Overview” (2002) 24 Delhi Law Review 22
- Dhar, P.M. “Polygamy among Hindus: A Survey in Retrospect” (1985) 5 Islamic and Comparative Law Quarterly 147
- D’Onofrio, Eve. “Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States” (2005) 19 Int’l J. of Law, Policy & the Family 373
- Drummond, Susan. “Polygamy’s Inscrutable Criminal Mischief” (2009) 47 Osgoode Hall L.J. 317
- Duncan, Emily. “The Positive Effects of Legalizing Polygamy: Love is a Many Splendid Thing” (2008) 15 Duke J. Gender L. & Pol’y 315
- Dunn, Shannon K. “Yearning for Zion Raid and its Impact on Texas Child Welfare Cases: How a Rescue Effort Exposed a Need to Refocus Efforts on Effective Service Plans” (2009) 41 St. Mary’s L.J. 405
- Fredman, Sandra. “Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights” in Ineke Boerefijn et al., eds., *Temporary Special Measures: accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (New York: Transnational Publishers, 2003)
- Garnett, G. & A. Johnson. “Coining a new term in epidemiology: Concurrency and HIV” (1997) 11 AIDS 681

- Gautier, Arlette. "Legal Regulation of Marital Relations: An Historical and Comparative Approach" (2005) 19 *International Journal of Law, Policy and the Family* 47
- Gher, James M. "Polygamy and Same-Sex Marriage – Allies or Adversaries within the Same-Sex Marriage Movement" (2007-08) 14 *Wm. & Mary J. Women & L.* 559
- Gupta, Kiran. "Polygamy – Law Reform in Modern Muslim States: A Study in Comparative Law" (1992) 12 *Islamic and Comparative Law Quarterly* 114
- Hayes, "Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists" (2007) 3 *Stan. J. C.R. & C.L.* 99
- Hassouneh-Phillips, Dena. "Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America" (2001) 22 *Health Care for Women International* 735.
- Hoq, Laboni. "The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights" (2001) 32 *Columbia H.R. L. Rev.* 677
- Howland, Courtenay. "Safeguarding Women's Political Freedoms under the International Covenant on Civil and Political Rights in the Face of Religious Fundamentalism" in Courtenay Howland, ed., *Religious Fundamentalism and the Human Rights of Women* (New York: St. Martin's Press, 1999)
- , "The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter" (1997) 35 *Colum. J. Transnat'l L.* 273
- Human Rights Watch, "Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda" (2003) 15, No. 15(A), 51
- Imloul, Sonia. "La Polygamie en France: Une Fatalité?" (Paris: Institut Montaigne, 2009)_
- Iversen, Joan. "Feminist Implications of Mormon Polygyny" (1984) 10 *Feminist Studies* 502
- Jain, Kiran B. "Vice of Bigamy and Indian Penal Code: Ramifications of an Archaic Law" (1990) 32 *Journal of the Indian Law Institute* 386
- Jegede, A.S. & O. Odumosu. "Gender and Health Analysis of Sexual Behaviour in South-Western Nigeria" (2003) 7 *African Journal of Reproductive Health* 63
- Kaganas, Felicity & Christina Murray. "Law, Women and the Family: The Question of Polygyny in a New South Africa" (1991) *Acta Jur* 116

- Kaufman, Amy. "Polygamous Marriages in Canada" (2005) 21 Can. J. Fam. L. 315
- Kelly, Lisa M. "Polygyny and HIV/AIDS: A Health and Human Rights Approach" (2006) 31 Journal for Juridical Science 1
- . "Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy" (2007) 65 University of Toronto Faculty of Law Review 1
- Khaliq, Urfan. "Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah" (1995) 2 Buff. Jour. Int'l L. 1
- Madhavan, Sangeetha. "Best of Friends and Worst of Enemies: Competition and Collaboration in Polygyny" (2002) 41 Ethnology 69
- Mashhour, Amira. "Islamic Law and Gender Equality – Could There be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt" (2005) 27 Human Rights Quarterly 562
- Mayambala, Esther. "Changing the Terms of the Debate: Polygamy and the Rights of Women in Kenya and Uganda" (1998) 3 East African Journal of Peace & Human Rights 200
- Mashour, Amira. "Islamic Law and Gender Equality – Could there be a Common Ground? A Study of Divorce and Polygamy in Shari'a Law and Contemporary Legislation in Tunisia and Egypt" (2005) 27 HRQ 562
- Lauren C. Miele, "Big Love or Big Problem: Should Polygamous Relationships be a Factor in Determining Child Custody" (2008) 43 New Eng. L. Rev. 105
- Morris, M. & Kretschmar, M. "Concurrent partnerships and the spread of HIV" (1997) 11 AIDS 641
- Note, "A Pink Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage" (2005-06) 38 Conn. L. Rev. 1065.
- Patten, Wendy L. & J. Andrew Ward. "Recent Developments: Empowering Women to Stop AIDS in Côte d'Ivoire and Uganda" (1993) 6 Harv. Hum. Rts. J. 210
- Phipps, Kelly Elizabeth. "Note: Marriage and Redemption: Mormon Polygamy in Congressional Imagination, 1862-1887" (2009) 95 Va. L. Rev. 435
- Pingree, Gregory C. "Rhetorical Holy War: Polygamy, Homosexuality and the Paradox of Community and Autonomy" (2006) 14 Am. U. J. Gender Soc. Pol'y & L. 313

- Pruitt, Lisa R. "Gender, Geography and Rural Justice" (2008) 23 Berkeley J. of Gender Law and Justice 338
- . "Migration, Development, and the Promise of CEDAW for Rural Women" (2009) 30 Michigan J. of Int'l Law 1
- Richards, Jacob. "Autonomy, Imperfect Consent, and Polygamist Sex Rights Claims" (2010) 98 Calif. L. Rev. 197
- Sagade, Jaya. "Polygamy and Women's Right of Maintenance: Survey of Judicial Decisions" (1989) 31 Journal of the Indian Law Institute 336
- . "Polygamy – law reform in modern Muslim states: a study in comparative law" (1989) 31 Journal of the Indian Law Institute 336
- Sayeh, Leila P. & Adriaen M. Morse, Jr. "Islam and the Treatment of Women: An Incomplete Understanding of Gradualism" (1995) 30 Texas Int'l L J 311
- Scales-Trent, Judy. "African Women in France: Immigration, Family, and Work" (1999) 24 Brooklyn J. Int'l L. 705
- Schwab, Kelly R. "Lost Children: Abuse and Neglect of Minors in Polygamous Communities of North America" (2010) 16 Cardozo J. L. & Gender 315
- Sealing, Keith E. "Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions against Polygamy are Unconstitutional Under the Free Exercise Clause" (2000-01) 17 Ga. St. U. L. Rev. 691
- Sepper, Elizabeth. "Confronting the 'Sacred and Unchangeable': The Obligation to Modify Cultural Patterns under CEDAW" (2008-09) 30 U. Pa. J. Int'l L. 585
- Shachar, Ayelet. "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50 McGill Law Journal 49
- Shah, Prakash A. "Attitudes to Polygamy in English Law" (2003) 52 Int'l Comparative and Law Quarterly 369
- Sheleff, Leon. "Human Rights, Western Values and Tribal Traditions: Between Recognition and Repugnancy, Between Monogamy and Polygamy" (1994) 12 Tel Aviv University Studies in Law 237
- Shelton, J., Cassell, M. & Adetunji, J. "Is poverty or wealth at the root of HIV?" (2005) 366 The Lancet 1057.

- Siegel, Reva B. "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930" (1993-1994) 82 Geo. L. J. 2127.
- Sigman, Shayna M. "Everything Lawyers Know About Polygamy is Wrong" (2006-07) 16 Cornell J. L. and Pub. Pol'y 101
- Smearman, Claire. "Second Wives' Club: Mapping Impact of Polygamy in U.S. Immigration Law" (2009) 27 Berkely J. Int'l Law 382
- Spendlove, David C. "Risk Factors and the Prevalence of Depression in Mormon Women" (1984) 18 Social Science and Medicine 491
- Starr, Sonja & Lea Brilmayer. "Family Separation as a Violation of International Law" (2002) 21 Berkeley J. Int'l L. 213
- Strassberg, Maura. "Symposium: Lawyering for the Mentally Ill: The Crime of Polygamy" (2003) 12 Temp. Pol. & Civ. Rts. L. Rev. 353
- "Distinctions of Form and Substance: Monogamy, Polygamy, and Same-Sex Marriage" (1996-97) 75 N.C.L. Rev. 1501
- "The Challenge of Post-Modern Polygamy: Considering Polyamory" (2003) 31 Cap. U.L. Rev. 439
- Sullivan, Donna J. "Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution" (1991-1992) 24 N.Y.U. J. Int'l. L. & Pol. 795
- Taylor, Anne. "Case Note: *In Re Kingston*: The Best Interests of Polygamous Children" (2006) 8 J.L. & Fam. Stud. 427
- Tibatemwa-Ekirikubinza, L. "Multiple Partnering, Gender Relations and Violence by Women in Uganda" (1998) 4 East African Journal of Peace and Human Rights 15
- Timaeus, Ian M. & Angela Reynar, "Polygynists and Their Wives in Sub-Saharan Africa: An Analysis of Five Demographic and Health Surveys" (1998) 52 Population Study 145
- Vazquez, Richard A. "The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting *Reynolds* in Light of Modern Constitutional Jurisprudence" (2001-02) 5 N.Y.U. J. Legisl. & Pub. Pol'y 225
- Volp, Leti. "Blaming Culture for Bad Behavior" (2000) 12 Yale J.L. & Human. 89
- Warner, Elizabeth. "Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls" (2004) 12 Am. U.J. Gender Soc. Pol'y & L. 233

Warner La Forest, Anne. "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37 U.B.C. L. Rev. 157

Weisbrod, Carol. "Universals and Particulars: A Comment on Women's Human Rights and Religious Marriage Contracts" (1999) 9 S. Cal. Rev. L. & Women's Stud. 77

Wing, Adrien Katherine. "Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century" (2001) 11 J. Contemp. Legal Issues 811

Zoglin, Katie. "Morocco's Family Code: Improving Equality for Women" (2009) 31 Human Rights Quarterly 964

REBECCA J. COOK

Faculty of Law, University of Toronto
Toronto, Canada M5S 2C5
Tel: (416) 978-4446 Fax: (416) 978-7899
E-mail: rebecca.cook@utoronto.ca
July 10, 2010

QUALIFICATIONS

Columbia University, School of Law	J.S.D. 1994
Washington, D.C. Bar	LL.M. 1988
Georgetown University Law Center	Attorney 1983
Harvard University, Kennedy School of Government	J.D. 1982
Tufts University, Fletcher School of Law and Diplomacy	M.P.A. 1973
Barnard College, Columbia University	M.A. 1972
	A.B. 1970

CURRENT POSITIONS

University of Toronto

Faculty of Law, Professor and Chair in International Human Rights

Current Teaching: International Women's Rights (1994-)
Reproductive and Sexual Health Law (1990-)

Co-Director, International Reproductive and Sexual Health Law Programme

Faculty of Medicine, Department of Obstetrics and Gynecology, Professor

Women and Gender Studies Institute, Professor

School of Graduate Studies, Member in Law and in Health Policy, Management and Evaluation

Joint Centre for Bioethics, Member

Women's College Research Institute, Member

American University

Intensive Course Instructor, Academy of Human Rights, Washington School of Law,
American University, Washington D.C., USA

Current Teaching: Women and International Human Rights Law (2005-)

FORMER POSITIONS

University of the Free State (South Africa), Faculty of Law, Professor Extraordinarius (2004-7)

University of Toronto, Faculty of Law, Faculty of Medicine, School of Graduate Studies (Law, Health Policy, Management and Evaluation), Associate Professor (Research) (1990-95), Assistant Professor (Research) (1987-90), Director, International Human Rights Law Programme, Faculty of Law (1987-98), Associate Dean, Graduate Studies, 1998

Health Policy, Management and Evaluation, Faculty of Medicine –
Teaching: Ethical and Legal Issues in Health Care (1987- 2000)

Columbia University, School of Public Health, Division of Population and Family Health, Assistant Professor of Clinical Public Health (1983-1987)

Teaching: Reproductive Health Law
 Human Rights and Health Care

Staff Attorney, Development Law and Policy Program,

Deputy Director and Co-founder, International Women's Rights Action Watch

Beveridge, Fairbanks and Diamond, Washington, D.C. Associate, 1980

United States Congress, Washington, D.C., Research Officer, 1978-80

International Planned Parenthood Federation, London, U.K., Director, Law Programme 1973-78

United Nations Population Fund, New York, N.Y., Research Associate, 1973

Population Council, New York, N.Y. Research Associate, 1972

Woodrow Wilson International Center, Smithsonian Institute, Washington, D.C., Research Associate, 1970-71

Lester Pearson Commission, World Bank, Washington, D.C., Research Associate, 1969

Carnegie Endowment for International Peace, Washington, D.C., Research Associate, 1966

EDITORIAL ADVISORY BOARDS

HIV/AIDS Policy and Law Review, Canadian HIV/AIDS Legal Network, 2005-

Human Rights Quarterly, Johns Hopkins University Press, Baltimore, Md., 1994-

International Journal of Gynecology and Obstetrics, Ethical and Legal Issues Co-editor, 1998-

Journal of Juridical Science, University of the Free State, 2008-

Journal of Middle East Law and Governance, Brill Publishers, 2007-

Medicine and Law, 2005-

New Zealand Yearbook of International Law, University of Canterbury, New Zealand, 2003-

Reproductive Health Matters, 1993-

La Revista Iberoamericana de Derechos Humanos, Iberoamericana University, 2005-

Violence against Women, 2004-

CURRENT ADVISORY APPOINTMENTS

Abo Akademi University, Finland, Institute for Human Rights, Advisory Board, 2003-

American University, Washington College of Law, Academy on Human Rights and Humanitarian Law, Advisory Board, 2004-

Barnard College, Alumni Advisory Committee on Women's Rights, 2008-

Center for Ethics and Law in Biomedicine, The Central European University, Advisory Board, 2005-

Center for Reproductive Rights, New York, NY, Member, International Litigation Advisory Committee, 2005-

Human Rights Watch, Advisory Committee of the Women's Rights Division, 2005-

Profamilia Servicios Legales Para Mujeres (Profamilia Legal Services for Women) Bogotá, Colombia, Advisory Board, 1987-

University of Chile, Faculty of Law, Human Rights Center, International Advisory Committee, 2002-

University of Cincinnati College of Law, Urban Morgan Institute for Human Rights, Advisory Board, 1994-

University of Connecticut, Human Rights Institute, Board of Advisors, 2004-

World Health Organization: Safe Abortion Guidelines Group – Advisory Committee, 2008-

BOARDS OF DIRECTORS

Center for Reproductive Rights, New York, NY, 2005-

HONOURS

1997 Certificate of Recognition for Outstanding Contribution to the Promotion of Women's Health, awarded by the International Federation of Gynecology and Obstetrics.

1998 Ludwik and Estelle Jus Memorial Human Rights Prize, University of Toronto

1999 Fellow, Royal Society of Canada

LANGUAGES: Fluent in French

PUBLICATIONS

A. BOOKS AND MONOGRAPHS

1. Bergman, E., D.N. Carter, R.J. Cook *et al.* (eds.). *Population Policy Making in the American States*, Politics and Population Series (Boston, Ma: D.C. Heath, 1974), 318 pp.

2. Cook, R.J. & B.M. Dickens. *Abortion Laws in Commonwealth Countries* (Geneva: World Health Organization, 1979), 108 pp.; revised and updated from "A Survey of Abortion Laws in Commonwealth Countries" in *Three Studies of Abortion Laws in the Commonwealth* (London: Commonwealth Secretariat, 1977), pp. 1-142.

French edition: *La législation de l'avortement dans les pays du Commonwealth* (Geneva: Organisation Mondiale de la Santé, 1979), 121 pp.

3. Cook, R.J. & P. Senanayake (eds.). *The Human Problem of Abortion: the Medical and Legal Dimensions* (London: International Planned Parenthood Federation, 1979), 57 pp. (also available in French and Spanish).

4. Cook, R.J., S.B. Schearer & J. Strand. *Contraceptives and Drug Regulation: An International Perspective* (Seattle, Wa: Program for the Introduction and Adaptation of Contraceptive Technology, 1982), 38 pp.
5. Cook, R.J. & B.M. Dickens, *Emerging Issues in Commonwealth Abortion Laws 1982* (London: Commonwealth Secretariat, 1983), 136 pp.
6. Cook, R.J. & B.M. Dickens. *Issues in Reproductive Health Law in the Commonwealth* (London: Commonwealth Secretariat, 1986), 109 pp.
7. Cook, R.J. *Women's Health and Human Rights* (Geneva: World Health Organization, 1994), 62 pp.; revised and updated from: *Human Rights in Relation to Women's Health: Promotion and Protection of Women's Health Through International Human Rights Law* (Geneva: World Health Organization, 1993), 75 pp.

Spanish edition: *La salud de la mujer y los derechos humanos* (Washington, D.C.: Organización Panamericana de la Salud, Publicación Científica No. 553, 1994), 72 pp;

French edition *La santé des femmes et les droits de l'individu* (Geneva: Organisation Mondiale de la Santé, 1995), 72 pp.
8. Cook, R.J. (ed.) *Human Rights of Women: National and International Perspectives*, (Philadelphia: University of Pennsylvania Press, 1994), 634 pp.

revised Spanish edition *Derechos Humanos de La Mujer: Perspectivas Nacionales e Internacionales* (Bogota, Colombia: Profamilia, 1997), 602 pp.

Chinese edition (Philadelphia: University of Pennsylvania Press and Chinese Encyclopedia Publishing House, 2003), 677 pp.

Taiwanese edition of two of the articles: Chun-ying Cho, ed., *An Introduction to Human Rights*, Taiwan: Show-We, 2007, translated by Ya-chi Chiang.
9. Cook, R.J. *The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women* (Washington, D.C.: American Society of International Law, 1995), 62 pp.
10. Cook, R.J., S. Jejeebhoy, A. Mundigo, L. Adeokun, S. Correa, & M. Danguilan. *The Ford Foundation's Reproductive Health and Population Program: A Five Year Review* (New York: Ford Foundation, 1996), 70 pp.

11. Cook, R.J. & B.M. Dickens. *Considerations for Formulating Reproductive Health Laws: A Discussion Paper*, 2nd ed. (Geneva: World Health Organization, 2000), 76 pp. [revised and updated from 1st edition, 1998, 96 pp.]

12. Cook, R.J., B.M. Dickens, O.A.F. Wilson & S. Scarrow. *Advancing Safe Motherhood through Human Rights* (Geneva: World Health Organization, 2001), 176 pp

Portuguese edition: *Promovendo a Maternidade Segura Atraves dos Direitos Humanos* (Rio de Janeiro, Brazil: Cepia; Geneva: World Health Organization, 2003), 200 pp.

13. Cook, R.J., B.M. Dickens & M.F. Fathalla. *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (Oxford: Oxford University Press, 2003), 554 pp.

Revised Spanish edition: *Salud Reproductiva y Derechos Humanos: Integración de la medicina, la ética y el derecho* (Bogota, Colombia: Profamilia, 2003), 605 pp.

Revised Portuguese edition: *Saúde Reprodutiva e Direitos Humanos: Integrando Medicina, Ética e Direito* (Rio de Janeiro, Brazil: Cepia, 2004), 578 pp.

Revised French edition: *Santé de la reproduction et droits humains : Intégrer la médecine, l'éthique et le droit* (Paris: Masson, 2005), 557 pp.

Chinese edition: [*Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*] (Beijing: National Population and Family Planning Commission of China, 2005), 511 pp.

Arabic edition of case studies: [*Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*] (Cairo, Egypt: Egyptian Fertility Care Foundation, 2008) online at: <http://www.efcf.net/book.htm>

14. Dickens, B. M., R.J. Cook & E. Kismodi. *Reproductive Health: Case Studies with Ethical Commentary* (Haifa, Israel: UNESCO Chair in Bioethics, 2006), 71 pp.

French edition: *Ethique Médicale en Santé de la reproduction: Etudes de cas* (Haifa, Israel: UNESCO Chair in Bioethics, 2006), 71 pp.

Chinese edition (Haifa, Israel : UNESCO Chair in Bioethics, 2008), 66 pp.
Online at: <http://medlaw.haifa.ac.il/index/main/4/ReproductiveChinese.pdf>

15. Cook, R.J. & L.M. Kelly. "Polygyny and Canada's Obligations under International Human Rights Law" (Ottawa: Department of Justice of Canada, 2006), 132pp.
Online at: <http://www.justice.gc.ca/en/dept/pub/poly/>
French edition: <http://www.justice.gc.ca/fr/dept/pub/poly/index.html>
16. Cook, R.J. & C. Ngwena, eds. *Health and Human Rights*, International Library of Medicine, Ethics and Law series (Aldershot, UK: Ashgate, 2007) 628 pp.
17. Cook, R.J. & S. Cusack. *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia, PA: University of Pennsylvania Press, 2010), 270 pp.

B. CHAPTERS

1. Paxman, J.M. & R.J. Cook, "Law and Planned Parenthood" in *Birth Control: An International Assessment*, Potts, M. and Bhiwandiwalla, P.P. (eds.), (Lancaster, U.K.: MTP Press, 1979), pp. 227-254.
2. Cook, R.J. "Your Health and the Law" in *Every Woman's Legal Guide* (2nd ed.) Burnett, B. (ed.) (New York, N.Y.: Nelson Doubleday, 1985), pp. 118-144, revised and updated from pp. 101-123 in 1st edition, 1983.
3. Cook, R.J. "Reducing Maternal Mortality: A Priority for Human Rights Law" in *Issues in Human Reproduction*, McLean, S.A.M. (ed.) (Aldershot, U.K.: Gower Publishers, 1989), pp. 185-212.
4. Cook, R.J. "International Law and Women's Health" in *Gender, Women and Health in the Americas*, Gomez, E.G. (ed.) (Washington, D.C.: Pan American Health Organization, 1993), pp. 244-251.
5. Cook, R.J. "From Abortion to Contraception - The Role of the Law" in *Progress Postponed: Abortion in Europe in the 1990s*, Newman, K. (ed.) (London, U.K.: International Planned Parenthood Federation, 1993), pp. 60-77.
6. Cook, R.J. "Contraception and Abortion: Legal Distinctions and Dynamics" in *The Beginning of Human Life*, Beller, F.K. and Weir, R.F. (eds.) (Dordrecht, The Netherlands: Kluwer Academic Pubs., 1994), pp. 163-178.
7. Cook, R.J. "Feminism and the Four Principles" in *Principles of Health Care Ethics*, Gillon, R. (ed.), (Sussex, U.K.: John Wiley and Sons, 1994), pp. 193-206.

Spanish edition: "El Feminismo y Los Cuatro Principios Éticos" in *Ética y Salud Reproductiva*, Pérez, G.C., Figueroa, J.G. and Mejia, M.C. (eds.) (Mexico: Programa Universitario de Estudios de Género, 1996), pp. 173-198.

8. Cook, R.J. "Legal and Ethical Approaches to Research on Women's Reproductive Health" in *Essays in Honour of Jan Štěpán*, Bednarikova, J. and Chapman, F.C. (eds.) (Lausanne, Switzerland: Swiss Institute of Comparative Law, 1994), pp. 107-124.
9. Cook, R.J. "New Reproductive Technologies: International Legal Issues and Instruments" in *Overview of Legal Issues in Reproductive Technologies*, Royal Commission on New Reproductive Technologies, Research Studies vol 3 (Ottawa: Royal Commission on New Reproductive Technologies, 1993), pp. 659-673.
10. Cook, R.J. "State Accountability under the Convention on the Elimination of All Forms of Discrimination against Women" in *Human Rights of Women: National and International Perspectives*, Cook, R.J. (ed.) (Philadelphia, Pa.: University of Pennsylvania Press, 1994), pp. 228-256.

Spanish edition: "La Responsabilidad del Estado según la Convención para la Eliminación de todas las formas de Discriminación contra la Mujer" in *Derechos Humanos de la Mujer: Perspectivas Nacionales e Internacionales*, Cook, R.J. (ed.) (Bogotá, Colombia, Profamilia, 1997), pp. 226-253.

Chinese edition: (Philadelphia: University of Pennsylvania Press and Chinese Encyclopedia Publishing House, 2003), 260-290.
11. Cook, R.J. "Enforcing Women's International Human Rights" in *Women's Rights Human Rights*, Yotopoulos-Marangopoulos, A. (ed.) (Athens, Greece: Hestia Pubs., 1994), pp. 29-52.
12. Cook, R.J. "Women" in *The United Nations Legal Order*, Schachter, O. and Joyner, C. (eds.), (Cambridge, U.K.: Cambridge University Press, 1995), pp. 433-471.

Revised and updated edition: "Women" in *The United Nations and International Law*, Joyner, Christopher C. (ed.), (Cambridge, U.K.: Cambridge University Press and the American Society of International Law, 1997), pp. 181-207.
13. Cook, R.J. & B.M. Dickens. "A Woman's Legal Right to Choose" in *Modern Methods of Inducing Abortion*, Baird, D.T., Grimes, D.A. and Van Look, P.F.A. (eds.), (Oxford, U.K.: Blackwell Science Ltd., 1995), pp. 190-213.
14. Cook, R.J. "Human Rights, HIV Infection and Women" in *HIV Law, Ethics and Human Rights*, Jayasuriya, D.C. (ed.), (New Delhi, India: UNDP Regional Project on HIV and Development, 1995), pp. 235-270.
15. Cook, R.J. "Overcoming Discrimination: Introduction" in *The Rule of Law and The Underprivileged in Latin America*, Guillermo O'Donnell, Mendez, J. and

- Pinheiro, S. P. (eds.), (Notre Dame, Indiana: University of Notre Dame Press, 1999), pp.109-115.
16. Cook, R.J. & R. Pretorius. "Duties to Implement Reproductive Rights: The Case of Adolescents," *Women's Rights and Bioethics*, Dennerstein, L. (ed.), (Paris: UNESCO, 2001), pp.175-189.

French edition: *Droits des femmes et bioéthique* (Paris: UNESCO, 2002).
 17. Cook, R.J. "Developments in Abortion Laws: Comparative and International Perspectives" in *Medical Ethics at the Dawn of the 21st Century*, Cohen-Almagor, R. (ed.) (New York: New York Academy of Sciences, 2000), pp. 74-87.
 18. Cook, R.J. "Effectiveness of the Beijing Conference in Fostering Compliance with International Law Regarding Women" in *United Nations-Sponsored World Conferences: Focus on Impact and Follow-Up*, Schechter, M.G. (ed.) (Tokyo, New York, Paris: United Nations University Press, 2001), pp.65-84.
 19. Cook, R.J. "Advancing Safe Motherhood through Human Rights" in *Giving Meaning to Economic, Social and Cultural Rights*, Merali, I. and Oosterveld, V. (eds.), (Philadelphia, Pa: University of Pennsylvania Press, 2001), pp.109-123.
 20. Cook, R.J. & B.M. Dickens "Etyczne aspekty prawa aborcyjnego [Ethical concerns in Abortion Laws]" *Dylematy Bioetyki [Dilemmas of Bioethics]*, Szewczyk K. (ed.). Alichniewicz, A. and Szczęsnej, A. (trans.) (Lodz, Poland: Lodz Academy of Medicine, 2001) 93-115.
 21. Cook, R.J. "Abortion Laws" in *Encyclopedia of Public Health*, Breslow, L. (ed.) (New York and Detroit: Macmillan Reference USA, 2002), pp. 5-7.
 22. Cook, R.J. "Compliance with Reproductive Rights" in *Discrimination and Toleration: New Perspectives*, Hastrup, K. and Ulrich, G. (eds.), (The Hague: Kluwer Law International, 2002), pp. 229-256.
 23. Cook, R.J. "Fostering Compliance with Reproductive Rights" in *An Agenda For People: The UNFPA Through Three Decades*, Sadik, N. (ed.), (New York and London: New York University Press, 2002), pp. 47-80;

Portuguese edition: "Estimulando a efetivação dos direitos reprodutivos" in *Reprodução e Sexualidade: Uma Questão de Justiça* (Porto Alegre, Brazil: Sergio Antonio Fabris, 2001), 13-60.
 24. Cook, R.J. "Reproductive Rights" in *Encyclopedia of Population*, Demeny, P. and McNicoll, G. (eds.), 2 vols. (New York: MacMillan Reference, 2003); vol 2, pp. 846-848.

25. Cook, R.J. "Celebrating *Vishaka*: Judicial Enforcement of Women's Human Rights," in *Liberty, Equality and Justice: Struggles for a New Social Order* (ILS Law College Platinum Jubilee Commemoration Volume), Sathe, S.P. and Sathya, N. S. (eds.). (Lucknow, India: Eastern Book Company, 2003), pp. 325-344.
26. Cook, R. J. "Obligations to Adopt Temporary Special Measures under the Convention on the Elimination of All Forms of Discrimination against Women," in *Temporary Special Measures: Accelerating the de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women*, Boerefijn, I., Coomans, F., Goldschmidt, J., Holtmaat, R. and Wolleswinkel, R. (eds.) (Antwerp: Intersentia, 2003), pp.119-141.
27. Cook R. J. & S. Cusack. "Women's Rights" in *The Essentials of Human Rights*, Smith, R.K.M. and Van Den Anker, C. (eds) (London: Hodder Arnold, 2005), pp. 366-69.
28. Ngwenya, C. & R.J. Cook. "Rights concerning health" in *Socio-economic Rights in South Africa*, Brand, D. and Heyns, C.H., (eds). (Pretoria: Pretoria University Law Press, 2005), pp. 107-151.
29. Erdman J.N. & R.J. Cook. "Protecting Fairness in Women's Health: The Case of Emergency Contraception," in *Just Medicare: What's In, What's Out, Who Decides* Flood, C.M. ed. (Toronto: University of Toronto Press, 2006), pp. 137-167.
30. Cook, R.J. "Abortion, Human Rights and the International Conference on Population and Development (ICPD)," in *Preventing Unsafe Abortion and its Consequences: Priorities for Research and Action*, Warriner I. K. and Shah I. H. (eds.) (New York: Guttmacher Institute, 2006), pp. 15-33.
31. Erdman, J. N. & R.J. Cook, "Sexual & Reproductive Health: Reproductive Rights" *International Encyclopedia of Public Health*, H. K. Heggenhougen and Stella Quah, eds. (Amsterdam: Elsevier, 2008) 532-538.
32. Undurraga, V. & R. Cook, "Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006" in *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Williams, S.H. ed. (Cambridge: Cambridge University Press, 2009), pp 215-247.
33. Cusack, S. & R. Cook, "Combating Discrimination Based on Sex and Gender" in *International Protection of Human Rights: A Textbook*, Krause, C and Scheinin, M. eds. (Turku: Institute for Human Rights, Abo Akademi University, 2009) 206-226.

C. LEGAL BRIEFS

1. Cook, R.J., B.M. Dickens & K. Kolbert, Brief of *Amici Curiae* on behalf of 22 International Women's Health Organizations in support of the Appellees in *Webster v. Reproductive Health Services*, No. 88-605 U.S. Supreme Court (1989) 24 pp.

Reprinted in *Women's Rights Law Reporter* 11: 191-212 (1989).
2. J.N. Erdman and R.J. Cook. *Amici Curiae* Submission to the Constitutional Court of Colombia regarding The Interpretation of Article 4(1) of the American Convention on Human Rights Compatible with the Human Rights of Women, May 23, 2005.
3. Erdman, J.N. & R.J. Cook. *Amici Curiae* Submission to the Supreme Court of Justice of Nicaragua regarding The Interpretation of Article 4(1) of the *American Convention on Human Rights* Compatible with the Human Rights of Women, 19 pp. March 29, 2007; revised December 10, 2008.
4. Cook, R.J., S.A. Cusack & J.N. Erdman. *Amici Curiae* Submission to the European Court of Human Rights regarding Application no. 27617/04, *R.R. v. Poland*, 13 pp. September 28, 2007.
5. Cook R.J. & J.N. Erdman, *Amici Curiae* Submission to the Supreme Court of Mexico Accion de inconstitucionalidad 146/2007 Mexico, Federal District. Decree Reforming the Federal District Penal Code and Amending the Federal District Health Law. Official Gazette of the Federal District. No. 70. April 26, 2007, 10 pp. October 5, 2007.
6. Cook, R.J., J.N. Erdman and C. Zampas, *Amici Curiae* Submission to the European Court of Human Rights in the case of *A., B. and C. v. Ireland*, Application No. 25579/05, 26 pp. October 31, 2008.
7. Cusack, S., R.J. Cook, V. Krsticevic & V. Coria, *Amici Curiae* Submission to the Inter-American Court of Human Rights in the case of *Campo Algodonero: Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez, v. the United Mexican States*, (Case Nos. 12.496, 12.497 and 12.498) 21 pp., December 3, 2008.
8. Cook, R.J. & J.Erdman, *Amici Curiae* Submission to the Supreme Court of Mexico regarding Acción de Inconstitucionalidad 11/2009, 26 December 2008 Amendment to Article 7 of the *Constitución Política del Estado Libre y Soberano de Baja California*, English and Spanish, 16 pp. April 13, 2009.

9. Cook, R.J., B.M. Dickens & S. Dughman, *Amici Curiae* submission to the Inter-American Commission on Human Rights in the case of *Ana Victoria Sánchez Villalobos y otros v. Costa Rica*, 16 pp., September 29, 2009.
10. Erdman, J.E., R. J. Cook & B.M. Dickens, *Amici Curiae* submission to the European Court of Human Rights Application in the case of *Z v. Poland* (with Joanna Erdman & Bernard Dickens), 11 pp., October 28, 2009.
11. Cook, R.J. & B.M. Dickens, *Amici Curiae* submission to the Inter-American Commission on Human Rights supporting the human rights of “Amalia”, a Nicaraguan woman denied treatment for cancer because of pregnancy. English and Spanish, 2 pp. February 24, 2010.

D. ARTICLES

1. Cook, R.J. “Formulating Population Policies: A Legal Approach” (1973) 3 *LAWASIA* 3: 86-107.
2. Cook, R.J. “Formulating Population Policy: A Case Study of the United States” (1974) 3: *Environmental Affairs* 47-78.

Reprinted in: *Population Policy Making in the American States*, Bergman, E., Carter, D.N., Cook, R.J. *et al.* (eds.), (Boston, MA: D.C. Heath, 1974), pp. 15-42.
3. Cook, R.J. “Distribution of Oral Contraceptives: Legal Changes and New Concepts of Preventative Care” (1976) 66 *American Journal of Public Health* 591-2.
4. Cook, R.J. & B.M. Dickens. “A Decade of International Change in Abortion Law: 1967-1977” (1978) 68 *American Journal of Public Health* 637-644.
5. Dickens, B.M. & R.J Cook. “The Development of Commonwealth Abortion Laws” (1979) 28 *International and Comparative Law Quarterly* 424-457.
6. Cook, R.J. & B.M. Dickens. “Abortion Laws in African Commonwealth Countries” (1981) 25(2) *Journal of African Law* 25(2): 60-79.
7. Bhiwandiwala, P.P., R.J. Cook, B.M. Dickens, & M. Potts. “Menstrual Therapies in Commonwealth Asian Laws” (1982) 20 *International Journal of Gynecology and Obstetrics* 273-278.
8. Cook, R.J. “Modern Medical Technologies in Commonwealth Law and Beyond” (1983) 17(4) *International Planned Parenthood Federation Medical Bulletin* 1-2 (also available in French and Spanish).

9. Isaacs, S.L. & R.J. Cook. "Laws and Policies Affecting Fertility: A Decade of Change" (1984) 7 *Population Reports* (Johns Hopkins University) Series E, 105-151 (also available in Arabic, French and Spanish).
10. Cook, R.J. "Antiprogestones and the Law" (1986) 20(5) *International Planned Parenthood Federation Medical Bulletin* 2-3 (also available in French and Spanish).
11. Cook, R.J. & J.M. Haws. "The United Nations Convention on the Rights of Women: Opportunities for Family Planning Providers" (1986) 12 *International Family Planning Perspectives* 49-53.

Spanish edition: *Profamilia* 3(9&10): 10-14 (1987) (also available in Arabic and French).
12. Cook, R.J. "Human Rights and Infant Survival: A Case for Priorities" (1986-87) 18 *Columbia Human Rights Law Review* 1-41.
13. Cook, R.J. "The U.S. Export of 'Pipeline' Therapeutic Drugs" (1987) 12 *Columbia Journal of Environmental Law* 39-70.
14. Cook, R.J. "Ethnic Cultures and Discrimination against Women" *Nemesis* (Dutch Periodical) 3: 49-55 (1987) (also available in Dutch).
15. Cook, R.J. & D. Maine. "Spousal Veto over Family Planning Services" (1987) 77 *American Journal of Public Health* 339-344.

Reprinted (1987) in 3 *The Lawyers* 56-58 and 61-2 (1988);

Spanish translation available in *Profamilia* 3: 30-38 (1988).
16. Cook, R.J. "The 1979 Women's Convention" (1988) 10(35) *National Law Journal* 34-36.
17. Cook, R.J. & B.M. Dickens. "International Developments in Abortion Law: 1977-1988" (1988) 78: *American Journal of Public Health* 1305-1311.
18. Cook, R.J. "Antiprogestin Drugs: Medical and Legal Issues" (1989) 21 *Family Planning Perspectives* 267-272;

Reprinted (1991) in *Mercer Law Review* 42: 971-987.
19. Cook, R.J. "International Dimensions of the Department of Justice Arguments in the *Webster Case*" (1989) 17 *Law, Medicine and Health Care* 384-394.

20. Cook, R.J. "Ethics in Family Planning" (1990) 2 *Current Opinion in Obstetrics and Gynecology* (symposium edition on Family Planning) 556-563.
21. Cook, R.J. "The Women's Convention: Opportunities for the Commonwealth" (1990) 16 *Commonwealth Law Bulletin* 610-619.

Reprinted in *Commonwealth Judicial Journal* 8: 10-16.
22. Cook, R.J. "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women" (1990) 30 *Virginia Journal of International Law* 643-716.

Excerpted in H. J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals-Text and Materials* (Oxford: Clarendon Press, 1996), pp 919-920; and in H. J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals-Text and Materials*, 2nd edition, (Oxford: Oxford University Press, 2000) pp. 441-442, and in R. Goodman, H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals-Text and Materials*, 3rd edition, (Oxford: Oxford University Press, 2007), p. 1126.
23. Cook, R.J. "International Human Rights Law Concerning Women: Case Notes and Comments" (1990) 23 *Vanderbilt Journal of Transnational Law* 779-818.
24. Cook, R.J. "Clandestine Abortions are Not Necessarily Illegal" (1991) 23 *Family Planning Perspectives* 283.
25. Cook, R.J. (guest editor), symposium edition on "Realizing the Rights of Women in Development Processes: Women's Legal Entitlements to Agricultural Development and Financial Assistance," *Third World Legal Studies - 1991*, 179 pp.
26. Cook, R.J., Guest Editor's Introduction to the symposium edition on Realizing the Rights of Women in Development Processes: Women's Legal Entitlements to Agricultural Development and Financial Assistance, *Third World Legal Studies - 1991* vi-ix.
27. Cook, R.J. "International Protection of Women's Reproductive Rights" (1992) 24 *New York University Journal of International Law and Politics* (symposium edition on Women's International Human Rights) 645-727.
28. Cook, R.J. "Women's International Human Rights: A Bibliography" (1992) 24 *New York University Journal of International Law and Politics* (symposium edition on Women's International Human Rights) 857-888; revised and updated version of Cook, R.J. "The International Right to Nondiscrimination on the Basis of Sex: A Bibliography" (1989) 14 *Yale Journal of International Law* 161-181.

29. Lampé, L.G. & R.J. Cook. "Macroethical Responsibilities of Gynecologists and Obstetricians" (1992) 38 *International Journal of Gynecology and Obstetrics* 1-3.
Revised and reprinted (1992/93) in 49 *Acta Medica Hungarica* 3-16
30. Grimes, D.A. & R.J. Cook. "Mifepristone (RU 486): An Abortifacient to Prevent Abortion?" (1992) Invited Editorial, 327 *New England Journal of Medicine* 1088-89.
31. Cook R.J. & D.A. Grimes. (guest editors) symposium edition on "Antiprogestin Drugs: Ethical, Legal and Medical Issues" (1992), 20(3) *Law, Medicine and Health Care* 248 pp.
32. Cook R.J. & D.A. Grimes. Guest Editors' Introduction to the symposium edition on "Antiprogestin Drugs: Ethical, Legal and Medical Issues" (1992) 20 *Law, Medicine and Health Care* 149-153.
33. Cook, R.J. "International Human Rights and Women's Reproductive Health" (1993) 24 *Studies in Family Planning* 73-86.
Spanish edition: "Derechos Humanos, mortalidad materna y salud reproductiva" (1993 June) 9 *Profamilia* 43-68.
Reprinted in *Women's Rights Human Rights*, Peters J. and Wolper A. (eds.) (New York, N.Y.: Routledge, 1995), pp. 256-275.
Reprinted in *Women, Medicine, Ethics and the Law*, Sherwin S. and Parish B. (eds.) (London, U.K.: Ashgate Publishing Limited, 2002); pp. 37-50.
34. Cook, R.J. "Women's International Human Rights Law: The Way Forward" (1993) 15 *Human Rights Quarterly* 230-261.
Reprinted (1992) 5(4) *Thatched Patio* 29-63 (Sri Lanka)
Reprinted in *Human Rights of Women: National and International Perspectives*, R.J. Cook (ed.) (Philadelphia, Pa.: University of Pennsylvania Press 1994), pp. 3-36.
Spanish edition: "Los derechos humanos internacionales de la mujer: el camino a seguir" in *Derechos Humanos de la Mujer: Perspectivas Nacionales e Internacionales*, Cook, R.J. (ed.) (Bogotá, Colombia, Profamilia, 1997), pp. 3-33.
35. Cook, R.J. "State Responsibility for Violations of Women's Human Rights" (1994) 7 *Harvard Human Rights Journal* 125-175.

36. Cook, R.J. & M.I. Plata. "Women's Reproductive Self-Determination: Evolutionary Models," (1994) 3 *Development* (symposium edition on Population and Development) 29-34.
37. Cook, R.J. & M.I. Plata. "Women's Reproductive Rights" (1994) 46 *International Journal of Gynecology and Obstetrics* (symposium edition on Women's Health) 215-220.
38. Cook, R.J. "Human Rights and Reproductive Self-Determination" *American University Law Review* (symposium edition on reproductive self-determination) 44(4): 975-1016 (1995).
39. Cook, R.J. & V.L. Oosterveld. "A Select Bibliography of Women's Human Rights Law" (1995) 44(4) *American University Law Review* (symposium edition on reproductive self-determination) 1429-1471.
40. Cook, R.J. "Gender, Health and Human Rights" (1995) 1(4) *Health and Human Rights* (symposium edition on women's health and human rights) 350-366.

Reprinted in *Health and Human Rights: A Reader*, Mann J.M., Gruskin, S., Grodin, M.A. and Annas, G.J. (eds.) (New York, N.Y.: Routledge, 1999), pp. 253-264.
41. Cook, R.J. "Enforcing Women's Rights through Law" (1995) 3(2) *Gender and Development* (symposium edition on women and rights) 8-15.
42. Cook, R.J. "Women's Health from Cairo to Beijing and Beyond" (1995) 346 *The Lancet* 835.
43. Cook, R.J. & M.F. Fathalla. "Advancing Reproductive Rights Beyond Cairo and Beijing," (1996) 22(3) *International Family Planning Perspectives* 115-121.

Reprinted in *Women and International Human Rights Law*, Vol. 3, Askin, K.D. and Koenig, D.M. (eds.), (Ardsley, NY: Transnational Publishers, 2001), pp. 73-90.
44. Jejeebhoy, S.J. & R.J. Cook. "State Accountability for Wife-Beating: the Indian Challenge," (1997) 349 *The Lancet* (Supplement I: Women's Health): s110-s112.
45. Cook, R.J. "UN Human Rights Committees Advance Reproductive Rights" (1997) 10 *Reproductive Health Matters*, 151-153.
46. Cook, R.J. "Reproductive Health Law: Where Next After Cairo and Beijing" (1997) 16(1): *Medicine and Law* 169-178.

47. Cook, R.J. "A Health-for-Women Strategy," (1997) 18(2): *World Health Forum* 131-134.
48. Cook, R.J. "Fostering Compliance with Women's Rights in the Inter-American System," (1998) (11(1) *Revue Québécoise de Droit International/Inter-American Institute of Human Rights* (Special Issue on the 50th anniversary of the OAS Declaration on the Rights and Duties of Man) 129-142.
49. Cook, R.J. "State Accountability for Women's Health," (1998) 49(1) *International Digest of Health Legislation* 265-279.
50. Cook, R.J. & M.F. Fathalla. "Duties to Implement Reproductive Rights," (1998) 67(1) *Nordic Journal of International Law* 1-16.
51. Cook, R.J. "Human Rights Law and Safe Motherhood" (1998) 5 *European Journal of Health Law* 357-375.
52. Cook, R.J. & B.M. Dickens. "Ethics, Justice and Women's Health" (1999) 64 *International Journal of Gynecology and Obstetrics* 81-85.
53. Cook, R.J., B.M. Dickens & L.E. Bliss. "International Developments in Abortion Law: 1988-1998" (1999) 89(4) *American Journal of Public Health* 579-586

Spanish edition: "Cambios en la legislación de aborto a nivel mundial, de 1988 a 1998," (2001) *ModemMujer* (www.modemmujer.org), Rayas L. (trans.)
54. Cook, R.J. "Advancing Safe Motherhood through Human Rights" (1999) 21(4): *Journal of the Society of Gynecology and Obstetrics of Canada* 363-371.
55. Cook, R.J. & B.M. Dickens. "Are 'Embryo' and 'Fetus' Differentiated in Law?" (1999) 43-44 *Entre Nous: The World Health Organization/European Regional Magazine for Reproductive and Sexual Health* 20.
56. Cook, R.J. & B.M. Dickens. "Human Rights and Abortion Laws," (1999) 65 *International Journal of Gynecology and Obstetrics* 81-87.
57. Cook, R.J. "The Human Rights Dimensions of Maternal Mortality" (1999) *Gender and Population Studies Series*, Pinnelli A. (ed.), International Union for the Scientific Study of Population (IUSSP), 1-23.
58. Dickens, B.M. & R.J. Cook. "Some Ethical and Legal Issues in Assisted Reproductive Technology," (1999) 66 *International Journal of Gynecology and Obstetrics* 55-61

59. Cook, R.J. & B.M. Dickens. "The FIGO Study Group on Women's Sexual and Reproductive Rights," (1999) 67 *International Journal of Gynecology and Obstetrics* 55-61.
60. Cook, R.J. & I. Merali. "The Interpretation and Application of Human Rights by Commonwealth Courts to Reproductive and Sexual Health," (1999) 25: *Commonwealth Law Bulletin* (25th anniversary issue) 109-117.
61. Cook, R.J. & B.M. Dickens. "Voluntary and Involuntary Sterilization: Denials and Abuses of Rights," (2000) 68 *International Journal of Gynecology and Obstetrics* 61-67.
62. Cook, R.J. & B.M. Dickens. "Recognizing Adolescents' 'Evolving Capacities' to Exercise Choice in Reproductive Healthcare," (2000) 70(1) *International Journal of Gynecology and Obstetrics* (World Report on Women's Health - Year 2000) 13-21.
64. Dickens, B.M. & R.J. Cook. "Law and Ethics in Conflict over Confidentiality?" (2000) 70 *International Journal of Gynecology and Obstetrics* 385-391.
65. Dickens, B.M. & R.J. Cook. "The Scope and Limits of Conscientious Objection" (2000) 71 *International Journal of Gynecology and Obstetrics* 71-77.
66. Dickens, B.M. & R.J. Cook. "The Management of Severely Malformed Newborn Infants: The Case of Conjoined Twins" (2001). 73: *International Journal of Gynecology and Obstetrics* 69-75.
67. Cook, R.J., B.M. Dickens, C. Ngwena & M.I. Plata. "Emergency Contraception" (2001) 75 *International Journal of Gynecology and Obstetrics* 185-191.

Spanish edition: "La Situación Legal de la Anticoncepción de Emergencia" (Bogotá, Colombia, Profamilia, 2001).
68. Cook, R.J. & B.M. Dickens. "Human Rights to Safe Motherhood" (2002) 76 *International Journal of Gynecology and Obstetrics* 225-231.
69. Cook, R.J. & B.M. Dickens. "Human Rights and HIV-Positive Women," (2002) 77 *International Journal of Gynecology and Obstetrics* 55-63.
70. Cook, R.J. "Developments in Judicial Approaches to Sexual and Reproductive Health" (2002) 21(1) *Medicine and Law* 155-164.
71. Cook, R.J. & B.M. Dickens. "The Injustice of Unsafe Motherhood," (2002) 2(1) *Developing World Bioethics* 64-81.

Reprinted in *Health Rights and Globalisation*, Bennett B., (ed.) The International Library of Medicine Ethics and Law series (Aldershot, UK: Ashgate, 2006) 47-64.

Reprinted in *The Bioethics Reader: Editors' Choice*. Ed. Ruth Chadwick, Helga Kuhse, Willem A. Landman, Udo Schuklenk, and Peter Singer (Malden MA: Blackwell Publishing, 2007) 459-476.

Reprinted in *The Ethics of Public Health*, Volume II, ed. Michael Freeman. (Ashgate 2010).

72. Cook, R.J. & B.M. Dickens. "Patient Care and the Health-Impaired Practitioner" (2002) 78 *International Journal of Gynecology and Obstetrics* 171-177.
73. Cook, R.J., B.M. Dickens & M.F.Fathalla. "Female Genital Cutting (Mutilation/Circumcision): Ethical and Legal Dimensions" (2002) 79 *International Journal of Gynecology and Obstetrics* 281-87.
74. Cook, R.J. & B.M. Dickens. "Challenges of Ethical Research in Resource-Poor Settings," (2003) 80 *International Journal of Gynecology and Obstetrics* 79-86.
75. Cook, R.J. & B.M. Dickens. "Human Rights Dynamics of Abortion Law Reform," (2003) 25 *Human Rights Quarterly* 1-59.

Reprinted in *Women's Rights: A Human Rights Quarterly Reader*, ed. Bert B. Lockwood, Baltimore: John Hopkins University Press, 2006, 557-612.

Spanish edition: "Dinámicas de los derechos humanos en la reforma de las leyes del aborto" Mexico, GIRE, 2004, online at:

<http://www.gire.org.mx/phpnuke/modules.php?name=prueba&opgire=61>

76. Cook, R. J., A. Faundes & B.M. Dickens. "Ectopic Pregnancy and Emergency Care" (2003) 82 *International Journal of Gynecology and Obstetrics* 121-126.
 77. Dickens B.M. & R.J. Cook. "Ethical and Legal Approaches to 'the Fetal Patient'" (2003) 83 *International Journal of Gynecology and Obstetrics* 85-91.
 78. Cook, R.J. & B.M. Dickens. "Access to Emergency Contraception" (2003) 25(11) *Journal of Obstetrics and Gynaecology of Canada* 914-916.
- Cook, R.J. & B.M. Dickens. Letter in Response to a Letter to the Editor, (2004) 26(2) *Journal of Obstetrics and Gynaecology of Canada* 112.
79. Cook, R.J. & M.B. Galli Bevilacqua. "Invoking Human Rights to Reduce Maternal Deaths" (2004) 363 *The Lancet* 73.

80. Dickens, B.M. & R.J. Cook. "Dimensions of Informed Consent to Treatment" (2004) 85 *International Journal of Gynecology and Obstetrics* 309-314.
81. Cook, R.J., B.M. Dickens & M. Horga. "Safe Abortion: WHO Technical and Policy Guidance" (2004) 86 *International Journal of Gynecology and Obstetrics* 78-84.
82. Cook, R.J. & B.M. Dickens. "Adolescents' Reproductive Health Care" 58 (2004) *Entre Nous: The World Health Organization/European Regional Magazine for Reproductive and Sexual Health* 13-15.
83. Cook, R.J., B.M. Dickens & S. Syed. "Obstetric Fistula: The Challenge to Human Rights" (2004) 87 *International Journal of Gynecology and Obstetrics* 72-77.
84. Cook, R.J. "Exploring Fairness in Health Care Reform" (2004) 29(3) *Journal for Juridical Science* 1-27.

Reprinted in *The ICFAI Journal of Healthcare Law* 3.4 (2005): 35-59.

Reprinted in L. Elit and J. Chamberlain-Froese, eds., *Women's Health in the Majority World: Issues and Initiatives* (New York: Nova Science Publishers, 2007) 109-132.
85. Dickens, B.M. & R.J. Cook. "Adolescents and Consent to Treatment" *International* (2005) 89 *Journal of Gynecology and Obstetrics* 179-184.
86. Dickens, B.M., G.I. Serour, R.J. Cook & R.Z. Qiu. "Sex Selection: Treating Different Cases Differently" (2005) 90 *International Journal of Gynecology and Obstetrics* 171-177.
87. Cook, R.J., B.M. Dickens & S. Thapa. "Caring for Victims of Sexual Abuse" (2005) 91 *International Journal of Gynecology and Obstetrics* 194-199.
88. Dickens, B.M. & R.J. Cook. "Conflict of Interest: Legal and Ethical Aspects" (2006) 92 *International Journal of Gynecology and Obstetrics* 192-197.
89. Cook, R.J., B.M. Dickens and J.N. Erdman, "Emergency Contraception, Abortion and Evidence-Based Law" (2006) 93 *International Journal of Gynecology and Obstetrics* 191-197.
90. Dickens, B.M. & R.J. Cook. "Legal and Ethical Issues in Telemedicine and Robotics" (2006) 94 *International Journal of Gynecology and Obstetrics* 73-78.

91. Cook, R.J. & B.M. Dickens, "The Growing Abuse of Conscientious Objection" op-ed, (May 2006) 8(5): *Virtual Mentor: Ethics Journal of the American Medical Association*, 337-340. Online at:
http://www.ama-assn.org/ama1/pub/upload/mm/384/oped1_16185.pdf
92. Cook, R.J. & C.G. Ngwena. "Women's Access to Healthcare: the Legal Framework" in World Report on Women's Health, Women's Right to Health and the Millennium Development Goals, ed. D. Shaw, (2006) 94 *International Journal of Gynecology and Obstetrics* 216-225.
93. Cook, R.J, A. Ortega-Ortiz, S. Romans & L.E. Ross. "Legal Abortion for Mental Health Indications" (2006) 95 *International Journal of Gynecology and Obstetrics* 185-190.

Spanish: Cook R.J., Ortega-Ortiz A., Romans S., Ross L.E. "La salud mental de la mujer como indicación para el aborto legal," trans. Sandra Dughman y Adriana Ortega-Ortiz. Texto traducido y reproducido con autorización de la Federación Internacional de Ginecología y Obstetricia (FIGO). En línea :
<http://www.law.utoronto.ca/documents/reprohealth/SP20-MentalHealth.pdf>
94. Erdman, J.N. & R.J. Cook. "Women's Rights to Reproductive and Sexual Health in a Global Context" (Nov 2006) 28.11 *Journal of Obstetricians and Gynaecologists of Canada* 991-997.
95. Dickens, B.M. & R. J. Cook. "Acquiring Human Embryos for Stem-Cell Research" *International Journal of Gynecology and Obstetrics*, Vol. 96, pp. 67-71, 2007.
96. Cook, R.J. & S. Howard "Accommodating Women's Differences under the Women's Anti-Discrimination Convention" (2007) 56 *Emory Law Journal* 1039-1091.
97. Cook, R.J., J.N. Erdman & B.M. Dickens. "Respecting Adolescents' Confidentiality and Reproductive and Sexual Choices" (2007) 98 *International Journal of Gynecology and Obstetrics* 182-187.
98. Dickens, B.M. & R.J. Cook. "Reproductive Health and Public Health Ethics" (2007) 99 *International Journal of Gynecology and Obstetrics* 75-79.
99. Cook, R.J. & B.M. Dickens. "The Introduction of Reversible Sterilization" (2007) 99 *International Journal of Gynecology and Obstetrics* 1-3.

100. Cook, R.J., J.N. Erdman & B.M. Dickens. "Achieving Transparency in Implementing Abortion Laws" (2007) 99 *International Journal of Gynecology and Obstetrics* 157-161.
101. Ngwena C.G. & Cook, R.J., guest editors' Editorial to the symposium edition on HIV/AIDS, Pregnancy, and Reproductive Autonomy 8.1 *Developing World Bioethics*, April 2008 pp. iii-vi.
102. Cook, R.J. "Ethical Concerns in Female Genital Cutting," (2008) 12.1 *African Journal of Reproductive Health* 7-11. French version pp. 12-16.
103. Cook, R.J., J.N. Erdman, M. Hevia and B. M. Dickens, "Prenatal Management of Anencephaly" (2008) 102 *International Journal of Gynecology and Obstetrics* 304-308.
- Spanish: "Manejo Prenatal de la Anencefalia" trans. Sandra Dughman, in 88.982 (Dec 2009): *Revista de la Sociedad de Obstetricia y Ginecologia de Buenos Aires* 225-233.
- Portuguese : "Tratamento Pre-Natal da Anencefalia" *UniBrasil Cadernos da Escola de Direito e Relaciones Internacionais* 10 (2009): 1-14
104. Dickens, B.M. and R.J. Cook, "Multiple Pregnancy: Legal and Ethical Issues" (2008) 103 *International Journal of Gynecology and Obstetrics* 270-274.
105. Cook, R.J. "Transparency in the Delivery of Lawful Abortion Services" *Canadian Medical Association Journal* 180.3 (Feb. 3, 2009): 272-273.
106. Cook, R.J, M. Arango Olaya and B. M. Dickens, "Healthcare Responsibilities and Conscientious Objection" 104 (2009) *International Journal of Gynecology and Obstetrics*, 249-252.
- Spanish: "Responsabilidades en los servicios de salud y objecione conciencia" 13 (June 2009) *Revista Argentina de Teoria Juridica*, 1-10.
http://www.despenalizacion.org.ar/pdf/publicaciones/Responsabilidades_en_los_servicios_de_salud_y_objecion_de_conciencia.pdf
http://www.law.utoronto.ca/documents/reprohealth/SP18-HealthcareResp_CO.pdf
107. Cook, R.J. and B.M. Dickens, "From Reproductive Choice to Reproductive Justice" 106 (2009) *International Journal of Gynecology and Obstetrics*, 249-252.
108. Cook, R.J. and B.M. Dickens, "Dilemmas in Intimate Partner Violence" 106 (2009) *International Journal of Gynecology and Obstetrics*, 72-75.

109. Cook, R.J. and B.M. Dickens, "Hymen Reconstruction: Ethical and Legal Issues" 107 (2009) *International Journal of Gynecology and Obstetrics*, 266-269.
110. Cook, R.J. and B.M. Dickens, "Special Commentary on the Issue of Reinfibulation" 109 (2010) *International Journal of Gynecology and Obstetrics*, 97-99.
111. Cook, R.J., S. Cusack and B. Dickens, "Unethical Female Stereotyping in Reproductive Health" 109 (2010) *International Journal of Gynecology and Obstetrics*, 255-258.

E. PUBLISHED CONFERENCE PROCEEDINGS

1. Cook, R.J. "State Population Legislation" in *A Report on the New England Regional Conference on Population*, Baldwin, S. (ed.) (New York: Population Council, 1973), pp. 164-230.
2. Cook, R.J. "Legal and Policy Aspects of Community Based Distribution of Oral Contraceptives in South East Asia" in *Proceedings of a Conference on Family Planning in South East Asia* published in *Hukum (The Law)* (Jakarta, Indonesia: Indonesian Law Center Foundation, 1976), 284-93.
3. Cook, R.J. Testimony, "Current Regulatory Status of Depo Provera Abroad" in *The Depo Provera Debate, Hearings Before the Select Committee on Population* (Washington, D.C.: U.S. House of Representatives, 95th Congress, 1978) 48-54 and 315-326.
4. Cook, R.J. "The Legal Promotion of the Human Right to Family Planning" in *Report of the Working Group on the Promotion of Family Planning as a Basic Human Right*, London, U.K.: International Planned Parenthood Federation, 1984, pp. 35-49 (also available in French and Spanish).
5. Cook, R.J. "Legal Abortion: Limits and Contributions to Human Life" in: *Abortion: Medical Progress and Social Implications*, Ciba Foundation Symposium 115 (London: Pitman, 1985) 211-218.
6. Cook, R.J. "The Family in Society: The Home of Equal Rights" in *Proceedings of the 1986 Commonwealth Law Conference* (Kingston, Jamaica: Commonwealth Law Conference Foundation, 1986) K: 1-8.
7. Cook, R.J. "United States Population Policy, Sex Discrimination and Principles of Equality under International Law," (1987) 20(1) *New York University Journal of International Law and Politics* (symposium edition of the Proceedings of the American Civil Liberties Union Conference on the Mexico City Policy) 93-142

8. Cook, R.J. "Human Rights and Development: Are Women Still Separate and Unequal?" in *Proceedings of the 1986 Conference of the Canadian Council on International Law* (CCIL) (Ottawa: CCIL, 1986) 315 - 350

Reprinted in (1988) 3 *The Lawyers* 15-18
9. Cook, R.J. & B.M. Dickens. "Ethics and Human Values in Family Planning: Legal and Legislative Aspects" in *Ethics and Human Values in Family Planning*, Proceedings of XXII Council for International Organizations of Medical Sciences (CIOMS), Bankowski, Z. Barzelatto, J. and Capron, A.M. (eds.) (Geneva: CIOMS, 1989) 117-140.
10. Cook, R.J. "Ethical and Legal Responses to Infertility" in *Proceedings of the 12th World Congress of Gynecology and Obstetrics 1988*, Belfort, P., Pinotti, J.A., and Eskes, T. (eds.), (Carnforth, U.K.: Parthenon, 1989) 97-105.
11. Cook, R.J. Testimony, "How the Mexico City Policy is Legally Flawed" in *The Effect of the Mexico City Policy on International Family Planning, Hearings Before the Subcommittee on International Operations* (Washington, D.C.: U.S. House of Representatives, 101st Congress, 1989) 73-91.
12. Cook, R.J. "Women's Legal Issues and Status in the Developing World" in *Proceedings of the 23rd Annual Conference of the Association for Population Libraries and Information Centers* (APLIC), Leadbetter, L. and Barrows, W. (eds.) (New York: APLIC, 1991) 1-14.
13. Cook, R.J. "Abortion Laws and Policies: Challenges and Opportunities" (1989) Supp. 3 *International Journal of Gynecology and Obstetrics* (symposium edition of the Proceedings of the Christopher Tietze International Conference on Women's Health in the Third World: The Impact of Unwanted Pregnancy) 61-87.

Spanish editions: (Oct. 1989) 13 *Quadern Caps: Acogida de la Demanda de Aborto* 31-95 and (1991) 2(3) *Debate Feminista* 89-142.

Portuguese edition: *Leis e Politicas Sobre o Aborto: Desafios e Oportunidades*, Pimentel, S. (ed.), (Sao Paulo, Brazil: Conselho Estadual da Condiçao Feminina, 1991) 9-87.
14. Meirik, O. & R.J. Cook. "Ethical Issues in Epidemiological Research in Human Reproduction: Two Case Studies" in *Ethics and Epidemiology: International Guidelines*, Proceedings of XXV Council for International Organizations of Medical Sciences (CIOMS) Bankowski, Z., Bryant, J., and Last, J. (eds.) (Geneva: CIOMS, 1991) 117-125.

15. Cook, R.J. & B.M. Dickens. "Legal and Ethical Aspects of Development and Use of Fertility Regulating Vaccines" in *Vaccines for Fertility Regulation*, Proceedings of the World Health Organization Symposium on Vaccines, Ada, G.L. and Griffin, P.D. (eds.) (Cambridge, U.K.: Cambridge University Press, 1991) 201-232.
16. Cook, R.J. "Legal Aspects of Methods of Fertility Regulation" in *Proceedings of the First International Conference on Bioethics in Human Reproduction Research in the Muslim World*, Serour, G. (ed.) (Cairo, Egypt: International Islamic Center for Population Studies and Research, Al Azhar University, 1992) 93-108 (also available in Arabic).
17. Cook, R.J. "Legal Aspects of Women" in *Proceedings of the First International Conference on Bioethics in Human Reproduction Research in the Muslim World*, Serour, G. (ed.), (Cairo, Egypt: International Islamic Center for Population Studies and Research, Al Azhar University, 1992) 140-156 (also available in Arabic).
18. Cook, R.J. "Antiprogestins: Legal Issues" in *Proceedings of the International Symposium on Antiprogestins*, Kamal, G.M. (ed.) (Dhaka, Bangladesh: Bangladesh Association for the Prevention of Septic Abortion, 1992) 71-81.
19. Cook, R.J. "Accountability in International Law for Violations of Women's Rights by Non-State Actors" in *Reconceiving Reality: Women and International Law*, Dallmeyer, D.G. (ed.), Studies in Transnational Legal Policy #25 (Washington, D.C.: American Society of International Law, 1993) 93-116.

Excerpted in: *International Human Rights in Context: Law, Politics, Morals – Text and Materials*, ed. R. Goodman, H.J. Steiner and P. Alston, 3rd edition (Oxford: Oxford University Press, 2007) pp. 221-222.
20. Cook, R.J. "Effectiveness of the Beijing Conference Advancing International Law Regarding Women" in *Proceedings of the American Society of International Law, 91st Annual Meeting: Implementation, Compliance and Effectiveness* (Washington: American Society of International Law, 1998) 310-317.
21. Cook, R.J. "Women's Rights and Women's Health" in *New Insights in Gynecology and Obstetrics: The Proceedings of the FIGO World Congress on Gynecology and Obstetrics, 1997*, Ottesen, B. (ed.), (Carnforth, U.K.: Parthenon Publishing, 1998) 137-143.
22. Cook, R.J. & B.M. Dickens. Co-editors, Symposium Edition, Legal and Ethical Aspects of Reproductive and Sexual Health in Central and Eastern Europe, (1999) *18 Medicine and Law* 153-495.

23. Cook, R.J. *Proceedings of the Short Course on Reproductive Health, Rights, Ethics and Law for Health Professionals*. (Manila: ReproCen. University of the Philippines College of Medicine, 2002), 87 pp.
24. Cook, R.J. *Proceedings of the Short Course on Reproductive Health, Rights, Ethics and Law for Law Professionals* (Manila: ReproCen. University of the Philippines College of Medicine, 2002), 163 pp.
25. Cook, R. J. "Reproductive Rights and Citizenship in the Americas," *Women, the Family and the State: Proceedings of the 2002 National Association of Women and the Law Conference*, Ottawa, March 7-10, 2002, available on CD-ROM, March, 2003.
26. Cook, R.J. "Human Rights Dimensions of Health Security," *Conflict & Coordination across International Regimes: Proceedings of the 97th Annual Meeting of the American Society of International Law*, Washington DC, April 2-5, 2003, 101-106.

F. REVIEWS

1. Cook, R.J. Book Review: *Report on Legal aspects of Population Planning in Bangladesh* by Sohrab Ali, M., Zahir, M., and Hasan, K.M. (1979) 30 *1978 International Digest of Health Legislation* (WHO) 982-84.
2. Cook, R.J. Book Review: *Controlling the Use of Therapeutic Drugs: An International Comparison*, Wardell, W.M. (ed.) (1981) 32 *1980 International Digest of Health Legislation* (WHO) 591-3.
3. Cook, R.J. Book Review: *Population Law and Policy: Source Materials and Issues* by Isaacs, S.L. (1982) 33: *1980 International Digest of Health Legislation* (WHO) 640-642.
4. Cook, R.J. Book Review: *Food and Drug Law Cases and Materials* by Merrill, R.A. and Hutt, P.B. (1982) 33 *1980 International Digest of Health Legislation*, (WHO) 967-70.
5. Cook, R.J. and Leonard, A. Book Review: *Reproductive Rights and Wrongs: The Global Politics of Population Control and Contraceptive Choice* by Hartman, B. 1987 (1989) 15: *International Family Planning Perspectives*, 47-48.
6. Dickens, B.M. & R.J. Cook. Conference Review: Second International Conference on Health Law and Ethics, London, U.K., (1989) 40: *International Digest of Health Legislation* (WHO) 891-900;

Reprinted in (1989)15 *Commonwealth Law Bulletin*, 1497-1505.

7. Cook, R.J. Book Review: *RU 486* by Lader, L. (1992). 24 *Family Planning Perspectives* 39-40.
8. Cook, R.J. Book Review: *Life Before Birth: the Moral and Legal Status of Embryos and Fetuses* by Steinbock, B. (1993) 1 *Medical Law Review*, 286-289.
9. Cook, R.J. Book Review: *Population Policy and Women's Rights: Transforming Reproductive Choice* by Dixon-Mueller, R. 1993, *Political Science Quarterly*, 109: 202-3 (1994).
10. Cook, R.J. Book Review: *Medicine, Law and Social Change: The Impact of Bioethics, Feminism and Rights Movements on Medical Decision-Making* by Darvall, L. 45: (1994) *International Digest of Health Legislation* (WHO) 438-439.
11. Cook, R.J. Book Review: *Intersections: Women on Law, Medicine and Technology*, Petersen K., ed., 1997. (2000) 7 *European Journal of Health Law*, 93-96.
12. Kelly, L.M. & R.J. Cook. Book Review: *Where Human Rights Begin: Health, Sexuality and Women in the New Millennium*, Chavkin, W., and Chesler, E. eds. in (2006) 27(4) *Conscience* 45-47.
13. Kelly, L.M. & R.J. Cook. Book Review of: *Learning to Dance: Advancing Women's Reproductive Health and Well-Being from the Perspectives of Public Health and Human Rights*, ed. Alice Ely Yamin (January 2007) 2.1 *Global Public Health* 99-102.
14. Cook, R.J. & S. Cusack. Book Review of *Honour: Crimes, Paradigms and Violence against Women* (2007) 29(2) *Human Rights Quarterly* 524-533.

G. OTHER PUBLICATIONS

Cook, R.J. Foreword to *Child Marriage in India: Social, Legal and Human Rights Dimensions* by Sagade J. (New Delhi, India: Oxford University Press, 2005), pp. xi-xii.

Cook, R.J. Foreword to *Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia* (Madrid: Women's Link Worldwide, 2007), pp. 5-11. Online at: <<http://womenslinkworldwide.org/pdf/sp-co-lat-col-decisioneng.pdf>>. Spanish translation in same volume.

Reprinted in *Reproductive Health Matters* 15.29 (2007): 1-3.

Cook, R.J. and J.N. Erdman, Foreword to *Legal Abortion: A Comparative Analysis of Health Regulations*, IPPF Western Hemisphere, 2009. 11-13

H. TEACHING MATERIALS

1. Cook, R.J. (ed.) *Teaching Materials: International Human Rights Law* (1987), (14th ed. 2003) University of Toronto, Faculty of Law.
2. Cook, R.J. & B.M. Dickens (eds.) *Teaching Materials: Ethical and Legal Issues in Health Care* (1987), (12th ed. 1999), University of Toronto, Faculty of Medicine, Department of Health Policy, Management and Evaluation.
3. Cook, R.J., B.M. Dickens & J.N. Erdman (eds.) *Teaching Materials: Reproductive and Sexual Health Law* (1990), (20th ed. 2009) University of Toronto, Faculty of Law.
4. Cook, R.J. (ed.) *Teaching Materials: International Women's Rights Law* (12th ed. 2009) University of Toronto, Faculty of Law.
5. Medina, C. & R.J. Cook (eds.) *Intensive Course on the Inter-American System* (2002) University of Toronto, Faculty of Law.
6. Cook, R.J., Abi-Mershed, E. (ed.) *Intensive Course on International Protection of Women's Rights* (5th ed., 2009), Washington College of Law, American University, Washington D.C.

I. FORTHCOMING

Cook, R.J. & V. Undurraga, Article 12 (Health) in C. Chinkin, M. Freeman, B. Rudolf and H.B. Schöpp-Schilling eds., *The United Nations Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: OUP, forthcoming 2011)

Ngwena, C., R.J. Cook & E. Durojaye, "Right to Health: South Africa," in Stephen Marks, ed., *Right to Health in Comparative Perspective* (Cambridge, MA: Harvard School of Public Health, forthcoming 2010).

Cook, R.J. & S. Cusack, "Stereotyping Women in the Health Sector: Lessons from CEDAW", 16 *Journal of Civil Rights and Social Justice*, Symposium Edition on the Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, forthcoming 2010.

Cook, R.J., Ortega-Ortiz A., Romans S., Ross L.E. "La salud mental de la mujer como indicación para el aborto legal," trans. Sandra Dughman & Adriana Ortega-

Ortiz. Forthcoming in Paola Bergallo ed., *Aborto y Derechos Humanos*, (Argentina: Ad Hoc, 2010).

Dickens, B.M. and R.J. Cook “The Legal Effects of Fetal Monitoring Guidelines” forthcoming in *International Journal of Gynecology and Obstetrics*.

Cook, R.J. “Gender, Health and Human Rights” originally published in 1.4 *Health and Human Rights* (1995): 350-66, republication in Michael J. Selgelid and Thomas Pogge, (eds.) *Health Rights*. International Library of Essays on Rights series. (forthcoming Farnham, Eng.: Ashgate, December 2010).