

Polygamy in the Recognition of Customary Marriages Act

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abstract

The Recognition of Customary Marriages Act (RCMA) 1998, recognises customary marriages which are "negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa" including polygamous marriages. The Act arises in the context of South Africa's Constitution which bans discrimination on grounds of culture and sexual orientation and allows for heterogeneity in its definitions of marriage and the family. A pluralist approach to family jurisprudence, however, is sometimes conceived of as setting up an irresolvable tension between the constitutional commitment to gender equality and protection for patriarchal prerogatives sanctioned by customary law. The fact that rights sometimes collide with one another is one of the reasons why it is impossible always to treat rights as absolute. When rights clash the question that arises is which of the rights that find themselves in tension with one another should give way and why? In the case of the recognition of polygamy, as an aspect of the right on the part of citizens to practise the culture of their choice, some women's rights advocates have argued that polygamy incontrovertibly denigrates women, reducing wives to mere appendages competing for the favours of an all-powerful husband and that it is, therefore, one aspect of a bundle of cultural practices that ought not to be permitted given the strong constitutional injunction in favour of gender equality. This *Perspective* offers a different viewpoint, arguing that the focus on polygamy in the new Act is to miss its more significant and far-reaching weaknesses which include an inert understanding of culture and tradition as well as the failure to extend choice equally to all citizens. From the perspective of gender equality, it is not so much polygamy that is the problem as the use of 'culture' as a tool to subvert the equality provisions in the Constitution and the state's reluctance to extend choice equally to all citizens.

keywords

Polygamy, customary marriage, culture, gender

Introduction

According to the most recent population census, just under 30 000 men are recorded as being in

polygamous marriages in South Africa (Statistics South Africa, 2004). While this is a small proportion of all marriages even allowing for statistical