

**Kirsten Besendahl**

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## ***Negotiating Marriage on the Eve of Human Rights***

### **Abstract**

*This paper examines the case of women's rights in marriage. It adopts a pluralist perspective on law and rights that highlights the complex legal framework within which women negotiate marriage. Based on research carried out in two Malawian cities in 2000-2001, it focuses on the interplay between different types of laws and norms related to marriage and discusses the opportunities and limitations women experience when negotiating polygynous marriages. One important aspect of the plural legal framework in contemporary Africa is the concept of human rights, which has accompanied the democratisation process. The paper draws attention to the possible impact of the introduction of women's rights on the legal framework in Malawi.*

### **Introduction**

In an African context, to negotiate a marriage usually signifies the communication and transactions between two families before a marriage is contracted. This paper focuses on the negotiations that take place between the spouses and their respective families *during* marriage and at the discontinuation of a marriage in the case of divorce. Based on research in Malawi in 2000-2001, the paper explores the ways Malawian women negotiate marriage. The focus will be on polygyny which many African women have experience of, one way or the other. To some of them polygyny causes uncertainty, such as worries about the ability of the husband to support two wives, while others have a more positive experience of it. Using insights from theories of legal pluralism (cf. Griffiths 1986; Moore 1978) the interplay between different types of laws and norms related to marriage will be discussed from the point of view of the opportunities and limitations women experience during their negotiations. As the examples presented below will show, women's responses to polygyny draw on and are informed by a complex framework of diverse and sometimes contradictory norms and laws found inside and outside state law.

Women's responses are not always meant to challenge polygyny as such; they must also be seen as part of wider societal processes and conditions, which have an impact on women and men alike. The uncertainties caused by contemporary life conditions, such as the consequences of HIV/AIDS, the increase in poverty due to shortage of land and unemployment, and uneasiness about what

the ongoing democratisation process will bring, also affect people's expectations of marriage and may call for a redefinition of the traditional gender roles and a review of the laws governing marriage.

The last decade has seen the introduction of the concept of women's rights into public discourse in Malawi, and local NGOs are making a huge effort to promote rights as a means of improving women's status. The concept of rights may be a useful input in the struggle for meeting the needs and interests of women. Yet, in line with other research on women's rights in southern Africa (Griffiths 2001; Hellum 1999), I will argue that the introduction of human rights does not automatically bring the intended changes in women's lives. Instead, a sensitive approach to the application of rights is needed which takes into account the ways women themselves negotiate their marriages and the solutions they aim at.

First, I will give an introduction to the laws and norms governing marriage in Malawi and suggest a theoretical perspective with which to conceptualise the legal framework. Then, the empirical context will be described from the point of view of the socio-economic conditions and cultural characteristics that form the background against which Malawian women negotiate marriage. Women's experiences of polygyny will be discussed next with a focus on the gendered nature of norms and power relations, which women are informed by and draw on during their negotiations. Finally, I will relate the plural legal framework to the introduction of the human rights concept and discuss the potential of a human rights-based approach for meeting the needs of women.

### **Malawian Marriage Law**

Owing to the country's colonial past, Malawi's legal system is based on English common law as well as African customary law.<sup>1</sup> At the constitutional level, since 1994, Malawi also recognises human rights on the basis of international human rights conventions. I use the term state law to signify this whole body of law sanctioned by the state, that is, constitutional provisions, common law, and the customary law observed by the courts and state institutions.<sup>2</sup> Malawi has a uniform court system, but the different types and levels of law are not fully integrated, for example, the constitution's human rights provisions have not yet found their way into all parts of the legislation.

The Malawian constitution recognises 'all marriages at law, custom and marriages by repute or by permanent cohabitation' (Republic of Malawi 2001:5). Only marriages at law and custom enjoy full legal protection. Marriage law includes four categories: marriage under the Marriage Act, marriage under Customary Law, Asiatic marriage, and Foreign Customary Law marriage (Mvula and Kakhongwa 1997:33). The Marriage Act derives from English common law; marriage is monogamous and can be contracted by religious or civil ceremony. Asiatic marriage applies to the small non-Christian population of Asian origin and these marriages are essentially Islamic or

Hindu. A Foreign Customary Law marriage signifies marriage between a Malawian and a foreigner according to the practices of the foreigner (Mvula and Kakhongwa 1997:33). Customary Law marriages are contracted according to the customs and traditions of Malawi's ethnic communities and are potentially polygynous. Since Customary Law marriages are by far the most common, my examples of women's negotiations of marriage concern this type of marriage.

Malawi is host to a variety of ethnic communities; therefore, the formalities of customary marriage differ. Within the matrilineal communities, which are the most prevalent in Malawi, marriage formalities include the exchange of gifts and matrilineal residence. Within the patrilineal communities marriage involves the payment of bride wealth (*lobola*) and patrilineal residence. These are general characteristics and actual practices may deviate from them, for example as regards residence patterns. Often, a Customary Law marriage involves both traditional and religious marriage rites, that is, entering into marriage entails traditional marriage negotiations and ceremonies as well as, for example, a church ceremony. Despite the Christian adherence to monogamy, the Christian blessing of a customary marriage does not change the legal consequences of the marriage; it remains potentially polygynous. The only way of ensuring a monogamous marriage by legal means is to register the marriage under the Marriage Act. However, marriage under the Marriage Act is rare; people choose a customary law marriage, which enjoys profound social recognition. Customary marriage is more than a union between two individuals; it involves a whole network of extended family members with obligations and rights towards the two individuals. Mutual obligations involve support in the case of illness and death, through taking care of orphaned children and old relatives, and giving them financial support (WLSA 2000). In connection with marriage formation important key actors are the *ankhoswe*. *Ankhoswe* are marriage counsellors, usually the couple's uncles, who are involved in contracting the marriage. In both patrilineal and matrilineal societies a marriage is not considered valid unless the *ankhoswe* have been involved in the officiating of the marriage (WLSA 2000:28). *Ankhoswe* continue to play a potentially crucial role in a marriage as they also mediate between the spouses in the case of matrimonial disputes.

The involvement of relatives in matrimonial affairs means that in order to comprehend the full legal context of marriage it is necessary to not only consider the law applied by courts and state institutions, but also the way women's lives are embedded in various social contexts and relations which shapes their options. In other words, 'law' must be conceptualised so as to embrace different types and levels of law.

## **Conceptualising Multiple Norms and Laws**

Based on longitudinal studies among the Chagga of Kilimanjaro in Tanzania, Sally Falk Moore (1978) has developed the concept of the 'semi-autonomous social field' to analyse the interaction between state institutions and society. This concept makes it possible to avoid a purely centralist perspective which sees state law as the only moral guide and regulative force in society. Likewise, the concept avoids a relativist perspective that sees all kinds of norms as 'law' (Griffiths 1986).

Semi-autonomous social fields are collectivities with 'rule-generating' and 'rule-enforcing capacities', which are interposed between the level of the state and the individual (Moore 1978:57). For example, a village or a lineage may have this capacity, or a branch of trade which itself contains a number of social fields in the form of business companies (Moore 1978:59). Semi-autonomous social fields are not fully regulated by state law neither are they fully isolated from state intervention or from intervention by other social fields. Thus, the autonomy of a social field is variable as it is constantly being challenged by members of the social field who seek to promote new interpretations of norms and social relations, and by the impact of the surrounding world.

Because of the 'rule-generating' and 'rule-enforcing' capacities of semi-autonomous social fields it is important to distinguish between law operating at the official level and law operating at the unofficial level (Moore 1978:80, cf. also Armstrong 1993). The courts and state institutions apply their version of customary law; a version that was originally constructed by colonial courts, often in collusion with African male leaders (Armstrong 1993, see also Channock 1985). Alternative versions of customary law evolve when people regulate their own communities and solve disputes through customary institutions without the assistance of the state system; this type of customary law is conceptualised as 'living customary law' (Armstrong 1993). Living customary law often plays a more significant role in people's everyday lives than state law.

Women's lives intersect with a variety of social fields where the nature of law and the content of law differ. Based on my ethnographic fieldwork in two Malawian cities in 2000-2001 I will examine how this plurality of social fields and laws shapes the options women have at hand when negotiating marriage.

## **Urban Women in Malawi**

The fieldwork sought to trace the opportunities and obstacles connected with implementing women's rights in local practice. It focussed on the everyday experiences of urban women and the significance of NGO activities. The fieldwork took place in an urban context, initially examining legal aid cases at a local NGO, the Society for the Advancement of Women based in Lilongwe, the capital of Malawi. This NGO rendered legal aid to women from all over the city. The insights gained from these client cases were further developed during

a four months' stay in the township of Ndirande on the outskirts of Blantyre, the country's largest city and commercial centre. In Ndirande, another local NGO, the Nkhomano Centre for Development, was running a legal aid and human rights project.

During the last 10-15 years urbanisation in Malawi has increased by more than 50 percent (National Statistical Office, n.d.). Today 15-25 percent of Malawi's approximately 11 million people live in urban areas (National Statistical Office, n.d.; United Nations Development Programme 2000), primarily in Lilongwe and Blantyre. People, not only from the hinterlands of the cities, but also from the most distant regions are drawn to the cities in search of a job and a better living. The scarcity of land and natural disasters like floods and drought make urban life seem more attractive than smallholder farming (it is estimated that about 60 percent of smallholder farmers live below the poverty line (WLSA 2000:ix). Despite people's aspirations, jobs and business opportunities are not abundant, not even in the cities. Therefore, poverty is as widespread in the urban townships as it is in the rural areas.

The urban population represents a diversity of ethnic groups and religious affiliations. Common to these urban dwellers is that even though they often live far away from their home villages and relatives, the traditions and customary law observed by their ethnic group still play a decisive role in their lives. Everyday life for urban women first and foremost revolves round the domestic sphere. As about 58 percent of women are illiterate and only nine percent have more than four years of schooling, few women are found in formal employment (Mvula and Kakhongwa 1997). In the informal economy too, women have difficulties because they lack business skills and access to credit facilities (Mvula and Kakhongwa 1997). Therefore, having no land they can cultivate to feed the family, urban women often depend on their husbands for economic support. Cultural norms contribute to this dependency. Although Malawi's new constitution gives women the right to be treated as equals and the right to formal employment, women and girls are being socialised to see themselves as inferior to men (Mvula and Kakhongwa 1997; Women's Voice 2000), whether it be their husbands or male relatives. The acknowledgement of men's position is very strong and a woman's refusal to accept it is likely to cause disputes, maybe even violence. With the man as breadwinner and head of the family women are differentiated from men as regards access to resources that might otherwise have given them more choices.

By exploring women's narratives, in the following sections I will provide an insight into the norms governing marriage in Malawi and how the different norms intersect. As will become apparent the importance to women of state law and the semi-autonomous social fields of everyday interaction vary according to the actual circumstances and the course of events as women proceed with their negotiations of polygyny.

## Negotiating Polygyny

I will begin by telling the story of a Malawian woman. I call her Helen. She was 45 years old and had been married for about 25 years. She had four grown-up children. By Malawian standards she was well educated, as she had finished secondary school (10 years of school). She used to have a job, but early in their marriage her husband had told her to stop working. She accepted and devoted her time to household tasks. I met her at the women's NGO in Lilongwe in November 2000 when she was receiving legal aid from the NGO. Her husband was divorcing her because she would not accept polygyny and resisted her husband's wish to have a second wife. At this point, Helen had been living by herself for the past two years, earning a small income from the nursery she had established in her tiny one-room house in a township outside Lilongwe. Her case had a long pre-history before it went to court.

After some years of marriage Helen found out that her husband was seeing another woman. She questioned him about it, but he denied it. She decided to call her own uncle and her husband's uncle to discuss the matter. At this point her husband admitted to having a relationship with another woman and to having a child by her. The uncles advised him to stop the relationship, but he refused to do so because of the child. Then the uncles told him to bring the child to Helen for her to look after it.

Helen's husband did not follow the uncles' advice. He simply continued the relationship. Helen went on to complain to her husband who, tired of her complaints, sent her back to her home village. He claimed that she would stay there only for a few weeks while he was looking for a solution to their matrimonial problems. Helen's uncle accepted this arrangement. Despite his promises, Helen's husband let Helen stay in the village for several months without telling her what was happening. In the end, she decided to return to the city on her own. Now she was entirely on her own since her relatives were not in a position to help her further and she could not return to her former home where her husband was staying with the second wife.

Helen's 22-year-old son who was staying with his father had objected emphatically when the second wife moved in and demanded that his father send her away. Helen's husband responded by reporting his son to the police accusing him of smoking *chamba* (a drug). The son was taken into custody whereupon Helen went to the police to explain the reasons for her husband's accusations, namely their marital problems. At this point the police advised Helen to seek help from a human rights NGO that offered legal aid. The NGO negotiated the release of the son and made sure he could return to his father's house whereupon the second wife chose to move out. Then Helen's husband petitioned for a divorce. Helen accepted that it was no longer possible to save her marriage; now her wish was to get half of the matrimonial property. The NGO provided legal assistance for the court case.

Helen is an example of a woman who chose to resist her husband's wish to practise polygyny. Her feelings were hurt and she wanted to achieve certainty about her own and the second wife's position. Her husband had caused doubt and uncertainty because he claimed not to want a second wife while continuing his relationship with another woman.

Seen from the perspective of the second wife, despite not being formally married, the relationship may have caused some kind of security in her life compared to staying on her own or being dependent on her relatives. The relationship probably gave her some financial security. Also, she may have wanted to achieve an acknowledged position as a wife and mother. One reason for this consideration is that single women living on their own are often regarded as prostitutes and are subject to social exclusion. They resist any attempt to label them as prostitutes. Sarah, an informant from Ndirande, explains her situation:

*I decided to get married and have children and a husband because I was running from being a prostitute. I couldn't choose to be independent and stay on my own because definitely more men would come to my house just to give me kids, so I would be suffering and it would be better to have a husband.*

Having a husband, formally or informally, gives a woman an acknowledged position in the community and some financial security. These circumstances contribute to making women see an informal marriage as a better option than no marriage at all.

Apparently, the practice of polygyny is changing. According to national surveys polygyny seems to be on the decline. From 1992 to 2000 the proportion of married women in polygynous unions had fallen from 21 percent to 17 percent. In 2000 nine percent of married men reported being in a polygynous union. Polygyny is also less frequent in the urban areas and matrilineal communities compared to the rural areas and patrilineal communities (National Statistical Office 2001). The figures suggest that although Malawians recognise polygyny as a Malawian tradition, a vast majority does not actually live by this tradition. However, the surveys probably capture formal marriages only. Polygynous unions were a common feature of the stories told by the Malawian women I interviewed. Many of them had experienced 'informal polygyny' whereby a man is officially married to his first wife while entering into an informal relationship with a second woman. This practice is also seen in other parts of southern Africa and may indicate a change of marriage patterns from formal polygyny to informal polygyny. Based on her research in Botswana, Anne Griffiths notes that there are men who prefer informal polygyny in order to escape the obligations of plural marriage. According to Griffiths, lack of resources to meet marital obligations and the fact that polygyny is no longer a means of accumulating power and resources are the reasons for this development (Griffiths 2001:113).

To women, informal marriage has its drawbacks. As we saw in Helen's story, the destiny of the second wife and her child was very much determined

by the way Helen's case developed. Even though Malawi's constitution acknowledges marriage by cohabitation on an equal footing with other types of marriages (Republic of Malawi 2001), in reality, such a relationship is hard to prove and a woman is left with very few legal rights. Therefore, the NGOs warn women not to enter into an informal marriage (Network Against Gender Violence 2000).

The diverging perspectives on polygyny, which Helen and the second wife represent, show that women cannot be regarded as a homogenous group with common interests. Their stories also indicate that a woman might not have a completely free choice of marriage partner. Women's negotiations around marriage within various social fields illustrate how social and cultural norms as well as economic circumstances shape the options available.

### Negotiating Marriage with the Relatives

The extended family was the social field in which Helen negotiated her resistance to polygyny. To consult the *ankhoswe* is usually a first step in solving matrimonial disputes due to the key role they play in contracting customary marriages (WLSA 2000:28). By consulting family elders, people also comply with the norm to keep a matrimonial dispute within the realm of the family. Matrimonial disputes are supposed to be solved 'within the four walls of the house', that is to say, these are private matters. To discuss private matters in public means disrespecting one's spouse. Helen explained:

When you are marrying each other, we have this time of counselling with elders. They tell you what to do, you don't have to be vicious even if you have this problem, and you don't need to take it out [...] you have to be patient [...]. With those that's why we are under-rated because the husband always gets boasting: 'As I am the head I can do anything I want'. We have this problem of respecting too much somebody instead of limiting.

Such instructions to keep a 'problem' inside the family contribute to maintaining the influence of family elders on a marriage and to maintaining the position of the husband as decision maker. According to research conducted by Women and Law in Southern Africa (WLSA) *ankhoswe* are usually male relatives and for these men it is difficult to empathise with the women and assist them constructively (2000:30). Also, *ankhoswe* were found to favour attitudes like 'a man is the head of the family' resulting in biased rulings and a feeling of injustice among the women (WLSA 2000). Thus the norms observed by the *ankhoswe* may limit women's opportunities to obtain the solutions they prefer. This was experienced by Jennifer, aged 42, who lived in Ndirande. Her husband had abandoned her for a second wife and he no longer supported her and their seven children. When she discussed the matter with the *ankhoswe* they had told her that she would have to accept polygyny. Jennifer accepted their advice because, at the same time, they had told the husband that he should support both wives. But the husband continued to ignore his marital obligations



and Jennifer did not receive any support from him. Therefore, she wanted him to leave the second wife and return to her; a goal she did not manage to achieve.

Contrary to Jennifer's experiences, the *ankhoswe* in Helen's story displayed an openness towards and understanding of the problems she experienced and the solutions she aimed at. By referring to recognised norms, such as the duty of a husband to care for his family and to respect his wife, a woman may succeed in winning the sympathy of family elders. Family elders also appear to be receptive to pragmatic arguments, for example about HIV/AIDS (an argument against polygyny), and about school fees for the children and improving the well being of the whole family (arguments for women's participation in formal and informal employment). By using such arguments, a woman is able to challenge the conduct of her husband, at the same time acknowledging the position of the husband as head of family. Therefore, as Moore (1978) stresses, the norms found within a social field like the extended family should not be seen as mere givens, they are continuously being maintained or contested, and changed or given different priority. A man's right to practise polygyny is negotiable within the realm of the family, though people who resist polygyny appear not to be in a position completely to abolish the perception that polygyny is a feature of customary marriage.

It is one thing to modify attitudes towards polygyny and quite a different matter to enforce them. An obvious difficulty connected with using the *ankhoswe* as mediators concerns enforcement mechanisms. As we saw in both Helen's and Jennifer's cases, the *ankhoswe* were not successful in making the husbands comply with their decisions. It seems that *ankhoswe* and other family elders are losing their authority owing to changing family structures and changing relations between generations.

When a couple moves to the city, often far away from their home villages, rural family elders have little influence on everyday matters and cannot guide the actions of their children. Because it is costly and time-consuming, some urban women simply give up involving the relatives at all as explained by two women from Ndirande, both married for about 25 years:

Our *ankhoswe*, they are in the village so it is far, I was beaten here in town, and to have transport [money] to go to Ntcheu [the home village] - I didn't have the opportunity of getting transport [money]. We have never consulted the *ankhoswe*. Sometimes we can quarrel but the *ankhoswe* are far away so for them to come it will be too late.

Apparently, urban women share some of these experiences with rural women (WLSA 2000). When the *ankhoswe* live too far away or if the *ankhoswe* fail to solve the matter a popular alternative in the rural areas is the chief or village headman who usually lives within walking distance and has an acknowledged position in the community (WLSA 2000:34). The urban neighbourhoods also have chiefs, but women did not make use of them for settling matrimonial disputes. As people move quite often – when they find a better house or have to move because they cannot pay the rent where they live – they seldom know the

chief of their neighbourhood very well and, likewise, the chief is not familiar with a couple and their relatives. Therefore, women are reluctant to involve the chief in their private matters.

Apart from the constraints posed by physical distance, the authority of family elders is also affected by changing relations among generations. One factor causing this change is that a man who earns his own money does not depend on his relatives for land or other kinds of resources. Helen considered that:

It's the money who talks, when you have money you think of doing everything. Before he [her husband] was very good. Because he knew where he was, he knew where he was coming from. But since he started touching more money that's the time he changed.

The obligations within the extended family to support kin who are in need mean that a man's relatives, and even his wife's relatives, may depend on him for financial support. This dependency on the part of relatives places the husband in a position where he may get away with ignoring the relatives' attempts to interfere in his affairs.

Contributing to the effect of differentiated access to resources is a general tendency for young people to free themselves from the control of older generations, a trend which people connect with the democratic wave and its promises of individual freedom (Englund 2000, 2001). Moore ascribes the autonomy of a social field to the ongoing, binding social arrangements between members of the field that obstruct attempts from the world outside to direct change within the field (1978:58). She is primarily concerned with the prospects for state law to intervene in the semi-autonomous social fields. But the relations between individuals within a field are also most important in the context of women's negotiations around polygyny. An individual is a member of several, possibly overlapping, social fields, which makes the flow of ideas from one field to another possible, and it may give an individual the choice of loosening his or her ties with one field while strengthening the ties with other fields. The latter appears to be the case when men ignore the authority of family elders despite the role *ankhoswe* play in matrimonial matters.

When women fail to obtain the solutions to their marital problems they aim at within the extended family, popular alternatives are the religious communities. The Christian churches offer a different normative stronghold to customary marriage law and most congregations offer counselling services to their members in the case of matrimonial disputes.

### **Negotiating Marriage within the Religious Communities**

Their relatives being far away, urban women engage in other kinds of networks to supplement the family network. One such network is the religious community. The women I interviewed were typically involved in church activities, like the church choir or Bible study groups. Most churches offer counselling ser-

vices, usually free of charge. They are easy to access as they are often found in the immediate neighbourhood. Women feel quite comfortable about using this option, as they tend to have close relations to their congregation.

When people take their matrimonial problems to the church for counselling, the church personnel (the reverend, church elders or deacons) refer to the prescriptions of the Bible. For over a century the Christian churches have advocated monogamy (Phiri 1997). Recently, the churches have also begun to adopt the concepts of gender and equality (see for example Kholowa and Fiedler 2000). Therefore, women can usually count on sympathy and help when they involve the Christian churches in their matrimonial problems. Jennifer, whose husband had left her and did not support her and their children, went to the church for help after the *ankhoswe* had failed to help her. The church tried to convince the husband to return to Jennifer and pressured him by excluding him from communion. Unfortunately, it had no effect; he stayed with the second wife and refused to support Jennifer. As membership of a religious community is voluntary, there is a limit to the authority of the churches. If both spouses are members of the same church and are willing to compromise, the counselling rendered by church personnel may be successful. But if the spouses belong to different churches or one of them is not a devoted member, the chance of success is limited.

Simultaneous membership in different social fields entails the risk that an individual may find herself trapped between diverging norms. This is the case for devoted Christians for whom customary law may be an obstacle because of the Christian adherence to monogamy. A case in point is Lisa from Ndirande who was a 47 year-old widow. Being a devoted Christian, for most of her married life she had wished for a Christian blessing of her customary marriage. But her husband had married a second wife and Lisa felt forced to accept it because of the possible consequences of resistance:

In fact, I accepted, but I wasn't deep down in my heart accepting that my husband should go [and marry her], but because of how my husband was doing, his behaviour, I just lied and said that it was OK.

Lisa's husband was a drunkard; often he came home drunk and was very aggressive. At the same time she suspected him of having a lot of extra-marital affairs and she feared sexually transmitted diseases. Yet she accepted the second marriage because she feared that her husband would beat her if she resisted, and she hoped that if he married a second wife he would stop seeing other women. The second marriage hindered a Christian blessing of Lisa's marriage because the churches do not accept polygynous marriages. Though her husband was a member of the same Christian congregation as Lisa, apparently he did not see a contradiction between being a Christian and entering into a polygynous marriage.

Finding oneself belonging simultaneously to different social fields may also imply a potential for flexibility and individual choice making: Margaret from Lilongwe was a second wife in a polygynous Customary Law marriage. She was a Christian herself and her husband was a Moslem. She considered that because she herself was a Tumbuka (a patrilineal ethnic group which practise polygyny) and her husband was a Moslem, polygyny was quite natural. She lived in her own house while the first wife lived in a different neighbourhood of Lilongwe. So the two wives lived separate lives while the husband stayed a few days or a week with each of them in turn. Margaret felt that she had a quite free and independent life, a freedom that she valued. In her case compliance with the marriage customs of her ethnic group and with her husband's religiously sanctioned right to practise polygyny overruled the Christian adherence to monogamy. The important thing to her was not religious convictions, but whether or not her husband was able to support two wives and the freedom she enjoyed.

Again, the examples show that women's interests and preferred marriage patterns differ. The intersection of the norms found in ethnic communities and those found in religious communities underline the complex interrelations between different types of norms and the processual character of norms and law (cf. Moore 1978). The customary marriage law as defined by the courts and the perceptions of traditional custom found within the ethnic groups challenge the Christian adherence to monogamy. At the same time, within the ethnic groups, the practice of polygyny is being challenged by members who are devoted Christians and by men and women who for various other reasons resist or abstain from polygyny.

Although semi-autonomous social fields have the capacity to exclude influence from the outside they are not immune to the continued efforts by actors from within and outside the social field to challenge the prevailing norms. Women's negotiations of polygyny indicate that alternative norms can be successfully invoked in a social field, but the end result depends on the relative power of key actors in these negotiations and on the strength of social and cultural values surrounding the position of women. So far I have discussed the opportunities and constraints women find outside the sphere of state law. I will now turn to the consequences of the official marriage law.

### **Taking a Case to Court**

According to customary law marriage is potentially polygynous. Therefore, the courts will not take up cases in which a woman asks the court to reject her husband's polygyny. Likewise, it will not be possible to obtain a divorce on the grounds of polygyny. In the case of polygyny, the courts refer to one interpretation of customary law, namely the one that perceives polygyny as the right of a husband. This interpretation of customary law both confirms and diverges from the norms observed outside the realm of state law. As the examples above have

shown, Malawian women who resist polygyny may succeed in winning the sympathy of *ankhoswe* and other relatives, thereby challenging the polygynous feature of customary marriage. The Christian churches<sup>3</sup> also challenge the interpretations of the courts. The surveys, which showed a decline in formal polygyny, confirm these observations. In addition to present day family negotiations and the official Christian adherence to monogamy, ethnographic descriptions of Malawi's ethnic groups indicate that polygyny has not always been an option for each and every man; on the contrary, it seems to have been a privilege only for men of a certain social position and wealth (Davison 1997; Read 1970; Wilson 1977). On the other hand, within the Moslem communities polygyny is religiously sanctioned.<sup>4</sup> The informal polygynous unions also point in this direction. The customary law applied by the courts does not embrace this variety, and the courts thereby limit the options at hand to those who wish to resist polygyny, as they cannot invoke the level of state law in their struggle. Unless, of course, they have their marriage registered under the Marriage Act, which would necessitate the consent of their spouses.

The courts also fail to acknowledge the heterogeneous experiences of women in another way. When hearing cases about matrimonial disputes or divorce cases, the courts find it important whether people have tried to solve the matter through family channels. This is a way of probing whether a complainant or defendant has sincerely tried every possible means to solve the dispute. For example, in a divorce case on the grounds of domestic violence, a woman who has not discussed her problem with the *ankhoswe* will have difficulties in legitimising her claim. The fact that the courts acknowledge the family as a dispute resolution setting makes it possible to use family members as primary witnesses. But it has the consequence that the courts preserve and enhance the importance of the extended family in dealing with matrimonial disputes despite the fact that family elders seem to be losing their importance, at least to urban women. By doing this, the courts contribute to the reproduction and reinforcement of women's subservience to the authority of their husbands and family elders.

The reluctance of the courts to take into account the existence of alternative norms when dealing with cases of polygyny is striking, as they appear to be increasingly turning to the constitution for guidance in other types of cases. Thus, for example, a court hearing a dispute on the distribution of property between a husband and wife, where the wife is demanding half of the property, is more likely to rule in favour of the woman. Kaunda (2000) cites an appeal case at the High Court where the constitution's provisions about 'fair disposition of property' (Section 24) were taken quite literally to mean half the property, without regard to official customary law. This decision overruled the decisions of two lower courts that had found that the husband was entitled to more than half the property.

The decision of the High Court indicates that when it comes to distribution of property the courts appear to be attentive towards changes in living customary law which work to the disadvantage of women. The majority of Malawi's ethnic groups are matrilineal and, by definition, matrilocal, in which case the husband is supposed to provide a house for the wife in her village. However, urban residence often causes people to disregard this custom. In addition, a husband and his relatives will regard the entire matrimonial property as their's, claiming that he earned the money that paid for it. In this connection the wife's contributions, whether they be money or labour, are ignored. The same pattern is seen in inheritance cases. Women find themselves the weaker party in these kinds of cases and are often left with no assets at all; this was also the case in Helen's story where the husband took for granted that the house and all other property belonged to him. As mentioned above, if a case reaches the courtroom, there is a fair chance that the wife will not only be compensated for the missing house in her village, but also be given a larger share of the matrimonial property than what she was entitled to according to official customary law. By referring to the constitution the courts appear to be modifying the official customary law. Whether the courts will begin to be more attentive towards the plurality of norms connected with polygyny and to invoke the constitution's women's rights provisions in cases of polygyny remains to be seen. One development, which may push the courts in this direction, is the promotion of women's rights by local NGOs and international donor agencies.

The application of the constitution's provisions to serve the interests of women has been widely promoted by the Malawian NGOs. By way of their legal aid services, the NGOs accumulate knowledge about laws and social and cultural practices that affect women in a negative way. This knowledge enables the NGOs to enter into a dialogue with judges and to lobby government for legal changes. The accumulation of knowledge also enables the NGOs to promote public debate about contested norms and practices. Through the activities of Malawian NGOs the concept of human rights is slowly being introduced to ordinary people, like the legal aid clients who receive help from the NGOs or participants in human rights projects, like the residents of Ndirande, to whom I will now turn.

### **The Introduction of Human Rights**

Since the democratic turn in 1994, Malawi has seen a growth of NGOs. Many of them engage in issues related to women such as women's legal rights, violence against women, women's political participation, and economic empowerment. The NGOs make continual efforts to advocate women's rights through campaigns targeting the Malawian people in general, the political leaders, the traditional authorities, and state institutions like the police. The main goals are to alter or discontinue cultural and institutional practices that discriminate against women, and to make women aware of their rights. The list of discrimi-

natory practices is long: 'property grabbing',<sup>5</sup> domestic violence, lack of economic support, polygyny, excluding women from formal employment, treating women as minors subject to the authority of men, to mention but a few (Ministry of Gender 2000; Women's Voice 2000). Much hope and aspiration is linked to the concept of human rights that has become firmly embedded, not only among NGOs, but also among politicians, journalists, and religious leaders (Englund 2000).

Harri Englund argues that the public discourse in Malawi is dominated by 'human rights talk' that seeks to define what is acceptable and conceivable (2000:580). During my fieldwork (2000-2001) the image presented by the NGOs was that women are being oppressed by paternalist attitudes and male-dominant structures to the degree that women find practices like the ones mentioned above a natural part of life because they do not know their rights. It seemed as if 'rights' was the yardstick applied to all sorts of practices and was posed as the only solution to all kinds of problems. At the same time women were talked about as if they constituted one, homogenous group. No doubt the local NGOs have been inspired by the trend within the international development community during the last 10-15 years where human rights and gender equality have been the main guidelines. In Malawi it is true that the majority of women do not know much about the rights that are accorded to them by the constitution. Likewise, there are women who take for granted the acts and practices that are being challenged by the NGOs. So far, the concept of human rights seems not to have invaded the social field of the extended family and only to a limited degree the religious communities, as it did not occur in women's negotiations of marriage within these fields. As such, 'human rights talk' remains a preoccupation for the educated elite who engage in the public debate. But the NGOs make an effort to introduce human rights into the lives of all Malawians.

An important initiative with long-term perspectives is awareness-raising activities, which can be seen as an attempt to influence social fields like the family. NGOs use the human rights discourse as a means of initiating a change in attitudes and behaviour among the population at large. Awareness raising about human rights encourages reflection and debate, including issues that are usually not discussed in public like the intimate relations between spouses. The introduction of the human rights discourse also has the effect of transforming the individual woman's struggle into a common experience of women, thus creating attention about the kinds of problems women face and reassuring the individual that her own private struggle is justified and worthwhile. As such, awareness-raising activities are an important supplement to law enforcement, and the women who participated in these activities welcomed the concept of women's rights.

At the same time, though, the human rights discourse causes much tension, as it tends to create stereotyped images of men as perpetrators and of women as

passive victims. Naturally, this gives rise to objections. Many men take offence at such negative images of themselves as they struggle every day to care for their families. In this sense the 'human rights talk' might unintentionally cause opposition to women's rights. During the awareness-raising activities organised by the NGO Nkhomano in Ndirande discussions were at times fierce, with utterances like '*ufulu wa amai* is poison' (women's rights are poison) and the associating of human rights with neo-colonialism. Accordingly, human rights were posed as a threat to African culture and full African independence. The rhetorical construction of a dichotomy between human rights and Africanness was invoked in order to oppose the arguments in favour of women's rights.

These kinds of tensions caused by the human rights debate create uncertainty about the personal consequences of demanding one's rights. The opposition to the very concept of rights along with the examples I have given of women's negotiations of marriage suggest that the concept of women's rights might not easily find its way into everyday practice. As noted by Englund (2001) the struggle for rights runs the risk of being rejected by the people whom it was intended to benefit because it might uproot existing social relations and have unforeseen consequences. Therefore, the norms found within the spheres of everyday interaction, like the family and the ethnic and religious communities, may continue to have a stronger impact on women's lives than the public discourse on rights and the constitutional provisions.

Women's narratives also revealed that women have different views on polygyny and different needs, which call for a sensitive approach to the concept of rights. As other studies, focusing on the interplay between individual rights and the social context have concluded, human rights per se might not serve the needs and interests of all women (Griffiths 2001; Hellum 1999). Based on her study in Zimbabwe of people's management of procreative problems, Anne Hellum (1999) found that women's rights must be seen in the light of the social contexts and the complex relationships within which women think and act. Her examples show that the abolition of polygyny by law may work to the benefit of some women while putting other women at a disadvantage. Polygyny would protect a childless woman who is in danger of being divorced by her husband or a woman who is in an informal relationship, thus being vulnerable to exploitation by a man to produce children that he was unable to have with his wife. Anne Griffiths reached similar conclusions from her research in Botswana: '[Polygyny] would protect some women from being abandoned or divorced by their spouses on the basis of old age or childlessness' (2001:113). Both Hellum and Griffiths discuss how best to interpret the United Nations Convention on the Elimination of All Forms of Discrimination against Women. According to the United Nations Committee (CEDAW) that considers the progress made by ratifying states as regards implementing the Convention, polygyny amounts to discrimination against women. It is debatable, though, whether polygyny is discriminatory if seen from the context in which it is being practised. Plural



marriage law may offer more equality than a homogenous law that does not take sufficient account of women's actual life circumstances. Armstrong (1993) notes that living customary law may give some guidelines on the best way to protect women's rights. She gives examples that suggest that living customary law may change in a way that is less discriminatory to women than the official customary law because living customary law is constantly being modified in response to changing socio-economic circumstances. Therefore, she sees a need for more research into living customary law in order to enforce it at state level.

The degree to which the concept of women's rights will serve the interests of Malawian women, thus, depends on how far it will be possible to adapt the application of it to the reality of women's lives. Englund (2001) argues that current interpretations of the rights concept in Malawi put too much weight on the freedom of the individual, ignoring local conceptions of the sociality of the individual. As current life conditions in Malawi are affected by poverty and fragile public security it might be more important to maintain the notion of mutual obligations between people instead of promoting individualistic rights (Englund 2001). This point of view seems to be in line with the attitudes of Malawian women in general. Although they did oppose norms and practices that they did not favour, they were keen to maintain relations with husbands, family elders, and others, and they continued to value marriage as an integral part of their lives.

### **Multiple Laws And Norms Revisited**

The stories of the Malawian women disclosed that they did not all share the same attitudes towards polygyny. Some preferred a monogamous marriage for emotional, financial or religious reasons, others entered into a polygynous union in order to obtain some degree of financial security and social standing. The latter option arose either out of compliance with ethnic traditions or because they found that this type of marriage offered them more individual freedom than a monogamous marriage. At first sight, the laws governing marriage seem to fit this heterogeneity as both monogamous and polygynous marriage law is available. However, when taking the socio-economic and cultural realities of women's lives into consideration it appears that not all women have a free and individual choice as to which type of marriage they want. In this sense, women cannot be regarded as the 'autonomous' individuals on which the human rights concept is founded.

Yet there are individualising trends in society that affect women. The practice of polygyny is moving away from being subject to decision within the extended family towards being the individual choice of a man. This means that women have fewer chances of acquiring an influence on the decisions being made through the ordinary channels. The women's negotiations around polygyny showed that living customary law is flexible and sensitive, to some

degree, towards women's needs, but the extended family lacks enforcement mechanisms. Likewise, there is a limit to the authority of religious communities. The 'modern' perceptions of the free individual appear to confirm the 'traditional' views of the husband as decision maker, which reduces the capacity of the dispute resolution settings outside the state legal system to enforce solutions that suit women's needs.

At the same time, the concept of 'custom', which lies behind the construction of official customary law (Channock 1985) links an individual to a specific culture. In this sense 'custom' tends to underplay the fact that people as individuals might be members of several social fields with potentially different norms. In this sense state law does not accommodate the uneven development of society, which manifests itself in a plurality of diverging or even contrasting norms and practices.

The concept of women's rights has the positive effect of directing attention towards the legal, social and economic structures at the root of women's weak position in law and society; thus, it may serve as a vehicle for initiating change (Hellum 1999). As I have shown, women's rights encourage debate and reflection, and they have in certain instances provided a new input to the courts' interpretation of family law. However, along with other research (Armstrong 1993, Griffiths 2001, Hellum 1999) I would argue that a uniform application of women's rights principles will only benefit some women while putting others at a disadvantage. Formal equality does not necessarily ensure equality in practice; instead, the diverse experiences of women call for adaptation of women's rights to local circumstances in a manner sensitive to women's actual needs. Therefore, concepts like equality and discrimination must not only be measured by the standards of international human rights norms, but by the everyday life situation of women (cf. Armstrong 1993). This would mean that the state legal system must be responsive towards the multiple voices and interpretations of 'custom', that is, take into account the developments within living customary law and actual marriage practices (cf. Armstrong 1993). It would also mean, for example, making use of the constitution's recognition of informal marriage arrangements in order to ensure the rights of those women who enter into such unions. In other words, it is important to avoid essentialising culture or rights, and it may be desirable to adapt state law to reflect the pluralism in which the reality of people's lives is grounded.

## Notes

1. Customary Law refers to the norms and practices of the African population recognised by the courts in the colonial period (Channock 1985, p. 240, n. 1). Through the colonial institutional processes local customs were transformed into law and, to a large degree, codified into written rules that could be used for judicial enforcement (Channock 1985:47). In post-independence Malawi customary law has remained an integral part of the law enforced by the state (WLSA 2000).

2. In line with Armstrong (1993) and Hellum (1999) I distinguish between the customary law applied within the state legal system and the customary law found outside the state system because of the differences in form and content between the law operating at the official level and that operating at the unofficial level.
3. About 75 percent of Malawians are Christians (CIA 2001).
4. About 20 percent of Malawians are Moslems (CIA 2001).
5. 'Property grabbing' occurs when the relatives of a deceased man take all matrimonial property, leaving the widow and children with hardly anything (WLSA 2000).

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**Kirsten Besendahl**  
**Department of Ethnography and Social Anthropology,**  
**The University of Aarhus,**  
**Denmark.**