

Polygamous marriages essay



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This essay will be looking at the situation of polygamous marriages with regards to the Constitution and with regards to recent precedent. A number of cases will be looked at to provide insight into the constitutionality of polygamous marriages in South Africa. The leading case and the most recent case that will be looked at is the case of *Hassan v Jacobs No and Others* .

International human rights instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa will then be looked at to establish whether recent precedent on polygamous marriages are in line with international Human Rights Instruments. Polygamy provides that a man marry women of your choice, two, three or four, however many he feels appropriate. The position of polygamous marriage in South Africa has in the past not been part of South African law, even though it is a well known practice in the culture of the indigenous people of South Africa. This culture and law known as customary law had very little recognition in South African Law until the Constitution was created to represent people from all the different spheres of life in South Africa.

In recent times and in the most recent case of *Hassan v Jacobs No and Others* , polygamy was the central issue at hand, and the court went on to interpret polygamous marriages with regards to the Constitution, Customary marriages Act and then went further to International human rights instruments to see whether or not to accept polygamous marriages would be unconstitutional and against international human rights. In the case of *Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd*

and Others the court looked specifically at section 39(2) of the Constitution a court, when interpreting legislation and developing the common or customary law, is obliged to promote the spirit, purport and objects of the Bill of Rights as constituting the corner-stone of our constitutional democracy and, where possible, in a manner that gives effect to the fundamental values therein contained. This statement of the court clearly holds that core values in the Constitution such as equality and dignity cannot be contravened as it would be if polygamous marriages were discriminated against and this would lead to the discrimination being unconstitutional. In the case of *Hassan v Jacobs*, the respondent held that the marriage of the applicant to the deceased was polygamous and therefore could not be considered a “ survivor” or a “ spouse” in terms of ISA or MSSA, for which the applicant instituted claims. The court went on to hold that the applicant would be entitled to the relief if it was found that the concepts of “ survivor” and “ spouse” in the ISA and MSSA included widows of polygamous Muslim marriages.

If this was not the case widows of such marriages will be discriminated against, this discrimination would include discrimination on marital basis, religion and culture and further it would also infringe their right to dignity . In the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, the court simply stated that the principle of constitutional interpretation must allow legislation to be implemented in a manner consistent with the core values of human dignity, equality and freedom as is set out in the Bill of Rights. This discrimination is unfair and not in line with the principles of the Constitution in terms of

section 9(5) of the Constitution and this can only be accepted if valid grounds exist under section 36 of the Constitution with regards to limiting their rights. In *Hassan v Jacobs*, the court found no justification in terms of section 36 of the Constitution that would allow the exclusion of widows of polygamous marriages from the provisions of the ISA or MSSA.

The court went on to hold that the more extensive interpretation of the words " spouse" and " survivor" is needed as polygamy in African customary law and Muslim law has received more recognition in recent times in regards to legislative and judicial decisions. Polygamous marriages has been established and accepted in a number of ways in recent times, the first of this being the legislature recognising polygamous marriages by the enactment of the Recognition of the Customary marriages Act 120 of 1998. This Act is of great importance as it recognises polygamous marriages in terms of customary law and the culture surrounded by it. This African law that recognises polygamy is now accepted in South African law and is an integral part of South African law as far as the rules and principles are in line with the Constitution and the Bill of Rights. Polygamous marriages have also been recognised in a number of statutes to include other cultures such as Muslim marriages.

Thirdly the South African Law Commission recognised and makes provisions for the registration of more than one Muslim marriage . Lastly polygamy as one has already seen in the Case of *Hassan v Jacobs* become a part of judicial policy in South Africa to give recognition to polygamous marriages. Other such cases where polygamy has been established as precedent can be seen in *Khan v Khan* , where the court held that Muslim marriages regardless

of whether its polygamous or monogamous are entitled to claim maintenance. *Wormald NO and Others v Kambule*, the court held that the right of a surviving spouse of a polygamous marriage in customary law was to be maintained and provided for with land both residential and agricultural. From this it is clear that in recent times precedent has been created that promotes and protects polygamous marriages in South Africa, this to ensure that the non recognition is not unconstitutional and also unfair in terms of international human rights instruments. With regards to international human rights instruments, the continued failure to recognise polygamous would contravene international human rights.

To mention just two international human rights such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa which recognises and makes provisions for polygamous marriages and therefore if South Africa had to continue not recognising polygamous marriages it would be in conflict with these two international human rights instruments. Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women 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". Therefore it is clear that the discrimination on the grounds of polygamous marriages is unfair and shall not tolerated by international human right instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, as it makes provision to protect women in polygamous marriages. Article 6 of

the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa states that; " Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.

They shall enact appropriate national legislative measures to guarantee that: monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected". Article 6 clearly speaks of the equality that needs to exist between men and women and goes on to clearly make its point that even though it encourages monogamous marriages as the preferred choice, it does protect and promote polygamous marriages. Therefore it is clear that this is another and the second international human right instrument that promotes equality and rules out discrimination against women and promotes and protects polygamous marriages, thereby South African law cannot afford not to recognise polygamous marriages as it would contravene international human rights instruments. From the recent precedent mentioned above, it is clear that South African law now recognises polygamous marriages as it would clearly be unconstitutional not to recognise polygamous marriages on the grounds of discrimination and equality afforded to South Africans by the Constitution. This recognition has been cemented by recent legislation created to protect and promote polygamous marriages and other cultural practices by creating and implementing the Recognition of Customary Marriages Act 120 of 1998.

From international human rights instruments that were looked at, it is also clear that non recognition of polygamous marriages and therefore the discrimination on the grounds of dignity and equality would contravene

international human rights instruments, and therefore to ensure that South African law is in line with international human rights law it is important to recognise polygamous marriages. As held in recent precedent I am therefore of the opinion that polygamous marriages need to be recognised in South Africa even though the constitutional validity of polygamy has not been subjected to judicial scrutiny as yet, international human rights instruments would encourage our Constitutional court to accept polygamy. Bibliography JC Bekker, C Rautenbach and NMI Goolam Introduction to legal pluralism in South Africa 2nd ed (2006) LexisNexis: Butterworths: Durban.