

The Roman Catholic response to customary unions in South Africa 1948-2012

Alan C Henriques OMI

Honorary Lecturer at the University of KwaZulu-Natal,
Pietermaritzburg, South Africa

Abstract

The study begins with a discussion started within Roman Catholic circles with the article published by Ten Velde on customary unions as legitimate marriages (*South African Clergy Review 1952*) and the response of Reuter in his book on the same subject. Authors discussed include Hastings, Berglund, Dwane, Blum and others that have written about indigenous marriage in South Africa and the African continent as a whole. Topics included within the body of this article include customary unions, reflections on polygamy, the emancipation of women, conjugal fidelity and addressing the issues of double standards. Marriage is a basic building block of any society. One has to also bear in mind that this building block consists of the church wedding, the traditional customary wedding involving the family and then finally the civil marriage which involves the state. At different moments in time specific aspects of the culture may be expressed. In particular the issue of marital fidelity was dealt with by Marc de Mûelenaere concerning the mentality of perpetual bachelorhood prevalent within South Africa. In the future it would be good to see more of a unity between the ecclesiastical and civil aspects of marriage. In conclusion the article focuses on the need to update our understanding of customary unions given that the South African government enacted the Recognition of Customary Marriages Act 120 in 1998 as part of the law of the land applicable to all South Africans.

Customary Unions and the Catholic Church in South Africa

This article investigates the marital practices that the first missionaries encountered when they initially came to South Africa as part of the colonial expansion of Holland in the 17th century. The specific ethnic groups studied include the Zulu, Sotho and Xhosa groups. Ironically, the most significant problem for missionaries of that period was the practice of polygamy which still exists today within South African society. The question therefore arises as to whether or not Christianity has had a significant impact on the practice of polygamy in South Africa. The early Catholic missionaries had problems with the practice of polygamy among the local people in South Africa. These difficulties need to be re-examined in the light of the Recognition of Customary Marriage Act 120 promulgated in 1998.

Although polygamy was practised by the majority of the indigenous people of South Africa before the arrival of the white settlers, it is now a practice of just a minority of these people. Can Christianity take the credit or responsibility for this change of marital patterns? The answer is yes, as well as no, since Christianity has had only a partial impact in effecting this change. Socio-economic and cultural factors have also affected these multiple marriage practices. Christianity did set a new standard in terms of what was expected from the marital relationship. Critical questions need to be raised about the attitude towards polygamy in the 17th century and the attitude to marriage in South African society today. It is necessary to study the issue of customary unions which formed the first attempts to address the practice of polygamy from a legal and church perspective. For an adequate understanding of indigenous marriage in South Africa reference will be made to the work of Reuter, a canon lawyer who worked in Rome for many years, and who taught for a year at Cedara in 1953. He responded to a controversy that ignited in an article in the *South African Clergy Review* (February 1952, pp. 145-152) by Henry Ten Velde, a member of the Dominican Order who had worked in the Orange Free State, and who was defending the status of customary marriages given the fact that they were viewed as inferior to western forms of marriage owing to the practice of polygamy.

In reviewing these issues we are updated by government legislation in terms of how polygamy has adapted in order to survive in an environment in which the traditional African practice was not accepted by Christianity. The work by Verryn on contemporary marriage in South Africa supports the claims made about African marriage in transition in an urban African context. It cannot be said that Christian marriage has replaced African traditional marriage forms. In dealing with these subtle transformations concerning fidelity in marriage Mgr Marc de Mûelenaere (Monsieur is an honorary ecclesiastical title given to a cleric for work done within the Roman Catholic Church) helps us understand the implications for Christian marriage in this process of cultural mutation. De Mûelenaere's doctoral thesis forms the basis for the discussion that follows on indigenous marriage in South Africa.

Pastoral questions set the agenda

Missiological insights

In terms of missionary policy and practice, it is important to establish what norms were formulated in the 16th century, in order to cope with these irregular situations found in the mission territories. Amand Reuter¹ gives us the positions taken by Popes Paul III, Pius V and Gregory XIII. In 1 June 1537, Pope Paul III promulgated the Bull *Altitudo Divini Consilii* which stated that the convert was to choose one of the women he had lived within conjugal union prior to his conversion. If the first wife was known, then she became the legally recognised wife. In the Apostolic Constitution *Romani Ponteficis* of 30 August 1567, Pope Pius V advocated that the wife with whom the convert was baptised was to be regarded as the legitimate wife. Gregory XIII in the Constitution *Populis* of 25 January 1585, stated that in the case of a polygamist or polyandrist wanting to contract a marriage according to the requirement of the Christian faith, only the first marriage contracted in infidelity is to be taken into consideration. In what is now the South African context, we can conclude that customary unions were considered valid marriages in terms of native law and custom. However, customary unions were not given the same status in ecclesiastical law because they were potentially polygamous and therefore considered to be contrary to natural law. The Catholic Church would, however, recognize one of the customary unions as being a legitimate proper marriage. The other unions were considered as concubinage, and subsequently illegal relationships according to Church law. This was the basis for the way in which Catholic missionaries dealt with polygamy in the territories they entered even some 300 years later in the Cape when the first Catholic Bishop Raymond Griffith settled in Cape Town in 1832.

The first resident Catholic bishop raised the question of mixed race couples seeking the sacrament of marriage in the Cape Colony but in the Colony of Natal John Dunn was a famous European polygamist. In the preface of Reuter's book Archbishop Denis Hurley wrote the following concerning the pastoral context into which Amand Reuter had been thrust:

Among the thorniest of problems in any mission territory is that of marriage. For marriage is at the heart of every social system. It has as its basic concern the propagation of life, so quite naturally it is looked upon as the element of highest importance in any culture and is surrounded by solemnities of custom and rituals reflecting the deepest convictions of that culture.²

When Reuter arrived in South Africa, he was confronted by an issue of the recognition of African customary unions. The issue had come to a head on the publication of "*Customary union*", by Henry Ten Velde OP in the *South African Clergy Review* of 1952, who contended that these "*Customary* native marriages have not only a natural status, as *matrimonia legitima*, but also a proper and well established place in the legal system of the Union of South Africa."³ The main reason for this assessment by Ten Velde was: "As many of these customs and regulations of Native Law are just, they will influence also the validity of a customary Union."⁴ It is most likely that the "Native Law" referred to is that of the customs of a particular ethnic group that has not yet been written down in a codified manner.

The Ten Velde article: customary unions

Henry Ten Velde had worked as a missionary in the Orange Free State and was writing about what he had experienced in his pastoral work. Ten Velde was also arguing against a Johannesburg lawyer, Mr. H.J.B. Vieyra, who had put forward his view that: "There is no doubt whatsoever that our common law does not recognise a polygamous union as a valid marriage."⁵ Vieyra had produced evidence from the South Africa Supreme Court, to substantiate his argument. Ten Velde argued that a customary union contracted under native law was recognised by the state as a marriage, "though not recognized by the common-law, i.e. the Roman-Dutch law."⁶ The difficulty arose from the fact that despite certain contradictions,⁷ native law was not accepted as the universally recognised juridical system for all indigenous Africans. The origin of the problem was that the indigenous people were subject to more than one code of law within the same country, thereby making it difficult for solutions to be

¹ Armand Reuter, *Native marriages in South Africa according to law and custom*, Aschendorfsche Verlagsbuchhandlung: Münster, 1963, pp 313-314.

² Archbishop Denis Hurley, cited in Amand Reuter, *Native marriages in South Africa according to law and custom*, Aschendorfsche Verlagsbuchhandlung: Münster, 1963, p V

³ A Reuter, op cit, p 3. This is Reuter's assessment of the article of Ten Velde.

⁴ H Ten Velde, "Customary union", *The South African Clergy Review*, Volume IV, February 1952, Number 4, p 152.

⁵ Herbert JB Vieyra QC BA LLB, "Customary union", *The South African Clergy Review*, Volume V, August 1952, Number 2, p 95.

⁶ A Reuter, op. cit, p 4.

⁷ Not all the missionaries viewed customary unions according to the teaching of the Catholic Church.

clearly determined in disputed cases. Vieyra asserted that African customary unions are not marriages for the following reason: “No polygamous union can be a *matrimonium* and no State can make it so, for it is a union entered into on the basis that if a man should desire to take further wives he is free to do so.”⁸

It is to be noted that the questions raised by Ten Velde were within the context of two unbaptised persons who had entered into a customary union. Vieyra contended that: “Clearly no Native Commissioner would recognise a customary union as a ‘*matrimonium*’ when our Courts have said that polygamy is contrary to our ideas of civilisation and therefore against public policy.”⁹ To further complicate the issue, two other authors, Romanus Kampungu from Okavango, in Namibia, and Professor C. Vijverberg, a Dominican then based in Rome, both disagreed with Vieyra’s point that no polygamous marriage can be recognised as a marriage. This they pointed out was at variance with the theory and practice of the Church, laid down in terms of canon § 1125 in the Code of Canon Law. Kampungu went on to argue by way of analogy, that it would lead to the same conclusion as a marriage contracted in terms of a system of civil law that incorporated and allowed divorce as an acceptable practice. For his part, Professor Vijverberg¹⁰ asserted that a *customary union* is a marriage:

[...] because it is a lasting union between a man and a woman, tolerated by law as a real source of rights and obligations which, according to the natural order of things, can only come forth from lawful wedlock.¹¹

The main objection to the customary union stemmed from its polygamous aspect, inherent in the fact that the male could in future contract a marriage with other women. This would be in violation of the Christian view of marriage which sets forth monogamy as the norm. The other cultural practices such as *lobola* (bride wealth) could be tolerated and adapted but the practice of polygamy would need to be excluded, so as to meet the Christian ideal of marriage.

Reuter’s response: can customary unions be considered as marriage?

Amand Reuter’s book, *Native marriages in South Africa according to law and custom*, is divided into three main sections: Part I, The South African background; Part II, Customary native marriages; and Part III, Comparative evaluation of customary native marriages. There had been a fear within South African society that even if a Black person adopted a Western life-style, that person would never completely relinquish his or her African identity and would revert back to the African customary practices. Amand Reuter had the following to say: “However, a marriage by civil rights would not be a definite and decisive indication in itself of such complete abandonment of Native ways.”¹² So, for that reason African customary law was applied in cases concerning indigenous Africans, and not the general law that applied to all the other citizens of the country. This raised the question of the proper place of customary law in South Africa. Reuter gave a good explanation of custom as a source of law. He began by drawing a distinction between the two ways in which law and custom can be interpreted as a phrase. In the first case, the law itself is considered to be derived from custom; in the second case the law and customs are thought to be different realities, namely statutory law and customary law. Recognising that law is a group of rules that are considered to be binding within a given community, custom is therefore explained as the usual manner of conduct that has obtained “the force of law”¹³ over the passage of time. Reuter went on to explain that custom had two aspects. These two aspects are observance and obligation; thus when certain observances become obligatory in a given group of people, they then become legal custom. There are four requirements for legal custom: it must be the fruit of the will of a community and not an individual or a small group, it needs to have stood the test of time, it needs to have been born out of the free will of the community, and finally, it must be reasonable in that it serves the community.

By way of summary Amand Reuter made the following comment on the development of common law in the Union of South Africa and the adjacent British territories. The common law of South Africa, as well as in the adjoining British territories, was Roman-Dutch law which was subject to modifications and had actually been modified on several points by the various territorial legislatures. In common with English law both at home and abroad the law was favoured accommodating custom which, indeed, has been the primary constituent element of the South African common law as it developed historically. Except for canon law, unequalled, perhaps, in this respect, the judicial efficacy of custom was less restricted under the law of the land in South Africa than under

⁸ Ibid, p 5.

⁹ H Vieyra, op cit, p 96.

¹⁰ C Vijverberg, “The Validity of a customary union in the Union of South Africa”, *The South African Clergy Review*, Volume VI, February 1954, Number 4, pp 181-188.

¹¹ A Reuter, op cit, p 6.

¹² A Reuter, op cit, p 20.

¹³ Ibid, p 24.

other systems of law, notably those based on codification. South African jurisprudence regarding custom, and particularly native law and custom, is very insistent on the requirement of reasonableness.¹⁴

Despite the fact that Reuter's thesis was published, it was never used as a textbook for teaching on marriage at St Joseph's Theological Institute. Reuter's work tended to be too technical and the approach to the subject of the polygamy was from the canon law perspective. Since its publication, however, the text that has been used by others for decades, and was highlighted by Emile Moteaphala, is *Forms of marriage: monogamy reconsidered* by William G. Blum, (Nairobi, 1989). This immediately raises the question about how can one apply this Kenyan based text to a South African situation? However, it shows the common features of marriage between various countries within Africa. According to Blum, in an African context and in other cultural groups in general, households are established on the basis of other relationships as well. These relationships are not only husband-wife relationships, but are also father-son, mother-daughter or brother-sister relationships. In the African context the existence of "half-siblings" is another example of what causes difficulties within families, as well as the usual problem of more than one wife residing within the same residence. The text by Blum also notes that the group-orientation that is so important to African society also plays a significant role in marriage. The following quotation will help to elaborate this point further:

Group-orientation is especially, manifested in three aspects of traditional African marriage, namely: the marriage alliance, the payment of bride wealth, and the acceptance of certain forms of marriage, which separate the roles of physiological paternity and of sociological paternity.¹⁵

The third part of Reuter's *Customary marriage according to law and custom* deals with the validity of a customary union as a marriage. According to the teaching of the Catholic Church, within a polygamous situation, only one of the marriages is considered as a legitimate marriage. It is usually the first marriage of the polygamist that is deemed to have the dignity of a valid marriage. Reuter, points out that according to South African civil law, a customary union can never be put on an equal footing as a legitimate valid marriage as it has the potential to be polygamist.¹⁶ That in effect means that even if the customary union is between a couple who both married for the first time and there is only a single union between the two of them and excluding anyone else, it remains potentially polygamist in that another union can take place. The context in which they gave their consent to each other is not equal in terms of conjugal fidelity, as the woman cannot choose another partner, but the man may later decide to take a second or third wife. De Mûelenaere re-iterates this point and emphasises the basic double-standard that this practice perpetuates. Reuter also goes on to explain in more detail that the *lobola* is intended as a sign of the indissolubility of the marriage. Four important points are made in regard to the security that the *lobola* offers a woman in a customary union, namely:

- The woman does not become her husband's slave.
- He may not kill, injure or maltreat her. [This is intended by the affinity agreement with the family of the bride but it is not completely guaranteed that this may not take place and that the bride may be injured or hurt in some way.]
- If she leaves him, owing to his misconduct, he does not have a claim against the parents for the *lobola* cattle, thus loosing bride and cattle together.
- He may not sell her to another.¹⁷

The above are understood since the wife has the protection of her family if she is ill-treated. It is however not sure that some of these problems might occur within a customary union.

The points made above, highlight the fact that the *lobola* although referred to traditionally as the "bride-price" (or gift in some instances), does not mean the bride is a commodity to be sold. In addition, her marriage is considered to be part of her journey towards maturity as a married woman and thereby changes her status within the society. However, she moves from being under the protection of her father, to being under the protection of her husband and in that way remains a perpetual minor in the legal sense of not having any autonomy as an individual. This means that she will have to ask her husband's permission to visit her own relatives once she has already been married. The bride is under her husband's control in marriage. At the death of her husband she may not marry but continues to belong to her husband's family. This seriously limits the freedom of a female in a customary union. Reuter also points out that there are three essential requirements for the recognition of a customary union: the

¹⁴ A Reuter, op., cit p 49.

¹⁵ William G Blum, CSC, *Forms of marriage: Monogamy reconsidered*, AMECEA, Gaba Publications Spearhead 105-107: Nairobi, 1989, pp 41 & 42.

¹⁶ This statement by Amand Reuter was in fact made invalid by the change in legislation in terms of the Recognition of Customary Marriages Act 120 of 1998. First published in terms of GN R 110 of November 2000 and later amended by GN R 359 of 14 March 2003.

¹⁷ A Reuter, op. cit, p 213.

payment of the *lobola*, the consent to be given by both spouses and finally the delivery of the bride to the home of her husband. The conclusion and solution reached by Reuter is that ...

[...] the status of customary native marriages under the law of the land is weak as customary unions are *not* legal or valid marriages in South Africa, hence they are not on a par with “civilized marriages”, even if they are actually monogamous and contracted in perfect accordance with the requirements of native law and recognised by the law of the land.

[...] Furthermore, the actual and duly authorized system of native law and custom in South Africa are such as to admit the establishment of marital unions which comply with the essential requirements of divine law as authoritatively declared by the Church. Therefore, in spite the fact that the native marriage system is predominantly polygamous, both simultaneous and successive, marriages by customary rites may be regarded as true and valid marriages in the eyes of Church law; where more than one union has been entered into, as a rule it is presumed that the first was the valid marriage.¹⁸

Given that the system of polygamy is so deeply rooted in the African life-style and that this cannot be changed easily, it is accepted as a normal part of native customary law which in turn is different from the common law of the land. In the case of South Africa the common law derives from Roman-Dutch law. From a Church perspective it is important to note that in speaking about a Christian marriage one is speaking about fidelity for life within the context of a monogamous union between one man and one woman for the procreation, education and upbringing of children. The system of polygamy was the major stumbling block that missionaries encountered in dealing with African marriages.

In summing up this section, the Recognition of Customary Marriages Act 120 of 1998 was an important legislative change that gave customary unions the same legal status as that of a civil marriage recognised in the eyes of the state. This is significant because it marked the acceptance of the practice of polygamy into mainstream South African legislation. In effect this means that in South Africa men may marry again after the first marriage and still enjoy the benefits and protection offered to those legally married in that country. However, it does raise questions about equality and gender issues as the same privilege is not afforded to the female citizens of the country. However, it should be remembered that in some African cultures, a female head of a household is entitled to appoint a partner for someone within her family group who has been widowed or from whom the family desires children to be sired. This may complicate the argument that polygamy curtails female freedom, however, it is to be factored in as female heads of households have become more prevalent within South African society.

Part of this study is to ask the question as to how did the seminarians in the Catholic seminaries in South Africa receive information so to understand the challenge of polygamy. It is also important to note that St Joseph’s specifically designed a course to deal with African traditional marriage and that, that course has been taught in more recent years by Emile Moteaphala OMI who has said: “The aim was to make students understand the principles of Christian Marriage and also to help them understand marriage in the African cultures which is the reality they will be dealing with.”¹⁹ The aim of such a course was to help students understand the dignity of traditional African customary unions within the context of first evangelisation of native peoples within South Africa. It has been stressed that in no way should traditional African marriages be considered invalid. It is a matter of acknowledging these unions as valid within their given cultural context and being aware that the Christian vision of marriage is to be introduced into the culture slowly so that the local people can appreciate this new vision of a marital union which is exclusive and indissoluble. The process of developing a new understanding of marriage as a partnership should be gradual, and it takes care and patience to foster that appreciation in the hearts of the evangelised, whoever they are and whatever their cultural background. There are also new challenges in contemporary society, such as divorce, which was traditionally frowned upon but is much more common nowadays. The St Joseph’s special moral course on marriage and African traditions also delves into topics such as informal unions and the reception of unbaptised persons into the Catholic Church. However, in terms of a contemporary perspective, Zwane’s doctoral thesis (University of Natal, Pietermaritzburg, 2003) on the role of the Roman Catholic Church in South Africa in developing an authentic Christian sexual morality for Zulu Christians should be consulted.

Polygamy: different approaches to the issue

The widespread prevalence of the practice of polygamy, one man married to many women, was one of the most important practices in South Africa that the early missionaries sought to change. Polyandry, the practice of one

¹⁸ A Reuter, op cit, pp 362 – 363.

¹⁹ Emile Moteaphala, Response to questionnaire, received on 11th May 2008.

woman having many husbands, was not practiced in South Africa. However, the practice of the levirate (when a male fathers children with a widow on behalf of his deceased brother) and the sororate (whereby a female has children on behalf of a woman who cannot bear children) were practiced and were linked to the system of polygamy among the indigenous people of South Africa.

Some other Christian perspectives on indigenous marriage

Rev Sequibo Dwane, an Anglican who taught Systematic Theology at the Federal Seminary in Pietermaritzburg, has challenged the assumption of many Christians when approaching African marriages:

One does not wish to make a mountain out of a mole hill, but there seems to lie behind the reference to polygamous marriages as 'alliances', an assumption that anything which is not monogamous is not marriage at all. And this premature judgment of customs which people had taken little trouble to understand is what has bedeviled the history of the Christian Church on this continent [Africa].²⁰

Sequibo Dwane stresses the point that polygamous marriages are not temporary liaisons but are permanent in nature, thereby bearing one of the enduring marks of marriage. However, he recognises that the frequent quarrelling of the wives of polygamists reflect the tension and difficulties that women have to endure where they have to share a husband, who has fathered children other than their own.²¹ Along a similar vein, Professor Axel-Ivar Berglund also recognises that the Scriptures (especially the Old Testament) might tolerate polygamy but never advocate it as an ideal:

[...] accepting that Holy Scripture describes men as having more than one wife, it never describes the polygamous condition as either good or advantageous (other than in the procreative fashion). On the contrary, the polygamous marriages are always described as causing strife, anger and jealousy, hatred and bitterness, indeed bloodshed frequently.²²

Nevertheless, a call for sensitivity to local culture is important for a society that has to grow and develop in order to reach the Christian ideal of fidelity within a monogamous marriage. Polygamous unions, likewise, need to be redeemed in order to meet the Gospel ideal. However, as polygamy does not receive the recognition of a marriage, there will always be the perception that the permanence of these unions has not been significantly acknowledged by the various Christian denominations. This becomes a point of contention when viewed in the light of the fact that some Christian denominations accept divorce as legitimate, thereby giving sanction to what some might call successive polygamy. However, as polygamy is considered the marriage of one man simultaneously to many women, customary unions would still not be able to be condoned within the context of what could be described as a Christian marriage.

Hastings' reflection on polygamy

The Catholic historian, Adrian Hastings, was commissioned by the Anglican Archbishops of Cape Town, Central Africa, Kenya, Tanzania and Uganda to make a report on Christian marriage in Africa. In his report of 1973, Hastings puts forward four positions that a Christian can possibly adopt in relation to the practice of polygamy:

- a Polygamy is simply a sin, comparable with adultery.
- b Polygamy is an inferior form of marriage, not sinful where it is the custom but always unacceptable for Christians.
- c Polygamy is a form of marriage less satisfactory than monogamy and one which cannot do justice to the full spirit of Christian marriage, but in certain circumstances individual Christians can still put up with it, as they put up with slavery, dictatorial governments, and much else.
- d Polygamy is a form of marriage, monogamy another. Each has its advantages and disadvantages; they are appropriate to different types of society. It is not the task of the Church to make an absolute judgment between them.²³

²⁰ S Dwane, "Polygamy", in TD Verryn (ed.), *Church and marriage in modern Africa*, Ecumenical Research Unit: Groenkloof, 1975, p 224.

²¹ S Dwane, op cit, p 235.

²² AI Berglund, in TD Verryn (ed), *Church and marriage in Modern Africa*, op cit, p 19.

²³ Adrian Hastings, *Christian marriage in Africa*, SPCK: London, 1973, p 73.

From the outset, Hastings suggests that options (a) and (d) should be excluded by the Christian observer. However, the options that need closer consideration by Christians are options (b) and (c) as the greater problem lies between these two positions. At this point, the advice given by the Anglican report differs from the traditional Catholic approach to dealing with the problem of polygamy. The report considers it impractical to simply withdraw from these situations. Instead, a certain amount of tension needs to be accepted and tolerated by the Christian who can in some circumstances be baptized, together with his wives and children, while continuing in his polygamist marriage.”²⁴ The reason stated for not asking him to separate from his wives of a plural marriage is that in such situations, it is the women and children, who are made to suffer the most. However, it is stated that whatever decision is made, it should be made with the agreement of the local Christian community, and every effort should be made so as not to scandalise the local Church.

However, there are also polygamist situations which Hastings considers impossible to accept if parties to such situations desire to enter into the Christian Church. For example, a man with ten wives cannot treat them and their children, as a man who only had three wives would. So, each case is to be considered on its own merits. However, for someone who is already baptised, the Christian ideal of monogamous marriage is the only standard that should be used. For an existing Christian, only a monogamous Christian marriage is to be tolerated. These solutions may be of help within an Anglican context, as the pastoral practice of some denominations is to allow women in polygamous marriages to receive communion, whereas the men are treated differently, as they have multiple partners but the women are being faithful to one person alone. In the pastoral setting, it is important to acknowledge the efforts of different denominations in solving problems that are common to all Christian marriages. However, there are the demands of Scripture, Christian doctrine and Canon Law/ Church regulations and polity to be considered by each denomination in finding suitable pastoral solutions. The following incident mentioned in an interview with Garth Michelson serves as an example:

The Church teaching is clear and one tries to live within it. But I have lived in situations where in the Valley of Thousand Hills there were good Catholics in *imihlangano* (church sodalities), associations of women, who were the second wife while the first wife was still there and living in a traditional Zulu society. Fortunately, the priest before me solved the problem by letting them come to communion, and I continued that. I say that light heartedly but that I think sometimes one need to have a pastoral decision there. Clearly one can see what the teaching of the Church is but within that teaching there is also this process going on in thinking. And we haven't come to the final answer, I think culturally and under God with this issue of first wife, second wife and third wife, *isithembu* (polygamy) in Zulu.²⁵

In the rural areas there are still communities where polygamy is accepted as the norm. This demands recognising that there is an evolution in thinking and practice as societies move towards establishing monogamy as the ideal form of marriage within that society. As the people of Israel went through this process of choosing monogamy as the norm for marriage, other cultures in turn need to be given the opportunity to grow towards establishing monogamy as their ideal.

The importance of marital fidelity

Marc de Mûelenaere: the emancipation of women

De Mûelenaere's thesis which was eventually published as the book *The 'Bonum Fidei' in an African context: the Canonical significance of marital fidelity among the Bantu of South Africa* (Groenkloof: 1986) is one of the most significant, if not the most significant study on marriage in South Africa due to the clarity of analysis of marriage in South Africa and its practical canonical applications. However, what is most challenging is the fact that he readily addressed the thorny issue of male dominance within African society. This was not an easy task, as being a critic from outside of any given culture is likely to draw criticism from many different sources. Nevertheless, the fact that de Mûelenaere had done pastoral work with the various ethnic groups and spoke both Zulu and Sotho did in fact give him the privilege of being able to reflect critically on what he experienced as being the needs of the local people in the area of marriage. Very often it is also difficult for any group of people to analyse critically a situation of oppression when enculturated into accepting those cultural practices as normal. Marc de Mûelenaere, noted the following points are of interest to Catholic theologians when considering marriage within an African context:

- The extended family in South Africa, and especially its compatibility with Christianity.

²⁴ Ibid, p 77.

²⁵ Interview with Garth Michelson, Archdiocesan Chancery Durban on 26th November 2008.

- The communitarian nature of marriage that is seen as very good, provided that it does not limit the individual's choice of partner.
- The progressive nature of marriage as being a process over a longer period, so as to increase personal and communal commitment.
- The male dominance found in African culture, which is not defensible from the perspective of Christianity. This male dominance promotes a polygamous mentality, the exploitation of women and a double standard being applied to the sexes.²⁶

This final point listed above, needs to be stressed as “male dominance found in African culture” creates a situation where it is difficult for women to speak for themselves and for them to improve their situation within their marriages. Another difficulty is that once a female has children, she has to accept the conditions thrust upon her in order to get sustenance for her children. This is at the root of the exploitation often suffered in silence by women in situations of polygamy, where the first wife and the in-laws can exert undue pressure on her because she is dependent on them for the livelihood of her children. De Mûelenaere reasserts John Paul II's insistence on the use of the human sciences such as psychology and sociology in order to understand “both the facts and the people in marriage cases”.²⁷

In attempting to establish a generative theme that emerges from the points raised by de Mûelenaere, the issue of the emancipation of women in South Africa becomes rather crucial. Father Patrick Whooley (who worked in the Eastern Cape and the South African Catholic Bishops' Conference) makes a similar point in the following observation: “One could certainly state that even in the circumstances of traditional life, young wives bore an unfair burden and their lot was very undesirable, especially since this condition lasted many years. In fact, the work burden was never lifted until she got a daughter-in-law.”²⁸ Another important factor is that the South African government, in implementing democracy and gender equality, has addressed this issue by promoting women's rights. Christianity, therefore, has had due impact in shaping the society's practices in terms of marriage. However, it is not an ideal for everyone within South African society. Christianity has influenced the dynamics of how marriage is lived in South Africa, but it has had to dialogue with cultural values that are important to society, as well as recognising the legal consequences of how marriages are contracted by citizens of the land. In Soweto particularly, more cultures have been combined than probably anywhere else in South Africa. In many cases aspects of traditional culture are maintained, but there is also hybridisation that takes place as couples create a culture that combines strands from both their cultural roots.

In seeking a way to assist men appreciate monogamy and to relate to their spouses with sensitivity and compassion, it might well be necessary to address the social custom of men spending most of their leisure time in the company of other males. In this regard de Mûelenaere says: “Men are expected to spend most of their time in each other's company and thus opportunities for real intimacy between the spouses is limited.”²⁹ Perhaps it is also somewhat unfair to place the blame for the lack of a deepening of intimacy between the spouses solely at the feet of the men, as women also spend most of their time together and some of their women's group activities may be used as a way to escape from the duties and responsibilities at home. Within indigenous African society the male has the duty “to act as legal and social guardian of his wife.”³⁰ It would be preferable if the relationship could develop in such a way that both husband and wife make decisions together and can share their feelings, hopes and expectations for their future lives together. This concept of a mutual partnership is more in line with the Christian vision of marriage.

²⁶ Marc de Mûelenaere, *The 'Bonum Fidei' in an African context: the Canonical significance of marital fidelity among the Bantu of South Africa*, Groenkloof, 1986, pp 228-229.

²⁷ Ibid, p x. Marc de Mûelenaere cites John Paul II's address to the Roman Rota, January 26, 1984, “The task of the Church Tribunal”, in *Origins*, 13 (1983-1984), p 585.

²⁸ Patrick Whooley, in TD Verryn (ed.), *Church and marriage in modern Africa*, op cit, pg 188.

²⁹ Marc de Mûelenaere, op cit, p 27.

³⁰ Ibid p 28.

The impact of urbanisation on relationships within indigenous African marriage

Urbanisation has increased access to education and employment, which has contributed to a weakening of the influence of traditional African culture on indigenous South Africans in urban areas. In some ways religion has replaced old tribal bonds and helps urban dwellers to unite into a community with a common vision which is rooted in Christianity, among other things. Typically, these people have chosen some aspects of urban life and retained other customs of traditional life. Emile Moteaphala raises an important point about the different understandings of Christian and African marriage:

There are many issues in African Marriage which contradict the Christian understanding of Marriage and cannot be reconciled with Christian marriage e.g. the many forms in which African Marriage ensures the begetting of children for the family (extended): Ghost Marriage (where a family marries a woman for their dead son), levirate or sororate, polygamy, etc. I do not think there has been much change in the teaching.³¹

This highlights the challenge faced by urban South Africans who have come from a traditional, rural African background. Moving to the cities has meant having to live in a socio-cultural environment where the Christian form of marriage is considered the norm. This has forced indigenous people to adapt to a new vision of marriage and also to view their customs and traditions in a new way. According to Blum: "Marriage alliances are formed by all types of African societies."³² However, a clear distinction needs to be made between matrilineal and patrilineal groups, in that the matrilineal groups do not have to employ any extraordinary measure to increase the numbers of their group. Whereas patrilineal groups resort to levirate, sororate and ghost marriage, matrilineal societies sidestep these issues because all children born to a female belong to her line of descent. There is also a prohibition on supplying a substitute where a female is barren, as no female can exist on her own outside of the descent group. Within South Africa practically all the ethnic groups are patrilineal groups, with the Balobedu³³ people of the Limpopo Province, being the only notable exception. These traditional practices continue to bolster society, but as time goes by, other considerations are coming into the equation when making decisions about the place of residence, and so on. Stuart Bate makes the following assertion:

Some of the best evidence to show the fallacy of these theories [*Volkekunde*] is in the urban areas of multicultural mixing in Africa. Besides this we see people of different "ethnic groups" increasingly socialise and even enculturated from birth into the Western value systems wherever they are born.³⁴

However, over and above the ethnic dimension is also the importance of the extended family in retaining the religious identity of the members of the family group. "It is very important to realise that the Catholicism, Anglicanism, Methodism or Islam or whatever we profess is itself a culture with its own set of traditions and customs."³⁵ Religious affiliation is a part of cultural identity for South Africans and the members of the extended family play an important role in maintaining those religious affiliations. In the introduction to his thesis, Marc de Mûelenaere emphasises that Pope Pius XII recognised the importance of the moral and juridical sciences for understanding marriage. Pope Paul VI stressed the importance of psychology and the social sciences and Pope John Paul II emphasised the human sciences in better appreciating matrimonial union. Later, in speaking about the incorporation of the wife into the husband's family and the relationship of the bridal couple, Marc de Mûelenaere points out the following: "In view of this, the really personal element in marriage is perceived to be the achievement of a new status, the transfer from the unmarried to the married, rather than the establishment of an intimate community to life together."³⁶ So, despite the decrease in the number of arranged marriages, clan considerations are still highly respected in the choice of a partner for marriage. Further to this point, the anthropologist Father P Whooley as cited by de Mûelenaere, makes the following assertion concerning bride-wealth among the indigenous people of the Ciskei:

³¹ Emile Moteaphala, Response to questionnaire, Op. cit., p.1.

³² Blum, op cit, p58.

³³ The Balobedu people have been ruled by six successive Rain Queens (*Modjadji*) from the reign of Rain Queen I Masalanabo Modjadji (1800-1854) to Rain Queen VI Makobo Modjadji (2003-2005).

³⁴ Stuart Bate, *Human life is cultural: introducing Anthropology*, Cluster Publications: Pietmaritzburg, 2002, p 49. [*Volkekunde* refers to cultural evolutionism developed by 19th century romantic philosophers from Holland and Germany, such as. Kuyper who developed *Ethnos* Theory.]

³⁵ Ibid, p 133.

³⁶ Marc de Mûelenaere, op cit, 1986, p 9.

[Bride wealth] gives a sense of security to the bride, it gives her a sense of dignity and of being wanted. It establishes her family's interest in her. It gives her security from her husband's anger or from others' abuse; she can go home in the knowledge that her husband is certain to seek her out [...]. But it also gives the husband the knowledge that the children are his, no matter what happens. It establishes him in control of his house and homestead and gives him final say in many important decisions regarding the children: their initiation, their marriage, ceremonies, etc. But more than all else, [bride wealth] and the ritual that accompanies it is the only language that can bring about the emotional changes that the new relationships demand [...].³⁷

Both the husband and the wife represent the respective lineages from which they descend, and their relationship is seen as complementary rather than marked by equality. This is due to the fact that the male is clearly the head of the homestead, and in a traditional marriage the wife is expected to be faithful to the husband, but the husband can in turn still seek other relationships. These relationships could lead to future wives within the polygamous system of marriage that is practiced by the indigenous people in South Africa. Despite the fact that polygamy is practiced less for religious and economic reasons, there is still a polygamous mentality among men that allows them to enjoy as much sexual freedom after marriage as they had enjoyed it before marriage. With the impact of Christianity, this polygamous mentality had been changing in so much as "evangelization [has] led to a loosening of tribal ties and the upsurge of personal freedom and decision."³⁸ Migrant labour has also helped in the emancipation of women in that it has decreased the presence of able-bodied men in isolated rural areas. These various cultural strands in South African society have caused the individual "to engage in a process of selective adaptation according to his own perceived needs and the demands of his closest kin, his most intimate friends, or his most important associates."³⁹ This therefore challenges the individual's perception of marriage in terms of Christian teaching where the pressures from society make even more demands of people than the Catholic Church. However, even in cases where polygamy is not being actively encouraged, it is a case of having this aspect of culture respected in a way that does not make subsequent generations born from polygamous families view themselves as social misfits in their own cultural *milieu*.

Marc de Mûelenaere: fidelity is non-negotiable

The opposite of conjugal fidelity is the option of having more than one partner in marriage, which is not according to the Christian preferred state of affairs. In the third chapter of his thesis, de Mûelenaere discusses fidelity as an essential element of marriage, not simply as a moral imperative but as a canonical requirement for Christian marriage. The major issue under discussion is the spouse's intention to have an exclusive sexual relationship. According to de Mûelenaere, the occurrence of adultery later on in the marriage is less important juridically. However, what is of importance are the groom's "intentions at the exchange of the wedding vows."⁴⁰ This is extremely important as when a Catholic marries someone from a religious group that allows polygamy, it is not uncommon for that person to conceal their intention to take another partner after the first marriage. The strategy used is one of only informing his wife once they are already married and perhaps have a few children. In these instances as the wife is dependent on her husband for the maintenance of the children, she has little option but to accept the proposal. In order to clarify these issues, de Mûelenaere also uses the Code of Canon Law in class so that the students develop a familiarity with the text and learn to apply it to the practical examples discussed in class. The inability to be faithful in marriage is not the same as having the *intention* at the time of the marriage to evade an exclusive relationship, as such an intention would invalidate the marriage. The social norms within society can be so strong that they can influence someone's commitment to marriage and invalidate the marriage.

In this regard the *Tria Bona* (offspring, fidelity and marriage as a sacrament) and the *Bonum Fidei* (the demand for sexual fidelity and generous mutual concern in friendship) become important in discussing marriage. St Augustine acknowledges the importance of the *Tria Bona* in terms of the structure and finality of marriage according to God's design. He therefore addressed such topics as conjugal love and friendship, and importance of mutual help as a remedy for weakness. Gradually canonists began to view the presence or absence of the *Tria Bona* as a mark of the validity of a marriage. St Thomas Aquinas, on the other hand, did not consider the *Tria Bona* as being of equal importance to indissolubility and consequently necessarily the mark of a valid marriage. For St Thomas Aquinas, the *bonum sacramenti* (sacrament) formed the substance and essential part of marriage. However, the *bonum prolis* (off-spring) and the *bonum fidei* (sexual fidelity of the spouses) were seen as part of the purpose of marriage and therefore were not essential. It was nevertheless maintained that within the context of bearing children, the fidelity of the couple was an important component of marriage. The demand for fidelity in marriage gained more weight in that the early Church Fathers were not in favour of males having more sexual

³⁷ Marc de Mûelenaere, op cit, p.25.

³⁸ Ibid, p 44.

³⁹ Ibid, p 55.

⁴⁰ Marc de Mûelenaere, op cit, p 112.

freedom than females (cf Michael Lawler, *Marriage and sacrament: A theology of Christian marriage*, 1993: 62). Further still, there is the New Testament requirement of equality between the sexes.

De Mûelenaere then goes on to discuss pre-conciliar and post-conciliar jurisprudence, and the 1983 Code of Canon Law concerning the *bonum fidei*. The canonical observations made by de Mûelenaere on the *bonum fidei* are the following:

- It is a necessary juridical element for a valid marriage.
- It pertains to the unity and exclusivity of Christian marriage.
- It is a sustaining element of the *consortium totius vitae*.
- It is equally binding on both spouses.
- Social and cultural attitudes can influence marital consent.
- There can be a conscious refusal of the obligation of fidelity at the outset.
- The *bonum fidei* is the free acceptance of sexual exclusivity and the unconditional surrender of self inherent in Christian marriage.⁴¹

Regarding the points raised above, it is the penultimate which is most important within this discussion on conjugal fidelity. If a man enters into a marriage with the full intention of entering into a second marriage and yet fails to inform the bride in advance so that this can be noted in the marriage records, it is considered in future when an annulment is applied for if problems are experienced within that relationship. In some cases, it is only once the first marriage has already been contracted that the husband reveals his intention to take a second wife. In such cases, the wife who desires a monogamous Christian marriage is denied her choice having entered into marriage without full disclosure. Family pressure on a female to marry a wealthy male who might already have a few wives because the family wants their daughter to be in a situation where her basic needs will be met, is also a problem. Not only does it place her in a polygamous marriage but prevents her from being able to make a choice to marry the person that she loves. This is if her marriage to a polygamist was for security rather than out of the love she had for her husband.

In the fourth chapter, De Mûelenaere then discusses the processing of annulment applications in *bonum fidei* cases. The difficulty of proving such *bonum fidei* is highlighted because it concerns the parties' intentions. These people alone know and can declare what their intentions were at the time of getting married. An investigation into a marriage is to establish proof for a person who declares that their marriage was invalid. Direct proof (the declarations of the spouses and the witness) and the indirect proof (including the circumstances of the wedding, the character of the excluding party and the motives for the exclusion of fidelity at the moment of consent during the wedding ceremony) are permissible in such an investigation. However, a marriage can only be ruled invalid after absolute moral certainty is reached, and that certainty needs to be substantiated. Bantu cultural values have an important role to play in the character of the person, the motives for marriage and the inducement of the person to exclude the *bonum fidei* from their marriage commitment. In the case of an invalid marriage, two typical scenarios emerge. Firstly, someone who has been sufficiently instructed on the need for fidelity in Christian marriage and who excludes this by an explicit act of will; and secondly, someone who received insufficient instruction and where there was an implicit non-assumption of the obligation to be faithful in marriage.

Conclusion

Biyo who challenges the values of Christianity on the topic of polygamy and the dismissal of the subsequent wives other than the first wife in a polygamous union:

It is very legitimate to ask whether in the traditional theology Western law and philosophy are not regarded as the only universal models. Even if this problem has to be discussed in today's context to a greater extent and admitting that Christians have to rethink everything anew from the Revelation, it is still to be asked whether the dismissal of all the wives except for the one before baptism does not precisely contradict the dignity of the human person.⁴²

Given this challenge, let us be reminded of the words of Michelson cited earlier "But maybe some kind of thinking will be that out of the Old Testament was a long process of coming to the fullness of Christianity and was the Old Testament perhaps an example of other cultures also coming to a fullness."⁴³ In history, all peoples reach the fullness of humanity in their own time and at their own pace by evolving towards the mystery of holy matrimony. This point is crucial, because if Christians justify polygamy, in an effort to make polygamy a recognised option over and above the matrimonial fidelity proposed in the Scriptures in terms of the analogy of

⁴¹ Marc de Mûelenaere, op cit, pp 167-168.

⁴² Bénèzet Biyo, *The ethical dimensions of community*, Paulines: Nairobi, 1998, p 35.

⁴³ Garth Michelson, same interview.

the unity of Christ and the Church, then there is always the possibility of backsliding into continuing the practice of polygamy, rather than encouraging future generations to embrace monogamy as the standard by which Christian marriage should be lived.

Given the fact that the social systems of different cultures evolve within a time-frame that is specific to each culture, it does need to be emphasized to Christians in South Africa, that polygamy can in no way be compared with the degree of support and fidelity demanded by the Christian form of marriage which presumes a permanent commitment to fidelity to one person in a marital bond that is indissoluble, and is intended for the mutual growth of the spouses on equal terms within their marriage. However, the fact that "Customary Union" was replaced by "Customary Marriage" in the Recognition of Customary Marriage Act of 1998 indicates a change in the understanding of marriage within the South African context. It also raises the question whether the Christian ideal of monogamy in marriage is still the standard for South African marriage? This poses the question of the role of the state and also the role of Christian churches in promoting the Christian vision of marriage to the adherents of their faith traditions, namely that marriage is monogamous in terms of the New Testament ideal in the Scriptures.

Works Consulted

- Bate, S 2002. *Human life is cultural: introducing anthropology*. Pietermaritzburg: Cluster Publications.
- Blum, WG 1989. *Forms of marriage: monogamy reconsidered*. Nairobi: AMECEA, Gaba Publications
Spearhead 105-107.
- Berglund, AI 1976. *Zulu thought patterns and symbols*. Cape Town: David Phillip.
- Biyo, B 1998. *The ethical dimensions of community*. Nairobi: Paulines.
- De Mùelenaere, M 1986. *The 'Bonum Fidei' in an African context: the canonical significance of marital fidelity among the Bantu of South Africa*. Pretoria: Groenkloof.
- Hastings, A 1973. *Christian marriage in Africa*. London: SPCK.
- Kisembo, B (et al) 1998. *African Christian marriage*. Kenya: Kolbe Press.
- Lawler, M 1993. *Marriage and sacrament: a theology of Christian marriage*. Collegeville, Minnesota: Liturgical Press.
- Reuter, A 1963. *Native marriages in South Africa according to law and custom*. Münster, Wesfalen: Aschendorffsche Verlagsbuchhandlung.
- Ryan, C (ed) 2006. The future of marriage. *Grace and Truth* 2(1).
- Schillebeeckx, E 1965. *Marriage: human reality and saving love*. London: Sheed & Ward. (Translated by N.D. Smith).
- Ten Velde, H 1952. Customary union. *The South African Clergy Review* IV(4), February, 145-152, Mazenod Institute, Basutoland.
- Verryn, TD (ed.) 1975. *Church and marriage in modern Africa*. Johannesburg: Zenith Printers.
- Vieyra, H 1954. Customary union. *The South African Clergy Review* V(2), August, 94-96 and V(3), November, 110-117, Mazenod Institute, Basutoland.
- Vijverberg, C 1954. The validity of a customary union in the Union of South Africa. *The South African Clergy Review* VI(4), February, pp. 181-188, Mazenod Institute, Basutoland.

Unpublished dissertations

- Kampungu, R 1965. Concept and aim of Okavango marriages: investigated in the light of ecclesiastical legislation. Doctoral dissertation in Canon Law submitted to the Pontifical University of the Propaganda Fide, Romae.
- Zwane, P 2003. The role of the Roman Catholic Church in South Africa in developing an authentic Christian sexual morality for Zulu Christians. Doctoral dissertation in the School of Theology, University of Natal, Pietermaritzburg.

Interviews

- Linda Zwane, 12 November 2008, St Peter's Parish, Nelspruit.
- Vincent Kunene, 13 November 2008, Diepkloof, Soweto.
- Gemma Kunene, 13 November 2008, Diepkloof, Soweto.
- Joy Brain, 19 November 2008, Archdiocesan Chancery, Durban.
- Alvin Tshuma, 21 November 2008, St Joseph's Theological Institute, Cedara.
- Garth Michelson, 26 November 2008, Archdiocesan Chancery, Durban.