

DOSSIER: SHOULD POLYGAMY BE RECOGNIZED IN CANADA?
ETHICAL AND LEGAL CONSIDERATIONS

Article: 18→21 Notes: 22

18

VOLUME 2 NUMÉRO 1
PRINTEMPS 2007
ARTICLES :

POLYGAMY AND PLURAL MARRIAGE

MARTHA BAILEY
PROFESSOR, FACULTY OF LAW,
QUEEN'S UNIVERSITY

In contrast to Canada, most countries do not permit same-sex marriage, many consider same-sex relationships as immoral, and many impose criminal sanctions for sexual activity between parties of the same sex¹. Many of these same countries continue to permit or tolerate polygamy, in accordance with religious or customary practice. In Canada it is not same-sex relationships but polygamous marriages that are considered immoral and criminalized. The disapprobation of polygamy in Western countries is longstanding and consistent with gender equality norms enshrined in human rights treaties and constitutions. The United Nations Committee on the Elimination of Discrimination Against Women has consistently inveighed against polygamy, and in 1992 issued a General Recommendation that included the following:

Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and pro-

hibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention².

While Canada does not permit polygamy, foreign polygamous marriages may be recognized for some purposes, as is the case in most countries. Under Canadian law, a foreign marriage is valid if it is formally valid under the law of the place of celebration and essentially valid under the law of each party's prenuptial domicile³. It is possible to refuse recognition to a foreign marriage on the ground of public policy, but this discretion is rarely exercised. There is no blanket prohibition against the recognition of foreign polygamous marriages on public policy grounds. On the contrary, they are recognized for many purposes. "[P]olygamous marriages valid in the country where they were entered into and where the parties were domiciled would be recognized as valid by Canadian Courts⁴."

Sometimes included in references to "polygamous marriages" are "plural unions" entered into by some renegade religious sects in North America, in particular the Fundamentalist Church of Jesus Christ of Latter Day Saints. The most well-known such sect in Canada is in Bountiful, British Columbia⁵. These plural unions are not legally recognized as marriages under Canadian law. There have been widespread concerns about allegations of abuse of women and children and other social problems in these communities.

In 2005 Status of Women Canada, a government agency that promotes gender equality, commissioned four research reports on the topic of polygamy⁶. The reports were printed and bound in one volume in late 2005 but not immediately released. As lead author of one of the reports⁷, I was then advised by Status of Women Canada that the reports had been requested by a reporter pursuant to Canada's *Access to Information Act*⁸. After the reporter obtained the report, he published an article in the national press⁹. The article was published just before the federal election in which Stephen Harper's Conservatives won enough seats to form a minority government. Perhaps because of the conditions in which the reports were released – an ongoing election campaign in which issues of same-sex marriage and moral values relating to the family were raised – the reports drew much attention. The original news item was subsequently picked

up by the wire services, and the story was widely circulated across North America.

Some of the media stories suggested that the reports were urging that polygamy be "legalized" in Canada¹⁰. During the debates on same-sex marriage, Stephen Harper had warned that if same-sex legislation were passed, other claims for redefining marriage, e.g. by legalizing polygamy, could be pressed¹¹. In fact, none of the four reports recommended allowing polygamous marriages to take place in Canada. All of the reports emphasized the harms to women and children associated with polygamy. However, the reports did express some reservations about imposing criminal sanctions on parties to foreign polygamous marriages or plural unions. There was a division in the reports as to the constitutionality of the criminal provision and whether it should be repealed. The report that I co-authored recommended repeal of the criminal provision on polygamy but that other criminal laws and civil laws be used to combat the harms associated with polygamy. It was this recommendation to repeal the criminal provision that generated most of the media attention.

The criminal prohibition against polygamy is set out in s. 293 of the *Criminal Code*¹², which provides:

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

By its terms, s. 293 applies to both foreign polygamous marriages and to plural unions. The report that I co-authored primarily addressed issues relating to recognition of foreign polygamous marriages, but it did consider the application of s. 293 to both foreign polygamous marriages and to plural unions and recommended repeal of s. 293 in its entirety. The other reports gave more attention to plural unions of the sort existing in Bountiful, British Columbia. Two of

the reports recommended retaining s. 293 but suggested that prosecutions be conducted with sensitivity to the vulnerabilities and equality concerns involved¹³. Angela Campbell, who authored the fourth report, had this to say:

The Parliament of Canada, in particular, the federal Department of Justice, must revisit the criminalization of bigamy and polygamy. These offences are rarely prosecuted and, as discussed, might not be consistent with current social perceptions of marriage. Moreover, the penal consequences that ensue from these offences might place women and children at considerable risk. As such, further study should be undertaken to determine the propriety of maintaining these offences in the Criminal Code¹⁴.

Campbell's observation that the offences of polygamy and bigamy are rarely prosecuted is germane. There is general concern about the failure to deal with the exploitation and abuses that are often a feature of polygamous marriages and plural unions. The challenges of investigating and prosecuting the offence of polygamy and, more recently, apprehensions about challenges to the constitutionality of s. 293 have prevented governments from proceeding. And there is divided opinion as whether prosecutions for polygamy *per se* (as opposed to prosecutions for other offences that may have been committed) are the most effective way of dealing with the problems without further harming women and children who have been victimized.

Later in 2006, another government study on polygamy was released¹⁵. This broad-ranging report thoroughly outlined the harms associated with polygamy and emphasized that polygamy is a form of discrimination and a violation of international law. It recommended vigorous action to address the practice in Canada and measures to protect the women and children living in or transitioning from polygamous families. The report recommended the following temporary measures to ensure that women and children "are effectively protected from ongoing human rights violations and acts of discrimination, and are assisted in fully integrating into broader society":

- an inter-ministerial investigation into polygamy and polygamy -related abuses in Bountiful, B.C. and elsewhere in Canada until such abuses are eliminated (with an emphasis on the Attorney-General's duty to prosecute criminal offences occurring within such communities)
- the development of gender-, religiously-, and culturally-sensitive guidelines for law enforcement officers and social workers investigating cases of polygamous families

- a review and amendment of existing provincial family legislation relating to spousal support and matrimonial property to ensure that women leaving polygamous unions – whether de jure or de facto – can qualify for the automatic consideration of support where needed and equalization of net family property
- training for law enforcement officials, social services authorities, health-care professionals, judges, lawyers, and teachers regarding the characteristics of polygamous families and polygamy -related abuses, until such time as training goals are achieved
- free legal aid for women fleeing polygamous relationships / communities, until polygamy is eliminated
- public education campaigns about polygamy and polygamy -related violations of human rights, until polygamy is eliminated
- a time-limited working group within the Canadian Department of Justice to coordinate governmental policies on and assist with prosecutions of polygamy -related criminal offences
- training for school counselors about the impact of polygamy on young girls, as long as the practice continues to exist; within the Bountiful, B.C. community, this should involve a counselor who is not from the community in order that students learn some of the life skills that may be ignored in their regular curriculum
- provide and fund support services for individuals who wish to leave polygamous relationships / communities, until polygamy is eliminated, including, but not limited to:
 - a) safe houses for up to 90 days that are staffed with counselors with training regarding these types of family circumstances
 - b) assistance with life skills such as managing one's financial and personal affairs
 - c) counseling in sexual abuse / incest issues, grief resolution, and family separation issues

In a media report on this most recent study, a spokesperson for the Department of Justice Canada was quoted as saying that it "reaffirms the position that polygamy will remain illegal in Canada" but that enforcement of the *Criminal Code* remains the responsibility of individual provinces¹⁶.

It seems unlikely that there will be any change to the *Criminal Code* provision on polygamy. Whether the provincial governments begin to prosecute cases remains to be seen. The widespread discussion of polygamy and plural unions over the course of 2006 may lead provincial governments to consider pursuing prosecutions or at least generate more initiatives to assist and protect women and children in these relationships.

NOTES

¹ LGBT World Legal Wrap Up Survey (ILGA, 2006), available online at <http://www.ilga.org/statehomophobia/World_legal_wrap_up_survey_November2006.pdf>.

² UNCEDAW, 13th Sess., UN Doc. A/49/38(1992) at General Recommendation 21: *Equality in marriage and family relations* at 1 [UNCEDAW Recommendation]. Article 5(a) of the Convention provides: “States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

³ The common law provinces follow *Brook v. Brook* (1861), 9 H.L. Cas. 193. For Quebec, see *Civil Code of Quebec*, S.Q. 1991, c. 64, Art. 3083.

⁴ *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 154 F.T.R. 285 at para. 7. For an explanation of the apparent anomaly involved in extending recognition to foreign polygamous marriages, see Joost Blom, “Public Policy in Private International Law and its Evolution in Time” (2003) *Neth. Int’l L. Rev.* 373 at 382-83.

⁵ The Canadian Broadcasting Corporation (CBC) has had a number of stories on this community. See “Bust-up in Bountiful (CBC, The Fifth Estate), online at <<http://www.cbc.ca/fifth/bustupinbountiful/>>.

⁶ Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research* (Ottawa: Status of Women Canada, 2005), available online at <[Reportshttp://www.swc-cfc.gc.ca/pubs/pub-spr/06624_20683/200511_0662420683_e.html](http://www.swc-cfc.gc.ca/pubs/pub-spr/06624_20683/200511_0662420683_e.html)>.

⁷ Bailey et al, “Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada” in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research* (Ottawa: Status of Women Canada, 2005).

⁸ *Access to Information Act*, R.S., 1985, c. A-1.

⁹ W Dean Beeby, “Study Recommends Repealing Polygamy Ban in Canada” (12 January 2006).

¹⁰ See, e.g., “Legalize Polygamy, Study Urges” (12 January 2006) *Globe & Mail*.

¹¹ Reginald W. Bibby, “Polygamy and the Same-sex Marriage Debate,” Press Release, The Vanier Institute of the Family (25 January 2005), online at <http://www.vifamily.ca/newsroom/press_jan_25_05.html>.

¹² R.S., c. C-34, s. 257.

¹³ Nicholas Bala, Katherine Duvall-Antonacopoulos, Leslie MacRae and Joanne J. Paetsch, “An International Review of Polygamy: Legal and Policy Implications for Canada” and The Alberta Civil Liberties Research Centre, “Separate and Unequal: The Women and Children of Polygamy” in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research* (Ottawa: Status of Women Canada, 2005).

¹⁴ Angela Campbell, “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis” in Status of Women Canada, *ibid.*

¹⁵ Rebecca J. Cook and Lisa M. Kelly, “Polygyny and Canada’s Obligations Under International Human Rights Law” (Ottawa: Department of Justice Canada, 2006), online at <<http://www.justice.gc.ca/en/dept/pub/poly/index.html#01>>.

¹⁶ Janice Tibbetts, “Canada Criticized Over Polygamy” (23 October 2006) *National Post*.