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Polygamy's Challenge: Women, religion and the post-liberal state

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[See table of contents](#)

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

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POLYGAMY'S CHALLENGE:
WOMEN, RELIGION AND THE
POST-LIBERAL STATE

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1. INTRODUCTION

In 2005, Status of Women Canada and the Department of Justice Canada jointly funded four policy research papers exploring the legal and social ramifications of the practice of polygamy from the perspective of its impact on women and children and gender equality. Ours was the only paper to recommend the decriminalization of polygamy.¹ This recommendation caused a media frenzy, partly due to the erroneous conflation² of decriminalization and legalization which we did not recommend³ As well, our recommendation likely prompted the release of two more reports, one supporting decriminalization and the other not.³

Polygamy is prohibited in the Canadian *Criminal Code*.⁴ After examining this prohibition, we concluded that it would not survive a challenge based on the Canadian Charter of Rights and Freedoms.⁵ Waiting for a challenge to materialize simply prolongs the time during which vulnerable women fear prosecution. Thus we recommended that Canada should repeal the prohibition.⁶

However there is no indication that the federal government intends to change its policy. Canada's inaction has serious constitutional consequences for three groups of women. I propose to argue that failing to decriminalize polygamy harms (I) women in legal polygamous marriages who want to immigrate to Canada; (II) women in Canada who want to terminate their polygamous relationships; and (III) women who oppose the legalization of polygamy in Canada. Before elaborating these harms, I will summarize the Charter argument for decriminalization.

2. THE CHARTER CHALLENGE

All Charter arguments implicate five issues: application, standing, rights, limits, and remedies. We developed all five issues in our paper but here I will refer to only two: (I) rights and (II) limits.

I. RIGHTS

The rights-seekers would invoke the Charter to challenge the constitutionality of the *Criminal Code* prohibition of polygamy in section 293, which provides:

- S. 293. Everyone who
- (a) practices or enters into or in any manner agrees or consents to practice or enter into
 - (i) any form of polygamy
 - (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 [that is polygamous] is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.⁷

This section is very general, capturing formal and informal arrangements. It captures cohabitation as well as marriage; and it encompasses both heterosexual and same sex relationships.

Given its generality, it is curious that there have been no reported prosecutions under this section over the past sixty years. Moreover, this is so despite the existence of communities such the ex-Mormons in Bountiful, British Columbia, who flaunt their polygamous unions and have been doing so for more than a century. Whatever the historical reasons for not laying charges under the polygamy prohibi-

tion, apparently contemporary prosecutors hesitate because they believe this prohibition violates the Charter right to freedom of religion.

How, you might ask, does religion come into this situation? It seems that virtually all practitioners attribute their polygamy – actually polygyny – to their religious beliefs, whether they are outcast Mormons (also known as the Fundamentalist Church of Jesus Christ of Latter Day Saints), or ultra-orthodox Jews, or practicing Muslims, or whether they subscribe to traditional African religious cultural beliefs. Thus, the rights seekers would be religious polygamists.

Their challenge would unquestionably fall within the broad definition of freedom of religion that is set out in *Big M Drug Mart*.⁸ “The essence of the concept of freedom of religion is”, according to Chief Justice Dickson, “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”⁹ The Chief Justice elaborated this definition in *Edwards Books*, stating: “The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.”¹⁰ Thus liberally defined, religion would prove no hurdle to the challenge by religious polygamists.

Moreover these claimants should have no difficulty complying with the further requirement of sincerity of belief that was set out in *Syndicat Northcrest v. Anselem*.¹¹ In this decision, Justice Iacobucci first rejects the notion that a claimant might have “to prove that his or her religious practices are supported by a mandatory doctrine of faith” because that would require judicial interference with the profoundly personal beliefs that Chief Justice Dickson had defined as identifying religious dogma.¹² Then he observes that a court “is qualified to inquire into the sincerity of a claimant’s belief,” emphasizing “that sincerity of belief simply implies an honesty of belief.”¹³ Therefore, since in fact, some of these religions promote polygyny as a desirable, sometimes even required, way of achieving the promised afterlife, it seems inevitable that a court would conclude that the polygamy prohibition violates religious freedom. But this would not be the end of the litigation story because the Charter allows the government to try to justify infringing freedom of religion.

II. LIMITS

To justify infringing the right to freedom of religion, the federal government would invoke the section 1 limitations provision of the Charter. Using the *Oakes* test requirements, Canada would begin by claiming that the crime of polygamy has a secular objective, namely the protection of women and children, including protecting gender equality.

However the history of the polygamy prohibition reveals a different objective. Whether that history is dated back to the 13th century in England when the church prohibited polygamy, or to the 1890s when the first *Criminal Code* prohibited polygamy in order to keep American Mormons out of Canada, the objective was religious.

Since religion animated the enactment of the polygamy prohibition, judges are unlikely to entertain gender equality as a “permissible shift in interest.”¹⁴ Moreover, even if Canada were to concede that the purpose of the polygamy prohibition is religious, courts cannot not accept this purpose as a justification for violating the claimants’ right to religious freedom. In *Big M Drug Mart*, the Court held that the religious purpose of the Sunday closing law not only violated the right to freedom of religion, but also “could not be a purpose that justified limiting the right.”¹⁵

Continuing with the *Oakes* test for the sake of completing the argument, the second step is to comply with the proportionality requirements. The federal government would have difficulty sustaining the minimal impairment requirement. In general, courts are reluctant to sanction absolute bans. More specifically, it is not easy to make the case for an absolute ban when there have been no polygamy prosecutions for sixty years. De facto, in other words, it seems obvious that minimal impairment could be achieved by decriminalization without legalization (an approach that is well understood in the context of marijuana). Thus we concluded that Canada would not be able to justify infringing religious freedom.

In sum, the polygamous religious freedom seekers would win their challenge; the prohibition would be declared unconstitutional. Polygamy would be decriminalized. The likelihood of this outcome seemed so strong that we recommended not waiting for a Charter challenge. Instead, the federal government should proceed forthwith to repeal the law, saving women – especially immigrant women – from the fear of being subject to an arbitrary change in prosecutorial policy, should it ever happen.

3. THE CONSTITUTIONAL CONSEQUENCES OF FAILING TO DECRIMINALIZE POLYGAMY

There is no likelihood that the current Canadian government will decriminalize polygamy. Therefore, we need to assess the consequences of maintaining the status quo. In particular, I propose to set out the constitutional consequences for three groups of women: (I) women in legal polygamous marriages who want to immigrate to Canada; (II) women in Canada who want to terminate their polygamous relationships; and (III) women who oppose the legalization of polygamy in Canada.

I. CRIMINALIZING POLYGAMY HARMS WOMEN IN LEGAL POLYGAMOUS MARRIAGES WHO WANT TO IMMIGRATE TO CANADA

Consider the situation of married women who apply to enter Canada as immigrants, refugees or even visitors. At the border, their marriage is considered polygamous if they come from a country in Asia, the Middle East or Africa where polygamy is a valid form of legal marriage. For example, polygamy is legal in Morocco, Libya, Jordan, Egypt, Indonesia, India, Bangladesh, Pakistan, Sri Lanka, Singapore, Cameroon, Burkina Faso, Gabon, and Bhutan. In many African countries, it may also be legal because the parties can choose between having a civil marriage (no polygamy) or a customary marriage (polygamy is valid). This choice exists, for example, in Uganda, Zambia, Namibia, Guinea, Zimbabwe, Eritrea, Ghana, and South Africa.

Now consider more specifically the situation of two hypothetical families, both in valid foreign polygamous marriages and wishing to immigrate to Canada, the first family being a couple while the second family includes more than one wife. Canadian law treats the first family, the couple, as living in a valid foreign “potentially” polygamous marriage. Because it is only “potentially” polygamous, it can be converted into monogamy, rendering them admissible as immigrants. However the second family, perhaps neighbours of the first, would be classified at the border as being in a valid foreign “actually” polygamous marriage. Because it is “actually” polygamous, this family would be refused entry to Canada on the grounds that an “actually” polygamous marriage would violate our *Criminal Code* prohibition on polygamy.

Given both families are in valid foreign polygamous marriages, admitting the one and denying the other seems patently unfair. Moreover, as we argued in the paper, it violates the private international law principle of “universality of status” which should be given effect to treat both families equally. Since they are at the border, neither family could invoke the protection of the Charter. Had they somehow gained entry to Canada, however, they might invoke section 15(1) of the Charter claiming ethnic or national origin equality rights, or even marital status equality rights as an analogous ground. The outcome of either ground as an equality rights claim is difficult to predict, and unlikely to survive a section 1 justification.

In fact, we researched the constitutionality of the *Criminal Code* prohibition on polygamy precisely because of our concern for immigrant women in valid foreign “actually” polygamous marriages. Our argument does not extend to protecting the women who reside in Bountiful, however. They cannot make a convincing claim to be in valid foreign polygamous marriages because they come to Canada from Utah where polygamy is illegal.

II. CRIMINALIZING POLYGAMY HARMS WOMEN IN CANADA WHO WANT TO TERMINATE THEIR POLYGAMOUS RELATIONSHIPS

Criminalizing polygamy harms women in Canada who want to terminate their polygamous relationships in two ways. In the first place, it creates a political environment that allows some governments to deny spousal or cohabitation status to women. Women cannot access the Divorce Act to terminate their polygamous relationships. Nor can they obtain support or property rights on the breakdown of the relationship unless they live in Ontario or Prince Edward Island, the only two provinces that have included polygamous relationships (potential and actual) in their family law regimes.

In the remaining seven common law provinces, potentially polygamous marriages may give rise to support or property claims on the basis of cohabitation. However, there is no case law, and no suggestion that such claims would extend to relationships that are actually polygamous. Moreover, in Quebec the situation is more difficult for women because cohabitation is not a basis for support or property claims even for parties in monogamous relationships.

In the second place, failing to decriminalize polygamy means that women face the threat of prosecution even though it has not materialized for sixty years. They must hide their polygamous relationships for fear of a change in prosecutorial policy. Immigrant women unfamiliar with the prevailing languages and cultures in Canada are particularly vulnerable to pressures to conceal. Such secrecy means women must be circumspect when they report spousal abuse, and when they claim custody of or access to their children. In addition, researchers are unable to conduct reliable research studies on the impact and extent of polygamy in Canada.

Expressed in constitutional terms, the harms that result from the denial of spousal or cohabitation status and the arbitrary prosecutorial policy are omissions that infringe women’s section 7 Charter rights to liberty and to security of the person. While some omissions have sustained Charter claims, it is unlikely that either of the successful omissions cases – *Vriend* or *Jane Doe* – would serve as a precedent for a successful section 7 Charter challenge to the denial of spousal status or to the arbitrary prosecution policy as long as polygamy remains a crime.

III. CRIMINALIZING POLYGAMY HARMS WOMEN WHO OPPOSE THE LEGALIZATION OF POLYGAMY IN CANADA

The third major constitutional consequence of failing to decriminalize polygamy is avowedly speculative. I suggest that Canada is entering a post-liberal state, one that will put women’s rights in jeopardy.

To date, Canada has self-identified as a liberal (or secular) state that keeps religion separate from politics, espousing toleration as the hallmark of religious freedom. However, contemporary religious fundamentalism of all varieties – Christian, Muslim and Jewish – appears to be producing a post-liberal state, one that I refer to as post-secular.

Jurgen Habermas has depicted the post-secular state as one that includes religious values in the political sphere.¹⁶ My view of the post-secular state is less benign. I believe religious values will take over politics and I fear the disappearance of women’s equality rights.

More specifically, I fear the post-secular state will recognize polygyny, not only by decriminalizing it, but also by legalizing it. Women’s rights will consist of the right to be subordinated, unfree,

sister wives. Worst case scenario, the Charter will be dissolved and with it women's citizenship and personhood.

Thus I call for a test case resolving the conflict between women's equality rights and claims of religious fundamentalism while we are still in the liberal state.¹⁷ Polygamy presents the perfect opportunity for such a test case, on condition that we have already decriminalized it.

If polygamy were decriminalized, whether by governmental or judicial fiat, it would inevitably be followed by litigation initiated by religious polygamists. They would invoke their Charter section 15 religious equality rights to challenge the new *Civil Marriage Act* definition of marriage as "two persons".

Although these religious claimants might win at the section 15 stage, they should lose at the section 1 stage. Canada should be able to argue successfully that the purpose of the new *Act* is to limit marriage to monogamous relationships in order to protect women's equality rights. That we heard no discussion of this objective during the debates surrounding adoption of this new Act should not provide any impediment because there is no other way to explain the "two persons" limit.

Therefore, while the Charter still has some life remaining, it would be better to decriminalize polygamy and to use women's equality rights to counter fundamentalist religious litigation for legal recognition of polygamous marriages. The current Supreme Court of Canada is more likely to accept Canada's justification for limiting civil marriage to two persons than is a post-secular Court adjudicating this issue in a post-secular world. Once religiosity overwhelms the liberal state, our current revulsion against polygamy may undergo a sea change.

4. CONCLUSION

The three groups of women whom I have identified are not the only women impacted by the polygamy prohibition. However, their stories are seldom told. Two factors may account for their silence. One is the fear of the criminal consequences that could result from revealing that they speak from experiences within polygamous relationships. The other is the rhetoric of political incorrectness that dominates contemporary discussions of polygamy. We have been socialized to believe that, in a world with few universals, nevertheless it is a truism that polygamy harms all women.

However, after studying existing international and domestic literature, Angela Campbell reports that the diversity of women who live in polygamous marriages makes "it ... impossible to draw a single, unqualified conclusion as to whether polygamy harms women."¹⁸ While some women suffer socially, economically, and health-wise from polygamy, other women may benefit from it. What is needed, she argues, is to target the specific factors that are detrimental to women (abuse, poverty, coercion, health) rather than the practice of polygamy on its own.

NOTES

¹ Martha Bailey, Beverley Baines, Bitu Amani, and Amy Kaufman, “Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada” in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, 2005) online: http://www.swccfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683_e.html

² Dean Beeby, “Legalize Polygamy, study urges” *The Globe and Mail*, 12 January 2006, online: <http://www.theglobeandmail.com/servlet/story/RTGAM.20060112.wpolygamy0112/BNStory/National/>

³ Harsha Walia, “West Coast LEAF: Women’s Equality and Religious Freedom Project”, November 2006, online: <http://www.westcoastleaf.org/pdfs/Multi-faithAdvisoryCommitteeReport.pdf>; Rebecca Cook and Lisa Kelly, “Polygyny and Canada’s Obligations under International Human Rights Law”, September 2006, online: <http://www.justice.gc.ca/en/dept/pub/poly/index.html>

⁴ *Criminal Code*, R.S.C. 1985, c. C-46, s. 293.

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.). 1982. c. 11.

⁶ Bailey, *supra* note 1 at 25, Recommendation 6.

⁷ *Criminal Code*, *supra* note 4, s. 293.

⁸ *R. v. Big M Drug Mart Ltd.*, [1985]1 SCR 295.

⁹ *Ibid.* at 336.

¹⁰ *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 759.

¹¹ *Syndicat Northcrest v. Anselem*, 2004 SCC 47

¹² *Ibid.* at para. 49.

¹³ *Ibid.* at para. 51.

¹⁴ *R. v. Zundel*, [1992] 2 SCR 731.

¹⁵ Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Canada Limited, 1997) looseleaf ed. 35-23 citing *Big M Drug Mart Ltd.*

¹⁶ Jürgen Habermas, “Religion in the public sphere”, Holberg Prize Lecture, 29 November 2005, online at http://www.holberg.uib.no/downloads/diverse/hp/hp_2005/2005_hp_jurgenhabermas_religioninthepublicsphere.pdf

¹⁷ Beverley Baines, “Equality’s Nemesis?” (2006) 5 *Journal of Law & Equality* 57 at 72-80.

¹⁸ Angela Campbell, “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis” in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, 2005) online: http://www.swccfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683_e.html