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Following Same-Sex Marriage: Redefining marriage and the impact for polygamy

Robert Leckey

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

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FOLLOWING SAME-SEX MARRIAGE:
REDEFINING MARRIAGE AND THE
IMPACT FOR POLYGAMY¹

ROBERT LECKEY

PROFESSOR, FACULTY OF LAW & INSTITUTE OF
COMPARATIVE LAW, MCGILL UNIVERSITY

Rather too often, opponents of legally recognizing same-sex marriage contend that polygamy is next.² As far as I can see, the notion that polygamy is going to follow same-sex marriage presumes that when you change marriage once, or change it substantially, anything goes. Philosopher John Corvino has written about what he calls the PIB argument: the idea that after same-sex marriage, polygamy, incest, and bestiality are fair game. He is not a fan of the argument.³ Frankly, I too find it difficult to follow the slippery slope. There have been many significant changes to the law of marriage in the past. Married women acquired civil rights. It became possible to marry someone of a different religion. It became possible to obtain a civil divorce. To my knowledge, these changes didn't generate concerns about whether polygamy was next. But since people raise the slippery slope, I shall attempt briefly to respond.

A caveat is in order at the outset. I am not undertaking a normative evaluation of the appropriate policy responses to polygamy. I am not treading on philosophical ground, pronouncing on personal autonomy versus community self-preservation. I am addressing the

question of what *legal* impact the recognition of same-sex marriage might have regarding polygamy as a recognized form of civil marriage. I thus bracket the constitutionality of the present criminal prohibition, as well as the thorny issues that polygamous marriages validly performed abroad raise for private international law and immigration policy.

My contribution to the discussion is two-fold. The first point concerns the way in which same-sex marriage litigation – *Halpern*⁴ and the cases in other provinces, and the reference to the Supreme Court of Canada⁵ – understands the relationship between civil marriage and religious marriage. I argue that some of these sources understate the relationship of opposition between religious and civil treatments of marriage. As I shall explain, the state is not only free to regulate marriage distinctly from religious regulation. Rather, at times it actually rejects religious ideas of marriage. The impact of this observation is that religious practices of polygamy in no way entail that the state adjust civil marriage to embrace such practices. The second point concerns the relationship between *Halpern et al.* and the private law of marriage and of the family. I argue that the recognition of same-sex marriage is not only a consequence of constitutional litigation. It also reflects incremental change to the private law of the family. Same-sex marriage has roots in private law amendments, whereas as yet, polygamy does not.

I begin with Professor Nick Bala's recent report for Status of Women Canada, in which he argues that same-sex marriage and polygamy are distinguishable.⁶ He makes four points. I will mention them briefly, to avoid covering the same ground and also to show how my own contribution to the conversation is somewhat different.

First, the popularity point. Far fewer Canadians favour legalization of polygamy than favour same-sex marriage. Second, the question of cost and impact. Same-sex marriage does not affect the concept of monogamy. Same-sex marriages impose no economic costs, beyond regular costs related to marriages. By contrast, polygamous marriages would have significant cost ramifications for the state and for employers in that it might require payment of spousal benefits to two or more spouses of an employee or principal beneficiary. Third, the harm issue. No evidence indicates that same-sex marriage harms anybody. By contrast, Professor Bala reads the literature as showing that polygamy inflicts psychological and emo-

tional harm on women and detrimentally affects children's development. I am neither endorsing nor criticizing Professor Bala's take on the existing literature. I am simply reporting his argument. Fourth, and finally, comes the doctrinal point of constitutional law. Same-sex marriage claims were framed under the equality guarantee, section 15, of the *Canadian Charter of Rights and Freedoms*.⁷ But polygamy exacerbates gender *inequality* of both men and women.

What, then, do the same-sex marriage cases tell us about the relationship between civil marriage and religious marriage? The same-sex marriage cases rejected religious freedom claims formulated under section 2(a) of the *Charter*. Courts rejected the idea, submitted by the Metropolitan Community Church of Toronto, that a regime of civil marriage excluding same-sex couples infringed their religious rights because their religious view of marriage included same-sex marriage.⁸ The takeaway is that there is no entitlement to have the state's rules of civil marriage reflect religious rules. From the standpoint of any single religion, the state's definition of civil marriage may be over-inclusive, or it may be under-inclusive. That is, people may be married civilly whom their religion will not recognize as such, or people may be religiously married whom the state will not recognize as such. Such disjunctures between civilly and religiously married persons are constitutionally acceptable. The plain point for polygamy is that the presence of a religious practice per se does not call for adjusting the rules of civil marriage to align with that practice.

Nor, however, is it the case that civil marriage and religious marriage are completely unrelated. In *Reference re Same-Sex Marriage*, the Supreme Court of Canada made such hollow assertions: "Marriage, from the perspective of the state, is a civil institution."⁹ Comparison with things that really are unrelated shows that the relation between civil marriage and religious marriage is not quite that. Jewish rites of religious male circumcision and the law of bankruptcy are unrelated. Civil marriage, however, stands to religious marriage in a relationship of relevance. The key feature to note is that the relationship is one of opposition and rejection. Some of the core elements of civil marriage have been enacted and redefined in conscious efforts to distance the regime of civil marriage from religious marriage. And these enactments have been made over the vocal opposition of religious opponents, in the effort to legislate fairly for a secular society.¹⁰

A theory that civil marriage and religious marriage occupy fully separate spheres isn't tenable when reviewing the positive law already in force. The *Divorce Act* includes civil impediments intended to induce one refractory spouse to facilitate his former spouse's religious remarriage.¹¹ The provision was introduced to tackle the problem of the Jewish divorce or *get*. This bit of the Act attests to Parliament's confidence that some values of civil marriage are appropriately telegraphed or exported towards religious marriage. I think these values are equality, liberty, and autonomy. These are not necessarily values that researchers associate with polygamy.

Not only, then, do religious claims not lead to a redefinition of civil marriage. Rather, in at least a limited fashion, Parliament will take secular values into account when determining how it wishes to influence behaviour in the religious sphere. In brief, the presence of a religious practice of polygamy does not lead to a constitutional claim for civil marriage to incorporate such practices. If anything, it is possible that Parliament will alter the rules of ostensibly civil regimes so as to provide disincentives for a religious practice that it determines to collide with secular values of equality, liberty, and autonomy. It is time to turn to my second argument, concerning same-sex marriage and private law.

Professor Bala has rather understated the path to same-sex marriage. He did so when stating same-sex marriage didn't infringe upon monogamy and imposed no economic costs because it fits the existing model of egalitarian monogamous marriage. The suggestion is that there was no insuperable impediment to same-sex marriage in other core notions of marriage. I argue that his account leaves out the way in which changes to the law of marriage brought it closer, as a civil institution, to the family practices of same-sex couples. Same-sex marriage didn't just fit into the existing model of marriage. In the last decades, changes to marriage and family law have made marriage thinkable for same-sex couples. I briefly recapitulate alterations to the private law of the family that made same-sex marriage thinkable and feasible.

One concerns spousal roles, and whether they are differentiated or identical. Not long ago – especially in the province of Quebec – civil marriage included roles sharply differentiated by the sex of the respective spouses. It was only in 1964, just over forty years ago, that married women obtained their civil emancipation under the Civil Code of Lower Canada.¹² Once both spouses have equal civil rights

and obligations in marriage, marriage is possible for two spouses of the same gender.

Another set of changes concerns the relation between marriage and children. The abolition of illegitimacy – the important distinction of parentage from marriage – shifted marriage's fundamental vocation. Now that children's status is determined independently from the marital status of their parents, marriage becomes a relevant concept for two persons whose relationship is not predicated upon their producing offspring. So it is not just that same-sex marriage fits into the existing marriage model. To put the point tendentiously, in past decades, the marriage model that existed shifted, in many ways, *towards* same-sex marriage.

It is not just these respects that are important. A number of developments in private law contributed to the increasing thinkability of same-sex marriage. A number of changes made it possible, from a legal perspective, to view same-sex couples as familial and conjugal. There is a private-law genealogy of same-sex marriage that sharpens the extent to which same-sex marriage and polygamy are distinguishable. Accounts reading same-sex marriage as exclusively a story about section 15 of the *Charter* occlude this private law history. At times, one gets the erroneous sense that judges interpreted the *Charter* in a vacuum, instead of against the backdrop of legislative and judicial changes to family law.¹³

There are many such relevant moments in which same-sex couples are moving onto the map of family and marriage law. Some of the moments are legislative, others judicial. Under the first federal *Divorce Act* (1968), adultery was one ground for divorce. Homosexual conduct was not, however, a species of adultery. Homosexual conduct was a distinct ground for dissolution, classified as one of the “unnatural offences.”¹⁴ Homosexual conduct was regarded as disgusting. Unlike adultery, however, it wasn't conjugal behaviour that threatened a marriage by holding up an alternative conjugality. The provision was eliminated with the passage of the 1986 *Divorce Act*. But prior to that, at least one judge stated that, given changing social attitudes towards homosexuality, it had become appropriate to treat homosexual conduct simply as garden-variety adultery.¹⁵ In an act of tacit law reform, homosexual conduct had acquired the dignity of becoming adulterous. In the context of a bitter divorce, in the wreckage of a marriage, this was admittedly not a happy, *Halpern*-type moment. But it marked a step of progress for the possibility of same-sex marriage.

Prior to *Halpern*, there were unjust enrichment cases involving same-sex couples. Claims equivalent to those made by opposite-sex cohabitants were successfully made out.¹⁶ The feasibility of same-sex couples as conjugal was authoritatively established in *Egan v. Canada*.¹⁷ *Egan*—not, admittedly, a private law matter—concerned a *Charter* claim that it was discriminatory for old age security legislation to define “spouse” for the purposes of its spousal allowance as only an opposite-sex spouse. The claim was ultimately unsuccessful on the merits, but in the process, the Supreme Court recognized sexual orientation as a prohibited ground for discrimination purposes. Moreover, five of the judges showed themselves to understand the claimant couple as conjugal.¹⁸

In making out the equality claim in *Halpern*, a crucial step was to establish the correct comparator group. To whom would the court compare same-sex couples denied the right to marry? As an equality claimant, if you can’t establish a favourable comparator group, you lose right there. But in *Halpern*, the court accepted that the appropriate comparator group was opposite-sex married couples. It wasn’t other unmarried people. The comparison to opposite-sex married couples depended upon the prior, *extra*-constitutional acceptability of same-sex relationships.

In my assessment, the early marriage challenges failed because the groundwork outside, as well as under, the *Charter* hadn’t yet been adequately laid. The first, unsuccessful same-sex marriage claim under the *Charter* was *Layland*.¹⁹ The two majority judges rejected the claim for a marriage license, although Greer J., dissenting, articulated a strong claim that same-sex couples were families and entitled to marry. Another failure, *Egan*, was decided narrowly. The claim for a redefinition of “spouse” failed as a result of a coalition of judges. Four judges found there to be no violation of the equality right. Four judges found there to be a violation that was not justifiable under the limitation clause, section 1. Justice Sopinka, the swing judge, agreed that there was a violation of section 15 but concluded that, in the circumstances, and given the necessity for society to change over time, the violation was justifiable under section 1. Justice Sopinka’s concurrence, emphasizing the novelty of same-sex relationships, is an eloquent testimony to the need for a legal and social groundwork. Other judgments not long afterwards reveal how quickly such foundations may be laid.²⁰

According to the best of my knowledge, there is no groundwork for the social acceptability of polygamy, even remotely resembling the established social acceptability of same-sex marriage. The social acceptability of same-sex marriage resulted from work done by gay and lesbian activists and rights claimants, over decades.²¹

To conclude this point, the question is not so much the doctrinal one about which *Charter* right is engaged, equality or religion. It should instead be the sociological, cultural, and political inquiry about the social context in which judges will interpret the *Charter* when any claim for civil recognition of polygamy is eventually framed. The interested observer should look for hints that civil recognition of polygamous marriage is imminent, not in the law reports treating same-sex marriage, but in the streets. Not until you see a polygamists’ Pride Parade marching down Yonge Street or René Lévesque Boulevard will things really be changing.

NOTES

¹ At the time of the round table, visiting scholar at the Centre de recherche en éthique de l'Université de Montréal (CREUM). I acknowledge the generous funding of the Pierre Elliott Trudeau Foundation. Though these comments have been lightly revised, they retain the informal character of the oral presentation. I thank Derrick McIntosh for comments on the penultimate version.

² *Civil Marriage Act*, S.C. 2005, c. 33.

³ John Corvino, "Homosexuality and the PIB Argument" (2005) 115 *Ethics* 501.

⁴ *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.) [*Halpern*].

⁵ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

⁶ Nicholas Bala *et al.*, "An International Review of Polygamy: Legal and Policy Implications for Canada" (research paper for Status of Women Canada, 2005) at 37-38. "Status of Women Canada (SWC) is the federal government agency which promotes gender equality, and the full participation of women in the economic, social, cultural and political life of the country": <http://www.swc-cfc.gc.ca/index_e.html> (date accessed: 30 April 2007).

⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁸ *Halpern* at paras. 51-58.

⁹ *Reference re Same-Sex Marriage*, *supra* note 4 at para. 22.

¹⁰ The arguments in these paragraphs are developed more fully in Robert Leckey, "Profane Matrimony" (2006) 21:2 *Can. J. L. & Soc'y* 1.

¹¹ R.S.C. 1985 (2d Supp.), c. 3, s. 21.1.

¹² *An Act respecting the legal capacity of married women*, S.Q. 1964, c. 66.

¹³ The argument here is developed at length in Robert Leckey, "Private Law as Constitutional Context for Same-Sex Marriage" 2 *J.C.L.* [forthcoming in 2007].

¹⁴ *Divorce Act*, S.C. 1967-68, c. 24, s. 3.

¹⁵ *Guy v. Guy* (1982), 35 O.R. (2d) 584 at 589 (S.C.).

¹⁶ *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.); *Forrest v. Price* (1992), 48 E.T.R. 72 (B.C.S.C.).

¹⁷ [1995] 2 S.C.R. 513 [*Egan*].

¹⁸ For detailed analysis of *Egan*, see Lori G. Beaman, "Sexual Orientation and Legal Discourse: Legal Constructions of the 'Normal' Family" (1999) 14:2 *Can. J. L. & Soc'y* 173; Robert Leckey, *Contextual Subjects: Family, State, and Relational Theory* (Toronto: University of Toronto Press) c. 3 [forthcoming in 2008].

¹⁹ *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.).

²⁰ *M. v. H.*, [1999] 2 S.C.R. 3.

²¹ See notably Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002); Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994); Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking*