

Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada

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Abstract

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Abstract:

This report assesses Canada's laws on the recognition of valid foreign polygamous marriages, arguing that the principle of "universality of status" should be given effect. A valid foreign polygamous marriage should be recognized and given effect to the extent that recognition does not violate Canada's essential "public policy." There is a strong association between polygamy and gender inequality, and a fundamental concern is whether either recognizing or failing to recognize valid foreign polygamous marriages would harm women. This report takes the view that the rights of women in valid foreign polygamous marriages should be protected by extending recognition to those marriages. It is the position of this report that recognition would not imply endorsement of polygamy or the gender inequality associated with the practice.

Recognition of valid foreign polygamous marriages raises the issue of how Canadian law should respond to "plural unions" entered into within Canada in some religious communities. The law does not consider such unions to be marriages. They are legal nullities. No civil legal consequences result merely from the fact that the parties went through a religious ceremony. There are, however, criminal consequences. Section 293 of the Criminal Code criminalizes polygamy and by its terms applies both to those who enter into a plural union within Canada and to parties to a valid foreign polygamous marriage who "practise" polygamy within Canada. This report examines the history, efficacy and constitutionality of s. 293 of the Criminal Code and recommends that this provision be repealed.

Finally, this report considers arguments for and against permitting polygamous marriages to take place under Canada's domestic laws, specifically, the constitutional arguments that could be made. The report recommends that Canada prepare for a constitutional challenge to the limitation of marriage to two persons.

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From the STUDY

Recommendation 6: Criminalization is not the most effective way of dealing with gender inequality in polygamous and plural union relationships. Furthermore, it may violate the constitutional rights of the parties involved. Canada should repeal the prohibition against polygamy and plural unions in s. 293 of the Criminal Code.

CONCLUSION

Further recognition of valid foreign polygamous marriages is warranted to ensure that parties to such marriages are not deprived of the legal benefits and protections of marriage. Women are most likely to be in need of and most likely to benefit from further recognition.

Further recognition of valid foreign polygamous marriage is not an endorsement of the practice of polygamy, which has long been associated with the inequality of women. This problem should not be addressed by denying “the victims” in valid foreign polygamous marriages the legal protection of marriage. Section 293 of the Criminal Code does not effectively address the harms associated with polygamy or plural unions and may be impugned on constitutional grounds. Therefore, Canada should repeal this provision. It is possible that a constitutional challenge will be brought to the limitation of civil marriage to two persons, and Canada should be prepared for such a challenge.

Kuwait wives example

[P 13] Immigration

Parties to an actually polygamous marriage are not entitled to permanent resident status as a family unit in Canada, because of the possibility that they would practise polygamy in this country in violation of the Criminal Code. This is consistent with current policy of other western countries.

Two recent immigration cases highlight the current approach of Canadian courts to actually polygamous marriages. In *Ali v. Canada (Minister of Citizenship & Immigration)*, Mr. Ali was denied entry into Canada. The immigration officer asserted that there were reasonable grounds to believe that Mr. Ali would practise polygamy in Canada, which was prohibited by the now-repealed Immigration Act and, of course, by the Criminal Code. In fact, the manual for immigration officers instructed them to turn away potential immigrants if the officers suspected they would practise polygamy in Canada (CIC nd). Mr. Ali, a Palestinian, had two wives he had married in Kuwait. At the judicial review, Mr. Ali submitted that he would not be practising polygamy in Canada, because each wife would have a separate residence in a different province.

Justice Rothstein applied the two-step test for validity of foreign marriage as set out in *Tse*, and found that this was a valid polygamous marriage. Nonetheless, the immigration officer’s determination stood, as Justice Rothstein held that despite the separate residences of the wives, the parties would still be practising polygamy, contrary to Canadian public policy.

From Executive summary

5. Parties to a valid foreign polygamous marriage that is actually polygamous are not able to immigrate to Canada as an intact family unit. This rule prevents immigration by parties in such marriages or breaks up the family unit so the husband and one wife can immigrate to Canada. The parties most likely to suffer from this rule are the left-behind wives. Permitting immigration by actually polygamous families would indicate toleration, but not endorsement, of the practice of polygamy within Canada. Canada should consider whether the prohibition on immigration by parties to actually polygamous marriages is necessary.